

TRUSTEE RECOUPMENT: A POWER ANALYSIS

Part I. Introduction

An express trust is a legal relationship created when ownership of, and powers over, property are vested in trustees on terms. The terms of express private trusts, such as family settlements and pension trusts, typically entitle beneficiaries to distributions of income and/or capital out of the trust fund. In certain circumstances, the due administration of such trusts may require a reduction to be made to the amounts paid so that trust funds can be used for other purposes. The process by which this is done is commonly termed ‘recoupment’.¹ For example, where a trust fund is depleted because a beneficiary has been overpaid or instigated a breach of trust, the trustees can ‘recoup’ the loss by using trust funds for this purpose that would otherwise have been distributed to the beneficiary; and where a trustee has paid trust expenses out of her personal resources, she can ‘recoup’ the cost by treating trust funds as her own so that less property is held on trust.

Recoupment supports the administration of trusts by enabling trustees to fund their dealings with third parties and by providing them with a method of correcting errors without incurring the costs and risks of litigation against beneficiaries, including the risk that beneficiaries might succeed in defending claims against them and also the risk of bad publicity (a consideration that can weigh with pension trustees). Recoupment can also help trustees avoid the effects of a beneficiary’s insolvency. Recoupment can therefore be a ‘practical and sensible’ option for trustees to correct errors of account and other problems in trust administration.² In some circumstances, they may owe a legal duty to give it proper

¹ The term ‘impoundment’ is also used to denote the same process in cases where reductions are made to an individual beneficiary’s entitlements to allow trust funds to be used for other purposes.

² *Australian Prudential Regulation Authority v Kelaheer* [2019] FCA 1521, (2019) 138 ACSR 459 [308].

consideration, and in others it may also benefit the trustee by discharging the trustee's personal liability to reinstate the trust fund.

It cannot be said, however, that trustees, legal practitioners and the courts have a clear understanding of how recoupment works and when it is possible. Judicial discussion is often focussed on the context of particular disputes and, as a result, the courts' conceptions of recoupment can vary from one case to the next. This makes it hard to understand recoupment and its interactions with other areas of law, including rules governing claims for breach of trust and defences to such claims including the limitation of actions.

In this article we advance a general theory of recoupment, dividing our discussion as follows. Part II outlines when recoupment is possible and argues that the term 'recoupment' denotes two distinct processes that are used in different types of case. One is where something has gone awry in the administration of a trust causing a depletion to the trust fund in which a beneficiary is implicated; here, recoupment is best understood as the exercise of a power vested in the trustees to change the terms of this beneficiary's future entitlements. The other is where trustees pay trust expenses and can treat trust property as their own to the extent necessary to reimburse themselves, using their powers as owners of the property in a way that is permitted from the outset either by a clause in the trust deed or by the general law. In our view, therefore, recoupment always entails the exercise of a power, but the powers which trustees exercise, and the reasons why they are allowed to do so, differ between the two types of case.

Part III contains a more detailed examination of what recoupment is and how it supports the due administration of trusts. Here we align our power-based analysis of recoupment with the rules that require trustees to exercise their powers in accordance with the trust terms and account to beneficiaries for their administration of trust property. Part IV sets out some competing conceptions of recoupment and explains why none is satisfactory. Part V discusses

the rules that control the exercise of a trustee's powers of recoupment. Part VI examines some other implications of our understanding of recoupment. Part VII concludes.

Part II. Recoupment in an Express Private Trust

A. Situations where recoupment is possible

There are five situations in which recoupment is typically carried out. *First*, where a trustee pays a beneficiary money to which she is not entitled under the trust terms, future payments to the beneficiary can be reduced by the amount of the overpayment.³ *Second*, where a breach of trust is committed by a trustee who is also a beneficiary, future payments made to her in her capacity as beneficiary can be reduced to make good the loss sustained by the trust fund.⁴ *Third*, where a trustee commits a breach of trust at the instigation of a beneficiary they are jointly and severally liable for the loss; if the trustee is compelled to pay more than her fair share of their common liability, property that would have been distributed to the beneficiary can be used to

³ *Fuller v Knight* (1843) 6 Beav 205, 210-211; *Dibbs v Goren* (1849) 11 Beav 483, 484; *Harris v Harris (No 2)* (1861) 29 Beav 110; *Merriman v Perpetual Trustee Co Ltd* (1895) 17 LR (NSW) Eq 325, 352; *Re Robinson* [1911] 1 Ch 502 (Ch) 512-513; *Re Ainsworth* [1915] 2 Ch 96 (Ch) 102-106; *Re Musgrave* [1916] 2 Ch 417 (Ch) 423-424; *Re Reading* (1916) 60 Sol Jo 655, [1916] WN 262 (Ch); *Re Oppenheim* [1917] 1 Ch 274 (Ch) 281-282; *MacPhillamy v Fox* (1932) 32 SR (NSW) 427, 431-3; *Re Robertson* [1953] VLR 685, 689, [1954] ALR 53; *Moore v Flavelle* [1969] 1 NSW 361, 364; *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch), [2011] Pens LR 153 [90]; *Blue Sky Private Equity Ltd v Crawford Giles Pty Ltd* [2012] SASC 28 [92]-[106]; *Burgess v BIC UK Ltd* [2018] EWHC 785 (Ch), [2018] Pens LR 13 [162]; *Kelaher* (n 2) [184], [308].

⁴ *Jacobs v Rylance* (1874) LR 17 Eq 341 (Ch) 342; *Re Brown* (1886) 32 Ch D 597 (Ch) 603; *Doering v Doering* (1889) 42 Ch D 203 (Ch) 207; *Re Towndrow* [1911] 1 Ch 662 (Ch) 668; *Re Dacre* [1916] 1 Ch 344 (CA) 347-8; *Palmer v Permanent Trustee Co* (1916) 16 SR 162, 166; *Harris v Harris* (1919) 20 SR (NSW) 61, 67-68; *Re Tolley (deceased)* (1972) 5 SASR 466, 472; *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 397.

reimburse the trustee.⁵ *Fourth*, where a beneficiary defaults on a duty she owes to contribute to the trust fund, payments to her out of the fund can be reduced by the amount of her liability.⁶ *Fifth*, where a trustee pays a third party to discharge a debt incurred by the trustee in carrying out trust business she can reimburse herself out of the trust property.⁷

B. Two types of recoupment

Detailed rules govern the question of when recoupment is possible in each of these situations. We shall not discuss these because we have a broader aim, which is to advance a general theory of how recoupment works in every situation. As a first step, however, we must make some observations about the differences and similarities between the five situations and introduce a fundamental distinction between recoupment against a particular beneficiary (situations 1-4) and recoupment for expenses (situation 5).

(i) Recoupment against a particular beneficiary

In situations 1-4, recoupment occurs against a particular beneficiary in the sense that it involves a change being made to that beneficiary's entitlement to the benefit of trust property. This

⁵ *Lincoln v Wright* (1841) 4 Beav 427, 432; *Raby v Ridalgh* (1855) 7 De G M & G 104; *Griffith v Hughes* [1892] 3 Ch 105 (Ch); *Re Somerset* [1894] 1 Ch 231 (CA); *Chillingworth v Chambers* [1896] 1 Ch 685 (CA); *Fletcher v Collis* [1905] 2 Ch 24 (CA); *Re Balfour's Settlement* [1938] Ch 928 (Ch) 933; *Re Pauling's ST (No 2)* [1963] Ch 576 (Ch) 583-4. The court also has a power to order recoupment from a beneficiary who instigates or requests a breach of trust *in writing* under the Trustee Act 1925, s 62.

⁶ Older cases concern arrangements that have fallen into desuetude, such as marriage and other family settlements, as in eg *Priddy v Rose* (1817) 3 Mer 86; *Smith v Smith* (1835) 1 Y & C Ex 338; *Burridge v Row* (1842) 1 Y & C Ex 183, 193; *Re Weston* [1900] 2 Ch 164 (Ch); but modern arrangements can also generate problems that fall into this category, eg where the 'issue price' for a beneficiary's entitlements under an investment trust is payable in instalments and the beneficiary defaults on a payment.

⁷ *Worrall v Harford* (1802) 8 Ves Jun 4, 8; *Re Blundell* (1999) 40 Ch D 370 (Ch) 376; *Stott v Milne* (1884) 25 Ch D 710 (CA) 714-715; *Armitage v Nurse* [1998] Ch 241 (CA) 262; *Barclay v Smith* [2016] EWHC 210 (Ch), [2016] WTLR 583 [9]; *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 [59]; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 368 ALR 390 [29]-[33], [80]-[84]. See too Trustee Act 2000, s 31(1)(a).

entitlement is sometimes described as ‘beneficial ownership’ or ‘equitable ownership’⁸ because the trustees owe duties to exercise their powers over the trust property to put the beneficiary ‘into a position where directly, or indirectly, or for all practical purposes, [she] ... enjoys or exercises the rights which the law has vested in the trustee’.⁹ The trustees might do this, for example, by paying her money or granting her possession of the property.¹⁰

When a trustee recoups against a beneficiary her entitlement is adjusted by treating her as if she has received a distribution in advance of the date when it would otherwise have fallen due. Consider a simple example of situation 1. A beneficiary is entitled to an annual income of £20, but in 2018 the trustees pay her £30 by mistake. They recoup by treating her as having received an advance payment of £10 which was not due until 2019 and the advance is then equalised by paying her £10 less in 2019. As a result, the overall value of the beneficiary’s receipts remains the same – over 2018 and 2019 she receives £40 – but a change is made to the timing of her receipts as a way of correcting the overpayment.

In situations 2-4, recoupment operates in a similar way. The beneficiary is treated as though sums to which she would have become entitled were paid ahead of time to the extent that she must restore the trust fund (in situation 2),¹¹ reimburse the breaching trustee (in

⁸ eg *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 498, 501-504. However, for the reasons identified in Part III.B.ii we doubt the accuracy of proprietary metaphors; and on this point see also B McFarlane and S Douglas, ‘Property, Value and Analogy’ (2020) 40 OJLS (forthcoming).

⁹ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 518-520.

¹⁰ Depending on the trust terms and nature of the subject property, this may mean that a beneficiary has a right to possession, but this is not necessarily the case. See further J Penner ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest Under a Trust’ (2014) 26 CJLJ 473.

¹¹ *Tolley* (n 4) 472, quoting *Dacre* (n 4). See also *Doering* (n 4) 208-209.

situation 3),¹² or pay money into the trust fund (in situation 4).¹³ A corresponding reduction is made to the beneficiary's future entitlements to equalise the early advance. In situation 1, the beneficiary's liability to recoupment arises because she has received an unauthorised payment and the effect of recoupment is to authorise her early receipt of funds with retrospective effect. In situations 2-4, the beneficiary's liability to recoupment does not depend on the receipt of trust funds, but on the beneficiary having committed a breach of trust in her capacity as trustee, or on her having failed to reimburse a trustee who was liable for a breach that she instigated, or on her having failed to perform a duty to pay money into the trust fund. In all of these situations, recoupment authorises the use of trust funds to discharge the beneficiary's various obligations, but the mechanism by which this is achieved is the same as the mechanism used in situation 1: a change is made to the time when trust funds are used to confer a benefit on the beneficiary.

(ii) Recoupment for expenses

A trustee has an indemnity for expenses properly incurred in the due administration of a trust.¹⁴ The trustee is entitled to be indemnified both for payments she has made, and against liabilities she has incurred, to third parties. There are thus two limbs to the trustee's 'right of indemnity', as it is frequently called. One allows the trustee to use trust funds to discharge liabilities owed to third parties directly; this is described as the trustee's 'right of exoneration'. The other allows the trustee to reimburse herself out of trust funds for expenses she has already paid with her

¹² Exceptionally, a beneficiary's liability will be limited to the extent of her receipt where she did not consent to the specific exercise of power, but requested the trustee to invest in an unauthorised way, as in *Raby* (n 5).

¹³ See n 6 above.

¹⁴ There are many formulations of the circumstances in which the indemnity is available: see eg *Re Beddoe* [1893] 1 Ch 547; *Re Grimthorpe* [1958] Ch 615 (Ch) 623; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 [47]; *Carter* (n 7) [40]; S Donald, 'The "Proper" Approach to a Trustee's Right to Indemnity out of Trust Assets' (2014) 8 J Eq 283.

own money; this is the trustee's 'right of reimbursement' or 'recoupment'.¹⁵ The exoneration limb and recoupment limb are different methods of achieving the same end, which is to ensure that a trustee is not left out of pocket through undertaking the proper administration of the trust. For example, it would be unfair to the trustee if she had to bear the burden of paying taxes or other expenses for which she is personally liable in her capacity as owner of the trust property,¹⁶ or of paying litigation costs which she incurs while acting as trustee.¹⁷ While exoneration and recoupment are directed towards the same end, however, they work differently. Exoneration allows a trustee to use trust property to pay a third party directly, while recoupment allows the trustee to treat trust property as her own, free of her duties as trustee – and it is only with recoupment that this article is concerned.¹⁸

Recoupment in situation 5 differs from recoupment in situations 1-4. It is not targeted on a particular beneficiary's entitlement to trust property, albeit that it may affect the position of some or all of the beneficiaries by reducing the total amount available for distribution.¹⁹ Indeed, if the trustee's expenses are larger than the trust fund, the beneficiaries' collective entitlements will be 'completely overwhelm[ed]';²⁰ but the effect of recoupment will always vary according to the size of the expense relative to the size of the trust fund and it may also

¹⁵ eg, *Carter* (n 7) [32]; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 336-7; *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 [47].

¹⁶ *Reid v Deane* [1906] VLR 138; *Re Reid* [1943] SASR 254; *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 [83], [143].

¹⁷ See generally *Easton v Landor* (1892) 62 LJ Ch 164 (CA) 165; *Beddoe* (n 14); *Armitage* (n 7) 262; *Re Spurling's WT* [1966] 1 WLR 920; *Price v Saundry* [2019] EWCA Civ 2261, [2020] WTLR 233 [29]-[31]; Rule 46.3 of the Civil Procedure Rules.

¹⁸ Whether the difference between exoneration and recoupment has any normative significance is an interesting question but one that lies beyond the scope of this article which is focused on recoupment only.

¹⁹ *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 587; *Buckle* (n 14) [48].

²⁰ As in *Lane v Deputy Commissioner of Taxation* [2017] FCA 953, (2017) 253 FCR 46 [58].

vary according to rules governing the apportionment of expenses between income and capital interests.²¹

Part III. Recoupment conceived as the exercise of (different) powers

A. Two types of recoupment

Judges have often observed that recoupment can be understood as the making of an adjustment to the trust accounts. For example, in *Merriman v Perpetual Trustee*, the New South Wales Court of Appeal described recoupment as ‘the well-known right of trustees to adjust the accounts of *cestuis que trustent* so long as the trust remains in their hands for administration’.²² Recoupment has also been described as ‘an integral part of the equitable accounting process between trustee and beneficiary as to the beneficiary’s entitlement’,²³ ensuring that ‘errors of account between trustees and beneficiaries will, as far as possible, be corrected’.²⁴ We agree that the accounting nature of the express trust relationship is a critical point for those seeking to understand recoupment, but we think that there is more to recoupment than tidy bookkeeping and the making of documentary amendments. Further, and despite the use of a common label,

²¹ There are elaborate rules regarding the allocation of costs to capital and income interests. The details lie beyond the scope of this article, but see eg Trustee Act 1925, s 19(1)(b) and (5); *Carver v Duncan* [1985] AC 1082, 1120; Trustee Act 2000, ss 31(1) and 39; Law Commission, *Capital and Income in Trusts: Classification and Apportionment* (Law Com No 315, 2009) Pt 7.

²² *Merriman* (n 3) 349. See also *Re Horne* [1905] 1 Ch 76 (Ch) 80; *Robinson* (n 3) 513; *Musgrave* (n 3) 424-425; *IVS Enterprises Ltd v Chelsea Cloisters Management Ltd* CA 1 January 1994; <https://www.ucc.ie/academic/law/restitution/archive/englcases/ivs.htm> ; *Moore* (n 3); *Clay v James* [2001] WASC 18 [13]-[17]; *Macphillamy* (n 3) 433.

²³ P Matthews, ‘Restitution 0, Trusts 0 (after Extra Time) - A Case of Set-off’ [1994] RLR 44, 50; D Hayton et al, *Underhill & Hayton: The Law Relating to Trusts and Trustees* (19th edn, LexisNexis, 2016) [98.91].

²⁴ *Blue Sky* (n 3) [103]. See also *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47 [115] where Lord Reed and Lord Hodge describe recoupment as ‘the correction of errors of account between trustees and beneficiaries: the courts ... allow a trustee or personal representative to deduct sums overpaid under a mistake of law from future instalments due to the overpaid beneficiary.’

recoupment is not the same process, and does not have the same legal effects, in every situation. Recoupment against a particular beneficiary (as in situations 1-4) differs from recoupment for expenses (as in situation 5). We shall discuss the first type of recoupment in section B and the second type in section C.

B. Recoupment against a particular beneficiary

As explained in Part II.B, recoupment against a particular beneficiary adjusts her entitlement to the benefit of trust property and her right to due administration. The trustee's corresponding duties to that beneficiary are also changed,²⁵ as are the trustee's duties of due administration to the other beneficiaries. Additionally, any duty owed by the trustee to restore or get in the trust estate is also discharged, as are the beneficiaries' rights which correspond to that duty. These changes to the parties' legal relations occur because recoupment varies the trust terms and, more exactly, the terms defining the particular beneficiary's entitlement to trust property at certain points in time. To develop this idea further, we must explain what the terms of a trust are and how they affect the legal relations between trustees and beneficiaries.

(i) Trust terms

The terms of a trust are 'propositions of law'²⁶ that define the sphere within which the trustee's powers can be validly exercised. Trust terms are derived, in part, from real world phenomena, most prominently the settlor's intention that property should be held by the trustee for the benefit of someone other than the trustee.²⁷ The rules of trust creation provide that the settlor's

²⁵ The beneficiary's power to call for the trust property and the trustee's corresponding liability are also varied.

²⁶ cf F Wilmot-Smith 'Term Limits: What is a Term?' (2019) 39 OJLS 705 who uses this label in relation to contractual terms.

²⁷ There may be more than one settlor, eg where employers and employees contribute to a pension scheme. The creation and existence of an express trust may also depend on the consent of a person prepared to act as trustee and of the intended beneficiaries: YK Liew and C Mitchell 'The Creation of Express Trusts' (2017) 11 J Eq 133.

intention must be externally manifested, as a ‘person creates a trust by his words or conduct, not by his innermost thoughts’,²⁸ and the meaning of the settlor’s words and conduct is elicited by a process of objective interpretation. A settlor may manifest her intention in various ways. These include an oral declaration, the fact of which may or may not be recorded in writing; or she may manifest her intention by executing a deed. The terms of a trust are also derived from equitable principle and statutory regimes which may, for example, confer on the trustee certain permissions and powers in addition to those created by the terms declared by the settlor.²⁹

The trust terms do not themselves empower a trustee to deal with trust property: the trustee’s power to do this is sourced in the settlor’s decision to make the trustee the owner of this property and in the general rules of equity, law and statute that govern the assignability of title to the property.³⁰ Hence the trust terms must be distinguished from the rules which determine the extent of the trustee’s powers held as an incident of her title: a trustee who complies with these rules can exercise her powers as titleholder irrespective of whether her actions are also in accordance with the trust terms.

To prevent a trustee from exercising her powers as titleholder outside the sphere of permission defined by the trust terms, equity must constrain the trustee by other means,

²⁸ *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59, [2016] WTLR 43 [59]. See also *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [71]; *Byrnes* (n 16) [53]-[55]; S Agnew and S Douglas ‘Self-Declarations of Trust’ (2019) 135 LQR 67, 78. Cf P Benson, *Justice in Transactions* (Harvard UP, 2019) 61, making a similar point regarding the creation of contract rights.

²⁹ eg Trustee Act 1925, s 36 (grants a trustee the power to appoint new or additional trustees), Pt IV (grants the court powers to appoint new or additional trustees, and to authorise trustee remuneration), s 57 (grants the court a power to authorise dealings with trust property); Trustee Act 2000, s 3 (permits a trustee to make certain investments); Trustee Act 2000, s 31(1)(b) (permits a trustee to recoup for expenses).

³⁰ As noted in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, 303; *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [51].

including rules obliging trustees to obey the trust terms³¹ and to account to beneficiaries for the trust property.³² The latter rules require the trustee to keep and provide a record of her dealings with the trust property (which may only include valid and may not include invalid dealings) and also require the trustee to produce the trust property (or its value) as defined by the record if asked to do so by the beneficiary.³³ The beneficiary has a corresponding right to the trustee's administration of the fund in accordance with the trust terms. The beneficiary therefore has an interest in the trust property in the sense that her right to due administration, and her entitlement to the benefit of property, are annexed to that property. There is an ongoing debate about the nature of a beneficiary's rights in this regard,³⁴ but irrespective of how these are conceived, their essence is 'a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust'.³⁵ The significance of the trust terms, therefore, is that they give content to the legal relations between the parties and their rights and duties respecting the trust property. Consistently with this, any variation to the trust terms has the effect of varying the parties' legal relations.

(ii) Power to adjust the terms of the beneficiary's entitlement

As a general matter, a settlor can confer a power on a trustee (or some other donee of the power) to vary the trust terms; and as we have said, recoupment against a particular beneficiary should

³¹ *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484 [32].

³² *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* [2000] HCA 25, (2000) 202 CLR 588 [54]-[56]; C Mitchell, 'Stewardship of Property and Liability to Account' (2014) 78 Conv 215; J Penner, 'Distinguishing Fiduciary, Trust, and Accounting Relationships' (2014) 8 J Eq 202; J Getzler, 'Fiduciary Principles in English Common Law' in E Criddle et al (eds), *The Oxford Handbook of Fiduciary Law* (OUP, 2019) 471.

³³ *Doss v Doss* (1843) 3 Moo Ind App 175 (PC) 196-197; *Head v Gould* [1898] 2 Ch 250 (Ch) 266.

³⁴ See eg B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1.

³⁵ *DKLR* (n 9) 520.

be understood as the exercise of a power, created by the settlor or the general law, to vary the terms defining that beneficiary's entitlement to the benefit of trust property.

A beneficiary's entitlements under a trust are often said to be analogous to proprietary rights or described as equitable property, because they exhibit 'proprietary' features such as enforceability against third parties.³⁶ For this reason it is tempting to conceive of recoupment as a 'redistribution of property' that 'belongs' to the beneficiary. However, it is a mistake to regard recoupment as a process through which property belonging to a beneficiary is taken or redistributed. It may be that the 'degree of protection afforded by equitable doctrines and remedies' makes it 'appropriate to describe [a beneficiary's rights] as having a proprietary character',³⁷ but there is a difference between saying that a beneficiary's rights *are* proprietary rights, and saying that they *are analogous to* proprietary rights. A beneficiary's rights under a trust are not proprietary rights in the same sense that the legal owner of real property, for example, has proprietary rights.³⁸ There is a fixed class of rights admitted to the status of property,³⁹ which does not include a beneficiary's rights. Unless and until the trustee transfers title to trust property to the beneficiary, the beneficiary does not have direct 'ownership' of, or proprietary rights to the trust funds.

Some basic features of trusts and trust administration reflect this idea. A beneficiary's entitlements are subject to, and contingent on, a trustee's exercise or non-exercise of powers

³⁶ *Akers* (n 30) [82]; R Nolan, 'Equitable Property' (2006) 122 LQR 232.

³⁷ *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 (Ch) 565–66; *Gartside v IRC* [1968] AC 553 (HL) 617–618; *Yanner v Eaton* (1999) 201 CLR 351 [17]–[20], [85].

³⁸ This point has been made before: eg SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths, 1981) 6; B McFarlane, 'Equity, Obligations and Third Parties' [2008] SJLS 308, 318–22; L Smith, 'Trust and Patrimony' (2008) 38 RGD 379, 392.

³⁹ *Keppell v Bailey* (1834) 2 My & K 517, 535–536; W Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354.

held as the titleholder of the trust property, for example to convert, sell, mortgage, lease or otherwise deal with the trust property.⁴⁰ They are also contingent on satisfaction of the trustee's indemnity for expenses, a rule which makes it impossible to say that any beneficiary has an *absolute* entitlement to trust property – a point made by the High Court of Australia.⁴¹ The trust property is thus more accurately conceived of as a fund,⁴² and the beneficiary's entitlements relate to the trustee's management of 'a collection of assets that may continually change'.⁴³ All of this means that, strictly speaking, recoupment is not a process by which a trustee takes from or redistributes the beneficiary's property or share of property. The beneficiary does not have ownership or title to the trust property. The trustee has title to the trust property and recoupment is best conceived as a variation to the terms on which the trustee holds her title to this property.

This conception of recoupment can be illustrated by reference to the example we gave earlier, of the overpaid beneficiary. The trustee treats the beneficiary as having received an advance of £10 in 2018 and paying her £10 less in 2019. The terms defining the beneficiary's entitlement over time are thereby changed. *Before* recoupment, the trust terms stipulated an

⁴⁰ *Akers* (n 30) [51]-[52]; C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277; D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart, 2002) ch 4.

⁴¹ eg *Buckle* (n 14) [47]-[48]; *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53, (2005) 224 CLR 98 [51]; *Carter* (n 7) [80].

⁴² Although there are different views about how the beneficiary's entitlement should be understood and these have implications for how a beneficiary's claim to the traceable proceeds of an unauthorised transaction should be understood: eg J Penner, 'Duty and Liability in Respect of Funds' in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis, 2006); M Raczynska, 'Parallels between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in L Smith (ed), *The Worlds of the Trust* (CUP, 2013); R Nolan, 'The Administration and Maladministration of Funds in Equity: Making a Coherent Set of Choices' in P Turner (ed) *Equity and Administration* (CUP, 2016) 74-80.

⁴³ As observed in *Fischer v Nemeske Pty Ltd* [2016] HCA 11, (2016) 257 CLR 615 [100]; J Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in R Chambers et al (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009) 314; P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (LawBook Co, 2005) 315.

entitlement to £20 in each of 2018 and 2019 and so the payment of the ‘extra’ £10 in 2018 was unauthorised. The other beneficiaries were therefore entitled to relief requiring the trustee, as an accounting party, to reinstate the trust fund,⁴⁴ although the trustee might have avoided this personal liability by recovering the £10 from the overpaid beneficiary.⁴⁵ Recoupment retrospectively varies the trust terms to permit the payments of £30 in 2018 and £10 in 2019. *After* recoupment, the terms therefore provide that the 2018 and 2019 payments were authorised and the parties are bound by the terms *as varied*. Accordingly, when the trustee pays the lesser sum of £10 in 2019, the beneficiary (or her assignee⁴⁶) cannot compel the trustee to pay £20 rather than £10; nor does the trustee owe a liability to reconstitute the trust fund for ‘missing’ property; nor can the trustee sue the beneficiary to recover any ‘overpayment’.

The foregoing analysis of recoupment as an exercise of power to vary the trust terms also holds good in the other situations of recoupment against a particular beneficiary. In each situation the beneficiary’s liability to recoupment arises for different reasons and is calculated according to the extent needed to discharge her duty to restore the trust fund (in situation 2), reimburse the breaching trustee (in situation 3), or pay money into the trust fund (in situation 4).⁴⁷ Yet the basic nature of the beneficiary’s liability to recoupment is the same in all of situations 1-4. In each the terms of the beneficiary’s entitlement are varied to authorise an early

⁴⁴ cf *Youyang* (n 31) [32]-[40]. This monetary remedy has been described as substitutive equitable compensation because it is awarded as a substitute for the trustee’s performance of her obligation to produce trust assets *in specie*: *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102 [333]-[349]; S Elliott, ‘Personal Monetary Claims’ in J McGhee (ed), *Snell’s Equity* (34th edn, Sweet & Maxwell, 2020) ch 20. Controversy attends quantification of the remedy after *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 and *AIB Group (UK) Ltd v Mark Redler & Co (a firm)* [2014] UKSC 58, [2015] AC 1503: discussion in *Underhill* (n 23) [87.2]-[87.30].

⁴⁵ See eg *Brooksbank v Smith* (1836) 2 Y & C Ex 58, 60.

⁴⁶ The ‘priority’ of recoupment in terms of its effects on third parties is acknowledged in *Brown* (n 4) 603; *Dibbs* (n 3) 484; *Ballard v Marsden* (1880) 14 Ch D 374, 377; *Dacre* (n 4) 347; *Doering* (n 4) 207-208.

⁴⁷ In relation the defaulting trustee see eg *Jacubs* (n 4); *Brown* (n 4); *Doering* (n 4); *Towndrow* (n 4) 666-668. In relation to the instigating beneficiary, see eg *Chillingworth* (n 5) 697, 699-700, 709.

advance of trust funds in the beneficiary's favour and to reduce the beneficiary's entitlement to income in the future to the extent needed to equalise the advance. In each situation, therefore, recoupment changes the substantive content of 'the rights between the *cestui que trust* and the trustee'.⁴⁸

Our power analysis of recoupment finds support in cases that refer to trustees having a power to recoup, and to act on their own accord without a court order, for example to recover an overpayment to a beneficiary.⁴⁹ There are also cases where the court has been asked to rule on the effectiveness of past actions by the trustees to effect recoupment,⁵⁰ and these authorities also accept, at least implicitly, that recoupment can be effected by trustees unsupported by any court order. In *Re Musgrave*,⁵¹ for example, trustees 'were entitled' to recoup themselves, independently of the court's power to adjust the trust accounts.

(iii) Ways in which a power to recoup against a beneficiary can be exercised

The power to recoup is created and defined by the trust terms, either because express provision for recoupment is made by the settlor,⁵² or because recoupment is authorised by equitable and/or statutory rules.⁵³ Like other amendment powers, a power to recoup is exercised when a trustee expresses an intention to do this, ie there must be an external manifestation of a trustee's intention to exercise the power and this cannot be done secretly.⁵⁴ Subject to any formalities

⁴⁸ *Musgrave* (n 3) 425 (Neville J).

⁴⁹ *Moore* (n 3) 364; *Merriman* (n 3) 349-350; *Fuller* (n 3) 211-212; *Kelahaer* (n 2) [280], [302].

⁵⁰ As in *Perpetual Executors Assoc v Simpson* [1906] 27 ALT 179; *Re Ettleson* [1946] VLR 217, 220; *Robertson* (n 3); *Reid v Deane* (n 16); *Moore* (n 3) 364; *Merriman* (n 3) 349-350; *Blue Sky* (n 3) [99]-[103].

⁵¹ *Musgrave* (n 3) 424.

⁵² *Kelahaer* (n 2) [279]-[281], [302].

⁵³ See nn 3-7 above.

⁵⁴ *Maundrell v Maundrell* (1805) 10 Ves Jun 246, 252; *Re Ackerley* [1913] 1 Ch 510 (Ch); *Fischer* (n 43) [32], [50]-[54], citing G Thomas, *Thomas on Powers* (2nd edn, OUP, 2012) [7.132]; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens & Sons, 1916) 201-202.

contained in the trust terms declared by the settlor, however, there are no formalities for the exercise of a power to recoup, and so a trustee's intention to exercise this power might be manifested in different ways.

One is the adjustment of the record of the trust accounts, and as mentioned above, recoupment is often conceived of in these terms. An adjustment to the trust accounts can evidence the trustee's intention to recoup owing to the interface between the trust accounts, the trustee's duty as an accounting party, and the trust terms. As an accounting party the trustee must 'be constantly ready with his accounts'⁵⁵ because they record the trustee's dealings with trust property, . The accounts also define the property which the trustee must be able to produce when called upon to do so. They may or may not be kept as a formal set of records, and may, for example, be constituted by a set of receipts and invoices and bank statements. The further significance of the accounts is that reference to these may be required to determine the extent of a beneficiary's future entitlements. This would be the case, for instance, if the trust terms provided for the application of a formula to a set of accounts measuring the value of capital and/or income of a defined fund.⁵⁶ The trust accounts thus look forwards as well as backwards. They evidence the trustees' previous compliance, or non-compliance, with the trust terms, define the nature and extent of the trust fund and, in turn, the parties' ongoing rights and obligations pertaining to the trust fund.

All of this means that an adjustment to the trust accounts is one way in which a trustee's decision to recoup might be manifested. However, a change to the trust terms is effected not by adjustment to the trust documents or records *per se*, but by what such adjustments represent, as an external manifestation of the trustee's decision to exercise her power to alter the terms.

⁵⁵ *Pearse v Green* (1819) 1 Jac & W 135, 140.

⁵⁶ As in *Kelahr* (n 2).

The trustee's intention to do this might also be externally manifested in other ways. At one end of the spectrum of formality, she might expressly amend the trust terms to authorise the early advance and equalise the advance by a future reduction; at the other end, she might simply transfer less property to a beneficiary than the amount stipulated in the terms originally declared by the settlor – and in this case, the transfer would itself be an external manifestation of the trustee's decision to vary the trust terms as well as the implementation of that decision.

Note, finally, that the trustee, as an accounting party, must keep records and narrations of her exercise(s) of a power to recoup. What is necessary to satisfy this duty will depend on the circumstances, including whether the trustee is a professional trustee. A trustee sometimes might be required to keep a separate record of her exercise of power to recoup in addition to the transaction description(s) accompanying any of the trustee's dealings with trust property. The trustee's compliance with this duty is a separate question to whether or not the trustee has exercised her power to recoup. Recoupment can occur irrespective of whether the trustee has also complied with her duty to record the fact and effect(s) of its exercise.

(iv) Recoupment against a beneficiary facilitates the due administration of a trust

In each of situations 1-4, something goes awry in the administration of the trust and recoupment is only one of several options that could be available to solve the problem. Alternatives may be for the trustee to reinstate the trust estate out of her personal resources, or, depending on the situation, to bring proceedings against the beneficiary, for example to recover an overpayment (situation 1) or for enforcement of an obligation to contribute to the trust fund (situation 4). However, recoupment offers advantages over the bringing of legal claims because it enables trustees to avoid the risks and costs of litigation and the risk of the beneficiary becoming insolvent. This is why recoupment was described in *Fuller v Knight*⁵⁷ as being 'for the

⁵⁷ *Fuller* (n 3) 210-211. See also *Dibbs* (n 3) 484; *Merriman* (n 3) 352.

reparation of the breach of trust' in a way which ensures that the reinstatement of the trust estate is not '[left] to chance'.⁵⁸ Other cases have also explained the rationale for recoupment as being a 'necessary' means 'to enforce the execution of the trust, by recovering back the sum thus received contrary to the trusts'.⁵⁹

A further theme in the cases is that recoupment protects the trustee, either by saving her from incurring personal liability to reinstate the trust fund,⁶⁰ or where she has already paid her own funds into the trust estate, by letting her recoup herself by releasing property from the trust estate so that the trustee can hold it for her own benefit.⁶¹ In either case, the effect is the same, namely that the trustee is enabled to avoid personal liability by exercising a power to vary the trust terms and thereby redefine the beneficiary's entitlements. This effect of recoupment was acknowledged in *Perpetual Executors Association v Simpson*,⁶² where A'Beckett J explained that recoupment is a form of 'protection' for the trustee.⁶³

C. Recoupment of expenses

(i) An exercise of the trustee's powers as titleholder

In situation 5, a trustee reimburses herself for trust expenses by reducing the overall quantum of funds held on trust and increasing the quantum of funds held by the trustee for herself. This might be accomplished, for example, by the trustee transferring funds between a trust account

⁵⁸ *Fuller* (n 3) 211.

⁵⁹ *Dibbs* (n 3) 484. See also *Moore* (n 3) 364; *Robertson* (n 3) 689; *Merriman* (n 3) 352; *Re Cambridge Credit Corp Ltd* (1991) 6 BPR 13,894, 13,897-13,898.

⁶⁰ As in eg *Byrnes* (n 16) where a trustee failed to enforce a tenant's obligation to pay rent for the lease of trust property.

⁶¹ As contemplated in *M'Gachen v Dew* (1851) 15 Beav 84, 90: 'the trustees are entitled, when they have replaced this stock, to recoup themselves out of the dividends of the funds in their hands belonging to [the beneficiary].'

⁶² *Simpson* (n 50) 180.

⁶³ The rule that trustees can exercise recoupment powers for their own benefit is discussed further in Part V.

and her personal account or by selling trust property and reimbursing herself out of the sale proceeds.⁶⁴ These examples show that recoupment for expenses entails the exercise of a different power from the power exercised by a trustee in situations 1-4. When a trustee recoups for expenses she does not exercise a power to vary the trust terms; rather, she exercises the powers to deal with the property that she holds by virtue of her ownership. As explained by Kiefel CJ, Keane J and Edelman J in *Carter Holt Harvey*, the trustee's 'power' to recoup for expenses therefore does 'not exist independently of the rights that the trustee holds on trust'.⁶⁵

It follows that care must be taken with statements that a trustee has a 'power' to reimburse herself for expenses. It must not be thought that that this power is generated by the trust terms, as in fact it derives from the trustee's status as titleholder. The role played here by the trust terms is a different one, namely that they define a sphere of permission within which the trustee is authorised to exercise her powers as titleholder to reimburse herself. The trustee's permission to recoup expenses is limited only by the extent of the trust fund.⁶⁶ Any entitlement that the beneficiary has to the benefit of trust property is conditional on reimbursement of the trustee.⁶⁷ If a beneficiary receives less than she would have received if the trustee had not recouped for expenses, there is nothing for her to complain about as the quantum of her entitlement always depends on the exercise or non-exercise of the trustee's power to recoup.⁶⁸

⁶⁴ Absent the trust terms permitting the trustee to sell the trust asset, a court can authorise a sale to satisfy the trustee's indemnity: *Buckle* (n 14) [50]; *Carter* (n 7) [32].

⁶⁵ *Carter* (n 7) [30]-[31].

⁶⁶ As recognised in *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 217 (CA) 284; *Carter* (n 7) [43].

⁶⁷ *Re Johnson* (1880) 15 Ch D 548 (Ch) 552; *Dodds v Tuke* (1884) 25 ChD 617 (Ch); *Buckle* (n 14) [47]-[48]; *Carter* (n 7) [32], [82].

⁶⁸ Cf *Re Dion Investments Pty Ltd* [2014] NSWCA 367, (2014) 87 NSWLR 753 [45], where Barrett JA makes an analogous point regarding the effect on beneficiaries' entitlements of the exercise of powers of variation.

(ii) Recoupment for expenses is a *conditional* permission

Some conditions are attached to the permission granted to trustees to recoup for expenses. One is that the expense must have been properly incurred in the due administration of the trust;⁶⁹ another is that the trustee may only recoup for expenses to the extent she has made good any breach of trust that she previously committed, for example by reinstating the trust estate herself, or by recouping against a particular beneficiary, under what is sometimes referred to as the clear accounts rule.⁷⁰ This second condition takes us back to situation 2, where a trustee-beneficiary commits a breach and where the rule is that ‘any equitable interest to which [the trustee] is entitled under the trust can be impounded to make good the misappropriation’.⁷¹ As noted already, we conceive recoupment for expenses as a permission given to trustees to use the powers which they already have as owners of the trust property for their own benefit, and as we discuss further in Part IV we think it misleading to characterise this as a new ‘interest’ or ‘right’. However recoupment for expenses is conceived, though, the cases⁷² are united in holding that the trustee’s position is ‘vulnerable’ if she is in default.⁷³ And on our approach, the reason for this is that in situation 2 the other trustees can exercise their power to redefine the terms of the defaulting trustee’s permission to recoup for expenses to the extent of her default. The effect of this will then be that the defaulting trustee can recoup no more than ‘the

⁶⁹ See n 14 above.

⁷⁰ See discussion in *RWG* (n 4) 397-398; *De Santis v Aravanis* [2014] FCA 1243, (2014) 227 FCR 404 [74]-[77]; *ASIC v Letten (No 17)* (2011) 286 ALR 346 [20].

⁷¹ *Harris* (n 4) 67-68 (Harvey J). See also *Dacre* (n 4) 347, 247-248, 348.

⁷² Both limbs of a trustee’s indemnity are vulnerable to recoupment, see eg *Johnson* (n 67) 552; *Dodds* (n 67); *Re Griffith* [1904] 1 Ch 807; *Investec* (n 7) [59]; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 [14]; *Carter* (n 7) [31]-[32]; *RWG* (n 4) 397-398.

⁷³ But for academic criticism, especially in relation to the exoneration limb, see N D’Angelo, *Commercial Trusts* (LexisNexis Butterworths, 2014) [5.46]; R White ‘Insolvent Trusts: Implications of *Buckle* and *CPT Custodian*’ (2017) 44 ABR 1, 18-23; D Coshott, ‘Understanding and Reforming the Trustee’s Right of Indemnity’ (2019) 33 Tru LI 45.

net value of the expenses properly incurred less any amount which is owed by the trustee to the estate.’⁷⁴

(iii) Recoupment for expenses facilitates the due administration of the trust

Recoupment for expenses is a necessary feature of trust administration in common law systems because an express trust is a legal relationship and not a legal person. Ownership of trust property is vested in the trustees and not ‘the trust’, it is the trustees and not ‘the trust’ who owe duties to the beneficiaries regarding the trust property, and it is the trustees and not ‘the trust’ who incur duties to third parties with whom dealings are needed to carry the trust business forward. Moreover, unlike civil law systems (and arguably also some mixed legal systems), common law systems have no concept of a patrimony, which can be thought of as a bundle of assets and liabilities held by a legal person.⁷⁵ In common law systems, it is impossible to conceive of a trustee holding rights and owing third parties duties in a special ‘trust patrimony’ separate from the trustee’s ‘personal patrimony’. Differently conceived rules are therefore needed to spare the trustee from having to bear the burden of paying for trust administration. One is recoupment for expenses, which, as explained by the Court of Appeal is ‘part of the fabric of the trust’ necessary to ‘ensure that the trustee is not out of pocket when acting in his capacity as trustee on behalf of the trust and that the trust is efficiently and properly administered.’⁷⁶

⁷⁴ *Lane* (n 20) [54], approved in *Carter* (n 7) [31].

⁷⁵ P Matthews, ‘Square Peg, Round Hole? Patrimony and the Common Law Trust’ in R Valsan (ed), *Trusts and Patrimonies* (Edinburgh Scholarship, 2015) 72-75; Smith, ‘Trust and Patrimony’ (n 38) 348-342.

⁷⁶ *Price* (n 17) [23].

Part IV. Other Conceptions of Recoupment

The idea of recoupment for which we argue in this article is not the only possible conception. Recoupment is sometimes said to be a ‘remedy’ or a form of ‘relief’ or a form of set-off; it has also been conceived as a ‘right’ or a ‘proprietary right’ or a unique form of equitable lien or charge. None of these alternative explanations of recoupment is satisfactory.

A. Recoupment is not a right

Recoupment is often referred to as a ‘right’, ‘claim’ or ‘entitlement’. These descriptions are not wrong if they simply mean that a trustee has an ability to recoup. However, referring to recoupment as a ‘right’ can be problematic if it conceals the fact that trustees do not always recoup for their own benefit, and may owe a duty to consider the option of recoupment, for example, where this is necessary to get in the trust estate.⁷⁷

A further problem is that recoupment is not a ‘right’ in the Hohfeldian sense of a claim-right that correlates to a duty.⁷⁸ As explained in Part II.B.i, in some situations, recoupment does discharge a beneficiary’s duty, such as a trustee-beneficiary’s duty to reinstate the trust fund or a defaulting debtor-beneficiary’s duty to contribute to the trust fund. However, recoupment is possible in other situations where the trustees have no right against anyone and recoupment does not have the effect of discharging any duty. For example, a trustee can recoup against an overpaid beneficiary although she has no proprietary claim,⁷⁹ and no personal claim for restitution of the value of the overpayment, against that beneficiary.⁸⁰ Indeed, noting this

⁷⁷ *Burgess* (n 3) [163]; *Horne* (n 22) 80; *Merriman* (n 3) 352; *Kelaheer* (n 2) [270], [306]-[309].

⁷⁸ W Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale LJ* 16, 30-33.

⁷⁹ The proprietary claim is confined to cases where the beneficiary still retains the specific property or its traceable substitute; *Re Montagu’s ST* [1987] 1 Ch 264, 271; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1519].

⁸⁰ Recoupment was still possible in *Musgrave* (n 3) 424-426; *Merriman* (n 3) 349-350; *Robertson* (n 3) 689.

feature of trustee recoupment in their joint judgment in *Test Claimants in the FII Group Litigation v HMRC*,⁸¹ Lord Hodge and Lord Reed observe that recoupment itself is ‘*not a claim at all*’. As we have said already, one of the strategic advantages of recoupment is precisely that it is possible in cases where the trustee has no right against the beneficiary.

The same point can be made about recoupment for expenses. Although it is often said that trustees have a ‘right of indemnity’, they do not generally have any rights enforceable against beneficiaries to recover expenses.⁸² Exceptionally, and as recognised in *Hardoon v Bellios*,⁸³ the trustee may have a personal right of indemnity against the beneficiary when it is impossible to recoup out of the beneficiary’s entitlement to trust property, but this exception proves the general rule. In some jurisdictions, furthermore, the trustee’s right of indemnity against the beneficiary under the rule in *Hardoon* has been abolished while the trustee’s ability to recoup for expenses has been maintained.⁸⁴

Nor is recoupment a means of enforcing rights. In some cases, recoupment can exist in parallel with the enforcement of rights as one of several options open to a trustee,⁸⁵ and if the trustee recoups then these rights are destroyed. However, it does not follow that recoupment is

⁸¹ *FII* (n 24) [115] [emphasis added].

⁸² See also A Silink, ‘Trustee Exoneration from Trust Assets – Out on a Limb?’ (2018) 12 J Eq 58, 69-70; D’Angelo (n 73) [5.46]. An outgoing trustee is permitted to retain the trust property for the purpose of reimbursement and, upon transfer of the trust property to a new trustee, acquires a right against that new trustee(s) to be indemnified for previous expenses, which may be secured against the trust property, see eg, *Dimos v Dikeakos Nominees Ltd* (1996) 68 FCR 39, 40 (Jenkinson J with whom Olney J agreed) 43-44 (Heerey J with whom Olney J agreed); *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* [2009] HCA 32, (2009) 239 CLR 346 [43] (the Court). This right, if it is to exist, arises upon the transfer of the trust property from the outgoing trustee to the new trustee(s), and is in addition and separate to the trustee’s power as the titleholder, which she may exercise to recoup expenses.

⁸³ *Hardoon v Bellios* [1901] AC 118 (PC) 123.

⁸⁴ See eg Trustee Act 1925 (NSW), s 100A, discussed in JC Campbell, ‘The Undesirability of the Rule in *Hardoon v Bellios*’ (2020) 34 Tru LI 131.

⁸⁵ On the existence of different options in overpayment cases see eg *Horne* (n 22) 80-81; *Robinson* (n 3) 513.

a way of enforcing rights. As just discussed, recoupment is possible whether or not the trustee has rights, and rights are destroyed by recoupment not because recoupment entails the enforcement of the rights, but for other reasons. For example, recoupment of an overpayment retrospectively authorises what was an unauthorised payment and any right which the trustee had against the overpaid beneficiary is extinguished because a necessary fact grounding the trustee's right – the unauthorised disbursement – has disappeared.

B. Recoupment is not a proprietary right

Recoupment, and particularly recoupment for expenses, has been understood as a 'beneficial interest', 'entitlement' or 'proprietary right'. This conception is very difficult to reconcile with the fact that the trustee is *already* the owner of the trust property. It makes no sense to talk about the trustee having, in addition to her title to the trust property, a *further* right or interest in the property to the extent of her ability to recoup, whether for expenses or otherwise.

We have already touched on the dangers of drawing analogies between proprietary rights and the rights, powers and entitlements arising under an express trust.⁸⁶ It is inescapable, however, that analogies will continue to be drawn for as long as statutory regimes force us to ask whether a trustee's powers of recoupment constitute 'property', 'proprietary interests' or 'ownership', for example because this language is used to express questions about a trustee's priority status in a beneficiary's insolvency, or questions about what property is available for distribution to the trustee's general creditors where the trustee is insolvent.⁸⁷ Each statutory regime uses such terms in its own way and the fact that recoupment is held to constitute a 'proprietary interest' or 'property' for the purposes of a statutory regime has no general significance for the juridical nature of recoupment.

⁸⁶ See n 8 above.

⁸⁷ See eg *Carter* (n 7) [84], [87] and [133]-[139].

Proprietary characterisations of recoupment may also be doubted for other reasons. One is that the ‘priority’ afforded to a recouping trustee cannot support a conclusion that recoupment is a ‘proprietary’ right. In cases of recoupment against a particular beneficiary, there is no priority contest between trustee and beneficiary. The beneficiary, her creditors and other assignees may lose out, but the reason for this is not priority between proprietary rights *per se*; it is, rather, that the trustee has exercised her power to re-define the terms of the beneficiary’s entitlement. In cases of recoupment for expenses, the terms of the beneficiary’s entitlement are contingent on satisfaction of the trustee’s indemnity from the outset. Again, therefore, there is no priority dispute between the trustee and beneficiary (and her creditors and assignees). The only question is whether a trustee is permitted by the trust terms to exercise her powers as titleholder to reimburse expenses.

C. Recoupment is not a lien or charge

Recoupment is sometimes characterised as an equitable charge or lien. Some of the difficulties with this have been pointed out by other scholars, including that the trustee may not always have a right the performance of which might be secured by the lien or charge.⁸⁸ Bell, Gageler and Nettle JJ in *Carter Holt Harvey* said that a lien or charge for expenses is not ‘a charge or lien comparable to a synallagmatic security interest over property of another’ but arises ‘endogenously as an incident of the office of trustee in respect of the trust assets’.⁸⁹ Even if we allow for this clarification, however, the lien or charge conception risks analytical confusion. Recoupment supports the trustee’s performance of her obligations as an accounting party in the due administration of the trust, as discussed in Part III. A lien or charge, on the other hand, is a power over property created or conferred in favour of the security holder to secure another

⁸⁸ Silink (n 82) 69-70; D’Angelo (n 73) [5.46].

⁸⁹ *Carter* (n 7) [83]. See also: *Lemery* (n 15) [46]-[47] (Brereton J) the trustee’s lien is a ‘mere hypothecation’.

person's performance of an obligation. Further, recoupment is not a power to realise an asset to secure the beneficiary's performance of an obligation owed to the trustee: as discussed in Part IV.A, recoupment may arise even when the trustee has no right, the performance of which could be supported by any security interest, however that interest was understood.

D. Recoupment is not a form of equitable set-off

It has been suggested that recoupment is a form of set-off, and more particularly, a form of equitable set-off.⁹⁰ This suggestion is based on the fact that recoupment can sometimes involve one legal relationship being extinguished through an adjustment to or extinction of another: for example, when trustees recoup against a defaulting trustee-beneficiary by reducing her future entitlements, their claims against her for breach of trust are extinguished.

Even if it is only understood as set-off 'on a loose use of the term',⁹¹ this idea is problematic. Set-off introduces its own analytical uncertainties, for it has 'no uniform meaning and is therefore a source of confusion' in English law.⁹² Further, there is no true parallel between the two phenomena⁹³ and set-off is not possible in any of the situations where recoupment occurs.⁹⁴ Equitable set-off is the netting out of monetary obligations or demands,

⁹⁰ P Turner, 'Equitable Set-off' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP, 2017).

⁹¹ *Byrnes* (n 16) [83].

⁹² *Fearn v Anglo-Dutch Paint and Chemical Co Ltd* [2010] EWHC 2366 (Ch), [2011] 1 WLR 366 [11]. Equitable set-offs are distinct from set-off in insolvency and bankruptcy, contractual rights of set-off, and various other forms of statutory set-off, all of which are different to abatement and counter-claim. See generally P Wood, *Set-Off and Netting, Derivatives, Clearing System* (3rd edn, Sweet & Maxwell, 2019).

⁹³ This point has been made in relation to rights of retainer in other fund contexts; eg *Cherry v Boulton* (1839) 4 My & Cr 442, 447; *Re Akerman* [1891] 3 Ch 212 (Ch) 219-220; *McGhee* (n 44) [33-021]; *Wood* (n 92) [2-016], [4-029].

⁹⁴ *Lehman Brothers International (Europe) (in admin) v CRC Credit Fund Ltd* [2009] EWHC 3228 [331]-[333]; *Re Kaupthing Singer & Friedlander Ltd (in admin) (No 2)* [2011] UKSC 48, [2012] 1 AC 804 [53]: a right of retainer 'may be said to fill the gap left by disapplication of set-off'.

liquidated or unliquidated, that are relevantly connected, for example because a debtor's demand impeaches the creditor's demand.⁹⁵ Neither type of recoupment involves the netting out of monetary obligations. Recoupment against a particular beneficiary entails a variation being made to the terms of the beneficiary's entitlement, while recoupment for expenses entails a reduction being made to the trust fund in favour of the trustee. Both types of recoupment are possible when the trustee has no right against the beneficiary that is capable of being set off.

E. Recoupment is not always a form of court relief

Recoupment can sometimes be the subject of a court order or the action of a court and to this extent it can be described as a form of relief. A court may order a trustee to exercise her power of recoupment, for example on the application of a (replacement or co-) trustee, or another beneficiary.⁹⁶ In such cases, the adjustment to the parties' legal relations will not occur until the trustee complies with the court order. Alternatively, the court can itself adjust a beneficiary's entitlement in a suit for general administration.⁹⁷ Also, a trustee is subject to various requirements in how she recoups (as discussed in Part V) and in some cases it may therefore be prudent for a trustee to seek advice and directions from the court as to the manner of exercise of the power.⁹⁸ Notwithstanding all of this, however, it is clear that a trustee can affect recoupment herself without seeking a court order: an 'adjustment ... [can] be made out of Court'⁹⁹ through the actions of the trustee.

⁹⁵ *Rawson v Samuel* (1841) 1 Cr & Ph 161.

⁹⁶ *Livesey v Livesey* (1830) 3 Russ 287; *Downes v Bullock* (1858) 25 Beav 54; *Church v Talbot* (1901) 1 SR (NSW) Eq 13, 33; *Harris* (n 4); *Cambridge* (n 59).

⁹⁷ As explained in *Musgrave* (n 3) 424. See also *Baker v Baker* (1858) 6 HLC 616, 632.

⁹⁸ As in *Musgrave* (n 3) 424-425; *Blue Sky* (n 3) [92]-[106]; *Ettleson* (n 50).

⁹⁹ *Musgrave* (n 3) 424. See also *Eccles v Mills* (1894) 14 NZLR 143, 159-60, affirmed on appeal, *ibid*, 177, 180 and 183, reversed by PC on a different point [1898] AC 360.

F. Recoupment distinguished from other accounting parties' rights of retainer

There is a distinction between recoupment by trustees of an express trust and the rights of retainer held by other accounting parties, such as executors,¹⁰⁰ liquidators,¹⁰¹ and trustees of purchase money resulting trusts.¹⁰² A right of retainer is defined by a general principle, sometimes attributed to *Cherry v Boulton*,¹⁰³ that 'where ... a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund'.¹⁰⁴ The distinction between this principle and recoupment is not described clearly and consistently in the cases. Sometimes recoupment by an express trustee is understood as part of a broader principle, which may or may not be ascribed to *Cherry v Boulton*.¹⁰⁵ In other cases, the connections between rights of retainer and recoupment by express trustees are not identified,¹⁰⁶ or the distinctions between them are expressly preserved, as in *Re Dacre*.¹⁰⁷ One reason for this muddle is that the courts have no clear understanding of recoupment in the express trust context. If our arguments about this are accepted then both recoupment and rights of retainer can be understood as ways to assist an accounting party in her administration of a fund, either by allowing her to re-define fund entitlements or to recoup for expenses.

¹⁰⁰ As in *Jefferies v Wood* (1723) 2 P Wms 128; *Akerman* (n 93) 219; *Cherry* (n 93).

¹⁰¹ *Re Rhodesia Goldfields Ltd* [1910] 1 Ch 239 (Ch) 247.

¹⁰² *Cowcher v Cowcher* (1972) 1 WLR 425, 432-433.

¹⁰³ *Cherry* (n 93). See eg *P Rower Graphics Pty Ltd v Scanagraphix Pty Ltd* (NSWSC, 6 September 1988); *Lane* (n 20) [54]. As discussed in *Kaupthing* (n 94) [8], [14]-[16] this rule can be derived from earlier cases, such as *Jefferies* (n 100).

¹⁰⁴ *Rhodesia* (n 101) 247. See also *Re Peruvian Railway Construction Co Ltd* [1915] 2 Ch 144 (Ch) 150; *Akerman* (n 93) 219; *Stephenson Nominees Pty Ltd v Official Receiver in Bankruptcy* [1987] FCA 606 [61].

¹⁰⁵ eg *Lane* (n 20) [54]. See also M Leeming and J Heydon, *Jacob's Law of Trusts in Australia* (8th edn, LexisNexis, 2016) 514.

¹⁰⁶ eg *RWG* (n 4) 398, where Brooking J discusses recoupment in situation 2, referring to *Dacre* (n 4) and *Jacobs* (n 4), without mentioning *Cherry* (n 93).

¹⁰⁷ eg *Dacre* (n 4) 346-347.

Even then, however, there would still be a distinction between the two because a trustee's power to re-define a beneficiary's entitlement has a narrower scope than the parallel power held by other accounting parties. A trustee can recoup against a beneficiary only where 'the benefit and liability arise under one and the same instrument'.¹⁰⁸ So recoupment is impossible, for example, where the trustee's power to recoup arises under a different trust from the trust under which the beneficiary has an entitlement to the benefit of trust property.¹⁰⁹ Similarly, a beneficiary's rights under a contract are not liable to the trustee's power to recoup¹¹⁰ and a beneficiary's entitlement under a trust is not liable to recoupment when the trustee has rights against the beneficiary under a contract,¹¹¹ or some other 'claim ... based on [the trustee's] title outside the [trust] estate'.¹¹² In contrast, the right of retainer held by an executor or other fund manager is not limited in this way. A right of retainer arises in relation to dealings occurring prior to, and external to, the creation of the fund. For example, an executor has a right of retainer where there is a debt between the testator and beneficiary. An express trustee would not be able to recoup against a beneficiary who owes the trustee a debt that does not arise under the trust.

¹⁰⁸ *Ballard* (n 46) 377. See also *Price v Loaden* (1856) 21 Beav 508; *Investec* (n 7) [98]; *Moore* (n 3) 364-365; *Harris* (n 4); *Palmer* (n 4) 166-167. Equally, a defaulting trustee's title to land which is not held under the trust is not liable to recoupment: *Fox v Buckley* [1875] 3 Ch D 508.

¹⁰⁹ As in *Towndrow* (n 4) 666-668.

¹¹⁰ *Re Hatch* [1919] 1 Ch 351.

¹¹¹ Recoupment in situation 4 is only possible, for example, where the debtor beneficiary is indebted to the trustees 'as trustees': *Corr v Corr* (1879) 3 LR Ir 435, 447; *Weston* (n 6) 172-173.

¹¹² *Re Tucker* [1918] VLR 460, 464-466.

Part V. Controls on recoupment

A. Recoupment for the trustee's benefit

As explained in Part III, both types of recoupment assist trustees in the due administration of trusts. In most, if not all, situations of recoupment, however, it is also possible to say that the trustee personally benefits in some way through recoupment. Recoupment for expenses allows the trustee to reduce the quantum of funds held on trust and increase the quantum of funds that the trustee holds for herself. Hence the trustee is personally benefited to the extent that beneficial enjoyment of the property passes to her. Recoupment against a particular beneficiary enables the trustee to ensure that losses caused by a breach of trust are made good and discharge the trustee's personal liability to reinstate the trust fund.¹¹³

It might seem counterintuitive that a trustee can exercise a power of recoupment for her own benefit, given her status as a fiduciary, particularly where the trustee is also an underpaid beneficiary and/or the trustee responsible for an unauthorised payment.¹¹⁴ It must be borne in mind, however, that the default rules which require trustees to act in a self-denying way can be displaced by the trust terms. Trustees are often given powers by settlors who choose to permit them to exercise these powers for their own benefit. Examples are powers of appointment to a class of objects of which the trustee is herself a member¹¹⁵ and powers to amend the terms of pension schemes in ways that enure to the trustees' benefit.¹¹⁶ Recoupment powers are similar: trustees can exercise these notwithstanding the fact that they derive a personal benefit from

¹¹³ As in *Byrnes* (n 16) [21]-[23], [67]-[73], [125].

¹¹⁴ The trustee's responsibility for the unauthorised payment did not prevent recoupment in eg *Musgrave* (n 3) 424-425; *Ainsworth* (n 3); *Reading* (n 3); *Macphillamy* (n 3) 432-433; *Robertson* (n 3) 687-688.

¹¹⁵ *Re Betty (deceased)* [1990] 1 WLR 1503; *Karger v Paul* [1984] VR 161, 163-6. See further C Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 Tru LI 92.

¹¹⁶ *Edge v Pensions Ombudsman* [1998] Ch 512 (Ch) 538-42; approved [2000] Ch 602.

doing so because the settlor and/or the general law permit them to do this – something which they might reasonably choose to do in order to promote effective trust administration and avoid deterring people from serving as trustees.

This is not to say, however, that a trustee is unconstrained in her ability to recoup. The exercise of powers held subject to an express trust are generally subject to various other requirements, and the exercise of powers by a trustee when she recoups is no exception to this. If a trustee fails to comply with one or more of these requirements, any (attempted) recoupment will be ineffective and/or generate a right to equitable relief.

B. Compliance with the trust terms

As discussed in Part III.B, the terms of a trust are sourced in the settlor’s express declaration of trust and from mandatory and default rules created by equity and statute. These typically provide that recoupment is permissible in the five situations summarised in Part II.A. However, there are limits to the availability of recoupment in these situations. For example, in situation 1, recoupment is legitimate only when the disbursement was unauthorised; and in situation 5, recoupment is legitimate only when the expense was properly incurred in the due administration of the trust. In cases where these requirements are not satisfied, recoupment is not possible because it is not permitted by the trust terms.

C. A proper purpose

A trustee’s power to recoup, like any other power held by a trustee under an express trust, must be exercised for a proper purpose.¹¹⁷ The proper purpose(s) of recoupment must be determined as a matter of construction of the trust terms that permit recoupment. A trustee acts improperly

¹¹⁷ *Wester v Borland* [2007] EWHC 2484 [12]-[13]; *Kelaher* (n 2) [304]-[309]. See generally: *Vatcher v Paull* [1915] AC 372, 378; *Duke of Portland v Topham* (1864) 11 HL Cas 32 (HL) 54.

if her actual purposes in recouping do not align with the purposes for which the power was given. When a trustee recoups expenses, for example, she must do so for the purpose of ensuring that she is not personally responsible for the expenses of duly administering the trust. A trustee cannot recoup, or refuse to recoup, for other purposes. For example, a trustee could not validly refuse to recoup because she wishes to leave an unsatisfied indemnity in order to prevent or block a beneficiary from exercising her own power to call for the trust property.¹¹⁸.

D. Good faith

A trustee must act in good faith when recouping, meaning that she must ‘make a sincere and serious commitment to the purposes for which her powers’ have been given.¹¹⁹ Whether or not this requirement is satisfied will be fact dependent. The trustee’s decision whether or not to recoup must be taken after genuine and sincere consideration of what will further the due administration of the trust in the interests of the beneficiaries. By way of illustration, a trustee was held to have recouped in good faith in *Australian Prudential Regulation Authority v Kelaheer*,¹²⁰ because the trustee had given ‘close consideration ... as to how to deal with the problem [of the unauthorised disbursement]... in the best interests of the beneficiaries’.¹²¹ The circumstances were such that recoupment was a ‘practical and sensible way to cause the least inconvenience to members whilst nevertheless ensuring all were treated fairly and equitably, even if over the longer-term’,¹²² especially when the alternatives of pursuing court action against other parties involved in the unauthorised transaction were complex and risky.¹²³

¹¹⁸ A similar example of an impermissible exercise of a trustee’s indemnity for properly incurred expenses is given in *Beck v Henley* [2014] NSWCA 201 [36].

¹¹⁹ Mitchell, ‘Good Faith’ (n 115) 96.

¹²⁰ *Kelaheer* (n 2).

¹²¹ *Ibid* [304].

¹²² *Ibid* [308].

¹²³ *Ibid* [309].

E. A duty to consider recoupment

A trustee may sometimes have a duty to consider recoupment.¹²⁴ This duty is often important in cases where something has gone wrong in the administration of the trust and the trustee has a duty to reinstate or get in missing trust funds. The fact that the trustee herself was responsible for causing this problem is irrelevant: responsible or not, she has a duty to fix the problem once it has occurred.¹²⁵ This is likely to necessitate an adequate and good faith consideration of the costs and benefits of recoupment, paying proper regard to the goal of effective trust administration, to the position of individual beneficiaries against whom recoupment might be effected, and to the position of other beneficiaries who might be disadvantaged if recoupment were not effected. Among other things, the trustee should consider (a) the amount to be gained for the trust fund by way of recoupment; as compared with (b) the cost of exercising a power of recoupment, for example the cost associated with seeking the court's advice, and/or of providing disclosure to the affected beneficiaries and engaging with any potential disputes; and (c) the circumstances of individual beneficiaries liable to recoupment, including their financial and other circumstances, such as the hardship or distress that might be caused by recoupment.¹²⁶

F. General inequity

Recoupment, like any other exercise of power by a trustee, 'is subject to the control of the Court' and will not be permitted in cases where it would be inequitable.¹²⁷ The relevant factors

¹²⁴ *Burgess* (n 3) [163]; *Horne* (n 22); *Merriman* (n 3) 352; *Kelahr* (n 2) [304]-[309].

¹²⁵ *Young v Murphy* [1996] 1 VR 279, 281-283, and cases discussed there; *Morlea Professional Services Pty Ltd v Richard Walker Pty Ltd* [1999] FCA 1820, (1999) 34 ACSR 371 [51].

¹²⁶ Some or all of these factors are expressly identified in: *Capita* (n 3) [90]; *USS Pension Scheme (PO-22315)* (Pensions Ombudsman Determination, 20 November 2019) [43]-[45]; *Kelahr* (n 2) [304]-[309].

¹²⁷ *Reid v Deane* (n 16); *Musgrave* (n 3) 425.

which a court will take into account are similar to those which bear on a trustee's own decision whether or not to recoup, ie the costs and benefits of recoupment for effective administration of the trust and the potential impact of recoupment or non-recoupment on the beneficiaries. For example, a trustee might not be permitted to 'abruptly' stop payment to a particular beneficiary all in one go,¹²⁸ especially where the income paid to the beneficiary is for maintenance;¹²⁹ and again a pension trustee might be prevented from taking 'any steps to recoup overpayments' to scheme members of small amounts where this would cause them 'distress' and would create disproportionate costs for the trust estate.¹³⁰

Some of the concerns relevant to inequity are of the kind that motivate the defence of change of position, which is generally considered applicable to a claim in unjust enrichment, such as for recovery of a mistaken payment. Some Pensions Ombudsman's Determinations recognise the in-principle availability of the defence of change of position to recoupment of overpayments to members of pension schemes.¹³¹ As recoupment is not a remedy for unjust enrichment, however, we do not think that the legal defence of change of position is strictly applicable in this context.¹³² Nonetheless, an overpaid beneficiary's factual change of position may be relevant to a court's assessment of the equity of recoupment. Depending on the circumstances, a beneficiary's change of position might render recoupment inequitable altogether or might require recoupment to occur over a longer period of time.¹³³

¹²⁸ *Simpson* (n 50); *Robertson* (n 3) 689 (hardship as acknowledged but not made out).

¹²⁹ *Simpson* (n 50) 180.

¹³⁰ *Capita* (n 3) [90]-[91].

¹³¹ A defence of change of position was said to be available in principle although not on the facts in *QinetiQ Pension Scheme (PO-16856)* (Pensions Ombudsman Determination, 25 October 2018) [31]-[35]; *USS* (n 126) [36]-[45]; *Mercury Provident Pension Scheme (PO-20306)* (Pensions Ombudsman Determination, 3 April 2020).

¹³² The non-application of change of position was recognised in *Clay* (n 22). See also P Newman, 'Owing Me, Owing You' (2020) 33 *Tru LI* 186.

¹³³ As contemplated in: *USS* (n 126) [43]-[45].

Estoppels might also prevent recoupment, for example where the trustee has made an unequivocal representation to a beneficiary regarding her entitlements to trust income.¹³⁴ Again, some of the concerns relevant to inequity may be relevant to estoppel, such as an overpaid beneficiary's factual change of position. However, an estoppel will not be enforced against a trustee when to do so would 'fetter [the trustee's] power of performing his duty'¹³⁵ or require the trustee to act in a way that was contrary to the trust terms.¹³⁶

G. Laches

Laches does not apply to recoupment when it is a power exercised by the trustee independently of a court order. However, laches may apply to bar recoupment when a party seeks a court order directing a trustee to exercise a power of recoupment, or that a court adjust the trust accounts in the context of a general administration suit. Like any other claim for equitable relief, equitable discretionary bars will apply, such as laches. Laches was said to be applicable in principle, although not on the facts, in *Harris v Harris*,¹³⁷ and was one reason why an underpaid beneficiary's claim for orders directing a trustee to recoup against an overpaid beneficiary was barred in *Re Horne*.¹³⁸

Part VI. Practical Consequences

Our power analysis of recoupment has consequences for how we understand the interactions between recoupment and statutory periods of limitation, orders for interest, and sections 91 and 67 of the Pensions Act 1995. These consequences are briefly outlined below.

¹³⁴ Estoppel was considered available in principle but not made out on the facts in *Mercury* (n 131).

¹³⁵ *Fuller* (n 3) 211-212.

¹³⁶ See eg *Burgess* (n 3) [154].

¹³⁷ *Harris (No 2)* (n 3).

¹³⁸ *Horne* (n 22).

A. Limitation

Recoupment is not subject to statutory periods of limitation, whether by direct or analogical application, and it is possible, for example, for a trustee to recoup in relation to payments made more than 6 years previously.¹³⁹ For example, recoupment is possible in cases where a claim in unjust enrichment is barred by a limitation period.¹⁴⁰ Limitation periods do not apply to recoupment because recoupment is neither ‘an action’ nor a ‘cause of action’.¹⁴¹ This is so whether recoupment occurs through an exercise of power by a trustee, through an exercise of power by the court, or through an exercise of power by a trustee under a court’s direction.¹⁴² Consequently, as Romilly MR said in *Harris v Harris (No 2)*,¹⁴³ for example, recoupment can occur ‘at any distance of time’.¹⁴⁴

B. Interest

In some cases, a trustee may wish to recoup for interest. For example, a trustee may wish to do this in a case where recoupment is pursued as an alternative to the bringing of proceedings to enforce a claim against a beneficiary which could lead to a court order for pre-judgment interest. However, the weight of cases indicates that it is not possible to recoup interest, either against an individual beneficiary,¹⁴⁵ or for expenses.¹⁴⁶ On our power analysis of recoupment,

¹³⁹ See eg: *Dibbs* (n 3); *Livesey* (n 96). See also: M Furness, ‘Statutory Limitation Periods for Claims Related to Breaches of Trust (2017) 23 T&T 527.

¹⁴⁰ *Robertson* (n 3); *Universities Superannuation Scheme (PO-19417)* (Deputy Ombudsman’s Determination, 17 September 2019) [34]; *USS* (n 126).

¹⁴¹ See eg: Limitation Act 1980, ss 5, 18, 21 and 32 apply to ‘actions’ or ‘rights of action’.

¹⁴² No statutory period of limitation applied proceedings seeking directions regarding recoupment, see eg: *Downes* (n 96); *Re Sharp* [1906] 1 Ch 793 (Ch); *Robinson* (n 3); *Burgess* (n 3) [172], not commented on appeal *BIC UK Limited v Burgess* [2019] EWCA Civ 806; *Eccles* (n 99).

¹⁴³ *Harris (No 2)* (n 3) 111.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Merriman* (n 3); *Clay* (n 22); *Cambridge* (n 59).

¹⁴⁶ *Gordon v Trail* (1820) 8 Price 416. There are some exceptions: *Underhill* (n 23) [81.25].

these cases can be explained on the basis that the legislation authorising pre-judgment interest awards allowed these only on a claim, action or set of proceedings for the recovery of a debt or damages,¹⁴⁷ statutory wording that did not include the exercise of a power to recoup.

C. Pensions Act 1995, section 91

Section 91 of the Pensions Act 1995 prohibits the exercise of a right of set-off or lien or charge against a member's accrued right or entitlement, unless certain procedures are followed, such as applying for a court order in the event the member disputes the amount.¹⁴⁸ There are mixed views on whether this section applies to recoupment against members of occupational pension schemes.¹⁴⁹ As originally drafted, the section contained some exceptions to the prohibition and these were subsequently extended with the specific purposes of ensuring that recoupment was excepted from the prohibition in section 91.¹⁵⁰ On our view of recoupment, however, this amendment was unnecessary because section 91 did not apply to recoupment cases in the first place. Application of the section is conditioned on the trustee exercising a right of 'charge, lien or set-off' and for reasons we have discussed in Part IV, none of these terms is an apt description of recoupment. That legislative amendments were thought necessary to put it beyond doubt that section 91 does not catch trustee recoupment is a good illustration of the

¹⁴⁷ See eg, s 35A of the Supreme Court Act 1981, which was held not to allow recoupment for interest on expenses in *Foster v Spencer* [1996] 2 All ER 672, 677. Conversely, the different worded Rules of the Supreme Court 1951 (Vic), Order LV rr 62 and 64, permitted recoupment for interest in *Robertson* (n 3). Recoupment for interest was also allowed in the context of an executor's right of retainer in *Akerman* (n 93), although the basis for this order is not clear.

¹⁴⁸ Pensions Act 1995, s 91.

¹⁴⁹ There were some Pension Ombudsman cases allowing recoupment without s 91 applying: *Noble* (L00663, 7 October 2002); *Noakes* (M00851, 24 February 2004). Although Arnold J in *Burgess* (n 3) [163], accepted the parties' concession that recoupment is subject to s 91 because recoupment is 'set-off' within s 91(1)(c); see also, *Clift* PO-2066, 3 June 2014.

¹⁵⁰ Pensions Act 2004, s 266.

confusions which can flow from the conceptual instability of recoupment as it is currently described in the cases.

D. Pensions Act 1995, section 67

A final point is that a pension trustee's exercise of a power to recoup may be subject to section 67 of the Pensions Act 1995. This section sets out certain restrictions and procedures for an exercise of a power to amend the terms of a pension scheme to affect a member's accrued right under the scheme. As we have explained in Parts I-III, trustee recoupment against an individual beneficiary entails the exercise of a power to vary the terms of that beneficiary's entitlement, suggesting that recouping trustees may need to comply with section 67 for the recoupment to be valid.

Part VII. Conclusion

In this article we have examined various conceptions of trustee recoupment that can be found in the cases and scholarly commentary. There are many of these, they are mutually inconsistent, and most are unsatisfactory for reasons we have explained. The appearance of competing conceptions of a legal doctrine in any legal system is a marker that the doctrine is not clearly understood. The reasons for this phenomenon are not hard to find in common law systems where legal rules are typically developed as a side-product of the judicial resolution of disputes arising out of factually different situations. Judges must decide cases as presented by the parties and are not always in a strong position to see that functionally similar rules have been applied in analogous situations by other judges who have conceived of the rules in a different way. Legal scholars have the luxury of surveying the whole field in which a body of rules has evolved and often have a better opportunity than judges to develop general theories of how these rules work, how they fit together and what they are designed to achieve.

In this article, we have argued that recoupment is a process that entails the exercise of powers which are vested in trustees in order to support effective trust administration. We have argued that trustee recoupment occurs in a variety of cases that reduce to two types. In the first type, trust funds are depleted because something goes wrong in the administration of the trust; because a particular beneficiary is implicated in this problem in one way or another it is cured by the trustee's exercise of a power to vary the terms of that beneficiary's entitlement to the benefit of trust property. In the second type of case, trustees pay trust expenses out of their own funds and are permitted to reimburse themselves by treating trust property which they already own as forming part of their personal estate rather than part of the trust fund; the reason why they can do this is that trust business requires the trustees to enter legal relations with third parties in the absence of other means of dealing with them yet fairness demands that trustees should not have to pay such liabilities out of their own pockets. The common thread running through our analysis is therefore that recoupment always entails an exercise of power; but the powers exercised in the two types of case are different, and the reasons why trustees are permitted to exercise these powers are also different.