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EQUITABLE OWNERSHIP

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ABSTRACT. *Recent academic debate has questioned whether equitable interests should continue to be classified as proprietary, proposing instead analyses based on "rights against rights", "modified" proprietary rights or the erosion of the proprietary/personal divide. This article, based on the text of the XXIV Old Buildings Lecture 2025, argues that these alternative frameworks, while illuminating, do not displace the enduring value of the traditional proprietary analysis. It shows that equity has long functioned as the principal means by which the law recognises ownership beyond traditional common-law categories. The proprietary characterisation of equitable interests accords with established principle, is often the simplest workable solution to the problem in hand, and corresponds to the ordinary understanding of ownership.*

KEYWORDS: *equitable proprietary interests*, *beneficial ownership*, *trusts*, *equitable assignment*, *cryptocurrency*, *priority on bankruptcy and insolvency.*

I. INTRODUCTION

There has over the last 20 years been a slow but sustained falling out of love between a body of distinguished academics and the concept of equitable proprietary interests as a useful means of classification or analysis of rights. Some have suggested that equitable rights should be, in effect, kicked out of the proprietary class and given a new *sui generis* classification of their own, namely "rights against rights". Others have opined that, at least in the equitable field, the splitting of rights into proprietary and personal classes has lost all practical utility. Some have held on to the traditional classification and yet others have alighted on various intermediate positions along what may for convenience be called a spectrum of academic opinion.

Thus far, this important debate has largely passed judges by, in the sense that a reasonably assiduous reader of the law reports will look in vain for any dicta which directly confront this controversy. By that I do not of course

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mean that the judges are all unaware of it. Some academic participants in the debate are now judges, led by my friend and colleague Lord Burrows, who at least recognised the existence of this controversy in a recent judgment, without taking sides on it.[1] Others have merely stumbled across it, by reading a summary of the debate in a leading textbook, hearing a lecture about it, or reading an academic article which discusses or engages with it. I venture to speculate that most judges (or at least most of those of or approaching my age) were taught that equitable proprietary interests were an important and well-recognised class of rights and few if any have had the occasion or been charged with the duty (in the sense that the outcome of a case depended upon it) to enter into the fray. I well remember having it drummed into me, in classes in the Old Hall at Lincoln's Inn in 1977, that the essential distinction between legal and equitable proprietary interests was that legal interests were good against all the world, but that equitable interests were only good against all the world other than a *bona fide* purchaser of a legal title or estate for value without notice: namely equity's darling.

Now it could be that we judges may have thought that, unlike the debate around unjust enrichment, this one would just quietly fizzle out (all the more so if we did nothing to fan the flames). But it has not. As recently as November 2024, I was privileged to be asked to chair a lecture[2] by one of the principal protagonists in the debate, Professor Ben McFarlane, given at UCL, the whole of which he devoted to a modernisation of the "rights against rights" thesis to which he made his original contribution as long ago as 2008.[3] So when I received the even greater privilege of being asked by Professor Graham Virgo (another protagonist in the debate) to give this lecture, it seemed to me to be a good time to offer a purely judicial perspective on the issue, from the dubious but at least independent vantage-point of having no academic pretensions or credentials whatever.

Pace Lord Burrows, who manages an almost unique two-in-one combination, I think it is worth dwelling for a moment on the respects in which that judicial perspective may differ to a greater or lesser extent from the academic one, particularly when it comes to delivering a lecture like this. The day job of a judge (particularly an appellate one) requires them to decide concrete cases by the application of what the judge conceives to be the specific (often very small) bit of the law applicable to the facts which have been found. The judge has no control at all, or even much influence, over what particular part of the law is going to be

[1] *Byers v Saudi National Bank* [2023] UKSC 51, [2024] A.C. 1191, at [103].
[2] B. McFarlane, "Understanding Equitable Property: More Complex than ABC?" Current Legal Problems Lecture Series 2024–25, delivered at the Faculty of Laws at University College London, 21 November 2024.
[3] See B. McFarlane, *The Structure of Property Law* (Oxford 2008).

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relevant to each case listed before them. The more senior the judge, the wider become the potential areas of the law which they might be called upon to apply and the shallower will be their level of immersion or expertise in any particular area. It is mere happenstance when, or even whether, a particular judge will ever be asked to rule upon a matter of developed academic debate, such as this one, even if it happens to be one in which they take a particular interest. Even if it does happen, the judge's reasoning is likely to be influenced, even constrained, by counsels' rival arguments, although not controlled by them. The judge's preparation time is likely to be relatively short and usually insufficient to read all academic writing on the matter in question. The upside is that the judge may get the unique privilege of deciding, or playing a collegiate part in deciding, the point in issue and making that decision part of what we misdescribe as our judge-made law. (It is really made by an informal partnership of judges, advocates and academics, working and arguing together.)

Regardless of whether it is (or is not) a thing of beauty, the law is ultimately a practical instrument for regulating and enhancing the lives and relationships of all those under its rule. So the daily judicial task of using, and very occasionally developing, the law has the advantage of training the judge to approach legal problems from an intensely practical perspective. That is no less true of a general legal problem such as the present one, about the classification of a whole range of rights and interests recognised by the law. The question for the judge is which of a set of rival classifications is most likely to assist judges and others in solving particular disputes, which is likely to be the more intelligible and useful to those affected by the part of the law in question (both lawyers and their clients), and which best reflects the property, business activities and other aspects of the daily lives of citizens which the law is there to regulate and enhance. The answer may be that the best classification for the resolution of one problem is not the best for resolving another. It may be that the choice is not for a single classification at all, but that we should recognise a range of different classifications, within which a useful choice may be made on a case-by-case basis.

I am not suggesting that modern legal academics are immune to these practical considerations. Some of the published commentary is firmly focused upon the very aspects which I have just described. But I hope I will not disappoint if my own perspective fails quite to scale the Olympian heights of a purely conceptual analysis of the problem and indeed fails to acknowledge or respond to every one of the differing academic points of view. In fact, I am bound to disappoint by the need to recognise two well-known constraints which always affect judicial lecturers. The first is the need to avoid becoming too closely committed to a particular point of view. Who knows, the very problem addressed by

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the lecture may land on the judge's desk shortly after delivery, for the fair and independent resolution of which they need to retain at least a measure of open-mindedness. The problem may already be on the judge's desk, between the hearing and the delivery of judgment. That happened to me in the recent *Rukhadze* case,[4] in which both sides attempted to rely upon an address of mine given at the Equity Today conference held in Oxford in April 2022. But that said, it is by no means unusual these days for a judge to acknowledge that an earlier decision of theirs was plain wrong. I had to do just that in 2023 in the *Aviva* case.[5] The second constraint is a nerdish habit of struggling to find out what the law actually is, rather than, in the judge-free utopia sometimes peopled by academics, what it should be.

Let me begin by recognising that these debates can be blighted by imprecision about the meaning of key words or their different meanings in context and over time. We are here concerned with common law and equity, with legal and equitable proprietary interests, with legal and beneficial ownership, with property, with rights *in rem* and *in personam*, and with rights and interests. I am not going to attempt a glossary, here or elsewhere. Suffice it to say that, like a word or phrase in a contract or in legislation, these words and phrases will take their particular meaning from being read (or listened to) in context and by reference to their underlying purpose.

II. The Debate

The quickest way to convey an entry-level understanding of the debate about the continuing utility (if any) of classifying certain rights as equitable proprietary interests is through a very brief summary of the different strands of academic thought about the problem. At one end of the original spectrum may be said to be Frederic Maitland's view that all equitable estates and interests are purely personal.[6] But that (I would suggest rather extreme) view is no longer supported academically and never commanded support from the judiciary. Now occupying a more defensible position towards Maitland's end of the spectrum is what I have briefly mentioned as the "rights against rights" analysis, encapsulated by the approach proposed by Ben McFarlane and Rob Stevens in their 2010 paper "The Nature of Equitable Property".[7] They propounded the theory that the equitable interests of beneficiaries under a trust are best regarded as a species of rights against rights, not

[4] *Rukhadze v Recovery Partners G.P. Ltd.* [2025] UKSC 10, [2025] 2 W.L.R. 529.
[5] *Aviva Investors Ground Rent G.P. Ltd. v Williams* [2023] UKSC 6, [2023] A.C. 855.
[6] F.W. Maitland, *Equity: A Course of Lectures*, 2nd ed., rev. by J. Brunyate (Cambridge 1936), 107. But even he may have repented: see F.W. Maitland, "Trust and Corporation" in D. Runciman and M. Ryan (eds.), *Maitland: State, Trust and Corporation* (Cambridge 2003), 75, 78.
[7] B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1.

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proprietary interests. The beneficiaries have equitable personal rights against the trustees' legal rights *in rem* in relation to the "thing" constituting the trust property. The beneficiaries' rights do not attach to the "thing" itself. They are neither proprietary rights nor merely personal rights, but a separate intermediate class of what they call persistent rights.

At the opposite end of the spectrum may be said to be the typical attitude of the English courts, as spelt out by luminary chancery judges such as Lord Browne-Wilkinson, Lord Millett and Lord Neuberger,[8] which is that a beneficial or equitable interest under a trust is generally a proprietary interest in the trust property, even if not strictly a right *in rem*: see *Webb v Webb*.[9] This conventional view is supported by several academic writers, including Jamie Glister and James Lee, and Kevin Gray and Susan Francis Gray.[10]

Intermediate places along the modern spectrum are occupied by a number of distinguished academic writers. I will briefly mention two. The first is that of Professor Dame Sarah Worthington, in her essay "The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation".[11] In what she calls a "simple and startling" thesis,[12] she suggests that equity has taken the lead in eliminating the divide between proprietary and personal rights, in response to persistent commercial pressure. Her analytical (rather than historical) justification is that no characteristics reliably identify one as separate from the other and no useful outcomes flow from maintaining the division between the two.

The second is that maintained by Graham Virgo, in his book *The Principles of Equity and Trusts*, namely that equitable interests are what he calls modified proprietary rights.[13] Building out from a dictum of mine in one of the *Lehman* cases,[14] he suggests that this classification can, for example, accommodate an equitable proprietary interest in a bundle of purely personal rights. He says that this approach is doing essentially the same thing as the "rights against rights" thesis, but simply adopting the language and concepts used by judges, which he kindly describes as "frankly, easier to understand and articulate".[15] The principal modification of the conventional proprietary interest which he identifies

[8] See Section III(E).
[9] *Webb v Webb* [1994] Q.B. 696.
[10] J. Glister and J. Lee, *Hanbury & Martin: Modern Equity*, 23rd ed. (London 2024), paragraphs 1-019–1-020; K. Gray and S.F. Gray, *Elements of Land Law*, 5th ed. (Oxford 2009), paragraph 1.4.18; See also the somewhat equivocal position (but still emphasising the proprietary nature of the rights/duties) in S. Gardner, *An Introduction to the Law of Trusts*, 3rd ed. (Oxford 2011), 210–25.
[11] S. Worthington, "The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation" (2007) 42 Texas International Law Journal 917.
[12] Ibid., at 917.
[13] G. Virgo, *The Principles of Equity & Trusts*, 5th ed. (Oxford 2023), paragraph 3.5.5.
[14] *Pearson v Lehman Brothers Finance S.A.* [2010] EWHC 2914 (Ch), at [227].
[15] Virgo, *Principles of Equity & Trusts*, paragraph 3.5.5.4.

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as characteristic of a purely equitable interest is its propensity to be defeated by equity's darling.

III. Analysis

My way into this gnarled forest is illuminated by three principles that have guided me, looking through a glass darkly, towards a dim understanding of the law throughout my career. The first is to look for the answers to particular legal problems by reference to legal principles rather than bright-line rules. Nowhere is that more important than in relation to equity. The second is to look for the simplest workable solutions, if complexity can be avoided. The third, closely related to the second, is to try to articulate legal concepts and principles in a way that accords as closely as possible with the way in which they might be understood by the person whose affairs are governed by them. None of these three guiding lights can be followed in all cases or at all times. But together they have contributed to a pathway towards solutions which I hope tend to approximate to fairness and justice, even if at some cost to complete predictability and to reaching those solutions by reference to reasoning which the non-lawyer may be encouraged both to understand and to accept.

So, applying those principles to the present debate, I would start by acknowledging that each of the rival theses has something of real and lasting value to offer. By way of example, the "rights against rights" thesis is undoubtedly both a correct and often very illuminating way of getting to the heart of a problem about whether a beneficial interest under a trust (the classical instance of equitable interest) has survived something done by the trustee in relation to the trust property to which that interest (to use a neutral phrase) originally related. Take trust property consisting of a painting which the trustee (T) sells to a third party (P). The question whether the beneficiary (B) retains any continuing rights in relation to the painting after the sale will first depend upon whether the terms of the trust (i.e. those governing the legal relationship between B and T) permitted the trustee to dispose of trust property and invest the proceeds. If they did, then B's rights in relation to the painting will have been overreached. If they did not, then the sale will have been a breach of trust and the question whether B's rights in relation to the painting persist will probably depend upon whether the trustee's exercise of his common-law power of sale was done in favour of a bona fide purchaser without notice of B's interest (i.e. equity's darling). Or it may depend upon whether the terms and circumstances of the sale gave P a clean title for some other reason, under the law applicable to the transaction, as in *Byers*.[16] That would be

[16] *Byers v Saudi National Bank* [2023] UKSC 51.

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a matter connected with T's rights in relation to the painting. It may have nothing to do with equity, save in the sense that even equity would recognise that B's rights in relation to the painting had been overridden, rather than overreached.

As a second example, the "rights against rights" thesis may help to answer the question whether the beneficiary has any standing to claim compensation from someone who negligently damages the trust property. This was precisely the purpose for which, in 2013, Justice James Edelman adopted the "rights against rights" theory as the basis for a critique of the 2010 decision of the Court of Appeal in *Shell v Total*[17] to award damages for pure economic loss to the beneficiary of a trust of a fuel pipeline damaged by negligence.[18] Conventionally, he argued, a common-law duty of care not to damage property extends only to persons who either have title (by which he meant legal title) to, or possession of, the property.[19] So the outcome should have depended upon whether the terms of the trust gave Shell possession of the pipeline or merely personal rights against the trustee, since plainly it had no legal title. In the event Shell had no such possession, but still recovered its economic loss on the basis of a purely equitable title.

It is also undoubtedly correct to say, as Sarah Worthington persuasively argues, that a distinction between personal rights and rights *in rem* that was originally conceptually pure and clear has become progressively eroded over time, both as the basis for the classification of rights and even as something of practical utility.[20] To some extent, as she vividly explains, that may be said to be the result of the endless inventiveness of equity itself in creating or recognising new forms of property despite, so it is said, always acting *in personam*. But it is also the consequence of various forms of statutory intervention where, for example, the question whether a particular equitable right affects third parties has come to depend upon registration rather than notice. This is ever-increasingly true of rights in relation to land, but it also applies to some other types of what is generally called property, such as floating charges.

The same tendency of a classification to point to an outcome is true of the traditional judicial perception that an equitable interest under a trust is generally to be regarded as a proprietary interest in the trust property, so that the beneficiary can properly be described as an owner (or co-owner) of it. This was, after all, precisely what seems to have persuaded the Court of Appeal to treat Shell as having a form of title (though not legal title) to the damaged pipeline, sufficient to give it standing as a complainant in negligence for damage to the pipeline and therefore

[17] *Shell UK Ltd. v Total UK Ltd.* [2010] EWCA Civ 180, [2011] Q.B. 86.
[18] J. Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66.
[19] Citing *Leigh & Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785 (H.L.).
[20] Worthington, "Disappearing Divide".

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entitled to compensation for its enormous economic loss, none of which had been suffered by the trustee with legal title. As the court put it: "on the face of things, it is legalistic to deny Shell a right to recovery by reference to the exclusionary rule. It is, after all, Shell who is (along with BP, Total and Chevron) the 'real' owner, the 'legal' owner being little more than a bare trustee of the pipelines."[21] Alas for all of us and in particular for James Edelman, who had been instructed to appear, the case settled before it reached the Supreme Court. This perception is also the essential basis of one of the two judicial explanations of the outcome of *Byers*,[22] as everything depended upon whether the beneficiary of the trust of the shares retained any proprietary interest in them after their transfer in breach of trust pursuant to a transaction governed by Saudi law.

A. The Problems with "Rights against Rights"

The real problem with all these competing theories about the nature of an equitable right or interest is that none of them quite covers the whole ground. Starting with the "rights against rights" theory, it could only, I think, qualify as a comprehensive way of classifying equitable interests if all such interests were held under a trust. But although there are some dicta (including, embarrassingly, one of mine) which suggest that every separation of legal and equitable interests in property assumes a trust,[23] I do not now find that convincing and nor did Lord Browne-Wilkinson in *Westdeutsche*.[24] Equitable leases, mortgages and charges are not, as far as I know, held under a trust and although attempts have been made to erect some form of trust as the basis for enforcing the rights of the equitable assignee of a debt against the debtor, I must say that I consider that to be artificial, as I shall later explain.

Furthermore, even within the confines of rights under trusts, the basis of the "rights against rights" theory (which works perfectly well where the trust property is a physical chattel or "thing") tends to imagine that the rights of the trustee are rights *in rem*. But they are very frequently not rights *in rem* as that phrase is traditionally understood. As an extremely common example, the trust property constituted by every trust bank account in credit is a chose in action, namely a purely personal contractual right of the trustees against the bank. Although it is commonly called "money" in a bank account and universally (and rightly) regarded as a species of property, it is not a right *in rem*. Similarly, trusts play an ever-increasing part in the intermediated holding of intangible investments such as derivatives, which are again forms of sophisticated choses in action, not rights *in rem*.

[21] *Shell v Total* [2010] EWCA Civ 180, at [132].
[22] *Byers v Saudi National Bank* [2023] UKSC 51.
[23] *Pearson v Lehman Brothers* [2010] EWHC 2914 (Ch), at [225].
[24] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 706–07 (H.L.).

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Sub-trusts give rise to a similar difficulty. Even where the property of the "head" trust may consist of a chattel in relation to which the trustees have rights *in rem*, the property of any sub-trust would nonetheless not have that character, because it would consist of the supposedly personal rights of the beneficiary under the head trust. At a more fundamental level, my main difficulty with the "rights against rights" thesis is not with the often-illuminating concept that the trust structure typically does employ rights against rights as its operating machinery. Rather, it is the persistent underlying proposition that, therefore, the rights or interests of the beneficiaries under a trust are not to be regarded as truly proprietary, whereas the rights of the trustee are so to be regarded. The slides so persuasively used by Ben McFarlane in his recent UCL lecture forcefully hammered home the message that the trustee has proprietary rights in the "thing" (on that occasion a boat) whereas the beneficiary only has personal, namely not proprietary, rights against the trustee, rather than rights in relation to the trust property.[25]

My troubles with that underlying "not proprietary" proposition come, I fear, like the sorrows of King Claudius in Hamlet, not single spies but in battalions. First and foremost, a move away from the traditional view that a beneficiary typically has a form of proprietary interest in the trust property seems to me to strike at the heart of equity's wish to give legal effect to what a non-lawyer thinks of as ownership. It is no coincidence that the title of this lecture is "Equitable Ownership". The concept of ownership may manifest itself in a range of different characteristics and in different subsets such as legal and beneficial ownership, but at the most fundamental and non-lawyerly level it is an attitude of mind that enables a person to say of something (be it a painting, a boat, a pipeline or a derivative): "it's mine."[26] As Lord Millett put it in an article in the *Cambridge Law Journal* in 2012, a proprietary interest "includes the right to identify an asset in the possession of another, possibly a total stranger who one has never met and with whom one has had no dealings and say, 'That belongs to me'".[27]

Take the Russian oligarch whose super-yacht is held through a bare trust. He would not say to his friends and cronies that the yacht is owned by trustees, against whose rights in the yacht he has personal rights. He would simply say it was his yacht. And his honest accountant would have to say that the oligarch was the yacht's beneficial owner.

Take the householder in whose partner's sole name their home is registered on trust for them both as tenants in common in equal shares. The householder would not say: "my partner owns the house, but I have

[25] McFarlane, "Understanding Equitable Property".
[26] *Byers v Saudi National Bank* [2023] UKSC 51, at [22].
[27] P. Millett, "Bribes and Secret Commissions Again" [2012] 71 C.L.J. 583, 588.

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certain personal or persistent rights against his ownership rights". He or she would say: "the house is half mine." That is why the Court of Appeal described Shell and its co-operators of the Buncefield fuel pipeline as its real owners, rather than so describing their bare trustee.

Take the client of a multinational company such as Lehman, for whom a portfolio of derivatives was held on complex sub-trusts with one or more depositaries at the top of the chain. The client would not say that the depositary owned the portfolio, but that he had personal rights against a trustee, which held personal rights against another trustee and so on up the chain, the last of which had personal rights against the depositary. The client would say that he was the owner of the portfolio and if he did not identify himself in his tax return as its ultimate beneficial owner he might find himself in trouble with Revenue and Customs.

Second, equity has, under both English law since 1925 and the similar law of most other common-law systems, now become the prime mover in the development of ever more sophisticated forms and concepts of ownership, mainly but not exclusively under the structure of trusts. It has enabled ownership to be split over time (between life tenant and remainderman), has enabled it to be shared in common (i.e. so that survivorship does not turn the sharing into the lottery of giving all to the last to die), and has enabled the responsibilities and dispositive powers of ownership to be separated from the enjoyment of its fruits, so as to enable a wide class of persons who lack the skills of management and investment nonetheless to be the beneficial owners of complex, volatile and vulnerable property professionally managed by trustees.

Third, equity has developed a far more sophisticated toolbox of remedies for beneficial owners who have been deprived of their property, or deprived of the performance of a contractual right to acquire property, than that which was available at law. Thus equity developed far more effective means of tracing and following equitable property into the hands of third parties than did the common law and the very availability of the remedy of specific performance was the means whereby equity turned the purely contractual purchaser of unique property (such as land or shares in a private company) into the owner of a proprietary interest in the subject matter of the sale by means of the vendor-purchaser constructive trust,[28] or by the recognition of a *Walsh v Lonsdale*[29] equitable lease.

Fourth, equity has never been confined by strict rules or rigid classification. It is almost amoeba-like, always on the move and encroaching into new areas. The recent history of equity smashing up all the perceived boundaries of the court's jurisdiction when granting an injunction is a case in point.[30]

[28] See *L.A. Micro Group Inc. v L.A. Micro Group (UK) Ltd.* [2024] UKSC 42, [2025] 2 W.L.R. 1.
[29] *Walsh v Lonsdale* (1882) 21 Ch. D. 9 (C.A.).
[30] *Broad Idea International Ltd. v Convoy Collateral Ltd.* [2021] UKPC 24, [2023] A.C. 389; *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47, [2024] A.C. 983.

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B. Equity's Flexibility

Take the way in which equity has enabled debts to become a species of transferable property, enforceable by an equitable assignee. The ancient common law refused to contemplate the possibility that a debt could be transferred at all.[31] A chose in action, like a debt, was considered to be purely personal as opposed to proprietary: nothing more than the ability to bring a personal action in relation to a personal claim against a particular counterparty.[32]

Equity, on the other hand, recognised the assignment of choses in action, though at first only equitable ones – usually interests under a trust. In time, legal choses in action – like debts – became assignable in equity as well.[33] But the practical difficulty caused by this divergence was that an assignee wanting to sue a debtor at common law had to embark on two separate sets of legal proceedings: lacking standing at common law, they had to sue the assignor in equity to compel them to grant authority to sue the debtor[34] and then separately sue the debtor at common law. Prior to the Judicature Acts of the 1870s this had to happen in two different courts. The amalgamation of the courts of law and equity meant that both could be brought in the same court and, eventually, both at the same time and in the same claim. But it remained – and remains – the case that an equitable assignee is generally required to join the assignor in order to pursue the debtor.[35]

There is a continuing debate as to whether this makes the assignor a trustee of the debt, of which the equitable assignee is a beneficiary.[36] To my mind, that would be strange indeed given the commercial context in which assignments and re-assignments arise. A trust would suggest the existence of a step-ladder of fiduciary relationships between each assignor and assignee – a revelation that I think would come as rather a shock to them. But that is beside the main point, which is that this trust-based analysis of equitable assignment denudes it of its essential character as a transfer of a transferable (and proprietary) right.

As Smith and Leslie suggest, in their *Law of Assignment*, when equity's innovation of allowing legal choses in action to be assigned is put into its historical context, it is clear that it is fundamentally concerned with the transfer of a right.[37] Looking backwards from that innovation, it grew out of the assignment of equitable choses and there can be little real doubt that those assignments are true transfers and not declarations of

[31] Subject to certain narrow exceptions, e.g. debts relating to the Crown.
[32] M. Smith and N. Leslie, *The Law of Assignment*, 3rd ed. (Oxford 2018), paragraphs 10.01, 10.04–07, 10.11–18.
[33] Ibid., at paragraph 10.27.
[34] Unless the assignor was otherwise happy to grant this.
[35] C.H. Tham, *Understanding the Law of Assignment* (Cambridge 2019), 171–75.
[36] See e.g. B. McFarlane and R. Stevens, "What's Special About Equity" in D. Klimchuk, I. Samet and H. E. Smith (eds.), *Philosophical Foundations of the Law of Equity* (Oxford 2020), 207 (n. 80).
[37] Smith and Leslie, *Assignment*, ch. 11, especially paragraphs 11.05–11.28, 11.55–11.90.

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sub-trust or similar: this is certainly the view expressed in the authorities, from *Milroy v Lord*[38] to *Grey v Inland Revenue and Customs*[39] and the other section 53(1)(c) Law of Property Act 1925 cases dealing with the ambit of a disposition of a subsisting equitable interest (recently revisited by the Supreme Court, in passing, in *L.A. Micro*).[40]

Leaving aside bills of exchange, the common law never managed to catch up with this development, until finally rescued from its myopic view by section 25(6) of the Judicature Act 1873, now section 136 of the Law of Property Act 1925. And equity has now downgraded the requirement to join the assignor in a claim against the debtor from being essential to give the equitable assignee title to sue to a mere procedural requirement,[41] necessary only to avoid the risk of the debtor having to pay twice: see *Kapoor v National Westminster Bank plc*, where it was held that an equitable assignee of a debt was entitled to vote at a creditors' meeting. Etherton L.J. considered that "[t]here is no good reason of policy or principle for the courts to refuse to recognise the title of the undisputed equitable assignee of part of a debt".[42]

Similarly, in *Roberts v Gill & Co.*, it was said by Lord Collins that "[i]n more modern times it has been held that, although the practice was to join the assignor, the requirement is a procedural one, the absence of which can be cured".[43]

Equity takes an ever-widening view of what may be classified as property. There are now virtually no limits to what may be recognised as trust property. Over time, almost every supposed limiting condition has been swept away. For example, it may once have been thought that to be capable of being trust property, the "thing" or chose in action had to be assignable. But this was decisively exploded by Lightman J. and then the Court of Appeal in relation to the management rights under a boxer management contract, in *Don King Productions Inc. v Warren*.[44] Similarly, it is now (at long last) recognised that a bribe may be, indeed usually is, trust property held by the fiduciary bribee on constructive trust for the principal.[45] Does it make sense to say that the fiduciary bribee is the owner of the bribe, but that the principal has personal rights against the rights of the bribee? I do not think so. The whole point is that equity now treats the principal as the equitable beneficial owner of the bribe, with the usual tracing and other remedies in relation to it, to

[38] (1862) 45 E.R. 1185.
[39] [1960] A.C. 1 (H.L.).
[40] *L.A. Micro Group v L.A. Micro Group (UK)* [2024] UKSC 42.
[41] Smith and Leslie, *Assignment*, paragraphs 11.30–11.53.
[42] [2011] EWCA Civ 1083, [2012] 1 All E.R. 1201, at [40].
[43] [2010] UKSC 22, [2011] 1 A.C. 240, at [67].
[44] [2000] Ch. 291 (C.A.).
[45] *F.H.R. European Ventures L.L.P. v Cedar Capital L.L.C.* [2014] UKSC 45, [2015] A.C. 250.

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which recourse can be had if the fiduciary disappears or (as so often happens) turns out not to be worth powder and shot.

Another area of equitable flexibility is the solicitor's equitable litigation lien. It used to be unavailable for any fees incurred until a writ had been issued, but the huge changes to litigation practice, and the perceived desirability of treating court proceedings as a last resort, means that it is now available in connection with claims which never lead to court and are settled without even being disputed.[46]

Equity has also shown itself to be adept at dealing with a wholly new kind of "property" in the form of cryptocurrencies such as Bitcoin. Crypto ownership is based on virtual transactions being recorded on an immutable and publicly available blockchain.[47] Accordingly, the holder has neither a chose in possession (crypto being intangible) nor a chose in action (they do not acquire enforceable rights by dint of holding the crypto in the way that a bondholder, say, acquires contractual rights). Crypto therefore falls entirely outside the traditional categories of property.[48] But despite these novel characteristics, a flurry of decisions across common-law jurisdictions have in recent years quite readily recognised crypto as capable of being trust property (or even as property more generally).[49] In the Hong Kong case of *Re Gatecoin Ltd.*,[50] Chan J. surveyed an extensive range of authorities including *AA v Persons Unknown*,[51] in which the English High Court held that crypto can be the subject of a proprietary injunction, and the New Zealand case of *Ruscoe v Cryptopia*,[52] in which it was held that crypto satisfied the essential criteria for "property" status. Chan J. concluded that "cryptocurrency is 'property', which is capable of forming the subject matter of a trust".[53]

That has great practical import because it opens the door to equitable remedies such as proprietary claims and constructive trusts, to equitable following and tracing, and to injunctions against persons unknown.[54] But more importantly for today's purpose, it illustrates the way that equity is willing and able to accommodate new concepts or technologies in order to give legal effect to the perception in the marketplace and among the public at large that crypto *is* property.

[46] *Gavin Edmondson Solicitors Ltd. v Haven Insurance Co. Ltd.* [2018] UKSC 21, [2018] 1 W.L.R. 2052; *Bott and Co. Solicitors Ltd. v Ryanair D.A.C.* [2022] UKSC 8, [2023] A.C. 635.
[47] *Re Gatecoin Ltd.* [2023] HKCFI 914, at [11]–[20].
[48] Ibid., at [47]. But see now section 1 of the Property (Digital Assets etc) Act 2025.
[49] Ibid., at [48]–[59], where a summary of such decisions appears.
[50] Ibid.
[51] [2019] EWHC 3556 (Comm), [2020] 4 W.L.R. 35.
[52] [2020] NZHC 728.
[53] *Re Gatecoin* [2023] HKCFI 914, at [59].
[54] See my lecture at the University of Hong Kong on 6 May 2024 entitled "Never Say Never: Equity's Reach in the Modern Age", at [18], available at https://supremecourt.uk/uploads/speech_lord_briggs_06052024_94faac9b27.pdf (last accessed 1 October 2025).

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It is a natural and almost inevitable consequence of equity's shameless welcoming of ever-widening types of rights as property capable of being held on trust that a similar broadening of the scope for the recognition of equitable ownership and equitable proprietary interests takes place right alongside it. Of course, it depends to some extent what one means by "proprietary". If one equates the word with the original meaning of the phrase "*in rem*", that immediately excludes a vast range of rights and interests which the non-lawyer would regard as plainly capable of being owned. It would exclude beneficial interests in debts, shares, most modern investments, all other choses in action, pretty well everything other than physical things such as land and chattels. But if, by "proprietary", one means a type of interest in the subject matter which may be exercised more widely than just against a contractual counterparty or trustee, then there is no simple limit to the class thereby recognised.

That is not to say that in recognising an ever-widening range of interests as proprietary, equity tamely follows the perspective of non-lawyers in the marketplace. Sometimes equity has its own agenda and goes first, frequently using the cutting-edge tool of the constructive trust. Let me give two examples. First, when equity developed the vendor-purchaser constructive trust, so as to make a contracting purchaser the beneficial owner of land (or shares) once they had paid the purchase price, it may well have come as a surprise to the typical purchaser that, without waiting for any conveyance or transfer, they could call themselves the beneficial owners of it. Equity created that constructive trust to ensure that its maxim – that something agreed to be done should be treated as done – should become effective, both against the vendor (who thereby became accountable for the rents and profits) and against third parties other than equity's darling. That sort of protection against third parties is now typically achieved differently in relation to registered land, but not, for example, in relation to shares in a private company or other unique property, where the equitable principle still prevails.

Second, it may well be that the typical principal whose fiduciary accepts a bribe would think twice before assuming that the bribe belonged to him. Equity recognises (not imposes) an institutional constructive trust of the bribe because it is the illicit fruit of the fiduciary's office, for which the fiduciary is liable to account to the principal from the moment of receipt.[55] Standing back, equity has a complex, symbiotic relationship with the marketplace, sometimes responding to demand and sometimes creating it by enabling the emergence and recognition in the market of new types of property and proprietary interest. By contrast, the common law has often stood helpless. As I have already mentioned, it resolutely

[55] See again *Rukhadze v Recovery Partners* [2025] UKSC 10.

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refused to recognise that a debt could be assigned (or transferred) at all, until rescued by statute in what is now section 136 of the Law of Property Act 1925.

C. A False Dichotomy?

It is time to look further along the spectrum, to Sarah Worthington's opinion that the traditional divide between proprietary and personal rights and interests has become so eroded (mainly by equity) that it is now virtually redundant. Those whose legal scholarship and memories are better than mine will probably already have recognised a broad and deep level of common ground between Sarah's famous essay on the disappearing divide between property and obligation, first published in 2007, and my rather disjointed thoughts. Indeed, when I recently read it when preparing this lecture, my first reaction was to wonder what more was usefully to be said on the subject. But while I travel happily with her along most of her road of historical and conceptual analysis, I have been compelled to apply the brakes a little short of her slightly anarchic conclusion. In short, I still find the idea that an equitable interest is usually proprietary in nature, rather than merely personal, to be conceptually distinct and functionally consequential.

She describes, in scholarly but very readable detail how, over the centuries, equity took the lead (ahead of statute and the common law) in conferring proprietary status and remedies on rights and interests that were previously regarded as purely personal, and in creating altogether new types and classes of property to meet (and I would say also to stimulate) commercial demand. She then describes examples where the favourable treatment afforded to proprietary rights came also to be afforded to personal (e.g. purely contractual) rights, and other examples where there was no good reason why not, even if the law continued to discriminate. In a remorseless central section,[56] she looks at the various criteria traditionally used to distinguish between proprietary and personal rights and finds, with one big exception, that they tend not to come up to muster.

Her one big exception is my convenient starting point in declining to follow her all the way to her conclusion. That is the effect of the personal/proprietary distinction upon priority in bankruptcy and, more importantly, insolvency.[57] She acknowledges, albeit with limited enthusiasm, that insolvency priority is widely regarded as the lynchpin of the continuing recognition of proprietary characteristics. That priority generally protects beneficiaries under a trust and all those creditors with

[56] Worthington, "Disappearing Divide", 923–39.
[57] Ibid., at 936–39.

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security over the assets of the insolvent person. The protection afforded to the holder of equitable proprietary interests is not of course absolute. It may be, and sometimes is, invaded by statute. Sarah's lack of enthusiasm is shared by some judges and by more academic commentators. Sometimes it finds an outlet where a borderline case arises as to whether a right or bundle of rights falls on one or the other side of a fuzzy boundary between proprietary and personal rights. But generally the centrality of the personal/proprietary distinction for the purposes of regulating priority in insolvency has remained largely intact over the 20 years since Sarah's essay was first published and shows no current sign of going away.

But I do not think that the continuing importance of the distinction is limited to the onset of insolvency. It continues to matter in many other areas. Three examples will have to suffice, two positive, one negative. The first lies in the distinction between the interest of a beneficiary under a trust and the interest of a beneficiary in the unadministered estate of a deceased person. The former is proprietary vis-à-vis the trust property, albeit sometimes only effective if all the beneficiaries act together. The latter is not.[58] My second (negative) example is the current realisation (by way of departure from nineteenth-century thinking) that shareholders do not have a proprietary interest in the assets of a company and that the proprietary or beneficial interest (even in relation to a charity company) lies always with the company itself.[59] The third example is the way in which the presence or absence of a proprietary interest continues to govern the existence or extent of the beneficiary's remedies against third parties, in particular in areas where priority is not strictly governed by registration and sometimes even where it is. A telling recent example is to be found in the *Byers* case,[60] where the question was whether liability in knowing receipt depended upon a continuing equitable proprietary interest of the beneficiary in property transferred in breach of trust or on the apparent unconscionability of the knowing recipient. The Supreme Court held unanimously that it was the former.

More generally it may well have seemed possible in 2007 that liability to disgorge property to a claimant might one day be governed entirely by restitutionary principles, rather than by the existence of proprietary rights in the claimant. I would hazard a guess that most would doubt whether the restitutionary tide has risen since then. And the bribery question, wide open in 2007, has since been resolved firmly in favour of an analysis based upon proprietary rights.[61]

[58] See *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694 (P.C.).
[59] See *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch. 193.
[60] *Byers v Saudi National Bank* [2023] UKSC 51.
[61] See *F.H.R. European Ventures v Cedar Capital* [2014] UKSC 45.

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D. Modified Rights?

So I come finally to look (necessarily briefly) at Graham Virgo's idea that equitable interests are best classified as *modified* proprietary rights.[62] My only reservation, and it may be little more than a quibble, is in his adjectival use of the word "modified". That may, I fear, suggest to a reader that equitable rights are generally to be described as secondary, a bit cut down and largely derivative of some other presumably better legal proprietary rights, only less effective due to some defect in the DNA during the transmission of the right to equity from the territory of the law. Of course, at first blush, the fact that equity's darling takes free means that the equitable interest is in that respect less safe against the world than an equivalent legal right (if there is one). And of course the proprietary rights of beneficiaries under a trust can be overreached and overridden by a whole miscellany of circumstances. But overreaching is just the working out of the aspects of the right intended and inserted by its creator, the settlor, not a defect inherent in the nature of the right itself. And legal rights and interests can also be overridden, such as by confiscation as the suspected proceeds of crime, by compulsory purchase, or by requisition in time of war.

Still, I think there is a quite subtle potential for this concept of modification to mislead. In the first place, although some equitable interests, such as equitable estates or leases, are the ugly sisters of fairly precise but prettier legal counterparts, usually because they arise during an attempt to create or convey a legal right that goes wrong for want of some formality, others are the pure unadulterated children of equity, for which there is no counterpart in law at all. Take the floating charge, for example. In other areas, the equitable interest may have a distant cousin in the law, but it is the legal cousin which appears inferior to the equitable version. Take as an example the equitable lien, which is not dependent upon possession, whereas a legal lien is. In yet other areas equitable interests rule the largest part of the roost, particularly in relation to land because section 1(3) of the Law of Property Act 1925 says so.

Second, and much more generally, equitable proprietary interests are in many respects much more user-friendly than their legal equivalents. They may be more easily created, shared and transferred. Remedies for their loss or invasion (such as tracing, following and the recognition of an equitable charge over a mixed fund) are plainly superior. These solid advantages may be said usually to outweigh the very occasional loss arising from the appearance on the scene of equity's darling, and the

[62] Virgo, *Principles of Equity & Trusts*.

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priority of many equitable interests is now protectable by registration rather than the less secure mechanics of notice.

Finally, it is instructive to ask why the bona fide purchaser is called *equity's* darling, at all. It is not because, as the holder of a legal interest or estate, he or she is somehow inherently superior by virtue of the fact that – by some weird application of the maxim that equity follows the law – legal interests are inherently superior to equitable interests. It is because equity itself regards the status of someone who has paid good money for the acquisition of legal title to property out of which the equitable owner's interest was carved, but in ignorance of it, as better entitled in good conscience to priority than the holder of the equitable interest, who would otherwise get priority as first in time.[63]

E. Judges and Legislators

The only occupants of the spectrum who remain to be weighed in the balance are of course the judges themselves. They (or perhaps I should say we) continue to use and (maybe) abuse the concept that an equitable interest may be proprietary with almost uniform gay abandon and with what Sir Robert Megarry might once have called "artless chancery simplicity".[64] We do it all the time and (except for Lord Burrows) show no sign of responding to the fact that a very distinguished body of academic thinkers are going cool or even cold on the concept. I will give just a few examples.

The first is from *Ayerst (Inspector of Taxes) v C.& K. (Construction) Ltd.*, per Lord Diplock:

> Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the "beneficial ownership" in the *cestui que* trust.[65]

Then two from Lord Browne-Wilkinson, first in *Tinsley v Milligan*:

> Although for historical reasons legal estates and equitable estates have differing incidents, the person owning either type of estate has a right of property, a right in rem not merely a right in personam.[66]

And in *Westdeutsche Landesbank Girozentrale v Islington*:

> Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary

[63] See D. Fox, "Purchase for Value Without Notice" in P. S. Davies, S. Douglas and J. Goudkamp (eds.), *Defences in Equity* (Oxford 2018), 66 (nn. 80–81 in particular).
[64] *Ross v Caunters* [1980] Ch. 297, 306.
[65] [1976] A.C. 167, 177 (H.L.).
[66] [1994] 1 A.C. 340, 371 (H.L.).

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> interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.[67]

I have already mentioned Lord Millett's classic explanation of a proprietary interest as conferring ownership in his *Cambridge Law Journal* article. And here he is, speaking of tracing, in *Foskett v McKeown*:

> The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment.[68]

Or Lord Neuberger, here in *F.H.R. European Ventures v Cedar Capital*:

> If the bribe or commission is held on trust, the principal has a proprietary claim to it, whereas if the principal merely has a claim for equitable compensation, the claim is not proprietary. The distinction is significant for two main reasons. First, if the agent becomes insolvent, a proprietary claim would effectively give the principal priority over the agent's unsecured creditors, whereas the principal would rank *pari passu*, i.e. equally, with other unsecured creditors if he only has a claim for compensation. Second, if the principal has a proprietary claim to the bribe or commission, he can trace and follow it in equity, whereas (unless we develop the law of equitable tracing beyond its current boundaries) a principal with a right only to equitable compensation would have no such equitable right to trace or follow.[69]

The up-to-date Scottish perspective (but speaking about English law) comes from Lord Hodge's summary of the common ground in *Byers* where he speaks of: "The proprietary interest of the trust beneficiary", "the claimant's proprietary equitable interest" and "a proprietary claim for the return of the property".[70] To take an even more recent example, from the wider common-law world, Lord Hoffmann's description – while sitting as a Non-Permanent Judge in the Hong Kong Court of Final Appeal in *Hui v Hui* – of a beneficiary's claim under a constructive trust as "in essence a proprietary claim, analogous to a common law action to recover property" is illustrative.[71]

Parliament, in the form of statute, has tended to see things in the same way. One might start with section 1 of the Law of Property Act 1925 which provides that, apart from a fee simple, a term of years, a legal easement, a rent charge or a legal mortgage, all other estates, interests

[67] [1996] A.C. 669, 705 (H.L.).
[68] [2001] 1 A.C. 102, 127 (H.L).
[69] [2014] UKSC 45, at [1].
[70] *Byers v Saudi National Bank* [2023] UKSC 51, at [2]–[5].
[71] [2024] HKCFA 32, at [16].

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and charges in or over land take effect as equitable interests. That basic classification of legal and equitable proprietary interests has stood the test of time for a century and, so far as I know, shows no sign of being replaced. Much more recently, both the old and new regimes governing the acquisition of title to land by adverse possession (in the Limitation Act 1980 and the Land Registration Act 2002) provide remedies for beneficiaries under trusts of land, which only make sense on the basis that the equitable interest of the beneficiary is proprietary.[72] And the Trusts of Land and Appointment of Trustees Act 1996 itself defines a beneficiary at section 22 as a person who has an interest in the property subject to the trust.

IV. Conclusion

These examples demonstrate that both judges and legislators continue to make use of the concept of equitable proprietary rights, both for the classification of types of ownership and for determining their boundaries and effects, with almost uniform unconcern for the intricacies of the mechanisms by which those types of ownership are held together, once viewed under a microscope, or for the fascinating process of historical development by which they emerged. But, just occasionally, when the classification appears to break down or fails to provide the answer to a practical legal problem, a closer investigation of the interaction of rights against rights, or the question whether the proprietary/personal divide has in truth disappeared, becomes necessary. Occasions do arise when it is best to look minutely at the interaction of rights against rights, or sometimes just to discard the proprietary classification altogether, in the anxious search for a reliable answer to a particular legal problem.

But, in general, that is not the case. The point is that the proprietary analysis ticks all three of my boxes. First, it is, I think, consistent with principle. Second, it is often the simplest workable solution to the problem in hand. Third (and perhaps most importantly), it corresponds most closely to what the user or owner of the equitable interest would think about it: "it's mine."

[72] E.C. Zaccaria, "The Nature of the Beneficiary's Right under a Trust: Proprietary Right, Purely Personal Right or Right Against a Right" (2019) 135 L.Q.R. 460, 475.

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