Explaining the trust

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*L.Q.R. 377 I. Introduction

By placing property on trust, a settlor arranges for control of the property to be separated from the right to benefit from it. The trustee has legal title, which confers control of the property, and the beneficiary or beneficiaries have an equitable interest, which is a right to an actual or possible benefit from the property in the way specified in the terms of the trust. The separation of control and benefit represented by the separation of legal title and equitable interest allows for the benefit to be allocated in many different ways that an owner of property could not achieve by a simple transfer. There is no doubting the enormous practical utility of this arrangement.

However, there is a longstanding controversy over the nature of the trust between two rival theories, the proprietary and obligational theories. As it is traditionally understood, the controversy is about whether the equitable interest of a beneficiary is a property right in trust property, or merely a personal right against the trustee with respect to the trust property. [1] As I understand the controversy, it is more fundamentally about the basic principles that govern the law of trusts and supply the justification for its fundamental rules or, one might say, its basic structure. This is the most important form of understanding of the trust, and it is relevant to the resolution of unsettled issues in the law, and to the judicial development and reform of the law.

The trust was, of course, an invention of the courts of equity, and the beneficiary's equitable interest and the trustee's duties are described as equitable. It is generally assumed that the division between law and equity and the distinctive character of equity are a necessary part of an account of the law of trusts. Conventionally it is said that the basis for intervention by equity in the common law is "unconscionability", [2] and according to some commentators the concept continues to play a unifying role in the modern law of equity. [3] On the approach I suggest here, however, the division between law and equity and the nature of equity and unconscionability are relevant only to an historical account of the trust, an *L.Q.R. 378 account of the arguments that were historically influential in its development, [4] and not to a principled account of the modern law of trusts.

II. The Obligational Theory of the Trust

According to the obligational theory, the trustee is the owner of the trust property, having a duty to deal with it for the benefit of another person or persons, the beneficiary or beneficiaries. (For convenience I will generally refer to a single beneficiary.) The beneficiary has no property right in the trust property, and the equitable interest is a personal right against the trustee to the performance of the trustee's duty to hold the trust property and distribute it in accordance with the trust.

The trustee's duty developed in equity and was traditionally said to arise as a matter of conscience. However, it seems clear that the reason why the trustee's conscience is affected with respect to the trust property is that the trustee has undertaken to act as such, and so acts unconscionably when he reneges on that undertaking. Thus it would seem to be more illuminating and more accurate to say that the justification for recognising and enforcing the duty of a trustee is simply the principle of agreement which binds the trustee to perform the undertaking. [5] One might then say that it is in the nature of a contractual duty,

though not normally described as such. This is not to say that the trustee's undertaking would necessarily be enforceable in contract at common law according to the established common law rules. Often it would not meet the common law requirements concerning privity and consideration, for example. However, as far as explaining the trust is concerned, the issue is not whether the rules of trust law are consistent with the common law rules of contract, but whether they are explicable as contractual in the sense that they represent a possible body of rules based on the legal recognition of the basic principle of agreement. In the ordinary operation of a trust, trust law does indeed seem to be explicable in this way. The trustee agrees to carry out the trust and performance of the trust is the fulfilment of a duty arising from the agreement. One might then say that the law of trusts falls under the equitable part of the law of contract, or more broadly the law of voluntary or consent-based obligations. [6] It seems to me that a trustee's duty does arise from the agreement to act as trustee and is in this broad sense contractual. This is how the obligational theory should be understood. [7] The obligational theory holds that the trust takes the ***L.Q.R. 379*** form of a personal right of the beneficiary to the trustee's performance with respect to trust property owned by the trustee, and the contractual theory provides a basis or justification for the trust, understood in this way.

Although the obligational or contractual theory does seem to have a role to play in explaining the trust, it cannot be a complete account of the trust. It may well have provided a satisfactory account of an early form of the trust, but it is difficult to see how it can explain, with respect to the modern law, what is normally understood as the proprietary aspect of the trust. This is not simply a reference to the fact that the trustee's undertaking relates to property, so that in carrying out the trust the trustee makes transfers of property to beneficiaries. This does not create problems for a contractual analysis any more than does a contract for the sale of goods. The problem concerns the legal position of the beneficiary vis-à-vis third parties, namely the trustee's creditors and recipients of unauthorised transfers of trust property.

If the trustee is bankrupt, the trust property is not available to satisfy the claims of his creditors, but is wholly reserved for distribution to the beneficiaries in accordance with the terms of the trust, by the original trustee or by a new trustee. The trust property is not treated as the trustee's own property. Where there is an unauthorised transfer of trust property to a third party recipient, the recipient is subject to a claim by the beneficiary arising from the receipt, and the beneficiary has a proprietary claim to recover the trust property, the so-called equitable proprietary claim, which prevails over any claims of the recipient's creditors in a bankruptcy. These rules suggest that beneficiaries have property rights in the trust property. According to the proprietary theory of the trust, which I will come on to later, a beneficiary does indeed have, from the start, a property right in the trust property, which is capable of binding the trustee's creditors and third party recipients of trust property. This would seem the natural way to explain these fundamental rules of trust law, but proponents of the obligational theory have objections to the proprietary theory, as discussed below.

Under the obligational theory, the beneficiary has only a personal right against the trustee to the performance of his duty. If the duty is not carried out, the beneficiary should have a claim against the trustee, exigible against the trustee's property, including the trust property, and if the trustee is bankrupt, the claim should be in competition with the claims of the trustee's personal creditors. There does not appear to be any reason why the trust property should be reserved for the satisfaction of the beneficiaries' claims. Similarly it is not apparent why the beneficiary should have a claim against a third party recipient, still less a proprietary claim. The problem under the obligational theory is to explain how the beneficiary's position vis-à-vis the trustee's creditors and third party recipients of trust property is explicable if the beneficiary has, in the first place, only a personal right to the performance of the trustee's duty with respect to property that belongs to the trustee, and not a property right in the trust property. I will consider a number of arguments, though in the end I do not think the obligational theory can overcome this objection.

One argument might be simply that equity has developed the ability to provide a proprietary claim to protect a personal right, or to convert the personal right into a property right. Consider, for example, equity's role in enforcing contracts for ***L.Q.R. 380*** the sale of property. The common law traditionally allows only damages as the remedy for breach, but equity has always been able to make an order of specific performance requiring the transfer of the property, provided that specific property has been identified as the subject matter of the contract. In addition, it is said that, if there is a right to specific performance, equity treats the purchaser as already being owner of the property, on the basis of the maxim that "equity treats as done what ought to be done". [8] In consequence, the purchaser has additional protection, including, it would appear, protection in bankruptcy and a right against third parties to whom the property is transferred in breach of contract. As a result of the equitable doctrine, it may be important to distinguish between, on the one hand, a creditor in the sense of someone who is owed a debt, and, on the other hand, someone who has a personal right to have property transferred to them. In the latter type of case, it seems that equity converts the personal right into a property right. This ability to protect a personal right as if it were a property right, or to generate a property right out of a personal right, is sometimes understood to be an important contribution of equity to the development

of the law. It might seem that the proprietary aspect of the trust is explicable under the obligational theory in a comparable way. On this understanding one might say that it is based on the ability of equity to overcome a remedial deficiency at common law.

One might doubt whether the doctrine can really be understood to have this effect, [9] and whether it translates directly to the trust, [10] but, in any case, it cannot provide an adequate explanation for the trust. The important point is that it is impossible to justify a rule that simply converts personal rights to property rights or gives a remedy for personal rights as if they were property rights. The objection can be put in terms of the requirement of "remedial consistency". [11]

In general, if C has a right against D and D a corresponding duty, and D fails to perform the duty, C should be entitled to a remedy that so far as possible corrects the wrong by securing to C the benefit of the duty owed. A remedy of specific performance or compensation for loss resulting from the breach of duty is justified on this basis. The remedy follows from the right it protects. However, if C has a personal claim for compensation against D, and D is bankrupt, C's claim is in competition with other personal claims against D for compensation or payment of debts out of D's property. None of the claimants is, in principle, in a stronger position than the others to have their claim satisfied out of any part of D's property. ***L.Q.R. 381*** Where C has a personal right to a transfer of property, it is reasonable that C should ordinarily be entitled to specific performance of the transfer, but if D is bankrupt C should not be entitled to this remedy if it gives C an advantage over other people with personal claims against D. C should be limited to the pecuniary claim for compensation. The reason is that although C has a right against D to receive the property, C has no such right as against anyone else. C's remedy should be consistent not only with the right against D but also with the absence of any right against third parties, including creditors. To put it another way, there is no reason why a breach of duty by D against C should give C a remedy that affects the legal position as between C or D and third parties. There is no justification for satisfying C's right against D by requiring a transfer of the property, if this means shifting the risk associated with C's personal right onto third parties, even if this is the best remedy for C and the appropriate remedy as between C and D. The fact that C's right to receive the property is personal carries with it this risk in D's bankruptcy. C is subject to the risk, irrespective of whether C was aware of it or intended to assume it, simply because it follows from the fact that the right is personal, which follows in the case of a contract to buy property from the fact that it was created by an agreement or promise. A fortiori, there is no justification for simply converting C's personal right against D to receive property into a property right in the property binding on everyone. The distinction that equity appears to make between a personal right to be paid a sum of money and a personal right to a transfer of specific property is unjustifiable. In both cases the claimant should be treated as an ordinary creditor. In the case of the trust, equally there is no justification for giving the beneficiary a proprietary claim if they have in the first place only a personal right against the trustee. One might object that, whether it is logical or not, this is actually the position that the law has arrived at. But for a good explanation for the trust (if one is available), it is not enough just to point to the established rules or the conventional explanation for them. [12]

Another line of argument has been advanced to explain how protection for the beneficiary against third party creditors and recipients can be reconciled with the obligational theory. A third party can be liable for interference in the trustee's performance of the duty to distribute the trust property. One might argue as follows [13]:

"It is wrong to get in the way of the performance of other people's obligations. Every system goes that far; they only differ on how generously to protect those who are owed obligations against interference by third parties."

In other words, the law must take a position on how strongly to protect the beneficiary's personal right to the performance of the trust against interference by third parties, and this is a matter of degree and depends on the balance of various considerations, on which different legal systems might reasonably take different ***L.Q.R. 382*** positions. [14] Smith suggests that, with respect to contract, the common law has taken the narrow view that the third party must knowingly interfere in the trustee's breach of contractual duty, whereas, with respect to the trust, equity has extended the scope of liability to include "innocent volunteers", donees of trust property who do not have actual or constructive knowledge of the breach of trust (but are not bona fide purchasers, who are of course protected in equity). Thus the beneficiary's claim against third party creditors or recipients is explicable as a response to the breach of the trustee's duty to the beneficiary, without any need for the beneficiary to have a property right in the trust property in the first place.

Take the case where the trustee makes a transfer in breach of trust. It is clearly justified for a third party to be liable to the beneficiary if the third party is complicit as an accessory in the trustee's wrong. This can certainly explain one particular form of third party liability found in the modern law, namely liability for knowing assistance. [15] A recipient may also sometimes be an accessory, and accessory liability may well be the original basis for the liability of a recipient in trust law. However, in the modern law the most fundamental claim against a third party—the equitable proprietary claim—arises from the receipt of

trust property, which may happen without any act by, or knowledge on the part of the recipient, and cannot itself amount to complicity in the trustee's wrongdoing. Furthermore, as a matter of remedial consistency, if the claim against the third party arises from complicity in the trustee's wrong, the remedy should be compensation for the loss of the trust property that the beneficiary would have received from the trustee if the trustee had performed their duty. The recovery of the property from a third party, if that party still has it, may be equivalent to compensation for its loss, and then a remedy of specific restitution —an order of transfer to satisfy a personal right to receive the property—might be apt as a means of effecting compensation for loss. However, as discussed above, although it may be justified to satisfy a right to compensation for a wrong by returning property, there is no justification for protecting it by way of a proprietary claim over property that binds creditors and further, indirect recipients if the property is passed on. [16]

If the equitable proprietary claim cannot be based on complicity in the trustee's wrongdoing, can it be based on interference in the performance of the trustee's duty in a broader sense? Can one say that, although not complicit in the breach of duty committed by the trustee in making the transfer, by failing to return the trust property to the trust, the recipient interferes in the performance of the trust by preventing the trustee from carrying it out? According to the obligational theory, the absolute owner of the trust property is the trustee, against whom the beneficiary has only a personal right. If this is the position, it seems very doubtful whether a recipient who has received the trust property from the trustee can have a duty to return it in order to enable the trustee to perform their duty, on the basis that otherwise the recipient would be interfering with the performance of the trust. Even if this were the case, again the claim would be for compensation, not a ***L.Q.R. 383*** proprietary claim. To explain a proprietary claim arising from interference, one would have to say that all the world (including creditors of the recipient and indirect recipients) are deemed to be interfering as well. This surely goes far beyond basing the claim on interference with the performance of the trustee's duty. The reliance on interference is fictional. It amounts to simply recognising that the beneficiary has a right to the trust property good against everyone, i.e. a property right. The same point applies where the trustee does not make a transfer at all but simply goes bankrupt and the matter arises as against the creditors.

A recent variation on the obligational theory is the "persistent right" theory. [17] Again, this theory is intended to show how a third party recipient of trust property can incur a liability to the beneficiary even though the beneficiary does not have a property right in it. The starting point for the theory is the obligational theory, though the persistent right theory is understood as an intermediate or hybrid theory that postulates that the beneficiary's right falls into a third category of rights that are neither personal nor proprietary, but "persistent". According to the theory, if A has a right in respect of which A has a duty to B, and the right meets certain other conditions, B's right against A to the performance of the duty is a persistent right. This means that if the right held by A is transferred by him to a third party C, C becomes subject to the same duty to B in respect of the right as A owed B. In other words, B's right persists against C. B is said to have "a right against a right", because the right is to the performance of a duty with respect to a right. The standard example of the persistent right is the interest of a beneficiary under a trust. In a typical case, A, the trustee, has a right of ownership of property, and a duty to B, the beneficiary, in respect of this right of ownership. In this situation, if A transfers that right of ownership to C, in breach of the duty to B, C becomes subject to the same duty to B in respect of the right as the trustee A was subject to. This is why the beneficiary has a claim against a third party recipient of trust property. In effect, the beneficiary B has a right in respect of the trustee A's right of ownership of trust property, though not a property right in the trust property.

One problem with the persistent right theory is that according to the theory the beneficiary's right to the performance of the trust binds the recipient, who should presumably incur the same duty as the trustee, but the recipient does not in fact become subject to the same duty as the trustee. The recipient does not have a trustee's duty to carry out the trust by making distributions in accordance with the trust, or to manage and invest the trust property. One might say that the recipient becomes subject to a lesser duty to return the trust property to the trust, but it is not apparent that any such duty is derived by transmission from an earlier duty binding the trustee, which only bound the trustee because they undertook it. If the duty is transmitted it is not clear why it should be different. One would think that if the recipient incurs a duty to return the property it is not an attenuated form of a duty that previously bound the trustee—why should this be?—but a new duty to return property arising from the fact that the recipient received the property ***L.Q.R. 384*** through a transfer that was not authorised under the trust. I will return to this issue later in connection with my preferred account.

Another problem is that, just as for the arguments considered earlier, the persistent right theory does not account for what is normally understood as the beneficiary's equitable proprietary claim. It appears that a persistent right is equivalent to a personal right correlated with a duty that is tied to and moves with the right with which it is associated, for example the right of ownership of property. If this is so, then it seems that the persistent right is still a personal right in the sense that it should not bind the trustee's creditors in the trustee's bankruptcy, and if the property is transferred to a recipient, the beneficiary still has only a personal right against the recipient to recover the right transferred, i.e. a claim for specific restitution, and again this is not the

equivalent of a proprietary claim binding creditors in the recipient's bankruptcy. Possibly one should say that the claim should be equivalent to a proprietary claim in this sense because the duty would be transmitted to whoever might subsequently receive the property, whether a further recipient or a creditor, though it is not clear that this follows from the concept of a persistent right. If the beneficiary does have the equivalent of a proprietary claim in this sense under the persistent right theory, it is difficult to see why this does not amount to saying that the beneficiary has a property right in the first place. [18]

In any case, for present purposes, the most fundamental problem with the persistent right theory, even if it does succeed in identifying a distinct category of right capable of binding third parties, is that it does not provide an account of why the beneficiary has a right of this sort, that is to say why there is a claim against the third party recipient. For a proper explanation of the trust, what is required is a justification for the rules of trust law, in particular for the rules governing the beneficiary's claim, and the theory of the persistent right does not offer this. The theory of the persistent right, as it applies to the trust, begins from the position that the trustee has a duty to the beneficiary in respect of the trust property that has arisen from the undertaking by the trustee, in accordance with the obligational theory. The justification for this duty is the principle that someone who has made an undertaking should be bound by it, [19] and, in principle, this justification for the duty should determine who is bound by it. Normally one would say that only someone who has given such an undertaking is bound by it, and the theory of the persistent right does not explain why the duty should be transmitted to a recipient of trust property. It does not give any indication of what the rationale might be for holding a third party liable, or why the claim against the third party should be, in effect, proprietary. In effect, it amounts simply to a novel way of asserting that a third party can be liable in this way under the obligational theory without explaining why this is.

The persistent right theory appears to be a variant of an older approach, according to which the trustee becomes subject to a personal duty owed to the ***L.Q.R. 385*** beneficiary to deal with the trust property in accordance with the terms of the trust, and this duty is "annexed" to, or "engrafted" onto, the trust property, which remains owned absolutely by the trustee. The consequence is that the duty moves with the property and binds any new owner of it, including third party recipients and creditors, for the benefit of the beneficiary. [20] This approach seems to me inadequate to explain the established rules of the trust for the same reasons as the persistent right theory: first, a recipient does not in fact incur the duty undertaken by and incurred by a trustee; secondly, under the condition of remedial consistency this approach does not explain the equitable proprietary claim; and thirdly, and most fundamentally, it does not provide an explanation in the required sense. It is a way of representing or picturing the trust rather than an explanation of it, because it does not give any indication of why the law should operate in this way, that is to say what the principle or principles behind it are.

In my view, none of the arguments considered above—the argument that a personal right is converted by equity automatically into a property right or protected automatically through a proprietary remedy, the argument based on interference with the trustee's performance of the trust, and the persistent right theory, or its older variant the idea of the personal duty annexed to the trust property—is successful in explaining the position of the beneficiary vis-à-vis the creditors or recipients under the obligational theory, that is to say, from the starting point that the beneficiary has no property right in the trust property. In my view, it is impossible to explain what is normally understood as the proprietary aspect of the trust under the obligational theory.

III. The Proprietary Theory of the Trust

1. How to understand the proprietary theory

Under the obligational theory, the beneficiary has a personal right against the trustee to the performance of the trust, and the trustee is the owner of the trust property. According to the proprietary theory of the trust, by contrast, the beneficiary has, all along, a property right in the trust property that binds the trustee's creditors and recipients of unauthorised transfers of trust property. This property right does not arise from the trustee's undertaking to carry out the trust: as discussed above, there is no basis for saying that the trustee's undertaking or a breach of it itself generates a property right. The property right is directly created out of the settlor's original right of ownership of the property, on the establishment of the trust, by the grant of the property right through the settlor's declaration of trust, accompanied by a transfer of the property to someone else to act as trustee, if the settlor is not to be the trustee. It arises because this is the intention of the settlor, as owner of the property, or at least because this is the best way to translate ***L.Q.R. 386*** the settlor's intention into the legal position. The proprietary theory seems the obvious solution to the problem of how to explain the proprietary aspect of the trust, which the obligational theory has such difficulty with, and in fact the proprietary theory is widely assumed in the textbooks and in ordinary usage.

However, there are also possible difficulties with the proprietary approach, and in particular it has sometimes been understood in a way that makes it seem paradoxical. This is the "dual ownership" or "split ownership" approach. On this approach, it is

said that both the trustee and the beneficiary are owners of the trust property, the trustee at law and the beneficiary in equity.[21] This way of putting the position reflects the idea of law and equity in conflict, the common law recognising the trustee as the owner and equity recognising the beneficiary as the owner. But of course, in the end, there must be an overall legal position, resulting from the separate contributions of law and equity, both before the procedural fusion of law and equity, when the legal and equitable contributions to the legal position had to be secured through different court systems, as well as afterwards, when they could be secured through a single system. Considering the position overall, clearly one cannot say that the trustee and the beneficiary are both separately the owners of the trust property, at least in the ordinary sense of ownership. The question seems to be who the actual owner is, in the sense of having the actual, enforceable rights of an owner. Under the obligational theory, it is the trustee who is the owner, the beneficiary having only a personal right against the trustee.[22]

Who then is really the owner of the trust property? To deal with this point, it is necessary to say something about ownership and property rights in general. A right of ownership is the right, good against all the world, to all the benefit and control of the "object of property", the land or other thing to which the right relates. A right of ownership is invariably curtailed in favour of lesser property rights in respect of the object of property that give someone else (as against all the world) the right to a particular element of the benefit, for example, an easement, lease, mortgage, or restrictive covenant. These are subtractions from the right of ownership, but although the owner does not have all the benefit, one can still reasonably say that someone is an owner if substantially all the benefit is retained after the subtractions.[23] (On this approach, an owner is not the same thing as the holder of a property right, but a particular type of property right holder. "Property" usually refers to the object of property, but can also refer to a property right in it.) Sometimes it may not be clear whether there really is an owner at all in this sense, because so much has been subtracted from what would otherwise be the right of ownership. Is a freeholder still the owner of land when they have granted a long lease? Possibly all one can say in general is that the law of property involves a certain distribution or allocation of the possible elements of benefit and control with respect to the property, and the standard arrangement in private law is for there to be a right of ownership, subject to lesser property rights. ***L.Q.R. 387***

According to the proprietary theory of the trust as I understand it, the trust consists of a particular distribution of all the elements of benefit and control that collectively make up the entitlement of an owner.[24] Of course, this cannot consist of a simultaneous allocation of all the elements of ownership to both the trustee and the beneficiary, as the dual ownership theory implies. Neither the trustee nor the beneficiary is an owner in the ordinary sense. In fact, the trust involves a distribution according to which the trustee has the right of control over the property, carrying with it the power to manage the property and to deal with it as owner vis-à-vis other parties, signified by legal title, and the beneficiary, where there is a single beneficiary, has the right to all the benefit and enjoyment of the property, which is beneficial ownership. In absolute ownership these elements are combined, and in a trust they are separated out. Their separation is what is signified by the separation of title.

Thus equitable or beneficial ownership means the right, as against all the world, to all the benefit of property, save for the right of control, which is given to someone else as a trustee. Of course, the elements of benefit can be distributed amongst more than one beneficiary, in innumerable ways, by way of successive or concurrent interests, discretionary interests, conditional interests etc. It is the separation of the right to benefit from the right of control that allows for all the various patterns of distribution of benefit found in trusts. Most beneficiaries are not beneficial owners of the trust property, and in general one refers to an equitable interest rather than equitable or beneficial ownership. On this approach, a beneficiary always has a property right in the trust property, whatever the precise nature of the particular interest. Whatever element of benefit the beneficiary is entitled to, even if it is a conditional benefit or merely the hope or expectation of a benefit under the exercise of a discretion, it is a right good against all the world to some part of the possible benefit of the trust property. It need not be a secure right to a tangible benefit, or a transferable right, in order to be understood as a property right.[25] This is reflected in the fact that beneficiaries whose interests collectively encompass all the possible benefit of the trust property, including entirely speculative benefits, can terminate the trust under *Saunders v Vautier*[26] on the basis that collectively they have beneficial ownership.

This distinctive allocation of rights in the trust property arises from the settlor's declaration of trust. It arises because the settlor, as an owner of property, has the power to grant property rights in it, and the trust arises when the settlor exercises these powers by expressing the intention to do so and taking the necessary steps to give effect to that intention.

It is worth noting at this point that, on this analysis of the trust, substantive fusion of law and equity does not entail the elimination of the trust, as is sometimes assumed.[27] Substantive fusion is the integration of the two bodies of law, common ***L.Q.R. 388*** law and equity, into a single body of law that can be stated without any need to identify any rule or doctrine or right or duty or other element of the law as being legal or equitable. It does appear that substantive fusion would eliminate the trust if it is understood in accordance with the dual ownership approach. Under this approach, it appears that the trust owes its existence

to a sort of perpetual internal contradiction in the law by which it accommodates the inconsistent claims of law and equity to ownership of the same property. On this understanding it is impossible to have a trust without being able to distinguish between these rival claims of ownership as claims at law and in equity, and substantive fusion would have the effect of resolving this inconsistency in favour of either law or equity and so eliminating the trust. On the suggested approach, however, legal title signifies the right of control over the trust property and an equitable interest is a right to some aspect of the benefit of the trust property, other than control of it. These are distinct and compatible types of right. They can co-exist—indeed they are mutually dependent. They are not rival claims or versions of the same right, and they can be described without the need for the traditional vocabulary of law and equity and without any reference to a division between law and equity. [28] Thus, as one would expect, substantive fusion would not eliminate the trust. [29]

Supporters of the obligational theory advance the following argument against the proprietary theory and in support of their position that the trustee is the owner of the trust property, and the beneficiary has merely a personal right to the performance of the trustee's duty. It is said that in general a right of ownership is protected by proceedings for interference with the property, by way of a claim in trespass or conversion or negligence at common law, and in the case of trust property it is the trustee who is entitled to pursue such a claim, not the beneficiary, and so the trustee must be the owner. [30] But the analysis suggested above is consistent with the trustee's having the exclusive power to sue for interference with the trust property, the proceeds of successful proceedings being held on trust for the beneficiary or beneficiaries, since they are entitled to the benefit of the trust property. [31] This simply reflects the normal incidents of the allocation of property ***L.Q.R. 389*** rights under the trust, the trustee having the right of control over the trust property, which one would expect normally to include the power to take proceedings in relation to it, and the beneficiaries the right to the benefit of it. There is no implication that the trustee rather than the beneficiary is the owner of the trust property in the ordinary sense. [32] Just as for the trustee's powers in general, the advantage of giving the trustee the power to sue is that the trustee is in a position to run the litigation and hold the proceeds for all the beneficiaries in accordance with their respective interests.

Furthermore, the beneficiary, having the equitable proprietary claim, can in fact take proceedings to recover property for the trust. Is this not just as much a claim to protect the right of an owner, or, here, the beneficial owner? It is reasonable for the beneficiary rather than the trustee to have the power to recover transfers because there has been a breach of trust by the trustee. It is said that it is in the nature of a right of ownership that it is a right of exclusion, correlated with a duty of others against interference with the property, and so the hallmark of ownership is the right to sue for wrongful interference by way of one of the common law claims. By contrast, as pointed out above, the beneficiary's equitable proprietary claim does not arise from a breach of duty by the defendant recipient. The defendant recipient merely receives the property, and generally has no control over the transfer, and can hardly be said to have breached a duty. The claim arises not from a breach of duty against interference, but in consequence of the fact that the transfer of trust property was invalid because it was beyond the authority of the trustee under the trust. Nevertheless it seems clear that a claim to recover property invalidly transferred serves to protect a right of ownership or an aspect of ownership. Indeed, in my view, the claim to recover property invalidly transferred (rather than a claim arising from the breach of a duty against interference) is the fundamental form of claim to protect a right of ownership or other property right, and a necessary feature of property law. (I will come back to this point.) [33]

2. The significance of bona fide purchase

One objection to the proprietary analysis of the trust has been particularly influential. This is that a property right is in its nature good against all the world and, since the right of a beneficiary can be lost to a recipient's defence of bona fide purchase, it is not actually good against all the world and so cannot be a property right. [34] The contrast is made with what are taken to be true property rights at common law, in particular the right of absolute legal ownership, which cannot be lost to a bona fide purchase defence. [35] This argument does not seem to me persuasive. Consider by comparison a right against assault. I take it that this would normally be said to bind all the world (though it is not a property right), and this is so despite the fact that in certain circumstances the right-holder can legally be ***L.Q.R. 390*** subject to the use of reasonable force that would in other circumstances amount to an assault, as in the case of lawful arrest or self-defence by another person. One might say that there is an abstract right that binds all the world, which conflicts in some circumstances with other abstract rights or with the public interest and may yield to them, so that in certain circumstances the concrete form of the right does not bind another party. The abstract right is the position in the standard or generic situation, and a concrete right the definitive position in a particular situation taking account of all the circumstances. [36] What is distinctive of a property right is not that it necessarily prevails over any contrary interest of a recipient of the property, but that it is capable of binding any recipient and can do so simply by virtue of the receipt of property, without the need for, say, the commission of a wrong by the recipient, or a prior agreement. Thus the

availability of bona fide purchase does not imply that the beneficiary's right in respect of the trust property is not a property right. The real question is when bona fide purchase should be available to override a property right and whether it is justified to have different treatment for the right of a trust beneficiary and the right of absolute legal ownership.

One might think, accepting that the beneficiary has a property right, that the availability of bona fide purchase says something about the nature of the property right. According to Lau, a trust necessarily involves a fund, that is to say a fluctuating set of assets (i.e. specific items of property). The trustee's right relates to individual assets, which the trustee can sell and replace, whilst the beneficiary has a right in the value of these assets for the time being, which subsists unaffected if they are replaced by different assets. Since the beneficiary's right is not a right to a specific asset, but to the value it contributes as an item in the fund, a purchaser can acquire the asset without affecting the beneficiary's right in the value of the fund, which now contains the new asset supplied as consideration by the purchaser. According to Lau, this is how bona fide purchase works and it is intrinsic to the trust because the trust always involves a fund. [37]

But this seems to reflect a misunderstanding of bona fide purchase. A trust involves a separation of the right of control of trust property, which the trustee has, and the right to the benefit of the property, which is with the beneficiary. This separation certainly allows for the beneficiary's right to be a right in the value of the assets that for the time being form the trust fund. This is an important consequence of the separation of control and benefit, and no doubt most modern trusts do indeed involve a fund. But a beneficiary's right need not be in trust property held as a fund. A settlor can specify a trust fund or a trust of specific property, and bona fide purchase is certainly available to a purchaser in the case of a trust of specific property. Furthermore, bona fide purchase is available to protect a purchaser dealing with a fiduciary who controls property belonging absolutely to the principal where there is no separation of title and no fund, and to protect a purchaser from an intermediary who received property from a trustee in breach of trust, who also clearly does not hold the trust property as a fund. ***L.Q.R. 391*** [38]

Where the beneficiary has a right in a fund, the presence of a fund explains why the trustee has a power to sell trust property without affecting the beneficiaries' rights. But bona fide purchase is not concerned with a sale by way of a valid exercise by the trustee of the power to sell trust property on behalf of the trust. In such a case there is no need for bona fide purchase. Bona fide purchase is concerned with the case where there is no such power or it is not exercised validly. Here the beneficiary surely does have a property right in the specific asset invalidly transferred and, where bona fide purchase is available, it overrides and cancels the beneficiary's property right in the asset. [39] The availability of bona fide purchase is not implicit in, or the corollary of, the fact that the beneficiary's right is in a fund. [40]

3. Debt investment as trust property

For some writers, the most fundamental objection to the proprietary theory of the trust is that in some cases, it is said, there is no trust property and so nothing in which a property right can subsist. Say a trustee holds a debt investment, a contractual right to the payment of a sum of money. Although this contractual right may be referred to as trust property, it seems clear that it is not a property right but a personal right against a debtor, typically a bank. It is said that, since there is no trust property, there is nothing that the beneficiary can have a property right in, and, it is said, one can hardly have a property right in a personal right. [41] For this simple reason, it seems that the property analysis must be rejected. It is argued instead that this type of case can be understood only in accordance with the obligational theory, on the basis that the trustee has a duty to the beneficiary to exercise the personal right for the benefit of the beneficiary in accordance with the trust. Furthermore, it seems natural to think that this analysis should apply generally, and therefore that even in the case where the trustee does have legal title to property such as land or goods, the beneficiary's right is not a property right in this property, but a right to the performance of a duty by the trustee with respect to the property. For the reasons given above, I do not think the obligational theory is tenable, but can the proprietary theory accommodate the case of a trust in respect of a debt investment?

Is it true that a personal contractual right to a payment cannot be trust property? It is true that a personal right is not itself a property right, and in my view there is no hybrid right that in some way combines the two. [42] However, the investments ***L.Q.R. 392*** in a trust fund typically include transferable personal rights, which are treated as trust property in just the same way as rights of ownership of tangible property, are interchangeable with them, and are typically described as trust property. In my view, a personal right of payment created by a contract can count as a "thing" in respect of which a property right subsists, that is to say it can be an "object of property". A property right can subsist in respect of such a personal right as an object of property, just as it can in respect of a tangible thing such as land or goods. Vis-à-vis the debtor, the right-holder is a creditor, whose right is not a right in a thing or object of property, and cannot bind third parties as transferees or creditors in bankruptcy. But whilst having a personal right as a creditor against the debtor, the right-holder can also have a right of ownership over

their own personal right as an object of property, and this right of ownership is good against third parties. [43] Thus a personal right can also be trust property, and there can be a trust of a personal right under the proprietary theory. In this type of case, the beneficiary's equitable interest is a right over a right, as the persistent right theory holds, though in a different sense (and, according to the proprietary theory, this is not generally true of a beneficiary's right in trust property). If the trust property in the form of a personal right is transferred by the trustee, so that the transferee acquires legal title to it, the transferee becomes the creditor vis-à-vis the original debtor, but if the trustee acted beyond the authority under the trust so that the transfer was invalid, the beneficiary retains the beneficial ownership of the personal right as property and has an equitable proprietary claim to recover it from the transferee.

Possibly the most common sort of case involves a transfer from a bank account, where T has a current account at bank X, which T holds as trustee for B. The account is a matter of contract between T and X. If T gives X an instruction to make a payment to R, without authority under the trust, B has an equitable proprietary claim against R to recover the money as trust property. The contract right is not itself transferred, but there is a transfer of value which reduces the value of the trust account and increases the value of R's account or is realised as money in R's hands, and this also amounts to a transfer of property. [44] It seems to me that this way of understanding contractual rights or debt investments as trust property is consistent with the law and legal usage, but it calls for a more general analysis of property and objects of property, which I will come back to briefly below.

Thus in the standard case where trust property takes the form of a contractual right of payment or another form of debt investment, the law is consistent with the proprietary theory. But where there is actually no trust property at all, there cannot be a trust under the proprietary theory, whereas under the obligational ***L.Q.R. 393*** theory there is no requirement for trust property. Under the obligational theory, the trust is a duty owed to the beneficiary with respect to a right, and there is no reason why the right need be understood as trust property. For example, the trustee may have a personal, contractual right to receive services that is incapable of being understood as an object of property. Under the proprietary theory, there cannot be a trust. It may nevertheless be possible in this type of case for the benefit of the right to the services to accrue in some way to another party, but, if so, according to the proprietary theory, it is really just a matter of contract, involving the issues of privity, agency and assignment rather than property or trust. [45] The obligational theory makes no distinction between this type of case and what, according to the proprietary theory, is a true trust involving trust property. It makes trust law merely an aspect or extension of contract law, concerned with enforcement by third parties, and it is incidental whether it happens to involve property. [46]

IV. The Two Dimensions of the Trust

1. The contract and property dimensions

An important objection to the proprietary theory is that the allocation of property rights under an express trust cannot account for the trustee's duty to look after and distribute the trust property in accordance with the trust. This is an onerous duty and it surely cannot arise as a matter of property law, simply as an incident of legal title arising from a transfer to the trustee. It would not be plausible to think that such a duty could be incurred without a voluntary undertaking, and indeed the recipient of a transfer of trust property who has not given such an undertaking does not incur any such duty. [47] Just as the obligational theory cannot account for the proprietary aspect of the trust, so the proprietary theory cannot account for the duty of an express trustee to look after and distribute the trust property. The trustee's duty arises from the undertaking given to distribute the trust property in accordance with the property rights stipulated in the trust. Thus it seems to me that the creation of an express trust involves two distinct legal events: (1) the allocation of property rights in the trust property arising from the declaration of trust by the settlor, and (2) the undertaking by the trustee to hold the trust property and distribute it to give effect to this allocation of property rights. These two events generate what can be described as the two dimensions of the express trust, the property dimension and the contract dimension. [48] These consist of the rights and duties or liabilities ***L.Q.R. 394*** generated by what are in principle two separate bodies of law, based on different basic principles, and operating in tandem. The two dimensions are based on fundamental principles of contract and private property, respectively, which determine the general character of the trust, though of course the particular rules of trust law also depend on other more particular considerations, and trusts law could vary considerably within the structure established by these principles, for example concerning such issues as trust investment and administration, and termination and modification by the beneficiaries.

The law of trusts is not strictly speaking, a hybrid or a blend. The beneficiary's right is not a hybrid or blend of personal and property rights in the form of a new sui generis type of right. [49] The trust has two separate parts which operate together without mixing, and the beneficiary's equitable interest consists of distinct personal and property rights, a property right in the trust property, along with a personal right against the trustee to the performance of the trustee's duty. For this reason, "dimension"

seems an appropriate expression to use. One can look at one dimension on its own and see how the trust operates in that dimension, but for the complete explanation of the trust both dimensions are required.

The idea of the two dimensions of the trust is helpful in explaining certain distinctive actual or possible types of trust. The trust according to the obligational theory is a trust in the contractual dimension only. The beneficiaries have no property rights in the trust property, but the trustee has undertaken a duty that the beneficiaries have a right to enforce. On the basis of the analysis above, here third party recipients of transfers in breach of trust would be liable only on the basis of complicity in the trustee's wrongdoing and there would be no protection against the trustee's creditors in the event of bankruptcy. This form of the trust may be the form of trust recognised in civil law systems.[50] It is not a fully-fledged common law trust because it lacks the property dimension and so the equitable proprietary claim.

In the case of a charitable trust, there are no beneficiaries with individual property rights, and in the property dimension one can say that the property is bound to the charitable purpose. In the contractual dimension, the trustee's duty to carry out the trust is enforceable by the Attorney General. Under a private purpose trust, there are no true beneficiaries with property rights in the trust property. In the property dimension, the property is bound to the purpose stipulated. In a *Re Denley* purpose trust, the trustees are subject to a duty in the contractual dimension to carry out the trust, and there are "factual beneficiaries" who have no property rights but do have the power in the contractual dimension to enforce the trustees' duty because they will directly benefit from the performance of the trust. ***L.Q.R. 395*** [51]

2. The equitable proprietary claim and knowing receipt

In another important situation, a trust exists in only the property dimension. Say a trustee has transferred trust property in breach of trust to a third party recipient (not a bona fide purchaser). There is now no contractual dimension with respect to this property, because the recipient has not undertaken to act as a trustee and does not bear the duties of an express trustee. With respect to the property dimension, however, although the recipient acquires legal title, signifying the right to control the property and deal with it vis-à-vis third parties, the recipient does not acquire beneficial ownership. The beneficiary's property right—in the property dimension of the trust—persists and binds the recipient because beneficial ownership of the trust property was not validly transferred, and the recipient is accordingly subject to an equitable proprietary claim, by which the beneficiary can enforce the property right in the trust property and recover it for the trust. The equitable proprietary claim arises from the invalidity of the transfer—from the fact that the transfer was not authorised under the trust, and so did not give the recipient absolute legal ownership—and not, strictly speaking, from the breach of duty by the trustee in itself. An invalid transfer is invariably equated with a breach of trust, but they are conceptually distinct. Invalidity relates to the transfer of property in the property dimension and breach of trust to breach of the trustee's duty in the contract dimension. As a matter of remedial consistency, the breach of duty by the trustee generates a claim for compensation against the trustee or an accessory, and the invalidity of the transfer generates an equitable proprietary claim against the recipient.

The recipient is bound by the beneficiary's property right in the property, in the form of the equitable proprietary claim, but the recipient does not have the duty of an express trustee. One might say that, since the beneficiary has a right to recover the property, the recipient must at least have a duty to return it. But in my view this is not, strictly speaking, the case. Simply by virtue of receiving the trust property, and no more, the recipient has no duty at all. The recipient is not subject to a requirement to take any action at all with respect to the property received, nor liable for any loss of trust property in consequence of anything done or not done with respect to the property. This is exactly the legal position, on my understanding.[52] The recipient has merely a liability or susceptibility to the beneficiary's claim to recover the property, or its traceable proceeds.[53] The property dimension is concerned only with the allocation of rights to the benefit of the property in this sense, and does not impose duties at all. It merely, as it were, assigns the property to the claimant-beneficiary, so as to justify proceedings for recovery. The liability of the recipient in this sense is shared by all the world, as one would expect for a property right. In the express trust, similarly, the trustee's duty does not arise as a correlate of the beneficiary's property right, but, separately, from the trustee's undertaking to carry out the trust, and its correlate is the beneficiary's personal right to the performance of the duty, not the beneficiary's ***L.Q.R. 396*** property right in the trust property, which binds the trustee and all the world equally.[54]

Although the recipient incurs no duty by virtue of receipt, it makes sense to say that, once they know or ought to know of the invalidity of the transfer, they become subject to a duty to preserve the property for recovery, or at least not to dispose of it or consume it.[55] Such a duty can make sense of the possibility of fault-based or knowledge-based liability in a recipient.[56] This duty is not in the contract dimension, arising from an undertaking; it is a distinct, lesser personal duty with respect to the trust property. It is really, I would say, a matter of having to take reasonable care to establish whether property received is trust

property and if so to avoid its loss, so as to keep it available for recovery by the claimant-beneficiary. As mentioned above in the discussion of the persistent right theory, the duty that the recipient incurs arises from the circumstances and not by transmission from the trustee. One might say that here the legal regime governing the trust property or its traceable proceeds has a property dimension and a tort or negligence dimension. [57] The negligence dimension is, one might say, the non-contractual counterpart, in the remedial context, of the contractual dimension in the express trust.

On this approach, the various claims that may be available to a beneficiary comprise (1) a claim for compensation for the loss of trust property against the trustee for breach of trust or against an accessory for complicity in the breach of trust (in or associated with the contract dimension), (2) an equitable proprietary claim against the recipient (in the property dimension), and (3) a claim for compensation for loss of trust property against a recipient who knows or ought to know of the invalidity of the transfer and has failed to take reasonable care to preserve the trust property (in the negligence dimension). The first two of these correspond to the recognised position in the law, but the claim stated in (3) does not, at least on the face of it, reflect the conventional understanding of the law. At issue here is the law of knowing receipt, the correct understanding of which has long been a matter of controversy. I will consider the way knowing receipt should be understood in the light of the suggested approach, without exploring the detail of the case law or the controversy over it.

According to the law of knowing receipt, as it is now formulated, the recipient is liable for the value of trust property received if it is unconscionable to retain the benefit of it. [58] Previously there was said to be liability for the value of the trust property received if the recipient knew or ought to have known of the breach of ***L.Q.R. 397*** trust (i.e. the invalidity of the transfer). [59] The continuing controversy over the fundamental nature of knowing receipt is not really affected by this change of formulation.

The knowing receipt claim appears to be a form of restitutionary claim to recover the value of the transfer, [60] like the equitable proprietary claim, but a personal rather than a proprietary claim. That is how it typically operates. The problem with this understanding, however, is, first, the requirement of knowledge or fault. A restitutionary claim should in principle be a strict liability claim, arising simply from the receipt of the transfer. It is the fact that the recipient has received the transfer and retains the benefit of it that justifies the claim, without any requirement for fault or knowledge (however formulated). [61] The restitutionary claim, as a strict liability claim, should, however, be confined to recovering the benefit of the transfer to the recipient, that is to say the surviving value of the transfer, the measure by which the value of the recipient's estate exceeds the value it would have had in the absence of the transfer. It is in principle only because the measure of recovery is limited in this way that strict liability is justified for a restitutionary claim. [62] But the knowing receipt claim allows for the recovery of the full value of the transfer, even if it exceeds the surviving value. In this situation, the claim in effect encompasses a claim to recover compensation for the value of trust property that was received and has since been lost, and such a claim should rightly depend on whether the recipient knew or ought to have known of the breach of trust and failed to take appropriate steps to preserve the trust property or its traceable proceeds. [63]

Thus it seems to me that, as it stands, the knowing receipt claim combines a personal restitutionary claim for the surviving value of the trust property in the recipient's hands and a claim for compensation for trust property that was received and then lost, without distinguishing between them, in the form of a composite, personal claim. The composite claim has developed in this way because of the analogy with the trustee of an express trust, who, by accepting the position of trustee, becomes responsible for the trust fund and personally liable to account for its value. [64] But in the case of a recipient who has not undertaken to act as a trustee it would be better in principle to separate out the two components, because they are really fundamentally different claims, based on different rationales, one concerned with returning the value of a transfer and the other with compensation for loss that the recipient ought to have prevented. ***L.Q.R. 398***

Furthermore, one might ask whether one component, the personal restitutionary claim, is not in principle redundant, on the ground that its work can be done by the equitable proprietary claim, as a proprietary restitutionary claim. Does the equitable proprietary claim not suffice to recover any surviving value of the transfer? It would normally be said that the equitable proprietary claim is a proprietary claim in respect of the original trust property, or its traceable proceeds identified under the tracing rules, and that it is necessary to have in addition a personal restitutionary claim to recover any surviving value of the trust property in the recipient's estate, which may exceed the value of the traceable proceeds. In my view, however, the only genuine basis for a restitutionary claim in this context is in the property dimension to recover the trust property or its traceable proceeds. It seems to me that a claim to recover value in the recipient's estate derived from trust property should properly be understood as encompassed in the equitable proprietary claim, on the basis that any value derived from the trust property should be treated as traceable proceeds. [65] It would follow, as a matter of remedial consistency, that the restitutionary claim should always be

proprietary rather than personal. The role of knowing receipt would then be limited to the recovery of compensation for the loss of trust property or its traceable proceeds. However, as the law stands, there can be surviving value that is not captured under the current tracing rules, and for this reason there remains a need for a restitutionary claim for non-traceable surviving value, which currently takes the form of (one component of) the claim for knowing receipt. [66]

With respect to the claim for compensation, one has to ask what steps a recipient should be expected to take to establish whether they have trust property, i.e. what the duty of inquiry is. On the suggested analysis, this is the significance of the *Baden Delvaux* scale or more recently the assessment of unconscionability. The strength of the duty determines how much protection is given to beneficiaries in respect of trust property because it determines the burden of monitoring placed on recipients with respect to their receipts. It represents a certain balance of the interests of trust beneficiaries and recipients. It reflects the concerns behind Smith's version of the obligational theory mentioned above, but it does not relate to the availability of a proprietary claim, which is the issue with which Smith associates this question. Whether there should be a proprietary claim depends simply on whether there was a property right in the first place and whether the defendant has the property or its traceable proceeds. ***L.Q.R. 399*** [67]

V. The Trust and Private Property

On the approach I have suggested, the express trust has two dimensions, the property dimension and the contract dimension. A beneficiary has a property right in the trust property, and a personal right to the performance by the trustee of their undertaking to carry out the trust. The property dimension is the more fundamental because it is the property dimension that governs not only property rights under an express trust but also the property rights that persist beyond the express trust in the form of remedial proprietary claims to recover property transferred in breach of trust. Thus the structure of private property law is fundamental to this explanation of the trust. This is of course a large topic, the significance of which goes well beyond the current discussion, but it is worth mentioning certain points that are relevant to the suggested analysis, some of which have been touched on already.

Private property law recognises (1) objects of property—things in which property rights can subsist—and (2) property rights—rights to all or some aspect of the benefit and control of an object of property. The most basic form of property right is the right of ownership, which gives an owner the right to all or substantially all the benefit and control of the object of property. Lesser property rights are rights that give the right-holder some aspect of the benefit or control of the object of property. The property dimension of the trust is an allocation of property rights in the trust property, the trustee having the right of control over the object of property and a beneficiary the right to all or some part of the benefit of the object of property (apart from control over it). The development of the trust in its modern form involved the recognition of these as possible forms of property right, which an owner can create by the grant of property rights in the object of property, or which can arise in the remedial context from the invalidity of a transfer. This development may have occurred fortuitously, but it is justified by the evident utility of the trust in facilitating the holding and distribution of the benefit of property in the more complex ways that it makes possible, without, for the most part, causing any adverse effects for other people. [68]

Another aspect of the structure of property law is important for the trust. A right of ownership of property or other property right is often understood as a right against interference or intrusion, correlated with a duty on the part of others not to interfere or intrude. [69] As suggested above, this is not the best way to understand a property right (as Lau also points out in his analysis of the trust). [70] A property right is, more fundamentally, a right to the property or some aspect of it that simply assigns it to the owner or right-holder, irrespective of the actions of anyone else, so that it is correlated not with a duty on the part of others not to interfere or cause harm, but simply with a liability on the part of other parties to a claim by the owner or right-holder to secure the benefit of the property, the original trust property or its traceable proceeds. Thus the basic claim in private property law is the claim to recover property invalidly transferred. It does not follow that there is no right against interference or intrusion. There may well be such a right, but it is distinct from the property right itself. In principle, one should distinguish between the right ***L.Q.R. 400*** to the property, enforceable as a matter of remedial consistency by way of a proprietary claim to recover it, and a right against interference or intrusion, which as a matter of remedial consistency generates a right of compensation for loss caused.

This distinctive feature of a property right is a crucial aspect of the two-dimensional structure of the trust. In the remedial context, the right to the trust property in the hands of the recipient of an invalid transfer is in principle distinct from the right to compensation for the loss of trust property wrongfully disposed of or consumed. In the case of the express trust, the beneficiary's right of beneficial ownership over the trust property or their property right to some aspect of it is in principle distinct from the right to the trustee's performance of the trust, which correlates with the trustee's duty to carry it out.

This feature of property law reflects the fact that a property right protects, most fundamentally, not an interest against intrusion or interference, but the interest in being able to invest labour or money or other resources in a thing with a view to receiving the benefit of the investment in the form of the right to use or dispose of the thing, as it has been adapted or improved or simply held. [71] It gives effect, in other words, to the simple principle that someone who has invested labour or money or other resources in a thing should be entitled to receive the resulting benefit. This is not a principle that can or ought to apply without qualification. It cannot be applied in the abstract, without rules to determine what is recognised as an object of property, and what sorts of property right can subsist in an object of property. But this is not to deny its significance. The rationale for these rules is to determine how this basic principle should be given effect, and the important features of property law are determined by this basic principle. [72] It explains, as already pointed out, the fact that the most basic form of claim to protect property is not wrong-based. [73] It also determines what sorts of thing are capable of being an object of property. A thing is capable of being an object of property if it persists through time in a well-defined form, so that it is possible to relate the money or labour or other resources applied to it with the benefit generated as a result. It is sometimes said that only land and tangible things can be objects of property, but there is no principled basis for this limitation. Land and goods are certainly included, but so are investments, which operate as a store of wealth, the input being the money invested initially and the output the sale proceeds. A contractual right of payment, if it is intended to be freely transferrable and so to operate as a store of wealth like money, is certainly capable of being an object of property, as argued above. [74] All these can also be trust property. It is said that a debt investment cannot be an object of property because a property right is identifiable from the fact that it attracts a duty against interference, and there can be no duty of interference with respect to a debt investment because one cannot interfere with an intangible thing, at least **L.Q.R. 401* in the ordinary sense. [75] This is not the case on the suggested approach, however. What is characteristic of the property right is not that third parties have a duty against interference but that they are susceptible to a claim to recover an invalid transfer of the property, and this can be available where the property is in the form of a debt investment, just as where it is a tangible thing.

VI. Summary

An express trust has two dimensions, the property dimension and the contract dimension. These consist of the rights and duties or liabilities of the beneficiaries, trustees and other parties arising out of what are in principle two bodies of law, based on distinct principles and generating distinct claims, operating in tandem to produce the distinctive institution of the trust. The property dimension allocates property rights, a right of control over the trust property to the trustee and rights to benefit from the trust property to the beneficiaries, as specified in the trust. The property dimension of the express trust arises from the settlor's declaration of trust, out of the settlor's ownership of the property that becomes the trust property. The contract dimension consists of the trustee's duty to carry out the trust arising from an undertaking to do so. This is not contract law in the conventional sense in which it refers only to the ordinary common law of contract, but in the broader sense that it arises from agreement. The beneficiary's equitable interest under a trust is a property right in the trust property in the property dimension, associated with a personal right to the performance of the trustee's duty in the contract dimension. In principle, claims arising in connection with a trust should be identified as being in the property or contract dimension. A claim against the trustee for breach of trust or against an accessory to the breach of trust is in or associated with the contract dimension. A proprietary claim to recover trust property or its traceable proceeds is in the property dimension. A recipient of trust property transferred in breach of trust is subject to a proprietary claim in the property dimension but is not subject to any duty to perform the trust in the contract dimension, having given no undertaking to do so. However, if that recipient knows or ought to know of the invalidity of the transfer, they can be liable to pay compensation for the loss of trust property disposed of or used up. This is really a matter of negligence and in this remedial situation the contract dimension is replaced by a negligence dimension. This is what is behind the law of knowing receipt, though the law does not fully reflect it.

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Footnotes

1 The view that the equitable interest is a personal right and not a property right is associated in particular with Maitland: *F.W. Maitland, Equity—A Course of Lectures, J. Brunyate, revised edn (Cambridge: Cambridge University Press, 1936)*. The view that it is a property right is associated with Scott, "The Nature of the Right of the Cestui que Trust" (1917) 17 Colum. L. Rev. 269. See generally with respect to the traditional debate Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can. Bar Rev. 221.

2 See for example *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669 at 705; [1996] 2 All E.R. 961* at 987, per Lord Brown-Wilkinson; *Watt, Trusts and Equity, 5th edn (Oxford: Oxford University Press, 2012), at p.16*. According to Macnair, "Equity and Conscience" (2007) 27 O.J.L.S. 1, the concept of conscience as it was originally understood is quite different from the modern understanding.

3 Delany and Ryan, "Unconscionability: A Unifying Theme in Equity?" (2008) 72 Conv. 40; Samet, "What Conscience Can Do for Equity" (2012) 3 Juris. 13.

4 This sort of approach contributes to the discussion in *Smith, "Philosophical Foundations of Proprietary Remedies" in Chambers et al. (eds), Philosophical Foundations of the Law of Unjust Enrichment (Oxford: Oxford University Press, 2009)*.

5 Some might prefer to say that the trustee is bound because of the promise to act or consent to act but the differences are not relevant for present purposes.

6 A full account would have to explain why the trustee's duty has the particular character of a fiduciary duty, including the particular remedies for breach of fiduciary duty that are available to the beneficiary but not to a contracting party at common law, as to which see further *Jaffey, Private Law and Property Claims (Oxford: Hart Publishing, 2007), at pp.144–150*.

7 As to the contractual theory of the trust, see Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625. See also *Maitland, Equity—A Course of Lectures (1936)*. Lau accepts that the trust is (in part) based on consent or agreement but denies that this should be associated with contract law, because contract law should be understood to refer to the particular body of rules developed under that name in the common law: see generally *Lau, The Economic Structure of Trusts (Oxford: Oxford University Press, 2011), Ch.1 especially at p.30*. Contract law can be and of course normally is understood in this sense, but this is not a point against the contractual theory in the sense suggested. Lau tends to equate contract law with default rules as opposed to mandatory rules, but contract law can contain mandatory rules and property law is not confined to mandatory rules.

8 See for example *Walsh v Lonsdale (1882) 21 Ch. D. 9* . On the maxim, see Gardner, "Two Maxims of Equity" [1995] C.L.J. 60 at 62, and Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" [2013] C.L.J. 720 at 738.

9 It is widely thought that the doctrine does not actually give rise to a genuine property right. The doctrine is criticised by *Swadling, "The Vendor-Purchaser Constructive Trust" in Degeling and Edelman (eds), Equity in Commercial Law (London: Sweet & Maxwell, 2005), at pp.475–476 and 487–488*. It may be possible to explain the legal position concerning contracts for sale in another way, for example on the basis of a third party's complicity in the breach of duty by the vendor, or where the vendor is intended to hold the property for a time before completing the transfer, he or she could be understood to grant a property right to the purchaser securing his or her interest as against third parties, pending completion.

10 In particular, in a trust the beneficiary does not always have a right to a transfer of specific property, but may simply have a right to a payment to be extracted from trust property.

11 This is equivalent to remedial "monism", as I understand it. It is monist in the sense that it treats the remedial rules as the unfolding of the primary relation in the particular circumstances, so that the primary and remedial relations are parts of a single body of law: see *Jaffey, Private Law and Property Claims (2007), Ch 2*. Remedial monism and dualism are usually considered in connection with contract and tort: see for example *Tilbury, "Remedies and the Classification of Obligations" in Robertson (ed.), The Law of Obligations: Connections and Boundaries (London: UCL Press, 2004)*. Sometimes the same idea is expressed in terms of the vindication or continuity of the primary right.

12 Turner argues in favour of the constructive trust for a purchaser on the ground that it gives the purchaser a better remedy than a personal right to specific performance but he takes no account of whether it is justified to

subject third parties to the property right: see Turner, "Understanding the Constructive Trust between Vendor and Purchaser" (2012) 128 L.Q.R. 582.

13 *Smith, "Philosophical Foundations of Proprietary Remedies" in Chambers et al. (eds), Philosophical Foundations of the Law of Unjust Enrichment (2009), at p.292*. Cf. Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625 at 647–648.

14 Cf. Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" [2013] C.L.J. 720 at 738–739.

15 *Royal Brunei Airlines v Tan [1995] 2 A.C. 378; [1995] 3 All E.R. 97* .

16 Chambers notes that historically equity equates specific restitution with proprietary restitution, but points out that it is not justified as a matter of logic or justice: *Chambers, "Two Kinds of Enrichment" in Chambers et al. (eds), Philosophical Foundations of the Law of Unjust Enrichment (2009), at p.256*.

17 McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1; *McFarlane, The Structure of Property Law (Oxford: Hart Publishing, 2008)*; McFarlane, "Reply: Property Law and its Structure" (2011) 2 Juris. 217. More fully, on the persistent right theory, some rights of the beneficiary are personal rights against the trustee, and some are persistent rights. I have confined my discussion of the persistent right theory to its application to the trust, though the theory purports to explain all equitable interests. See also Webb, "The Double Lives of Property" (2011) 2 Juris. 205; Jaffey, "The 'Persistent Right' and the Remedial Part" (2011) 2 Juris. 181; *Gardner, "Persistent Rights Appraised" in Hopkins (ed.), Modern Studies in Property Law, Volume 7 (Oxford: Hart Publishing, 2013)*.

18 It is said that the persistent right is not a property right because, although it binds recipients (and even creditors as potential recipients), it does not entail any right against interference by third parties. For example, a trust beneficiary does not have a claim against a third party who trespasses over trust property. It does not seem to me that this provides any basis for denying that the beneficiary's right is a property right. This point is considered below at fn.30 and at fn.69.

19 For example, McFarlane treats it as a matter of consent: *McFarlane, The Structure of Property Law (2008), at p.228*.

20 See *DKLR Holding Co (No.2) Pty Ltd v Commissioner of Stamp Duties (1982) 149 C.L.R. 431* at [14]–[15], per Hope J.A., discussed by Justice R.W. White, "The Nature of a Beneficiary's Equitable Interest in a Trust", a revised version of a paper presented to the Supreme Court of NSW Annual Conference 2007, available on the website of the High Court of Australia, http://www.supremecourt.justice.nsw.gov.au/supremecourt/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.html#Justice_White_. Thus the equitable interest is said to be "an interest in property" though not necessarily a right in rem. According to *Gardner, An Introduction to the Law of Trusts, 3rd edn (Oxford: Oxford University Press, 2011), at p.223*, the trustee can be subject to a "proprietary duty" with respect to the trust property without there being in consequence a proprietary right in the beneficiary, which might be understood in the same way.

21 This is the traditional way of putting it. See, for example, *Pettit, Equity and the Law of Trusts, 12th edn (Oxford: Oxford University Press, 2012), at p.30*.

22 Cf. Gardner, "Two Maxims of Equity" [1995] C.L.J. 60 at 64–65, referring to Hohfeld's idea of the "genuine law" in *Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (New Haven: Yale University Press, 1923)*.

23 I take this to be the usual understanding, associated with *Honoré, "Ownership" in Making Law Bind (Oxford: Clarendon Press, 1987)*: see also Nolan, "Equitable Property" (2006) 122 L.Q.R. 232 at 258; *Worthington, Equity, 2nd edn (Oxford: Oxford University Press, 2006), at p.63*.

24 An earlier version of this approach is in *Jaffey, Private Law and Property Claims (2007), Ch.5*.

25 This understanding seems consistent with the law and I do not see any problem with it in principle, though it may be contrary to standard usage in this context, as for example in connection with whether there is a taxable interest, as considered in *Gartside v IRC [1968] A.C. 553* . One might object that the suggested analysis of the trust assumes that there are property rights of a type that are not actually recognised in the law: for example, according to *McFarlane, The Structure of Property Law (2008), at pp.140 and 218*, only the right of absolute ownership is generally available for all objects of property. But if the suggested analysis provides the best account of the trust, we should conclude that the law does in fact recognise these forms of property right, even if the courts have not been explicit about it.

26 *(1841) 4 Beav. 115; 49 E.R. 282* .

27 See for example Burrows, "We Do This at Common Law But That In Equity" (2002) 22 O.J.L.S. 1.

28 According to this analysis, an "equitable interest" in the sense of the beneficiary's right under a trust, meaning the right to an element of the benefit of trust property held by a trustee, is not the same concept as an "equitable

interest" in the sense of a lesser property right recognised in equity, such as an equitable easement or an equitable charge. The difference would be crucial in the event of substantive fusion, since substantive fusion would require the equitable and legal versions of a lesser property right to be integrated or treated as variants of the same type of right: see further *Jaffey, Private Law and Property Claims (2007), at pp.126–128*. Cf. *Gardner, "Persistent Rights Appraised" in Hopkins (ed.), Modern Studies in Property Law, (2013), Vol.7 at pp.15–17*.

29 It follows from the suggested approach that, as one would expect, there is nothing in the nature of the trust to preclude its being adopted by a civilian system that does not recognise anything in the nature of the division between law and equity. I leave aside the broader question of whether substantive fusion is the right approach.

30 "Interference" is used broadly to cover intrusion and damage. See *McFarlane, The Structure of Property Law (2008), at pp.22 and 194*, and in the trust context, at p.29. This is important to McFarlane's theory of the persistent right discussed above, because according to McFarlane it is because the beneficiary does not have a right against interference by third parties that his right is a persistent right and not a property right. See also below at fn.75. According to the analysis of knowing receipt suggested below, it involves a claim by the beneficiary in the nature of negligence.

31 This is consistent with *Shell UK Ltd v Total UK Ltd [2010] EWCA Civ 180; [2011] Q.B. 86* . According to this case, the beneficiary can compel the trustee to take action, which supports the suggested analysis. The case is criticised by Justice Edelman, "Two fundamental questions for the law of trusts" (2011) on the website of the Supreme Court of Western Australia: http://www.supremecourt.wa.gov.au/S/speeches_2011.aspx?uid=3701-3103-3469-1783. See also *Gardner, "Persistent Rights Appraised" in Hopkins (ed.), Modern Studies in Property Law, Volume 7 (2013), at p.349*; Hargreaves, "The Nature of the Beneficiaries' Rights under Trusts" (2011) 4 T.L.I. 163. The fact that the beneficiary's interest originated in equity and the right against interference with property at common law cannot in my view determine whether as a matter of principle the beneficiary's interest is a matter of property, or the beneficiary should be able to make the claim.

32 There is room for comparison with the position in company law under the rule in *Foss v Harbottle (1843) 2 Hare 461; 67 E.R. 189* and the derivative action.

33 Although a claim at common law conventionally has the form of a claim in tort, at least in the case of conversion it is often, like the equitable proprietary claim, in substance a claim to recover property or its value arising simply from the fact that there was no valid transfer of the property to the defendant.

34 See fn.1 above.

35 In fact, property rights at law do sometimes yield to a bona fide purchase defence, as for example in the case of currency.

36 This usage of abstract and concrete rights is associated with Ronald Dworkin: see *Dworkin, Taking Rights Seriously (London: Duckworth & Co, 1977)*.

37 *Lau, The Economic Structure of Trusts (2011), at pp.150–156*. Lau refers to analyses of the fund in Nolan, "Property in a fund" (2004) 120 L.Q.R. 108 and *Penner, "Duty and Liability in Respect of Funds" in Lowry and Mistelis (eds), Commercial Law: Perspectives and Practice (London: Butterworths, 2006)*.

38 Furthermore, bona fide purchase protects a purchaser of property subject to equitable property rights that are not rights under a trust.

39 Thus the operation of bona fide purchase should be distinguished from overreaching. The existence of many different types of legal right can increase search costs and make property less marketable, but this problem is avoided in the case of the trust through overreaching because a purchaser need only deal with the trustee, the beneficiaries' interests being hidden behind the "trust screen": Merrill and Smith, "The Property/Contract Interface" (2001) 101 Colum. L. Rev. 773.

40 Furthermore, bona fide purchase does not necessarily maintain the value of the fund by providing an exchange product, as *Lau argues, The Economic Structure of Trusts (2011), at p.161*, because it can operate against an intermediary and the money can be paid to a third party and it may not be in the form of an asset at all. Bona fide purchase protects the recipient and not the beneficiary.

41 See, e.g. *McFarlane, The Structure of Property Law (2008), at p.27*; McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1 at 3; *Edelman, "Two fundamental questions for the law of trusts"* (2011) on the website of the Supreme Court of Western Australia: http://www.supremecourt.wa.gov.au/S/speeches_2011.aspx?uid=3701-3103-3469-1783.

42 Thus it is not necessary to conclude that transferable personal rights form a distinct category of rights that are not ordinary personal rights but are not property rights in the full sense, as suggested by *Chambers, "Two Kinds of Enrichment" in Chambers et al. (eds), Philosophical Foundations of the Law of Unjust Enrichment (2009), at p.254*. Nor does it seem to me necessary, at least for present purposes, to regard the distinction between property and personal rights as blurred: see generally the discussion in Worthington, "The Disappearing Divide

Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2007) 42 Tex. Int'l L.J. 917.

43 This does not have the effect of converting the personal right into a security right over the debtor's assets as Lau suggests: *The Economic Structure of Trusts (2011), at p.126*.

44 In the absence of a trust, where the claimant bank account holder, C, makes a mistake in giving the instruction to the bank to make a transfer to D, or alternatively the instruction is given by C's agent with apparent but not actual authority, the account is understood to be governed purely by contract, and the claim is understood to be based on D's unjust enrichment at C's expense. But if the initial legal position were actually entirely a matter of contract, it is difficult to see on what basis one could treat the money received by D as coming from C, as the unjust enrichment claim requires. We should say, by analogy with the trust case, that the common law case is also a matter of property law.

45 See also *Gardner, "Persistent Rights Appraised" in Hopkins (ed.), Modern Studies in Property Law, Volume 7 (2013), at p.14*.

46 An account of the trust should also deal with the partitioning of assets theory, which is a version of the property theory, but it is not feasible to deal with this here. See Hansmann and Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73 N.Y.U.L. Rev. 434; Hansmann and Mattei, "Trusts Law in the United States. A Basic Study of its Special Contribution" (1998) 46 Am. J. Comp. L. 133; Hansmann and Kraakman, "The Essential Role of Organisational Law" (2000) 110 Yale L.J. 387; Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L. Rev. 621.

47 See generally Nolan, "Equitable Property" (2006) 122 L.Q.R. 232.

48 An earlier version is in *Jaffey, Private Law and Property Claims (2007), Ch.5*. See also Palmer, "Theories of the Trusts and What They Might Mean for Beneficiary Rights to Information" [2010] N.Z.L.R. 541; Nolan, "Equitable Property" (2006) 122 L.Q.R. 232. Virgo refers to two components of the trust, but these are (1) the ownership of the trust property by the trustee and (2) the duty owed by the trustee in respect of the trust property: see *Virgo, The Principles of Equity & Trusts (Oxford: Oxford University Press, 2012)*. See also Parkinson, "Reconceptualising the Express Trust" [2002] C.L.J. 657; *Gardner, "Persistent Rights Appraised" in Hopkins (ed.), Modern Studies in Property Law, Volume 7 (2013), at pp.347–349*.

49 The trust is characterised as a sort of hybrid in *Pearce, Stevens and Barr, The Law of Trusts and Equitable Obligations, 5th edn (Oxford: Oxford University Press, 2010), at p.71*. See also Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625 at 669; Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L. Rev. 621 at 633; Gallanis, "The New Direction of American Trust Law" (2011) 97 Iowa L. Rev. 215 at 234ff.

50 See Hansmann and Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73 N.Y.U.L. Rev. 434.

51 *Re Denley [1969] 1 Ch. 373; [1968] 3 All E.R. 65* . Thus the distinction between a *Re Denley* purpose trust and a discretionary trust is whether there are true beneficiaries with property rights, as opposed to "factual beneficiaries". On the suggested analysis, a "factual beneficiary" does not have an equitable proprietary claim in their own right, but the trustee should be able to recover trust property invalidly transferred and the factual beneficiaries should be able to compel the trustee to act.

52 *Westdeutsche Landesbank Girocentrale v Islington LBC [1996] A.C. 669* ; Nolan, "Equitable Property" (2006) 122 L.Q.R. 232; cf. *McFarlane, The Structure of Property Law (2008), at p.30*.

53 This usage of "liability" is not unusual but is nevertheless controversial because it is non-Hohfeldian: see *Jaffey, Private Law and Property Claims (2007), Ch.2*.

54 With reference to the persistent right theory discussed earlier, the beneficiary has a right that persists, but this is their property right, which is not a right to the performance of the trustee's duty. The right to the performance of the trustee's duty arising from the trustee's undertaking does not persist—it binds only the trustee as the person who gave the undertaking. The equitable proprietary claim is not based on enforcing a duty derived from the duty of the original express trustee and transmitted to the recipient (or indeed on enforcing a duty at all).

55 See Gardner, "Moment of Truth for Knowing Receipt?" (2009) 125 L.Q.R. 20; *Jaffey, Private Law and Property Claims (2007), at p.190*. McFarlane refers to the duty of the recipient not to use the trust property for their own benefit, as part of the "core duty" of an express trustee: *McFarlane, The Structure of Property Law (2008), at pp.216 and 554*. The duty is not a duty to return the property as it would be if it were the correlate of the property right.

56 Again, it might be better to say that this is a liability rather than a duty in the sense suggested above, and that the recipient bears the risk of loss resulting from a failure to take reasonable measures to preserve the trust property, rather than a duty to take reasonable steps to prevent loss, but it is not necessary to pursue this here.

57 I leave aside the controversial question of the appropriate usage of the expressions "constructive trust" and "constructive trustee" and "resulting trust" in this context. In this context and more generally, it seems to me that the constructive trust is concerned with the proprietary dimension.

58 *BCCI v Akindele [2001] Ch. 437; [2000] 4 All E.R. 221* .

59 Or, more precisely, has the requisite level of knowledge under the *Baden Delvaux* scale.

60 Thus for example Virgo suggests that it is the equitable counterpart of the common law claim for restitution: *Virgo, The Principles of Equity & Trusts (2012), at p.677ff*. A distinct argument is that the restitutionary claim is based on unjust enrichment: see in particular *Birks, Restitution—The Future (Annandale, New South Wales: The Federation Press, 1992), at p.26ff*. See also *Lord Nicholls, "Knowing receipt: the need for a new landmark" in Cornish et al. (eds), Restitution: Past, Present and Future (Oxford: Hart Publishing, 1998)*.

61 In *Farah Constructions Pty Ltd v Say Dee [2007] HCA 22* the High Court of Australia overturned the Court of Appeal's decision adopting strict liability and upheld the traditional knowledge and fault requirement.

62 This is of course reflected in the principle of "change of position".

63 This characterisation of knowing receipt as wrong-based is consistent with *City Index v Gawler [2007] EWCA Civ 1382; [2008] Ch. 313* , in which the liability of the defendant recipient, as a wrongdoer, was reduced under the Civil Liability (Contribution) Act 1978 to take account of the fact that the claimant's negligence also contributed to the claimant's loss, but, on the suggested analysis, the loss caused by the defendant for the purposes of the Act should be the reduction in traceable proceeds or value surviving, not the full value of the transfer.

64 This reflects the traditional treatment in terms of constructive trusteeship: *Barnes v Addy (1873–1874) L.R. 9 Ch. App. 244; (1874) 22 W.R. 505* . See the discussion in *Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed.), Constructive and Resulting Trusts (Oxford: Hart Publishing, 2010), at p.129*.

65 This calls for tracing into abstract value causally-defined (a version of the swollen assets theory), which is of course controversial, as advocated in *Jaffey, Private Law and Property Claims (2007), at pp.161–164*.

66 With respect to this aspect of the claim there is no justification for a knowledge or fault condition. The personal restitutionary claim, nowadays often understood as a claim based on unjust enrichment, is increasingly conceived as a claim to surviving value, change of position being understood to define the surviving value: see for example *Chambers, "Two Kinds of Enrichment" in Chambers et al. (eds), Philosophical Foundations of the Law of Unjust Enrichment (2009), at pp.247–248*; *Birks, Unjust Enrichment, 2nd edn (Oxford: Oxford University Press, 2005), at p.63*.

67 Lastly the two-dimension approach also implies that the availability of a proprietary claim should not in principle depend on whether there was a prior express trust or fiduciary relationship. The claim arises not from a breach of trust or fiduciary duty but from the invalidity of the transfer, and there is no principled basis for distinguishing between invalidity in this case and other cases, such as transfers that are invalid because of mistake or absence of authority. Furthermore, as a matter of remedial consistency, all invalid transfers of property should in principle generate proprietary claims irrespective of whether there was a breach of trust or fiduciary duty. This issue is of course controversial: see, e.g. *Chase Manhatten Bank v Israel-British Bank [1981] Ch. 105; [1979] 3 All E.R. 1025* ; *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669* .

68 There are possible adverse effects for which provision has been made, for example as to duration of the trust or with respect to creditors.

69 For example, *Harris, Property and Justice (Oxford: Oxford University Press, 1996)*. This is important to the persistent right theory discussed at pp.383–385 above.

70 *Lau, The Economic Structure of Trusts (2011), Ch.8*.

71 Or some aspect of the thing, according to the property right in question.

72 This general approach is discussed further in *Jaffey, Private Law and Property Claims (2007), Ch.3*.

73 This principle provides the basis for the right of an owner or other property right holder who has acquired their right by spending their own money or applying their own labour or other resources in acquiring the object of property, but if the right of ownership is recognised to encompass the power to make a gift or establish a trust, it also supports the derivative property rights of a donee or trust beneficiary. However the principle directly applies to reliance incurred by a donee or trust beneficiary on the assumption of their entitlement after receipt.

74 This is not because transferability is a necessary feature of property rights. Some property rights are not transferable: as mentioned above a beneficiary's property right under a trust may not be transferable. But a personal right must be transferable if it is to function as a store of wealth and so be an object of property.

75 See e.g. *Edelman, "Two fundamental questions for the law of trusts"* (2011) on the website of the Supreme Court of Western Australia: http://www.supremecourt.wa.gov.au/S/speeches_2011.aspx?

uid=3701-3103-3469-1783; *McFarlane, The Structure of Property Law (2008), at p.194*; McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq. 1 at 3.

