The Challenge of Identifying Private Property under English Law

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At its most basic level, property law exists so as to allow for those with the relevant legal capacity to assert "rights of excludability" over a given asset or resource.[1] This monopoly of control lies at the very heart of property law.[2] Indeed, as has been noted elsewhere, the "use" of property[3] serves a justificatory role for the property right while "exclusion" is the formal essence of the right.[4] This monopoly of control lies at the very heart of property law.[5]

In *National Provincial Bank Ltd v Ainsworth,*[6] the House of Lords had to decide whether a wife had a property interest in the matrimonial home owned by her husband. Having left her and their four children, he transferred the freehold title into the name of his company, which then mortgaged the property to the bank. At the time, the common law recognised that a wife had a personal right, enforceable against her husband, to occupy the matrimonial home. In this case, the wife sought to argue that she had a form of property right which was enforceable against the bank. The House of Lords, however, refused to accept the wife's right of occupation as amounting to a property right enforceable against the bank. Significantly, Lord Wilberforce identified the key hallmarks of a property right in the following terms:[7]

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

Needless to say, these hallmarks, together with the requirement of excludability, provide a useful set of criteria from which to assess whether or not certain rights and interests amount to property for the purposes of English law. As we shall see, the ability of the right or interest to be capable of forming the subject-matter of a trust may also prove helpful in identifying

[1] For a detailed study of the philosophical and theoretical difficulties surrounding the concept of private property, see: J. Waldron, "What is Private Property?", (1985) 5 Oxford Journal of Legal Studies 313.
[2] See, T. Honore, "Rights of Exclusion and Immunities Against Divesting", (1960) Tulane LR 453.
[3] Inevitably, any asset or resource will have some form of value. Typically, it will have a commercial or market value, but not always as more rarely it may attract only a sentimental or practical value (e.g., a trinket or an old piece of furniture).
[4] See, J. E. Penner, *The Idea of Property in Law* (1997), Ch. 4. See further, Thomas W. Merrill, "Property and the Right to Exclude", (1998) 77 Neb. L. Rev. 730, who argues that the right to exclude is not simply an essential aspect of property; rather, "it is the sine qua non".
[5] See, T. Honore, "Rights of Exclusion and Immunities Against Divesting", (1960) Tulane LR 453.
[6] [1965] A.C. 1175.
[7] Ibid, at 1248.

whether it can be properly characterised as property. The article, therefore, seeks to examine the concept of private property[8] under several general headings: first, the traditional categorisation of private property under English law; secondly, the dynamic nature of property; thirdly, the role of trusts of choses in action; fourthly, the new emerging forms of property; and fifthly, the notion of quasi-property rights. The overall conclusion is that certain key elements are crucial to the notion of private property. In the absence of these elements, however, the right or interest in question may still be characterised as a form of quasi-property assuming the requirement of exclusivity is present.

The traditional categorisation of private property

English law has typically divided the concept of private property into the following categories and sub-categories, namely: (1) real property (realty); (2) personal property (personalty), comprising both choses in possession and choses in action; and (3) chattels-real (leases). This established categorisation has been in existence in English law for a long time even though its origins remain unclear. As we know, it has also become a staple of the law school curriculum typically taught in English universities.

Real property, as the name suggests, is that form of property which consists of proprietary rights in land and is rooted in historical principles and concepts dating back to the Norman Conquest, with its ancient doctrine of tenure ultimately giving way to the modern day doctrine of estates. Needless to say, English land law has developed as a subject "in its own right" primarily because of the long-held socio-economic and political power the ownership of land symbolised in English society and also as a result of the immoveability and indestructability of land as a form of property. Further, land as an asset can also give rise to multifarious rights in favour of several third parties at any one time.

Personal property, on the other hand, has developed in a different way largely because it is moveable and more easily destructible, lacks the permanent nature of land and, unlike land, tends not to generate different rights in numerous third parties. For these reasons, personal property law has evolved differently to land law. Personal property consists of both tangible and intangible objects. A tangible object is described as a chose in possession or chattel. By contrast, where the asset is intangible (for example, shares in a company or a debt), the same is described as a chose in action. A key distinguishing feature between choses in possession and choses in action lies in the fact that in the former category, the owner of the property can physically lay claim to actual possession of the item whereas with intangible choses in action, the owner of the property must bring a legal action to assert ownership rights over the item in question against any wrongdoer. Choses in action can be further sub-divided into two sub-categories, namely, pure intangibles and documentary intangibles. Pure intangibles include a debt, copyright, patents, registered designs, trademarks and business goodwill, whereas documentary intangibles cover those items of personal property where a document provides the basis for the legal right of collection of something such as money or goods. Examples here

[8] Private property, in a basic broad sense, is property which is capable of being owned privately by individual legal persons and is, therefore, distinguishable from common property, (such as public parks, where individuals have no right of exclusion as against others) and state property (such as nationalised industries, where again individuals have no right of exclusion as against others).

would include a bill of exchange, rights under an insurance policy or bill of lading. Money can be both a chose in possession (bag of coins) or a chose in action, such as cheque where the Bank of England promises to pay the bearer the sum specified.

As Clarke[9] observes, the House of Lords' decision in *Colonial Bank v Whinney*[10] is taken as authority for the view that a chose in action is the only form of intangible personal property recognised at common law. More recently, Moore-Bick LJ reinforced this position in *Your Response v Datateam Business Media Ltd* [11] in stating that the *Colonial Bank* decision "makes it very difficult to accept that the common law recognises the existence of intangible property other than choses in action". Yet, as endorsed by Clarke,[12] this view is now disputed and it is probably more accurate to say that a "thing in action" is just *one* kind of intangible property, allowing for another unique category of intangible property to be recognised. Indeed, support for this latter sui generis category of property can be found in the Privy Council decision of *A-G Hon Kong v Nai-Keung,*[13] where it was held that textile export quotas were not choses in action but were, nonetheless, a form of intangible property.[14]

The dynamic nature of property

In broad terms, property has been described as a relationship rather than simply a thing - in other words, property arises whenever there is a relationship between a subject and object of property within the legal system.[15] Significantly also, the subjects and objects of property can both change over time. A classic historical illustration may be found in slavery. During the time of slavery, slaves could be the objects of property (i.e., could be owned) but could not be the subjects of property (i.e., assert ownership rights over others). Obviously, the heinous system of slavery has long been abolished, but the institution of slavery does demonstrate how the subjects and objects of property can change with socio-economic and political changes in society. In the words of Kohler and Clarke:[16] "property is no more than a normative set of relationships which might be attached to whatever subject-matter society deems it necessary or beneficial to make the subject of property. We are sorry if that destroys the mystique but that really is all it is . . ." It is for this reason that property is often described as an inherently dynamic concept. It is noteworthy that, over the past 100 years, there has been a marked growth in intangible property, in particular, choses in action and, in more recent times, the sui generis type of intangible property alluded to by Clarke, mentioned earlier.

Trusts of choses in action

[9] A. Clarke, *Principles of Property Law*, (2020), at p. 272.
[10] (1886) 11 App. Cas. 426.
[11] [2014] EWCA Civ 281, at [26].
[12] A. Clarke, *Principles of Property Law*, (2020), at p. 272.
[13] [1987] 1 W.L.R. 1339.
[14] See also, *Armstrong DLW Gmbh v Winnington Networks Ltd* [2012] EWHC 10, where the High Court held that a carbon emission unit was property, albeit a thing in action of the sui generis variety.
[15] See, C.R. Noyes, *The Institution of Property*, (New York and Toronto), (1936), at p. 357.
[16] A. Clarke and P. Kohler, *Property Law Commentary and Materials*, (2005), at p. 372.

The institution of the trust lies at the heart of contemporary English property law. It is the vehicle through which ownership of any property,whether real or personal, can be fragmented so as to allow for legal ownership to be vested in trustees with equitably ownership being held behind the trust in favour of beneficiaries.

Choses in possession, as items of personal tangible property, can clearly be held on trust - indeed, no formality of writing is needed to establish an express trust in relation to personalty, with oral declarations being sufficient to establish such a trust.[17] Choses in action, despite being items of personal property which are intangible, may also be held on trust and English law. Thus, for example, where a contractual right is held by A on trust for B, A may sue and obtain damages or specific performance on behalf of B,[18] or B may obtain such relief on his own if A refuses to act, joining A as a co-defendant in the action.[19]

Similarly, where there is a completely constituted trust of the benefit of a covenant to settle existing property in favour of another, the trustees who have received the benefit of the covenant, or the beneficiaries themselves, may enforce the trust.[20] It may also be possible for other choses in action, such as copyright, patents, trademarks and service marks, registered designs, etc., to be held on trust in favour of beneficiaries. Indeed, in theory, it would seem that any chose in action, being a species of personal property, may be the subject of a trust whereby ownership of the same is split between the trustees and beneficiaries.

The key point here is that English law will recognise the availability of the trust as a means of fragmenting ownership so long as the subject-matter can legitimately be treated as property.[21] It would follow, reversing the logic here, that if the thing or right in question can be subjected to a trust obligation through which ownership can be fragmented, then the thing or right may be treated as property. On this basis, therefore, the availability of the trust device becomes itself a key element in identifying whether a right or thing amounts to property.

Emerging forms of property

[17] By contrast, express trusts of land must be manifested and proved by some writing, with the person declaring the trust signing the same: see, s.53(1)(b) of the Law of Property Act 1925.

[18] *Lloyd's v Harper* (1880) 16 Ch. D. 290.

[19] *Les Affreteurs Reunis Societe Anonyme v Leopold Walford* Ltd [1919] AC 801; *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch. 12. This exception to the privity of contract rule is, however, less important now as a result of the Contracts (Rights of Third Parties) Act 1999.

[20] The right to sue and collect a contractual debt has long been an established form of property right in English law. This right of debt collection can be assigned to another for free or, more typically, for consideration. There is no reason why this chose in action could not be subject to a trust. If the right to collect the debt is assigned in accordance with s.136 of the Law of Property Act 1925, any bare assignment to the assignee would be subject to equities and the assignee would hold the chose in action subject to any declared trust of the same in favour of any beneficiary, who would ultimately be entitled to the debt monies obtained. If the assignee paid money to the assignor for the debt, this money would, in turn, be held on trust for the beneficiary of the contractual promise to receive payment.

[21] There is considerable academic debate over the precise nature of the trust obligation and the rights/interests it generates in favour of beneficiaries: see, for example, B. McFarlane and R. Stevens, "The Nature of Equitable Property", (2010) 4 Journal of Equity, 1 and J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Property Interest under a Trust", (2014) 27/2 Canadian Journal of Law and Jurisprudence, 473.

The writers would, therefore, argue that a three-pronged test can be used in determining whether a particular thing or right amounts to private property for the purposes of English law: (1) is there excludability over the thing or right?; (2) does it meet the basic requirements of Lord Wilberforce's property criteria in *Ainsworth*?; and (3) can a trust[22] be established in relation to the thing or right? It will be convenient to consider these elements under the following headings; (1) cryptocurrencies; (2) business opportunity; (3) business reputation; (4) confidential information; (5) body parts and human samples; and (6) regulatory licences and quotas.

C*ryptocurrencies*

Cryptocurrency is any form of currency that exists digitally or virtually and uses cryptography to secure transactions. Unlike normal currency, cryptocurrencies do not have a central issuing or regulating authority (like the Bank of England), but instead use a decentralised system to record transactions and issue new units. Cryptocurrency is, therefore, a digital payment system that does not rely on banks to verify transactions. Instead, it is a peer-to-peer system that can enable anyone anywhere to send and receive payments. Rather than amounting to physical money, cryptocurrency payments exist purely as digital entries to an on-line database describing specific transactions. When cryptocurrency funds are transferred, the transaction is recorded in a public ledger. Units of cryptocurrency are created through a process called "mining", which involves using computer power to solve complicated mathematical problems that generate coins. A user can buy the currencies from brokers, then store and spend the currency using cryptographic digital wallets. Significantly, there is nothing tangible here - what is owned is a key that allows a person to move a record or a unit of measure from one person to another without a trusted third party. Bitcoin is the best know version of cryptocurrency in use today.[23]

Is cryoptocurrency capable of being characterised as property?[24] Taking the writers' three-pronged test, it can be said to amount to a right of excludability over a certain resource (i.e., an electronic unit); it appears to satisfy Lord Wilberforce's property criteria as set out in *Ainsworth* in so far as it has a degree of permanence, is definable, identifiable by third parties and capable of assumption by third parties. Finally, in terms of the third test, it would seem possible to create a trust in relation to cryptocurrency in the same way as other intangible property.[25] Most recently, in *Wang v Darby*,[26] the High Court has recognised that fungible and non-identifiable digital assets constitute property that is capable of being bought and sold as well as held on

[22] Needless to say, trusts play a vital role in fragmenting ownership and enabling the co-ownership of private property in English law.

[23] Although Bitcoin has been around since 2009, cryptocurrencies and applications of blockchain technology are still emerging in the financial world, with an increase in users generally expected in the future. There are many types of cryptocurrency, but the best known are: Bitcoin, Etherum, Litecoin and Ripple.

[24] See generally, Kelvin F.K. Low and Ernie G.S. Teo, "Bitcoins and Other Cryptocurrencies as Property?", Law, Innovation and Technology, (2017) Vol. 9/2, 235, who argue that bitcoin is a form of property within the common law systems. See also, Eric D. Chason, "How Bitcoin Functions as Property Law", Seton Hall Law Review, (2018), Vol. 49, 129.

[25] See generally, D. Scott, "Cryptocurrencies and Trusts: Watch and Learn", (2022) TELTJ 232, 24.

[26] [2021] EWHC 3054 (Ch), at [55]. See also, *Ion Science Ltd v Persons Unknown*, (unreported), 21 December 2020).

trust as a matter of English law. This reflects earlier case law where the Commercial Court has granted (interim) proprietary injunctions against the defendants in respect of cryptocurrencies that had been fraudulently extracted or misappropriated from the claimant or the traceable proceeds of such digital assets. In *AA v Persons Unknown*,[27] hackers attacked the computer systems of a Canadian company and held them hostage. A ransom of some $1.2 million was demanded. A reduction was negotiated and paid in Bitcoin by the company's British insurer. The insurer then traced some of the ransom payment to a digital wallet linked to Bitfinex a cryptocurrency exchange. The insurer sought a proprietary injunction over the traced ransom payment. The High Court concluded that cryptocurrency was a form of property and granted the freezing injunction.[28] The High Court of New Zealand in *Ruscoe & another v. Cryptopia Limited (In Liquidation)*[29] has also held that a cryptocurrency trading exchange, known as Cryptopia, held the digital assets of its customers (i.e., account-holders) on express trust. Cryptopia operated as a form of depository and trading exchange/platform. The accounts of its customers were operated through so-called "hot" wallets that were live and interconnected. The possessive or proprietary language used to describe this position (e.g., the use of "your" cryptoassets) was consistent with the existence of an express trust.

Business opportunity

Does a business opportunity amount to property? Here again, arguably it amounts to an exclusive right vested in a particular individual. It also has a degree of permanence, is identifiable by third parties and capable of assumption by third parties, so meets the *Ainsworth* criteria. In one sense, the opportunity created is an asset belonging to the business, "a chance of transacting", and by analogy resembles an option to purchase.[30] Both the opportunity and option may never be exercised, but they together represent the chance of making a commercial profit or gain. In *FHR v European Ventures,*[31] the Supreme Court suggested that a business opportunity was something which could be the subject of a trust held by a fiduciary in favour of his principal. In several other cases, business opportunities have been treated as assets of a business and, hence, a form of property in their own right.[32] Where such an opportunity is

[27] [2020] 4 W.L.R. 35, at [55]-[61]. See also, *Wang v Darby* [2021] EWHC 3054 (Comm), at [55], where it was held that fungible and non-identifiable digital assts such as Tezos constituted property that was capable of being bought and sold, as well as held on trust as a matter of English law. For an interesting commentary on the case, see: M. Schreeve-McGiffen, "Crypto-conundrums: A Case Comment on *Wang v Darby*", Computers & Law, (2021), 49.

[28] See also, *Robertson v Persons Unknown*, (unreported), CL- 2019-000444, where a freezing order was made in relation to a cryptocurrency account. It is also noteworthy that the Singapore International Commercial Court has held that cryptocurrency meets the *Ainsworth* property criterion and can be the subject of a trust: see *B2C2 Ltd v Quonine* [2019] SGHC (1) 3.

[29] [2020] NZHC 728. See generally, G. Cooper, "Virtual Property as Trust Assets and Investments", Butterworths Journal of International Banking & Finance, (2021) 36/11, 751, where the author discusses the movement towards recognition of cryptocurrencies as virtual property, whether they can be assets held on trust, and the possibility of trustee investments in cryptocurrencies.

[30] It is noteworthy that in *Re Vandervell's Trusts (No 2*) [1974] Ch 269 an option to purchase was held on a resulting trust.

[31] [2014] UKSC 45.

[32] See, *CMS Dolphin Ltd v Simonet* [2001] 4159 (Ch) and *Lindsley v Woodfull* [2004] EWCA Civ 165.

exploited wrongly by a fiduciary in breach of fiduciary duty, any assets obtained will be held on a constructive trust for the principal, who can trace into the same.[33]

Business reputation

Business reputation (or goodwill) can arguably amount to property. It is, in the words of Bridge,[34] a form of intangible personalty - "an item of property that may be used as a security for a loan and disposed of apart from the underlying trade premises". Goodwill is "whatever adds value to a business by reason of situation, name, and reputation, connection, introduction to old customers and agreed absence from competition".[35] So, applying the writers' three-pronged test, goodwill generates in the holder of the business an exclusive form of right, seems to meet the property criteria in *Ainsworth*, namely, it has a degree of permanence and is identifiable and capable of assumption by third parties. Can goodwill, however, be the subject of a trust? On its own, it certainly lacks sufficient certainty of subject-matter, but if a business is held on trust, then the goodwill goes hand-in-glove with the business and would, it is submitted, be subject to the trust. Thus if A holds a commercial lease in relation to restaurant premises which he has built up over the years, if A declares that he holds the lease on trust for A and B in equal shares, then the goodwill attaching to the business would likewise be subject to the same trust.

C*onfidential information*

Let us assume that a research scientist invents a formula during the course of his employment to cure baldness in men.[36] His contract of employment states that any such invention belongs exclusively to the employer. In breach of contract and fiduciary duty, he sells the invention to a rival company and makes £10 million profit. The rival company, in turn, exploits the confidential information and makes millions in profits. Can the employer bring any claim here? If the confidential information is not treated as property, the employer has to content itself with a personal claim for an account of profits against the employee for breach of contract and/or fiduciary duty. If, on the other hand, the confidential information amounts to property, the employer may be able to bring a potential tracing claim as against the rival company and lay claim to the profits achieved through its exploitation of the information, assuming the grounds for establishing liability were made out.

Unfortunately, English law has not been consistent in its acceptance of information as property.[37] In *Boardman v Phipps,*[38] where a solicitor had used confidential information belonging to a trust, Lord Upjohn concluded that information was property. In *Oxford v Moss,*[39]

[33] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.
[34] M. Bridge, *Personal Property Law*, (4th ed., OUP) at p. 17.
[35] See, Lord Lindley's judgment in *IRC v Muller and Co's Margarine* Ltd [1901] A.C. 217, at 235.
[36] Assuming no patent has been registered.
[37] See generally, P. Jaffey, "Private Property and Intangibles", (2022) 1 Conv, 47, who discusses how intangible property should be recognised by English law, focusing on the treatment of intellectual property, confidential information and contractual rights. In particular, the author considers the basic rights of a property owner, including the right of exclusion and right to benefit, and how these can be applied to intangible assets.
[38] [1967] 2 A.C. 46.
[39] (1978) 68 Cr. App. Rep. 183.

where a student misappropriated an examination paper, it was held that the student could not be guilty of theft under s.4 of the Theft Act 1968 since information was not property. By contrast, in *Rolls Royce v Jeffrey,*[40] Lord Radcliffe could not see how confidential information was different from other forms of corporate assets.

One problem noted by Bridge[41] is that the transferor of the confidential information himself retains the information that was transmitted (albeit in breach of any duty of confidence), which arguably denies one of the key features of a property right, namely, its exclusivity, the notion that "a diamond ring cannot support two wearers at the same time".[42] This is admittedly a problem unique to confidential information but, as has been suggested by others, treating confidential information as property has the potential of offering a richer form of legal protection to the owner.[43] Despite, therefore, arguments over excludability, the *Ainsworth* criteria and the ability to create a trust in relation to information would appear to be met. It is noteworthy that in a Canadian case, a fiduciary who misused confidential information was deemed to hold the benefits flowing from its misuse on a constructive trust for the owner. In *LAC Minerals Ltd v International Corona Resources Ltd,*[44] LAC received confidential information from Corona during the course of negotiations with a view to establishing a joint venture to exploit minerals from land owned by Corona, which indicated that adjacent land was also likely to contain mineral deposits. LAC subsequently purchased the adjacent land in their own right and exploited the minerals themselves. The Supreme Court of Canada held that there was a fiduciary relationship between the parties and that LAC held the land on constructive trust for Corona because of their breach of confidence.

Body parts and human samples

Several English criminal cases have confirmed the notion that human body parts can generate property interests. For example, in *R v Herbert,*[45] the defendant was convicted of theft for cutting hair from the head of a female passenger in his car. In *R v Welsh,*[46] the defendant was convicted of theft of a urine sample which he had provided pursuant to s.9 of the Road Traffic Act 1972. Having provided the sample to the police, the defendant then poured it down a sink while the duty officer was absent. The conviction suggests that the defendant's urine had become the property of the police. In *R v Rothery,*[47] the defendant provided a blood sample in a capsule belonging to the police. Whilst the duty officer's back was turned, the defendant removed the blood capsule and took it away. The defendant was convicted of theft of property from the police.

[40] [1962] 1 All E.R. 801.
[41] M. Bridge, *Personal Property Law,* (4th ed., OUP) at p.26.
[42] Ibid, at p. 26. Bridge goes on to suggest that it is preferable to protect the misuse of confidential information through the law of contract and tort, rather than through a "heavy-handed invocation of property law".
[43] N. E. Palmer and P. Kohler, "Information as Property" in Palmer and McKendrick (eds), *Interest in Goods*, (1993).
[44] [1989] S.C.R. 574.
[45] The Times, 22 December 1960; (1961) Journal of Criminal Law 163.
[46] [1974] RTR 478.
[47] [1976] RTR 550.

In the leading American case of *Moore v Regents of the University of California*,[48] the California Supreme Court was asked to consider whether a donor of human tissue was entitled to a share in the sale proceeds of a biotechnological product made from the donor's tissue. A Dr Golde diagnosed Moore as suffering from hairy cell leukaemia and told Moore that his spleen would need to be removed. This operation was carried out. Moore then supplied Golde with various body fluid samples which were used to develop a unique cell line which had a therapeutic value. The cell line was patented and licences sold to drug companies generating considerable revenue for the University of California, Dr Golde and the drug companies. Moore sued Golde and the University of California in the tort of conversion. The California Appeal Court held that Moore's rights over his own body were akin to a property interest and Moore succeeded in his claim. However, a 5-2 majority in the California Supreme Court overruled this decision concluding that to find property in Moore's human tissue would generate a negative impact on medical research.

However, a "work and skill exception" to the no-property rule was established in the earlier Australian case of *Doodeward v Spence*.[49] Here, a doctor had preserved the still-born body of a two headed foetus and kept it on display in a jar in his surgery. The doctor died and his possessions, including the jar, were inherited by Doodeward, who put the jar (with its contents) on display to the public and charged people to view the same. The police confiscated the jar and charged Doodeward with outraging public decency. Doodeward brought an action against the police for a return of the contents of the jar. The High Court of Australia decided, by a majority, that Doodeward could have the foetus returned, holding that the no-property rule could not apply once someone had exercised lawful work or skill over it. Such an exception, it was argued, protected many valuable anatomical and pathological specimen collections. The logic of the ruling is also reflected in the English case of *R v Kelly*,[50] where anatomical specimens had been kept for research and teaching purposes and which were held to generate property ownership in favour of the Royal College of Surgeons.

It was in *Yearworth v North Bristol NHS Trust*[51] that the English Court of Appeal was provided with the opportunity to consider whether a general notion of property could exist in relation to human body parts and samples. Here, a group of men had their sperm frozen and stored by North Bristol NHS Trust in advance of their cancer treatment. The Trust negligently allowed the storage temperature to drop which caused irretrievable damage to the sperm. The men sued for distress and psychiatric injury. The Trust disputed that the men had any property, which had been damaged by its negligence, in the sperm samples.[52] The Court of Appeal, however, held that the men had property in the stored sperm and allowed their claim for compensation. Significantly, the Court refused to apply the "work and skill" exception in *Doodeward*, but rather viewed the men as having a form of property ownership of the sperm. The Trust were,

[48] (1990) 51 Cal 3d 120.
[49] (1908) 6 C.L.R. 406.
[50] [1999] Q.B. 621.
[51] [2009] EWCA Civ 37.
[52] It was noted that the Human Fertilisation and Embryology Act 1990 (as amended) regulated all activities involving human reproductive material, including only permitting storage and destruction of sperm by licensed bodies, with the welfare of any prospective child being paramount along with the informed consent of the donor in all material respects.

therefore, liable as bailees of the sperm for the men and were liable to compensate them for the injury which flowed from its negligent destruction.

If the property model is employed in this context, can such body samples be alienated or held on trust? Commentators have fallen into two camps on this issue. For example, Herring suggests that the property approach is wrong here as it claims all our bodily material is property and, in so doing, imagines we may have similar interests in all parts of our bodies. He suggests that we have very different attitudes towards different kinds of bodily material in different contexts.[53] In the writers' view, however, there is no obvious reason why human tissue, samples and body parts cannot be the subject of private property ownership. Interestingly, in stark contrast to Herring, Reid[54] suggests that a property approach to human body parts provides for a ready-made set of rules for their use, preservation, defence, vindication and transfer and he notes that, in practice, body parts are often treated as if they are owned. They are donated, preserved, worked on and abandoned. The very language used to describe these activities is the language of property law. Moreover, the existence of statutory regulation in this context need not detract from the adoption of a property law model.[55]

Regulatory licences and quotas

It seems that the English courts have accepted regulatory licences as a form of property interest capable of alienation. A regulatory licence is one granted by a public body, or other regulatory authority, which permits the grantee of the licence to use some resource in a certain way - only the public body or regulatory authority can ensure a resource is used in a certain fashion, in accordance with certain conditions and in a way which is in the public interest. Those without such licences cannot exploit the resource in question. Thus, such licences clearly satisfy the exclusionary test. Moreover, such regulatory licences are often paid for by the licensee, who is in a sense paying for the resource they are extracting or using. Oil, gas and fracking licences are good examples here. In *Dean v Secretary of State for Business, Energy and Industrial Strategy,*[56] it was held that a licence to drill for and extract shale gas by fracking was a property interest. Such regulatory licences are also alienable and, therefore, meet the *Ainsworth* criteria of permanence, identifiability and assumption by third parties. It would not seem too much ofa leap to suggest, (barring any statutory or policy objections) that such licences could also be the subject of a trust in favour of a third party.

Government or regulatory authority imposed "quotas" or "spectrum licences" may also amount to property. It is noteworthy that in *UK Association of Fish Producer Organisations v Secretary of State for the Environment Food and Rural Affairs,*[57] it was suggested that fishing quota units were "possessions" for the purpose of Article 1, Protocol 1 of the European Convention on

[53] J. Herring, "Why We Need a Statute Regime to Regulate Bodily Material" in Goold et al., *Persons, Parts and Property: How We Should Regulate Human Tissue in the 21st Century*, (Oxford and Portland), Hart Publishing 2016), at p.215. see K. Reid, "Body Parts and Property", University of Edinburgh School of Law Research Paper Series, No. 2015/25.

[54] See K. Reid, "Body Parts and Property", University of Edinburgh School of Law Research Paper Series, No. 2015/25.

[55] Leases, for example, are the subject of comprehensive statutory regulation and yet this does not detract from the appropriateness of a basic property law analysis of leases.

[56] [2017] EWHC 1998.

[57] [2013] EWHC 1959.

Human Rights. In this connection, unused fishing quota units are traded and have a monetary value.[58] The Privy Council has also held that textile export quotas were not things in action but were a form of sui generis intangible property.[59] In *Armstrong DLW Gmbh v Winnington Networks Ltd,*[60] it was held that a carbon emission unit was a form of intangible property. Thus, regulatory licences and quotas might likewise best be described as being within the class of intangible sui generis property.

Quasi-property rights

There are several rights and interests which may have a feel of "property", in so far as they satisfy the first exclusionary test, but fail to meet the other criteria for a property right, mentioned earlier. These may be termed "quasi-property" rights or interests. Several examples may be given to illustrate this category. In *Dobson v North Tyneside Health Authority,*[61] the Court of Appeal held that there could be no property in a corpse, but that those charged with the burial of a corpse had a legal right to its possession and control for the purposes of disposal, burial or cremation. The decision confirms the right of excludability over the corpse with those charged with its disposal or burial, but denies that property can exist in relation to the corpse itself. The *Ainsworth* criteria are, therefore, not satisfied and the corpse cannot form the subject-matter of a trust. Given, however, the excludability element which is present here, the right may be characterised as form of quasi-property.

An individual's right to privacy may also be argued to constitute a form of quasi-property in the sense that the individual has an exclusive right to enjoy life free from unwarranted intrusion and publicity.[62] However, the right is entirely personal to the individual and, therefore, fails to meet the test of transmissibility to third parties and cannot be the subject of any form of trust. For these reasons, the writers would argue that the right to privacy is, at best, a form of quasi-property only, and not property in any conventional sense.[63]

Turning to proprietary estoppel claims, these give rise to a right to exclusive relief vested in the clamant, even though the actual remedy (if it is granted) in satisfaction of the equity may not be apparent at the outset. There are, however, clearly issues of transmissibility here. Although the burden of a proprietary estoppel claim can potentially bind a purchaser of the land it affects by virtue of s.116 of the Land Registration Act 2002, it is by no means clear whether the benefit of any such claim can be transmitted to a third party. Academic opinion

[58] Cranston J concluded that the test for deciding whether regulatory licences were possessions looked to both monetary value and tradeability. His lordship cited the comments of Parker J in *R (Nichols) v Security Industry Authority* [2006] EWHC 1792, which drew a distinction between milk quotas and certain spectrum licences which had a monetary value and could be marketed for consideration either through outright sale, leasing or sub-licensing fell and those which could not be marketed nor obtained at market price.

[59] See, *A-G Hong Kong v Nai-Keung* [1987] 1 W.L.R. 1339.

[60] [2012] EWHC 10.

[61] [1997] 1 W.L.R. 596.

[62] See, for example, *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777.

[63] See, L.H. Scholz, "Privacy as Quasi-Property", Iowa Law Review (2016) Vol. 101, 1113, where it is argued that privacy is quasi-property.

and authority go either way.[64] However, Gray and Gray,[65] argue that the "preferable view" is that the benefit of any such claim can be transmitted to a purchaser of the land so benefitted.[66] If this is right and the estoppel equity generates a form of chose in action, this would also pave the way for accepting that the equity may form the subject of a valid trust. If, on the other hand, the benefit of the equity is not transmissible, the writers would suggest that it falls to be characterised as a species of quasi-property.

Similarly, a mere equity, such as the right of a leaseholder to rectify a lease, may amount to property in the form of a chose in action or, alternatively, a form of quasi-property. Case law seems to suggest that such equities can amount to a form of property in so far as they amount to a claim for equitable relief.[67] Here again, there is the element of exclusivity and certainty, and the burden of such rights are transmissible under s.116 of the 2002 Act. So far as the passing of the benefit is concerned, academic opinion is again divided, but Gray and Gray[68] suggest the balance of authority lies in favour of such transmissibility. This would, therefore, bring mere equities within the category of choses in action and, hence, a species of property. If the benefit is not transmissible, however, the writers would again argue that such equities amount to a form of quasi-property.

Conclusion

English law needs a clear and robust framework from which it can recognise private property in both its traditional and emerging forms. This article has sought to provide this framework. In particular, it has suggested that certain elements are crucial to the notion of private property under English law. These elements have been identified as: (1) the right of exclusion which an individual has over a thing or right; (2) the criteria outlined by Lord Wilberforce in the *Ainsworth* case, (namely, that to amount to property, the thing or right "must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability"); and (3) there must be the potential to establish a trust over the particular thing or right.[69] In the absence of these elements, the thing or right may still, it is submitted, be characterised as a form of quasi-property assuming the key requirement of exclusivity is present.

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[64] See, F.R. Crane (1967) 31 Conv (NS) 332, at 341; and D. J. Hayton (1990) 107 LQR 87, at 97, to the effect that the equity here is merely a personal interest vested in the original estoppel claimant, not being shareable nor transmissible to others. See also, *Matharu v Matharu* (1994) 68 P & CR 93, at 98; and *Fryer v Brook* [1984] L.S. Gaz. R. 2856. By contrast, there is Denning L.J's judgment in *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379, at 395, where his Lordship describes the estoppel equity as being available to successors in title.

[65] Gray and Gray, *Elements of Land Law,* (5th ed., OUP), at p. 1236.

[66] If amounting to an equitable interest, any transmission of the benefit would need to satisfy the formalities of s.53(1)(c) of the Law of Property Act 1925; see, G. Battersby (1995) 7 CFLQ 59, at 63.

[67] See, for example, *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch. 183.

[68] Gray and Gray, *Elements of Land Law,* (5th ed., OUP), at p. 1236.

[69] An obvious caveat is that a thing or right cannot be property if society refuses to countenance the same for policy reasons (e.g., slavery).