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Express Trusts, Private Law Theory and Legal Concepts

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Abstract: The paper explores Peter Jaffey's views on the trust and fusion and some aspects of his wider private law theory which impact on his view on trusts law. It shows that, although he is correct that the trust involves both proprietary and personal rights, in the end his theory is ahistorical and unDworkinian, despite his acceptance of a view of law based on Dworkin. His theory is also based on implausible views of the role of equity post-Judicature Acts, the ownership of value and does not adequately fit accepted views on how trusts law works.

In a paper some 10 years ago, I examined and critiqued Peter Jaffey's private law theory and his application of the theory to the law of restitution.[1] Jaffey's theory, however, has some profound effects on the law of trusts and that of tracing as well.[2] Indeed these effects are linked to his views on unjust enrichment in that he rejects altogether the idea of a law or principle of unjust enrichment in favour of many (but not all) such claims being property claims enforced via a trust. Other claims that might be placed into unjust enrichment are reclassified by Jaffey as contractual and the division between contractual and proprietary is also important to Jaffey's treatment of trusts. Jaffey argues that both aspects – the property aspect and the contractual or obligationary aspect - are necessary to explain the trust. He denies that the trust is a hybrid and keeps these two dimensions very separate.[3] Jaffey argues, "The trust has two separate parts that

This paper has had a long gestation; various versions were presented at a staff seminar at IDEA-CETL in Leeds in February 2018, an invited seminar at Singapore Management University in April 2018, the Property and Trusts section of the SLS Conference, Queen Mary University of London in September 2018. My thanks to the anonymous referee and also to Peter Jaffey for his comments on different versions. At no point did he succeed in changing my mind. Duncan Sheehan (MA BCL DPhil (Oxon)) is Professor of Business Law at the University of Leeds with research interests in trusts, personal property, unjust enrichment and private law theory. d.k.sheehan@leeds.ac.uk

[1] Duncan Sheehan, "The Property Principle and the Structure of Unjust Enrichment" [2011] RLR 138

[2] See also Kit Barker, "Review Article: The Nature and Scope of Restitution" [2001] RLR 232 at 237

[3] Peter Jaffey, "Explaining the Trust" (2015) 131:3 LQR 377 at 393-395

operate together without mixing and the beneficiary's equitable interest consists of distinct personal and property rights…"[4]

This paper examines Jaffey's theory as it applies to the trust and the law of tracing and also his views on the substantive fusion of law and equity. There has been increased interest in these fundamental questions about the nature of trusts and fusion recently. If correct, however, Jaffey's theory has some profound and radical implications for the nature of the trust and indeed the nature of ownership and so it is timely to take a look at his views. The article takes two main lines of attack. The first is that Jaffey's theory of the trust does not fit English law. Jaffey's division of trusts into a proprietary and contractual aspect, while attractive in some ways, does not appropriately characterise the proprietary rights that the beneficiary does have. In particular Jaffey mischaracterises the interest of the beneficiary as an interest in "value."

The second line of attack is on Jaffey's wider private law theory and some of his wider commitments which force him to implausible positions on the trust. The first commitment is to remedial consistency. The requirement of remedial consistency is that the remedy which a court gives must reflect and secure the content of the primary relation between the parties. Jaffey's second commitment is to the idea that unconscionability has relevance only to a historical rather than a principled account of the law of trusts,[5] and that a historical account is different from, and cannot help with, a principled account. In its second line of attack, this paper challenges both commitments. The principle of remedial consistency is flawed in theory, but also fails to represent the truth about English trusts law in that the account of administration in common form is a personal remedy dependent on the invalidity of transfers – not on a proven wrong of breach of trust. If the principle of remedial consistency is, however, flawed it also suggests that the need to keep the two sides or dimensions of the trust separate is illusory.

[4] *Ibid* at 394
[5] *Ibid* at 377-378

Indeed, historically it seems they were not kept separate and so the principle is ahistorical. Using it to justify the two dimensions of the trust fails take the development of the trust into account and the paper uses one account of the trust's development – Lionel Smith's – to demonstrate that the trust is a classic example of English law (or equity's) doing precisely what Jaffey says is impermissible – developing a proprietary remedy from a personal right. If so, this suggests deep problems with Jaffey's commitment to the idea that there is a hard distinction between principled and historical accounts. This is supported theoretically. Jaffey has in the past accepted a version of Dworkin[6] and yet his theory seems to run counter to it. For Dworkin there is no hard distinction between principle and history. Explaining the law involves looking at fit with prior decisions as well as an examination of their justification with an eye to future decision-makers.[7] It is both forward and backward looking.[8] Jaffey, however, in insisting on the irrelevance of history, posits a static system that cannot account for the development of concepts over time. This in turn suggests problems with a third commitment of Jaffey's, which I challenge more indirectly, that each area of the law must be a justificatory category.[9] By justificatory category, Jaffey means a category comprising claims arising out of a unique normative rationale, so each category has a rationale applicable only to that category.[10]

(1) An Outline of Jaffey's Trusts Theory

In this section of the essay, I clear the ground with a brief summary of Jaffey's position. The second section critiques some specific aspects of his theory of trusts. Jaffey argues that neither a pure proprietary nor a purely obligational theory can succeed. He takes Ben McFarlane's

[6] Peter Jaffey, "Authority in the Common Law" (2011) 36 Australian Journal of Legal Philosophy 1; Peter Jaffey, "Two Ways to Understand the Common Law" (2017) 8:3 Jurisprudence 435
[7] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 227-228
[8] Duncan Sheehan and TT Arvind, "Private Law Taxonomy: Reframing the Debate" (2015) 35:3 LS 480
[9] Peter Jaffey, £Classification and Unjust Enrichment" (2004) 67:6 MLR 1012 at 1022
[10] *Ibid* at 1014

view to be an example of the obligational theory. McFarlane argues that the trust is made of a right against a right – ie a right that the beneficiary has against the trustee that he use his legal (or equitable) rights in a particular way.[11] Jaffey argues that this cannot explain the trust. This is because it is contrary to the principle of remedial consistency,[12] sometimes referred to as the monist principle. The principle of remedial consistency is simply put. A remedy can only be justified by reference to its match with the primary relation between the parties.[13] A proprietary remedy effective against third parties cannot therefore be justified by reference to a personal obligation between the trustee and the beneficiary, nor can the priority over the trustee's creditors in bankruptcy.[14] A pure proprietary theory also fails. It fails because it cannot explain the demonstrable fact that the trustee has an obligation to look after and distribute the trust property according to the trust.[15] For Jaffey the trust's two dimensions are therefore

1) The allocation of property rights
2) Undertaking to distribute and hold the rights according to that allocation

The idea of the two dimensions of the trust therefore exposes different possibilities. One such is a trust in the contractual aspect only – this might reflect the Civilian or mixed jurisdiction view of the trust.[16] Under such a view, third party recipients could only be liable on the basis of complicity in the trustee's wrongdoing and there would be no protection against the trustee's creditors.[17]

The suggestion that the trust is made up of a complex of property and personal rights is not new. Nolan has argued that a trust beneficiary has a negative exclusionary right, which is the

[11] Ben McFarlane, *The Structure of Property Law* (Hart 2008) at 15
[12] Jaffey. *supra* note 3 at 383
[13] Peter Jaffey, *Private Law and Property Claims* (Hart 2007) at 40
[14] *Ibid* at 134-135
[15] Jaffey, *supra* note 3 at 393
[16] *Ibid* at 394
[17] In fact in Scots and South African law there is protection against trustee creditors, and the beneficiary can reach third parties either through tracing and constructive trusts (Scotland) or the condictio indebiti (South Africa). See *Commonwealth Oil & Gas Co Ltd v Baxter* 2010 SC 156 and Daniel Visser, *Unjustified Enrichment* (Juta 2008) at 334-336

common proprietary right linking examples of equitable property and a set of positive rights which can be put together as needed by the circumstances.[18] Jaffey's distinctive allocation of rights into two dimensions, however, emerges from the power of the settlor to grant property rights in the asset.[19] That power explains how the property rights are divided up. For Jaffey, the trustee has the right of control over the property and the beneficiary has the benefit of it. Control rights are at the core of what Jaffey in earlier writing called dispositive title.[20] The trustee is able to dispose of the asset without reference to the beneficiary. The allocation of benefit (or some part of it) to the beneficiary lies behind the trustees' having to hold the proceeds on trust and Jaffey describes property rights as being rights to the benefit or some part of the benefit of property.[21] The allocation does not explain the trustee's obligation to distribute and hold the rights according to that allocation. That is explicable by reference to the trustee's agreement or consent. All that is implied by the property dimension therefore is that there is a power in the beneficiary to lay claim to the assets or their surviving value in the hands of the trustee or third parties and consequent immunity from third party creditors' rights held within the trust. The reference to value is important; the right to trace into exchange products is inherent in ownership because the beneficiary owns the value of the assets, inherent in whatever the proceeds might be.[22] Jaffey therefore splits legal and equitable ownership but eschews the "dual" or "split" ownership approach[23] where the beneficiary owns in equity and the trustee at law. That view where both jurisdictions claim their man is the owner and equity prevails,[24]

[18] Richard Nolan, "Equitable Property" (2006) 122:2 LQR 232 at 237-238; see also Ying Khai Liew and Charles Mitchell, "The Creation of Express Trusts" (2017) 7:2 Journal of Equity 133 at 134
[19] Jaffey, *supra* note 3 at 388-389
[20] Peter Jaffey, *The Nature and Scope of Restitution* (Hart 2000) at 318
[21] Jaffey, *supra* note 3 at 395; see also Peter Jaffey, "Private Property and Intangibles" in Martin Dixon and Martin George, eds, *Issues in Modern Land and Property Law: Essays in Memory of Mark Thompson* (Hart 2021) forthcoming
[22] Jaffey, *supra* note 3 at 390
[23] *Ibid* at 386
[24] Senior Courts Act 1981, s 49

making the equitable owner the true owner is false.[25] It also seems a straw man because nobody really argues for that simplistic view. Rather it seems better to see the trust as being where the trustee has a set of rights over the property but has duties regarding the asset's management. Put differently the trustee has a set of legal powers regarding the assets, but duties as to how they are to be exercised.[26]

I examine the implications of the split in title later, but it is entirely separate from the contractual or obligational aspect of the trust. Agreement is at the heart of Jaffey's views on how contract is justified. Importantly for Jaffey it is not actually an agreement to do something that matters in a contract. The agreement consists of assumptions of responsibility for the reliance of the other party on his promise.[27] There are real issues with Jaffey's explanation of contractual remedies, which I have explored in some depth elsewhere.[28] Jaffey is not saying that the trust agreement is a contract in its technical sense, however. He expressly accepts that the rules may depend on other considerations, but the trustee cannot be subject to an obligation to look after and distribute the trust property other than by his agreement.[29] A trustee plainly must consent to act to be subject to elaborate obligations such as to invest the trust assets.[30]

(2) Specific Critiques of Jaffey's Trusts Theory

This section is divided into two subsections, which relate to specific aspects of Jaffey's trusts theory. In the first subsection I examine the rights that a trustee has to control or manage the assets and to sue for interference with those assets, the obligations he has vis-à-vis the

[25] *Akers v Samba Financial Group Ltd* [2017] UKSC 6 at [50-51], but see *Ayerst v C&K Construction Ltd* [1976] AC 167 at 177
[26] See Daniel Clarry, "Fiduciary Ownership and Trusts in a Comparative Perspective" (2014) 63:4 ICLQ 901; Frederic W Maitland, *Equity and the Forms of Action* (Cambridge University Press 1910) at 17
[27] Jaffey, *supra* note 20 at 34
[28] Sheehan, *supra* note 1 at 141-143
[29] Jaffey, *supra* note 3 at 393-394
[30] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705; Liew and Mitchell *supra* note 18 at 144-146

beneficiary, how they arise and critically also the remedies available in the case of misapplication of the trust assets. I compare those remedies with the remedies available in knowing receipt. In the second subsection I examine the misrepresentation of value in Jaffey's theory and argue it is confusing and requires a new, completely unrecognised, proprietary right to be developed.

(A) Control Title and Beneficial Title

This subsection is divided into two. In the first part I examine the control rights that the trustee has. Jaffey's analysis here has the merit of reflecting the rights that the legal owner has to control the assets and to sue for interference, rights denied to the beneficiary who cannot sue a third party-converter. In the second section, however, I show that Jaffey's assertion that the agreement of the trustee compels him to hold and distribute the assets is questionable. Knowledge is key, but in the context of the express trust, Jaffey omits any consideration of this. It is also difficult to see how the beneficiary can have property rights in the assets (or their proceeds) when the claim that they be held for him exists in a different contractual dimension. Nolan, for instance, has commented that the duality of title and the negative exclusionary right in the beneficiary is backed up by the action to recover assets and restore the integrity of a fund depleted without authorisation.[31]

[31] Nolan *supra* note 18 at 255, although Swadling describes the ability to claim the assets – a power to obtain a right - as the antithesis of a trust. William Swadling, "Unjust Enrichment: Value, Rights and Trusts" (2021) 137:1 LQR 56 at 62

(i) Legal Owner as Having Control Rights

Control or managements rights are at the heart of Jaffey's view of the trustee's legal title. [32] Consequently, the trustee has the exclusive right to sue for interference with the asset. That latter point is supported by case law such as *MCC Proceeds Ltd v Lehman Bros,*[33] and this aspect of Jaffey's theory poses few issues. Yet – parenthetically - there is nothing particularly "trust-sy" about control rights. The trustee has these control rights because (in the usual case at least) he has legal title and legal title brings with it a number of powers and incidents, including the ability to possess, use, dispose of the asset etc.[34] The important thing is what he can (or not) do with these powers and how can he exercise them.

This is different from the equitable owner's rights. Returning to *MCC Proceeds*, the Court of Appeal said conversion was unavailable to a trust beneficiary, who does not have the necessary underlying right to possession. In *International Factors v Rodriguez*[35] Sir David Cairns appears to suggest that fusion meant equitable rights could give an entitlement to sue in conversion. However, fusion does not change our substantive rights;[36] it simply compels symmetry between actions protecting similar things. In fact a conversion action was allowed on the basis the claimants had a right to have possession of the cheques in question. Despite suggestions in *Shell (UK) Ltd v Total (UK) Ltd*[37] that a trust beneficiary should be able to sue in negligence, conversion protects possession and since there is no such thing as equitable possession trust beneficiaries should not be able to sue directly even if they can procedurally

[32] Jaffey. *supra* note 20 at 288-289
[33] [1998] 4 All ER 675; see Kit Barker, "Equitable Title and Common Law Conversion: The Limits of the Fusionist Ideal" [1998] RLR 150
[34] For an account of these see Tony Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 108
[35] [1979] QB 351
[36] In this context see Andrew Tettenborn, "Trust Property and Conversion: An Equitable Confusion" [1996] CLJ 36 at 38
[37] [2010] EWCA Civ 180, [2011] QB 86

take over the trustees' action if he refuses to sue.[38] The trustee also has the exclusive right to deal with the dispositive title and transfer it to a third party. If that transfer is unauthorised, the equitable title is not overreached and the transferee acquires legal, but not equitable title, unless he is a bona fide purchaser.[39] Absent bona fide purchase the beneficiary has the right to reclaim the asset for the trust, which does not necessarily mean that the third party holds directly on trust for the beneficiary.[40]

(ii) Knowledge, Consent, Breach of Trust and Knowing Receipt

It is in the relationship between trustee and beneficiary that the problems really begin with Jaffey's theory. A totally ignorant "trustee" has no obligations. That does not mean that the beneficiary has no rights. He does. He has equitable proprietary rights and therefore immunity to the claims of third-party creditors. Jaffey would probably say there is no trust – or a trust only in the property dimension. To some extent this is semantics.[41] What matters is that the asset can be claimed in preference to creditors. The beneficiary, assuming he knows of the attempt to settle a trust, can simply inform the trustee of its existence. If he does so, the trustee will be liable to a claim for substitutive equitable compensation or, in more traditional terms, an account of administration in common form if he makes unauthorised disbursements of trust funds.[42] This ability in the beneficiary to inform the trustee is not a legal power in any Hohfeldian sense; it is a purely factual ability. If the "trustee" knows, he becomes liable and this is sometimes expressed in terms of the trustee's conscience being affected.[43] It is pretty

[38] Duncan Sheehan, *The Principles of Personal Property Law* (2d edn Hart 2017) at 193-194
[39] *Akers v Samba Financial Group Ltd* [2017] UKSC 6 at [52-53]; *Independent Trustee Services Ltd v GP Noble Services Ltd* [2013] Ch 91
[40] *Akers v Samba Financial Group Ltd* [2017] UKSC 6 at [46]
[41] Liew and Mitchell, *supra* note 18 at 143
[42] See for details of the claim Duncan Sheehan, "Equitable Remedies for Breach of Trust" in Roger Halson & David Campbell, eds, *Research Handbook on Remedies* (Edward Elgar 2019) 146
[43] *Akers v Samba Financial Group Ltd* [2017] UKSC 6, at [89]; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; see also *Independent Trustee Services Ltd v GP Noble Services Ltd* [2013] Ch 91 at 122

much impossible to claim in priority to creditors without telling the "trustee" or his trustee in bankruptcy, so in practice any time a proprietary claim is made for priority it will trigger the trustee's obligation to keep the assets safe. For any further liability, however, such as for failing to invest the assets, the trustee must consent to the whole package of trust duties involved in the given trust.[44] The requirement for consent, which is frequently framed in a contract, makes it not completely inapt to talk of a contractual (or certainly consensual) dimension to trust law and investment obligations (say) are definitely personal. It is plainly impossible to sue a third party because of the negligent investment made by a trustee.[45]

There is, however, no need to prove a breach of trust to obtain an account in common form.[46] All the beneficiary needs to do is request an account of the stewardship of the property. The language of "account" is entirely appropriate in the colloquial sense. The beneficiary asks for an account in a prescribed form of how the trust assets have been used. The beneficiary may then object to a given entry, and an ancillary order to pay any amount due can be made.[47] If assets are disbursed without authority, the account is falsified.[48] Since the law pretends the disbursement never took place the original assets from the trust fund must still be in the trust fund and any expenditure is treated as if it were the trustee's own; if specific restoration is impossible a money obligation is substituted.[49] This is a purely personal remedy,[50] but as a doctrinal matter is bound inextricably to Jaffey's property dimension. Jaffey repeatedly makes claims along these lines,

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[44] *Jones v Higgins* (1866) LR 2 Eq 538
[45] Sheehan, *supra* note 38 at 21
[46] *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681; *Partington v Reynolds* (1858) 4 Drew 253, 62 ER 98; *Angullia v Estates & Trusts (1927) Ltd* [1938] AC 621 at 637-638
[47] Robert Chambers, "Liability" in Peter Birks &Arianna Pretto, eds, *Breach of Trust* (Hart 2002) 1 at 8; Sheehan *supra* note 42 at 147
[48] *Pittt v Cholmondeley* (1754) 2 Ves Sen 565, 28 ER 360
[49] *Agricultural Land Management Ltd v Jackson (no 2)* [2014] WASC 102, [335-336]; James Penner, "Duty and Liability in Respect of Funds" in John Lowry & Loukas Mistelis, eds, *Commercial Law: Perspectives and Practice* (Sweet and Maxwell 2006) 212 at 216-217
[50] *Jackson v Dickinson* [1903] 1 Ch 947; *Wright v Morgan* [1923] AC 788 at 799; *Head v Gould* [1898] 2 Ch 250

> "Invalidity relates to the transfer of property in the property dimension and breach of trust to breach of the trustee's duty in the contract dimension. As a matter of remedial consistency the breach of trust generates a claim for compensation against the trustee… and the invalidity of the transfer generates an equitable proprietary claim against the recipient."[51]

Yet this is wrong. There is no need to prove a breach of trust, or to put it in different terms there is no need to prove the breach of a duty. The order against the trustee to pay money is not a secondary obligation to pay compensation, but enforcement of the trustees' custodianship and amounts to a kind of substitute performance[52] (subject to limitations on the trust's needing to be continuing and on foot). This is an aspect of the performance interest in trusts – that the trust be performed and that the court be able to step in and perform it if the trustee will not or cannot.[53] Trusts law therefore focuses, in this context, on restoring the fund to its duly administered state – not on reversing harm.[54] As Ho and Nolan point out this is significantly different from the aim of contract damages[55] (or for that matter tort damages) and this is reflected in the fact that causation is generally irrelevant to a common account.[56] Two points come out. First invalidity of the transfer (which is in the property dimension) triggers the remedy against the trustee. Secondly, the remedy is personal, when presumably remedial consistency demands it be proprietary. It might be possible for Jaffey to remodel his views. He

[51] Jaffey, *supra* note 3 at 395
[52] Lionel Smith, "Measurement of Compensation Claims against Trustees and Fiduciaries" in Elise Bant and Matthew Harding, eds, *Exploring Private Law* (Cambridge University Press 2010) 363 at 372-373; for a discussion of how quantum is calculated see Sheehan *supra* note 42 at 158-159. See also *Target Holdings v Redferns* [1996] AC 421; *AIB Group v Mark Redler & Co* [2014] UKSC 58, [2015] AC 1503; James Edelman & Steven Elliott, "Money Remedies against Trustees" (2004) 18 TLI 116 at 116-118
[53] See Lusina Ho & Richard Nolan, "The Performance Interest in Trusts" (2020) 136 LQR 402
[54] *Ibid* at 412-413; plainly there is a lot more to the performance interest than this. It also explains eg the strictness of the three certainties at 409-410
[55] *Ibid* at 419-420
[56] *Magnus v Queensland National Bank* (1888) 37 Ch D 466; *Cocker v Quayle* (1830) 1 Russ & My 535, 39 ER 206; *British Elevator Company v Bank of British North America* [1919] AC 658.

could first argue for a change in the law to insist on consent not merely knowledge and for a proven breach of duty. He might note that it is not unknown to talk of a performance interest in contract[57] and seek a greater role for causation in the assessment of equitable compensation. Jaffey, however, recognises the lack of need for full agreement in the context of knowing receipt where he refers to a "tort" or "negligence" dimension of trust law.[58] An alternative open to Jaffey might therefore be to accept a "tort" dimension to express trusts as well.

Currently he does not accept this. Knowing receipt is best seen as a wrong – and one parasitic on the existence of a proprietary claim - and is not, say, an unjust enrichment claim.[59] The precise degree of knowledge needed remains controversial, but so long as the recipient does not have notice for the purposes of any bona fide purchase defence he may well be a knowing recipient.[60] Innocent donees are not knowing recipients, but purchasers for value with sufficient notice are subject to liability and this is a very old rule.[61] Knowledge is the critical point; the beneficiary may enforce his interests against party A, who knew of the breach, even after it has been transferred (and re-transferred back) to a bona fide purchaser.[62] One immediate objection is that Jaffey's argument is internally inconsistent, which is why the alternative remodelling mentioned earlier of recognising a "tort" dimension in express trusts may be the better option for Jaffey. Why, using Jaffey's terms, if a (knowing, but un-consenting) recipient, on becoming aware of the invalidity of a transfer, becomes subject to a "tort" duty should the knowing, but un-consenting, trustee not also be subject to a "tort" duty? The second objection to Jaffey's thesis is that in fact neither is subject to a tort duty. From a remedial perspective the

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[57] See *White & Carter Ltd v MacGregor* [1962] AC 413
[58] Jaffey, *supra* note 3 at 396-398
[59] See Duncan Sheehan, "Disentangling Equitable Personal Liability for Receipt and Assistance" [2008] RLR 41; *Byers v Samba Financial Group Ltd* [2021] EWHC 60 at [46]
[60] *Armstrong v Winnington Networks Ltd* [2012] EWHC 10; *Credit Agricole Corporation and Investment Bank v Papadimitrou* [2015] UKPC 13
[61] *Walley v Gaudy* (1687) 1 Vern 485, 23 ER 609; precisely how much notice/knowledge is required for knowing receipt as opposed to proprietary liability is still unclear; it may be more than mere notice. *Arthur v AG Turks and Caicos Islands* [2012] UKPC 30
[62] *Independent Trustee Services Ltd v GP Noble Services Ltd* [2013] Ch 91 at 114-115

express trustee and knowing recipient are in the same position[63] even though the recipient is not subject to the same fiduciary or other duties to which the express trustee is subject.[64] The recipient must receive property to which the claimant was entitled and has a primary duty to restore the value of the misappropriated property because he is liable "to deal with the property as if he were a trustee".[65] This explains references to liability as a constructive trustee: liability as if the recipient were an express trustee even though he is not.[66]

Jaffey rejects the analogy with express trustees,[67] however, arguing the recipient has not undertaken to act as a trustee. He argues that there are two components of the knowing receipt action – the restitutionary claim to recover the value of the property and the compensatory claim for loss. Jaffey goes on to argue[68] that knowing receipt is the equitable analogue of conversion; conversion too, he says, is a hybrid of a property action for the return of the value transferred and a compensation action where that is impossible. It is difficult, however, to see the knowing receipt claim as a restitutionary claim. It is frequently available against third parties and personal restitionary claims cannot normally reach so far. That leaves only the compensatory aspect of knowing receipt, which is, as noted, dependent on a duty of stewardship triggered by the same event – knowledge – as that of the express trustee. It is this, as seen above, that provides the analogy with express trusts. The parasitism on another action (the proprietary claim) provides a disanalogy with conversion.[69] The tort dimension is not

[63] *Rolfe v Gregory* (1865) 1 De G J&S 576, 46 ER 1042; *Byers v Samba Financial Group Ltd* [2021] EWHC 60; Charles Mitchell and Stephen Watterson, "Remedies for Knowing Receipt" in Charles Mitchell, ed, *Constructive and Resulting Trusts* (Hart 2009) 116 at 128-138
[64] *Lonrho v Al Fayed (no 2)* [1992] 1 WLR 1 at 12, but see for a more doubtful approach Mitchell and Watterson, *supra* note 63 at 142-144
[65] *City Index v Charter Plc* [2007] 1 WLR 26 at 38; *Byers v Samba Financial Group Ltd* [2021] EWHC 60 at [46, 109-111]
[66] *Paragon Finance Ltd v DB Thackerar & Co Ltd* [1999] 1 All ER 400 at 409
[67] Jaffey, *supra* note 3 at 397
[68] Jaffey, *supra* note 13 at 205-206
[69] Sheehan, *supra* note 59 at 53

therefore, as Jaffey puts it, "the non-contractual counterpart in the remedial context of the contractual dimension in the express trust."[70]

(B) Value and Tracing

None of these criticisms are, however, fatal. They simply cannot be said to go to the heart of Jaffey's theory; although Jaffey's mischaracterisation of the performance interest in trusts as contractual comes close, he may – as I noted - be able to introduce a tort dimension to express trusts. The criticism in this section does seem fatal though. No amount of remodelling can save Jaffey's theory from failure.

Many of Jaffey's problems are caused by his insistence that abstract value can be owned. This lies behind his view that when a mistaken transfer of assets takes place, the transferor retains ownership of the abstract value even though the control of the specific asset has moved. It also lies behind his subscription to a variant of the trust fund theory. Penner also subscribes to such a theory, although, unlike Jaffey's theory, Penner's view is a pure proprietary view.[71] Penner believes that the beneficiary's interests are essentially future-oriented.[72] He argues that the beneficiary's interest is in the power of the trustee to manage the funds through investment and re-investment.[73] The beneficiary automatically obtains an interest in the proceeds, because an interest in the power to exchange simply is an interest in the fruits of its exercise.[74] This Penner describes as proprietary reasoning par excellence and reflects the beneficiaries' real interest in potential wealth,[75] and the fact that I can never have

[70] Jaffey, *supra* note 3 at 396
[71] James Penner, The (True) Nature of the Beneficiary's Interest under a Trust" (2014) 27 CJLJ 473 at 480
[72] *Ibid* at 485
[73] *Ibid* at 483
[74] *Ibid* at 497
[75] *Ibid* at 481

an asset and its value simultaneously.[76] Value – or more precisely relational value – is a means of quantifying equivalence between qualitatively heterogenous things. Value is not owned or transferred; it is realised. If I realise the exchange value of my asset, I relinquish the asset and all rights to it to the buyer.[77] Penner concludes that I do not own the value of the asset; I own the asset itself. Value, not being a separable thing itself, cannot be separately owned.

Jaffey's views can, however, only be accepted if value can be separated from the concrete asset. Abstract value must be an objective phenomenon, separate from the *value* anyone might put on it. It bears repetition therefore that according to Jaffey the trust beneficiary owns the abstract value of the fund separate from the individual assets.[78] There is no need, however, to reify the fund as an object of property.[79] The fund has no separate legal personality,[80] or legal identity. It is always the individual assets that matter. The beneficiary has an immediate overreachable interest in particular assets,[81] which on an authorised transfer are detached and reattached to the proceeds of the old asset. Limitations on the trustee's authority to deal with the specific assets tells us when, how and whether the beneficiary's rights are transferred to another asset. In fact, it makes no sense for Jaffey to say that the trustee has control interests in specific assets, but the beneficiary's interest is held in a fund, separate from the assets controlled by the trustee. If the beneficiary has a proprietary right of any sort it will be in a specific asset. A trust fund therefore only exists when a set of assets is demarcated by being taken out of the legal owner's full control.[82] The trustee's equitable obligations to the

[76] James Penner, "Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds" in Robert Chambers, James Penner & Charles Mitchell, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 306 at 314-315
[77] *Ibid* at 308-309
[78] Jaffey, *supra* note 20 at 139
[79] See Richard Nolan, "Property in a Fund" (2004) 120:1 LQR 108; see also Richard Nolan, "*Vandervell v IRC*: A Case of Overreaching" [2002] CLJ 169; Duncan Sheehan, "Property in a Fund, Tracing and Unjust Enrichment" (2010) 4:3 Journal of Equity 215
[80] But see H Hansmann and U Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73:2 New York University L Rev 434
[81] See Richard Nolan, "Property in a Fund" (2004) 120:1 LQR 108
[82] Penner, *supra* note 49 at 211

beneficiaries provide this demarcation from other assets to which he has legal title, and a breach of trust obligations can only be identified if an asset misused is identified. Indeed, a fund cannot be identified without identifying the assets within it. The individual assets are consequently the critical feature.

Jaffey's idea causes real trouble if the trust does not operate normally. Tracing comes in here. The purpose of tracing, Jaffey argues, is in essence to decide where – after an unauthorised payment - the surviving value lies.[83] Jaffey explains, "There is always a subsisting… property right, though not in a specific asset. Surviving value cannot be duplicated or multiplied, although it can be divided and distributed to different people. Its location is a matter of causation."[84] In the money context this is because of the fungibility of money. It matters not which £10 I have, only that I have £10, but Jaffey extends this to all forms of asset. Orthodox English tracing rules reject causation even in equity. *Foskett v McKeown*[85] is a classic example of a case where a tracing link was present, but no causation link. The life insurer would have paid out on the policy even had the premiums paid with misappropriated trust money been left unpaid. On Jaffey's view the life insurance beneficiaries should win as no causal connection exists between their payout and the trustee's use of misappropriated funds. A view of tracing that condemns the leading English appellate decision as wrong begins badly.

This insistence on causation also allows for a complete de-mooring of proprietary rights from specific assets with strange conceptual consequences. Jaffey argues that the basis for the law of tracing is simply that beneficial owners have a right to the exchange value of the asset.[86] This does not, however, entail any subscription to the exchange product rule or principle.[87] That rule is that if a cow (to which the claimant has an equitable proprietary claim) is exchanged

[83] Jaffey, *supra* note 20 at 296-300
[84] Jaffey, *supra* note 13 at 165
[85] [2001] 1 AC 102
[86] Jaffey, *supra* note 13 at 161
[87] *Ibid* at 159-160

for a goat the claimant's property right is transferred to the goat. Jaffey argues that there are no theories to adequately explain such a transmission of property rights between individual assets in this way.[88] Jaffey concludes therefore that if no explanation can be given for how property rights move between assets, the claimant cannot have rights over any particular given thing. The claimant has an interest instead in recovering value.[89] Consequently the defendant's estate is a body of abstract wealth to which the claimant has a share – the part of that abstract value derived, causally, from the invalid transfer. At the time of the invalid transfer the surviving value will be the value of the asset transferred.[90] If the asset is destroyed or damaged, it will be worth less and the measure of the claim reduced. There may be surviving value in the estate even after the original asset is disposed of.[91] A proprietary claim is not a claim to restitution of a specific asset unless the "surviving value… has not diminished and the value of the asset does not exceed the surviving value in the estate."[92] This is in effect the (discredited) swollen assets theory and Jaffey endorses it. He endorses it in a particular way though. He suggests that the proprietary right is akin to a floating charge,[93] in not being attached to particular assets, but it is not a charge because it is not to satisfy the discharge of a debt.[94]

Jaffey's new proprietary right has no parallel. It is neither a security right, although it is akin to one, nor a right in any particular asset. No case has ever recognised such a property right; indeed, quite the contrary, the courts have repeatedly required that there be certainty as to the asset in which one might have a proprietary right; this explains why one need not – indeed should not – accept Jaffey's characterisation of a fund. Jaffey's logic is also troublesome because it extends further than he himself might wish. Section 16 Sale of Goods Act 1979 for

[88] Jaffey, *supra* note 20 at 294-296
[89] Jaffey, *supra* note 13 at 161-162
[90] *Ibid* at 162
[91] *Ibid* at 168-169
[92] *Ibid* at 163
[93] The proprietary right was characterised as a charge in *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072
[94] Peter Jaffey, "Proprietary Claims for Mistaken and Unauthorised Payments" in Peter Devonshire & Rohan Havelock, eds, *The Impact of Equity and Restitution in Commerce* (Hart 2018) 65 at 71

example requires that specific assets be identified before legal title passes in a sale and *Re Goldcorp*[95] is often held up as an example of a case requiring certainty of subject matter. Yet it would be conceptually possible on Jaffey's logic to say that, before assets are identified where a buyer agrees to buy 100 gold bars and the seller has not yet appropriated 100 gold bars from the 1000 in the warehouse to the contract, property in the value passes to the buyer, essentially giving the buyer a 10% tenancy in common interest and an interest in the abstract value held by the seller. The analogy is with quasi-specific goods and sections 20A and 20B Sale of Goods Act 1979 and would extend the rule in those sections beyond the context of the fungible bulk. This would have difficult insolvency consequences (as indeed do many of Jaffey's proposals).

The logic of Jaffey's position is that ownership of a thing carries with automatically ownership of substitutes and proceeds – ie an interest in the abstract value inherent in the thing. Although odd for an English lawyer the idea of a legal interest in a fund is not completely alien to common law systems. It seems to some courts the best explanation of a security interest under a Personal Property Security Act.[96] Yet the cases suggest owners do not have – at common law - automatic rights to proceeds of either tangibles or (at least some) intangibles.[97] If so, automatic rights to traceable exchange products (or traceably surviving value in Jaffey's terms) in the hands of a converter do not exist. If I take your cow and swap it for a goat do you have a legal claim for the goat? No. In the absence of a pre-existing relationship, such as in *R v Bunkall,*[98] there is no authority for such automatic exchange product rights at common law. Jaffey suggests, however, that when I convert your cow the common law lacks the conceptual

[95] [1995] 1 AC 74 – and Sale of Goods Act 1979, s 16

[96] *Royal Bank of Canada v Sparrow Electric* [1997] 1 SCR 411; see Duncan Sheehan, "Secured Transactions Law Reform, Priorities and the Nature of a Security Interest" (2018) 29 KLJ 364

[97] Aruna Nair, *Claims to Traceable Proceeds* (Oxford University Press 2018) at paras 6.27-6.33; see eg *Twentieth Century Fox v Harris* [2013] EWHC 159 at [17-19] (copyright); *Golightly v Reynolds* (1772) Lofft 88, 98 ER 547 (trover); *Marsh v Keating* (1834) 1 Bing (NC) 199, 131 ER 1094 (shares). Paul Matthews, "The Legal and Moral Limits of Common Law Tracing" in Peter Birks, ed, *Laundering and Tracing* (Oxford University Press 1995) 23 at 47-63

[98] (1864) Le&Ca 372, 169 ER 1436

apparatus to recognise this type of proprietary claim and this type of interest in abstract value, and that the claim be provided by equity instead to fill the gap.[99]

But there are two points. First, as a matter of fit, the cases suggest that no such claim exists – the converter does not hold the cow or the goat on trust[100] - and yet Jaffey's theory drives us to creating the claim to compensate for the law's alleged remedial inadequacy in providing only damages or a statutory order for redelivery.[101] Secondly, why does substantive fusion not require the common law to develop its own equivalent claim, or to recognise the concept of interests in abstract value? Jaffey argues substantive fusion is about removing a spurious justificatory category (equity) and allowing analogical reasoning to reach its proper potential. That implies the need for an analogous common law proprietary claim to the goat (or some asset of equivalent value in the defendant's estate), blurring the line between legal and equitable title, extending the type of legal fund analysis used in some Canadian Personal Property Security Act cases, and thereby driving a radical and unacknowledged fusionist outcome. Jaffey responds to the objection that introducing an equitable proprietary claim in common law restitutionary claims involves substantive fusion by saying we need not go so far "for present purposes".[102] The provision of an equitable remedy for a common law claim is common enough, as Jaffey accepts. The relevance of substantive fusion lies instead in whether the common law ought to develop a similar claim of its own – for our purposes in the conversion context. Jaffey seems – obliquely - to leave this open "as part of the natural development over time of the common law"[103] and therefore to accept at least the potential for these radical implications as to legal title.

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[99] Peter Jaffey, "Remedial Consistency and Constructive Trust Claims" [2019] Conv 101 at 106
[100] See *Black v S Freedman & Co* (1910) 12 CLR 105 for the proposition that a thief may hold stolen property on trust, but this is at best not uncontroversial see Robert Chambers "Trust and Theft" in *supra* note 52 at 225
[101] Torts (Interference with Goods) Act 1977, s 2
[102] Jaffey, *supra* note 94 at 79; conversion on Jaffey's view hides a common law restitutionary claim and so his comment must be taken to cover conversion as well as the mistaken payments context.
[103] *Ibid* at 79, n 49

Jaffey's characterisation of the right as a floating right to take assets to the limit of surviving value also implies the availability of change of position. The defence arises in the usual case for example where A transfers an asset to B by mistake (say) and B then incurs an extra-ordinary expense in reliance. He changes his position. For Jaffey seeing the proprietary claim contingent on tracing purely as one to surviving value allows us to reorient change of position as a limit to proprietary claims. It does not matter if the claim is against the original asset or against the traceable proceeds of the asset. Change of position is built into the tracing rules. B has less abstract value causally related to the initial transfer than he had at the time of that transfer and his liability should be reduced accordingly.[104] For Jaffey it is an advantage of his causal approach that it explains and justifies the availability of the defence to the initial recipient,[105] but also his successors in title.[106] Although there is no clear authority on the question, Jaffey is right that the defence should be available to successors in title. Its availability can, however, be better explained in other ways. The third party defendant who, having received a payment (perhaps made in breach of trust), and who then draws on an unconnected bank account in reliance on his receipt to pay for a posh dinner, is morally speaking in the same position as the initial recipient in a personal claim for a mistaken payment. His freedom of choice should be respected, and this should not depend on an arbitrary decision as to which bank account to pay from. The defence works differently to its operation in personal claims, where it simply reduces the quantum of relief, in that it becomes a set off against the return of the specific asset to which the claimant is making a claim,[107] but the essence of it is the same.

Two other final points of criticism are worth making for completeness, although neither is fatal for Jaffey. First, let us assume I use money from a trust fund to buy a Grandfather clock.

[104] Jaffey, *supra* note 13 at 166-167
[105] Jaffey, *supra* note 3 at 72-76
[106] See Robert Chambers, "Change of Position in Proprietary Restitution" in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, eds, *Defences in Unjust Enrichment* (Hart 2016) 115 at 128 for the view it should not lie against successors in title.
[107] McFarlane, *supra* note 11 at 333-335

If the price of the Grandfather clock rises it is reasonable to assume that I would have taken advantage of that and the "value of the asset remains the correct measure of the surviving value."[108] But if an innocent defendant increases the item's market value (perhaps by repairing it) the claimant should not automatically be entitled to the increase in value,[109] because the innocent defendant should not be left empty-handed after his efforts. Surviving value is here less than the asset value.[110] It is impossible to avoid the conclusion that "value" can mean different things and confusion is likely to reign. Talk of value becomes unhelpfully metaphorical.[111]

Secondly, if in the cow for goat swap the cow is still there (and the possessor not a bona fide purchaser) presumably the claimant could claim the cow? Does surviving value not causally subsist in the third party's estate? This is the problem of geometric multiplication and Jaffey does not adequately deal with the problem as it relates to his "value theory." He argues value cannot be duplicated or multiplied, but it does seem in this context that it is duplicated; it is causally in both parties' estates. Jaffey does not suggest double recovery is an option, but there does seem an explanatory gap here.

(3) Jaffey's Wider Private Law Theory

This section relates to Jaffey's wider views on private law, where his theoretical commitments cause Jaffey to take implausible positions about the trust. I look, in the first subsection, at the effect of Jaffey's commitment to his principle of remedial consistency. I challenge the principle in a number of ways. It does not fit the law, which does provide a personal remedy against the trustee in the case of an invalid property transfer and historically did create a proprietary right

[108] Jaffey, *supra* note 20 at 311
[109] Jaffey, *supra* note 13 at 165
[110] Sheehan, *supra* note 1 at 156-157
[111] Craig Rotherham, *Proprietary Remedies in Context* (Hart 2002) at 104

in the beneficiary from personal rights against the trustee. Secondly, the principle is in theoretical terms too narrow. It should not in its own terms in fact require exact conformity to the original right in a remedy and it amounts to a type of (discredited) sanction theory. The second subsection examines Jaffey's claim that a historical understanding of the trust cannot help with the development of a principled explanation. The trust can in fact, contrary to Jaffey's assertion, only be understood in terms of its development and in particular the way equity strengthened the beneficiary's rights against the trustee so much as to make them proprietary rights in the asset.

(A) Express Trusts and the Principle of Remedial Consistency

(i) Remedial Consistency and its Implications Explained

Jaffey describes the principle of remedial consistency as a logical, rather than a normative, principle which means that it hides a remarkably strong claim that a remedy that does not fulfil the objective set out in the quotation below is not merely undesirable, but unintelligible.[112] Jaffey is clear that while he thinks remedies ought to follow this principle, he accepts that they do not always do so in current law.[113] Jaffey concedes that responses that do not meet this objective of fulfilling the original right are fine[114] – so long as they are not called remedies, a concession which could render the principle an essentially toothless labelling point. Jaffey says,

> "The objective of the remedy should be, so far as possible, to secure the claimant C the benefit of the primary relation… The remedy serves to correct an injustice, and this

[112] Sheehan, *supra* note 1 at 139
[113] Jaffey, *supra* note 99 at 102
[114] Jaffey, *supra* note 13 at 57-59; Peter Jaffey, "Restitution, Property and Unjust Enrichment" [2013] RLR 17 at 18

injustice is the injustice as defined by the primary relation. It is not open to the court to seek to remedy an injustice in any broader or unrelated sense."[115]

The principle, also referred to as the monist principle, requires that a remedy for a breach of duty be personal as it cannot affect third parties and that remedies to protect proprietary interests must themselves be proprietary. This is why there must be two dimensions to the trust. Breaches of the trustee's duty to the beneficiary must have personal remedies only.[116] The proprietary remedy available to the beneficiary against third parties is not based on the breach of any duty,[117] but on the invalidity of the transfer. As Jaffey puts it in the context of a claim by the trust beneficiary against the third party donee where the trustee has misapplied the assets,

> "The beneficiary's property right… persists and binds the recipient because beneficial ownership of the trust property was not validly transferred, and the recipient is accordingly subject to an equitable proprietary claim, by which the beneficiary can enforce the property right in the trust property and recover it for the trust. The equitable proprietary claim arises from the invalidity of the transfer—from the fact that the transfer was not authorised under the trust."[118]

The paper has already demonstrated that in the trusts context the principle breaks down. Since a beneficiary's personal remedy following an account of administration in common form is not based on a proven breach of duty, but invalidity of the transfer it should be a proprietary remedy. Jaffey's view of the law does not fit how English and Canadian law actually works. It also does not accurately represent the way equity behaved in reifying (or part-reifying)

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[115] Jaffey, *supra* note 13 at 40
[116] *Ibid* at 104-105
[117] Jaffey, *supra* note 94 at 81
[118] Jaffey, *supra* note 3 at 395; see *Willoughby v Willoughby* (1784) 1 TR 764, 99 ER 1366, 1370 for the proposition that the remedy is to have the assets restored on the same trusts that they were on prior to the misappropriation.

obligations and providing proprietary remedies for what were historically personal rights, as seen later. There may be a parallel – but not identical – development in Scotland where the third-party recipient as a constructive trustee holds the misapplied trust assets in a separate patrimony immune from his personal creditors, despite the insistence that the Scots trustee only owes personal obligations to the beneficiary.

(ii) Theoretical Problems with Remedial Consistency

There are wider theoretical issues with the principle as well as this practical issue of fit in the trusts context, which should make us question whether it should be a central idea in reasoning about private law generally, not just trusts. Essentially there are two (linked) problems. The first is that Jaffey appears to misunderstand the nature of a primary duty. It is not the case that the remedy is irreducibly linked to the duty so that it must replicate the effect of compliance with the duty. John Gardner put it well. An obligation is no more than a categorical mandatory reason to act in the sense that it acts to the exclusion of (at least some) other reasons.[119] Further, and this is worth quoting, "Those who say they cannot detach the normative consequences because they are built into the very idea of mandatoriness have simply misunderstood the idea of mandatoriness."[120] Gardner's target here is the sanction theory of duties. Jaffey denies that his theory is a sanction theory, but it really is. Jaffey, reminiscent here of Gardner, argues that the sanction theory gives insufficient attention to the fact that a duty is simply a normative requirement directed at the actor. The sanction for Jaffey is merely additional.[121] But it is a wholly, completely, apparently logically non-detachable element of the package for Jaffey and

[119] John Gardner, "Obligations and Outcomes in the Law of Tort" in John Gardner & Peter Cane, eds, *Relating to Responsibility: Essays in Honour of Tony Honoré* (Oxford University Press 2001) 111 at 140; this section draws heavily on Sheehan, *supra* note 1 at 140-143
[120] Gardner, *supra* note 119 at 140-141
[121] Jaffey, *supra* note 13 at 28-29

so while he is quite right – like Gardner – to point to independent normative reasons justifying the existence of a duty he still falls fouls of Gardner's correct insistence that the normative consequences of a breach of duty are in fact logically detachable from the duty.

The second, and related problem, is that the monist principle is, by its own lights, too narrow. The reasoning behind it does not support such a narrow conclusion as to what is acceptable. Even accepting *per arguendo* that the purpose of a remedy is to negate the effects of the breach or violation, to tie it in the standard case to factual replication of the fulfilment of the right is too narrow. Jaffey argues that because damages – and not specific performance – are the standard remedy for breach of contract, there is no Hohfeldian duty in contract cases,[122] but only a right-liability relation, which amounts to an allocation of risk of the other party's reliance on the (non-forthcoming) performance. If there were a duty, specific performance, which more fully vindicates a Hohfeldian claim-right would be the standard remedy. Jaffey does not say that damages are never appropriate, quite the contrary, but he insists that specific performance should be the standard remedy, bar where that is oppressive or pointless or where specific performance puts an additional burden on the defendant.[123] For Weinrib, however, who also maintains that his view of remedies is monistic[124] a remedy's purpose is to negate the negation of the claimant's right.[125] This is rather opaque, but essentially Weinrib refers to the consequences of a breach as the wrongdoer having a normative gain and the victim a normative loss. It is this normative imbalance which should be corrected. For Jaffey to be right that normative imbalance should only be corrected by directly forcing factual performance (unless it is oppressive). Weinrib's corrective justice account shows that this is not right; the duty can typically be vindicated by money. Damages are a proper response therefore – indeed a proper

[122] Jaffey, *supra* note 18 at 30-33; Jaffey, *supra* note 13 at 46
[123] Peter Jaffey, "Damages and the Protection of Contractual Reliance" in Ralph Cunnington and Djakhongir Saidov, eds, *Contract Damages* (Hart 2008) 138 at 146
[124] Ernest Weinrib, "Two Conceptions of Remedies" in Charles Rickett, ed, *Justifying Private Law Remedies* (Hart 2008) 3 at 27-28
[125] *Ibid* at 12

default standard response - to breach of contract.[126] Of course – parenthetically - once you have accepted that damages are sometimes acceptable to avert hardship on the defendant there is a slippery slope in terms of defining when that is so, which could bring Jaffey right back to defending the current law. If so, the principle seems to contribute little if anything to the debate. It becomes trivial.

(B) Normativity, Remedial Consistency and Historical Development of the Trust

Jaffey ignores history, claiming that a historical understanding of the trust cannot explain it normatively.[127] Unconscionability is only relevant to a historical as opposed to a principled understanding of the trust, and historical and principled explanations are distinct. On one level this is perfectly reasonable. Doing legal history is not the same as doing law. However, there are two reasons to be sceptical; in fact there are reasons to think that Jaffey is trying to have his theoretical cake and eat it. The first reason is equity did do what Jaffey says must never be done. The second reason is that Jaffey must, in dividing the two approaches so completely, take a philosophically realist view of concepts at odds with his own espousal of Dworkin.

(i) Historical Development of the Trust

The first reason for scepticism is historical. Lionel Smith describes how the obligation that the feoffee of the land owed to the beneficiary of the use was gradually reified. Initially the third party had to actually interfere with the feoffee's – later the trustee's – obligations, but over time the requirement denatured as equity gave greater protection to the obligation.[128] Essentially by

[126] Sheehan, *supra* note 1 at 143.
[127] Jaffey, *supra* note 3 at 377-378
[128] See Lionel Smith, "Transfers" in Peter Birks and Arianna Pretto, eds, *Breach of Trust* (Hart 2000) 93

the end everyone bar equity's darling was assumed to interfere with the trustee's obligations. The process can be seen in the old case of *Earl Brook v Bulkeley.*[129] That case involved an obligation to renew a lease. A purchaser of an estate from a tenant in tail with notice of the latter's obligation to renew was obliged to renew the lease. The development of restrictive covenants is similar although limited[130] and despite a suggested general principle, the extension of liability to third parties with notice, such that they will be restrained in equity from inconsistent use of the asset, in *The Strathcona*[131] is again limited. There the time charterer of a ship was held to have an interest in the ship such as to bind a purchaser with notice of the charterparty. Nonetheless the point is simply that equity has been prepared, in appropriate cases, to make third parties liable and restrain them accordingly, if they have notice of the relevant obligations, and the language of constructive trust has been used to justify this.[132]

Jaffey is quite right to say that any talk of interference by (say) a completely innocent donee is fictional and that there is a proprietary right – a proprietary right in the beneficiary to exclude anyone bar a bona fide purchaser (or a thief) from the asset. That exclusionary right is the in rem part of the beneficiary's rights.[133] However, what Smith's theory illustrates is that the normativity ascribed to the beneficiary's rights is inextricably bound to its history. In essence equity reified the obligation. It did exactly what Jaffey claims is wholly impermissible and the idea of a trust (or the restrictive covenant, and possibly *The Strathcona*) cannot be understood without recognition of this. It gave a remedy for a violation of, or interference with, a personal right and then denatured it to the extent that any violation needed no longer be proven. It made the beneficiary the owner of a property right in the obligation but because the obligation always

[129] (1754) 2 Ves Sen 498, 28 ER 319
[130] *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143
[131] [1926] AC 108 (PC); *De Mattos v Gibson* (1858) 4 De G&J 276, 45 ER 108; *Binions v Evans* [1972] Ch 359*; Lyus v Prowsa Developments* [1982] 1 WLR 1044; see *Port Line Ltd v Ben Line Steamers Ltd* [1958] QB 146 rejecting the reasoning as applied to chattels.
[132] Jaffey suggests in fact that a similar process is (or should be) at work with contractual rights, discussing *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1. A third party can interfere with the promisee's property rights in the benefit of the contract and be liable accordingly for such interference. See Jaffey, *supra* note 21.
[133] Nolan, *supra* note 18 at 233

relates to particular assets one that is indistinguishable from a proprietary right in the thing itself. The two cannot be separated and it is in fact Jaffey's insistence that they must be that demonstrates the ahistorical nature of his theory. His governing concepts and fundamental principles are delinked from past applications. His is a prescriptive approach,[134] stating what the law ought to be without charting a path from where the law is (and how it got there) to where it ought to be, which is how an interpretive approach would work.

(ii) Normativity

The second reason for scepticism is that Jaffey thinks he is not being prescriptive but is being interpretive. He has subscribed to a Dworkinian view of law.[135] As is probably well known, Dworkin illustrates his theory by positing[136] the existence of a hypothetical superhuman judge called Hercules, attempting to find the right answer in the case before him.[137] Essentially for Dworkin a proposition of law will be true if the best justification of the practice provides a better explanation for that proposition than for any other.[138] Hercules uses two dimensions of interpretation. The first is fit, which asks how well the theory fits with the previously decided case law. The second is justification, which asks how good a theory it is in terms of the substantive political morality of the society.[139] Hercules tests his interpretation of any part of the law by asking whether it could form part of a coherent theory justifying the entire law.[140] This process of moving to a higher level of generality and testing theories for how they fit at

[134] See Arvind and Sheehan, *supra* note 10 at 486 on the distinction between descriptive, prescriptive and interpretive approaches
[135] Peter Jaffey, "Authority in the Common Law" (2011) 36 Australian Journal of Legal Philosophy 1 at 22-24
[136] Dworkin, *supr*a note 7 at 239
[137] See also Richard Markovits, "Legitimate Legal Argument and Internally Right Answers to Legal Rights Questions" (1999) 74:2 Chicago-Kent L Rev 415
[138] See Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985) 142
[139] Dworkin, supra note 7 at 242
[140] *Ibid* at 245

that higher level is known as theoretical ascent.[141] Hercules then adjusts the theory and move back to the lower level. The process is dynamic; interpretation is an interaction between interpreters and the practice itself.[142]

Dworkin's emphasis on fit and therefore with keeping faith with the past, and on developing the law by putting cases in the best possible light, makes his approach explicitly dynamic and developmental.[143] This dynamic dimension allows theorists to move the law in a direction that is more philosophically or morally justifiable, while remaining grounded in its past application.[144] Essentially by interpreting past decisions and justifying them a judge works out what he think the law is, but having decided that this is the best view of the law he is forced to say not only is this the law, but it always was the law.[145] Dworkin therefore takes what might be described as an anti-realist position about legal concepts. Consequently, it is unfair to see Dworkin as believing in Lord Reid's Aladdin's cave of law.[146] This can be contrasted with the realist[147] position where concepts are out there in the world. Some theorists, such as Beever and Rickett adopt this view that norms are out there to be found.[148] Jaffey's view that all categories of law should be justificatory and that all such categories must have a single normative justification unique to that category which can be found without reference to history equally suggests a static and geometric view of law where the concept is somehow "out there". The oddity is – as noted earlier - that Jaffey has in the past favoured a Dworkinian view of law,[149] but because of his insistence that history cannot assist with a principled explanation, ends up with a realist position on legal concepts, reflecting Hegelian *Verstand*.

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[141] Ronald Dworkin, *Justice in Robes* (Oxford University Press 2007) at 25
[142] Druscilla Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1988) 136:4 University of Pennsylvania L Rev 1135 at 1151
[143] Arvind and Sheehan, *supra* note 10 at 489
[144] Dworkin, *supra* note 7 at 227
[145] *Ibid* at 400-401
[146] Lord Reid, "The Judge as Law-Maker" (1972-3) 22:1 Journal of the Society of Public Teachers of Law 22
[147] Importantly this is not realism as contrasted with positivism.
[148] Allan Beever and Charles Rickett, "Interpretivism and the Academic Lawyer" (2005) 68:2 MLR 320
[149] Jaffey, *supra* note 135 at 22-24.

Verstand is typically translated as Understanding and can be contrasted with *Vernunft* or Reason. Understanding is static and attempts to define the concept as an object separate from itself.[150] Essentially *Verstand* requires the criteria to be settled in advance; for Jaffey the concepts and categories are settled in advance. His mono-justificatory category map of the law is a fixed thing against which developments are measured. Jaffey is a philosophical realist in this sense. *Vernunft* does not require this. As answers given by courts shift so the map of our categories shifts as well. Like *Verstand* it is determinate, but in the sense that it is only once the reasoning process is complete that a person can know what comprises the concept. A Dworkinian and Hegelian view of legal concepts demands *Vernunft,* not *Verstand.* For Hegel conceptual content arises from the process of applying concepts – the determinate content of a concept is unintelligible apart from the process of development.[151] His theory of concepts is therefore a conceptual history[152] and fits well with Dworkin, whose aspect of fit looks backwards and whose aspect of justification looks forward in a dynamic and developmental manner. Both Dworkin and Hegel hold that law is a seamless web and law should seek to resolve any inconsistencies within itself, hence why Brooks puts both philosophers in the "interpretivist" camp.[153] Law's normative content develops immanently – what is new in any determination of law's normative content is only the implicit aspect of content not yet seen. For Hegel the more explicit the determinations, the richer one's understanding becomes and the closer to justice the law gets,[154] exposing a distinction with Dworkin who denies that in his "one-world" view justice and law are different.[155] For my purposes that is not so important. What is important is that if Jaffey wishes to keep fidelity to his espoused Dworkinianism a

[150] Arnold V Miller & John Niemayer Findley, eds, GW Hegel, *The Phenomenology of Spirit* (Clarendon Press 1977) at 165
[151] See generally Paul Redding, "Georg Wilhelm Friedrich Hegel" in *Stanford Encyclopaedia of Philosophy* (2020) at https://plato.stanford.edu/entries/hegel/
[152] Richard Hyland, "Hegel: A User's Manual" (1989) 10:5-6 Cardozo L Rev 1735 at 1802
[153] Thom Brooks, "Between Natural Law and Legal Positivism: Hegel and Dworkin" (2007) 23:3 Georgia State University L Rev 513 at 514
[154] *Ibid* at 524
[155] Ronald Dworkin, *Justice for Hedgehogs* (Oxford University Press 2011) at 402-403

more Hegelian view of legal concepts would suit him better and allow him to take historical developments such as Lionel Smith describes into account in his principled theory of trusts.

(4) Fusion of Law and Equity

There are two strands to Jaffey's argument on fusion. The first is a theoretical one based on the structure of his justificatory category system. Essentially Jaffey denies that equity is a justificatory category and if it is not it needs to be discarded. He argues that equity contains material drawn from different justificatory categories – primarily contract, tort and property.[156] From this premise he suggests that equity is not a substantive category of law. At best defenders of equity as a separate category have a remedial conception of it. Samuel Bray for example argues that equitable remedies should be treated differently because of their different functions.[157] For Jaffey this makes no sense. Equity is not a justificatory category. Analogical reasoning requires that one take the justificatory category, say of contract, and rationalise it to eliminate false differentiation based on the jurisdictional origin of the rules. That is all Jaffey means by substantive fusion. It is true of course that if all equitable doctrines are treated as somehow different purely by virtue of its jurisdictional origins mistakes will be made.[158] Equitable duties of care are just as much duties of care as those in the tort of negligence, and where equitable and common law rules seek the same thing – here compensation for negligence – they should do so in the same way.[159] Yet it should be treated differently where there is a different type of claim in play – protecting an equitable interest is not the same as protecting possession.[160]

[156] Jaffey *supra* note 13 119-120
[157] Samuel Bray, "The System of Equitable Remedies" (2016) 63:3 UCLA L Rev 530
[158] See Andrew Burrows, "We do This at Common Law and That in Equity" (2002) 22:1 OJLS 1
[159] *Bristol & West BS v Mothew* [1998] Ch 1
[160] *MCC Proceeds v Lehman Bros* [1998] 4 All ER 195

So far Jaffey would not demur. Jaffey compares his discussion of equity with unjust enrichment. Substantive fusion aims to break up a spurious justificatory category – equity. Unjust enrichment theory creates such a spurious justificatory category.[161] Both unjust enrichment and equity draw on a range of different principles, but this is what one would expect in any sophisticated legal system. Despite Jaffey's appeals to Dworkin, it is completely clear from *Law's Empire*[162] that Hercules is not interested in the type of sharp-edged mono-justificatory categories that Jaffey works with. Hercules believes that different principles have different weights across the whole spread of private law. Dworkin would never say that the only principled categories are those that fit within Jaffey's purist view of doctrinal category. There is no reason why an idea such as equity that draws together features of the law that may be unrelated to the justification of a claim, but might relate to the remedy, should not provide cross-cutting principles. Jaffey's second point is related to this. Since the labelling of a right as legal or equitable refers only to a defunct procedural division in its enforcement, it has ceased to matter.[163] In the trusts context Jaffey argues that his division between control and benefit was obscured by that, now obsolete, procedure. One answer is that his project is reconstructionist; he says explicitly that the trust can only be properly understood once dissociated from its historical origins,[164] the exact opposite of what is argued by this paper.

Jaffey can be read as making a more sophisticated claim about conceptual change. The abolition of the procedural division in the enforcement of legal or equitable rights to which he refers allowed for an interpretive development of the concept of the trust. On the view of law and concepts espoused in this article it is the differing possible inferences that can be made in any particular case that allow for conceptual change. If several possible interpretations are open to a judge than when he makes a choice that choice concretises the concept. Such change also

[161] Jaffey, *supra* note 20 at 123-124
[162] Dworkin, *supra* note 7 at 251-252
[163] Jaffey, *supra* note 20 at 422
[164] Jaffey, *supra* note 13 at 128

occurs when normative notions that previously constrained decisions begin to lose their grip and are experienced with weakening authority. This might be, as it is often in the common law, because of a new problematic case,[165] although Pippin puts it wider than this, suggesting that the notion and nature of normative authority can equally be up for grabs in the extreme case. Jaffey's view can only really be defended on the basis of a radical revolution post Judicature Acts, where, in a loose analogy with Thomas Kuhn's distinction between normal and revolutionary science, one paradigm is completely replaced by another.[166] In other words what happens is that the administrative fusion of the courts of Chancery, Queens Bench and Common Pleas into one abolished a procedure and by doing that enabled the law to reconstruct the trust around the two dimensions. The original argument had a huge leap in it. In an appendix to *The Nature and Scope of Restitution* Jaffey argued that removing the relevance of whether the right derived from the Chancery Court in itself removed the relevance of whether it is equitable or legal.[167] If that were right, there would indeed have been a Kuhnian revolution. The jump is too great, however. Substantive differences in the law remain and further argument is needed. Jaffey provided some of that extra argument in his second book, but the point remains unproven. To prove the point conclusively Jaffey would need to show that fusion has removed all need to look to past arguments. He has not done this.

Jaffey's argument in his second book is mainly aimed at the procedural fusionist position that equity has a distinct methodology, but in fact does not entirely succeed in countering the position. He suggests that for example equity does not systematically prefer discretion over rules.[168] He argues that it cannot be a justificatory category without the unique underpinning that exists, say in contract law. He argues that unconscionability cannot perform that function

[165] Robert Pippin, "Brandom's Hegel" in Espen Hammer, ed, *German Idealism* (Routledge London 2007) 153 at 173
[166] See Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago University Press 1962) at 121
[167] Jaffey, *supra* note 20 at 421-422
[168] Jaffey, *supra* note 13 at 116

as it is at best a statement that there is wrongdoing – a type of modality.[169] Henry Smith, however, provides important potential counter-arguments, although Jaffey is not Smith's target. In a range of important contributions, Henry Smith suggests equity provides many of these substantive contributions to the law by providing a second order safety valve,[170] which he now describes as meta-law.[171] Originally Smith argued equity responds to problems of opportunism. He described opportunism as being behaviour technically legal but which in fact tries to extract unintended benefits from a position and often imposes disproportionate costs in doing so.[172] He has since added issues of multi-polarity, polycentricity and conflicting rights. Polycentric problems involve many items, people and ideas which are interdependent in their connections and such are said to pervade equity.[173] Equity as meta-law is well suited to competing or conflicting rights. One solution, Smith argues, is to define them better ex ante but equity instead reconciles them ex post in a more context-sensitive manner.[174] With regard to opportunism, because it is difficult to detect and define and rule against in an ex ante fashion, equity acts ex post, as for instance in fiduciary duties but, because of the potentially over-expansive nature of such an open-ended ex post jurisdiction, it steps in only when certain factors are triggered – bad faith, disproportionate costs or burdens for instance.[175] The trustee on this view has obligations to the beneficiary precisely because there is the potential for opportunism built into his ability to use and manage legal title.[176] The burden of proof in the obligation of stewardship is effectively reversed. The beneficiary need not prove a breach; he

[169] *Ibid* at 118
[170] Henry Smith, "Fusing the Equitable Function in Private Law" in Kit Barker, Karen Fairweather & Ross Grantham, eds, *Private Law in the Twenty First Century* (Hart 2017) 173
[171] Henry Smith, "Equity as Meta-Law" (2021) 130:5 Yale LJ 1050
[172] Smith, *supra* note 170 at 177-180; Henry Smith, "Why Fiduciary Law is Equitable" in Andrew Gold and Paul Miller, eds, *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2016) 261; see for greater detail Henry Smith, "Equity and Second Order Law: The Problem of Opportunism" Harvard Public Law WP 15-13; Smith, *supra* note 171 at 1076-1081
[173] Smith, *supra* note 171 at 1071-1073
[174] *Ibid* at 1072
[175] Henry Smith, "Equity and Second Order Law: The Problem of Opportunism" Harvard Public Law WP 15-13, at 28
[176] Smith, *supra* note 171 at 1098

needs only to ask for an account of what happened and demand that anything missing be replaced. This – and associated fiduciary obligations - precludes opportunism and responds effectively to vulnerability in the person of the beneficiary. For Smith therefore the safety valve is a second order module, linked to the law by particular interactions. Smith goes further, suggesting that not only is this what functional equity ought to have from a normative standpoint, but that historically Chancery judges have attempted explicitly to do precisely this, referring to their role in preventing fraud or "equitable fraud" in relation to section 53(1)(b) Law of Property Act 1925 or secret trusts.[177]

Jaffey has rejected this line of argument, although not discussing Smith directly. He suggests that it amounts to a two-stage legal reasoning process in which first, a reasoner decides what the party is allowed to do at law and then modifies that according to a set of principles based on as different method of adjudication or regulation.[178] Jaffey questions whether that is sensible. First, Smith would agree that it is two stage, but he argues that the two-stage nature of equity is essential. It is essential because it reduces complexity and uncertainty. He notes that the only way to reduce this to a first order matter is to generate combinations of standards and multi-factorial discretions at law in much the way that American law has. He provides the example of nuisance which involves assessments of the social value of both the plaintiff's and defendant's use or actions.[179] This undermines the rule of law in ways equity currently does not[180] by allowing context free rein without the discipline of restricting it to the equitable points of contact[181] with the law. By restricting equity and making use of it as a higher order meta-law it is possible to handle complexity, polycentricity and interdependence better. By

[177] Smith, *supra* note 175 at12-13
[178] Jaffey, *supra* note 13 at 117-119
[179] Smith, *supra* note 171 at 1073-15
[180] See Matthew Harding, "Equity and the Rule of Law" (2016) 132:2 LQR 278
[181] On which see also Smith, *supra* note 171 at 1084-1089

correcting problems from outside equity allows the common law to be more general and more predictable.[182]

Paul Miller has made the important point that equitable intervention might simply be because it is better at supplementing or adding to the law if the common law were slow to innovate.[183] It may even be that in some cases where the action can be easily defined and delineated that it crosses the line to being common law and tortious.[184] For Henry Smith much of equity has a distinct function - one which is not captured effectively by Jaffey's hermetically sealed justificatory boxes. Indeed, by its very nature, Smith's second-order equitable function – equity as meta-law - supplements the first order law in a way that is superior to other solutions. Equity's intervention is not as a doctrinal justificatory category but as a cross-cutting principle, the existence of which cannot be thought surprising on a Dworkinian view. It may be of course that opportunism cannot explain all of jurisdictional equity. Functional equity and jurisdictional equity need not coincide and this might allow slippage of areas into common law.[185] Breach of confidence (or parts of it) have slipped into common law misuse of private information. The function that Smith claims for equity survived the abolition of the court of Chancery.

(5) Conclusion

This paper has sought to explain flaws in Jaffey's theory of the trust as well as some flaws in his wider private law theory, illustrated by the way it applies to the trust. The paper sought in Part 2 to expose the inadequacies of Jaffey's failure to recognise the importance of trustee

[182] *Ibid* at 1056
[183] Paul Miller, "Equity as Supplemental Law" in Dennis Klimchuk, Irit Samet & Henry Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) ch 5
[184] See John Goldberg and Henry Smith, "Wrongful Fusion: Equity and Tort" in John Goldberg, Peter Turner & Henry Smith, eds, *Equity and Law: Fission and Fusion* (Cambridge University Press 2019) 309
[185] Smith, *supra* note 171, at 1108-1109

knowledge (as opposed to consent) and the radicalism of his views on ownership of value. It suggested, in Part 3, first that Jaffey's monist principle does not fit English trusts law and amounts to a discredited sanction theory. Secondly, Part 3 argued that Jaffey's view that history cannot assist in understanding the trust is unDworkinian. An interpretivist view of the law – and Jaffey maintains that he is an interpretivist – must be faithful to both its history and moral justification. A legal concept can therefore only be understood in the context of its conceptual history, and in our context that conceptual history can only be understood in terms of the purpose behind the development of the trust and historical understandings of the distinctive contribution of equity. The paper finally exposed how Jaffey's views on fusion are unsupported in Part 4.