The nature of the beneficiary's right under a trust: proprietary right, purely personal right or right against a right?

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A. Introduction

Legal theorists typically regard the concept of property as a "bundle of rights" that may be exercised by the rightful owner or possessor in regard to a thing. The interests that are associated with property are the three traditional rights of enjoyment, management and possession as understood in their broadest, most abstract form[1]. By enjoyment what is meant is the right to enjoy the benefits of property and receive an income from it. The right to management is the right to decide how and by whom the thing owned or possessed shall be used or transferred. Lastly, the right of possession consists of two elements: "first, the exercise of factual control over the [thing]; and secondly, the concomitant intention to exclude others from the exercise of control".[2] The same "bundle of rights" does not necessarily attach to all forms of property, as there may be a need to detach some rights from others and to vest them in different persons. For instance, in the case of a bailment, there may be circumstances in which possession is distinguished from the enjoyment of the thing, as the factual control by one person (e.g. the hirer of a television set) may provide an income for someone else. Similarly, under a trust the person who is to enjoy the benefits of property (i.e. the *cestui que trust* or beneficiary) is different from the person who has the actual management (i.e. the trustee).

Unlike bailment, in the case of a trust the main problem is that the beneficiary is generally entitled to exercise his/her (proprietary) rights only through the trustee, making his/her relationship with the trust property rather awkward. Furthermore, there may be circumstances in which the beneficiary is prevented from enforcing his/her proprietary rights against certain categories of third parties.

This opens an "age-old" academic debate as to the exact nature of the beneficiary's right: is this a right to a "thing" (right *in rem* or proprietary right) or a right against a person (right *in personam*)? While the personal nature of the beneficiary's right has been rebutted by many legal scholars in favour of the proprietary approach[3], Ben McFarlane and Robert Stevens have recently put forward an alternative solution which considers

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[1] See A. M. Honoré, "Ownership" Chapter V, in A. G. Guest (ed.), *Oxford Essay in Jurisprudence* (Oxford: Oxford University Press 1961) at p. 116.

[2] M. G. Bridge, *Personal Property Law*, 3rd edn (Oxford: Clarendon Law Series, 2002) at p. 17.

[3] See, among others, A. W. Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 Colum. L. Rev. 269 at 273 - 274; C. A. Huston, *The Enforcement of Decrees in Equity* (Cambridge MA: Harvard University Press 1915) at pp. 87 – 90; M. S. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1936/1937) 50 Harv. L. Rev., 1249 at 1264 and S. Gardner, *An Introduction to the Law of Trusts* (Oxford: Oxford University Press 2011), at pp. 217 - 225.

such a right as neither personal nor proprietary but simply as a *sui generis* right. The main point of their analysis (better known as the theory of a "persistent right"[4] or a "right against a right") is that the right of the beneficiary does not attach to the trust property, being simply a (*sui generis*) right against the right held by the trustee.

This study firstly examines the historical development of the nature of the beneficiary's right under a trust and then follows on to test the theoretical foundation of McFarlane and Stevens' argument, attempting to demonstrate that the beneficiary's right is to be classified as proprietary rather than *sui generis*. In order to achieve this effectively, two ways of supporting the proprietary nature of the beneficiary's right are identified. The first solution is based on the idea of an indirect right *in rem*, which means considering the beneficiary as holding a right that attaches *indirectly* [emphasis added] to the trust asset. The second approach is to see it as an interest in a sub-property, thereby identifying the beneficiary's item of property as "something" that is separate and distinct from the trust asset, corresponding to the proprietary right of the trustee. More specifically, in the latter case the beneficiary holds a proprietary right in the trustee's proprietary right in the asset.

The primary objective here is to highlight the idea that while the persistent right theory (suggested by McFarlane and Stevens) raises doubts for conceptual, methodological and pragmatic reasons, the alternative concepts of an interest in a sub-property and that of an indirect right *in rem* (both conferring proprietary status to the beneficiary's title) are capable of explaining what power a beneficiary can have over the asset, and also have the advantage of being consistent with English legal taxonomy.

B. The historical development of the law of trusts

The nature of equitable rights in property has long been the focus of academic debate. Particularly, in the case of trusts some scholars view the equitable right of a beneficiary (also known as the *cestui que trust*) simply as a right *in personam* (i.e. a personal right) against the trustee and not as a right *in rem* (i.e. a proprietary right) exercisable against the trust fund[5].

This debate originated sometime between the end of the 19th century and the beginning of the 20th century, when the historian and legal theorist Frederic Maitland challenged the proprietary nature of equitable rights under a trust. During one of his celebrated lectures on equity, Maitland argued that equitable rights cannot be classified as proprietary rights as they are not enforceable against certain types of third parties, namely *bona fide* purchasers for value who have obtained a legal right in the assets without notice of the trust[6]. In his view, the hallmark of property is its universality; hence, any limits posed to the enforceability of a right preclude the possibility of classifying this title as "proprietary".

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[4] B. McFarlane, *The Structure of Property Law* (Oxford: Hart Publishing 2008), at pp. 23 – 27 and B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 1 – 2.

[5] F. W. Maitland, *Equity. A Course of Lectures,* revd by J. Brunyate, 2nd edn (Cambridge: Cambridge University Press, 1936), at p. 107; C. C. Langdell, *A Brief Survey of Equity Jurisdiction*, 2nd edn (Cambridge MA: The Harvard Law Review Association, 1908), at pp. 5 – 6; J. B. Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Harvard University Press 1913), at p. 262; T. E. Holland, *The Elements of Jurisprudence*, 3rd ed. (Oxford: Clarendon Press 1882), at pp. 140 – 261 and H. F. Stone, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 Colum. L. Rev. 467 at 469 - 470.

[6] Maitland, *Equity. A Course of Lectures* (1936), at p. 120.

According to Maitland, this view seems to be consistent with the historical evolution of the equitable rights under a trust[7]. In this regard, it should be noted that as far back as medieval law the *cestui que trust* was considered as conferring merely a personal right against the trustee (i.e. a right to the proper performance of the trustee's obligations) and so the beneficiary was not entitled to prevent third parties from interfering with his/her rights[8]. It was only later, in the mid-17th century, that the developing rules of equity gradually changed this approach by extending the protection of the beneficiary's rights against an increasing number of diverse classes of persons[9]. In particular, pursuant to the rules of equity the *cestui que trust* was granted protection against (i) purchasers for value who had actual or constructive notice of the trust (i.e. knew or had reasons to know that the assets had derived from a breach of trust); (ii) parties who had received the trust assets without consideration; (iii) parties who had inherited the trust property from the trustee, as well as (iv) creditors of the trustee in cases where the latter had been declared bankrupt. This process took over two centuries but by the 19th century it was evident that the beneficiary could enforce his/her rights against all parties other than *bona fide* purchasers for value without notice of the trust.

While admitting that the equitable rights under a trust had become *almost* [emphasis added] equivalent to proprietary rights, Maitland infers that they had not yet fully reached that status. The reason for this is that equitable interests were not considered by Maitland as "rights against the world at large but [only as] rights against certain persons"[10]. In other words, the fact that such interests are always vulnerable to a *bona fide* purchaser for value without notice of the legal estate means that they cannot be asserted *erga omnes* (i.e. they are not universal)[11]. These considerations led Maitland to perceive equitable interests essentially as rights of a personal nature that have a misleading resemblance to rights *in rem*.[12]

This interpretation proposed by Maitland is somewhat controversial. In particular, his approach to equitable rights attracts criticism from those scholars who consider such rights as property rather than mere obligation[13]. The rationale behind this argument is that the ability of the beneficiary to recover the assets from third parties (other than *bona fide* purchasers for value) is incompatible with the beneficiary having no more than a right *in personam* against the trustee.[14]

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[7] S. Worthington, *Equity* (Oxford: Oxford University Press 2006), at pp. 3 – 67; Gardner, *An Introduction to the Law of Trusts* (2011), at pp. 217 - 225 and D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can. Bar Rev. at 219.

[8] E. Coke, *The First Part of the Institutes of the Laws of England: or a Commentary on Littleton* (London 1639), at p. 272 b.

[9] D. Yale, *Lord Nottingham's Chancery Cases* vol. II. (London: Selden Society 1961), at pp. 88 – 101.

[10] Maitland, *Equity. A Course of Lectures* (1936), at p. 112.

[11] In support of this argument see also the decision of the European Court of Justice in *Webb v Webb* (Case C-294/92) []1994 QB 696.

[12] Maitland, *Equity. A Course of Lectures* (1936), at pp. 23 and 106 – 116. See on this point also Langdell, *A Brief Survey of Equity Jurisdiction* (1908), at p. 6.

[13] Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 Colum. L. Rev. 269 at 273 - 274; Huston, *The Enforcement of Decrees in Equity* (1915), at pp. 87 – 90; Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1936/1937) 50 Harv. L. Rev., 1249 at 1264.

[14] Scott, "The Nature of the Rights of the *Cestui Que Trust*" (1917) 17 Colum. L. Rev. 269 at 273 – 274. Consistent with the idea that proprietary rights should not be interpreted in absolute terms and perceived as enforceable against *everyone* [emphasis added] in the world see also the decision in *Miller v Race* [1758] 1 Burr 452 and ss. 24 and 25 of the Sales of Goods Act 1979.

C. The proprietary nature of the beneficiary's rights and the role of equity in English law

The proprietary characterisation of the equitable rights under a trust enjoys greater acceptance among English scholars than Maitland's view, which assigns mere personal rights to the *cestui que trust*[15]. In particular, it is argued that "where it appears that the right is enforceable against third parties the expression "an equity" has come to be used in the sense of a proprietary interest ranking at the bottom of a hierarchy of proprietary interests"[16]. This approach is also supported by the English courts[17] as well as by statute law[18], both of which recognise the beneficiary as having a proprietary right in the trust assets. However, these equitable proprietary rights are generally considered to be of a special nature since they do not operate in the same way as legal proprietary rights.

As pointed out above, one of the main differences is that unlike legal proprietary rights the equitable interests of a beneficiary under a trust are at all times vulnerable to the *bona fide* purchaser for value. The rationale behind this principle is that in the case of a trust the beneficial interest is "hidden" in as much as it is the legal owner (acting as the trustee) who usually has possession of the property. Hence, under these circumstances there is a greater risk that third parties (who acquire such property) will be unaware of the existence of a trust[19]. This may explain why, according to equity rules, *bona fide* purchasers (to whom trust property is transferred) are protected from the risks created by trusts.

Furthermore, the beneficiary has no direct (personal) claim for tort of conversion or tort of negligence against third parties who steal[20] or carelessly damage the trust property[21]. The general rule is that these types of claim lie only with the trustee, who holds the legal ownership and has either possession or the right to immediate possession. Should the trustee refuse to make a claim against the third parties, the beneficiary may commence an action to compel the trustee to do so. Alternatively, in special circumstances the

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[15] See, among others, Gardner, *An Introduction to the Law of Trusts* (2011), at pp. 210 – 225; J. E. Martin, *Hanbury & Martin - Modern Equity*, 19th ed. (London: Sweet & Maxwell 2012), at para. 1-019; K. Gray and S. F. Gray, *Elements of Land Law* (Oxford: Oxford University Press 2009), at paras. 7.1.1. and 7.1.3 and C. Webb and T. Akkouh, *Trusts Law*, 3rd. ed. (London: Palgrave Macmillan 2015), at pp. 29- 30.

[16] M. Neave and W. Weinberg, "The Nature and Function of Equities" (1978-1980) 1 U. Tas. L. Rev., 6, at 24 and 38. For a different view, see R. C. Nolan, "Equitable Property" (2006) 122 (2) L.Q.R. 232, at 233 and R. C. Nolan, "Understanding the Limits of Equitable Property" (2006) 1 J. Eq., 18 at 19.

[17] *Tinsley v. Milligan* [1994] 1 A.C. 340 at 371; [1993] 3 All E.R. 65 at 86, per Lord Browne-Wilkinson; *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 at 705; [1996] 2 All E.R. 961 at 987 per Lord Browne-Wilkinson; *Foskett v. McKeown* [2001] I AC 102 at 126 - 128; [2000] 3 All E.R. 97 at 119 - 120 per Lord Millett and *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 177. See, more recently *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424; *Lehman Brothers International (Europe) v CRC Credit Fund Ltd and others* [2012] UKSC 6; [2012] 3 All E.R. 1; *Re Lehman Brothers International (Europe)* (No. 2) [2009] EWCA Civ 1161; [2010] Bus. L. R. 489; *Pearson v. Lehman Brothers Finance SA* [2011] EWCA Civ 1544; [2012] 2 B.C.L.C. 151. The European Court of Justice, however, reached the opposite conclusion in *Webb v. Webb* Case C 294/92 [1994] QB 696; [1994] 3 All E.R. 911 (not followed in *Re Hayward (deceased)* [1997] Ch. 45; [1997] All E.R. 32 but applied in *Ashurst v. Pollard* [2001] Ch 595; [2001] 2 All E.R. 75 and *Prazic v. Prazic* [2006] EWCA Civ. 497; [2007] I. L. Pr. 31).

[18] See, for example, s. 22 (1) of the Trusts of Land and Appointment of Trustees Act 1996.

[19] Webb and Akkouh, *Trusts Law* (2015), at p. 35.

[20] See among others, *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All E.R. 675; [1998] 95(5) L.S.G. 28.

[21] The beneficiary is also prevented from suing for tort of negligence those parties who have damaged or caused economic loss to the trust assets, *Leigh & Sillivan v. Aliakmon Shipping Co. Ltd (The Aliakmon)* [1986] AC 785 at 809; [1986] 2 All E.R. 145 at 149 per Lord Brandon.

beneficiary may be entitled to sue the tortfeasor but only to the extent that the trustee is made a party to the proceedings[22].

Once again, these rules seem to confirm that (as a general principle) the beneficiary can enforce his/her equitable interest indirectly through [emphasis added] the trustee[23]. The reason why both the tort of conversion and the tort of negligence are restricted to cases involving legal proprietary interests or possessory interests lies in the common law nature of these actions, since common law does not recognise the equitable title of the beneficiary under a trust[24].

These differences seem to suggest that equitable ownership is weaker than legal ownership in so far as (i) it does not bind *bona fide* purchasers for value and (ii) it allows the beneficiary to bring a tort action against third parties only through the trustee.

The special nature of equitable ownership is deeply rooted in the historical development of the concept of trust and, more importantly, in the role that was played by equity in creating new forms of property.

The core idea is that over the centuries the rights of a beneficiary under a trust gradually changed from purely personal rights into property[25]. This was made possible through the rules of equity, which have provided the beneficiary's rights with specific advantages typically related to ownership and other proprietary rights.

The creation of this new form of property is part of a broader process that characterised the development of certain equitable rights and resulted in a significant expansion of the notion of property[26]. Equity carried out this process by correcting the common law and treating certain personal rights as proprietary.

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[22] The procedure is known as "Vandepitte", after the case *Vandepitte v. Preferred Accident Insurance Corp. of New York* [1933] A.C. 70 P.C at 79; [1932] 44 Ll. L. Rep. 41 at 46 per Lord Wright. On the reasoning behind the Vanderpitte procedure see *Barbados Trust Co Ltd (formerly known as CI Trustees (Asia Pacific) Ltd) v Bank of Zambia & Anor* [2006] EWHC 222 (Comm); [2007] 1 CLC, 434 and *Hayim v. Citibank NA* [1987] A.C. 730 PC; [1987] 84 L.S.G. 1573. However, it is worth mentioning that such a procedure has a history long pre-dating the decision of the Privy Council in *Vandepitte v. Preferred Accident Insurance Corp. of New York*. Indeed, in *Fletcher v Fletcher* [1844] 4 Hare 67, [1844] 67 ER 564 the beneficiary was entitled "to sue for himself, in the name of the trustee", as the court felt that in the circumstances of the case the right of the *cestui que trust* could not "depend upon mere accident and caprice [of the trustee]". See also *Meldrum v Scorer* [1887] 56 L.T. 471 (Ch D).

[23] In *Roberts v Gill & Co and another* [2010] UKSC 22, [2011] 1 A.C. 240, at 262, Lord Collins of Mapesbury JSC stated that "joinder […] has a substantive basis, since the beneficiary has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee". See also *Parker-Tweedale v. Dunbar Bank Plc. (C.A.)* [1991] Ch. 12; [1990] 2 All E.R. 577. See, however, *Shell UK Ltd v. Total UK Ltd* [2010] EWCA Civ. 180; [2011] QB 86, at [132], where the Court of Appeal considers the beneficiary "the real owner" of the trust assets, "the legal owner being little more than a bare trustee". This decision was criticized by certain legal scholars (see e.g. E. Hargreaves, "The Nature of Beneficiaries' Rights under Trust" (2011) 4 T.L., 163; P. G. Turner, "Consequential Economic Loss and the Trust Beneficiary" (2010) 69, 3, CLJ, 445 and J. Edelman, "Two fundamental questions for the law of trusts" (2013) LQR, 66 at 66 and K. F. K Low "Equitable title and economic loss" (2010) LQR, 507.

[24] See, on this point, *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All E.R. 675 at 691.

[25] S. Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42 Tex. Int'l L. J, 917 at 930.

[26] S. Worthington, *Equity and Property: Fact, Fantasy and Morals* (The McPherson Lecture Series, IV University of Queensland Press 2009), at pp. 7 – 9.

The development of these equitable interests was achieved by means of two different mechanisms. Firstly, equity recognised new categories of interests in property under the notion of trust and of equitable charges. It did this by allocating to different parties the bundle of rights that are typically associated to ownership[27]. For example, in regard to a trust, the management of the trust property (including the right of alienation and the right of possession) is allocated to the trustee, while the beneficiary retains the substantial enjoyment of the thing. The main characteristic of the law of trusts is that it allows both the trustee and the beneficiary to own the property simultaneously in different ways (i.e. through legal and equitable ownership, respectively). However, as mentioned earlier, this form of "dual ownership" was not a feature of the initial structure of trusts. The right of the beneficiary was originally classified as a purely personal right against the trustee and only considerably later did it develop into a proprietary right. This change in nature was achieved essentially by granting proprietary protection to the beneficiary (namely, the power to exclude others from interfering with his/her right). A similar process to the one governing the structure of trusts can be found in relation to the creation of equitable charges, since both "devices began as contractual arrangements ('personal obligations'), and slowly evolved until they were unequivocally recognised as delivering new (divided) property interest in the underlying […] asset"[28].

Secondly, equity transformed into property certain interests in intangible assets (e.g. debts and shares in a company) which were typically characterised by common law as "personal rights against specific parties"[29]. Once again, this change was made possible by providing some form of proprietary protection to the holders of such rights, as well as permitting their assignment to third parties.

The main difference between these two mechanisms is that in the second case (concerning interests in intangible assets) equity simply transformed existing rights from personal into proprietary, while in the first case it created new devices or "novel divisions of bundle of rights". These involved interests that were initially classified as personal and were later transformed into property (namely, the interest of the beneficiary under a trust and the interest of the chargee).

This new idea of property (based on the coexistence of legal and equitable rights) seems to support the argument that the interests of a beneficiary under a trust should be classified as proprietary rather than merely personal rights.

D. The theory proposed by McFarlane and Stevens: not proprietary rights but "rights against rights"

An alternative approach would be to classify the equitable rights under a trust as *sui generis* rights. This approach is supported by McFarlane and Stevens, who define an equitable right not as a "right to a thing" (i.e. a proprietary right), or a "right against a person" (i.e. a personal right) but as a "right to, or against, a right" (i.e. a "persistent

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[27] This "fragmentation of ownership" was already known in common law due to the co-existence of different estates (i.e. freehold or lease) or interests (i.e. easement or charge) in land, F. H. Lawson and B. Rudden, *The Law of Property*, 2nd edn (Clarendon Law Series Oxford: Clarendon Press, 1982), at pp. 76 - 97.

[28] Worthington, *Equity and Property: Fact, Fantasy and Morals* (2009), at pp. 7 – 9.

[29] Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917, at 920.

right").[30] This new category of rights was coined to emphasise that equitable rights (e.g. under a trust) can be classified as *sui generis* rights since they do not attach to a "thing" but rather attach or flow from the rights of another.[31] The advantage for equity, in recognising the concept of a right to a right, is that "it permits B to enjoy the benefit of a right without holding that right directly, whilst also recognising that B has more than a mere personal right against A, the holder of the right."[32]

The starting point of this analysis is to qualify proprietary rights merely as rights that "(i) relate to the use of [material] things[33] and (ii) impose a *prima facie* duty on the rest of the world"[34]. This definition strictly confines the concept of property to a very brief closed list of rights that does not include what is conventionally described as an equitable proprietary interest[35]. In particular, it rejects the idea that a proprietary right may (i) relate to intangibles and (ii) more importantly, may be recognised in the case of an indirect relationship with the asset (whether tangible or intangible) through an intermediary (e.g., a trustee)[36].

In regard to the equitable right of a beneficiary under a trust, McFarlane and Stevens criticise the "very common view" that over the centuries equity has extended the notion of property by creating "a weaker, more vulnerable version of the proprietary rights recognised at common law". This "orthodox […] view", continue McFarlane and Stevens, "overlooks the genius of equity"[37], which does not recognise two competing concepts of ownership (namely, equitable as opposed to legal ownership) but includes the equitable right of a beneficiary into a new category of rights (i.e. "persistent rights").

Unlike personal interests, this type of right shares with property a very important feature, namely the power to bind third parties and not only a specific person such as a contracting partner. This means, for example, that if the trustee is insolvent the beneficiary's right is protected against the trustee's creditors. However, it can be ascertained that there are certainly differences between a persistent right and a proprietary right since the former (unlike the latter) does not relate directly to a thing but rather to the right of another person. In other words, the equitable right of a beneficiary is a right against the proprietary right held by the trustee[38]. In short, in order to enforce his/her persistent right against a third party, a beneficiary does not "need to

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[30] The term persistent right "is used to refer to any right usually called an equitable proprietary right", McFarlane, *The Structure of Property Law* (2008), at pp. 23 - 27. More specifically, with regard to a trust the fact that in certain circumstances equity binds third parties to the trustee's personal obligations towards the beneficiary has prompted McFarlane and Stevens to define the beneficiary's right as "persistent", McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 1 – 2.

[31] McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 1 – 2.

[32] McFarlane and Stevens, "Interests in Securities. Practical Problems and Conceptual Solutions" in L. Gullifer & J. Payne (eds.), *Intermediated Securities: Legal Problems and Practical Issues Issues* (Oxford: Hart Publishing 2010), at p. 38.

[33] Proprietary rights can only relate to the use of "an object that can be physically located" (namely, land and goods), McFarlane, *The Structure of Property Law* (2008), at pp. 132. Hence, this does not include rights over intangible assets that are classified by McFarlane either as "persistent rights" (e.g. debts, goodwill or shares in a company) or "background rights" (e.g. intellectual property rights).

[34] McFarlane, *The Structure of Property Law* (2008), at p. 22.

[35] McFarlane and Stevens argue that "while there is a closed list, or *numerus clausus* list, of rights against things, there is no such limit to the content of rights against rights", McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 2.

[36] McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 4. For a different view see J. E. Penner "The Structure of Property Law (Book Review)" [2009] R.L.R., 250 at 254.

[37] McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 2.

[38] McFarlane, *The Structure of Property Law* (2008), at pp. 23 – 24.

find a particular thing" (such as a trust asset) but "needs to show that [the third party] has acquired a right that depends on the [proprietary] right held by [the trustee]."[39]

These conceptual differences between a proprietary right and a persistent right explain why the beneficiary under a trust is prevented from making a claim for tort of conversion or tort of negligence directly against a person who steals or carelessly damages the trust assets. According to McFarlane and Stevens, the reason for this limitation is not simply that common law does not recognise the equitable title under a trust but rather that the beneficiary has no rights to the trust property and, consequently, "no claim, either at law or in equity, against the parties who steal or damage such property."[40] Indeed, the third parties do not derive any title to the trust property from the trustee since the wrong they have committed is against the latter alone, by violating his/her proprietary right. In accordance with this reasoning, the trustee is the only person entitled to make a claim for conversion or negligence directly against the tortfeasor. However, as mentioned above, if the trustee is unwilling to make such a claim, "the beneficiary can apply to the court to force the trustee to do so"[41].

Thus, in this case the claim of the beneficiary is "an action against the trustee, not against a third party in connection with the trust property"[42]. Similarly, the *cestui que* trust may exceptionally decide to join the legal owner in the action against the third parties[43].

The limitations imposed on the beneficiary seem to support the argument that an equitable right under a trust cannot be considered a competing ownership to the legal ownership but should be classified as a persistent right[44].

E. Analysing McFarlane and Stevens' approach to equitable rights under a trust

McFarlane and Stevens offer a theory which sets out to describe the existing principles of trust (and more in general of equity) from an innovative perspective. This means that their intention is not to propose normative changes but simply to show that (in contrast with the traditional or orthodox approach to the law of trusts) the concept of a right against a right provides a better understanding of the existing legal framework.

Sections E and F of this paper aim to defend the traditional approach which views the equitable interest of a beneficiary as a proprietary right rather than a (*sui generis*) right against a right. In doing so, the author raises doubts over McFarlane and Stevens' main argument showing that firstly, the traditional (proprietary) approach to the law of trusts does not effectively create any form of friction or inconsistency with general principles of trusts and secondly, the application of a persistent right theory is likely to undergo criticism for both theoretical and practical reasons[45].

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[39] McFarlane, *The Structure of Property Law* (2008), at pp. 23 – 24.
[40] McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 4.
[41] McFarlane, *The Structure of Property Law* (2008), at p. 29.
[42] M. Smith, "Equitable owners enforcing legal rights?" (2008) 124 L.Q.R., 517 at 521.
[43] See, on this point, text to fn 22.
[44] McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 4.
[45] See text to fns 87 and 126.

E.1 The proprietary theory is adequately capable of explaining English trust law

The legal structure of a trust is described as being the combination of two dimensions which operate together (while remaining separate), i.e. the proprietary dimension and the personal dimension[46]. This description is meant to highlight the idea that a trust is intended to confer to the beneficiary both a proprietary right in the trust asset and a personal right against the trustee (to ensure the proper management of the trust's affairs). The key point of this analysis is that while the personal right can be enforced only against the trustee, the proprietary right is charged on to, or attached to the trust asset and therefore can be asserted against third parties.

The author agrees with this position but feels that such an analysis does not fully explain the peculiarity of the beneficiary's proprietary right, which is characterised by the existence of a "special" relationship between the beneficiary and the trust asset. In this regard, one possible way of describing the beneficiary's proprietary right is to accept the view, suggested by certain legal scholars, that defines such an interest as an "indirect" right in the trust assets[47]. Indeed, the main feature of a trust is that the beneficiary is generally entitled to assert his/her rights against third parties *through* [emphasis added] the trustee. This means that the proprietary nature of the equitable rights under a trust is based on an indirect relationship between the beneficiary and the trust assets. McFarlane and Stevens respond to this argument by stating that if the right of the beneficiary ("B") is indirect, it cannot be "*in rem*" but only a right against the right of the trustee ("T")[48]. Penner disagrees on this point and states that "nothing is provided to ground [this] assumption."[49] In particular, he argues that "if B has a right against T's ownership, then B has a right against whatever makes it the right it is, including its *in rem* aspects"[50].

One must reject McFarlane and Stevens' assumption that equitable ownership is *competitive* [emphasis added] to legal ownership[51]. Indeed, nowadays it is rather difficult to contend that English law "recognises two competing interests in the same asset, the common law recognising the trustee as owner, equity recognising the beneficiary as owner"[52]: "[i]f the trustee does not have the rights he has, then the beneficiary cannot have the right he has, and no court of equity has ever expressed a view to the contrary[53]." In this regard, it has been recently argued by certain legal scholars that equitable ownership is "derivative of" rather than "competitive with" legal ownership[54].

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[46] On this point, see Jaffey "Explaining the trust" (2015) 131 L.Q.R., 377 at 394 – 395 who refers to the combination of a proprietary dimension and a contractual dimension. See also A. Hudson, *Equity and Trusts*, 9th edn (Routledge, 2017) at para. 2.4.3.

[47] See, on this point, Penner "The Structure of Property Law (Book Review)" [2009] R.L.R., 250 at 254; Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest" (2014) 27 Can. J. L. & Jurisprudence 473 at 477 and 480 and Penner, *The Law of Trusts*, 10th edn (Oxford: Oxford University Press, 2016) at paras. 2-27 – 2-28.

[48] McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 2 – 4.

[49] Penner "The Structure of Property Law (Book Review)" [2009] R.L.R., 250 at 254.

[50] Penner "The Structure of Property Law (Book Review)" [2009] R.L.R., 250 at 254.

[51] Penner "The Structure of Property Law (Book Review)" [2009] R.L.R., 250 at 254.

[52] Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest" (2014) 27 Can. J. L. & Jurisprudence 473 at 475.

[53] Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest" (2014) 27 Can. J. L. & Jurisprudence 473 at 475.

[54] Penner, *The Law of Trusts* (2016) at para. 2.28.

According to Penner and Matthews, this statement is not inconsistent with the idea that the interest of a beneficiary is *linked* [emphasis added] to the property[55].

Furthermore, the fact that the claim for tort of conversion and tort of negligence lies only with the trustee does not prevent the equitable rights under a trust from being classified as proprietary rights. On the contrary, these limits on the level of enforceability of the beneficiary's rights seem to be consistent with the purpose of a trust. The main argument is that equity created the structure of trust by allocating to different parties the bundle of rights related to ownership. As pointed out by Lawson and Rudden, the "habit of splitting ownership into its component parts"[56] and conferring them to different parties is a practice which was already in use in early common law[57]. This means that equity just confirmed and strengthened the idea of "fragmented" ownership[58]. Particularly, concerning trusts it allows the benefits of ownership to be "split from the responsibilities of management"[59]. The "separation" between management functions and enjoyment of the trust property explains why the beneficiary cannot bring a direct claim for tort of conversion or tort of negligence against third parties who steal or carelessly damage the trust assets. Indeed, the management responsibilities of a trustee, "by their very nature, encompass protecting the trust property from third parties[60]." Hence, if the beneficiary were allowed to sue the tortfeasor directly for tort of conversion or tort of negligence, this "would be tantamount to overriding the discretion of the trustee, which would unacceptably undermine the structure of a trust"[61].

There are also practical concerns[62] that prevent the beneficiary from directly suing (for tort of conversion and tort of negligence) third parties[63]. For example, "in a complex trust, the trustee may be balancing the interests of multiple different beneficiaries so it makes sense that the trustee is responsible for any third party actions[64]." In these cases, the "recovery by the trustee will ensure the property is properly distributed to the correct beneficiaries at the correct point in time[65]."

These considerations show that the idea of an indirect right *in rem* can certainly provide convincing arguments to explain the limits of the beneficiary's rights.

E.2 The distinction between proprietary rights and personal rights

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[55] Penner, *The Law of Trusts* (2016) at para. 2-28. See also on this point P. Matthews, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust" in D. Hayton (ed.) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International 2002) 203 at p. 206.

[56] Lawson and Rudden, *The Law of Property* (1982) at p. 76.

[57] See on this point text to fns 1 and 3.

[58] Lawson and Rudden, *The Law of Property* (1982) at p. 76. It was in the seventeenth century that Lord Nottingham started to promote the idea of slices of the ownership over the assets, D. *Yale Lord Nottingham's Chancery Cases* (1961) at pp. 88 – 101. In support of this argument see also *Hopkins v Hopkins* [1739] West temp Hard 606, at 619 per Lord Hardwicke LC and *Burgess v Wheate* [1759] 1 Eden 177, at 223 per Lord Mansfield CJ.

[59] Worthington, *Equity* (2006) at p. 75. See on this point also Jaffey "Explaining the trust" (2015) 131 L.Q.R., 377 at 387.

[60] Hargreaves, "The Nature of Beneficiaries' Rights under Trust" (2011) 4 T.L., 163 at 174.

[61] Hargreaves, "The Nature of Beneficiaries' Rights under Trust" (2011) 4 T.L., 163 at 174.

[62] Low "Equitable title and economic loss" (2010) 126 L.Q.R., 507 at 512.

[63] See, however, text to fns 91 and 97.

[64] Hargreaves, "The Nature of Beneficiaries' Rights under Trust" (2011) 4 T.L. 4, 163 at 182.

[65] Hargreaves, "The Nature of Beneficiaries' Rights under Trust" (2011) 4 T.L. 4, 163 at 182.

An argument advanced against the orthodox approach is that it creates "inconsistencies" when distinguishing proprietary rights from personal rights. In particular, McFarlane and Stevens reject the theory of an extensive notion of property (based on the coexistence of legal and equitable interests in both tangibles and intangibles) and criticise the practice of asserting that (unlike other interests) proprietary rights are transferable and exercisable against third parties.

The reason for this criticism is that the orthodox approach does not provide "a *stable* [emphasis added] meaning to the term property right"[66], which is consistently applicable in all circumstances. In this regard, it is not possible to say that all rights that are transferable and exercisable against third parties are considered as proprietary rights. For example, it is possible for certain types of personal obligations (namely, contractual rights) to be transferred to third parties, while the assignment of proprietary rights may be subject to restrictions. Similarly, proprietary rights are not the only interests that can be asserted *erga omnes* since the right to physical integrity and to reputation also imposes a *prima facie* duty on the rest of the world.

For these reasons, McFarlane and Stevens believe that the orthodox approach "does not draw a useful distinction between property rights […] and personal rights […]"[67]. By contrast, the idea of confining the concept of property to a restricted list of rights (that does not include equitable proprietary rights) is considered more appropriate in as much as it places property within sharp and definitive boundaries.

In the author's view these conclusions are open to criticism in so far as the orthodox approach does not create inconsistency within English law. The traditional approach is intended to recognise proprietary rights as "exercisable" against third parties and generally "transferable". This means that the attributes of "excludability" and "transferability" are typically regarded by most English scholars as the characterising features of property. However, this general statement cannot be interpreted in absolute terms and, moreover, is not used under the orthodox approach to distinguish property rights from *all other interests* [emphasis added]. Particularly, as regards the attribute of excludability, the general view is that not all rights exercisable against third parties are classified as proprietary rights. Indeed, the attribute of excludability is not a unique feature of property but is used primarily to draw a line between proprietary interests on the one hand and personal (mainly, contractual) interests on the other: a proprietary right "can be asserted against the world at large"[68] while a personal right is exercisable "against another individual such as a contracting partner"[69]. Setting aside this main distinction, nothing prevents us from acknowledging that (unlike contractual interests) there may be other types of rights which share with property the feature of "excludability" (e.g. the right to physical integrity and to reputation). The reason for this is simply that certain interests receive greater protection than others as a result of the importance in a community of setting socio-political and economic priorities (e.g. the need to protect private property as well as the right to *corpus*[70], *fama*[71] and *dignitas*[72]).

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[66] McFarlane and Stevens, "Interests in Securities. Practical Problems and Conceptual Solutions" in L. Gullifer & J. Payne (eds.), *Intermediated Securities: Legal Problems and Practical Issues* (2010) at p. 35.
[67] McFarlane and Stevens, "Interests in Securities. Practical Problems and Conceptual Solutions" in L. Gullifer & J. Payne (eds.), *Intermediated Securities: Legal Problems and Practical Issues* (2010) at p. 36.
[68] Bridge, *Personal Property Law* (2002) at p. 12.
[69] Bridge, *Personal Property Law* (2002) at. p. 12.
[70] "Bodily integrity".
[71] "Reputation".
[72] "Dignity".

This principle seems to be consistent with the classification (typically applied in civil law systems) of "absolute" versus "relative" rights "depending on whether they involve a legal remedy *erga omnes*" (i.e. against the whole world) or only *inter partes* (i.e. against a given individual). Following this classification, personal obligations are considered "relative" since they are only effective against a specific person (such as a contracting party). On the other hand, the category of "absolute" rights comprises both proprietary rights (i.e. real rights or *rights in rem*) and the so-called "personality rights" (e.g. rights to physical integrity, to reputation and to privacy) which can be enforced against every person who interferes with such rights. On the basis of this analysis, there is nothing to prevent us from stating that unlike personal obligations, proprietary rights are exercisable against third parties.

As regards the attribute of transferability, "it is no longer possible to suggest that 'property' is assignable, but […] contract rights, are not": "the modern rule is that both are assignable"[73]. This argument (supported by McFarlane and Stevens) is certainly true and brings us to partially reconsider the traditional view according to which "the truly essential features of property rights are that the right-holders can *transfer* [emphasis added] […] and can exclude third parties from interfering with their rights"[74]. The reason for this is that such a statement is now only partially indicative of property. For a number of centuries the twin attributes of "excludability" and "transferability" were used strictly to separate proprietary rights from contractual rights. It was only between the latter part of the 19th and the early 20th century that the attribute of "transferability" was gradually conferred to an increasing number of rights (that were typically classified by common law as purely personal). This process was made possible through the rules of equity which then started treating certain types of personal rights as "transferable, usable wealth" (e.g. the right to receive payment from a customer). Furthermore, in certain circumstances the assignment of proprietary rights may be subject to specific restrictions either on public policy grounds or as a result of the parties agreeing to such limitations (namely, by inserting a no-assignment clause in the contract)[75]. The outcome of this practice was that the main distinction between property and obligation was gradually confined to the concept of excludability. Hence, today the general perception is that proprietary rights differ from contractual rights in that they are better protected than the latter. In other words, the *distinctive* [emphasis added] feature of property is its universality[76].

This demonstrates that there is no uncertainty arising from the orthodox approach in so far as it is still possible, through the attribute of "excludability", to draw a distinction between proprietary rights on the one hand and contractual rights on the other. Nevertheless, although proprietary rights are exercisable against third parties, this statement cannot be interpreted in too rigorous a fashion, since there are exceptions to the general rule. As emphasized by Worthington, "there are no assets that entitle their

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[73] Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917 at 927.
[74] Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917 at 920.
[75] M. G. Bridge et al., *The Law of Personal Property* (London: Sweet & Maxwell 2013) at para. 29-028. See, for example, on this point *Swift v Dairywise Farms Ltd* [2001] EWCA Civ 145; [2003] 2 All E.R. 304 (Note); *Re Celtic Extraction Ltd* [2001] Ch 475; [1999] 4 All E.R. 684; *Money Markets International Stockbrokers Ltd v London Stock Exchange* [2001] 1 WLR 1150; [2001] All E.R. 223; *Don King Productions Inc v Warren* [2000] Ch 291; [1999] 2 All E.R. 218.
[76] Bridge, *Personal Property Law* (2002) at p. 12.

holder to *absolute* [emphasis added] rights to enjoy, to transfer, and to exclude others"[77]. This means that with respect to the attribute of excludability, common law property rights may at times be overridden[78], and equitable rights, such as the interest of the beneficiary under a trust, do not bind the *bona fide* purchasers for value without notice of the legal estate[79]. In other words, there are different degrees of exigibility of proprietary rights that can either be imposed by law or contractually created by the parties. The argument presented here is that such exceptions (or limitations) to the attribute of excludability are found both in common law and in equity, and more importantly, apply regardless of whether the notion of property relates merely to "physical things" (as suggested by McFarlane and Stevens) or is extended to intangibles (as supported by the orthodox approach). Hence, even if one were to accept McFarlane and Steven's idea of property (based on a rigorous dominium over material things)[80] the existence of property rights with different degrees of exigibility over the asset would still have to be acknowledged.

E.3 The concept of property entails a dynamic (not a static) relationship between an individual and a thing

The considerations made above show that it is difficult (if not almost impossible) to confine the notion of property within sharp and definitive boundaries. English law has developed a "flexible" and "malleable" idea of property, particularly through the rules of equity, which has proven capable of adapting to the continuing changes in market practice[81]. As a result of this process, the concept of property cannot be analysed by strictly using a "tick box" approach[82], with the aim of identifying its features in rigorous terms, as if they were applicable consistently in all cases. In contrast with a *stable* [emphasis added] definition of property (which seems to be favoured by McFarlane and Stevens), property rights can be defined as "more or less expansive [and] more or less limited"[83] depending on the number of third parties against whom such rights can be asserted. This means that although the orthodox approach is still in a position to distinguish proprietary rights from contractual rights on the grounds of the attribute of exigibility[84], it does recognise the possibility of applying the concept of universality in

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[77] Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917 at 923.

[78] Common law proprietary rights may be overridden by legislation for reasons of public interest (e.g. environmental restrictions on the use of land) or for the protection of certain groups of people (e.g. compulsory licensing and government use of a patent). Furthermore, in relation to land a person's ownership of property may be limited by the competing existence of different estates (i.e. freehold or lease) or interests (i.e. easement or charge) in land. See on this point Lawson and Rudden, *The Law of Property* (1982), at pp. 76 -97.

[79] Moreover, the exigibility of an equitable proprietary right may be subject to statutory limitations or other conditions, which are based on the type of interest involved. For example, as regards competing charges over the same assets, if the debtor becomes insolvent a floating charge holder has lower priority than the fixed charge holders as well as various statutory creditors.

[80] See on this point text to fns 32 and 36.

[81] The terms "flexible" and "malleable" are used by James Penner in relation to the concept of property. On this point see Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L. Rev. 711 at 723.

[82] Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917 at 923.

[83] The expression was used by Michael Bridge during a joint meeting (of senior Chancery, Queen's Bench judges and senior academics) at London Law Club on April 2010.

[84] For an alternative view see Worthington, "The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2006-2007) 42, Tex. Int'l L. J, 917 at 917 – 918.

different ways depending on the circumstances. In other words, the key point is that the concept of property is now based almost exclusively on a non-rigorous definition of excludability.

Consistent with this argument, it might be argued that certain rights are now "regarded as 'property' rather than 'obligation' since commercial practice demanded that these rights be recognized as enforceable against third parties"[85]. This has certainly been the key factor that brought about the adaptation of the beneficiary's rights under a trust from personal to proprietary. Indeed, over the centuries equity extended the protection of the beneficiary's rights by permitting its enforcement not only against the trustee but also against third parties. These changes were gradually introduced by the courts of equity in response to persistent commercial pressure. The trend toward affording greater protection through the recognition of proprietary rights has developed over time and continues to be present today; indeed, courts have recently emphasised that the proprietary nature of an interest depends on the intention of the parties: if the purpose was to create a right that is "sufficiently strong"[86] to be asserted *erga omnes*, then such a right can be classified as proprietary[87].

E.4 Difficulties in accepting the concept of a right against a right

In support of the proprietary nature of equitable rights under a trust, it could also be claimed that the idea of a right against a right is likely to encounter certain reservations from the theoretical and practical points of view.

E.4.1 Conceptual considerations

A conceptual argument against McFarlane and Stevens' theory could be that the concept of a right against a right makes it difficult to explain the position adopted in certain circumstances by statute law and case law when evaluating what a beneficiary can do and, more broadly, to what extent equitable rights can be protected against third parties.

One of the key points raised by McFarlane and Stevens when elaborating their theory is that a right against a right differs from a proprietary right, in that it cannot be asserted against non-disponee third parties. In other words, "it is *impossible* [emphasis added] for a persistent right to bind a party whose right *does not depend* [emphasis added] on A's right"[88]. This means that if A holds a house for B and then decides to transfer the house to C in breach of trust, B is entitled to enforce his/her right directly against C (save where C is a good faith purchaser for value without notice)[89]. On the other hand, if, for example, the house is badly damaged in a fire caused by C, B has no direct cause of action for negligence against C[90], as it is A who is generally entitled to enforce a tortious claim against C on behalf of B. Similarly, as mentioned earlier, where the trust property (e.g. the furniture in the house) is stolen by C, B has no claim for tort of conversion against the thief, since B has no legal title to the property.

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[85] S. Worthington, "Shares and shareholders: property, power and entitlement: part I" (2001) 22 (9), The Company Lawyer, 258 at 260. This statement refers specifically to shares, but it can be extended to other proprietary rights, such as the right of the beneficiary under a trust.
[86] *Pearson and others v. Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), at [253].
[87] *Pearson and others v. Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), at [225].
[88] McFarlane, *The Structure of Property Law* (2008), at p. 887.
[89] More specifically, C would be considered as holding the house on constructive trust for B, which means that C incurs the duty to respect the fact that the house is not beneficially his/her own.
[90] *Leigh & Sillivan v. Aliakmon Shipping Co. Ltd (The Aliakmon)* [1986] AC 785 at 812.

The author believes that although these considerations have merit, they still present certain inconsistencies with relevant positive law[91].

For example, going back to the case of a third party who causes damage to the trust property, while it is certainly true that the claim for tort of negligence generally lies only with the trustee, this has not prevented, in certain circumstances, English courts from allowing the recovery of losses which were suffered exclusively by the beneficiary, not by the trustee[92]. In other words, C would be liable not only for the physical damage of the trust property, but also for the foreseeable consequences of that damage which were incurred by the beneficiary (such as loss of profit and *extra* expenditure). The reasoning behind this position was highlighted by the Court of Appeal in *Shell UK Ltd v. Total UK Ltd* when stating that "a duty of care is owed [by the tortfeasor] to a beneficial owner of property (just as much as to the legal owner of property)"[93]. McFarlane criticises this decision on the grounds that it seems to be based more on functional considerations rather than on conceptual ones; yet he does recognise the importance of such a decision as it shows that "in cases where the third party has acted carelessly in performing a contract with [a trustee] then, although the [beneficiary] is not a party to such a contract, the terms of the contract may modify any duty of the third party to the [beneficiary]"[94]. Now, on what grounds can this statement be considered fully consistent with the idea that the right of the beneficiary does not *bind* [emphasis added] the tortfeasor, and more broadly that such a right is not linked or attached to the trust property? Indeed, even if one were to accept the idea that the reasoning behind the decision in *Shell UK Ltd v. Total UK Ltd* is "unorthodox", it would still clearly show that courts are moving away from the idea that a beneficiary is unable to bind non-disponee third parties[95].

As for the case where the trust property is stolen by C, it is possible to argue that if B has no direct clam in conversion against the thief, she/he is still entitled (through the rules of equity) to obtain immediate protection against the tortfeasor. More specifically, the beneficiary has the power to bring either a proprietary claim or, subject to certain conditions, a personal claim in knowing receipt against the third party[96]. Hence, notwithstanding the difficulties in suing a third party directly at common law, the beneficiary is in a position to gain access to certain equitable remedies, without having to assert his/her rights through the trustee.

Another example (involving non-disponee third parties) concerns the possibility of suing squatters who acquire a legal title over unregistered land by adverse possession. As a general rule, under the Limitation Act 1980 (hereafter the "Act 1980") a person's

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[91] For a similar view see Simon Gardner and Emily MacKenzie, *Introduction to Land Law* 4 th edn. (London: Hart Publishing, 2015) at pp. 19-20-21

[92] *Shell UK Ltd v. Total UK Ltd* [2010] EWCA Civ. 180 at [137] - [144]. In support of this argument see also those cases where third parties were held liable to the trustee for breach of contract and consequently ordered to recover not only the losses suffered by the trustee personally but also those that had affected the beneficiary, *Lloyd's v Harper* [1880] 16 Ch D 290; *Woodar Investment Development Ltd v Wimpey Construction* UK Ltd [1980] 1 WLR 277, [1980] 1 All E.R. 571; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1988] 2 Lloyd's Rep 505, affirmed [1989] 1 Lloyd's Rep 568; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, [1995] 3 All E.R. 895; *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch 19 (Ch D); *Malkins Nominees Ltd v Société Financiére Mirelis SA* [2004] EWHC 2631 (Ch).

[93] [2010] EWCA Civ. 180, at [142].

[94] See also McFarlane, "Intermediated Securities: Taking Stock" (2016) 31 (6) JIBFL 359, at 360.

[95] See on this point also S. Gardner, "Persistent Rights' Appraised", in N. Hopkins (ed.) *Modern Studies in Property Law*, vol. 7 (Oxford: Hart Publishing 2013), ch. 15, s. I.E.

[96] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 and *Brown v Bennet* [1999] B.C.C. 525.

right to take action to recover unregistered land from a squatter expires if not exercised within twelve years[97]. Interestingly, (for the purpose of the Act 1980) where the land is held on trust the beneficiaries are deemed to have their *own right of action* [emphasis added] to recover the land which the trustee enforces on their behalf[98]. This means that if, on the one hand, the beneficiaries are required to sue only through the trustee (as the deeming is confined to the purpose of limitation), on the other "so long as the right of action of [the beneficiaries] […] has not accrued or has not been barred" (e.g. because it was related to a future interest or because of the beneficiaries' disability) "the legal estate of the trustee shall not be extinguished"[99]. Let us imagine a scenario where C takes adverse possession of a piece of (unregistered) land held by A on trust for a minor (e.g. B who is only six years old at the time of dispossession). Twelve years later A's right of action to recover the land is barred but B's right is not barred (given that under the Act 1980 in cases of disability the period of limitation is extended to six years[100]). Hence, under these circumstances A[101] will still have the power to recover possession of land on behalf of B (despite A's own right being barred)[102]. The question remains, is the Act 1980 fully consistent with McFarlane and Steven's argument? In the author's view, it is consistent in procedural terms[103] but not so much in substance, as it is difficult to deny that B's right of action to recover the land is somehow affecting (and therefore binding) C's position over the trust property. Indeed, had it not been for B's right of action, C would have acquired (*ex novo*) legal ownership over the land after only twelve years (rather than having to wait a longer period of time to obtain such a title).

This position is even further exacerbated when dealing with other types of equitable rights, such as restrictive covenants (which are classified by McFarlane and Stevens as "persistent rights" or "rights against rights"). Indeed, in *Re Nisbet and Potts' Contract*[104] the Court of Appeal held that a restrictive covenant can bind all parties, including certain non-disponees, such as squatters who acquire title to the land by adverse possession[105]. Similarly, the principle set out in this decision seems to apply also to

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[97] ss. 15 and 17 of the Act 1980.

[98] s. 18 (1) and (4) of the Act 1980.

[99] s. 18 (3) of the Act 1980. The term disability is defined in s. 38(2) of the Act 1980 and it includes an infant or a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings.

[100] s. 28 of the Act 1980.

[101] In this case, however, it would be most likely a newly appointed trustee.

[102] The reasons behind s. 18 (4) of the Act 1980 are based on the need to do practical justice to the beneficiary. See on this point L. Tucker, J. Brightwell and N. Poidevin, *Lewin on Trusts*, 9th ed. (London: Sweet & Maxwell, 2015) at para. 44.104.

[103] In this case, the legal estate of the trustee is preserved so as to allow the beneficiary (through the trustee) to sue after the twelve years.

[104] 1906 1 Ch 386 (CA).

[105] McFarlane criticises the Court of Appeal by stating that such a decision cannot be justified "as a matter of doctrine", as it was merely based on "policy" considerations and "practical convenience" (such as the need to maintain "the value of estates in the neighbourhood of London and all large towns") B. McFarlane, "The Numerus *Clausus* Principle and Covenants Relating to Land", in S. Bright (ed.) Modern Studies in Property Law – Vol. 6 (Oxford: Hart Publishing 2011) at p. 323. For a criticism of this decision see also Maitland, *Equity. A Course of Lectures* (1936), ch 12, at pp. 126-170. However, it is possible to argue that it was not only a matter of mere convenience, rather a question of having to interpret the provisions of the Statute of Limitation in a fair and reasonable manner. This point was highlighted by Cozens-Hardy L.J. when stating that "the [r]ights extinguished for the benefit of the squatter under [the limitation rules] are those of persons who, might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant […] never had any cause of action which he could have brought, because unless and until there is a breach or a threatened breach, of such a covenant, it is impossible for a person entitled to the benefit of it to bring an action."

other types of persistent rights, such as equitable leases and equitable mortgages[106]. The question is posed once again: how is it possible to reconcile such a principle with the idea that in *no circumstances* [emphasis added] are persistent rights able to bind parties whose title over the asset is acquired other than by derivative transfer?[107]

As a result of these considerations, one can identify two main problems when evaluating McFarlane and Stevens' argument (on the inability of a persistent right to bind non-disponee third parties). The first problem is the difficulty in accepting the assumption that all equitable rights function in the same way[108], as there may be situations (such as those involving restrictive covenants) where equitable rights are enforceable against non-disponee third parties[109]. Secondly, as regards trusts, although the beneficiary is generally required to sue non-disponee third parties through (the right of) the trustee, case law has shown that even in these circumstances the beneficiary may retain the power to bind third parties. The most convincing explanation for granting such a power to the beneficiary is the (courts' and the legislator's) assumption that the right of the *cestui que trust* is somehow linked to the asset and therefore it is a proprietary right.

In support of the proprietary nature of the beneficiary's right, one should also mention the rule established in *Saunders v Vautier*[110] which states that a beneficiary of full age and sound in mind (who is entitled to the whole beneficial interest over the trust property) may have the power to terminate the trust and obtain full title of the property[111]. Once again, it is difficult to fully explain this rule without conceiving the beneficiary as the "ultimate owner"[112] of the trust property who in specific circumstances (such as those contemplated in *Saunders v Vautier*), can decide what to do with his/her own property[113], even if this means going against the will of the settlor and defeating the trustee's duties[114] (such as the duty to avoid the termination of the trust)[115].

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[106] Equitable leases and equitable mortgages are capable of binding non-disponee third parties, such as adverse possessors. See on this point M. Dixon, *Modern Land Law*, 9 th edn. (Oxford: Routledge 2014) at pp. 238 and 423.

[107] The position taken by the Court of Appeal on restrictive covenants contradicts McFarlane and Stevens' argument, not only in substance but also in procedural terms, given that the holder of a restrictive covenant is entitled to enforce his/her right directly against a squatter or a subsequent purchaser (other than a *bona fide* purchaser for value, without notice).

[108] The author is grateful to Professor Robert Chambers for highlighting this point.

[109] In support of this argument, see also fn 106.

[110] [1841] 41 E.R. 482; [1841] 4 Beav 115, Cr & Ph.

[111] In this case shares were held on trust for Vautier. All the dividends were to be accumulated along with the capital in the trust and then transferred to Vautier when he attained the age of twenty-five. When Vautier attained the age of majority, i.e. twenty-one, he claimed that the whole fund be transferred to him immediately.

[112] *Curtis v Lukin* [1842] 49 E.R. 533; [1842] 5 Beav 147.

[113] In other words, it is necessary to conceive the interest of the beneficiary - not as a mere right to the performance of the duties under the trust (including the duty to avoid the termination of the trust) but as a right which attaches to the trust property. In support of this argument see S. Gardner, *An Introduction to the Law of Trusts* (2011), at p. 223. McFarlane attempts to explain this rule by arguing that as the duties are owed to the beneficiary (e.g. the duty not to transfer the shares until Vautier turned twenty-five), the latter is entitled to waive those duties, "just as, if someone owes you £100, you can choose to release them from that duty to pay you", McFarlane, *The Structure of Property Law* (2008), at p. 554. While this argument may be true, it does not fully explain on what ground the beneficiary is entitled to decide what to do with the trust property.

[114] For a different view see the approach taken by US courts in cases such as *Brandon v Robinson* [1811] 18 Ves 429.

[115] See also the controversial decision of the House of Lords in *Baker v. Archer-Shee* [1927] AC 844 where the beneficiary was considered to be owner of the shares for the purpose of liability to tax income on the dividends.

To conclude this section, on the basis of relevant positive law one must confirm the idea that the beneficiary holds an indirect right *in rem*. Such a right is perceived as "indirect", given that (as mentioned earlier) the beneficiary is generally entitled to assert his/her right against third parties through the trustee[116]. Yet, the attachment to the trust property makes it possible to fully understand the reasoning behind those cases where the beneficiary is entitled to bring a direct claim against third parties or (if this is not possible) to somehow bind the position of the third party over the asset. In this regard, English law seems to be generally prepared to grant such a power to the beneficiary where interests of justice and fairness so require (mainly, where the trustee is not in a position to fully protect the beneficiary's equitable ownership over the asset). The idea is that in these cases the trustee's intermediation to recover the asset is either completely removed or reduced to a pure formality and this effect makes it possible to confirm the argument that (in the context of proprietary rights) the relationship between an individual and a thing is dynamic (not static).

E.4.2 Methodological and practical considerations

Setting aside these conceptual considerations, the author believes that even if the persistent right theory were to fully explain the beneficiary's position under a trust, it may still be rejected for methodological and pragmatic reasons.

Firstly, the concept of a "right against a right" is alien to English law, which classifies the equitable interest of a beneficiary under a trust as "proprietary" rather than "persistent" rights[117]. In this regard, courts and statute law are generally more inclined to address commercial needs by accommodating existing principles rather than creating an entirely new class of rights. This practice has been established over the centuries not only by creating the idea of an equitable ownership under a trust or by granting new forms of charges to secured creditors[118], but also by extending the category of proprietary rights to include interests over an increasing number of intangibles. This trend was recently confirmed when statute law introduced a rather "singular" idea of possession, which applies to circumstances where parties can obtain non-exclusive *dominium* over intangibles. In particular, the 2010 Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations (hereafter "FMIR") overrides the common law requirements (which have traditionally confined the concept of possession to the idea of *physical and exclusive control* [emphasis added]) by allowing a secured creditor to take possession over investment securities in circumstances where the degree of control is not necessarily "exclusive" and the nature of the asset can be either tangible or intangible. Although this innovative provision has attracted some criticism[119], it does confirm a general trend in favour of adapting (wherever possible) existing legal concepts to commercial needs rather than creating *ex novo* different categories of rights[120].

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[116] See text to fns 46 and 65.

[117] See, among others, the decisions in *Baker v. Archer-Shee* [1927] AC 844; *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 and more recently in *Pearson and others v. Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch) and *Akers v Samba Financial Group* [2017] UKSC 6.

[118] See, however, McFarlane and Stevens "The Nature of Equitable Property" (2010) 4 J. Eq., 1 at 26.

[119] See E.C. Zaccaria, *"*An inquiry into the meaning of possession and control over financial assets and the effects on third parties*",* (2018) 18, J.C.L.S., 217.

[120] Regarding statute law see also e.g. s. 22 (1) of the Trusts of Land and Appointment of Trustees Act 1996 which confirms the idea that the interest of the beneficiary under a trust is an "interest in property".

McFarlane and Stevens disregard this general trend and elaborate an abstract theory which seems to be detached from English case law and statute law. Although the intention was to draw up a set of interests whose boundaries are clear and better defined[121], this has been achieved at the expense of not taking into account the historical development of English property law. The question remains, can a particular concept within a legal system be described without tracing its historical roots? Certain comparative lawyers believe that from a methodological point of view this cannot be considered a correct approach to legal analysis[122], as it may lead to a distorted or misleading idea of the true, characteristic features of a particular legal system. In this case, for example, McFarlane and Stevens embrace the idea (common to civil law jurisdictions) that definitions and classifications of legal concepts descend from the formulation of absolute theories rather than being constantly accommodated to practical needs. However, as highlighted by Lawson and confirmed more recently in *Roxborough v Rothmans of Pall Mall Australia Ltd*[123], this procedure (better known as the "top-down" approach) does not seem to reflect English legal culture in terms of the approach generally adopted by courts when dealing with claims[124].

One last aspect that deserves careful consideration is the idea of a "right against a right" being part of a broader theory (proposed by McFarlane and Stevens) which confines the notion of property to a restricted list of rights that does not include interests in intangible assets[125]. This approach could raise doubts from a practical point of view as it is in contrast with the general trend toward granting increasing importance to intangibles rather than tangibles. As emphasised by the Organisation for Economic Co-operation and Development ("OECD"), "in most countries the investment in intangibles is growing rapidly' and in certain cases it also 'matches or exceeds investment in traditional capital such as machinery, equipment and buildings".[126] Hence, by accepting McFarlane and Stevens' approach to intangible assets, the importance of proprietary rights would be significantly reduced while persistent rights and background rights[127] would start to be associated to a large and increasing portion of people's wealth. To a certain extent, it could be stated that this restrictive approach to proprietary rights would not be easily accepted either in common law or civil law jurisdictions. While there are considerable differences among legal systems, the general trend in most countries is to classify at least certain types of interests in intangibles as proprietary (e.g. intellectual proprietary rights). As a result of these practical reservations, the approach suggested by McFarlane and Stevens is likely to be confined to the academic debate and unlikely to be accepted in practice.

F. The proprietary character of a right against a right

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[121] See, however, text to fns 65 and 81.

[122] See among others, G. Gorla, *Diritto comparato e diritto comune europeo* (Milan: Giuffré 1981) at p. 730 and G. Gorla, "Diritto Comparato" in *Enc. Dir.*, XII (Milan: Giuffré 1964), at p. 930.

[123] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; [2001] 208 CLR 516. In this decision the High Court of Australia criticised the "top-down" approach (used by certain legal scholars in common law systems) according to which a theory or concept is "invented […] and then applied to existing decisions to make them conform to the theory". For an analysis of this case see E. Bant, "An Introduction to Property Law in Australia" (2002) 26 (1) Melb. U. Law Rw., 10.

[124] F. H. Lawson, "Common Law" in International Encyclopedia of Comparative Law IV/2, VIII (Tübingen-Paris, 1975), at p. 24.

[125] See fn 33.

[126] Organisation for Economic Co-operation and Development - OECD, (September 2011). *New Sources of growth: intangible assets* <http://www.oecd.org/sti/inno/46349020.pdf> accessed 13 July 2017.

[127] See fn 33.

At this point, the author suggests that a third possible measure could be to confer proprietary *status* to a right against a right. One could argue that for the purpose of a trust the beneficiary holds a proprietary right in the trustee's right in the main property. For example, if A holds a house on trust for B, B acquires a (proprietary) right in A's (proprietary) right in the house (rather than a *sui generis* right against A's proprietary right or an indirect proprietary right in the house).

The general idea lying behind this argument is that the beneficiary's (proprietary) right does not attach directly to the original property, which led to the creation of the trust (i.e. the house) but attaches to a separate asset which is *strictly linked* [emphasis added] to such a property. In other words, what the beneficiary really acquires is an interest in a sub-property that derives from the property immediately above it.

The key issue is to try to establish what precisely is meant by "sub-property". In the example presented above, the sub-property can be identified with the trustee's (management) right in the house which allows B to enforce a series of rights against A that are typically related to proprietary rights (such as a right to enjoy the benefits of the house, to pass the house on to his/her heirs and to be protected against A's creditors in cases where A is declared bankrupt).

This description of B's right in a sub-property shows that there are a few similarities between such a solution and the theory of a right against a right, given that in both cases B acquires a package of rights against A. The main difference is simply the proprietary or *sui generis* characterisation of certain rights that B can exercise (not only against A) but also *erga omnes*. More specifically, while the theory suggested by McFarlane and Stevens considers a right against a right as a *sui generis* title, the alternative option (based on the concept of an interest in a "sub-property" or in a "derivative asset") identifies A's proprietary right in the house as the item of property held or owed by B (which generally allows B to claim certain rights over the house). This means that the debate should not really be about the nature of B's right but rather about the subject matter of B's *proprietary* [emphasis added] right under a trust.

Yet, the difference between a right against a right and that of an interest in a sub-property cannot be confined merely to a matter of semantics given that the latter (unlike the former) confirms the idea that if B has a right in A's proprietary right in the house, B's right is *linked* [emphasis added] to the house (although generally through A's property right). Only by recognising the existence of such a link with the trust property are we able to fully explain why certain rights conferred to B have proprietary features while others do not (i.e. why certain rights can be asserted *erga omnes* while others can only be enforced against A). Interestingly, McFarlane and Stevens seem to ignore the importance of such a link and argue that B is entitled to enforce his/her rights against third parties (i.e. disponee third parties, other than a *bona fide* purchaser for value, without notice of the trust) simply because certain *personal* [emphasis added] obligations that A owes B (and that derive from B's undertaking to carry out the trust) are somehow attached to the house and consequently passed on to third parties. The problem with this description is that firstly, the concept of a right against a right makes it difficult to understand the reasons why when receiving the trust property from A, C does not incur the same duties undertaken by A to carry out the trust (e.g. making distributions in accordance with the trust, or managing and investing the trust property). One could argue that C has acquired a lesser or smaller duty to return the trust property to B (arising from the fact that C received the property) but this does not clarify how by

transferring the right of ownership from A to C the obligations (which were linked or attached to that ownership) have managed to change and turn into different duties[128]. How could this be so? Secondly, it cannot fully explain the reasons why in certain circumstances B is capable of binding a third party who has acquired a legal title to the trust property, other than by derivative transfer.

If the main difficulty behind the theory proposed by McFarlane and Stevens is to recognise the idea of a proprietary right that attaches *indirectly* [emphasis added] to an asset, one can overcome this obstacle through a legal construction that conceives of A's proprietary right as the "asset" held by B. McFarlane and Stevens would most likely disagree also with this analysis, stating that proprietary rights only attach to tangibles and not to abstract concepts such as rights. This argument, however, can be rebutted since (as emphasised in the previous sections of this paper[129]) English law has frequently shown that even a simple right (such as a debt) can be recognised as an item of property[130]. Hence, there is no reason to reject the idea of conceiving the management functions of the trustee as an asset.

A further objection to the proprietary characterisation of a right against a right is that it may clash with the idea of fragmented ownership. Once again, this criticism does not seem entirely convincing. A closer look at the concept of an interest in a sub-property shows that although at first glance it does not seem to comply *stricto sensu* with the conventional trust law, it does yield the same conclusions as those of a general model of fragmented ownership. In particular, such a concept confirms the tendency in English law to allocate to different parties a bundle of rights which are somehow (whether directly or through a sub-property) related to the same asset. The objective in this case is clearly to maximise the economic value of that asset by allowing the *cestui que trust* to enjoy the benefits of property through the management right of the trustee.

This shows that the idea of an interest in a sub-property is still aimed at defending the traditional approach (which views the equitable interest of a beneficiary as a proprietary right), the novelty being simply that of looking at the *indirect* [emphasis added] relationship between the beneficiary and the trust asset from a different perspective and therefore concluding that there can be two alternative ways of describing the beneficiary's proprietary right, i.e. as an indirect right *in rem* (as mentioned in sections E.1 and E.4.1) or as a right in a sub-property which is linked to the trust asset. In other words, while in the first case one argues that the beneficiary has a right in the trust property which generally attaches indirectly through the trustee's ownership; in the second case one is basically saying the same thing but going a bit further and defining the trust's ownership as the sub-property held by the beneficiary[131]. Indeed, in both cases it is the ultimate link to the trust property which explains why in certain circumstances the interest of the beneficiary is capable of binding (disponee and non-disponee) third parties.

Conclusions

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[128] Jaffey "Explaining the trust" (2015) 131 L.Q.R., 377 at 382 – 391.
[129] See text to fns 28 and 30.
[130] In support of this argument see also Jaffey "Explaining the trust" (2015) 131 L.Q.R., 377 at 393 - 395.
[131] This approach may be considered an effective way of explaining certain complex structures of trust and sub-trust, particularly those used in the practice of intermediated securities. This aspect, however, cannot be summarized in just a few paragraphs, as it requires a broader analysis (now under preparation).

The law of trusts is typically described as giving rise to two types of proprietary interests, namely a legal title to the trustee and an equitable title to the beneficiary. Unlike legal proprietary rights, the equitable interest of the beneficiary can be somewhat limited, not only in terms of its control over the asset but also in terms of the number of persons against whom such rights can be asserted.

McFarlane and Stevens attempt to explain these limitations, by defining the beneficiary's title not as proprietary but simply as a (*sui generis*) right against the right held by the trustee.

The study critically evaluates McFarlane and Stevens' argument and draws the conclusion that their theory may be difficult to accept. The main reason for this is that from a methodological point of view the theory of a right against a right cannot be considered a correct approach to legal analysis, given that it is not consistent with the historical development of English property law. More specifically, it does not take into account the tendency in English law to accommodate market needs by stretching (wherever possible) the boundaries of well-established concepts of property law rather than creating new categories of rights. This has certainly been the approach adopted over the centuries by courts when creating, for instance the idea of an equitable ownership under a trust or of a proprietary right over intangibles but more recently, it has also been the position chosen by statute law (through the FMIR) when aiming to expand the notion of possession (so as to include circumstances which entail a non-exclusive dominium over intangible assets). As a result of these considerations, certain comparative lawyers would argue that the theory of a right against a right is difficult to accept, as it does not reflect English legal culture (in terms of the manner typically employed by courts and statute law to deal with legal problems).

Yet, even setting aside these methodological concerns, the question remains: does the theory of a right against a right offer an effective contribution to the theoretical debate on the nature of the beneficiary's title? McFarlane and Stevens believe that such a theory manages to provide a better understanding not only of the principles of trust but more in general of property law. In particular, (a) it explains the reasons why a beneficiary cannot assert his/her rights against non-disponee third parties and (b) it avoids the awkwardness of having two "conflicting" types of ownership over the same asset, as well as removing the alleged inconsistencies (claimed to be associated to the traditional approach) when distinguishing proprietary rights from personal rights.

The author rejects this position primarily for three reasons.

Firstly, equitable ownership is not in conflict with legal ownership, as it simply derives from the latter (in the sense that, it is generally through the management functions of the trustee that the beneficiary can obtain the enjoyment of the property). In support of this argument, it is possible to identify two alternative ways of describing the "derivative" nature of the beneficiary's proprietary right: the first one corresponds to the idea of a right which attaches indirectly to the trust asset, and the second to that of an interest in a sub-property (where the item of property held by the beneficiary is something separate from the trust asset, resulting in the trustee's proprietary right). In the author's view, both these solutions are capable of explaining the structure of a trust as well as showing that there is a perfect balance between the interest of the trustee (who can use the asset) and that of the beneficiary (who simply enjoys the benefits of that use). Indeed, it is usually through the combination of these two facets of

ownership that property law manages to fully achieve its main purpose, i.e. to maximise the economic value of an asset).

Secondly, McFarlane and Stevens' assumption (that equitable ownership is prevented from binding non-disponees) does not seem to be fully consistent with relevant case law and statute law which shows that – even in circumstances where the legal title to the trust property is vested in someone other than by derivative transfer - the beneficiary can still be granted the power to somehow bind such a person.

Thirdly, there is no confusion or inconsistency (in relation to the traditional approach) when separating a proprietary right from a personal right, the key difference being simply that the latter is only enforceable against a given individual, while the former can be claimed against the outside world. To put it another way, the characteristic feature of a proprietary right remains its universality, i.e. the possibility to receive greater protection than that of a mere personal right.

After all – when looking at the historical development of English property law – it can be seen that the extension of its boundaries has been mainly driven by the trend towards affording greater protection to the parties in response to commercial pressure.

Yet, the attribute of universality cannot be interpreted in rigorous terms, as it may be subject to limitations (either imposed by law or contractually created by the parties). The core idea is that some of these limitations may also apply over what McFarlane and Stevens define as a "proprietary" right (as opposed to a *sui generis* right).

This demonstrates that – regardless of the acceptance or not of the theory of a right against a right - the concept of property embodies a dynamic (rather than a static) relationship between an individual and a thing, as its content is liable to change depending on the circumstances.