Property, Analogy, and Variety

Ben McFarlane* and Simon Douglas**

1. Introduction

What do lawyers mean when we talk about 'property' or 'property rights'? Most would agree that rights to tangible assets, such as freehold title to land, or ownership of a chattel, are properly described as 'property rights'. But what about rights that need not relate to any physical thing, such as choses in action, intellectual property rights, and rights under a trust? Are such rights to intangibles 'property rights'? There is, of course, an ongoing academic debate as to the nature of property: the possible justifications that may be provided for the institution of property will vary depending on the scope given to the terms 'property' or 'property rights'. In litigation, significant practical consequences can similarly turn on whether a court adopts a wider or narrower understanding of those terms: and courts, like academics, are far from unanimous in their approach.

The aim of this article is not to advance or advocate a particular definition of 'property rights'. Rather, it engages with the question in a different fashion. It examines a type of argument often encountered in this area, which might be described as the, 'This is property and, therefore …' argument. The premise of the argument is that a particular type of right (such as a chose in action, an intellectual property right, or a beneficial interest under a trust) is the same type of right as a right to a tangible asset and must therefore be protected in the same way. Such an argument will be referred to in this article as 'the property syllogism'.

It is clear to see why a claimant may wish to invoke the property syllogism. Where a party (A) holds a right to a tangible asset, A benefits from a broad set of claim-rights, privileges, powers, and immunities, and often also from public law or constitutional protections; it is no surprise that a party (B) with a right to an intangible resource may wish to claim at least some of those benefits. In this article, we will focus on examples of the property syllogism's use in a particular class of cases: where B wishes to claim that the defendant (D) is under a duty to B

*Professor of Law, University College London.
**Associate Professor in Law, Jesus College, Oxford.
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not to interfere with B's intangible asset.[1] In such cases, B's use of the property syllogism will have the following structure:

1. If A has a right to a tangible asset, then the law protects A against particular interferences with the asset.

2. As B has a particular intangible asset, B's legal relationship with this asset is *the same as* A's legal relationship with A's tangible asset (i.e. B's right is the *same* type of right as A's right).

3. If B's right is the *same* type of right as A's right, then the law *must* protect B against interferences in the same way that it protects A.

There are two principal reasons for focusing on this particular use of the property syllogism. First, the ability of property rights to have an impact on the action of strangers – i.e. to have *in rem* effect – is often cited as a key aspect of property, which distinguishes property rights from purely personal rights. In Section 2, we examine more closely the content of the duties imposed on strangers where A has a right to a tangible asset, and thus examine the major premise of the property syllogism. Second, the case-law affords clear examples of attempts by B, a party with a right to an intangible asset, to use the property syllogism in order to argue for the existence of such a duty on a defendant. In Section 3, we examine such examples, and thus consider the minor premise in the property syllogism. We do so in relation to each of three types of right: choses in action; intellectual property rights; and beneficial interests under trusts. In Section 4, we consider the consequences of our analysis in instances where a party has been said to have 'quasi-property' in a resource.

We reach three key conclusions. First, in the three cases considered in Section 3, the property syllogism cannot succeed on its own terms: it does not compel a court to give the holder of a right to an intangible asset the same protection as the holder of a right to a tangible asset. The contention behind the apparent syllogism, in fact, can be understood only as a form of argument by analogy. This is not to deny, of course, that there may be important similarities between a particular type of right to an intangible on the one hand, and a right to a tangible

[1] For different uses of the property syllogism, see e.g. *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals; St Martins Property Corp Ltd. v Robert McAlpine Ltd.* [1994] 1 AC 85 (HL) for the argument (rejected by the House of Lords) that a non-assignment clause should not be effective to prevent the assignment of a chose in action as such a right is 'property' and so a restraint on its alienation is invalid.

asset on the other, and that such similarities may not be shared by purely personal rights. As such, the 'This is property and, therefore …' argument might persuade a court, in a particular context, to protect intangibles in the same way that it protects rights to a tangible asset; however, such protection is not logically required, as relevant similarities must of course be weighed against relevant differences between the two types of right. One advantage of the idea of 'quasi-property', examined in Section 4, is that the analogical nature of the argument is made explicit; importantly, this means that distinguishing B's right from A's right to a tangible asset is not in itself sufficient to deny B's claim.

Second, in cases where B seeks to impose a duty on a defendant not to interfere with an intangible asset, the absence of a physical thing to which B's right relates is a significant factor weighing against the analogy to A's right to a tangible asset. This is because, as we will argue in Section 2, the characteristic duty owed to A is a duty not to interfere with the *tangible asset itself*. The physical thing thus plays a crucial role in delimiting the nature of the duty, and of A's correlative right: this point will be developed in Section 3 when considering each of three types of rights to an intangible.

Our argument here is relevant to the wider debate as to the scope and justification of property rights. This is not because we wish to argue by fiat that rights to an intangible asset are not property rights. Indeed, in the abstract, it is difficult to choose between rival definitions of property rights: such rights are of course a legal construct, not existing in nature, and there is no external reality against which the accuracy of a particular definition can be tested. Our approach, when considering different types of right in Sections 2, 3 and 4, is to examine the legal relations arising where such rights exist, and thus to work from the inside, considering how the law currently protects the holders of such rights from interference by a stranger.

In pointing out some important differences between rights to tangible assets and rights to intangible assets, we are not claiming that it would necessarily be mistaken to adopt an overarching definition of property, or of property rights, which includes both rights to tangible assets and (at least some) rights to intangible assets. We do however insist – and this is our third and final conclusion – that such an overarching definition would have to recognise the variety of different types of right within its scope, and suitably distinguish those types of right into distinct sub-groups of property. In particular, the fact that rights to tangible assets and rights to intangible assets might share sufficient characteristics (lacked by purely personal rights) to be labeled as proprietary does not mean that the distinction between the sub-groups

should be lost, and the rights treated in exactly the same way. This point is not merely formalistic: accurately identifying the differing forms of legal relation involved in a particular claim is an essential first step to deciding if the claim is justifiable. Indeed, there is something of an irony here: a focus on context and policy rather than concepts and form is a key aspect of much legal realist analysis, and such analysis also challenges the utility of organizing concepts such as 'property'. Whilst our analysis instead takes seriously the form of legal relations recognized in the existing case-law, it does also lend support to the point that the concept of 'property' is far from monolithic, and, in its common current usages, includes a number of quite different types of legal relation.[2] This is, we suggest, the main reason for the continued uncertainty as to what lawyers mean when we talk about 'property' or 'property rights'.

2. The Major Premise: Rights to Tangible Assets

Whenever the property syllogism is invoked, its major premise concerns an aspect of the operation of A's right to a tangible asset that B argues should also apply to B's right to an intangible asset. In the examples considered here, that aspect is the duty of non-interference imposed on strangers where A has a right to a tangible asset: this duty is often said to correlate to A's 'right to exclude'. To examine the major premise, we must consider the legal relations that arise where A has a right such as a freehold title to land, or ownership of chattels, and look carefully at the content of the duty of non-interference. Building on our earlier work,[3] we will argue that the physical thing itself, the land or chattel to which A's right relates, plays an important part in defining the content of this duty. This point poses a critical question for the particular application of the property syllogism we are considering: if the presence of a tangible asset defines the duty of non-interference owed to A, it is then impossible to argue that, as a matter of logic, the same duty should be owed to a party, such as B, whose right does *not* relate to a tangible asset.

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[2] Our analysis can therefore be seen as consistent with a 'new doctrinalist' methodology, as it seeks to capture the benefits of a careful analysis of legal forms, without disregarding lessons arising from a realist critique of such concepts: see e.g. H Smith, 'The Persistence of System in Property Law' (2015) 163 U Pa L Rev 2055; B McFarlane: 'Property and the New Doctrinalism: Comment' (2015) 163 U Pa L Rev Online 293.

[3] S Douglas & B McFarlane, 'Defining Property Rights' in James Penner & Henry Smith (eds) *Philosophical Foundations of Property Law* (OUP, 2013).

A. The Duty of Non-Interference and the 'Right to Exclude'

Where A has a right to a tangible asset, such as ownership of a car, one means of capturing the distinctive nature of A's position is to say that A has a 'right to exclude' others from that thing. We have previously suggested that this right can be understood in Hohfeldian terms of claim-rights and duties.[4] The 'right to exclude', as a claim-right prima facie binding on the rest of the world, correlates to duties owed by the rest of the world to A. This legal duty can be readily inferred from tort law. A tort, which is a type of civil wrong, involves the breach of a legal duty. If a stranger, X, is held to have committed a tort by physically interfering with A's chattel or land, we can infer from B's liability in tort law that he is under a legal duty to A not to physically interfere with A's thing. We know from the torts of trespass, conversion and negligence, that should X scratch the panel of A's car[5], steal it[6], or even just touch it without A's consent,[7] then X will breach a legal duty owed to A. It is the law of torts, therefore, which recognizes that the A is owed a legal duty by all others not to physically interfere with the thing.

Turning to land, the torts of trespass, negligence and nuisance similarly recognise a duty to refrain from interfering with A's land. A freeholder has rights, under the *ad coelum* principle, to a straight column extending both upwards and downwards.[8] It seems that any boundary crossing of this column counts as a physical interference with A's land. In *Bocardo v Star Energy*,[9] where X had a licence to drill for oil in an area adjacent to A's land, X drilled diagonal wells that crossed the boundary of A's land. This boundary crossing, even though at a depth of over 2000 feet, constituted a breach of a legal duty and X was liable in trespass. Taken together, the torts of conversion, trespass, negligence, and nuisance demonstrate that, subject to the requisite mental states being satisfied,[10] if X physically interferes with A's chattel or land he will be held to have committed a tort. It follows that A is owed a legal duty by X not

[4] Ibid.
[5] See e.g. *Fouldes v Willoughby* (1841) 8 M. & W. 540.
[6] See e.g. *Kuwait Airways v Iraqi Airways (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 883 (HL).
[7] See e.g. *Vine v Waltham Forest London Borough Council* [2000] 1 WLR 2383 (CA).
[8] See e.g. *Wandsworth Board of Works v United Telephone Co. Ltd*. (1884) 13 QBD 904. There are of course limits to the extent of the column: see e.g. *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479.
[9] *Bocardo SA v Star Energy UK Onshore Ltd*. [2010] UKSC 35, [2011] 1 AC 380.
[10] The torts are strict liability in the sense that X does not need to be aware that she has no privilege to interfere with the property (e.g. an honest belief that the property belongs to X is no defence), but (in relation to conversion and trespass) X must know that her action is physically interfering with some property and (in relation to negligence) X must of course be in breach of the duty to take reasonable care. See further Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart, 2011) chs 7 and 9.

to physically interfere with the chattel or land. It is this legal duty which is being described when A asserts that he has a 'right to exclude' others from his thing.

It has been suggested that the right to exclude operates as an indirect means of protecting A's liberties to make use of property, and in some cases as a '(very) rough proxy'[11] for the identification of harmful conduct by X. More radically, it has been proposed that the right to exclude is secondary to, and should be limited by, the power of an owner to set the 'agenda' for a particular resource, so that 'there is no general right to exclude; others owe the owner a duty of exclusion where her agenda for the resource requires it.'[12] The common law position is, however, clear: a liability to pay substantial damages can arise where X has deliberately or carelessly physically interfered with A's thing, even if, on the facts, X's interference caused no harm or loss of value to A.[13] A's right to exclude can be understood solely in terms of the duties of non-interference with the physical thing owed to A by X. Described in such terms, we can see the importance played by the physical thing in defining the content of this duty, as the physical boundaries of the thing define the extent of X's duty.

B. The Duty of Non-Interference and the 'Right to Use'?

If A has a right to a tangible asset, do strangers then have not only a duty not to interfere with that asset, but also a distinct duty not to interfere with A's *use* of A's tangible asset? The existence of such a further duty would be important for any litigant attempting to invoke the property syllogism. Certainly, the concept of use can provide a bridge from tangible to intangible assets: just as A benefits from driving her car, so may B benefit from publishing a work to which B holds a copyright. Moreover, it is common to speak of A as having a right to use her car, and some academic approaches to defining property emphasise the importance of rights of use.[14] If the 'right to use' exists in respect of tangible assets, one might argue that the *exact* same right exists in relation to intangible assets. On our view, however, this argument is flawed. Careful consideration of the legal relations arising where A has a right to a tangible

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[11] Henry E. Smith, 'Intellectual Property as Property: Delineating Entitlements in Information' (2006) 116 Yale LJ 1742, 1745.
[12] Larissa Katz, *Exclusion and Exclusivity in Property Law* (2008) 58 U. Toronto LJ 275, 302-3.
[13] See e.g. *Owners of the S.S. Mediana v Owners of the Lightship "Comet" (The Mediana)* [1900] AC 113 (HL) at 117; *Mountain View Coach Lines Inc. v Storms* 102 AD 2d 663, 476 NYS 2d 918 (1984); Restatement (Second) Of Torts § 931(a), comment b. (Am. Law. Inst. 1965). Note too *Bocardo v Star Energy* (n 10), [35].
[14] See e.g. Christopher Essert, 'Property in Licences and the Law of Things' (2014) 3 McGill L.J. 559 (2014).

asset reveals that A simply has a privilege to make particular uses of that asset, and as a result A's right to use does not correlate to any duty owed to A by strangers.

An example of the right to use functioning as a Hohfeldian privilege is provided by *Bradford v Pickles*.[15] The defendant, A, sunk a well into a natural reservoir under his land, thereby causing the springs used by the city of Bradford to run dry. The House of Lords, rejecting the claim against A, held that he was perfectly entitled to use his land in this way. Lord Halsbury said, 'If it was a lawful act, however ill the motive might be, [A] had a right to do it.'[16] Of course, A's 'right' to take water from his land is a 'privilege', not a 'claim-right', as it does not denote a legal duty on others to behave in a certain way towards A. Rather, the 'right' denotes the absence of any legal duty on A himself; he was not under a duty to refrain from taking water from his land and, consequently, his use was permitted.

The crucial question is whether, in cases where A has a right to a tangible asset, A's right to use is ever more than a mere privilege. Does A also have a claim-right that X refrain from impairing A's ability to use his chattel or land? The answer appears to be 'no'. Indeed, this is a crucial aspect of the law governing carelessly caused economic loss. In *Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd*,[17] for example, X carelessly damaged a power cable whilst carrying out road maintenance and so cut off power to the factory used by A to process its metal ingots. Ingots in machines at the time of the power cut were damaged, and A was therefore able to recover damages for this physical interference with its goods, including profits lost by its inability to sell the ingots. By damaging those ingots, X had clearly breached its duty not to physically interfere with A's tangible assets. The power loss also prevented A from processing a number of its other ingots and offering them for sale. No recovery was allowed in relation to those ingots, however: there had been only an interference with the *use* of the ingots, and no interference with the ingots themselves. The loss A suffered through its inability to process the ingots was of course related to those tangible assets; but it flowed not from an interference with the assets themselves, but rather from an interference only with their use, and

[15] *Bradford Corp v Pickles* [1895] AC 587 (HL).
[16] ibid 594.
[17] *Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.* [1973] 1 QB 27. See too Restatement (Third) Of Torts: Liability For Economic Harms (Second Draft) § 7, Illustration 8 (Am. Law. Inst. 2014), referring to *Newlin v New England Tel. & Tel. Co.* 54 NE 2d 929 (Ma. 1954).

was therefore regarded as 'pure' economic loss, recovery for which is allowed only if there is a special relationship between claimant and defendant.[18]

Turning to land, it has often been suggested that the tort of nuisance recognises a right to use land: a private nuisance has been defined, for example as a 'substantial and unreasonable interference with the private use and enjoyment of another's land'.[19] It might thus seem that, whatever the position in relation to chattels, the courts have recognised a claim-right to use land, which can be infringed by X even in the absence of a physical invasion of A's land. Three points can be made in response. First, the difference between nuisance and chattel torts can be seen as based on the distinct physical nature of a plot of land: as the thing itself includes the air space above the surface,[20] a broader range of activity by X may constitute interference with that physical thing. Second, whilst the language adopted by the courts may refer to the notion of balancing the interests of A and of X,[21] the results in the case-law can generally be reached more quickly, and explained more clearly, by focussing on the simpler question of whether there has been a physical invasion. In the vast majority of successful nuisance claims, A has been able to show that something, whether it is fumes, smells, cricket balls etc, has come onto his land, thus crossing the physical boundary. It is crucial to note that, where such a crossing has occurred, the notion of interference with use is a means to *limit*, not to extend, the duties owed by strangers to A. In almost all cases, the idea of interference with A's use does not mean that X can be liable in nuisance even without some form of crossing onto A's land; it rather means that, even where such crossing has occurred (as where sound waves produced by the laughter of X's children cross onto A's land), the *absence* of interference with A's reasonable use of the land means that X has breached no duty to A.

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[18] The distinction between an interference with the physical thing, and an interference with use, is also present in the tort of conversion: see e.g. *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport (The Van Gogh)* [2008] EWHC (Comm) 2794, [2008] 2 CLC 708.

[19] *Hendricks v Stalnaker* 380 S.E.2d 198 (W. Va. 1989). See too D Nolan, 'A Tort Against Land: Private Nuisance as a Property Tort' in Donal Nolan & Andrew Robertson (eds) *Rights and Private Law* (Hart, 2011) 463 defining the tort of private nuisance as an 'unlawful non-trespassory interference with the private use and enjoyment of land.'

[20] There are of course limits on the application of the *cujus est solum, ejus est usque ad coelum et ad inferos* maxim: see *supra* note 9.

[21] See e.g. *People ex rel. Hoogasian v Sears, Roebuck & Co*. 287 N.E.2d 677, 679 (Ill. 1972), where reference is made to 'competing legitimate commercial interests'. Note that the idea of balancing is not inconsistent with our analysis if used when determining if a physical interference is relatively trivial and so does not give rise to liability (see e.g. the analysis of Lord Wensleydale in *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 653-4) . This is simply an application of a 'live and let live' maxim: see Richard A. Epstein, 'Nuisance Law: Corrective Justice and Its Utilitarian Constraints' (1979) 8 J. Legal Stud. 49, 54. That same maxim means, for example, that A cannot complain about the jostling one might expect on a busy railway platform.

Third, whilst in some rare cases liability in nuisance has been imposed even in the absence of such physical interference,[22] it must be recognised that such cases are anomalous.[23] If the law of nuisance were to break away from the other property torts and confer direct protection on uses of land, it would have to operate quite differently. The current clear rules against general liability for interference with a view[24] or with the flow of undefined air, or light or TV signals[25] passing to A's land are easily explained on the basis that, whilst X may have interfered with the use or enjoyment of A's land, there has been no crossing of a physical boundary.[26] Moreover, if the law of nuisance were to prohibit interferences with the use of land unconnected to any boundary crossing, the clear rule that that a nuisance claimant must have a property right in the land[27] would have to be reconsidered. After all, a licensee, for example, also has a 'right to use' land that can be interfered with by X's actions; yet such a licensee has no claim in nuisance.

C. Defining the Major Premise: Summary and Consequences

We have argued that, where A has a right to a tangible asset, the content of the duty owed by X to A is quite specific, and is defined by reference to the tangible asset itself. The duty is breached if X intentionally or carelessly interferes with the physical asset, whether or not that interference in fact causes loss to A, or interferes with any planned use by A of the asset. Conversely, if X causes loss to A, or interferes with a planned use of A without interfering

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[22] See e.g. *Laws v Florinplace* [1981] 1 All ER 659 (Ch), *Thompson-Schwab v Costaki* [1956] 1 WLR 335 (CA): two decisions criticised persuasively by Richard Kidner, 'Nuisance and Rights of Property' [1998] Conv 267; *Street v Marshall* 316 Mo. 698 (1927); *People Exp. Airlines Inc. v Consol. Rail Corp.* 495 A.2d 107 (N.J. 1985) (a case perhaps better explained as resting on public nuisance).

[23] The very clear general rule is that some crossing into A's land is required before a nuisance can be made out: see e.g. *Hunter v Canary Wharf Ltd.* [1997] AC 655 (HL) and *Fontainebleau Hotel Corp. v Forty-Five Twenty-Five, Inc.* 114 So. 2d 357 (Fla. Dist. Ct. App. 1959); note that in *Hoogasian* (n 28) there was no invasion, and hence no liability, as X simply constructed a building on land not owned by A). See too *Bryant v Lefever* (1879) 4 CPD 172 (CA): although criticised in Ronald H. Coase, 'The Problem of Social Cost' (1960) 3 J. L. Econ. 1, the reasoning of the court depends on the simple point that X had not interfered with A's land itself. Adopting such a simple test has certain advantages even on Coasean logic: see Thomas W. Merrill & Henry E. Smith, 'Making Coasean Property More Coasean' (2011) 54 J. L. Econ. 577, 596.

[24] See e.g. *Hunter* (n 30) at 709, referring to *Aldred's Case* 9 Co Rep 57b; *Fontainebleau* (n 30).

[25] See e.g. *Hunter* (n 30) at 709, referring to *Bryant v Lefever* (1879) 4 CPD 172 and *Bury v Pope* (1587) 1 Cro Eliz 118.

[26] See *supra* note 29. Note too that in *D Pride* (n 25) no liability arose where X carelessly caused an outbreak of foot and mouth disease close to A's land. None of A's pigs were infected, but the imposition of a quarantine zone prevented A from sending its pigs to the abattoir and thereby caused A economic loss.

[27] See *Hunter* (n 30), Restatement (Second) Of Torts § 821(e) (1965).

with the physical thing itself, then X is not in breach of the general duty imposed on strangers as a result of A's property right.

This means, first, that B, a holder of a right to an intangible asset, faces a significant obstacle when attempting to rely on the property syllogism in order to impose a duty of non-interference on a stranger. Even if B's right, like A's right, can be called a 'property right', that does not mean that strangers must owe the same duty to B as they owe to A: the duty owed to A is defined by reference to A's tangible asset, and, clearly, no such asset can play the same role where B has instead a right to an intangible. Instead, rather than relying on the strict logic of the property syllogism, B can argue only that as her right is *analogous* to A's right, strangers should owe B a duty which is *analogous* to the duty owed to A not to interfere with A's physical thing.

The second consequence of our analysis relates to definitions of 'property' or of 'property rights' that focus on the right to use a resource as an overarching principle which unites rights to tangible assets and rights to intangible assets. Our analysis suggests that, at the level of legal relations, a focus on the right to use fails to distinguish between the position of A, who has a right to a tangible asset, and the position of others in relation to that same asset. It is true that, as against a stranger such as X, A has a privilege to use A's asset; yet, as against X, another stranger, such as Y, also has a privilege to use A's asset. After all, Y commits no wrong *against X* if Y makes use of A's asset.[28]In its content, then, the 'right to use' of Y against X is identical to A's 'right to use' against X; yet Y is not conventionally regarded as having a property right in the asset. This takes us back to the point made above in relation to *Bradford v Pickles*: not only A, but also a stranger such as Y with no rights in A's land, had a privilege as against the city of Bradford to take water from A's land that the city would otherwise have received. Moreover, as is the case with A's privilege against the city, Y's privilege against the city does not depend on, to use Honoré's phrase,[29] any particular title: Y, prima facie, has the same privilege as against C, D, E etc. Put shortly, the point about a privilege is that it depends on the absence of another party's claim-right, and so, by itself, tells us nothing about the claim-rights of its holder.

As far as use of an asset is concerned, then, the difference between the position of A (who has a right to that asset) and Y (who has no such right) lies in the fact that A has a liberty

[28] For an example, see *Hill v Tupper* (1863) 2 Hurl. & C. 121, 159 ER 51 (Exch.).
[29] Tony Honoré, 'Ownership' in Oxford Essays In Jurisprudence (ed A.G. Guest, 1961) 456.

against Y to use the car, whereas Y has no such liberty *against A*. In Hohfeldian terms, of course, the fact that Y does not have this liberty against A is the result of Y's owing a particular duty to A. In other words, in distinguishing A's position from that of Y, and thus determining the distinctiveness of a property right, we need to focus on the fact that Y (and, prima facie, everyone else) owes a specific duty of non-interference to A. As we have seen, the physical thing plays a crucial role in defining this duty, as its physical boundary delimits the extent of the activity from which Y must refrain. This means that, whilst of course it may be possible to adopt a definition of 'property' or 'property rights' which includes both rights to tangible assets and rights to intangible assets, it should not be the 'right to use' that provides the link between those rights.

3. The Minor Premise: Rights to Intangible Assets

The second step in the property syllogism consists of the claim that, where B has a right to a particular intangible asset, B's legal relationship with this asset is *the same as* A's legal relationship with A's tangible asset. In this Section, we consider three different types of rights to intangible assets; in each case, we examine a prominent example of an attempt to invoke the property syllogism.

A. Choses in Action

(i) An attempt to invoke the syllogism

Choses in action provide a particularly useful example of why courts should be wary of an argument of the form: 'My right is a property right and, *therefore* …' In *OBG Ltd. v. Allan*,[30] for example, B claimed to have suffered loss when X, who had been appointed as administrative receivers under a defective grant, purported to settle a contractual claim held by B against a customer for much less than its true value. Such loss is normally considered to be irrecoverable pure economic loss.[31] Eager to avoid such a characterisation of its claim, B's

[30] [2007] UKHL 21, [2008] 1 AC 1.
[31] See e.g. *Cattle v Stockton Waterworks Co*. (1874-75) LR 10 LR 453. The general position is the same in the United States: see e.g. *Robins Dry Dock & Repair Co. v Flint* 275 U.S. 303 (1927).

argument was premised on the notion that its contractual right was a type of 'property right', no different to a freehold title to land or ownership of a chattel. We can see this being developed by counsel in the following passage: [32]

> Choses in action should be treated on the same side of the line as tangible assets when, in a case with features of the present case, the claimant has legal title to the contractual rights in question and they have been dealt with by a third party in a manner sufficient to satisfy the test for conversion.

On the facts of the *OBG* case, this argument had particular purchase, as X had also dealt with land and goods of B, and was strictly liable to B for having done so. The argument was accepted by a minority in the House of Lords. Baroness Hale regarded it as 'logical' that a strict liability tort claim, such as conversion, should be available to protect 'the usurpation of all forms of property' and stated that a chose in action should be regarded as property as 'it has an existence independent of a particular person' and can '… be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts ….'.[33] Lord Nicholls agreed that it would make 'no sense' if the defendants were to 'be liable strictly in respect of their unauthorized dealings with some parts of the company's property but not others'.[34] The majority of the court, however, rejected B's claim and confirmed that the tort of conversion is not committed by simply interfering with the value of, or even taking over, a chose in action.

The view of the majority can be supported by closely scrutinizing the claim that, as B's contractual right could be regarded as property, it *therefore* had to be protected in the same way as a freehold of land or ownership of chattels. The point is that, as seen in Section 2, a right to a tangible asset imposes a prima facie duty on the rest of the world not to physically interfere, deliberately or carelessly, with that physical thing. The content of the duty for which B argued in the *OBG* case was quite different. It was instead a duty to prohibit unauthorized negotiation and settlement with B's contractual partner. Whilst this duty may be similar in some respects to that owed to a freeholder or an owner of a chattel, it is observably *not* the same type of duty, as it captures a different type of conduct. This difference is not merely formal, but instead has an impact on the arguments that may be used to justify the existence of

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[32] *OBG* (n 39) 10.
[33] ibid [309].
[34] ibid [221].

such a duty: a strict duty not to interfere with A's physical thing may be easier to justify than a strict duty not to engage in unauthorized negotiation and settlement of a debt owed to B. Most obviously, the presence of a physical thing provides a clear signal to a stranger that unauthorized interference with that thing may give rise to liability to its owner;[35] and the limited space occupied by the physical thing limits the circumstances in which such interference can occur. This does not, in itself, mean that there can be no good reason to recognize a strict duty to refrain from unauthorized negotiation:[36] the key point for present purposes, however, is that such recognition is *not* compelled by the fact that a contractual right might be labeled "property".[37] On our analysis, then, the majority of the House of Lords in the *OBG* case was right to reject B's attempt to use the property syllogism to impose a duty of non-interference on X in relation to B's intangible asset.

(ii) Analogies between B's right and a right to a tangible asset

It is important to stress that our argument is not that the law should never protect holders of contractual rights from third party interferences.[38] Rather, the point made here is about methodology: the existence of a strict duty not physically to interfere with A's land or goods does not *logically* demand the existence of a strict duty not to interfere with B's contractual right.

There are, however, some useful analogies that may be drawn between a right to a tangible asset and a chose in action. For example, on Baroness Hale's analysis in the *OBG* case,

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[35] See e.g. Lord Hoffmann in *OBG v Allan* [2008] 1 AC 1 [9], referring to Cleasby J's robust statement in *Fowler v Hollins* (1872) LR 7 QB 616, 639 that: "persons deal with the property in chattels or exercise acts of ownership over them at their peril" and contrasting it with the law's wariness of "imposing any kind of liability for purely economic loss". See too H Smith, 'Property as the Law of Things' (2012) 125 Harv L Rev 1691, framing the analysis in terms of information costs: the existence of a physical thing lowers information costs to a third party discovering, and attempting to comply with, the duty owed to A.

[36] Some relatively rare American decisions have extended the scope of the tort of conversion to interference with purely intangible rights (see e.g. *Kremen v Cohen* 99 F. Supp. 2d 1168 (N.D. Cal. 2000)). The reasoning in such cases is however undermined by their reliance on authorities that conversion of a document of title to a debt can lead to the defendant being liable to pay the value of that debt to A. Such cases do not in fact support the claim that a chose in action can be converted, as the value of the debt is instead used to calculate the consequential loss suffered by A as a result of X's physical interference with a physical thing (A's document of title): see e.g. Simon Douglas, 'The Scope of Conversion: Property and Contract' (2011) 74 MLR 329.

[37] It is also instructive to note the difficulties have arisen in applying the distinction between *per se* and regulatory takings to cases involving an alleged taking of a chose in action (see e.g. *Alley's of Kingsport, Inc. v U.S.* 103 Fed Cl 449 (2012) and John D. Echeverria, *Public Takings of Private Contracts* (2011) 38 Ecology L. Q. 639): such distinctions are necessarily difficult to apply in the absence of a physical thing to which the plaintiff's right relates.

[38] Note e.g. *Lumley v Gye* (1853) 2 El. & Bl. 216, 118 ER 749 (QB).

it was the fact that B’s chose in action can be bought and sold, and has an existence independent of B which justified its description as ‘property’. Indeed, the idea of a right being only contingently connected to its holder plays an important role in some academic approaches to the definition of property,[39] as it allows such rights to be distinguished, for example, from the claim-right corresponding to X’s duty not to physically interfere with A’s person. Moreover, courts have in some cases equated the assignment of a contractual right with a transfer of a right to a tangible asset.[40] In the case of *Dearle v. Hall*[41], for example, which concerned the question of priority in assignments of contractual rights, Plumer MR repeatedly drew on rules relating to the priority of property rights in physical things, equating the position of the assignee who first gives notice to the debtor with that of the party who first takes possession of a physical thing.[42] This is quite clearly analogical reasoning. A contractual right cannot, of course, pass from one person’s possession to another, as there is nothing capable of being physically possessed. Yet the language serves a clear purpose: just as possession is a simple way to determine priority in disputes involving physical things, notice serves the same purpose in the context of contractual rights.

Even when considering this aspect of contingent connection, however, some care must be taken in drawing the analogy between a chose in action and a right to a tangible asset. The former right, as it depends on a duty owed by a specific debtor to B, is not characterized by the ‘two-way depersonalization’[43] of the latter right. It matters little to X whether a duty of non-interference with a physical thing is owed to A or to a purchaser from A. In contrast, the performance of a contractual duty imposed by a contract between B and X (such as to make a payment of £100 to B) requires X, the duty-holder, to know of the holder of the corresponding claim-right. This explains why, in *Dearle v Hall*, notice to X is crucial: X must know to whom the benefit of performance under the contract is due. Moreover, in the case of a contractual duty, the basis on which X’s initial duty arose consists in part on X’s consent, and so it is far from obvious that B should be permitted to change the nature of that duty without X’s consent.[44] Indeed, even if there is some resemblance between B’s right and A’s right as

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[39] See e.g. James Penner, *The Idea of Property in Law* (OUP 2000) ch 5.
[40] See e.g. *Sprint Commc'ns Co. v APCC Services Inc*. 554 U.S. 269, 307 (2008).
[41] (1828) 3 Russ. 1, 38 ER 475 (Ch.)
[42] ibid 484.
[43] Henry Smith, ‘Emergent Property’ in J Penner & H Smith (eds) *Philosophical Foundations of Property Law* (OUP, 2103) 338.
[44] See Chee Ho Tham, ‘The Nature of Equitable Assignment and Anti-Assignment Clauses’ in Jason W. Neyers et al (eds), *Exploring Contract Law* (Hart Publishing 2009). For the view that an equitable assignment does not involve a transfer of a chose in action, but instead involves the assignor retaining that right, and coming under a

concerns assignability, there is no necessary reason why that similarity should mean that the rights must impose the same type of duty on strangers: the considerations determining if a power to assign exists may well differ from those determining if a strict duty of non-interference is imposed on third parties.

B. Intellectual Property Rights

(i) An attempt to invoke the syllogism

The context in which the 'My right is a property right and, *therefore* …' argument has had its greatest (albeit only temporary[45]) success is the law of intellectual property. Many of the issues discussed in this article were played out in *Millar v Taylor*.[46] The case, which arguably gave the law of copyright its 'proprietary' lexicon,[47] concerned James Thomson's poem 'The Seasons'. Thompson had sold his 'rights' to the poem to B, a London publisher. Under the Statute of Anne 1710[48] authors and their assigns (such as B) were granted a fourteen year term in which they had the exclusive right to control the copying of the work. Long after the fourteen year term had expired in relation to *The Seasons*, X, a rival publisher, opened a bookshop in London and started to sell copies of the poem at a lower price. This detrimental effect of this activity on B's business prompted B to seek an injunction against the defendant. B's principal argument was that he held a 'property right' in the artistic expression of *The Seasons*. As the reporter notes, the 'general' argument of counsel was:

> … that there is a real property remaining in authors, after publication of their works; and that they only, or those who claim under them, have a right to multiply the copies of such their literary property, at their pleasure, for sale …[49]

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duty to the assignee in relation to that right, see e.g. Ben McFarlane, *The Structure Of Property Law* (Hart Publishing 2008) at 212-214; Ben McFarlane & Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J. Equity 1, 6-8; James Edelman & Steven Elliott, 'Two Conceptions of Equitable Assignment' (2015) 131 LQR 228.

[45] See *infra* n 68.

[46] (1769) 4 Burr. 2303, 98 E.R. 201.

[47] Catherine Seville, 'Millar v Taylor' in Simon Douglas, Robin Hickey & Emma Waring (eds), *Landmark Cases in Property Law* (Hart Publishing 2015).

[48] c.19, 1710.

[49] *Millar* (n 60) 2304, 202.

As in *OBG Ltd v Allan*, the facts in *Millar v Taylor*, at least in one sense, involve a claim for pure economic loss. Indeed, *Millar* seems to provide a quintessential example of non-recoverable loss: that suffered by a shop owner finding that his profits fall when the defendant, a rival shop owner, starts to undercut his prices.[50] B relied on the property syllogism to avoid such a characterisation of his claim;[51] and, in contrast to the decision in *OBG*, B's tactic succeeded.[52] The majority of the court accepted Millar's characterisation of his right as a 'property right' and held that the defendant had infringed it by making and selling copies of *The Seasons*. Aston J, for instance, expressly described Millar's claim as based on an 'invasion' and as essentially identical to that arising from the theft of a physical thing.[53]

To a modern reader there is nothing remarkable about the assertion of 'property' in an artistic expression, as we are now of course familiar with the language of 'intellectual property'. However, *Millar v Taylor* was decided before 'intellectual property' really existed as an established concept, and there is nothing routine or usual in making a comparison between, on the one hand, a legal relationship with land or chattels and, on the other hand, a legal relationship with the purely abstract concept of an artistic expression. Indeed, Yates J, dissenting in the case, said that the assertion that B held 'property rights' '… to the very ideas themselves, seems to me very difficult, or rather quite wild.'[54]

Indeed, the right recognised in *Millar* was short-lived: in *Donaldson v Beckett*,[55] the House of Lords overruled the case and thus denied the existence of a perpetual copyright at common law. On our view, this is no surprise, as there is a crucial difference between the duty recognised by the court in *Millar* and the duty breached by a thief of a physical thing. As we saw in Section 2A, where A has ownership of a chattel, the duty owed by X to A is a duty not to interfere physically with that chattel. An important practical consequence is that the existence of the physical thing itself can set the limits of the duties owed by X[56] and restrict the number of such

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[50] See *Mogul Steamship Co. Ltd. v McGregor, Gow & Co.* (1889) 23 QBD 598 (per Bowen LJ).
[51] Note too that B's reliance on property is likely also to have been motivated by the remedy sought: an injunction. This is a further example of the use of the property syllogism: it was used, historically, to find a basis for equitable intervention: for discussion see e.g. Leon Green, 'Relational Interests' (1936) 31 Ill L Rev 35, 39-40.
[52] Smith, 'Intellectual Property as Property' (n 11) 1754 notes that 'Much of intellectual property has its origins in unfair competition'.
[53] *Millar* (n 60) 2342-43.
[54] ibid 2357, 230.
[55] (1774) 2 Bro. P.C. 129, 1 ER 837.
[56] Andreas Rahmatian, 'Intellectual Property and the Concept of Dematerialised Property' (n 3) instead argues that intellectual property rights demonstrate that *all* property rights are dematerialised. It is true, of course, that all rights (whether or not property rights) are legal constructs, but this does not alter the fact that, where A has a

third parties who, in practice, may breach such a duty. There is no such basis for delineating the duties recognised in *Millar*. Whilst copyright would of course re-emerge, it was under a statutory regime, where the specific duties of non-interference are defined, and confined to a specific period.[57] A holder of a property right in a physical thing is owed a strict prima facie duty by all others that they refrain from physical interferences with the thing. Where B instead has a copyright, there is no physical thing around which the duties of strangers can cohere. In *Millar*, for example, the court sought to recognise a different, more limited duty: a duty to refrain from imitation. There may be good reasons for the existence of this duty, but those reasons are unlikely in themselves to justify the same clear, basic rules as apply in the case of ownership of a physical thing.

The shifting boundary of intellectual property protection is the product of a long running debate where the incentive functions of intellectual property rights are pitted against competing interests such as free speech and technological development. This sophisticated dialogue over the nature and scope of intellectual property rights is far removed from the 'everyday ontology'[58] of the physical thing[59] which informs the operation of property rights in tangible assets.[60] At the risk of over-simplification, in relation to land and chattels, it is the physical thing which sets the content of the duty owed by the rest of the world; in relation to intellectual property, it is the content of the duties imposed by law which create the "thing" protected. When this happens, the scope and content of the duty becomes far more negotiable: in relation to copyright, for example, courts must navigate the line between the defensible use of another's idea and illegitimate imitation. Defences available to alleged infringements of intellectual property rights further illustrate the point. The availability of the defence of fair use has no obvious analogue in relation to property rights in physical things. One cannot seek to justify a trespass to land, for example, by invoking public interest related notions of 'scholarship',

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property right in a physical thing, the content of the prima facie duty owed by the rest of the world to A is defined by reference to the thing itself.

[57] As is also the case under the Berne Convention.

[58] See Henry Smith, 'The Elements of Possession' in Y Chang (ed) *The Law and Economics of Possession* (CUP, 2015) 71.

[59] It is important to note that, for example, the mere existence of particular created information (e.g. an image or a database) in the form of a 'work' does not mean that someone must hold copyright in that work. The fact that a form of thing (i.e. the work) can be found does not mean that the test for copyright has been passed: that work must also be 'independently created by the author' and it must have 'at least some minimal degree of creativity': see e.g. *Feist Publications, Inc. v Rural Telephone Service Co. Inc.* 499 U.S. 340, 345 (1991).

[60] For example, whereas incentive effects are clearly taken into account both in justifying the existence of intellectual property rights, and in the acquisition rules governing such rights (see e.g. Peter Mennell, 'Intellectual Property and the Property Rights Movement' (2007) Regulation 36, 38), the acquisition rules for property rights in physical things, as discussed in Section 3A, focus on the fact of possession even if, as in e.g. *Pierson v Post* 3 Cai. R. 175 (N.Y. 1805), this may not align with dessert in a broader sense.

'research' or 'news reporting';[61] yet this is routine in the context of intellectual property.[62]Further, the effect of X's conduct on the economic value of B's copyright may be critical when considering the fair use defence.[63] Again, this is far removed from the position in relation to property rights in physical things where, as discussed in Section 2A, the financial effects of X's interference are irrelevant in determining if a breach of duty has occurred.

Put shortly, then, where there is no physical thing to coalesce around, the boundaries of the duty owed by strangers become far less certain. So far as intellectual property rights are, as Smith argues, [64] a 'module', they are at best an imprecise and vague one, hampered as they are by the absence of a physical thing to delineate the duties owed to the holder of the right. In determining the duties that strangers should owe to a holder of a copyright, no weight should be given to an argument that, because a copyright is a property right, those duties *must* match the duties owed to A, the holder of a right to a tangible asset: the reasoning of the majority in *Millar v Taylor*, like that of the minority in *OBG v Allan*, was flawed.[65]

(ii) Analogies between B's right and a right to a tangible asset

There are important structural similarities between at least some intellectual property rights and property rights to a physical thing. This can be seen by considering copyrights and patents.[66] Like choses in action, such rights can be bought or sold, and are only contingently connected to B,[67] their holder at the time. Moreover, unlike choses in action, copyrights and patents do each impose prima facie duties on the rest of the world. There is, therefore, a relatively strong analogy between such rights and a right to a tangible asset. Indeed, given this impact of copyrights and patents on strangers, it can be argued that the *numerus clausus* principle, which limits the ways in which A can confer on others new property rights in A's

[61] As noted by Smith, *supra* note 11, at 2077-2078, academic suggestions that such defences should also apply to trespass claims are arguments for a significant change in the law.
[62] 17 U.S.C. § 106 (2000).
[63] See e.g. *Harper & Row v Nation Enterprises* 471 U.S. 539, 568 (1985).
[64] See Smith, *supra* note 11.
[65] We would similarly reject Epstein's claim that one can: '[j]ust use limited terms of exclusive rights, longer for copyrights than patents, to work the transformation from tangible property to those two vital forms of intellectual property'; Richard Epstein, 'The Disintegration of Intellectual Property? A Classical Response to a Premature Obituary' (2010) 62 Stanford Law Review 455, 459.
[66] Smith, *supra* note 11, suggests, for example, that the 'exclusion' strategies that characterise property law are more evident in relation to the rules governing patents than those governing copyrights.
[67] The element of contingent connection is absent, however, when considering some rights which might be described as intellectual property rights, such as moral rights of an author or the right arising where the defendant is under a duty of confidence.

tangible asset, should also be applied to attempts by a holder of a copyright or patent to fragment its benefits, by distributing some claim-rights whilst retaining others.[68] It is therefore no surprise that judges or academics, when proffering general definitions of property or of property rights, generally seek to include intellectual property within the scope of the definition. Our point is not that such general definitions should not be adopted; it is rather that such definitions should not be allowed to obscure the variety, and differing operation, of the different rights contained within. The key point for present purposes is that, whilst intellectual property rights do impose duties on strangers the nature and content of those duties differ significantly from the simple duty, owed to a party with a right to a tangible asset, not to physically interfere with that asset. This means both that it should not be assumed that the legal relations imposed by intellectual property rights must match those existing where A has ownership of a physical thing, and, equally, that there is no logical reason for particular features of the protection of intellectual property, such as a 'fair use' defence,[69] to be transposed into cases of ownership of a physical thing.

C. Rights under Trusts

(i) An attempt to invoke the syllogism?

The facts of *Shell UK Ltd v Total UK Ltd*,[70] like those of *OBG Ltd v Allan* and *Millar v Taylor*, raised the question of the boundary between an interference with a property right, on the one hand, and pure economic loss, on the other. The carelessness of the defendant, X, caused significant damage to fuel storage and pipeline facilities used by B. As a result of its inability to make use of those facilities, B was unable to supply fuel to its customers and so suffered serious economic loss. B did not however have legal title to the land or facilities:[71] that title was instead held by T (in fact, two service companies) on trust for four companies, of which B was one. Such was the legal form chosen by the companies when co-operating to establish the facilities. It was held at first instance that, as B had no legal ownership or possessory title to the property, the loss it had suffered as a result of the damage to that property was purely

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[68] See Christina Mulligan, 'A Numerus Clausus Principle for Intellectual Property' (2013) 80 Tenn. L. Rev. 235.

[69] See Ben Depoorter, 'Fair Trespass' (2011) 111 Colum L Rev 1090, 1114, proposing a 'novel four-factor test of 'fair trespass' which draws upon the concept of fair use developed in copyright law.'

[70] *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86.

[71] B did own fuel, stored in the tanks and pipelines at the time of X's carelessness, which was lost or damaged and X did compensate B for that loss, as noted at [2011] QB 86, [115].

economic loss, and so the general “exclusionary rule” applied, meaning that X was not liable to B for B’s consequential economic loss.[72] X had of course breached its duty, owed to T, not to physically interfere with the facilities, and T could recover damages in relation to that breach. As such damages would flow from T’s right to the assets, and the assets were held on trust by T for B, T would then of course hold those damages on trust for B. Moreover, if T for some reason refused to claim such damages from X, B could compel T to do so, and could combine B’s claim against T with T’s claim against X in one set of proceedings.[73] T could not however recover from X damages in relation to a consequential loss suffered by B, where that loss resulted from the particular use made by B of the property.

B succeeded, however, in persuading the Court of Appeal that X owed a duty directly to B not to carelessly interfere with the facilities, and so was liable to pay damages to B for reasonably foreseeable consequential loss suffered by B as a result of the physical interference with the facilities. It might therefore be thought that B successfully invoked the property syllogism to convince the court that it should extend to B the same protection enjoyed by A, a holder of a right to a tangible asset, against interference from strangers. That is not, however, quite accurate. First, B’s argument was not as simple: it was accepted, for example, that, unlike a party with a right to a tangible asset, B could sue X only if T was also joined to the proceedings. Second, more importantly, the Court of Appeal accepted that B’s loss was correctly characterised as pure economic loss:[74] it did not, therefore, directly equate the position of B with that of a legal owner of goods who suffers consequential loss when those goods are carelessly damaged.

Rather than finding that B’s consequential loss was not pure economic loss, the Court of Appeal instead held that the facts fell into one of the special situations in which a duty not to carelessly cause pure economic loss is owed by the defendant to the claimant. At that point, unfortunately, the reasoning of the court is seriously flawed. It was stated that such an exceptional situation exists where there is a ‘special relationship’ between claimant and defendant.[75] It was then held that: ‘Beneficial ownership of the damaged property goes well beyond contractual or non-contractual dependence on the damaged property and does indeed

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[72] *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd’s Rep 1.
[73] Using the procedure named for *Vandepitte v Preferred Accident Co of New York* [1933] AC 70 (PC).
[74] [2011] QB 86, [128]-[136], where the court considers if B can show an exception to the ‘exclusionary rule’ preventing recovery of carelessly caused pure economic loss.
[75] *Shell UK* (n 90) [134]

constitute a special relationship of the kind required...'.[76] The flaw is that the existence of the trust proves that a special relationship exists between B and T; whereas for recovery of pure economic loss, a special relationship is required between B and X, i.e. between claimant and defendant.

It may be that this error in the court's reasoning was influenced by a view of the merits which was in turn affected by a form of the property syllogism. For the court refers at one point to B as the ' 'real' owner' of the facilities, and states that it would therefore be 'legalistic' to deny B a right to recover for the economic loss caused by X's interference with the facilities.[77] Such rhetoric is of course consistent with the property syllogism: if B, whilst a beneficiary of a trust, should in fact be regarded as the owner of the asset, then of course B should be given the same protection against interference accorded to A, a party with ownership of goods (even if, presumably for purely procedural reasons, T should also be joined to any proceedings brought by B against a stranger interfering with the trust property).

On our view, however, a careful examination of the legal relations arising where T holds a right on trust for B shows that it is an error to regard B as entitled to the same protection against strangers as A, a party with a freehold of land or ownership of a chattel. First, consider the case where T transfers the trust property to C, and C receives the property as a gift. If C has no knowledge of the trust, and disposes of the property (and any traceable proceeds) before acquiring such knowledge, there is no claim that B may bring against C.[78] B's ability to bring an equitable claim against C seems to depend on C's holding a particular right (the trust property or its traceable proceeds) *at the same time* as C's conscience is affected by knowledge of B's right.[79] The importance of considering C's conscience has recently been emphasised by both Lord Sumption[80] and Lord Mance:[81] unlike A's ownership of a chattel, B's equitable interest does not impose a general duty of non-interference on X, as the existence of such a duty would leave no room for considerations of whether X's conscience was affected by knowledge of B's right.

[76] ibid [135].
[77] ibid [132].
[78] See e.g. the analysis of Lloyd LJ in *Independent Trustee Services v GP Noble Trustees Ltd* [2013] Ch 91, [76] (CA).
[79] See e.g. *BCCI v Akindele* [2001] Ch 437 (CA) 455.
[80] *Akers v Samba Financial Group* [2017] AC 424, [2017] UKSC 6, [89].
[81] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [228].

Second, it is important to consider the impact of the existence of a trust on the legal relations between a trustee and third parties, such as X. Consider a case where A, an owner of a chattel, declares that she holds her rights to the chattel on trust for B. In such a case, X remains under a duty to A not to physically interfere with the chattel. The reasoning of the Court of Appeal in the *Shell* case suggests that, as a result of the declaration of trust, X now also owes the same duty to B. It seems difficult to justify why the declaration, which of course may be purely oral, should thus impose additional burdens on X, who may be wholly unaware of B's rights.[82] The Court of Appeal distinguished the position of B, as a beneficiary of a trust, from a party with a purely contractual link to the damaged property. From X's perspective, however, that distinction is unpersuasive. A key argument against allowing recovery by a party with a purely contractual link is that there is no limit to the number of such links that can exist in relation to particular property, and no means for X to discover the existence of such links. Exactly the same argument applies in relation to the existence of trust beneficiaries. It is therefore no surprise that, prior to the decision in the *Shell* case, it was clear, as a matter of authority, that X owed no general duty to B, a beneficiary of a trust, not to interfere with the trust property.[83]

(ii) Analogies between B's right and a right to a tangible asset

At first glance, our analysis in Section 3A(i) might seem to be inconsistent with Lord Sumption's recent emphatic statement in *Akers v Samba Financial Group* that B, a beneficiary of a trust, has a 'true proprietary right'.[84] After all, if B's right can be so classified it might be thought that, if the trust relates to a tangible asset at least, strangers would owe a duty to B not to physically interfere with that asset. Instead, Lord Sumption's full analysis provides a very

[82] See e.g. Paul Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Lionel Smith (ed.) *The Worlds of the Trust* (CUP 2013). Note that whilst a declaration of trust imposes a liability on third parties not to dishonestly assist in a breach of the trust, such liability is incurred, of course, only if the third party acts with knowledge of the existence of the trust.

[83] See e.g. *The Lord Compton's Case* (1587) 3 Leo 197; *Leigh & Sillivan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] AC 785 (HL). See too Restatement (Third) Of Trusts §§ 107-08 (2003); *Slaughter v Swicegood* 162 N.C. App. 457, 464 (2004): 'The common law rule provides that any injury to the property placed in trust may only be redressed by the trustee.' The court there approved the statement, now set out in George G. Bogert et al, *The Law Of Trusts And Trustees* §869 (2015), that: 'Although the beneficiary is adversely affected by such acts of a third person, no cause of action inures to him on that account.'

[84] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] 2 WLR 713 at [82].

useful demonstration of one of our key arguments: that great care must be taken in invoking the property syllogism. Lord Sumption stated that:[85]

> An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice…

Lord Sumption thus takes a somewhat unusual approach to identifying a right *in rem*. The term '*in rem*' usually refers to a right that imposes a prima facie duty on the rest of the world. If, for example, A has ownership of a chattel, then A's right to the chattel can be described as *in rem* as it imposes a prima facie duty of non-interference on the rest of the world. In such a case, it does not matter if the chattel, in Lord Sumption's words, 'comes into the hands of' the third party: any deliberate or careless physical interference, whether or not it involves taking possession, can give rise to liability. Similarly, an intellectual property right can be described as *in rem* as a prima facie duty, preventing particular conduct, is imposed on the rest of the world, even though it is difficult to think of any asset that may 'come into the hands of' the defendant.

Lord Sumption's focus seems instead to be on a particular class of third parties: successors in title. It is certainly the case, for example, that if T holds a right on trust for B, and then transfers that right to C, it may be possible for B to assert a right against C. In that case the relevant 'property' that has 'come into the hands of' C is T's right: the right initially held on trust for B. In that ability to bind third parties, of course, B's right is analogous to that of A, a party with a freehold of land or ownership of a chattel. The crucial point in relation to our analysis in Section 3C(i), however, is that such a third party effect (focussing on successors in title) can be recognised *without* allowing B's right to be prima facie binding on *any* third party whose action may interfere with B's intangible asset.[86] Indeed, prior to the decision of the Court of Appeal in the *Shell* case, at least, that is precisely how beneficial interests under trusts have functioned. In this way, the (limited) third party effect of an equitable property right can be recognised without undermining the point that it is T, rather

[85] Ibid.

[86] See too James E. Penner, 'Duty and Liability in Respect of Funds' in John Lowry & Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis 2006), distinguishing between successor and trespassory liability; Ben McFarlane & Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

than B, who has a proprietary entitlement to the subject matter of the trust.[87] The point, again, is that types of rights, all of which are capable of being called 'property rights', may be revealed to operate in a variety of different ways when the legal relations between the holder of the right and strangers are considered.

It is clear, for example, that Lord Sumption did not mean to subscribe to the view that, the bona fide purchaser defence aside, a beneficial interest operates exactly like a legal estate or interest.[88] Whilst his Lordship's statement as to the *in rem* nature of such an interest was obiter, the Supreme Court in *Akers* was unanimous on the critical point that it is possible for Cayman (and hence English) law to recognise a trust of an asset (in this case shares in a Saudi company) even if the *lex situs* has no concept of a beneficial interest. A quite different rule applies if A instead seeks to claim ownership of an asset and the *lex situs* does not recognise that A can hold such a right. The explanation consistently provided by the authorities is that the recognition of a trust does not, in itself, undermine the position under the *lex situs*, as it does not deny that T has a proprietary entitlement, but simply recognizes that, as a matter of conscience, T is under a duty to B in relation to T's assertion of that entitlement.[89]

Commented [A1]: Delete?

It is a good quote, and I would prefer to keep it, but it does not seem essential as the point about conscious is made has already been made in the preceedings paragraph.

4. Quasi-Property

In *OBG Ltd v Allan*, when discussing the tort of procuring a breach of contract, Lord Hoffmann stated that it:[90]

> treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so.

This observation was made when contrasting that tort with the distinct cause of action arising under the 'unlawful means principle', which requires the defendant to have used unlawful means with the intention of causing loss to B, but which is 'indifferent as to the nature of the

[87] See e.g. P Matthews, *supra* n 87.
[88] This is supported by Lord Sumption's emphasis on the importance of considering C's conscience where B attempts to assert a pre-existing equitable interest against C: *Akers* (n XX) [89].
[89] See the analysis of Lord Mance in *Akers* at [
[90] [2008] 1 AC 1, 32.

interest which is damaged'[91] and so can apply even where the loss suffered by B does not result from a breach of contract. Given Lord Hoffmann's clear view, noted in Section 3A(i), as to the absence of a strict liability claim for conversion of a contractual right, it is possible to identify three different levels of protection provided by the different torts analysed by Lord Hoffmann. Where A has ownership of a physical thing, the rest of the world is under a strict, prima facie duty not to interfere deliberately or carelessly with that physical thing. Where B instead has only a contractual right, the core duty to perform the contract binds only B's contracting partner, but B's right does receive some protection against third parties, via the tort of procuring a breach of contract. Where B suffers economic loss, but not specifically as a result of any physical interference with B's land or goods, or as a result of a breach of a contractual duty owed to B, a claim may be available through the 'unlawful means principle'[92] but only in the limited circumstances where unlawful means have been used with the intention of causing such loss to B.[93]

In this structure,[94] Lord Hoffmann's reference to the treatment of contractual rights as a 'species of property' can be seen as a means to distinguish loss caused to B by a breach of contract from other, more general forms of economic loss, in order to justify imposing an additional duty on third parties not to intentionally procure, without justification, a breach of contract. At the same time, of course, Lord Hoffmann also distinguished the protection available where B has only a contractual right from the case where A has ownership of a chattel.[95] There is an interesting parallel here to Balganesh's discussion of the concept of 'quasi-property',[96] a term perhaps most famously recognised in Justice Pitney's judgment in the 'hot news' case of *International News Service v Associated Press*.[97] As Balganesh emphasizes, the protection provided in that case to B, an organization that posted news on

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[91] Ibid.

[92] Note of course that this is not the only tort that is potentially available in such a case: lawful means conspiracy, noted by Lord Hoffmann at [14] in *OBG* (ibid) provides one further example.

[93] There are also further limits on that tort: in Lord Hoffmann's view, speaking for the majority on this point at [49] in *OBG*, 'subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss.'

[94] It is of course critical to this structure that, as Jacob LJ did in *Smithkline Beecham plc v Apotex Europe Ltd* [2007] Ch 71 (CA) 96, the courts consistently reject the idea that 'a mere freedom to trade can fairly be regarded as property or anything in the nature of property': see too the analysis in *RCA Corp v Pollard* [1983] Ch 135 (CA) 147-148 of Lord Diplock's judgment in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173.

[95] *OBG* at [9]: see n XX.

[96] Shyamkrishna Balganesh, 'Quasi-Property: Like, But Not Quite Property' (2012) 160 U Penn L Rev 1889. Note that Benson has attempted to explain the tort of procuring a breach of contract as protecting a 'quasi-proprietary right: Peter Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in DG Owen (ed) *Philosophical Foundations of Tort Law* (Oxford, 1995).

[97] (1918) 248 US 215, 236.

bulletin boards for use by its members, was different to, and much more limited than, the protection available to A, an owner of a chattel. In particular, the duty not to make use of that information was not a general one, and was owed by the defendant only because of its special position as a competitor to B, engaged in the same business.[98]

Our analysis has a number of consequences for attempts to develop a coherent notion of quasi-property.[99] First, whilst Lord Hoffmann in *OBG* referred to B's contractual rights as a 'species of property', and Justice Pitney in *INS* applied the label 'quasi-property' to B's interest in news it had gathered, it is clear from the legal relations recognized as a result that B's right is not given the same protection as the right of A, an owner of a physical thing: the qualifier 'quasi' plays an important role.[100] Second, the invocation of property, albeit qualified, is justified by Balganesh on the basis that, once the required triggering events have occurred, such cases set up an 'exclusionary framework':[101] in *INS*, for example, the defendant, as direct competitor to B, came under a duty not to make use, in its own business of providing information to members, of information gathered by B. Our analysis of the 'right to exclude' held by A, an owner of a physical thing,[102] makes clear, however, that an analogy based on the idea of exclusion works only at a functional level, and is harder to maintain on the level of legal relations.[103] The distinction is not simply as to *when* the defendant's duty arises, and as to *which* defendants it binds, but also as to the *content* of that duty. A's right to exclude correlates specifically to a duty of others not to interfere, deliberately or carelessly, with A's physical thing, whereas the duty not to procure a breach of contract, or not to make use of particular information in one's business, is much more specific and its contours are not defined simply by reference to a particular resource.[104] It is

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[98] Ibid, 236. In Balganesh's phrase, the duty to B was 'activated by certain triggering facts'. See too Shyamkrishna Balganesh, ' "Hot News": The Enduring Myth of Property in News' (2011) 111 Col L Rev 419 and the response by Richard Epstein (2011) 111 Col L Rev Sidebar 79, 84 noting too that the protection given to B in relation to any particular information was given only for a limited time.
[99] Balganesh (n XX) also notes the use of the term in relation to the right of a personal representative to control a corpse (see e.g. *Pierce v Proprietors of Swan Point Cemetery* (1872) 10 RI 227, 237-8). In English law, the term has also been used in relation to e.g. confidential information (see e.g. *A-G v Guardian Newspapers Ltd (No 1)* [1987] 1 WLR 1248).
[100] Our analysis thus provides support for Balganesh's view on this point: see e.g. Balganesh (n XX) 1892-1894.
[101] Balganesh (n XX) 1900.
[102] See Section 2.
[103] It is significant, for example, that Justice Pitney's analysis in *INS* (n XX, 236), like that of Aston J in *Millar v Taylor* (n XX) makes use of the idea of 'misappropriation': yet the taking of a physical thing is only one of the means by which a duty not to physically interfere may be breached, and there is of course only a metaphorical 'taking' in relation to intangible resources.
[104] Indeed, Balganesh (n XX) 1917 notes, in relation to the protection of trade secrets, that 'the notion that the regime seeks to regulate a certain type of action – is functionally as much a part of what constitutes a trade secret as the underlying information itself. The action, simply put, influences the functional conception of the res.' This mimics the point noted in Section 3B(i), and distances the case from one where the duty imposed is a

telling, for example, that *OBG* finally laid to rest the idea that it is a tort to *interfere*, deliberately and directly, with a contract[105] (rather than, more specifically, to procure a breach):[106] that heresy had no doubt gained credibility from a misplaced analogy to torts dealing with interference to physical things.

An important part of Balganesh's analysis of quasi-property lies in its identification of links between seemingly disparate areas of law.[107] The idea that triggering events can impose duties on certain groups of defendants, particularly where there is a pre-existing relationship between B and another, is also apparent, for example, when considering the ability of B, a beneficiary under a trust, to bind specific parties (those who receive trust property or its traceable proceeds) if certain events occur (such a party has knowledge of the breach of trust whilst still holding the trust property or its traceable proceeds). The possibility of such liability may be said, in a general sense, to have the effect of signalling to particular parties to 'stay away' from particular resources. Our argument, however, is that it is important to look not only to the *effect* of the liability, but also to its form, and the precise legal relations it involves. Indeed, in a case where B wishes to argue for such a liability to be recognized, there is a danger that placing undue weight on the property analogy may undermine the arguments for such liability,[108] by making a judge think that recognising B's claim will necessarily elevate B's interest to the same status as that of A's ownership of a physical thing.[109] A better approach may simply be to argue directly for an analogy to an existing form of liability, without invoking a term such as 'quasi-property'.[110] The term 'quasi-contract' captured, in

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duty not to interfere with a physical thing, the existence of which is defined independently of the actions of the defendant.

[105] See e.g. *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106.

[106] See *OBG* (n XX), [44], [187].

[107] The analysis builds in important respects on that of Leon Green, 'Relational Interests' (1934) 29 Ill L Rev 460, (1935) 30 Ill L Rev 1, (1936) 31 Ill L Rev 35.

[108] Note there are instance of judges using 'quasi-property' as a derogatory term when dismissing a claim: see e.g. *Rickless v United Artists Corp* [1988] QB 40, 52.

[109] See e.g. *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 508-9, where Dixon J referred to Justice Brandeis's dissenting judgment in *INS* in order to reject B's claim, stating that: 'it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches.' If B invokes property, even through the notion of quasi-property, to advance a novel claim, there is the risk of such a rebuttal.

[110] See Epstein (n XX), 85, arguing that the application of such a standard analogical method would have led to a different result in *Cheney Bros v Doris Silk Corp* (1929) 35 F 2d 279, a case in which Judge Hand considered, but refused to apply, the reasoning in the *INS* case (n XX). Note that in *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530, [125], the joint judgment of Glesson CJ, Gummow, Kirby, Callinan and Heydon JJ robustly rejected the attempt to argue that a right to performance of a contract is protected because it is a quasi-proprietary right, stating that the argument was simply circular.

some ways, the *effect* of imposing civil liability in a case where no tort had been committed by the defendant, but it proved an obstacle to justifiable claims in cases where a contractual cause of action would clearly be inappropriate.[111] The full benefits of noting similarities between particular claims previously seen as disparate could only be realised when a more suitable name was found, more accurately reflecting the nature of the liability, and accepting a distinct concept (e.g. unjust enrichment or restitution) that can stand by itself and need not borrow legitimacy from a better-established, but different, type of liability.[112]

5. Conclusion

The apparent strength of the 'My right is a property right and, *therefore* …' argument is that it is based upon strict logic. If B's right to an intangible asset is the *same* type of right held by A, who has a freehold of land or ownership of a chattel, then a court *must* give B the same protection from interference by strangers as is accorded to A: like cases must be treated alike. The argument is, therefore, a potentially attractive one to a claimant with a right to an intangible; and, even if not directly invoked, it can still influence the reasoning of a court.[113]We have examined the application of this 'property syllogism' to the question of whether each of a chose in action, an intellectual property right, and a beneficial interest under a trust imposes on a stranger, X, the same general duty of non-interference that X owes to A, who has a freehold of land or ownership of a chattel. We have concluded that, in these cases, the property syllogism cannot succeed: it does not compel a court to give B the same protection as A. The best B can argue is that her right is *similar* to A's right, and that these similarities have some relevance. As we have seen, rights to an intangible asset do indeed share some important features with rights to a tangible asset. Yet there are also differences between the rights, and

[111] See e.g. *Sinclair v Brougham* [1914] AC 298. For the rejection of the quasi-contractual approach see e.g. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

[112] Note too that the use of the concept of 'quasi-property', by drawing unconvincing parallels between different causes of action, may impede the identification of other, broader principles: for example, regarding the tort of procuring a breach of contract as depending on the 'quasi-proprietary' status of a contractual right may obscure the link between that tort and other forms of accessory liability (such as dishonest assistance in a breach of trust or other fiduciary duty, a liability described by Lord Nicholls in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC), 387 as 'not property-based': see e.g. Paul S Davies, *Accessory Liability* (Hart, 2015) 17, 164-165.

[113] As seen in *Shell UK* (n 82) (see 3C(i) above).

these dissimilarities may provide a reason *not* to protect the rights in the same way. The question is essentially whether the dissimilarities are relevant: do they have any bearing upon the question of how the law should protect the rights of each of A and B?[114]

In approaching that question, a court should be aware of two key points. First, the characteristic duty owed to A is a duty not to interfere with the *tangible asset itself*. The physical thing itself thus plays a crucial role in delimiting the nature of the duty, and of B's correlative right. In cases where B seeks to impose a different duty on a defendant, the absence of a physical thing to which B's right relates is a significant factor weighing against the analogy to A's rights. Indeed, when considering attempts to develop a category of quasi-property, we noted that even if a duty recognized by a court may be said to have, at a general level, the *effect* of excluding the defendant from a particular intangible resource, the *content* of that duty will still vary in important ways from the duty owed to A, an owner of a tangible asset. Second, more generally, the fact that rights to tangible assets and rights to intangible assets might share sufficient characteristics (lacked by purely personal rights) to be labeled as proprietary does not mean that the distinction between such rights should be lost. The conventional understanding of 'property rights' includes rights that impose a wide variety of different legal relations, and differ, in particular, in their impact on third parties. In answering the question of whether a particular duty should be recognized, it may therefore be dangerous to place too much weight on the mere usage of the term 'property' to describe a particular right. Indeed, as we saw when discussing quasi-property, a misplaced invocation of such a term may obscure both the nature of a legal relation that a court is asked to recognize, and the possible justifications for such liability. The danger of reliance on legal labels as an alternative to careful thought is never more clear than when considering 'property' and 'property rights'.

[114] See Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009), 85-92. For a recent example of a court looking for an analogy to property in order to reach a particular result, see *Morris-Garner v One Step Support Ltd* [2018] UKSC 20 where, in considering whether 'negotiation' damages are available on a breach of contract, Lord Reed (at [95]) considered whether the clamant's contractual right could be said to be analogous to a property right, at least in the sense of being an 'asset' which the defendant in breach can then be said to have 'taken'; see too Lord Sumption at [125].