THE ESSENTIAL NATURE OF TRUSTS AND OTHER EQUITABLE INTERESTS: TWO AND A HALF CHEERS FOR HOHFELD

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1 INTRODUCTION

"From very early days down to the present time the essential nature of trusts and other equitable interests has formed a favorite subject for analysis and disputation."[1] Thus begins the article with which Hohfeld is most closely associated. The observation remains true over one hundred years later. Indeed, the liveliness of academic interest in the subject over the first two decades of this century[2] parallels that of the first two decades of the last:[3] modern thinkers retain a "peculiar fascination"[4] for the subject. This chapter aims to show why, and how, Hohfeld's work is relevant to this contemporary debate; it also demonstrates why the subject is worth arguing about. In doing so, the chapter makes three main points: each may also be important when considering the wider importance of Hohfeld's work.

First, whilst Hohfeld criticized the then prevailing academic analyses of the nature of trusts and equitable interests as "inadequate",[5] he did not, of course, regard inquiry into the conceptual questions as redundant. Rather, Hohfeld emphasized the *practical* importance of the correct characterization of such rights, by showing how it might determine questions

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[1] W Hohfeld, *Some Fundmental Legal Conceptions as Applied in Judicial Reasoning* 23 YALE L.J. 16 (1913-4) 16.

[2] For contributions to this debate, see e.g. R Nolan, *Equitable Property* 122 L. Q. REV. 232 (2006); L Smith, *Trust and Patrimony* 38 REVUE GÉNÉRALE DE DROIT 9 (2008); B McFarlane & R Stevens, *The Nature of Equitable Property* 4 J. EQUITY 1 (2010); J Penner, *The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust* 27 Can J L & Jurisprudence 473 (2014); P Jaffey, *Explaining the Trust* (2015) 131 L. Q. REV. 377 (2015).

[3] See e.g. C C Langdell, *Classification of Rights and Wrongs* 13 HARV. L. REV 659 (1900); F W Maitland, LECTURES ON EQUITY (Cambridge, CUP, 1909); A W Scott, *The Nature of the Rights of the 'Cestui Que Trust'* 17 COL. L. REV. 269 (1917); H F Stone, *The Nature of the Rights of the Cestui Que Trust* 17 COL. L. REV. 467 (1917).

[4] Hohfeld, *supra* note 1, 16.

[5] Hohfeld, *supra* note 1, 18.

addressed by the courts.[6] By considering three such issues addressed relatively recently by courts in the United States, England, and Australia, this chapter demonstrates the continuing truth of Hohfeld's contention that: "the true analysis of trusts and other equitable interests is a matter that should appeal to even the most extreme pragmatists of the law."[7] This point is of wider significance: nowadays, it is often assumed that a careful analysis of doctrines employed by the courts is naïve, or even dangerous, as it takes the judges at their own words and can obscure important questions of policy or efficiency.[8] In this chapter, however, it will be seen that even the most practical issues (such as the information costs imposed on third parties by the recognition of particular rights) may depend on the precise nature of the relevant legal relations. Moreover, before one can properly evaluate the efficiency or otherwise of the current law, it is important to know not only the existing results, but also the means by which the law reaches those results.[9]

Second, whilst the academic debate as to the nature of trusts and other equitable interests is of course long-standing, this chapter will argue both that some advances have recently been made, and that such progress demonstrates the usefulness of some key parts of Hohfeld's analysis. This may be an example of a broader phenomenon – as shown by a number of the contributions to this volume,[10] an application of Hohfeld's scheme may assist in ensuring that, in any particular debate, the right questions are at least asked, and the opposing participants are indeed addressing the same questions. Indeed, like a cold but bracing shower, the technical nature of a Hohfeldian analysis may serve to take some of the muddling heat out of intemperate debates as to legal rights.

The third point includes a note of caution. Hohfeld regarded the then current debate as to the nature of trusts and other equitable interests as "inadequate" partly because:

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[6] Two examples given by Hohfeld were London & S W Railway Co v. Gomm (1882) 20 Ch D 562 (CA) and re Nisbet and Potts Contract [1906] 1 Ch 386 (CA).

[7] Hohfeld, *supra* note 1, 18.

[8] It is however significant that there are some more recent signs of a modified approach, which attaches greater value to doctrinal analysis: see e.g. the articles based on a symposium on "The New Doctrinalism" in 163 U. PA. L. Rev. (2015).

[9] See e.g. H Smith *Property as the Law of Things* 125 HARV. L. REV. 1691 (2012) and *The Persistence of System in Property Law* 163 U. PA. L. REV. 2055 (2015).

[10] See e.g. J W Singer, *Religious Liberty & Public Accommodations: What Would Hohfeld Say*?

> the tendency – and the fallacy – has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more searching and more discriminating analysis.[11]

It will be seen that Hohfeld was correct in identifying certain views as too simplistic: in section 3, for example, it will be shown that some recent judgments have fallen into the trap of assuming that, because a beneficial interest gives its holder many of the economic advantages of outright ownership, it must involve the same legal relations as such ownership. To regard the beneficiary of a trust as an owner to whom a bona fide purchaser defence may apply is to adopt a heuristic that is serviceable in many cases, but which may be dangerously misleading in others. This, again, reflects an important wider lesson of Hohfeld's work: the fact that two legal relations frequently operate in a similar way, or are just as often called by the same name, does not mean that those relations are necessarily identical.[12] Nonetheless, it may well be that some degree of simplification is necessary in order for laypeople,[13] lawyers and judges to make sense of legal ideas such as the trust and other equitable interests, and there is a risk that a strict adherence to Hohfeld's scheme may make it harder to explain the law comprehensibly.[14] More specifically, when considering equitable doctrines, it may be that Hohfeld's focus on atomized outcomes obscures an important and elegant aspect of the operation of equity as a secondary system:[15] its ability to function as means to control the exercise of primary legal rights. This, again, leads to a wider point: there is a risk (evidenced, by the adoption of at least some variants of the "bundle of rights" view of property) that, by

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[11] Hohfeld, *supra* note 1, 19-20.

[12] See e.g. the distinction between a claim-right and a privilege, as applied, e.g., in the discussion of Allen v. Flood (1898) AC 1 (HL) (appeal from Eng.): Hohfeld, *supra* note 1, 36-37.

[13] It is interesting to note that, in each of *Some Fundmental Legal Conceptions as Applied in Judicial Reasoning* 23 YALE L.J. 16 (1913-14) 20 and *The Relations Between Equity and Law* 23 MICH L.R 537 (1912-3) 540, Hohfeld emphasized that law students were a key intended audience of his work.

[14] It is worth noting that the complexity of the law of trusts is already such as to magnify the risk of judges falling into error: see J Penner, *An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine* (2010) CURRENT LEGAL PROBLEMS 653.

[15] For discussion of equity's ability to prevent oppressive use of primary, common law rules, see e.g. H Smith, *Property, Equity, and the Rule of Law* in L Austin & D Klimchuk (eds) PRIVATE LAW AND THE RULE OF LAW (Oxford, OUP, 2014).

leading to an extreme disaggregation of particular legal rights, Hohfeld's approach may obscure the very thing it aimed to reveal: how legal conceptions function in practice in judicial reasoning.

2 THE NATURE OF THE DEBATE

The conceptual aspect of the debate as to the "essential nature of trusts and other equitable interests" takes particular practical aspects of the operation of such interests as given, and strives to find the most satisfactory explanation for those effects. For example, the position where T holds a bank account, now $100 in credit, on trust for B can be contrasted in various ways with the position where D, having borrowed money from P, now owes P $100.

First, B is protected in the event of T's insolvency: the bank account, as trust property, does not form part of the estate available for distribution to T's creditors. In contrast, P has no such protection, and, in D's insolvency, will have to accept whatever reduced sum is available as an unsecured creditor of D. Second, if T makes an unauthorized transfer of the bank account or its proceeds to a third party, C, then, if C still has that property or its traceable proceeds, and C cannot establish the defense of bona fide purchase for value, B will be able to make a claim against C, as well as against T. Such a claim can succeed even if, before the claim was made, C had no knowledge, or means of knowing, about the existence of the trust. In contrast, P has no such protection: if, for example, D were to choose to make a gift of $100 to C, rather than paying that $100 to P, P has no claim against C. Thirdly, if T acquires new rights through an authorized or unauthorized use of the trust property, B can claim that those new rights are held subject to the terms of the initial trust in B's favor. In contrast, if D takes $100 and, rather than paying it to P, instead purchases shares that increase in value, P has no claim to the shares or the increased value.

Those well-established aspects of B's position suggest that the nature of at least some of B's rights differs in important ways from that of P's contractual right to be paid $100 by D. They suggest that B's rights may be seen as closer to those of O, a party with ownership of a physical thing, than to those of P against D. After all, if X goes into insolvency when having

possession of O's property, that property will not be available for distribution to X's creditors; if X makes an unauthorized transfer of possession of the thing to C then O will, prima facie, have a claim against C as well as against X.[16] In such a case, C will not be able to take advantage of any general bona fide purchase for value defense, and this has long been acknowledged as an important practical difference between B's rights and those of O. Nonetheless, as noted by Maitland, these features of B's interest under a trust have allowed it to be seen by some as "just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of *bona fide* purchasers".[17]

The conceptual puzzle arises because there are, however, some equally long-standing features of the trust (and of other equitable interests) that are shared with P's position, and distinguish B's position from that of O. Perhaps most obviously, the trust depends on the existence of a particular relationship between B and another party, T (the trustee), whose position is distinct from that of the rest of the world. It may be that the court assists B in finding a party to fill that role of trustee, but it is nonetheless true that such a special relationship must exist for the trust to take full effect.[18] This feature is reflected in the means by which a trust may come into existence. It is, for example, possible for a party to acquire certain property rights independently, as occurs, for example, when O takes possession, on his or her own behalf, of a physical thing. The acquisition of an equitable interest, in contrast, depends on finding a specific party who is under a duty to B. This also means that, in principle, the varied means by which one party can come under a duty to another (e.g. the conclusion of a contract; the commission of a wrong; an unjust enrichment) may also give rise to a trust or other equitable interest. When considering the acquisition of equitable interests, it is noteworthy that such interests can generally be acquired without the formality (such as the use of signed writing or registration) or overt acts (such as the transfer of possession) often required for the acquisition of legal interests in property. The flexibility of the trust is also apparent when

[16] It seems that O does not have the benefit of a claim to an asset acquired by X purportedly in exchange for O's initial property, and so, in that sense, O's position may be weaker than that of B: see the discussion of this point in section 4.1 below.

[17] F Maitland, *Trust and Corporation* (1904) Grunhut's Zeitschrift fur das Privat und Offenliche Recht, Bd. Xxx, S. 167; reprinted in D Runciman & M Ryan (eds), MAITLAND: STATE, TRUST AND CORPORATION (CUP, 2003) 94.

[18] See e.g. L Smith, *supra* note 2, 14: pointing out that "[a]lthough a trust will not usually fail for the want of a trustee, there is no such thing as a common law trust without a trustee." Smith refers to re Lysaght [1966] Ch 191, 207 to demonstrate that an express trust will fail for want of a trustee "if the settlor made it clear that the identity of his or her chosen trustee(s) was essential to the trust" and that trustee refuses so to act.

considering the content of the rights of an individual beneficiary. The trust can be used as a means to divide the benefits of T's rights between many different people in many different ways, and the content of the rights of any individual beneficiary does not have to match that of a right on any closed list of interests. In other words, as is the case when considering the content of a purely contractual right of P against D, the *numerus clausus* principle does not apply to the content of an individual beneficiary's rights under a trust. Given the importance of that principle in protecting strangers from the information and notice costs imposed by legal property rights,[19] the distinction between legal and equitable property rights is thus clearly of practical, as well as conceptual, importance.

3 PRACTICAL CONSEQUENCES

Hohfeld noted that the correct analysis of the rights of a beneficiary, or holder of a different equitable interest, may be necessary to reach the "solution of many difficult and delicate problems in constitutional law and in the conflict of laws".[20] Modern demonstrations of the practical importance of analyzing equitable interests abound:[21] three examples will be considered here.

3.1 Example 1

In *Sprint Communications Co. v. APCC Services Inc.*,[22] the Supreme Court considered whether the plaintiff aggregators, to whom payphone operators had assigned their statutory claims against carriers, had standing under Article III of the Constitution to pursue those claims. The defendants' argument was that, as the plaintiffs had promised (in return or payment of a fee) to remit all sums thus recovered to the payphone operators, no "injury in

[19] See e.g. T Merrill & H Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle* 110 YALE L.J. 1 (2000).

[20] Hohfeld, *supra* note 1, 18.

[21] In relation to constitutional law, see section 3.1 below; in relation to the conflict of laws, see e.g. Webb v. Webb [1994] 3 WLR 801 (Ch) and [1991] 1 WLR 1410 (CA). In relation to determining the extent of statutory protection given to occupiers of land, see e.g. R v. Tower Hamlets LBC, ex p von Goetz [1999] QB 1019 (CA).

[22] Sprint Commc'ns Co. v. APCC Services Inc., 554 U.S. 269 (2008).

fact" would be suffered by the plaintiffs if their claim were denied. In rejecting that argument, the majority judgment considered the rights of a beneficiary under a trust, noting the well-established point that a trustee may bring a claim against a third party, even if the proceeds of that claim will benefit the beneficiaries and not the trustee. This demonstrates that a claim may be within "the traditional concern of the courts at Westminster"[23] even if the plaintiff will not retain the benefits of the claim. Such analysis also reveals a significant aspect of the operation of a trust: protection for the beneficiary against third parties may depend on the existence of the *trustee's* rights against third parties. More broadly, it demonstrates an important aspect of private law claim-rights: a party with such a right may simply enforce it, and so does not need to establish 'standing' in the same way as a party seeking to enforce a limit on the power of a public authority that does not correlate to a claim-right.[24]

A Hohfeldian analysis (particularly apt, of course, when the very question asked is as to the nature of jural relations) is thus useful in exposing a difficulty in the minority position in *Sprint Communications*. That position was premised on the idea that the plaintiffs would suffer no "injury in fact" as, being under a duty to transfer any proceeds of the claim to the assignees, they had, in practice, no right to the benefit of the claim. The error here is to invoke an abstract sense of a right to a benefit, thus overlooking that a right must involve at least two parties. The plantiffs *did* have a valid contractual right *against the defendant carriers*, correlating to the defendants' duty to pay the sums due; the existence of that right was not negated by the fact that the assignees also had a similar right against the plaintiffs, correlating to the plaintiffs' duty to pay the sums recovered from the defendants. The majority's invocation of the trust analogy was appropriate. If, for example, A holds a bank account, and then declares that she holds that account on trust for B, she retains the claim-right against the bank arising under her contract with the bank, even though she is now under a new duty to B in relation to that right. The declaration of trust does not remove A's initial right against the bank; on the contrary, that right is the very subject-matter of the trust.

[23] To adopt the words of Justice Frankfurter interpreting the Article III judicial power in Coleman v. Miller 307 US 433, 460 (1939).

[24] See e.g. R Stevens, *Contractual Aspects of Debt Financing* in A Reisberg and D Prentice (eds) CORPORATE FINANCE LAW IN THE UK AND EU (Oxford, OUP, 2010).

A nice example of this point, provided by English law, is the "charge-back": where A has a bank account with B Bank, she can create an equitable charge over that account for the benefit of B Bank, by coming under a duty to hold that right as security for a debt owed to B Bank.[25] It had been thought that such a device, whilst common in practice, was conceptually dubious,[26] as, where A has a personal right against B, it is not possible to create a mortgage of that right in favor of B. The bar on a "mortgage-back", however, follows simply from the fact that a mortgage, strictly speaking, involves a transfer of a right, and an attempt by A to transfer to B a right correlating to B's duty to A operates instead as a release of B's duty. An equitable charge, in contrast, involves no transfer, but instead, like a trust, depends on A's retaining the right, and coming under a duty to B in relation to that right.

The correct analysis of the trust and other equitable interests may be relevant not only to the interpretation of particular constitutional or statutory provisions, but also in determining directly the operation of equitable interests in contested areas. At this point, the debate is no longer about how best to explain accepted aspects of such interests, but is instead as to how those interests should operate. The answer given to such questions will, of course, feed back into the conceptual analysis. For example, the stance traditionally taken by the courts on two practical issues, to be examined here as Examples 2 and 3, undermines the common contention that the only significant difference between the position of a beneficiary and that of an unencumbered legal owner is the vulnerability of the former to the bona fide purchaser defense.

3.2 Example 2

The first of these two further examples relates to the position of X, a party who intentionally or carelessly damages physical property where T's rights to that property are held by T on trust for B. In such a case, does B have a direct claim against X? The long-standing position

[25] See e.g. In re BCCI (No 8) [1998] AC 214 (HL) (appeal taken from Eng.).

[26] See e.g. re Charge Card Services Ltd (No. 2) [1987] Ch 150.

throughout the common law world is that there is no such claim.[27] It is another example, to stand alongside the point examined in section 3.1, where B's protection against a third party depends on the rights of T, who can be compelled by B to bring a claim against X. This is no mere technicality: if, for example, T has consented to X's action, then T has no claim against X, and B's only recourse will be against T. Similarly, if B has suffered consequential economic loss as a result of B's particular activities, that loss will not be recoverable from X, as X is liable only for the loss in value of the property and for any reasonably foreseeable consequential loss suffered by T.[28] It was argued above that, where a trust of a debt is declared, the key jural relation of creditor and debtor does not change. Similarly, where a trust of ownership of a physical thing arises, the key jural relations between owner (now trustee) and the rest of the world do not change: strangers continue to owe a duty of non-interference with the physical thing to the owner (now trustee).[29]

This analysis is consistent, first, with the flexibility of the rules governing the acquisition and content of equitable interests: if B's acquisition of such an interest does *not* impose on strangers an additional strict duty, owed to B, of non-interference with the thing, an important justification for controls on the acquisition and content of legal interests (the need to lower information costs to third parties affected by such rights)[30] does not apply. It is also consistent with the point that B does not have an abstract right to the benefit of the trust property, allowing a claim against any party who intentionally or carelessly reduces the value of that property: B's protection depends instead on T's rights. Indeed, this demonstrates an important aspect of the means by which equity can take advantage of its nature as a secondary system: rather than creating a whole new scheme of jural relations, in competition with those established at common law, it can instead impose duties that assume the existence of, and relate to, particular rights already held by a defendant. This is, finally, also consistent with Hohfeld's observation that the position at common law, even if supplemented by a different

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[27] See e.g. The Lord Compton's Case (1587) 3 Leo 197; Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. (The Aliakmon) [1986] AC 785 (HL) (appeal taken from Eng.); Restatement (Third) of Trusts (2003) §§ 107-108.

[28] The position is different where X has expressly or impliedly assumed responsibility to B (as may occur where, for example, X, knowing of the trust, contracts with T to perform a service for the benefit of B: see e.g. Chappell v. Somers & Blake [2004] Ch 19).

[29] This point is discussed by P Matthews, *The Compatibility of the Trust with the Civil Law Notion of Property* in L Smith (ed) THE WORLDS OF THE TRUST (Cambridge, CUP, 2013).

[30] See Merrill & Smith, *supra* note 19.

equitable rule, "may represent an important *stage of thought* in the solution of a given problem".[31]

It is therefore surprising that the English Court of Appeal, in *Shell UK Ltd v. Total UK Ltd*,[32] appeared to depart from the long-standing rule that a beneficiary of a trust has no direct claim against a stranger interfering with trust property. The case concerned the largest peace-time explosion in Britain: it occurred at the Buncefield oil storage terminal as a result, in part, of the carelessness of the defendant, X. The destruction and damage extended to fuel storage and pipeline facilities used by B. As a result, B suffered serious economic loss through its inability to supply fuel to its customers. B did not however have legal title to the land or facilities: 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 structure chosen by the companies when co-operating to establish the terminal. 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 was purely economic loss, and so the general "exclusionary rule" applied, meaning that X was not liable for having carelessly caused such loss.[33]

The Court of Appeal, in contrast, allowed B's claim for substantial damages. Particular weight was placed on the ability of B to describe itself as an "equitable owner" of the damaged property, with the court holding that:

> it is legalistic to deny [B] a right to recovery by reference to the exclusionary rule. It is, after all, [B] who is (along with [the other three beneficiaries]) the 'real' owner, the 'legal' owner being little more than a bare trustee of the pipelines.[34]

The court then went on to find that the recovery of purely economic loss could be permitted only if some special relationship of proximity can be established between claimant and defendant, and it held that: "[b]eneficial ownership of the damaged property goes well

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[31] W Hohfeld, *The Relations Between Equity and Law* 11 MICH. L.R 537 (1912-3) 544.

[32] [2011] QB 86 (CA).

[33] The first instance decision is reported as Colour Quest Ltd v. Total Downstream Ltd [2009] EWHC 540 (Comm).

[34] [2011] QB 86 (CA) at [132].

beyond contractual or non-contractual dependence on the damaged property and does indeed constitute a special relationship of the kind required."[35]

The reasoning of the Court of Appeal in *Shell UK* has been subject to widespread criticism,[36] chiefly as a result of its departure from the settled precedent[37] establishing that the existence of a trust does not impose additional direct duties of non-interference on strangers to the trust. Even on its own terms, however, the decision is hopelessly confused:[38] it evidences the dangers, adverted to by Hohfeld, of taking an overly simplified view of the trust. First, whilst it might be reasonable to regard B, as opposed to T, as the "real owner" when considering, for example, T's duties to use its rights for the benefit of B, that does not mean that B should be regarded as having the same complex aggregate of rights as an unencumbered owner of property: to do so is to confuse one particular jural relation (between B and T) with other jural relations (between B and strangers to the trust such as X). Second, whilst such rhetoric supports the view that B has a proprietary right in the trust property, the exclusionary rule was seen by the Court of Appeal as prima facie applicable. This means that B's loss must have been regarded as purely economic, rather than as consequential on an interference with a property right of B: the unstated premise, then, is that X had *not* interfered with B's property. The court then regarded the case as falling within an exception to the exclusionary rule, as B's beneficial interest provided the required relationship of proximity. This involves a further error as to jural relations. The exception to the exclusionary rule depends on the existence of a special relationship of proximity between claimant and *defendant*, not between the claimant and someone other than the defendant, such as T.

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[35] [2011] QB 86 (CA) at [134].

[36] See e.g. K Low, *Equitable Title and Economic Loss* 126 L. Q. REV. 507 (2010); P Turner, *Consequential Economic Loss and the Trust Beneficiary* 69 CAMB. L. J. 445 (2010); J Edelman, *Two Fundamental Questions for the Law of Trusts* 129 L. Q. REV. 66 (2013).

[37] See the authorities set out at n 25.

[38] The argument made here is also set out in B McFarlane, 'Avoiding Anarchy? Common Law v Equity & Maitland v Hohfeld' in P Turner et al (eds), EQUITY AND LAW: FUSION AND FISSION (Cambridge, CUP, 2018). Note that the Supreme Court gave permission for an appeal against the Court of Appeal's decision in the *Shell* case, but the appeal was settled. Even if the defendant had succeeded on the point as to the negligence claim, A was also pursuing a claim against X based on public nuisance.

The Court of Appeal's reasoning in *Shell UK* is based on essentially the same error as that of the minority in the *Sprint Communications* case: it is motivated by a concern to ensure that an ability to bring a claim is linked to the suffering of actual loss. Of course, it is very commonly the case that, where loss is suffered by a claimant as a result of X's actions, a claim arises: this occurs, for example, where X has carelessly damaged property owned by the claimant. The discussion in section 3.1 showed, however, that it would be a mistake to assume that the suffering of such loss is a necessary condition for a claim to be made; it would equally be an error to regard such loss as a sufficient condition for a claim. This can be seen by considering Hohfeld's crucial distinction between a claim-right and a liberty, and his analysis of *Allen v. Flood*.[39] The plaintiff shipwrights in *Allen v. Flood* suffered loss when they were denied further work by the employer, but as they had no ongoing contract with the employer, their loss did not result from any denial of a claim-right: the employer was in any case free to choose not to give them further employment. In contemporary debates on the law of torts, Hohfeld's analysis has assumed great significance for supporters of a "right-based" view of the law of torts.[40]

The distinction between a claim-right and a liberty is also significant in property law, for example when considering the position of a licensee.[41] In *Hill v. Tupper*,[42] for example, the owners of a canal gave the plaintiff an "exclusive" permission to hire boats out on the canal. X, who ran a public house on the bank of the canal, then also started to hire boats out, despite having no permission from the owners of the canal. The plaintiff wished to prevent X from doing so, and to claim damages for the loss caused to his business. X's action was clearly prohibited (as a tort against the owners of the canal) and also caused loss to B, yet the claim was denied, on the basis that the plaintiff's license gave it only a personal right against the owners of the canal: the plaintiff had no proprietary interest in the canal and so had no claim against X. The denial of the claim might seem somewhat technical,[43] but it is motivated by

[39] [1898] AC 1 (HL) (appeal from Eng.)

[40] See e.g. R Stevens, TORTS AND RIGHTS (Oxford, OUP, 2007).

[41] See W Hohfeld, *Faulty Analysis in Easement and License Cases* 27 YALE L. J. 66 (1917).

[42] (1863) 2 Hurl & C 121 (Exchq).

[43] See e.g. the quite different analysis of Bramwell B, dissenting, in Stockport Waterworks Co. v. Potter (1864) 3 H & C 300 (Exch), where his Lordship argued that as the defendant, by polluting a river, had in any case committed a wrong against A, a riparian owner, the defendant could not complain about also being liable to compensate B, a non-riparian owner granted rights by A who had suffered loss as a result of the pollution. For

the important practical concerns,[44] particularly as to controlling information costs to third parties, that underpin the *numerus clausus* rule.[45]

3.3 Example 3

A parallel to the decision in *Shell UK Ltd v. Total UK Ltd*, showing the dangers of equating the position of a beneficiary of a trust with that of a holder of unencumbered legal title, can be found in the decision of the Court of Appeal of New South Wales,[46] later reversed by the High Court of Australia,[47] in *Farah Constructions Pty Ltd v. Say-Dee Pty Ltd*. One of the errors identified by the High Court concerned the analysis of the position of C, an innocent donee to whom T transfers the trust property in breach of trust.[48] If C acquires notice of the trust only at a point when C no longer has the trust property or its proceeds, is it possible for B to bring a claim against C based on C's retention of a benefit deriving from the receipt of the trust property?

In England[49] and Australia,[50] the well-established position is that there is no claim, but the New South Wales Court of Appeal had taken the view that, in such a case, C may be subject to a constructive trust in favor of B, arising to reverse C's unjust enrichment at B's expense.[51] The court's adoption of that view rested on the fallacy that there is no longer any good reason to accord less protection to B than to an unencumbered owner of property. In a case where, for example, such an owner mistakenly transfers a right to the defendant, it can be said that the defendant is enriched (and thus possibly unjustly enriched) at the plaintiff's expense, as

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an illuminating discussion of Bramwell's jurisprudence, see R Epstein, *For a Bramwell Revival* 28 AM. J. L. HIST. 246 (1994).

[44] See e.g the judgment of Lord Brougham L.C. in Keppell v. Bailey (1834) 2 My & K 517.

[45] See Merrill & Smith, *supra* note 19.

[46] [2005] NSWCA 309.

[47] (2007) 230 CLR 89.

[48] The case itself involved a claimed breach of fiduciary duty, and the possible liability of a third party receiving property transferred in breach of such duty, but the Court of Appeal of New South Wales took the rule to be the same as applicable to the case of a breach of trust.

[49] BCCI v. Akindele [2001] Ch 437 (CA).

[50] Farah Constructions Pty Ltd v. Say-Dee Pty Ltd (2007) 230 CLR 89.

[51] [2005] NSWCA 309 [233].

the right acquired by the defendant was formerly held by the plaintiff. Where it arises, such liability in unjust enrichment helps to mitigate the effect on the plaintiff of the rule that allows for the transfer of a right to be valid even where a mistake has been made.[52] In contrast, where T transfers trust property to C, it is clear that the rights acquired by C were formerly held by T: if, for example, the trust property consists of a chose in action against a debtor, it was T, rather than B, to whom the debtor owed the duty; if, for example, the trust property consists of a legal estate in land, it was T, rather than B, to whom strangers owed their duty of non-interference with the land. The vital Hohfeldian point, overlooked by the New South Wales Court of Appeal, is that the existence of a trust simply means that *T* is under a duty to B to use the trust property consistently with the terms of the trust; it does not mean that B has some sort of abstract, general right against the rest of the world to the value of the trust property.[53]

It is worth noting that, in relation to our third example, the position in the United States is less clear. The Restatement (Third) of Restitution follows the First and Second Restatements of Trusts in assuming, without citation of authority that, even if acquiring knowledge of the trust only after disposing of the trust property and its proceeds, C, if he or she retains some benefit from the use of such property, will have no defense to B's personal restitutionary claim.[54] This is consistent with an analysis of the trust mentioned by Hohfeld:[55] that employed by James Barr Ames[56] when seeking to explain the restitutionary liability arising where, for example, a mistaken transfer of a right is made. It may seem puzzling that such liability can arise even though the transfer of the right is itself valid. Ames argued that an analogy with the receipt of trust property may assist: where T holds a right on trust for B and then transfers

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[52] See B McFarlane, *Unjust Enrichment, Rights and Value* in D Nolan & A Robertson (eds), RIGHTS IN PRIVATE LAW (Oxford, Hart, 2010); S Smith, *A Duty to Make Restitution?* 26 CAN. J. L. & JURIS. 157 (2013).

[53] See too J Penner, *Value, Property, and Unjust Enrichment* in R Chambers et al (eds) PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT (Oxford, OUP, 2009) for a number of important general doubts about the utility of thinking of a party as having an abstract entitlement to value, as opposed to simply a power to realise the exchange value of an asset.

[54] Restatement (Third) of Restitution and Unjust Enrichment (St Paul, ALI Publishers, 2011) § 17, comment c, illustration 9. C's retention of an abstract enrichment prevents C's relying on the change of position defence set out in § 65.

[55] Hohfeld, *supra* note 1, 16.

[56] J B Ames, *Purchaser for Value Without Notice* 1 HARV L. REV. 1 (1887). For discussion of Ames' influence on the development in the United States of the law of restitution, see A Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment* 25 OXF. J. LEG. STUD. 297 (2005).

that right to C in breach of trust, the fact that C has indeed acquired the right is not inconsistent with holding that C, if his or her conscience is affected by knowledge of the trust, will come under a liability to B as a constructive trustee. One broad way of understanding that result would be to say that the transaction between T and C was effective to transfer a right from T to C, but that it did not transfer the *value* of that right from B to C. A similar analysis might then be said to apply to the mistaken transfer case: the imposition of liability on the defendant is not inconsistent with the finding that the right was indeed transferred, as it can be said that, as a result of the mistake of the claimant, the value of the right has not been validly transferred.

Such an argument, however, cannot meet the now familiar Hohfeldian objection: as a party's claim-rights are rights against another party that such a party act or not act in a particular way,[57] it makes little sense to talk of a transfer of value or, indeed, of a general right to value. This point is, again, of wider import: for example, when courts seek to explain the ability of a plaintiff to make a claim to traceable proceeds of an initial right, it is often said that the value of the initial right can be traced into such proceeds.[58] As Penner has forcefully argued,[59] however, it makes little sense to think of a holder of a right as also having a distinct or independent right to its value.[60] In the case of a trust, for example, B has no abstract right to the value of the trust property. Indeed, as against parties other than B, T has the same general privilege as an unencumbered owner to use the trust property for his or her own benefit: thus, if anyone has a broad 'right to the value' of the trust property, it is T rather than B. In order to deny a holder of a right the privilege, as against B, to use that right for his or her own benefit, it is necessary to find a specific reason why that party is under a duty to B: in the case of a trust or other equitable interest, that requires B to show that the conscience of the holder of the right has been affected, for example by agreeing to hold as trustee, or by acquiring knowledge of the initial trust.

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[57] See e.g. J Finnis, *Some Professorial Fallacies About Rights* 4 ADEL. L. REV. 377 (1972).

[58] See e.g. Foskett v. McKeown [2001] 1 AC 102, 127 (HL) (appeal from Eng) where Lord Millett refers to the choice of B either "to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner." The facts of that case were very similar to those of Homes v. Gilman 138 NY 369, 34 NE 205 (1893).

[59] Penner does not rely on Hohfeldian analysis in making his argument, but that argument is nonetheless perfectly consistent with, and can be supported by, such an analysis.

[60] See too T Cutts, *Tracing, Value and Transactions* 79 MOD. L. REV. 381 (2016).

4 THE STATE OF THE DEBATE

4.1 Progress

Hohfeld linked the "inadequacy" of then current analyses of the trust and other equitable interests to a tendency to over-simplify the rights considered.[61] It can be argued that some recent progress in the perennial debate stems from the adoption of a more nuanced approach. For example, Nolan[62] carefully distinguished between the different types of right that compose B's complex aggregate of entitlements, pointing out correctly that not all of those rights are capable of binding a third party who receives the trust property,[63] thus illustrating the danger of an undifferentiated analyses of B's rights as proprietary. Nolan did claim, however, that B has some proprietary rights and that these "consist principally in the beneficiary's primary, negative right to exclude non-beneficiaries from the enjoyment of trust assets."[64] The danger of that view, however, is that, in a case such as Example 2, where a stranger carelessly damages trust property, it overlooks the indirect nature of B's protection, which depends on T's rights and so is unavailable, for example, where T consented to the interference.

Other more recent work on the nature of trusts and equitable interests can avoid those difficulties. It has been argued that some of the key features of equitable interests can best be explained as depending on one party (call him or her T) having a right and also being under a special sort of duty to the holder of the equitable interest (call him or her B): a duty that relates specifically to the particular right held by T.[65] On that view, some parts at least of B's

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[61] Hohfeld, *supra* note 1, 18-20.

[62] Nolan, *supra* note 2.

[63] So, for example, T may be under particular positive investment duties in relation to a trust fund: such duties will not bind C merely as a result of C's acquisition of the fund with knowledge of the trust.

[64] Nolan, *supra* note 2, 236.

[65] See e.g. B McFarlane, THE STRUCTURE OF PROPERTY LAW (Oxford, Hart, 2008); L Smith, *supra* note 2; McFarlane & Stevens, *supra* note 2. R Chambers, AN INTRODUCTION TO PROPERTY LAW IN AUSTRALIA (Sydney, Thomson Reuters, 2001) 115 also stated that the property to which an equitable interest relates may be

rights under a trust are different from a right such as P's to be paid a sum of money by D. In the case of a simple debt, D's duty does not relate to any specific right held by D, and D can draw on any funds to make payment to P. Equally, some parts at least of B's rights differ from those of O, an owner of a physical thing, as the rest of the world owes B no prima facie duty of non-interference with any specific thing. If one adopts the conventional, but of course deeply un-Hohfeldian, practice of referring to P's right as a right against a person and O's right as right against a thing, B's rights might then be said to include at least some "rights against rights": a term which is, of course, simply a shorthand for describing the content of at least some of T's duties to B.

The "rights against rights" view can thus be seen as an attempt to capture two key parts of the definition of a trust provided in successive Restatements: the trust depends on T's being under a duty, but the duty is "with respect to property, subjecting the person by whom the property is held to equitable duties".[66] On this view, analyses of B's rights as either proprietary or personal may be too simplistic, not only in the sense of failing to distinguish between the different specific rights of B, but also in overlooking the possibility of a different type of right, which does not conform to the template of either a personal or a proprietary right. It is also no accident, on this view, that such rights are prominent in equity: where it operates as a gloss on the common law, for example, equity can impose duties the content of which can incorporate the rights already established at common law. If it is the case that legal proprietary interests have a modular character,[67] often using a physical thing as the organizing module, it can also be argued that, in relation to the trust, the trustee's rights constitute the module that regulates the operation of the trust and controls its effect on third parties.

Penner, whilst arguing that a proprietary characterization of at least some of B's rights can be defended,[68] has noted the value of emphasizing that B's rights *derive* from those of T, and has

another right. Edelman, *supra* note 36 argues that the view that B's right is an "interest or encumbrance upon the rights held by the trustee" has a "distinguished lineage".

[66] Restatement (Trusts) (ALI, 1930) § 2. See now Restatement (Third) of Trusts (St. Paul, ALI, 2003), § 2, where "equitable duties" is replaced by "duties".

[67] H Smith (2012), *supra* note 9.

[68] For a different defence of the proprietary characterization, see Jaffey, *supra* note 2.

also made the important point that care must be taken in identifying the particular rights of T on which B's rights depend.[69] So, for example, where T holds a legal estate in land on trust for B then, as Penner points out, the rights of T correlating to strangers' duties not to interfere with the land are not the only (and, also, not the most practically significant) rights of T on which B's interest depends: what Penner refers to as the "powers of title" of T (e.g. the power to transfer the right) are also crucial to B, as T is under a duty to B in relation to the exercise of those powers.[70] This important point, as Penner argues, assists in explaining a component of B's rights that may in fact be absent from the rights of an unencumbered owner: B's power to make a claim to traceable proceeds of the trust assets. If O owns a car, which is then stolen by X and exchanged for Z's motorbike, it seems reasonably clear that O does not have a power to acquire a legal interest in the motorbike, and there is some doubt as to whether O can claim the motorbike is held by X on trust for O. The point is that X acquired ownership of the motorbike from Z without exercising any power held by X for O. In contrast, where T, acting in breach of trust, exchanges his or her rights to a car held on trust for ownership of a motorbike, T's rights to the motorbike *do* derive from T's exercise of a power in relation to the car, and there is a logic to finding that, as T was under a duty to use that power for B's benefit, B now has the power to claim that T in fact did so, and that T therefore now similarly holds his rights to the motorbike for B's benefit. Whilst Penner does not make explicit reference to Hohfeld in his analysis, he does draw on Nolan's work, which in turn refers, albeit briefly,[71] to the analysis in *Fundamental Legal Relations*. Certainly, it can be argued that, to the extent that more recent work has made progress in the age-old debate, such progress has depended on the nuanced analysis of the different components of a beneficiary's entitlements urged by Hohfeld over a century ago.

4.2 A note of caution

It is necessary to end with a note of caution. If, as suggested above, progress has recently been made, an important step in the right direction has been the general rejection, both judicially and amongst academics, of what Penner has called the "sausage meat" conception

[69] Penner, *supra* note 2.

[70] Penner, *supra* note 2, 476.

[71] Nolan, *supra* note 2, fns 18-20.

of equitable interests, according to which "an outright legal owner of property is regarded as having an equitable beneficial ownership which exists within the skin of his legal ownership".[72] In rejecting that view at the highest judicial level in England,[73] Lord Browne-Wilkinson stated that:

> A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title.[74]

There is a danger, however, that Hohfeld's own analysis, by regarding law and equity as two separate systems each of which must provide an answer to any practical question posed, lends support to the contrary idea that O has distinct entitlements at each of law and equity. Indeed, in *The Relations Between Equity and Law*, in considering "concurrent rights and correlative concurrent duties", Hohfeld regards X, a stranger as owing, O, a party with an unencumbered legal estate in land, a concurrent legal *and equitable* duty not to damage trees on O's land; similarly, O's privilege against X to cut the trees down is seen as concurrently legal and equitable.[75] This strongly suggests that the complex of rights held by O against strangers give O *both* a legal and an equitable proprietary interest.

In the supplemental notes to that article, Hohfeld does acknowledge the awkwardness of this analysis, noting that such jural relations are more usually styled "'exclusively legal' or simply 'legal'".[76] As always, there is a logical basis for Hohfeld's choice: X's duty not to interfere with O's trees is something that is recognized in equity by, for example, the possibility of an injunction's being granted to prevent such action by X. The underlying assumption is that there is a practical question (is X under a duty to O not to cut down the trees?) and each of law and equity must provide an answer to that question. It is here, however, that the rigor of

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[72] Penner, *supra* note 2, 487-488.

[73] See too Brennan J in the High Court of Australia in DKLR Holding Co (No 2) Pty Ltd v. Commissioner of Stamp Duties (NSW) (1982) 149 CLR 431: "[an] equitable interest is not carved out of a legal estate but impressed upon it."

[74] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669 (HL) (appeal from Eng.) 706.

[75] Hohfeld, *supra* note 31, 553 (Examples 10 and 11).

[76] Hohfeld, *supra* note 31, 569 (note 34).

the Hohfeldian scheme, which focuses on ends, may obscure the crucial *means* by which equity operates when recognizing the trust and other equitable interests, and thus cause us to misunderstand this aspect of the relationship between common law and equity.

The key point, noted both before[77] and after[78] Hohfeld, is that equity did not seek to set up a competing and contrasting law of property which might parallel the common law scheme. Instead of reinventing the wheel, equity in fact adopted a more elegant, and in many ways simpler, approach. A trustee of land, for example, retains, as against all but the beneficiary (B), a complex aggregate of common law entitlements; equity, by recognizing that those rights are held subject to a core duty owed to B, gives B the practical benefit of those rights without needing to cut down the trustee's general rights against strangers. The extension of the trustee's core duty to third parties who hold the initial trust property, or its traceable proceeds, with the requisite knowledge of the initial trust, does not change B's core rights into rights that, like legal interests, impose a prima facie duty on the rest of the world. It rather allows B to show that there is a reason why a particular third party should come under a duty to B in relation to a specific right held by that third party. It also reflects the fact that, where a third party acquires trust property from the trustee, that party's entitlement depends on the trustee's exercise of what Penner calls a power of title: a power that, as part of the complex aggregate of rights constituting the trust property, the trustee held subject to a duty to B.

5 CONCLUSION

There has not been space in this paper for a full discussion of the ongoing debate as to the essential nature of trusts and other equitable interests. It has rather been argued that Hohfeldian rigor can be of great benefit to that debate and, indeed, in understanding private law rights more generally. First, it assists in understanding the practical operation of such interests and thus in avoiding the errors into which appellate courts have fallen when dealing

[77] See e.g. C C Langdell, *Classification of Rights and Wrongs* 13 HARV. L. REV 659 (1900); F W Maitland, LECTURES ON EQUITY (Cambridge, CUP, 1909). For discussion of the differences on this point between Maitland and Hohfeld, see B McFarlane, *supra* note XX.

[78] See e.g. J Hackney, UNDERSTANDING EQUITY AND TRUSTS (London, Fontana, 1987).

with each of the three examples considered in this paper. In particular, a Hohfeldian analysis emphasizes the crucial point that actual loss to the plaintiff is neither a necessary nor a sufficient condition for a successful private law claim. Second, such analysis underpins the progress that has recently been made in academic analyses of equitable interests, in particular by warning against the tempting, but inaccurate, idea that a holder of such an interest has a general right to the value of particular property. The crucial Hohfeldian point here is that all claim-rights are simply rights that another individual act, or not act, in a particular way.

So, two cheers for Hohfeld. Each of these two advances can be traced to his laudable determination not to over-simplify: a determination which merits another half-cheer. The concern, however, which must also be borne in mind when applying Hohfeld's approach in other areas of private law, is that the focus on results, on the practical linking of two parties and one activity, may obscure the particular ways in which the law as a whole, and in this case equity, achieves those results. The specific point in danger of being lost is that, in recognizing trusts and other equitable interests, equity built on, and did not compete with, common law rights. Its approach, whilst sophisticated, has the "right kind of simplicity"[79] as it did not require the re-invention of the proprietary wheel, but rather built on the existing system of rights, thus treating those common law rights as a "stage of thought". The broader point is that, by disaggregating particular jural relations, and in emphasizing ends rather than means, Hohfeld's approach contains some hints of the later excesses of legal realism, with its scant concern for debates such as that into the essential nature of trusts and other equitable interests: at large in Hohfeld's beautifully ordered formal garden are the seeds of the bramble bush.

[79] To adopt a term of Hohfeld's: *supra* note 1, 20.