COLLAS CRILL

Rusnano: An update (or, what constitutes 'all the beneficiaries' of a trust)

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In December 2019 the Guernsey Court of Appeal handed down its decision in *Molard International (PTC) Limited and Pullborough Int. Corp v Rusnano Capital AG (in liquidation)*, an appeal from a decision of the Royal Court in May of that year. Although handed down at the end of last year, the appeal judgment has only now been publicly reported.

The appeal, and the original judgment, focused on the ability of beneficiaries to require that a trustee terminate a trust and distribute the trust fund to them. This has been a well-known avenue for beneficiaries to explore pursuant to the so-called rule in *Saunders v Vautier*, but the present case focused on the statutory basis for such an action.

Owing to the similarities between the relevant provision in the two islands' legislation, the appeal judgment is significant not only in respect of Guernsey trusts, but also Jersey trusts and practitioners.

First Instance: Arguments

Collas Crill's analysis of the first instance judgment can be found here See below for a summary of that decision and some background facts:

Rusnano Capital AG is the beneficiary of a Guernsey trust called the RN Pharma Trust. The trustee of the trust is Molard International (PTC) Limited.

For reasons relating to its liquidation, Rusnano sought to invoke section 53(3) of the Trust (Guernsey) Law, 2007 (the '**Trusts Law**'), by which it considered it was entitled to require the trustee to terminate the trust and distribute the trust property to it.

Section 53(3) of the Trusts Law states:

'*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 legal disability, they may require the trustees to terminate the trust and distribute the trust property among them.*'

Almost identically, section 43(3) of the Trusts (Jersey) Law 1987 (the '**Jersey Trusts Law**') states:

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'Without prejudice to the powers of the court under paragraph (4) and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained and none are interdicts or minors they may require the trustee to terminate the trust and distribute the trust property among them.'

Crucially, the trust instrument provides that while Rusnano is the only named beneficiary of the trust, the trustee is afforded the power to add new beneficiaries.

The question that fell to be answered was, does the wording '*all the beneficiaries*' in section 53(3) of the Trusts Law mean all of the beneficiaries *as at that moment*, or should it be construed as meaning that all current *and potential* beneficiaries are needed in order to require the trustee to terminate the trust and distribute the property?

The trustee argued that because of its power to appoint new beneficiaries, Rusnano was merely the sole current member of the discretionary class, and that this was not sufficient for the purposes of s.53(3). The trustee argued that the statutory provision was analogous to, and a codification of, the rule in *Saunders v Vautier*, and that accordingly the trust should not be terminated unless all persons 'entitled absolutely and indefeasibly under a trust to the whole of the income and capital had been ascertained'.

Rusnano argued that a 'snapshot' analysis was correct and that when construing the meaning of s.53(3), a power to add beneficiaries did not alter the position because objects of such a power were not beneficiaries unless and until the power was exercised so as to actually add them.

First Instance: Decision

The Deputy Bailiff agreed with Rusnano's arguments and, noting the Royal Court of Jersey case in *Re Exeter Settlement* (2010 JLR 169), determined that a person who is a mere object of a power is not a beneficiary.

Therefore, Rusnano was the only beneficiary of the trust, and accordingly was able to invoke s.53(3) to require the trustee to terminate the trust.

This decision was, however, appealed by the trustee and the enforcer of the trust.

Court of Appeal: Arguments

The grounds of the appeal were set on two bases.

Firstly, that the original decision was wrong in law because the Royal Court ought to have concluded that *potential* beneficiaries should be treated as beneficiaries for the purposes of s.53(3).

Secondly, that the Deputy Bailiff had – but did not consider whether to exercise - a discretion under section 53(4) of the Trusts Law to decline to grant Rusnano's request to terminate the trust where appropriate. The Jersey Trusts Law contains equivalent provisions to the Trusts Law in sections 43(4)(a) and 43(4)(b) which provide the Jersey court with the same discretion to either require the trustee to distribute or direct the trustee not to distribute the trust property.

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The main thrust of the trustee's arguments was that the relevant statutory provision shouldn't be read in a vacuum, and that instead it should be read and construed taking into account its context. The context, it was argued, was the desire to codify in Guernsey (and Jersey) statute the (stricter, in this sense) English common law position.

In other words, s.53(3) should have been interpreted by the Court in line with the rule in *Saunders v Vautier*, with the trustee's power to add other beneficiaries therefore preventing the current beneficiary, Rusnano, from terminating the trust.

To support this view the trustee drew on common examples of trust use in the Channel Islands to demonstrate how the Royal Court's original decision could have adverse and unfortunate consequences for these jurisdictions.

The trustee noted that such consequences were most likely to be felt in respect of so called 'Red Cross trusts', of which all Channel Island fiduciary practitioners will be aware: discretionary trusts set up with one named beneficiary (often a charity such as the Red Cross) with the intention and power to add beneficiaries subsequently.

Under the Royal Court's interpretation of s.53(3), the trustee argued that a charity in such a case could call for the trust to be terminated and receive the entirety of the trust property at any point before another beneficiary was appointed.

For its part, Rusnano submitted that the Royal Court's decision was the right conclusion and should not be overturned.

Court of Appeal: Decision

The appeal was allowed but only to a limited extent, and the core appeal in respect of the construction of s.53(3) was dismissed. The reasons for this decision are important for local practitioners to keep in mind.

Firstly, the Court of Appeal considered at some length the issue of the correct interpretation of s.53(3).

The particulars of those considerations are likely to be of more interest to Guernsey and Jersey advocates than to Channel Islands fiduciaries, but are nevertheless instructive as to the decision reached.

To summarise, the Court of Appeal accepted on a qualified basis that a statute and a statutory provision should properly be construed with regard to its context. It also noted and accepted the proposition that Guernsey law (and, by extension, Jersey law) incorporated the provisions of English law unless it was inconsistent with local customary law or statute (or was otherwise inapplicable).

Citing well-known trust-related case law (*Stuart-Hutcheson v Spread Trustee Company Limited* (2002) Guernsey CA, 299; *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* 2018 GLR 97), the Court of Appeal considered that '*English trust law has in certain respects been modified by statute in Jersey and Guernsey*' and

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the question was whether the rule in *Saunders v Vautier* had been incorporated into local law entirely by s.53(3), or in some modified form.

The Court of Appeal held that the first instance decision was correct, with s.53(3) standing on its own two feet. The relevant English case law had been modified by Guernsey statute, it decided. There was no basis for considering that the words '*all the beneficiaries*' meant '*all the potential beneficiaries*' when those were not the words used, and when other Trusts Law sections had expressly catered for such additional persons in their wording (e.g. s.52(c)).

Ultimately, standing back, the Court of Appeal asked itself '*who are the beneficiaries of this trust?*' and found that it was Rusnano and Rusnano alone, being the only entity in whose favour the trustee could exercise a power to distribute trust property at that time (i.e. a 'snapshot' analysis).

However, despite confirming the Royal Court's interpretation of the statutory termination and distribution provision, the appeal was allowed on a limited basis. This was because the Court of Appeal considered not only that the Court had a discretion to override that right of termination by virtue of s.53(4) of the Trusts Law, but that there was an application under that provision that was before the Royal Court but which had not yet be determined (it not having been pertinent at first instance, with agreement that no evidence would be adduced in relation to it).

As such, and despite finding the Royal Court's decision to be correct in relation to the interpretation of section 53(3) (a fact which was revisited upon the Appellants in relation to the issue of costs of the proceedings), the Court of Appeal sent the matter back to the Royal Court so that it could exercise its discretion to approve or reject the proposed termination.

Points to Note

1. Of primary importance is the confirmation that in relation to beneficiary rights to require the termination and distribution of a trust, Guernsey's statutory provisions are similar but not identical to, English case law. Under Guernsey law, the existence of a power to add beneficiaries will not prevent beneficiaries of a trust from requiring it to be terminated.
2. As a result of the almost identical wording of the relevant statutory provisions in the Trusts (Jersey) Law 1984 and the Guernsey Court of Appeal's analysis of the importation of English trust law into both islands, this decision is likely to be followed by the courts of Jersey (the two islands' Courts of Appeal are drawn from the same panel of judges).
3. The points identified by the trustee in respect of so-called Red Cross trusts are validly made, although the Court of Appeal queried both the prominence and desirability of such trusts in its judgment. Nevertheless, many professional trustees in the islands will be trustees of trusts of this nature – with many likely to still be in their 'out of the box' set-up of having one charity as a beneficiary. Prudent trustees who are aware of an intention to add further beneficiaries subsequently may consider it desirable to either make those additions now (if appropriate) or at least to document that intention now, so as to ensure there is evidence of it should it be needed to support any future s.53(4) application to Court.

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If you'd like to discuss altering the class of beneficiaries of a trust, please contact Angela Calnan or Kellyan Ozouf in relation to Guernsey and Jersey trusts respectively.

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