

Review Essay

On Property in Equity

Legal and Equitable Property Rights by John Tarrant (2019), Federation Press, 176 pp, ISBN 9781760022044

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Abstract

This essay reviews *Legal and Equitable Property Rights* by Professor John Tarrant. Through a focus on the meaning and content of ‘equitable property’, it is argued that the central thesis of Tarrant’s book provides a valuable, alternative conception of equitable rights to that postulated by many leading scholars. However, while Tarrant’s thesis is supported by authority and does much to challenge prevailing academic perspectives, it also has several limitations.

I Introduction

What is ‘property’? What is ‘equitable property’? Is ‘equitable property’ really ‘property’? The answers to these questions, still unsettled, have been elaborated over many thousands of pages and demand inquiries of a fundamental kind about, for example, the legal significance of ‘ownership’ and ‘possession’;¹ and the relationship to the law of obligations,² remedies,³ and the wider superstructure of private law.⁴

In *Legal and Equitable Property Rights*, Professor John Tarrant seeks to address such questions through the development of a comprehensive theory of legal and equitable property. In terms of structure and approach, Tarrant first seeks to identify what *things* can be, or perhaps more precisely have been, the subject of property rights.⁵ Importantly, Tarrant argues that ‘our legal system has adopted a thinghood approach to property ... the courts and the legislature determine what

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¹ See, eg, Lee Aitken, ‘Antipodean Vivisection? Recent Analysis of “Ownership” of Sperm, Body Parts, and Other *Disiecta Membra*’ (2019) 47(3) *Australian Bar Review* 266.

² Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 28–38.

³ See, eg, Elise Bant and Michael Bryan, ‘A Model of Proprietary Remedies’ in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook, 2013) 211.

⁴ See, eg, Birks (n 2) chs 2, 12.

⁵ John Tarrant, *Legal and Equitable Property Rights* (Federation Press, 2019) ch 2.

things can be the object of property rights'.⁶ This is a key footing in the development of Tarrant's broader theory. There is, however, a potential circularity in this reasoning: setting out to identify what things can be the subject of property then to conclude that the law has adopted a 'thinghood' approach. That aside, Tarrant next identifies the different characteristics of property rights, noting that (for Tarrant) not all recognised 'property' rights have the same characteristics.⁷ Relevantly, Tarrant analyses these different types of rights through an examination of the different duties that can arise: duties of non-interference; duties of obligation; and unilateral property rights, being those property rights that 'do not have a correlative duty or obligation' (for example, on Tarrant's view, rescission).⁸ The third concept (the 'unilateral right') is here noted: seemingly incongruous to Hohfeldian classification, rescission might better be understood as a 'power'.⁹

Next, Tarrant seeks to explain how it is characteristic of some property rights that the right can attach to a 'thing' that is already subject to existing property rights (whereas other property rights do not) and the implications that this has for third parties. He argues that these different characteristics between property rights are based on 'policy considerations'.¹⁰ Tarrant then considers 'how some private law property rights also have a public law aspect'.¹¹ In so doing, he seeks to maintain, and to explain, the distinction between private and public law.¹² Tarrant examines how 'property rights' (both at common law and in equity) fit within the broader private law superstructure.¹³ Finally, Tarrant considers conceptions of ownership (at law and in equity)¹⁴ and then the utility of deploying two levels of property (again, at law and in equity) particularly as regards the availability of remedies.¹⁵

In this review essay, I argue that Tarrant's thesis has limitations for at least two reasons. First, private law protects interests other than 'proprietary' rights, particularly if one defines a 'proprietary' right as being a relationship to, or with, a *thing*. Second and relatedly, by characterising all private law rights as 'property', the label 'property' as a classificatory device is deprived of much normative content and thereby loses considerable explanatory utility.

In this regard, of principal consequence is Tarrant's classification, or taxonomy, of the private law superstructure. As adverted to in the above summary, putting aside the law of evidence and the law of procedure,¹⁶ Tarrant adopts a binary classification: on the one hand, rights that protect the individual from physical and mental harm (termed the 'rights to personal integrity') which, it is said, are *not* property rights;¹⁷ and on the other, all other private law rights which, it is said, are all

⁶ Ibid 8.

⁷ Ibid ch 3.

⁸ Ibid.

⁹ Consider Adam Reilly, 'Is the "Mere Equity" to Rescind a Legal Power? Unpacking Hohfeld's Concept of "Volitional Control"' (2019) 39(4) *Oxford Journal of Legal Studies* 779.

¹⁰ Tarrant (n 5) 8.

¹¹ Ibid 9.

¹² Ibid.

¹³ Ibid chs 4–5.

¹⁴ Ibid ch 6.

¹⁵ Ibid ch 7.

¹⁶ Ibid 10.

¹⁷ Ibid 9.

to be classified as property rights.¹⁸ Crucially, Tarrant rejects the proposition that only rights in rem are properly recognised as ‘property rights’:¹⁹ ‘all private law rights that are not concerned with the protection of personal integrity are property rights’.²⁰ Tarrant premises this on the footing that private law has only two purposes: the protection of personal integrity and the protection of private property (that is, ‘our things’).²¹ From this premise, Tarrant proposes that, while it is not necessary to identify which of these rights are ‘property rights’ (because all of the rights within his second category are proprietary), it is necessary to identify the different characteristics of those property rights.²² However, a difficulty with such a conception of property is that it is so wide as to have very limited analytical utility. How is, for example, a claim on a *quantum meruit* properly seen as proprietary in nature when the relevant service may yield no end product, no ‘thing’, no *res* and the remedy not be in specie? Similarly, what function is served by classifying all such rights as ‘property’ if the precise meaning and content of ‘property’ varies so widely?

Notwithstanding these arguments, Tarrant’s analysis usefully controverts alternative conceptions proposed by some of the leading academic contributions. Further still, some of the divergences, at least in relation to the meaning of ‘equitable property’, may be less marked than initial appearance suggests.

The balance of this essay focuses on Tarrant’s theory of ‘equitable property’. Such a focus is revealing for several reasons. First, the meaning of ‘equitable property’ has been the focus of a considerable body of recent literature and is thereby a useful point for comparative analysis. Second, Tarrant’s conception of ‘equitable property’ is central to his overall thesis, particularly his conceptions of ‘property’ and ‘ownership’ and his subsequent analysis of remedies. Third and following, this focus on ‘equitable property’ elucidates the implications of Tarrant’s thesis for the wider private law superstructure. This essay is structured as follows. Part II considers the theory, increasingly supported by leading scholars, that ‘equitable property’ is really a misnomer and, rather than as ‘property’, is better understood as a peculiar kind of persistent right being a right against a right. Part III examines the central thesis of Tarrant’s book, within the overall text, that ‘equitable property’ is properly conceived as involving a property right and that our legal system does recognise two levels of property (at common law and in equity). Part IV draws out some implications of this, including for the cogency of Tarrant’s overall thesis.

II ‘A Right against a Right’

This Part explores the conception of ‘equitable property’ which has been posited in various forms by leading scholars such as Burrows,²³ Smith,²⁴ McFarlane and

¹⁸ Ibid 9, 77, 82.

¹⁹ Ibid 9, 82 cf Birks (n 2) 29.

²⁰ Ibid 10.

²¹ Ibid 10, 77.

²² Ibid 10.

²³ Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2010) 191–3.

²⁴ Lionel Smith, ‘Unravelling Proprietary Restitution’ (2004) 40(3) *Canadian Business Law Journal* 317.

Stevens,²⁵ and Justice Edelman.²⁶ On this approach, while a common law property right must relate to a thing (the *res*), an equitable property right is an interest against the rights of that person holding the legal property right.²⁷

For example, in *Shell UK Ltd v Total UK Ltd*,²⁸ Total disputed liability for Shell's loss of profits consequential to the destruction of, or damage to, various assets held on trust for Shell and others, for which destruction and damage Total was vicariously liable. Total relied on the rule that only the legal owner, or someone with an immediate right to possession, can claim damages for economic loss consequential to property damage.²⁹ The Court of Appeal held that, if and where a trustee is joined to the action, a beneficiary under the trust can recover for consequential loss, including those losses that only the beneficiary has suffered: 'if formality is necessary, then [in any such case, the trustee owners] can recover the amount which [the beneficiary] has lost but will hold the sums so recovered as trustees for [the beneficiary].'³⁰ The Court reasoned that '[o]n the face of things, it is legalistic to deny Shell a right to recovery ... It is, *after all*, *Shell who is ... the "real" owner*, the "legal" owner being little more than a bare trustee of the pipelines.'³¹

Justice Edelman, writing extra-curially, has observed that '[t]he reason why the Court of Appeal reached this conclusion was essentially that the [C]ourt did not consider that *equitable title should be treated any differently from legal title*.'³² Such reasoning is said to be 'problematic' because it proceeds on the footing that:

at the heart of the common law lies a monstrous contradiction. The common law and equity are both looking at the same bundle of rights but reaching diametrically opposed conclusions. *The common law sees one person as the owner. Equity sees another*.³³

Similarly, McFarlane and Stevens have described it as 'the orthodox, *but unattractive*, view that English law contains two competing laws of property'.³⁴

Meanwhile, in *MCC Proceeds Inc v Lehman Brothers International (Europe)*,³⁵ Hobhouse LJ observed that '[the prohibition on a claim by the equitable interest holder] is not a quirk of history ... Equitable rights *are of a different character*'.³⁶ That 'different character' being that the beneficiary's interest is not proprietary, but rather an encumbrance on the proprietary rights of the trustee. As was described in the first edition of what is now *Jacobs' Law of Trusts in Australia*:

²⁵ Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1.

²⁶ Justice James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129(January) *Law Quarterly Review* 66 ('Two Fundamental').

²⁷ *Ibid* 66.

²⁸ [2011] QB 86 ('*Shell*'). Leave to appeal to the Supreme Court of the United Kingdom was granted (UKSC Case No 2010/0073, Lords Hope and Kerr JJSC and Sir John Dyson JSC, 20 May 2010), but the matter was ultimately settled.

²⁹ *Ibid* 93 [5] cf *Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad"* (1976) 136 CLR 529.

³⁰ *Shell* (n 28) 103 [144].

³¹ *Ibid* 99 [132] (emphasis added).

³² Edelman, 'Two Fundamental' (n 26) 69 (emphasis added).

³³ *Ibid* 70 (emphasis added).

³⁴ McFarlane and Stevens (n 25) 2 (emphasis added).

³⁵ *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675.

³⁶ *Ibid* 701 (emphasis added).

‘[a] trust exists when the holder of a legal or equitable interest in certain property is *bound by an equitable obligation* to hold his interest in that property not for his own exclusive benefit, but for the benefit ... of another person or persons’.³⁷

Similarly, in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*, Hope JA observed that:

the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.³⁸

On this conception, the rights of the beneficiary have been said to be unique: they are neither personal rights (that is, rights against a person), nor are they proprietary (that is, rights against a thing). Rather, those rights might be seen as rights (or powers) to the trustee’s rights: ‘a right against a right’³⁹ or ‘persistent rights’.⁴⁰ McFarlane argues that

we need to reject the assumption that all private law rights are either personal or proprietary. The recognition of persistent rights as a discrete category means that we do not need to distort equitable property rights by forcing them into one of two ill-fitting boxes.⁴¹

This is the key tenet of the ‘right against a right’ theory and, if accepted, has the necessary implication that ‘there is no such thing as equitable property; it is a myth’⁴² — at least if one adheres to the Roman law dichotomy of rights in personam and rights in rem and a definition of ‘property’ as meaning a right against a thing *prima facie* binding upon anyone who interferes with that thing.

III ‘Equitable Property’ as ‘Property’

In apparent contradistinction, Tarrant postulates that such equitable rights are indeed ‘property’. Specifically, he argues that equitable property rights are properly conceived of as ‘a second level, or second tier, of property rights’;⁴³ and following, while legal property rights are rights *to things*, equitable property rights are rights *to obtain a legal property right*. By way of example, the beneficiary electing to collapse the trust and thereby obtain a legal property right to the trust property; or in Tarrant’s terminology, to elect to ‘move from a second-tier property right to a first-tier

³⁷ K S Jacobs, *The Law of Trusts in New South Wales* (Butterworths, 1958) 7.

³⁸ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510, 519 [16]. See also, eg, Walter G Hart, ‘What Is a Trust?’ (1899) 15(3) *Law Quarterly Review* 294, 302.

³⁹ McFarlane and Stevens (n 25) 1.

⁴⁰ For this reason, McFarlane has suggested that the beneficiary’s rights should be described as ‘persistent rights’: Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 364.

⁴¹ See Ben McFarlane, ‘Equity, Obligations and “Third Parties”’ [2008] (2) *Singapore Journal of Legal Studies* 308, 322.

⁴² McFarlane and Stevens (n 25) 1.

⁴³ Tarrant (n 5) 10. See particularly ch 5.

property right'.⁴⁴ Tarrant places some emphasis on this example in the text and it is a key footing on which the thesis is advanced.

Tarrant propounds a historical account to support this analysis. While acknowledging authoritative scholarship (including that of Maitland)⁴⁵ opposed to recognising the rights of a beneficiary as a form of ownership⁴⁶ and that scholars such as Honoré argued that utilisation of the trust does not depend on recognition of dual-ownership,⁴⁷ Tarrant contends that 'our legal system considered this issue on two occasions and on both occasions decided to continue with a dual system of property rights.'⁴⁸ He identifies the first instance as being Lord Mansfield's judgment in *Burgess v Wheate*⁴⁹ where his Lordship stated, as to legal and equitable estates, that 'the *forum* where [these rights] are adjudged *is the only difference* between trusts and legal estates'⁵⁰ and that a beneficiary 'is actually and absolutely seised of the freehold in consideration of this court'.⁵¹ Tarrant argues that, by that dictum, Lord Mansfield clearly favoured only a single level of property rights, but says that this position was not adopted subsequently. The second instance identified by Tarrant is found in those authorities post-dating the Judicature Acts where 'common law courts decided to recognise equitable rights *in addition to* existing common law rights and remedies',⁵² rather than recognising only one estate or level of proprietary right.⁵³ At this juncture, it should be fairly accepted by those adhering to the 'right against a right' analyses that the weight of authority seems to support Tarrant's position. After all, as mentioned, McFarlane and Stevens describe it as the 'orthodox' view.⁵⁴

Tarrant contends that, contrary to scholars such as McFarlane and Stevens, the right of the beneficiary is not a right *against* a right but, rather, a right *to obtain* a right.⁵⁵

IV Implications and Observations

There are, ostensibly, significant differences between the approach advanced by McFarlane, and others, and that proposed by Tarrant — not least that Tarrant expressly recognises equitable property as *property*. It is said 'ostensibly' because,

⁴⁴ Ibid 11.

⁴⁵ See, eg, FW Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 2nd ed, 1949) 29. In medieval law, the *cestui que trust* was considered as conferring merely a personal right against the trustee: see Edward Coke, *The First Part of the Institutes of the Lawes of England: Or a Commentary upon Littleton* (London, 1639) 272b.

⁴⁶ Tarrant (n 5) 90.

⁴⁷ Ibid 90. Consider also Tony Honoré, 'Trusts: The Inessentials' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, 2003) 7.

⁴⁸ Tarrant (n 5) 90.

⁴⁹ *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652.

⁵⁰ Ibid 670 (emphasis added).

⁵¹ Ibid 671.

⁵² Tarrant (n 5) 91 (emphasis in original).

⁵³ Tarrant (n 5) 91–2, citing *Metropolitan Railway Company v Defries* [1877] 2 QBD 189, 193 (Field J) cf *Walsh v Lonsdale* (1882) 21 ChD 9, 14 (Jessel MR).

⁵⁴ McFarlane and Stevens (n 25) 2.

⁵⁵ Tarrant (n 5) 96.

upon closer inspection, this divergence may be more chimerical than real. For instance, how is it relevantly different to say, as does Tarrant, that equitable property rights are rights to obtain a legal property right; as opposed to the beneficial right being a right against the trustee's right? This Part considers the implications of the foregoing points and offers some additional observations.

Tarrant argues that several proprietary remedies are only available because of the judicial adoption of equitable ownership and the 'flexibility inherent in a legal system that has two levels of property rights and two levels of ownership rights'.⁵⁶ By contrast, he suggests that the remedies available in a legal system that deploys only one level of property right (and ownership) are 'more likely' to be limited to monetary remedies.⁵⁷ This is because, Tarrant argues, a system with a 'dual level' of ownership can recognise two (or more) persons as having ownership rights to the same thing, particularly as a remedial response to a wrong.⁵⁸

In support of this contention, Tarrant cites the decision in *Attorney-General (Hong Kong) v Reid*⁵⁹ and suggests that there the Privy Council deployed 'two levels of property rights'⁶⁰ in order to deny a fiduciary, Reid, the equitable ownership of property obtained using the proceeds of a bribe (taken in breach of fiduciary duty).⁶¹ Tarrant argues that this is a clear example of a court recognising the creation of equitable ownership rights while preserving Reid's legal ownership. The consequence was that the Crown could 'convert that equitable ownership into legal ownership by collapsing the trust'.⁶² Meanwhile, McFarlane and Stevens have argued that the result in *Reid* is explicable on the basis that, once it is decided (or assumed) that the false fiduciary is under a duty to transfer a specific right to their principal, the principal automatically acquires a right *against* the rights obtained by the fiduciary.⁶³ Thus, the result in *Reid* is explicable under both conceptions.

Nevertheless, it is submitted that the right against a right approach has greater normative and explanatory force. This is because the approach directs the focus to the relevant *duty* that is engaged and demands a particular (possibly in specie) remedy. It is imperative, in this regard, to recognise that not all wrongs are to be remedied by the wrongdoer transferring a specific right (for example, as in *Reid*, the freehold title) to the plaintiff: while a defaulting trustee or breaching fiduciary will generally be made subject to specific relief, a negligent motorcar driver will not. This is important because, by focusing on that specific duty and the resulting right (against the defendant's right), the ambit of the remedy can be accurately identified and the normative justification for that particular remedial response precisely interrogated. A model predicated simply on recognising two levels of proprietary right (and, more broadly, a binary taxonomy of private law) is of more limited explanatory utility.

⁵⁶ Ibid 126.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324 ('*Reid*').

⁶⁰ Tarrant (n 5) 133.

⁶¹ The Privy Council found that Reid held the freehold on trust for the Crown: *Reid* (n 59) 339.

⁶² Tarrant (n 5) 134.

⁶³ See McFarlane and Stevens (n 25) 18.

It is also illustrative, in this respect, to briefly consider the operation of tracing. Returning to *Reid*, the appellant there relied on equitable tracing in order to show that Reid's interests in the land were acquired by the proceeds of the bribe.⁶⁴ It is difficult to explain this result, and more generally still the rules of tracing, consistently with a thesis that two levels of property right are being engaged: the only way to do so, it seems, is to say that the 'equitable property right' is, in effect, moving through one item of 'property' to the next and so on.⁶⁵ However, a difficulty with that explanation is that there is no 'thing' involved in a usual case of tracing (at least conventionally speaking, the right to money in a bank account is an obligation, not a *res*). Relatedly, as McFarlane and Stevens observe, tracing can very rarely, or 'almost never', be used to support acquisition by the plaintiff of a right against a thing.⁶⁶ Indeed, it is tolerably more rational to say that the plaintiff's right can annex to, and thereby be traced with, any right acquired by the defaulting party.

On the same theme, Justice Edelman has described as 'the greatest conceptual obstacle'⁶⁷ to any conception of the trust as involving two owners as being that personal rights — not only property rights (or, rights in *rem*) — can be held on trust:⁶⁸ '[i]t is, at best, a great strain in language to speak of the trustee "owning" the debt [in the bank account and owed by the bank]. It is even more confused to speak of the beneficiary, unknown to the bank, owning the debt'.⁶⁹ Indeed, Cotton LJ and Lindley LJ, in *Lister & Co v Stubbs*, opined that this confuses ownership with obligation.⁷⁰ The decision in *Trustee of the Property of FC Jones & Sons v Jones* is on point.⁷¹ There, a firm in which Mr Jones was a partner went bankrupt. After the event of bankruptcy, cheques were drawn on a partnership account in favour of Mrs Jones. The money, subsequently profitably invested in brokering transactions, ultimately ended up in Mrs Jones' bank account. At the time, a doctrine of relation back applied such that dispositions of partnership assets after the event of bankruptcy were void.⁷² The question was: who could get the money?

Again, it is conventional to describe the relationship between Mrs Jones and the bank as contractual: the bank has an obligation to Mrs Jones (and no one else) to pay, on her demand, the money in the bank account.⁷³ Notwithstanding, in the result, the trustee in bankruptcy was able to obtain the money. Notably, the Court of Appeal reasoned to this result by holding that Mr Jones' partners could assert a *direct right*

⁶⁴ Reid (n 59) 330.

⁶⁵ See generally Denis SK Ong, *Ong on Tracing* (Federation Press, 2019) cf Lionel D Smith, *The Law of Tracing* (Oxford University Press, 1997) 320–32.

⁶⁶ See McFarlane and Stevens (n 25) 20. McFarlane and Stevens note the exception where 'the mixture of A's thing and B's thing produces a new thing possessed by A. In such a case, B can acquire a legal co-ownership right in the new thing': at 20 n 90, citing *Indian Oil Corp Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345. Though, McFarlane has elsewhere argued that, in such a case, B should instead acquire only a right against A's right: see McFarlane (n 40) 162.

⁶⁷ Edelman, 'Two Fundamental' (n 26) 71.

⁶⁸ *Ibid* 70.

⁶⁹ *Ibid*.

⁷⁰ *Lister & Co v Stubbs* (1890) 45 ChD 1, 12 (Cotton LJ), 15 (Lindley J).

⁷¹ *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 ('Jones').

⁷² McFarlane and Stevens (n 25) 21.

⁷³ See, eg, Lionel Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125(April) *Law Quarterly Review* 338, 347.

as against the bank.⁷⁴ Indeed, this decision too seems to lend authoritative support for Tarrant's thesis. Meanwhile, McFarlane and Stevens argue that such reasoning commits the fallacy of overlooking the concept of a right against a right and thereby failed to identify that, in substance, what had occurred was that the partners had obtained a right against Mrs Jones' right (while at all times the bank still owed the duty to Mrs Jones).⁷⁵ This is surely a more plausible view if one adheres to the difference between obligation and ownership. There are many decisions that have conflated 'equitable' and 'legal' property, or obligation and ownership, in this or a similar way.⁷⁶

Meanwhile, on Tarrant's approach, the bank account is 'property' — recalling that, for Tarrant, all relevant private law rights are property. In this way, it can be said that the problems, or weaknesses, identified can be accommodated (at least semantically). However, this itself raises difficulties: again, why is it meaningful, or what is the utility, in recognising all such rights as proprietary only if, by doing so, the precise content of each of those rights is to vary on policy or other grounds? Indeed, if Tarrant's binary classification is rejected, then it is more difficult to see how these examples cohere with his theory of dual-levels of property.

As observed at the outset, the meaning of, and implications that follow from, something being defined as 'property' is far from settled. We have seen that those implications include the availability, explanation, and justification of particular remedies. Additionally, there are also implications regarding statute. As to statute, a substantial part of McFarlane and Stevens' thesis, as well as that of Tarrant, is devoted to explaining how their respective approaches best accord with the operation of applicable statutory schemes — for example, the statutory formalities regulating (or, perhaps more precisely, not regulating) equitable assignments and also those regimes regulating bankruptcy and insolvency.

To a considerable extent, these debates turn heavily on perceived differences, or conversely similarities, between the meaning and content of 'property' at common law, in equity, and under statute. As Justice Edelman has observed:

[The contrast with the label 'property' at common law and in equity] is striking. At common law, the notion of a property right to a tangible thing is often taken to involve a right to prevent others from interfering with the asset. Interference with property rights involves strict liability ... But a third party who "interferes" with a debt which is held on trust will not be liable to the beneficiary unless the third party's involvement amounts to knowing assistance in a breach of trust nor liable to the trustee unless the third party intentionally induces a breach of contract.⁷⁷

Again, any such differences can certainly be accommodated in Tarrant's thesis if it is accepted that all such 'rights' are proprietary (and that different property rights have different characteristics).

⁷⁴ *Jones* (n 71) 169–70 (Millet LJ), 171–2 (Beldam LJ), 172 (Nourse LJ).

⁷⁵ McFarlane and Stevens (n 25) 22.

⁷⁶ See, eg, *International Factors Ltd v Rodriguez* [1979] QB 351.

⁷⁷ Edelman, 'Two Fundamental' (n 26) 71.

V Conclusion

In conclusion then, as Justice Edelman has said, the quest for a ‘single unitary theory of “property”’ is a ‘hopeless ideal’.⁷⁸ The thesis proposed by Tarrant — particularly, the proposed dual system of ‘property’ and its adoption of a binary taxonomy of private law — may lack the coherence of the other conceptions presented. In this regard, Tarrant’s own thesis may raise more questions than it answers.

Nevertheless, on many of the key points discussed above, the balance of authority, or at least obiter dicta, seems to support Tarrant’s thesis. Moreover, there is much to be said for a text that challenges an approach which (at least recently) has found support in a corpus of scholarly literature and, thereby, contributes to and enhances our understanding of the law. In this regard, others have also recently questioned the right against a right theory for conceptual, methodological, and pragmatic reasons; not least by arguing that the alternative conception of the beneficiary’s ‘right’ as being an interest in a sub-property (or that of an indirect right in rem) is, perhaps, better capable of explaining the beneficiary’s power over the asset and is more consistent with traditional English legal taxonomy.⁷⁹ Further, while the above discussion draws mainly on the common law and trusts literature, Tarrant also seeks to consider, and accommodate into his theory, decisions that fall outside the habitual focus of authors writing on this topic (which, largely, attends examination of the trust).⁸⁰

⁷⁸ Justice James Edelman, ‘Property Rights to Our Bodies and Their Products’ (2015) 39(2) *University of Western Australia Law Review* 47, 53.

⁷⁹ See, eg, Elena Christine Zaccaria, ‘The Nature of the Beneficiary’s Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right’ (2019) 135(July) *Law Quarterly Review* 460.

⁸⁰ For example, *Yanner v Eaton* (1999) 201 CLR 351 is considered by Tarrant at several junctures. Perhaps, a focus on the common law and equity divide does not fully take account of some specifically Australian aspects of the elastic term ‘property’ as used in our legal system. See also *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303–4. I thank an anonymous reviewer for this point.