

The unbearable lightness of property

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Abstract

When considering property rights, it is not only necessary to inquire into their extent, their incidents and their enforceability, it is also necessary to inquire into their weight. In Milan Kundera's novel the Unbearable Lightness of Being it is suggested that the tragedy of human life is that moments of true happiness are too light and too fleeting to be capable of profound enjoyment. The social theorist Zygmunt Bauman draws on Kundera's theme to suggest that in the post-modern world there are those cosmopolitan enough (in Bauman's sense) to enjoy life on a plane which makes their existence seem perpetually light. Allied to this metaphor is a reflection of Sennett's observation that many of the world's leading industrial figures consider their property not to be something which carries the ordinary burdens of ownership but rather as something which is comparatively light because it exists only as an expression of cash value.

For such people, property exists only as something to be sold or disposed of when it is no longer useful. There is no emotional bond between owner and owned here, rather the attachments are light and they are financial. It is suggested that this significant feature of property ownership is something which modern property law is incapable of understanding as presently organised. Moreover, modern property law contains within it a number of conceptual weaknesses which, taken with the postmodern turn, suggest that its logic is no longer immutable. Models for such developments are to be found within the nature of legal co-operatives and in the manner in which property inevitably is valued in terms of the relativity of its value in cash terms. Examples of this lightness will be identified with assertions that trusts should be considered simply as contracts, with an analysis of the unit trust, with a category of quasi-property, and with tangible property theory, so-called. By contrast, the domestic mortgage will be shown to be an example of a type of property relationship which, while a mere contract at root, displays great weight for the mortgagor. Ultimately, it is argued that property law is necessarily organised around the tangible nature of property whereas this paradigm fails to understand the relativity and perpetual change which is a feature of the postmodern world order.

INTRODUCTION

Property law is concerned with the recognition of entitlements in relation to property. Such entitlements may reflect use, the right to take a benefit, the right to prohibit use by others and so forth. It is of course the business of property lawyers to inquire into the different incidents and extents of those various rights. What is suggested here is that the law of property ought also to recognise that different aspects of property also have different weight.

There are circumstances in which this weight demonstrates itself in the classical sense of property ownership connoting both exclusive rights of use and the burdens of ownership: this is most people's experience of their homes, the maintenance of their cars and the insurance of their other chattels. Alternatively, for the cosmopolitan elite (the current mode of sociologists and the bane of classical Marxism)¹ their property indicates a lightness in ownership either in the sense that its owners do not feel that they are bound to their property by ties of maintenance and sentiment, or in the sense that professional advisors are able to construct sophisticated mechanisms to conceal their ownership for fiscal and other regulatory purposes.

The basis for suggesting that property has different weight in this way is based on the work of the sociologist Richard Sennett.² Every conspiracy theorist logged onto every internet chat-room in the world is aware of the annual meetings in the Swiss resort of Davos at which the premier league of the world's entrepreneurs, CEO's and industrialists go on retreat with a selection of carefully selected politicians and influential thinkers. The conspiracy theorists are convinced that it is these meetings which actually run the world. In commenting on the meetings at Davos, Sennett records his observations of entrepreneurs like Microsoft's Bill Gates who, in talking about their assets, do not consider them to be something tangible and heavy, carrying not only the incidents of ownership but also the burdens of maintenance, but rather as constituting merely an expression of a market value and themselves necessarily disposable. Significantly this property is something which is *kept* (rather than *owned*) solely to realise its financial value. Sennett noted that

“[Gates] seems free of the obsession to hold on to things. His products are furious in coming forth and as rapid in disappearing, whereas Rockefeller wanted to own oil rigs, buildings, machinery, or railroads for the long term.”³

For this ultra-cosmopolitan elite in their Davos seminars, property has a very different quality from the way in which the lumpen mass of the population feel about their few possessions, mortgaged to the hilt and, so far as the sociologists can make out, terminally insecure about their place in the world.⁴

¹ And where the former are typically former enthusiasts of the latter: e.g. Giddens, *Beyond left and right*, Polity, 1992; Bauman, *Globalisation*, Polity, 1998.

² Sennett, *The corrosion of character: the personal consequences of work in the new capitalism*, WW Norton & Co., 1998, 61.

³ *Ibid.*

⁴ Bauman, *Work, consumerism and the new poor*, Open University Press, 1999; Giddens, *Modernity and Self-identity*, Polity, 1991.

The term “cosmopolitan” is one that is very much in vogue among social theorists.⁵ It refers to those participants in the global economy who move easily from one jurisdiction to another, trading on their global brands, and finding new and disposable sites for their franchised operations. What we are left with, in Bauman’s terms, is a “light, free-floating capitalism, marked by the *disengagement* and loosening of ties linking capital and labour”.⁶ This is bound up with a perception of globalisation which permits the capitalists to withdraw quickly and tidily from labour markets by franchising their goods elsewhere, thus creating lightness for capital and weight for labour. It is this contested approach to globalisation and its impact on the individual which is also explored in this essay.

This essay seeks to probe both the illogicalities at the heart of English property law and the significant gap between the tangibility and separateness which mainstream English property law still assumes and the necessarily ephemeral and disposable nature of property in the late capitalist world.

What is at issue then is the bedrock of capitalism: the ability to establish and to protect rights to private property, whilst also permitting the capitalists “lines of flight” from disadvantageous entanglements with any particular geographic location.⁷ To understand the challenges facing property law it is necessary to understand first the nature of that capitalism which, it will be argued, offers weight to some and lightness to others.

THE NATURE OF CAPITALISM

The lightness of late capitalism: from franchising to freedom

To understand the late capitalists’ use of property it is necessary first to understand those capitalists. By “late capitalist” is meant those entrepreneurs, industrialists and others who own the means of supply in that period of economic history which has seen individuals be transformed from citizens and producers into consumers.⁸ A period of time dubbed by many social theorists “postmodernity”. By “means of supply” is meant a necessary connection to this process of consumption whereby the capitalist owns the means of supplying that which is consumed, whether that is the ideology informing consumption – produced by advertising agencies, politicians and public relations consultants who run all those call-centres – or whether that is the goods which are actually consumed – produced by a range of industries from the traditional hardware metal-bashers to software engineers.

This new spread of industrial capitalism into virtual data production has been dubbed “soft capitalism”, a reference to the non-tangible nature of much of the material that is produced.⁹ However, other theorists prefer to think of this capitalism not as being “soft”, because the competitive nature of global markets is typically cut-throat and

⁵ Beck, “The cosmopolitan society” in *Democracy without enemies*, Polity, 1998.

⁶ Bauman, *Liquid modernity*, Polity, 2000, 149.

⁷ Negri and Hardt, *Empire*, Harvard, 2001.

⁸ Mandel, *Late Capitalism*, Verso.

⁹ Thrift, “The rise of soft capitalism”, *Cultural Values*, 1/1, April 1997, 29.

unrelenting, but rather as responding better to metaphors such as “dancing” or “surfing” as an illustration of its lack of connection with any particular geographic location in which its goods are produced.¹⁰ Surfing, in particular, carries with it connotations of being carried along on waves of other elemental forces with the skill of the surfer being to direct the board successfully and flamboyantly to shore. Surfing is also resonant of the internet, of course, and the ability to ride waves of data so as successfully to manipulate virtual markets and so forth.

The point relates to the globalisation both of these markets and also of the places of their production. In the globalised industrial world, the capitalists no longer need to own the means of production, rather they prefer to own the trademark which governs the right to sell that product and to franchise out the task of mechanical production to the cheapest available labour pools in the (so-called) Third World.¹¹

The value of nothing: the business of late capitalism

In the dramatic corporate collapses of 2002, what has been most apparent is that the products generated by these financial giants have been assets which have no tangible existence and a market value calculated only by reference to their reputation or a common belief in that mythical marketplace that they are of a given value. The most obvious is Enron, a corporation which traded energy, or rather it traded rights to be delivered amounts of energy the value of which was calculated on the basis of predictions as to future energy demands: that is, it traded on people’s expectations of whether or not it will rain tomorrow.¹² Enron, like Barings, Kidder Peabody and many other large financial institutions before them strayed across that line from inadvertently over-stating their worth today based on overly optimistic predictions of their actual worth tomorrow, into deliberately overstating that worth. Absent the fraud that is present in one case but not the other, the similarity between these cases is based on an ascription of a notional value to property which has no true personality; referred to as *quasi-property* below.

It is suggested that this constitutes an entirely new conception of property and one which English property law will struggle to conceptualise, as considered below in relation to *tangible property theory*. This new form of property is light in a different sense from that considered above – it is light both in that it is not tangible and in that its value can disappear in an instant. Neither of these facets of property is entirely new – however, it is suggested that the sorts of assets which are conceived of in corporate accounts as bearing value (financial derivatives, dot-com future cash flows, securitised assets) are different from anything which has gone before.

What is also important to note here is that the industrialists, particularly in the new high-technology sectors, do not need to own the means of production anymore. They do not need to establish burdensome ties either with the plant which produces the

¹⁰ Bauman, *Liquid modernity*, Polity, 2001.

¹¹ Klein, *No logo*, Flamingo, 2000; Bauman, *Globalisation*, Polity, 2000. As well as the task of servicing customers to call-centres strategically located in previously high unemployment areas of the jurisdictions in which the goods are then sold.

¹² For a discussion of energy derivatives, see Hudson, *The law on financial derivatives*, 3rd edn., Sweet & Maxwell, 2002.

goods nor with the workers who populate that plant. Instead, they have the lightness of owning merely the rights to receive the cash flows which derive from their legal entitlements to exploit those goods once produced.¹³

More of this lightness later, first it is important to unpack a little further the postmodern turn in this late capitalism and so to set out the framework through which we can analyse the nature of property in this sense.

Property and the postmodern

The model on which this development of capitalism through its modern to its postmodern phase will be based is that of the work of the social theorist Zygmunt Bauman. Bauman identifies in this expansion of global capitalism a form of *liquid modernity* in which the old social building blocks have melted away and in their place is a constantly shifting sea of choices, opportunities and risks.¹⁴ For the cosmopolitan elite which is free of the ties of geography, for those commercial actors who are able to remove themselves from any particular location without feeling any fetters, there is a lightness about their lifeworld.¹⁵ Not for them the ties of place, nor the burdens of creating direct contractual links with the workforce employed by the franchisee in that place.

Indeed the spirit of place which was so much a feature of the poetry of Lawrence Durrell and others – themselves considered by literary theorists to have been among the early modernists – appears now to be a hackneyed notion. Why dwell over the experiences dwelled on in five volumes on the Avignon of Durrell's *Avignon Quintet* when you could move on after a single holiday to Klosters, then Bali, then trekking to Kilimanjaro. The spirit of our age is of short-term consumerism, a fetish for multiculturalism and consequently a disdain for the pedestrian heritage of any particular place or time. Our money is electronically stored and transferred, our allegiances are many and shifting, and our modernity is liquid.

The global commercial actor's being is light. Property is a means to an end and not a value in itself. To consider a share to be property in the same way as a home is property is to stretch one concept of property to fit very different concepts. A share is many things: an investment, a contingent right in the property of the company on winding up, an expression of a hope that a dividend will be declared.¹⁶ The commercial purpose of a share is that it is both intangible and that it is merely an expression of value – not a thing in itself. A home on the other hand is more likely intended to be solid, to be reliable, to be an expression of emotional security in bricks and mortar.¹⁷ It also embodies a range of expressions of hope and of anxiety but the

¹³ *Ibid.*

¹⁴ Bauman, *Liquid modernity*, Polity, 2001.

¹⁵ Beck, *World risk society*, Polity, .

¹⁶ Hudson, *The law on investment entities*, Sweet & Maxwell, 2000, 110.

¹⁷ Although, to argue against myself, the performance of the housing market in the UK over recent decades perhaps indicates an element of investment and speculation – particularly in the buy-to-let trend of 2000/2001 – but that is explained away in the framework employed below to relate, perhaps, to the consumerist determination of the postmodern populace to realise a speculative turn on their homes as well as to live in them precisely because this culture inculcates in us a desire for riches and for access to the inner sanctums of the capitalist playground.

crucial distinction between the home and the share is that the home necessarily *embodies* those feelings whereas the share merely *expresses* a value which fluctuates from time-to-time.

A property law which is insensitive to these sorts of nuances will not be capable of dealing adequately with the various different circumstances which will be brought before it. More than that, I shall show that, of course, property law is sensitive to context in a number of circumstances but, I shall suggest, many of those examples of relativity advantage commercial interests rather than ordinary uses of property. What will be important to consider later in this essay is the fact that property, as dealt with by commercial people in particular in the late capitalist world, does not respond to the old requirements of tangibility or capability of identification. Property in this new world order is identifiable primarily by its ability to generate cash flow and not through any permanence nor the necessity for separation from other property which has troubled judges in cases like *Westdeutsche Landesbank v. Islington*.¹⁸

The development of Bauman's own thought: from modernism to postmodernism

Before leaving the general and delving into the specific, it would be useful to map the intellectual framework borrowed from Bauman which will underpin this notion of weight and lightness. Bauman's work has moved through two clear phases: the first was his modern phase and the second his postmodern phase.¹⁹

His modern phase drew on three key theorists: Jurgen Habermas, Antonio Gramsci and Karl Marx. From Marx he took his belief in state socialism and in the inexorable logic of alienation leading to social change. From Gramsci he took an analysis of the subtlety with which hegemonic power is established in civil society by means of communicating a dominant ideology to the populace through the mass media so that the populace comes to adopt those values as their own.²⁰ From Habermas he took the optimism of the latter's theories of communicative action through which society would achieve its ideal speech situation constituting a consensus of views on that society's values.²¹

The modern phase suggested an optimism for social change and for social justice. It was through the 1980's in particular that Bauman lost his faith in progress with the displacement of welfare society in favour of the atomised values of societies based on monetarist economics. At this time Bauman published his great trilogy of works which drew striking parallels between the holocaust and the nature of society.²² Following Freud's observation in *The Future of an Illusion* that "every civilisation

¹⁸ [1996] A.C. 669. The role of cash flow is considered below particularly in relation to financial products as items of property in themselves. This is perhaps a distinction between a formalism in property law and a substantive response to the nature of property in the late capitalist era.

¹⁹ An analysis presented most cogently by Dennis Smith in *Zygmunt Bauman: Prophet of Postmodernity*, Polity, 2000. On his appointment to the University of Leeds, Prof. Bauman was required to wrestle with his own disenchantment with the state socialist order in Poland which he had championed as an officer in the Polish brigades of the Soviet Red Army in the Second World War and as an academic in Poland.

²⁰ Gramsci, *Prison notebooks*, Lawrence Wishart.

²¹ Habermas, *Theory of communicative action*, Beacon Press, 1982.

²² Bauman, *Modernity and holocaust*, Polity, 1991.

must be built upon coercion and renunciation of instinct”²³, Bauman posited the views in *Modernity and Holocaust* that it was the bureaucratisation of society which enabled the Nazi administration to conduct such a genocide without public interference and that it was the technological modernity championed by the Ford production line which enabled that administration to conduct the business of executing such an extraordinary number of people in such a short space of time.²⁴

Bauman’s viewpoint shifted in his postmodern phase into a world whose values he saw as having collapsed. In its place came a consumer culture in which people were valued for what they bought. Identity was not something forged in the light of experience, nor of phenomenological perception nor in the crucible of the Freudian triumvirate of ego, id and superego; rather identity was something that was bought and which could be discarded, replaced or updated through the cleansing medium of shopping.²⁵ His influences became Foucault, Lyotard, Adorno and Levinas. From Levinas he derived an ethical understanding of “the Other”, in which each individual must be understood as being an ethical self and not merely a social product, and in which a sensitivity to the needs of each individual is considered to be the obligation of every other individual.²⁶ From Lyotard an understanding that postmodernity necessitates the deconstruction of value and the possibility of creating new values in their place.²⁷ From Adorno, frankly, a pessimism that this consumer-orientated world could generate the socialist oasis he had striven for in his modern and pre-modern periods.²⁸ From Foucault, a renunciation of Habermas’s dogmatic assertion that the ideal speech situation would be place of consensual and not contested values, working beyond Foucault a perception that the Panoptic control of the state has been replaced by the Synoptic control of mass culture as the many sit indoors watching, envying and emulating the few on television.²⁹ In short, this postmodern turn places an accent on deconstructing strictures on thought or lifechoices. Ironically, standing in the way of such a liberating project is the all-consuming postmodern world itself.

In this postmodern worldview, property will frequently be part of the individual’s atomistic project, part of a series of acquired identities and short-term life projects which can be discarded without sentiment in the whirling oceans of the zeitgeist. This property is of the ephemeral kind which we would be least likely to litigate for: last year’s combat trousers, heroin-chic v-necked jumpers, or chocolate coloured jeans from the year when brown was the new black. This is the most common inter-action of property and the personal life project: the collection of belongings acquired to constitute an identity. In place of solid social bonds we have now the constant chatter of magazine features telling us who’s in and who’s out with all the enthusiastic throw-away analysis of the day’s stock market reports: from these polls of whose stock is up and whose down, we are invited to select our selves. From Bauman we can take a vision of the loneliness of the individual confronted by such choices and not reassured by familiar social expectations, values or organic communities. It is from these

²³ Bauman, *Community, Polity*, 2000, 25.

²⁴ Bauman, *Modernity and holocaust*, Polity, 1991.

²⁵ Bauman, *Liquid modernity*, Polity, 2001.

²⁶ Levinas, *Otherwise that being: or beyond essence*, Duquesne University Press, 1998.

²⁷ Lyotard, *The postmodern condition*, Manchester, 1984.

²⁸ Adorno, *Negative dialectics*, Routledge.

²⁹ Mathieson, “The viewer society: Michel Foucault’s ‘Panopticon’ revisited”, *Theoretical Criminology*, 1 / 2, 1997, 215.

observations that Bauman posits the view that the consumer society benefits those cosmopolitans whose lifestyles are lent lightness by the impermanence of property and so forth, whereas there is that excluded class³⁰ for whom the weakening of these social bonds in fact adds greater weight and worry.³¹ So, how does this notion of lightness and weight further an analysis of property law?

Lightness and weight

In Milan Kundera's novel *The Unbearable Lightness of Being*, the human tragedy is expressed as being the impossibility of holding onto those moments of being which carry with them particular significance, those spots of lighted time which seem more than any other to make life seem worthwhile. A little, if you like, in the way that Albert Camus adapts the Sisyphus myth in relation to that moment when he had hauled the rock to the top of the hill, had felt it sit in place for an instant before crashing back down the slope again, and then felt (in Camus's view) a sense of liberty and of possibility when walking back down the hill to rejoin his burden.³² Set first in Czechoslovakia before and during the Soviet invasion and latterly in Geneva and Paris after they have fled their homeland, Kundera's characters in *The Unbearable Lightness of Being* try to capture these perfect moments. The tragedy is that none of them can overcome the lightness of their lives; those moments slip away and any happiness necessarily dissolves. Whether they be photographers, artists or doctors, none of them can freeze life sufficiently to be able to enjoy completely any particular moment. It is a truly modern novel in that it observes the liquidity of our social and familial structures, by following the émigrés of central Europe in their restless quests for lives with structures.

Bauman takes this motif and uses it to demonstrate how the cosmopolitan elite has managed to capture this lightness precisely because their wealth is freed from ties to the land, to geographic space and to any particular workforce. They operate by means of mobile communications and wealth which is constantly capable of being turned to account. By contrast the remainder of the populace is still encumbered by property – by the need for its maintenance, by the worries that arise from it, by the need to earn money to pay for it. In Bauman's worldview, the mass of the populace is left with the weight of property.

And so we come to consider the divisions in the way in which property law conceives of property in these senses.

Compulsory obsolescence – consumption of property by non-entrepreneurs

Thus far, the notion of property has leaned on observations about the use of such property by capitalists like Bill Gates and others with similar ambition; but what of the perception of property by society more broadly? The difficulty with answering that question is in identifying the society which is meant by that question. In the

³⁰ Whether an underclass in western societies or the mass of the population in the so-called developing world.

³¹ Bauman, *Liquid modernity*, Polity, 2000; Bauman, *Life in fragments*, Blackwell, 1995.

³² Camus, *The myth of Sisyphus*, Penguin.

society's of the Third World there is probably little concern about consumer goods in the manner that is understood in Western Europe or North America.³³ However, by "society" I mean in this context simply that tier of humanity in the affluent West with access to consumer goods provided that their salaries enable them to acquire. This we shall term the "consumer society" and exclude from it those in poverty – an essential topic for another time unfortunately – and also the entrepreneurs who own the means of consumption.

Baudrillard's clearest statement about the consumer society is that no-thing is created with permanence in mind. It is an essential feature of goods that they will break, that they will be replaced at some time in the future, or (more significantly perhaps) that the onward march of technology will render obsolescent the thing which has been bought: therefore, there is no permanence.³⁴ It is an essential part of the ideology of this marketplace that consumers expect that they will in time reach out to buy goods or lifestyles which are newer, brighter and better: therefore there is no permanence *in mind*, the ideology is for change. It is suggested that this relates not only to chattels but also to the home. Whether it is the decoration or the garden that can be remodelled, there is also the unerring assumption in our economy that house prices must continue to rise, that the house will probably be sold before the mortgage expires, and that the home is no longer just the castle but also the nest-egg.

The metaphor for this postmodern age is the most significant scientific breakthrough of the modern age: $e=mc^2$. The relativity principle demonstrates that there is no fixed point in space from which we can perceive any other body in space. Rather, the existence of one body is always relative to the other. Even time is relative in the space-time continuum. It is essential to note that this most widely-known, but least understood equation, suggests that we are never at rest. Instead, change is the most natural aspect of our lives.³⁵

I will come to suggest that property law is focused on the segregation, tangibility and permanence of property, whereas the very fundamentals of the world are orientated around the relativity of one force to another and therefore of change, movement and evolution. Below, we will consider the necessary tangibility of property in the ideology of English law – even in circumstances in which the property is itself intangible.

TANGIBLE PROPERTY THEORY

English law's desire for the tangible

Tangible property theory is the label I give to a necessary tendency in English property law to see the property with which it is concerned as being tangible. The reason for this tendency, I would suggest, is bound up with the genesis of property rules in dealings with land historically – necessarily an immovable and tangible asset

³³ Whether that Third World is reduced to poverty by a combination of incessant war, the harrowing effects of climate change or exploitation by affluent West.

³⁴ Baudrillard, *The consumer society*, 1998.

³⁵ Buckminster Fuller, *Nine chains to the moon*.

– before early humans came to assert property-like rights over livestock and crops. It is no accident that the word “chattel” has the same root as “cattle” and that even terms dealing with intangible assets like “pecuniary” come from the Greek “pecus” meaning “cow”. The logic of property law is bound up with tangibility. English property law has been, with a few notable statutory exceptions like those of 1925, developed incrementally by the common law. That means that judges have been required to develop the law to deal with complex chattels and intangible property while respecting precedents developed in relation to land and livestock, using ancient rules in new contexts until eventually the logic was likely to be stretched too far.

The problem of transfer of property under void transactions

It should therefore come as no surprise that those norms are in difficulty when confronted with a claim for restitution of sums transferred under an interest rate swap contract which was held to have been void *ab initio*.³⁶ If we were to bear in mind Lord Goff’s complaint in *Westdeutsche Landesbank v. Islington*³⁷ that such cases are concerned merely with the calculation of amounts of money and that all we ought to be concerned to do is to calculate which party must pay how much to whom, then it throws into relief the antiquity of Lord Browne-Wilkinson’s device for answering the question “can the moneys paid over be traced?”. The device used by Lord Browne-Wilkinson was to consider the moneys as though they were a “stolen bag of coins” (the heading used in his lordship’s speech, no less) and that those very coins must be recovered. Of course, the payments were in fact reciprocally-owed payments of interest under a deep discount interest rate swap in relation to which the seller had made an off-balance sheet loan to the buyer of the swap: the full amounts of “interest” were never actually paid but rather were subject to a set-off and any amounts “paid” were actually settled by virtue of a recalibration of the values of each party’s electronically-held bank accounts. The case could not have been further from a situation in which detectives were seeking to recover a stolen bag of coins in which the coins had an intrinsic value equal to their face value.³⁸

The loss of the right to trace

The clearest expression of this tangible property theory in the law of tracing comes from the loss of the right to trace rule – a tangibility thesis par excellence. In

³⁶ *Westdeutsche Landesbank v. Islington* [1996] A.C. 669.

³⁷ [1996] 2 All E.R. 961, 966.

³⁸ This example, well-travelled in the literature, highlights a number of oddities in property law. At one level it shows that title in property can pass even if the instrument which purports to transfer title is itself void. It demonstrates that entitlement to compound interest is bound up with title in the asset in issue. It illustrates that even if a contract is carefully drafted to provide for a mechanism to minimise the parties’ loss in the event that their contract is found to be void will itself be ignored and therefore that any expression of title in such a document would be ineffective (even though title can pass under that document, as mentioned). Above all, however, it demonstrates that English property law needs to consider all claims to property as relating to something tangible. This is true even of tracing – the tracing process is concerned to identify the traceable product of the original property, or some other traceable proceeds which have come into contact with that property or which have derived their value or existence in some way from that property – as though bound up in some complex, legally formalistic game of “tag”.

*Westdeutsche Landesbank v. Islington*³⁹ the bank lost its right to trace the deep discount amount transferred to the local authority because the account into which that money had been paid had run overdrawn and it was impossible to identify any substitute property into which the tracing claim could then pass. This is the loss of right to trace rule in the banking context: when money passes into an account and that account is run overdrawn before the commencement of the action, the claimant loses its right to trace into that bank account because the money has disappeared.⁴⁰

The rationale for this rule is that money in a bank account is analogous to tangible property. An overdrawn account means that that specific property has ceased to exist in the same way that a table which is burnt to cinders is said to cease to exist as a table. What the rule does not account for is the fact that the property at issue is not tangible property at all, but rather that it is an amount of value represented by the bank account debt. English law understands payment flows as being made up of movements of tangible property which informs the treatment of restitution of payments, taking security rights over payment flows, and tracing payments generally in financial markets. The courts have tended to see financial transactions not as being made up of choses in action in this way but rather as being mere conduits for transfers of tangible property in the form of money.

Moving beyond “tangible money”, and into “money as value”

The argument that money in these contexts should be considered to be value and not property has the strength that it becomes easier to establish tracing claims for value in cases of money laundering. There remains the further question as to whether or not the rights ought to be proprietary or merely personal. It is suggested that the distinction in relation to financial transactions is typically a meaningless one. Financial transactions are concerned with the allocation of value to accounts and not with the establishment of rights in any particular property because the property does not exist in any meaningful sense in any event. A bank is not concerned to recover the “specific £2.5 million” which was transferred, rather they want to recover value *equal* to “£2.5 million plus compound interest”. To talk in language born out of the law relating to tangible property is meaningless here.⁴¹

³⁹ [1996] A.C. 669.

⁴⁰ *Bishopsgate v. Homan* [1995] 1 WLR 31, *Roscoe v. Winder* [1915] 1 Ch. 62.

⁴¹ In relation to insolvency, the “property” which the claimant is seeking to recover is still an amount of value equal to the size of its claim. The question is therefore not one of recovery of property in truth, it is in fact a question for the policy of insolvency law: in what circumstances should one creditor be entitled to jump the queue in the event of insolvency? The answer must lie in the form of the contract creating the transaction. At this level, it is a question of risk allocation. If the contract has segregated assets and taken some proprietary right over them, insolvency law policy has long held that that claimant should receive preferential treatment to other creditors. The question is, in truth then, whether or not that creditor has agreed to enter into the transaction only on the basis that it would be protected in the event of the insolvency of its counterparty. In relation to money claims, the loss of right to trace rule terminates those proprietary rights at the moment when the money leaves the account and is dissipated.

Money-laundering the easy way

This inability to conceive of money as being really just value represented by electronic bank accounts is an enormous source of encouragement to money-launderers. Given that the common law will not allow tracing beyond clean substitutions⁴² and that equity will not permit tracing after money where the bank account where it was held has subsequently gone overdrawn,⁴³ laundering money becomes seemingly straightforward. The impact of the *Bishopsgate v. Homan* decision is that even bank accounts are still to be treated as containing chattels which cease to exist once they have moved out of that account.

The difficulty caused by these analyses of money, as Millett J. held in *Agip v. Jackson*,⁴⁴ is that it is impossible to maintain an action for tracing at common law where money was moved between accounts by means of 'telegraphic transfer'.⁴⁵ His lordship held that the property which was being dealt with in *Agip* was really a transmission of electrons between computers which evidenced debts of money in the form of bank accounts. Similarly, the issues before the House of Lords in *Westdeutsche Landesbank v. Islington* were concerned with the payment, and sought-after repayment, of amounts of money represented by electronic bank accounts and telegraphic transfers.⁴⁶

CONFLICTING FORMS AND USES OF PROPERTY IN THE GLOBALISED WORLD

Four alternative contexts of property

This section considers how property is used in ways in which do not correlate with tangible property theory. There are five issues investigated here. First, an acceptance that some forms of non-transferable assets have been accepted as being property. Second, the understanding of property as being merely value. Third, offshore, tax avoidance structures in which the owners of property seek to conceal their ownership while retaining the value attached to such ownership. Fourth, the example of unit trusts in which the proprietary rights associated with equitable title are intended only as a means of ensuring financial regulation. These four examples, it is suggested, demonstrate possibilities for the lightness of property due either to its intangibility or to the narrow extent of the obligations which it imposes on its owner. Fifth, by way of contrast, the very different context of the domestic mortgage which carries with it burdensome obligations of ownership.

⁴² *Jones v. Jones* [1996] 3 WLR 703.

⁴³ *Bishopsgate v. Homan* [1995] Ch 211.

⁴⁴ [1990] Ch 265; affirmed at [1992] 4 All E.R. 385.

⁴⁵ [1990] Ch 265, 279.

⁴⁶ The comments of Lord Templeman, obiter, in the *Space Investments* case [1986] 1 WLR 1072, 1074 have been much derided. His lordship commented, in terms, that money should be seen as value which augments the value belonging to its recipient even if it cannot be identified as a specific item of property taken from the original owner. This 'swollen assets' approach is the orthodoxy in US legal systems less addicted to property rules. The need to see property rights relating to a specific 'thing', is at odds with the operation which tracing aims to perform of identifying 'value' in respect of which rights can be enforced.

Disposable does not mean transferable

In traditional property law theory the element which distinguishes property from other legal relationships is that property is transferable.⁴⁷ Therefore, a chose in action is accepted as being property, a copyright is accepted as being property, and an equitable interest under a trust is accepted as being property. All of these relationships while not being rights in tangible property necessarily are property rights in themselves because they are capable of being transferred to third parties.

However, there is a further strain of authority which accepts as property rights which are not capable of being transferred. In *Don King v. Warren*⁴⁸ a partnership was created between two boxing promoters such that any boxing promotion contracts which they, or companies which they controlled, entered into were held on trust for the benefit of the partnership. That much is not exceptional.⁴⁹ What was interesting was that the individual contracts were expressed as being incapable of being transferred to any third party. However, it was held that the benefits which would accrue to the promoters from their contracts were themselves property rights which could be held on trust. As such two analyses are possible. The first is that non-transferable rights are capable of being property in English law. The second is that the non-transferable rights remain in a category of assets not capable of being considered to be property but that any future entitlement which might flow from that non-transferable right can itself be considered to be property.

The point of principle in the *Don King* case has been applied in cases involving non-transferable assets in the form of quotas to produce milk⁵⁰ and licences to deal with waste.⁵¹ In each of those cases, whereas the non-transferable rights were not capable of transfer, it was held that the parties were entitled to deal with the rights which flowed from them as being property in themselves. This is a very modern acceptance that commercial people are concerned to treat assets according to the cash flows they attract rather than by reference simply to their intrinsic identity as objects of property in themselves.

This analysis is an old one. In *Fletcher v. Fletcher*⁵² it was accepted that where a testator entered into a covenant with a trustee to leave property in the hands of a trustee without allocating equitable title in that property to either of the testator's children, it was not open to that trustee to argue that the testator's intention was to vest absolute title in the trustee. Rather, the court held that there was an intention to hold the benefit of the covenant on trust for the testator's children and by extension that the after-acquired property which was promised under the covenant would flow into that trust subsequently.

⁴⁷ Penner, *The Idea of Property in Law*, Oxford, 1997.

⁴⁸ [2000] Ch. 291.

⁴⁹ Although on the facts it was not clear that the parties had demonstrated a sufficiently clear intention to create trusts over those boxing promotion contracts, before Lightman J decided that that analysis was open to him despite the surprising inaccuracy of the contracts entered into between the parties.

⁵⁰ *Swift v. Dairywise Farms* [2000] 1 All E.R. 320.

⁵¹ *Re Celtic Extraction Ltd (in liquidation)* [1999] 4 All E.R. 684.

⁵² (1844) 4 Hare 67.

The principle is clear enough but its application to these facts is less clear because the testator did not make such a clear statement. What is more apparent is that the court was concerned in 1844 not to permit a trustee to take absolute title in the enormous sum of £66,000.⁵³ Therefore, the court's purpose was clear – it was concerned to permit the trustee from acquiring such a large sum of money absolutely. Had that case been decided about 150 years later, it is likely that some form of constructive trust would have been employed to prevent the trustee from unconscionably asserting absolute title to the property.

What is less clear in *Fletcher v. Fletcher* is the way in which the trust over the benefit of the covenant automatically assumes title over the after-acquired property when it eventually comes into the hands of the settlor or his estate. Accepting that this property flows subsequently, automatically into the trust fund is the device by which courts of Equity justify the allocation of title to such property.

What might appear heretical in the teeth of the evident assumption by property law that the identity of the fund must be clear and separate from all other property is the suggestion that perhaps the identity of the property in cases like these is less important than the value of such property. In short, in such cases all that is of importance is that the claimant receive assets of the value which she requires to satisfy that claim: where the claim is only for money it makes no practical difference whether the money comes from one source or another: it is only as a matter of legal formalism that it is important to be able to identify separate assets and so assert a claim against them and to compound interest too.⁵⁴ In the House of Lords in *Westdeutsche Landesbank v. Islington* Lord Goff tellingly remarked as follows:

‘... the basic question is whether the law can restore the parties to the position there were in before they entered into the transaction. I feel bound to say that, in the present case, there ought to be no difficulty about that at all. This is because the case is concerned solely with money. All that has to be done is to order that each party should pay back the money that it has received - or more sensibly strike a balance, and order that the party who has received most should repay the balance; and then to make an appropriate order for interest in respect of that balance. It should be as simple as that. And yet we find ourselves faced with a mass of difficult problems, and struggling to reconcile a number of difficult cases.’⁵⁵

Where the case involves an asset of particular value then the law of property is more inclined, through doctrines like tracing, to pursue rights in that particular asset. It is only in circumstances in which the asset is, for example, one's home that the litigant will be particularly concerned to protect her rights in that particular asset and not to be satisfied with an amount of money by way of remedy. Lord Goff's observation,⁵⁶ however, that cases concerning money ought to be capable of being disposed of simply is in line with a modern understanding of property as something inherently

⁵³ By comparison it may be useful to note that the fortune which D'Arcy stood to inherit in *Pride and Prejudice* was about £30,000.

⁵⁴ *Westdeutsche Landesbank v. Islington* [1996] A.C. 669.

⁵⁵ [1996] 2 All E.R. 961, 966.

⁵⁶ *Ibid.*

disposable; it is only property law which continues to insist on the intrinsic personality of property.

Property merely as value

Rights over intangible property constitute value, not assets

So, if it is the mantra of our time, fed to us from the television's cathode ray nipple every fifteen minutes, that property exists only to become obsolescent or to be sold onwards, then how should we think of it. It is suggested that many forms of asset which are accepted by English law as being property may be better considered to constitute an amount of value which is accepted as being secured by reference to some pre-existing, separately identifiable property. At the most basic level we might take the example of an obligation to make payment which is secured over a fund of money. If that fund of money is held in a bank account separately from all other moneys, then that fund will be capable of being the subject matter of a trust.⁵⁷

If we think carefully about the nature of this property all that is held on trust is a book debt which the bank acknowledges is held to the account of the accountholder. Examined more closely, that asset is in truth merely a debt claim against the bank which is held on trust – that is, a personal claim which stands as though a form of identifiable property. The logic of property law here is clear – that the debt is capable of transfer and therefore ought to be considered to be property in itself – but the reality of the situation is less clear. It is only an acceptance of the formalism bound up in property law which leads to its understanding of such a right as being property. It would make more sense to recognise that it is not separately identifiable property which is being held but rather that it is an amount of value which is accepted as being held to the account of the rightholder.⁵⁸

Trusts as contracts

From lightness to transparency; tax avoidance and the trust contract

The principle challenge to the traditional trust comes not from the law of restitution, which has no need of an explanation of express trusts and little of trusts implied by law, but rather from commercial and tax practice. In commercial practice there is a drive to reduce the perceived uncertainties and illogicalities in particular of the beneficiary principle in trusts law in favour of the more familiar territory of the law of contract. The chief advocate of this view has been Langbein. Langbein is determined that every trust is part of a contract and therefore that there is no need to consider the nature of the trust in isolation from the contractual matrix of which it forms a part.⁵⁹ Before continuing any further with this analysis it would be worth pointing out that this fundamental assertion is wrong. Many trusts are not bound up with a contract. In relation to commercial practice it will commonly be the case that there will be a commercial contract which uses a trust as a device to hold security for payment or a

⁵⁷ *MacJordan Construction Ltd v. Brookmount Erostin Ltd* [1992] B.C.L.C. 350.

⁵⁸ Hudson, "Money as Property in Financial Transactions", [1999] J.I.B.L., Issue 14:06, 170-177.

⁵⁹ Langbein, "The contractarian basis of the law of trusts", (1995) *Yale Law Journal*, Vol. 105, 625.

contract for services whereby some person will be limiting their liability and identifying their fee in return for acting as trustee. To that extent, yes, there will be a contract. To that extent, the Court of Appeal has held that this contract ought to limit even trustees' liability for breach of trust if the terms of the contract require that – even where the trustee has been guilty of gross negligence.⁶⁰ However, many express trusts arise without a contract in will trusts and in situations like *Paul v. Constance*⁶¹ or *Re Kayford*⁶² where the parties do something akin to a trust but which they may not necessarily have described as a trust – these may occur naturally in the wild in great profusion but they are unlikely to have enough at stake to reach the Chancery courts.

However, to return to the central argument of Langbein's essay: trusts should be considered as being contracts at root and therefore it should not matter that there is or is not a beneficiary who can satisfy the beneficiary principle. This is particularly important for a range of vehicles used to hold assets for tax avoidance purposes whereby those who contribute to a fund might wish to appear to have no beneficial interest in that fund for tax purposes but nevertheless be able to rely on the munificence of a discretionary trustee looking favourably upon them when the time comes to distribute the fruits of the fund. It is important that no individual be identifiable as a beneficiary for two reasons. First, so that no revenue authority can identify any profit-generating property in any of the participants. Second, so that no individual can claim entitlement to the fund in the absence of any other and so establish a beneficial claim to the fund ahead of the participants. This second feature means that there is no beneficiary capable of satisfying the beneficiary principle.

The claims of Langbein and others in this line that trusts should be considered to be contracts are therefore intended to serve that well-heeled community of cosmopolitans who wish to increase the lightness of their property ownership not only by converting entirely into cash flow without the wearying difficulties of ownership but also by denying the very fact of their ownership while still being reassured that they will receive an income stream as though the recognised owner of the property! Double the lightness, half the risk. Ownership without ownership, wealth without responsibility, property without weight!

Investment trusts as contracts

Aside from the fiscal benefits of the trust-as-contract considered immediately above, there are other analyses of various types of trust as being, in essence, merely contracts. The most obvious is that of Sin in relation to unit trusts: Sin suggests that a unit trust ought not to be considered to be a trust at all but that it ought properly to be considered to be a purely contractual relationship.⁶³ Sin's argument is based on the simple proposition that the purpose of entering into a unit trust arrangement is to generate a cash flow for the investor (or, "participant"). It is this contract effected between the participants and the scheme manager (who conducts all of the investment business on behalf of the participants) which Sin contends is the true substance of the arrangement as opposed to any property law arrangement.

⁶⁰ *Armitage v. Nurse* [1998] Ch 241.

⁶¹ [1977] 1 WLR 527.

⁶² [1975] 1 WLR 279.

⁶³ Sin, *The legal nature of the unit trust*, Oxford University Press, 1997.

It may be worthwhile probing this argument a little further by considering the nature of a unit trust arrangement.⁶⁴ A collection of (usually) unconnected investors contribute capital to the unit trust's fund and in return are allocated a given number of units in the total fund. That pool of investment capital is then invested by the scheme manager and the profits, if any, shared out in proportion to each participant's holding of units. Title in the unit trust rests with the trustee, an officer unconnected with the investment business of trust but required to be a person distinct from the scheme manager so that one fiduciary is able to supervise the activities of the other.

I cannot agree with Sin's argument. Further to s.237(1) of the Financial Services and Markets Act 2000 it is clear that the term "unit trust scheme" means a collective investment scheme under which the property is held on trust for the participants." That there is a trust is therefore beyond doubt. What is less clear, however, in fairness to Sin is, first, whether or not we would consider such an arrangement to be a trust in the absence of that statutory provision and, second, whether or not the scheme manager is to be considered to be a trustee.

Whether a unit trust is a trust

Sin centres on four areas in which classic trusts law thinking does not apply to the unit trust: the absence of a settlor, the bicameral nature of the trustee function, the unsuitability of the rule in *Saunders v. Vautier* in this context, and the non-applicability of many of the rules of formality. To focus on the question of whether or not there needs to be a settlor or any of the ordinary formalities, the Australian caselaw has expressed the manager, who does create and market the unit trust commercially, as being in fact a settlor.⁶⁵ In New Zealand there is authority for the proposition that when the manager brings the unit trust into existence that is an act which is sufficient to qualify the manager as a settlor.⁶⁶ The New Zealand authorities accept that there is a trust but that the value contributed to the unit trust results from the subscriptions of the participants and not from the original action of the manager in creating the trust. However, that is no different, it is suggested from the creation of a pension fund trust. There is English law authority for the proposition that the participant is not settling property when subscribing for units within s.164(1) of the Law of Property Act 1925.⁶⁷ Rather that contribution is in consideration for the receipt of contractual rights derived from the investment of the unit trust.

Understanding the forms of trust

It is important to understand the three forms of express trust which might be said to exist. The first form was the *conscious express trust* which arises in circumstances in which a settlor has an explicit intention to create a trust. The *unconscious express*

⁶⁴ Hudson, *The law of investment entities*, Sweet & Maxwell, 2000, 199.

⁶⁵ *Truesdale v. FCT* (1969) 120 C.L.R. 353, a case involving the tax effects of settlement; *Famel Pty. Ltd v. Burswood Management Ltd* (1989) 15 A.C.L.R. 572, per French J..

⁶⁶ *Baldwin v. CIR* [1965] N.Z.L.R. 1; *Tucker v. CIR* [1965] N.Z.L.R. 1027: both cases concerning the question of creating a trust in the context of taxation.

⁶⁷ *Re AEG Unit Trust (Managers) Ltd's Deed* [1957] 1 Ch. 415, 420, per Wynn-Parry J..

trust arises in circumstances in which the settlor does not understand that she is creating a trust but a court of Equity subsequently orders that the thing which the settlor intended to do ought to bear the legal label 'trust'.⁶⁸ The *complex commercial trust* arises in situations in which (usually) commercial people decide to build a trust structure into their relations generally to cater for the stewardship of some property perhaps while an underlying commercial transaction is completed. Escrow and other arrangements fall into this category. These trusts do not require the existence of a traditional, single settlor expressing a donative intention to take effect as trusts. Rather, the trust is part of a contract or similar arrangement whereby a number of parties create the trust – that trust becomes properly constituted once the property is vested with the person who is to act as trustee.

The question which arises is then the extent to which the trustee of a complex commercial trust ought to be subject to identical investment and other obligations of the trustee under a simple institutional trust – there is an argument to suggest that in the complex commercial trust the trustee ought to be governed in the first place by the terms of any contract giving effect to the trust in the first place and only in the absence of such agreement to any general rules of the law of trusts. However, that does not make the complex commercial trust any less a trust. Rather, the question which governs whether or not there will be found to be a trust is whether or not the conscience of the trustee is so affected as to impress that person with the office of trustee.⁶⁹

For Sin's assertion that the unit trust is not a trust because it lacks a settlor is simply to say that it is not a simple institutional trust. It does not follow that it does not fall to be construed to be some other form of trust. Were that argument correct, no complex commercial trust would be a trust at all. Similarly, no pension fund would be a trust.⁷⁰

Whether or not the scheme manager is a trustee

Sin's argument rests on the notion that the scheme manager is not to be considered to be a trustee and that it is only the contractual relationship which is of significance. The Financial Services and Markets Act 2000 provides that:

'The participants must be entitled to have their units redeemed in accordance with the scheme at a price related to the net value of the property to which the units relate and determined in accordance with the scheme.'⁷¹

Therefore, the central right of the participant is that of redemption. Without redemption of the unit, and payment out of the value of the unit, the unit trust would

⁶⁸ As in *Paul v. Constance* where the 'unsophisticated' settlor did not understand the legal effect of his actions although the court was prepared to consider them to be a trust.

⁶⁹ *Westdeutsche Landesbank v. Islington* [1996] AC 669.

⁷⁰ Pensions funds are treated as trusts albeit with particular rules as to equitable title in the surplus and a particular regulatory regime. That they are at root to be described as trusts is not at issue. Therefore, it is suggested that the unit trust is a trust albeit of a particular type and with its own rules of construction and so forth, in the same vein as a pension fund trust.

⁷¹ Financial Services and Markets Act 2000, s.243(10)

be commercially useless. The commercial purpose of the unit trust is the ability of the participant to redeem her units by ensuring that she is entitled to sell them for their market value at any given time.

The courts of Australia have accepted that there is an analogy to be made between the allotment of shares in an ordinary company and an allotment of units in a unit trust.⁷² Similarly, on a transfer of a unit, the transferor participant is entitled to have the transferee accepted as being a good transfer of the rights attaching to the unit to the transferee.⁷³ Under statute, good title attaches to the holder of the unit from the moment that person is entered on the register as owner of the unit.⁷⁴ The rights of the participants against the unit trustee are similarly a mixture of contract, based on the issuance of the units in parallel to an issue of shares,⁷⁵ and based on trust given the custodianship duties of the unit trustee.⁷⁶

The potential weakness of Sin's argument is that, in the case of a unit trust, the manager does assume the position of a person bearing all the hallmarks of a trustee by directing the "unit trustee"⁷⁷ how to deal with the property. The unit trustee is then required to obey those directions.⁷⁸ The acid test would therefore appear to be: what would happen if there were a breach of the investment obligations of the unit trust? Given that the unit trustee is required to obey, the manager must be inter-meddling either as an express trustee entitled to direct the investment of the trust fund, or as a delegate of the person who is the trustee⁷⁹, or as a trustee de son tort, or as a dishonest assistant in the treatment of the trust property.

It would be odd to consider that someone who was delegated, or appointed in the trust document, to have the specific task of making investment decisions would not be the person who would be subject to the general trusts law obligations of investment. Suppose there was a breach of the investment powers set out in the trust document, it would be odd for the person who was responsible for carrying out investment to argue "while I have breached the investment obligations binding on the trustees, I am merely responsible for investment on the basis of contract". If this were true, the manager would not be responsible under the law of trusts for breach of trust to reconstitute the trust fund or pay equitable compensation to the participants.⁸⁰ It would seem more sensible to suggest: "you bear the investment obligations of the trustee and therefore you should be liable *as a trustee* for any breach of those obligations".

⁷² *Graham Australia Pty. Ltd v. Corporate West Management Pty. Ltd* (1990) 1 A.C.S.R. 682, 687.

⁷³ *Elkington v. Moore Business Systems Australia Ltd* (1994) 15 A.C.S.R. 292, 296.

⁷⁴ Financial Services (Regulated Schemes) Regulations 1991, reg. 6.03.

⁷⁵ *Elkington v. Moore Business Systems Australia Ltd* (1994) 15 A.C.S.R. 292.

⁷⁶ *West Merchant Bank Ltd v. Rural Agricultural Management Ltd*, noted in Sin, *op cit*, 82. See also Sin, 'Enforcing the Unit Trust Deed among Unitholders' (1997) 15 A.C.S.R. 292.

⁷⁷ That is, the person named as "trustee" in unit trust jargon.

⁷⁸ See Sin, *op cit.*; Maurice, 'The office of custodian trustee' (1960) 24 Conv. 196; Stephenson, 'Co-trustees or several trustees?' (1942) 16 *Temple ULQ* 249, 250.

⁷⁹ Whoever that would be, because it appears that it is not the unit trustee.

⁸⁰ *Target Holdings v. Redferns* [1996] 1 A.C. 421, [1995] 3 W.L.R. 352, [1995] 3 All E.R. 785.

The weight of the domestic mortgage

By way of contrast with those types of property we have considered so far – the investment assets of the rich and famous, offshore trust funds, rights under unit trusts – there is no form of property which offers a greater contrast to these unbearably light forms of property than the home. To underline the extent to which the home exhibits weight where the others show only light, I will focus on the mortgage. The mortgage, self-evidently, constitutes most homeowners' largest form of expenditure, the most burdensome contract they will create, in short their greatest worry.

To begin at the beginning. The mortgage is a contract of loan. At root then the mortgage itself is born of contract although it grants right to possession for the mortgagee in a range of circumstances. However, unlike the categories considered above, this root in contract does not limit the mortgage to a non-proprietary relationship, primarily because of the mortgagee's rights of possession. It is these rights to possession which demonstrate the very different approach of English law to this ubiquitous, quotidian form of property right from even the most abstract of the quasi-property rights considered above.

Defeasibility of the mortgage contract dependent on context

So, is English property law prepared to accept that rules can be created in recognition of context in this way, or much we accept that property law will always identify one form of property as being much the same as any other. The equity of redemption cases are instructive in this context. In that context the courts have been prepared to accept that there ought to be a clear distinction drawn between situations in which a mortgage taken out by an ordinary member of the public should be treated differently from a mortgage contract effected between two commercial parties where there is no such inequality of bargaining power. So, in *Knightsbridge Estates Trust v. Byrne*⁸¹ the question arose whether or not a deed of mortgage, which provided that repayments were to be made on half-year days over a period of 40 years such that the agreement could not be terminated within 40 years, constituted a fetter on the equity of redemption. The Court of Appeal held that this provision was not a clog on the equity of redemption because the parties were commercial people who had been properly advised as to the effect of the contract. Significantly the Court of Appeal was of the view that the courts could not introduce notions of reasonableness to the agreements of commercial people and that intervention could only be permitted if the terms of the mortgage were 'oppressive' or 'unconscionable'.

By contrast in *Fairclough v. Swan Brewery*,⁸² a case concerning a mortgage taken out by an individual from a brewery as part of a larger agreement under which the mortgagor took over the running of licensed pub premises for the brewery, it was held that there was a clog on the equity of redemption where the mortgagor was precluded from terminating the agreement within a contractually specified time. Lord Macnaghten held that 'equity will not permit any contrivance ... to prevent or impede redemption'. Beyond this, the court was clear in its view that the inequality of

⁸¹ [1938] Ch 741.

⁸² [1912] AC 565.

bargaining power between the parties – that is, the context of the arrangement – rendered this situation different from other decided cases.

This division between parties of equal and unequal bargaining strength is pursued in relation to cases in which the mortgagee seeks some collateral advantage after redemption of the mortgage. In *Noakes & Co Ltd. v. Rice*⁸³ the contract contained a covenant that the mortgagor, who was a publican, would continue to buy all its beer from mortgagee even after the redemption of a mortgage. This was found to be a void collateral advantage on the basis that, once the mortgage amount is paid off, there is no obligation on the mortgagor to continue to provide security or to continue to make payments to the mortgagee. In that context the court was apparently influenced by the lack of equality of bargaining power between the parties.

By contradistinction in *Kreglinger v. New Patagonia Meat Co. Ltd*⁸⁴ a mortgage was created between wool-brokers who made a loan to a company which sold meat. It was a term of the agreement that the loan could not be redeemed within its first five years. The meat-sellers contracted that as part of this agreement they would sell sheepskins to no-one other than the lender wool-brokers even after the expiration of the contract. It was held that this agreement was collateral to the mortgage and was in fact a condition precedent to the wool-broker entering into the mortgage in the first place. In other words the wool-broker would not have lent the money to the meat-seller unless the meat-seller agreed to provide these sheepskins. Importantly, because the parties were both commercial parties it was held that the provision was not a clog on the equity of redemption.

The right of repossession

It is a remarkable feature of the law of mortgages that the mortgagee has a right to repossession of the mortgaged property even before the ink is dry on the contract, to borrow a colourful phrase from the cases.⁸⁵ A right to repossession entitles the mortgagee to vacant possession of the property either to generate income from that property (perhaps by leasing it out to third parties) or as a precursor to exerting its power of sale over the property.⁸⁶ The mortgagee has a legal estate in the property⁸⁷ from the date of the mortgage and can enter into possession as soon as the ink is dry, unless there is an express contractual term excluding such repossession to the contrary.⁸⁸ So, in *Western Bank v. Schindler*⁸⁹ the mortgagee was held entitled to repossession despite an express term in the mortgage contract that there would be no repayment required on an endowment mortgage within the first 10 years of the life of the mortgage. In *National Westminster Bank v. Skelton*⁹⁰ this sentiment was expressed so that the mortgagee always has an unqualified right to possession except where there is a contractual or statutory rule to the contrary.

⁸³ [1902] AC 24.

⁸⁴ [1914] AC 25.

⁸⁵ *Four Maids Ltd. v. Dudley Marshall Ltd.* [1957] Ch. 317; *Esso v. Alstonbridge Properties* [1975] 1 WLR 1474; *Western Bank v. Schindler* [1977] Ch. 1.

⁸⁶ Section 91 or s.101 of the Law of Property Act 1925.

⁸⁷ In line with Law of Property Act 1925, s.1(2)(c) if the mortgage complies with s.85 or s.86 LPA.

⁸⁸ *Four Maids Ltd. v. Dudley Marshall Ltd.* [1957] Ch. 317.

⁸⁹ [1977] Ch. 1.

⁹⁰ [1993] 1 All ER 242.

There are powers to stay such powers of possession under s. 36 Administration of Justice Act 1970 and s.8 Administration of Justice Act 1973. However, despite attempts in cases such as *Cheltenham and Gloucester Building Society v. Norgan*⁹¹ to effect such a stay over the remainder of the term of the mortgage, the preponderance of authority is for repossession to be awarded even under those statutory powers by reference to a period of time selected arbitrarily by the court. Similarly, the courts' decisions on the exercise of the power of sale under s.91 of the Law of Property Act 1925 have given priority to the wishes of the mortgagee in deciding whether or not to order sale. So, in *Cheltenham & Gloucester B.S. v. Krausz*.⁹² Millett LJ held that control of the sale remained with the mortgagee provided that it was taking "active steps" in relation to its powers.⁹³

Significantly the mortgagee's property rights are dependent solely on the commercial context: in this instance, whether or not the mortgagee considers that a sale of the property would raise sufficient capital to discharge the mortgage debt. The approach of the courts to sales under the old s.30 of the 1925 Act were similarly slewed in favour of creditors and mortgagees.⁹⁴ What is evident from the exercise of these powers is that there is no "one-size fits all" approach to property rights: while this is self-evident to an English lawyer, it remains an anathema to civilian lawyers used to the one-dimensional dominium surrounded by personal claims against the owner of the property which would not be considered to be proprietary rights in the same way. In relation to the mortgage contract, there is greater weight for the rightholder primarily due to the range of remedies which are available to the mortgagee under statute and which the courts have shown themselves prepared to expand in favour of the mortgagee's commercial expectations.

What is observable from the foregoing is the weight of burden which attends the mortgage contract. Whereas other forms of property arguably connected to contract – whether in the form of unit trusts or Langbein's tax avoidance trust – present a lightness to the rightholder, the mortgage contract presents the risk of losing the the litigant's home.

THE PROBLEMS OF QUASI-PROPERTY

The phenomenon of quasi-property

By "quasi-property" I mean those forms of property which are accepted by English law as being property but which do not in fact relate to any identifiable asset, for all that their legal treatment still conforms to the tangible property theory outlined above. The purpose of considering quasi-property as a distinct category in this fashion is to suggest that there are categories of property outwith the ordinary categories of property, that there are conceptual and logical problems with quasi-property which

⁹¹ [1996] 1 All ER 449.

⁹² [1997] 1 All ER 21.

⁹³ Noticeably, in that case, "active steps" appeared to include a period of four years in which no sale was effected.

⁹⁴ E.g. *Re Citro* [1991] Ch. 142.

challenge the essential claim to logic of much property law, and that there are forms of relationship outwith those ordinarily understood as being proprietary which warrant inclusion in that category given the extensions proffered by quasi-property.

So, what is this quasi-property? The clearest example is the chose in action. A chose in action is a claim which is in action; that is, a personal claim which is capable of being enforced by one person against another person not in relation to the delivery or treatment of any particular item of property. The argument in favour of this relationship in itself being accepted as being proprietary is that it is capable of transfer. That is, the benefit of the transactions – for example, the right to receive money or to acquire the performance of some obligation – can be transferred to another person so that that transferee acquires the right to receive that money or that performance. What is transferred is the *right* to receive. The ordinary parlance suggests that the entire arrangement is transferred. The entire debt, for example, is treated as being a chose in action and thereby property whereas, in that example, it is only the right to receive payment which is transferred subject to all the conditions as to payment which were incumbent on the transferor.

That the benefit of a non-transferable transaction is now accepted as being property at English law was demonstrated by the *Don King v. Warren*⁹⁵ decision, by *Swift v. Dairywise*⁹⁶ and *Re Celtic Extraction*⁹⁷ whereby contracts or entitlements which were clearly expressed as not being transferable were nevertheless capable of being held on trust or otherwise treated as being property provided that it was understood that it was the right to receive a benefit from the transaction which constituted the property in this instance.

These cases demonstrate the peculiarity at the heart of the argument that a chose in action is property. Nothing is transferred in *Don King*. Rather, an obligation is created whereby the promisor will transfer to the other party any benefit received under that contract. This is a promise to pay an amount of money calculated by reference to a floating indicator; to wit the size of the benefit received under the contract.

Choses in action as quasi-property & resultant unpleasantness

A chose in action, similarly, is a right to receive judgment for a personal claim. By treating the chose in action as an item of property in itself all that is being said is that the right to receive that benefit is capable of being transferred to another person. However, all that that transferee actually receives is the same personal right to enforce that judgment, which is in itself a purely personal right which is dependent on the solvency of the defendant, her presence in the jurisdiction and so forth: precisely all of the features which make personal claims less attractive than proprietary claims. Therefore, a chose in action is quasi-property because it is treated as being property in itself even though the right itself is a right merely to sue on a personal claim.

That much is a self-evident feature of the nature of a chose in action. There are, it is suggested, contexts in which this analysis demonstrates the less acceptable features of

⁹⁵ [2000] Ch. 291.

⁹⁶ *Swift v. Dairywise Farms* [2000] 1 All E.R. 320.

⁹⁷ *Re Celtic Extraction Ltd (in liquidation)* [1999] 4 All E.R. 684.

quasi-property. The case of *Fletcher v. Fletcher*⁹⁸ is instructive in this regard. In that case it was held that where a testator had been incapable of declaring a valid trust over after-acquired property, a trust had nevertheless been created where the court was prepared to accept that it was the testator's intention to create a trust over the covenant which the testator had created with his intended trustee to hold such after-acquired property on trust for the testator's sons. The sleight of hand necessarily to give flesh to this bony argument was twofold. First, that the trust came into existence once the covenant was created and the testator had evinced an intention to have that covenant held on trust (even though such intention is difficult to identify on the facts). Second, that as soon as the after-acquired property was received by the testator and/or the trustee it was automatically to constitute the trust fund of that trust which hitherto had held only the benefit of the covenant.

The logic, not expressed in the case but evident nonetheless, is an extension of the familiar *Walsh v. Lonsdale*⁹⁹ principle deployed by Lord Templeman in *Attorney-General for Hong Kong v. Reid*¹⁰⁰ to the effect that once property is received by the testator, say, under the terms of the covenant with the trustee the testator is obliged in equity to give specific performance of that covenant and so equitable title is said to move automatically to the trust. So the testator is deemed to have transferred beneficial title in that after-acquired property whether or not a formally valid transfer of the absolute title has been effected. This is, in truth, one of two phenomena. Either, first, the court is acting on the conscience of the testator to require him to recognise a constructive trust¹⁰¹ or, second, the testator is simply subject to a claim for specific performance against him personally to carry out the obligations in the covenant. In either case, the order is a personal claim with proprietary consequences and not a proprietary right in itself.

The logical problem is not this question of personal claims carrying proprietary consequences – that is considered below. The issue is that such a personal claim, in the form of the covenant, is able to found a secured, proprietary right in the after-acquired property which would have to be effective in the event of an insolvency even though its basis is in a merely personal claim to transfer property. That is to say, a personal claim can be elevated to the status of a property claim while that property claim concerns an asset which itself carries entitlement only to receive judgment in a personal claim. That much is to defeat the spirit of the insolvency laws which seek to rank *pari passu* all those personal claims which exist against an insolvent person, and exempting from such treatment only those claims under which the claimant can demonstrate a pre-existing right to a separately identifiable item of property which the claimants are entitled to abstract from the insolvency proceedings because it is already “theirs”. The right to the after-acquired property, however, exists as a result of *Fletcher v. Fletcher*¹⁰² against whatever property comes into the fund even that property need not be separately identifiable before being paid into that fund.

The problem here is not that the law is in some way “wrong” but rather that it is either operating without the logical coherence which it would ordinarily claim for itself or

⁹⁸ (1844) 4 Hare 67.

⁹⁹ (1882) 21 Ch D 9.

¹⁰⁰ [1994] 1 A.C. 324.

¹⁰¹ If we believe *Attorney-General for Hong Kong v. Reid* [1994] 1 A.C. 324.

¹⁰² (1844) 4 Hare 67.

that the various legal categories (trusts law, insolvency law, commercial law) offer no coherence between themselves. Therefore, property law does not have the coherent logic which otherwise it might wish to have.

Conditions precedent to the vesting of rights

And from that seed comes another problem at the heart of trusts law. Beyond the well-understood intricacies of after-acquired property and incompletely constituted trusts, there are the anterior questions about certainty of objects and certainty of subject matter: the requirement that the beneficiaries under a trust be clearly known and similarly the identity of the trust fund. The beneficiary principle requires that there be someone for whose benefit the court can decree performance.¹⁰³ In effect, the logic of trusts law is that the only means of keeping trustees in line is if there is a beneficiary who can sue them so that the court can be appraised of any breaches of trust and so forth.¹⁰⁴ In parallel with this principle are the rules as to certainty of objects. Notably the case of *McPhail v. Douulton*¹⁰⁵ dealing with a discretionary trust upholds the principle that a trust is sufficiently certain if it is possible to say of any given propositus that that person is or is not within the intended class of beneficiaries. And yet, where there is a class of persons all of whom in theory fall within the beneficial class, it is not at all clear that those people will satisfy the beneficiary principle themselves because none of them would appear to have any vested right until the trustee makes an appointment or exercises her discretion in favour of some person.

The problem is that of conditions precedent, in short. If I declare that a person shall have a vested beneficial interest in a trust fund provided that she goes to the foot of my stair, does that mean that before going to the foot of my stair there is no person in whose favour the court can decree performance or does the decision in *Saunders v. Vautier*¹⁰⁶ entitle that person to override my express wish as settlor and seize that property? If the example is more difficult and I provide that the first of a number of class of people to go to the foot of my stair becomes entitled to the fund, is there any beneficiary with a vested interest before anyone reaches that place? It seems that the rule in *Saunders v. Vautier* provides a convenient answer to that question by suggesting that, for example, a trust to preserve trees is determinable so that beneficiaries under another part of that trust are entitled to take absolute title in the trust fund.¹⁰⁷ What this approach does not answer is the question: why should those people be so entitled if they have not satisfied the condition precedent of such entitlement, to whit being a tree or having reached foot of my stair. What if the beneficial class is drafted in such a way that it is not possible to know before the foot of my stair is reached which individuals would constitute the whole of that beneficial class: suppose that the trust provides that all those people who attended some event in the future would constitute that total class – that is, they will be sufficiently identifiable but they cannot be known yet?

¹⁰³ *Knight v. Knight* (1840) 3 Beav 148.

¹⁰⁴ *Morice v. Bishop of Durham* (1805) 10 Ves 522.

¹⁰⁵ [1970] 2 WLR 1110.

¹⁰⁶ (1841) 4 Beav 115.

¹⁰⁷ *Re Bowes* [1896] 1 Ch 507.

I would suggest that trusts law does not have coherent answers to the condition precedent question. The reason for that is primarily because there is no perfect answer. There are a number of questions which have no perfect answer. For example, the question whether or not to regulate financial institutions has two probably answers: no, because that will encourage people to invest here; or yes, because that will prevent abuse of markets. There is no perfect answer in the sense that it is impossible to know objectively which is the correct answer. Similarly, either the beneficiary has a right in property before the condition is satisfied, so defeating the settlor's purpose of denying such a right until the satisfaction of the condition; or the beneficiary has no right before satisfaction of the condition but then *Saunders v. Vautier* is ignored and so is the rule that there is someone in whose favour the court can decree performance.¹⁰⁸ Examples of perfect answers might be Descartes answer to the question "how do I know that exist?" by means of saying "I know I exist because I am thinking".¹⁰⁹ And that is the epistemological point here: property law cannot provide perfect answers simply by extension of its own logic and therefore it should be more prepared to draw dividing lines on the basis of explicit value judgments where the logic ceases to work.

Another problem¹¹⁰ from trusts law, it is suggested, is the following. From *Re Goldcorp*¹¹¹ we know that there must be sufficient certainty of subject matter before a trust can be valid. The division between that requirement of certainty and of property rights attaching to a specified item of property and the possibility that property rights might be granted to one person on the basis of another person's unconscionable treatment of them gnaws away at the very heart of property law. Those, like Birks, who demand certainty conflict with those, like Lord Templeman, who insist on good behaviour by reference to some opaque moral standard recognisable by judges only when they are called upon to activate it.¹¹² Those moral questions are rejoined elsewhere below.

Certainty of subject matter – a question of context

So, what of this certainty of subject matter? If I were to declare that the £20 I hold in my hands, in the form of two £10 notes, were to be settled on two completely different trusts so that each trust should comprise a fund of £10, then there would be a problem of lack of certainty because neither trust would know which £10 note was to be held on trust for it. The rationale for the rule, so far as one can tell, is that a general principle which provided that it should not matter which £10 is held for which trust would mean that in the event of an insolvency where there were obligations to hold £30 or more on trust (such that my mere £20 could not possibly satisfy those claims) then it would be to the disadvantage of other creditors to give effect to either trust.

¹⁰⁸ Although, it must be said, one could always fudge that one by suggesting that the beneficiary's future rights would be adversely affected by some wrongful act of the trustee, for example, in not preventing a breach of trust and so such an answer is justified. "Justified" but not "perfect".

¹⁰⁹ The only other perfect answer is to the question "what in this world is perfect?"; to which the answers are biscuits, the novels of P.G. Wodehouse and the Stone Roses' first album.

¹¹⁰ Or, perhaps, parlour game.

¹¹¹ [1995] A.C. 75.

¹¹² *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324, [1993] 3 WLR 1143; *Space Investments Ltd v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd* [1986] 1 W.L.R. 1072, [1986] 3 All E.R. 75.

Suppose now a different situation. A settlor has created one, single trust over two £10 notes and transferred legal title in those banknotes to a single trustee. The terms of the trust are that the money is to be held for two beneficiaries in equal shares and paid to them on reaching the age of 18. On the beneficiaries' birthday, let us suppose them to be twins, the trustee gives one £10 note to one and the other £10 note to the other. The law of trusts does not bat an eyelid. The answer on the basis of principle is that the trust itself has been validly created so that the entire fund is sufficiently identifiable to justify segregating it from third parties but that there is no perceived conceptual problem with permitting the trustee to decide who gets which £10 note.

In practice there is unlikely to be any dispute over the first example of two trusts being settled without severance of the £20. But it is no answer to the theoretical question to say that there is unlikely to be a practical problem. The problem is a failure in property law simply to express its concern that in cases of insolvency such *laissez faire* attitudes are unacceptable, whereas in cases where all of the parties are solvent and there is sufficient value to satisfy all claims that ought not to negative any claims to property rights. This is, in truth, the only sensible distinction between the *Re Goldcorp*¹¹³ line of cases and the *Hunter v. Moss* line of cases. Within property law's internal logic there is no good reason for holding that intangible property can have a different rule from tangible property on the basis that individuals items of property are indistinguishable one from another because that does not explain why identical, mass-manufactured chattels are treated the same as other tangible property which is not inter-changeable. The only explanation for the decision in *Hunter v. Moss*¹¹⁴ is that it was considered in each case to be unfair to allow the defendant to renege on his contractual obligations in circumstances where there was sufficient property to satisfy all claims.

Paradigms in property law – morality or a priori concepts

Grantham has explored the Hohfeldian context of these principles. In *Attorney-General for Hong Kong v. Reid*¹¹⁵ the decision of the Privy Council was based entirely on a moral condemnation of receiving bribes and a determination to punish the defendant. That element of punishment emerged not only from the tortured logic of the *Walsh v. Lonsdale*¹¹⁶ point considered above that equity ought to look upon as done that which ought to have been done, but also from the fact that the constructive trust which was necessarily found to bite on the bribes from the moment of their receipt extended into a liability to make good any loss realised on an investment of the bribes and not simply a liability to return any traceable proceeds of the original bribes, whatever their then worth. Here, proprietary rights are vested in the claimants whomsoever they may have been (the good people of Hong Kong? The "state" of Hong Kong?) on the basis of the defendant's wrongful act and not because of the satisfaction of any pre-existing right; a particularly queer proposition where there is no evident "desert" on the part of the claimants other than some ethereal harm that has been caused to their common spirit. No, punishment is the only explanation.

¹¹³ [1995] A.C. 75.

¹¹⁴ [1994] 1 WLR 452.

¹¹⁵ [1994] 1 AC 324.

¹¹⁶ (1882) 21 Ch D 9.

That is to be compared with the dry logic of *Re Goldcorp*¹¹⁷ and the purported icy logic of *Westdeutsche Landesbank v. Islington*.¹¹⁸ In the former case, no-one who could not demonstrate as a matter of fact (and of luck) that no property was held separately to their account received any secured remedy in the insolvency of the bullion exchange in that case, even though the customers appeared to have one of a number of standard form contracts with the exchange specifying that bullion must be held to their account. Consequently, luck was the device which decided in practice who was the recipient of a proprietary award and who not. In the latter case, the attempt by Lord Browne-Wilkinson to displace the logic of resulting trusts achieving restitution with a trust based on essential notions of conscience left as many questions as it asked. At the initial level, the purported establishment of “conscience” as an *a priori* concept which governs in advance when trusts will arise “by operation of law” served only to highlight that knowing when someone has or has not acted unconscionably may be a very difficult in many cases. As a result the notion of conscience may have to be left to the discretion of the judge to apply and thereby it would be necessary to accept that the idea of conscience is an epistemologically imprecise one – not arising a priori but arising only by virtue of judicial perception. Otherwise, conscience will only be applied by reference to a set of principles to be developed in the future or to be divined from past judgements – in which case it is not an a priori concept but rather one that is generated by judicial legislation or by reference to an actively created set of rules.

Other forms of control as quasi-property

Property rights as ‘rights’

The term ‘right’ is frequently used carelessly in relation to political property theory, as distinguished from legal theory.¹¹⁹ At a political level, one might *claim* or *assert* than one ought to have a right to ramble across agricultural land or to have a right demonstrate in a public place. In these contexts the expression ‘right’ is a synonym for a political aspiration or as a rhetorical assertion of a civil liberty. It is not a right in the sense of being a legal right enforceable in a court; it is an expression of the desire to be heard as a citizen. In Raz’s conception of a legal understanding of a right, a right should be recognised as something which enables the rightholder to impose a duty on another in order to protect her interest.¹²⁰ The most obvious difference between the two being that the legal right constitutes an *entitlement* recognised by law, whereas the former category merely constitutes an *assertion* that the claimant wishes a right to be recognised.¹²¹

¹¹⁷ [1995] 1 A.C. 74.

¹¹⁸ [1996] A.C. 669.

¹¹⁹ Penner, *The Idea of Property in Law*, Oxford University Press, 1997, 13.

¹²⁰ Raz, *The Morality of Freedom*, Oxford University Press, 1984, 199.

¹²¹ Even in the company it is suggested that the understanding of the share as simply a “bundle of rights” constituting property is insufficient to explain the complex web of relationships which exist in a company and which constitute both effective *entitlements* and also *assertions* of rights against the assets of the company.

However, that is not simply to draw a distinction between those claims which are recognised by law and those which are not. There may be claims recognised by law whose provenance as ‘rights’ we may question. At one level it might be that the law’s willingness to enforce a particular claim is problematic either because the detail of the law is unclear or because a rule is considered to be anachronistic and unlikely to be enforced in future.¹²² At another level the objection might be political. In relation to the allocation of claims to property in English law we might question the very existence of rights in private property as opposed to more redistributive mechanism for recognising claims to property.¹²³

There is then the problem of where these ‘rights’ are said to originate. In truth, legal rights are claims which are recognised by the courts¹²⁴ as being rights. The word ‘recognised’ in this context is revealing. Some ancient theorists of the common law suggest that judges do not make law rather they are merely instruments for the recognition of laws which are in some way innate, whether derived from god or some grundnorm of principle.¹²⁵ In this sense “recognition” is meant in the sense of uncovering or re-discovering, not creating anew. Recognition is carried out by judges who are themselves recognised as having the authority so to do because of the qualifications which they have received. This ability which the legal system and its actors have to confer qualifications on lawyers and judges, the legitimacy to pronounce judgment and to allocate rights, are all facets of power in those particular social institutions.¹²⁶ For many post-Marxist social commentators many of the problems of the modern world are bound up with the reduced authority which these actors are able to command.¹²⁷ It is a question of legitimacy in the legal system to pronounce that *assertions* have reached a level of recognition as *entitlements*.

Pseudo-property rights – ‘transferable personal claims’

I considered earlier that property law does recognise as property some phenomena which in truth constitute only personal claims. Their status as property is said to rest primarily on their transferability or “separability”;¹²⁸ although that does not account

¹²² Fuller, *The Morality of Law*.

¹²³ Witness, for example, claims over land rights in Australia on behalf of its indigenous peoples and claims to and government expropriation of agricultural land in post-colonial Zimbabwe.

¹²⁴ Alternatively law which has effect as a result of lawyers giving advice to their clients and thus controlling the activities of those clients for many practical purposes. See the comments on Lord Browne-Wilkinson in *Kleinwort Benson v. Lincoln City Council* [1998] 3 W.L.R. 1095 in relation to the frequent role of the advising lawyer as both accepting decided law as being “the law” and also in creating a market’s acceptance of what the law would be in a particular context, as considered in Hudson, *Swaps restitution and trusts*, Sweet & Maxwell, 1999, xii.

¹²⁵ Cotterrell, *The politics of jurisprudence*, Butterworths.

¹²⁶ Foucault points out the phenomenon of power at this micro-level in all of those bodies who have the reflexive power to confer legitimacy on their own membership by awarding them the qualifications which are then recognised in the broader society as entitling them to make definitive pronouncements on the matters in question: Foucault, *The Archaeology of Knowledge*, Routledge.

¹²⁷ See for example Habermas, *Legitimation Crisis*, Polity, 1988.

¹²⁸ The latter is the argument considered by Penner, *The Idea of Property in Law*, Oxford University Press, 1997, 105.

for situations in which non-transferable contracts have been held to be capable of being settled on trust.¹²⁹

Within the law of property there is an awkward distinction drawn between those claims which are considered to be property and those claims which are not. The following section advances the argument that there is a further category of relationship which ought to be considered to be proprietary given English law's attachment to conceiving of transferable personal claims as being property: that is, the status of democratic control over property as being a form of property right.

Control as a property right – property which cannot be owned

There are many forms of resource which can readily be identified as being property without too much debate but which nevertheless do not conform to the proprietary rights thesis that all property is owned at law by some person. Take for example Victoria Park in London's East End. Victoria Park sits on the edge of Hackney and Tower Hamlets and is now connected to the Thames by the Mile End Park land bridge. It is undoubtedly land. It is undoubtedly capable of constituting property in legal terms. And yet, as I cycle through it every morning, seeking a short-lived haven of safety from the chaotic traffic of Hackney, I have great difficulty in identifying its owner. I do know in legal terms that the park was constituted by the Corporation of London and the Council for the recreation of the disadvantaged slum dwellers of the East End and named after Queen Victoria. I know that Tower Hamlets London Borough Council has responsibility devolved to it by statute to maintain the park. In law, those persons are empowered to exercise the rights of the owners. I am also aware that, in some shadowy sense, the Crown has ultimate title in it and every other piece of land over which we are estate-holders or tenants of the Crown.

And yet that does not explain to me in any meaningful way the ownership of the park. Each summer the park fills with migrating geese and other birds who clearly consider its ornamental ponds to be home. In winter, large number of squirrels forage in the bins forsaking hibernation now that the temperature does not fall low enough to drive them into warm nests for part of the winter. The most common occupants of the park are young men with pit-bulls, mothers taking a turn with babies in prams, and young boys playing football on Saturday mornings in front of enthusiastic parents living out their own sporting ambitions vicariously.

If you tried to deny any of them access to the park they would tell you that they had a right to be there. They use this land unhindered: they think it is *their* right to move freely through here. So who 'owns' this park? In (non-legal) truth no-one owns it. This is a more difficult question for property theory than the easy cases of redistribution of land. The lawyer will point to the legal entitlement in the local council to maintain the park as they see fit and to close it at night when they think it

¹²⁹ The most common example of this phenomenon was said to be the chose in action. What is peculiar about this form of property is that ownership of the right does not in itself give rise to any right in any identifiable property. Rather it is a claim which entitles the holder of the right to receive *some* property, in the form of money, which is recognised not by its identity but rather by its value. To put it crudely, it does not matter which pound coins are handed over provided that they have the same value as the value of the claim. The transferable personal claim is therefore property with no identifiable proprietary base.

convenient, or to the occasional leasing of the park to hold concerts and open air film showings in summer. The political theorist might talk about the freedom of people to use the park as part of their democratic entitlement to use municipal property. But none of them will focus on the real notion of Victoria Park as property: namely, its boring day-to-day use when no-one has closed it off or declared an emergency or taken it into common ownership. It is a park – merely an expanse of grass and trees bounded in by a strip of tarmac – hemmed in by the human community which would not want to live without it. Its owners are those who use it.

Ultimately it is ‘owned’ by its spontaneous democratic and anarchic use. This form of property right through control rather than through legal entitlement is a vital extra-dimension for this discussion of property. To overlook this is to ignore the way in which resources are used in society and the way in which law interacts with that. Cotterrell is right: we cannot divorce law from this sociological setting.¹³⁰ Maybe the only way to understand property such as this is simply by its control and use. Title in a park is unlikely to be of much moment – what might be of more importance is the manner in which members of a commune or co-operative use property which they have each surrendered voluntarily to the common purpose.

Democracy as a property right?

That democracy might be considered as a means of exercising property rights is not, in fact, as surprising a notion as it may appear at first blush. There are well-trodden examples of democratic control being the most efficient explanation of proprietary rights of the rights of shareholders in ordinary companies, the rights of partners *inter se*, and of beneficiaries in some types of trust. As is considered below, co-operatives in the form of industrial and provident societies have democratic features in relation to their use of property. As will emerge, in the same way that it is not possible or even meaningful to try to identify the owner of Victoria Park, it is not always meaningful to identify the owner of property which is held in common as part of a co-operative. The rights of the members of the co-operative under common law and under statute are not in the capital of the co-operative (even though those members will have provided that capital initially) but rather property rights in that property are exercised through the collective will of those members as expressed through the contract in which they set out the constitution of their co-operative. Control over this property is based on democracy and not on specific rights attaching to any particular thing. It is to these co-operatives that we turn to now.

OTHER VISIONS OF PROPERTY: COMMUNITY AND DEMOCRACY

Property and organic solidarity

As considered above, Durkheim’s view of property relations was that they were socially divisive because they identified which property could and which property

¹³⁰ Cotterrell, *The Sociology of Law*, Butterworths, 1992.

could not be used by given classes of people.¹³¹ In relation to private property they meant that the use of property was reserved entirely to the owner. In relation to civil code notions of dominium, it is easy to see why property law would occupy such a binary position. However, English property law does recognise a broader spectrum of legal relationships as being property rights. That is, it recognises the holder of an easement, the holder of an equitable interest and the holder of a lease as all having proprietary rights and not purely personal rights against the holder of the legal title.

What this section seeks to explore is the creative aspect of property law and its possible uses as means of promoting social solidarity. This requires a conception of law as being something which is owned by the people and not simply as something which is done to them. If law is thought of as belonging to the people then it is possible to think of property law as generating a series of models of behaviour which enable people to share property. For example, the ability to use trusts to create charitable purposes offers a model for groups seeking to provide purposes beneficial to the community to receive not only the fiscal benefits of charitable status but also a model for the means by which such social activity can be made possible.

Historically, the working class has needed to combine to provide for their common security in parallel with the ways in which the propertied classes were concerned to combine to increase their wealth. For the working classes the units which they used were what would now be termed unincorporated associations, in the form of friendly societies or industrial and provident societies. At the time they were first created there was no term of art to describe them. From the late eighteenth century, co-operative movements were formed in England.¹³² They were considered seditious and so were illegal until the late nineteenth century with their decriminalisation in 1874. It was thought to be dangerous for the working classes to combine because it might enable them to form rebellious groups and so the Combination Acts were passed to criminalise such associations. Over time, in the white heat of the industrial revolution and at the height of Victorian enthusiasm for imperial capitalism, the justifications for the criminalisation of such associations, and subsequently for making them liable in tort for any loss they caused to employers, were economic rather than to do with public order.

What such associations sought to achieve was a measure of security for their membership against loss of income through illness, infirmity or otherwise. The Victorians saw the benefits in enabling the working classes to maintain the available pool of labour and in reducing the pressure on the workhouses by allowing such associations to spring up organically, or to be formed by the Gradgrinds¹³³ of local communities to ensure the proper behaviour of the proletariat.

¹³¹ Cotterrell, *Emile Durkheim: law in a moral domain*, Edinburgh UP, 1999, 94.

¹³² Identifying the first such organisation is all but impossible. E.P Thompson rejects the common assertion that the first working class political association was the London Corresponding Society in 1792; see Thompson, *The making of the English working class*, Penguin, 1968, 22. The beginnings of widespread working class combination are placed at the time of the "American war" in the late eighteenth century: *ibid.*, 22. There is evidence that rudimentary groups of labourers or tradesmen had been formed in secret (due to the laws on sedition) as early as the 1670's: *ibid.*, 28.

¹³³ Cf. Dickens, *Hard Times*.

Co-operatives and credit unions: the common bond and genuine community

An industrial and provident society takes deposits from its members to aim to fulfil the purposes identified in the society's objectives. A registered industrial and provident society specifically is organised as a corporation,¹³⁴ having operated as either a partnership or an unincorporated association before 1862. Industrial and provident societies are necessarily corporations with a minimum of seven members.¹³⁵ This requirement mirrors the number of members originally required to make up a joint-stock company¹³⁶ and indicates the antiquity of the industrial and provident society legislation. Today, the primary code for the treatment of industrial and provident societies is contained in the consolidating Industrial and Provident Societies Act 1965 ("IPSA 1965") and subsequent legislation.¹³⁷

The principle requirement for registration is that 'the society is a bona fide co-operative society ...'¹³⁸. The most significant facet of industrial and provident societies is that they are obliged to be organised on co-operative principles or to carry on business 'for the benefit of the community'.¹³⁹ In deciding whether or not a society is indeed a 'bona fide co-operative society' the legislation provides that:-

'... the expression "co-operative society" does not include a society which carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the society or any other person.'¹⁴⁰

Beyond straightforward industrial and provident societies come the credit unions. Credit unions in truth form a kind of co-operative which in practice falls within the class of industrial and provident societies. An entity can only be recognised at law as being a 'credit union' if that entity is an industrial and provident society¹⁴¹ and registered under the Credit Unions Act 1979 as such.¹⁴² The credit union is identified as such by the presence of five key factors: an objective of the promotion of thrift amongst its members, numbers of members, a common bond with a local community or other restrictive category of persons, prescribed rules, and compulsory insurance.¹⁴³

Credit unions are local initiatives. That is, they are 'local' in that they are required by legislation to have a link with the community which they serve. They are 'initiatives'

¹³⁴ S.3 IPSA 1965.

¹³⁵ S.2(1)(a) IPSA 1965.

¹³⁶ S.3 Joint Stock Companies Act 1856.

¹³⁷ Minor legislative amendments were effected by the Friendly Societies Act 1992. More substantial changes were introduced by the Deregulation (Industrial and Provident Societies) Order 1996 (S.I. 1996 No. 1738). For administrative fees see the Industrial and Provident Societies (Amendment of Fees) Regulations 1998 (S.I. 1998 No. 676). For new forms and procedures see the Industrial and Provident Societies (Forms and Procedure) Regulations 1996 (S.I. 1996 No. 3121).

¹³⁸ *Ibid.*

¹³⁹ s.1(2)(b) IPSA 1965; see generally the excellent Snaith, *The Law on Co-operatives*, Waterlow, 1984.

¹⁴⁰ s.1(3) IPSA 1965.

¹⁴¹ S.3 CUA 1979.

¹⁴² *Ibid.*

¹⁴³ Registration as a credit union removes such an entity from the need to comply with the regulation of ordinary banking business.

in that, in practice, credit unions will be formed by sufficiently motivated local people to pool resources from that community in the form of deposits (or, subscriptions) so that the credit union can make loans to members of the union. The subscriptions made by members will typically be small. The aim is that those without access to more mainstream financial services (such as bank loans and overdraft facilities) will be able to generate capital from within their local community.¹⁴⁴ The depositor may receive a low rate of interest in return for the subscription. However, the principal aim is to provide a pool of capital for local people.

They create pools of social capital available for the use of their members because of their membership and not because of their status as either consumers nor as owners of rights in property. Significantly, members of a credit union do not take rights in property. Rather, their rights are restricted to being rights of use – that is, to borrow – in accordance with the constitution of the union. Similarly, their rights are the rights not of owners of shares in accordance with the size of their shareholding, but rather as members entitled to one vote in accordance with their membership as an individual.

There is a requirement that there be a *common bond* between those people who are the members of the credit union and, in turn, between the credit union and the communal impact of its activities. Therefore, the Credit Union Act 1979 provides for what are described as *appropriate* ‘qualifications to admission to membership’:

- ‘(a) Following a particular occupation;
 - (b) residing in a particular locality;¹⁴⁵
 - (c) being employed in a particular locality;
 - (d) being employed by a particular employer;
 - (e) being a member of a bona fide organisation or being otherwise associated with other members of the society for a purpose other than that of forming a society to be registered as a credit union;
- and such other qualifications as are for the time being approved by the appropriate registrar.’¹⁴⁶

Therefore, credit unions have a broader definition of the communities than simply the geographic areas which they serve. That the membership resides in a particular locality is, however, one of the possibilities.¹⁴⁷ Therefore, it is likely that credit unions will continue to be most important in relation to initiatives in small, geographic communities.

In Bauman’s conception, the sort of community which is important in the late modern world is that form of community which arises organically through local action and not that which is imposed externally by government diktat.¹⁴⁸ The attraction of credit

¹⁴⁴ On the effects of denial of access to financial services for the socially excluded see the H.M. Treasury, *Access to Financial Services*, November 1999, as part of the National Strategy for Neighbourhood Renewal initiative.

¹⁴⁵ The term ‘residence’ is generally taken to be the place where someone habitually lives: *R v. St Leonard’s, Shoreditch, Inhabitants* (1865) LR 1 QB 463; *R v. Glossop Union* (1866) LR 1 QB 227; *Levenue v. IRC* [1928] AC 217.

¹⁴⁶ S. 1(4) CUA 1979.

¹⁴⁷ The employment-based credit unions are likely to become less important as occupational pension schemes become more prevalent and with the introduction of a minimum wage.

¹⁴⁸ Bauman, *Community*, Polity, 2000.

unions is precisely that they offer such organic, local action. The question is how credit unions correlate with our ordinary understandings of the legal models available to us with which we can understand the nature of the legal relationships between people who form a relationship within which they pool money for their common use.

What is significant about these structures is that suggest the use of property norms in a way that is socially useful. They are more akin to that form of communal use of property without a care as to title in it and so forth which traditional property law debates have associated with innocent tribes whose members take only according to their need without ever needing to ask “who owns this?”.

What is required for the effective existence of a credit union is a collective of individuals whose distinct personality nevertheless permits them to come together as a coherent unit to pursue their common, benevolent goals. With what has been said above about the atomising effects of postmodern society, it is important to consider the nature of such collective entities as spontaneous accumulations of individual social memberships.

From co-operatives to a compulsory “embourgeoisement”

Developments in public policy

A Treasury consultation paper entitled *Proposed Amendments to the Credit Unions Act 1979*¹⁴⁹ aims to make a number of changes to the CUA 1979 to enable credit unions to carry on their business more easily. The first proposal is to enable credit unions to borrow more money than is currently permitted by s.8 CUA 1979 particularly at the time of their commencement. At this time credit unions are usually reliant on grants from other bodies to give them initial capital. However, as an organic community initiative it is to be doubted the extent to which it is advisable to free up the ability of credit unions to take on the risk of debt at too early a stage in their development.

One particularly unfortunate suggestion is that the credit union be allowed to offer interest-bearing accounts to members. It does appear that this would be equate credit unions with entities undertaking straightforward banking business. One of the more attractive features of the co-operative is precisely that the membership invests for the common purpose and not for interest return. While there would be restrictions on the unions permitted to offer such accounts, it nevertheless whittles away at the main principle of low co-operative dividends rather than interest-bearing accounts. This tendency is hardened by suggestions that credit unions offer other financial services such as payment of bills and so forth on behalf of its members. It is submitted that in this way the common bond between the members will become looser. This suggestion is hardly surprising coming from a government which is quite so averse to collectivist and co-operative principles. The attraction of the co-operative structure is its collectivist heritage and not its ability to compete in the already saturated market for financial services.

¹⁴⁹ Which can be found at www.hm-treasury.gov.uk/pub/html/reg/cucon.html

The requirement of co-operative principles for the formation of a valid industrial and provident society is significant because it constitutes an entirely different notion of investment from the financial investment model considered in relation to shareholding in ordinary companies. An industrial and provident society is organised on the democratic principles of 'one person one vote'. This contrasts with the 'capitalist model' of the ordinary company in which each shareholder has a number of votes dependent on the number of shares owned or the nature of the shareholding¹⁵⁰. The industrial and provident society is organised so as to achieve collective goals on the basis of communal democracy.

In the 1970s the workers' co-operative came to prominence due to high unemployment in the late 1970s and ability for those made redundant to use their of statutory redundancy payments to invest in new ventures.¹⁵¹ In *Drym Fabricators Ltd. v. Johnson*¹⁵² a co-operative which had registered as a company with the Registrar of Friendly Societies, dismissed one of its members who was also an employee for alleged malpractice. That employee made a complaint of unfair dismissal. The company contended that as a co-operative it could not be sued by a member for unfair dismissal not having the necessary personality. The Employment Appeal Tribunal decided that because the co-operative had taken the option of organising as a company, that co-operative had the legal personality of an ordinary company and could therefore face proceedings for unfair dismissal.

Given that industrial and provident societies are required to operate on co-operative grounds it is important to understand the principles on which those co-operatives are distinguishable from other entities making communal investment.

Compulsory membership of the middle class

Whereas these forms of self-help group had their genesis in working class solidarity, public policy is orientated at using these structures to provide financial services for those people who cannot access bank accounts, private pensions and all of the other ephemera of the affluence of 21st century living. Such people are Bauman's dispossessed.¹⁵³ The aim of public policy is to offer a form of the services to them which other, more affluent people are able to acquire on the high street so that they can be included within the government's demographic which wishes bank accounts for everyone, private pensions for everyone and at least some experience of university for half of the population under the age of 30 by 2010. In effect, it is a set of policies which is directed at making everyone middle class by enabling everyone to access those features of life which have been historically the preserve of the middle classes.

¹⁵⁰ I.e. preference or ordinary shares attracting different classes of rights in an ordinary company according to the articles and memorandum of association.

¹⁵¹ Worker co-operatives may be formed either as industrial and provident societies, or under the Industrial Common Ownership Act 1976 or as companies. The Industrial Common Ownership Act 1976 defines common ownership enterprises and co-operative enterprises (s.2); both definitions have in common that 'the body is controlled by a majority of the people working for the body and of the people working for the subsidiaries, if any, of the body.' See Morse et al, *Palmer's Company Law*, Sweet & Maxwell, 26th edn., para. 1.236.

¹⁵² [1981] I.C.R. 274.

¹⁵³ Bauman, *Work, consumerism and the new poor*, Open UP, 1999.

At one level it is an egalitarian mission whereas at another it is project which hopes to enrich us all without requiring us to pay for it.

CONCLUSION

The question of perception and of relativity

The perception of property which is maintained by property law, that of the tangible object in space, is only possible as a relic of a time when perception was understood as emanating from the individual. As Husserl put that viewpoint:

‘If walking begins, all worldly things therefore continue to appear to me to be orientated about my phenomenally stationary, resting organism. That is, they are orientated with respect to here and there, left and right, etc., whereby a firm zero of orientation persists, so to speak, as absolute here.’

As Virilio says, this opinion of Husserl’s was written in 1934 before our perception of the world changed; that is, before Einstein’s relativity and space travel explained to us how our perceptions are based on phenomena which are in fact relative and not absolute.¹⁵⁴

The nature of property as understood by property law must similarly be understood as being relative to other social forces. It must be understood that those forms of rights understood by the law of property which entitle the rightholder to take a benefit from property or to transfer the benefit which might be derived from property even if the property itself is not capable of transfer, are very different direct property rights which attach immutably to an identified item of property. Further, property rights which relate to items of property held only for investment purposes or only for the value to be derived from that investment differ greatly from property which is held for its intrinsic value. Each of these forms of property are relative to the intentions of the property-holder but, further than that, each of the types of right are similarly relative to the purpose for which the property is held.

The perception of lightness

The central metaphor of this essay has been that in some circumstances property is heavy and that in others it is light. By lightness is meant the ability to abandon property by turning it to value or simply by refusing to be bound by it and the sensation in the owner that title in that property does not connote burdensome responsibility.

In this essay we have encountered three principal situations in which such lightness was apparent and in which it was deliberately sought by the property owner. First, the cosmopolitans who organise their businesses by using franchising operations so that their assets are merely the contracts they create with manufacturers, their property is

¹⁵⁴ Virilio, *Polar Inertia*, London, Sage, 2000; *L’Inertia Polare*, Paris, Bourgois, 1990.

principally bound up in the trade marks they licence and the cash flows they receive from such licences. Second, the offshore tax avoidance communities who seek to rely on the trust structure as a convenient vehicle for holding property but who contend that the proprietary nature of rights in such a trust should be capable of dilution into mere contractual claims so that the investor can avoid any liability to tax which would otherwise have come part and parcel of her equitable ownership. Third, and related to the second, investment in a unit trust which is considered by some to be equivalent to a mere contract on the basis that the proprietary aspect of the investment arrangement is of no practical benefit to the investor who would prefer to rely on financial regulatory protection and the law of contract in most circumstances.

There were also situations in which some property relationships appeared to have lightness by virtue of their vagueness. First, situations in which proprietary rights are asserted over assets which are in themselves merely evidence of personal claims. Examples were choses in action generally, title in bank accounts and rights in financial products. Second, situations in which assets have been accepted as constituting property even though they represented merely cash flows derived from choses in action which were themselves not transferable, and therefore not property within the traditional conception of a right in property.¹⁵⁵

Contexts in which property relations appear to have weight were those in which ordinary human beings inter-act with their homes – all of the burdens of insurance, maintenance and protection; the emotional investment in a home, the attention lavished on a car, the kitchen drawer full of warranties for electrical goods. All of these are the measures of modern life; these slips of paper and promises to make payment if chattels (real or personal) do not perform as warranted are the little additions that constitute our lives. As we hide within the frailties of our “phenomenally stationary, resting organisms”, perhaps we need to reflect on a property law which is currently conspiring to mark the lines of flight of the cosmopolitan elite and to mark the perimeter fence of the ambitions of everyone else.

¹⁵⁵ The latter is the argument considered by Penner, *The Idea of Property in Law*, Oxford University Press, 1997, 105.