

Termination of Guernsey Discretionary Trusts

MAY 2019

A recent Royal Court decision has considered when beneficiaries of a discretionary trust are able to require the trustee to terminate the trust and distribute the trust fund. In *Rusnano Capital AG (in liquidation) v Molard International (PTC) Limited and Pullborough International Corp* [2019] GRC 011, the Royal Court was asked to consider whether a sole named beneficiary of a discretionary trust was able to request a trustee to terminate the trust and distribute the trust fund to it in reliance upon Section 53(3) of the Trusts (Guernsey) Law, 2007 ("**Trusts Law**"), in circumstances where a power existed to add additional beneficiaries.

In its judgment, the Royal Court has confirmed that for the purposes of Section 53(3) of the Trusts Law (which provides that all the beneficiaries of a trust may request the termination of the trust) that "all the beneficiaries" will be assessed by looking at those who are properly beneficiaries under the provisions of the trust, at the time the request is made – in other words applying a "*snapshot in time*" analysis. The fact a power to add additional beneficiaries exists does not mean that the beneficial class should be treated as open, such that it would be impossible to invoke Section 53(3) whilst a power to add further beneficiaries was exercisable.

In making this finding, the Royal Court has also provided clarification on the relationship between Section 53(3) of the Trusts Law and the so-called 'rule' in *Saunders v Vautier*.

Facts

The Applicant, Rusnano Capital AG (in liquidation) was an entity within a wider structure, the purpose of which is to invest in the nanotechnology industry in Russia.

One investment which was identified was shares in a UK company called Pro Bono Bio Plc ("**PBB**"). It was decided to acquire the shares in PBB and hold them on a new discretionary trust, to be called the RNPharma Trust ("**Trust**") with the First Respondent, Molard International (PTC) Limited as trustee ("**Trustee**") and the Second Respondent, Pullborough International Corp as enforcer and appointor ("**Appointor**").

The Trust Instrument provided that the Applicant was the only named beneficiary of the Trust. However, the Trust Instrument provided that the Appointor had the power to add further beneficiaries to the Trust after the earlier of: the shares in PBB being listed on a recognised stock exchange or 31 December 2017 ("**Power of Addition**"). At the time of the Application, the Power of Addition was exercisable but the Appointor had not yet exercised the Power of Addition to appoint any further beneficiaries.

The Applicant was subsequently placed in liquidation and in early 2018, the liquidator wrote to the Trustee indicating that he was undertaking the exercise of gathering in the Applicant's assets.

The liquidator subsequently made an application to the Royal Court, pursuant to sections 53 and 69 of the Trusts Law, requiring that the Trustee terminate the Trust and distribute the Trust property on the basis that it was the sole beneficiary.

Section 53(3) of the Trusts Law provides that: "*Without prejudice to the powers of the Royal Court under subsection (4), and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under a legal disability, they may require the trustees to terminate the trust and distribute the trust property among them*".

Recap on the 'rule' in Saunders v Vautier

Before looking at the Royal Court's decision it is relevant to give a re-cap on the 'rule' in *Saunders v Vautier*.

The rule stems from the English law case dating back to 1841 which established that if all beneficiaries are of full age and capacity and are together entitled to the entire equitable interest, they can require the trustee to transfer the trust assets to them and thereby collapse the trust.

The Royal Court's Decision

The question for the Royal Court to decide was whether Section 53(3) could be relied upon by the Applicant to terminate the Trust in circumstances where there existed a power exercisable by the Appointor to add further beneficiaries.

Submissions

The Applicant's submissions were straightforward. It suggested that the critical phrase in Section 53(3) is whether "*all the beneficiaries are in existence and have been ascertained*". It submitted that this phrase, when properly construed by reference to the other provisions of the Trusts Law (namely Sections 1 and 8), draws a distinction between someone who is a beneficiary and someone who is a potential object of a power (in this case the Power of Addition). Accordingly, the effect of Section 53(3) must operate at a given point in time and, in the absence of the exercise of the Power of Addition by the Appointor, the position is that the Applicant is the only beneficiary of the Trust.

Conversely, the Respondents' main submission was that Section 53(3) was merely a "codification" of the rule in *Saunders v Vautier* (placing reliance on the same description used by the Deputy Bailiff in the case of *Bond v Equiom Trust (Guernsey) Limited* Guernsey Judgment 24 of 2018) so that the cases that have considered and developed the rule elsewhere could be relied upon to interpret the ambit of Section 53(3).

Accordingly, the Respondents' position was that only where all persons entitled absolutely and indefeasibly under a trust to the whole of the income and capital of the trust property, have been ascertained and are of full age and capacity, will section 53(3) be able to be relied upon to terminate the trust. In circumstances where it was possible for the beneficial class to be added to, the sole named beneficiary did not represent the entire beneficial class for the purposes of activating Section 53.

Findings

The Deputy Bailiff first clarified his earlier observation in *Bond v Equiom*, and stated that whilst he had described Section 53(3) as a codification of the rule in *Saunders v Vautier*, the primary task when considering the ambit of that Section is to interpret the relevant provisions in the Trusts Law. He went on to state: "*What matters now, though, is how to give effect to the statutory regime that operates in Guernsey, using the definitions found in the 2007 Law itself and giving the other words their meanings through applying usual principles of statutory interpretation*".

In deciding whether the Applicant satisfied the requirements of Section 53(3) (namely, the requirement that "*all the beneficiaries are in existence and have been ascertained*") the Deputy Bailiff went on to consider the Jersey case of *In re Exeter Settlement* 2010 JLR 169, a case concerning a black hole or "Red Cross" trust (a trust usually set up with a sole-named charity as a beneficiary but with the power to add additional beneficiaries at a later date so as to achieve greater levels of confidentiality).

In that case, when the trust was executed, the trust had erroneously been set up with no named beneficiary (in this case the intended beneficiary was the RNLI) but there was a power to add beneficiaries. However, that power would not assist if the trust was invalid from the outset by reason of having no beneficiaries. The Royal Court of Jersey decided that rectification was possible, but in considering arguments on the original validity of the trust, commented on the difference between a beneficiary and someone in respect of whom a power to add beneficiaries could be exercised. In particular it held that: "*a person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary*".

Placing reliance upon the distinction drawn by the Royal Court of Jersey, the Deputy Bailiff found that: "*just because there is a real possibility that the power to appoint additional beneficiaries might be exercised, it does not follow that anyone who the Second Respondent, as Appointor, has in mind is a beneficiary for the purposes of the 2007 Law and, more particularly, section 53(3)*".

The Deputy Bailiff also dismissed with short shrift the Respondents' submission that "*all the beneficiaries*" should be read as meaning "*all the potential beneficiaries*". In rejecting this submission, the Deputy Bailiff held that Section 53(3) needs to be construed by reference to Section 80(1) of the Trusts Law which made no reference to "*potential beneficiaries*". Accordingly, had the legislature intended to extend the definition of "*beneficiary*" to "*potential beneficiary*" it would have expressly done so in Section 80(1) of the Trusts Law.

The Deputy Bailiff went on to consider a number of authorities from other jurisdictions relied upon by the Respondents, on the application of the 'rule' in *Saunders v Vautier* that had previously considered the extent to which a power to add further beneficiaries affects beneficiaries' ability to terminate a trust. One case in particular, *Orb ARL v Ruhan* [2015] EWHC 262 (Comm), had failed to come down definitively on whether a class of beneficiaries could be treated as closed, where a power to add further beneficiaries existed. As there was some doubt over whether the class of beneficiaries could be closed, the Respondents submitted, in essence, that the same should apply to the interpretation of Section 53(3).

Whilst the Deputy Bailiff considered the development of the 'rule' in *Saunders v Vautier* was "interesting" it was a "fundamental flaw" to try and argue that anything do with the 'rule' could still be introduced into Guernsey law. He went on to state that: "*There is nothing on the face of section 53(3) of the 2007 Law that refers to the beneficiary or all the beneficiaries*".

having to establish an absolute, vested and indefeasible interest in the trust property", as the Respondents' had tried to argue, and found that "the approach taken by the legislature involves no more than a consideration of whether "all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under legal disability".

As there was no suggestion that the Applicant was suffering from any form of legal disability, and as a corporation it was not a minor, the way to interpret Section 53(3) turned on to whether or not there was any other beneficiary who had not joined in the with the Applicant's request to terminate the Trust which would defeat the application. The Deputy Bailiff was satisfied that the existence Power of Addition did not affect the conclusion that can be reached at any given moment in time as to who the beneficiaries of the Trust were. Until the Power of Addition is actually exercised, the only beneficiaries identifiable under the test set out in the Trust Law, are those who are properly beneficiaries under its provisions - in this case, the Applicant.

Conclusion

This case confirms that Section 53(3) of the Trusts Law creates a separate statutory mechanism in Guernsey by which beneficiaries can terminate a trust. How that mechanism can be used requires construing the wording of that Section by reference to the provisions of the Trusts Law, rather than by trying to import into Guernsey law cases dealing with *Saunders v Vautier* which should not be treated as being determinative of that wording.

For the purposes of Guernsey law, the power to add additional beneficiaries will not prevent beneficiaries of a trust from requesting that a trust be terminated under Section 53(3). As more applications are made under Section 53(3) it will be interesting to see how the Royal Court continues to interpret its ambit as compared to the 'rule' in *Saunders v Vautier*. If this case is anything to go by, it would seem that Section 53(3) has the ability to be potentially wider.

For more information please contact:



Ben Havard

Partner | Guernsey

t: +44 (0) 1481 734248 | **e:** ben.havard@collascrill.com



Emma Taylor

Of Counsel | Guernsey

t: +44 (0) 1481 734236 | **e:** emma.taylor@collascrill.com