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RESEARCH ARTICLE

Enforcing charitable trusts: a study on the English necessary interest rule

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Abstract

In England, Parliament introduced the 'necessary interest rule' through the enactment of section 115 of the Charities Act 2011 (England and Wales), allowing 'any person interested' in a charitable trust to initiate charity proceedings against defaulting trustees in their administration of charitable assets. Nevertheless, insufficient attention has been paid to this rule despite it being initially enacted in 1853. Parliament has refrained from clearly defining the rule, and the courts have long been grappling with its meaning in determining whether a person is eligible to sue. This paper studies the necessary interest rule by exploring the way in which the courts have interpreted it and the uncertainties surrounding its operation. It is shown that, in the context of charitable trusts, the concern of securing the due administration and execution of the trust lies at the heart of the rule. The final section of this paper discusses the significant theoretical implications of the necessary interest rule. It considers the beneficiary-enforcer debate concerning the conceptual nature of express trusts and highlights the insights that analysis of the rule can provide into this debate.

Keywords: charitable trust; necessary interest rule; locus standi; beneficiary-enforcer debate

Introduction

To create a valid private express trust, the Court of Chancery required three certainties: certainty of intention, certainty of subject matter, and certainty of objects.[1] The focus of this paper is on the certainty of objects requirement, whose origin dates back at least as far as the most notable English case, *Morice v Bishop of Durham*[2] (*Morice*). A notorious principle that *Morice* laid down is that private express trusts must be created in favour of identifiable or named individuals. Following this principle, a trust created for purposes rather than identifiable individuals is prima facie void, due to the absence of ascertainable individuals 'in whose favour the court can decree performance'.[3] On the other hand, a body of scholarly writings has argued that certainty of objects is not a legal necessity, although 'it is reasonable, equitable, and in accordance with the analogies of the law'.[4] The main tension between

†I thank Andrew Godwin, Matthew Harding and Michael Bryan for their generous comments on earlier drafts. I am also grateful to Yiming Liu for research assistance. The usual responsibility for errors applies.

[1] *Knight v Knight* (1840) 3 Beav 148 at 172.

[2] *Morice v Bishop of Durham* (1805) 32 ER 947 at 955.

[3] *Morice v Bishop of Durham* (1804) 9 Ves 399 at 405.

[4] J Gray 'Gifts for a non-charitable purpose' (1902) 15(7) Harvard Law Review 509 at 515. Clauson J observed in *Re Thompson* that this element is certain where 'the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given': see *Re Thompson* [1934] Ch 342 at 344.

these two arguments lies, in substance, in the concern regarding the enforceability of a purpose trust.[5] The case law developed in the last century has upheld a limited, though well-recognised, number of purpose trusts.[6] Yet the basis on which these exceptional and anomalous trusts were recognised falls short of consistency and coherence, and therefore it is doubtful whether these instances can be followed in light of recent case law.[7]

Traditional trust scholarship holds that the presence of an equitable proprietary interest, held by an identifiable individual or individuals, is the prerequisite of a valid trust. An exception to this view is the institution of the charitable trust. In view of the public benefit deriving from the enforcement of charitable trusts,[8] the courts have widely recognised their establishment and appointed the Attorney General to perform the role of an enforcer.[9] In *Leahy v Attorney-General for New South Wales*,[10] the Privy Council held that 'a trust may be created for the benefit of persons as cestuis que trust but not for a purpose unless the purpose be charitable. For a purpose cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it'.[11] The Master of Rolls Sir William Grant referred to the legal validity of charitable trusts as long ago as 1804 in *Morice*, although it was recognised far earlier than that.[12] His Lordship said, 'where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object'.[13]

The central concern of a charitable trust lies in the establishment of mechanisms to hold a charity trustee accountable for its performance of duties, so as to the protect the public benefit flowing from the execution of the charitable purposes. In England, Parliament introduced the 'necessary interest rule' through the passage of the Charities Act, allowing 'any person interested in'[14] a charitable trust to bring charity proceedings against a defaulting trustee in its administration of charitable assets. This rule has also been introduced into other jurisdictions inheriting the common law tradition, though the expression is slightly different; for example, section 57A(a)(iii)[15] of the Trustee Ordinance (Hong Kong), section 70(5)(e)[16] of the Trustee Act 1925 (Australian Capital Territory), and section 36(1c)(e)[17] of the Trustee Act 1936 (South Australia). Nevertheless, insufficient attention has been paid to this rule, even though it came into being as long ago as 1853.[18] Upon closer inspection of the relevant trust scholarship, there exists already a sizable body of literature that discusses the role of settlors and the Attorney General in supervising the trustees' daily management of charitable

[5]*Radmanovich v Nedeljkovic* [2001] NSWSC 492 (15 June 2001) at [102]; *Re Denley's Trust Deed* (1969) 1 Ch 373 at 377; *Re Hummeltenberg* [1923] All ER Rep 49 at 51.

[6]See eg *Bourne v Keane* [1919] AC 815; *Pedulla v Nasti* (1990) 20 NSWLR 720; *Re Thompson*, above n 4; *Re Pearce* [1946] SASR 118 (24 October 1946); *Chesterman v Mitchell* (1923) 24 SR NSW 108; *Carson v Presbyterian Church of Queensland* [1956] St R Qd 466 (15 December 1955).

[7]D Parker and A Mellows *The Modern Law of Trusts* (Sweet and Maxwell, 5th edn, 1983) p 177.

[8]It is the factor of public benefit that distinguishes charitable trusts from private trusts. D Morris 'Charities and the big society: a doomed coalition?' (2012) 32(1) LS 132 at 135.

[9]On account of the enforcement of charitable trusts by the Attorney General, see eg *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59 (30 September 1998) at [39], [54], [67]; G Pont *Charity Law in Australia and New Zealand* (Oxford University Press, 1999) pp 266–267; H Picarda *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th edn, 2010) pp 727–729.

[10]*Leahy v Attorney-General for New South Wales* [1959] AC 457.

[11]Ibid, at 479.

[12]G Jones *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969) p 161.

[13]*Morice*, above n 3, at 405.

[14]Charitable Trusts Act 1853 (UK), s LVII; Charities Act 1960 (England and Wales), s 28; Charities Act 1993 (England and Wales), s 33; Charities Act 2011 (England and Wales), s 115.

[15]Its legislative text is 'persons claiming to administer the trust, or persons otherwise interested in the trust'.

[16]Its legislative text is 'a person who … has a relevant interest in the trust'.

[17]Its legislative text is 'any person who … has a proper interest in the trust'.

[18]Charitable Trusts Act 1853 (UK), s LVII; *Re Hampton Fuel Allotment Charity* [1989] Ch 484 at 490; *Metropolitan Petar v Mitreski* [2001] NSWSC 976 (31 October 2001) at [8]. On the limited literature that discusses the necessary interest rule, see K Chan *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) pp 94–97; R Pearce et al *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 5th edn, 2010) pp 856–859.

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trusts.[19] In contrast, scholarly writing analysing the role of the 'interested' person in the governance of charitable trusts is exceedingly rare. This is primarily attributable to the widely acknowledged conceptualisation of the charitable trust as a purpose trust.[20] It thus follows that the model of charitable trust has no beneficiary or beneficiaries as understood in the context of an express private trust, and the recipients selected for the purpose of charity asset distribution play the mere role of a channel through which the public benefit pursued by the trust is realised. This view, very much the orthodox one, has discouraged both academics and practitioners from exploring the potential supervisory role of recipients under a charitable trust and the scope of 'interested' persons in relation to the bringing of charity proceedings.

This paper studies the necessary interest rule under English law[21] with the aims of exploring the way in which it has been construed and applied, and of identifying the extent to which an interested person may hold charity trustees responsible for their management of charitable assets. This study has significance in both practical and theoretical senses. Practically, although it is recognised that the Attorney General '[represents] the Crown as *parens patriae* to enforce the execution of charitable trusts',[22] this 'protector'[23] or 'guardian'[24] mechanism has been extensively criticised due to its lack of resources (in terms of both personnel and funds) dedicated to supervising the administration of charitable trusts.[25] Since the reforms of the Charities Act 1960 (England and Wales), the function of the Attorney General has largely been replaced by the Charity Commission for England and Wales[26] (Commission). However, the establishment of the Commission does not completely alleviate the concerns over the supervision and enforcement of charitable trusts, for not all charitable trusts are required to register with the Commission,[27] and more notably, it is questionable whether the Commission is capable of effectively performing its monitoring role.[28] One might argue that, aside from the Attorney General and the Commission, settlors are interested in seeing charitable assets being properly used, and therefore they are ideal candidates to play an overseeing role. But this approach is also not free of problems, as too much reliance on settlors to supervise charitable trusts will contribute to the risk that they may use charitable trusts as a vehicle for illegal purposes, such as money laundering or tax evasion. In view of the above concerns, it is of practical significance to explore other ways to oversee trustees' administration of charitable trusts, such as via interested person(s).

[19]See eg K Chan 'The role of the Attorney General in charity proceedings in Canada and in England and in Wales' (2010) 89(2) Canadian Bar Review 373 at 388–391; A Vestal 'Critical evaluation of the charitable trust as a giving device' (1957) 1957 (3) Washington University Law Review 195 at 210–211; L Kutner and H Koven 'Charitable trust legislation in the several states' (1966) 61 Northwestern University Law Review 411 at 425.

[20]See eg M Bryan et al *Equity and Trusts in Australia* (Cambridge: Cambridge University Press, 2nd edn, 2017) para [16.2]; L Tucker et al (eds) *Lewin on Trusts (Volume 1)* (Sweet & Maxwell, 20th edn, 2020) para [1-031]; J Penner *The Law of Trusts* (Oxford: Oxford University Press, 10th edn, 2016) para [13.3]; J Garton *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) para [6.05]; Chan, above n 18, p 80.

[21]Given that the UK has three legal systems: English law, applying in England and Wales, Northern Irish law, applying in Northern Ireland and Scots law, applying in Scotland. When referring to laws of the UK or English law in this paper, it particularly means the law of England and Wales.

[22]*Wallis v Solicitor-General for New Zealand* [1903] AC 173 at 181–182.

[23]*Perpetual Trustees Victoria Limited v Barns & Another* [2012] VSCA 77 (2 May 2012) at [42].

[24]*National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 63.

[25]Chan, above n 19, at 391–392; Vestal, above n 19, at 210; Kutner and Koven, above n 19, at 412.

[26]R Fries 'Charity Commission for England and Wales' (2006) 8(2) International Journal of Not-for-Profit Law 7 at 8; Pearce et al, above n 18, p 855.

[27]Charities Act 2011, above n 14, s 30(2).

[28]C Decker and M Harding 'Three challenges in charity regulation: the case of England and Wales' in M Harding et al (eds) *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) p 334; A Dunn 'Using the wrong policy tools: education, charity, and public benefit' (2012) 39(4) Journal of Law and Society 491 at 512; Charity Commission for England and Wales *Charity Commission Annual Report (2019–2020)* pp 15–16, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901690/Charity_Commission_Annual_Report_and_Accounts_2019_to_2020.pdf.

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Theoretically, there has been a long-standing debate as to the conceptual nature of express trusts, where two arguments have been raised. The first opines that the essence of an express trust lies in the 'equitable proprietary rights of the beneficiaries'.[29] This argument considers charitable trusts an exception to the beneficiary principle and recognises the validity of charitable trust as a matter of public policy. The second argument holds that the essence of express trusts is in 'the trustee's subjection to the control of her exercise of power over trust property'.[30] This argument centres on the accountability of trustees and the proper execution of trusts. It follows that a valid trust may be created by way of appointment of an enforcer and that whether this enforcer is the person in whom the 'equitable proprietary rights'[31] are vested is not a critical question. Focusing on the 'due execution'[32] of charitable trusts, the necessary interest rule relates to the identification of qualified persons who are entitled to 'call on the court to enforce the trust'.[33] An examination of this rule provides an opportunity to revisit the discussion concerning the conceptual nature of express trusts, and sheds light on the debate concerning the two arguments noted above.

This paper will proceed as follows. After the 'Introduction', Part 1 analyses the two elements constituting the necessary interest rule: the necessary interest requirement and the protection filter. It explores the meaning of the 'interest' required of a person for the purpose of bringing charity proceedings, and the factors that the courts have taken into account in its interpretation. It also identifies the way in which the protective filter is operated for the prevention of frivolous and pointless litigation. Part 2 draws out the theoretical implications that analysis of the necessary interest rule has for the beneficiary-enforcer debate, as well as the court's inherent jurisdiction to supervise the administration and execution of trusts. Finally, the paper concludes with some comments.

1. The necessary interest rule

In contrast to the private law approach of standing under express private trusts, ie trustees' duties are 'seen as correlative to a right of [beneficiaries]'[34] and beneficiaries accordingly are entitled to sue against trustees who commit misconduct, the courts and Parliament have chosen to take a different approach in determining whether a person is eligible to sue in the context of charitable trusts. This Part studies this different approach, ie the necessary interest rule, which comprises two elements: the requirement of necessary interest and the protective filter. In summary, section (a) of this part seeks to explore the meaning of the phrase 'necessary interest' and its application in case law. Section (b) centres on the analysis of the protective filter, including its operational mechanisms and the policy concerns underlying its operation. Section (c) summarises the key observations about the rule.

(a) The requirement of necessary interest

(i) Statute

Section 115[35] of the Charities Act 2011 (England and Wales) has two provisions spelling out the entitlement of a person to file charity proceedings in the context of charitable trusts. It reads:[36]

[29]B McFarlane and C Mitchell *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 14th edn, 2015) p 197.

[30]J Hudson 'Mere and other discretionary objects in Australia' in Y Liew and M Harding (eds) *Asia-Pacific Trusts Law: Theory and Practice in Context* (Oxford: Hart Publishing, 2021) forthcoming.

[31]McFarlane and Mitchell, above n 29, p 197.

[32]J Getzler 'Morice v Bishop of Durham (1805)' in P Mitchell and C Mitchell (eds) *Landmark Cases in Equity* (Oxford: Hart Publishing, 2012) p 200.

[33]McFarlane and Mitchell, above n 29, p 170.

[34]Ibid, p 197. See also P Turner 'The entitlements of objects as defining features of discretionary trusts' in R Nolan et al (eds) *Trusts and Modern Wealth Management* (Cambridge: Cambridge University Press, 2018) p 258.

[35]Charities Act 2011, above n 14.

[36]Ibid, s 115(8).

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(1) Charity proceedings may be taken with reference to a charity by –
(a) the charity,
(b) any of the charity trustees,
(c) any person interested in the charity,
(d) if it is a local charity, any two or more inhabitants of the area of the charity.[37]
…
(8) In this section, 'charity proceedings' means proceedings in any court in England or Wales brought under –
(a) the court's jurisdiction with respect to charities, or
(b) the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

Section 115 shows that how the phrase 'any person interested in the charity' is construed lies at the crux of understanding a person's standing in the charitable trust context. This phrase is not defined, either in the Charities Act 2011 or elsewhere, and the terms 'interest' and 'interested in' may 'bear widely differing meanings according to their context',[38] as Nicholls LJ recognised in the English Court of Appeal case of *Re Hampton Fuel Allotment Charity*[39] (*Re Hampton*). By enacting section 115 of the Charities Act 2011 and its predecessors,[40] Parliament had intended not to 'give the Attorney General a monopoly of proceedings for judicial monitoring of'[41] charitable trusts, but affords no express guidance on how this necessary interest rule should be interpreted and how wide 'the net is spread'.[42] The case law shows that English judges have been markedly reluctant to work out an explanation or definition of this rule, for two reasons. First, charitable trusts vary so widely that it is impossible to provide a uniform understanding applicable to all forms of charitable trusts.[43] Secondly, the term 'interest' is 'capable of a very wide and general meaning'[44] and the context out of which the interest arises is crucial to its construction. As Lord Wilberforce observed in the English House of Lord case of *Gartside v Inland Revenue Commissioners*,[45] 'the wide spectrum that it covers makes it all the more necessary, if precise conclusions are to be founded upon its use, to place it in a setting'.[46]

(ii) Case law

The English courts have long been grappling with the application of the necessary interest rule, despite 'its existence in some form since 1853'.[47] There is a lack of uniform understanding as to the meaning of the necessary interest rule amongst judges, and conflicts or inconsistencies have been raised because of the different interpretative approaches the courts have adopted. A close review of the case law shows that the courts tend to read the phrase 'interest in the charity' in two ways: (a) interest in the due administration of charities; and (b) beneficial interest in the charitable assets.

(a) Interest in the due administration of charities. A stream of authority holds that, to be recognised as 'having an interest in'[48] the charity, the person in question should 'have some good reason for seeking

[37]Ibid, s 115(1).
[38]*Re Hampton Fuel Allotment Charity*, above n 18, p 493.
[39]Ibid.
[40]The predecessors of s 115 of the Charities Act 2011 are s 28 of the Charities Act 1960, s 33 of the Charities Act 1993, and s LVII of the Charitable Trusts Act 1853.
[41]*Scott v National Trust for Places of Historical Interest or Natural Beauty* [1998] 2 All ER 705 at 714.
[42]*Re Hampton Fuel Allotment Charity*, above n 18, at 493.
[43]Nicholls LJ noted in *Re Hampton* that 'charitable trusts vary so widely that to seek a definition here is, we believe, to search for a will-o'-the-wisp'. See ibid, at 494.
[44]*Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617.
[45]Ibid.
[46]Ibid, at 617.
[47]*Metropolitan Petar v Mitreski*, above n 18, at [8].
[48]*Haslemere Estates Ltd v Baker* [1982] 1 WLR 1109 at 1122.

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its due administration'.[49] This view was first proposed by Sir Robert Megarry in the English High Court case of *Haslemere Estates Ltd v Bake*[50] (*Haslemere Estate*). *Haslemere Estates* is the first English case dealing with the construction of the phrase 'any person interested in the charity'. Its dispute relates to whether a commercial developer who had a contract for the grant of a lease of property owned by a charity fell within the remit of 'any person interested in the charity' under section 28(1) of the Charities Act 1960.

In this case, Sir Robert Megarry defined what a person's interest should entail in order to qualify as a 'person interested in the charity'. Through distinguishing 'any person interested in the charity' from any person who 'has a claim against the charity',[51] his Lordship declared that only those whose claims focused on 'seeking the [due administration] of the charity'[52] were entitled to bring charity proceedings. The fact of contracting with the trustees of a charity itself would not automatically transform the contractor into a person interested in the charity.[53] In *Haslemere Estates*, the commercial developer sought to enforce the contract with the charity merely for the purpose of developing its own commercial interest. Such a claim '[aimed] to improve [the developer's] position at the expense of the charity'[54] and was therefore 'not the best course in the interest'[55] of the charity. Understanding the object of the developer's claim in this way, Sir Robert Megarry eventually struck out the litigation.

Sir Robert Megarry's reasoning in *Haslemere Estates* has been endorsed and further developed by Nicholls LJ in *Re Hampton*, the only recent case that has gone to the English Court of Appeal. In *Re Hampton*, Nicholls LJ commented that there was no 'justification for the court attempting to delimit with precision a boundary which Parliament has left undefined'.[56] Accordingly, Nicholls LJ in his judgment only provided guidance as to how the terms 'interest' and 'interested' can be construed, without attempting a comprehensive definition of the necessary interest rule. His Lordship subscribed to Sir Robert Megarry's observation in *Haslemere Estate* that 'some good reason'[57] is needed for a person to 'bring the [litigation] before the court'.[58] To qualify as 'good reason[s]', a person's claim should be centred on securing the due administration of a charity,[59] as opposed to facilitating the furtherance of his own interest. Consistent with this thinking, a person will be barred from bringing charity proceedings if his claim is 'adverse to the charity'[60] or 'not on the charity side of the fence'.[61]

However, in contrast to Sir Robert Megarry's construction in *Haslemere Estate*, Nicholls LJ took a further step by qualifying 'necessary interest' with a gravity requirement. According to his Lordship, a person cannot qualify as a 'person interested in the charity' if he or she only 'has a sentimental or altruistic interest in [the charity] or provides modest financial support for [its administration]'.[62] For the purpose of launching charity proceedings, the interest required of a person must be 'materially greater than, or different from, that possessed by ordinary members of the public'.[63] The assessment of whether an interest meets the gravity requirement is fact-sensitive and should be conducted by scrutinising 'all the circumstances of [a] particular case'.[64] Upon closer inspection of the case law, the

[49]Ibid.
[50]*Haslemere Estates Ltd v Baker*, above n 48.
[51]Ibid, at 1121.
[52]Ibid, at 1122.
[53]Ibid.
[54]Ibid.
[55]*Rosenzweig v NMC Recordings Ltd* [2013] EWHC 3792 (Ch) at [34].
[56]*Re Hampton Fuel Allotment Charity*, above n 18, at 494.
[57]*Haslemere Estates Ltd v Baker*, above n 48, at 1122.
[58]*Re Hampton Fuel Allotment Charity*, above n 18, at 493–494.
[59]*Haslemere Estates Ltd v Baker*, above n 48, at 1122; *Re Hampton Fuel Allotment Charity*, above n 18, at 493.
[60]*Haslemere Estates Ltd v Baker*, above n 48, at 1122.
[61]Ibid.
[62]*Re Hampton Fuel Allotment Charity*, above n 18, at 493.
[63]Ibid, at 494.
[64]*Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 714. See also *Re Hampton Fuel Allotment Charity*, above n 18, at 494.

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'circumstances' that are of relevance to the taking of charity proceedings include the substance and nature of the interest a person possesses, the relevance of this interest to the advancement of the charity's objects, and the context out of which the interest arises.[65]

Nicholls LJ's two-stage approach in *Re Hampton* – first, identifying whether the person concerned has the necessary interest and, secondly, assessing whether the person's interest meets the gravity requirement – has been extensively cited with approval by judges in subsequent cases. For example, in *Gunning v Buckfast Abbey Trustees Registered*[66] (*Gunning*), Arden J, delivering the judgment of the English High Court, held that by 'making a contract for their [children's] education with the [charity] trustees',[67] the parents in question were considered to possess 'a materially greater interest than ordinary members of the public in securing the due administration of'[68] the preparatory school run by the charity and, accordingly, they were entitled to bring charity proceedings against the trustees' decision to close the school. Four years later, in another English High Court case, *Scott v National Trust for Places of Historic Interest or Natural Beauty*[69] (*Scott*), Robert Walker J followed Nicholls LJ's approach in *Re Hampton* and recognised the standing to sue on the part of tenant farmers. His Lordship identified the partnership relationship between the tenant farmers and the National Trust 'in the successful preservation of the red deer population [on that land]',[70] holding that such a relationship led to these farmers' interests being 'materially greater than or different from that possessed by ordinary members of the public'.[71]

Nicholls LJ's two-stage approach in *Re Hampton* has also been endorsed by courts outside of England. In *Metropolitan Petar v Mitreski*[72] (*Metropolitan*), Hamilton J, delivering the judgment of the Supreme Court of New South Wales, observed that Nicholls LJ's interpretation in *Re Hampton* of the necessary interest rule was authoritative and influential, which could be applied as a useful reference for evaluating whether a person's interest was sufficient to 'qualify [him or her as] a plaintiff within the meaning of [section 33 of the Charities Act 1993]'.[73] In the Hong Kong Court of First Instance case of *Sik Chiu Yuet v Secretary for Justice*[74] (*Sik Chiu Yuet*), Justice Lisa Wong systematically reviewed the English case law on the construction of the special interest rule, and discussed the applicability of English authorities to the interpretation of section 57A(a)(iii)[75] of the Trustee Ordinance (Hong Kong). In applying Nicholls LJ's two-stage approach in *Re Hampton*, her Ladyship declined the applicant's standing to sue, since his interest was 'potentially adverse to the Trust'[76] and not 'materially greater than that possessed by ordinary members of the public'.[77]

(b) Beneficial interest in the charity assets. Aside from the interpretation of 'interest in the due administration of charities', there exists another line of authority noting that 'necessary interest' is a beneficial interest or is 'analogous to a beneficial interest'[78] in the charitable assets. This view was first proposed by Hoffmann J in the English High Court case of *Bradshaw v University College of*

[65]*Haslemere Estates Ltd v Baker*, above n 48, at 1122; *Bradshaw v University College of Wales* [1988] 1 WLR 190 at 192–193; *Re Hampton Fuel Allotment Charity*, above n 18, at 493; *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 715; *Rosenzweig v NMC Recordings Ltd*, above n 55, at [22]; *Royal Society for the Prevention of Cruelty to Animals v Attorney General* [2002] 1 WLR 448 at 459; *Bisrat v Kebede* [2015] EWHC 840 (Ch) at [22].

[66]*Gunning v Buckfast Abbey Trustees Registered* (1994) Times, 9 June.

[67]Ibid.

[68]Ibid.

[69]*Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41.

[70]Ibid, at 715.

[71]Ibid, at 714.

[72]*Metropolitan Petar v Mitreski*, above n 18.

[73]Ibid, at [8].

[74]*Sik Chiu Yuet v Secretary for Justice* [2017] HKCU 2269.

[75]This section is the Hong Kong equivalent of the English necessary interest rule.

[76]*Sik Chiu Yuet v Secretary for Justice*, above n 74, at [85].

[77]Ibid, at [67], [86].

[78]*Re Hampton Fuel Allotment Charity*, above n 18, at 492.

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Wales[79] (*Bradshaw*). Although not as widely recognised as Nicholls LJ's two-stage approach, this view was not explicitly rejected by the English Court of Appeal in *Re Hampton* and subsequent English cases. It therefore still has reference significance for the understanding of the necessary interest rule. In *Bradshaw*, Hoffmann J stuck out a claim by the executors who represented the deceased settlor of certain charitable trusts against the trustees for a full account of the administration of the trust, on the grounds that these executors were not 'person[s] interested in the charity' under s 28(1) of the Charities Act 1960. In contrast to Nicholls LJ's two-stage approach in *Re Hampton*, Hoffmann J adopted a narrower view in *Bradshaw* by limiting the class of the persons 'interested' to those whose interest is or is analogous to a beneficial interest in the trust assets. As his Lordship noted:[80]

> A person who could not in any circumstances be a beneficiary of the charity or take any interest under the trusts applicable to the property of the charity can be within the expression of 'any person interested'.

Pursuant to this approach, the expression 'interested in the charity' is considered to have the same meaning as that of 'beneficial interest in the property'[81] owned by the charity. This approach accords with the traditional understanding of the beneficiary principle, and is apparently in contradistinction to what Sir Robert Megarry stated in *Haslemere Estates*, namely, 'a person may be interested in the property of a charity without, for this purpose [of the charity proceedings], being interested in the charity'. Following this narrow approach, Hoffmann J declined the *locus standi* of the executors, asserting that their interests '[were] no more than that of any other member of the public whose guardian in the enforcement of charities was the Crown';[82] the founder of the charitable trust could have been a 'person interested', but this interest could not be transmitted to the executors, because '[e]xecutors succeed to the property of the deceased; not to her spirit and disembodied wishes'.[83]

Hoffmann J's approach in *Bradshaw* was considered by Knox J at first instance in *Re Hampton*. His Lordship emphasised the role of the circumstances of a case in construing the 'words in the extracts from Hoffmann J's judgment',[84] and remarked that he 'would not go so far as to limit the category of persons interested to those who have something which is or is analogous to a beneficial interest'.[85] When it went on appeal, Nicholls LJ thoroughly scrutinised the merits and demerits of Hoffmann J's interpretation of the necessary interest rule, concluding that his approach was 'unsatisfactory'[86] in that it could not provide full insight into the scope of the persons eligible to take charity proceedings. The following passage from Nicholls LJ's judgment is especially illustrative:[87]

> It may be too wide, because the class of potential beneficiaries under many nationwide charities is vast. We accept that there may be cases where an actual or potential beneficiary under a nationwide charity will qualify as a person interested in that charity. But we do not accept that an actual or potential beneficiary will always qualify. It must depend on all the circumstances. Conversely, the test will, in some circumstances, be too narrow. Take the example of a local authority which sets up a charitable trust for the relief of poverty of former employees and their dependents. Assume the local authority has power to appoint all the trustees. Assume further that the trust is maladministered. We are not at all attracted by the conclusion, which application of

[79] *Bradshaw v University College of Wales*, above n 65.
[80] Ibid, at 194E.
[81] *Stack v Dowden* [2007] 2 AC 432 at 457.
[82] *Bradshaw v University College of Wales*, above n 65, at 191.
[83] Ibid, at 193.
[84] *Re Hampton Fuel Allotment Charity*, above n 18, at 492.
[85] Ibid.
[86] Ibid, at 493.
[87] Ibid, at 492.

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> the suggested test would yield, that such an authority would not be a person interested in that charity: that it would not be able to launch charity proceedings in respect of that charity.

Nicholls LJ criticised the approach proposed by Hoffmann J, but did not completely overrule it. Thus, in the sense of *stare decisis*, Hoffmann J's approach in *Bradshaw* still has reference significance for subsequent courts in their construction and application of the necessary interest rule. Nonetheless, judicial practice over the past two decades has shown that, in contrast to Nicholls LJ's two-stage analysis in *Re Hampton*, Hoffmann J's approach has not received many followers, either inside or outside of England. After *Bradshaw* was adjudicated, subsequent English High Court cases such as *Gunning*, *Scott* and *Royal Society for the Prevention of Cruelty to Animals v Attorney General*[88] (*Royal Society*) made no reference to *Bradshaw* at all when their respective judges explored the meaning of the expression 'any person interested in the charity'. In the New South Wales Supreme Court case of *Metropolitan*, Hamilton J followed Nicholls LJ's two-stage approach in *Re Hampton* directly and left *Bradshaw* unmentioned in the entirety of his judgment. In the recent English High Court case of *Bisrat v Kebede*[89] (*Bisrat*), Judge Purle QC implicitly rejected Hoffman J's approach in *Bradshaw* by warning against the use of the terms 'beneficiary' and 'beneficiaries' in the context of charitable trusts, as he observed:[90]

> I think one has to be careful of the use of the word 'beneficiary' in this context. A charitable trust, as such, does not have beneficiaries in the same sense as beneficiaries under a private trust. No individual has any proprietary interest in the charity's assets and funds as such, but a person may become a beneficiary in a loose sense as an object of the charitable trust.

Even more recently, in the Hong Kong case of *Sik Chiu Yuet*, Justice Lisa Wong, after reviewing the cases considered by English courts, identified seven 'applicable principles'[91] with respect to the necessary interest rule.[92] In response to Hoffmann J's approach in *Bradshaw*, her Ladyship opined that a person who has a beneficial interest under a trust does not necessarily qualify him as a 'person interested in the charity';[93] a holistic approach should instead be adopted in the assessment of a person's eligibility to bring charity proceedings.[94] As she explained:[95]

> That being the case, an actual or potential 'beneficiary', used in this context in a loose sense to mean an object of a charity, may not always qualify, depending on all the circumstances … whether a person is a 'person interested in the charity' for the purpose of bringing charity proceedings in relation to that charity is a fact sensitive question, depending on facts and circumstances that can be so varied that no helpful definition of the phrase could or should be attempted.

(b) The protective filter arrangement

In addition to the necessary interest requirement, there is a protective filter in respect of the taking of charity proceedings. Pursuant to section 115(5) of the Charities Act 2011, the taking of charity proceedings must be authorised by an order from the Charity Commission, or by leave from one of the judges of the High Court. This protective filter arrangement is indicative of the supervisory role of the

[88] *Royal Society for the Prevention of Cruelty to Animals v Attorney General*, above n 65.
[89] *Bisrat v Kebede*, above n 65.
[90] Ibid, at [22].
[91] *Sik Chiu Yuet v Secretary for Justice*, above n 74, at [84].
[92] Ibid, at [67].
[93] Ibid, at [50].
[94] Ibid, at [67].
[95] Ibid.

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court and the Commission over the administration of charities. Robert Walker J explicitly discussed the rationale underlying such a protective filter in *Scott* – that is, '[t]his protective filter is intended to protect [charity trustees] from being harassed by a multiplicity of hopeless challenges'.[96] In *Rosenzweig v NMC Recordings Ltd*[97] (*Rosenzweig*), Norris J, delivering the judgment of the English High Court, explained that the protective filter was aimed at preventing cases that would 'cause [charities] to fritter away money subject to charitable trusts in litigation'.[98] The protective filter is thus linked to the necessary interest requirement – it supplements the interpretation of the phrase 'anyone interested in the charity', and the need for complaints to have a necessary interest enhances the 'efficacy of this protective screen'.[99]

The protective filter reflects a strong sense of public law thinking. It is said to be a 'sensible and necessary requirement in the public law field',[100] and its application grants the courts a degree of flexibility in determining the scenarios in which a charity proceeding can be brought about. It is widely acknowledged that a distinction exists between public law and private law in terms of the standing to sue: private law grants standing as a matter of right on the basis of plaintiffs' personal interests, whilst public law grants it as a matter of discretion in consideration of various factors.[101] The critical relevance of public law thinking to the determination of whether charity proceedings should be commenced has been well illustrated in *Rosenzweig*. In this case, Norris J recognised the sufficient interest that Mr Rosenzweig had in the charity, and held that this interest was sufficient to enable Rosenzweig to initiate charity proceedings.[102] However, Norris J still disallowed the proceeding, due to the concern that such litigation could 'exhaust the assets of the Charity and prevent it from achieving its charitable objectives from which others appear to benefit'.[103] After considering the limited financial budget of the charity and the way in which the charity executed its goals,[104] Norris J struck out Rosenzweig's claim, on the grounds that his litigation was 'not the best course in the interests of the Charity as a whole'[105] and allowing it would lead to the 'destruction of the Charity'.[106] In *Rosenzweig*, the internal administration of the charity and the carrying out of its charitable purposes were predominant in determining the outcome of the case. In other words, public law thinking triumphs where there is a conflict between the execution of the charity's goals and the advancement of a potential recipient's personal interest. As Norris J argued:[107]

> This is the very sort of case where even an Applicant who can demonstrate that he is a 'person interested' in the charity ought not (because of the application of the protective filter) to be permitted to cause the charity to fritter away money subject to charitable trusts in litigation.

The need to protect public interest in the administration of charities is not a policy that was only considered in *Rosenzweig*; it has also been evident in numerous cases adjudicated by the English High Court. Take *Bisrat*, *Royal Society* and *Scott* for example. In *Bisrat*, when determining whether regular worshippers and contributors of a Church were 'interested' persons, Judge Purle QC emphasised the

[96] *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 713.
[97] *Rosenzweig v NMC Recordings Ltd*, above n 55.
[98] Ibid, at [35]. See also Pearce et al, above n 18, p 859.
[99] *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 713.
[100] Ibid, at 718.
[101] J Freeman 'Extending public law norms through privatization' (2003) 116(5) Harvard Law Review 1285 at 1303–1304; J McLean 'Convergence in public and private law doctrines – the case of public contracts' (2016) 1 New Zealand Law Review 5 at 9; J Krahe 'The impact of public law norms on private law relationships' (2015) 2 European Journal of Comparative Law and Governance 124 at 126; Chan, above n 18, p 98.
[102] *Rosenzweig v NMC Recordings Ltd*, above n 55, at [22].
[103] Ibid, at [34].
[104] Ibid, at [11].
[105] Ibid, at [34].
[106] Ibid, at [35].
[107] Ibid.

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important role of the Ethiopian Orthodox Church – namely, the Church is 'one of the oldest churches [and] of great distinction and establishment',[108] and the 'trustee's [maladministration of the Church has] impacted upon the Ethiopian community in this country'.[109] For the purpose of ensuring proper management of the Church and thereby protecting the public interest in the carrying out of its charitable activities, Judge Purle QC interpreted the necessary interest rule in a very broad manner, recognising the standing to sue of regular worshippers 'who have contributed to the acquisition of the assets of the charity and [have worshipped] at the church in its various forms over many years'.[110]

Similarly, in *Royal Society*, when assessing whether the members of a charity had the necessary standing under section 33(1) of the Charities Act 1993, Lightman J pointed out the important role of the charity in the country: '[the charity] is very important and its activities (in particular the inspectorate and its prosecutions for cruelty to animals) are of great value to society'; most notably, 'its inspectorate is the largest non-governmental law enforcement agency in England and Wales'.[111] For the purposes of securing effective administration of the charity and preventing supporters of hunting from damaging the reputation of the charity,[112] Lightman J also adopted a broad approach to determine whether a person's interest is sufficient to 'meet the statutory standard for the institution of charity proceedings'.[113] According to his Lordship, both an annual member and a life member can be recognised as having sufficient interest in the due implementation of the membership policy, whilst a rejected applicant for membership does not.[114]

Finally, in *Scott*, in deciding whether the tenant farmers were persons 'interested' in the National Trust under s 33(1) of the Charities Act 1993, Robert Walker J confirmed that 'the National Trust was a charity of exceptional importance to the nation and its purposes and functions were of high public importance'. His Lordship also cited Lord Camden LC's definition of charity in *Jones v William*[115] and Harman LJ's remarks on the nature of charity cases in *Inland Revenue Commissioners v Educational Grants Association Ltd* [116] to emphasise the public law nature of the National Trust.[117] With regard to the tenant farmers, Robert Walker J highlighted the significant role that they had played in the development of local economy – they were an 'important part of the rural economy in providing a service in destroying and removing sick and injured beasts, and generally in deer management'.[118] In view of the public law role of the National Trust and the purpose of securing its due administration, Robert Walker J considered these farmers as partners with National Trust in the preservation of the deer population on the land, and recognised their capacity to 'apply for authority to commence and to prosecute charity proceedings'.[119]

In *Scott*, Robert Walker J's observations about *Haslemere Estates* shed considerable light on the role of public law norms in the analysis of standing. His Lordship found that the dispute in *Haslemere Estates* was commercial in nature, and 'had no real connection with the internal or functional administration of charitable trusts'.[120] According to Robert Walker J's reasoning, the position of the farmers in *Scott* could not be equated with that of a commercially sophisticated developer in *Haslemere Estates*.[121] The commercial nature of the dispute justified Sir Robert Megarry's refusal to grant

[108] *Bisrat v Kebede*, above n 65, at [26].
[109] Ibid.
[110] Ibid, at [22].
[111] *Royal Society for the Prevention of Cruelty to Animals v Attorney General*, above n 65, at 459.
[112] Ibid, at 464.
[113] Ibid, at 459.
[114] Ibid, at 458.
[115] Charity is a gift to the general public use. See *Jones v William* (1767) 27 ER 422 at 422.
[116] The word 'public' runs through all the charity cases. See *Inland Revenue Commissioners v Educational Grants Association Ltd* [1967] Ch 993 at 1011.
[117] *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 712.
[118] Ibid, at 715.
[119] *Rosenzweig v NMC Recordings Ltd*, above n 55, at [22].
[120] *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 715.
[121] Ibid.

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standing in favour of the developer. If the developer's litigation had been related to the charity's 'functional land'[122] or to its internal management, Sir Robert Megarry might have decided the case in a markedly different way.[123]

(c) Summary

Examination of the foregoing cases has shown that English courts in general differentiate 'interest in the charity' from 'beneficial interest in trust properties' under a private trust. This differentiation reflects how the courts have conceptualised the purpose nature of charitable trusts. With respect to the necessary interest requirement, Parliament chose not to define the terms 'interest' and 'interested'. Nor have the courts attempted a comprehensive explanation of this requirement. Flexibility is inherent in its application: according to the facts of a particular case, the courts are granted a high level of discretion in assessing whether the claimant has an interest, and whether the interest is sufficient to make the claimant 'a person interested in the charity', and thus eligible to launch charity proceedings. The courts have considered a wide range of factors in the construction of the necessary interest requirement, including the substance of the interest the persons possess, the relevance of the interest to the furtherance of the charitable objects, and the context out of which the interest arises. The way in which the courts construe the meaning of 'necessary interest' reflects their central concern over the securing of due administration and execution of charitable trusts.

The protective filter for charity proceedings, on the other hand, is applied with a view to protecting charity trustees from 'being harassed by a multiplicity of hopeless challenges',[124] and to protecting charitable assets from being exhausted because of frivolous and vexatious claims.[125] A person whose interest is sufficient to meet the threshold of the initiation of charity proceedings *does not necessarily* mean that he is entitled to initiate litigation in respect of a charity trustee's misconduct. Through the operation of the protective filter, the courts can examine the full circumstances of a case, eg the object of the proceeding and the relevance of the proceeding to the execution of the charity's goals, and then balance the benefits and detriments of upholding a person's claim. The 'right' of a qualified person to bring charity proceedings is thus 'not absolute and is subject to [the court's] discretion'.[126] The way in which the necessary interest requirement and the protective filter operate has evidenced a prominent public law thinking and demonstrated the inherent jurisdiction of the courts to supervise the administration and enforcement of charitable trusts.[127]

2. Theoretical implications

Part 1 has explored the way in which the necessary interest rule has been construed and applied in judicial practice. It shows that the courts' administrative jurisdiction over trusts is fundamental to the application of the rule. This analysis has theoretical implications for the beneficiary-enforcer debate around the conceptual nature of express trusts. This Part discusses these implications. The necessary interest rule, as presented in Part 1, is closely confined within the public law concerns underpinning the recognition and operation of charitable trusts, ie securing public benefit flowing from the due execution of the trusts' charitable purposes. Looking beyond such public law concerns provides a wider view of how charitable trusts relate to express trusts at the doctrinal level. Such an

[122]Ibid.
[123]Ibid.
[124]Ibid, at 713.
[125]*Re Hampton Fuel Allotment Charity*, above n 18, at 493–494.
[126]Hudson, above n 30.
[127]*Haslemere Estates Ltd v Baker*, above n 48, at 1121; *Scott v National Trust for Places of Historical Interest or Natural Beauty*, above n 41, at 716; *Sik Chiu Yuet v Secretary for Justice*, above n 74, at [52]; *Hunter Region SLSA Helicopter Rescue Service Ltd v Attorney General* [2000] NSWSC 456 (22 May 2000) at [5]; *Re Estate Polykarpou* [2016] NSWSC 409 (22 July 2016) at [40].

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approach encourages a proper appreciation of the unique characteristics of charitable trusts and more significantly, a better understanding of the law of trusts as a whole. This Part comprises two sections. Section (a) briefly reviews the beneficiary and enforcer principles and the rationale underlying them. Section (b) identifies the relevance of the necessary interest rule to the beneficiary-enforcer debate and highlights the theoretical contribution that analysis of the necessary interest rule in the context of charitable trusts can make to the debate concerning express trusts.

(a) The beneficiary and enforcer principles

Although presently the English courts adopt the beneficiary principle as opposed to the enforcer principle, the debate as to which principle more appropriately describes the essence of an express trust has never been conclusively settled. The beneficiary principle suggests that 'the equitable proprietary rights of the beneficiaries'[128] lies at the heart of an express trust. The enforcer principle, in contrast, holds that the essence of the trust lies in subjecting trustees 'to an equitable duty relating to the [administration and distribution] of [the trust] property'.[129] It has been argued that the equitable duty need not be owed to a person 'who benefits directly from [the trustee's] performance';[130] an enforcer can be appointed for the purpose of creating valid express trusts.[131]

Morice has been considered 'as a key source of the modern "beneficiary principle"'.[132] It holds that a beneficiary's standing to sue is founded on its proprietary entitlement to the benefit of the trust assets.[133] However, the English High Court case of *Re Denley's Trust Deed*[134] is important in its impact on the understanding of the beneficiary principle. In this case, Goff J allowed a party who was a member of a defined group of individuals to initiate litigation to enforce a defined non-charitable purpose trust,[135] indicating the relaxation of the requirement that only 'beneficiaries with equitable rights'[136] in the trust assets are eligible to sue. The correlative relationship between the possession of beneficial interest in the trust assets and the right to sue to enforce due administration of trusts has been further challenged following the English House of Lords' decisions in *McPhail v Doulton*[137] and *Re Gulbenkian's Settlements*[138] on the validity of trust powers and mere powers respectively. So far, there exists a large body of court decisions that recognise the 'entitlement'[139] of objects of trust or mere power ('discretionary objects') to sue in respect of the due administration of a trust. In the English House of Lords case of *Gartside v IRC*,[140] Lord Wilberforce remarked that 'a beneficiary under a discretionary trust 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'.[141] In the New Zealand Court of Appeal case of *Johns v Johns*,[142] Tipping J was of the view that objects of trust power have more

[128]McFarlane and Mitchell, above n 29, p 197.

[129]Ibid.

[130]Ibid.

[131]D Hayton 'Developing the obligation characteristic of the trust' (2011) 117 Law Quarterly Review 96 at 100; Tucker et al, above n 20, para [1-005]; Penner, above n 20, para [9.26].

[132]Getzler, above n 32, p 159.

[133]McFarlane and Mitchell, above n 29, p 176.

[134]*Re Denley's Trust Deed*, above n 5.

[135]Ibid, at 383.

[136]Chan, above n 19, at 378.

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

[138]*Re Gulbenkian's Settlement* [1970] AC 508.

[139]There is a lack of uniform agreement as to the analytical nature of a discretionary object's entitlement. Controversial questions include: (a) whether such entitlement is limited to 'claims enforceable as of right'; and (b) whether such entitlement indicates that discretionary objects hold an 'interest' under the trust; if so, what the nature of the interest is, ie interest in trust assets for the purpose of conveyancing or interest of any kind. On discussion of these questions, see Turner, above n 34, pp 252–264.

[140]*Gartside v Inland Revenue Commissioners*, above n 44.

[141]Ibid, at 617.

[142]*Johns v Johns* (2004) 3 NZLR 202.

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than a 'mere spes',[143] 'mere hope'[144] or 'mere equity';[145] instead, a discretionary beneficiary 'has sufficient standing to compel proper administration of the trust',[146] although he or she may have no proprietary interest in the trust assets. Likewise, the weight of recent Australian cases has confirmed the proposition that 'the right to due administration [can] accrue to objects [of mere or trust power] who have only a chance of acquiring an entitlement to the benefit of trust property'.[147]

Under the beneficiary principle, it follows that the person, 'in whose favor the court can decree performance', is constrained to the 'narrower sense of'[148] beneficiaries who have an equitable proprietary interest in the trust assets,[149] or those who are entitled to invoke the rule in *Saunders v Vautier*.[150] In contradistinction, recognition of the standing to sue on the part of discretionary objects signifies a trend in departure from the orthodox operation of the beneficiary principle. These discretionary objects possess no 'definable'[151] proprietary interest in the trust assets. What they have is only the 'chance [or expectation] of acquiring an entitlement to the benefit of trust property'.[152] The conferral of standing on them, sitting more comfortably with the understanding of the enforcer principle, demonstrates the court's central concern over the accountability of trustees and the proper execution of a trust,[153] rather than the identification of the 'equitable proprietary rights of the beneficiaries'.[154] This line of thought is supported by the following statement from Lord Eldon in *Morice*, 'often cited as the ratio of [his Lordship's] judgment':[155]

> As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; 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. [156]

This passage, on the one hand, has been commonly cited in support of the establishment of the beneficiary principle.[157] On the other hand, the wording of this passage leaves scope for an alternative interpretation in favour of the enforcer principle. In the first half of his statement, Lord Eldon twice emphasised the essentiality of execution of a trust, and thrice the requirement that such execution must be amenable to the court's control. In the second half, his Lordship explained the relationship between the requirement of the objects being ascertainable and the court's capacity in controlling the administration of a trust. That is, in the absence of ascertainable objects to 'make representations

[143] *Gartside v Inland Revenue Commissioners*, above n 44, at 617. See also *Re Cooper Street Property Trust* [2016] VSC 756 (9 December 2016) at [35].

[144] Turner, above n 34, p 248.

[145] G Virgo *The Principles of Equity & Trusts* (Oxford: Oxford University Press, 3rd edn, 2018) p 56.

[146] *Johns v Johns*, above n 142, at [34].

[147] Hudson, above n 30.

[148] Ibid.

[149] L Smith 'Massively discretionary trusts' in Nolan et al, above n 34, pp 154–155.

[150] Ibid. The rule established in *Saunders v Vautier* [1841] EWHC J82 is that, where all of the beneficiaries in the trust are of adult age and under no disability, they are entitled to require the trustee to transfer the trust asset to them and thereby terminate the trust.

[151] Smith, above n 149, p 141.

[152] Hudson, above n 30.

[153] Because of the court's inherent jurisdiction over the execution of trusts, Lord Walker of Gestingthorpe in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66] remarked that it was meaningless to 'draw any bright dividing-line either between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character)'.

[154] McFarlane and Mitchell, above n 29, p 197.

[155] Getzler, above n 32, p 195.

[156] *Morice v Bishop of Durham*, above n 2, at 954.

[157] See eg Penner, above n 20, para [9.4]; Virgo, above n 145, p 101; Bryan et al, above n 20, para [16.46].

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[about the trustees' misconduct]',[158] the court is unable to intervene to enforce the trust by way of providing 'guidance, directions and assistance'.[159] Following from this interpretation, the requirement of certainty of objects is not an end, but rather one of the *mechanisms* through which a court can invoke and exercise its inherent jurisdiction to supervise the trustees' administration of the trust. The crucial concern for the present purpose is that there must be someone who can 'call on the court to [execute] the trust';[160] it does not matter whether this person is a beneficiary who has a vested, albeit defeasible, equitable proprietary interest in the trust assets. Such an interpretation also fits squarely with Sir William Grant's oft-cited statement in his trial judgment of *Morice*, namely, '[t]here must be somebody in whose favour the Court can decree performance'.[161] Since his Lordship made no explicit mention of what the phrase 'in whose favour' entails, it is arguable that the person concerned can be an enforcer 'who does not personally benefit from performance of [the trustees'] duty'.[162]

Interpreting Lord Eldon's statement in such a way provides a basis for defending the rationality of the enforcer principle, and the court's inherent jurisdiction over the administration and execution of trusts lies at the heart of this interpretation.[163] As suggested previously, what matters most is that a valid trust should be one over which the court is capable of exercising its control and supervision. The background against which *Morice* was adjudicated has also confirmed this line of thinking.[164] As Professor Joshua Getzler convincingly explained, Morice occurred in an episode where there existed '[n]ot only a desire to clarify the nature and enforceability of a private trust, not only mortmain concerns, but also a desire to reduce the clout of the Church in its control of testamentary and charitable wealth';[165] it is the courts that were tasked to '[address] issues of the role of clerics in administering succession, and attendant problems of undue influence and the fiduciary status of executors'.[166]

(b) The necessary interest rule

It has been shown in section (a) that the focus of the beneficiary principle is on the beneficial entitlement to trust assets, whilst the enforcer principle is centred on the due execution of a trust. The way in which the necessary interest rule operates suggests that it stands closer to the enforcer principle: the essentiality of this rule is to invoke the court's power to remedy the breach of charitable trusts by way of the interested person as a mechanism. This observation can be further clarified by drawing comparisons between the beneficiaries of a fixed trust and the recipients of a charitable trust. Examples of the latter include the UK-based composer in *Rosenzweig*, the tenant farmers in *Scott*, the existing members in *Royal Society*, and the regular worshippers and contributors in *Bisrat*.[167]

[158] *Royal Society for the Prevention of Cruelty to Animals v Attorney General*, above n 65, at 458.

[159] R 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 at 487.

[160] McFarlane and Mitchell, above n 29, p 170. Holland J's statement in *Randall v Lubrano* (Supreme Court (NSW), Holland J, 31 October 1975, unreported) was also illustrative to this point. His Honour (at 3) considered the possible consequence of an object of the mere power being deprived of the entitlement to seek relief, that is: '[the trustee] could do as he pleases with the trust property and commit any breach of trust that he cared to commit. There may be no way of detecting it and no person could require him to reveal what he had been doing'.

[161] *Morice*, above n 3, at 405.

[162] McFarlane and Mitchell, above n 29, p 170.

[163] The court's supervisory role can be seen in various aspects of the law of trusts. For example, as to the beneficiary's right to information, Lord Walker of Gestingthorpe in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [66] commented that the basis of the beneficiary's right to information was 'best approached as one aspect of the court's inherent jurisdiction to supervise the administration of trusts'.

[164] The background is important to the understanding of a rule, as Dixon CJ famously said in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, 'the context, the general purpose and policy of a [rule] and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.

[165] Getzler, above n 32, p 171.

[166] Ibid.

[167] Albeit the cases examined in this paper are mainly related to incorporated charities rather than charitable trusts, the reasoning behind the court's decision as to whether or not a charity proceeding can be upheld in these cases is equally

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It is common practice in charitable trusts that the charity trustee, according to the criteria specified in the trust instrument, selects qualified recipients for the purpose of distributing charitable assets. From the perspective of distribution, the recipients who obtain benefits under a charitable trust are akin to beneficiaries who acquire benefits under a fixed trust: they are the persons who benefit from the execution of a trust. However, the analogy should stop here. Unlike the beneficiaries of fixed trusts, the selection of recipients of charitable trusts and the distribution of charitable assets to them are primarily concerned with aspects of public benefit, rather than the advancement of personal or private interests of these selected individuals. The recipients selected merely act as a channel through which the charitable purpose is carried out. While beneficiaries of a fixed trust hold 'definable beneficial interest'[168] before the trustee proceeds with distribution, recipients of a charitable trust do not have any right to any part of the trust assets before the charity trustee carries out selection and distribution. The most they have is a mere hope or expectation that they will be selected by the trustee to acquire the entitlement to the benefit of the charitable assets.

Also, in contrast to discretionary objects, currently there seems to be no authority that affirms the proposition that the recipients of a charitable trust have the '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'.[169] The charity proceedings initiated by the tenant farmers in *Scott*, the existing members in *Royal Society*, and the regular worshippers and contributors in *Bisrat* were upheld by the English High Court, not because they had a 'right' to the due administration of the Society or the Church concerned, or they had an equitable proprietary entitlement to the distribution of charitable assets, but because their lawsuits exposed the risk related to the administration of these charities to the courts. The courts could therefore exercise their supervisory jurisdiction to 'reform mal-administration'[170] by the charity trustees at issue. Accordingly, it can be said that the upholding of these charity proceedings is due to the consideration of the proper execution of charities rather than the protection of the recipients' personal interest.

This line of thought also illuminates the reluctance of the courts and Parliament to attempt a comprehensive and explicit definition of the phrase 'interest in the charity'. One reasonable explanation is that they are unwilling to set unnecessary restrictions to hinder the initiation of charity proceedings. The current practice creates the greatest scope for charity proceedings to be launched in a manner that is facilitative to the invocation of the court's jurisdiction over the enforcement of trusts. At the same time, the protective filter is applied with a view to avoiding frivolous litigations that would exhaust the assets of a charitable trust. It is submitted that 'not everyone who can be said to be on "the charity side of the fence" is a "person interested in the charity"';[171] neither can it be said that 'a beneficiary of a charity is necessarily a "person interested in the charity"'.[172] It is 'open to the court in any charity proceedings to permit persons interested in the widest sense of the term to be joined as parties [to the proceedings]'.[173] The protective filter arrangement therefore allows the courts to evaluate whether the proceedings involved have the genuine effect of promoting the proper management of charitable trusts, and enables them to uphold or strike out a person's claim based on such evaluations.

Finally, moving back to the debate between the beneficiary principle and the enforcer principle, under the former, the trustees of an express private trust are subject to equitable duties because there exist beneficiaries who can enforce their correlative equitable right.[174] The 'proper plaintiff

applicable to charitable trusts. The essence of the necessary interest rule suggests that, for the purpose of this paper, there is no need to distinguish between charitable trusts and incorporated charities when exploring its application and rationale.

[168]Smith, above n 149, p 141.

[169]*Gartside v Inland Revenue Commissioners*, above n 44, at 617.

[170]*Morice*, above n 2, at 954.

[171]*Sik Chiu Yuet v Secretary for Justice*, above n 74, at [53].

[172]Ibid, at [57].

[173]*Royal Society for the Prevention of Cruelty to Animals v Attorney General*, above n 65, at 458.

[174]K Low 'Non-charitable purpose trusts: the missing right to forego enforcement' in Nolan et al, above n 34, p 491; Virgo, above n 145, p 201.

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rule'[175] is thus applied in the assessment of a person's eligibility to sue and the scope of his standing. Failure to satisfy the beneficiary principle does not strike down the validity of charitable trusts, due to the policy consideration that their recognition and execution can bring about 'identifiable benefit'[176] for 'a sufficient section of the community',[177] as shown in the Introduction above. Charitable trusts are characterised as an exception to the beneficiary principle, and a person's entitlement to sue against defaulting charity trustees is generally analysed on 'policy and pragmatic grounds'.[178] In contradistinction, if the enforcer principle is followed, whether a person is eligible to sue is not completely determined with reference to the proper plaintiff rule. The lack of beneficial interest does not necessarily deprive a person of his standing to sue. Instead, whether a person is eligible to sue depends on whether he has 'good reason[s] for seeking to enforce the trust or secure its due administration'.[179] Of course, the enforcer principle does not preclude the application of the proper plaintiff rule — if a person has 'some positive claim to benefit from the [trust assets]',[180] this rule can be still be invoked to remedy the infringement of his own interest. What distinguishes the enforcer principle from the beneficiary principle is that, under the former, a person may still be able to file lawsuits even if he has no 'expectation of benefit'[181] under the trust – his standing to sue is not derived from '[a person's] own right to put [trust assets] back into [their] proper state'[182] but rather from the notion that the integrity of the administration of the trust has been compromised, and thus they are allowed to invoke the court's inherent power to remedy the breach of the trust. Meanwhile, recognising that such a person has '*prima facie* standing to apply to court to remedy the maladministration of a trust'[183] does not indicate that the court 'must accede to every such invocation'.[184] By scrutinising the purpose of the proposed litigation and the relevance of the litigation to the protection of the trust's proper administration, the court has discretion in determining whether litigation can be justified or not.[185]

When exploring the entitlement of discretionary objects to secure the due administration of a trust, scholars and judges have widely borrowed the reasoning of the enforcer principle to justify the granting of certain entitlements to them.[186] Unfortunately, presently there is very little discussion that connects this line of reasoning to the analysis of a person's standing to sue in the context of charitable trusts. It is assumed that charitable trusts are policy-oriented and, accordingly, a person's entitlement to sue against defaulting trustees is granted by legislation or case law as a matter of public policy. The analysis in this paper demonstrates that, aside from policy and pragmatic justifications, the law relating to a person's entitlement to sue is also 'doctrinally coherent'[187] if one accepts that the doctrinal basis for the court's intervention is the due administration and execution of trusts. From a purely doctrinal perspective, the operation of the necessary interest rule is essentially in line with the tenor of the enforcer principle. The way in which the courts have applied and construed this rule suggests the *same*

[175]The rule that 'prima facie the correct person to bring proceedings is the person whose interests are at issue, which, for present purposes, is prima facie a beneficiary affected by the breach of trust in question'. See R Nolan 'Invoking the administrative jurisdiction: the enforcement of modern trust structures' in P Davies and J Penner (eds) *Equity, Trusts, and Commerce* (Oxford: Hart Publishing, 2017) p 172.

[176]*Independent Schools Council v Charity Commission for England and Wales* [2012] Ch 214 at 230.

[177]Ibid, at 273.

[178]*Gregg v Scott* [2002] All ER (D) 418 at [57].

[179]*Haslemere Estates Ltd v Baker*, above n 48, at 1122.

[180]Nolan, above n 175, p 159.

[181]Ibid, p 167.

[182]Ibid, p 173.

[183]Ibid, p 167.

[184]Ibid.

[185]Smith, above n 149, p 135; Nolan, above n 159, at 493; Nolan, above n 175, p 167.

[186]Jessica Hudson in her book chapter summarised five entitlements that discretionary objects under Australian trust law have: (a) relief when there has been an unauthorised or improper exercise of a power to replace a trustee, appointor or guardian; (b) relief when there has been an unauthorised disbursement of trust property; (c) pursue derivative proceedings; (d) disclosure of trust information; and (e) relief for the replacement of a trustee or other power-holder under an express trust. See Hudson, above n 30.

[187]Virgo, above n 145, p 623.

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conceptual basis for the recognition of an interested person's standing to sue under charitable trusts and that for discretionary objects. Irrespective of whether an express trust is for persons or for purposes, it is the concern of securing its due administration and execution that lies at the heart of the assessment of a person's eligibility to sue.

Conclusion

The way in which a charity trustee's obligations are enforced is significant for an understanding of the execution of the charitable trust. This paper has provided a detailed analysis of the necessary interest rule in both statute and case law. It shows that the administrative jurisdiction of the court to 'secure the performance and execution of trust' is fundamental to the application of this rule. Despite a lack of uniform understanding as to its meaning, the majority of cases have affirmed that the 'interested' persons who are qualified to bring charity proceedings tend to be those whose claims are aimed at securing the due administration and execution of charities. In addition to the necessary interest requirement, the rule also entails the arrangement of a protective filter. It confers on courts the deciding power as to whether a proceeding can be launched, so upholding Parliament's efforts in striking a balance between the protection of charity trustees' exercise of power and the avoidance of frivolous litigations that would exhaust the charities' assets.

The necessary interest rule also has relevance to the understanding of the essence of express trusts. Centring on the accountability of charity trustees and the proper enforcement of charitable trusts, the necessary interest rule stands in alignment with the tenor of the enforcer principle. It is fairly clear that the current English law of express trusts, unless and until it is re-interpreted by the Supreme Court, adopts the beneficiary principle as opposed to the enforcer principle. However, similar to the discussion of the entitlement of discretionary objects to the due administration of trusts, analysis of the necessary interest rule can also contribute to academic discussions around the beneficiary-enforcer debate and the conceptual nature of express trusts. In accordance with the enforcer principle, the fundamental concern of securing due execution of trusts can serve as a uniform basis to explain both the granting of standing to sue to discretionary objects and the identification of 'interested persons' under charitable trusts.

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