THE NATURE OF THE TRUST: *QUO VADIS*, NEW ZEALAND?

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The exact nature of the trust, as well as the nature of the beneficiary's interests thereunder, has been a matter of sustained debate for those operating in the trusts field for well over a century. Are they proprietary? Obligational? Some combination of the two? The debate is not merely the result of the academic desire for conceptual clarity but rather boils down to debates about how best to explain the practice of trust law and render its various doctrines intelligible. For example, how does one explain a beneficiary's rights to trace misappropriated trust property into substitute assets held by third parties? Or the rule in Saunders v Vautier*?*

This article analyses the three major explanatory frameworks that have been used to explain these rules, as well as the practice of trust law generally: i) the "rights against rights" framework, ii) the traditional "split title" framework and iii) the "impressed obligations" framework. In doing so, it argues that the most convincing explanation of the practice of trust law lies in a reconciled version of the split title and impressed obligations framework.

I INTRODUCTION

The exact nature of the trust is a subject over which rivers of ink have been spilt over the centuries, perhaps even since its inception. Given that agreement on that nature is essential in order to define it, the number of definitions of what a trust is has likewise multiplied almost endlessly. Thus, in 1899 Walter Hart already noted 11 definitions,[1] before then providing a twelfth, which was:[2]

* Lecturer, Faculty of Law, Monash University. An early version of this article was written during a George Flannery Visiting Fellowship at the University of Sydney Law School where it was presented at an internal research seminar. The author would therefore like to thank Sydney Law School, and in particular his academic host Matthew Conaglen as well as the attendees of that seminar, for their support. Thanks are also due to Nicola Peart, Pauline Ridge and Nuncio D'Angelo for helpful comments on earlier drafts. Last, but not least, the author would like to thank the editors of the Victoria University of Wellington Law Review and the anonymous peer reviewers. As always, all opinions expressed, and any errors made, are the author's alone. *Non nobis Domine*.

1 Walter G Hart "What Is a Trust?" (1899) 15 LQR 294 at 294–298.

2 At 301.

> A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation.

As a result, some writers on the subject simply gave up, with one stating bluntly that:[3]

> No endeavour is here made to define a trust. Most of those writers or judges who have attempted such a definition have done little to assist the world to a clear conception of what a trust is.

Maitland similarly noted the problem, stating before providing his own definition, almost apologetically, that "Where judges and text-writers fear to tread professors of law have to rush in".[4] The problem is further exacerbated by the sub-division of the trust into various categories, in particular, the distinction between the discretionary trust, where the beneficiary has "no more than a mere expectancy … or hope … that the trustee's discretion may be exercised in the beneficiary's favour"[5] and thus "has no interest, legal or equitable, in the assets of the trust";[6] and a fixed trust, where the beneficiary "is the owner of a specific interest in the trust property".[7] Here, again, there is disagreement between those who hold that discretionary beneficiaries do not have a proprietary interest,[8] and those who argue that they do have some sort of property interest.[9] Similar problems have also arisen even in the sui generis case of the charitable trust,[10] so that the controversy is a little like a Russian doll: no matter what sub-category one unpacks, there too will be disagreement.

Before going any further, I should outline what I mean by "the nature of the trust" and why the answer to this question matters. Although various responses can be given, the most general, and most relevant for present purposes, is that all those involved in the debate are attempting to find a general explanatory framework for the practice of trust law. In other words, they are attempting to render the law "intelligible".[11] Thus, to make things concrete, they are attempting to explain why it is that

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3 J Andrew Strahan *A Digest of Equity* (Butterworth & Co, London, 1913) at 49.

4 FW Maitland, AH Chaytor and WJ Whittaker *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press, Cambridge, 1910) at 44.

5 *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11].

6 At [11].

7 Nigel P Gravells "Discretionary Trusts and Powers of Appointment: Progressive Assimilation" (1992) 5 Canta LR 67 at 68.

8 *Hunt v Muollo*, above n 5, at [11]; and *Whaley v Whaley* [2011] EWCA Civ 617 at [112].

9 See generally *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366; *Re Smith* [1928] Ch 915 (Ch); *Re Nelson* [1928] Ch 920 (CA); and *Re Beckett's Settlement* [1940] Ch 279 (Ch) at 285.

10 See generally the discussion in *Zhao Hui Fang v Commissioner of Stamp Duties* [2017] SGHC 105.

11 See generally Allan Beever "Formalism in Music and Law" (2011) 61 UTLJ 213. See also Ernest J Weinrib "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale LJ 949.

absolutely entitled beneficiaries can call for the transfer of trust property under the rule in *Saunders v Vautier*,[12] or why it is that beneficiaries should be able to claim traceable proceeds of property transferred in breach of trust,[13] or what the courts mean when they use the terms "legal ownership" and "equitable ownership".

This article aims to add to this rich debate by analysing the three most prominent explanatory frameworks which have been set out: the "split title" framework, the "impressed obligations" framework and the "rights on rights" framework, although as outlined below, there are arguably two "rights on rights" frameworks. In doing so I will outline which framework I believe best explains the practice of trust law, before then applying this to the New Zealand context to discover whether this framework can also explain the practice of New Zealand trust law.

II AN OVERVIEW OF EXPLANATORY FRAMEWORKS OF THE TRUST

A The Split Title Framework of the Trust

The classical statement of the split title framework is the statement of Lord Diplock in *Ayerst v C&K Construction Ltd* that:[14]

> … the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The "legal ownership" of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the "beneficial ownership" in the cestui que trust.

Although this statement was provided only in 1975, the framework had support from the Privy Council since at least the 1870s when it stated in *Tagore v Tagore* that:[15]

> The anomalous law which has grown up in England of a legal estate which is paramount in one set of courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu Law.

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12 *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (Ch). See generally Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) [*Lewin on Trusts*] vol 1 at [22-014]–[22-026].

13 See generally *Lewin on Trusts*, above n 12, at vol 2, ch 44.

14 *Ayerst v C&K (Construction) Ltd* [1976] AC 167 (HL) at 177.

15 *Tagore v Tagore* (1872) 9 Beng LR 377 (PC) at 401.

The Privy Council made a similar statement some 30 years later in *Hardoon v Belilios* where it held that:[16]

> All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant.

Several contemporaneous scholars also had statements to much the same effect, thus John Salmond wrote that:[17]

> Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust ownership. The latter is called the beneficiary, and his ownership is beneficial ownership.

For the avoidance of doubt, this framework does not hold:[18]

> … that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable.

That view would clearly be fallacious because, as was stated by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:[19]

> 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. Therefore to talk about the bank "retaining" its equitable interest is meaningless.

Instead, what the split title framework holds is that *if* there is *a trust*, ownership must be split between the trustee and the beneficiary. Generally, this means that there must be someone, or a group of people, who hold the legal title, and likewise someone, or a group of people, who hold the equitable title. It is for this reason that the Privy Council in *Hardoon v Belilios* held that such a split was necessarily indicative of the existence of a trust.[20]

The situation is more complicated where the trust property is merely equitable.[21] In such cases, it would be inaccurate to say that the trustee had legal ownership, and it would confuse matters to use

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16 *Hardoon v Belilios* [1901] AC 118 (PC) at 123.

17 John W Salmond *Jurisprudence: or the Theory of the Law* (Stevens and Haynes, London, 1902) at 278.

18 *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) at 712.

19 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 706 per Lord Browne-Wilkinson.

20 *Hardoon v Belilios*, above n 16.

21 *Lewin on Trusts*, above n 12, vol 1 at [2-034].

the term "equitable ownership" because here both the trustee and the beneficiaries have equitable ownership.[22] Instead, it would be best to adopt Salmond's terminology and speak of the trustee having "trust-ownership" with the beneficiaries having "beneficial ownership".[23] This division reflects the core truth that trusts involve a division between the right to benefit from "the entirety of the powers of use and disposal allowed by law",[24] which is called "beneficial ownership", and the exercise of those rights, or the "right of management over the trust",[25] which can be called "trust-ownership".[26] As explained below, the proprietary nature of the beneficiary's interest resides in the fact that they can enforce their interest as against everyone except a bona fide purchaser for value of the legal estate without notice of that interest[27] (otherwise known as "equity's darling"[28]).

The split title framework explains beneficiaries' ability to trace misappropriated trust property into substitute assets held by third parties on the basis that in so doing, beneficiaries are "directly assert[ing] [their] equitable ownership of those assets".[29] Thus, in *Foskett v McKeown*, Lord Millett notes that:[30]

> The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution … The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment.

Thus, beneficiaries can recover any increase in value of property, to the extent that it was wrongfully purchased with trust money, even if this was arguably "unfair" as:[31]

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22 The point was noted by Salmond himself: see Salmond, above n 17, at 278–282.

23 At 278.

24 Frederick Pollock *A First Book of Jurisprudence for Students of the Common Law* (Macmillan and Co, London, 1904) at 175.

25 Hanoch Dagan and Irit Samet "The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime" (2023) 86 MLR 701 at 711.

26 This is true even where the trustee is also a beneficiary, because in his capacity as trustee he cannot benefit from the trust property even if he can so benefit in his capacity as beneficiary. Limited exceptions for payment, and indemnity, do not seriously undermine this rule.

27 *Westdeutsche Landesbank*, above n 19, at 705; and *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 at [82]–[83] per Lord Sumption.

28 *Byers v Saudi National Bank* [2023] UKSC 51, [2024] AC 1191 at [18].

29 CEF Rickett "The Classification of Trusts" (1999) 18 NZULR 305 at 320.

30 *Foskett v McKeown* [2001] 1 AC 102 (HL) at 127.

31 At 127.

> Property rights … are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

Lord Browne-Wilkinson accepted that the result may be to give beneficiaries a windfall but held that "this windfall is enjoyed because of the rights which the purchasers enjoy under the law of property"[32] and thus tracing claims were a case of "hard-nosed property rights" with no need to consider whether it would be "fair, just and reasonable to give the [beneficiaries] an interest".[33] The result is that, at present, although "The proprietary character of an equitable interest in property has sometimes been doubted … in English law … the position must be regarded as settled".[34]

Admittedly, this characterisation is not universal. Jessica Hudson has argued that a claim in tracing does not vindicate ownership because "the claim asserts the beneficiary's right for property to be restored to the trustee", thus "the claim does not assert ownership nor the beneficiary's right to control and dominion over the property" as in order to do this "it would be necessary for the beneficiary to recover the property directly".[35] However, why is it necessary for tracing to require direct recovery in order for it to amount to a vindication of ownership? Hudson never answers that question, but merely asserts that it is so. This is particularly problematic because the traditional understanding of a beneficiary's proprietary right is that they are the beneficial owner of the trust property, with the trustee having all the rights of ownership except the right of "beneficial enjoyment"[36] so that the trustee's rights must be exercised "for the benefit of him to whom they in truth belong";[37] that is, the beneficiary. On this view, there is nothing strange with tracing not requiring the trust property to be paid over to the beneficiary, because whilst the beneficiary has the sole right to benefit from the property, they do so indirectly via the trustee,[38] and it is the trustee who has the powers of use and control.[39] Moreover, this understanding explains why in cases where the beneficiaries are absolutely

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32 At 110.

33 At 109.

34 *Akers*, above n 27, at [82] per Lord Sumption.

35 Jessica Hudson "Equitable ownership and restitution of misapplied trust property" (2017) 11 J Eq 245 at 266–267.

36 Salmond, above n 17, at 278.

37 At 279; *Ayerst v C&K (Construction) Ltd*, above n 14; *Westdeutsche Landesbank*, above n 19, at 705; and *Byers*, above n 28, at [37]–[38]. See also JE Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014) 27 CJLJ 473.

38 Thus, Salmond distinguishes absolute ownership, which he calls "direct ownership", from the situation under a trust: Salmond, above n 17, at 278, n 1.

39 Thus, even under a bare trust "it is ... doubtful how far, in the absence of express provision, a trustee is bound to give effect to directions given by an absolute beneficiary, other than a direction to transfer the trust property to [them] or as [they direct]": *Lewin on Trusts*, above n 12, vol 1 at [1-039].

entitled to the property, they can "short-circuit" the paying of traced property to the trustee and receive payment directly,[40] as in such cases they would be entitled to demand conveyance of the property under *Saunders v Vautier* so that paying the traceable funds over to the trustee would be highly artificial.

Lastly, the split ownership framework also provides "the most straightforward explanation for the *Saunders v Vautier* … rule" which provides that:[41]

> … adult beneficiaries of a sound mind, who are between them wholly entitled to the trust property, may direct the trustees to end the trust and transfer the trust property to themselves as full owners.

This is so even if there is some sort of restriction on the absolute gift; for example, as was the case in *Saunders v Vautier* itself, a direction not to pay it over until the beneficiary reached the age of 25.[42] The rule has even been extended to discretionary beneficiaries, as long as they all make the application collectively.[43] The rule is part of the "proprietary conception of private trusts",[44] and although it has taken the name of that case, "there are cases from 1814 and 1822 that treat the principle as already well established".[45]

It is closely related to the general property law rule against restraints on alienation, which also applies in the trusts context,[46] given that both enable "beneficiaries … collectively to override any restrictions the settlor may have ordained",[47] whether this be on alienation or anticipation. Fundamentally both are based on the idea that when:[48]

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40 Hudson, above n 35, at 267; as happened in *Foskett v McKeown*, above n 30. As explained by Lord Browne-Wilkinson, albeit in the context of compensation for loss as opposed to tracing, in such a case "… there is no reason for compensating the breach of trust by way of an order for restitution and compensation to the trust fund as opposed to the beneficiary himself. The beneficiary's right is no longer simply to have the trust duly administered: he is, in equity, the sole owner of the trust estate": *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) at 435.

41 Dagan and Samet, above n 25, at 706.

42 *Saunders v Vautier*, above n 12, at 485.

43 *Re Smith*, above n 9; and *Re Nelson*, above n 9. The point is even described as an "obvious proposition" in *Re Beckett's Settlement*, above n 9, at 285; and see *Lewin on Trusts*, above n 12, vol 1 at [22-022].

44 Stuart Anderson "Trusts and Trustees" in William Cornish and others (eds) *The Oxford History of the Laws of England* (Oxford University Press, Oxford, 2010) vol 12, 232 at 242.

45 At 242.

46 *Corbett v Corbett* (1888) 14 PD 7 (CA) at 12.

47 Anderson, above n 44, at 242.

48 *Curtis v Lukin* (1842) 5 Beav 147 at 155–156, 49 ER 533 (Ch) at 536.

> … a testator has given to an individual an absolute vested interest in a defined fund [then] according to the ordinary rule of law, he would have a power, of his own authority, to receive or dispose of it immediately …

With underage beneficiaries, this could only happen "on his attaining legal age".[49] However, this power arises from the fact that "in equity the property was theirs"[50] and thus:[51]

> … beneficiaries, who are sui juris and together absolutely entitled to the trust property [can] exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.

On this view, trustees are merely "channel[s]" through which "the settlor may have intended [their] bounty to flow" whilst the beneficiaries are "the absolute beneficial proprietors".[52] The rule itself also played a key part in the development of trust law, as it ensured:[53]

> … final recognition of beneficiaries under a trust as holding a beneficial title mirroring the plenary title of a common legal owner, save for the interposition of a nominee as legal titleholder.

Jessica Hudson has however challenged this characterisation by arguing that "the *Saunders* power does not define all circumstances in which a beneficiary can be the equitable owner of property" because a child beneficiary could be the only beneficiary, and thus possess equitable ownership, without being able to call for the property under *Saunders v Vautier* as she had not reached the age of majority.[54] However, it would be more accurate here to say that whilst the child is the equitable owner, the exercise of their powers of ownership is partially suspended until they reach the age of majority. Thus, the child could not validly dispose of their beneficial interest as they are under the age of majority, and as such powers are considered an essential part of ownership,[55] the result would be that

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49 At 156.

50 *Re Holt's Settlement* [1969] 1 Ch 100 (Ch) at 112. See also *Pearson v Lane* (1809) 17 Ves Jr 101, 34 ER 39 (Ch); James Penner "Justifying (or Not) the Office of Trusteeship With Particular Reference to Massively Discretionary Trusts" (2021) 34 CJLJ 365 at 370; and James Penner "Exemptions" in Peter Birks and Arianna Pretto-Sakmann (eds) *Breach of Trust* (Bloomsbury Publishing, London, 2002) 241 at 255.

51 *Goulding v James* [1997] 2 All ER 239 (CA) at 247 per Mummery LJ.

52 *Lewin on Trusts*, above n 12, vol 1 at [22-014].

53 Joshua Getzler "Transplantation and Mutation in Anglo-American Trust Law" (2009) 10 TIL 355 at 369.

54 Hudson, above n 35, at 257.

55 Pollock, above n 24, at 166–167; and Penner "Justifying (or Not) the Office of Trusteeship", above n 50, at 370. Attempts to restrain alienation under a trust have been described as "quite a novel attempt to separate the devolution of property from the property itself": *Ross v Ross* (1819) 1 Jac & W 154 at 158, 37 ER 334 (Ch) at 336. This also underlies the principle against restraints on alienation and on treating certain powers as property: see Lucas Clover Alcolea "The Numerus Clausus as a Meta-Principle of Trusts Law: Hiding in Plain Sight?" (2023) 37 TLI 205. Conversely, a person who has a power both to use property and to dispose of it to

either they are not the owner at all (which would lead to the absurdity that the property would be ownerless[56]) or that they are the owner but some of their powers of ownership are in suspense until they reach the age of majority.

The rule also tells us something about what the fundamental proprietary right of beneficiaries is: it must be more than merely "a … [negative] right to exclude non-beneficiaries from the enjoyment of trust assets"[57] because this would not explain why absolutely entitled beneficiaries, or even all discretionary beneficiaries collectively,[58] have the right to require transfer of the trust property from the trustees to themselves. Such a right goes beyond merely denying the trustees the right to benefit from the trust property which, in any event, unless they have been authorised, they cannot do due to the no profit rule.[59] Can it be that the fundamental proprietary right which beneficiaries have is to possess the trust assets? This point has been denied by James Penner, who has argued that:[60]

> … the objects of a trust … never have any possessory interests in the trust assets just in virtue of their being the objects of a trust (though under the terms of a trust they may … have the right to make the trustee put them in possession of tangible trust assets) …

However, can a sharp line really be drawn between a right to possession – and in the case of the *Saunders v Vautier* rule, an immediate right to possession – and possession itself? In many respects, "an immediate right of possession endows its holder with rights similar to those that attach to possession",[61] thus "the person having the right to immediate possession is … frequently referred to

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anyone they want is to be treated as if they were the owner: *Hinton v Toye* (1739) 1 Atk 465, 26 ER 296 (Ch). See also *Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721. Retention of such rights by a settlor will therefore render the trust invalid: *Webb v Webb* [2020] UKPC 22.

56 This is problematic because equity abhors a vacuum: Alastair Hudson *Equity and Trusts* (9th ed, Routledge, Abingdon, 2017) at [1.4.16]; and *Re Mallinson's Consolidated Trusts* [1974] 1 WLR 1120 (Ch) at 1123. Thus, the law requires that property must always have an owner: *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (HL) at 313–314. It has, however, been suggested that in non-exhaustive discretionary trusts, the beneficiary's proprietary interest may simply be in suspense: see Dagan and Samet, above n 25, at 726–727. Alternatively, such trusts may simply be invalid, or the true beneficiary may be someone other than the "paper" beneficiary: see the discussion in Lionel Smith "Massively Discretionary Trusts" in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press, Cambridge, 2018) 130; and Kelvin FK Low "Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement" in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press, Cambridge, 2018) 486.

57 RC Nolan "Equitable Property" (2006) 122 LQR 232 at 251.

58 *Lewin on Trusts*, above n 12, vol 1 at [22-022].

59 See generally at [45].

60 Penner, above n 37, at 495.

61 Norman Palmer *Palmer on Bailment* (3rd ed, Sweet & Maxwell, London, 2009) at [4-006]. The author is indebted to his colleague Alex Latu for discussions on this latter point.

in English law as being the 'possessor'".[62] Indeed, one of the ways of proving possessory title is by proving an immediate right to possession,[63] so it is arguably very difficult to see on what basis Penner draws a sharp line between the right to possession and possessory interests themselves.

It is certainly true that a beneficiary, at least where the *Saunders v Vautier* rule applies, has more than just a possessory interest – they have an interest in the title of the trust property[64] – but this does not change the fact that such beneficiaries also have a right to possession. Indeed, they must have an immediate right to possession, as the trustee has no discretion to refuse the *Saunders v Vautier* application, but is required to transfer the property over to them whenever, and as soon as, they ask for it. The principle can also work both ways, as explained in *Commissioners of Inland Revenue v Executors of Hamilton-Russell*:[65]

> The trustees could at any time after [the beneficiary attained the age of majority], even though GL Hamilton-Russell had requested them to continue the accumulations, have refused to do so and, if he had refused to accept a transfer of the trust funds, could have paid them into court just in the same way as GL Hamilton-Russell could, contrary to the wishes of the trustees, have insisted on a transfer to himself of the whole of the trust funds.

Thus, in certain circumstances, one could say that the rule in *Saunders v Vautier* not only gives beneficiaries the right to take possession of the trust assets, but can also oblige them to do so against their will. In any event, it is difficult to see how the rule can be explained except on the basis that the beneficiaries have some sort of possessory interest in the trust fund. It is true that the matter is complicated in cases where the trustee has an unsatisfied right of indemnity. However, that issue will be addressed below in the context of the impressed obligations framework, as it is inextricably intertwined with the different framework Australia has adopted vis-à-vis trusts.

B The Impressed Obligations Framework of the Trust

The rejection of a split title framework to the trust in favour of the "impressed obligations" framework can be traced to the statement of Brennan J in *DKLR Holding Co v Commissioner of Stamp Duties* that "an equitable interest is not carved out of a legal estate but impressed upon it",[66] and this

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62 *United States of America v Dollfus Mieg et Cie SA* [1952] AC 582 (HL) at 605.

63 Cynthia Hawes "Title to Found and Stolen Goods: The Right to Sue in Conversion" (2005) 11 Canta LR 185 at 186.

64 To this extent, the author agrees with the views expressed in Penner, above n 37.

65 *Commissioners of Inland Revenue v Hamilton-Russell Executors* [1943] 1 All ER 474 (CA) at 477. See also *Lewin on Trusts*, above n 12, vol 1 at [22-019].

66 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 474.

can, in turn, be traced to the *DKLR* New South Wales Court of Appeal judgment by Hope JA.[67] In his judgment, Hope JA noted the truism that:[68]

> … an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate.

He then made the novel statement that, as a result, a trustee likewise:[69]

> … has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit … Equitable obligations require him to use them in some particular way for the benefit of other persons.

The approach is not, as it might seem to be, obligational but rather proprietary. Thus, Hope JA noted that:[70]

> Although there has long been a controversy whether trust interests are true rights in rem … there can be no doubt that the interest of the cestui que trust is an interest in property.

The impressed obligations framework itself is rooted in a rejection of what has been described as "dualism of estates". As mentioned above, this has been described as the view:[71]

> … that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable.

Understood in its strictest sense, as it was uttered by the Privy Council in *Commissioner of Stamp Duties (Qld) v Livingston*, this is merely a truism, given that, as explained above, absolute owners have no such dual ownership. However, the rejection of dualism has gone much further in Australia. Thus in *Glenn v Federal Commissioner of Land Tax*, Griffith CJ held that:[72]

> The respondent's argument is based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.

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67 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510 (NSWCA).

68 At 519.

69 At 519.

70 At 518. See also *Re Transphere Pty Ltd* [1986] 5 NSWLR 310 (NSWCA) at 311.

71 *Livingston*, above n 18, at 6.

72 *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497.

Thus, the High Court of Australia has described *Glenn* as being a:[73]

> … rejection of a "dogma" that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.

However, there are two significant problems with this view.

First, it is clear that whilst there is no issue with what he says immediately before, the statement by Griffith CJ in *Glenn* that the trustees had both the equitable and legal ownership, if taken literally, is simply wrong as a matter of principle. This is because it is a long-established rule that "wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former",[74] or, to put it another way, "a person cannot be trustee for [themselves]".[75]

Secondly, *Glenn* is a split decision, and it is not evident that any single ratio was applied even by the majority. Thus, Rich J dissented, arguing that the residuary legatees were "entitled in equity to an estate of freehold in possession"[76] as they could merely "pay off or provide for those charges and have possession of the estate".[77] Although Isaacs J concurred in the result with Griffith CJ, thereby forming a majority, he concluded his judgment on the narrower ground that the interests did not come within the meaning of the term "estate in possession" which was "a well-known technical expression of property law with a certain connotation"[78] and not on the broader grounds that the trustee held both equitable and legal estates.[79] Indeed, he expressly stated that "trustees have no equitable interest; that belongs to the person or persons for whom the benefit is intended",[80] thereby restating the orthodox view and explicitly rejecting Griffiths CJ's unorthodox understanding of trusts.

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73 *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53, (2005) 224 CLR 98 at [25].

74 *Selby v Alston* (1797) 3 Ves Jr 339 at 341, 30 ER 1042 (Ch) at 1043.

75 *Re Selous* [1901] 1 Ch 921 (Ch) at 922.

76 *Glenn*, above n 72, at 508.

77 At 508.

78 At 500.

79 The point was noted by the Singapore High Court when considering the case in *Zhao*, above n 10, at [72].

80 *Glenn*, above n 72, at 503.

Nevertheless, the Australian courts have used *Glenn*, as well as *Livingstone*, as a basis on which to reject the split title framework. Thus, in *Commissioner of Taxation v Linter Textiles Australia*, the High Court of Australia stated that:[81]

> Insofar as their Lordships were proceeding in *Oriental Steam* upon an assumption that the law of property requires the location at all times and in all circumstances of distinct legal and beneficial ownership, that assumption since has been exploded by *Commissioner of Stamp Duties (Queensland) v Livingston*.

Subsequently, the High Court of Australia positively quoted the heterodox statement of Griffith CJ discussed above in *CPT Custodian v Commissioner of State Revenue*, noting that it was "a prescient rejection of [the dualism] 'dogma'"[82] and has also restated its acceptance of the impressed obligations view in both *Carter Holt Harvey v Commonwealth* and *Boensch v Pascoe*.[83] The problem with this framework is that it struggles to explain both the rule in *Saunders v Vautier* and the right of a beneficiary to recover traceable proceeds of wrongfully transferred trust property to a third party.

Turning first to the rule in *Saunders v Vautier*, *Meagher, Gummow & Lehane* reject the traditional understanding of the rule as being justified on the beneficiaries being equitable owners on the basis that it is an "instance" of "false notions of dual concurrent legal and equitable estates".[84] Thus, they argue that:[85]

> The "rule" in *Saunders v Vautier* … allows the beneficiaries or objects to become the owners of the trust assets. However, a power to become the owner of trust assets in future is different from being the owner … of the trust assets at present. *Saunders v Vautier* indicates nothing of whether the beneficiaries or objects have proprietary rights in the trust assets for the time being …

However, if this is so, then on what basis do trust beneficiaries have the right to demand that the trust property be transferred to them? The question is left unanswered, which is particularly puzzling given the long line of case law which explains it on the basis of the beneficiaries being the equitable owners of the fund. Instead, the possibility is dismissed out of hand on the basis that the beneficiaries

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81 *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20, (2005) 220 CLR 592 at [30].

82 *CPT Custodian*, above n 73, at [25].

83 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 at [82]; and *Boensch v Pascoe* [2019] HCA 49, (2019) 268 CLR 593 at [4]–[5].

84 JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, Chatswood (NSW), 2015) [*Meagher, Gummow & Lehane*] at [4-105].

85 At [4-105].

were the equitable owners, the fact that the "law permit[s] those who create trusts to stipulate [the] terms on which they wish to create the trust" would be inexplicable, and likewise:[86]

> … the beneficiaries or objects would at the same time have equitable ownership of the trust assets (under the "rule" in *Saunders v Vautier*) while lacking equitable ownership of the trust assets (under the trust terms).

With respect, neither objection prospers. Trust law allows the settlor to set the terms of the trust, however "the property law matrix within which trusts operat[e] [is] not negotiable" because "beneficiaries ha[ve] interests in the trust property, and it was part of the origin of trusts in real property law that interests had 'natures' that could not be gainsaid".[87] It is because of this that courts can invalidate trusts where the settlor has retained such extensive rights that they, in fact, never parted with their interests in the trust property,[88] and likewise, it is this which allows a settlor's creditors to access the settlor's interest in the trust if those interests are so extensive as to amount to property.[89] Similarly, it is wrong to see the beneficiaries as both having an equitable property right according to *Saunders v Vautier* and not having one according to the trust terms. Rather, if they have a property right under *Saunders*, then it does not matter what the trust terms say. Substance prevails over form.[90]

The High Court of Australia has also itself muddied the waters by noting in *CPT* that:[91]

> The classic nineteenth century formulation by the English courts of the rule in *Saunders v Vautier* did not give consideration to the significance of the right of the trustee under the general law to reimbursement or exoneration for the discharge of liabilities incurred in administration of the trust.

Thus, according to the Court, the rule could not apply unless and "until satisfaction of [the] rights of reimbursement or exoneration".[92] This is fair enough. Indeed, it is certainly true that where the trustee has an unsatisfied right of indemnity, the beneficiaries cannot insist on payment of the entire trust fund; rather, they must be content with what is left after the trustee's right of indemnity has been satisfied.[93] Nevertheless, this does not mean that the trustee can simply refuse to pay over the trust

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86 At [4-105].

87 Anderson, above n 44, at 246.

88 *Webb v Webb*, above n 55.

89 *Fonu*, above n 55. See also, in the context of the Property (Relationships) Act 1976, *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

90 Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [1.4.9]; and *Younghusband v Gisborne* (1844) 1 Coll 400, 63 ER 473 (Ch).

91 *CPT Custodian*, above n 73, at [50].

92 At [51].

93 *Lewin on Trusts*, above n 12, vol 1 at [22-018].

property until they can, entirely at their own leisure, calculate what is owed to them with no consideration of the beneficiary's rights.[94] It is also wrong to say, as the High Court did, that until such satisfaction was made, "it was impossible to say what the trust fund in question was".[95] This is because certainty of subject matter is a basic requirement of trust validity, thus if it cannot be said what property is subject to a trust, it could easily be argued that in such cases there was no valid trust. This is illustrated by Justice White's raising of the possibility that a beneficiary does not:[96]

> … have a proprietary interest in trust assets where a trustee has incurred liabilities for which he or she is entitled to be indemnified, given that the existence of such liabilities leads to the result that "it is impossible to say what the trust fund is" …

However, who would own the trust funds on such a view? If the trustees own the trust fund completely then they would no longer be trustees but absolute owners, the trust would collapse and they would no longer be trustees,[97] because "wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former",[98] as "a person cannot be trustee for [themselves]".[99] The problem is exacerbated by cases which hold that in such cases "their duties as trustees are suspended by reason of the right which they have to be indemnified",[100] and in consequence "as regards [their] own beneficial interest in the land the subject of the settlement, the defendant trustee was under no fiduciary obligation to the beneficiaries" so "that to the extent of the right to be indemnified the land was not trust property".[101] Moreover, the description of the trustees' right of indemnity as a "beneficial interest"[102] has led some scholars and judges to state that former trustees who have an unfulfilled right of indemnity should be seen as

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94 See generally *Wester v Borland* [2007] EWHC 2484 (Ch). Thus, they must calculate what is owed to them "within a relatively short period": *McKnight v Ice Skating Queensland (Inc)* [2007] QSC 273 at [38].

95 *CPT Custodian*, above n 73, at [51].

96 RW White "The Nature of a Beneficiary's Equitable Interest in a Trust" (speech to the Supreme Court of New South Wales Annual Conference, 2007) at [18].

97 *Re Selous*, above n 75, at 922.

98 *Selby v Alston*, above n 74, at 341.

99 *Re Selous*, above n 75, at 922.

100 *Daly v Union Trustee Co of Australia Ltd* (1898) 24 VLR 460 (VSC) at 469.

101 *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* [1984] 1 Qd R 576 (QSC) at 587.

102 *Carter Holt Harvey*, above n 83, at [84].

"preferential beneficiar[ies]"[103] to whom the current trustees would owe a fiduciary duty which prevailed over their fiduciary duties to the "ordinary" beneficiaries.[104]

All such approaches effectively explode the trust and must be rejected as wrong. Even when a trustee has an unpaid right to indemnity, they are still under a fiduciary duty (only[105]) to the beneficiaries as regards the trust fund. They must therefore "take into account the proper interests and concerns of the beneficiaries whose property it is and so exercise that right having regard to their independent proprietary interests".[106] Thus, whilst trustees are entitled to "retain any or all of the trust fund to satisfy [their] entitlement to an indemnity", they can "retai[n] no more than [is] reasonably required to satisfy [their] entitlement" and cannot refuse to distribute merely because "events may occur in the future giving rise to a claim to an indemnity".[107] Holding otherwise would invert the nature of the relationship between trustees and beneficiaries because "the purpose of [that] relationship … is not to further the interests of the trustee; it is the other way around".[108]

Meagher, Gummow, and Lehane also rejects the proprietary understanding of tracing because "the theory depends on a duality between legal and equitable titles which does not correspond with the law".[109] They do not, however, clearly explain what the alternative is. The closest they come to doing so is to express the view that where a:[110]

> … beneficiary has a transmissible right to the due administration of the estate … this right … entitles the beneficiary as plaintiff to trace when assets of the estate are wrongfully dealt with, but it is no "proprietary base" …

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103 Jessica Hudson "Trustee Succession and Indemnification" (2024) 98 ALJ 454 at 463.

104 *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214, (2023) 112 NSWLR 318 (*Jaken Properties* NSWCA) at [1]–[34] per Bell CJ dissenting. This view was rejected by the majority. On further appeal, the High Court of Australia decided that current trustees do not owe former trustees a fiduciary duty: *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1. However, this was a split decision, with Gageler CJ, Gleeson, Jagot and Beech-Jones JJ in the majority, and Gordon, Edelman and Steward JJ in the minority. The fact that the High Court of Australia was so starkly divided about basic, and previously non-controversial, principles of trust law further demonstrates the problems caused by the impressed obligations framework. It is also notable that even the majority continued to use the term "beneficial interest" to describe a trustee's interest in the fund, although they attempted to distinguish it from other forms of beneficial interest (such as that of the beneficiaries): see [13]–[30].

105 *Jaken Properties* NSWCA, above n 104, at [35]–[227] per Leeming JA and [228]–[237] per Kirk JA.

106 *Wester v Borland*, above n 94, at [12].

107 *Lewin on Trusts*, above n 12, vol 1 at [22-018].

108 *Jaken Properties* NSWCA, above n 104, at [237].

109 *Meagher, Gummow & Lehane*, above n 84, at [4-110].

110 At [4-110].

Nevertheless, *Meagher* repeatedly criticises the split title framework as resulting in:[111]

> … the unsatisfactory position that the equitable tracing doctrines can only be invoked if the plaintiff first shows an entitlement to proprietary relief *as the result of* applying tracing doctrines in equity.

Is this really so? Arguably not. Instead, the beneficiary's right to trace misapplied or misappropriated trust funds results from the fact that they have an interest in the trust fund. This is understood as "proprietary" by equity in the sense that it is generally enforceable against third parties. It is this interest which justifies their right to increases in value and windfalls, and that insists on enforcement even if this would not be "fair" or "equitable".[112]

Crucially, even on the Australian authorities, this framework is not uncontested. Thus, the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)* described the fact that:[113]

> … if you wish to trace from asset A into asset B (as its traceable proceeds), you must first establish you have proprietary rights in asset A. You must establish your "proprietary base" [as an elementary point].

This explicitly contradicts the view discussed in *Meagher*. The Court went on to do so again when it stated that there was a "need to establish a proprietary base before one can follow or trace"[114] so it is not clear that *Meagher* correctly states Australian law on the point. This is particularly so given that, elsewhere in its judgment, the Full Court explicitly endorsed the description in *Foskett v McKeown* as being a matter of "hard-nosed property rights"[115] so that it would appear that the current Australian framework is broadly in line with that of England.[116] This is somewhat puzzling because the English approach has repeatedly and explicitly been justified by English courts based on the split title framework. How then can Australian courts accept it and retain the impressed obligations framework? It is difficult to know for certain, but one possible answer is that the English framework has "been accepted uncritically as good law by Australian … courts" notwithstanding the differences that exist between the two jurisdictions' frameworks.[117]

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111 At [4-110] (emphasis in original).

112 *Foskett v McKeown*, above n 30, at 127–128.

113 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 at [560].

114 At [669].

115 At [699], quoting *Foskett v McKeown*, above n 30, at 109.

116 See generally, albeit criticising this, Pauline Ridge "Tracing and associated claims in Australian law" (2020) 14 J Eq 32.

117 At 33. In her article, Ridge builds on this point and argues generally for a uniquely Australian approach to tracing.

Alternatively, it may be possible to reconcile the English and Australian frameworks by noting that the Australian divergences, at heart, are the result of certain special uses for trusts, often for purposes for which they were not designed. Thus, much of the case law concerning trustees' indemnity rights in Australia stems from the use of trusts for commercial purposes in situations where a company would generally be used in England, so-called "trading trusts".[118] The problem is that for creditors of the trust, the trustee's "indemnity is thus their only route of access to the trust assets in enforcement or insolvency".[119] It is this which has resulted in interminable litigation, and conflicting judgments, on trustees' rights of indemnity across Australia[120] and it perhaps explains why the beneficiary's rights have been undermined in favour of trustees' indemnity rights, because this in turn indirectly protects creditors. Moreover, in general terms, all such trusts "involve some rebalancing of the prima facie trustee/beneficiary relationship via the governing instrument to accommodate the trustee's particular mandate and the commercial bargain between the stakeholders".[121] Ultimately, such trusts, as with unit trusts, are a special case, and it is therefore not surprising that there is broad support for the possibility of regulating them via a sui generis statutory scheme.[122] Cases which concern such trusts should not, therefore, be considered as setting forth generally applicable principles of trust law, and it is remarkable that almost invariably the problematic statements which I have discussed here occur in that context.[123]

It is also possible to argue that the idea of a trust merely comprising impressed obligations, and a trust being the result of split title, are merely two sides of the same coin by noting that:[124]

> All of the obligations of the trust … are … imposed by the law, ie, are default terms, which over the history of the trust the law has found important to impose, but impose purely as a function of giving effect to the fact that the property belongs beneficially not to the trustee, but to the beneficiaries.

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118 See generally Nuncio D'Angelo "Commercial Trusts" in Adam Hofri-Winogradow and others (eds) *Oxford Handbook of Comparative Trust Laws* (Oxford University Press, Oxford) (forthcoming).

119 At 9.

120 See generally Australian Parliamentary Joint Committee on Corporations and Financial Services *Corporate insolvency in Australia* (July 2023) at 299–313.

121 D'Angelo, above n 118, at 3.

122 Australian Parliamentary Joint Committee on Corporations and Financial Services, above n 120, at [14.25]–[14.35].

123 See for example White, above n 96. See also Anthony Mason "Discretionary trusts and their infirmities" (2014) 20 Trusts & Trustees 1039.

124 Penner "Exemptions", above n 50, at 263.

In other words, a trust is not just a matter of property but necessarily involves certain obligations, or duties,[125] but those obligations, equally necessarily, arise out of the fact that ownership of the trust assets is split between the trustee and beneficiary, with the former holding legal title and the latter holding equitable title[126] (or at the least, a split between beneficial ownership and trust ownership[127]). Such a reconciliation has the benefit of being able to explain general Australian adherence to English authorities, as well as the departures as regards trading trusts, whilst also avoiding the extremes of a proprietary view which "while [it] tells us what the trust (or the trustee) does, it tells us nothing of how that is to be done".[128]

C The "Rights on Rights" Framework of the Trust

The most well-known conception of the rights on rights framework is that of Ben McFarlane and Robert Stevens who argue that:[129]

> An equitable property right is neither a right against a person nor a right against a thing. Rather, it is a right against a right. As a result, it cannot be fitted into the Roman dichotomy of rights in personam and rights in rem.

Thus, "if A holds his or her right to a thing on trust for B … A has a right against the thing, [whilst] B has a right against A's right of ownership".[130] The framework explicitly rejects the split title framework on the basis that "no legal system could sensibly operate in such a way: it would not be possible to have two court systems within one jurisdiction giving such flatly conflicting answers".[131] Fundamentally, the rights on rights framework is based on the idea that traditional property rights, ie rights against a thing, must be "binding on the rest of the world",[132] and as equitable property rights are not, for example because of equity's darling, they cannot be property rights in this sense. Instead, they are "persistent right[s]"[133] which are "prima facie binding on anyone who acquires a right that derives from A's [the trustee's] right".[134] On this view, when courts speak of "an equitable interest

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125 See generally Jessica Palmer "Theories of the Trust and What They Might Mean for Beneficiary Rights to Information" [2010] NZ L Rev 541.

126 *Hardoon v Belilios*, above n 16.

127 Salmond, above n 17, at 278–282.

128 Palmer, above n 125, at 553.

129 Ben McFarlane and Robert Stevens "The nature of equitable property" (2010) 4 J Eq 1 at 1.

130 At 2.

131 At 2.

132 At 1. Or, to put it another way, those rights must be "universal[ly] exigib[le]": at 1.

133 At 1.

134 At 1.

possess[ing] the essential hallmark of any right in rem"[135] this "must be understood in a special, limited sense"[136] because such rights do not "impos[e] an immediate, strict duty on the rest of the world".[137] The rights on rights framework is therefore underlaid by what might be called a "Roman" or "civilian" understanding of property rights as being rights that must at all times bind all the world.[138]

McFarlane and Stevens were not, however, alone in formulating the rights on rights framework. Lionel Smith has also argued that:[139]

> The essence of the common law trust lies not in any division of ownership of the trust property … Rather it lies in the fact that the trust beneficiaries hold rights in the rights that the trustee holds as trust property.

Although McFarlane and Stevens acknowledge that their work "builds on the insights of Professors Chambers and Smith",[140] Smith is considerably clearer about the fundamentally obligational nature of the rights on rights analysis. Thus, he argues that instead of splitting property, the trust "was created by a distortion of the law of obligations, in particular an enormous expansion of the universally accepted possibility of third party liability for interference with obligations".[141] He goes on to note that "equity simply understood the idea of an obligation differently from the common law and differently from the civil law tradition" and notes that "the beneficiary's right is not a real right, as a civilian would understand it; but it is a legal relation that can affect third persons".[142] In consequence, it is perhaps fair to speak not of a singular rights on rights framework but rather of plural rights on rights frameworks. The distinction between the two is arguably that whilst Smith is clear that a beneficiary's interests are really obligational, McFarlane and Stevens believe that those interests are proprietary, albeit they define "proprietary" in a limited sense. Nevertheless, both frameworks share some common challenges, which are addressed below.

First, it is unclear how either rights on rights framework can explain the strict proprietary approach to tracing whereby a beneficiary's assertion of an interest in traceable proceeds is a matter of "hard-nosed property rights" with no need to consider whether it would be "fair, just and reasonable to give

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135 *Akers*, above n 27, at [82] per Lord Sumption.

136 Sinéad Agnew and Ben McFarlane "The Paradox of the Equitable Proprietary Claim" in Sinéad Agnew and Ben McFarlane (eds) *Modern Studies in Property Law* (Hart Publishing, Oxford, 2019) vol 10, 303 at 303.

137 At 304.

138 McFarlane and Stevens, above n 129, at 1.

139 Lionel D Smith "Trust and Patrimony" (2008) 38 Revue générale de droit 379 at 381.

140 McFarlane and Stevens, above n 129, at 2, n 2.

141 Smith, above n 139, at 392.

142 At 393 and 393, n 45.

the [beneficiaries] an interest".[143] Sinead Agnew and Ben McFarlane have argued that this should be understood:[144]

> … as recognising that whatever reason justifies T or C being under a duty to B in relation to the initial trust property also justifies that party's being under a duty to B in relation to its traceable proceeds.

Thus, where "T has consented to hold not only the initial property, but also its substitutes, on trust for B", tracing is "a 'next best' means to enforce T's initial duty" and thus:[145]

> … it is a focus on the duty of the defendant, rather than on any abstract property interest of the claimant, that best explains … the ability of B to make a claim in relation to traceable proceeds of trust property.

This does not really explain why B can make a claim against the third party C to enforce their proprietary rights, but that issue is dismissed as being trite, because:[146]

> … it is obvious (and can be explained without reference to ideas such as unjust enrichment) that T also holds property acquired in exchange for that trust property on trust for B.

However, this again does not explain why B should be able to claim against C. It would appear that the analysis here is similar to third party personal liability in that:[147]

> … C's receipt of the property, by itself, does not subject C to an immediate duty to B. Rather, B must point to further facts to show why there is a good reason for C to come under such a duty: specifically, B needs to show that C's conscience is affected by knowledge … of the pre-existing trust relationship between T and B.

The problem is that this is not how tracing works. B can enforce their interest in the traceable proceeds against C unless and until that interest is destroyed in some way so that C takes the property with clean title. In other words, B does not have to show that C's conscience is affected. Rather, it is for C to show that they are a "bona fide purchaser for value of the legal estate without notice of [the equitable] interest", ie equity's darling.[148] As stated by Lord Sumption in his concurrence in *Crédit Agricole Corp and Investment Bank v Papadimitriou*, in such cases:[149]

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143 *Foskett v McKeown*, above n 30, at 109.

144 Agnew and McFarlane, above n 136, at 307.

145 At 307.

146 At 306.

147 At 306.

148 *Byers*, above n 28, at [18] per Lord Briggs.

149 *Crédit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13, [2015] 1 WLR 4265 at [33].

> The hypothesis is that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests.

There are, of course, other situations where B may not able "to vindicate his or her equitable interest by a proprietary claim, even while the property remains in the hands of [C]",[150] for example "where the trustee (in whom the legal title is vested) has power under the terms of the trust to dispose of the property free of the equitable interest",[151] or where "under the law applicable either to the property or to the transaction, the transferee takes free of it, even if the property is transferred in breach of trust".[152] In such cases, the reason that B can no longer enforce their equitable interest is that:[153]

> … all three types of transfer have the effect of destroying [B]'s equitable interest in the property. [B] simply cannot say to [C]: "give me back my property". The property has become beneficially owned by [C], free from (or in priority to) any proprietary claim by [B]. [C] can simply say: "no, it's now mine".

However, if such an interest is not destroyed, then, contrary to McFarlane's statement that this depends on the "conscience of the third party's being affected",[154] the beneficiary can enforce their equitable proprietary interest via tracing, as was explained by the House of Lords in *Foskett*. In that case, a testator wrongfully used trust funds to make several payments on his life insurance policy before then committing suicide. Although his children were entirely innocent, and thus there was no question of their conscience being affected, the beneficiaries could nevertheless trace their proprietary interest into the life insurance payout and claim a proportionate share of it. Conscience, and the innocence of the children, had no role to play because the children were volunteers who "gave no value for what they received and derive[d] their interest … by way of gift",[155] and a beneficiary's beneficial interest "binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice".[156]

Smith's framework likewise faces challenges in explaining how the law of tracing is currently understood by the courts. First, it is very difficult to classify the extensive rights of beneficiaries to recover traceable proceeds, including windfalls or increases in value, as being a result of an extension

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150 *Byers*, above n 28, at [22] per Lord Briggs.

151 At [19].

152 At [21].

153 At [22].

154 Ben McFarlane "Avoiding Anarchy?: Common Law v Equity and Maitland v Hohfeld" in John CP Goldberg, Henry E Smith and PG Turner (eds) *Equity and Law: Fusion and Fission* (Cambridge University Press, Cambridge, 2019) 331 at 339.

155 *Foskett v McKeown*, above n 30, at 127.

156 At 127; and *Westdeutsche Landesbank*, above n 19, at 705–706.

of the law of obligations. This is because such rights are, as noted above, so extensive that they are synonymous with property, and that is how the courts have understood them.[157] Secondly, and for the same reason, it is difficult to understand the law of tracing on the basis of reversing the unjust enrichment of an individual, as Smith argues for in his seminal book on the subject.[158] This is not only because the House of Lords in *Foskett* expressly disavowed this view[159] but also because unjust enrichment cannot explain why if "A misappropriates B's money and uses it to buy a winning ticket in the lottery, B is entitled to the winnings" even if this "seem[s] to give B an undeserved windfall".[160]

The second major issue faced by both rights on rights frameworks is that they cannot explain the rule in *Saunders v Vautier*[161] which allows absolutely entitled beneficiaries, and on occasion discretionary beneficiaries collectively, to insist that the trustee transfer the property to them. As noted above, the courts have consistently justified this rule on the basis that in such circumstances, the trust property belongs to the beneficiaries and they are therefore entitled to decide what is done to it, including by insisting on its transfer notwithstanding any contrary instructions of the settlor.[162] McFarlane has attempted to explain this in his rights on rights framework by arguing that in such a case, the beneficiary "has the power to impose a duty on A to transfer [the] right [held on trust] directly to B" because even if there is a duty not to transfer it until X condition is met, a beneficiary "can simply waive that duty".[163] However, this merely begs the question, as it "does not fully explain on what ground the beneficiary is entitled to decide what to do with the trust property".[164] Why is it that the beneficiary can insist on having the property transferred to them, or to another person where they have transferred their interests in the fund? And why is it that, on the same grounds, a trustee can insist on such a beneficiary either accepting the fund or paying it into court if they refuse to do so?[165] The easiest explanation is that:[166]

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157 See generally *Foskett*, above n 30. See also *Westdeutsche Landesbank*, above n 19.

158 Lionel D Smith *The Law of Tracing* (Clarendon Press, Oxford, 1997) at 299–301.

159 *Foskett v McKeown*, above n 30, at 108.

160 At 134.

161 *Saunders v Vautier*, above n 12.

162 *Re Holt's Settlement*, above n 50. See also *Pearson v Lane*, above n 50.

163 Ben McFarlane *The Structure of Property Law* (Hart Publishing, Oxford, 2008) at 554.

164 Elena Christine Zaccaria "The Nature of the Beneficiary's Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right?" (2019) 135 LQR 460 at 477, n 113.

165 *Hamilton-Russell Executors*, above n 65.

166 Penner "Justifying (or Not) the Office of Trusteeship", above n 50, at 370. See also Dagan and Samet, above n 25, at 706.

> In the eyes of equity, the beneficiaries are the owners of the trust property, not the settlor. They have the rights against the trustee, and must enforce the trust themselves. When they reach full age, in essence the trust is in their hands.

The third challenge faced by the rights on rights frameworks is that they do not justify their view that only rights which are always and anywhere enforceable against third parties amount to property rights. The issue is particularly important because common law systems have never possessed such an absolutist conception of proprietary rights. Instead, property in common law systems (excluding the operation of systems of land registration) is conceived of as "relative", thus "titles are never absolute: they are always 'relatively good or relatively bad'".[167] The result is that "property is not for all purposes to be equated with 'full beneficial, or absolute, ownership'. Indeed, a proprietary relationship can have the quality of relativity".[168] It is because of this that:[169]

> … the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

The same is true of a thief,[170] as well as of, among other things, rights in wild animals.[171] In all these cases, the common law has accepted that the individuals concerned have a limited proprietary right, whereas according to the rights on rights frameworks, their rights would not be "truly proprietary". This is because property, for the common law, has "an almost infinitely gradable quality"[172] and it is therefore unsurprising that the courts have long explained the beneficiary's interests in the trust fund to be proprietary,[173] even describing the beneficiaries as "owners",[174] notwithstanding their lack of universal exigibility.

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167 Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at [2.1.38].

168 *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, (2020) 271 CLR 1 at [90].

169 *Armory v Delamirie* (1721) 1 Strange 505, 93 ER 664 (KB).

170 *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381.

171 *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2020] EWCA Civ 578; and William Blackstone *Commentaries on the Laws of England in Four Books* (JB Lippincott Co, Philadelphia, 1893) vol 2 at 389–394.

172 Kevin Gray and Susan Francis Gray "The Idea of Property in Land" in Susan Bright and John Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press, Oxford, 1998) 15 at 16.

173 *Sinclair v Brougham* [1914] AC 398 (HL) at 442; *Grey v Inland Revenue Commissioners* [1958] Ch 690 (CA) at 707–708; and *Ayerst v C&K (Construction) Ltd*, above n 14, at 177–178.

174 *Tagore v Tagore*, above n 15; and *Directors of the Shropshire Union Railways and Canal Co v The Queen* [1875] LR 7 HL 496 at 511.

On one level, this is merely a problem of authority for the rights on rights frameworks: it merely means that their view cannot be reconciled with the law as it is currently stated. However, behind it lies a deeper problem: why is it necessary for rights to be everywhere and always enforceable against third parties in order for them to amount to proprietary rights? In other words, why is the Roman or absolutist understanding of property the correct understanding? This point is not, as far as the author can tell, addressed by the rights on rights frameworks but merely asserted without argument.[175] Similarly, no attempt is made to demonstrate that common law systems themselves have adopted this framework, or that they should do so. The fact that none of these questions have been addressed by the rights on rights theories speaks to a deeper malaise which underlies them, namely that they are "abstract theor[ies] which [seem] to be detached from English case law and statute law" and have been developed without "taking into account the historical development of English property law".[176]

III QUO VADIS, *NEW ZEALAND?*

It can be seen from the above that arguably the best framework, the best means of explaining trust law or making it intelligible, lies in a reformulation of the split title framework in line with the impressed obligations framework. Indeed, as argued above, they can be seen as two sides of the same coin, as long as they are properly and carefully analysed.[177] However, just as this is subject to qualification in Australia because of some of the unique distortions certain uses of the trust have caused there, there may be some reason why a different framework should be developed in New Zealand. Consequently, a question remains as to whether the law in New Zealand has departed in some way from the general position such that a new framework is required to explain the law. Given the recent statutory reform via the Trusts Act 2019, I will take as my starting point the work of the Law Commission which led to the Act, as well as the Act itself.

Turning first to its preferred approach paper, the Law Commission appeared to cast doubt on the appropriateness of the split title framework. It noted that:[178]

> Most submitters considered that the title split concept no longer accurately portrays the trust, but some, including the NZLS, did consider that this was an important element of what makes a trust a trust. It may be possible to include the flavour of this understanding of the trust, without stating that beneficiaries have the beneficial ownership.

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175 Commenting on this point is Penner, above n 37, at 489.

176 Zaccaria, above n 164, at 478.

177 See further Palmer, above n 125; and Rickett, above n 29.

178 Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [2.15].

However, this had changed by the time of the final report, with numerous references to the split title framework throughout, including the statement that:[179]

> There is currently a concern that the law lacks a means of addressing arrangements purporting to be trusts but which lack the fundamental elements of a trust, such as the intention to create a trust, the duties of a trustee, and any separation of beneficial and legal ownership.

Similarly, the Law Commission explained that "there will not be a valid trust if the sole trustee is also the sole beneficiary, because legal and beneficial ownership will exist in the same person",[180] and noted that "the core characteristics of trusts" included "the trustee's legal ownership of trust property [and] the proprietary effect of trusts".[181]

It is also notable that the Trusts Act was, at least in part, a response to concerns that the trust form was being abused, or at least misused, with many trustees unaware of their duties and a general lack of understanding of the non-negotiable aspects of valid trusts.[182] The Law Commission therefore intended that the Trusts Act "uphol[d] the trust as a robust institution with core mandatory obligations" and noted that "during the consultation period we have been somewhat alarmed by general misconceptions as to what might be permissible as a 'trust'".[183] In addition, and relevantly for present purposes, the Law Commission noted that:[184]

> … it is essential that New Zealand trust law be largely consistent with overseas trust law, in particular the trust law of England and Wales, Australia, Canada and other common law countries to which New Zealand often compares its law.

All of this tends to suggest that the Law Commission did not view New Zealand as requiring a different framework for its trust law than that of other jurisdictions, and where there were issues with New Zealand practice through abuse of the trust form, intended to bring New Zealand generally into line with overseas practice.

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179 Te Aka Matua o te Ture | Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [4.13].

180 At [8.8], n 220.

181 At 92.

182 See for example the discussion in Jessica Palmer "The Trusts Law Legislation Project in New Zealand" in Ying Khai Liew and Ying-Chieh Wu (eds) *Asia-Pacific Trusts Law, Volume 2: Adaptation in Context* (Hart Publishing, Oxford, 2022) 241. See also Bill Patterson "Disclosure of Trust Information and Current Issues" (paper presented to New Zealand Law Society Trusts Conference – 2021 A Trust Odyssey, 2021).

183 Te Aka Matua o te Ture | Law Commission, above n 179, at [2.25].

184 At [2.23].

Ultimately, the Trusts Act 2019, probably wisely given the controversy over it, does not explicitly take any position on the nature of the trust, or of the beneficiary's interest.[185] However, several of its sections arguably lean towards the split title framework. Thus, it provides that a person cannot be both sole trustee and sole beneficiary,[186] codifies the rule in *Saunders v Vautier* in s 121,[187] and even expands it by providing in s 123 that where a beneficiary has a fixed share they are absolutely entitled to, and "the transfer is not detrimental to the interests of the other beneficiaries", it must be transferred to them. It likewise provides in s 122 that the beneficiaries can, with unanimous consent, agree to vary or resettle the trust. Arguably, read together, these sections strongly imply that the beneficiaries can do these things because, collectively, they own the trust fund. On the other hand, s 125 permits the court to waive the requirement of consent with regard to termination, variation or resettlement of the trust, which could be taken as suggesting that the beneficiaries do not so own the fund. However, the prohibition against doing so where it "would … reduce or remove any vested interest in the trust property"[188] suggests that beneficiaries with such interests must be taken as having proprietary rights. The point is illustrated by the Law Commission's statement on its draft of this provision that:[189]

> Overriding the views of a beneficiary in this situation would not be consistent with the underlying principle in *Saunders v Vautier*. Those with the right of enjoyment in the property should be able to dictate the manner of enjoyment. Where a beneficiary with a fixed or indefeasible interest refuses to agree to a variation, overriding his or her refusal in a manner that removes or reduces that interest arguably amounts to an expropriation of property.

The New Zealand courts have also adopted the English approach to tracing. Thus in *Enright v Newton*, the Court of Appeal stated that:[190]

> The principle discussed and applied in *Foskett v McKeown* has been acknowledged (we think correctly) as part of New Zealand law … We therefore summarise the position as follows. Where misapplied trust money is traced into the hands of a third party who is not a bona fide purchaser for value without notice, the equitable owner of the money is entitled to the return of the property (where a new asset has been purchased entirely with trust money) or to the proportion of the property that the value of its equitable interest bears to the whole (in the case of mixed substitution). Given that this response is one occurring

185 Geoff McLay "How to read New Zealand's new Trusts Act 2019" (2020) 13 J Eq 325 at 336.

186 Trusts Act 2019, s 14.

187 Colette MacKenzie and Emma Richards *Working with Trusts* (online ed, Thomson Reuters) at [4.2.01]. See generally Te Aka Matua o te Ture | Law Commission, above n 179, at 37–38.

188 Trusts Act, s 125(4).

189 Te Aka Matua o te Ture | Law Commission, above n 179, at [10.15].

190 *Enright v Newton* [2020] NZCA 529, [2021] 2 NZLR 412 at [139].

> by operation of the principles of equity, it is not a matter for the Judge's discretion but for the claimant to elect.

Justice Goddard has also expounded this view extrajudicially, noting that:[191]

> The ability of a claimant to assert property rights in the traceable proceeds of an asset in which they had a beneficial interest is part of the law of property, not the law of unjust enrichment. The claimant succeeds by virtue of their own title, not to reverse unjust enrichment.

He then goes on to note that "these property rights are determined by fixed rules and settled principles. They are not discretionary".[192] The result, it seems to me, must be that the courts should be taken as also having adopted the framework which underlies the *Foskett* approach to tracing.

However, it must be conceded that there is conflicting authority as regards which framework correctly explains New Zealand trust law. Thus, in *Smith v Hugh Watt Society*, Randerson J in the High Court stated that:[193]

> … contrary to the submission by the plaintiffs, that a trustee has all the rights of an absolute owner but subject to the right of the beneficiary to compel the trustee to hold and use those rights in accordance with the terms of the trust. Although the rights of the beneficiary constitute an equitable estate in the land, that interest, as the authorities have stated "is not carved out of a legal estate but impressed upon it".

On the other hand, there are several cases which adopt the split title framework. Thus, in *Priest v Ross Asset Management*, Clifford J states that:[194]

> *Clayton's Case* tracing is not a requirement for the acquisition of legal or equitable title where, in the name of a bare trustee, a beneficiary acquires assets. Legal title vests in the bare trustee and beneficial title vests in the beneficiary at the time the assets are acquired.

Similarly, the High Court has repeatedly applied the statement in *Hardoon v Belilios* that:[195]

> All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant.

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191 David Goddard "Trusts Update: Beneficiaries' Proprietary Remedies" [2022] NZ L Rev 81 at 85.

192 At 85.

193 *Smith v Hugh Watt Society Inc* [2004] 1 NZLR 537 (HC) at [52].

194 *Priest v Ross Asset Management Ltd (in liq)* [2016] NZHC 1803 at [150].

195 *Hardoon v Belilios*, above n 16, at 123. See *Taitapu Gold Estates Ltd v Prouse* [1916] NZLR 825 (SC) at 833; *Public Trustee v Guardian, Trust & Executors Co of New Zealand Ltd* [1939] NZLR 613 (CA) at 679; and *Levin v Ikiua* HC Auckland CIV-2007-404-6810, 24 July 2009 at [110].

Nevertheless, the issue can be resolved, as I have done above, by noting that the two approaches, correctly understood, are two sides of the same coin.

It is also true that the split title framework faces challenges in explaining discretionary trusts,[196] which are especially popular in New Zealand, because it is generally accepted that they do not have a proprietary interest.[197] Thus, as seen above, the Court of Appeal in *Hunt v Muollo* held that a discretionary beneficiary has "no more than a … hope … that the trustee's discretion may be exercised in the beneficiary's favour", so they have no "interest, legal or equitable, in the assets of the trust".[198]

However, the law has also long accepted that discretionary beneficiaries can collectively be considered owners of the trust property, so that they can call for its conveyance under *Saunders v Vautier*,[199] and can also trace wrongfully dissipated property into the hands of third parties,[200] as well as bring actions seeking reconstitution of the trust fund.[201] The result is that discretionary beneficiaries' rights could well be considered proprietary. Thus, Judge Paul Matthews stated in *Lewis v Tamplin* that:[202]

> A negative right of one person over the asset of another person, good against at least some third parties, is by definition a proprietary right. Judged in this way, a discretionary object does have a proprietary right.

It might therefore be more accurate to say that whilst discretionary beneficiaries cannot individually be considered beneficial owners of the trust property, they can be so considered as a group,[203] and, indeed, where an individual discretionary beneficiary's interest is coupled with significant powers, they may themselves be treated by equity as the owner of the fund.[204] Equally, even absent such powers, it may be better to regard them, like a purchaser under a contract for the sale of land prior to the point when they are entitled to conveyance, as individually having "a lesser

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196 Jessica Palmer and Charles Rickett "The revolution and legacy of the discretionary trust" (2017) 11 J Eq 7.

197 *Whaley v Whaley*, above n 8, at [112]–[113]; Paul Matthews "The New Trust: Obligations without Rights?" in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) 1 at 1–2; *Lewin on Trusts*, above n 12, vol 1 at [1-061]; and Palmer and Rickett, above n 196.

198 *Hunt v Muollo*, above n 5, at [11].

199 *Re Smith*, above n 9; *Re Nelson*, above n 9; *Re Beckett's Settlement*, above n 9, at 285; and *Lewin on Trusts*, above n 12, vol 1 at [22-022].

200 *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm); and *Lewin on Trusts*, above n 12, vol 2 at [41-073].

201 *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JLR 1.

202 *Lewis v Tamplin* [2018] EWHC 777 (Ch) at [39]. See also, in the Australian context, *Kennon v Spry*, above n 9.

203 See the discussion in Dagan and Samet, above n 25, at 725–726.

204 See for example *Fonu*, above n 55; and *Clayton v Clayton*, above n 89.

equitable interest than ownership".[205] This would account for their ability to exercise proprietary remedies whilst respecting the limited nature of their interest in the trust fund, and this in turn would explain the Court's ability under s 125 to waive the need for their consent to variation or termination of the trust if certain conditions are met.[206] The matter is not, therefore, as clear cut as it is often made out to be and I would suggest that a greater degree of nuance is required than simply saying that they have no proprietary interest, in any sense, in the trust fund.

IV CONCLUSION

The correct framework to understand at least the express fixed trust is that of split title, reconciled with the impressed obligations approach. This is because it is very difficult to explain fundamental rules of trust law, such as the rule in *Saunders v Vautier* or tracing, except on the basis of the reconciled split title and impressed obligations approach. This is so simply as a matter of authority, given that the courts have been clear that they see beneficiaries who are absolutely entitled, or collectively when discretionary, as the owners of the fund, and have likewise been clear that tracing is a matter of property, not unjust enrichment or discretion. It is also so because alternative explanations – whether an extreme impressed obligations approach, which for example denies the relevance of *Saunders v Vautier* or tracing as aspects of the beneficiaries' proprietary rights, or the rights on rights approach, which does the same but in different ways – simply cannot explain how the law works. The rights on rights approach fundamentally misconceives how tracing works, and cannot explain the rule in *Saunders v Vautier*. The impressed obligations approach likewise struggles to explain the operation of either doctrine. Indeed, the Australian courts appear to have reverted to the English *Foskett* approach which is predicated on split title.

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205 *Stern v McArthur* (1988) 165 CLR 489 at 523 per Deane and Dawson JJ.

206 Thus, the High Court waived the need for consent from beneficiaries "whose interests were remote and, essentially, redundant": *Re Goubitz* [2024] NZHC 976 at [29]; and similarly, where "there [was] no real possibility that [the discretionary beneficiary] will benefit by the exercise of the trustee's discretion": *Re Jury* [2022] NZHC 568 at [34]. The power cannot be used to waive consent where there is agreement among all beneficiaries that the trust should be terminated but disagreement as to how the assets should be divided: *Sherwin v JKA Holdings Ltd* [2024] NZHC 920 at [55]–[57].