The trust as an equitable response

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Locating this paper within larger research projects

This paper is located within a group of inter-linked, ongoing research projects. My principal goal is to consider Equity/equity[1] in terms of: its philosophical roots, the development of both the jurisdiction of Equity and the development of some of its key principles through history, an ordering of the law of trusts, an ordering of Equity/equity as presently understood, and the future for Equity/equity within social theory.

Within that larger project, the current paper – "The trust as an equitable response" – hits upon three key components of those topics:

1. the nature of the "trust";
2. what is meant by "equitable" in a juristic sense; and
3. how the term "response" might reflect most neatly on the trust's conceptual roots.

The focus of the verbal delivery of the paper

The first question "what is a trust?" is a key feature of current debates about the law of trusts – however, that will be the subject of Geraint Thomas's inaugural lecture and so I will consider it within my verbal delivery of this paper primarily only in so far as it relates to the shape of the second topic. **The principal focus of the verbal delivery of the paper will be on the question 'what is meant by "equitable" in a juristic sense'?** However, returning to the question of the nature of the trust, the question suggested by the title of this essay is as to the possibility of conceiving of the trust as an "equitable response" necessarily involves some discussion of the place of the trust within Equity/equity more generally.

Contents

Abstract

Part I. The trust is a relationship under which trustees hold property on trust for beneficiaries such that those beneficiaries have equitable proprietary rights in the trust fund, and under which the trustees owe fiduciary duties to the beneficiaries broadly

[1] The apparently peculiar rendering "Equity/equity" reflects the distinction, which will hopefully become apparent, between "Equity" as a jurisdiction embodied once by the Courts of Chancery in England and Wales and "equity" which could describe either philosophical notions of fairness and so forth considered below or that collection of intellectual principles developed by the Courts of Chancery.

described as being duties of good conscience. This traditional understanding of the trust device has been contested recently by restitution thinking, by contract thinking and by debates within the traditional trusts community relating primarily to offshore trusts. This essay argues that a coherent explanation of express, resulting and constructive trusts can be only achieved by thinking of the trust as an example of the principle that Equity/equity acts *in personam* against the conscience of the defendant. The central conceit of the first part of this essay is that the trust is best considered as an equitable response to factual situations and not as a contractarian nor a restitutionary device.

Part II. That, in turn, begs the question what is meant by "Equity/equity" in this context: a question which is considered in theoretical terms in the second part of this paper. Equity/equity is presented as operating on the basis of four principal motivations: the rectificatory, the adjudicative, the responsive and the creative. Each of these motivations appears to be in conflict with the others but, it is suggested, offers a means of mapping equitable doctrines and of understanding better this complex juristic field. In broader terms, it is suggested that the term "conscience" is best understood within the parameters of the familiar theoretical debate about subjectivity and objectivity: this analysis seeking to reconcile Equity/equity's role as a body of formal legal rules with its ostensibly competing role of addressing the human condition, individual claims to justice and so forth.

Part III. It is conceded that trusts law necessarily lacks some theoretical coherence in relation to issues not considered as frequently in the literature: primarily, as to the nature of the property with which Equity/equity is dealing. The resolution of such issues, it is suggested, rests on an understanding of the many faces of Equity/equity and, ultimately, in an acceptance that Equity/equity's flexibility of response is its principal strength. The title "The Unbearable Lightness of Being" refers to the manner, suggested by Bauman, in which late modern conceptions of property enable us to divide between the "light" ownership of property experienced by global trading entities and the "heavy" burdens of ownership of property experienced by ordinary people. It is suggested that "lightness" is the paradigm of late modern capitalism and that it is dematerialised forms of property, such as money held in electronic bank accounts, which cause most difficulties for traditional concepts of property law which are modelled typically on tangible property.

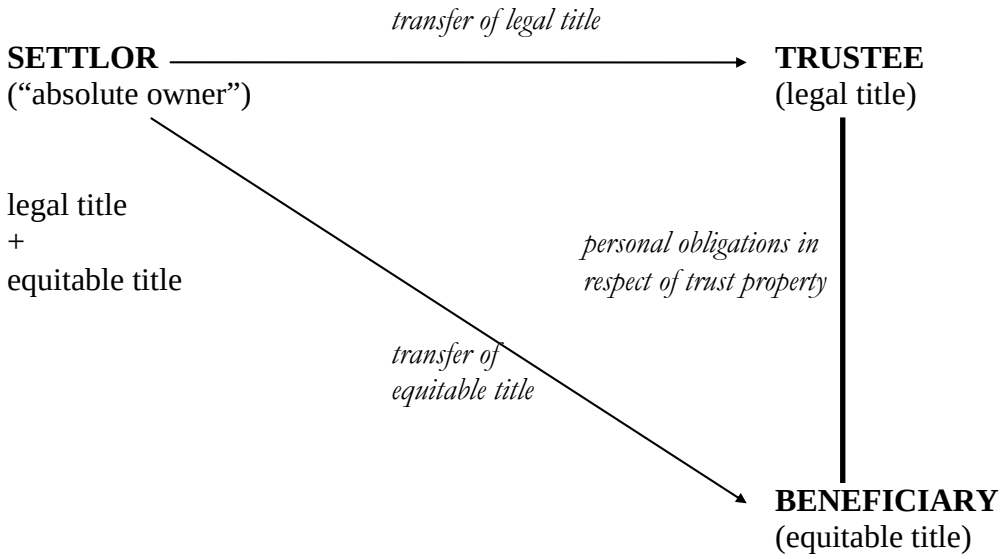
Part IV. The legal treatment of rights in the home differs from legal field to legal field. Family law, trusts law, the law of real property, social security law, revenue law and so forth all have different approaches to the allocation of rights in the home. It is suggested that in a society whose members exhibit aspirations contained within the problematic concept of "individualisation", the best legal model for issues such as the recognition of rights in the home would be one which is able to contain both the need to be treated as an individual and the need to be socially located. One means of doing this is, and of exposing the very different motivations of different legal fields, is by analysing the law through the lens of Miller's division between rights, deserts and needs as alternative foundations for socially just decision-making.

I. THE ORDERING OF TRUSTS

Separating wheat from chaff in the modern law of trusts

What is a trust?

The question "what is a trust?" is not one we ask too often beyond the first lecture of a standard undergraduate course on trusts. A definition of the term "express trust" might run as follows: A trust is created where the absolute owner of property (the settlor) vests the legal title in that property in a person (the trustee) to hold that property on trust[2] in accordance with terms set out by the settlor for the benefit of another person (the beneficiary) so vesting the equitable interest in that property in the beneficiary.[3] The settlor retains no further interest *qua* settlor in a validly constituted express trustee; the trustee owes fiduciary duties to any person in the position of beneficiary. The inter-action of the various parties can be represented diagrammatically as follows.



There is something beautiful in the simplicity of the structure of the express trust. In two dimensions it expresses a familiar trinity of creator, angel and supplicant. The

[2] Here the term "trust" might have both its technical and its vernacular meaning. Cf. Cotterrell, 1993.

[3] The question "what is a trust?" has always been considered susceptible of a sufficiently certain answer in the abstract, even if the detail of such a definition might have proved slightly more complex. It would have included reference to settlor, trustee and beneficiary. Indeed, the use of the term "definition" as opposed merely to "description" would not have seemed too startling. However, as soon as one begins to interrogate the relationship between settlor, trustee and beneficiary, the questions start to fly. To what extent is the relationship proprietary or merely one based on personal obligations? Does the settlor retain any rights in relation to the trust *qua* settlor? Are trusts always institutional or might they be remedial in some circumstances? That these questions are all, strictly speaking, susceptible of "yes" or "no" answers on the decided cases only complicates matters further because, in spite of clear authority, there are still many more questions asked about the nature of the trust relating both to its use in practice and also as to its deeper, theoretical nature. The practical use of the trust orbits around the use of the trust as a device for partitioning or managing assets in tax avoidance, in commercial security and settling disputes in relation to the family home. Less fashionably the trust is also concerned with the allocation of rights in property after death, the creation of family settlements and so forth.

creator is the settlor who creates the trust but then, *qua* settlor, plays no further, direct part in its life. Instead the word of the creator is revealed through the trust instrument (where there is one) or through the recollections of the parties otherwise. Thus the settlor / creator retains a profound influence over the functioning of the trust without having any tangible role *qua* settlor in it. The trustee is an angel, *qua* trustee, because she takes no direct benefit from the trust (beyond that sanctioned by the settlor in advance) but works solely and selflessly for the benefit of the beneficiary. The beneficiary is therefore both volunteer (in the sense that she takes her benefit without having consideration), rightholder (in that only she has *locus standi* to sue the trustee in the event of any breach of trust) and supplicant (in that, in the vernacular sense of the word "trust", she is nevertheless always prone to the trustee breaching the trust in such a way that it causes her irrecoverable loss).

The various definitions of the trust in the books move subtly between the static descriptions and more dynamic definitions.[4] An example given above favoured by Sir Arthur Underhill[5] of a relationship between trustee and beneficiary holding different forms of title:

> "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."

By "static" is meant that this definition refers only to express trustee and is defined as being "an obligation" rather than an institutional device which might arise by operation of law: a sense, it is suggested, which is not implicit in this version.[6] To describe a trust as *constituting* an obligation, as will emerge below, might be said to describe the trust as something other than a property relationship, whereas the traditional language of "institutional" and "remedial" equitable doctrines would understand the trust both as constituting a property relationship and *imposing* equitable, fiduciary duties on a trustee *in personam*.[7]

An example of a more dynamic definition is that contained in Keeton and Sheridon:[8]

> "A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may

[4] *Lewin on Trusts* demurs from giving a definition and instead draws on the definitions of other people, suggesting that a trust is easier to describe than to define: Mowray et al, 17th edn., 2000, 3.
[5] Underhill and Hayton, *Law relating to Trusts and Trustees*, 15th edn., Butterworths, 1995, 3.
[6] It has been amended slightly by Pettit, *Equity & Trusts*, Butterworths, 2001, , so as to include charitable purpose trusts: "A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called the beneficiaries or cestuis que trust) of whom he himself may be one, and any one of whom may enforce the obligation, or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law though unenforceable".
[7] That is, "*in personam*" in the sense that Equity is said to operate *in personam* against the conscience of the defendant and not more generally in any sense to suggest that the trustee is embroiled in a non-property relationship.
[8] Keeton and Sheridan, *Law of Trusts*, 12th edn., 3.

> one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust."

The more "dynamic" thrust of this definition is contained in its implication that a trust can "arise", as opposed to being expressly created, whenever a person is "compelled" to hold property as trustee. This definition would therefore cover trusts implied by law which arise by operation of law. Much of the discussion that is to follow, in seeking a comprehensive definition of the trust, will be required to recall express trusts when talking of trusts implied by law, and vice-versa, where the former are created by virtue of the settlor's intentions (as interpreted by the court[9]) and the latter created by operation of law frequently contrary to the intention of one or other of the parties (under the rubrik of constructive or resulting trusts).

[9] See the discussion below in relation to "unconscious express trusts" such as that in *Paul v. Constance* [1977] 1 WLR 527 where the court interpreted the settlor to have intended to create an express trust even though the Scarman LJ considered him to have been an unsophisticated character not knowledgeable enough about trusts to have consciously intended any such thing. In such circumstances the settlor's intention may therefore be implied but, it is suggested, the court is not imposing the trust contrary to the settlor's intention.

The logic of the trust in classical Equity theory is that the beneficiary controls the trustee through the courts.[10] Hence the development of the beneficiary principle which requires that there be an identifiable beneficiary so that there is someone in whose benefit the court can decree performance of the trust.[11] Similarly, the requirements of certainty of the settlor's intention,[12] of the identity of the beneficiaries[13] and of the identity of the subject matter of the trust[14] are necessary to ensure that the court is able effectively to police the actions of the trustee on behalf of the beneficiary. It is the beneficiary who is truly Equity's darling. The roots of the strict liability approach to trustees' liability for breach of trust even where the loss occasioned to the trust fund was only indirectly the fault of the trustees[15] would appear to be in an almost judicial acceptance of the fact that the wealth and security of the English upper and middle classes was, in the manner of Jane Austen novels, dependent entirely upon the viability of their trust funds, whether containing land, money or valuable chattels.

It is precisely, it is suggested, the collision between the heritage of the trust and its modern usage which have generated all of the questions to follow. In one leading case, Lord Browne-Wilkinson suggested that there might yet need to be a distinction made between commercial trusts on the one hand and traditional trusts on the other.[16] In another leading decision, his lordship also appeared to leave ajar a door on the debate as to whether trusts are institutional or remedial devices which otherwise he might have slammed shut.[17] The very core of the law of trusts has been questioned in recent years. The principal questions, beyond those raised by his lordship are these:

1. is the trust based on property or on obligations?
2. is the trust in truth a species of contract?
3. is the beneficiary principle necessary?
4. is there a core, irreducible content of trusteeship?

These questions are considered below. After answering them it will be suggested that the proper means of analysing the express trust becomes apparent: that is, as a property relationship under which trustee and beneficiary have a matrix of rights,

[10] This essay advances the notion that trusts might simply be equitable responses to certain situations. By that is meant that Equity/equity operates neither entirely institutionally nor entirely remedially but rather *responds* to context in the most appropriate manner. In some circumstances it will be advantageous to consider property and other rights to have arisen institutionally (that is, retrospectively, automatically and ostensibly by operation of law without the use of judicial discretion) and in others to arise remedially (that is, prospectively from the date of judgment, with an intention to compensate the claimant in some way, and by means of the court's inherent equitable discretion). It also considers the various manners in which equity operates and what might be meant, theoretically, by the concept of "conscience" which is at the heart of equity. The subjective and objective natures of "conscience" in particular will be considered – ultimately suggesting a resolution of ancient arguments about subjectivity and objectivity within technical, legal discourse by means of understanding the conscience of the individual to be socially-constructed in some way.

[11] *Morice v. Bishop of Durham* (1805) 10 Ves 522; *Denley, re* [1969] 1 Ch 373, *Lipinski, re* [1976] Ch 235.

[12] *Knight v. Knight* (1840) 3 Beav 148; *Knight v. Boughton* (1840) 11 Cl & Fin 513.

[13] *Ibid*., *Hay's ST, re* [1981] 3 All ER 786.

[14] *Ibid*., *Goldcorp, re* [1995] 1 A.C. 74; *Westdeutsche Landesbank v. Islington* [1996] 1 AC 669.

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

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

[17] *Westdeutsche Landesbank v. Islington* [1996] 1 AC 669.

duties and powers in relation to a fund of property, and furthermore a relationship which is founded on Equity's jurisdiction to act *in personam* in relation to the conscience of the trustee.[18] It will be suggested that it is most helpful to think of Equity as *responding* to given factual situations as part of its mission to observe the trustee's conscience rather than to think of trusts as being abstract entities which stand either as impersonal *institutions* functioning by operation of law or alternatively as *remedies* to be applied as though common law devices like contractual or tortious damages.

The trust is a property relationship

The trust is, in essence, a property relationship. Without property being on held on trust by the owners of the legal title for the benefit of beneficiaries there would be no trust. Any relationship not conforming to that pattern is something other than a trust; by extension only a relationship conforming to that pattern falls to be described as a trust. It is important to state these matters plainly because, as will emerge below, there are forces abroad who would suggest that the trust is something other than a property relationship. The trust is, however, a hybrid property relationship: if it were not it would simply be a matter of outright ownership at common law. This hybrid relationship operates at two levels. At the first, the one which generates the most confusion, is the matrix of obligations which the trustee owes to the beneficiary. In that sense, the trust is comprised both of proprietary rights and of ostensibly personal obligations between trustee and beneficiary. At the second level, the trust enables two (or more) people to have rights in property simultaneously: the trustee has the legal title and the beneficiary the equitable title. It is this feature which marks the trust out not only from common law property relationships but also from civil code concepts of *dominium* and so forth.

The case from history

That the trust was intended from its inception to be a property relationship is evident from its history. The earliest 'uses', latterly 'trusts', took effect over land. In consequence, there was little possibility of confusion as to the property which was to be held on trust because the trust fund was readily identifiable. There could be boundary disputes as to which land was held on trust thus raising questions of fact but otherwise the identity of the property would typically pose few intellectual or technical problems. Such early uses over land whereby the common law owner of the land held it to the order of its equitable owner were self-evidently property relationships. The trustee's obligations were predicated on a combination of his ownership of the legal title over that land and Equity's recognition that the benefit of that land was to be enjoyed ultimately by the beneficiary.

The questions asked of this emerging law of trusts (or, uses) become more complex when the settlor of this trust over land chooses to appoint a number of beneficiaries, or to make those beneficiaries entitled to the equitable interest in that land in

[18] It will be suggested that this *in personam* concept operates both in relation to express trusts and to trusts implied by law.

qualitatively different ways, and/or to give the trustees powers as to how that land is to be enjoyed by the beneficiaries.[19] Indeed the trust became a very important device for the landed classes to manage their property across the generations. Trusts were created to identify, for example, one beneficiary as the life tenant and another beneficiary as remainderman. The trustee might then be given the obligation to maintain the land for the ultimate benefit of the remainder beneficiary but also a power to provide that part of the land might be sold for the benefit of the life tenant in certain circumstances. As will emerge below, the questions asked of the law of trusts have simply continued to become more and more complicated because much of the property developed and used in the modern world is itself more complicated: dematerialised securities in ordinary companies,[20] money held in electronic bank accounts,[21] and book debts.[22] Nevertheless, the trust from its earliest beginnings was a property relationship.

That all trustees are fiduciaries – bar none

At this point the position of the trustee is evidently more complex than that of the bare trustee. A bare trustee who is required simply to maintain property for safekeeping – whether as a nominee over land or even the depositary in relation to collective investment schemes[23] – does not have to balance the competing claims of beneficiaries with claims against the same property albeit that their rights have different incidents and extents. Indeed some would go so far as to say that the bare trustee is not a fiduciary at all because her obligations are similar, in effect, to a bailee of property required to mind it for its true owner.[24] It is said that it is only when a trustee is charged with some discretion or some power in relation to the trust property that she is properly considered to be a fiduciary in relation to it.[25]

This view is incorrect. The bare trustee is a fiduciary. My reasoning is as follows: it is suggested that it is far from controversial. In this context there are two forms of fiduciary duty. First, there are *active* fiduciary duties which police the manner in which trustees and others carry out their express powers. Secondly, however, there are *latent* fiduciary duties which apply equally to a bare trustee as to a trustee charged with some power. Such latent fiduciary duties are only evident when the bare trustee performs some act which, will perhaps not even mentioned in the express terms of her trusteeship, nevertheless offends against fiduciary law. Examples of such latent fiduciary duties are the rule against self-dealing, the rule against making secret profits from the fiduciary office and so forth. These rule apply to a bare trustee as to any other type of trustee. If the bare trustee behaves properly then no mention of them need be made. However, that does not mean that they do not apply to such a bare

[19] In this sense the trust progresses from being a question of *inter vivos* title into, in Chesterman and Moffat's glorious phrase, a 'gift over the plane of time': Moffat, *Trusts Law*, Butterworths, 1999, 92.
[20] E.g. *Hunter v. Moss* [1994] 1 WLR 452; *Harvard Securities Ltd, re; Holland v. Newbury* [1997] 2 BCLC 369.
[21] E.g. *MacJordan Construction Ltd v. Brookmount Erostin Ltd* [1992] B.C.L.C. 350; *Macmillan Inc. v. Bishopsgate Investment Trust* [1995] 1 WLR 978, 1000, 1014; [1995] 3 All ER 747, 769, 783.
[22] E.g. *Agnew v. IRC (The Brumark)* [2001] 2 AC 710.
[23] Hudson, *The Law on Investment Entities*, Sweet & Maxwell, 2000, 206.
[24] Penner, "Exemptions", *Breach of Trust*, ed. Birks and Pretto, Hart Publishing, 2002, 245, 14n.
[25] *Ibid*.

trustee. A little like the station platform which slips from view as our train pulls away: just because we cannot see it, it does not mean that it is not always there.

Developments in the nature of property itself

To return to the central point: historically, the earliest trusts were created over land. This is the nature of all property law: rules are applied first to land (whether as sacred sites or for the purposes of agriculture) and then concepts of ownership are developed in relation to other property: chattels.[26] It is not accident that the term "chattel" has the same stem as "cattle" nor that "pecuniary" has the same stem as the Greek "pecus" (or, cow), for it was in relation to livestock that human beings next applied concepts of ownership.[27] From these roots the law of trusts developed not in advance of human development nor in advance of the development of new forms of property over which people sought to apply concepts of ownership, but rather in reaction to such developments. This is a centrally important point. The law of trusts has always had to react to situations as they have arisen. Consequently, rules created initially to resolve land disputes were required subsequently to be adapted in relation to disputes over property other than land. Therefore, trusts created over animals, over other chattels, or in time over intangible property required the use of rules which were created over immovable property. The problem with movable property was that it would move about, sometimes due to human agency or sometimes, in the case of livestock, of its own volition. In consequence, rules like the requirement for certainty of subject matter have demonstrated themselves to be deeply problematic in relation to trusts of intangible property like ordinary shares or money held in electronic bank accounts in ways that they had not in relation to land.[28]

The consequence of the application of trusts to new forms of property, and the conceptual problems which have resulted from that development, is that it is easy for our gaze to shift away from the solidity of the property involved onto other issues. This happens in two ways. First, the moveability of the property and the apparent instability of concepts like the requirement of certainty of subject matter[29] have led some to assume that there is a crisis at the heart of trusts law where in truth there is only a need for adaptation of the existing rules.[30] In relation to, for example, corporate bonds, there is a system of registration of title over bonds which has replaced the need to print and issue into circulation physical bearer bonds. The bond market has, in consequence, been said to have dematerialised.[31] It has become a complex matter seeking to take title over holdings of such securities where the property to be held on trust is itself incapable of segregation from other property: that is, it is impossible to segregate the bond held on trust from all other bonds because title in those bonds is held (typically physically in a jurisdiction which does not recognise the trust) simply by means of an entry on a register. The only property which is capable of being dealt

[26] Cotterrell, *Emile Durkheim – law in a moral domain*, 1999, Edinburgh: Edinburgh University Press..
[27] *Ibid.*
[28] *Hunter v. Moss* [1994] 1 WLR 452; *Harvard Securities Ltd, re; Holland v. Newbury* [1997] 2 BCLC 369.
[29] *Ibid.*, examples of cases which have held that the rule on certainty of subject matter do not apply to identical units of intangible property.
[30]
[31] Benjamin , *Global Custody*, Butterworths, 1996, generally.

with, therefore, is the claim which the bondholder has against the registrar to be recognised as the owner of a given number of bonds.[32] This form of property requires recognition by the law that the property can be separately identified but that the property itself does not conform to patterns historically associated with property.

So it is that Penner, for example, takes the classical property theorist's approach in defining all property as being any 'thing' which can be transferred to another person.[33] However, there are forms of property long-understood by commercial practice as constituting meaningful 'items of value' which have been accepted within the canon of property rights but which do not conform to Penner's matrix. Examples of these forms of property are the benefits which flow from a commercial contract,[34] the benefits which flow from a non-transferable milk quota,[35] and the benefits which flow from a non-transferable waste management licence.[36] In each of these situations, commercial and banking lawyers accept with little difficulty the notion that what is important about an income stream is the stream itself and not the source or the transferability of that source of income. These forms of property necessarily challenge our understanding of the nature of property in law.

How property law must react to such changes in the nature of property

For property lawyers the acceptance that the benefits which derive from non-transferable property are to be considered to be property in themselves,[37] constitutes a radical re-conceptualisation of the nature of property: property ceases to be the thing-itself and becomes instead the derivations-from-the-thing. In line with the core of phenomenological thinking there is a distinction between the existence of the capital and the essence of that capital, where the essence of the capital to the commercial lawyer is the benefit which flows from that capital. In line with what will be said below about the 'unbearable lightness of property',[38] the essence in commercial terms is something very far removed from the essence of land which might have been experienced as being tangible and real by its owner, whereas modern commercial practice sees property as being necessarily both inherently disposable[39] and income-bearing.[40] The technical problems of property in the express trust are considered below.

Second, the tendency for the property comprising the trust fund from time-to-time to be sold or exchanged for other property, has tended to allow us to assume that the identity of the trust property is of lesser importance than the obligations which are incumbent on the trustee. One of the great conceptual advances of trusts law was that

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[32] Hudson, *The Law on Financial Derivatives*, 3rd edn., Sweet & Maxwell, 2002, 452. Cf. *Don King Productions Inc v. Warren* [1998] 2 All E.R. 608, Lightman J; affirmed [2000] Ch 291, CA, whereunder it may be possible to take title effectively in the benefits which flow from the chose in action owed by the registrar to the bondholder.
[33] Penner, *The Idea of Property in Law*, Oxford University Press, 105.
[34] *Don King v. Warren* [1998] 2 All E.R. 608.
[35] *Swift v. Dairywise Farms* [2000] 1 All E.R. 320.
[36] *Re Celtic Extraction Ltd (in liq), Re Bluestone Chemicals Ltd (in liq)* [1999] 4 All ER 684.
[37] *Ibid*.
[38] Part III.
[39] Baudrillard's 'compulsory obsolescence' in practice.
[40] And not intrinsically valuable in itself.

it loosened its grip on the need for one specified item of property, and only that specified item of property, to be held on trust. Instead, trusts law came to understand that if the trust property was transferred away in consideration for the acquisition of new property then that new property should be considered to comprise the trust fund in place of the original property. The identity of the trust fund from time-to-time is consequently unimportant, provided that whatever property comprises the trust fund is segregated from other property.[41] We are therefore not concerned with the thing-in-itself but rather in whatever-stands-for-the-thing from time-to-time.[42] The upshot of this shift in our gaze is that the trust appears to be a relationship built on obligations and not on property. That is, the trust appears to be simply a right in the beneficiary to recover from the trustee personally any diminution in the value of trust caused by some breach of trust and a range of obligations incumbent on the trustee to act fairly between the various persons interested in the trust. It becomes all-too-easy in consequence to see the trust as being made up entirely of these obligations. While such obligations are incumbent on the trustee, they do not constitute the entirety of the trust concept: the argument which suggests that they do is considered next.

The express trust is not a contract

Dealing with the contractarian thesis

The imposition of duties on the trustee by the settlor has led some commentators to suggest that the essence of the express trust[43] is the relationship between settlor and trustee, and not between trustee and beneficiary.[44] The question really is whether an express trust is concerned to effect the intentions of the settlor or whether it is concerned merely to police the conscience of the legal owner of property, that is the trustee. Under the former analysis we might say that the trust is concerned with a form of contract between trustee and settlor whereby the settlor is required to observe the wishes of the settlor and nothing else. This would mean, for example, that the beneficiary would not be entitled to terminate the trust nor to deal with the property in any way which conflicted with the wishes of the settlor. Alternatively, to focus on the

[41] *Re Goldcorp* [1995] AC 74.

[42] The only conceptual exception to this assertion concerns transfers of property in breach of trust, in which circumstance the obligation of the trustee is to reconstitute the trust fund, first by recovering the very property transferred away in breach of trust or alternatively (assuming the first is impossible) by means of reconstituting the trust fund in cash terms: *Re Massingberd* , *Target Holdings v. Redferns* [1996] . However, the continued concern as to the identity of the property is more apparent than real. That the property can be replaced by its cash value suggests that the principal focus is on the value to the beneficiaries and not necessarily with the specific property. Furthermore, it is suggested that even the initial requirement that the original property be recovered is itself concerned with the maintenance of the value of the fund and not to prohibit (absent specific provision in the trust instrument) the transfer of the trust fund away in exchange for other investments or other property.

[43] It can only be the express trust which is intended here. A resulting or constructive trust does not require any contract between 'settlor' and trustee of necessity because either form of trust arises by operation of law and not by means of the consensual act of the parties. There may be agreement between the parties which is the context within which, for example, common intention constructive trusts come into existence, but such agreement is not a necessary pre-condition for the creation of such trusts implied in law in general terms.

[44] E.g. Langebein, "The contractarian basis of the law of trusts", (1995) *Yale Law Journal*, Vol. 105, 625, considered below; Swadling, paper at the WG Hart conference, 2002; Penner, "Exemptions", *Breach of Trust*, ed. Birks and Pretto, Hart Publishing, 2002, 245, 14n.

latter approach is to accept that the settlor has no further part to play in the trust and that there is no objection to the beneficiary exercising proprietary rights to deal with the trust and so act contrary to the wishes of the settlor if necessary. This latter approach treats the trust as a combination of the beneficiary's property rights and obligations borne by the trustee in favour of the beneficiary; whereas the latter approach treats the trust as being comprised simply of obligations borne by the trustee to the settlor.

From lightness to transparency; tax avoidance and the trust contract

The trust is said by the contractarians[45] to revolve around the contractual retainer between the settlor and the trustee. It is suggested at the outset that this argument cannot hope to describe constructive, resulting or implied trusts and therefore requires a dismantling of any all-embracing definition of a trust. As outlined below, it also fails to provide a complete analysis of even express trusts given that there are express trusts which are recognised as having come into existence without the conscious action of the parties[46] let alone the formation of a contract between settlor and trustee.[47]

The principal challenge to the traditional express trust model[48] 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[49] 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.[50]

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 indeed be a commercial contract which uses a trust as a device to hold security for payment or a contract for services whereby some person will be limiting their liability and identifying their fee in return for acting as trustee. 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 trustee's contract of services require that – even where the trustee has been guilty of gross negligence.[51] However, many express trusts arise without a contract in will trusts and in situations like *Paul v. Constance*[52] or *Re Kayford*[53]

[45] E.g. Langbein, "The contractarian basis of the law of trusts", (1995) *Yale Law Journal*, Vol. 105, 625.
[46] E.g. *Paul v. Constance* [1977] 1 WLR 527; *re Kayford* [1975] 1 WLR 279.
[47] Particularly in circumstances in which the settlor is also the sole trustee.
[48] Definitions given above … .
[49] That is, the rule in cases such as *Morice v. Bishop of Durham* (1805) 10 Ves 522 that there must be someone in whose favour the court can decree performance.
[50] Langbein, "The contractarian basis of the law of trusts", (1995) *Yale Law Journal*, Vol. 105, 625.
[51] *Armitage v. Nurse* [1998] Ch 241.
[52] [1977] 1 WLR 527.
[53] [1975] 1 WLR 279.

where the parties create something akin to a trust but which they may not necessarily have described as a trust themselves – these may occur naturally in the wild in great profusion but they are unlikely to have enough money at stake to reach the Chancery courts. Nevertheless, these unconscious express trusts[54] have been analysed by the courts as being express trusts, rather than anything else, even though the parties had no notion that they were creating such a thing.[55] Therefore, express trusts can arise in English law without the existence of a contract; trusts implied by law necessarily arise by operation of law and not as a result of any act of the parties.

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 an investment fund might wish to appear to have no beneficial interest in that fund for tax purposes.[56] 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 which might be susceptible to taxation as such. 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.

It is these investment funds which are sold by trusts service providers in the so-called "tax havens" which are leading the charge for the acceptance by other jurisdictions in which their clients would otherwise be ordinarily resident to accept that such structures constitute valid trusts without creating any proprietary rights for their clients.[57] These havens have changed their own municipal trusts laws to admit such strctures but move in fear that their trusts are merely "limping trusts" in the sense that other jurisdictions would consider them to be merely incomplete trusts whereby the property purportedly held on trust in fact remains the property of the settlor under resulting trust.[58] It would be as well, however, to remind ourselves of some of the basics of English trusts law.

The settlor plays no part once the trust has been declared

The trust is a property obligation under English law, *inter alia*, in that all of the beneficiaries acting together and constituting the whole of the equitable interest are entitled to direct the trustee how to deal with the property, whether by means of re-writing the trust in effect or of terminating it.[59] That the settlor has no right to be consulted directly *qua* settlor, in the absence of any express provision in any trust instrument to the contrary, is evident from those cases in which two settlors of

[54] Considered below … .
[55] *Paul v. Constance* [1977] 1 WLR 527.
[56] Nevertheless the "settlor" here will wish to be able to rely on the munificence of a discretionary trustee looking favourably upon them as one of a range of potential objects of that trust when the time comes to distribute the fruits of the fund.
[57] See, generally, Hayton, ed., *Extending the boundaries of Trusts and Similar Ring-Fenced Funds*, Kluwer International, 2002.
[58] Hayton, *ibid*, 7.
[59] *Saunders v. Vautier* (1841) 4 Beav 115.

marriage consideration have sought to unwind the trust once the marriage had failed: in such circumstances, *qua* settlors they had no such power and on the cases were not the only beneficiaries having identified other relatives as having equitable interests in the marriage settlement.[60] Therefore, on the creation of an express trust, the beneficiaries acquire ultimate beneficial title in the trust fund and the settlor *qua* settlor relinquishes all property claims against that property. Hence the expression that a trust is, in a sense, a *gift* over the plane of time in that the settlor transfers away all property rights over the life of the trust.[61]

For the settlor to retain rights in the trust property requires the settlor to retain either title in the trust property – in the form of a gift with reservation of benefit – or a power to control the manner in which the trustees exercise their powers in relation to the trust. In either case, the settlor holds those rights not as settlor but rather holds any reserved benefit as a beneficiary under the trust or any power to control the trustees' exercise of the trust property as a form of fiduciary. In the latter example, it might be said that the settlor might have a purely personal power in relation to the manner in which the property is applied. However, it is suggested that if the settlor has the ability to override or to direct the actions of the trustees, then the settlor is also acting as a form of trustee with a fiduciary power over the trust property at the very least. It is only if the settlor were seeking to exercise such control over the trustees before the trustees took legal title in the trust property that the settlor could be said to be acting as settlor: however, if the settlor had not vested legal title in the trustees at the time then no trust would then have been in existence over that trust property and therefore the settlor's directions to the trustees would be an act of declaring the trust and not any other.

The authorities are clear. If the settlor intended to create a trust, then it is by reference to the law of trusts that any question must be answered; whereas if that person's intention were to do anything other than create a trust, then the law of trusts has no part to play.[62]

The principal argument against trusts being contracts

Thus far the focus on rebutting the contractarian mistake has been focused on suggesting both that there are some trusts which clearly do not correspond to the contractarian theory,[63] that beneficiaries own the trust fund in equity in the English position,[64] and that the settlor drops out of the picture in the English context.[65] However, the principal reason for saying that trusts are not capable of being subsumed within the box labelled "contract" is that trusts necessarily create fiduciary duties whereas contracts do not necessarily create fiduciary duties (except in relation to partnership and agency contracts). Contracts are means of allocating risks between the

[60] *Paul v. Paul* (1882) 20 Ch D 742.
[61] Subject to what is said below about the failure of the trust, in which case the property may be held on resulting trust for the settlor: *Vandervell v. IRC* [1967] . However, this is not simply *qua* settlor but rather as beneficiary under a resulting trust.
[62] *Milroy v. Lord* (1862) 4 De GF&J 264.
[63] E.g. *Paul v. Constance* [1977] 1 WLR 527.; *Re Kayford* [1975] 1 WLR 279.
[64] *Saunders v. Vautier* (1841) 4 Beav 115.
[65] *Paul v. Paul* (1882) 20 Ch D 742.

contracting parties. Trusts necessarily create property rights in the beneficiary and fiduciary duties in the trustee. This is so, it is suggested elsewhere in this essay, even if the trustee is merely a bare trustee.[66] There is no equivalence in relation to trusts because there are senses in which trusts law requires a base level on the trustee's duties without which there will not be a trust at all. This base level has been referred to in the literature as the "irreducible core content of trusteeship"[67] and is a theme to which I turn next.[68]

Identifying the trust concept

The trust as a conceptual, not a contextual, category

Within the broader scheme of the law there are concepts and there are contexts.[69] The concepts are those categories, it is suggested, which are bound up in the foundations of the law. They are the pre-eminently legal categories which, not coincidentally, form the foundations of the English law degree. Those concepts revolve around criminal law doctrine, constitutional and public law, and in the civil law context they revolve around contract, tort and property in the main. It is suggested that the trust and, more generally, Equity/equity also constitute a conceptual category. The suggestion that the trust should be considered to be a sub-set of the law of contract would be to reduce the trust to the level of a contextual category. The contextual categories are those areas in which core legal principles have been adapted by the lawyers themselves (in the form of judges, practitioners and jurists) or by statute to cope with particular non-legal contexts.[70] One example of a contextual category would be company law which, in the days of the joint stock companies, was comprised of contract (originally between the members as partners, now either the nexus of contracts approach or the director's contracts of employment) and of trust (by reference to which the directors held the company's stock). The result, in the wake of the decision of the House of Lords in *Saloman v. Saloman*[71] and legislation granting first limited liability[72] to the nascent companies and then a panoply of regulation,[73] is a distinct legal field which nevertheless draws heavily on fundamental legal concepts.[74]

What is suggested by those who would either treat trusts as being simply contracts[75] or who would divide trusts between commercial and non-commercial trusts[76] is the

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[67] Hayton, "The Irreducible core content of trusteeship", Oakley Ed., *Trends in Contemporary Trust Law*, 1996, Oxford: Oxford University Press, 47; *Armitage v. Nurse* [1998] Ch 241.

[68] The more general questions of provision of information, conflicts of interest and so forth, however, will not be included in this paper which has already become over-long.

[69] Birks .

[70] Cf. discussion below of non-technical inputs to the legal system.

[71] *Saloman v. A. Saloman & Co Ltd* [1897] AC 22.

[72] Limited Liability Act 1844.

[73] E.g. The Listing Rules of the London Stock Exchange.

[74] E.g. *Tesco Supermarkets plc v. Nattrass* [1972] AC 153 which concerned the liability of the company itself, its directors and its non-executive employees for the commission of offences under the Trades Description Act and connected torts: all central to the notion of the personality of the company, the organic theory of directorial responsibility and the hinterland of fundamental legal and equitable claims which surround the company.

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

transformation of trusts law – with its subtle combination of property and fiduciary law principles – from a conceptual category into a contextual category. Once the trust is diluted in this form then the moral operation of equity-through-trust is obfuscated. The contexts to which the trust would then be organised would be trusts being commercial parties seeking security, rich individuals seeking shelter from taxation, testamentary trusts, trusts regulated in the provision of financial services, trusts over the home, and a hotchpotch of miscellaneous others.

No need for a formal division between types of trust

There is no need for such a formal division between trusts. What would be its purpose? Answer: to permit rich individuals and corporations to disturb the historic balance of the law of trusts so that they can avoid their moral, civil duties to pay tax by creating trusts without property rights for the beneficiary. That, it is suggested, is a poor premise for this project to begin.

Identifying the mandatory content of trusts law

I have said that there is no need for such a formal division between types of trust. By that I mean that the decision of the Court of Appeal in *Armitage v. Nurse*[77] has ostensibly, for good or ill, obliterated any notion that there is a mandatory category of trustee obligations which will be enforceable in all situations no matter what limits are placed on the trustee's obligations. There is, perhaps, a means by which the credibility of a core irreducible content of trusteeship can be salvaged. That would be to recognise that the trust is based on the conscience of the trustee, as the leading cases suggest,[78] and to begin the process of colouring in that notion of conscience for this context. Consequently, it could be said that if the trustee has limited her obligations by contract then there is no affront to conscience if she acts within the terms of such a contract: that is a perfectly credible definition of the extent of her fiduciary duties. The mandatory element should be contained, nevertheless, in a judicial acceptance that the trustee ought never to be permitted to exclude its liability from liability for fraud, for commission of any criminal offence in the course of her duties, for breach of any regulatory rule governing the conduct of her duties, for any conflict of interest[79] not authorised by contract and for any specific breach of the trust instrument not sanctioned by contract.

The mandatory content thus far has related to the nature of the obligations which the trustee bears in the specific context of express trusts in which their might be contracts or trust instruments in place to limit the extent of the trustees' duties. However, what is necessary within the law of trusts is to recognise the extent to which there is a mandatory content in those norms. The mandatory minimum would appear to be the following:

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[76] *Target Holdings v. Redferns* [1996] 1 A.C. 421, [1995] 3 W.L.R. 352, [1995] 3 All E.R. 785.
[77] [1998] Ch 241.
[78] *Westdeutsche Landesbank v. Islington* [1996] AC 669.
[79] Within this category, for ease of reference, I include a conflict between fiduciary and personal capacities (such as making secret profits), conflict between different beneficiaries' interests, receipt of bribes and so forth.

- trustees to act in accordance with good conscience
- trustees to bear liability for breach of trust as a fiduciary
- beneficiaries' equitable ownership of trust fund
- beneficiaries entitlement to information
- settlor's non-participation *qua* settlor

If a structure does not conform to this pattern then it is quite simply not a trust. Rather, it is something else. Depending on context one can choose between contract, unincorporated association, bailment, partnership, company, or other. But it is not a trust.

A sensitivity to the context of different forms of express trust, not formal division

As considered below in relation to "The New Ordering of Trusts" there are contexts in which we might now consider that different contexts require different treatment from trusts law. These relate principally to occupational or to private pension funds, to trusts used solely as devices to take security in commercial contracts and to public trusts. What is not suggested by that division is that these are categories into which the law of trusts should break for convenience.[80] Rather, it is suggested that the nature and extent of the fiduciary duties imposed by the courts in different contexts are perfectly capable of differentiation without the need formally to disaggregate the law of trusts as a whole. Thus, it has long been accepted that[81] when enquiring into the nature and extent of a person's fiduciary duties, those duties will require interpretation from case-to-case. This operates on two bases. First, the category of relationships which will import fiduciary duties is not a closed category.[82] Second, even within categories which are well-established as being fiduciary there is still a need to interpret each case according to its own context. In line with this second factor, it is suggested that the segregated discussions set out below are to be taken to suggest some of the factors which ought to be taken into account in interpreting those fiduciary duties in those specific contexts.

Before coming to those questions, however, it would be useful to consider further the way in which commercial activity and trusts law concepts can overlap.

The relationship between trust and contract in commercial contexts

The "nexus of contracts" approach: from trusts to companies

Legend has it that there are close ties between the company and trust. Historically, the company was founded on the trust. Modern textbooks on company law, however, make no reference to trusts law concepts and settle for the neutral term "fiduciary" to describe the overlap between directors' duties and trustees' liability for permitting conflicts of interest and so forth. It is as though the company lawyers, with their

[80] Cf. *Target Holdings v. Redferns* [1996] 1 A.C. 421.
[81] E.g. Millett .
[82]

technical talk of securities, governance and separate personality are ashamed of their past. And yet, it is by virtue of seeing the company as constituting a simplification of the web of contracts which would otherwise have been necessary if the company-as-trust model had persisted that company law theory, borrowing from economics, came to think of the company as a "nexus of contracts" precisely because the company itself had a personality distinct from the shareholder's property claims against it and the obligations owed by the directors and promoters. The question for those who advocate a transformation of (at least commercial) trusts into mere combinations of contracts is how such a new model trust would correspond to the development of the self-supporting company.

The consequence of seeing the trust as a nexus of contracts is twofold. First, it is tempting to consider the settlor as setting the bounds of those obligations through the trust instrument such that the trustee is said to be acting under contractual duties owed to the settlor which are in some way enforceable by the beneficiaries. This error was analysed above. It has been suggested that the Contract (Rights of Third Parties) Act 1999 itself constitutes a circumvention of the trust by providing that persons who are intended to be benefited by the contract can enforce any obligations in the law of contract. However, such contracts do not in themselves create fiduciary duties to act in the utmost good faith, to provide information on any decisions taken, to abstain from making unauthorised profits and so forth. Therefore, the 1999 Act does not displace the equitable content of the trust.

Second, the analysis of trusts structures as being in some way contractual is considered more easily analysed through economic concepts. An example of this tendency is the company. It is common in company law to analyse the company as being a nexus of contracts. That means that the company, in economic theory, constitutes a simplification of the mass of contracts which were necessary when joint stock companies were analysed as partnerships between the members for whose benefits the directors held the company's property on trust. Without the company having the distinct legal personality to act on its own behalf and to enter into contracts in its own name, there would need to be contracts between all of the partners and the directors with every person who sold the firm a vending machine, or invoiced them for a telephone call and so forth. The trust is in danger of collapsing into this convenient mode of thought in many contexts by virtue of seeing the trust as an expression of some contractual relationship between trustee and settlor.[83]

One example of this phenomenon is the cell structure. It is common for trusts service providers to seek to pool money from clients into large trusts funds in a way which entitles those investors to *de facto* title in the property but masked behind a *de jure* absence of title such that they appear, *inter alia*, for tax purposes not to be the owners of the income-generating fund. The fund is, however, divided into distinct cells in the ledgers and accounts of the service providers so that either the larger fund can be divided up between distinct forms of investment or else so that the fund can be divided between different clients' contributions to the larger fund. In either event, the service provider will frequently attempt to limit the claims of third parties dealing with the fund to particular cells (or, sub-funds) within the larger fund. To achieve this, the argument is raised that these cells should be considered to be separate legal

[83] E.g. Fan Sin, *The Legal Nature of the Unit Trust*, .

entities when defending litigation, even if they are intended to be considered to be one large fund for fiscal purposes. Under English law, such analyses are not conceptually possible in the sense that each cell would not be considered to be a separate legal entity although express contractual provision may limit a contracting party's claims to specific assets. However, the result of a greater intrusion of contractual thinking into trusts law would be the disbanding of its foundations as a property relationship. The gain would be solely in the provision tax harbours for the rich in offshore jurisdictions.

The upshot is that the trust remains exactly the same institution that it always was. An express trust is created when a settlor manifest sufficient intention to create a trust over property, which then becomes the trust fund and which is held on trust by the trustee for the benefit of the beneficiary in accordance with the terms set out by the settlor. If there were no property, there would be no trust. Without the property, the relationship comprising the obligations of the "trustee" would be contractual, possibly creating an agency or a partnership. In any event, such a relationship would not be a trust. A trust is predicated on the property and therefore the trust is a property relationship. The detail of that relationship will then be defined and refined by reference to the nature of the trustee's obligations.

It is different question whether the defining core of the property relationship is the title of the beneficiary or a combination of legal and equitable title: that issue is considered below. First, it is important to consider another issue related to the incorrect suggestion that the trust might be a relationship based on obligations and not property.

Trust and contract in commercial transfers of property

In contractual investment relationships there is an outright transfer of property to the investment manager and the return paid to the investor will be in accordance with the contractually specified formula for calculating that return. Common law is sufficient to deal with the various entitlements here. There is no suggestion that once a transfer of funds from the investor to the investment manager takes place that there is any suggestion that the investment manager stands as trustee of those funds. Once an outright transfer has been voluntarily made, even if it emerges after that property or its traceable proceeds have been dissipated that the transfer was made under a mistake or a void contract, then there is no question of the intervention of trust to protect the position of the investor.[84] Similarly, when an investor contributes to a pool of investments it might be possible to structure that pool such that the investor transfers its investment stake outright and is entitled at common law only to the return identified in the contract (possibly including ultimately the return of an amount equal to the original investment stake). Again, common law would be sufficient to deal with such an arrangement and there would be no need for the intervention of the law of trusts given that there is no proprietary right created in the fund in favour of the investor.

[84] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669.

It is a narrow line between that form of structure and a structure in which the investor is specified as being entitled to a vested proprietary right by way of trust in the investment fund throughout the life of the fund, perhaps as security for an entitlement to receive an amount of money on the maturity of the contract where payment of the full amount would constitute a full discharge of all rights under the trust. In such a situation, the investor's original money is spent by the investment manager to acquire investments of the type specified in the parties' agreement, which investments may in turn by exchanged for other investments or sold for cash. The investor's right as beneficiary will be governed by the contract as well as the terms of the trust. Those rights will be limited to whichever property makes up the trust fund from time-to-time. Furthermore, those rights will be capable of being expressed only as a given proportion of the total fund; that proportion may itself change to correspond with the number of investors in the mutual fund from time-to-time where that fund permits investors to enter and exit the fund at a time which suits them and which is not limited to some agreed maturity date.

Two things might be said about these proprietary rights. First, that they are subsidiary, in commercial terms, to the investors' contractual rights to receive payment in cash corresponding to their share of the fund's profits. Consequently, they add little to the arrangement other than a form of security entitling the investor to prevent dealing with the trust fund in breach of agreement. Second, that the trust fund itself is really just a creature of contract in which the beneficiary is not able to identify from time-to-time any particular assets which are held on trust exclusively for her but rather in which the beneficiary is only able to identify a value to which she is entitled. Therefore, it is said that many of these arrangements are no more than contracts. Indeed, this corresponds to the contention that all trusts are in fact merely contracts used for asset management or tax avoidance purposes. However, it is suggested that this is to overstate the argument and to accord overmuch significance to the presence of a contract in investment or financial transactions. In relation to unit trusts it has been said that the scheme manager and the unit trustee constitute trustees precisely because the investor is recognised as being a beneficiary under a trust of that arrangement.[85] The trust, in that context recognised (rather than imposed, it is suggested) by statute, does more than add an aura to the transaction. What that trust does is to secure the rights of the investor to some cash flow by expressing that throughout the life of the transaction the investor has proprietary rights either in some calculable portion of the trust fund or, less frequently, in some separately identifiable asset forming part of the total fund. Therefore, it is of the essence of such arrangements that there are two components: first, the contract which sets out the parties' commercial objectives in relation to cash flow and, second, the trust which secures the investor's position by vesting in each investor some proprietary right in the pooled property.

The suggestion that the trust is necessarily just a contract is mistaken at a number of levels. First, it is said that every trust involves a contract and therefore the trust can be said to be some merely component feature of the contract obviating the need for any formality in the law of trusts to validate that trust. It is, however, simply not the case that every trust involves a contract. Trusts implied by law – such as constructive trusts and resulting trusts – arise by operation of law whether or not there is a contract. In

[85] Hudson, *The Law on Investment Entities*, 2000, 191 *et seq*.

relation to express trusts, there is no requirement that a settlor enter into a contract with her trustees on declaring a trust. It may be that in commercial and chancery practice the well-advised trustee will insist on a contract limiting its obligations and identifying its fees but there is no requirement for the creation of such a trust that this is done. Indeed, the familiar will trust in which the testator appoints his executors to act as trustees of his estate, will frequently identify family members as trustees without entitling them to remuneration or the protections of the law of contract. Similarly, implied express trusts of the kind found in *Paul v. Constance*[86] or *Re Kayford*[87] are identified by the courts as being the product of an intention to create a trust (hence, an express trust) and yet created by the settlor in complete ignorance of the equitable notion of the trust (hence, also an implied trust). In such express trusts, there is no possibility of contract because none of the parties knew that they were creating any such legal relationship.

There is a second strand in the refutation of the possibility of the trust being subsumed into the law of contract. A contract constitutes a personal relationship between its parties. As part of that contract, the parties may agree to confer benefits and obligations on one another which would be defined as being proprietary. However, that the contract contains provisions which create proprietary relationships, it is not the law of contract which governs the nature and extent of those relationships: instead it is the law of property. It is the law of property which will decide what form of relationship is created: trust, fixed charge, floating charge, lien or bailment. It is the law of property which will allocate the right contained in that contract between these proprietary, possessory and other, non-proprietary categories. It is the law of property which gives effect to these rights just as it is the law of property which would give effect to other similar rights not contained in a contract. The distinction between contract and property is precisely that it is the law of property which gives effect to such claims to the use or ownership of property whereas the law of contract is properly silent on such matters.

It is this close inter-action between property and contract which gives rise to the difficult question whether a trust is in truth concerned with obligations or whether it is concerned with property. In truth, the answer is that it is concerned both with property and with equitable obligations. The beneficiary has a right, under English law, against the property held in the trust fund from time-to-time such that those persons holding the entire equitable interest are entitled to call for the delivery of the absolute interest to them or to direct the trustee how to deal with the property otherwise. The sense in which those rights relate to equitable (as opposed to common law) obligations is in the sense that the beneficiaries are entitled to sue the trustee personally for any breach of trust to enforce their proprietary rights or to receive some other property of equivalent value, or to sue third parties who have dishonestly assisted in the breach of trust or who have received the trust property knowing of such breach of trust. These latter rights entitle the beneficiary to an account from the defendant trustee or third party for an amount of money equal to the loss suffered by the trust fund – those third parties to the trust accounting as though they were construed to have been trustees. The source of these rights in the beneficiaries, however, are found in their original proprietary relationship with the trust fund which would have continued whoever

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might have been acting as trustee from time-to-time, which would be enforceable as rights against whoever was trustee at the time of any breach of trust and which are enforceable against whatever property is identifiable as forming part of the trust fund from time-to-time. It is this mutability in those rights which demonstrates that their source cannot be in any particular right against any particular person because they are rights which would be enforceable against any person who intermeddled with the beneficiaries right to free enjoyment of the relationship with the trust fund.

A NEW ORDERING OF TRUSTS

The modern nature of the trust

When seeking to understand the genus "trust", it is common to talk of a taxonomy of the subject. This is something of which I have been guilty myself in the past.[88] To use the term "taxonomy" suggests a scientific approach which will dissect the various forms of trust and categorise them as though butterflies or beetles or flowers according to their characteristics. Trusts, however, do not correspond well to such a project. The quintessence of the trust is its very unpredictability. It is open-textured. To speak of taxonomy is, perhaps, to miss the point.

Nevertheless, the trust is an equitable institution: one whose formal requirements have hardened over time into something resembling a contract in that the rules for its creation, operation and termination have become concrete.[89] This development is due both to its commercial application and its long-standing use as a means of providing for the welfare of rich families in marriage settlements or will trusts. Both of these contexts required certainty in the use of trusts with the result that the general equitable notions have been pushed into the background.[90] This section suggests that the bright line tendency[91] of much of the law on express trusts towards ever stricter rules means that there is a need for a new division in the categories of the law of trusts. The increasing prominence of pension funds and investment funds based on trusts law principles requires that there be new principles of trusts developed to match the regulatory rules applied to such funds. That is aside from the equally difficult developments in the treatment of trusts implied by law.[92] This essay attempts to outline some of the ways in which that re-drawing of principles could take effect.

What this discussion illustrates is the one core idea underpinning the entirety of this essay: the world is a fundamentally complex place in which it is not possible to develop one rule which will fit all circumstances. Rather, the classical understanding of equity as a philosophically-valid means by which justice can be meted out in individual circumstances is the only way of rising to the challenge of the multiple

[88] Hudson, *Equity & Trusts*, 2nd edn., Cavendish Publishing, 2001, . See now Hudson, *Equity & Trusts*, 3rd edn., Cavendish Publishing, 2003, , with reference to 'The Ordering of Trusts'.
[89] Para. 7.x.x.
[90] Before the decision of the majority in *Westdeutsche Landesbank v. Islington* [1996] AC 669 reclaimed them.
[91] Gardner .
[92] Considered in Part 4.

applications of the trust in our late modern world.[93] Within that argument is bound up an understanding that a contextually-valid taxonomy of the law of trusts must now recognise the distinctions between public-interest and private-welfare trusts; consciously- and unconsciously-made express trusts; familial trusts and commercial trusts; as well the more established divisions between express and implied trusts, or between public and private trusts. This chapter attempts such a taxonomy, based on the divisions of the subject matter made in this book up to now: express trusts, implied trusts, welfare trusts and commercial trusts.

Towards a new ordering of trusts

The proper delineation of the law relating to the trust and that relating to the fiduciary is a vexed business. There are many more manifestations of these creatures than there are categories adequate to express their very particular characteristics. The purpose of this essay, if Shakespearians among you will permit me, is to give to airy nothing a local habitation and a name. Some further sub-division of the trust is required beyond the well-established triumvirate of express, resulting and constructive trusts. That task is the business of this essay. Allied to that will be a necessary re-comprehension of the nature of the concomitant fiduciary responsibilities.

Express trusts

Conscious and unconscious express trusts

Within the category of express trusts there is scope for division between those trusts which are created deliberately by the settlor and those trusts which are arise as a result of the court's interpretation of the true intentions of the settlor. This distinction should be picked apart carefully. On the one hand there are those trusts which are, in the most obvious scenario, drafted by a lawyer and executed as a deed constituting an express declaration of trust. This form of trust I would designate a *conscious express trust*. This is a deliberate and institutional act in which people create trusts - similar to commercial trusts and to pension funds. It is this form of trust which is most obviously an express trust.

Then there is the further situation in which the settlor is not aware that she is acting a settlor but where the court chooses to interpret the creation of a trust as being her intention. A good example would be *Paul v. Constance*[94] in which a couple, described as "not sophisticated" people, created a bank account in which they deposited joint moneys with Mr Constance's intention expressed to Mrs Paul to be that as common law owner "the money be as much yours as mine". It was clear that neither person had any understanding of the concept of the trust when they created this arrangement. However, the court was prepared to hold that their true intention was to create an express trust. This form of trust I would dub the *unconscious express trust* because the settlor does not understand (or, is unconscious of) the legal nature of her actions.

[93] A line of argument essayed in chapter 37 below.
[94] [1977] 1 WLR 527.

Nevertheless, the court attaches the label of "express trust" to them because the substance of the parties' intentions equates to the legal category of trust.

It is important to understand that these two categories of express trust exist. Between the two clear cases considered above will fall a range of deliberate acts in which the protagonists may or may not have intended to create a trust. That they are both express trusts is significant because the formalities and certainties attaching to an express trust will have to be observed whereas they would not need to be a trust implied by law.[95] However, it is also important to know that these trusts are distinct from constructive trusts, even though there is clearly a narrow dividing line between the unconscious express trust and the constructive trust in many cases: both trusts being imposed by the court, in truth, in recognition of a factor affecting the conscience of the common law owner of the property.[96] Similarly, there may be contexts in which someone seeks to dispose of her rights in property which she had previously held absolutely in circumstances in which a resulting trust might arise, (for example, if not all of the equitable title has passed).[97] In such a situation the dividing line between a resulting trust and an unconscious intention to create an express trust may be similarly difficult to identify.

It is important to know whether or not such an express trust has been created because only then will it be possible to know the nature of the trustee's obligations as to the investment and treatment of the trust property. The principle distinction between the express trust and the trusts implied by law is that the implied trusts do not have to fulfil the formalities requisite for the establishment of such an express trust. And yet the unconscious express trust arises simply because it would be unconscionable to deny the claimant some interest in the trust fund given the settlor's unconscious declaration of trust. Perhaps this form of unconscious express trust could be dubbed as an "implied trust" in this sense, thus attracting the benefits of s.53(2) of the Law of Property Act 1925.

Distinguishing between familial and commercial trusts

The other significant distinction to be made in relation to express trusts is between trusts in the family context and trusts in the commercial context.[98] The genesis of the modern express trust was in the early family settlements which were drafted by lawyers after lengthy consultation between the families "supplying" the bride and groom. These settlements allocated rights to land and to income between the married couple and other members of the extended families born and yet unborn: thus reflecting the notion of the trust as a 'gift over the plane of time'.[99] As a result the principles that trustees are required to do the best possible for the beneficiaries[100] and that the trustees are not entitled to take any benefit from their office[101] are founded on

[95] In particular the beneficiary principle and the formal requirements in s.53(1) of the Law of Property Act 1925.
[96] *Westdeutsche Landesbank v. Islington* [1996] A.C. 669.
[97] *Vandervell v. IRC* [1967] 2 WLR 87; *Westdeutsche Landesbank v. Islington*, *supra*.
[98] *Target Holdings v. Redferns* [1996] .
[99] Moffat .
[100] *Cowan v. Scargill* [1985] Ch 270.
[101] *Keech v. Sandford* (1726) Sel Cas Ch 61.

the need in the family context to protect the wealth of future generations from the risk of being defrauded by unscrupulous trustees. The continued sensitivity of the courts for beneficiaries constitutes a determination to protect the private property rights of the upper middle classes.

Commercial express trusts do not need to rely on this level of sensitivity for the needs of beneficiaries. Typically trusts created between commercial parties are effected to protect property dealt with as part of a contract. As such the terms of the trust are frequently contained in the contract or are collateral to that contract. There is usually no need for equity to intervene on behalf of the beneficiaries to require that the trustees generate a sufficient investment return for the beneficiaries and so forth because the contract will deal with such matters. Similarly, if the parties are commercial parties acting at arm's length there is no need for equity to prefer one party to the other, for example, by assuming that the beneficiary is always entitled to more sensitive treatment in the way that the law of trusts is prone to do. The principles which cover the law on trusts of homes are concerned with questions of social justice which do not apply in the same way in relation to purely commercial contracts. And yet, ironically, it might be thought that the common intention constructive trust has more to offer in commercial situations where the terms of a contract offer clear evidence of the common intentions of the parties as compared to the search for a phantom common intention which is conducted in the trusts of homes cases to which that doctrine currently belongs.[102]

The "complex commercial trust"

One form of trust which will be significant in this discussion is the *complex commercial trust* which combines ordinary investment contracts (frequently similar to partnerships being used for business purposes in the sharing of losses and profits) with an express trust. The unit trust, for example, combines an investment contract between the investor (or, participant) and the investment manager. However, the unit trust is required to vest equitable interest in the scheme property in the participants[103] and therefore necessarily constitute express trusts. Similarly, in considering eurobonds the investor[104] is concerned to acquire a speculative return on her investment and the existence of a trust is collateral to that intention.[105]

In consequence, these forms of trust are not formed solely on the basis of conscience in the manner set out in *Westdeutsche Landesbank v. Islington*[106] but rather arise out of commercial convenience or regulatory requirement. Akin to the *Quistclose* trust,[107] it is not easy to categorise these trusts as ordinary express trusts. Rather, the trust device is used either by the judiciary or by commercial practice to reach a commercially desirable result. The trust is also used to provide security for complex

[102] Para. 14.x.x.
[103] Financial Services and Markets Act 2000, s.237(1).
[104] Hudson, 2000, chapter 6.
[105] Although the trust created to hold the benefit of a eurobond transaction is required by the listing rules and forms no part of the common intention of the parties beyond compliance with those regulations: *ibid*.
[106] [1996] A.C. 669.
[107] [1970] AC 567.

financial transactions.[108] In this context, the trust structure made generally available by the law is co-opted into the structure to allow for assets to be pledged to secure a range of transactions. In such situations, the form of conscience which the courts are apt to provide ought to recognise both the contractual understanding reached between the parties and also the capabilities of such professionals to assess and allocate the risks of such transactions between them. Therefore, the strict liability under breach of trust[109] and constructive trust[110] principles generated by the courts of Equity in the mid-nineteenth century to protect family wealth from unscrupulous trustees ought perhaps to be applied equally liberally only where the contractual context permits it: that is, where the parties have allocated those risks associated with proprietary title between them.

Nevertheless, the property relationships expressed by *complex commercial trusts* are still those of trustee and beneficiary – albeit that the trust is subsidiary in the eyes of the parties to the entitlement to receipt of a cash flow from the underlying investment. Indeed, the trust here may be performing one of two purposes collateral to the main contract: either providing security for the participants' underlying obligations or expressing the investor's participation in a mutual fund which is held on trust for the investors in common by the scheme manager or, in the case of a unit trust, by the trustee. In this latter case it is not intended that the participants will seek to establish title in the underlying investments. Rather, having selected their level of risk appetite, the investors are typically content to leave it to the scheme manager to select investments within the confines of the prospectus which marked out the fund's investment purposes. The investors are the ultimate rentier capitalists in this sense: they hand their capital over to a manager who acts as their fiduciary in selecting the investments whereas the capitalists themselves take no interest at all in the nature, extent or effects of the investment provided that it generates sufficient income for them and is performed without any breach of duty on the part of the fiduciary. However, their distance from the precise composition of the fund is of no matter because they retain proprietary rights in it no matter what.

Consumer trusts and regulatory suitability

This form of trust is distinguished from the *complex commercial trust* considered above only to the extent that the beneficiary under the *consumer trust* is comparatively inexpert in the particular form of investment which the trust is proposing to make and where the beneficiary is not seeking to bear the risk of the trust investment. An example of such a trust might be an ordinary pension fund in which the investor is compelled by economic circumstance – primarily the withdrawal of state pensions maintained at the level of a living wage – to make an investment. In financial regulatory practice it is now required that sellers of financial instruments assess their clients with regard primarily to their expertise in the instrument which is being sold. The manner in which the product is sold and the risk explained to the client is something which the seller is obliged to consider, as well as the intrinsic suitability of the product for that particular client. Unlike the complex commercial trust, it is not possible to bind the parties to notions of freedom of contract and typical

[108] Hudson, 1998, 265; Benjamin, 2000.
[109] *Re Massingberd* ; *Re Dawson* .
[110] *Keech v. Sandford* ; *Boardman v. Phipps* .

market procedures. Rather, the beneficiary/investor is necessarily uneducated in the milieu and so dependent on the trustee who operates not in accordance with ordinary trusts law theory as an impartial fiduciary but rather as someone who necessarily stands to earn a fee (at the very least) from its fiduciary office.

Financial regulation and ombudsmen have replaced trusts law theory's understanding that the beneficiary will protect herself by means of litigation enforcing the terms of the trust. Rather, financial regulation is required to maintain the integrity of markets and the beneficiary's role is reduced to that of an infant awaiting gifts from on high. The necessary limitation on ordinary trusts law principles is due in no small part to the trustee/seller's limitation of its own liabilities by means of the investment contract entered into with the client. Contract, in this context, connotes the allocation of risk away from the fiduciary to the beneficiary.

In relation to trusts in which one party is acting in a professional capacity and the other party in a purely personal capacity as a consumer, then equity needs to be sensitive to the need for the fiduciary to act suitably. This notion of "suitability" is borrowed from financial regulation and requires a financial institution selling financial products to consider not only the suitability of the product for the buyer – deciding whether the risks posed by that product are appropriate to the investor's situation – but also to ensure that the manner in which the product is sold is also suitable in the context – deciding whether that person has sufficient expertise to understand the risks involved with it, for example.[111] What is needed in this sense is an understanding that equity will need to balance not only the need to protect the beneficiary in a position of dependence on the trustee, but also the contractual context in which consumers will generally acquire rights, *inter alia*, under s.137 of the Consumer Credit Act 1974 in relation to exorbitant credit bargains. It is suggested that a notion of suitability is the only means by which the protection of the consumer can be balanced with the contractual rights of the supplier.

Quasi-trusts

The topic "quasi-trusts" remains a vague one not embraced whole-heartedly by the literature. For me they encapsulate a satellite community of unrelated equitable doctrines which appear, at many levels, to operate in ways similar to trusts. Proprietary estoppel is the first.[112] What is unclear about proprietary estoppel is the nature of the right to which it gives rise. The options are, primarily, twofold. Either proprietary grants an entirely new property right to the claimant or it grants simply a claim exercisable only by the claimant[113] against the defendant which prevents the claimant from suffering some detriment at the hands of the defendant. As an illustration of the former possibility the case of *Re Basham*[114] illustrates a claimant who had been promised that she would be transferred absolute title in the deceased's home in the deceased's will. In reliance on that representation she performed a

[111] Hudson, 1999:2, 78, 200; Hudson, 1999:3, 84.
[112] Or, perhaps, more generally, equitable estoppel: Cooke, *The Modern Law of Estoppel*, Oxford University Press, .
[113] And therefore, to that limited extent, a purely personal claim entitling the claimant potentially to receive some right in property.
[114]

number of acts of detriment either directed at the property itself or in direct reliance on that representation. In the event, the deceased failed to leave her any such right in a will. The claimant was entitled to the fee simple over the property. This was a new property right in the sense that the claimant had never held that right over the property previously.[115] By contrast, it may that we explain the claimant's entitlement here as being a purely personal claim against the defendant to prevent the claimant from suffering uncompensated detriment as a result of the defendant seeking to renege on his earlier representation. This would seem to accord with a general notion of Equity estopping the defendant from seeking unconscionably to transfer title in the house to some other person.[116] An increasing number of cases have suggested[117] that proprietary estoppel is very similar to constructive trust in that it responds to the defendant's unconscionable behaviour by requiring the defendant to hold property on trust for the claimant. There are complications relating to the burden of proof[118] which lies differently in relation to constructive trust and proprietary estoppel. That aside, the difference between the two doctrines would appear to be the possibility that proprietary estoppel, as a form of equitable remedy, will not transfer equitable title to the claimant by operation of law, preferring in some cases to make only awards of money[119] or equitable leases.[120] In that sense, proprietary estoppel might only be said to operate as a quasi-trust in the sense that the owner of property, the defendant, is obliged by Equity to deal with that property in accordance with the order of the court. Until the appropriate transfer of rights is performed, it must be the case that the defendant is a constructive trustee over that property in favour of the claimant.

Second, the *Quistclose* trust.[121] This form of trust is explicable as a form of commercial trust relating specifically to loan contracts under which the loan is made for an identified purpose.[122] The separation of this form of trust into a distinct form of trust relating to commercial situations may require the recognition of an expanded category of commercial trusts which relate specifically to situations relating to title in assets used as part of a transaction between commercial people. The sentiments of many of their lordships in *Westdeutsche Landesbank v. Islington*[123] indicate a similar understanding of a need for distinct principles to deal with non-family situations. The *Quistclose* trust is a complex beast which can be described variously as a species of resulting trust,[124] constructive trust,[125] as an express trust subject to a power to use the money,[126] or as a form of trust arising *sui generis*.[127] A further suggestion has been made that it is a form of quasi-trust, perhaps on the basis that it arises *sui generis*.[128] One difficulty which arises with a *Quistclose* trust is how the trust takes effect when the money which is to be held on trust has, necessarily, been dissipated on purposes

[115] See also *Pascoe v. Turner* .
[116] See Cooke, *The Modern Law of Estoppel*, Oxford University Press, .
[117] *Yaxley v. Gotts* ; cf. *Stokes v. Anderson* .
[118] .
[119] *Baker v. Baker* .
[120] *Inwards v. Baker* .
[121] *Barclay's Bank v. Quistclose Investments Ltd* [1970] AC 567.
[122] On which see Worthington, 1996, 43.
[123] [1996] A.C. 669.
[124] *Barclays Bank v. Quistlose* .
[125] *Carreras v. Rothmans*
[126] Thomas, ; Hudson, 2001, .
[127] Hudson, 2001, .
[128] *Twinsectra v. Yardley* [1999] Lloyd's Rep. Bank 438, .

other than those stipulated in the loan contract. This would appear to offend against the requirement that there be sufficient certainty of subject matter generally[129] and more specifically in relation to money.[130]

Third, mere equities such as that arising from *Barclays Bank v. O'Brien*.[131] A complex form of right may arise as a result of the setting aside of a mortgage contract in *O'Brien*.[132] It is possible that a person ("the cohabitee") is required by a mortgagee to sign a mortgage agreement as either co-mortgagor or surety even though it is unclear at that stage whether or not she has any property rights in the home. This may even be prudent on the part of the mortgagee to ensure that the cohabitee is made a party to the contract. That cohabitee may, nevertheless, prove to have no rights in the property ultimately. The right to have the mortgage set aside is then a right which entitles the cohabitee to set aside another person's property right (i.e. the mortgagee's rights to possession and sale of the property) and therefore might be a right which would consider to be proprietary in and of itself. Furthermore, there is the question whether or not such a right is itself capable of registration, for example in the event that the mortgagee sought to transfer the benefit of its rights under the mortgage contract to a third person. It is suggested that such a transfer to an associate would be inequitable as merely a means to circumvent any ruling that the mortgage be set aside. Further, it is suggested that it would be unconscionable for the mortgagee to seek to transfer to a third person a right which the mortgagee did not have itself;[133] perhaps as an extension to the principle *nemo dat quod non habet*. It is suggested that this right therefore falls either to be analysed as an interest which overrides the mortgagee's rights to possession and sale on the grounds of the cohabitee's occupation of the property[134] or potentially to be registered as a minor interest. There remains also the difficult issue as to whether or not a court could order a sale of the property under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 so as to realise its rights against the other mortgagor's rights in the property.[135] It is suggested, on the basis that the mortgagee's rights are set aside *in toto*, that the mortgagee ought to be restrained from seeking to enforce its security through the back door by means of using an order for sale as a person interested in the property. Consequently, the cohabitee seems to acquire rights in equity against the common law rights of sale and possession of the mortgagee, thus making the mortgagee a quasi-trustee of those rights in favour of the cohabitee.

Trusts implied by law

Much of this essay has focused on the overlap between commercial activity and express trusts. In such situations the courts have shown themselves prepared to interpret express trusts and the liabilities of trustees in accordance with contract. Those trusts which arise by operation of law, however, arise on different bases and fall to be analysed, if they are to be analysed at all coherently, by means of a much

[129] *Re Goldcorp* [1995] AC 74.
[130] *MacJordan v. Brookmount* [1992]
[131]
[132] *TSB v. Camfield* .
[133] Cf. *Abbey National v. Moss* .
[134] Land Registration Act 2002, .
[135] *First National Securities v. Hegerty* ; further to s.15 TOLATA 1996.

closer recognition of the basis of these responses in the difficult notion of conscience. The particular question of conscience is considered in detail below.[136] At this juncture it is sufficient to recognise that the doctrines of resulting trust and of constructive trust are responsive to a general notion of conscionable and unconscionable behaviour on the part of the legal owner of property or of other persons interfering with property belonging to another. These doctrines are coherent if viewed in that light. If an attempt is made to replace the general notion of conscience wholesale with other notions, whether restitution of unjust enrichment or notions of voluntary/involuntary dispositions,[137] then the existing division of material becomes immediately incoherent. Part of the beauty of the current division of material, it is suggested, is precisely that its concepts are broad and worldly enough to admit of the gamut of human activity without forcing it uncomfortably into conceptual straitjackets.

Resulting trusts

Frequently, trusts law questions revolve around ownership of property tout simple. The resulting trust operates as a long-stop such questions to ensure that there is no gap in the ownership of property.[138] That is, a resulting trust will arise automatically so as to declare that an equitable interest continues to be vested in a settlor where that settlor had failed to dispose effectively of the entire beneficial interest.[139] Similarly, a resulting trust will be presumed to exist where a person contributes to the acquisition of property: that presumption will stand unless it can be demonstrated that the parties had some other intention, such as that the money should have construed as a loan acquiring only personal rights to be repaid.[140] The presumptions bound up with resulting trusts also arise where property is transferred by a man to his wife or to his child – again, the purpose being to explain who takes title in that property when the evidence adduced by the parties is inconclusive of the matter. Whereas the restitution lawyers sought an expanded role for the resulting trust, its purpose has been limited to this narrow objective of filling gaps in the allocation of title.

Constructive trusts

The constructive trust in general terms

The categories of circumstance in which a constructive will arise are: generally where the defendant has knowledge of some factor affecting her conscience; in relation to unconscionable dealings with land; to support contracts to convey land and other property; in response to profits from unlawful acts such as receiving bribes, theft or killing; in response to fiduciaries making unauthorised profits; to reinforce common intention in relation to the acquisition of land; in response to secret trusts and mutual wills (it is suggested); in response to intermeddling with trust property; in response to dishonest assistance in a breach of trust; and in response to knowing receipt of property in breach of trust. This general statement needs to be refined to distinguish

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137 E.g. Swadling, 2002.
138 Ricketts and Grantham, 2000.
139 *Westdeutsche Landesbank v Islington* [1996] AC 669.
140 *Ibid*.

between those cases which are concerned with punishing defendants for their wrongful behaviour, those which are concerned to protect beneficiaries and those which are concerned with the allocation of property rights.[141]

The only general definition of conscience in this context is one based entirely on observation of the decided cases: no more certain principle exists than description. Elias explains the three aims of constructive trusts as being: perfection, restitution and reparation.[142] The constructive trust discussed by Elias is one that explicitly speaks in the language of gifts and which is of less use in commercial context.[143] The "perfection aim" is identified most clearly in *Re Rose*,[144] on the basis that the settlor's intentions should be given effect to.[145] The perfection aim concentrates on using the constructive trust as a means of perfecting the choices and contracts which individuals had sought to make but which have been found to be ineffective.[146] In Elias' view, the restitution aim is inherently less 'harsh' than the perfection aim and the reparation aim because the restitution aim does no more than 'remove superfluities in the defendant's hands' by transferring them back to their more justified owner.[147]

The more useful way to think of constructive trusts, it is suggested, is as an equitable response to a wrong – such wrongs being decided on the basis of a case-by-case approach in which the judge considers the morality of the defendant's behaviour and awards a response in accordance with the justice of the case. It is acknowledged that this is to advocate a remedial constructive trust – akin to the range of remedies awarded in cases of proprietary estoppel – in place of the purportedly institutional constructive trust currently favoured under English law.

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[141] First, we could categorise constructive trusts as falling into three broad categories of claim which exist solely to punish the defendant. First the liability of one who receives bribes to make good personally any loss made when investing those bribes,[141] the personal liability of a knowing recipient of property in breach of trust to account to the beneficiaries,[141] and the personal liability of a dishonest assistant to a breach of trust to account to the beneficiaries.[141] While the courts refer to these actions as being "constructive trusts" it would be better to consider them actions for equitable wrongs because there is no property held by the defendant on trust for the claimant. The only difference then between these claims and, for example, the constructive trust imposed on someone who kills another person unlawfully and profits from that killing, is that the killing constructive trust concerns identified property held on trust whereas the other claims are purely personal liabilities to account. Second, constructive trusts imposed to protect the defendant include unconscionable dealings with land; trustees making unauthorised profits; and intermeddling with trust property. In relation to all of these forms of constructive trust the court's focus is on protecting the beneficiaries' property rights above all else. As such the constructive trust supports the equitable rights and obligations bound up with some pre-existing express trust or fiduciary relationship. Third, constructive trusts imposed to allocate rights in property are again concerned primarily to avoid unconscionable conduct but they operate as an extension of property law primarily. They include contracts to convey land, common intention in relation to the acquisition of land, "doing everything necessary" to transfer title, secret trusts and mutual wills. In each of these contexts, the categorisation as a constructive trust is contested by the commentators. The commonality is the intervention of equity to enforce a trust relationship such that title is allocated between the protagonists on the basis of good conscience.

[142] Elias, 1990, 4.

[143] *Ibid*., 14.

[144] *Rose, re* [1952] Ch. 499, [1952] 1 All E.R. 1217.

[145] The issue arises how this analysis would work with reference to collateral contracted for but not actually delivered. For example, in the case of bankruptcy, would a trust be imposed over such collateral. In any event, would that be a constructive trust or a species of express trust?

[146] Elias, 1990, 9 n.2; Fried, 1981.

[147] Elias, 1990, 75.

Definition of constructive trusts

There are a great many examples of the constructive trust. Those categories identify constructive trusts being imposed in the following circumstances:

> in response to unconscionable behaviour;[148]
> to enforce agreements: (a) contracts and (b) voluntarily assumed liability;[149]
> in response to abuse of fiduciary position;[150] and
> where intermeddlers are construed to be liable as though trustees.[151]

Before essaying such a programme of categorisation, however, it is worth recalling the words of Edmund-Davies LJ in *Carl Zeiss Stiftung v. Herbert Smith & Co.* that

> "English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case might demand."[152]

This statement indicates that the constructive trust is not a certain or rigid doctrine. Rather, its edges are blurred and the full scope of its core principles are difficult to define. However, in *Paragon Finance plc v. DB Thackerar & Co*[153] Millett LJ did attempt a general definition of the doctrine of constructive trust:

> 'A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.'[154]

It is suggested that this simply leaves the notion of constructive trust in a similar position to that which went before. What is suggested, however, in the discussion immediately following this, is that there is a general principle to which all constructive trusts can be said to correspond.[155] That principle correlates with the core role of equity as a jurisdiction which acts *in personam* against the conscience of the individual defendant.[156] The jurisdiction based on conscience finds its roots in the Courts of Chancery such that the judges developed the principles of equity derived from the authority of the Lords Chancellor. From the time of the Tudors the Lord Chancellor was identified as being the Keeper of the Queen's Conscience,[157] through whom the monarch's inherent divine authority to dispense justice was increasingly

[148] Para .
[149] Para .
[150] Para .
[151] Para .
[152] [1969] 2 Ch. 276, 300.
[153] [1999] 1 All ER 400.
[154] Cf. *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669.
[155] Para .
[156] McGhee, *Snells' Equity*, 30th edn., 2000, London: Sweet & Maxwell, 41.
[157] A title identified closely with Sir Christopher Hatton in the reign of Elizabeth I.

exercised.[158] In time, the authority to hear the writs and actions which grew out of that office were devolved onto the Chancery courts. The jurisdiction of the modern doctrines of equity which act *in personam* against the defendant is a development of this early conception of "conscience". In this modern form it identifies as its propositus the defendant and, in relation to unconscionable dealings with property, will impose a constructive trust where there is knowledge on the defendant's part of any factor which affects his conscience in relation to that property.[159]

The core notion of the constructive trust

Constructive trusts arise by operation of law such that the defendant is construed to be liable as a trustee[160] in circumstances in which the defendant has knowledge of factors which affect his conscience and so justify the imposition of such liability.[161] Liability as a constructive trustee can be either proprietary or personal.[162]

That the constructive trust is said to arise by operation of law means that it does not arise in furtherance of the intentions of the parties in general or any settlor in particular.[163] However, there may be situations in which a constructive trust is imposed to ensure performance of a specifically enforceable contract[164] or otherwise to prevent a defendant from reneging unconscionably on some other form of voluntary agreement.[165] In such situations it might be said that the constructive trust is being imposed in furtherance of some demonstrable agreement, arrangement or understanding between the parties;[166] the more significant point is that the imposition of the constructive trust does not itself require the consent of all material parties.[167] Rather, the constructive trust, in general terms, is imposed as a response to some unconscionable act of the defendant related to property,[168] whether or not that property was formerly part of a trust fund if it accrued in conflict with some fiduciary office.[169] This chapter considers both the manner in which constructive trusts arise further to a general principle of responding to unconscionable actions in general terms[170] and the circumstances in which constructive trusts have been imposed by the case law by extrapolation from those general principles.

Proprietary constructive trusts arise such that the defendant is taken to hold identified property on trust, whether because the defendant occupied a fiduciary relationship in

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[158] G. Thomas, "James I, Equity and Lord Keeper John Williams" (1976) *English Historical Review* 506.
[159] *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] AC 669.
[160] Cf. *Soar v. Ashwell* [1893] 2 Q.B. 390, 393, *per* Lord Esher MR.
[161] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669, *infra*.
[162] Para .
[163] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669.
[164] *Chinn v. Collins* ; *Neville v. Wilson* .
[165] *Banner Homes* ; *Pallant v. Morgan* .
[166] E.g. *Lloyds Bank v. Rosset* ; *Grant v. Edwards* ; *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669, *infra*.
[167] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669; *Banner Homes* ; *Lonrho v. Al Fayed* ; etc..
[168] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669.
[169] *Boardman v. Phipps* ; *Reading v. Attorney-General*; *Attorney-General for Hong Kong v. Reid* ;
[170] Set out at para .

relation to the claimant[171] or because the defendant has acted knowingly contrary to conscience such that a constructive trust is imposed for the first time.[172] It is suggested that proprietary constructive trusts imposed on persons who did not formerly occupy a fiduciary office operate by means of construing that person to have acted in a way in which the imposition of such a trust is appropriate and that the constructive trust itself operates so as to make that person liable to treat that constructive trust fund as though he had been appointed an express trustee of it.[173] Such constructive trusts of either type are described as being "institutional" and to arise by operation of law, which is to say that such constructive trusts are considered to take effect from the date of the activity which was contrary to conscience and not from the date of any court order. Therefore, the English institutional constructive trust is said to be different from the remedial form of constructive trust favoured in some US jurisdictions in which the trust does take effect from the date of the court order and the nature of which is at the discretion of the court.[174]

Personal liability to account to the claimant as a constructive trustee arises in two circumstances: first, where the defendant has received trust property into his possession or control knowing that he did so further to a breach of trust[175] or, secondly, where the defendant has dishonestly assisted in a breach of trust without receiving any such property.[176] That such a person is described as being a constructive trustee is to say that that person is construed to be liable to account to the beneficiaries of a trust potentially for any loss suffered by that trust as a result of the breach of trust: the extent of the liability to make good the loss suffered by the trust is equivalent to the liability which would be faced by some person who was an express trustee of that trust.[177] Hence, the assertion that such a person is *construed* as being a trustee of that trust. In neither circumstance, however, is there any property which is held on trust by the defendant.[178] Rather this form of liability is purely a personal liability to account to the beneficiaries for their loss.[179]

Public trusts

Charitable trusts

The only well-established form of public trust at the time of writing is the charity: itself a collection of very specific rules relating to a particular form of institution

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[171] *Boardman v. Phipps* .
[172] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669.
[173] As to the extent of a constructive trustee's fiduciary duties, see para [ ] below.
[174] *Westdeutsche Landesbank v. Islington L.B.C.* [1996] A.C. 669, considered below at para [ ] .
[175] *Twinsectra v. Yardley* [2002] UKHL 12, HL, [2002] 2 All E.R. 377; *Bank of Credit and Commerce International v. Akindele* [2001] Ch 437.
[176] *Royal Brunei Airlines v. Tan* [1995] 2 A. C. 378; *Twinsectra v. Yardley* [1999] Lloyd's Rep. Bank 438, CA.
[177] *Target Holdings v. Redferns* [1996] 1 A.C. 421, [1995] 3 W.L.R. 352, [1995] 3 All E.R. 785.
[178] *Twinsectra v. Yardley* [2002] UKHL 12, HL, [2002] 2 All E.R. 377.
[179] This personal liability has led some to describe this remedy as being a wrong, akin to tort: Birks, 2002. That this form of liability is remedial rather than institutional might be true – depending on one's view of whether the liability for breach of trust arises institutionally or remedially. However, to equate that liability to wrongs such as tort is to overlook the fact that the remedy is based on the equitable remedy of account which does not correspond to common law notions of reasonableness and foreseeability.

formalised in Elizabethan period in the 1601 statute of charitable uses. These charities were administered predominantly by religious bodies and were accepted by the common law as being valid charitable purposes where they sought to alleviate the poverty of the peasant class, to provide education effectively for an emergent middle class and to do other works for the general public benefit. The question of conscience does not apply in these contexts: instead their common feature is perhaps a desire to act in the public service.[180]

Welfare trusts

The development of charities filled the gap left by a lack of effective state provision for the poor, for education and for the public benefit before the creation of the welfare state in 1945. That development asserted the responsibility of the state to provide for citizens and replaced the need for private capital to bridge that gap. As importantly it ensured that structured state provision would meet social needs rather than the uncoordinated impulses of charities and their subscribers. At the time of writing the wheel looks set to turn again: welfare state provision is being rolled back and citizens are required to provide for their own welfare after retirement and also before in many instances involving private healthcare and so forth. Thus, "welfare trusts" in this sense refer to pension funds and co-operatives which provide for the welfare of individuals by virtue of the voluntary contribution of their own property and also to bodies corporate like NHS trusts which provide welfare services within the welfare state. It is suggested that the fiduciary principles developed for these forms of trust ought to reflect a need to maintain the welfare of their objects and not concerned to maximise investment return (as with private express trusts).

Public interest trusts

The division between public and private trusts has not been the only division recognised by the law of trusts. In *Kinloch v. Secretary of State for India*, Lord O'Hagan advanced a division between two forms of trust, private trusts and trusts in a "higher sense": [181]

> '… the term "trust" is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction but also other relationships such as the discharge under the direction of the Crown of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind are described … as being "trusts in the lower sense" trusts of the latter kind … "trusts in the higher sense".'

Thus a division is made between ordinary private trusts (that is, trusts of the lower kind) and trusts in which some person in entrusted in a general sense with the use of some public property (trust in the higher sense). The case law has generated a notion that public bodies providing a service may owe fiduciary duties not only to those who

[180] In relation to poverty, that public service is effectuated by relieving the poverty even of close relatives.
[181] (1882) 7 App. Cas. 619, 625-6, 630. See also the support lent to this analysis in *Tito v. Wadell No.2* [1977] Ch. 211, 216, *per* Megarry V-C; and *Bartlett v. Barclays Bank, op cit.*, 188.

pay for the service (for example, through local taxation) but also to anyone who might use that service.[182] In consequence, the fiduciary duties which might be owed by the officers of public bodies (of fairness between categories of "beneficiary", not to breach the trust, etc..) extend to an uncertainly broad category of person. It appears that, for example, a transport authority must take into account the needs of regular commuters but it is not clear whether those same duties extend to anyone who might use that service only very occasionally or even to tourists using that transport system. All that could be said for this extension of fiduciary rights is that it might generate a concept of "acting in the public interest" when officers of public bodies consider the exercise of their powers. This would equate roughly to the obligations on private trustees to consider the nature of their trust power and the manner in which it should be exercised.[183]

The new landscape

The upshot of the foregoing is either that the legal usage of the term "trust" should be restricted to those institutions which are currently recognised by the law as constituting trusts, or that a new category of fiduciary duties must be encompassed by the jurisprudence. Once it is understood that within express trusts there is room for sub-division, then the way is open for a broader redefinition. Understanding the distinctions between the categories will be important so that the trustee will know what obligations will come into existence at what stage. For example, in relation to unconscious express trusts and to constructive trusts, it is not clear at what point the general fiduciary duties to act fairly or the duties to generate an investment return for the beneficiary ought to bite given that the trustee will typically be unaware of her fiduciary office until the date of the court order. Similarly, it is not clear whether or not such obligations ought to apply at all.

The utility of the development of the public interest trust as a form of trust incorporating those applicable fiduciary duties is to develop that facet of the law on which this book places much reliance: it ability to generate models which can be used by policymakers and by ordinary citizens to facilitate their social inter-action.[184] In this way, social welfare initiatives like housing action trusts and NHS trusts[185] can enable effective service provision and also to enable users of their services to effect some control over them. Equitable estoppel is the natural counterpoint in equity as a flexible tool of justice, as compared to the ever more institutional express trust and constructive trust.[186] In consequence, I would suggest that such re-definition and re-ordering of trusts law concepts is both important and timely.

Thinking of the trust as an equitable response

[182] *Bromley v. GLC* [1983] AC 768.
[183] See *Re Hay's S.T.* [1981] 3 All ER 786 in which Megarry J. distinguished variously between personal powers, mere powers, fiduciary powers, discretionary trust powers, and fixed trust powers.
[184] Possibly akin to those in *Bromley v. GLC* [1983] AC 768.
[185] Whether you approve of them politically or not: a larger question deferred until the concluding chapter.
[186]

Perfectly possibly many readers familiar with the debates about trusts law have already read this sub-heading as "the trust as an equitable *remedy*" and not "the trust as an equitable *response*". If it were said that the trust were an equitable *remedy*, then that would be to argue with clear authority to the effect that trusts are institutional and not remedial. Rather, to describe a trust as an equitable response is to suggest that trusts are only capable of being understood as responses to situations in which Equity considers it necessary to act. Indeed, this essay does not argue that all forms of trust correlate neatly within this notion of responsiveness, rather it is suggested that it offers a more comprehensive means of understanding trusts as being orientated around the conscience of the trustee and not around any extraneous conceptual categories such as institutional or remedial trusts and so forth.

The binary division between institutional trusts, favoured in England for example, and remedial trusts, favoured in New York in relation to constructive trusts, is an unfortunate one.[187] These concepts are not exact opposites in the manner that is often thought: the category of institutional trusts applies to all trusts whereas that of remedial trusts applies only to constructive trusts. In both conceptions, however, there is a suggestion that the trust is an active device rather than a reactive one. This, it is suggested, is an error. Trusts are neither always active nor always reactive but to understand them as being frequently merely "responsive" is in itself a means of better understanding their nature.

What is meant by the term "response"

By "responsive" is meant that the law of trusts is concerned primarily with the good conscience of the trustee. The cases all constitute responses to the behaviour of the legal owner of property. In some circumstances it is considered appropriate to recognise that the claimant ought always to have had property rights in identified property, perhaps because the legal owner of that property acquired it from the claimant in circumstances which the court considers to have been unconscionable. This is the foundation of an institutional trust. Examples of such unconscionable activity would be where the legal owner seeks to take beneficial entitlements from property which she knew she was to hold on trust for the claimant,[188] or where the legal owner has received a payment of money from the claimant in circumstances in which it knew that payment to have been made mistakenly,[189] or where the legal owner has stolen property form the claimant.[190] The usual explanation of such situations is that the unconscionable activity created an institutional trust automatically by operation of law and without the discretionary intervention of the court.[191]

A competing analysis is that property so dealt with ought to have been transferred to the claimant immediately and therefore any benefit derived from the property by the wrongdoer ought similarly to be treated *as though it had been transferred to the*

[187] *Westdeutsche Landesbank v. Islington* [1996] AC 669.
[188] E.g. *Fletcher v. Fletcher* ; *Blackwell v. Blackwell* on secret trusts.
[189] *Chase Manhattan v. Israel-British Bank* , as explained in *Westdeutsche Landesbank v. Islington* [1996] AC 669, *per* Lord Browne-Wilkinson.
[190] *Lennox v. The Queen* ; *Westdeutsche Landesbank v. Islington* [1996] AC 669.
[191] *Westdeutsche Landesbank v. Islington* [1996] AC 669.

claimant. This is recognised in Equity as transferring equitable title immediately.[192] In truth, it is suggested, what is happening in both contexts is that the court is evaluating the conscionability of the legal owner of the property and responding to it. In the former context, the court's concern is whether or not the claimant *ought* to be considered to have been entitled to property before it was disposed of by the defendant or before the defendant uses that property to make substantial personal profits for herself. The underlying question is normative – you should not use another's property to make profits for yourself – even though the issue is stated differently.

By way of example, the decision to recognise the existence of a constructive trust in *Attorney-General for Hong Kong v. Reid*[193] was reached by using the *Walsh v. Lonsdale*[194] principle to argue that a public official who took bribes not to prosecute criminals ought to have handed the bribes over to his employers immediately and therefore that equitable title in those bribes was deemed to have been transferred automatically. In this case, the normative analysis was that the defendant was culpable of corruption and that everything should therefore be construed against him.

In relation, for example, to cases like *re Goldcorp*[195] the claimant was attempting to establish title in property which would constitute it a secured creditor in the insolvency of the bullion exchange in that case. It was held that there was no such entitlement to any property because it had not been segregated on trust for the claimant in advance of the insolvency. From the perspective of the claimant the argument was made that the contracts between customer and exchange obliged the exchange to segregate bullion to the account of each customer order and that there ought therefore to be a recognition that the exchange bore duties under the *Walsh v. Lonsdale*[196] doctrine that equitable title be deemed to have passed automatically. The normative prescription in *Re Goldcorp*[197] was in response to the context of insolvency and the perceived injustice of breaking the *pari passu* principle by giving secured creditor status to someone who had not, as a matter of fact, had property segregated to her account even if under the terms of her contract she was entitled to have had that happen. The argument here in relation to conscience is very different from that in *Reid*, where *Reid* was concerned with the defendant's own wrongdoing whereas *Goldcorp* is giving effect to an economically-driven, insolvency law policy as to the rights of creditors in the event of bankruptcy.

The *Westdeutsche Landesbank v. Islington*[198] decision was predicated on the measurement of the good or bad conscience of the defendant. (The question of the nature of conscience in this context is considered in greater detail below.[199]) The normative question here was whether or not there was any effect on the defendant's conscience when it received and spent money under a contract which was subsequently held to have been void *ab initio* such that it could be said to have

[192] *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 1.
[193] [1994] 1 AC 1.
[194] (1882) 21 Ch D 9.
[195] [1995] AC 74.
[196] (1882) 21 Ch D 9.
[197] [1995] AC 74.
[198] [1996] AC 669.
[199]

become trustee of that money. Interestingly, it was said that there could not have been an institutional trust because there was no [ethical question] at the time the money was spent: that is, the spender did not know at the time that the contract under which it had received the money was ineffective and so the money was spent in good faith as to the validity of its receipt. The manner in which a trust operates here is clearly by reference to the lack of blameworthiness of the defendant and not by reference to the abstract justice or injustice suffered by the claimant. It is suggested, by contrast, by Lord Browne-Wilkinson that a remedial trust might have had the effect of measuring the liability of the defendant by reference to the loss suffered by the claimant not simply by reference to the level of culpability of the defendant. It is suggested, in any event, that a remedial trust would have operated in that case such that the defendant bore no culpability and therefore ought not to have been liable for the claimant's loss. That is, it is suggested, because the defendant had no knowledge that the money paid to it voluntarily by the claimant was transferred under a void contract.[200]

In either situation, the role of the court is to *answer* the question asked of it by the parties. It would be, at the most banal level, a remarkable suggestion that in situations in which courts are asked to address issues relating to private law questions which have arisen without the intention of the parties that the courts were doing anything other than *responding* to those events. Therefore, the courts are necessarily seeking to express, through institutional trusts, the way in which they would have wanted the parties to act and to deal with property between them. They do not have the luxury of setting out for the parties in advance the way in which they should behave in the future – unless they are asked to decide on a question of injunctive relief. Rather, the court is always responding after the event – but frequently seeking to justify rights which would have had to have arisen long before the date of judgment.

The decision in *Westdeutsche Landesbank v. Islington* is necessarily predicated on the basis of the retrospective, institutional trust. Fortunately, as Lord Goff expresses the matter, the court is simply deciding on a question of the value of the cheque which the local authority is required to write in favour of the bank: that is, the court is only asked whether or not the applicable rate of interest on the judgment is compound or simple interest, albeit that requires a decision on questions as to property rights in the money originally transferred. The notion of conscience here relates solely to the slightly technical question as to the date at which the recipient acquires knowledge of the failure of the contract. By contrast in *Re Goldcorp* the concern is more specifically with the economic effects of insolvency and the identity of property being subjected to secured rights. That is, the conscience involved is a purely technical matter as to the insolvency law policy. In *Reid*, by further contrast, the Privy Council found a constructive trust which reached outwith the normal ambit of such institutions by means of holding the defendant personally liable for any loss which might have been suffered if the investment of the bribes had fallen in value. It is suggested that this model of constructive trust goes further than the other two because it borrows from the law on breach of express trusts to attach personal liability to the defendant to compensate the claimant. In ethical terms it is a general question as to the unconscionability of bribery and the Privy Council, in the person of Lord Templeman, is concerned to find a technical means of justifying the general moral opprobrium they wish to visit on the defendant's head. Therefore, it is clear that the constructive

[200] Cf. [simple interest / compound interest].

trust will arise (or not arise) on different bases – there is no all-embracing form of conscience, or even of ethical enquiry, on which the constructive trust will arise even in just these examples. What connects them is Equity's general mission to *respond* to those cases by measuring the appropriate level of conscionability: there is no central *a priori* notion of conscience which is applied institutionally by the courts.

When the doctrine of proprietary estoppel is added to this matrix it is clear that the form of unconscionability at which Equity/equity differs from case to case.[201] Proprietary estoppel is directed representation, reliance and detriment give rise to the estoppel[202] but that the precise remedy which the court will impose differs from case to case. Those remedies are variously from absolute title in the property[203] to mere personal rights to money.[204] That proprietary estoppel is remedial arises from this large range of remedies being made available to claimant. However, the constructive trusts – to which proprietary estoppel is occasionally compared in all innocence – also arise in line with principle but nevertheless in response to context. In *Goldcorp* the claimants were perfectly entitled as a matter of contract to a constructive trust in the same manner that constructive trusts have been held in other contexts in which a contract for the transfer of property has been created over land[205] or over personalty.[206] However, the availability of that constructive trust was limited by the context of the defendant's insolvency: that is, the trust will be capable of disapplication where the context so requires.

In this way it is suggested that the trust is responsive to context. Between cases of remedial uses of equitable doctrine and institutional uses of trusts, the term "response" is nevertheless a useful collective term for the way in which equity operates.

Trusts law acting in personam *against the legal owner*

The trustee is always posited as being the defendant in trusts law theory. So it is that the questions of certainty of subject matter and of objects are targeted at the need for the court to ensure sufficient certainty for it to be able to police the responsibilities of the trustee in carrying out her duties in relation to the trust fund. Similarly, even the beneficiary principle, which might otherwise be thought to focus attention on the beneficiary is expressed in *Morice v. Bishop of Durham*[207] in terms of the need for there to be a beneficiary in existence who can bring the trustee to court in the event of any breach of trust.[208] Even the principle in *Saunders v. Vautier*[209] which most clearly expresses the English law concept that it is the beneficiary, or beneficiaries acting collectively, who control the ultimate destiny of the trust is nevertheless framed in terms of the right of such beneficiary to direct the trustee how to deal with the trust

[201] Cooke, *The Modern Law of Estoppel*, OUP, .
[202] *Gillett v. Holt* [2000] 2 All ER 289; *Yaxley v. Gotts* [2000] 1 All ER 711.
[203] *Pascoe v. Turner* [1979] 2 All E.R. 945.
[204] *Baker v. Baker* [1993] 25 HLR 408.
[205] *Lysaght v. Edwards* .
[206] *Chinn v. Collins* [1981] A.C. 533.
[207]
[208] Cf. financial regulation which displaces the primacy of the trustee's role and represents a reversal in part of the trust theory relationship, as considered above.
[209]

property: that is, the principle is ultimately focused on the trustee-as-defendant. That the settlor has no role *qua* settlor under English law is clear from *Paul v. Paul*[210] whereby the settlor *qua* settlor is not entitled to control the trust. Instead it is necessary to construct a trust so that the settlor retains some right *qua* trustee or *qua* beneficiary in relation to the trust property to ensure that that person has some control over the trust.

Thus the law of express trusts is, in its theory, directed entirely at the obligations incumbent on the trustee. In that sense the trust is truly an equitable device because it acts *in personam* against the conscience of the trustee. It is suggested that it is by reference to the same matrix that constructive and resulting trusts are to be analysed. They are ostensibly incoherent if analysed at the level of common law categories such as voluntary and involuntary behaviour; rather they only cohere if they are understood as responses in general terms by the courts to the individual defendant's behaviour in those particular circumstances. In that sense their more efficient comparator is the award of an injunction in equity rather than the creation of a contract at common law.

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II. CONCEPTUALISING EQUITY

THE MULTI-FACETED NATURE OF EQUITY

The basis of Equity/equity in conscience

This essay is concerned with the entire field of Equity/equity[211] and the possibility of mapping the open terrain which lies there. The central question is "what do we mean by equity?" There is precious little discussion of these ideas in the literature.[212] Rather, there is either an implicit assumption that we know what equity is or there is simply an analysis of those decisions which comprise the corpus of chancery law. In truth there are many possible meanings of equity and many possible motivations behind it.

The broad answer to the question "what is equity?" from the case law would appear to be that it is "something to do with conscience". So, in *Westdeutsche Landesbank v. Islington*[213] Lord Browne-Wilkinson sought to uncover the core values behind the trust with the first of his "Relevant Principles of Trust Law":-

> "(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)."[214]

As we shall see, it is understood by "equity lawyers" [sic] that the basis of the trust and arguably the whole of Equity/equity is concerned with regulating the conscience of a defendant where the common law might otherwise allow that person to act unconscionably but in accordance with the letter of the law.

That answer it is suggested, is unsatisfactory at two levels.

First, it tells us nothing about what is meant by "*conscience*". As explored in detail below, talk of conscience may lead us to think that Equity operates solely by means of

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[211] The theoretical nature of the trust is bound up in some way with its nature as a creature of *Equity*, or possibly even of *equity*. The upper case "E" referring to the legal jurisdiction whose principles gave birth to the concept and the lower case "e" referring, arguably, to the intellectual roots of those same principles within some grander notion of doing fairness between parties to litigation outwith the confines of statute or of the common law. In either case, the roots of the trust are not susceptible of easy explanation because they modern form rests on a combination of history, of legend and of Victorian revisionism.

[212] There is comparatively little academic discussion of "equity" in the modern context. Even Maitland's *Essays in Equity* are concerned primarily with doctrine and less with theory or history. Instead, the topic appears to have grown too large for comprehensive treatment either in terms of all-encompassing undergraduate courses or in academic research. Rather, focus is on "equitable interests" or "equitable proprietary rights" to the extent that those doctrines overlap either with larger questions of restitution or common law, or more contextually as they intrude into the law of tracing, the law dealing with recovery of payments and so forth.

[213] [1996] AC 669, [1996] 2 All E.R. 961.

[214] [1996] 2 All E.R. 961, 988.

subjective tests interrogating the morals of the individual defendant.[215] Alternatively, it may be code for the establishment of objective ethics against which the behaviour and moral turpitude of the defendant is to be measured. If the latter, it falls prey to all of the criticisms of natural law theory in needing to identify, justify and legitimise the contents of that ethical code. Once the process of identification, justification and legitimisation is complete, then those principles are more likely to respond to positivists' understanding of legal rules in having a source in a body of legal principle exercised by the courts. Consequently, the principles of Equity/equity would appear either to be primary rules (e.g. formalities in the creation of trusts, establishment of rights in the home under common intention constructive trusts) or secondary rules (e.g. procedural devices such as interlocutory injunctions, freezing orders, search orders and so forth): in either case, judicial decision-making made in accordance with settled principle. If those principles are, however, exercised in such a way that the judge has discretion then a positivist might question the validity of such decision-making. Below, it is suggested that there need not be such a clear, binary distinction between subjective and objective notions of "conscience" by reference to understandings in ethical philosophy of the conscience as something which is socially constituted to some extent. That discussion, however, must wait for an exploration of the nature of Equity/equity.

Second, it still fails to answer the question "*what is equity?*" because equity could be one of many things: and is a term which has significantly (if subtly) different meanings throughout the humanities and the social sciences. It may mean "equality" (a word with which it shares etymological roots), or it may mean simply a body of juristic principle developed by the Courts of Chancery, or it may connote a judicial power to dispense Soloman's justice, or it may mean simply fairness in individual cases in the manner that Rawls and others would understand that term. The purpose of the discussion that follows is to tease apart some of the possible meanings of equity and thus to demonstrate that identifying the trust as an equitable response is merely to begin to ask the relevant questions. It is suggested that there are [fifteen] different strands to the concept of equity. Those strands will be considered one at a time in the first place and then, later in the essay, an attempt will be made to allocate equitable doctrines between four principal motivations: the rectificatory, the adjudicative, the responsive and the creative.

1. A means of righting legislative shortcomings

The most common root of equity is generally cited to be in the thinking of Aristotle. In Aristotle's conception equity operates primarily to plug the gaps in formal rule making by means of second-guessing the legislator's decision had he but known of

[215] Indeed, Prof. Birks tells us that equity jurists who speak of "conscience" fall into the same intellectual folly as Nazis who considered themselves to act in accordance with their consciences: appropriating Campbell "Fascism and Legality" (1946) 62 LQR 141, 147 who was in turn quoting Heydrich when he said "For the fulfilmnent of my task I do fundamentally that for which I can answer to my conscience … I am completely indifferent whether others gabble about breaking the law": Birks, "Trusts raised to reverse unjust enrichment: the *Westdeutsche* case", (1996) RLR, 1, 21. Apparently, "conscience" thinking is not thinking at all. It is suggested by Prof. Birks that it is an absence of thought, or even worse that it permits the perpetration of the very worst kind of evil. One of the purposes of this paper is to suggest that perhaps there is more content to conscience thinking than might otherwise be supposed.

the facts which had confronted the tribunal. This discussion is found in the *Ethics* after Aristotle has considered his [four] categories of formal "justice".

> "For equity, though superior to justice,[216] is still just … justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice."[217]

So it is that equity provides for a better form of justice[218] because it provides for a more specific judgment as to right and wrong in individual cases which *rectifies* any errors of as to the "just" application of those rules which the common law would otherwise have made. The superiority of equity emerges in the following passage continuing from the last quoted:

> "The explanation of this is that all law is universal,[219] and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. … So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator[220] owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances."[221]

Thus, equity exists to rectify what would otherwise be errors in the application of the common law to factual situations in which the judges who developed common law principles or the legislators who passed statutes could not have intended. Indeed a similar approach can be found in Hegel.[222] In both Aristotle and Hegel, however, equity is seen as being, primarily, a technical device for the interpretation of legal rules rather than straightforwardly a means of giving effect to generally moral or ethical principles through law. This approach we will identify with doctrines such as that of secret trusts which exist to side-step statute in circumstances in which they would permit a benefit to arise from unconscionable behaviour or where statute would otherwise be used as an engine of fraud.

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[216] The concept of justice in the work of Aristotle is too complex to consider here. In short, it divides between various forms of justice: justice in distribution, justice in rectification, justice in exchange and mean justice. On these categories of justice see Bostock, 2000; Leyden, 1985. Equity is presented in Aristotle's work as a flexible counterpoint to these formalistic attitudes to justice.

[217] Aristotle, *The Nicomachean Ethics*, 1955, 198, para.1137a17, x.

[218] A philosophically-loaded term in the Aristotlean tradition but here limited to the context of legal justice as provided for by common law and statute.

[219] That is, law aims to set down general principles and not to deal with individual cases.

[220] Or judge.

[221] Aristotle, 1955, 198, para.1137a17, x.

[222] "Equity involves a departure from formal rights owing to moral or other considerations and is concerned primarily with the content of the lawsuit. A court of equity, however, comes to mean a court which decides in a single case without insisting on the formalities of a legal process or, in particular, on the objective evidence which the letter of the law may require. Further, it decides on the merits of the single case as a unique one, not with a view to disposing of it in such a way as to create a binding legal precedent for the future." Hegel, *Phenomenology of Right*, 1821, trans. Knox, 1952, 142, para. 223.

The translations of these passages in Aristotle's *Ethics* use the English word "equity" and therefore they appear to correlate neatly with those principles developed by the Courts of Equity which historically had always appeared to be antagonistic to the courts of common law in some way.[223] However, expressed simply as a means of stretching legislation to cover anomalous or extraordinary cases in some way might appear to achieve nothing more than English courts do with judge-made common law. Indeed the mischief principle of statutory interpretation necessarily supposes that the common law constitutes the whole of the law and that statute is concerned solely with rectifying gaps in that judge-made law: remarkably, the precise inverse of Aristotle's equity.

Equity as a body of legal principle, however, is concerned with narrower tasks than Aristotle's model would suggest. This brings us to the second possible form of equity.

2. Equity invests judges with strong discretion: acting where "just and equitable" to do so

Renouncing the old religion

Equity is in truth a more formalised system than Aristotle's general statement. Aristotle's conception is more useful as an expression of another mode of equity: that of empowering judges to "do justice" on the facts of individual cases regardless of the formal rules of common law or of statute. This is a useful means of explaining the need for equity within a legal system. It corresponds to a range of well-known maxims which suggest that it is not possible to legislate or to create formal legal rules in the abstract without perpetrating manifest injustice in some cases. The arguments against such a loose-limbed legal doctrine are most evident in the modern restitution school's affection for Justinian's elegant, if elliptical, division within private law:

> "All our law is about persons, things or actions".[224]

Montaigne had the following to say about such Roman elegance:

> 'I hardly agree therefore, with the opinion of that man [Justinian] who tried to curb the authority of his judges by a multitude of laws, thus cutting their meat up for them. He did not understand that there is as much liberty and latitude in the interpretation as in the making of them.'[225]

More closely associated with legal notions of equity, Spry counsels that '[t]o attempt to lay down an inflexible standard for the proof of particular matters involves a misunderstanding of equitable principle' because equity is necessarily concerned to be more responsive and more sensitive to context than that.[226] That general feeling that

[223] The process of moving between courts of common law and of equity is expressed most brilliantly by Dickens in *Bleak House*.
[224] J. Inst 1.2. This is the redefinition which is advocated by Birks, 'Definition and Division: A Meditation on *Institutes* 3.13', *The Classification of Obligations*, Clarendon Press, 5 for English civil law. See generally the division of materials in Birks, ed., *Private Law*, Oxford University Press, 2000.
[225] Michel de Montaigne, 'On experience', *Essays*, trans. J. Cohen, Penguin, Harmondsworth, 1958.
[226] Spry, *Equitable remedies*, 6th edn., Sweet & Maxwell, 2001, 14.

rigid law-making without the power of mercy or without flexibility, it is suggested, lies at the heart of equity jurists' instinctive affection for Equity/equity for it is within Equity/equity that it is possible on a day-by-day basis to ensure that our affection for justice in the abstract does not blind us to the individual suffering of many.[227]

Is there strong discretion? The example of final injunctions

On this basis – and the merits of these arguments must wait for another occasion – equity operates so as to invest judges with *strong discretion*, in Dworkin's expression,[228] to decide in their absolute discretion as to the correct resolution to any given dispute. This, it is suggested, constitutes a possible explanation of the equitable discretion to grant injunctions. The injunction is an equitable remedy. It is at the discretion of the court to make an order to either party to litigation, or by way of a final judgement, to take some action or to refrain from some action. The broadest discretion of the court is visible at this point.[229] Section 37(1) of the Supreme Court Act 1981 provides that

> "The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so".

These final words would appear to invest the court with a strong discretion. What is interesting, however, is the way in which the judges through the case law then seek to fetter their own discretion by means of the creation of principles in accordance with which their jurisdiction to grant injunctions wherever it is just and convenient will be exercised.

A useful recent case on final injunctions generally is the decision of the Court of Appeal in *Jaggard v. Sawyer*.[230] The principal issue was whether the applicant ought to be entitled to the injunctive relief sought and whether in fact damages would have been a sufficient remedy.[231] In giving his judgement, Sir Thomas Bingham MR considered the four probanda which had been identified as being relevant for the grant of an injunction in *Shelfer v. City of London Electric Lighting Co*.[232] Those four requirements are that: (1) the harm suffered by the applicant must have been

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[227] Bevan, *In place of fear* (1952) , 1978, London: Quartet

[228] Dworkin, *Taking rights seriously*, Duckworth, 1978, 31 – 39.

[229] Injunctions can be used in a broad range of factual situations from family law disputes to commercial litigation. Sometimes the injunction forms a part of the relief sought by one or other of the parties in parallel to claims for damages and other remedies, whereas at other times the injunction is the sole remedy required by the claimant.

[230] [1995] 1 WLR 269, [1995] 2 All ER 189.

[231] The facts revolved around restrictive covenants effected between freeholders of land in a residential, cul-de-sac development. The covenants prevented the freeholders from using any undeveloped land adjoining their plots, or made part of their plots, for any purpose other than domestic gardens. The respondent acquired a plot neighbouring their land and, operating under some misapprehension as to the status of the land, built an access road across it to their house. A neighbour, the applicant, sought an injunction to prevent the respondents from maintaining this road, on the basis that it was in breach of covenant and that it required the respondent to trespass on the applicant's land. The applicant had commenced, but not pursued, proceedings when the development started but had sought injunctive relief once the development had been completed.

[232] [1895] 1 Ch. 287.

comparatively slight, (2) the harm suffered must be capable of being quantified in financial terms, (3) the harm suffered must be such that it can be compensated adequately by payment of damages, and (4) it must have been oppressive to the respondent to have granted the injunction sought.[233]

Millett LJ considered the question whether damages for the tort of trespass (common law) ought to be held sufficient such that there would be no requirement for an award of an injunction. His lordship held that "… the common law remedy of damages in cases of continuing trespass is inadequate not because the damages are likely to be small or nominal but because they cover the past only and not the future". Therefore, it is possible to contend that, where there is the likelihood of future harm if the respondent is not enjoined from continuing past behaviour, an injunction will necessarily be a valid adjunct to common law damages.[234] However, while that is the logic of providing for parallel remedies, Millett LJ did provide for damages to guard against potential future loss also when his lordship held that a court "… can in my judgement properly award damages 'once and for all' in respect of future wrongs because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented".

In deciding whether or not an injunction would have been appropriate, therefore, the Court of Appeal could have decided that it considered it "just and equitable" and proceeded entirely on that basis. However, their lordships instead proceeded by means of a careful survey of the governing case law and argued their way by reference to decided doctrine towards their answer. As an answer to whether or not equity promotes strong discretion or not, this example is perhaps more anthropological than it is theoretical. By that remark I mean that while the court could in theory have considered itself to have had unfettered discretion it chose instead to genuflect, as is the custom, to previous decisions of a like kind and to proceed on the basis solely of settled principle in that regard. The interesting question at that juncture, therefore, is whether such strong discretion is possible theoretically even if it is not often taken up in practice.

Strong discretion in theory

Dworkin, however, suggests that judges ought not to have unfettered discretion but rather ought to act only in relation to settled principle.[235] More accurately, Dworkin's point is that judges will not arbitrarily change a rule even in a common law system and even when the judge is overruling a previous decision, as when the House of Lords chooses to reverse its own previous decisions.[236] Rather, it is said, the court will have reference, in effect, to established principles as to the manner in which legal principles can be altered.[237] The alternative point of view might argue that in applying

[233] *Ibid*., *per* A.L. Smith LJ.
[234] This argument proceeds on the basis that common law damages will remedy the applicant's loss for the past, whereas an injunction will provide a remedy for what would otherwise be future loss. Therefore, the two can validly run together without doing violence to the underlying rationale of either remedy.
[235] Dworkin, *Taking rights seriously*, Duckworth, 1978, 69 – 70.
[236] E.g. *Kleinwort Benson v. Lincoln City Council* .
[237] Dworkin, *Taking rights seriously*, Duckworth, 1978, 37.

equitable principles the judge is simply acting in his complete discretion. Dworkin, it is suggested, could still argue that the judge would not be acting entirely in his own discretion but rather would be reaching a decision on those facts in accordance with principles which delimit the extent of his discretion: that is, he would be deciding in accordance with principle and not in accordance with whim.

The matter, I would venture, is a question of degree. If the principle in play were "do whatever you consider right" then the judge would both be acting in accordance with principle while simultaneously exercising an effectively unfettered discretion. (That, it is suggested, is *prima facie* akin to the power to award injunctions where it is "just and equitable" to do so with s.37 of the Supreme Court Act 1981.) Similarly, however, even in deciding a case in accordance with a much stricter rule such as "the first litigant to have entered the room wins", a judge has a common sense form of discretion when listening to the evidence adduced by the witnesses to decide that the claimant is lying when he claims to have been first in the room because he can recall nothing about its colour, size or shape when in the witness box. In such a situation the judge would clearly exercise a level of self-determination, if not discretion in the sense that Dworkin intends, by choosing to find in favour of the defendant whom he considers to have been the more credible witness.

Therefore, we might say that all judicial decisions involve discretion either in the sense of weak/strong discretion-within-principle that Dworkin intends or in the sense of judicial self-determination when listening to the witnesses. The more significant question for present purposes is whether judges are ever operating without a fetter on their discretion when deciding cases in Equity. It is suggested that, on the basis of the foregoing, that they would be in connection, for example, with decisions relating to the granting of injunctions if only they chose to do so. The fetter on their discretion in that instance is entirely self-imposed. The statute itself provides that the judge has a strong discretion to decide where the balance of convenience lies. Similarly, it is suggested that judges have strong discretion when they find that defendants have acted unconscionably in relation to property belonging in equity to another person and are consequently liable as constructive trustees of that property. However, the judicial tendency is to introduce principle because, it is suggested, it appears to more rigorous and somehow more lawyerly. By contradistinction, the decisions of the Family Division of the High Court are considerably more open-ended when deciding, for example, cases of child welfare in accordance with statute. While not strictly "equitable" decisions, they do resemble a strong discretion model of decision-making more closely than technically equitable areas do.

This brings us to the third explanation of equity.

3. Equity grants judges weak discretion: from fraud towards unconscionability

Weak discretion hemmed in by principle

Following on from the above, judges might be said to have merely weak discretion on the basis that they do not decide cases entirely in a vacuum[238] but rather those cases are decided always in accordance with settled principle. Therefore, it could be said that judges do not have strong discretion because even ostensible exercises of free judgment are in truth hemmed in by precedent. This is part of the central tension in equity considered in more detail below: while a jurisdiction which might be considered to operate on open judicial discretion, the Courts of Equity have nevertheless developed tests which have tended to sets judges' decisions on clear tram-lines even if they have not necessarily given the judge no room for manoeuvre. For example, the rules of certainty in the creation of express trusts suggest that trusts are similar to contracts in that there are clear rules as to their effective constitution.[239]

Fixing on unconscionability rather than fraud

There has been an important development, considered below, in relation to equitable principles. Early conceptions of equity and of the trust were orientated clearly around the avoidance of fraud. By way of example, the doctrine of the secret trust was concerned exclusively to prevent a legatee under a will from benefiting fraudulently from that bequest in breach of an informal arrangement reached with the testator to hold that property on trust for some third party.[240] The test for fully-secret and half-secret trusts were concerned to deem the legatee to a trustee of the bequest where fraud could be proved. The "modern" approach is to establish, in effect, a single three-stage test for either form of secret trust based on intention, communication and acceptance passing between testator and legatee.[241] There is no longer any need to prove fraud.

Similarly, the doctrine of proprietary estoppel has moved away from the five probanda test[242] which required that there be some mistake between claimant and defendant such that the defendant would take some fraudulent benefit from denial of the claimant's rights.[243] The doctrine of proprietary estoppel is now organised around proof that there has been some representation by the defendant on which the defendant relies to the claimant's detriment.[244] In both contexts the tests have developed from a requirement of proof of fraud towards satisfaction of a three-step test. The standard of proof therefore dilutes from that level of proof necessary to

[238] Equity, of course, abhors a vacuum.
[239] [Alternatively, one might say that these are general standards against which a court which measure a settlor's actions in seeking to create a trust and do not operate in quite the same manner as the formalities necessary for the creation of a contract. There is little apparent difference between the test for offer and acceptance, consideration and intent to effect legal relations, and the test for sufficient certainty, formalities in relation to certain types of property and effective constitution of the legal title in the trustee. However, so many of the formalities relating to the establishment of a trust are rules relating to the particular property at issue – whether land, shares, copyrights and otherwise – and are not rules which govern every trust, unlike the common law test for the creation of contracts which apply to all contracts with exceptions.]
[240] *McCormack v. Grogan* .
[241] *Blackwell v. Blackwell* ; *Ottaway v. Norman* .
[242] *Wilmot v. Barber* .
[243] *Coombes v. Smith* .
[244] *Re Basham* ; *Gillett v. Holt* ; *Yaxley v. Gotts* .

establish fraud to a lesser level of proof on the balance of probabilities necessary to make out the modern tests.[245]

The nature of the secret trust is up for grabs – and some commentators consider it to be a form of generalised constructive trust intended to prevent the legatee acting unconscionably.[246] Similarly, many recent decisions on proprietary estoppel have considered it to be a form of constructive trust concerned to deal with unconscionable behaviour too.[247] This latter doctrine is considered in greater detail below. What is important to observe at this stage is that many equitable doctrines are gravitating ever closer to this notion of unconscionability, a notion which is considered in detail itself below.

The doctrines of equity have developed therefore from the fight against fraud towards a fight against unconscionable behaviour. That approach based on unconscionable behaviour occupies a more equivocal moral and ethical ground than does fraud. Fraud requires deceit and does not involve particularly difficult moral questions. By contrast, the notion of good and bad conscience is particularly complex in that is raises questions as to whose conscience has to be affected: whether the defendant's own conscience, some objectively constructed conscience or the potential unconscionability of allowing uncompensated harm to be suffered by the claimant. This problematic notion of conscience is considered in detail below.

4. A means of responding to the human condition

A broader jurisdiction

One form of understanding equity is to consider it to be a much broader jurisdiction than it had previously been understood to be. Such a project might tempt us to align the legal notion of equity with other conceptions of equity in the social sciences. That might include the economist's notion of *equality* (which shares an etymological root with "equity"[248]) as opposed to *efficiency*. If equity is taken to constitute a conception of equality then we might be able to ask why equitable doctrines like the constructive trust or liability for civil breach of trust have not been applied to claims to social security benefits in the same way that they would apply to claims to pensions held under private pension funds.[249] The legal notion of equality has tended instead to revolve around equal access to the law and not to equal access to all of the remedies possible in equity or at law. Any claim to a presently existing notion of equality based on access to the law of course stands not a moment's empirical scrutiny. The Woolf reforms of civil procedure have formalised the division between different forms of litigation dependent exclusively, in the ordinary run of civil actions, on their cash worth between fast-track, case management and small claims procedures. Limited access to legal aid acts as an effective barrier to access for most citizens. These

[245] *In re Sharpe* .
[246] Oakley, 1995, ; Hudson, 2001, .
[247] E.g. *Yaxley v. Gotts* [2000] 1 All ER 711. Cf *Stokes v. Anderson* .
[248]
[249] Hudson, 2001, .

failures in the justice system in practice are so well known that they generally pass unspoken in such debates.[250]

So, is equity about addressing such inequalities? Well, to do so would require judges to act with strong discretion and would require judges to make overtly political decisions, as opposed to covertly political decisions. In this sense, it might be argued that the principles of equity ought to be capable of similar elasticity and vigour to principles of human rights law. Indeed, the correlation between the two codes is interesting. Their similarity is, based even on Aristotle,[251] a determination to reach the "right result" where formal justice would not do so – but, importantly, to do so in a way that ensures justice for the individual claimant. In that sense it is perhaps a partial recognition of the humanity of the individual litigant within the impersonality of the legal system and of rule making.

In that sense, the "equitable" project might seem similar to that of human rights law if human rights are conceived of as a post-Enlightenment recognition of the essential humanity and value of individuals. In this way Douzinas traces the seeds of human rights thinking from the advances of Hobbes and Locke, controversially for their time, from belief in the power and right of the divine to a recognition of qualified rights in human beings.[252] That line can then be traced through phenomenology[253] and existentialism's concern with human essence,[254] ethical philosophy's interrogation of the good life and so forth. However, it is suggested that the legal notion of equity has not a question of fact ever concerned itself with the broad spectrum of issue with which human rights law concerns itself.[255] That much is undoubtedly the result of the fact that human rights are not an ancient code like the principles of Equity/equity (whose provenance and motivations are difficult to identify historically). Rather human rights norms are the result of a political settlement which crystallised in law in the aftermath of the Second World War and which we might describe as being founded on a determination, broadly, that "we must never see those days again". Equity's development has been organic and grounded in historical development in legal principle; human rights law's development is not capable of equivalent legal-historical observation but rather rests on the political and theoretical head of steam which has come into being arguably since the Enlightenment[256] but in legal terms since the end of the Second World War. Therefore the former is grounded in technical, legal developments[257] whereas the latter is an aspirational, political development in our constitutional settlement.

That is not, I would suggest, to say that Equity/equity could never change its remit and seek to advance what might appear to be political goals. Indeed such a social-engineering turn of mind would be in keeping with equity's history in the same way that the writs and the *sub poenas* which were developed by Lords Chancellor generally as expansions of their own political power. In the period after the South Sea

[250] Hudson, *Towards a just society*, Pinter, 1999, .
[251] Above.
[252] Douzinas *The End of Human Rights*, 2000, Oxford: Hart Publishing.
[253] Merleau-Ponty, *Phenomenology of Perception*, below.
[254] Sartre, *Letter on Humanism* .
[255] Hudson, 2001, .
[256] Douzinas, *op cit*.
[257] By which, broadly, I include for ease of reference at this stage the often overtly political expansion of the rights of the Lords Chancellor to serve writs as "legal" developments. See following text.

Bubble equitable principles advanced a law against usury, which has been criticised by Atiyah as being anathaematic to modern contract law theory.[258] Those principles were informed not only by a moral agenda but also by an economic agenda.

The next great challenge for Equity/equity will be to frame the liabilities of pension fund providers and trustees when their products fail to generate the returns which their beneficiaries either had been led to anticipate or which other pension providers have generated for their beneficiaries:[259] as considered above in relation to *consumer trusts*.[260] In such a cauldron, equity will be required to decide between perpetuating the long-standing equitable principles requiring trustees to generate the best possible return for beneficiaries[261] together with a need to invest prudently.[262] Alternatively, the law could continue its present trend of allowing professional trustees to rely upon their contractual exclusion clauses and so limit their personal liabilities to make good any shortfall in pension fund provision.[263]

The right to have one's story heard

So, how might we consider Equity/equity to be concerned with the plight of the human condition? Equity is a means, in James LJ's expression, of ensuring that any individual defendant can "have his story heard", a means of raising one's voice over the noise of the machine.[264] Therefore, equity potentially contains a means of enhancing the liberty of individuals in front of the law (whether conceived of as "the justice system" or more technically as "the common law") by permitting judges to step outside the strictures of legal principle or statute to "do justice" between the parties.

There are larger questions here about the inherent fragility of human beings and the potential which Equity/equity offers individuals, who might otherwise be the victims of unconscionable behaviour not prevented by common law, the possibility of having their story heard and justice done. The sociology of the body remains a vital area of modern thought.[265] [This essay will not be able to do justice to such areas of thought. What can be said for present purposes is that when we think of the individual as being placed before the impersonal majesty of the law, then we ought to reflect on the fragility of that individual. Equity offers a means of reconciling our concern for that individual's condition with a means of hearing that individual and taking the just path in relation to them.] Two things can be said at this stage. The first is that this reflects on our ethical concern for other people which needs to be reflected in our social systems.[266] Second, it potentially reflects more accurately on a sociologist's attitude to criminal law – where the individual is indeed a single accused facing the embodiment of Her Majesty's justice in the person of the judge sitting beneath her

[258] Atiyah, *The Rise and Fall of Freedom of Contract*, 1979, Oxford: Clarendon Press.
[259] Cf. *Equitable Life* … .
[260]
[261] *Cowan v. Scargill* .
[262] *Learoyd v. Whiteley* ; *Sprange v. Barnard* .
[263] *Armitage v. Nurse* [1998] .
[264] *Fowkes v. Pascoe* (1875) 10 Ch. App. 343.
[265] E.g. Turner, *The body and society*, Sage, .
[266] Bauman, *Postmodern Ethics*, Polity, .

royal crest[267] - rather than on civil disputes in which there are two litigants with competing claims to justice. Therefore, in the practice of Equity/equity we must be concerned not solely with the plight of the individual but also with dispute resolution *between* two or more individuals.

This brings us to the next question: how many people is equity seeking to help on a case-by-case basis?

5. A means of reaching just conclusion between two or more people

Thus far the focus of all of these conceptions of equity has been on the need to free one individual from the maw of an indifferent legal system. However, litigation will typically be conducted between at least two people.[268] In relation to a trust dispute involving succession to an item of property under a will there will typically be within the confines of the court the trustees, the testator's next of kin, the testator's other relatives, the person nominally entitled to the property under the terms of the will, the residuary beneficiary anxious to claim any bequest which fails. Each will have their own claims to fairness and their own perception of conscionable and unconscionable behaviour. The matrix of right and wrong in such situations is not between oppression of the individual or liberty of the individual from oppression, but rather various claims.[269]

The principles of Equity/equity have therefore developed formal rules, as opposed to rules based on abstract notions of justice, to whittle down the various possible claims. Therefore, those who have delayed will have their equities defeated,[270] those who have come to court with "unclean hands" will similarly lose theirs,[271] those whose claims come first in time will be preferred to those whose rights arose later,[272] and so forth. These are not rules based simply on fairness, rather they are the rules typical of an administrator attempting to produce common sensical principles in accordance with which she can exercise her manifold discretion. Equity therefore, is acting in some circumstances in a "just" fashion recognised by Aristotlean models of justice – that is, formalised rules and mottos for deciding cases.

That in turn brings us to the sixth form of equity: what does it mean to say that equity is a jurisdiction based on conscience?

6. Equity is a jurisdiction based on conscience.

The fifth form of equity suggested a formalisation of its rules and a drift away from its flexible concern with fairness in individual cases. However, most of the books and

[267] A contrast to an impersonal majesty of the law perhaps?
[268] The possible exception being uncontested petitions for declarations as to the parties' rights.
[269] Cf. *Jaggard v. Sawyer*, *op cit*. where oppression is measured by reference to the question whether such-and-such a result would be more oppressive of one party rather than the other.
[270] *Smith v. Clay* (1767) 3 Bro CC 639; *Fenwicke v. Clarke* (1862) 4 De GF&J 240.
[271] *Jones v. Lenthal* (1669) 1 Ch Cas 154; *Evroy v. Nicholas* (1733) 2 Eq Ca Abr 488; *Quadrant Visual Communications v. Hutchison Telephone* [1993] BCLC 442: that maxim cannot be excluded by agreement of parties.
[272]

many recent cases suggest that trusts law in particular and equity in general are concerned with unconscionable behaviour. It is important to question what that might mean.

(i) A general morality

A jurisdiction based on good conscience appears to be concerned to use the courts to erect and to police an abstract moral standard. Alternatively, a jurisdiction based on conscience might be charged with the even more perilous task of gazing into individual men's and women's souls and questioning what they find there. The tension between these two echoes the ancient debates about subjective and objective tests. A jurisdiction based on dealing with the defendant *in personam*, as equity is supposed to do, ought to take subjective approaches. The level of subjectivity then becomes awkward. A truly subjective approach to conscience would require the analyst's couch, an interrogation of the individual's basic desires and motivations. The conscience might be that small, still voice within us all that shrieks in alarm at different times. That difference would be the undoing of such an approach because it would create higher legal standards for the easily troubled and lower standards for the louche and irresolute. Therefore, the courts necessarily season their principles with a little objectivity. The result is that sort of mess typified by the decision of the House of Lords in *Twinsectra v. Yardley*[273] in which the test for the liability of someone who assists in a breach of trust without ever receiving any trust property into her possession or control is rendered not as whether the individual was subjectively dishonest in rendering that assistance nor as whether the individual was objectively to be considered to have acted dishonestly, but rather as whether the individual ought to be considered not to have acted as an honest person would have acted always provided that the individual herself knew that her actions would be considered not to have been those of an honest person.

In truth, the test will always be more bloody-minded than that. Akin to Scott LJ in *Polly Peck*,[274] the trial judge will always be concerned in truth with her own hunch having heard the evidence as to whether or not that person "ought to have been suspicious"[275] that there had been a breach of trust. Therefore, the court will be concerned to erect a general morality which is put to work in judging the good conscience of the defendant *in personam* but always through the lens of that individual judge's sense of right and wrong, and of the protagonists' performances in the witness box.

(ii) Strict application of principle

All this talk of abstract morality will make most Chancery judges blush. Therefore, in line with [3] above, judges would typically prefer to suggest that they have only weak discretion to reach the best decision in line with settled principle. In consequence, many commentators will describe equity as that body of principle created by the Courts of Equity since time immemorial and not as a general permission granted to judges to inject morality into our social life.

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[273] [2002] 2 All ER 377.
[274] *Polly Peck International v. Nadir (No.2)* [1992] 3 All ER 769.
[275] *Ibid*.

(iii) Unconscionability, not simply fraud

As above [ ], a jurisdiction based on conscience is a jurisdiction with a greater ambit than one concerned simply to prevent fraud. The latter is concerned to prevent lying but not to prevent sharp practice or unethical behaviour. In that sense, how was this notion of conscience unearthed after an historical period of prevention of fraud? The answer lies in a re-claiming of the notion of conscience which was used in relation to the jurisdiction of equity only in a stylised way, as considered next.

(iv) The King's Conscience

The role of Lord Chancellor was described as the Keeper of the King's (/ Queen's) Conscience. In effect, the Lord Chancellor acquired great political power of the sort displayed most effectively in *A Man for All Seasons* in which various Lords Chancellor conduct the business and bidding of Henry VIII using their ever-growing capacity to issue writs, to compel attendance to answer treasonous charges, and to act through the jurisdiction of *criminal equity* through the Court of Star Chamber. The appeal to conscience today[276] as the root of equity is to mistake the capacity of the Lord Chancellor to administer the royal prerogative of mercy and the criminal equity on behalf of the Crown, for the general rag-bag of principle collected today in the books and in the law reports under the heading "equity". For, in truth, like so much of English law, it was the great nineteenth century writers who created it. The shape of contract law, trusts law, equity, tort and so forth were forged by Chitty (1826), Underhill, Snell (1868) and Clerk. Out of the primal soup of the material now in the English reports came the framework for English private law – a legacy to which we add contextual categories like company law, commercial law and so forth. For postmodernists, this reduces the law to what we know it to be "les choses dites"[277] – merely things that are said and which could be unsaid, or said differently.

Our jurisdiction based on conscience is therefore a chimera. It is a mis-transcription of a forgotten concept – that of the royal power to dispense mercy – to a very modern context of trust, injunction, specific performance and so forth. Indeed, so much of what falls within equity is in truth to do with contract (specific performance, rectification, rescission and so forth) that it would be crass to suggest that there is any remnant of that old notion of conscience here anymore. Rather, the challenge for equity is to define what it means by conscience in the modern world.

The distinct question of what is meant by "conscience" is considered in the next main section. For the purpose of maintaining the flow of this examination of the many facets of Equity/equity it is important to consider how this jurisdiction based on conscience operates as a means of dispensing moral pronouncements.

7. A means of applying a stream of "ought" to litigation

[276] *Westdeutsche Landesbank v. Islington LBC* [1996] AC 669.
[277] Foucault, … .

Given the distance between the ancient role of the Lord Chancellor as the functionary of God's appointed regent on earth and the modern role of equity, the role of equity in applying a general morality has again become critical. The commercial face is set against such a flexible jurisdiction. The plea goes up from commercial lawyers[278] that discretionary remedies must not interfere with commercial practice.[279] Judicial opinion is also wary of permitting equity to intrude into commerce.[280] In part the fear is that English law will be less attractive to commercial people from other jurisdictions who use it as a form of lex conveniens for cross-border contracts[281] or else that the courts may generate results which are so contrary to the parties' commercial expectations as to appear to be in some way "unfair".[282]

That commerce is so hostile to equity, and yet so accepting of equitable means of taking security like the trust and the floating charge, suggests that commerce and commercial law do indeed have a moral compass – one that is set on freedom of contract and the protection of the sanctity of contract, through the use of equitable concepts where necessary. The development of the doctrine of undue influence is instructive in this context.[283] Undue influence is a key part both of contract law and of land law (in the form of the of mortgages). For the property lawyer considering the possibility of setting aside a mortgage contract on the grounds that it was procured by some misrepresentation or some actual or presumed undue influence, there is a necessary reflection of the old equitable doctrine of notice.[284] The question is whether notice of the act of misrepresentation or undue influence can be imputed to the mortgagee seeking to rely on the mortgage.[285] The issue is therefore as to the possibility of defeating the defendant's proprietary rights over the mortgaged property. For the contract lawyer, by contrast, the question is whether or not the contracting parties entered into the contract voluntarily or whether their freedom so to

[278] E.g. Goode, *Commercial Law in the Next Millennium*, Hamlyn Lectures, Sweet & Maxwell, .
[279] As Mason put it: '… there is strong resistance, especially in the United Kingdom, to the infiltration of equity into commercial transactions … [arising] from apprehensions about the disruptive impact of equitable proprietary remedies, assisted by the doctrine of notice, on the certainty and security of commercial transactions.' Mason, (1997/98) *King's College Law Journal*, 5.
[280] E.g. *Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana* [1983] 2 WLR 248, 257: 'It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrecoverable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions - the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly.'
[281] E.g. *Westdeutsche Landesbank v. Islington* [1996] AC 669, *per* Lord Woolf who informed us that "it is no secret that [the local authority swaps cases] caused dismay among some of those concerned with the standing abroad of the commercial law of this country:" [1996] 2 All E.R. 961, 1002.
[282] E.g. *Westdeutsche Landesbank v. Islington* [1996] AC 669, *per* Lord Goff who was of the view that "justice", tout simple, required an award of compound interest on repayment of money advanced under an interest rate swap contract which subsequently transpired to have been void *ab initio*. His lordship was also mindful of the "grave concern among financial institutions, especially foreign banks, which had entered into such transactions … in good faith …", [1996] 2 All E.R. 961, 965.
[283] *Barclay's Bank v. O'Brien* [1994] 1 AC 180.
[284] *Ibid*.
[285] E.g. *CIBC v. Pitt* [1993] 3 W.L.R. 786.

do was in some way qualified by the misrepresentation or undue influence.[286] The result is the same: either the mortgage contract signatory does or does not have to surrender the property to the mortgagee. However, the basis on which that result is based is either a question of equality of bargain, of capitalist exchange and of voluntary action, or alternatively it is a question of entitlement to the exclusive use of property, of the justice of defeating a right to use property and of the matrix of questions to do with rights in the home.

The front-line concerns of the contract lawyer and of the property lawyer are subtly but essentially distinct. In that sense too, the morality which is applied to the facts of cases through equity is fundamentally different. The framing of the questions either in terms of bargains or of rights to occupy property call into play very different theoretical questions. The former is one of the morality of capitalist exchange and the latter one of the sanctity of rights in private property.

Therefore, there are also different motivations bound up in equity and in the provision of equitable remedies. Some equitable doctrines relate almost exclusively to contracts: primarily specific performance, rectification and rescission. There are significant conceptual distinctions between promissory estoppel (used merely as "a shield" in the law of contract) and proprietary estoppel (used in the law of property often to grant entirely new rights and so apparently "a sword").

The more general point made here, however, is that even *within* equitable doctrines there can be different bases on which those doctrines are deployed. A useful example of this phenomenon comes from the doctrine of proprietary estoppel. The distinctions are between avoidance of detriment, preventing benefit being derived from unconscionable actions, or granting new[287] proprietary or other rights. It is this issue which is considered in the next section.

8. A means of preventing the claimant suffering detriment, or of preventing an unconscionable benefit, or of enforcing promises?

The doctrine of proprietary estoppel is a particularly useful example of two contrasting motivations for the use of equitable remedies. The first is that estoppel exists to prevent detriment and the second that estoppel existing to prevent a benefit being taken from unconscionable behaviour. An example will underline the importance of deciding between those two.

Suppose I give you an assurance that it you repair the roof of my house at a cost to you of £1,000 that I will grant you a right to occupy the house for the rest of your life in respect of it. To your detriment you incur costs of £1,000 in repairing my roof in reliance on my assurance that you would receive a right in that house. The court then has a choice. Proprietary estoppel is a bi-cameral equitable doctrine, like equitable tracing,[288] in that establishing the claim is an entirely separate matter from the remedy which results from that claim being made out. In equitable tracing, the claimant

[286] E.g. *Royal Bank of Scotland v. Etridge (No.2)* [2001] .
[287] "New" in the sense that they are rights capable, for example, of registration as substantive rights in land which the claimant did not have before the commencement of the litigation.
[288] *Boscawen v. Bajwa* [1996] 1 WLR 328.

demonstrates some right in the property sought and only then is the court forced to decide between trust, charge, lien and so forth by way of response to that claim.[289] So in proprietary estoppel the claimant establishes a claim on the basis of there having been representation, reliance and detriment[290] but the court is then at liberty to decide on the appropriate remedy. On the decided cases this may range from a transfer of the fee simple in consideration for a few decorative expenses[291] to an award purely of money which did not need to recognise any proprietary right in the property at all.[292]

The choice which the court faces is between dealing with the benefit taken from the property, enforcing the assurance or avoiding the detriment. Avoidance of detriment would entitle the claimant only to receive £1,000 in cash. This approach would recognise that if the house were worth, say, £360,000 then it would be a remedy disproportionate to the detriment suffered (absent other factors) to make any greater award than that. Enforcement of the assurance would require that the claimant be granted either a lease for the remainder of her life, or licence on the same terms, or a life interest under trust. If repair to the roof enabled the proprietor to effect a sale of the fee simple for a price which increased by £5,000 (perhaps because it satisfied a nervous buyer as to the property's worth) then a remedy orientated around the benefit to the proprietor would require payment of £5,000 to the claimant. That in turn, however, raises questions about what the nature of the benefit must be.[293]

More generally, there is a trend in the cases towards recognising that proprietary estoppel is concerned with unconscionability.[294] What is less clear is whether it is concerned to prevent unconscionability, to prevent a benefit being derived from unconscionability or to prevent that unconscionability causing harm to others: as just discussed. Furthermore, there is a regular trend in the cases to suggest that proprietary estoppel is therefore more akin to constructive trust than to a free-standing doctrine. Certainly the drift away from a test based on fraud towards one based on unconscionability makes them appear more similar.

9. Private law's passionate place

The foregoing discussion suggests that equity is multi-faceted. At one level it is an embodiment of a philosophical sentiment that no matter how rigorous a system of rule-making or of justice may seek to be, there must always be a means of setting such systemic questions to one side so that the right answer can be reached (even if that answer is not the formally just or correct answer). At another level, Equity/equity is concerned to shield the individual from the impersonal injustice of the common law in a far more creative fashion.

[289] *Ibid*.
[290] E.g. *Re Basham* [1986] 1 W.L.R. 1498.
[291] *Pascoe v. Turner* [1979] 2 All E.R. 945.
[292] *Baker v. Baker* [1993] 25 HLR 408.
[293] There are further questions about whether or not the benefit must be direct or indirect, but there is no space for them here.
[294] E.g. *Lloyds Bank v. Carrick* .

Equity/equity within a closed legal system

Therefore, equity operates perhaps to penetrate the possibility of law as being an autopoietically closed system. That is, equity ensures that those rules which are created in the technical process of legislation and common law are nevertheless open to broader ideas of truth, morality and justice which might be situated outside law but within grander social narratives. So, equity ensures that deceit, force and fraud will not be suffered by the legal system – even though those are the phenomena which Parsons himself would have identified as motivations which are possible within the operation of social systems.[295] Indeed, it is against this Parsonian acceptance of the effects of force and fraud on the individual at the micro-level and on the ethical content of our laws at the macro-level that we might identify the clearest need for a means of "doing equity" in its broadest sense.

Alternatively we might say that equity does not operate outwith the closed system of legal principle precisely because the principles of Equity have themselves become hardened over time into either primary or secondary rules (depending on which rules you are considering). The rules for the creation and operation of a trust, for example, have become concretised into rules on certainties, perpetuities and accumulations and so forth. In that sense, the law could still be said to operate autopoietically.

Equity/equity as a turnstile

The central metaphor in autopoietic theory is the biological cell from which the idea was originally taken.[296] It is said that social systems operate by means of stylised inputs and outputs between one another.[297] The communications within systems and between systems are said to have existence in priority to any individual within that system.[298] There are, therefore, issues as to the manner in which social systems communicate between each other and the systemic irritation which arises when their various norms and languages fail to communicate effectively. An example in this context is the clash of legal norms and norms from the world of international finance in the English local authority swaps cases.[299] Self-evidently, an understanding of social activity which prioritised official communication over the plight of the individual would appear to be at odds with Equity/equity as discussed thus far. Or so it might seem at first blush. However, if the law can be accepted as operating in some way autopoietically[300] – by reference for example to the manner in which it uses its own terminology, its own internal procedures, its stylised means of taking information from other systems – then perhaps Equity/equity could be understood as being a

[295] Parsons, .
[296] Maturana .
[297] Luhmann .
[298] Teubner, *Law as an autopoietic system*, Blackwell, , 49.
[299] Hudson, "The Law of Finance", *Lessons of the swaps cases*, ed. Birks, Mansfield Press, 2000.
[300] That is by accepting that the notion underlying autopoiesis is perhaps a very simple one: that law is sufficiently technical to have closed itself off to other social systems and to non-lawyers. The study of the sociology of the English legal system has long identified the problems of ordinary citizens affording legal advice, understanding the substance of the law, understanding the law's procedures and so forth. At this level we can identify "closure" without needing to penetrate to the centre of Luhmann' thicket of social differentiation.

means of permitting non-technical phenomena like pleas for mercy, justice and so forth to be admitted to private, civil law disputes.

Perhaps the more useful way to think of equity in this sense would be as a turnstile between ideas in the world generally and ideas generated within the legal system. By that is meant a sense that while the practice of equity may be made up of a combination of formalised principles and judicial discretion in individual cases, extra-legal ideas of justice and of morality are able to pass into equity thinking from elsewhere comparatively easily due to the open texture of equity thinking. Equally, equity thinking can be narrow, technical and complex, thus accepting that the turnstile may occasionally operate to prevent non-legal notions from entering into equity thinking.

This second example of prevented access of non-legal ideas would appear in a technical question of sufficient certainty of subject matter in the creation of a trust,[301] whereas the former turnstile open to access for other ideas might be more evident in a claim for an interlocutory injunction in which the court has a broad discretion.[302] [The more interesting example would involve a claim for relief from liability for breach of trust in which the trustee is seeking to rely on an implied lack of professional competence to be held accountable for the failures of a stockbroker to achieve a suitable return on the trust's investment: that claim, all technical questions to one side, would boil down to a plea for clemency.[303]]

The diagram on the following page suggests a model for thinking about how the foundational concepts of the English legal system might admit non-technical (as well as technical) ideas to penetrate into legal norms. There is a further dimension not considered at this stage which is the more puzzling manner in which judges arbitrarily take ideas from the world around them in an unpredictable fashion to constitute norms by which the law ought to be informed. An example is the persistent policy in the law relating to homeless people of refusing to give effect to legislation which has as its clear intent a broadening of situations which will be accepted as constituting homelessness on the basis of a judge-made policy grounded in cod economics to the effect that local authorities should not be obliged to spend more of their finite resources on housing the homeless than they do at present.[304] In consequence, despite legislative attempts expressly to displace these case law norms[305] the courts have persisted in their application.[306] No authority on economics is ever cited, nor any statistics produced, and yet this policy persists. An explanation for such non-technical norms creeping into the case law is beyond the scope of this essay.

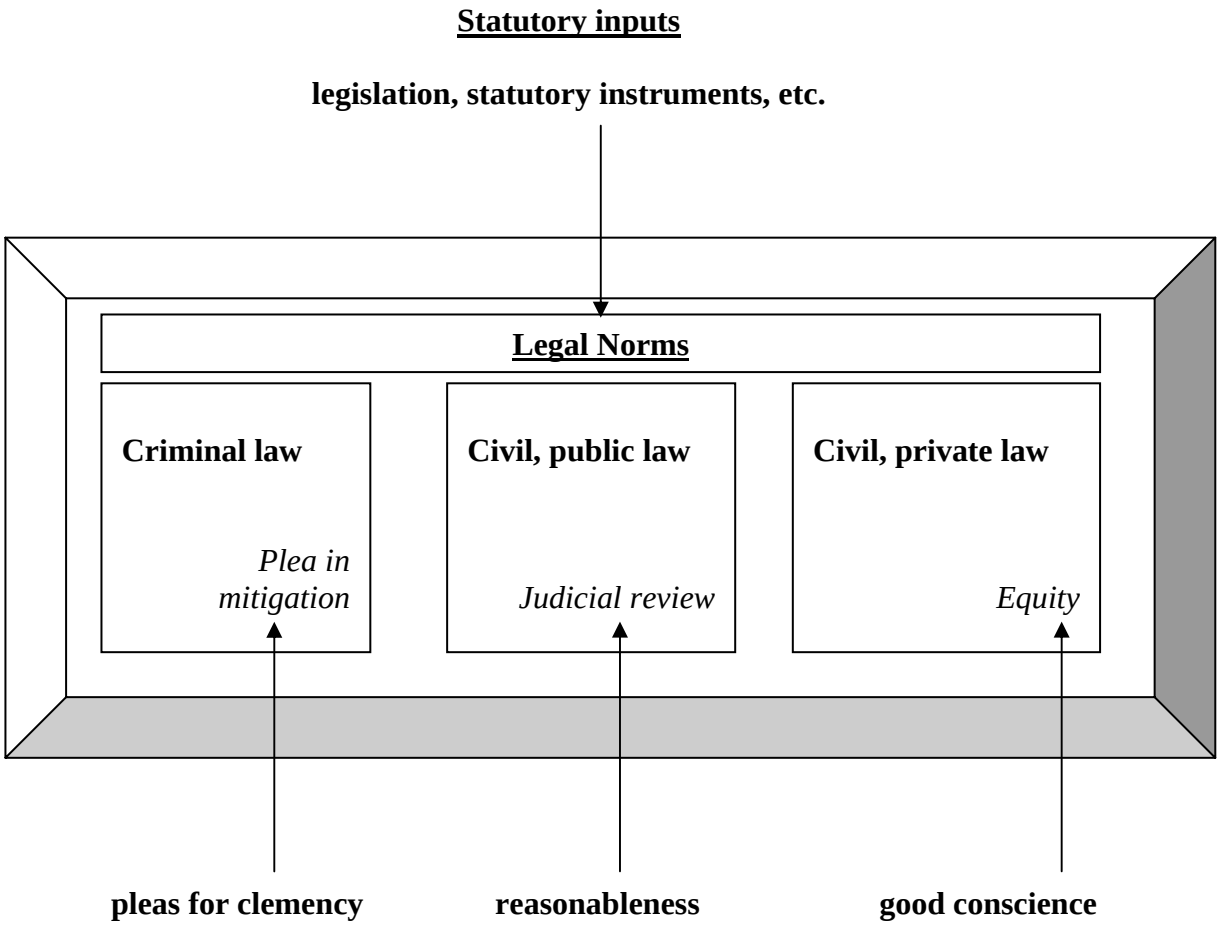
For present purposes, it is accepted that the notion that the legal system is closed from other systems is a "ubiquitous" one,[307] however its use here is in a narrow sense. Cotterrell refers to a range of senses in which legal closure, and further autopoiesis, operate on the academic and the practitioner. This discussion is concerned simply

[301] *Goldcorp, re* [1995] 1 A.C. 74.
[302] E.g. *Series 5 Software v. Clarke* [1996] 1 All ER 853.
[303] *Nestle v. National Westminster Bank* (June 29, 1988) [1993] 1 WLR 1260.
[304] *Pulhofer v. Hillingdon LBC* [1986] AC 484.
[305] E.g. Housing Act 1985, s. 60.
[306] *R v. Brent LBC, ex p. Awua* [1995] 3 WLR 215.
[307] Cotterrell, *Law's Community*, Clarendon Press, OUP, 1995, 91.

with the possibility that Equity/equity might permit non-technical ideas to penetrate into legal and equitable, civil law norms.

Fig. 1

This figure suggests that legal norms operate within a closed legal system. There are inputs directly from statute which constitute legal norms themselves even though developed outside the legal system not simply by Parliamentary diktat but also by means of lobbying, the development of public policy and so forth.



The non-technical inputs across the panoply of legal areas differ from context to context. Therefore, within criminal law general claims to clemency whether under the Royal prerogative of mercy or simply in the form of pleas in mitigation at the end of criminal trials frequently involve non-technical concepts in the form of pleas for clemency. This is so even if they are bounded in by legal rules as to what can be adduced. That goes, it is suggested to demonstrate the means by which legal norms treat these non-technical inputs. Similarly, public law deals with claims as to public bodies' lapses in reasonableness and/or repudiations of the claimant's legitimate expectations (where the latter might even be considered to be a form of public law

estoppel) by filtering them through the procedures for judicial review. Similarly, it is suggested, one might consider Equity/equity to be a means of filtering claims to "fairness" in civil, private law claims through its own doctrinal norms.

The open texture of Equity/equity

Of course, the possibility of describing the law as a fully closed system is a difficult one. The process of creating legislation through politics, economics and naked power necessarily ensures that the body of the law is filled with norms that are created outwith the legal system. Therefore, the sense in which the law operates as a closed system is in the interpretation of those statutes and their alignment with existing common law norms. The role of equity in this sense might be considered either autopoietic or open-textured. Let us take the example of the doctrine of secret trusts again. That doctrine could be considered autopoietic in the sense that equitable doctrines like the secret trust operate precisely to circumvent statutory rules and therefore suggest that equity is a technique concealed within law which undermines the notion of Parliamentary sovereignty and so forth.[308] It might be open-textured, however, if the secret trust were considered to be a legal technique which in fact operated to ensure that the underlying, extra-legal policy of the Wills Act 1839 – to prevent fraudulent abuse of testamentary estates – were to be effected through the use of equity. Equity the gatekeeper ensures that the decision is made by reference to general considerations of conscionability rather than simply technical legal ones.

Significantly, this might mean nothing more than that there is a dispute as to the extent to which law is necessarily founded on morality. That, it seems to me, does not invalidate the notion of equity as a turnstile or gate between technical legal issues and non-technical legal rules and norms. If law is founded on moral notions, then equity is one way in which that morality can seep into decision-making in a stylised way. If law is not founded on such moral notions, then equity is merely a means of bringing non-legal notions like morality into play. In either sense, vitally, equity becomes a place in which private law acquires a passionate quality. The appeal that is made to the tribunal dispensing equity is an appeal to fairness and to justice in the grandest possible way. It is the civil law equivalent of the criminal advocate's plea for mercy. Through it the claimant calls out: 'Do not use that rule because to do so would be unfair.'

The complaints that are raised against flexible equitable concepts come from commercial people and from restitution lawyers. The former have already been considered.[309] The latter contend, for example, that the weakness of the constructive trust is that it is not possible to know on what basis the constructive trust has arisen.[310] All one can know, it is said, is the bare fact that a constructive trust has been imposed but not the intellectual basis on which it has been imposed. In answer to that suggestion is the simple point that a constructive trust is based on the court being convinced that the defendant has acted unconscionably. It is suggested that this is a moral question and not simply a technical one. This is the principal feature of equity:

[308] E.g. *Re Young* [1955] .

[309]

[310] Birks, *Introduction to the Law of Restitution*, 1989, Oxford: Clarendon Press, .

it is deliberately, defiantly open-textured. That is the source of its passion. It is also the source of its potential future development.

Human rights law has proffered a challenge to English private law – as to all of English law – to consider whether or not its norms comply with the norms of human rights as expressed through human rights law. The response has been to accept that the norms of private law are susceptible of change simply because of the claims made on them by human rights. By way of example, the law of easements must accept a different notion of "necessity" in relation to implied rights of way over land as a result of disability rights which require access for the disabled citizen and consequently different forms of right of way to achieve that.[311] In short, the detail of case law principles are open to challenge by dint of the logical application of such insurgent concepts. The point is that, if human rights law can demand such fundamental reassessment of our private law, then so can a dynamic form of equity seised of a determination to question the impact of the common law on the human condition in many contexts.

THINKING ABOUT CONSCIENCE

The central paradox

What I hope to do in this section is to confront one of the central paradoxes which lies unspoken within equity.[312] Equity operates through judicial discretion against the conscience of the individual defendant and yet it based on formally-generated, juristic principles. Thus equity is at one and the same time a means of ensuring justice in individual cases, perhaps personifying a recognition within the legal schema of the fragility of the human condition, whilst also constituting a code of abstract, technical rules which are applied by judges carefully in accordance with case law precedent. Equity is free and yet constrained. The solution to this apparent conundrum, it is suggested, lies in a fuller understanding of the nature of "conscience" in this context and in understanding that equity is, in truth, a mosaic of doctrines, principles and patterns of justice provision.

Rehearsing the trust as an example of equitable doctrine

Equity, it is said, is a doctrine based on conscience.[313] What appears little in the literature on the juristic concept of equity is any discussion of what this notion of conscience means. It is suggested here that conscience has a stylised meaning particular to its use in equity. Therefore, we must consider the nature of equity, then

[311] Lawson, … .

[312] This contradiction is evident from the growing gap between books in this area which deal with "Equity" (frequently in Australia) and books which deal only with "The Law of Trusts and Equitable Remedies" and yet which are in truth dealing with the same subject matter. The key distinction between the two approaches is that the former type of book typically begins with Aristotle's *Ethics* and its ancient conception of equity as rectifying formal rule-making, whereas the latter begin with the formalities necessary to create express trusts to give effect to commercial transactions, marriage settlements and wills.

[313] From Maitland, *Essays on Equity*, 2nd edn, 1936, Cambridge: Cambridge University Press to Lord Browne-Wilkinson in *Westdeutsche Landesbank v. Islington LBC* [1996] AC 669.

consider what conscience connotes in its more general sense, before attempting to assess the inter-action of the two terms.

The trust, used here as an example of an equitable device, is responsive to the conscience of the legal owner of property. This may manifest itself by means of express trusts through the action for breach of trust which compels the trustee to permit no conflict of interest,[314] no loss to the beneficiaries nor any deviation from the terms of her trusteeship,[315] or it may manifest itself by means of trusts implied by law which seek to prevent the legal owner of property or some other person from taking a benefit unconscionably from that property.[316] Another example of an equitable device is the interlocutory injunction which permits the court to use its discretion in accordance with principle to decide whether or not a *prima facie* case has been sufficiently well established to justify the imposition of such an injunction restraining disposal of property, removal of assets from the jurisdiction or the continuation of otherwise lawful activities.[317]

The express trust suggests a formalised equity which has been rigidified to achieve specific legal and non-legal goals: the protection of beneficiaries, certainty in relation to title over property and so forth.[318] The trusts implied by law and the interlocutory injunction suggest responses to factual situations which appear to be contrary to conscience or demanded by fairness more generally.[319] These latter manifestations of equity display a much broader use of judicial discretion to achieve goals which we might consider to be broadly moral or ethical (those two terms are considered below) but which are nevertheless established in accordance with principle to a large extent and with precedent to a lesser extent. In this sense 'principle' refers to that body of equitable principles such as 'you must come to equity with clean hands' whereas 'precedent' is used here to suggest a slavish application of rules in earlier cases with a lesser use of discretion in any individual case which is more clearly associated with the common law.

What is meant by "conscience" in the context of Equity/equity?

"Courts of conscience"

Despite the foregoing differences in the operation of Equity/equity, it is nevertheless said to be based on "conscience". The principle within the equitable canon which best encapsulates the notion of conscience intended is the principle that 'equity acts *in personam*'. As Lord Selborne has put the matter:

> "The courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem* ; and in the exercise of this personal jurisdiction they have always been accustomed to compel the

[314] *Boardman v. Phipps* [1967] 2 AC 46.
[315] *Target Holdings v. Redferns* [1996] 1 A.C. 421, [1995] 3 W.L.R. 352, [1995] 3 All E.R. 785.
[316] *Westdeutsche Landesbank v. Islington LBC* [1996] AC 669.
[317] *Series 5 Software v. Clarke* [1996] 1 All ER 853.
[318] Above.
[319] Above.

> performance of contracts and trusts as to subjects which were not … within their jurisdiction."[320]

This principle means that the court's concern is to look to the conscience of the individual defendant and to respond to that defendant's actions and omissions. At first blush, this would suggest that the court will inquire into the individual's own conscience. As such it would be expected that equity would prefer subjective tests to objective tests. However, that is to misunderstand the manner in which equity acts.[321] Nevertheless, this troublesome term 'conscience' remains. If equity were said to act on the basis of 'a public morality expressed through the courts' then that would not lead to the uncomfortable muddle which is generated by the modern usage which suggests that equity is concerned with the individual defendant's conscience rather than with the embodiment of the sovereign's conscience through the actions of her officials and delegates.

Beyond mere subjectivity in conscience: the objectively-constituted conscience

On its face the term "conscience" does suggest subjectivity. However, matters are perhaps not so easy. To suggest that conscience is something entirely within the individual and is something other than a public ethic expressed through legal principle, is to suggest that the individual conscience, and the consciousness to which it is both etymologically and [spiritually] connected, is not socially constructed at some level. This notion is beautifully expressed by the playwright Luigi Pirandello in his play *Each in his own way* when the character Diego challenges the other characters who are talking about giving confession (itself that classical objectification of the conscience) and claiming that their self-contained consciences are clear:

> 'But what is conscience? It is the voice of others inside you.'[322]

The suggestion is that conscience is necessarily socially-constructed. The distinction between subject and object is, of course problematic. To talk of the subject meaningfully, one must mean an individual and particular person. As soon as discussion becomes discussion of similarities between subjects or of an idealised subject then one immediately begins to objectify that subject.[323] So, the conscience is most easily recognised as that small, still voice within us individually which speaks to us only of shame. For equity to seek to judge the conscience in accordance with

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[320] *Ewing v. Orr Ewing (No.1)* (1883) 9 App Cas 34, 40. Cf. *Duke of Brunswick v. King of Hanover* (1848) 2 HLC 1; *United States of America v. Dollfus Mieg et Cie SA* [1952] AC 318.

[321] Historically, equity is, in theory at least, the embodiment in legal principle of the monarch's conscience expressed through the powers delegated to the Lords Chancellor. A more modern understanding of that concept would be to recognise equity as being an embodiment of an objective ethics to which the individual is intended to aspire and by reference to which her deeds and misdeeds will be judged by the civil courts. In that sense, there might be broad parallels between the role of equity in the civil law and the role of the criminal law more generally. A marriage which is suggested by the expression that the old Court of Star Chamber was concerned with 'criminal equity'.

[322] Pirandello, *Each in his own way*, spoken by Diego in Act 1, trans. Firth, *Pirandello – Collected Plays*, Vol. 3, Calder, London, 1992, 71. Also rendered in other versions as 'Don't you see that blessed conscience of yours is nothing but other people inside you!', for example in Williams, *The Wimbledon Poisoner*, Faber & Faber, London, .

[323] Adorno, 'Subject and object', .

decided principle is necessarily to seek to objectify that conscience. To judge the conscience even on the basis of total judicial discretion is to objectify it, is to take it outside the subject and use it as a lens through which to view those acts or omissions which for which the defendant is on trial.[324]

This perception of the vernacular sense of conscience is still troublesome. Is it correct to think of the conscience as a *still*, small voice. Is the conscience something which moves, which grows and which develops? Further, is the conscience a still, *small* voice. If the individual is formed socially, at least in part, then the conscience is potentially a particularised rendering of a massive, public ethic and/or morality which is produced within the individual as an amalgam of socially-broadcast messages about right and wrong, of the products of inter-actions with other individuals (from immediate family, to work-mates to school-friends), and of more subtle phenomena like law, environment and so forth which shapes expectations and attitudes more subliminally still.

In Elias's view, individuals are necessarily socially-constructed.[325] From birth, the infant cannot survive alone. Rather others are essential to the new-born's survival. The infant absorbs language entirely from the human beings which surround her. Even if there is an instinct for language, the development of a particular language, accent, and linguistic patterns are all socially created through the weaning and maturing process. Many of the stages of life common to people in civilised societies have been created entirely by those societies. Adolescence itself has been socially created by imposing a long period between childhood and full adulthood during which adolescents are schooled and then trained. This "adult infancy" leaves the adolescent in a twilight condition between dependence and full self-determination until she receives sufficient qualification to permit her to graduate not into work but rather into adulthood. From the fundamental levels of weaning and assimilation of language through to the ostensibly more superficial levels of schoolroom experiences, the individual biography is shaped at every stage by social inter-action. Therefore, the internal world of even the particular individual must be considered to be objectified at some level.

In a different sense Levinas suggests that even our morality is something outside us.[326] He locates the essence of morality in a respect for the Other and argues that morality comes even before ontology. What is unique about the human animal, it is said, is that it has the ability to feel genuine compassion. The suggestion is that there is something innate in us about this morality. What is common both to Elias and to Levinas, then, is an understanding that the world existed before we existed individually. We are born into the world. Therefore, we do not write on the world as a clean slate, rather we arrive in a world already teeming with stimuli for us individually to assimilate and *the world* begins to doodle on *us* from the very beginning. The conscience, then, is simply a part of the way in which our internal landscape is formed by reference to our inter-action with the outside world. The postmodern suggests that the subject disappears in this welter of stimuli.[327] I would

[324] Cf. [being and time – looking backwards?].
[325] Elias, *The society of individuals*, .
[326] Levinas, *Entre nous – on thinking-of-the-other*, Athlone Press, .
[327] For Marcuse, for example, the Freudian subject has been displaced by our society's focus instead on the formation of the mass as our individuality becomes a standard commodity: Marcuse, . Now it is

not go so far. Rather, the individual is both the receptacle *and crucible* within which the chemistry of these stimuli are formed into the person each individual becomes. But, as Merleau-Ponty suggests, our perception of the world is not entirely removed from the world but rather necessarily in-the-world.[328] Our selves are objects even though to each of us individually they may seem to be a filter outwith the world through which we, uniquely, experience that world.[329] The conscience, it will be suggested, is just such an objectification.

Consequently, equity might sensibly be said to operate on the externally-exhibited morality of the individual rather than on the internally-situated morality of that same person. Equity is responsive to the external manifestation and not inquisitive as to the contents of the internal morality. This is always assuming that the individual is *conscious* of her own internal morality until external factors challenge that individual, causing her *conscience* to speak for the first time "out loud" even to herself about her own attitudes to particular ethical challenges. By this I mean that we will frequently not know our own attitude to certain phenomena until we are faced but those phenomena. Or perhaps that we will not know our view on an issue until we are appraised of that issue. At this level, therefore, it is possible that much of the content of the conscience and of our personal mythologies – that part which remains dormant and unexplored in many of us (our true feelings about strawberry yoghurt, an aversion to blue food dye, a thrill at the smell of warm road tar, a suspicion of sewing needles, a fear of accidentally chewing the tin foil wrapper on a Kit-Kat[330]) – remains hidden until something in the outside world calls it unexpectedly to our conscious perception. Conscience, that automatic censor, is therefore not only externally created in part, but the process of its generation in terms of our realisation of what our conscience likes and dislikes is frequently dependent on external stimuli.

All that can be said is that the conscience is *privately situated*. This suggests that the individual hosts her conscience. What remains at large are both the *contents* of that conscience[331] and the *process* by which the conscience is formed.[332] The contents of that conscience are prey to constant change and adaptation. Furthermore, the contents of that conscience at any particular time will be objectively created, even if passed through ostensibly subjective filters.

In conclusion, it is suggested that the conscience on which equity purports to act is necessarily a partly objective phenomenon in any event. Indeed, the most striking example of the action of public morality on the privately-situated conscience would be a judgment from a Court of Equity that a particular action breaches that equitable

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possible that we would adapt Marcuse's point to recognise that capitalism operates on us not simply as a mass but rather on each of us more subtly as part of a category of consumers beguiled by the suggestion made, for example through advertising or through human rights talk, that we are each of us uniquely valuable. Thus, we may well move en masse but each of us thinking that we move alone.

[328] Merleau-Ponty, *The Phenomenology of Perception*, .

[329] Cf. Bauman, *Liquid Modernity*, Polity, 2001, , where this paradox is laid bare in our age's obsession with acquiring objects in the expectation that by so doing we are inventing ourselves rather than simply buying an identity.

[330] Another brand name which is automatically familiar to my speller checker.

[331] Until a situation calls to the conscious mind the attitude of that individual's conscience.

[332] That is the way in which the world confronts us with circumstances which test our consciences.

code.[333] In consequence, if the conscience is indeed objectively formed then there is no reason why basing a part of our legal doctrine on such objectively formed notions of the good and bad conscience of individual defendants. The more difficult question is as to the contents of that objectively-formed conscience-through-principle and as to the process by which that conscience is both formed and expressed. To begin to address these concerns it is important to attempt to model the manner in which Equity/equity operates. It is to that task that I turn next.

MODELLING EQUITY

Given the many-faced natures of equity it is perhaps important to try to model some of these various approaches. The table set out below (Fig. 2) attempts to establish some broad categories within which we might argue that Equity/equity operates. Hidden behind this table is a notion that equity is both a juristic and a non-juristic concept. That is, equity exists at large in the social sciences in the manner considered above and that Equity also comprises the legal jurisdiction expressed over time by the Courts of Chancery. In truth, however, what the table above suggests is that the sense in which equity is deployed by jurists is a combination of legal concepts and extra-legal concepts. My meaning will emerge.

Fig. 2

remedy	*Cognitively open >*	*< Autopoietically closed*	*claim*
Weak discretion	**Rectificatory**	**Adjudicative**	*Institutional*
Strong discretion	**Creative**	**Responsive**	*At large*
	Open textured >	*< Principled*	

At the centre of the table are the four emboldened concepts which, it is suggested, describe the four principal ways in which Equity operates. While the concepts are separate, it is suggested that they are best envisaged as points on a compass – that is, any individual set of co-ordinates might be best expressed as having characteristics within one category but nevertheless close to another, such as North-West, South South-East.

[333] Of course it could be said that, in part, law exists to measure the behaviour of individuals up against the objective conscience of society as expressed through law – therefore, equity is simply expressing that general prescription.

The satellite concepts are organised in pairs: cognitively open / autopoietically closed; open textured / principled; weak discretion / strong discretion; institutional / at large. Each is in opposition with the other but also located next to the emboldened concepts which they most closely describe. On the right of the table are those concepts which relate to the *claim* which is available to the parties, whereas the left hand of the table is concerned with the discretion as to the *remedy* which the court can award if it is convinced as to the availability of the claim. There are equitable claims in which the remedy follows the claim. For example, a claim that equity will not allow statute to be used as an engine of fraud requires that the statute be put aside. There are other equitable claims which are strictly set out but whose remedy is nevertheless at the complete discretion of the court. For example, proprietary estoppel in which the claim must comply to a clear three-step test where as the remedy may range across the complete spectrum from personal to proprietary rights.

The emboldened concepts will be described in turn by reference to the foregoing discussion.

Rectificatory. Aristotle's conception of equity is as a means of rectifying universal rules (principally legislation) or formal justice to achieve the best result. Within Equity, rectificatory concepts are organised on the basis of weak discretion in that judges will generally only circumscribe statutory rules (in particular) in line with established precedent.[334]

Adjudicative. When cases come before Courts of Equity in which there are two or more protagonists competing one with another, then equity is called upon to adjudicate between them. [The distinction from the rectificatory mode is that rectification is concerned with the defendant's good conscience in relation to the abuse of statute or some common law rule, rather than the adjudicative mode which decides contested claims to property.] Equity will often do this on the basis of presumptions (as in resulting trusts or the categories of undue influence) or by reference to evidential principles (such as the rule that the first in time prevails, or that delay defeats equities). In this sense, the concern of the court is solely to decide between two competing claims which of the two has a greater claim, in effect, to the judge's sympathy.

Responsive. The responsive mode is best expressed by the doctrines of proprietary estoppel, constructive trusts and interlocutory injunctions. In the manner considered above, the responsive approach of equity is concerned to deal with unconscionable behaviour otherwise than in straightforward resolution of contested actions for title to property or to set aside statutory rules. These responsive doctrines appear to grant judges potentially strong discretion at two levels: first, by means of interpreting the witnesses' evidence or, second, by means of deciding whether or not the judge is convinced that the facts justify the deployment of such a device. However, they are not cognitively open nor open-textured because the tests governing their application are developed within the doctrine of precedent and in accordance with equitable principle. Thus, the interlocutory injunction is available in circumstances in which the judge is convinced that the applicant has a sufficiently strong case to succeed at trial and so grants the judge a strong discretion. This mode demonstrates equity in its

[334] [How is this weak discretion not the same as "principled"?]

general sense, rather than in the narrower confines of trusts law. Principle, however, ensures that the judge will only make the award by reference to decided, comparable cases. Proprietary estoppel demonstrates this tendency more clearly. There is clear principle as to the manner in which the estoppel arises – representation, reliance and detriment – even though there is strong discretion subsequently as to the result or remedy which is awarded. Therefore, there is a combination of strong discretion and strict principle.

Creative. By contrast with responsive equity, creative equity is not bound in by precedent. Significantly, such claims are open-textured in that both the scope of the claim and the available remedy are capable of malleability. They are cognitively open in that the concepts which will inform both claim and remedy can be drawn from institutions and agencies outwith the legal system. Controversially, perhaps, it is suggested that common intention constructive trusts and claims in family law to rights in the home are capable of being creative in this manner. While common intention constructive trusts are supposedly based on the clear principles set out in *Lloyds Bank v. Rosset*,[335] that case is perhaps best known for its being ignored by the Court of Appeal at least as often as it is followed. In *Midland Bank v. Cooke*[336] and *Hammond v. Mitchell*,[337] Waite LJ adopted an open-textured approach to the structure of such trusts. In New Zealand the spirit of Lord Denning's new model constructive trust still burns brightly in some quarters. The new model constructive trust was flirted with in a few cases[338] before the reasonable expectations test was finally developed.[339] This is the axiomatic expression of open-textured remedies deploying cognitively-open strategies from family law and so forth.

In truth, the creative potential of equity would be under-played by most trusts lawyers – and yet it is suggested both that it is equity's most dynamic future facet and that it has been its previous success in the commercial context [such as with the use of the trust and the floating charge as devices for taking security in commercial situations].

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338 *Carly v. Farrelly* [1975] 1 NZLR 356 – drawing on cases like *Hussey v. Palmer* [1975] 1 WLR 1338.

339 *Phillips v. Phillips* (1993) 3 NZLR 159; after comments in *Pasi v. Kamana* [1986] 1 NZLR 603.

III. THE UNBEARABLE LIGHTNESS OF PROPERTY

The changing nature of property as experienced in the world: disengagement, softness, and lightness

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[340] 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.[341] 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."[342]

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.[343]

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[340] And where the former are typically former enthusiasts of the latter: e.g. Giddens, *Beyond left and right*, Polity, 1992; Bauman, *Globalisation*, Polity, 1998.
[341] Sennett, *The corrosion of character: the personal consequences of work in the new capitalism*, WW Norton & Co., 1998, 61.
[342] *Ibid*.
[343] 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.[344] 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".[345] 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.

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.[346] 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 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.[347] 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 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.[348] 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.[349]

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*

[344] Beck, "The cosmopolitan society" in *Democracy without enemies*, Polity, 1998.
[345] Bauman, *Liquid modernity*, Polity, 2000, 149.
[346] Negri and Hardt, *Empire*, Harvard, 2001.
[347] Thrift, "The rise of soft capitalism", *Cultural Values*, 1/1, April 1997, 29.
[348] Bauman, *Liquid modernity*, Polity, 2001.
[349] 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.

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.[350] 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.[351] 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.[352]

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.[353] 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.[354] It also embodies a range of expressions of hope and of anxiety but the 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*.[355]

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[350] Bauman, *Liquid modernity*, Polity, 2001.
[351] Beck, *World risk society*, Polity, .
[352] 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.
[353] Hudson, *The law on investment entities*, Sweet & Maxwell, 2000, 110.
[354] 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.
[355] [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.

Compulsory obsolescence – consumption of property by non-entrepreneurs

Thus far, the notion of property has leant 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 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.[356] 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.[357] 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.[358]

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.

[356] 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.
[357] Baudrillard, *The consumer society*, 1998.
[358] Buckminster Fuller, *Nine chains to the moon*.

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.[359]

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.

[359] Virilio, *Polar Inertia*, London, Sage, 2000; *L'Inertia Polare*, Paris, Bourgois, 1990.

IV. TRUSTS OF HOMES, SOCIAL JUSTICE AND INDIVIDUALISATION

The process of individualisation; "the average exoticism of everyday life"

The core to individualisation theory is an understanding that there is no longer, in Western societies, anything which could properly be described as a normal person. Rather, "everyone is into something", and each of us is said to identify herself by reference to her own context, her own mythology and her own foibles. Beck quotes Hans Magnus Enzensberger's exuberant examples of what he terms the "average exoticism of everyday life":[360]

> 'It is most obvious in the provinces. Market towns in Lower Bavaria, villages in the Eifel Hills, small towns in Holstein are populated by figures no one could have dreamed of only thirty years ago. For example, golf-playing butchers, wives imported from Thailand, counter-intelligence agents with allotments, Turkish Mullahs, women chemists in Nicaragua committees, vagrants driving Mercedes, autonomists with organic gardens, weapons-collecting tax officials, peacock-breeding smallholders, militant lesbians, Tamil ice-cream sellers, classics scholars in commodity futures trading, mercenaries on home leave, extremist animal-rights activities, cocaine dealiers with solariums, dominas with clients in top management, computer freaks community between Californian data banks and nature reserves in Hesse, carpenters who supply golden doors to Saudi Arabia, art forgers, Karl May researchers, bodyguards, jazz experts, euthanasiasts and porno producers. Into the shoes of the village idiots and the oddballs, of the eccentrics and the queer fish, has stepped the average deviationist, who no longer stands out at all from millions like him.'[361]

It might not be too far-fetched to suggest that among the only things which make us the same are the facts that we are expected to be subject to the same laws, that our common biology makes us react in broadly similar ways to medical treatment and the same problems of phenomenology apply to us all – that is, how do we account for ourselves as embodied entities encountering the world from inside our own minds through our five senses. The question is therefore, in relation to equity, how should the law account for these differences between us as individuals or are there sufficient and suitable reasons for the law to treat us all as identical units when we appear before the justice system.

Philosophical bases for individualisation

Beck and Beck-Gernsheim set out their individualisation as being concerned with a very different sense of modernity from many of the key philosophical conceptions of that idea:

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[360] *Ibid*., 13.
[361] Enzensberger, 1992, 179.

> 'The question is: what is modernity? The answer is: not just "instrumental rationality" (Max Weber), "optimal use of capital" (Karl Marx), or "functional differentiation" (Talcott Parsons, Niklas Luhmann), but supplementing and conflicting with these, it is *political freedom*, citizenship and civil society … meaning morality and justice are not pre-ordained … Quite the reverse is true. Modernity has an independent, living and simultaneously ancient and highly up-to-date wellspring of meaning in its midst: political freedom. … Modernity accordingly means that a world of traditional certainty is perishing and being replaced, if we are fortunate, by legally sanctioned individualism for everyone.'[362]

The centrality of political freedom is what the authors assert, based in part on changing social aspirations towards a better quality of life rather than simply higher incomes or greater consumption.[363] This is a form of lifechoice which may sound familiar to the academic lawyer: less money but a better lifestyle with more control over one's own time. Within this hankering for freedom, it is said, there is also a greater understanding of the need for increased co-operation and an understanding that one's choice of lifestyle may impact on the environment and on the rights of others.

What is more problematic is the evidence of social exclusion which theorists such as Bourdieu have been astute in pointing out to the individualists, arguing instead that a welfare state is the only viable solution. Beck's response to that is to reflect that more community is not necessarily a positive thing by pointing to the German experience in the 1930's of persecuting minorities. This is not, it is suggested a full response to Bourdieu's assertion that the phenomenon of poverty nevertheless constitutes a very great challenge to this idea of individualism. Beck deals with Bourdieu's complaint by compacting (incorrectly in my view) Bourdieu's approach with that of the American communitarians,[364] for whom community is an artificial result of imposing conservative norms of behaviour on societies on pain of loss of benefits and other social goods. By examining the communitarian approach to these issues it is easier for Beck to suggest that enlightened individuals making their own lifechoices are more likely to subscribe to broadly permissive approaches to such questions.[365]

The socially-constructed individual

What remains within the concept of individualisation is an understanding that being individual in the sense of being distinct and apart from all other people would be insufficient. Human beings are necessarily weaned through a process of inter-action with other human beings.

This possibly surprising turn in the theory raises two further questions. First, to what extent is the individual socially-generated in any event? Second, to what extent can

[362] *Ibid*., 157.
[363] *Ibid*., 161.
[364] E.g. Etzioni, *The moral dimension*.
[365] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 166.

we say that there is sufficient social confidence in the minimum levels of equality necessary to found security.

The thinking underpinning much social theory at the turn of the millennium was that the onset of civilisation had constituted a decisive turn in the relations between individual human beings and the societies of which they formed a part. In Freudian terms this constituted an uncomfortable match of instinctive desires with socially-imposed restrictions.[366] Means of socialisation were developed by those societies which entered an industrial revolution, although the changes themselves were evident before the process of industrialisation and urbanisation. The changes, principally, were connected with the training which was required of individuals before they would be considered suitable for the roles which were either selected for them or which latterly they selected for themselves.[367] For example, training to become a lawyer, to take holy orders or simply to be apprenticed to a trade all took young people and subjected them to a regimented period of training. The broadening of access to schooling and subsequently of compulsory schooling created a novel hiatus between childhood and adulthood because it introduced between those two stages a period of time when the biological adult was still considered not to be an adult because he or she was still undergoing schooling or training. In the twentieth century such people became the more important demographic of teenagers with their own youth culture and so forth. What is significant is that this period of training inculcated into the young many of the values of the dominant social ideology,[368] only vesting them with the badges of success once they had graduated from school or training.[369] At one level failure to be properly inculcated led to exclusion from the technical social sub-groups which controlled law, medicine and other professions, whereas at another level to deviate significantly from these social norms gave rise to a risk of incarceration as part of the great confinement of the late medieval period.[370]

Thus the socially-conditioned human being was generated over time, not simply as a passive recipient of feudal power but as a contributor to industrial society. Such societies became dependent upon the technical expertise of individuals skilled in their own areas of expertise and not simply another unit in a general pool of unskilled labour.[371] Behind that social conditioning, however, human beings remained individual in that they continued to perceive the world through their own eyes, to hear the world through their own ears and feel the world through their own touch. The difficulties of phenomenological philosophy are grounded in this awkward combination of social conditioning and individual perception. As Elias conceives of the middle ground between these two poles, individuals are socially generated in that they require inter-action with other human beings to wean them initially, conversation with other human beings to develop their language faculties and so forth.[372] The individual is necessarily linked to society, that is to other human beings, from the moment of birth. It is impossible to conceive of human beings, in both senses, without the presence of other human beings.

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[366] Freud, *Civilisation and its discontents*, Penguin.
[367] Elias, *The society of individuals*, Continuum, 1998.
[368] *Ibid*.
[369] Founcault, *The archaeology of knowledge*, Routledge.
[370] Foucault, *The birth of the clinic*, Routledge.
[371] Elias, *The society of individuals*, Continuum.
[372] *Ibid*.

Who is the subject?

The individual is then the most complex problem we face. The individual before the law may have gone through a number of ages. The first age might be said to be a recognition straightforwardly that the individual is entitled to appear as a claimant or a defendant before the law and to have the principles of that law applied in such litigation. For many socio-legal thinkers, the individual may have been created in a second age in which the Freudian concept of the self places us in front of the law precisely so that our basest desires and uncontrollable urges are capable of some control by this civilisation.[373] A third age belongs to the postmodernist's deconstruction of the self. That is a legacy with which we are still wrestling. To say that the individual no longer exists and that there are no more truths, *pace* Nietzsche, leaves us nothing to believe in, not even a raft in the storm. When the state caught ahold of this notion of the individual as a tempest of uncontrollable urges, it attempted to control those urges. In Marcuse's terms this was done by destroying the notion of the individual and replacing her with "the masses" in which the Freudian father is replaced by the urges fed to us by mass industry, the political system and possibly by the Weberian bureaucratic machine. The result was the creation of the "one-dimensional man" who is fed opinions, aspirations and desires by the state. When this idea of the mass was unpacked by the monetarist, libertarian politics of the Reagan-Thatcher era we became addicted to our own individuality. It is a commonplace now to suggest that this increased individuality offers us less quality of self than we might have had in an era of shared aspirations. Solidarity has arguably been replaced by shopping.[374] The self which we seek is now a self which we buy rather than a personal project which we create.

The post-structuralists decided that the subject was no more. Foucault's history was a history, in the Nietzschean conception, without a subject. For Foucault, power was the positive force which made thoughts transform into effects, actions into reactions. The removal of the focus on the individual permitted his well-known parallel between Bentham's Panopticon, a design for a prison the structure of which meant that prisoners would behave as though being watched constantly even if they were not being watched, and the effect of discipline on individuals through their schooling, prisons and so forth.[375] Collectively these become, for Foucault, technologies of the self in which it is possible to exert power through the development of governmentality which is an extension of mere sovereign power into a web of more subtle and localised expressions of control.[376]

The removal of the subject as the central locus of this form of social thought was at the heart of the differences between Luhmann's enthusiasm for understanding society as being made of systems which communicate one with another[377] and Habermas's preference for communicative action in which individuals would take part in reaching

[373] Freud, *Civilisation and its discontents*, Penguin.
[374] Bauman, *Liquid modernity*, Polity, 2000.
[375] Foucault, *Discipline and punish*, Penguin.
[376] Foucault, *The history of sexuality*, Penguin.
[377] Luhmann, *Social systems.*

a consensual position in which all of their needs were accounted for.[378] This determination to exclude the individual is an approach criticised by Giddens[379] who in his theory of structuration prefers to conceive of social activity comprising inter-actions of active individuals who may nevertheless not be knowledgeable about the effects of their actions. This is akin to Marx's view that "men make history, but not in conditions of their own choosing". Instead Giddens defends the liberal, bourgeois capitalism which arose in the modern era as not necessarily putting the factory on a par with the prison in the way that Foucault tends to do; Foucault's thought frequently replaces Marx's focus on the place and means of production as the central feature of social action with the prison, the clinic and the school.[380]

There is, however, a question for any area of law which, like equity, seeks to decide questions relating to the conscience of individuals, then it requires some concept of the individual which is before it. Foucault's conception accords with one version of equity as developed by means of judicial application of pre-existing principles. In this sense, equity is not concerned with any particular subject but rather looks to models by which certain forms of behaviour are rewarded with rights in property and so forth, whereas others are not. Alternatively, one could say that these principles are necessarily developed by reference to the individual litigants on a case-by-case basis. The reference to the body of principle from which any decision flows is therefore difficult to allocate between a straightforward application of principle and a reaction entirely to the facts of the case before the court.

Of course, different judges decide in different ways in different cases. As considered below in relation to the caselaw on trusts of homes, there are clear divisions in the cases between decisions like that of the House of Lords in *Lloyds Bank v. Rosset*[381] which attempts to set out clear, concrete principle and that of Waite LJ in *Midland Bank v. Cooke*[382] in which his lordship declared himself mystified by the division in the cases between decisions based on a money consensus between the parties and those based on an interest consensus, so that he considered himself entitled instead to survey the whole course of dealing between the parties and to reach whichever result he wished. However, in reaching the result he considered appropriate on the facts, his lordship did have reference to another old principle of equity – namely that equity requires equality between the parties. Therefore, an ostensibly strong discretion (in Dworkin's terminology[383]) was masked in observance of an ancient principle as though no discretion at all had been exercised.

That question arises in equity: to what extent has the subject been taken out of equity by virtue of the development of more rigid principle? For all the courts' ritual setting out of the facts of the case at the beginning of each judgment, is that merely by way of a prelude to the business of fitting the abstract of the facts into the matrix of recognised principle? The question is then as to the place of the individual within the technology of the law.

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[378] Habermas, *Theory of communicative action*, Beacon Press.
[379] Giddens, *Profiles and critiques in social theory*, Macmillan, 1981, 218.
[380] *Ibid*.
[381] [1991] 1 A.C. 107.
[382] [1995] 4 All ER 562.
[383] *Taking rules seriously*, Duckworth, 1977.

Is there such a thing as social justice?

Rather than conceive of "social justice" purely rhetorically, I would suggest that it is possible to create a model of social justice which allows us usefully to measure the way in which the legal system allocates rights in the home. Principally this discussion will be concerned with Miller's model of social justice (while also considering some of Rawls's model of achieving social justice).[384] This section will adopt the definitions of that term considered by Miller[385] to highlight the philosophical differences between the norms exacted by three different sub-systems of law: English property law, English family law, and the Canadian law of unjust enrichment.

As considered above, the term "justice" has been the subject of complex philosophical debate since before the time of Aristotle. "Social justice" more particularly relates to the applications of these theories of justice to social goods beyond simply claims between individuals. In Miller's analysis the forms of social justice can be divided into two: conservative and ideal. First, *conservative* social justice seeks to apply principles of justice so as to preserve a status quo: such justice may, for example, seek restitution to vindicate the property rights of some person so that the pre-existing division of property rights is maintained.[386] Second, *ideal* social justice seeks to change existing social conditions in line with some political ideology – the particular ideology need not matter for that categorisation.[387] This marks out two political philosophies: the radical and the conservative. The purpose of using a model of social justice here is to create some form of benchmark against which various approaches to rights in the home can be measured.

Beyond that initial delineation it is said that social justice operates on one or more of the following three bases: rights, deserts, or needs. Social justice based on *rights* is orientated around the vindication of some recognised entitlement to property.[388] Social justice based on *deserts* allocates goods to a deserving person because that person is said to be deserving on account of their talents, their social position, and so forth. Social justice based on *needs* measures neither a pre-existing entitlement nor a deserving case but rather identifies a category of person who requires a transfer of goods to them so that their lack of such goods can be alleviated. It would be possible to imagine situations in which a persons needs might give rise to a right under a particular legal system,[389] or where we might argue that to have a right to something means that you are deserving of it under a positivist system of law: there is unfortunately neither space nor time for such detailed questions here.

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[384] It is suggested that Miller's model is more useful for descriptive purposes whereas Rawls's model is more aspirational in the sense that Miller has no agenda – he does not assert any particular political point of view – whereas Rawls's agenda is to promote equal right to a basic liberty as set out in the two principles of justice: Rawls, 1972, 61.

[385] Miller, *op cit*., 1976.

[386] Such as in *Foskett v. McKeown* [2000] 3 All ER 97.

[387] This is primarily a radical political agenda but may also be reflected in doctrines like proprietary estoppel which frequently create rights which had never existed before.

[388] There is insufficient space here to consider the ways in which "rights" may come into existence philosophically.

[389] As evidenced in housing law or the family proceedings considered above.

A worked example

The example which Miller gives to tease apart the three forms of social justice[390] relates to two boys being asked to clean my windows on the basis that I will pay them £1 each for the work. I notice that one boy works diligently and performs an excellent job, whereas the other boy is slovenly and cleans the windows poorly. I have the following dilemma: do I pay the boys equally for their unequal work? A *rights* theory would require me to pay them according to our agreement: that is, a contract which entitles each to be paid £1 and which creates common law rights for each boy. A *deserts* theory might suggest that I pay £1.25 to the diligent child and only £0.75 to the slovenly child on the basis that the diligent boy's personal characteristics and hard work mean that he *deserves* to receive more than the lazy boy. Alternatively, it might require me to reward the diligent boy with an extra £0.25 and to respect the lazy boy's rights to receive his £1. A *needs* theory may make me take into the account the possibility that one boy is from a rich home whereas the other is from a poor home – perhaps this would prevent me from refusing to pay the slovenly boy less than I owed him under our contract if he was poor. Alternatively, a needs thesis might encourage me to withhold the money from the lazy boy if he was rich and did not need the full £1 so that some of that money could be redistributed to a diligent, poor boy.

Rights-based approaches to social justice

If we consider the manner in which English law deals with the home we will see that there are different concepts of justice at play. English property law provides that on relationship breakdown only a person who has contributed to the purchase price of the property is entitled to take property rights in it.[391] The decision of Bagnall J. in *Cowcher v. Cowcher*[392] sought to conceptualise the different possible approaches to the form of constructive trust used in cases of common intention. This approach had not been followed explicitly for some time until the decision of the Court of Appeal in *Midland Bank v. Cooke* [393] where Waite LJ adopted it as a suitable exposition of the principles in *Gissing v. Gissing*. It is considered here as a reasonable introduction to the development of the principle of constructive trust in this context. Bagnall J. began by explaining that proprietary rights are *not* to be determined simply on the basis of what is considered to be 'reasonable, fair and just in all the circumstances', thus underlining the courts' determination to avoid the development of a remedial constructive trust approach in relation to family homes. Rather, the constructive trust will rest only on pre-existing entitlements.

The decisions in cases such as *Cowcher v. Cowcher,*[394] *Grant v. Edwards,*[395] and *Coombes v. Smith*[396] offered a variety of readings of the concept of "common intention" which ranged from divisions between the forms of consensus, the need for common intention to be coupled with detriment, and proprietary estoppel respectively.

[390] Miller, 1976, 28.
[391] *Lloyds Bank v. Rossett* [1991] 1 AC 107.
[392] [1972] 1 All ER 948-951, 954-5.
[393] [1995] 4 All ER 562.
[394] [1972] 1 All ER 948.
[395] [1986] Ch 638.
[396] [1986] 1 WLR 808.

In the light of this welter of contradictory and difficult authority, there was some momentum for rationalisation of the law. Particularly in an area of such great social importance there was some momentum for clearing up the difficulties and making the law more straightforward. Just such a rationalisation was set out in what is now the leading authority on the operation of the constructive trust in this area in the leading speech of Lord Bridge in *Lloyds Bank v. Rosset*.[397] Lord Bridge appointed himself the task of setting out the terms on which a claimant may acquire an equitable interest in the home on grounds of "constructive trust or proprietary estoppel". In either case, the entitlement to some equitable interest in the home is dependent upon an express agreement or on a cash contribution to the purchase price or to the mortgage repayments. The contractarian basis of this area of law is evident. Where there has been some agreement, arrangement or understanding, the court will enforce that as a common intention; or similarly where there has been some cash consideration paid over there will be a right to property.

The Australian unconscionability approach is founded on concepts from commercial partnership law. In *Muschinski v. Dodds*[398] the analogy developed by Deane J was those rules "applicable to regulate the rights and duties of the parties to a failed partnership or joint venture" ought to be incorporated into a case in which two people had brought severally their money and their brawn to the development of a piece of land on which they intended to live together until their relationship failed.[399] As a result the partners should be entitled to a share of the property in proportion to their contribution to the joint venture.[400] This permits a broader conceptualisation of the sorts of contributions which are made to a joint venture between two people although it leaves at large how one will go about valuing significant but intangible contributions like child-rearing and so forth.

This is a *rights*-based conception of a just conclusion which awards rights in property solely on the basis of some recognised pre-existing entitlement. What is concealed is the court's value judgment in preferring expressed, contractarian models to any other. So it is that the purchase price resulting trust recognises a right as arising from the payment of money: it is this right which gives rise to an equitable interest in property but it is blind to any question of the needs of the parties.[401] This attitude is similar to contract law which enforces my obligation to the other contracting party on the basis of our freely created contract. It is ostensibly value-neutral except to the extent that it supports commercial morality by requiring that a contract once made is inviolate – however, that ostensible neutrality by means of a failure to disclose its true underpinnings of course speaks most eloquently as to its true underpinnings.

Deserts-based approaches to social justice

[397] [1991] 1 AC 107.
[398] (1985) 160 CLR 583.
[399] *Ibid*., 618.
[400] The requirement of a joint venture is now diluted slightly so that a personal relationship with co-habitation will constitute a joint venture – it does not also require a business undertaking: *Baumgartner v. Baumgartner* (1988) 62 ALJR 29, (1987) 164 CLR 137; *Hibberson v. George* (1989) 12 Fam LR 725.
[401] *Tinsley v. Milligan* [1994] 1 AC 340.

Canadian unjust enrichment law takes a more creative approach to rights in the home by finding that property rights come into existence when a person participates in a relationship such that the other party receives valuable services, albeit not payments in cash. This is an approach based on *deserts* – to contribute to a relationship over a period of time means that the individual acquires some claim to just treatment by way of a transfer of some right in that property.[402] The very fact that the claimant has contributed something the denial of which would cause her to be hard done-by is itself the thing which means that she deserves to be compensated for that. More precisely, it means that the defendant can be precluded from being enriched in some way that is unjust.

Similarly, the approach taken by Waite LJ in *Midland Bank v. Cooke*[403] in recognition of a wife's contribution to a marriage recognises that she *deserved* some right in the property sufficient to defeat the claim of a mortgagee to take possession of that property from her. What is difficult about that decision is that Waite LJ is determined to protect the Cooke family from the mortgagee and so grants Mrs Cooke an entitlement in the home based on exactly the sort of ephemeral contributions which had been rejected in *Lloyds Bank v. Rosset* and *Burns v. Burns*.[404] Waite LJ returned to the speech of Lord Diplock in *Gissing* and to the decision of Browne-Wilkinson V-C in *Grant v. Edwards*, before holding the following:-

> "[T]he duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'."

On these facts, the matter could not be decided simply by reference to the cash contributions of the parties. The court accepted that the parties constituted a clear example of a situation in which a couple 'had agreed to share everything equally'. Facts indicating this shared attitude to all aspects of their relationship included evidence of the fact that Mrs Cooke had brought up the children, worked part-time and full-time to pay household bills, and had become a co-signatory to the second mortgage.

Possibly my favourite case is *Hammond v. Mitchell*, [405] a decision of Waite J (as he then was) in which the question arose as to rights in real property, business ventures and chattels. Hammond was a second-hand car salesman who was aged 40 and who had recently left his wife. He picked up Mitchell when she had flagged his car down to ask directions in Epping Forest. She was then a Bunny Girl (or, nightclub hostess) at the Playboy club in Mayfair, then aged 21. Very soon after that first meeting they began living together. It was said by Waite J that "[t]hey both shared a zest for the

[402] (1993) 101 DLR (4th) 621.
[403] [1995] 4 All ER 562.
[404] [1984] Ch. 317.
[405] [1991] 1 WLR 1127.

good life."[406] The history of the equitable interest in their personal and their real property followed a familiar pattern in that "[t]hey were too much in love at this time either to count the pennies or pay attention to who was providing them".[407] In time they bought a house in Essex in which they continued to live until the break-up of their relationship. There were no formal accounts and no formal agreements as to rights in any form of property. They had two children and an exciting, 11-year relationship. Aside from the house and its contents, they both acquired interests in restaurant ventures in Valencia, Spain.

Waite J. was clear that he considered the question of finding a common intention "detailed, time-consuming and laborious"[408] and therefore, in the light of all the facts, it was found that her share of the house should be one half of the total interest, on the basis that it appeared that the couple had intended to muck in together and thereby share everything equally. On this basis we might say that Mitchell *deserved* her interest in the home because of her contribution to their relationship and to the business. However, she was granted no rights in the restaurant business in Spain because she had contributed nothing towards it and therefore had neither a right nor a desert to any interest therein.

The extraordinary facet of the "family assets doctrine"[409] is that it eschews all of the carefully prescribed rules in *Rosset* and other similar cases. Rather than concern himself with the niceties of the time of contributions and so forth, Waite LJ appears to be either a great realist or a great romantic. Waite LJ is a great realist in that he acknowledges that life is a chaotic muddle for many people in which they do not pay careful attention to their property rights when seeking to cope with the many vicissitudes of life. Chaos is not so much a feature of the law as of the circumstances on which the court is asked to rule.[410]

It is the possibility of drawing careful distinctions which is mystifying: particularly when those distinctions will not fall easily between an interest consensus and a money consensus on competing authorities. Waite LJ is a great romantic when he acknowledges the passionate confusion personified by Hammond and Mitchell and acknowledges that their real intention was to treat everything as shared between them.

It could be said that proprietary estoppel is similarly based on deserts. When a right to the fee simple in property is awarded to a claimant who has been promised that she will receive the property in its owner's will, it could be said that she deserved that transfer of title in the light of her acts to her detriment in reliance on the promise made to her.[411] Of course the outcome and the extent to which the claimant in *Pascoe v. Turner*[412] could be said to have *deserved* it, is questionable. Only by reference to the biblical parable of the widow's mite could it be said that her contribution of a few hundred pounds to the decoration of a house worth tens of thousands ought to entitle her to a transfer of the fee simple in possession. In that case the court justified its

[406] *Ibid*., 1129.
[407] *Ibid*., 1130.
[408] *Ibid*., 1130.
[409] Terminology adopted in Hudson, *Equity & trusts*, Cavendish, 2002, 447.
[410] Dewar, 1998.
[411] *Re Basham* [1986] 1 W.L.R. 1498.
[412] [1979] 2 All E.R. 945.

award on the basis that there was no other means of protecting her interests because she had no registered rights under land law.

The form of desert at issue her is difficult. In classical philosophical discussions of desert, the question is always whether or not the claimant of the desert would have some unfair, natural advantage – such as a gift for music or athleticism – such that anything she won would not necessarily be as deserving as somebody less naturally advantaged who had perhaps worked harder for less attainment. And so it is with desert in this context in another sense: desert must be distinguished from *rights* or else we might say that the person who had paid for the home *deserved* it as well as having the rights granted to her under resulting trusts principles. The *Pascoe v. Turner* decision measures desert in part by reference to the lack of pre-existing wealth in the claimant – but does not that intrude into a question of needs or simply of feeling sorry for the needy claimant?

Needs-based approaches to social justice

English family law takes different approaches. The Children Act 1989 places the welfare of the child as the paramount consideration – in consequence, the legislation takes a *needs* approach to a just conclusion. The child will not have contributed to the purchase price nor will it necessarily have formed an integral part of the family unit for long enough to deserve property rights (or even occupation rights). Similarly the Inheritance (Family Dependents) Act 1975 provides a power for the court to rewrite a will on grounds either of some overlooked proprietary right or on grounds of need – an alternative choice of rights and needs respectively.

Property law is directed at the recognition of pre-existing rights. Purely remedial, equitable doctrines such as proprietary estoppel are concerned to ensure both good conscience and also that someone who has suffered detriment receives their just deserts. Family law, housing law and social security law are concerned to meet the needs of applicants.[413] Within these subtly different approaches to social justice are the true differences between these various aspects of the English law treatment of the home. One point should be made in relation to social security law in this context. Whereas one would ordinarily expect social security payments to be responsive to need, with the advent of the job-seeker's allowance and the increasing tendency towards linking benefits to preparedness to seek work, there is a seismic shift in the social justice balance. Benefits under this newer type of regime would be based on desert, by reference to having sought work sufficiently diligently in the foregoing period. This is to be contrasted with the requirement that someone seeking advice and assistance under the Housing Acts on grounds of homelessness be in "priority need" – a category predicated on the social obligation to assist those who are without suitable accommodation on the basis that they are pregnant, elderly or, otherwise, considered sufficiently vulnerable.

[413] Although, it could be argued that with the possibility of losing entitlement to the job-seekers' allowance on grounds of failure to attend interviews that such social security provision is now based on a weak form of right which stems from attendance at interviews and not simply from an assessment of needs.

There is no single approach to the home in the common law nor in equity, in spite of developments in the legislation since the housing statutes of 1977,[414] the Children Act 1989 and the variety of family law, housing and property legislation passed in 1996.[415] It is submitted that this lack of common principle is true of the various departments of common law and equity, covering the well-established divisions between trusts law, family law, child law, public law and housing law. Rather, each area of law appears to advance its own understanding of the manner in which such rights should be allocated, resulting in an inability to understand the changing nature of the family nor to account for it in the current jurisprudence. The result is a hotchpotch of rules and regulations coming at the same problem from different directions. A comprehensive legislative code dealing with title to the home, the rights of occupants, the rights of children and the rights of creditors is necessary to reduce the cost and stress of litigation, and to ensure that this problem is given the political consideration that it deserves.

How can social justice and individualisation inter-sect?

The purpose of identifying a taxonomy of social justice here is to enable a more careful dissection of the varying outcomes which result from the differing approaches to allocating rights in the home. Much of the discussion of this area among property lawyers and in property law courts proceeds on the basis of technical differences as to the appropriate principles. The leading case-manque, *Lloyds Bank v. Rosset*, was the clearest example of an attempt to tidy up the law without paying particular attention, in the judgment itself, to the social ramifications of that decision. Rather, *Rosset* concealed, thinly, a rights-based attitude to title in the home which was predicated on very particular contributions to that home. It is suggested that being able to label the underpinnings of that approach makes it easier to muster one's concern about it and, co-terminously, to identify those approaches which might be considered preferable to it.

Individualisation theory has more to say about families than it does about property. In relation to the family it speaks intelligently about the importance of understanding the roles which women want for themselves outwith the strictures of the traditional family; more than that, it moves beyond merely "understanding" those aspirations and advocates instead that respect for them is a necessary pre-requisite of founding secure, happy societies. Women are currently caught it is said between "no longer" and "not yet" in that conditions of gender parity have improved but are not yet close to equilibrium.[416] Rather, what is needed is a recognition of a need for a "life of one's own" outwith the socially constructed roles of carer, wife and mother.[417] Taken in this regard, individualisation theory is concerned with respect for individual biographical choices. It is also sensitive, however, to the need for society to recognise its ethical duties to those communities, such as the elderly, who are entitled to support and respect in a way which goes beyond merely cheering their existential decisions from the sidelines and instead requires social policy on a range of issues including

[414] That is the Housing (Homeless Persons) Act 1977, the Protection from Eviction Act 1977 and, of course, the Rent Act 1977.
[415] Principally the Family Law Act 1996 and the Housing Act 1996.
[416] Beck and Beck-Gernsheim, *Individualisation*, Polity, 2002, 54.
[417] *Ibid*., 56.

healthcare, housing and pensions to add quality to their lives which a value-free pursuit of individual liberty would not give them.[418] As Beck and Beck-Gernsheim point out, the word "care" is too often dropping out of our vocabularies in this context. Talk instead is of taking action during one's working life to provide for one's own old age. The increasing experience of those in work is also of the need to care for an elderly relative. The concern which they have with current public policy in this area is that too often the state decides to construct old age in a number of ways ranging from setting retirement ages to, more importantly perhaps, deciding what is and is not possible for the elderly to achieve economically and socially.[419]

Therefore, in relation to gender politics and life politics, individualisation theory has identified some of the key trends in the claims to greater liberty of the ordinarily dispossessed in our societies: senior citizens and women, two massive social categories too frequently excluded from complete liberty in their lifechoices despite their size. What is more problematic, is how this thinking translates directly into, for example, rights in property. There is, I would suggest, a situation in which it is impossible to reach a perfect answer to the problems associated with rights in the home. By virtue of the fact that there is conflict, one person is likely to lose out against another. Taking victory[420] in litigation from one category of claimant and handing it to another does not reduce the amount of misery in the world, rather it re-allocates it. Even if one party is a financial institution seeking arbitrarily to recover the capital lent on a mortgage, refusing to allow mortgagees victory[421] in such cases does not create a perfect answer, rather it creates an answer which responds to a different set of values from the current approach in cases like *Re Citro* and *Lloyds Bank v. Byrne* which favour creditors automatically in order for sale proceedings.

What is necessary instead is to recognise that there is no problem with a failure to create a perfect answer. The inability among many property lawyers to accept that is at the root of the concern over the legal allocation of rights in the home. It is perfectly acceptable to identify a value judgment which for reasons of politics, ethics or even aesthetics is considered to be superior to all others, and to place that value judgment at the heart of each decision. That is why breaking out the various approaches in accordance with their attitudes under Miller's matrix is so useful – because it exposes the underlying value judgments to view. The success of the Canadian approach is precisely its acceptance as a value judgment that certain types of work in the home are of a type which ought to be accepted as founding claims to an equitable interest. By throwing over the pretence to be giving effect to institutional trusts which arise in some primal way "by operation of law", it is possible to admit that such cases ought to be decided on the basis of value judgments and not on the false premise that there is some "perfect answer" to the question "who owns this home?".

In that acceptance it is possible to marry the search for social just conclusions with a process of individualisation. In tune with Bauman's and Levinas's search for the

[418] *Ibid*., 129.
[419] *Ibid*., 135.
[420] And I use the word "victory" here because it is so useless – to frame these cases in terms of winning and losing is, self-evidently, counter-productive. What point in talking of socially just conclusions if the metaphors are entirely comprised of the war metaphors of victory, establishing a position, attacking one's opponent, etc.?
[421] *Ibid*.

ethical self in a world without values – and even without a "self" – it is only honesty about our values and debate as to those values which can open out equity into something which belongs to the litigants and not being simply something which is done to them. The process of individualisation is not an entitlement to victory on every occasion – but rather an entitlement to participate and to be heard. Society must be conscious of need but it must remain flexible in its definition of what constitutes a right or a desert from time-to-time.

Finally, I would suggest that that is the power of equity. Precisely because it is caught between this concern for the conscience of the individual and the application of general principles, it is uniquely well-placed to host the debate about the content of those principles. However, this can only be the case if there is sufficient equality of access to this discourse and if we can be confident that those who judge over us at this level are equally responsive to and representative of the society which generates these questions.

That is why equity is so important. Only through equity are we able to measure each case according to its own facts and against a set of principles based, in all honesty, on contested value judgments. It is here that the confident logic of unjust enrichment theory reaches its limits because there are cases – such as those relating to trusts of homes – which will not respond to the binary pattern "enrichment causes subtraction" without a value-laden concept of "injustice" to go with it. If I move into your house, have children with you and work to maintain your home, is it unjust for you to turn me out without a penny; and contrariwise, if I move into your house, have children with you and then throw you out of that house you have worked to maintain, is that unjust too? There is no perfect answer to either question. All that we can do is to be honest about the way in which we answer those questions – we must make value judgments, make them openly and debate them openly. To do anything else would be inhuman. To do anything else would be believe that the law which governs this area is simply magic and nothing for which we are responsible.