Theoretical Justifications for the Judicial Approach to Problematic Super Discretionary Trusts

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I. Introduction

This paper will expound a theoretical approach for analysing super discretionary trusts and their validity in order to justify the correctness of the high-level reasons recently advanced by the Supreme Court of New Zealand and the Privy Council.[1] This paper will also evaluate the application of these high-level reasons and the conclusions that were drawn with reference to the theories. The approach adopted by the courts has exposed a justificatory gap with regard to the reasons why a super discretionary trust is problematic (or not). The core contention of this paper is that this justificatory gap can be rectified by looking to the Persistent Rights Thesis (PRT) and the Functional Thesis (FT) as theories of the trust.[2] The theoretical approach that this paper develops to fill the justificatory gap and evaluate judicial reasoning and conclusions will be premised upon the theories' propounded interpretation of the minimum characteristics of the trust. Through the application of the theories, it will be argued that the impugned high-level reasons and their application are generally justifiable although some need refinement.

Developments in the law of trusts, such as relaxing the test for certainty of objects (beneficiaries), have increased the flexibility of the trust and have facilitated the rise of the super discretionary trust, now commonly used for wealth-management purposes.[3] The super discretionary trust that is the focus of this paper is where the trustee has discretions and powers, and where various duties or limitations that control the exercise of the trustee's powers, such as the duty to not act in conflicts of interest, have been excluded.[4] The Vaughan Road Property Trust from *Clayton v Clayton* exemplifies what this paper understands to be a super discretionary trust. The courts have wrestled with challenges to super discretionary trusts and have explicated some high-level reasons for why they might be problematic, including where the trust gives someone a "power to bring the [super discretionary trust] to an end" or that it is

[1] *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; and *Webb v Webb* [2020] UKPC 22. See Lionel Smith "Massively Discretionary Trusts" (2017) 70(1) CLP 17 for an analysis of the similar "massively discretionary trust".

[2] Ben McFarlane and Robert Stevens "The nature of equitable property" (2010) 4 J Eq 1 at 1-3, and 5; and J E Penner "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014c) 27(2) CJLJ 473 at 484.

[3] Sam Short "Are or Were? The Continuing Influence of the Settlor" (2019) 28(4) NZULR 587 at 588-590; and Jessica Palmer and Charles Rickett "The Revolution and Legacy of the Discretionary Trust" (2017) 11 J Eq 157 at 167-168.

[4] Mark Bennett "Competing views on illusory trusts: The *Clayton v Clayton* litigation in its wider context" (2017) 11 J Eq 48 at 56-59; Mark Bennett "The Illusory Trust Doctrine: Formal or Substantive?" (2020) 51(2) VUWLR 193 at 202; Terence Tan Zhong Wei "The irreducible core content of modern trust law" (2009) 15(6) Trusts & Trustees 477 at 491; and Grahame Young "Sham and illusory trusts – lessons from *Clayton v Clayton*" (2018) 24(2) Trusts & Trustees 194 at 195.

invalid for a failure to "dispose of the property […] in favour of another".[5] This paper has described the reasons as "high-level" because of the degree of generality and the absence of specificity with which they are expressed, and to concurrently isolate them as lacking a justification. Accordingly, this paper will argue that the application of the PRT's and FT's theoretical perspectives fill a justificatory gap regarding the theoretical "correct[ness]" of the Supreme Court's and Privy Council's high-level reasons.[6] However, some refinement of the reasons will be necessary before they can be fully justified. The theories' propounded approaches will thus be used to critique the application of the high-level reasons to super discretionary trusts and the conclusions that follow. By using the theories to fill the justificatory gap and posit why the high-level reasons are theoretically correct, this paper should assist in eschewing instrumentalism and unjustified legal reasoning with respect to the validity of super discretionary trusts.[7] Addressing the justificatory gap and critiquing the Supreme Court and Privy Council's conclusions should also lead to a more cogent understanding of super discretionary trusts and why they might be theoretically problematic.[8]

The PRT and FT will be the focus of this paper because of their explanatory strength that will be demonstrated in Chapter III, which is in part due to their Hohfeldian approach.[9] Their Hohfeldian approach means they engage in a precise analysis of the outward-facing legal relations between the beneficiary and third parties (analysed by the PRT), and the inward-facing aspects of a trust between the beneficiary and the trustee (analysed by the FT).[10] The theories' attention to the precise legal relations within the trust assists in isolating the key juridical effects of the declaration of a trust and therefore helps in propounding the theories' interpretations of the minimum characteristics. The theoretical approaches will be applied to

[5] *Clayton v Clayton*, above n 1, at [124] and [125].
[6] *Clayton v Clayton*, above n 1, at [127]; and Bennett (2020), above n 4, at 230.
[7] Charles Rickett "Instrumentalism in the Law of Trusts – The Disturbing Case of the Constructive Trust upon an Express Trust" (2016) 47(3) VUWLR 463 at 463-465; Guilherme Vasconcelos Vilaça "Why Teach Legal Theory Today?" (2015) 16(4) German Law Journal 781 at 785. See also Bennett (2020), above n 4, at 210-213 for instrumentalism in the case of *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) and 221-227 for evaluation of justifiability of the court's various approaches.
[8] Mátyás Bódig "Legal Theory and Legal Doctrinal Scholarship" (2010) 23(2) CJLJ 483 at 498.
[9] Wesley Newcomb Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-1914) 23(1) Yale LJ 16; and Wesley Newcomb Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-1917) 26(8) Yale LJ 710.
[10] Ben McFarlane "The Essential Nature of Trusts and Other Equitable Interests: Two and a Half Cheers for Hohfeld" in Shyamkrishna Balganesh, Ted M Sichelman, and Henry E Smith (eds) *Wesley Hohfeld A Century Later: Edited Major Works, Selected Personal Papers, and Original Commentaries* (Cambridge University Press, Cambridge, Forthcoming 2022) 1 at 19-20.

the Vaughan Road Property Trust deed, from the case of *Clayton v Clayton*.[11] Both theories can and do address the super discretionary trust in *Clayton v Clayton* and justify the reasons opined by the Supreme Court and Privy Council. When applying the theoretical approaches to the Vaughan Road Property Trust deed, the PRT's exposition did not reveal any problems with the super discretionary trusts, which means that according to the PRT there was a disposition of (property) rights.[12] The FT's exposition elucidated that there was no disposition of beneficial ownership, and that the court's opinion that a trust could be defeasible, in the sense of being unilaterally revocable at the instance of the trust, can be substantiated and theoretically justified.[13] In neither instance will there be any issue with trustee accountability.

This paper will begin in Chapter II with a discussion of the cases of *Clayton v Clayton* and *Webb v Webb*.[14] This will be with regard to the postulation of high-level reasons that could be applied to challenge the validity of a super discretionary trust, and the justificatory gap that is exposed which this thesis will seek to address.

Chapter III will explain the pre-existing essence of the two theories. This Chapter will demonstrate the explanatory power and complementarity of the theories that will justify Chapter IV's application of the theories to the super discretionary trusts. The PRT primarily addresses the juridical relations between the beneficiary and third parties and conceptualises the beneficiary's right as a *persistent* right.[15] However, this is only a partial explanation of the trust because it does not comprehensively address the beneficiary's relationship with the trustee.[16] To complement the PRT, the FT explains that the beneficiary has rights in the trustee's powers because they are essential to the beneficiary's realisation of value and the receipt of trust income and capital, which the FT argues is their primary interest in the trust.[17] This Chapter will finish with an argument for the performative interdependence and conceptual compatibility of the two theories.

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[11] Vaughan Road Property Trust deed (2011) annexed to *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.
[12] *Clayton v Clayton*, above n 1, at [124]; and Vaughan Road Property trust deed, above n 11.
[13] *Clayton v Clayton*, above n 1, at [125].
[14] Above n 1; and above n 1.
[15] McFarlane and Stevens (2010), above n 2, at 1-3, and 5.
[16] Penner (2014c), above n 2, at 484.
[17] Penner (2014c), above n 2, at 484.

Chapter IV will propound the theories' approaches to super discretionary trusts. These approaches will fill the courts' justificatory gap and be used to evaluate super discretionary trusts and the courts' reasoning, to show that the high-level reasons are justifiable following some refinement. The case for the core contention will be made by first elucidating the two minimum characteristics of a trust, being a disposition, and trustee accountable. Second, the PRT's conceptualisation of both the minimum characteristics will be propounded, which will then be applied to the Vaughan Road Property Trust deed. The application of the PRT's propounded interpretation will not raise any problems with the super discretionary trust in *Clayton v Clayton*. Third, an argument will be made for the FT's exposition of both the minimum characteristics, and then applied to the Vaughan Road Property Trust deed. The super discretionary trust will be found defeasible, which is consistent with and justifies the Court's obiter dictum in *Clayton v Clayton*.[18] The FT will be extended to the Webb Family Trust deed to explore the efficacy of the FT's approach and to critique the Privy Council's decision where the FT's conclusion contradicts the Board's, finding that there *was* a disposition of beneficial ownership and a functionally valid super discretionary trust.[19] Both theories will be jointly used to refine the dictum of the Privy Council in the abstract, which as will be demonstrated, can only be fully justified if the theories are complementary. The theories also elucidate the nature resultant legal relationship where the impugned super discretionary trust is formally or functionally problematic.

Chapter V will conclude on the theoretical approaches of the PRT and FT and their application to the issue of the super discretionary trust and their role in filling the impugned justificatory gap. Furthermore, some future issues that this paper raises will be noted.

[18] Above n 1, at [125].
[19] *Webb v Webb*, above n 1, at [89]; and Webb Family Trust deed (2016) materially the same as the Arorangi Trust deed (2005) annexed to *Webb v Webb* [2020] UKPC 22 (See *Webb v Webb*, above n 1, at [68]).

II. (Some) Super Discretionary Trusts in the Courts

Extensive trustee control is a common feature of super discretionary trusts.[20] Trustee control is often achieved through the inclusion of discretionary powers, and the exclusion of various duties and constraints.[21] Yet, because of this, super discretionary trusts have been challenged in court, with respect to their validity.[22] This Chapter will set out the two cases of interest and highlight the high-level reasons and their justificatory gaps that the court purports to apply to the super discretionary trust which this paper will address by reference to the PRT and FT.

First, the Supreme Court of New Zealand's analysis in *Clayton v Clayton* found that Mr Clayton as trustee held a general power of appointment in the trust subject-matter.[23] This was because the trustee held a power to appoint income and capital in combination with clauses which meant that "the normal constraints of fiduciary obligations [were] not of any practical significance" and therefore the trustee could exercise the power for their own benefit.[24] Mr Clayton as trustee could thus "exercise the VRPT powers to appoint the whole of the trust property to himself".[25] The power was said to be sufficiently analogous to a general power of appointment, which is "usually viewed as tantamount to ownership and can be [and was] treated as [Mr Clayton's] property".[26] The Supreme Court found that Mr Clayton's powers were effectively property and therefore did not need to determine whether the super discretionary trust was valid.[27]

The Court espoused some high-level reasons to apply to super discretionary trusts to test their validity. First, a trust would be invalid if there had been *no disposition of property* because the trustee has been "reserved such broad powers", which would consequently "bring into question

[20] Bennett (2017), above n 4, at 56.
[21] Lusina Ho "'Breaking Bad' Settlors' Reserved Powers" in Richard C Nolan, Kelvin F K Low, and Tang Hang Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press, Cambridge, 2018) 34 at 45-47.
[22] David Russell AM QC and Toby Graham "Illusory Trusts" (2018) 24(4) Trusts & Trustees 307 at 317.
[23] *Clayton v Clayton*, above n 1, at [68].
[24] *Clayton v Clayton*, above n 1, at [64] and [56]-[57]. The clauses of interest are 11.1, 14.1, and 19.1(c).
[25] *Clayton v Clayton*, above n 1, at [56]-[58].
[26] *Clayton v Clayton*, above n 1, at [61] and [79]-[80].
[27] *Clayton v Clayton*, above n 1, at [127] (on a finding of invalidity being unnecessary). Finding the power was equivalent to property was drawn from *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 at [54] and [59]-[60] where the Privy Council found that a personal power of revocation could be treated as tantamount to ownership.

whether the irreducible core of Trustee obligations" bound the trustee.[28] Second, that a trust could be defeasible, because the trustee held powers that gave them the ability to unilaterally "bring the VRPT to an end".[29] However, until the trustee exercised the powers in such a manner, there was "no reason in principle why [the super discretionary trust] should not be regarded as a trust and be administered" as such.[30] The Supreme Court's obiter dictum are essentially high-level reasons which could be applied to a super discretionary trust to ascertain its validity. There is, with respect, a paucity of cogent theoretical justification for why a super discretionary trust might be problematic if the trust deed manifested the proffered reasons.[31] In other words, the Supreme Court left a justificatory gap when espousing the high-level reasons in obiter.[32]

Secondly, the Privy Council recently decided a case regarding a challenge to the validity of a super discretionary trust.[33] The Privy Council found that Mr Webb, who was the settlor, Consultant, trustee, and beneficiary, could "secure the benefit of all the trust property to himself" at any time, in total disregard for the "interests of the other beneficiaries".[34] The Board thus concluded that Mr Webb could "arrange matters in such a way that he alone would hold the trust property on trust for himself and no-one else".[35] This was because Mr Webb, as settlor, had a personal power to remove other beneficiaries and collapse the trust, which led the Board to conclude that there was "no effective alienation" of the trust property and Mr Webb's power was thus "indistinguishable from ownership."[36] The Board also posited what it indicated was another reason in obiter for analysing the validity of a super discretionary trusts. That there would be no trust if the powers that had been reserved were so extensive that meant there was no disposition "of any of the property purportedly settled on or acquired by the trusts".[37] "[I]n connection" with this it could be asked whether the powers "were so extensive" that the trustee was not bound by the "irreducible core of obligations".[38] The distinction between these two

[28] *Clayton v Clayton*, above n 1, at [124], and the "irreducible core" from *Armitage v Nurse* [1998] Ch 241 (CA) at 253-254. Note that this suggests that trustee accountability presupposes a disposition and will be elaborated upon in Chapter IV.
[29] *Clayton*, above n 1, at [125].
[30] *Clayton*, above n 1, at [125].
[31] Bennett (2017), above n 4, at 48-49.
[32] Bennett (2020), above n 4, at 220.
[33] *Webb v Webb*, above n 1.
[34] *Webb v Webb*, above n 1, at [83]-[87], and [89]; and Bennett (2020), above n 4, at 217-218.
[35] *Webb v Webb*, above n 1, at [87] and [89].
[36] *Webb v Webb*, above n 1, at [87] and [89].
[37] *Webb v Webb*, above n 1, at [89]. Also note the similarities with *Clayton v Clayton*, above n 1, at [125] and the failed disposition reasoning.
[38] *Webb v Webb*, above n 1, at [89].

conclusions is unclear. Lord Kitchen's dictum, with respect, evinces the same justificatory gaps as the New Zealand Supreme Court's.[39] Lord Kitchen's first approach suggests that the settlor of a super discretionary trust can successfully dispose of the "property" whilst concurrently retaining powers that meant the trustee is not divested of beneficial ownership. Whereas the second approach indicates that a super discretionary trust will be invalid due to a failure to dispose of the property *because* the powers reserved were too extensive which negated the effect of the irreducible core.[40] These high-level reasons are of fundamental importance to analysing the validity of a super discretionary trust, however, the distinction between, and the justification for the reasons is absent.[41]

The Supreme Court and Privy Council's treatment of the super discretionary trusts and their validity reveals the vexing nature of the issue.[42] There is a lack of theoretical justification for why the high-level reasons, being a *formal* failure to dispose of property, and a *functional* reservation of extensive powers and a failure to divest beneficial ownership, are correct and matter for a super discretionary trust's validity.[43] Accordingly, it is this paper's core contention and the focus of the following Chapters that the justificatory gaps in the judicial dictum on super discretionary trusts can be addressed through the PRT's and FT's theoretical approaches which will be propounded. These theoretical approaches will used to refine and restate the high-level reasons such that they can be justified. By applying the theoretical approaches to the relevant trust deeds this paper will affirm and at times critique the courts' application of the high-level reasons.

[39] Charles Strachan "Whither the "illusory trust"?" (2021) 137(2) LQR 206 at 211-212.
[40] *Webb v Webb*, above n 1, at [89]; and Sinéad Agnew "The Reservation of Powers by Settlors: Intention and Illusion" (2021) 80(1) CLJ 18 at 20.
[41] *Webb v Webb*, above n 1, at [89]; and Strachan, above n 39, at 211-212.
[42] Bennett (2020), above n 4, at 225.
[43] Bennett (2020), above n 4, at 230; and JE Penner "An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine" (2010) 63(1) CLP 653 at 664.

III. Theories of the Beneficiary's Interest and the Trust: The PRT and the FT

This Chapter's primary focus is to present the respective explanations of the two relevant theories of the trust, the PRT and FT which have gained considerable traction in recent debates.[44] This Chapter will argue that together they provide a strong conceptual framework for the trust. The PRT will be discussed first and elucidates the juridical right-duty relationship between the beneficiary and relevant third parties, specifically tortfeasors and recipients of misappropriated trust subject-matter. The FT will be discussed second and provides a complementary conception of the beneficiary's right in the trustee's powers as the functional aspects of the trust. Finally, the theories will be shown to be performatively interdependent and conceptually compatible. This Chapter will thus demonstrate the explanatory strength of the two theories for the purpose of justifying the use of the PRT and FT in Chapter IV for analysing super discretionary trusts.

A. The Persistent Rights Thesis

1. The Essence of a Persistent Right

The core premise of the PRT is that the beneficiary's interest is *not* a property nor personal right, but rather that it is a *persistent* right meaning a right *against a right*.[45] The beneficiary's right is not a right directly in the subject-matter of the trust, but is annexed to the trustee's rights in the subject-matter (such as a right to exclude in the case of property).[46] The trustee still holds their original right, be it a chose in action against a bank or a right in land, but the exercise of that right is controlled by the beneficiary's right and must therefore be exercised for the beneficiary's benefit.[47] The essence of a trust according to the PRT is that a party holds a

[44] See for example, 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(3) LQR 460; and Peter Jaffey "Explaining the Trust" (2015) 131(3) LQR 377.
[45] McFarlane and Stevens (2010), above n 2, at 1.
[46] McFarlane and Stevens (2010), above n 2, at 1; and Simon Douglas and Ben McFarlane "Defining Property Rights" in James Penner and Henry E Smith (eds) *Philosophical Foundations of Property Law* (Oxford University Press, Oxford, 2013) 219 at 242-243.
[47] McFarlane (Forthcoming 2022), above n 10, at 8. Additionally, where the trust is a super discretionary trust, it is possible to conceive of the beneficiaries holding the persistent right collectively "*as a body*." (Rickett (2016), above n 7, at 468).

specific right, subject to a duty to exercise the right for the benefit of another.[48] The PRT has been described as a *formal* account of the trust because it focuses on the beneficiary's right-duty juridical relations, and their precise structure (as opposed to their substance).[49]

The PRT rejects the traditional understanding of the beneficiary's interest as a functional equivalent of a property right with the bona fide purchaser (BFP) exception.[50] Accordingly, it will be demonstrated, that the beneficiary's right *does not* have the requisite direct, strict *in rem* effect of a property right.[51] Rather, the beneficiary's right only directly binds *some* third parties, the one of interest being successors in title (recipients) who are bound because their conscience has been sufficiently affected.[52] Hence, because of the juridical effect of the beneficiary's interest it is erroneous to conceive of it as equivalent to a property right.[53]

2. Distinguishing Persistent Rights from Personal and Property Rights

The PRT's distinction between personal rights, property rights, and persistent rights rests almost entirely on their "exigibility" (meaning how, and against whom the rights are enforceable).[54] The distinction is illuminated through a Hohfeldian approach that focuses on the nature and content of the right-duty relations between beneficiaries and third parties.[55] The conceptualisation of the nature of the beneficiary's interest follows from an evaluation of the effect of the beneficiary's right on various categories of third parties, specifically the tortfeasor,

[48] Ben McFarlane "The *Numerus Clausus* Principle and Covenants Relating to Land" in Susan Bright (ed) *Modern Studies in Property Law* (Vol 6, Hart Publishing, Oxford, 2011) 311 at 319.
[49] Thomas W Merrill "Property and the Right to Exclude" (1998) 77(4) Neb L Rev 730 at 745; and J E Penner *The Idea of Property in Law* (Oxford University Press, Oxford, 1997) at 71-72. This attention to the form of right-duty juridical relations is exemplified by the PRT's Hohfeldian approach to analysing the technical details of juridical relations (McFarlane (Forthcoming 2022), above n 10, at 19-21).
[50] J W Harris *Property and Justice* (Oxford University Press, Oxford, 1996) at 53; and Ben McFarlane "Avoiding Anarchy? Common Law v Equity *and* Maitland v Hohfeld" in J Goldberg, H Smith, and P Turner (eds) *Equity and Law: Fusion and Fission* (Cambridge University Press, Cambridge, 2019a) 331 at 339.
[51] Charlie Webb "Three Concepts of Rights, Two of Property" (2018) 38(2) OJLS 246 at 259.
[52] Ben McFarlane and Simon Douglas "Property, Analogy and Variety" (2021) OJLS 1 (Advanced Copy Available At doi.org/10.1093/ojls/gqaa043) 1 at 21 and 23.
[53] Douglas and McFarlane (2013), above n 46, at 242-243 on the conclusions in *Shell UK Ltd and others v Total UK Ltd and another* [2010] EWCA Civ 180, [2010] 3 All ER 793.
[54] Peter Birks *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985) at 49; and Ben McFarlane "Equity, Obligations and Third Parties" (2008b) 2008(2) Sing JLS 308 at 311.
[55] Douglas and McFarlane (2013), above n 46, at 220 and James Penner and Henry E Smith "Introduction" in James Penner and Henry E Smith (eds) *Philosophical Foundations of Property Law* (Oxford University Press, Oxford, 2013) i at xxv. Note also Penner (1997), above n 49, at 71-73 where Penner also looks to the duty to understand the nature of a right *in rem*, hence McFarlane's methodological approach is in no way uncommon to property theorists.

and the recipient of misappropriated property.[56] The distinctive exigibility of the beneficiary's right relative to both a personal and property right, substantiates the PRT's characterisation of the beneficiary's right as a persistent right.

A personal right, such as a contractual right, is at its core a right that binds only the other party to the relationship and is thus a simple form of bilateral juridical relations.[57] Despite this, the beneficiary's right has the potential to bind third-party recipients of misappropriated trust property (henceforth "Y"), therefore it cannot be a purely personal right.[58]

The distinction between persistent rights and property rights rests primarily on two matters.[59] First, the beneficiary "does not have a right to exclude all non-beneficiaries" including the trustee from the trust property.[60] Rather, the trustee holds the right of exclusion as against the world, which by implication includes the beneficiary.[61] Thus, the beneficiary out of possession cannot exclude the trustee, and the trustee is also likely bound to exclude the beneficiary unless the trustee has licenced the beneficiary to enter the property.[62]

The second and foundational point of differentiation is the distinctive exigibility of the beneficiary's right. The distinctive exigibility which will be elaborated below illuminates the key reasons why the beneficiary's right is not a property right. At their core, these reasons are that while a property right imposes a direct, strict duty of non-interference on all third parties, including those that interfere with or damage the property and those that receive the property

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[56] Ben McFarlane "Reply: Property Law and its Structure" (2011) 2(1) Juris 217 at 225.
[57] Thomas W Merrill and Henry E Smith "The Property/Contract Interface" (2001) 101(4) ColumLRev 773 at 776-777.
[58] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] 2 All ER 799 at [89]; and Charlie Webb "The Double Lives of Property" (2011) 2(1) Juris 205 at 207.
[59] Note also that the PRT argues that the beneficiary's right is distinguishable from a property right because a property right must be to a tangible thing, whereas the beneficiary's right is in another right (McFarlane and Stevens (2010), above n 2, at 3; and McFarlane and Douglas (2021), above n 52, at 6 and 12). The proposition that property rights must be rights to a physical thing is undoubtedly questionable, given that it is inconsistent with extant law, for example that intangibles like company shares are property (*Borland's Trustee v Steel Brothers* [1901] 1 Ch 279 at 288), and with property theory (and Katrina M Wyman "Property as Intangible Property" in Paul B Miller and John Oberdiek (eds) *Oxford Studies in Private Law Theory* (Vol 1, Oxford University Press, Oxford, 2020) 81 at 99; and Penner (1997), above n 49, Chapters III and IV). However, this position is inconsequential for the purposes of this paper, and arguably for the PRT because the key reason that elucidates the distinctiveness of the beneficiary's right is its exigibility.
[60] *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161 at 165-166; and *Moore v MacMillan* [1977] 2 NZLR 81 (SC) at 88 on the requisite possessory interest one must have to exclude others from property. Nevertheless, following these two cases, if the beneficiary is in possession, they will be able to exclude others, but this will only be by virtue of their possessory right (Penner (2014c), above n 2, at 486).
[61] McFarlane (Forthcoming 2022), above n 10, at 22.
[62] Penner (2014c), above n 2, at 482 and 486.

without authorisation, a beneficiary's right does not.[63] The beneficiary's right as a persistent right has no direct *in rem* trespassory quality.[64] Yet the beneficiary's right has some *in rem* successor quality because it will bind a third party who holds the encumbered right or a traceable substitute and whose conscience is simultaneously affected (however, this is dissimilar to the operation of a property right).[65]

3. The Beneficiary's Right as a Persistent Right and Third-Party Interference: Tortious Intervenors

The beneficiary has no direct claim against a tortfeasor; however, the encumbrance of the trustee's right with the core trust duty means that the beneficiary's right is indirectly protected. If a third-party (henceforth X) deliberately or carelessly damages trust property, it is the trustee's right to the property that has been infringed and it is their right that will be vindicated.[66] This is because upon the declaration of a trust, the trustee retains the right in the trust subject-matter which entitles them to sue X for any damage.[67] The trustee holds the right for the benefit of the beneficiary, and therefore the trustee is obliged to exercise the right and sue X, and any damages will be held on trust for the beneficiary.[68] Notably, only damages to the property are recoverable, and not the beneficiary's consequent loss.[69] Therefore, the form of the juridical relations demonstrates that the right to the trust subject-matter and to sue tortfeasors are both retained by the trustee.

The beneficiary can nevertheless indirectly protect the trust subject-matter by compelling the trustee to perform their duty and sue X.[70] This is achieved at common law, through the

[63] Merrill and Smith (2001), above n 57, at 783-785.
[64] McFarlane and Douglas (2021), above n 52, at 17-20; and J E Penner "Duty and Liability in Respect of Funds" in John Lowry and Loukas Mistelis (eds) *Commercial Law: Perspectives and Practice* (LexisNexis Butterworth, London, 2006) 207 at 214-215.
[65] McFarlane and Douglas (2021), above n 52, at 17-22; and Penner (2006), above n 64, at 214-215.
[66] *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 at 812; and McFarlane (2019a), above n 50, at 336.
[67] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1982] HCA 14, (1982) 149 CLR 431 at 474; Ben McFarlane "Form and Substance in Equity" in Andrew Robertson and James Goudkamp (eds) *Form and Substance in the Law of Obligations* (Hart Publishing, Oxford, 2019b) 197 at 205-206; and McFarlane (Forthcoming 2022), above n 10, at 14.
[68] *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240 at [55]; and McFarlane (2019a), above n 50, at 336.
[69] *The Aliakmon*, above n 66; and McFarlane and Douglas (2021), above n 52, at 20.
[70] Lusina Ho and Richard C Nolan "The Performance Interest in the Law of Trusts" (2020) 136(3) LQR 402 at 411.

expedited procedure known as the "*Vandepitte* procedure."[71] This procedure formally involves two actions. The first is the beneficiary enforcing the trustee's duty to exercise the right for the beneficiary's benefit and therefore take action against X.[72] The second is the enforcement of the duty of non-interference, which is only actionable by the trustee, as the holder of the encumbered legal title.[73] The trustee holds the relevant right to sue X and the beneficiary cannot "leapfrog" them to directly sue X.[74]

The indirectness of the beneficiary's right is further elucidated by the possibility of the trustee giving consent to the interference which would mean that there was no claim for the beneficiary to compel the trustee to initiate.[75] Rather the beneficiary would only have an action for breach of trust because the trustee consented to the damage.[76] The trustee's permission to the tortfeasor's interference means that the beneficiary cannot compel the trustee to sue X because there was no unlawful interference.[77] Nevertheless, the beneficiary can on principle sue the trustee for breach of trust to restore the loss caused by their consent.[78] In this instance, the beneficiary's right to sue the trustee for breach of trust is effectively an alternative way for the beneficiary to protect their interest in the trust subject-matter by seeking for the trustee to restore the value that they would have otherwise recovered from X.[79] The mediating role of the trustee reflects the inherently relational nature of persistent rights, and the trustee's ability to disrupt the beneficiary's protection of the trust subject-matter.[80]

The PRT clearly explicates the juridical form of the joinder action. However, there is a conceptual disagreement regarding the *significance* of indirectness and the beneficiary's claim against X which steps back from the focus on form and nature of juridical relations to reasons and justification.[81] Penner, the proponent of the FT, argues that the PRT's focus on form is a

[71] McFarlane (2019a), above n 50, at 336, "Named for *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70." See also *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445.
[72] McFarlane (2008b), above n 54, at 318; see also *Roberts v Gill & Co*, above n 68, at [62].
[73] McFarlane (2008b), above n 54, at 318; see also *Roberts v Gill & Co*, above n 68, at [62].
[74] James Edelman "Two conceptions of equitable assignment" (2015) 131(2) LQR 228 at 240-241.
[75] McFarlane and Stevens (2010), above n 2, at 4.
[76] McFarlane and Stevens (2010), above n 2, at 4.
[77] McFarlane and Stevens (2010), above n 2, at 4.
[78] *Clough v Bond* (1838) 3 My & Cr 490 (Ch); McFarlane and Stevens (2010), above n 2, at 4; Penner (2014c), above n 2, at 484-485; and Ho and Nolan, above n 70, at 411.
[79] Penner (2014c), above n 2, at 485; and Larissa Katz "Equitable Remedies: Protecting "What We Have Coming To Us" (2021) 96(3) Notre Dame LRev 1115 at 1116-1122.
[80] Lionel D Smith "Trust and Patrimony" (2009) 28(4) Est Tr & Pensions J 332 at 343-344.
[81] Penner (2014c), above n 2, at 480-481.

distraction and of little interest to the practical operation of the trust and the beneficiary's "true" interests under the super discretionary trust.[82] This will be discussed further in parts B and C of this Chapter.

4. The Beneficiary's Right as a Persistent Right and Recipients of Trust Property: The Innocent Donee, the Knowing Receiver, and the Bona Fide Purchaser

The PRT provides a clear and strong explanation of the beneficiary's relationship to recipients of misappropriated trust property (Y): the innocent donee; the knowing recipient; and the bona fide purchaser. In certain circumstances, a third-party recipient of misappropriated trust subject-matter can become liable *as if* they are a trustee (within the PRT conceptualisation), to exclusively use the received right for the beneficiary's benefit.[83] This occurs where there is a *reason* and therefore a justification for the recipient to be bound in equity.[84] Therefore, as will be demonstrated, the beneficiary's right does not bind recipients of misappropriated rights in the same strict *in rem* manner that a property right does.[85]

The innocent donee of misappropriated trust property (Y) is under no immediate duty upon receipt to return the property.[86] Y can freely deal with the right, and if they dissipate the trust subject-matter without any appreciation of the beneficiary's pre-existing right then the beneficiary will have no right against Y's right.[87] This is because without an appreciation of the beneficiary's pre-existing right there is no reason to justify equity's control of Y's exercise

[82] Penner (2014c), above n 2, at 480-481.
[83] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 at [81]; and McFarlane (2019a), above n 50, at 343. See *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, 1206, at [26] and [31] per Lord Sumption JSC for an alternative opinion. Sinéad Agnew and Ben McFarlane "The Paradox of the Equitable Proprietary Claim" in Ben McFarlane and Sinéad Agnew (eds) *Modern Studies in Property Law* (Vol 10, Hart Publishing, Oxford, 2019) 303 at note 14 would distinguish the Court's decision and limit it to the definition of "trustee" used in the Limitation Act 1980 (UK), which "is not inconsistent with a finding that such a recipient does hold specific assets subject to a duty to [the beneficiary]" and is still therefore a "trustee" within the PRT's conceptualisation and definition.
[84] *Akers v Samba Financial Group*, above n 58, at [88] and [89]; *Independent Trustee Services Ltd v Noble*, above n 83 at [80]; and Sinéad Agnew and Ben McFarlane "The Nature of Trusts and the Conflict of Laws" (2021) 137(3) LQR 405 at 416-417. Also note that this can be thought of as whether there is a reason for *equity* to control Y's exercise or enforcement of the misappropriated right (Ben McFarlane and Robert Stevens "What's Special about Equity? Rights about Rights" in Dennis Klimchuk, Iris Samet, and Henry E Smith (eds) *Philosophical Foundations of the Law of Equity* (Oxford University Press, Oxford, 2020) 191 at 199).
[85] Agnew and McFarlane (2021), above n 84, at 416-417.
[86] McFarlane (2019a), above n 50, at 343.
[87] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 705; *Independent Trustee Services Ltd v Noble*, above n 83, at [76]; and Agnew and McFarlane (2021), above n 84, at 416-417.

of the right.[88] However, if Y holds the misappropriated right and their conscience is concurrently "affected by knowledge of the [beneficiary's] pre-existing" right, then a duty will arise and encumber Y's right binding them to hold it for the beneficiary's benefit.[89] If Y still has the original right, Y will be obliged to perform their duty by re-transferring the right *in specie*, which is the beneficiary's "equitable proprietary claim".[90] However, if after becoming conscious of the beneficiary's pre-existing right Y dissipates the right, they will be personally liable for an equivalent amount, which is the claim in knowing receipt.[91] Both the claims are premised upon the same duty that Y must not use the right for their own benefit, and are merely alternative ways for Y to perform that duty.[92]

Before Y can come under a duty to the beneficiary their conscience must be affected whilst they simultaneously hold the misappropriated right (or a traceable right).[93] Y's affected conscience is the reason for their duty to the beneficiary, and will only be relevantly affected if Y has knowledge of the beneficiary's pre-existing interest.[94] This is because such knowledge prompts their capacity for moral reasoning, meaning they come under a moral duty to the beneficiary which equity crystallises into a legal duty.[95] This legal duty obliges Y to respect the beneficiary's right and to re-transfer it.[96] Y's affected conscience is equity's way of requiring the beneficiary to prove that it is just to regulate Y's enforcement and enjoyment of

[88] McFarlane and Stevens (2020), above n 84, at 199.
[89] *Independent Trustee Services Ltd v Noble*, above n 83, at [78] and [81]; and Agnew and McFarlane (2021), above n 84, at 416-417.
[90] *Independent Trustee Services Ltd v Noble*, above n 83, at [81]; and Agnew and McFarlane (2019), above n 83, at 306.
[91] *Independent Trustee Services Ltd v Noble*, above n 83, at [81] and [84]; Agnew and McFarlane (2021), above n 84, at 416-417; and Hans Tijo "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away From English Law Towards American Law?" (2019) 2019(1) Sing JLS 235 at 239.
[92] *Independent Trustee Services Ltd v Noble*, above n 83, at [78] and [81]; Agnew and McFarlane (2021), above n 84, at 422; and Agnew and McFarlane (2019), above n 83, at 305. *Byers and others v Samba Financial Group* [2021] EWHC 60 (Ch) at [110] provides some very recent support for this view, stating that Y's liability to deal with the received rights is "as if [they] were a trustee" which arises at the "moment of receipt because of [their] knowledge that the property is trust property." If Y fails to retransfer the trust property they will *at that point* be at fault, and "In those circumstances, a personal claim against the transferee can properly be said to be fault-based, but the reason for liability is that the transferee has knowingly dealt with (or retained) property that belongs to the trust inconsistently with [their] duty." For a survey of the alternative fault-based view of knowing receipt see Rohan Havelock "The Battle Over Knowing Receipt" (2015) 26(3) NZULR 587 at 589-595.
[93] *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 87, at 705; and McFarlane (2019a), above n 50, at 343.
[94] Agnew and McFarlane (2019), above n 83, at 313.
[95] Agnew and McFarlane (2019), above n 83, at 313. Sinéad Agnew "The Meaning and Significance of Conscience in Private Law" (2018) 77(3) CLJ 479 at 489 notes that the language of an "affected conscience" which triggers one's capacity for moral reasoning does not necessarily suggest a specific level of knowledge, and that even slight knowledge which would prompt a reasonable person to make further inquiries would be sufficient.
[96] Agnew and McFarlane (2019), above n 83, at 313.

the right in question.[97] Relative to the strict exigibility of a property right, this is a very different way of binding third parties.[98] This is because Y will only owe the beneficiary a duty regarding the received right if there is a *reason* and justification for the obligation in the form of an affected conscience.[99]

The PRT's explanation for how the beneficiary's right binds a third-party also explains the beneficiary's preference over the trustee's creditors upon bankruptcy.[100] In theory, upon the trustee's bankruptcy their trustee in bankruptcy (or Official Assignee) receives all the trustee's assets.[101] This would include the encumbered trust rights. The PRT would suppose that the trustee in bankruptcy would be constrained in the same way as the knowing recipient of trust property.[102] Therefore, the trustee's creditors would be disentitled from benefiting from the encumbered rights.[103] Although the effect is the same as a property right, the form of the beneficiary's protection is very different. The primary problem for the beneficiary on the PRT conception is that their ability to prevail against the trustee's creditors is contingent upon the trustee in bankruptcy's conscience being affected. This means that in theory, the beneficiary's position under the PRT explanation is more precarious than under a proprietary theory where the beneficiary's interest is considered to be effectively equivalent to a property right which takes priority notwithstanding one's conscience.[104] Despite statutory disruption and the codification of insolvency, the PRT's explanation of priority is important for demonstrating its explanatory power regarding such a central feature of the trust.[105]

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[97] McFarlane and Stevens (2020), above n 84, at 199.
[98] Merrill and Smith (2001), above n 57, at 783-785.
[99] *Akers v Samba Financial Group*, above n 58, at [88] and [89]; Agnew and McFarlane (2021), above n 84, at 415; and McFarlane and Stevens (2020), above n 84, at 200.
[100] *Space Investments v Canadian Imperial Bank of Commerce Trust Co (Bahamas)* [1986] 3 All E R 75 (PC) at 76-77 on the general principle that the beneficiary has an interest in trust property as against the trustee's creditors.
[101] Agnew and McFarlane (2019), above n 83, at 306.
[102] Agnew and McFarlane (2019), above n 83, at 306.
[103] Agnew and McFarlane (2019), above n 83, at 306.
[104] Zaccaria, above n 44, at 479.
[105] Note that the Insolvency Act 2006 (NZ), s 104 circumvents this problem by preventing any property held on trust by the bankrupt from even vesting in the trustee in bankruptcy. See also *Levin v Ikiua* [2010] NZCA 509, [2010] 1 NZLR 400 (HC) at [111]-[112]. Therefore, the encumbrance of the trustee's right in the beneficiary's favour is both necessary and sufficient for priority in practice. Jim Guest "Introduction and History" in Paul Heath and Mike Whale (eds) *Health and Whale: Insolvency Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) 15 at 17; and Ben McFarlane "The trust and its civilian analogues" in L Smith (ed) *The Worlds of the Trust* (Cambridge University Press, Cambridge, 2013) 512 at 513 for centrality of beneficiary's priority over the trustee's creditors.

The BFP is immunised from the beneficiary ever bringing a claim against them.[106] In the same way as other recipients of misappropriated trust rights, the BFP does not *receive* a duty-burdened right, because the duty only arises where there is a justification and reason for it.[107] Thus, the BFP's position upon receipt is formally no different from any other innocent recipient.[108] Yet, the BFP's position thereafter is unique because there will never be a reason for finding that the BFP owes a duty to the beneficiary with respect to the received right.[109] The BFP's initial bona fides and the payment of value mean that they are permanently protected from a duty arising in favour of the beneficiary, even if they later gain full knowledge of the misappropriation.[110] Thus, although the BFP's position is analogous to the innocent donee upon receipt, the BFP is distinguished by their permanent immunity from a duty burdening their right.[111]

The PRT's analysis of the liability of recipients of trust rights reveals that the beneficiary's persistent right operates in a distinct juridical manner to a property right. The beneficiary's right does not impose the same strict *in rem* duty upon receipt as a property right and therefore on principle it cannot be a property right.[112] The supposition that the existence of the BFP defence is a mere exception that reflects the "lumpiness" or relativity of a property right is an uncritical understanding of the exigibility of the beneficiary's right.[113] This position overlooks the role of conscience as the *reason* why the beneficiary's right binds Y and the conspicuous position of the innocent donee who can freely deal with the misappropriated right before their conscience is affected.[114] Supposing that the beneficiary has a property right which is subject

[106] *Akers v Samba Financial Group*, above n 58, at [62]; and McFarlane and Stevens (2020), above n 84, at 201.
[107] *Akers v Samba Financial Group*, above n 58, at [62].
[108] McFarlane (2019a), above n 50, at 343.
[109] *Investment Trustee Services v Noble*, above n 83, at [106]; and McFarlane and Stevens (2020), above n 84, at 200.
[110] *Investment Trustee Services v Noble*, above n 83, at [106]; and Agnew and McFarlane (2019), above n 83, at 312.
[111] Note various arguments around the justification for the bona fide purchaser doctrine: Grantham and Rickett provide an instrumentalist explanation, arguing that the doctrine is about maintaining market confidence and ensuring the efficiency of transactions (Ross Grantham and Charles Rickett "A Normative Account of Defenses to Restitutionary Liability" (2008) 67(1) CLJ 92 at 115). Conversely, Nair and Samet argue that the doctrine is about assigning risk to the party that bears moral responsibility for the matter, with regard to a balancing of the competing ideals of justice, conscience, and efficiency (Aruna Nair and Irit Samet "What Can 'Equity's Darling' Tell Us about Equity?" in Dennis Klimchuk, Irit Samet, and Henry E Smith (eds) *Philosophical Foundations of the Law of Equity* (Oxford University Press, Oxford, 2020) 264 at 284-289).
[112] McFarlane and Douglas (2021), above n 52, at 20-22; and Jaffey (2015), above n 44, at 389.
[113] Thomas W Merrill and Henry E Smith "The Morality of Property" (2007) 48(5) Wm & Mary L Rev 1849 at 1862.
[114] Ben McFarlane and Andreas Televantos "Third Party Effects in Private Law: Form and Function" in Paul B Miller and John Oberdiek (eds) *Oxford Studies in Private Law Theory* (Vol 1, Oxford University Press, Oxford, 2020) 107 at 116.

to the BFP doctrine is logically erroneous because it makes a rule out of the exception.[115] The juridical effect of the beneficiary's right with respect of recipients of trust property thus is fundamentally distinct from the strict presumptive binding nature of a property right.[116] Thus, the beneficiary's right can be described as a persistent right because of its distinctive exigibility.

B. The Essence of the Functional Thesis

The FT explains the beneficiary's interest in the trust its relation to the function of the trust. The FT posits that the essence of the beneficiary's interest in the trust is the trustee's use of their "powers […] to realise the value of property by exchange" and to in time, transfer that value to the beneficiary.[117] The beneficiary is exclusively interested in and entitled to benefit from the trust, and the trustee's powers are the means through which the beneficiary can realise their entitlement.[118] The trustee's powers are thus duty-burdened so that the beneficiary's exclusive entitlement can be realised.[119] The FT locates the beneficiary's right in the trustee's powers because the powers are important for *how* the trust operates and is performed and thus *how* the "beneficiary realises [their] interest in the trust".[120] The FT thus explicates a trust's purposive function in serving the beneficiary's interest in future receipt and the realisation of value from the trust.[121] Which the FT aligns with the performative function of the trust through the beneficiary's right against the trustee's powers that they be exercised for the beneficiary's benefit.[122]

The FT explains the trust through the trustee's powers and "*ownership*" as opposed to their rights.[123] This includes the power to put the beneficiary in possession of trust property, the power to "transfer, confer rights in, or otherwise dispose of" trust subject-matter.[124] These powers facilitate the "exchange, sale, or reinvestment" of the trust subject-matter, and to

[115] Penner (1997), above n 49, at 137; *Akers v Samba Financial Group*, above n 58, at [88], and McFarlane and Stevens (2020), above n 84, at 200.
[116] Penner (1997), above n 49, at 137.
[117] Penner (2014c), above n 2, at 481.
[118] J E Penner "Distinguishing fiduciary, trust, and accounting relationships" (2014a) 8 J Eq 202 at 210
[119] Penner (2014a), above n 118, at 210; and Penner (2014c), above n 2, at 476 note 13.
[120] Penner (2014c), above n 2, at 476, 483, and 486; Henry E Smith "Property as the Law of Things" (2012) 125(7) Harv L Rev 1691 at 1692-1693; Henry E Smith "Property Is Not Just a Bundle of Rights" (2011) 8(3) EJW 279 at 281; and Jesse Wall "Taking the Bundle of Rights Seriously" (2019) 50(4) VUWLR 733 at 736 and 741.
[121] Allan Beever "The Law's Function and the Judicial Function" (2003) 20(3) NZULR 299 at 299-300.
[122] Beever, above n 121, at 299-300; and Penner (2014c), above n 2, at 486.
[123] Penner (2014c), above n 2, at 486.
[124] Penner (2014c), above n 2, at 487.

accumulate or "realise the value" of the trust subject-matter.[125] It is through the exercise of the trustee's powers that the beneficiary will enjoy real benefits from the trust in the form of the receipt of legal interest (realised through the likes of the trustee's transfer of income or capital by way of a power of appointment).[126] For the beneficiary to realise their interest in the trust they must have rights in the trustee's powers that they be exercised for the beneficiary's benefit.[127]

Therefore, the FT posits that the beneficiary's right correlates to the trustee's powers, the functional locus of an owner's interest in their property (and other transferable and assignable rights).[128] The trustee's power must be exercised for the beneficiary's benefit so that they can realise their entitlement to benefit from the trust, and thus the beneficiary is described as the "beneficial owner" of the trust subject-matter.[129]

C. The Performative Interdependence and Conceptual Complementarity of the PRT and FT

The PRT's explanation of the beneficiary's juridical relations with third parties is a partial explanation of the trust because it does not satisfactorily explain the beneficiary's relationship to the trustee.[130] To fully comprehend the trust, the beneficiary's right in both the trustee's right and powers should be considered in concert.

The PRT and FT are performatively interdependent. By way of example, the beneficiary's right in both the trustee's rights and powers are relevant where the beneficiary is making a claim against substitutes held by the trustee which were purchased with misappropriated trust subject-matter.[131] The beneficiary's ability to claim that a substitute right is encumbered by the core trust duty depends in part on the trustee's exercise of their duty-burdened power to transfer the original right.[132] The encumbrance of the power means that the beneficiary is entitled to claim

[125] Penner (2014c), above n 2, at 487; and Wall (2019), above n 120, at 740.
[126] Penner (2014c), above n 2, at 485 and 487.
[127] Penner (2014c), above n 2, at 476; and Wall (2019), above n 120, at 740.
[128] Penner (2014c), above n 2, at 487; and *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [309].
[129] Penner (2014a), above n 118, at 210; and Penner (2014c), above n 2, at 487.
[130] Penner (2014c), above n 2, at 481.
[131] McFarlane and Stevens (2020), above n 84, at 204.
[132] McFarlane (Forthcoming 2022), above n 10, at 20.

that the power *was* exercised for their benefit, that the substitute right was legitimately acquired and thus encumbered by the same core trust duty.[133]

The performative complementarity of the PRT and FT is further elucidated by a reconsideration of the joinder action. If a tortfeasor has destroyed trust property, the trustee's encumbered rights are essential for identifying that the tortfeasor has breached a duty and is thus liable to the trustee.[134] However, it is "the trustee's *power* to bring an action" for the beneficiary's benefit that is essential to the recovery of damages.[135] The trustee's power to bring such a claim works alongside, and presupposes an interference with, the trustee's encumbered right. Neither an encumbered right nor an encumbered power can fully explain the action in isolation. Thus, to fully explain the operation of the trust the two theories must be interdependent.

The joinder action also elucidates some of the PRT and FT's conceptual compatibility. The PRT's formal Hohfeldian analysis of the joinder action reveals that the protection of trust subject-matter from X is at the behest of the trustee, to be exercised for the beneficiary's benefit, where the beneficiary has no direct right against X.[136] The beneficiary's joinder action is a consequence of the beneficiary's performance interest in the trust actualised through the trustee's encumbered right.[137] However, the PRT's encumbered right and performance interest is not the justification for the joinder action, which is revealed by the FT's postulation of the beneficiary's interest in the trust.[138] The FT elucidates that the beneficiary is entitled to undertake the joinder action because they have an interest *in* the trust subject-matter which they are protecting, where the encumbered right is the *means* for protection.[139] The beneficiary is thus protecting their interest in the future receipt of the trust subject-matter against present interference which may disrupt it.[140] This proposition in no way detracts from the PRT's formal account of the joinder action, or the distinctiveness of the beneficiary's right relative to a property right.[141] Rather, it recognises that the beneficiary's right against the trustee's right,

[133] McFarlane (Forthcoming 2022), above n 10, at 20.
[134] *The Aliakmon*, above n 66, at 812; and McFarlane (2019a), above n 50, at 336.
[135] Penner (2014c), above n 2, at 483.
[136] McFarlane (2019a), above n 50, at 336.
[137] Ho and Nolan, above n 70, at 402 and 411.
[138] Simon Gardner "'Persistent Rights' Appraised" in Nicholas Hopkins (ed) *Modern Studies in Property Law* (Vol 7, Hart Publishing, Oxford, 2013) 321 at 349; and Zaccaria, above n 44, at 470.
[139] Penner (2014c), above n 2, at 486-488.
[140] Katz (2021), above n 79, at 1116-1122.
[141] McFarlane (Forthcoming 2022), above n 10, at 9.

and the trustee's obligation to perform their duty with respect of that right, are not necessarily the entirety of the beneficiary's interest in the trust.[142]

The PRT and FT's conceptual compatibility can be reinforced through an analysis of the different matters they address in the trust. These different matters reflect that the theories have been developed for different reasons, which shapes where the theories locate the beneficiary's rights, in either the trustee's right or powers.[143] The reason behind the PRT is to explain the juridical right-duty relationship between the beneficiary and third parties.[144] The PRT's reason evinces an underlying commitment to explaining how the beneficiary's right (and interest in the trust) is protected, and it thus looks predominantly to the outward-facing dimension of the beneficiary's right.[145] Conversely, the reason behind the FT is understanding the beneficiary's interest in the trust (the receipt of trust income and capital) and how it is realised.[146] This requires that the trustee's powers be exercised for the beneficiary's benefit so that their interest might be realised.[147] It is in this sense that the FT is inward facing. By seeing the theories in this refined sense it can be seen that they are conceptually compatible.[148] This is because the PRT is focused on the beneficiary's right-duty juridical relationship with third parties, whereas the FT is focused on the beneficiary's entitlement to benefit from the trust, realised through the exercise of the trustee's powers.[149] The PRT's focus on protection serves the beneficiary's interest in the subject-matter and future receipt by providing a means to exclude others and protect the subject-matter until the trustee appoints it, as was clearly evinced by the discussion of the joinder action.[150] The beneficiary's ability to protect the trust subject-matter through an

[142] McFarlane (Forthcoming 2022), above n 10, at 20.
[143] McFarlane and Stevens (2020), above n 84, at 191-192; and J E Penner "Purposes and Rights in the Common Law of Trusts" (2014b) 48(2) RJT 579 at 582.
[144] McFarlane (Forthcoming 2022), above n 10, at 2.
[145] McFarlane (2019a), above n 50, at 341, and 345.
[146] Penner (2014c), above n 2, at 486-487.
[147] Penner (2014c), above n 2, at 486-487. The focus here is on the theories' exposition of the dispositional characteristics because they are the aspects that are ostensibly incompatible. Moreover, as will be discussed with regard to the FT's elaboration on the characteristic of accountability, the PRT and FT expound very similar positions on trustee accountability.
[148] McFarlane (Forthcoming 2022), above n 10, at 19-20.
[149] For a different view see Jesse Wall "The functional-formal impasse in (trust) property" (2018) 14(3) Int JLC 437.
[150] Penner (2014c), above n 2, at 481; Penner (1997), above n 49, at 70 and 139; Henry E Smith (2011), above n 120, at 281; Henry E Smith (2012), above n 120, at 1704; and Eric R Claeys "Use And the Function of Property" (2018) 63(2) AmJJuris 221 at 240-241. Note also that "protection" is essentially performing the same function as "exclusion" and is not truly a value or end in and of itself, rather, it services a greater end. In property, this would be the right-holder's interest in *using* the thing (or right), and in trusts, which is best conceptualised as the beneficiary's (future) interest, realised through the trustee's powers over the trust subject-matter, in the receipt of trust income and capital (See Henry E Smith (2012), above n 120, at 1704; and Penner (2014a), above n 118, at 210-211).

encumbered right is justified by their entitlement to benefit and their interest in the future receipt of trust income and capital. The reason being that the beneficiary's interest in *future* receipt, might be thwarted without *contemporary* protection, likewise, the exclusion and protection of a right or subject matter is meaningless without appreciating the reason, as explained by the FT, for that protection.[151]

D. Conclusion

Chapter III has explained the essence of both the PRT and FT and showed their explanatory and conceptual strength regarding pre-existing and more conventional issues pertain to the trust. The exposition of the theories substantiates their use in Chapter IV to address the justificatory gap regarding super discretionary trusts. Chapter III substantiates this use by demonstrating that the theories adeptly explain the more conventional issues that they were developed to address. The essence of the PRT is a focus on the juridical relations between the beneficiary and third parties, and the FT's essence is the conceptualisation of the beneficiary's interest in the trust that explains the encumbrance of the trustee's powers through which the beneficiary's interest is realised. This Chapter also posited that the PRT and FT are performatively interdependent and conceptually compatible theories of the trust, which will be significant for Chapter IV.

[151] Henry E Smith (2012), above n 120, at 1704; and Penner (1997), above n 49, at 71-72.

IV. Theoretical Approaches to Super Discretionary Trusts: The PRT's and the FT's Propounded Interpretation of the Minimum Characteristics of a Trust and their Application

A. The Super Discretionary Trust: Identifying the Issue and the Role of the PRT and FT

Chapter IV will expound the theories' interpretations of the minimum characteristics of a trust. The theories' approaches will thus be shown to fill the impugned justificatory gap with cogent and principled expositions for why those reasons, following some refinement, are correct and can compromise a super discretionary trust. The theories' propounded interpretations, separately and in conjunction, will be used to argue that the courts' high-level reasons and application are generally justifiable if they are refined. The PRT's approach will be shown to justify the no disposition of property reason, and the FT's approach will justify the reservation of powers and failure to divest beneficial ownership reasons. The argument is as follows: First, it will be necessary to identify the essential minimum characteristics of a trust that are presupposed by both the PRT and FT. Second, the PRT's interpretation, and subsequently the FT's interpretation of these minimum characteristics will be expounded and applied. This Chapter will show that while the super discretionary trust in *Clayton v Clayton*, the Vaughan Road Property Trust, presents no challenge for the PRT, it does undermine the functional purpose of the trust expounded by the FT and, as such, may be a defeasible trust. The FT's approach will then be applied to the super discretionary trust that is the Webb Family Trust, given the Privy Council's reliance on reasons relating to extensive powers and the concept of ownership, such that the Board's reasons and conclusions can be evaluated and justified.[152] Finally, both the theories will be used to evaluate and refine the high-level reasons, predominantly the Privy Council's, in the abstract to demonstrate how the theories' approaches interact and what resultant legal relationships emerge.

[152] *Webb v Webb*, above n 1, at [89].

1. The Minimum Characteristics of a Trust and the Theories' General Interpretation of the Minimum Characteristics

If the product of a settlor's objective intent is to establish a trust at law it must manifest the minimum characteristics of a trust.[153] The manifest intent must evince both the disposition of the "beneficial interest" in the trust subject-matter, and trustee accountability, meaning that the trustee must owe a duty to account which secures the due performance of the trust.[154] These two characteristics capture that a trust is at its core a relationship over rights or powers in property, which is for the benefit of another.[155] The minimum characteristics of a trust are important because where the theories' propounded interpretations of the minimum characteristics, are missing, then the super discretionary trust will be problematic in the relevant sense. For example, the super discretionary trust will be formally problematic if there is no encumbered right, functionally problematic without an encumbered power, or lacking trustee accountability if there is no duty to account.[156]

At a high level of generality, the theories' propounded interpretations conceptualise "disposition" to mean an *alienation* of the ability to deal with property for one's own purposes, as opposed to a *physical* transfer of property (such as a change in ownership).[157] In juridical terms it is the divestment of a *liberty* or *authority* to deal with the right or power respectively, for the trustee's own *purposes* which is essential.[158] Disposition is thus concentrated upon changing purposiveness which, as will be demonstrated in the following sections, is the legally significant consequence of the declaration of a trust brought about through the encumbrance of

[153] David Fox "Non-excludable trustee duties" (2011) 17(1) Trusts & Trustees 17 at 18. Note that this is in conjunction with the three certainties, if the three certainties are properly complied with a trust with the "minimum characteristics" will be the resultant legal structure (Rickett, above n 7, at 466; and Penner (2010), above n 43, at 664).
[154] Agnew (2021), above n 40, at 20; and Penner (2010), above n 43, at 664. Note that the two elements of a disposition and of trustee obligations are present in *Clayton v Clayton*, above n 1, at [124]-[125].
[155] Penner (2014a), above n 118, at 209. Note again Penner (1997), above n 49, Chapters III and IV on the broad definition of property. See also Eric R Claeys "Property, Concepts, and Functions" (2019) 60(1) BCL Rev 1 for another broad definition of property centred around the interest in use.
[156] Whether a formally or functional problematic super discretionary trust is still a "trust" will be discussed at Chapter IV C6.
[157] Sinéad Agnew and Simon Douglas "Self-Declarations of trust" (2019) 135(1) LQR 67 at 69. Note that the distinctiveness of this conceptualisation is not of importance for the purposes of this paper, but for a slightly different conceptualisation see Joel Nitikman "More about illusory trusts: is "tantamount" to ownership the same as "ownership"? The Privy Council takes a step too far" (2021) 27(1-2) Trusts & Trustees 69 at 69.
[158] See Chapter IV B1 and B2 and C1 and C2.

the trustee's rights or powers by the core trust duty.[159] Accordingly, the mere existence of the core trust duty is the pivotal part of the dispositional analysis because it causes the change in purposiveness.[160] This means that the exclusion of liability for breach of the core duty does not negate the dispositive characteristic because excluding *liability* does not undermine the *mere existence* of the duty that the liability presupposes.[161] In this way, the exclusion of liability, does not in principle negate the existence of the core trust duty.[162] The second minimum characteristic, the duty to account which is the same on both theories, is necessary and sufficient for trustee accountability to "promote and procure" the due performance of the trust.[163] Thus understood, the existence of the core trust duty reflects whether there has been a disposition, and trustee accountability indicates whether the trustee owes a duty to account.

B. Super Discretionary Trusts under the PRT

1. Minimum Characteristics

The PRT's propounded interpretation of the first minimum characteristic of the trust is that a trustee holds a right that is *encumbered* by a *duty* in the beneficiary's favour.[164] The encumbered right obliges the trustee to use that right for the purpose of benefiting the beneficiaries.[165] The juridical effect of the declaration of trust is that the trustee loses "liberties of use as against [the beneficiary]" and for this reason the trustee's self-regarding exercise or use of the right or thing is a wrong against the beneficiary.[166] The trustee's loss of liberty

[159] James Edelman "Two fundamental questions for the law of trusts" (2013) 129(1) LQR 66 at 66; and Agnew and Douglas, above n 157, at 69; McFarlane, (2008b), above n 54, at 318-319; and Merrill and Smith (2007), above n 113, at 1883.
[160] See Chapter IV B1 and B2, and C1 and C2.
[161] JE Penner "Exemptions" in Peter Birks and Arianna Pretto-Sakmann (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) 241 at 251; Robert Flannigan "The Core Nature of Fiduciary Accountability" (2009) 2009(3) NZLRev 375 at 390-391 and 396-397; and Charles Mitchell "Good faith, self-denial and mandatory trustee duties" (2018) 32(2) TLI 92 at 100-101.
[162] Penner (2002), above n 161, at 251. Note that this position will become relevant when considering the application of the theories to the relevant trust deeds at Chapter IV B4 and C4 and C5.
[163] J E Penner "The Beneficiary's Performance Interest in a Trust: *AIB v Redler* and the March of the Compensatory Principle" in Richard C Nolan, Kelvin F K Low, and Tang Hang Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press, Cambridge, 2018) 277 at 280.
[164] McFarlane (2008b), above n 54, at 318; and McFarlane (2019a), above n 50, at 343.
[165] McFarlane (2019a), above n 50, at 343; Lionel D Smith "Conflict, Profit, Bias, Misuse of Power: Dimensions of Governance" in Paul B Miller and Matthew Harding (eds) *Fiduciaries and Trust: Ethics, Politics, Economics and Law* (Cambridge University Press, Cambridge, 2020) 149 at 151; and *Armitage v Nurse*, above n 28, at 253-254.
[166] For example, see *Eden Refuge Trust v Hohepa* [2011] 1 NZLR 197 (HC) at [176] and [215]; and McFarlane (2019a), above n 50, at 338-339; and Douglas and McFarlane (2013), above n 46, at 220-221.

regarding their exercise of the right is the essential juridical effect that signifies whether there has been a disposition within the PRT's approach, and therefore whether a super discretionary trust is formally valid.

The PRT's interpretation of the second minimum characteristic is that the trustee must owe a duty to account. The duty to account is an essential duty which the beneficiary has as of right to ensure that the trust is performed as it should be (for the beneficiary's benefit).[167] The trustee is obliged at any point to "produce either: (i) the right initially held on Trust for B; or (ii) a […] product of that right".[168]

The key focus of the PRT's propounded interpretation of the dispositional element is the trustee's loss of liberty, which consequently means that the trustee must exercise the right and deal with the thing for the new purpose of benefiting the beneficiary. A comprehensive and defensible understanding of the PRT's exposition of the dispositional characteristic is reached by considering the position with an absolute owner who has the right to exclude and thus residual liberty in the property. From this position the PRT's propounded understanding of a disposition will be further refined, to conceptualise the dispositional characteristic as the interrelated aspects of *action* and *purposiveness*. This understanding will then be applied and shown to justify the high-level reason pertaining to whether there was a disposition of property.[169]

2. From the Right to Exclude (RTE) and Residual Liberty to Actions and Purposes

The RTE is understood to be the defining juridical concept regarding the form or structure of property.[170] The PRT accepts the operation of the RTE insofar as it is the right to which the

[167] *Libertarian Investments Ltd v Thomas Alexej Hall* [2013] HKFCA 93, [2014] 1 HKC at [168]; *Re Lehman Brothers International (Europe) (No 2)* [2009] EWHC 2141 (Ch) at [53]; and Paul S Davies "Remedies for Breach of Trust" (2015) 78(4) MLR 681 at 684.
[168] Ben McFarlane *The Structure of Property Law* (Hart Publishing, Oxford, 2008a) at 551.
[169] *Clayton v Clayton*, above n 1, at [124].
[170] The PRT accepts and uses the essentialist position on property, hence, if the essentialist position were to fall away, the PRT might need some reworking because of the loss of the notion of a residual liberty that is foundational for the present argument (McFarlane and Douglas (2021), above n 52, at 10). The essentialist position was propounded in contradiction to the bundle of rights (BOR) view of property. Whereby, property on the BOR view has no essential content, and is composed of innumerable disaggregated rights, powers, privileges, and duties, which can be disassembled and reassembled in any manner, with the result being labelled as "property" (JE Penner "The "Bundle of Rights" Picture of Property" (1996) 43(3) UCLA L Rev 711 at 728 and 734; and Claeys (2019), above n 155, at 10). The essentialist position was propounded in opposition to the BOR view, and essentialist theorists have made many arguments against the BOR view, including that it

beneficiary's right annexes where the trust subject-matter is property.[171] The RTE means that the right-holder can exclude all others from the relevant property according to their own reasons (for whatever purpose or end they desire).[172] The RTE protects an individual's interests in things by establishing an exclusive space in which the right-holder has a liberty to use the thing and it is the right-holder's interest in use which justifies the exclusion of others.[173] The right-holder can use the right and property as they please because no one else will be in a position to legally inhibit or prevent any such use.[174] The right-holder is thus the only person legitimately entitled to use the property on a last-person standing basis, hence the notion of a *residual* liberty to use the property.

The notion of residual liberty will be deconstructed so that the PRT's propounded interpretation of the dispositional characteristic and the effect of a declaration of trust can be fully understood, and applied beyond tangible property.[175] The residual liberty to use property and exercise the right is comprised of two constituent aspects: the actual use of the property or right (the *action*) and the (self-regarding) interests or reasons that motivate the action (the *purpose*).[176] It is the purposes for which the trustee can act that are limited by a trust. Trust deeds commonly provide that the trustee may act as if they are an absolute owner.[177] This reflects the action component of residual liberty. However, the purpose of any action must be to benefit the beneficiary.[178] Following the declaration of trust there is a change in the purposiveness of the trustee's actions as regards the right, from acting for self-regarding purposes to acting for the purpose of

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overlooks the important role of the thing in mediating interpersonal relations (Henry E Smith "The Thing about Exclusion" (2014) 3 Brigham-Kanner Property Rights Conference Journal 95 at 118-119), that it conflates property and contract (J E Penner *Property Rights: A Re-Examination* (Oxford University Press, Oxford, 2020a) at 12-14), and that it misconstrues simple matters like the transfer of property rights (James Penner "On the Very Idea of Transmissible Rights" in James Penner and Henry E Smith (eds) *Philosophical Foundations of Property Law* (Oxford University Press, Oxford, 2013) 244 at 248-255).

[171] McFarlane and Douglas (2021), above n 52, at 10.

[172] Merrill (1998), above n 49, at 740.

[173] Merrill (1998), above n 49, at 740; Penner (1997), above n 49, at 71-72; and Adam J MacLeod *Property and Practical Reason* (Cambridge University Press, Cambridge, 2015) at 43. Note also Henry Smith and Thomas Merrill's utilitarian justification of the structure of property rights on the basis of reducing information costs (See Merrill and Smith (2001), above n 57, at 789). The distinction is unimportant because the justifications have been treated as generally complementary (See Henry E Smith (2012), above n 120, at 1701-1720).

[174] Merrill (1998), above n 49, at 741, noting also that the possible uses of property or a thing can be limited by the exercise of state power. Note also Larissa Katz "Property's Sovereignty" (2017) 18(2) Theo Inq L 299 at 307-311, where Katz develops an argument that separates the benefits and burdens of ownership from their ability to create authoritative agendas, and thus state regulation that diminishes the benefits is not seen to compromise the owner's authority.

[175] Douglas and McFarlane (2013), above n 46, at 227-228.

[176] Thomas W Merrill "Property and the Right to Exclude II" (2014) 3 Brigham-Kanner Property Rights Conference Journal 1 at 9; and Penner (1997), above n 49, at 70.

[177] Vaughan Road Property Trust deed (2011), above n 11, at clause 12.

[178] McFarlane (2019a), above n 50, at 338; and Douglas and McFarlane (2013), above n 46, at 220-221.

benefiting the beneficiaries. This is evinced by the beneficiary's ability to bring the joinder action, which elucidates that the trustee's exercise of the RTE and actions pertaining to the subject-matter cease to be self-regarding. This means that if the trustee fails to exercise the RTE for the correct purpose of benefiting the beneficiary, the beneficiary can compel them to do so.[179]

The idea of disposition as postulated on the PRT trust is directly attuned to the new purposes for which the trustee must use the encumbered right. The core trust duty thus operates as an internal norm on the trustee, to deliberate, act and exercise the right in a manner that is for the purpose of the benefiting the beneficiary.[180] The trustee as legal owner and right-holder may undertake the same actions as before, however, the *reasons* are fundamentally different, in that they become *other*-regarding (for the beneficiary's benefit), not self-regarding (for the right-holder's benefit).[181] By way of example, the trustee is physically able to paint the trust property yellow both before and after the declaration of trust. However, their action is only justified after the declaration if the painting accords with and is for the purpose of benefiting the beneficiary.[182]

Pursuant to the PRT's propounded interpretation, the trustee's obligation to exercise the right for the beneficiary's benefit means that the trustee is, as against the beneficiary, absolutely disentitled from exercising the right and using or dealing with the trust subject-matter for self-interested purposes.[183] The PRT's theoretical approach thus justifies the *no disposition of property* reason, as a separate reason with distinct consequences if the property is not formally disposed of. If this reason is understood as separate with distinct consequences, then the justificatory gap left by the Supreme Court and Privy Council will be filled.[184] The essence of the PRT's understanding of the dispositional characteristic is the change in purposiveness with which the trustee can exercise the right or deal with the thing, which is brought about by the

[179] Chapter III A3 and C.
[180] Arthur Ripstein "Property and Sovereignty: How to Tell the Difference" (2017) 18(2) Theo Inq L 243 at 244; and 257-258 and Lionel D Smith "Can We Be Obliged to Be Selfless?" in Andrew S Gold and Paul B Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford, 2014) 141 at 151.
[181] MacLeod, above n 173, at 105.
[182] The same reasoning would stand for the exercise of the right, for example excluding someone from trust property.
[183] Agnew and McFarlane (2019), above n 83, at 308; and Matthew Conaglen *Fiduciary Loyalty: Protecting the Due Performance of non-Fiduciary Duties* (Hart Publishing, Oxford, 2010) at 66 and 75-76.
[184] *Clayton v Clayton*, above n 1, at [124]; and *Webb v Webb*, above n 1, at [89].

mere existence of the core trust duty (to exercise the right for the beneficiary's benefit).[185] Thus, where a trust deed negates the juridical effect of the encumbrance of the core trust duty on the trustee's right, there will be no necessary loss of liberty and "no disposition" of the property in its formal capacity.[186] This will mean that the super discretionary trust is not formally valid. Hence, where the trustee can still deal with the right for their own purposes, which is antithetical to the PRT's propounded interpretation of the dispositional characteristic, there will have been no disposition of property.

3. Trustee Accountability

The PRT's elaboration of the accountability characteristic contemplates that the trustee owes a duty to account. The duty to account is both necessary and sufficient for holding the trustee accountable and ensuring that the trustee performs their obligations.[187] The duty means that the trustee must keep records of the trust subject-matter, to be given to the beneficiary when they exercise their right.[188] The beneficiary can call for the trust accounts as of right, and does not need to assert that there has been a breach of trust.[189] Following the production of accounts and faced with an unauthorised transaction, the beneficiary has the choice to either adopt the profitable but originally unauthorised purchase.[190] To surcharge the account and compel the trustee to "make good the deficiency" that eventuated because they failed to obtain a benefit for the trust which they ought to, or falsify the account by disallowing a disbursement and

[185] McFarlane (2011), above n 48, at 319.
[186] *Webb v Webb*, above n 1, at [87]; and Merrill (2014), above n 176, at 1.
[187] McFarlane (2008a), above n 168, at 551-552; and Penner (2018), above n 163, at 280. Note also that there is an argument to be made about the essentiality of a number of subsidiary duties which would include a duty for the trustee to be informed of the terms of the trust, to inform the beneficiaries they are beneficiaries, and to provide the beneficiaries with information upon request (Mitchell (2018), above n 161, at 101; Penner (2002), above n 161, at 251-252; and Fox, above n 153, at 20). Sections 51-54 of the Trusts Act 2019 (NZ), provide the beneficiaries with a means to access trust information. In addition, the Act establishes the duty to know the terms of the trust (s 23) and the duty to follow the terms of the trust (s 24) as default duties. However, for the purposes of this paper's theoretical exposition, these subsidiary duties do not form part of the theories' propounded interpretation of the characteristic of accountability which is confined to the duty to account (McFarlane, 2008a, above n 168, at 551).
[188] David KL Raphael "An Australian view on a Trustee's duty to account and to keep records and identify just what records should be kept and to discuss what are trust documents" (2020) 26(1) Trusts & Trustees 956 at 956. Note that in McFarlane (2008a), above n 168, at 551, there is contemplation of the production of the actual rights, which would include the property itself. However, Raphael's perspective reflects the more modern approach of producing paper records. Justice Gummow has opined that a duty to account also contemplates a duty to provide the beneficiary with additional information about the operation of the trust which was said to be necessary for the beneficiary to decide how to proceed (*Re Simersall; Blackwell v Bray* [1992] FCA 221; (1992) 35 FCR 584 at 587).
[189] *Libertarian Investments Ltd*, above n 167, at [167]; and Penner (2018), above n 163, at 280.
[190] *Libertarian Investments Ltd*, above n 167, at [168]-[170].

obliging the trustee to restore the deficit and take any necessary subsequent steps.[191] Establishing a breach of trust is not a prerequisite to calling accounts.[192] However, where the account is falsified or surcharged, the accounting process "clearly does" reveal a wrong and a breach of the trustee's duty.[193] Both the Supreme Court and Privy Council overlooked the importance of the duty to account and the existence of the beneficiary's interest in having the trust performed, thus it does not necessarily play a justificatory role like the dispositional characteristics do. The beneficiary is entitled to trust accounts "as of right" and can apply to the court for an order for accounts.[194] Thus, unless the trust deed explicitly abrogates the right, the beneficiary will still be able to call accounts and compel the trustee to perform the super discretionary trust.[195]

4. Application of the PRT to *Clayton v Clayton*

The application of the PRT's propounded interpretation of the dispositional characteristic requires an analysis of whether the hypothetical Vaughan Road Property Trust trustee's ("the VRPT trustee") right is encumbered by the core trust duty. If the right were encumbered then the VRPT trustee would lose the ability to use the trust subject-matter and exercise the right as against the beneficiary for their own purposes, rather they would be obliged to act in pursuit of the essential norm when exercising the encumbered right. If this norm is negated and the trustee can exercise the right and use the subject-matter for their own purposes, then it can justifiably be concluded that there has been *no disposition of property*.[196] Clause 12.1 of the Vaughan Road Property Trust deed (the VRPT Trust deed) provides that the VRPT trustee has all the rights and privileges of an absolute owner for the purpose of interacting with third parties, according to the terms of the trust, and for the purpose of benefiting the beneficiary.[197] Clause 12.1 thus manifests the PRT's propounded interpretation of a disposition because the trustee

[191] *Libertarian Investments Ltd*, above n 167, at [168]-[170]; Ben McFarlane "The Centrality of Constructive and Resulting Trusts" in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010) 183 at 197; and Charles Mitchell and Stephen Watterson "Remedies for Knowing Receipt" in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing, Oxford, 2010) 115 at 120-127.
[192] Penner (2018), above n 163, at 280.
[193] Penner (2018), above n 163, at 280.
[194] *Libertarian Investments Ltd*, above n 167, at [167].
[195] *Libertarian Investments Ltd*, above n 167, at [167].
[196] *Clayton v Clayton*, above n 1, at [124]; and *Webb v Webb*, above n 1, at [89].
[197] Vaughan Road Property Trust deed, above n 11.

holds the trust rights as against third parties, and the rights are concurrently encumbered and must thus be exercised for the beneficiary's benefit.[198]

In addition, on vesting day the VRPT trustee must distribute the capital to the relevant beneficiaries per clause 10.1 or final beneficiaries under clause 10.2.[199] Crucially, the VRPT trustee is themselves disentitled from making use and taking the trust property, and upon vesting day, their ability to deal with the rights is strictly prescribed to the single purpose of distributing the rights to the relevant beneficiaries. The VRPT trustee thus has no residual right or liberty to the trust subject-matter.[200] Ultimately, the VRPT trustee has been divested of the liberty to deal with the rights in the trust subject-matter for their own purposes and their rights must be encumbered. Therefore, on the PRT's approach there has been a valid disposition of property.[201]

The trustee must also owe a duty to account, which secures the due performance of the trust. The VRPT deed is silent on the beneficiary's ability to demand accounts from the VRPT trustee. Yet, the duty to account has not been expressly excluded and the beneficiary can seek an order for accounts as of right pursuant to *Libertarian Investments*.[202] Thus, if the VRPT trustee were to act, or not act in such a way as to fail to perform their trust obligations, the beneficiary would be able to exercise an unimpeded right to call for accounts and take the necessary steps to secure the relevant performance of the trust.[203] Accordingly, the VRPT is valid pursuant to the PRT's propounded interpretation of trustee accountability and the PRT's approach raises no problems with its formal structure.[204]

The PRT's propounded interpretation of the dispositional characteristic justifies the theoretical "correct[ness]" of the Supreme Court's and the Privy Council's *no disposition of property* reason discussed in Chapter II as a problem for a super discretionary trust.[205] The PRT's dispositional characteristic also helps to refine the courts' dictum and refine the high-level

[198] Vaughan Road Property Trust deed, above n 11.
[199] Vaughan Road Property Trust deed, above n 11.
[200] McFarlane (2019a), above n 50, at 338; and Douglas and McFarlane (2013), above n 46, at 220-221.
[201] Agnew and McFarlane (2019), above n 83, at 308.
[202] *Libertarian Investments Ltd*, above n 167, at [167], per Lord Millett NPJ "Once the trust or fiduciary relationship is established or concede the beneficiary or principal is entitled to an account as of right." Clause 22 establishes that the trust is subject to jurisdiction of New Zealand law and courts.
[203] Ho and Nolan, above n 70, at 403.
[204] *Libertarian Investments Ltd*, above n 167, at [167]-[171].
[205] *Clayton v Clayton*, above n 1, at [124] and [127]; and *Webb v Webb*, above n 1, at [89].

reason to a theoretically justified form. Pursuant to the PRT the failure to dispose of property should be a standalone reason. This would mean that a super discretionary trust will not be formally valid if the trustee has not been divested of their liberty to exercise the right and deal with the trust subject-matter for their own purposes, which will indicate that the trustee's rights have not been encumbered. Reformulating the Supreme Court and Privy Council's reason in this way provides the high-level reason with clear juridical meaning that is theoretically justified and clearly applicable. This elucidation of the reason avoids conflating the interconnected but distinct concepts of "property" and rights with "ownership" and powers as the Supreme Court did.[206] Avoiding this conflation is theoretically sound because it recognises the distinct and complementary roles of *both* the trustee's encumbered rights in the PRT *and* powers in the FT, and it thus facilitates a more nuanced analysis of the impugned super discretionary trust.[207]

C. Super Discretionary Trusts under the FT

1. Minimum Characteristics

The FT's propounded interpretation of the dispositional characteristic is that the trustee must be divested of their "beneficial" ownership meaning that they no longer have the absolute authority to exercise their powers for whatever reason they desire. Instead, the trustee may only exercise their powers in a manner that furthers the prescribed purpose of benefiting the beneficiaries, as manifested in the trust deed.[208] The exercise of the trustee's powers will only be authoritative when they are used in this way. The FT's propounded interpretation therefore centres not so much on the powers themselves, but on the notions of purposiveness and authority that dictate *how* the powers may be legitimately exercised.[209] The change in purposes which the trustee is authorised to pursue is brought about by the encumbrance of powers by the core trust duty.[210] Just as the PRT emphasises the encumbered right as a necessary element of the dispositional characteristic, so the FT emphasises that disposition requires that the owner's

[206] Merrill (2014), above n 176, at 1; and Jesse Wall *Being and Owning* (Oxford University Press, Oxford, 2015) at 24.
[207] See further Chapter III C and Chapter IV C6.
[208] Lionel D Smith (2020), above n 165, at 151; and *Armitage v Nurse*, above n 28, at 253-254.
[209] McFarlane (Forthcoming 2022), above n 10, at 22.
[210] Daniel Clarry "Fiduciary Ownership and Trusts in a Comparative Perspective" (2014) 63 ICLQ 901 at 930-931.

powers are similarly encumbered. Purposiveness and authorisation are best elucidated through the concept of ownership and how the declaration of trust changes them. The FT's propounded interpretation fills the justificatory gap pertaining to the high-level reason regarding the reservation of extensive powers and the failure to divest beneficial ownership identified in Chapter II, that lead to a functionally problematic super discretionary trust.

The trustee on the FT's propounded interpretation of the accountability characteristic must owe a duty to account.[211] Hence, the FT's propounded interpretation of the accountability characteristic is the same as the PRT's where both focus upon ensuring the due performance of the trustee's obligations through the duty to account.[212]

2. Powers of Ownership

The trustee's powers are the locus of the FT's propounded interpretation of the dispositional characteristic; however, the FT's interpretation looks beyond the powers to ownership and authority. The trustee's powers include the power to invest, to sell, to realise the value of the trust subject-matter, or to grant security interests in the trust rights or property.[213] These powers are the products of the confluence of the trustee's powers to transfer or licence trust rights and the trustee's (personal) power to enter into contracts.[214] The legal effect of these powers is *functionally* unchanged by the declaration of the trust.[215] Yet upon the declaration of a trust the legitimate exercise of a power (meaning the trustee has authority to act as such) is constrained to decisions and uses that are for the correct reason or purpose (for the beneficiary's benefit).[216] The encumbrance of the trustee's powers with the core trust duty strips the trustee of their *authority* to act for their own *purposes*, which signifies that the trustee has been divested of

[211] Penner (2014c), above n 2, at 499.
[212] Penner (2002), above n 161, at 252; and Penner (2018), above n 163, at 280-281.
[213] Penner (2020a), above n 170, at 13; and Penner (2013), above n 170, at 255. These powers exist in relation to intangibles, including a trust fund composed of shares or other choses in action as much as to land (Penner (2020a), above n 170, at 14; and Penner (2014c), above n 2, at 494-495).
[214] Penner (2020a), above n 170, at 16; and Penner (1997), above n 49, at 91-92.
[215] Penner (2020a), above n 170, at 13 and 14; Penner (2013), above n 170, at 255; Penner (2014c), above n 2, at 494-495; and Harris, above n 50, at 74. Note that the separation of the power (in a Hohfeldian sense of being able to do something with effects in law) and whether the exercise of that power is authorised or proper follows from Nolan's Hohfeldian analysis of powers (Richard Nolan "Understanding the limits of equitable property" (2006) 1 J Eq 18 at 24).
[216] Penner (2020a), above n 170, at 27; and McFarlane (Forthcoming 2022), above n 10, at 20 has noted that even Penner, the original proponent of the FT used a Hohfeldian analysis, hence the current separation of the Hohfeldian power from the authority to act for certain purposes is consistent with the early propounding of the FT.

their beneficial ownership.[217] To fully appreciate the divestment of beneficial ownership the concept of ownership simpliciter must be explored in greater detail.

Ownership for the purposes of the FT's propounded interpretation is about an authority to act for one's own purposes. Ownership, Katz has argued, recognises the "special *position*" of exclusive authority that an owner is in to "set the agenda" for a tangible or intangible thing.[218] This means that an owner is free to exercise their "authority to set, pursue – and revise – [their] purposes" with respect to their things which others *must* defer to *if* they decide to interact with the thing.[219] This authority legitimises the owner's ability to positively *determine the uses and actions* (within legal limits), which the owner can realise through the exercise of their powers.[220] The owner's decisions about what the agenda for a thing is, and how to realise the agenda are "authoritative" because they are conclusive, unimpeachable within legal limits, and demand deference from other parties.[221] Decisions regarding the exercise of an owner's powers can be legitimately made for whatever purpose they desire.[222] This means that the owner is absolved from "normative constraints", such as a mandate to act for certain purposes.[223] Accordingly, there is no *internal* standard against which the reasons that motivate an owner's exercise of their powers can be measured and quashed.[224]

The FT's propounded interpretation of disposition means that the trustee is obliged to set an agenda for their powers such that they are exercised exclusively for the purpose of benefiting

[217] Larissa Katz "It's Not Personal: Social Obligations in the Office of Ownership" (2020a) 29(3) Cornell JL & Pub Pol'y 587 at 598
[218] Larissa Katz "Exclusion and Exclusivity in Property Law" (2008) 58(3) UTLJ 275 at 277; and Ripstein (2017), above n 180, at 251. Ownership as agenda-setting authority is also critical of the essentialist "boundary approach" to ownership whereby the right-holder is the last one standing by virtue of their RTE and thus enjoys a de facto, residual liberty to use and enjoy the property (Katz (2008), above n 218, at 277).
[219] Larissa Katz "Ownership and Social Solidarity: A Kantian Alternative" (2011) 17(2) LEG 119 at 139.
[220] Katz (2008), above n 218, at 288-289; and Katz (2017), above n 174, at 302-303.
[221] Katz (2011), above n 219, at 139; and Larissa Katz "Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right" (2013) 122(6) Yale LJ 1444 at 1478. Katz argues that the source of the owner's authority to set the agenda is their role in occupying the *office* of ownership (Larissa Katz "Ownership and Offices: The Building Blocks of the Legal Order" (2020b) 70(2) UTLJ 267 at 267; and Katz (2020a), above n 217, at 598). The office of ownership is said to be an essential part of societies "collective plan" for distributing authority to make decisions as regards the use of things (tangible or intangible) (Katz (2020b), above n 221, at 267 and 274-275; and Katz (2017), above n 174, at 325). For a recent challenge to this idea see JE Penner "Private Law Offices" (2020c) 70(2) UTLJ 299 at 310.
[222] Harris, above n 50, at 65.
[223] Ripstein, above n 180, at 257.
[224] Katz (2017), above n 174, at 304 and 320. Note that the self-seekingness inherent in ownership as agenda-setting authority is very similar to that which is inherent in the right-holder's residual liberty.

the beneficiaries.[225] The trustee is ostensibly the owner of the trust subject-matter because they formally hold the powers in the trust subject-matter.[226] However, the trustee loses the authority to exercise those powers for their own purposes, and must instead exercise them for the beneficiaries' benefit.[227] The agenda must be set for the sole purpose of benefiting the beneficiaries and therefore characterising the beneficiaries as the beneficial owners, or owners in substance, is entirely justifiable.[228] Thus, the term beneficial owner as conceptualised by the FT's propounded interpretation identifies the individual or collective in whose interests the agenda must be set.

The disposition of beneficial ownership means that a trustee cannot exercise their powers for personal, self-regarding reasons when they are encumbered, in much the same way that a public official's decision cannot be made for personal reasons.[229] The trustee's powers must be exercised in pursuit of the specific other-regarding purpose, which functions as a superimposed internal norm ("the controlling norm").[230] The trustee's decisions and exercise of powers are only *authoritative* and command deference (from the beneficiaries and the court) if they are exercised for the purpose of benefiting the beneficiaries.[231] On this basis the justificatory gap regarding the functional high-level reasons of a failure to dispose of beneficial ownership and a trustee's extensive powers, can be met by the FT's propounded interpretation.[232] The high-level functional reasons are justified by the FT's approach since the super discretionary trust will be functionally problematic if the trustee has not been divested of their beneficial ownership, because they can authoritatively pursue exclusively self-serving purposes and set a self-regarding agenda for their powers. On the FT's approach these reasons are substantially similar, if not equivalent because the reasons both pertain to the functionality of the super discretionary trust, and are equally justifiable on the FT's propounded interpretation. Hence, there will have not been a valid disposition on the FT's propounded interpretation if the trustee has the authority to act for self-serving purposes which signifies that the core trust duty that in theory encumbers the trustee's powers has been negated.

[225] Katz (2008), above n 218, at 309. Note that in this sense this argument will likely support and cohere with other arguments like Bennett's "Unlimited benefit" position (Bennett (2017), above n 4, at 65).
[226] Penner (2020a), above n 170, at 27.
[227] Penner (2020a), above n 170, at 27.
[228] Penner (2020a), above n 170, at 27.
[229] Katz (2017), above n 174, at 325.
[230] Katz (2017), above n 174, at 317.
[231] Katz (2017), above n 174, at 319.
[232] Penner (2014c), above n 2, at 486-487.

3. Trustee Accountability

The FT's propounded interpretation of the minimum characteristic of accountability is that the trustee must owe a duty to account. The FT's understanding of the characteristic of accountability is thus the same as the PRT's, that the trustee owes a duty to keep and provide accounts on demand, which is essential to the beneficiary's performance interest in the trust.[233]

4. Application of the FT to *Clayton v Clayton*

The VRPT trustee must be divested of their beneficial ownership for there to be a valid disposition according to the FT's propounded interpretation. If this is achieved, then the VRPT trustee will only be authorised to set the agenda and exercise their powers for the purpose of benefiting the beneficiaries. Clause 4.1(a) of the VRPT deed provides for the power to apply Trust income to a beneficiary, and clause 6.1(a), the power to apply Trust capital to a beneficiary.[234] Both are of key interest given the weight the FT gives to these powers because they facilitate the beneficiary's realisation of their interest in the receipt of trust income and capital.[235]

Clauses 11, 14 and 19 are the relevant clauses with regard to whether the VRPT trustee is obliged to set the agenda for the powers for the purpose of benefiting the beneficiaries.[236] An analysis of these clauses will elucidate whether beneficial ownership has been divested, or whether the VRPT trustee is authorised to exercise their powers for self-serving purposes as opposed to benefiting the beneficiaries. Clause 11 means the VRPT trustee can act in a discriminatory manner and can exclusively benefit an individual beneficiary because they can exercise the powers without considering the interests of all the beneficiaries (11.1(a)) and can act contrary to the interests of any other beneficiaries (11.1(b)).[237] The VRPT trustee is authorised to exercise the powers for a single beneficiary to the direct disbenefit of all others (clause 11.1(b) and (c)), for their own self-benefit (clause 14), with the result being the absolute

[233] Penner (2002), above n 161, at 252; McFarlane (2008a), above n 168, at 551; and Penner (2014c), above n 2, at 499.
[234] Vaughan Road Property Trust deed, above n 11.
[235] Penner (2014c), above n 2, at 485.
[236] Vaughan Road Property Trust deed, above n 11.
[237] Vaughan Road Property Trust deed, above n 11. Note that this clause is necessary if discretionary trusts are to be valid, see *Edge v Pension Ombudsman* [1999] 4 All ER 546 at 566; and *Manukau City Council v Lawson* [2001] 1 NZLR 599 at 617.

distribution of Trust income and capital (clause 11.1(c)).[238] In addition, clause 19.1(c) authorises the trustee to exercise their powers in an unreviewable manner in situations where their decision-making could be improperly influenced by their self-interest.[239] Hence, clause 11 authorises the trustee's exercise of the powers that exclusively prefer a single beneficiary without contemplation of benefiting other beneficiaries, clause 19.1(c) legitimises the consideration of otherwise compromising self-interests when deciding whether and how to exercise the relevant powers and clause 14 authorises the realisation of personal benefits.[240] The VRPT trustee can thus set an agenda for the exercise of their powers that is authoritative and exclusively self-serving for themselves as a beneficiary. The trustee's exercise of their powers is unconstrained by the controlling norm that obliges them to act for the beneficiaries' benefit, and as against the beneficiaries there has not been a divestment of the trustee's beneficial ownership. Therefore, the FT's required dispositional characteristic is unsatisfied. The FT's approach thus justifies and affirms the correctness of the Supreme Court's reason that a super discretionary trust can be defeasible because the trustee holds a power to unilaterally collapse the trust which concurrently means they have not been divested of their beneficial ownership, and extends the reason into an applicable analysis.[241]

Thus, although the application of the FT's propounded interpretation to the VRPT deed did not reveal an instance where the settlor had "reserved such broad powers" that absolutely invalidated the trust, it did evince that the trust was functionally problematic and defeasible in the sense contemplated by the Supreme Court.[242] The FT's approach can help to critique the Court's supposition that a reservation of powers might absolutely invalidate a trust, and to refine it such that it is theoretically justifiable. Postulating that the reservation of excessive powers absolutely invalidates a super discretionary trust is questionable in light of the FT's complementarity with the PRT. This is because the Court's reasoning would suggest that if a sufficient range of duties and constraints on the trustee's exercise of *powers* were excluded thus negating the essential norm, then the *entire* super discretionary trust might be invalidated. Yet a functionally problematic super discretionary trust is just that, and it is not outright "invalid".[243] The Court's reasoning misses the role of an encumbered right which justifies the

[238] Vaughan Road Property Trust deed, above n 11.
[239] Lionel D Smith (2014), above n 180, at 156.
[240] Lionel D Smith (2020), above n 165, at 157 and 161.
[241] *Clayton v Clayton*, above n 1, at [125].
[242] *Clayton v Clayton*, above n 1, at [124]-[125].
[243] See Chapter IV C6 for further discussion of the conceptualisation of functionally or formally problematic super discretionary trusts.

formal existence of the super discretionary trust.[244] Thus, the Court's reason regarding extensive powers is justifiable once the consequence of infringing it is reformulated as creating a defeasible and not an invalid trust. This is because although the trustee holds a non-fiduciary, personal power with a limited class of objects, they still concurrently hold an encumbered right.[245]

The FT's propounded approach for analysing super discretionary trusts is theoretically preferable to the Supreme Court's "powers as property" approach despite being methodologically similar. The FT's approach looks to the same clauses as the Supreme Court when it held that the trustee's powers were *personal* powers and tantamount to ownership, and were thus treated as property.[246] The Supreme Court's approach to determining that the power was non-fiduciary was unobjectionable and essentially a matter of legal characterisation.[247] Insofar as the analysis is formally similar, the FT's propounded approach is preferable because it engages with the fundamental principles of the trust, and alongside the PRT, the FT has a rounded, theoretically justified view of the super discretionary trust. Whereas the personal powers' analysis is a technical approach that places less emphasis on understanding the nature and justification of the trust relationship as a whole.[248] Furthermore, the crucial part of the Court's approach required a conceptually questionable determination that the personal powers are effectively property.[249] The "powers as property" determination is incoherent because it conflates two distinct juridical concepts without justification.[250] Powers can be a *means* for changing legal relations, such as the transfer and receipt of property and one can have a power of title *in* property, yet this does not make a power *into* property, nor does it justify the conflation of the two.[251] The "powers as property" approach consequently relies on a degree of "worldly realism" and instrumentalism to conflate the two and for this reason it is objectionable.[252] In contradistinction, the FT's approach in combination with the PRT

[244] Mark Bennett and Adam Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41(3) OJLS 692 at 699.
[245] Short, above n 3, at 615.
[246] *Clayton v Clayton*, above n 1, at [56]-[57], [64] and [79]-[80].
[247] *Clayton v Clayton*, above n 1, at [58] and [64].
[248] *Clayton v Clayton*, above n 1, at [59]-[62] and [64].
[249] *Clayton v Clayton*, above n 1, at [79]-[80]; and *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, above n 27, at [54] and [59]-[60] on powers being "tantamount to ownership".
[250] Lionel Smith "Execution against a power of revocation" (2013) 129(3) LQR 332 at 333; and Simon Cooper and Emma Lees "Interests, Powers and Mere Equities in Modern Land Law" (2017) 37(2) OJLS 435 at 439-440 and 443.
[251] Hohfeld (1913-1914), above n 9, at 55; and Penner (2020a), above n 170, at 16.
[252] *Clayton v Clayton*, above n 1, at [79]; and Bennett (2020), above n 4, at 224.

accurately analyse the states of juridical relations as they stand, and recognise that where the trustee has not been divested of beneficial ownership, a defeasible trust persists because the trustee at the least, still has an encumbered right.[253] Thus, relative to the FT's approach, the Supreme Court's reasoning is less nuanced, and the crucial step of holding that the powers are akin to property is theoretically unsound.

The position on whether the VRPT trustee is accountable under the FT is the same as that ventured for the PRT. Hence, it is likely that the trustee owes a duty to account.[254] Although, the duty to account is present, because the VRPT trustee is not divested of beneficial ownership and are authorised to transfer property to themselves, there will likely be less occasion to call accounts.[255]

5. Application of the FT to *Webb v Webb*

The FT's propounded interpretation of the dispositional characteristic will be applied to the Webb Family Trust deed to further test the cogency of the approach and its effectiveness for evaluating and refining judicial dictum on super discretionary trusts.[256]

Clause 1.1 authorises the Webb Family Trust trustee ("the WFT trustee") to act in a discriminatory manner and absolutely dispose of trust income and capital to a single beneficiary if they see fit.[257] The clause itself does not authorise the trustee to act for purposes other than the beneficiary's benefit and the authority to exercise the powers in a discriminatory manner does not itself contravene the essential norm that the powers must be exercised for the beneficiary's benefit.[258] In addition, clause 21.1(c) positively authorises the WFT trustee to exercise the power despite the otherwise compromising influence of a conflict between the controlling norm and their own self-interest.[259] Thus the WFT trustee can positively exercise their dispositive powers where their decisions about who should benefit might be influenced

[253] *Clayton v Clayton*, above n 1, at [79]-[81]. Although paragraph [80] suggests that this conclusion is confined to the Property (Relationships) Act 1976 (NZ) context, the following paragraph strongly suggests that the statutory context was not necessarily definitive.
[254] *Libertarian Investments Ltd*, above n 167, at [167].
[255] Vaughan Road Property Trust deed, above n 11, clauses 11, 14.1, and 19.1(c).
[256] Webb Family Trust deed, above n 19.
[257] Webb Family Trust deed (2016), above n 19.
[258] *Manukau City Council v Lawson*, above n 237, at 617.
[259] Webb Family Trust deed (2016), above n 19; and Conaglen, above n 183, at 64 and 72.

by personal reasons, such as their personal desire to exclusively benefit *as a beneficiary*.[260] These clauses will likely undermine the existence of the controlling norm guiding the WFT trustee's actions to be other-regarding, but it is unlikely that the norm will be negated.[261] Although, the WFT trustee is able to exercise their power in a discriminatory manner and can also exclusively consider their own interests as a beneficiary, which together could implicitly negate the essential norm, they are not expressly authorised to *pursue* an agenda relating to the powers that exclusively *benefits* themselves.[262] This is because although they might be a beneficiary and thus entitled to benefit, there is no positive authorisation for them to benefit *as the WFT trustee*.[263] It is thus arguable that given the essentiality of the controlling norm and the absence of positive authorisation, the *purposes* for which the WFT trustee must exercise their powers remain *other*-regarding for the exclusive benefit of the beneficiaries.[264] Therefore, it is likely that the trustee has been divested of their beneficial ownership because it is unlikely that the obligation to act for the benefit of the beneficiaries has been absolutely compromised.[265]

Thus, the FT's approach concurs with the Board's conclusion. However, the Board's reason, that the clause did not "exonerate [the trustee] from all possible breaches of trust" and therefore did not impugn the trust is, with respect, unsound.[266] Exoneration from liability is not a theoretically sound reason for suggesting that the functional validity of a super discretionary trust is impugned because as previously discussed, immunity from personal liability for breach of the core trust duty does not undermine the *mere existence* of that duty.[267] Rather, as evinced by the prior analysis, it is the erosion of the norm which obliges the trustee to exercise their powers solely for the beneficiary's benefit which is why this clause matters.[268] The Board thus arrived at a theoretically-sound conclusion, but for reasons which were not theoretically justified.[269]

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[260] Webb Family Trust deed, above n 19, at clause 1.1; and Lionel Smith "Prescriptive Fiduciary Duties" (2018) 37(2) UQLJ 261 at 278-279.
[261] John H Langbein "Mandatory Rules in the Law of Trusts" (2004) 98(3) NWULR 1105 at 1122-1123.
[262] Webb Family Trust deed, above n 19, at clause 1.1 and Lionel D Smith (2014), above n 180, at 156.
[263] Lionel D Smith (2014), above n 180, at 156.
[264] Katz (2020b), above n 217, at 598; and *Armitage v Nurse*, above n 28, at 251-252.
[265] Lionel D Smith (2014), above n 180, at 150.
[266] Penner (2002), above n 161, at 251.
[267] Chapter IV A1; *Webb v Webb*, above n 1, at [84]; and Penner (2002), above n 161, at 251.
[268] Mitchell, above n 161, at 100-101.
[269] Strachan, above n 39, at 211-212.

Clause 10.1 reserves a power to the settlor to remove beneficiaries ostensibly in their uncontrolled discretion. This could be exercised such that Mr Webb would become both trustee and beneficiary, thus collapsing the trust.[270] The Privy Council concluded that because of this the "trust deed failed to record an effective alienation by Mr Webb of any of the trust property".[271] However, concluding that the super discretionary trust was *invalid* was unnecessary. The Board could have followed albeit questionable but established authority and hold that Mr Webb's power was a personal power and thus "tantamount to ownership".[272] More importantly, the Board's final conclusion that the trust was *invalid* because of this clause was, with respect, unjustified.[273] This is because the power reserved to the settlor in their personal capacity which allows them to effectively revoke the trust did not contravene the concurrent divestment of the trustee's beneficial ownership and the existence of the beneficiary-focused norm which controls the trustee's exercise of their powers.[274] The settlor's untrammelled authority to set the agenda for their reserved personal power is consistent with the divestment of the trustee's beneficial ownership, and the functional validity of the super discretionary trust.[275] Reserving powers to the settlor should thus be seen as a distinct issue requiring its own reasons and justification.[276]

6. The Theories' Abstract Justification of High-Level Reasons

The theories' propounded interpretations assist in justifying and where necessary refining reasons in the abstract, in this instance the high-level reasons are from the Privy Council's decision.[277] Lord Kitchen's dictum suggested that one could successfully dispose of property yet concurrently retain powers which are too extensive and thus problematise the functionality of a super discretionary trust.[278] Following the theoretical approaches propounded here, this could be refined by accepting that the PRT's exposition of the dispositional element has been

[270] Webb Family Trust deed (2016), above n 19; and *Webb v Webb*, above n 1, at [87].
[271] *Webb v Webb*, above n 1, at [89]. Given that the next sentence pertains to "ownership" it is arguable that the Board is referring to "property" in the same functional sense that the FT does. At the least, the theoretical approaches expounded in this paper support a more precise usage of "property" and "ownership" such that it can be ascertained whether the existence of an encumbered right or power is in dispute.
[272] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, above n 27, at [54] and [59]-[60]; and Lionel Smith (2013), above n 250, at 333-334.
[273] See *Clayton v Clayton*, above n 1, at [59]-[61] and [79]-[81].
[274] Jessica Palmer "Controlling the Trust" (2011) 12(3) OLR 473 at 494; and David Hayton "English Fiduciary Standards and Trust Law" (1999) 32(3) Vand L Transnat'l L 555 at 605.
[275] Palmer, above n 274, at 494.
[276] See for example Bennett (2017), above n 4, at 63 on "Trustee usurpation".
[277] *Webb v Webb*, above n 1, at [89].
[278] *Webb v Webb*, above n 1, at [89].

satisfied, meaning there has been a disposition of property in its formal capacity (an encumbered right).[279] However, the trust deed may nevertheless fail to evince a functional disposition of ownership within the FT's elaboration.[280] Therefore, one could dispose of "property" in the sense of an encumbered right within the PRT's conception, but reserve extensive powers and fail to dispose of "ownership" within the FT's conception, creating a defeasible but not invalid trust. This reflects the theories' interdependence and complementarity. Pursuant to this, the Privy Council's postulation that property would not be disposed "because" of the reservation of powers is unjustified because the reasons and the justificatory theories apply disjunctively and the absence of each reason has a different consequence for the impugned trust.[281] The theories' refinement of Lord Kitchen's hypothetical super discretionary trust would lead to the conclusion that it was formally valid, but concurrently functionally problematic, much the same as the Vaughan Road Property Trust. In addition, the Privy Council and Supreme Court rightly linked the dispositional characteristic with the existence of the "irreducible core of trustee obligations".[282] On both theories' approaches if there is no disposition as the theories interpret it, then the irreducible core, manifested as the core trust duty, will not encumber the right or power respectively.[283]

Discussing the theories' approaches in the abstract highlights the centrality of the theories' compatibility for facilitating a more nuanced analysis of the resultant legal relationship where there is a failed attempt to settle a super discretionary trust. For example, if there has been a disposition within the PRT's propounded interpretation but not the FT's, then the legal consequence will likely be a defeasible trust in the sense of a formally encumbered right with an essentially personal power.[284] Conversely, if there had been a disposition within the FT's propounded interpretation but not the PRT's, it may be that the settlor only created a fiduciary power of appointment, which would mirror the functional operation of a theoretically valid

[279] Merrill (1998), above n 49, at 745; and Penner (1997), above n 49, at 71-72.
[280] See above Chapter IV C4 and C5.
[281] *Webb v Webb*, above n 1, at [89]; and *Clayton v Clayton*, above n 1, at [124].
[282] *Webb v Webb*, above n 1, at [89]; *Clayton v Clayton*, above n 1, at [124]; and *Armitage v Nurse*, above n 28, at 253-254.
[283] McFarlane (2008a), above n 168, at 551-552.
[284] McFarlane (2010), above n 2, at 197; Short, above n 3, at 607; and Geraint Thomas *Thomas On Powers* (2nd ed, Oxford University Press, Oxford, 2012) at 1.17.

super discretionary trust, yet the objects of the power would be without with any formal rights against third parties in the PRT sense.[285]

In both instances, a trust of sorts should be created. This is because it is the obligation that matters, and not the specific Hohfeldian juridical concept (the right or power in property) to which it annexes.[286] Provided that the core trust duty annexes to *a* juridical concept then on theory, there will be a trust.[287] The focus on the annexation of *a* relevant juridical concept with the core trust duty is consistent with Millet LJ's (as he was then) dictum that the trust is about *obligations* which do not necessarily need to encumber a *specific* juridical concept (provided a right or power is encumbered).[288] Thus, although a trust must be over *property*, property can be extensively understood to be both tangible and intangible things, and following a Hohfeldian analysis must extend to both legal *rights* and *powers* in those things.[289] Hence, in theory wherever the core trust duty encumbers a right *or* power in property, conceptualised in its most capacious sense which includes choses in action, a trust of sorts exists.[290] This indicates that there is a need to interrogate further the final form and function of the impugned super discretionary trust, which the theoretical approaches can provide insight into, to understand its nature, as opposed to simply asserting that it is "invalid".[291]

D. Conclusion on the Theoretical Approaches to Invalidity

This Chapter has expounded the theories' interpretation of the minimum characteristics of a trust, such that they can fill the justificatory gap pertain to the proffered high-level reasons used to address super discretionary trusts. Filling the justificatory gap should improve both our theoretical understanding of super discretionary trusts and legal reasoning when its validity is being challenged.[292] The theoretical approaches were also applied to the same trust deeds that the Supreme Court and Privy Council wrestled with which facilitated the evaluation and

[285] Short, above n 3, at 607; and Lionel D Smith (2020), above n 165, at 150-151 for a discussion of a fiduciary power which is constrained by the same norm that is recognised by the FT as being essential to the divestment of beneficial ownership.
[286] McFarlane and Stevens (2010), above n 2, at 12-13; and Hohfeld (1913-1914), above n 9, at 55.
[287] Penner (2014a), above n 118, at 209; and Hohfeld (1913-1914), above n 9, at 55.
[288] *Armitage v Nurse*, above n 28, at 253-254.
[289] Hohfeld (1913-1914), above n 9, at 55; McFarlane and Stevens (2010), above n 2, at 12-13; and Penner (1997), above n 49, at 128-152.
[290] Penner (1997), above n 49, at 129-139.
[291] *Clayton v Clayton*, above n 1, at [124]; and *Webb v Webb*, above n 1, at [89].
[292] Vilaça, above n 7, at 785.

refinement of the reasoning and conclusions as regards the super discretionary trusts in those cases. Furthermore, only the FT's expounded understanding of the dispositional characteristic was applied to the VRPT that the super discretionary trust was found to be functionally problematic but only in the sense of being revocable at the instance of the trustee.[293] Likewise, the Privy Council's reasons could generally be justified where the theoretically unsound reasons and conclusions were exposed and refined to a justified formulation.[294]

[293] *Clayton v Clayton*, above n 1, at [125].
[294] *Webb v Webb*, above n 1, at [89].

V. Conclusion

This paper has propounded theoretical interpretations of the minimum characteristics of the trust to fill the justificatory gap left by the judicial propagation of high-level reasons used to address a super discretionary trust. The reasons were generally justifiable, however, some needed refinement, particularly with regard to the relationship between formal and functional reasons and the consequence of their absence on the impugned super discretionary trust. It has been demonstrated that the PRT and FT both provide cogent and strong explanations of different aspects of the trust, and in line with the core contention, can be expounded to do the same with regard to the minimum characteristics of a trust. The PRT and FT understand and build upon the minimum characteristics in distinct but complementary ways that accord with how they seek to explain different aspects of a trust. The PRT and FT are performatively interdependent and conceptually complementary theories, and therefore both theories concurrently address and provide insights into the super discretionary trust.

Various issues and questions that require further attention have arisen because of the development of the core thesis, with some of the more notable or (personally) interesting questions including the two theories' complementarity. This paper postulated that the PRT and FT are complementary theories of the trust. However, this position is not without detractors and disagreement.[295] Hence, it would be worth delving deeper into the arguments made here, and to interrogate further the postulated performative interdependence and conceptual compatibility of the PRT and FT.[296]

This paper also wrestled with the relevance of the no-profit and no-conflict duties, particularly with regard to the Webb Family Trust deed. These rules support the trustee's core obligation to act for the beneficiary's benefit by excluding improper purposes or influences which may compromise decision-making and ensuring all benefits accrue to the beneficiary.[297] In theory the no-profit, no-conflict rules support the core trust duty, and as evinced by the discussion of clause 1.1 in the Webb Family Trust deed the exclusion of just the no-conflict rule seriously

[295] See for example Wall (2018), above n 149.
[296] Beever, above n 121, at 299.
[297] Lionel D Smith (2014), above n 180, at 150 and 158; and *Bristol and West Building Society v Motthew* [1998] Ch 1 (CA) at 18.

risked negating the existence of the essential norm and problematising the functionality of the super discretionary trust.[298] In New Zealand law these duties can be excluded, and courts have held and commentators have suggested that the two duties are not essential.[299] Given the significance of these duties, it is important to inquire further into which of these duties could be excluded before it could be said that no disposition occurred in the FT sense and whether a good reason or justification existed for permitting their exclusion.[300]

Finally, this paper also argued that the resultant legal relationships will change depending upon the conclusions drawn from the application of the PRT's and FT's propounded interpretation of the dispositional characteristic. This paper's theoretical approach reinforced Millett LJ's (as he was then) dictum that the trust was about the trustee being bound by a core duty.[301] The postulation and application of the theories' approaches suggested that a super discretionary trust might only be a trust in form, or in function. Consequently, the nature and operation of these resultant legal relationships would be worth exploring further.

[298] Lionel D Smith (2014), above n 180, at 150.
[299] Trusts Act 2019 (NZ), above n 187, ss 34 and 36 where the duties are default and not mandatory. *Kelly v Cooper* [1993] AC 205; Penner (2014a), above n 118, at 220 also notes that a *Quistclose* trustee is a clear example of a trustee not being a fiduciary (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567,]1968] 3 All ER 651 (HL); and Sarah Worthington "Exposing Third-Party Liability in Equity: Lessons from the Limitation Rules" in Paul S Davies and JE Penner (eds) *Equity, Trusts and Commerce* (Hart Publishing, Oxford, 2017) 331 at 338.
[300] Langbein (2004), above n 261, at 1122-1123.
[301] *Armitage v Nurse*, above n 28, at 253-254.

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