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What Can ‘Equity’s Darling’ Tell Us About Equity? *

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Introduction

‘The black market in stuff that just might have fallen off the back of a lorry predates lorries and probably the invention of the wheel’.¹ According to the Office of National Statistics, there were 5,066,000 incidents of crime against property in 2016 in the UK; of these, 59% had the potential to generate stolen goods that could be resold as new or ‘preloved’.² One percent of mobile phone owners (equivalent to 446,000 people), experienced a theft in the previous year. With the ubiquity of electronic commerce, and mega websites like eBay which allow people to sell used items in relative anonymity, competition between the original owners of property and purchasers from unauthorised sellers is highly likely to erupt.³ But the new electronic platforms are just new foil for one of property law’s oldest chestnuts: the conflict between an owner of assets (‘FO’), a purported purchaser of those assets under an unauthorised transfer (‘P’), and the community that has a stake in the outcome of the dispute. It is, and has always been, a legal conflict that engages a particularly complex and varied smorgasbord of values and interests. Every system for the allocation of property rights must therefore make a choice as to the values and interests the solution it offers will cater for.⁴ In this chapter, we take a close look at the particular legal dilemma of priority conflict, at law and in Equity. Our aim is to use this dilemma as a prism to examine the unique character of Equity’s contribution to property law, highlighting how the central concept of conscience shapes both the content and structure of equitable rights to assets.

The choice Equity has made – to prefer the purchaser for value without notice over a first-time equitable owner – may look like a straightforward use of the usual building blocks of property law to construct a solution to a specific permutation of this age-old conflict. This is not so. In this chapter, we argue that the choice made by Equity on this occasion reflects its distinctive nature as a body of law that is highly responsive to inter-personal morality. At the same time, its flexibility allows Equity to locate the fine point in which patterns of moral responsibility coincide with efficiency considerations. As a result, Equity is able to develop a solution that is sensitive, so far as is possible, to the incommensurable values that are at play in such an intricate conflict. The distinctive nature of Equity’s solution is particularly clear against the background of the current (i.e. post-1994) English Common Law, which treats these conflicts in a different way from civil systems or the UCC in the USA. The

¹ Mark Easton, can you persuade people not to buy stolen goods? (http://www.bbc.co.uk/news/magazine-24745784)
² ‘Focus on property crime: year ending March 2016’. Vehicle-related theft comprised 17% of the total, other theft of personal property – 15%, domestic burglary –14%, and other household theft – 13%.
⁴ We define a system for the allocation of property rights in a broad sense, as including any system that allocates control of, and access to, items of social wealth to private individuals to the exclusion of others. Debates about whether equitable rights are property rights in any narrower sense are not, therefore, relevant for our purposes. On this point see further in FN 10
English Common Law solution represents a legitimate, albeit slightly unusual, choice from both efficiency and moral perspectives. However, we wish to argue, its framework does not fit the paradigm situation to which Equity responds, namely that of a competition between a beneficiary under a trust and a purchaser of assets from a trustee acting ultra vires. In a setting of trust, considerations of justice and efficiency call for a different solution from that offered by the Common Law; and Equity – with its habit of fastening on the purchaser’s conscience, and probing into the special circumstances of every transaction – is particularly well-suited to accommodate these considerations.

The chapter proceeds as follows. We first set out the array of justice and utility considerations that provide a metric for assessing different solutions to the conflict between first owners and purchasers (henceforth FO-P conflicts). In the second part, we compare and contrast Equity’s solution (i.e. the protection of Equity’s Darling) with the approach adopted by the Common Law. We then move to examine, in the third part, how the differences between the two approaches reflect the unique features of Equity, first and foremost its engagement with the defendant’s conscience. These characteristics, we argue, enable Equity to weave an array of values and social goals into a successful strategy for coping with the challenge of incommensurable values we set out in part one.

**Part One: What We Need to Consider**

A ‘winner takes it all’ battle between innocents, which is played out in the crossroad between property and commercial law, is bound to be fiendishly difficult to solve. Some, indeed, believe that property law does not have the resources to offer a satisfactory solution to FO-P conflicts: a (largely) rule-based body of norms like property law, which is dominated by zero-sum-games, can be perceived as lacking the nuance necessary for a satisfactory solution to such intricate conflicts. But even if this is true, Equity, we argue, has at its disposal some unique tools it can employ in order to do a better job than other property law regimes. In that respect, the issue of FO-P conflicts is an excellent test-case for assessing the potential of Equity to utilise its unique feature in order to construct solutions to perplexing problems. But before we can assess the merits of the way Equity tackles FO-P conflicts, we need to draw a conceptual map of the values and social goals that any good answer to the conundrum would, ideally, address and the different principled ways in which those values can be reconciled.

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5 Allen Schwartz and RE Scott, ‘Rethinking the Laws of Good Faith Purchase’ (2011) 111 Columbia Law Review 1332. For the goals served by the zero-sum approach of property law, as compared to those promoted by the more context-specific approach of tort law, see Carol M Rose, ‘The Shadow of The Cathedral’ (1997) 106 Yale 2175.
1.1 Protecting Entitlement to Property

The question ‘what is property for’ or ‘how can we be justified in allocating control over scarce resources to individuals who will not necessarily put them to the best possible use’ has intrigued the best minds in political philosophy. Those who believe that such justification can be found have come up with a highly diverse range of opinions about where we can find it, and which uses of private property it can sanction. However, while scholars differ on the ends, goods and values that private property serves, there is a wide consensus that title must come with the authority to decide not only what use the property will be put to, but also over whether, when and to whom it will pass (or the right to have these questions answered in a manner that promotes one’s individual interests). As Charlie Webb puts it, without the assurance to the owner that ‘the dispositions he wants are the dispositions he gets… an owner’s claim to his assets would be no greater than my claim to the seat I happen to take on the bus: ‘mine’ to enjoy while I am in occupation, but free to all comers the moment I am not’. Whether ownership is designed to enable us to ‘act in relation to others in accordance with self-chosen purposes’, express our humanity, shield us from arbitrary state power or incentivise people to work and create, it cannot do so on the ‘bus seat’ model.

In an FO-P conflict, the first owner did not voluntarily transfer her rights to the purchaser; the decision to do so is not made in accordance with either her will or her interests. When the Common Law has to decide whether (a full) title nevertheless passed, it therefore contemplates an exception to a principle that stands at the foundation of positive property law— *nemo dat quod non habet*—and the justifying principle behind this law (whatever it may be). When FO-P conflicts flare up in Equity, the legal structure of the parties’ rights is different. If the trustee sells a trust asset, the question is not whether he transferred the equitable interest of the beneficiary (he cannot), but whether the equitable interest disappeared as a result of the transfer of the legal title. But the *normative* question remains importantly similar to the one we find in Common Law: under which conditions are we willing to say

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6 Jim Harris’ definition of private property as involving ‘authorised self-seekingness’ is wide enough to cover this type of beneficiary ownership as well (James Harris, *The Idea of Property: Its Meaning and Power* (Oxford University Press 2003)p.76.


9 [The trustee] simply transferred his legal ownership of the shares to [the purchaser], and, on the assumption that Samba was a bona fide purchaser for value without notice, the equitable interest effectively disappeared’. *Akers & Ors v Samba Financial Group* [2017] UKSC 6 (UKSC ) per Lord Neuberger at [65]
that an owner, a person to whom the law has allocated the right to have an asset used for her benefit, has lost her rights because of an unauthorised transfer to a third party?

A decision that P gets a good title despite the involuntary nature of the transfer represents a blow to the FO’s autonomy. But since, as between the P and FO this is a zero-sum game, a decision that title does not pass means that respect for the FO’s autonomy will come at the expense of P. And as Dennis Klimchuk points out (in the context of unjust enrichment claims arising out of similar circumstances of involuntary transfer), if the purchaser did not bring about the compromise of the first owner’s autonomy, why should she account for it? In FO-P conflicts, the responsibility for the setback to FO’s autonomy lies squarely with the thief or embezzler. The purchaser’s responsibility is, at best, indirect: the maximum we can say is that if purchasers were very careful to investigate the title, thieves would lose much of the incentive to steal (assuming that very few steal or embezzle property for their personal use). This is not enough to justify treating P as responsible for the injury to FO’s autonomy. Moreover, where purchasers are constantly exposed to the risk that first owners will come after them, their autonomy, as expressed in the ability to enjoy one’s possessions and make plans for them, is also compromised. It seems therefore that, while a rule that overwhelmingly prefers the purchaser would indeed fail to properly take into account the owner’s autonomy, a strong pro-FO priority rule cannot be justified purely on the basis of the need to protect entitlement to property.

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10 One might think that the beneficiary in a FO-P conflict is to be treated differently by virtue of lacking this status of an ‘owner’, due to the quasi proprietary/personal, rather than fully proprietary, nature of the beneficiary’s interests (for an account of the beneficiary’s interest in trust assets as intermediate between a property and personal right, see McFarlane and Stevens’ chapter in this volume). However, this explanation of the difference between Common Law and Equity on FO-P conflicts puts the cart before the horse. For the way to answer the question ‘what is the nature of the beneficiary’s interest’, is to look into the different incidents of this particular relationship (like possession, right to exclude or use) in order to find out whether they support a property or in personam analysis; see, for instance, the exchange between J. E. Penner, ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust’ (2015) 27 Canadian Journal of Law & Jurisprudence 473 and Ben McFarlane and Robert Stevens, ‘The nature of equitable property’ (2010) 4 Journal of equity 18 about the importance of ‘possession’ as an indicator of the proprietary nature of the relationship. If so, it is the law on how the BO-P conflict is resolved that explains the nature of the beneficiary’s interest, not the other way around. In other words, one’s view about whether the beneficiary’s interest is proprietary or personal follows from one’s interpretation of the legal norms that apply to the right (like Equity’s darling, the ability to sue a thief directly or the way the right behaves in bankruptcy), rather than explains it.


13 Although, as the judiciary often note, such ‘rogues’ are often practically very difficult to hold to account, or in the more colourful language of Lord Salmon, ‘usually, the rogue… is not worth powder and shot’ (Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, at 907).

14 The Italian law which prefers the purchaser on a number of aspects may succumb to this criticism (see Giuseppe Dari-Mattiacci, ‘Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules’ (2015) 35 OJLS 543; see especially the table at p.555).
1.2 Corrective Justice

In the context of FO-P conflicts, corrective justice answers the questions ‘whether and to what extent and in what form and on what ground [property] should now be allocated back from one party to the other, reversing a [faulty] transaction that took place between them’.\(^\text{15}\) If before the transaction the parties were equal, in the sense that each of them had what lawfully belonged to him or her, an injustice occurs ‘when, relative to this baseline, one party realises a gain and the other a corresponding loss. The law corrects the injustice when it re-establishes the initial equality’.\(^\text{16}\) However, tackling FO-P conflicts from a corrective justice perspective faces a serious difficulty. For corrective justice, as Weinrib explains, ‘conceptualizes the parties as the active and passive poles of the same injustice’.\(^\text{17}\) But, in an analogy to Dennis Klimchuk’s contention in the context of unjust enrichment claims, the parties in FO-P conflicts are not really linked as doer and sufferer of the same wrong.\(^\text{18}\) For even if the purchaser was not careful enough in examining the title (more on that below), the wrong which brought about FO’s misery, and which links the parties together, is first and foremost the theft/embezzlement, and this is not a wrong committed by P. P is in fact also a victim of that wrong. And so, it seems to us that the transfer of property from FO to P cannot really be analysed as a transaction which is constituted on a wrong and must be reversed in order to correct it.

But perhaps corrective justice is after all the right perspective from which to explore the morality of FO-P conflicts, if we use the analogy not of unjust enrichment, but of accidents. For some, the conceptual relationship between FO-P conflicts and accidents is very intimate; according to Mautner, for example, ‘[t]riangle conflicts may well be viewed as accidents, while accidents may be viewed as events involving priority conflicts’.\(^\text{19}\) The idea is, presumably, that since neither P nor FO intended the result (i.e. involuntary transfer), and can, at most, be blamed for carelessness, their status is similar to that of parties in tort lawsuits concerned with cases of accidental loss. Corrective justice is (at least) a prominent explanatory principle behind one idea of tort law, namely, that one may be made to bear the cost of a loss to which she has a causal connection even if she never intended to cause it.\(^\text{20}\) And if conflicts between first-owners and purchasers are indeed a kind of accident, one could argue that a successful solution will run along the lines of corrective justice. Alas, the analogy between FO-P conflicts and accidents can only be of limited assistance in helping us to solve the question who should


\(^{16}\) Ernest Joseph Weinrib, **Corrective justice** (Oxford legal philosophy, Oxford University Press 2012), p.16

\(^{17}\) Ibid, p.2

\(^{18}\) Klimchuk, ‘The Normative Foundations of Unjust Enrichment’, p.87


be the new owner of the property in dispute. If the analogy with tort law is to work, we need to establish some kind of fault which can be pointed out as the cause of the other party’s woes (unless, that is, you want to invoke the highly controversial concept of strict liability as a basis of responsibility). But in many cases of FO-P conflict no fault can be identified (except that of the thief, of course). When we look at these cases, a deep structural difference between negligence law and property law comes to light. In negligence law, we have a person who suffered a loss, and the assumption is that unless she can show that someone else must bear the cost of repairing it, she has to pick it up herself. In property law, in contrast, the FO who suffered the loss of theft or embezzlement is assumed to be entitled to the property since she never passed her title voluntarily. The burden of proof is on P to show that the title nevertheless ought to be transferred (or considered as transferred) to him.

We have already shown in 1.1 that the nemo dat rule – according to which the thief/embezzler could not transfer to the purchaser a title he never held – embodies values that underlie any regime of private property. And so, while it need not be an exception-less, or even a very strong rule, it makes a lot of sense to use it as a baseline for asking questions about transfer of title to property. Thus, if we want to remain within the framework of property law as we know it, the question we should ask is ‘under which conditions ought FO to be deemed to have given up her title, even though the transfer was not voluntary’. This question assumes a very different allocation of burdens from the one underlying the negligence model, namely, that FO will not have the loss repaired, i.e. the property returned, unless she can show that P is negligent. The legal analysis of FO-P conflicts therefore runs on lines that are materially different from accidents. Consequently, corrective justice does not seem to be the right prism through which to view FO-P conflicts. In the Aristotelean typology, FO-P conflicts are better understood as problems of distributive justice, to which we turn now.

1.3 Distributive Justice

Principles of distributive justice provide ‘moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies’. When these principles apply to legal disputes, ‘instead of linking one party to the other as doer and sufferer [as corrective justice does,

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21 On the problems of turning the solution to FO-P conflicts on negligence standard, and a suggestion on how to solve them, see Schwartz and Scott, ‘Rethinking the Laws of Good Faith Purchase’ (n 5).
22 See text to n 8 above. For a criticism of this baseline, see, for example, D Stevens, ‘Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things Part II’ (1989) 39 University of Toronto Law Journal 325, 329, describing the rule as perhaps representing ‘merely a remnant of a more superstitious age’.
they] link all the parties to the benefit or the burdens they all share’.24 The two parties to FO-P conflicts, who have fallen a victim to the wrongs of the thief/embezzler, both have a good claim to a scarce resource – the property that FO was wrongly deprived of and P paid to buy. The judge, *qua* ‘animated justice’, is thus called upon by principles of distributive justice to offer a fair distribution of the burdens created by the wrongdoing.25 While the model of distributive justice also differs from the doctrinal property law (‘nemo dat’) paradigm, in that it treats the parties as having an equal claim to the property, it offers, we think, a neutral position from which to examine the automatic preference given to FO in the doctrinal framework.

Distributive justice is traditionally analysed as responding to various bases. Here we look at two that are most relevant to FO-P conflicts: need, and desert.

1.3.1 Need

‘The core idea of the concept of needs may be generalized to imply that scarce resources should be allocated to avoid excessive hardship and suffering, i.e., to parties who would undergo a great amount of suffering if they were deprived of such resources’.26 According to Mautner, ‘need’ is therefore one of the most relevant bases of justice for resolving FO-P conflicts.27 This may be so in theory, but the practical difficulties of using a need standard for solving FO-P conflicts in a court of law are obvious: it is not easy to decide which human needs should be taken into account in resolving the dispute. Psychological attachment to the property is difficult to weigh against economic factors, such as each party’s ability to internalize the loss, or the importance of the use being made of the particular thing (e.g. a set of tools that FO uses for her craft). Even if we agree on which needs are to be taken into account, it is impossible to determine *ex ante* who is likely to be in more need: a typical FO or an archetypal P. If so, a ‘need’ criterion will have to see the judges doing the balancing work on an *ad hoc* basis – a decision-making process which will rob the parties of a certain and predictable baseline for further negotiations. Such formidable rule of law considerations suffice, we believe, for ruling out ‘need’ as a basis for a just distribution of the burdens created by FO-P conflicts.

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24 Weinrib, *Corrective justice* (n 16), p.18
25 Term used by Aristotle in Aristotle and W. D. Ross, *The Nicomachean ethics* (Oxford University Press, 2009), IV.
27 Ibid, ibid.
1.3.2. Desert

Sidgwick’s remark that ‘men ought to be rewarded in proportion to their deserts’\textsuperscript{28} strikes many people as a truism. In a just state, so the thought goes, ‘in every case in which a citizen… deserves—in virtue of his or her political economic desert bases—to have some political economic desert, he or she gets it’.\textsuperscript{29} Views as to which features secure desert are varied. Some believe that to be deserving, one must be responsible for having the feature on which the desert claim is based. In the context of FO-P conflicts, Locke’s claim that God gave the world to the ‘industrious and rational’, and the great emphasis he places on the value of labour is highly relevant.\textsuperscript{30} The argument that one deserves the fruit of one’s labour favours FO – at least, if she produced the stolen/embezzled property. But in most cases, both FO and P will have acquired the property simply by spending money to purchase it, so that the special relationship between labourer and the fruit of her labour will not help us find who is more deserving. A very different picture of the basis of desert is drawn by consequentialists who believe that someone deserves something if giving it to her would lead to the best possible outcome overall. Below, we discuss efficiency-based solutions to FO-P conflicts which follow this route. Justice, in this solution, is no longer a matter as between the parties to a specific dispute (as corrective justice would have it), but rather a large scheme of distribution that aims to maximise the satisfaction of preferences across the entire community.

But those who subscribe to the ‘Autonomy of Desert’, i.e. the view that desert claims cannot be justified by appeal to claims about any other normative notion, will not stray into such considerations of overall utility but consider the inherent features of the parties to the dispute.\textsuperscript{31} Vulnerabilities which hamper human flourishing and can only be remedied by some sort of collective effort are good examples of such a desert-generating inherent feature. Our defencelessness as individuals in the face of natural disasters immediately comes to mind.\textsuperscript{32} Vulnerability to crime is another case in point, and gets us closer to FO-P conflicts. Owners are susceptible to falling victim to crimes against their property, and it is unreasonable to expect them to fend this risk off all by themselves. Helping them to reclaim stolen property can be one element in a package of property-defence measures which owners deserve to receive from the state. The other side of the coin is that an FO who did not do what can be expected of an individual to minimise her exposure to harm does not deserve the state’s help in repossessing the property. Yet, the human susceptibility to being cheated arguably places the purchaser in a position of no lesser claim to desert: a title-transfer mechanism can then be conceptualised as part of the protection from fraud we deserve from the state. However, unlike the need base, in some permutations of the FO-

\textsuperscript{28} The Methods of Ethics (Macmillan, reprinted 1907) Bk III, Ch. 5.
\textsuperscript{29} Fred Feldman, Distributive Justice (Oxford University Press 2016), p.27
\textsuperscript{30} Locke, Second Treatise on Civil Government Chapter 5, section 34, and 40-44.
\textsuperscript{31} See for example, Feldman, Distributive Justice (n 29), section 2.1
\textsuperscript{32} Ibid, p.77
P conflicts it is definitely possible to tell \textit{ex ante} which party displays a greater vulnerability. And as we will see below, this fact will enable a good lawmaker (the Courts of Equity as it happens) to take the desert basis on board when designing a solution to FO-P conflicts.

Other types of justice like retributive justice have been mentioned by some writers as a possible framework for solving FO-P conflicts.\footnote{See Mautner, ‘The Eternal Triangles of the Law”: Toward a Theory of Priorities in Conflicts Involving Remote Parties’ (n 19), pp. 103-4.} But we will leave the prism of justice here, and focus in the rest of this part on the social goals that may be promoted or thwarted by the way we formulate the priority rule for FO-P conflicts. We will accept here, without arguing for it, the view that such considerations can play a legitimate role in the array of considerations in favour, or against, a solution to disputes in private law.\footnote{Contra Weinrib’s view that ‘no distributive consideration can serve as a justification for holding one person liable to another’ (Weinrib, Corrective justice, p.19), but in alliance with legal economists, and neo liberals like Ḥanoeh Dagan, Property : values and institutions (Oxford University Press 2011), chapter 3, and others. See also Matthew Harding’s chapter in this volume, arguing that a wider view that takes into account the effect of the court’s decision on the robustness of the social institutions that stand at the background of the claim (like the trust) is typical of Equity.}

\section*{1.4. Efficiency}

Space limits do not allow us to explore the efficiency of different solutions to the FO-P conflicts in any detail. Instead, we sketch a few of the goals, sometimes incommensurable, that the literature suggests an efficient solution ought to achieve, and highlight the difficulties in realizing these goals, or in determining what it would take to do so:

\subsection*{1.4.1 Security in entitlements and flow of commerce}

When parties to FO-P conflicts appear in court, their interests are diametrically opposite—one’s gain is the other’s loss. But from a bird-eye view, a pro-P priority rule reduces the value of ownership \textit{for all owners}, as it renders this right prone to the risk of being lost to a third party. This reduction of the value of ownership will, of course, affect P as well – what he gets under the pro-P rule is worth less. As a result, everyone’s incentive to labour, in order to be able to afford ownership or to improve what one already owns, is accordingly reduced.\footnote{Barak Medina, ‘Inducing Investment in Gathering Information by Settling Conflict of Rights between a Bona Fide Purchaser and the Original Owner [Hebrew]” (2000) 5 HAMISHPAT 117, p.50. On the instrumental value of property as promoting work, investment and other beneficial behaviours and institutions see J. W. Harris, Property and justice (Clarendon Press 1996), chapter 15.} The flipside is that, where potential purchasers worry about the security of transfer and must invest in checking the title to a property they are interested in, the flow of
commerce slows down and it is harder for goods to end up in the hands of the person who values them most.36

But is such a chilling effect really a necessary consequence of a pro-P rule? After all, if any advantage given to P is also a disadvantage to the same person when he becomes an owner, why should the rule of priority (either way) affect the flow of commerce?37 Those who insist that the priority rule we pick does have a chilling effect on the market point out that the risk to the owner, lest her property is stolen and sold off to a purchaser with a defence, is lower than the risk that an item one contemplates purchasing may be located by its original owner.38 And if the risks do not cancel each other out, purchasers will need to pay a ‘premium’ to move to a lower risk position (i.e. that of an owner), and their reluctance to do so will hold back the flow of transactions. One factor that makes it relatively easy to incorporate the goal of ‘flowing markets’ into the rule we choose is our ability to predict, at least in some cases, whether the rule will have the desired effect. Thus, for some assets, like notes and bills, the power to transfer is central to their function; with idiosyncratic exceptions, it is unlikely that owners value the possession of such assets just as such, and apart from their potential to be subsequently transferred to others for value.39 With regards to them, therefore, purchasers should get priority;40 the disadvantage to an owner in being unable to easily transfer such assets to a willing purchaser is likely to outweigh any advantage of security from loss of title.

1.4.2 Clear and predictable rules

There is no need to repeat the benefit to all members of the community of a clear and predictable rule which minimises the costs of litigation, and forms a baseline for negotiations following which the party who values the property most will become its owner. To fulfil this Rule of Law ideal, the legal norms of priority ought to be ‘typical situations’ rules, rather than case-by-case principles, a structure that saves the court the need to bring the thicket of considerations we are exploring here to bear on each novel situation.

36 On the origins of the nemo dat rule in Roman law as protecting the res mancipi - the type of property that is inextricably tied to the status of the paterfamilias see Kozolchyk, ‘Transfer Of Personal Property By A Nonowner: Its Future In Light Of Its Past.’, pp 1462-5.
38 Medina, ‘Inducing Investment in Gathering Information by Settling Conflict of Rights between a Bona Fide Purchaser and the Original Owner [Hebrew]’, p.50
39 Cf Moss v Hancock [1899] 2 QB 111, where the owner of a stolen gold piece had always kept it in a cabinet in his drawing room, never having let it into circulation as currency, and valued it primarily as a curiosity. As a result, the purchaser of the coin from a thief did not have any defence against the original owner. We might justify this result on the basis that an owner’s valuation of his security of title, in the case of that particular coin, outweighed any gain that could result from security of transfer.
40 Medina p.51; Weinberg. pp. 591
1.4.3 Prevent the conflict from arising in the first place

The first and foremost state-induced disincentive to stealing and handling stolen goods is, of course, the criminal law.\(^{41}\) Alas, the criminal law system is not nearly strong enough to uproot theft or the market for selling and buying the loot: in the UK, just 7% of stolen goods were recovered from the £2 billion of valuables taken from homes and businesses in two million break-ins between 2011 and 2016.\(^{42}\) From the perspective of the law enforcement authorities, any help they can get from private law would therefore be welcome. Legal economists actually disagree about whether theft is a ‘social cost’ in and of itself, as some prefer to analyse it as just another means by which property is transferred from one person to another.\(^{43}\) But they do seem to agree that the phenomenon of theft is utility-reducing as it ‘increases transaction costs in the transfer of property relative to other modes of transfer by imposing huge costs on individuals, in particular on potential victims who invest in protection measures’.\(^{44}\) And so, even without committing ourselves to intricate arguments about the immorality of theft, we can agree that if forming the priority rule in a particular way will affect the players’ structure of incentives, so as to reduce the chance that FO-P conflicts ever arise, there is value in following this formula. Nipping FO-P conflicts in the bud can be achieved by tackling one (or both) of the events that lead to them, namely, the theft and the sale of the stolen/embezzled goods. Alas, a formulation of the rule that affects FO in the right direction may have the opposite effect on P, while potential thieves/embezzlers may be deterred by yet another way of devising the rule. Let us see how.

1.4.3.1 Before the theft

A Press Association analysis of Home Office data shows that in 2014/15, forces in England and Wales closed 80.2% of investigations into break-ins without identifying a suspect. The prevention of burglaries is so low on the agenda, that in the same year, Leicestershire Police revealed they had not fully investigated break-ins at odd-numbered houses as part of an experiment to look at ways of saving money.\(^{45}\) Surely the most eye-catching of all crimes against property is art theft: the global market for stolen art is worth $6Bn. With an appalling rate of recovery – between 10% (according to the optimists) and 2% (as per the sober) – the consensus is that ‘once art is stolen, there’s an abysmally small chance of getting it back’.\(^{46}\) Prevention seems to be the best strategy for reducing the social price of theft. Can

\(^{41}\) For some commercially significant assets, such as land, state-run registries of transactions and/or rights also provide an important mechanism for pre-empting fraud.

\(^{42}\) http://www.huffingtonpost.co.uk/entry/nine-out-of-10-burglaries-unsolved-and-7-of-stolen-goods-recovered_uk_58de0a03e4b08194e3b8e41d


\(^{44}\) Omri Ben-Shahar, Property Rights In Stolen Goods: An Economic Analysis (1999) p.2

\(^{45}\) http://www.bbc.co.uk/news/uk-england-leicestershire-33788264

the priority rule in FO-P conflicts create the conditions in which prevention is encouraged? From a socially-optimal perspective, the owner ought to invest in precautions against theft until ‘the marginal reduction in the probability of theft times the goods’ value to her equals the marginal precaution cost’.\textsuperscript{47} A pro-FO priority rule enhances the chances that FO will be able to retrieve the property if it is stolen or misapplied; as a result, where that is the case, investment in protecting it in the first place is less expedient from FO’s perspective. Thus, a priority rule which prefers FO, especially if it does not sanction a careless owner, incentivises a suboptimal investment by owners in guarding their property.

A pro-FO priority rule would influence the chances of the theft taking place in another way: if purchasers know that their chances of retaining property they are thinking of buying are lower – because the priority rule would give it back to their original owner if she finds the property – they will be reluctant to buy it or will offer a lower price for it. That would disincentivise thieves, and bring about a further reduction in the amount of precautions by owners.\textsuperscript{48} An 18\textsuperscript{th} century observer already had this advice for theft prevention: ‘deprive a thief of a safe and ready market for his goods, and he is undone’.\textsuperscript{49} If you are after reducing thievery across the community, you would be happy with this result. But if you think this is only a worthwhile cause if done efficiently, i.e., inter alia, when owners make the optimal investment in precautions, you will see this as an unwelcome result of a pro-FO priority rule. And here is another cause for scepticism about the effect of the priority rule formulation on the thievery: the belief that thieves can be incentivised to stop by manipulating the law is based on a highly-contested assumption that criminals act rationally, i.e. choose the best means to promote their ends.\textsuperscript{50} But behavioural economics demonstrates that people make systematic mistakes in decision-making, and criminals, in particular, may not use objectively verifiable evidence of the frequency and severity of the punishment for the offences they consider committing.\textsuperscript{51} In addition, criminal activity is a prime example of ‘bounded self-control’, i.e. activity in which poor control of impulses explains severe deviations from rationality (the problem is particularly acute with criminals who are addicted to substances, as many offenders against property are).\textsuperscript{52} That said, sophisticated thieves, e.g., those who target specific art works or other valuable goods, are more likely to engage in a cost-benefit calculation and take into account their chances of selling the stolen goods for a profit. Still, with regards to the vast

\textsuperscript{47} Schwartz and Scott, ‘Rethinking the Laws of Good Faith Purchase’ (n 5), p.1339
\textsuperscript{48} Ben-Shahar, Property Rights In Stolen Goods: An Economic Analysis (n 44), p. 25
\textsuperscript{49} Patrick Colquhoun ‘A Treatise on the Police of the Metropolis’ The European Magazine, and London Review, Volume 29, p.386
\textsuperscript{52} See more in Glenn D. Walters The Decision to Commit Crime: Rational or Nonrational? VOLUME16, ISSUE 3, PAGES 1–18 (2015) Criminology, Criminal Justice Law, & Society
majority of thefts, all arguments that a certain formulation of the priority rule can reduce their occurrence should be taken with a pinch of salt.

1.4.3.2 After the theft
Once property is stolen, we might reduce the chances of a FO-P conflict by incentivising the owner to search for her property, in the hope that she finds it before it is sold on. In the face of public authorities’ unwillingness to spend on recovering stolen goods, private owners can invest their own resources in searching, by hiring private detectives, filing a complaint with the police, searching online markets like eBay etc. Under an FO-favouring rule, FO gets a better chance of retrieving the property if she only manages to find it after it was sold to a third party. Such rule therefore incentivises her to invest more in searching for the misappropriated goods, as she knows that even if it was sold on, the investment may bear fruit.53

But a more likely way of reducing the amount of FO-P conflicts at this stage is to encourage potential purchasers to investigate the title of goods they contemplate buying. The purchaser should ideally invest in ensuring that he is getting a good title until ‘the marginal increase in the probability of receiving a good title times the goods’ value to him equals the marginal inquiry cost’.54 Yet, purchasers will spend less than this ideal sum on scrutinising the title because they know that there is a fair chance that the real owner (if there is one) will never find her property. Can the way we formulate a priority rule further detract from the ideal investment, or improve it? Some writers are doubtful about the ability of a priority rule to influence the behaviour of purchasers, especially if exchange of misapplied goods is a relatively small fraction of the trade in merchandise of this type, and where goods are unidentifiable so the purchasers can do very little to investigate the title.55 Others believe that purchasers can, if they want, notice shady features in a deal they are being offered, and invest in substantiating or refuting the suspicion.56 If so, lawmakers should be worried by the adverse effect which a pro-P priority rule may have on the purchaser’s incentives to investigate the title. A rational maximiser of utility will calculate what minimum investment will be sufficient for proving to the court that he fulfilled the conditions for getting priority according to the rule, e.g. bona fides. The result of this calculation may be very different.

53 Schwartz and Scott, ‘Rethinking the Laws of Good Faith Purchase’ (n 5), p. 1350
54 Ibid, p.1339
55 Ben-Shahar, Property Rights In Stolen Goods: An Economic Analysis, p.3. Indeed, according to Mautner, purchasers (under the UCC) are subject to a narrow standard of actual knowledge, rather than negligence because ‘generally purchasers of assets or rights in assets are unable to take any meaningful precaution- any measures to verify whether a prior conflicting claimant exists’, see Mautner, ”The Eternal Triangles of the Law”: Toward a Theory of Priorities in Conflicts Involving Remote Parties’ (n 15), p.117
56 See for example advice in http://www.scambusters.org/stolengoods.html
from the ideal investment. This consideration would be a real drawback for a pro-P rule of priority, unless the court has tools to tackle it (as, to foreshadow, the Court of Equity has).

In the next Part, we move to look more closely at the solution offered by Equity to FO-P conflicts that arise between a beneficiary and a purchaser of a legal title to the subject matter of the trust. Against a foil of highly pro-FO rules of the kind offered by the common law, the special attributes of the ‘Equity’s darling’ solution to FO-P conflicts come to light. In the third part, we build on the insights of the first two parts and ask how the Chancery Court employs the distinctive modus operandi of Equity to reach a good enough solution to a complicated permutation of FO-P conflicts.

**Part Two: Equity’s darling and Nemo Dat Exceptions at Common Law**

In his *Lectures on Equity*, Fredric Maitland proposed that the distinctive character of equitable interests can be understood by reference to two examples, ‘which in the eyes of the moralist may seem closely similar but between which the lawyer will see a vast difference.’ Both are classic FO-P conflicts. In the first, there is a clash between a legal owner of land and X who has paid money to a third party to buy that land in reliance on a forged deed. In the second example, the clash is between a beneficiary under a trust and Y, who has paid money to a trustee to buy the trust land in reliance on a forged deed concealing the existence of the trust. Both X and Y have diligently inspected the forged deeds and found nothing suspicious, and both have given value. Nevertheless, Maitland says, X will undoubtedly lose to the freeholder in the first scenario and Y will likely win against the beneficiary in the second. This is because ‘X has had the misfortune to buy from one who had nothing to sell’; by contrast, Y, ‘having come to legal ownership bona fide for value and without notice, actual or constructive, of [the beneficiary’s] rights,’ is unaffected by those rights. In other words, the Common Law solves the priority conflict by applying the nemo dat principle: FO keeps his land because she has done nothing to give it away, and the purchaser’s innocence and diligence are irrelevant, as is the fact that he has given value. Meanwhile, Equity solves the priority conflict very differently, by asking whether the purchaser has become a legal owner and, if so, whether he has given value and how he has behaved. This difference between Common Law and Equity, according to Maitland, captures a fundamental distinction between legal and equitable rights and it provides an important plank of his argument that equitable rights are importantly different from common law property rights.

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57 Schwartz and Scott, 'Rethinking the Laws of Good Faith Purchase' (n 5), p.1351  
59 Ibid 130.  
60 Ibid.
This argument is, however, complicated by the existence of bona fide purchase defences at Common Law. Maitland himself noted that ‘sales in market overt’, and sales that complied with section 9 of the Factors Act 1889, could destroy a Common Law owner’s title to the thing sold and confer a good title on the purchaser—where the purchaser was bona fide, had given value, and did not have notice of the problem with the seller’s title. While the market overt exception—a narrower version of which is still an important exception in the UCC—was abolished in England in 1994, the solution to FO-P conflicts offered by the Common Law has retained the structure Maitland is grappling with. The baseline preference is for FO over P, subject to a cluster of specific and context-defined exceptions that favour ‘bona fide purchasers’. For example, in the context of sales of goods, P, like his American counterpart, can win where FO has entrusted someone else with possession of the goods she has purchased and where the owner is estopped from denying the ownership or authority of a seller by her own representations or negligence. Another standard exception to the pro-FO rules is specific to chattels which perform the functions of money, such as negotiable instruments and cash. Here, again, a purchaser who can show he was bona fide can get good title.

Maitland acknowledges that these Common Law defences ‘at first sight…may seem analogous to the case of the person with an equitable estate who loses it when a bona fide purchaser obtains the legal estate for value and without notice’. Nevertheless, he insists, the analogy is misleading: there is really a ‘marked difference’ between the two cases. This conspicuous disparity comes down to the structure of the argument made by P in the two scenarios. In the case of a Common Law defence, like that of a sale in market overt, P gets ownership but does not get it from FO, who does not have it to give. His argument, against FO, is that he has somehow obtained the very rights that were once held by FO, despite FO’s lack of consent to the transaction. In the case of the sale by a trustee, P need not say that he has obtained the very rights of the beneficiary to the trust property; having obtained the trustee’s own title to the trust property, he can point to the consent of the trustee as the source of his ownership, and argue, as against the beneficiary, that ‘there is no reason for taking away … the legal right which

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61 Providing a defence where the owner has agreed to allow a prospective purchaser of goods to take possession and that purchaser deals with the goods before the owner’s title has actually passed to her; substantively re-enacted by the Sale of Goods Act 1979, s 25. The ‘Market overt’ rule has been explained in an early 17th century KB case as stating that ‘if plate be stolen and sold openly in a scrivener’s shop on market day, this shall not alter property; otherwise if it had been in a goldsmith’s shop’ (77 Eng. Rep.180, cited by Kozolechyk, ‘Transfer Of Personal Property By A Nonowner: Its Future In Light Of Its Past.’, p.1499)  
62 The thought being that in light of changing social and economic conditions—most people are no longer dependent on local markets and the rule no longer serves a useful purpose. See Sale of Goods (Amendment) Act 1994, c.f. UCC § 2-403  
63 Sale of Goods Act 1979, s 24 (buyer in possession) and 25 (seller in possession), and s 21. For the limited meaning of negligence in this context, see (discussion of Moorgate below). Some exceptions are specific to kinds of goods, for example, where a car is let on hire-purchase, there is a defence in favour of a private purchaser of such a car (Hire-Purchase Act 1964, section 27). See UCC sec 2-403(2) (the entrustment rule).  
64 Bills of Exchange Act 1882; Miller v Race (1758) 1 Burr 452  
65 See also U.C.C, Article 3 section 4  
66 Maitland, Equity: a course of lectures (n 59), p.139.  
66 Ibid.
has thus been transferred to him. As Lord Mance explains in the recent Supreme Court decision of Akers & Ors v Samba Financial Group,

[i]f the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular… bona fide third-party purchasers for value (Equity’s “darling”).

It is not clear, however, how this formal and structural difference between the operation of the defences at Common Law and in Equity reflects any significant normative difference between the choices made by the two jurisdictions. Both appear, in some circumstances, to favour a purchaser for value in good faith.

In his Reading on the Statute of Uses, Francis Bacon is baffled by the same conundrum. In discussing the nature of the use (the pre-16th century form of trust), Bacon notes that a purchaser for value of stolen goods who buys in market overt can acquire a good legal title to those goods. Like Maitland, he compares this with the Equity’s darling defence, and argues for a fundamental distinction between the two cases, albeit on somewhat different grounds. He contends that the reason why a purchaser in market overt will get a clean title with or without notice, while a use will bind any purchaser who takes with notice is that ‘chancery looketh farther than the Common Law, namely, to the corrupt conscience of him that will deal with the land, knowing it to be in equity another’s … so that consideration, or no consideration, is an issue at the Common Law; but notice, or no notice, is an issue in the chancery.’

As with Maitland’s account, it is not immediately clear what this analysis is getting at that is of any normative importance. Bacon could not have meant that a purchaser who actually knew that his seller lacked title would get a clean title in market overt; this is not how the archaic defence worked at Common Law. Meanwhile, as Bacon himself notes, a purchaser of land from a feoffee to use (equivalent to the modern trustee) could only escape liability to the cestui que use (the beneficiary) if he had given consideration; both in Equity and at Common Law, no defences were available to mere donees who had not given value. Both the Common law and Equity seem, then, to have been interested in ‘notice, or no notice’ and ‘consideration, or no consideration’. What is the basis for Bacon’s view

67 Maitland (n 59) 140.
68 Akers & Ors v Samba Financial Group per Lord Mance at [51], see also Lloyd LJ in Independent Trustee Services Ltd v GP Noble Trustees Ltd [2012] EWCA Civ 195
69 For a comparison between the medieval use and the modern trust, see N G Jones, ‘Uses, Trusts, and a Path to Privity’ (1997) CLJ 175, 176-182. _
70 W H Rowe (ed.), The Reading Upon the Statute of Uses of Francis Bacon (W Stratford, London 1806) 16.
71 2 Co Inst 713: ‘If the buyer doth know whose goods they were, and that the seller thereof hath at most a wrongful possession, this shall not bind him that right hath’.
72 See W S Holdsworth, A History of English Law: Volume 4 (3rd edn, Methun & Co Ltd, 1945) 432., and 2 Co Inst 713: ‘It must be a sale and not a free gift, without any valuable consideration; for fairs and markets were not instituted for gifts but for sales[,]’. 
that notice—which goes to conscience—is in some sense the special concern of Equity, while the Common Law maintains more of a focus on consideration? We believe that despite their surface opaqueness, these arguments made by Maitland and Bacon do point to substantive differences in Equity’s approach, both to the availability of purchaser-protective defences and to the ‘without notice’ standard that a purchaser must satisfy to avail himself of such a defence.

2.1 Availability of purchaser protection
The general approach of the Common Law to the bona fide purchaser is well illustrated by the decision in *Dyer v Pearson*. The claimants had authorised one Smith to buy thirty bags of wool on their behalf. Smith took delivery of the wool and the bill of lading, and hired the first defendants, who were warehouse keepers, to store it. Nothing in the bill of lading revealed the claimants’ ownership of the wool, and Smith was entered in the warehouse keepers’ records as its owner. He subsequently borrowed £528 from them for his own purposes on the security of the wool, and sold ten bags of it to the second defendant, Clay, for £579. Clay paid off the £528 debt and the first defendants duly delivered the wool to him, although by then they had been notified of the claimants’ title. The claimants sued all the defendants in trover. On the first hearing of the claim, Abbott CJ instructed the jury to determine ‘whether Clay had purchased under circumstances which would induce a reasonable, prudent, and cautious man to believe that Smith… had authority to sell’ or if, contrariwise, he had purchased under circumstances ‘which ought to excite his suspicion’. He directed them to find for the plaintiffs if the circumstances were suspicious, and otherwise to find for the defendants. Obeying these instructions, the jury found in favour of the defendants: they had transacted with Smith under circumstances that led them to believe he had the authority to sell the wool, and would have led any ‘reasonable, prudent and cautious man’ to believe the same. An appeal against the decision succeeded, on the grounds that the jury had been misdirected. Abbott CJ agreed that he had asked the jury the wrong question, since ‘the general rule of the law of England is that a man who has no authority to sell, cannot, by making a sale, transfer the property to another.’ There was only one exception, market overt, which was not engaged on the facts. Thus, ‘even if there was an unsuspicious purchase by the defendants’, they were unable to defend themselves against the claim in trover—unless, ‘perhaps’, if the claimants had ‘by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property’. The question whether they had done this was the most favourable way of putting the case for the defendant, and the dispute was sent back for a new trial on that issue.

73 (1824) 3 B & C 38, 107 ER 648.
74 (1824) 3 B & C 38, 39-40; 107 ER 648.
75 (1824) 3 B& C 38, 42; 107 ER 650.
76 ibid.
Contrast the position in Equity. Suppose that Smith, instead of being an agent, had been a trustee of the legal title to the bags of wool and Clay had purchased that title from him. The conduct of the claimants, as beneficiaries under a trust, would have been irrelevant. The important question would have been the one put to the jury the first time around—had Clay purchased ‘under circumstances which would induce a reasonable, prudent, and cautious man to believe that Smith, of whom he purchased, had authority to sell’? If so, he would have won: ‘from such a purchaser, a Court of Equity takes away nothing which he has honestly acquired,’ ‘however hardly it may operate on the persons on whom … fraud has been committed.’

Equity’s starting point, therefore, is different from that of the Common Law. A purchaser, however innocent and cautious, cannot defeat a legal owner’s title unless there are some special circumstances that justify a subordination of the legal owner. By contrast, an owner in Equity, however unfortunate or needy, cannot defeat a purchaser of a legal title, unless there are some special circumstances that justify a finding that the purchaser has not acquired the asset with clean conscience.

The Common Law’s approach cannot be explained as built upon a general quest after the person who can most efficiently minimise the utility costs arising from a fraudulent transaction. For it does not adopt a broad principle that allocates loss to the person who, as between owner and purchaser, bears more causal responsibility for the loss. Nor does the Common Law generally penalise owners for failing to avoid loss of this kind, even in circumstances where the potential loss-avoidance measures are cheaper for owners than for purchasers. It adopts a much narrower strategy, limiting the circumstances in which an owner will bear the loss to a discrete set of situations that do not straightforwardly map either on a cost/benefit analysis or on ideas of desert based on carelessness or irresponsibility. A causal link between the owner’s carelessness and the purchaser’s loss is neither sufficient nor, always, necessary for the purchaser to have a defence at law. In the sale of goods context,

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78 For a detailed overview of these situations in the context of sales of goods, see L Merrett, 'The importance of delivery and possession in the passing of title' (2008) 67 CLJ 376.
79 Cf Bassett v Nosworthy (1673) Fin 102, 104; 23 ER 55, 56: ‘Precedents of this Nature are very antient [sic] and numerous, viz where the Court hath refused to give any Assistance against a Purchaser either to an Heir, or to a Widow, or to the Fatherless, or to Creditors, or even to one Purchaser against another.’
80 See 1.4.3 above.
81 Contra the well-known dictum of Ashhurst J in Lickbarrow v Mason (1787) 2 D & E 63, 70; 100 ER 35, 39 that English law recognises ‘a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.’ As has been pointed out, the dictum has most often been cited to criticise it or to deny its general application and only rarely applied: see M Bridge, Benjamin’s Sale of Goods (9th edn, Sweet & Maxwell 2016) at 7-008 and authorities cited there.
82 In Farquharson Bros & Co v C King & Co for example, Lord MacNaghten emphasised that carelessness on the part of an owner and diligence on the part of a purchaser would not displace the normal preference of the Common Law for the owner: ‘unless there has been a sale in market overt,’ an owner who loses his chattel to a finder will be able to recover it from a purchaser from the finder, and this right ‘is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been’ ([1902] AC 325). The application of this principle by the majority of the House of Lords in Moorgate Mercantile Co Ltd v Twitchings illustrates the apparent irrelevance of the cost of loss-avoidance as between owner and purchaser ([1977] AC 890).
the law is attentive to situations where the owner has allowed the property to be out of her possession, or where she is responsible for the seller’s apparent ownership or apparent authority to sell.\(^{83}\) Thus, it has refused to provide a defence to a purchaser, however innocent, from a seller who is in a position to sell goods without any consent at all on the part of the owner, even if the owner has been careless.\(^{84}\) By contrast, where transactions involving negotiable instruments and money are concerned, the law is interested in neither consent nor carelessness on the part of the owner; it prefers the purchaser in good faith who lacks notice.\(^{85}\) This very specific exclusion is, apparently, justified on the efficiency consideration (what the judges abstractly call ‘policy’) that preferring the owner in this context would seriously hamper the flow of commerce, and undermine the expectation of the parties.\(^{86}\) Thus, it is difficult to reduce the patchwork of protections that the Common Law offers to certain purchasers, in certain situations, to any single principle of loss-allocation or account of moral desert.\(^{87}\)

If we turn to the approach of Equity, can we identify a more coherent underlying principle? In Equity, we saw, we do not find a parallel structure of special exceptions to a general rule preferring equitable owners against subsequent purchasers. When a competition arises between P who purchased the legal interest and an FO who is a beneficiary, the rule gives priority to P who satisfies a set of conditions. The traditional language of the courts of Equity is that they lack the power, or jurisdiction, to reach a purchaser for value of a legal estate unless she has notice of the equitable interest. In Stanhope v Earl Verney,\(^{88}\) Lord Northington LC described the principle ‘that a purchaser for a valuable consideration [without notice] … cannot be hurt by a court of equity’ as ‘the polar star of equity’.\(^{89}\) This raises the question, which both Maitland and Bacon found perplexing, why a purchaser in Equity is in any different situation from an apparently identical purchaser at Common Law. In his comparative analysis of different solutions offered to FO-P conflict in various legal systems, Saul Levmore notes that ‘[t]he relevant incentives that the different rules can place on the owner and the purchaser are of uncertain magnitude and cut in opposite directions… Variety, or diversity in outcomes, is [therefore] explained by the difficulty of the problem’.\(^{90}\) But the case of Equity and Common Law, we want to

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\(^{83}\) E.g. Sale of Goods Act 1979, s 24 (seller left in possession by a buyer) and s 25 (buyer in possession); Factors Act 1889, s 9 (mercantile agent in possession with the owner’s consent). A very similar entrustment exception can be found in the UCC sec 2-403(2); Sale of Goods Act 1979, s 21(1).


\(^{85}\) E.g. Chichester v Hill & Son (1882) 52 LJQB 160.

\(^{86}\) In Miller v Race (1758) 1 Burr 452, 459; 97 ER 398, 402 Lord Mansfield says: ‘A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.’

\(^{87}\) As noted by A Tettenborn, proposing that the current ‘incoherent mess’ be replaced by a broad principle of ‘entrustment’: see A Tettenborn, ‘Transfer of Chattels by Non-Owners: Still an Open Problem’ [2018] CLJ 1. (1761) 2 Eden 81, 28 ER 826.

\(^{88}\) (1761) 2 Eden 81, 85; 28 ER 826, 828.

argue, is different. For here, the different solutions respond to different considerations of inter-personal morality, efficiency and justice that apply to the version of the conflict we find in each system.

One reason for the difference, we think, is that a purchaser can be unaware of the existence of equitable rights in a sense that is quite special to the institution of the trust and parallel equitable rights. While members of the public need not know who owns a piece of property at Common Law, they can expect, and be expected, to know that it is owned;\(^{91}\) thanks to the *numerus clausus* principle, they can also make a reasonable prediction as to the shape of any legal property right that might affect that particular piece of property, and tailor their conduct accordingly. Common Law rights are, in that sense, public. Trusts and other equitable interests, by contrast, are often private arrangements.\(^{92}\) Unless an official registry of equitable interests is in place—and it is notable that, where such registers have been introduced, statutory defences have superseded the Equity’s Darling defence—it is hard to know whether any equitable interests in some asset exist at all.\(^{93}\) In addition, the law leaves a legal owner free, within certain very broad limits, to create—in the form of a trust or an equitable charge—an idiosyncratic structure of rights and powers in Equity that would be hard for an individual purchaser to predict. A purchaser who buys a legal title from an ostensible owner, who happens to be a trustee, cannot be expected, by default, to predict the possibility or effect of an unknown trust. This may also explain why Equity extends its protection only to purchasers of Common Law rights, and does not grant the status of ‘Equity’s Darling’ to a person who has given value but is seeking to invoke Equity’s more flexible and more secret institutions by purchasing (only) an equitable interest.\(^{94}\)

2.1 Notice at Common Law and in Equity

In addition to the difference in availability of purchaser-protective defences, the *content* of the defence in Equity differs significantly from analogous ‘good faith’-based exceptions to the Common Law rule. This, we argue, is down to the distinctive concept of notice used by Equity. The difference is best captured by the notion of ‘constructive notice’. A purchaser with ‘constructive notice’ is ‘deemed to know the answers to questions that a reasonable person in his conditions would have asked, even if he does not actually know the answers because he did not in fact ask the questions’.\(^{95}\) Some dicta suggest...

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\(^{91}\) Property law places owners under a duty to publicise their rights in various ways, see Carol M. Rose, *Possession as the Origin of Property* (1985) 52 University of Chicago Law Review 73.

\(^{92}\) For an account of this ‘private’ and hidden character of the trust, and its implications for our understanding of the beneficial interest under a trust as a right in *rem*, see Wai Lau, Ming, *The Nature of the Beneficial Interest: Historical and Economic Perspectives*, available at https://ssrn.com/abstract=2213055, pp 38-41. See also, B McFarlane and R Stevens, *The Nature of Equitable Property* (2010) 4 Journal of Equity 1, 2, where the authors note the variety of unpredictable ways in which different equitable interests can arise by operation of law and the absence of any *numerus clausus* principle limiting their content.

\(^{93}\) E.g. Land Charges Act 1972, s 4; Land Registration Act 2002, s 29; Companies Act 2006, s 859H.

\(^{94}\) *Phillips v Phillips* (1861) 4 De Gex, Fisher & Jones 208, 45 ER 1164.

\(^{95}\) Charles Mitchell and David J. Hayton, *Hayton and Mitchell: commentary and cases on the law of trusts and equitable remedies* (13th edn, Sweet & Maxwell 2010), 1-137
that constructive notice does not apply in the context of commercial transactions. But recent authority has made it clear that, although precise expectations of a purchaser’s behaviour will vary according to the context in which he finds himself, a purchaser may still be bound in Equity if he has failed to discover facts in circumstances where his failure to inquire is unconscionable in the broad sense, ie motivated not only by actual dishonesty but also by laziness or selfishness. Meanwhile, the Common Law defences operate a laxer standard, under which a purchaser will lose his right to keep the property only if he possesses actual knowledge or if the circumstances justify an inference of a deliberate decision to abstain from inquiry, with the specific motive of defeating FO’s rights.

Unlike these Common Law defences, P will not be bound in Equity only where the facts are such that she must have been aware that there was something inherently improper or dishonest about a transaction or that it is probable that a third party right exists somewhere. If P fails to appreciate the risk that the property she is buying is held on trust, because she did not bother to make the inquiries that a reasonable person would have made in the circumstances, she will be fixed with constructive notice of the trust. In this context, the reasonable person is the person who possesses all the attributes of the purchaser herself but lacks her motive for being unaware of the facts – whether she intentionally avoided seeking the information, or hid it from herself by resorting to self-deception. Papadimitriou v Crédit Agricole Corpn & Investment Bank provides a good example. P was a bank which received the proceeds of a fraudulent sale of FO’s art deco collection; the thief used the proceeds to settle a debt he owed to P. The payment was made via a series of complex transactions, involving various different legal entities, which had no discernible commercial purpose. The Privy Council held that, in the circumstances, a reasonable bank with the attributes of the defendant bank would have made inquiries or sought advice about the reasons why the seller had gone to the trouble and expense of using such ‘a web of legal entities’, since the transaction raised a risk of money laundering or tax evasion that a reasonable bank would have investigated. This subjective standard of prudence—the test is what a reasonable P with the attributes of the actual P would have done—suggests that Equity’s concern is to capture P who, if his own interests alone were at stake, would have made more detailed inquiries into potentially dubious features of the transaction but who is willing to close his eyes to risk where the rights of others might be at stake: the purchaser who, as Lord Sumption JSC puts it, is willing to tell himself that ‘there might well … be an honest explanation’ for unusual facts surrounding the transaction in his favour, and then does not objectively investigate the evidence for and against this probability.

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96 e.g. *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 408, 507 (Vinelott J), and *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, 782 (Scott LJ).
98 See e.g. *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, at 707-8.
99 See *Jones v Gordon* (1877) 2 App Cas 616.
100 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, per Lord Neuberger MR at [97].
This focus on what P would have done if he lacked a self-regarding motive is distinctive to Equity’s concept of notice.

Thus, Equity handles the competition between FO (the beneficiary) and P (the purchaser of a legal interest) entirely differently from the Common Law, in respect of who is preferred (P), how the purchaser gets a good title (FO’s beneficial ownership disappears), and what state of mind is required of him (lack of actual or constructive notice). The next part shows that this distinctive solution to FO-P conflicts is expressive of Equity’s character as a body of rules and principles that follows the matrix of the parties’ moral accountability fairly closely, and pays close attention to the specific circumstances of the parties to the dispute.

**Part Three: Is Equity’s Darling Equitable?**

In one important sense, the solution offered by Equity to FO-P conflicts follows the Common Law (and most other legal systems): it is binary. At the end of the day, either FO or P takes the property home. In another sense, however, we saw that Equity greatly departs from the Common Law – beneficial owners do not get the same protection as a ‘normal’ owners. In what follows, we argue that Equity’s solution can be interpreted as a measured response to the melange of values and social goals that ought, ideally, be served by a solution to FO-P conflicts. Given the diversity and incommensurability of these values and goals, the ‘Equity’s darling’ solution does cannot fully address each one of them. However, in our view, Equity can be seen to employ its unique tools to achieve a result that reflects the moral merits of the case and creates an efficient incentive structure. This enables Equity to strike a good balance between the conflicting ideals that are at play in FO-P conflicts.

**3.1 Justice**

Let us look first at the way Equity’s darling is expressive of the relevant distributive justice considerations. While a priority rule that fully accounts for the parties’ needs (psychological, economic and other) would have to leave room for unacceptable levels of judicial discretion, ‘Equity’s Darling’ is a feasible solution that takes into account a significant aspect of what each party deserves. To begin with, unlike a standard P, purchasers from a trustee are highly likely to have a special vulnerability, namely, ignorance as to the existence of (or the terms of), a trust. Due to the private character of the trust, sketched above, it is very hard for a purchaser to know that the legal owner’s right does not encompass one of the most basic attributes of ownership, namely, the right to benefit from the asset.\(^{102}\)
purchaser who buys a legal title from an ostensible owner, who happens to be a trustee, deserves protection from this risk as a player in the market in reliance on the public dimension of ownership.\(^{103}\)

Moreover, as the benefits to society from a system that allows a beneficial interest to be engrafted unto legal ownership are significant, it makes sense to demand that the vulnerability that is created by the *sotto voce* nature of the trust should be redressed by communal action – here, in the form of enacting pro-P rule. And it seems only fair that the person who benefits directly from the secretive arrangement (viz. the beneficiary) will be the one made to answer for this vulnerability. Indeed, beneficiaries are also highly vulnerable to being cheated by their trustees; for this reason, a particularly stringent duty of loyalty is placed on the latter. From a distributive justice point of view, however, the innocent purchaser who never benefited from the trust arrangement is more deserving of protection than the beneficiary who enjoyed the equitable nature of her right (e.g. freedom from the *numerus clausus* and registration restrictions). Obviously, all that is true only if the purchaser indeed displays this vulnerability, namely, if he is indeed truly ignorant of the trust. Equity is highly attuned to the temptation to exploit the shelter it offers to the vulnerable, and its attempt to subvert such abuse is captured by the notions of notice and clean conscience to which we now turn.

3.2 Conscience

The bona fide purchaser for value features in various solutions to FO-P conflicts – from the UCC’s voidable title and entrustment exceptions, to civilian systems with strong ‘market overt’ protection. But when Equity resorts to this formula it adds a unique element: conscience.\(^{104}\) When the Chancery Court seeks to resolve P-FO conflicts, as Bacon explains, it ‘looketh… to the corrupt conscience’.\(^{105}\) Is there more to this reference than a linguistic frill? We have seen that the answer is a firm ‘yes’. The requirement of conscionability has an important role to play in explaining why the Courts of Equity think it their business to force some purchasers, but not others, to return the property so as to reconstitute the trust. As is the case with other Equitable doctrines where conscience is invoked, it does not grant judges a licence to resolve the FO-P conflict on a basis of their gut feeling as to which party holds the higher moral ground. The reference is rather to objective moral standards, which are transparent and accessible to anyone who is willing to engage with the moral dilemma at stake with honesty and integrity.\(^{106}\) In equitable FO-P conflicts, we saw, the limelight is on P – if he can show that his state of

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\(^{103}\) On the duty of owners to shout about their right, and the sanctions for not doing so, see Carol M. Rose, ‘Possession as the Origin of Property’ (1985) 52 U CHI L Rev 73

\(^{104}\) One of us has set out her views about the role of the conscience category in Equity in Samet Irit, *Equity: Conscience Goes to Market* (OUP 2018), chapter 1.


\(^{106}\) Irit Samet, ‘What Conscience Can Do for Equity’ (2012) 3 Jurisprudence 13
mind when making the purchase is such that Equity does not have authority to declare that the beneficiary’s interest in the property affects him, he gets to hold on to the property. When asking themselves which state of mind indeed justifies intervention, the allusion to conscience guides the court to look into the moral merits of the purchaser’s position at the time of the purchase.

One aspect of the concept of conscience that is particularly relevant for resolving FO-P conflicts, and that illuminates Equity’s approach to constructive notice, is the way it engages with the phenomenon of self-deception. When a purchaser is offered a deal for a particularly excellent price, from someone who is not in the business of selling this type of property, or is not very likely to be the real owner of the property, he may get suspicious. He may then decide to ignore the suspicion and go ahead with the deal. But not everyone is hard-nosed enough to do this. Honest people will feel guilt and shame for taking advantage of the owner’s misfortune. Prudent people will be scared of being found out, losing what they paid plus transaction costs and suffering public humiliation to boot. But such unpleasant feelings and concerns will not necessarily be enough to motivate everyone to give up on an excellent bargain. Instead of passing the deal they may convince themselves, against strong evidence to the contrary, that the deal is actually kosher. Such blissful ignorance can be achieved with the help of the psychological mechanism that fixes mismatches between the agent’s desires, and her beliefs about appropriateness of pursuing this desire: self-deception.\(^\text{107}\)

Closing oneself to reality via self-deception is extremely prevalent, for, as Demosthenes explains, ‘nothing is easier than self-deceit. For what every man wishes, that he also believes to be true.’\(^\text{108}\) Surely, the fact that the agent is now genuinely unconscious of the wrong nature of her action does not exonerate her from responsibility for the wrongs she committed under the spell of self-deception.\(^\text{109}\) But since the agent is (at least) not fully aware of the wrongfulness of his actions, his responsibility has to be ‘pegged’ to the earlier stage, i.e. to the stage where he allowed himself to fall into the oblivion of self-deception. One suggestion on how to understand the backwards attribution is Linehan’s: the self-deceived, he says, displays culpable ignorance: ‘ignorance is culpable when the person could have, and should have, known; he should have known if the actions his ignorance allows have grave consequences for others’.\(^\text{110}\) This echoes the language of constructive notice and shows how, in the circumstances of FO-P conflicts, it is the search for clean conscience that alerts the court to the very real possibility that P, who comes across as unaware of the existence of a trust, should nevertheless

\[^{108}\text{Demosthenes, Third Olynthiac (London, William Heinemann Ltd. 1930), at 3.19.}\]
\[^{109}\text{Otherwise we fall into the paradox that ‘trying to deceive oneself so as not to be responsible is bad (morally evil), but succeeding restores one to moral innocence’ (Linehan, p.109).}\]
lose to FO when the responsibility for his false belief lies with him.\textsuperscript{111} Thus, in the circumstances of FO-P conflicts, the search for clean conscience alerts the court to the very real possibility that P who comes across as telling the truth when claiming he was unaware of the trust, should nevertheless lose to FO when the responsibility for the ignorance lies with him. In this context, Equity introduces a reasonable person standard for deciding whether a purchaser genuinely lacks constructive notice.

3.3. \textit{Efficiency}

At the end of his discussion of the preference awarded in some systems to the bona fide purchaser, Menachem Mautner arrives at the conclusion that formulating the defence in accordance with justice principles will also generate the most efficient result.\textsuperscript{112} A fairly similar blissful overlap can be found in the case of Equity’s darling – a result that would not surprise those who believe that finding the cheapest cost avoider plays a part in deciding desert claims in distributive justice. In departing from the strong pro-FO solution of the Common Law, the Courts of Equity designed a solution that fits the efficiency considerations that are particular to situations where FO is a beneficiary, and the unauthorised sale is done by a trustee.

At the pre-theft stage, a beneficiary can do precious little to guard the property over which she has rights. She can insist that the trustee submits reports, and call him to account promptly whenever she has a reasonable suspicion he is mishandling the trust. But, at the end of the day, trusts are created in order to separate the ownership of an asset from its daily management. The person who can be incentivised to make efficient investment at the pre-theft stage is therefore the \textit{settlor}: a pro-P rule can drive her to gather more information on the prospective trustee, as she knows that the wrong person may cause (intentionally or negligently) a complete loss of the trust property.\textsuperscript{113} Heightened attention to the identity of the trustee would also promote the reputation of the trust as a social institution one can have faith in. But what about the argument according to which a pro-FO priority rule would disincentivise \textit{thieves} by chilling the market for stolen property? Unlike the burglar who is after his next fix, a trustee who contemplates a misapplication of trust property may indeed respond to a pro-FO rule as a rational maximiser of wealth by taking into account the reduction in people’s willingness to buy

\textsuperscript{111} For a Law & Economics perspective on the strength of the duty to inquire see Richard A. Epstein, ‘Inducement of Breach of Contract as a Problem of Ostensible Ownership’ (1987) 16 The Journal of Legal Studies 1. The author argues there that the tort of inducement of breach of contract is best understood as a manifestation of the problem of ostensible ownership of an individual’s labour.

\textsuperscript{112} Mautner, ‘The Eternal Triangles of the Law’: Toward a Theory of Priorities in Conflicts Involving Remote Parties’ (n 19), p.126

\textsuperscript{113} Or, in jurisdictions where this is an option, to appoint a trust protector to monitor performance of the trust duties.
property from suspicious sellers. But Equity has a more powerful tool for disincentivising embezzlement in the form of the severe sanctions for breach of trust, including profit-stripping remedies for breach of fiduciary duty by express trustees and claims based on tracing against constructive as well as express trustees. Meanwhile, trustees who misapply the property by mistake will be blind to any incentive provided by a pro-FO priority rule. Efficiency considerations that support an FO rule are therefore particularly weak when it comes to the pre-theft stage with respect to an FO who is a beneficiary of a trust.

Let us move then to the post-theft stage. What effect will the pro-P Equity’s Darling rule have on the actions of potential Ps and upset FOs? It may be that once she learns of the misapplication, the beneficiary can invest in identifying the misapplied property, or at least in asking the court to appoint a new trustee who will so act. Her incentive to do so will be stronger if a pro-FO rule increases her chances of retrieving the property. But again, given the beneficiary’s distance from the everyday management of the asset, crucial time is likely to be lost until she finds out about the misapplication; if a new trustee has to be appointed, the start of the search will be delayed even further. Her chances of finding the property before a conflict with a purchaser arises are even lower than in the case of an ordinary FO, and so a major push for a pro-FO priority rule is largely inapplicable to Equity’s take on FO-P conflicts. Almost everything that can be achieved by way of prevention is, therefore, dependent on dissuading P from buying the property from the trustee. But won’t a pro-P rule – which considerations of justice and flow of the market support – create an incentive for underinvestment in title investigation? Recall that Schwartz and Scot raise the worry that a rational maximiser of utility will only invest at the minimum level that is sufficient for proving to the court that he fulfilled the conditions for getting priority according to the rule, instead of following the formula of optimal investment (i.e. ‘invest until the marginal increase in the probability of receiving a good title times the goods’ value to you equals the marginal inquiry cost’). In the context of the UCC ‘good faith’-based exceptions to the nemo dat rule (such as the voidable title or entrustment), this worry makes a lot of sense, as it defines ‘good faith’ as ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade’. While the reference to a ‘good faith’ standard in the UCC can be interpreted as an equitable mitigation of a fairly rigid pro FO rule, Equity (as a body of law) offers a unique formula that tackles the problem in a particularly appealing way.

By prioritising on the basis of conscience, Equity makes working one’s way around the exception harder. For the Courts of Equity have at their disposal a particularly sensitive set of tools for gauging the real state of mind of the purchaser. While proxies like ‘reasonable commercial standards

114 At § 2-103. The comment explains further that '[F]air dealing’ . . . is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction.’ For a clear exposition of the good faith requirement, see Kotis v. Nowlin Jewelry INC 844 SW 2d 920 - Tex: Court of Appeals 1992.
Of fair dealing in the trade’ can do some important work, the conscionability requirement encourages the judge to look for the very specific circumstances of the transaction by which P (allegedly) acquired the property. Even if P has, for example, immaculately followed the rules of a respectable online market in order to purchase an item of jewellery, low-quality photos, reduced price in comparison with same designs on other websites, and reluctance/ inability of the seller to answer questions about the pieces in details can be interpreted as tell-tale signs that P chose to ignore in bad conscience.\textsuperscript{115} Other types of goods, and even specific types of the same goods, may have different give-aways that would trigger a well-functioning conscience to sound an alarm. Fastening on the defendant’s conscience means that the court will also pay full attention to P’s behaviour before and after the purchase.\textsuperscript{116} Did he make reasonable enquiries as to the nature of the deal, or does it look like he is trying to have as little as possible to do with the seller? Does he display the work of art in the living room/wear the jewellery in public/use the equipment in his front office, or does it look like he is trying to avoid unsolicited inquiries from people who might see it in his possession? This power granted to the Court of Equity to conduct a highly-refined investigation into the state of mind of P undermines the purchaser’s ability to peg his investment into the title to the inefficient minimum required for proving his innocence; to be found conscionable, he would actually need to be conscionable, and that means investing, roughly, at the efficient level for the particular subject matter.\textsuperscript{117} Of course, this judicial power comes with a price tag: reduced predictability, increased risk of a judicial mistake and an increase in litigation costs. However, at least the purchaser who suspected something dodgy and managed to dismiss his suspicion cannot be heard to complain about the uncertainty. Others will have to take it as a price worth paying for approximating an elusive ideal balance between the interests and deserts of two innocent parties and the community in which they act.

Conclusion

Equity’s stance on the perplexing dilemma of FO-P competition sheds a bright light on Equity’s self-perception as a Court of Conscience. In a sharp distinction from the priority rule in Common Law, which comprises of a core tenet of property law (\textit{nemo dat}) and a string of pragmatic exceptions,  

\textsuperscript{115} See in more details: \url{http://www.ebay.co.uk/gds/TOP-THREE-WAYS-TO-IDENTIFY-STOLEN-GOODS-DO-YOU-CARE-/10000000178450365/g.html}. In Kotis v. Nowlin Jewellery INC, for example, P contacted FO after the sale to ask whether the seller/thief has given good payment for the watch before the latter learnt that the cheque will not be honoured. Nevertheless, the extremely low price, of which P was aware, was enough to rob him of the purchaser in good faith status (ibid p.924)

\textsuperscript{116} See, for example, the courts’ detailed analysis of every step of the purchaser’s conduct in \textit{Gray v Smith} [2013] EWHC 4136.

\textsuperscript{117} For an analysis of Equity as tackling the opportunism that navigating the priority rules to make a lower-than-efficient investment exemplified, see Henry Smith’s chapter in this volume.
Equity’s point of departure is a refusal to engage defendants whose conscience is clean. Relegating the structure of property rights to a secondary place, the frame of reference that Equity adopts is built around the notion of conscionability.

Some will say that this change of focus – from the power of ownership to the mindset of the purchaser – shows that beneficiaries do not have ownership rights in the trust property. Without taking a position on this question, we have argued that Equity has taken a typically independent path on the question of when ownership should be limited for reasons of justice or efficiency. In using a conscionability standard to resolve the standoff between FO and P in favour of Equity’s Darling, Equity devised a solution that tracks the pattern of the parties’ moral responsibility for the predicament they now face, and at the same time serves the communal goal of encouraging owners and purchasers to make efficient investment in preventing it. The situations in which Equity is prompted to resolve an FO-P conflict are unique in that they involve a social institution that, while it enables people to manage their wealth in creative ways, also puts the public aspect of property under a great strain. The needs which deserve to be accounted for by a social action are therefore different from what we find in FO-P conflict outside the equitable context, and finding a good balance between them requires subtle work on the question who should bear the burden of a third party’s wrongdoing. Due to the unique position of equitable right-holders, the question of moral responsibility for the conflict hangs almost entirely on P’s state of mind. Happily, an efficiency-oriented analysis yields similar conclusion as to the importance of ascertaining P’s state of mind for an optimal solution of the conflict. The ad hoc retroactive standard of conscionability, which empowers the court to investigate P’s position in all its particularity and subtlety, is therefore particularly suitable for arriving in a successful resolution that is responsive both to inter-personal justice and the interest of the community at large.

118 Thus, in contexts where equitable interests have relinquished their historic advantage of secrecy as a result of statutory registration regimes, the distinctive ‘Equity’s darling’ defence has also vanished, to be replaced by simpler and more predictable statutory defences: see, generally, L Gullifer (ed) Goode on Legal Problems of Credit and Security (5th edn, Sweet & Maxwell 2013) 2-22 to 2-33. As a result of the introduction of such registration regimes for many classes of equitable interests in land, and for equitable charges over company assets, the defence now plays its traditional role of protecting a purchaser with a clean conscience from a hidden interest primarily in cases involving equitable interests affecting personal property and trusts of unregistered land. These are the main contexts in which the defence remains available in modern English law.
Dagan H, *Property: values and institutions* (Oxford University Press 2011)
Feldman F, *Distributive Justice* (Oxford University Press 2016)
Maitland FW, *Equity: a course of lectures* (2nd edn, CUP 1936)
Merrill C and Smith HE, *Property* (Oxford University Press 2010)
Mitchell C and Hayton DJ, *Hayton and Mitchell: commentary and cases on the law of trusts and equitable remedies* (13th edn, Sweet & Maxwell 2010)

*Kotis v. Nowlin Jewelry INC* 844 SW 2d 920 - Tex: Court of Appeals 1992
*Akers & Ors v Samba Financial Group* [2017] UKSC 6 (UKSC )


Medina B, 'Inducing Investment in Gathering Information by Settling Conflict of Rights between a Bona Fide Purchaser and the Original Owner [Hebrew]' (2000) 5 HAMISHPAT 117

Rose CM, 'Possession as the Origin of Property' (1985) 52 U CHI L Rev 73

