(Journal of Equity)

The Concept of Beneficial Ownership in Express Trust: A Necessity?

Hui Jing*

Abstract
The symmetry between legal and equitable estate is often considered a defining characteristic of an express trust. Consequently, the concept of beneficial ownership plays a crucial role in understanding how an express trust is established and operated. However, concentrating solely on beneficial ownership leads to the categorisation of charitable and non-charitable purpose trusts as exceptions within the express trust framework. This also creates challenges in understanding the entitlement of discretionary trust beneficiaries to initiate legal proceedings regarding the mismanagement of trust property by trustees. This article argues that due administration, instead of beneficial ownership, is a shared concern applicable to all kinds of express trusts. By shifting the focus from beneficial ownership to due administration, it is possible to establish a doctrinal connection among all types of express trusts. Furthermore, the increasing adoption of express trusts in civil law jurisdictions demonstrates that trust law has surpassed the confines of the common law sphere, and the understanding of trusts is no longer limited to the context of common law. By emphasising due administration, it becomes feasible to encourage a conversation between civil and common law jurisdictions regarding their unique approaches to express trusts.

I Introduction

In the context of express trusts, it is often asserted that 'the distinction between the legal and equitable estate is of the essence of the trust'.[1] In line with this statement, the concept of 'beneficial ownership'[2] has been deemed essential for understanding an express trust. Within the realm of legal transplantation and comparative law, the commonly accepted notion that 'trust property has two contemporaneous owners'[3] has been perceived as a challenge for adopting the express trust

* Dr Hui Jing, Assistant Professor, Faculty of Law, The University of Hong Kong. I extend my gratitude to Michael Bryan, Andrew Godwin, Henry Smith, and Timothy Chan for their valuable feedback on earlier drafts of this article. A previous version of this work was presented at the Journal of Equity Annual Conference at Melbourne Law School. I am grateful to Simone Degeling, Ying Khai Liew, Miranda Webster, Rosemary Langford, James Penner, Matthew Harding, Kelvin Low, Katy Barnett, and Jason Grant Allen for their insightful comments. Additionally, I appreciate the constructive feedback provided by the two anonymous reviewers. All remaining errors are my own.

[1] *Abdul Hameed Sitti Kadija v De Saram* [1946] AC 208, 217. See also *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 221 ALR 196, [25]; *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 497.

[2] *Stack v Dowden* (2007) 2 AC 432, 468. This term has often been interchangeably used with three other terms: equitable title, equitable ownership, and equitable proprietary interest. See, eg, *Foskett v McKeown* (2001) 1 AC 102, 127; *Patel v Mirza* [2017] AC 467, 497; *Byers v Saudi National Bank* (2024) 2 WLR 237, 270; *RnD Funding Pty Ltd v Roncane Pty Ltd* (2023) 411 ALR 1, 25; *Commissioner of State Revenue v Serana Pty Ltd* [2008] WASCA 82, [39]; *Arjon Pty Ltd v Commissioner of State Revenue* [2003] VSCA 213, [62]; *Enright v Newton* (2021) 2 NZLR 412, [137].

[3] Daniel Clarry, 'Fiduciary Ownership and Trusts in a Comparative Perspective' (2014) 63(4) *International and Comparative Law Quarterly* 901, 906. In the English House of Lords decision of *Ayerst (H M Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, Lord Diplock (at page 177) observed that 'Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property

concept in civil law jurisdictions, which 'do not share English law's colourful history'.[4] The emphasis on the importance of beneficial ownership in an express trust has led to a significant amount of scholarly literature exploring the nature of a beneficiary's right. This has sparked a long-standing debate regarding the proprietary account and the obligational account of the nature of a beneficiary's right. According to the proprietary account, the establishment of an express trust results in the beneficiary obtaining a property right in the trust property, which arises in equity.[5] On the other hand, the obligational account posits that the creation of an express trust imposes certain duties on the trustee, and the rights acquired by the beneficiary are determined by the scope of those duties.[6]

The debate surrounding which account provides a more comprehensive explanation for the nature of a beneficiary's right remains inconclusive. However, a consensus has been reached that the two accounts do not encompass all possible interpretations. While the proprietary and obligational accounts may represent opposite ends of a spectrum, this spectrum accommodates a diverse range of perspectives. A notable example of such perspectives is the 'new obligation theory'[7] advanced by Ben McFarlane and Robert Stevens. This view distinguishes between a simply personal duty and a duty specifically pertaining to the trust property, highlighting the persistent nature of a beneficiary's right.[8] In addition to the ongoing debate regarding proprietary and obligational aspects, there is another debate surrounding the true essence and substance of beneficial ownership. For example, James Penner has argued that beneficial ownership amounts to 'a right, correlative with the trustee's duty to exercise his powers of title to carry out the administrative and dispositive provisions of the trust'.[9] In contrast, Tatiana Cutts has suggested that beneficial ownership should be understood 'in terms of the beneficiary's power to impose upon the trustee a duty to transfer to the former the rights to the trust res, and the corresponding liability of the trustee to be made subject to such a duty'.[10]

---

was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the "beneficial ownership" in the cestui que trust'.

[4] Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1, 28. Civilian lawyers commonly interpret the practice of vesting legal titles in trustees and equitable titles in beneficiaries as a 'division or split of title'. See, eg, Peter Hefti, 'Trusts and Their Treatment in the Civil Law' (1956) 5(4) *American Journal of Comparative Law* 553, 561; Ignacío Arroyo Martinez, 'Trust and the Civil Law' (1982) 42(5) *Louisiana Law Review* 1709, 1718. This interpretation has recently faced criticism for being misleading, as it suggests that an equitable interest is carved out of a legal estate, when in fact it is impressed or engrafted onto it. See *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 40 ALR 1, 36; *Akers v Samba Financial Group* [2017] AC 424, [50]; AS Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) [4.150].

[5] See, eg, Elena Christine Zaccaria, 'The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right, or Right against a Right?' (2019) 135 *Law Quarterly Review* 460, 461; Peter Jaffey, 'Explaining the Trust' (2015) 131 *Law Quarterly Review* 377, 401; Hanoch Dagan and Irit Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2023) 86(3) *Modern Law Review* 701, 703.

[6] See, eg, FW Maitland, *Equity: A Course of Lectures by F W Maitland*, ed J Brunyate (Cambridge University Press, 1936) 107; John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 646, 660; Patrick Parkinson, 'Reconceptualising the Express Trust' (2002) 61(3) *Cambridge Law Journal* 657, 682; Lionel D Smith, 'Trust and Patrimony' (2014) 38(2) *Revue générale de droit* 379, 391–92.

[7] JE Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27(2) *Canadian Journal of Law and Jurisprudence* 473, 474.

[8] McFarlane and Stevens argued that the beneficiary's right is a right against the trustee's right', which is prima facie binding against anyone who acquires a right that derives from the trustee's right. See McFarlane and Stevens (n 4) 5–7; Ben McFarlane, *The Structure of Property Law* (Hart, 2008) 23–25.

[9] Penner (n 7) 476.

[10] Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6 *Journal of Equity* 44, 44.

Regardless of the merits of each account, it is undeniable that the existing accounts are founded on the assumption that understanding beneficial ownership is crucial to comprehending express trusts. The emphasis on beneficial ownership has posed challenges in accounting for the entitlement of discretionary trust beneficiaries to initiate legal proceedings regarding trustees' mismanagement of trust property.[11] Furthermore, this emphasis has resulted in the characterisation of charitable trusts as exceptions to traditional trust principles, with their existence and operation being justified by public law considerations of generating public benefit to the community.[12] Additionally, non-charitable purpose trusts, which lack beneficiaries and do not serve the purpose of promoting public benefit, have long been regarded as outliers within the express trust framework. Their incompatibility with the concept of beneficial ownership has discouraged trust scholars from thoroughly investigating them. The existing valid non-charitable purpose trust cases[13] are often described as mere 'concessions to human weakness or sentiment'[14] and, therefore, must be viewed as an 'anomalous and exceptional'[15] category of cases that will not be expanded.

The assumption that beneficial ownership is essential to understanding express trust law has historical roots. The concept of trust, originating from the historical practice of 'use', has its roots in the *feoffor to uses* transferring land to the *feoffee to uses* with the ultimate goal of benefiting the *cestui que trust*.[16] By recognising the beneficial ownership for the *cestui que trust*, the royal chancellor safeguards against any potential violation by the *feoffee to uses*, thus ensuring that the intention of the *feoffor to uses* to establish the 'use' structure is preserved. However, the historical precedent is not the only rational explanation for express trust law. Over time, trust law has continued to evolve, with many recent developments having little to do with its historical lineage. Moreover, the current express trust system is doctrinally fragmented due to the insistence and emphasis on the notion of beneficial ownership. This raises a fundamental question: Is it possible to observe and interpret express trust law from a perspective other than beneficial ownership? In other words, can we find a perspective that doctrinally connects different types of express trusts instead of treating charitable and non-charitable purpose trusts as mere exceptions? While the notion of beneficial ownership has long been considered orthodox within the framework of express trusts, the development of trust law suggests that no rule is eternally orthodox.[17]

---

[11] *Re Gestetner Settlement* [1953] Ch 672, 688; *Re Manisty's Settlement* [1974] Ch 17, 25; *Lygon Nominees Pty Ltd v Commissioner of State Revenue* [2005] VSC 247, [58]. Lionel Smith posited that objects of discretionary powers do not possess any rights to the trust property and, consequently, cannot enforce the duties owed by trustees in relation to the benefit of the trust property. Moreover, objects of discretionary powers lack standing to bring legal action for breach of trust. See Lionel Smith, 'Massively Discretionary Trusts' in Richard C Nolan, Kelvin FK Low, and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 130, 135–36.

[12] *Wilson v Barnes* (1885) 38 Ch D 507, 513; *Cunnack v Edwards* (1896) 2 Ch 679, 686; *Aid/Watch Inc v Commissioner of Taxation* (2010) 272 ALR 417, 436–37. See also Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart, 2016) 13; Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) [9.02]; Kelvin F K Low, 'Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement' in Richard C Nolan, Kelvin F K Low, and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 486, 497–98.

[13] See, eg, *Trimmer v Danby* (1856) 25 LJ Ch 424; *Re Dean* (1889) 41 Ch D 552; *Re Pearce* [1946] SASR 118; *Re Filshie* [1939] NZLR 91; *Mussett v Bingle* [1876] WN 170; *Re Spehr* [1965] VR 770.

[14] *Astor v Scholfield* [1952] Ch 534, 547.

[15] Ibid.

[16] John H Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 311; Robert H Sitkoff and Jesse Dukeminier, *Wills, Trusts, and Estates* (Wolters Kluwer Law & Business, 11th ed, 2022) 396–97.

[17] Yuri Grbich once commented that 'the term "trust" is not clear and unchanging like a crystal, it is the skin round a living and growing concept'. See Yuri Grbich, 'Baden: Awakening The Conceptually Moribund Trust' (1974) 37(6) *Modern Law Review* 643, 645.

This article aims to explore the aforementioned questions and provide an account that better explains express trust law as a whole. The discussion is divided into four parts. Following the 'Introduction', Part II examines the role of beneficial ownership in understanding the creation and operation of express trusts. Four types of express trust (i.e. fixed private trust, discretionary private trust, charitable trust, and non-charitable purpose trust) are specifically selected for case studies. Through these case studies, a common theme emerges, emphasising the importance of ensuring the due administration of a trust. In Part III, the implications of this notion of due administration are explored further in relation to the broader understanding of express trust law. Two perspectives are presented: the internal doctrinal coherence of the express trust system, and the potential for bridging the conversation between civil and common law approaches to express trusts. Finally, Part IV provides a conclusion summarising the key insights from the exploration.

II Case Studies

Before diving into a detailed analysis, it is crucial to clarify the definition of beneficial ownership as used in this article. The term 'beneficial ownership' can be interpreted in various ways depending on the specific context.[18] There have been numerous debates surrounding the concept of 'beneficial ownership' due to the lack of a universally accepted definition. Viscount Radcliffe's observation in the Privy Council case of *Commissioner of Stamp Duties (Queensland) v Livingston* corroborates on this point:

> [T]he terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words "interest" and "property". Thus propositions are advanced or rebutted by the employment of terms that have not in themselves *a common basis of definition*.[19]

A thorough examination of case law reveals that the prevailing view tends to regard 'beneficial ownership' as a vested right or power to obtain benefit from the trust property.[20] This article explores the extent to which this concept contributes to our understanding of express trusts. Consequently, adopting the court's majority view allows for a more accurate representation of the general manner in which the court interprets this concept, as well as any potential limitations in their interpretations, if applicable. Therefore, this view is adopted in the article.

Express trusts can be categorised into various types based on the criteria employed. Regardless of the specific designation, an express trust can typically be classified into one of four categories: fixed private trust, discretionary private trust, charitable trust, and non-charitable purpose trust.[21] As such, these four types of express trusts have been deliberately selected for case

---

[18] *Commissioner of Stamp Duties (Queensland) v Livingston* [1964] All ER 692, 699–700; William Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72, 90.

[19] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 699 (emphasis added).

[20] See, eg, *In re Demarest's Settlement Trusts* [1940] Ch 661, 664; *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* (1975) 50 TC 651, 671; *Hargreaves Property Holdings Ltd v Revenue and Customs Commissioners* [2024] EWCA Civ [43]; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (n 1) [25]; *Trust Company of Australia Ltd (as Trustee for the Clayton 3 Trust) v Commissioner of State Revenue* [2007] VSC 451, [58]-[59]; *Fay v Henry Kai Tong Au* [2009] NSWSC 1428, [32]; *Horsfall v Potter* [2018] NZFLR 154, [61]; *Kruger (obh of Tūhoe Te Uru Taumatua Trust) v Nikora (obh of Te Kaunihera Kaumātua O Tuhoe)* (2023) 3 NZLR 160, [89], [92].

[21] Trust classification is inherently flexible and context-dependent, lacking a universally accepted taxonomy. The four categories of express trusts serve as an analytical framework rather than a rigid classification system. For example, although offshore trusts are often discussed as a distinct category, they are more accurately understood as a jurisdictional variant that can manifest in any of these four forms. They frequently adopt the structure of non-charitable purpose trusts due to specific legislative frameworks in offshore jurisdictions that facilitate such arrangements. Nonetheless, the principles developed for these four categories remain relevant and applicable to offshore trusts, irrespective of their jurisdictional location. While offshore jurisdictions may modify certain trust law principles through legislation, these modifications represent adaptations of existing trust forms rather than creating entirely new categories.

studies, with the objective of examining the role of beneficial ownership in their formation and functioning.

A Fixed Private Trust

The first case under examination involves fixed private trusts. A fixed private trust is a type of trust where the trustee has a legal duty to distribute the trust property to the beneficiaries in a predetermined manner, as specified in the trust deed. The beneficiaries have a fixed entitlement to the trust property, and the trustee has little to no discretion in how the trust property is distributed. A fixed trust structure aligns well with the beneficiary principle and the notion of certainty of object. This structure also demonstrates 'a division of legal and equitable ownership of the [trust] property',[22] which is deeply rooted in the historical context from which the concept of express trust originated. The term 'ownership' supports the understanding of a beneficiary's interest as a form of proprietary right.[23] In accordance with this proprietary understanding, beneficial ownership has often been viewed as the foundation for a beneficiary's entitlement to demand due administration by a trustee and to initiate legal proceedings against third parties with whom a trustee improperly transacts. These entitlements underpin the beneficiaries' role in monitoring and ensuring the trustee's due administration of the trust. Considering the beneficiary's interest as directly associated with the trust property, and thus possessing a proprietary nature, offers a reasonable justification for these entitlements.

However, case law has demonstrated that there is not always a necessary correlation between holding beneficial ownership and possessing these entitlements. In various scenarios, individuals lacking any equitable proprietary interest in the property can still be afforded these entitlements. This is particularly evident in the context of estate beneficiaries. For example, in the Privy Council case of *Commissioner of Stamp Duties (Queensland) v Livingston*[24] (*Livingston*), the primary issue was whether the widow, named as the residuary legatee in her husband's will, held any 'beneficial interest'[25] in the property comprising her husband's unadministered residuary estate at the time of her own death. This question was crucial in determining whether she was liable for succession duty under the *Queensland Succession and Probate Duties Acts*.[26] In support of his argument, Viscount

---

[22] *Public Trustee (Qld) v Opus Capital Ltd* (2013) 96 ACSR 493, 498. See also *Artist Court Collective Ltd v Khan* (2016) 3 WLR 1619, [52]; *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2003] FCAFC 63, [34].

[23] A proprietary right encompasses a right to exclude or imposes a duty of non-interference on the rest of society. See Richard Nolan, 'Equitable Property' (2006) 122 *Law Quarterly Review* 232, 235; Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' (2022) 42(1) *Oxford Journal of Legal Studies* 161, 164–65. In contrast, James Penner contends that the essence of a proprietary right does not lie in the right to exclusion, but rather in the right to alienable exclusivity. This refers to the ability to transfer one's exclusive right to another individual, who then assumes the role of the exclusive right holder. See James Penner, *The Idea of Property in Law* (Clarendon Press, 1997) ch 4.

[24] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 692.

[25] Ibid 696. There is ongoing debate regarding the precise definition of 'beneficial interest' in trust law. For example, in the Privy Council case of *Commissioner of Stamp Duties (Queensland) v Livingston* [1964] All ER 692, Viscount Radcliffe (at page 700) noted that the term can encompass two aspects. First, it refers to beneficiaries having a property right in the trust property. Secondly, it refers to beneficiaries having a legal remedy to ensure proper administration of the property and protection of their future rights. In the Irish High Court case of *Trafalgar Developments Ltd v Mazepin* [2023] IEHC 235, McDonald J (at [89]) endorsed the definition from Jowitts' Dictionary of English Law. The dictionary states that a beneficial interest means '[t]he interest in a trust of a beneficiary. Also known as an equitable interest. It is established as a property right. The beneficiary is entitled to the "fruits of the tree", such as income or right to occupy property'. In the Australian High Court case of *Boensch v Pascoe* (2019) 375 ALR 15, Kiefel CJ, Gageler, and Keane JJ observed (at [15]) that '[for the purpose of section 58 of the *Bankruptcy Act 1966 (Cth)*], a valid beneficial interest means a vested or (subject to applicable laws as to remoteness of vesting) contingent right or power to obtain some personal benefit from the trust property'.

[26] Ibid 693.

Radcliffe in *Livingston* relied on the reasoning put forth by Viscount Finlay in the English House of Lords decision of *Dr Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts*,[27] as well as Lord Halsbury LC's reasoning in the English House of Lords decision of *Lord Sudeley v Attorney General*.[28] According to Viscount Radcliffe, the widow did not hold any beneficial interest in her husband's unadministered residuary estate upon her death. He based his reasoning on two main points. First, when the executor received the property, he did so 'in full ownership, without distinction between legal and equitable interests'.[29] Nevertheless, due to the executor's role in 'carrying out the functions and duties of administration',[30] he acted in a fiduciary capacity with respect to the assets that came to him by virtue of his office.[31] Secondly, Equity did not find it necessary to 'recognise or create for residuary legates a beneficial interests in the executor's hands during the course of administration'.[32] This was because of concerns that an unadministered estate was incapable of satisfying the requirement of certainty of subject matter.[33] Additionally, the court had sufficient means, such as the enforcement of remedies, to 'control the executor in the use of his rights over assets'.[34] Based on these two points, Viscount Radcliffe concluded that the widow's interest was essentially a 'chose in action',[35] which could be 'invoked for any purpose connected with the proper administration of [her deceased husband's estate]'.[36] According to Viscount Radcliffe, the principal objective in recognising a residue legatee's right is to ensure the proper administration of the estate, rather than focusing on any beneficial ownership they may hold over the property. Consistent with this view, Viscount Radcliffe also affirmed the right of a residue legatee to make claims against third parties, as he further elaborated:

> [A] creditor or a pecuniary or residuary legatee has been allowed to follow and recover assets which have been improperly abstracted from an estate. The basis of such proceedings is that they are taken *on behalf of* the estate and, if they are successful, they can only result in *the lost property being restored to the estate for use in the due course of administration*. Thus, while they assert the beneficiary's right of remedy, they assert the estate's right of property, *not the property right of creditor or legatee*; indeed the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default, and thus his rights have to be *put in motion* by some other person on behalf of the estate.[37]

Thus, while 'beneficial ownership' can serve as a valid rationale for an individual's entitlement to bring claims against a trustee's or executor's improper disposal of the property, or

---

[27] *Dr Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* (1921) 2 AC 1.

[28] *Lord Sudeley v Attorney General* [1897] AC 11.

[29] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 696. See also *Artist Court Collective Ltd v Khan* (n 22) [50]; *Vandervell v Inland Revenue Commissioners* (1967) 2 AC 291, 311; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 706.

[30] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 696.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid 699.

[35] Ibid 702.

[36] Ibid. Similarly, in the English House of Lords decision of *Marshall v Kerr* (1995) 1 AC 148, Lord Browne-Wilkinson observed (at page 166) that 'the property settled by [the residuary legatee] comprised, not the assets in the deceased's estate … but a separate chose in action, the right to due administration of his estate'. In his paper, Charles Mitchell acknowledged the similarities between the duties that personal representatives have in administering a deceased person's estate and the duties that trustees owe to ensure proper administration. Additionally, Mitchell contended that personal representatives' duties are owed to the estate's creditors and residuary legatees, none of whom have any equitable proprietary interest in the assets being managed. See Charles Mitchell, 'Commissioner of Stamp Duties (Queensland) v Livingstone (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart, 2019) 265, 267–68.

[37] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 700 (emphasis added).

against third parties involved in transactions with the trustee or executor, it is not the only justification for such entitlements. As demonstrated in the case of *Livingston*, ensuring the proper administration of the property also constitutes a valid ground for conferring these entitlements.

B Discretionary Private Trust

The second case under consideration involves discretionary private trusts, which have long been the predominant form within the trust industry. A discretionary private trust is a type of trust where the trustee has discretion over how to distribute the trust property among the beneficiaries. The trustee can decide which beneficiaries receive distributions, how much they receive, and when they receive it, subject to any limitations set out in the trust instrument.[38] In contrast to fixed trust beneficiaries, discretionary trust beneficiaries have no 'vested interest in possession'[39] in the trust property.[40] As PG Turner explained, 'the main distinguishing feature of discretionary trusts is that no beneficiary has an indefeasible right to the income [of the trust] as it arises'.[41] Mandie J expressed a similar view in the Victorian Supreme Court case of *Trust Company of Australia Ltd (as Trustee for the Clayton 3 Trust) v Commissioner of State Revenue*,[42] where he stated that 'it is difficult to treat the beneficiaries of a discretionary trust as being the beneficial owners of land held by that trust'.[43]

The two English House of Lords decisions — *Baker v Archers-Shee*[44] (*Baker*) and *Gartside v IRC*[45] (*Gartside*) — explicitly demonstrate the difference between a fixed trust and a discretionary trust with respect to the interest of a beneficiary. In *Baker*, the beneficiary was the life tenant under a trust of shares. The trustee was entrusted with the responsibility of utilising those shares for the beneficiary's benefit throughout the beneficiary's lifetime, and subsequently for the benefit of others after the beneficiary's passing. It was the trustee's duty to distribute dividends declared on the shares to the beneficiary, although the trustee had the authority to deduct expenses before making these payments. One question that arose in this case is whether the *Income Tax Act 1918* applied to the beneficiary concerning their receipt of the share dividends from the trustee.[46] The House of Lords observed that, due to the entitlements granted to the beneficiary under the trust, they could be perceived as the 'sole beneficial owner'[47] of the income generated by the trust

---

[38] In the Victoria Supreme Court case of *Re Cooper Street Property Trust* [2016] VSC 756, McMillan J (at [45]) observed that '[t]he term discretionary trust does not have a constant, fixed normative meaning. Rather, it is used to describe a species of express trust in which the beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable once or from time to time'.

[39] *Lewis v Tamplin* [2018] EWHC 777 (Ch), [39]. The concepts of 'interest in possession' and 'interest in expectancy' are notably distinct. Both types of interests sufficiently equip a beneficiary with the ability to safeguard against the trustee's misapplication of trust property. However, 'interest in possession' uniquely enables the beneficiary to assert an immediate claim on the subject of the interest. See *Gartside v IRC* (1968) 2 WLR 277, 286; *Moore v IRC* (1984) 3 WLR 341, 346; *Westminster Bank v IRC* [1958] AC 210, 218.

[40] *Gartside v IRC* (n 39) 294; *Sainsbury v IRC* [1970] Ch 712, 725; *Re Cooper Street Property Trust (No 2)* [2017] VSC 291, [4]; *Public Trustee v Smith* [2008] NSWSC 397, [107]; *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2015] VSCA 9, [229]; *Richstar Enterprises Pty Ltd v Carey (No 6)* (2006) 233 ALR 475, [36].

[41] PG Turner, 'The Entitlements of Objects as Defining Features of Discretionary Trusts' in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 242, 246. See also Rebecca Lee, 'Transnational Legal Ordering of Modern Trust Law' in Seth Davis, Thilo Kuntz and Gregory Shaffer (eds), *Transnational Fiduciary Law* (Cambridge University Press, 2023) 169, 173.

[42] *Trust Company of Australia Ltd (as Trustee for the Clayton 3 Trust) v Commissioner of State Revenue* (n 20).

[43] Ibid [49]. See also *MSP Nominees Pty Ltd v Commissioner of Stamps* [1999] HCA 51, [34].

[44] *Baker v Archers-Shee* [1927] AC 844.

[45] *Gartside v IRC* (n 39).

[46] *Baker v Archers-Shee* (n 44) 847.

[47] Ibid 870.

property immediately upon its production, and therefore could be liable to pay income tax in accordance with such earnings.[48]

In contrast, the case of *Gartside* centres on the issue of whether tax duties should be levied on the beneficiary of a discretionary trust. More specifically, it examines whether the beneficiary held any form of 'interest' in the trust property before receiving any distribution from the trustee under the discretionary trust, which could potentially lead to tax liabilities.[49] In the Court of Appeal decision, Lord Denning MR, Harman, and Salmon LJJ unanimously determined that beneficiaries of a discretionary trust possess an interest in possession in the trust property, considered as a whole, before the date of advancement.[50] In a favourable ruling for the beneficiary, the House of Lords overturned the Court of Appeal decision, concluding that due to the discretionary nature of the trust in question, the beneficiary's entitlement did not qualify as a legitimate 'interest' within the context of the applicable tax laws.[51] Lord Wilberforce's judgment offered a particularly insightful analysis of this aspect:

> No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. … But that does not mean that he has an interest which is capable of being taxed by reference to *its extent in the trust fund's income*: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still *lack the necessary quality of definable extent* which must exist before it can be taxed.[52]

Lord Wilberforce's observation ties into the long-standing debate regarding the appropriateness of the term 'beneficiary' in the context of discretionary trusts. One perspective suggests that instead of using the term 'beneficiary' interchangeably for both fixed and discretionary trusts, it might be more accurate to substitute 'beneficiary' with 'object' when referring to individuals whose receipt of trust benefits depends on the exercise of discretion by a trustee.[53]

Discretionary trusts can be sub-categorised into two types based on the beneficiary class: closed class and open class. In closed-class discretionary trusts, the beneficiary class is predetermined, and the trustee's discretion is limited to selecting among the members of the class. The class may be defined from the outset or initially left open, only to be closed by a subsequent event. In such trusts, the group of members collectively represents the entire scope of entitlement under the discretionary power, and the beneficial ownership may be considered to vest collectively in the group. However, a challenge arises in determining whether a collective entitlement can legitimately support an individual member's claim to the trust property. The answer seems to be negative, as a crucial distinction exists between collective and individual entitlements. Consequently, an analysis of collective entitlement does not necessarily illuminate the nature of individual entitlements.[54] This analysis aligns with Ungoed-Thomas J's observation in the English High Court case of *Sainsbury v IRC*,[55] where he stated, 'all the separate unquantifiable interests do not constitute separate quantifiable interests nor one quantifiable interest'.[56]

---

[48] Ibid 866, 871.

[49] *Gartside v IRC* (n 39) 280–82.

[50] *Gartside v IRC* (1967) 3 WLR 671, 679–87.

[51] *Gartside v IRC* (n 39) 299.

[52] Ibid 295.

[53] Smith, 'Massively Discretionary Trusts' (n 11) 134; *Fay v Henry Kai Tong Au* (n 20) [32].

[54] In her book chapter, Jessica Hudson posits that a collective entitlement can provide a valid basis for justifying an individual's claim to trust property. However, she does not elaborate on the reasoning behind this assumption, as it falls outside the primary scope of the chapter. See Jessica Hudson, 'Mere and Other Discretionary Objects in Australia' in Ying Khai Liew and Matthew Harding (eds), *Asia-Pacific Trusts Law: Theory and Practice in Context* (Hart, 2021) 19, 22.

[55] *Sainsbury v IRC* (n 40).

[56] Ibid 725.

On the other hand, an open class of beneficiaries suggests that the class is so broad that it is not feasible to create a definitive list of beneficiaries. An example of an open class is seen in the English House of Lords case of *McPhail v Doulton*,[57] where the beneficiaries were defined as 'officers and employees or ex-officers or ex-employees of the company and any relatives or dependants of such persons'.[58] Another example is found in the English High Court decision of *Re Denley's Trust Deed*,[59] where the beneficiaries were described as 'the employees and such other persons (if any) as they may admit to use the land for the purpose of a recreation or sports ground'.[60] In open class cases, there is no identifiable group in which the beneficial ownership can be vested, and individual beneficiaries do not have any 'present or future vested interest'[61] in the trust property. These cases involve a structure where 'a legal estate can be vested in a trustee without there being a symmetrical equitable estate'.[62] This challenges the notion that an express trust is always characterised by 'legal and equitable ownership'[63] or that 'the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive'.[64]

The absence of beneficial owners of the trust property neither hinders the establishment of discretionary trusts nor impedes the ability of discretionary trust beneficiaries to actively monitor the trustee's fulfilment of duties. A substantial body of case law recognises the standing of discretionary trust beneficiaries to sue for the trustee's maladministration of the trust. For example, in the English High Court case of *Lewis v Tamplin*, Matthews J stated that 'If the trustee of a discretionary trust in breach of trust gave away a trust asset to a third party, no one can doubt that even a discretionary object of the trust in whose favour an appointment could still be made would have standing to sue the third party for the return of the asset to the trust fund'.[65] In the English House of Lords case of *Gartside*, Lord Wilberforce alluded to the Privy Council's judgment in *Livingston*, which tackled the issue of the entitlement of a residuary legatee in an unadministered deceased estate. Lord Wilberforce suggested that the same equitable principle governs both discretionary trust beneficiaries and residuary legatees. Consequently, he noted that '[discretionary trust beneficiaries hold the] right to have the trustees exercise their discretion "fairly" or "reasonably" or "properly", [which] indicates clearly enough that some objective consideration … must be applied by the trustees'.[66]

In the *Johns v Johns* case heard in the New Zealand Court of Appeal, Tipping J expressed the opinion that discretionary trust beneficiaries are not merely entitled to 'an expectation or hope'.[67]

---

[57] *McPhail v Doulton* [1971] AC 424.

[58] Ibid 427.

[59] *Re Denley's Trust Deed* (1969) 1 Ch 373. The decision made by Goff J in *Re Denley's Trust Deed* has been a subject of controversy. In the English High Court decision of *Re Grant's Will Trusts* (1980) 1 WLR 360, Vinelott J defended Goff J's decision by considering the trust in *Re Denley's Trust Deed* as a type of discretionary trust. Vinelott J (at pages 371-72) did not differentiate between a trust that permits a defined class based on employment to utilise and enjoy property in compliance with the rules established at the discretion of trustees, and a trust that distributes income at the discretion of trustees amongst a class defined based on, for instance, the settlor's relationship.

[60] Ibid 388.

[61] Penner (n 7) 494.

[62] Parkinson (n 6) 661. James Penner's view is that discretionary trusts can align with the concept of 'beneficial interest' if the concept is not restricted to presently vested or indefeasible interests. Instead, this concept should encompass future and contingent interests. According to Penner, these future and contingent interests can absorb all the benefits the trust property has. See Penner (n 7) 495. Penner's perspective offers insights into the concept of beneficial interest; however, his explanation falls short when applied to the concept of beneficial ownership. The concepts of beneficial interest and beneficial ownership possess distinct meanings. Unlike beneficial interest, beneficial ownership primarily pertains to a vested, rather than a contingent, right to obtain the benefits of trust property.

[63] *Cuo v Ming* (2016) 54 Fam LR 610, [9].

[64] *Abdul Hameed Sitti Kadija v De Saram* (n 1) [217].

[65] *Lewis v Tamplin* (n 39) [39].

[66] *Gartside v IRC* (n 39) 295.

[67] *Johns v Johns* (2004) 3 NZLR 202, 211.

Rather, they 'may well be able to bring proceedings to compel proper administration of the trust',[68] although they may not possess any proprietary interest in the trust property. Similarly, recent Australian cases have solidified the notion that individuals classified as objects of trust power can still possess the right to proper administration. This holds true even in jurisdictions where legislation allows only individuals 'beneficially interested'[69] in the trust property to initiate legal proceedings in cases of trustee misconduct. For instance, in the Victorian Supreme Court case of *Re Cooper Street Property Trust (No 2)*[70] (*Re Cooper*), McMillan J highlighted that while a discretionary trust beneficiary is not 'a person beneficially interested in the trust [and does not have] a proprietary interest in assets of the Trust, [they do have] the right to have the Trust duly administrated'.[71] In the NSW Supreme Court case of *Public Trustee v Smith*,[72] White J observed that although the interest of a discretionary trust beneficiary 'did not amount to a proprietary interest in any of the assets of the trust, [they are] entitled to enforce the due administration of the trust'.[73]

According to the beneficiary principle, the individuals entitled to invoke the Court's inherent jurisdiction to supervise and, if necessary, intervene in the administration of the trust are typically limited to beneficiaries who possess an equitable proprietary interest in the trust property, or those who are able to invoke the rule established in *Saunders v Vautier*. However, granting standing to sue for beneficiaries of discretionary trusts, whether in open-class or closed-class cases, represents a departure from the traditional application of the beneficiary principle. These beneficiaries lack a clearly defined proprietary interest in the trust property and instead hold merely the possibility or expectation of acquiring entitlement to the benefits of the trust. By permitting them standing, the court underscores its primary concern with ensuring the accountability of trustees and the proper execution of the trust, rather than focusing solely on delineating the equitable proprietary rights of the beneficiaries.[74]

---

[68] Ibid 212.

[69] See, eg, *Trustee Act 1958* (Vic) s 64; *Trustees Act 1962* (WA) s 93; *Trustee Act 1936* (SA) s 42; *Trusts Act 1973* (Qld) s 94.

[70] *Re Cooper Street Property Trust (No 2)* (n 40).

[71] Ibid [4].

[72] *Public Trustee v Smith* (n 40).

[73] Ibid [107].

[74] The analysis herein is equally applicable to massively discretionary trusts (MDTs), a contemporary development in trust drafting wherein trustees are endowed with exceptionally broad dispositive discretions, effectively controlling the entire trust structure. MDTs are characterised by extensive discretionary elements, typically encompassing a wide class of discretionary objects (potential beneficiaries) who lack fixed entitlements to the trust property and may receive benefits solely at the trustees' discretion. This structure often includes various family members, potentially the settlor, and frequently designates a charity as the residuary beneficiary, creating a complex web of potential beneficiaries without guaranteed interests. For scholarly discussions on MDTs, see, eg, Hanoch Dagan and Irit Samet, 'What's Wrong with Massively Discretionary Trusts' (2022) 138 *Law Quarterly Review* 624, 640–45; Lionel Smith, 'Massively Discretionary Trusts' (2017) 70(1) *Current Legal Problems* 17, 24–32. I acknowledge the practical challenge in ensuring due administration in open-class discretionary trusts where no objects are initially named and a charity serves as the default beneficiary. However, this scenario does not necessarily undermine my thesis about due administration, for two reasons. First, the principle of due administration does not require constant active enforcement by beneficiaries. Rather, it requires that the trust structure provides adequate mechanisms for ensuring proper administration. In open-class scenarios, multiple layers of oversight exist: the court's inherent jurisdiction to supervise trusts remains available; the trustees themselves have positive duties to properly administer the trust; the charity as default beneficiary, despite practical reluctance, retains standing to enforce; and future discretionary objects, once identified, gain standing to ensure due administration. Secondly, the practical challenge of enforcement in such scenarios is distinct from the theoretical validity of the trust structure. My thesis focuses on the latter — whether the trust framework provides sufficient mechanisms for ensuring due administration. The fact that these mechanisms might be underutilised in practice does not negate their existence or theoretical importance.

C Charitable Trust

The third case under scrutiny pertains to charitable trusts. Often classified as purpose trusts, charitable trusts are distinct in that they lack traditional 'beneficiaries' as found in express private trusts. Instead, individuals benefiting from the distribution of charitable trust property are viewed as conduits through which the trust's charitable purpose is realised. These individuals neither possess an ownership interest in the charitable trust property nor hold 'a right to be considered as a potential recipient of benefit'[75] by the charitable trust trustee (charity trustee). In line with this understanding, the emphasis on the importance of beneficial ownership in an express trust has led to the characterisation of charitable trusts as an exception to the traditional express trust framework. The validity of charitable trusts stems from their classification as part of public law, as opposed to private law.

To ensure that charity trustees fulfil their duties, common law has granted the Attorney General the authority to bring charity proceedings against trustees who have mismanaged charitable assets. As a result, the Attorney General is commonly referred to as the 'parens patriae'[76] of charitable trusts. This is why case law frequently states that the 'Attorney General represents the beneficial interest'[77] in the charitable trust property. The use of the term 'represent' implies that the beneficial ownership does not belong to the Attorney General. This is logical since the Attorney General's role is to safeguard, rather than receive, the charitable trust benefit. However, this terminology raises an important question: Where is the beneficial ownership actually held? As previously clarified,[78] 'beneficial ownership' refers to a vested right or power to obtain the benefit of the trust property. With this understanding, the beneficial ownership cannot be vested in the settlor, the trustee, or the individuals eligible for receiving benefits from the charitable trust.

First, it is customary for a settlor to cease involvement in a charitable trust once it has been established. Consequently, it would be impractical to assign the beneficial ownership to the settlor who may not have a consistent presence within the trust. It is noteworthy that there could be situations where property is designated for charitable purposes that fail initially, and in which the settlor does not demonstrate a general charitable intention. In such instances, the beneficial ownership of the trust property could be vested in the settlor through the implementation of a resulting trust.[79] Nonetheless, this approach does not address whether the beneficial ownership should revert to the settlor in cases where the charitable trust does not experience initial failure. The answer is likely negative for two reasons. The first reason relates to the one mentioned earlier: a settlor typically withdraws from involvement once a charitable trust is established, making it unreasonable to assign ownership to someone who may not have a consistent presence in the trust's ongoing operations. The second reason concerns the possibility that the settlor might not meet the distribution criteria set forth by the charitable trust, which implies they may not possess a vested right or power to receive the trust's benefits. Secondly, the beneficial ownership cannot be vested in the trustee. If both the legal and beneficial interests are vested in trustee, the trustee will become a 'full beneficial owner'[80] of the trust property, eradicating the distinction between the legal and equitable estate, which is considered essential for the existence of a trust. Thirdly, the beneficial ownership cannot be collectively vested in individuals who qualify for the receipt of the charitable trust benefit. Unlike beneficiaries of fixed and discretionary trusts, these individuals primarily act as conduits for realising the trust's charitable purpose. Regardless of how broadly the concept of beneficiaries may be defined, they do not fall within the scope of beneficiaries. These individuals only possess a mere expectation of potentially receiving the charitable trust benefit and lack the entitlement to request the trustee to exercise distributive discretion in their favour.

---

[75] *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617.

[76] *Uniting Church in Australia Property Trust (NSW) v Monsen* (1978) 1 NSWLR 575, 391.

[77] *Metropolitan Petar v Mitreski* [2001] NSWSC 976, [10].

[78] See Part II.

[79] *Re Hillier* (1954) 1 WLR 9, 17; *Re North Devon and West Somerset Relief Fund Trusts* (1953) 1 WLR 1260, 1266.

[80] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 699.

Consequently, there is no compelling rationale for a court of equity to protect such an expectation on their behalf.

In addition to the arguments presented above, one may argue whether it is possible to conceptualise beneficial ownership as being vested in the charitable purpose. This argument is unlikely to be successful as it does not align well with the concept of ownership. Ownership generally refers to the legal or rightful possession, control, and authority that a person or entity has over a specific property or asset.[81] The charitable purpose, on the other hand, cannot possess these attributes as it is an abstract concept that cannot claim exclusive rights or make decisions regarding the use of trust property.[82] This perspective was affirmed in the case of *Re Winding-up of the Christian Brothers of Ireland in Canada*[83](*Christian Brothers*), which was heard by the Court of Appeal for Ontario. In response to the 'issue of split ownership',[84] Feldman JA made the following statement:

> It is problematic to conceptualise charitable purposes as 'owning' the equitable interest in trust property. In this context, whether or not the purposes can be said to 'own' the equitable interest in trust property, that property is held by the trustees for use only for the charitable purposes and that obligation is enforced by the Attorney General through the courts.[85]

Later, in the Supreme Court of British Columbia case of *Rowland v Vancouver College Ltd*,[86] Levine J cited Feldman JA's reasoning in *Christian Brothers* with approval and concluded that 'the "purpose" of a specific charitable purpose trust may not be the beneficial owner of the trust property'.[87] Considering all the arguments presented, it can be observed that charitable trusts share certain similarities with discretionary private trusts that have an open class. In both types of trusts, the legal estate is held by the trustees, while no corresponding equitable rights are vested elsewhere.

In the realm of charitable trusts, the predominant focus for legislators and regulators has consistently been the implementation of robust mechanisms to ensure public benefit through the proper administration of these trusts.[88] Recognising the limitations of enforcement mechanisms involving the Attorney General and the Charity Commission,[89] several jurisdictions have

---

[81] *Cooper v Pinney* [2023] NZFLR 20, [54]. See also Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691, 1709; AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 113.

[82] There are cases that suggest the possibility of beneficial ownership being in abeyance or in suspense. See *Bupa Insurance Ltd v Revenue and Customs Commissioners* [2014] UKUT 262 (TCC), [57]; *Sainsbury (J) plc v O'Connor (Inspector of Taxes)* (1991) 1 WLR 963, 972; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, 223. There are also cases that argue against the notion of beneficial ownership being in suspense. See *Twinsectra Ltd v Yardley* (2002) 2 AC 164, 189. I concur with the idea that beneficial ownership cannot be held in suspense. This is due to the fact that the notion of ownership encompasses the critical elements of possession, control, and the right to use and dispose of the property. In the absence of a clearly identified owner, these fundamental elements of ownership cannot be realised. It is futile to assert ownership while simultaneously lacking an individual or a collective group of individuals who can exercise the inherent aspects of ownership.

[83] *Re Winding-up of the Christian Brothers of Ireland in Canada* (2000) 3 ITELR 34.

[84] Ibid 55.

[85] Ibid.

[86] *Rowland v Vancouver College Ltd* (2000) 3 ITELR 182.

[87] Ibid 208.

[88] G E Dal Pont, 'Charity Law: "No Magic in Words"?' in Matthew Harding, Ann O'Connell, and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 87, 97.

[89] Scholars and practitioners have heavily criticised the effectiveness of the Attorney-General's role, pointing out the limited resources available for monitoring and enforcing charitable trusts. Additionally, not all trusts are obligated to register with the Charity Commission, and there are concerns about the Commission's ability to effectively carry out its monitoring responsibilities. See Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45(1) *UNSW Law Journal*

implemented the special interest rule. This rule allows any individual with a special interest in a charitable trust to take legal actions against trustees who breach their duties. Similar to the rationale behind granting standing to sue to discretionary trust beneficiaries,[90] the special interest rule reflects the court's primary concern with ensuring the proper administration of charitable trusts, rather than determining the specific location of beneficial ownership of the trust property. An example of this rule can be found in section 115 of the *Charities Act 2011 (England and Wales)*, which states that 'Charity proceedings may be taken with reference to a charity … by any person *interested in* the charity, or by any two or more inhabitants of the area of the charity'.[91]

Analysis of case law demonstrates that the courts tend to interpret the phrase 'interest in the charity' as referring to an 'interest in ensuring the proper administration of the charity'. The English High Court case of *Haslemere Estates Ltd v Bake*[92] (*Haslemere Estate*) was the first English case to address the interpretation of the phrase 'any person interested in the charity'. In this case, Sir Robert Megarry V-C made a distinction between individuals who have a claim against the charity and those whose claims focus on ensuring the proper administration of the charity. He stated that only the latter group is entitled to bring charity proceedings.[93] Nicholls LJ endorsed Sir Robert Megarry V-C's reasoning in *Haslemere Estates* in *Re Hampton Fuel Allotment Charity*[94] (*Allotment Charity*), which was the only recent case that has gone to the English Court of Appeal. He argued that to have a 'good reason'[95] to bring litigation, the person's claim must focus on ensuring the proper administration of the charity, rather than advancing their own interests.[96] On the other hand, in the English High Court case of *Bradshaw v University College of Wales*,[97] Hoffmann J noted that the phrase 'interested in the charity' should have the same meaning as 'beneficial interest in the charity's property'.[98] However, Nicholls LJ in the *Allotment Charity* case criticised this interpretation as inadequate because it did not provide a comprehensive understanding of who is eligible to bring charity proceedings.[99] Subsequent English High Court cases have shown that Hoffmann J's interpretation has not received much support, as judges examining the meaning and application of the special interest rule rarely reference *Bradshaw*.[100]

In Australia, both South Australia (SA) and the Australian Capital Territory (ACT) have legislation that adopts a special interest approach when determining the eligibility of individuals to bring charity proceedings. Under this approach, any person who can demonstrate to the Supreme Court that they have a 'proper interest'[101]or a 'relevant interest'[102] in the charitable trust can initiate proceedings against defaulting charity trustees. Similarly, in New South Wales, section 6 of the *Charitable Trusts Act 1993 (NSW)* allows any person to bring charity proceedings against defaulting

---

70, 102; Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and in Wales' (2011) 89(2) *Canadian Bar Review* 373, 391–92; Hui Jing, 'Enforcing Charitable Trusts: A Study on the English Necessary Interest Rule' (2022) 42 *Legal Studies* 228, 230.

[90] See Part II-B.

[91] *Charities Act 2011* (England and Wales) s 115(1) (emphasis added).

[92] *Haslemere Estates Ltd v Baker* (1982) 1 WLR 1109.

[93] Ibid 1122.

[94] *Re Hampton Fuel Allotment Charity* [1989] Ch 484.

[95] Ibid 494.

[96] *Haslemere Estates Ltd v Baker* (n 92) 1122; *Re Hampton Fuel Allotment Charity* (n 94) 493.

[97] *Bradshaw v University College of Wales* (1988) 1 WLR 190.

[98] Ibid 194E.

[99] *Re Hampton Fuel Allotment Charity* (n 94) 493.

[100] See, eg, *Gunning v Buckfast Abbey Trustees Registered* [1994] Times 9 June; *Scott v National Trust for Places of Historical Interest or Natural Beauty* (1998) 2 All ER 705; *Royal Society for the Prevention of Cruelty to Animals v Attorney General* (2002) 1 WLR 448.

[101] *Trustee Act* (n 69) s 60(2)(g). Part 4 of the *Trustee Act 1936 (SA)* is titled 'Charitable trusts procedure'. The predecessor of this part was the *Charitable Trusts Procedure Act 1922 (SA)*, which was passed with the intention of offering the Supreme Court an efficient and expeditious means to exercise its authority over the administration of charitable trusts. See Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) [5.1].

[102] *Trustee Act 1925* (ACT) s 94A(3)(g).

charity trustees, provided they have obtained authorisation from the Attorney-General or if the court deems the case suitable to proceed. The case of *Metropolitan Petar v Mitreski*[103] *(Mitreski)* in the NSW Supreme Court is a recent example that examines the eligibility of individuals to sue under section 6. Hamilton J recognised the public law rationale behind the requirement of the Attorney-General's authorisation, which serves as a protective filter against frivolous lawsuits intended solely to extract costs from the charitable fund.[104] Hamilton J also implicitly acknowledged the potential standing of charitable trust objects,[105] emphasising that section 6 provides for persons other than the Attorney-General to initiate charitable trust proceedings.[106] To ensure the proper administration of the charitable trust in question, Hamilton J remedied the 'defect of constitution of the suit by giving [the Court] leave'.[107]

D Non-charitable Purpose Trust

The final case under examination involves non-charitable purpose trusts (NPTs). Testamentary dispositions that aim to have a monument or tomb constructed, as well as cases concerning the care and maintenance of animals, hold a distinct position within the law of express trusts. This position has been aptly characterised as an 'arcane by-way'[108] by Burchett AJ in the Supreme Court of New South Wales case of *South Eastern Sydney Area Health Service v Wallace*.[109] The existing valid NPTs have often been labelled as 'troublesome, anomalous, and aberrant'[110] or 'merely occasions when Homer has nodded'.[111] The court suggests that their scope should not be extended and that they should not be followed unless 'where the one is exactly like another'.[112] Rules can be categorised into two types: orthodox and exceptions, and both types should be justified. So, what is the justification for NPTs? RM Eggleston offered an explanation:

> [NPTs] deal with subjects near to the hearts of Englishmen — their graves, horses and dogs, and fox-hunting — and therefore would presumably, in an English court, be regarded as deserving of exceptional treatment.[113]

Characterising NPTs as forming 'an exception to the general rule, or an exceptional method of construction'[114] gives rise to a perception that orthodox trust rules are inapplicable to NPTs. Consequently, it is theoretically worthless to investigate NPTs in light of the orthodox trust law framework. This perception has discouraged scholars and practitioners from thoroughly exploring NPTs and has led to the fact that the course syllabus for Equity and Trusts in the majority of law schools has given little attention to this topic or completely ignored it.

---

[103] *Metropolitan Petar v Mitreski* (n 77).

[104] Ibid [6].

[105] Charitable trust objects include both potential and past objects. Potential objects pertain to individuals with the class that the charitable trust aims to benefit, while past objects refer to those who have already received benefits in alignment with the trust's goal.

[106] *Metropolitan Petar v Mitreski* (n 77) [9].

[107] Ibid [16].

[108] *South Eastern Sydney Area Health Service v Wallace* [2003] NSWSC 1061, [1].

[109] *South Eastern Sydney Area Health Service v Wallace* (n 108).

[110] *Corpe v Endacott* [1960] Ch 232, 251.

[111] Ibid 250.

[112] Ibid. See also *Re Pacella* [2019] VSC 170, [18]; *Corpe v Endacott* (n 110) 251.

[113] RM Eggleston, 'Purpose Trusts' (1939) 2(2) *Res Judicatae* 118, 120. See also Philip Jamleson, 'Trusts for the Maintenance of Particular Animals' (1985) 14(2) *University of Queensland Law Journal* 175, 177; Adam J Hirsch, 'Bequests for Purposes: A Unified Theory' (1999) 56 *Washington and Lee Law Review* 33, 60. In order to justify NPTs, one approach is to characterise them as powers to carry out specific purposes. See James Barr Ames, 'Failure of the Tilden Trust' (1892) 5(8) *Harvard Law Review* 389, 395; Bryant Smith, 'Honorary Trusts and the Rule against Perpetuities' (1930) 30(1) *Columbia Law Review* 60, 68–70. However, a problem arises with this approach as the language used to create a trust is distinct from that used to create a power. Treating trusts as powers by disregarding the specific words chosen by the testator poses difficulties.

[114] *Re Pacella* (n 112) [19].

So far, case law has recognised four types of NPTs: trusts for the erection or maintenance of monuments or graves,[115] trusts for the promotion and furtherance of fox-hunting,[116] trusts for the maintenance of particular animals,[117] and trusts for the saying of masses in private.[118] Although NPTs exhibit anomalous characteristics, there is no debate that they still fall within the scope of express trust law from a taxonomic standpoint. Consequently, two questions can be posed concerning NPTs. First, does the concept of beneficial ownership exist in the context of NPTs? Secondly, what is the focal point of the court's analysis regarding NPTs? Similar to charitable trusts, the answer to the first question is evidently negative. NPTs are apparent purpose trusts, meaning that there is a lack of individuals who have vested or contingent proprietary interest in the trust property. Given the nature of the purposes under NPTs, it is impossible to adopt Goff J's approach in *Re Denley's Trust Deed* by characterising NPTs as absolute gifts to specific individuals. As a result, the concepts of 'beneficiary' and 'beneficial ownership' are not applicable in the context of NPTs.

Regarding the second question, there are two distinct lines of case authorities. These two lines differ in their interpretation of the role of enforceability in determining the validity of an express trust. However, they both concur that the concept of due administration is crucial in the court's analysis of NPTs. In this context, 'due administration' should be interpreted in light of the trust's terms, the powers granted to the court under trustee legislation, and the court's inherent jurisdiction over trusts. The first line of cases maintains that a NPT can be considered valid so long as there is a potential for the trust to be duly administrated, regardless of the court's ability to exercise control over its administration. In other words, the trust's enforceability is not a determining factor for its validity. This position does not align with the view that 'the Court will not recognise a trust unless it is capable of being enforced by someone'.[119] The English High Court case of *Trimmer v Danby*[120](*Danby*) serves as an illustrative example. In this case, JMW Turner directed his executors to utilise a sum of money to construct a monument in his honour at St Paul's Cathedral. Kindersley V-C, delivering the judgment, upheld the validity of this testamentary bequest and made the following observation:

> I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument; but if ... *the trustees insist upon the trust being executed*, my opinion is that this Court is bound to see it is carried out. [121]

The cited paragraph gives rise to two implications. First, the administration of the trust is regarded as solely a matter of choice for the designated trustee. So long as the trustee is willing to fulfil their duties, the trust can be upheld. Secondly, if the trustee is unwilling to carry out the trust, it should fail, and the court would not proactively intervene by appointing a new trustee to fulfil the trust's purpose. The similar reasoning is demonstrated in another English High Court case, *Re Dean*,[122] where a testamentary provision to create a trust for the maintenance of horses and hounds was upheld. In this case, North J drew analogies between trusts for the upkeep of animals and trusts for the construction of monuments. He argued that both types of trusts are 'perfectly good trust[s], although [no one] could ask the Court to enforce [them]'.[123] By examining the language used in the will, North J identified the testator's instructions for the trustees regarding the care of the animals. These directions formed the criteria by which the due administration of the trust was valuated, as he observed:

---

[115] *Pirbright v Salwey* [1896] WN 86; *Re Hooper* [1932] Ch 38; *Mussett v Bingle* (n 13); *Re Filshie* (n 13); *Trimmer v Danby* (n 13).

[116] *Re Thompson* [1934] Ch 342.

[117] *Re Dean* (n 13); *Pettingall v Pettingall* (1842) 11 LJ Ch 176.

[118] *Bourne v Keane* [1919] AC 815.

[119] *Re Astor's Settlement Trusts* (1952) 1 All ER 1067, 1072.

[120] *Trimmer v Danby* (n 13).

[121] Ibid 427 (emphasis added).

[122] *Re Dean* (n 13).

[123] Ibid 557.

> It is clear that [the testator] was not leaving to the trustees a discretion as to the way in which they were to deal with the animals, but he was himself giving directions as to what was to be done about them, and lastly, if a time should arrive at which the trustees should think that any of them should be killed, he gives specific directions as to the mode by which that end is to be accomplished, thus shewing that he was giving directions which they were bound to follow, and not merely giving them an absolute discretion to apply the money to those purposes or to any other purposes they pleased.[124]

According to North J, the directions provided by the testator play a crucial role in assessing the trustees' fulfilment of their duties. These directions determine the interpretation of 'due administration' within the context of the trust at hand. So long as the trustees are willing to carry out the trust in accordance with this interpretation, the validity of the trust can be acknowledged.[125] The focus on due administration is also evident in the case of *Re Pearce*,[126] which was heard by the Supreme Court of South Australia. In this case, the testator directed the use of three hundred pounds to erect suitable railings and a headstone on their grave. Importantly, the testator used the specific words 'the suitability of same to be decided by my executrix',[127] granting complete discretion to the executrix in using the money. Abbott J interpreted 'administration' in light of this language, concluding that 'the executor was at liberty to spend that or a smaller sum as she should think proper'.[128] Abbott J's judgment did not delve into the meaning of 'proper' or establish any limitations on the executrix's exercise of discretion. This analysis suggests that so long as the meaning of due administration can be ascertained from the language of the will, and there is potential for the executrix to fulfil the requirements of due administration, the testamentary disposition could be deemed valid.

In contrast, the second line of cases suggest that both the due administration of the trust and the court's capacity to control it are crucial. The lack of either would result in the trust being considered invalid. For example, in the English High Court case of *Minty v Bourne*,[129] Lord Cozens-Hardy, who was the Master of Rolls at the time, declared a charitable bequest in trust for the Roman Catholic Archbishop of Westminster as void. This decision was based on the principle that 'the Court cannot recognize a trust which is so uncertain that there is no known means by which the trustee can be compelled to distribute that fund'.[130] The provision of the bequest in question was similar to the one discussed in the case of *Re Pearce*, where the trustee was granted absolute discretion in the distribution of the funds. Granting absolute discretion implies that there are no limits on how the trustee can exercise their discretion, which consequently prevents the court from effectively overseeing the trustee's administration of the funds.[131] Considering this, Lord Cozens-Hardy invalidated the bequest. The English High Court case of Re *Thompson*[132] serves as another example that underscores the importance of the court's ability to control the administration of a trust. In this case, Clauson J upheld a bequest that granted the executors discretion to use the residuary estate for promoting and advancing fox-hunting. Clauson J based his decision on two factors. First, he noted that the provision of the bequest clearly and sufficiently described the purpose of the gift. This ensured that the bequest had the requisite qualities to be effectively executed,[133] and as a result, the meaning of 'due administration' within the context of the bequest could be discerned. Secondly, the residuary legatees were given the power to seek court orders if the executors failed to execute the legacy. This mechanism provided an effective means to ensure

---

[124] Ibid 562.

[125] Ibid.

[126] *Re Pearce* (n 13).

[127] Ibid 123.

[128] Ibid 118.

[129] *Minty v Bourne* (1909) 1 Ch 567.

[130] Ibid 571.

[131] Ibid. See also *Baker v Sutton* (1836) 1 Keen 224, 233; *James v Allen* (1817) 3 Mer 17, 19; *Farley v Westminster Bank* [1939] AC 430, 436.

[132] *Re Thompson* (n 116).

[133] Ibid 344.

that the trust could be properly managed by the executors.[134] Taking these factors into account, Clauson J concluded that the bequest was both valid and enforceable.

E Preliminary Observations

The preceding case studies demonstrate that the notion of symmetry between legal and beneficial ownership does not apply to all types of express trusts. In the cases of discretionary private trusts with an open class, charitable trusts, and non-charitable purpose trusts, the legal ownership rests with the trustee, but there is no individual or group of individuals in whom the corresponding beneficial ownership can be vested. The terms 'ownership' and 'owner' are 'concurrent and coextensive':[135] claiming ownership of a property without an owner who possesses the right to use, possess, and dispose of it is problematic. Therefore, the term 'beneficial ownership' becomes irrelevant in cases where there are no beneficial owners of the trust property.

It is commonly stated that, in the creation of an express trust, an equitable interest is 'impressed or engrafted onto'[136] the legal estate. However, a thorough analysis of case law relating to discretionary private trusts, charitable trusts, and non-charitable purpose trusts indicates that the concept of equitable interest in these instances cannot be employed and construed in the same way as in the context of fixed private trusts. In such cases, this concept carries no implications for beneficial owners or the location of beneficial ownership. Rather, its purpose is to provide justification for imposing an equitable duty on the trustee — a duty that requires the trustee to administer and dispose of the trust property in compliance with the terms[137] set forth in the trust instrument. Taking this into account, it is clear that the fundamental and essential aspect of an express trust relationship does not always centre on identifying the owner of the equitable proprietary interest in the trust property. Instead, the primary aim for all types of express trusts is to ensure the due administration of the trust. In this context, 'due' functions as an adjective that refines the concept of administration. Assessing whether a trustee's administration meets the 'due administration' criterion depends on its alignment with the trust's purpose, as established by the settlor. In the realm of fixed and discretionary private trusts, the trust's purpose is generally interpreted as safeguarding and advancing the beneficiaries' interests. These interests should be determined in accordance with the terms of the trust instrument. If the terms do not explicitly define the beneficiaries' interests, a context-specific approach should be employed to elucidate them. This approach should consider factors such as the trust's purpose, the beneficiary's status, the nature and scope of the trustee's powers, and the circumstances under which the trust was created. Conversely, charitable and non-charitable purpose trusts adhere to a model of purpose-driven governance.[138] Since purpose trusts do not have designated beneficiaries, the due administration requirements are discerned and assessed in light of the trust's purpose, the powers conferred upon the court by trustee legislation, and the court's inherent jurisdiction over trusts.

The duty to hold and deal with the trust property in accordance with the trust terms is an inherent aspect of the trustee's role. Therefore, the trustee acts as the conduit through which the due administration of the trust is carried out. This is achieved through the imposition of onerous

---

[134] Ibid. See also *Re Pacella* (n 112) [41]; *Johansons v ANZ Executors & Trustee Co Ltd* [1999] VSC 219, [15]-[16].

[135] *M & G Hoschke Pty Ltd v Ray Fry Investments Pty Ltd* [2016] FCCA 3190, [10].

[136] *Akers v Samba Financial Group* (n 4) 453.

[137] The word 'terms' is a general description of the instructions provided to the trustee regarding how they should exercise their power or other legal entitlements, as well as any limitations or restrictions. These terms are of utmost importance because they form the basis for the stewardship arrangement, expressing the intended purpose of the law in recognising and implementing that arrangement. See Ben McFarlane, Charles Mitchell and Jessica Hudson, *Hayton, McFarlane and Mitchell on Equity and Trusts* (Sweet & Maxwell, 15th ed, 2022) 136.

[138] Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954, 968; Matthew Harding, 'The Conditions for Purpose-Based Governance' in Rosemary Teele Langford (ed), *Governance and Regulation of Charities: International and Comparative Perspectives* (Edward Elgar Publishing, 2023) 67, 79–80.

duties on trustees, some of which are irreducible that cannot be excluded through exoneration or exclusion clauses in the trust instrument.[139] This explains why the duty of due administration is regarded as one of the 'essential elements of a private trust',[140] regardless of whether they are discretionary trusts or other forms of trusts. As the respected authors of Hayton, McFarlane and Mitchell on Equity and Trusts noted,

> The existence and operation of express trusts … all depend upon the law's creation of legal powers, as well as *equity's further rules of due administration* that ensure such powers are exercised in the ways they should be … Due administration thus supports whatever the law's ends may be regarding particular legal relationships and institutions and give parties extra choices as to how rights and powers can be held, supporting their decisions, for example, to set up a trust …[141]

The aforementioned paragraph also aligns with the following statement from Lord Eldon in *Morice v Bishop of Durham*,[142] which has frequently been cited as the ratio for his judgment:

> As it is a maxim, that the execution of a trust shall be under the [control] of the Court, it must be of such a nature, that it can be under that [control]; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration.[143]

The referenced passage, which was upheld by the English House of Lords in their ruling of *McPhail v Doulton*,[144] asserts that the established criterion for determining the validity of a trust is its susceptibility to court control. Lord Eldon, in this passage, stresses the importance of trust administration and the necessity for it to be subject to the court's oversight. Additionally, he elucidates the correlation between the identifiability of trust objects and the court's ability to oversee trust administration; specifically, in the absence of identifiable objects that may raise concerns about trustee misconduct, the court cannot intervene and ensure proper trust administration through guidance and directions.[145] In this light, the certainty of objects requirement serves as a mechanism for the court to exercise its inherent jurisdiction and supervise the due administration of the trust. The primary issue at hand is that there needs to be a party possessing the necessary standing to request the court's involvement in safeguarding the appropriate execution of the trust. Whether this party is a beneficiary holding an equitable proprietary interest in the trust property or not is irrelevant to the ultimate goal of ensuring the trust's proper administration.

III Implications

Part II has examined the significance of beneficial ownership in comprehending the establishment and administration of express trusts. It demonstrates that the concept of beneficial ownership is not universally applicable to all forms of express trusts. Instead, the common objective of due administration is a shared consideration across all categories of express trusts. This Part delves into the potential implications of the findings in Part II. Two perspectives are presented: the

---

[139] *Armitage v Nurse* [1998] Ch 241, 253–54; *Spread Trustee Co Ltd v Hutcheson* (2012) 2 AC 194, [129].

[140] *Schmidt v Rosewood Trust Ltd* (2003) 2 AC 709, [60].

[141] McFarlane, Mitchell and Hudson (n 137) 136 (emphasis added).

[142] *Morice v Bishop of Durham* (1805) 32 ER 947.

[143] Ibid 954.

[144] *McPhail v Doulton* (n 57) 440.

[145] Richard C Nolan, 'The Execution of a Trust Shall Be under the Control of a Court: A Maxim in Modern Times' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 469, 487.

doctrinal coherence within the express trust framework, and the exchange of ideas between common law and civil law regarding their respective approaches to express trusts.

A Doctrinal Coherence within the Express Trust Framework

In a legal system that prioritises legal formalism, the importance of doctrinal coherence and consistence is highly emphasised. Institutions that deviate from orthodox rules are typically viewed as exceptions. However, it is important to recognise that orthodox rules themselves continue to evolve, and therefore, exceptions are not permanent. As previously noted,[146] the concept of beneficial ownership has long been considered fundamental to the understanding of express trusts. Due to the historical origins of express trusts, scholars and practitioners have often unquestionably assumed that 'the legal estate in [the trust property] is vested in a trustee [and] there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession'.[147] This understanding seemingly implies that 'beneficial ownership' is an indispensable concept within the express trust system. However, as analysed in Part II, this understanding has posed challenges in understanding the structure of discretionary trusts and justifying the entitlement of discretionary trust beneficiaries to initiate legal proceedings regarding trustees' mismanagement of trust property. Additionally, it has contributed to the prevailing practice of categorising charitable trusts and non-charitable purpose trusts as exceptions to the express trust system. This 'exception' perspective becomes even more prominent when the distinction between trusts for individuals and trusts for specific purposes is extensively recognised and embraced within judicial practices and the academic community.[148]

The case studies in Part II have demonstrated that among the four categories of express trusts — fixed private trust, discretionary private trust, charitable trust, and non-charitable purpose trust — only the fixed private trust aligns comfortably with the concept of beneficial ownership. In the case of the other three types of express trusts, the legal estate in the trust property is solely vested in the trustee, without equitable ownership being vested in any other party. The common thread running through all types of express trusts is that the trustee has the duty of ensuring the proper administration of the trust property, and the court's primary concern is to establish effective mechanisms for ensuring the due administration of the trust. Moreover, the legal presumption of 'two contemporaneous owners' is not always applicable and has recently undergone re-examination by the courts. For instance, in the Australian High Court case of *CPT Custodian Pty Ltd v Commissioner of State Revenue*,[149] Justices Gleeson, McHugh, Gummow, Callinan and Heydon unanimously rejected the necessity of the concept of beneficial ownership within the framework of express trust law. They endorsed Griffith CJ's statement in another Australian High Court case, *Glenn v Federal Commissioner of Land Tax*,[150] emphasising that

> [Griffith CJ's] statement was a prescient rejection of a "dogma" that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it

[146] See Part I.

[147] *Glenn v Federal Commissioner of Land Tax* (n 1) 497.

[148] The practice of classifying trusts into trusts for persons and trusts for purposes has recently been criticised by scholars as undesirable and unjustifiable. For insights into such criticism, see, eg, Matthew Harding, 'A Fresh Look at Purpose Trust' in Simone Degeling, Jessica Hudson, and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP, 2023) 201, 203–5; David Wilde, 'Trusts and Purposes: Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36(4) *Trust Law International* 141, 153–65.

[149] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (n 1).

[150] The statement is: 'the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable'.

> is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.[151]

Accordingly, it becomes evident that the concept of beneficial ownership is neither universally applicable to express trusts nor an indispensable aspect of such trusts. Instead, the principle of due administration permeates all types of express trusts. By shifting the emphasis from beneficial ownership to due administration, there is no longer a necessity to categorise charitable trusts and non-charitable purpose trusts as exceptional cases. Similarly, the challenge of reconciling the granting of standing to sue to discretionary trust beneficiaries with their lack of beneficial ownership becomes redundant. Irrespective of whether a trust is intended for an individual or a purpose, the primary concern revolves around ensuring the proper administration of the trust. Provided that the trust's due administration can be demonstrated and safeguarded, the trust can be considered valid.[152]

Recognising the importance of due administration serves to bridge the dialogue between trusts and similar institutions that involve 'stewardship'[153] and 'custodial'[154] arrangements. The duty of due administration is applicable across various contexts. Within the scope of trusts, a trustee's duty of due administration can be owed to a beneficiary, a discretionary object, or, in the case of charitable trusts, to the Attorney-General or any individual interested in the proper execution of the trust.[155] In the realm of partnerships, it is often stated that partners owe each other the common duty of a trustee to use the partnership property solely for the partnership's benefit, as outlined in the partnership deed.[156] In the context of a deceased estate, personal representatives are frequently recognised as having the duty to 'preserve the assets, manage them appropriately, and apply them in the due course of administration'.[157] The duty of due administration in these contexts is anchored in the principle that any granted authority should only be exercised for the conferred purposes and in accordance with its terms. Given this shared root, a parallel pattern emerges in the duties of due administration across these contexts: the specifics of each duty of due administration depend on the terms governing how a person entrusted with power exercises it. In

---

[151] *CPT Custodian Pty Ltd v Commissioner of State Revenue* (n 1) [25].

[152] The analysis herein relates to the enforcer principle in trust law. For scholarly discussions on this principle, see, eg, David Wilde, 'Re Denley: Re-Evaluating Its Significance for Non-Charitable Purpose Trusts' (2023) 139(2) *Law Quarterly Review* 243, 247–53; Kelvin F K Low (n 12) 488–94; David Hayton, 'Developing the Obligation Characteristic of the Trust' (2011) 117 *Law Quarterly Review* 96, 98–102; Jing (n 89) 240–41. However, the argument concerning due administration is more nuanced than the enforcer principle. While enforcement is crucial, it represents only one component of proper administration, which encompasses all aspects of trustee obligations, trust management, and the fulfilment of trust purposes. Enforcement mechanisms primarily refer to the procedural aspects — who has standing to sue and how breaches can be legally remedied. In contrast, 'due administration' is a broader concept that encompasses whether the trust terms can be meaningfully executed, whether trustee duties can be clearly defined and monitored, whether the trust purpose is sufficiently certain to allow for objective assessment of proper administration, and whether there are adequate standards to judge if the trust is being properly managed. For example, a trust might have an enforcer but still fail because its terms are so vague or uncertain that proper administration cannot be objectively assessed or achieved. Therefore, due administration looks at the substantive ability to implement and oversee the trust, rather than just the procedural ability to enforce it. The distinction is between having someone who can sue (enforcement) versus having a workable framework for executing and monitoring the trust's operation (due administration).

[153] *Hancock v Rinehart* [2015] NSWSC 646, [339].

[154] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503, 1522.

[155] Both English and Australian law introduce the special interest rule, which allows any individual interested in the proper execution of the trust to bring proceedings against a trustee who breaches their duties. For a detailed analysis of the special interest rule, see, eg, Jing (n 89) 231–39; Hui Jing, 'Bringing Proceedings Against Trustees of Australian Charitable Trusts: The Standing of Objects' (2021) 27(2) *Third Sector Review* 35, 38–45.

[156] *Commissioner of State Revenue v Rojoda Pty Ltd* (2020) 376 ALR 378, [32].

[157] *Commissioner of Stamp Duties (Queensland) v Livingston* (n 18) 707.

some instances, these terms may require an individual with authority to exercise their power proactively, while in other scenarios, they might limit the application of power under specific circumstances.

Despite the shared root, it is crucial to note that the duty of administration varies across the aforementioned contexts. There are two distinctions to highlight. First, the duty of administration arises in different ways. In some instances, such as express trusts, partnerships, and most agency relationships,[158] this duty is explicitly created based on the parties' intentions. In contrast, in cases where a personal representative receives a deceased estate on an intestacy, this duty is imposed by law, regardless of the parties' intentions. There are also scenarios, such as those involving company directors and other corporate officers, where the duty arises from a combination of their agreed-upon roles and the legal obligations imposed by law. The second, and arguably the most fundamental difference, pertains to the functioning and enforcement of the duty of administration. In the context of trusts, the court, utilising its inherent jurisdiction,[159] plays a pivotal role in safeguarding the due administration of the trust. However, in other contexts such as deceased estates and partnerships, the court's role in ensuring due administration is neither as vital nor as extensive as it is in the case of trusts. Instead, the meaning of due administration and its execution largely depends on the terms detailing powers and specifying how these powers should be exercised. The court does not take the initiative to actively ensure that due administration is carried out.

The court's inherent jurisdiction, which can be seen as a form of state-supported regulatory supervision and assistance for trusts,[160] underscores the state's unique capability to facilitate the due administration of a trust. While it is true that the court may also rely on its equitable discretion to address unforeseen circumstances in other contexts such as partnerships and deceased estates, the distinctiveness of the court's inherent jurisdiction in trust law becomes clearer when examining the breadth of its jurisdiction over trusts. In the case of partnerships, court interventions typically focus on resolving disputes between partners or facilitating the termination of partnership relationships.[161] In the context of deceased estates, court interventions primarily revolve around the proper preservation and distribution of the deceased person's property. In contrast, in the context of trusts, the court provides comprehensive assistance throughout the entire life cycle of a trust. The assistance is primarily exhibited through the court's use of diverse management-oriented mechanisms that facilitate trustees in their administration of the trust. These mechanisms cater to both trustees and beneficiaries, with their specific expressions and operations varying based on the unique roles of trustees and beneficiaries within the trust structure.

In relation to trustees, these mechanisms primarily manifest in the provision of 'guidance and advice'.[162] These guidelines and directives are designed to assist trustees in their administration of the trust. Specifically, when trustees are uncertain about exercising their discretion and seek the court's assistance, the court can provide advice on how they should proceed. Additionally, the court can assist trustees in interpreting the scope of their powers or grant approval for their

---

[158] The phrase 'most agency relationships' is used to acknowledge exceptions where the duty of administration may not explicitly arise from the parties' intentions. In some cases, an agency relationship might be created by statute or regulation rather than through explicit agreement. For instance, certain government agencies or regulatory bodies might have duties imposed by law, regardless of the specific intentions of the individuals involved. Additionally, an agency relationship can sometimes arise by implication, based on behaviour or circumstances rather than a formal agreement. In such cases, the duty of administration might not be clearly defined by the parties' intentions.

[159] *Shepherd & Co Solicitors v Brealey* (2023) 2 WLR 979, 1006; *Holland ato Tauranga Energy Consumer Trust v Jonkers* [2021] NZHC 3469, [102]-[104]; *Re Tam Kwong Cheung* [2020] HKCU 1992, [34], [37]; *Re Cooper Street Property Trust (No 2)* (n 40) [16].

[160] Nolan (n 145) 488.

[161] Ibid 490.

[162] *JGE v Trustees of the Portsmouth Roman Catholic Diocesan* (2013) 2 WLR 958, 1010.

proposed actions.[163] In cases where trustees are found to have misused the trust by actions that endanger the trust property or display incompetence, dishonesty, or a lack of reasonable loyalty, the court can, in the interest of 'expediency and necessity',[164] replace trustees or appoint new trustees. Moreover, when settlors and trustees attempt to absolve the trustees of their liabilities for breaching their duties through exemption clauses, the court has the authority to prioritise the notion of due administration over the principle of 'freedom of contract'.[165] This is achieved through the mechanism of 'irreducible core duties',[166] which safeguards the settlors' deliberate and conscious intent to employ the trust structure from being unjustifiably undermined by the trustees' potential inclination to mismanage the trust.

When it comes to beneficiaries, these mechanisms primarily manifest in the form of rights that empower them to actively oversee the trustee's administration. For instance, when determining whether a beneficiary is entitled to initiate legal proceedings concerning the trustee's maladministration of the trust, the court's primary concern is not whether the beneficiaries in question have equitable proprietary interest in the trust property, but rather whether there is a necessity for the court to intervene in order to rectify the trustee's maladministration. As such, the approval of the beneficiary's entitlement to seek court intervention is not an end in itself; instead, it serves as a mechanism to invoke the court's inherent jurisdiction to safeguard the trust's proper administration. Furthermore, the court also afford beneficiaries the right to access trust documents in order to enhance their capacity to invoke the court's inherent jurisdiction.[167] This right enables beneficiaries to scrutinise the trustee's power, access whether their management aligns with the trust's objectives, and determine the appropriate actions to hold trustees accountable to their office.

Reflecting on the findings from the abovementioned case studies,[168] concerns about due administration permeates every aspect of the court's inherent jurisdiction over trusts. This jurisdiction does not exist in isolation; rather, it becomes evident through the court's intervention in the management of the trust by trustees. By offering guidance, facilitating the replacement of trustee when necessary, and granting beneficiaries the right to seek the court's intervention, the court strives to ensure that the established trust retains both the capacity and practicality for proper administration.

B Exchange of Ideas between Common Law and Civil Law

The inherent 'duality of law and equity',[169] often enigmatic to civilian lawyers, forms the foundation from which the law of express trusts has emerged and evolved. The *Hague Convention on the Law Applicable to Trusts and on Their Recognition* asserts that 'the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution'.[170] This distinctiveness of the trust institution stems from the ability to classify rights into legal and equitable components. Historically, the traditional division between law and equity was perceived as a substantial barrier preventing the express trust law system from being integrated into civil law countries.[171] Nonetheless, practical experiences with trusts have

---

[163] *Public Trustee v Cooper* [2001] WTLR 901, 924; *Re Allen-Meyrick's Will Trusts* (1966) 1 WLR 499, 503. See also Lynton Tucker et al (eds), *Lewin on Trusts (Volume II)* (Sweet & Maxwell, 20th ed, 2020) [39-088]; James Glister and James Lee, *Hanbury and Martin Modern Equity* (Sweet & Maxwell, 22nd ed, 2021) [19-027].

[164] *Shaw's Trustees v Shaw* (1870) 8 M 419, 420.

[165] Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) 65.

[166] *Armitage v Nurse* (n 139) 245.

[167] *Schmidt v Rosewood Trust Ltd* (n 140) [51]; *Dawson Damer v Taylor Wessing* (2017) 1 WLR 3255, [47]; *Lewis v Tamplin* (n 39) [44].

[168] See Part II.

[169] Hefti (n 4) 557.

[170] The *Hague Convention on the Law Applicable to Trusts and on their Recognition*, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=59 (accessed on 31 March 2024)

[171] George L Gretton, 'Trusts Without Equity' (2000) 49(3) *International and Comparative Law Quarterly* 599, 600; Vera Bolgár, 'Why No Trusts in the Civil Law?' (1953) 2(2) *American Journal of Comparative Law* 204, 210; Hefti (n 4) 557–58.

demonstrated that the perceived obstacles are not as insurmountable as initially thought, as illustrated by the extensive adoption of trusts law and its prevalent employment in structuring transactions in civil law jurisdictions. The widespread application of trusts within these jurisdictions indicates that express trust law has moved beyond the purview of the common law sphere, and the conceptualisation of trusts is no longer restricted to the context of common law. This notion resonates with George Gretton's insightful remark, 'The trust [in and of itself] presupposes neither equity nor divided ownership'.[172]

Functional analysis serves as a crucial component in the process of legal transplantation.[173] Consequently, the distinct and essential functions provided by the common law express trust form the fundamental elements when integrating the express trust law system into civil law jurisdictions. Numerous studies on express trusts have recognised that these functions primarily involve the separation of management and benefit, along with the establishment of a prudent management regime.[174] The separation between management and benefit serves to effectuate the settlor's intended deployment of the trust mechanism. This dichotomy establishes an equilibrium between trustee autonomy and fiduciary accountability, whereby trustees are vested with discretionary management authority whilst being circumscribed by their duties. The management regime institutes a rigorous standard of conduct to which trustees must adhere, and its implementation necessitates the balancing of potentially competing considerations: the settlor's intentions, the beneficiaries' interests, and trustees' exercise of professional judgement. Civil law scholars have similarly recognised the importance of safeguarding proper trust administration and typically employ two mechanisms to achieve this objective: the trust property independence mechanism (the 'TPI mechanism') and the patrimony mechanism.

1 The Trust Property Independence Mechanism

East Asian jurisdictions, including China,[175] Japan, and South Korea, have adopted the TPI mechanism. These jurisdictions are firmly entrenched in the Roman-Germanic tradition, making nomenclature and taxonomic classification vital for understanding rights, obligations and their interrelationships within their respective private law systems. Generally, these jurisdictions utilise a dualistic system concerning their private law governing property, which encompasses both the law of property and the law of obligation.[176] The *numerus clausus* principle, established under the purview of property law, posits that only the legislature has the authority to create new types of rights with *in rem* effects against the world; the number of property rights and their standardised incidents must be delineated by law. Owing to the impact of the *numerus clausus* principle, a beneficiary's right cannot be categorised as form of 'ownership' within these jurisdictions.[177]

In the aforementioned three jurisdictions, the absence of the concept of beneficial ownership does not hinder the establishment or administration of express trusts. Furthermore,

---

[172] Gretton (n 171) 601.

[173] James Boyle, 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form Private Jurisprudence of Substance' (1993) 78(3) *Cornell Law Review* 371, 381.

[174] See, eg, Michael Bryan, 'The Inferred Trust: An Unhappy Marriage of Contract and Trust?' (2016) 69(1) *Current Legal Problems* 377, 379; Ying Khai Liew and Charles Mitchell, 'The Creation of Express Trusts' (2017) 11 *Journal of Equity* 133, 155; Lusina Ho, 'Trusts: The Essentials' in Lionel D Smith (ed), *The Worlds of the Trust* (Cambridge University Press, 2013) 1, 4–5; Robert H Sitkoff, 'Trust Law as Fiduciary Governance Plus Asset Partitioning' in Lionel D Smith (ed), *The Worlds of the Trust* (Cambridge University Press, 2013) 428, 430–34.

[175] For the purpose of this article, 'China' refers to the People's Republic of China, excluding the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan Region.

[176] Ying-Chieh Wu, 'East Asian Trusts at the Crossroads' (2015) 10(1) *National Taiwan University Law Review* 79, 81.

[177] Masayuki Tamaruya, 'Japanese Law and the Global Diffusion of Trust and Fiduciary Law' (2018) 103(5) *Iowa Law Review* 2229, 2237–38; Ying-Chieh Wu, 'Trusts in South Korea: Towards an Independent Fund Mechanism' in Ying Khai Liew and Ying-Chieh Wu (eds), *Asia-Pacific Trusts Law: Adaptation in Context* (Hart, 2023) 311, 319–20; Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58(3) *International & Comparative Law Quarterly* 655, 665–66; Wu, 'East Asian Trusts at the Crossroads' (n 176) 98–100.

none of these jurisdictions endow courts with 'inherent jurisdictional powers'[178] to assist trustees in their administration of the trust. Rather, the emphasis is placed on utilising the TPI mechanism to ensure the trust is administered appropriately. This objective is achieved through two legal consequences associated with this mechanism: the substitution of trust property and the insulation of trust property from the bankruptcy proceedings of settlors and trustees. In relation to the first consequence, trust laws in China, Japan, and South Korea all recognise that, in the absence of specific provisions in the trust instrument, trust property encompasses not only the initial property transferred to the trust but also any property acquired during the trustee's administration of the trust.[179] This implies that when a trustee sells the trust property to a third party and receives the price in return, the money automatically becomes part of the trust property. Similarly, if trust property is damaged and the trustee obtains agreed compensation from an insurance company, the compensation will automatically be considered part of the property governed by the trust.

It is indisputable that the trust and confidence a settlor places in a trustee are fundamental to the trustee's appointment. However, it is not necessarily accurate to claim that a trust will be terminated if a trustee is unable to fulfil their administrative duties. In fact, express trust laws in all three jurisdictions explicitly state that a trust will continue to exist even if its trustee is deceased, bankrupt, or resigns.[180] This demonstrates that the ongoing existence of a trust is not contingent upon the trustee's status, but rather on the continuous existence and identifiability of the trust property. So long as the trust property remains identifiable and capable of administration, the trust will persist in operation. As such, the TPI mechanism's substitution rules facilitate the identification and administration of the 'autonomous or self-contained bundle of assets'[181] created by an express trust.

The second consequence of the TPI mechanism, which insulates trust property from bankruptcy proceedings involving settlors and trustees, necessitates that trust property be separated from the assets of the trustee and settlor in the event of bankruptcy.[182] This 'carving out' consequence sheds light on the concept of 'independence' within the TPI mechanism: trust property remains immune and insulated from the trustee's and settlor's personal assets. As a result, trust property is exempted from the purview of bankruptcy law and is not distributed among the settlor's and trustee's personal unsecured creditors. Inherent to this 'immunity' or 'insulation' effect is the stipulation that trustees are prohibited from using trust property to offset liabilities incurred by their personal assets or executing trust property to settle debts owed to their personal creditors.[183] Ying-Chieh Wu's insights offer valuable perspective on this aspect:[184]

---

[178] *London Borough of Redbridge v SNA* (2015) 3 WLR 1617, 1619.

[179] *Trust Act (No 108, 15 December 2006) (Japan)* art 16; *Trust Act (No 15022, 31 October 2017) (South Korea)* art 27; *Trust Law (No 50, 1 October 2001) (China)* art 14.

[180] *Trust Act (No 108, 15 December 2006) (Japan)* art 74; *Trust Act (No 15022, 31 October 2017) (South Korea)* arts 23 and 24; *Trust Law (No 50, 1 October 2001) (China)* art 52.

[181] Ying-Chieh Wu, 'Trusts Reimagined: The Transplantation and Evolution of Trust Law in Northeast Asia' (2020) 68(2) *American Journal of Comparative Law* 441, 463.

[182] *Trust Act (No 108, 15 December 2006) (Japan)* art 25; *Trust Act (No 15022, 31 October 2017) (South Korea)* art 24; *Trust Law (No 50, 1 October 2001) (China)* arts 15-16.

[183] *Trust Act (No 108, 15 December 2006) (Japan)* art 22; *Trust Act (No 15022, 31 October 2017) (South Korea)* art 25; *Trust Law (No 50, 1 October 2001) (China)* art 18.

[184] Wu, 'Trusts Reimagined: The Transplantation and Evolution of Trust Law in Northeast Asia' (n 181) 463 (emphasis added). In the Privy Council case of *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, Lord Briggs described the trust as possessing an enduring character. His judgment (at [256]-[257]) states: 'While a trust does not … have a separate legal personality of its own, it is in my view relevantly to be regarded as a form of *continuing institution or scheme* under which a fluctuating body of assets (the fund) is administered by fiduciaries who may change over time, for the benefit of beneficiaries who may likewise change, subject to a set of rules contained in the trust deed and the general law, which may also change, by amendment of the trust deed, by judicial variation, by legislation or even by the "export" of the trust into a different legal jurisdiction. Despite all these potential changes, *the trust itself has an enduring character which is*

> The concept of trust fund independence resembles the concept of legal personhood. [The trust fund] exists and functions as if it were an *autonomous or self-contained* bundle of assets not affected by the trustee's personal bankruptcy, death or compulsory execution. In other words, the doctrine of independence of the trust fund turns a bundle of assets … into a *quasi-legal entity*.

In accordance with the cited paragraph, the implementation of the TPI mechanism results in the creation of 'two distinct legal persons [for a trustee]: a natural person contracting on behalf of himself, and an artificial person acting on behalf of beneficiaries'.[185] This distinction serves to justify the separation and safeguarding of trust property from both the settlor's and the trustee's personal assets, ultimately laying the foundation for and streamlining the proper administration of trust property by the trustee.

2 The Patrimony Mechanism

Compared to the English literature concerning the TPI mechanism, there is a relatively larger body of English literature pertaining to the patrimony mechanism. Using a metaphor, a patrimony can be characterised as a container that possesses the capacity to hold both assets (pecuniary rights) and liabilities.[186] Scotland and Québec are notable jurisdictions that incorporate the patrimony mechanism within their respective express trust systems, although the functionality of the patrimony principle varies between them. For instance, Scottish law deems it essential for patrimony to be attached to an individual.[187] In contrast, Québec law embraces the concept of patrimony by appropriation, permitting patrimony to be allocated to an abstract purpose rather than a person.[188] Despite these differences, both jurisdictions concur that an express trust relationship encompasses two types of patrimony. The first is the personal patrimony held by the trustee, which pertains to the personal assets and liabilities of the trustee in their individual capacity. The second is the trust patrimony, comprising the assets and liabilities related to the trust itself. In Scottish law, the trust patrimony can be held by the trustee,[189] while in Québec law, it may exist abstractly, independent of the settlor, trustee, or beneficiary.[190]

In line with the dualistic patrimony structure, creditors transacting with the trustee in their role as trustee possess the authority to access the trust property to satisfy their claims. In contrast, the trustee's personal creditors are restricted to accessing the trustee's personal assets for the fulfilment of their claims. The dualistic patrimony structure, therefore, ensures that the rights of

---

not dependent upon separate legal personality, any more than is a partnership or unincorporated association. That perception that *a trust, like a company, has an enduring quality of its own* is central to my view that the insufficiency of the fund to meet all the trustees' lien-based claims in full is a common misfortune for which a pari passu sharing of the residue is the fairest, or least worst, general rule' (emphasis added). The enduring character analysis in *Halabi* and the quasi-entity legal analysis share conceptual similarities. Both approaches recognise that a trust maintains a continuing existence that transcends changes in its constituent elements, whether trustees, beneficiaries, or assets. However, there are subtle distinctions. Lord Briggs acknowledges that this enduring character exists without separate legal personality, whereas the quasi-entity analysis draws more direct parallels with legal personality. The enduring character analysis is more focused on the practical continuity of the trust arrangement, while the quasi-entity analysis emphasises the trust's autonomous functioning.

[185] Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110(3) *Yale Law Journal* 387, 416.

[186] Christopher B Gray, 'Patrimony' (2005) 22(1) *Les Cahiers de droit* 81, 146; Magda Raczynska, 'Parallels between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in Lionel D Smith (ed), *The Worlds of the Trust* (Cambridge University Press, 2013) 454, 456–57; Smith, 'Trust and Patrimony' (n 6) 383.

[187] David Hayton, 'Liability of Trustees to Third Parties: The Scottish Law Commission's Proposals' (2008) 12 *Edinburgh Law Review* 446, 447; Kenneth GC Reid, 'Patrimony Not Equity: The Trust in Scotland' in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press, 2015) 110, 116–17.

[188] *Civil Code of Québec 1991* arts 1260 and 1261. See also Alexandra Popovici, 'Trust in Quebec and Czech Law: Autonomous Patrimonies?' (2016) 24(6) *European Review of Private Law* 929, 931–32.

[189] Hayton (n 187) 450.

[190] *Civil Code of Québec* (n 188) art 1261.

trust beneficiaries are segregated and safeguarded from the claims of the trustee's personal creditors. Under this framework, ownership of the trust property is characterised as a 'full, civilian, undivided ownership'[191] exclusively vested in the trustee. The rights of beneficiaries are deemed personal in nature, enforceable against the trust patrimony.[192] This personal nature of a beneficiary's right is a commonality shared between jurisdictions adopting either the TPI mechanism or the patrimony mechanism.

The patrimony mechanism, through the segregation of the assets and liabilities of the trust patrimony from those of the trustee's personal patrimony, plays a crucial role in the proper administration of the trust in two ways. First, the concept of office is intrinsically linked to the patrimony principle. The assets and liabilities pertaining to the trust patrimony are associated with the office of the trustee. The personal identify of a trustee is inconsequential in the functioning of the dualistic patrimony structure, as the trustee serves merely as a titular or administrator[193] of the trust patrimony.[194] Consistent with this analysis, the equitable maxim 'no trust is to fail for want of a trustee'[195] is equally applicable in Scottish and Québec laws. This means that even if the trustees themselves become incapacitated, pass away or go bankrupt, the trust will persist in its operations. Furthermore, in situations where a trustee is unable to perform their administrative duties properly, the court has the authority to intervene.[196] The court can remove the trust from the original trustee's control and appoint a new trustee, thereby ensuring the effective administration of the trust and adherence to its intended purpose.

Secondly, in line with the concept of patrimony, when a trustee transfers the trustee office to another trustee, there is a form of 'universal succession'[197] whereby the new trustee succeeds to all the assets and liabilities associated with the trust patrimony.[198] The new trustee does not have the liberty to choose which portion of the assets or liabilities to take over. The notion of universal succession distinguishes a trust from a mere entrusting arrangement,[199] and its proper execution relies on the trustee's diligent performance of their administrative duties. The establishment of an express trust does not typically involve the segregation of the trust property from the trustee's personal assets. Consequently, the trustee may commingle the trust property with their personal assets, making it difficult to ascertain the trust property. Depending on the nature of the trust property and the extent of the commingling, this practice of commingling may obstruct the effective functioning of the dualist patrimony structure, rendering the implementation of universal succession unfeasible. In light of this, the patrimony mechanism inherently requires the trustee to take certain steps to properly carry out their administrative duties. For example, when the trust property consists of chattels, a trustee should, in accordance with a reasonable person standard, keep them separate from their personal chattels and declare them as part of the trust property. In the case of money, the trustee should deposit it into a separate bank account and label it as 'trust money'. These actions of keeping the trust property separate and labelling the trust account help maintain the independence and integrity of the trust patrimony, providing an effective notice to external third parties that the trust property is segregated from the trustee's personal assets.

---

[191] Lionel Smith, 'Scottish Trusts in the Common Law' (2013) 17(3) *Edinburgh Law Review* 283, 285.

[192] Gretton (n 171) 612.

[193] Article 1278 of the *Civil Code of Québec 1991* stipulates that 'A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation. A trustee acts as the administrator of the property of others charged with full administration'.

[194] Smith, 'Trust and Patrimony' (n 6) 398.

[195] *Lloyd's Bank Ltd v Lorvand* (1944) 1 All ER 408, 410.

[196] Gretton (n 171) 613–14.

[197] Gray (n 186) 147.

[198] Paul Matthews, 'Square Peg, Round Hole? Patrimony and the Common Law Trust' in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press, 2015) 62, 71.

[199] Gretton (n 171) 618.

IV Conclusion

This article presents a comprehensive analysis of the role of beneficial ownership in express trust law. It elucidates that while the concept of beneficial ownership is well-suited for fixed trusts, it faces limitations when applied to discretionary trusts with an open class, charitable trusts, and non-charitable trusts. Therefore, it cannot be deemed as an irreducible concept in comprehending the formation and functioning of all types of express trusts. Through an examination of relevant case law, the article further highlights that ensuring the due administration of the trust is a crucial objective that applies across all types of express trusts. By redirecting the emphasis from beneficial ownership to due administration, a chance arises to doctrinally link all kinds of express trusts. Regardless of whether the trust is for a person or a purpose, the court's main priority is to ascertain that adequate mechanisms are in place to ensure the due administration of the trust. The concept of due administration is not confined to trust law; it extends to various contexts, including partnerships and deceased estates. While the duty of due administration across different contexts is rooted in the principle that any granted authority should be exercised solely for its intended purposes and in line with its terms, the circumstances under which this duty arises can vary. Additionally, the court's role in ensuring the performance of the duty of due administration differs across these contexts. In the realm of trust law, the court employs its inherent jurisdiction to provide comprehensive assistance, facilitating trustees in their administration of the trust. However, in other contexts, the court generally refrains from taking proactive steps to ensure that due administration is executed.

This article also carries implications for the conversation between civil and common law jurisdictions regarding their respective approaches to express trust law. The widespread adoption of express trust law in civilian jurisdictions suggests that it is no longer necessary to conceptualise the law of express trust solely within the framework of common law. Although the concept of beneficial ownership does not exist in civilian jurisdictions, its absence has not impeded the establishment of express trusts. Similarly, the lack of the court's inherent jurisdiction over trusts does not obstruct the functioning of express trusts in these jurisdictions. Civilian lawyers recognise the importance of due administration within an express trust structure and have typically adopted two mechanisms to achieve this objective: the trust property independence mechanism and the patrimony mechanism. These mechanisms differ in their manifestation and function, but both serve to facilitate the due administration of the trust, ensuring the proper preservation of the settlor's intent in utilising the express trust structure.

The issue of how a common law express trust functions within a civil law jurisdiction remains a subject of ongoing debate. In this context, a system-neutral term is both desirable and essential for effective communication between the two jurisdictions. McFarlane and Stevens propose the notion of 'rights against rights' as a neutral term, suggesting that trust rules are more reliant on this concept rather than on localised traditions of equity.[200] I concur with their perspective and propose that the principle of due administration can also serve as a neutral term. This approach could foster dialogue, facilitating the integration of optimal practices across jurisdictions, while respecting the unique legal traditions inherent within each system.

[200] McFarlane and Stevens (n 4) 28.