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Industry Information

## Saunders v Vautier in the Channel Islands

### Guidance from Guernsey

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Can the beneficiaries of a discretionary trust require the trustees to terminate the trust and distribute the trust property, in circumstances where a power to add further beneficiaries exists? In *Rusnano Capital AG (in liquidation) v Molard International (PTC) Limited and Pullborough International Corp* [2019] GRC 011 (the “Judgment”) the Guernsey Royal Court has held that in Guernsey they can. In doing so, the court also provided a welcome clarification of the relationship between section 53 of the Trusts (Guernsey) Law, 2007 (the “Trusts Law”) and the so-called ‘rule’ in *Saunders v Vautier*.

### Facts

The Applicant was an entity within a wider group structure which invested in the nanotechnology industry. One such investment was shares in an English healthcare technology company (the “Shares”). A trust was established in 2014 (the “Trust”), with Molard International (PTC) Limited (the “Trustee”) as trustee, and Pullborough International Corp (the “Appointor”) as ‘enforcer’ and ‘appointor’, onto which the Shares were settled.

The only beneficiary designated by the trust instrument was the Applicant which was named specifically therein. However, the Trust instrument gave the Appointor the power to add persons or classes of persons as beneficiaries (and to exclude classes or members of a class from being beneficiaries). That power had not been exercised. The Trust instrument also provided that the Trustee was to appoint the trust fund and/or its income to “all or such one or more of the beneficiaries...in such shares...and in such matter generally as the Appointor shall in its absolute discretion from time to time by instrument direct.”

The Applicant applied under section 53 of the Trusts Law to require the Trustee to terminate the Trust and distribute its assets. 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.”*

### Findings

In *Bond v Equiom Trust (Guernsey) Limited* (4 June 2018, Guernsey Judgment 24/2018), McMahon DB had observed that section 53(3) could be regarded as a codification of the so-called rule in the case of *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, and approved the summary of the ‘rule’ in Lewin on Trusts (19th edn), at 24-009:

*“If there is only one beneficiary, or if there are several beneficiaries all of full age and capacity and of one mind, the specific execution of the trust may be stayed and the special trust will acquire the character of a bare or simple trust; for through whatever channel the settlor may have intended his bounty to flow, the beneficiaries, as the persons ultimately to be benefited, are in equity and from the creation of the trust, and before the trustees have acted in the execution of the trust, the absolute beneficial proprietors.”*



McMahon DB clarified at paragraph 15 of the Judgment that his primary task concerning the application was to interpret the relevant provisions in the Trusts Law. Whilst section 53(3) may be a codification of the 'rule' in *Saunders v Vautier*, "such codification does not necessarily mean that the principles developed in other jurisdictions as to how to give effect to that rule are applicable under the 2007 Law". Instead, he stated that "What matters 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."

The key question for the court therefore was: in circumstances where the Trust document had designated only the Applicant as a beneficiary, but a power to add beneficiaries to the Trust existed, was it correct to say that "all the beneficiaries are in existence and have been ascertained"?

McMahon DB held that it was. At paragraph 22 of the Judgment he stated 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 Appointor] has in mind is a beneficiary for the purposes of the 2007 Law, and, more particularly section 53(3)."

In so finding, he drew upon the distinction drawn by the Royal Court of Jersey in *In re Exeter Settlement* 2010 JLR 169. In that case, the court had commented on the difference between being a beneficiary and merely being someone in respect of whom a power to add beneficiaries could be exercised. In particular, the Jersey court had stated 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."

McMahon DB confirmed that this distinction is also applicable in Guernsey. He also found that there was no basis for interpreting the phrase "all the beneficiaries" in section 53(3) of the Trusts Law as meaning "all the *potential* beneficiaries". Given those principles, McMahon DB was therefore satisfied that the Applicant was the sole beneficiary of the Trust, and (being in existence and ascertained), was entitled to invoke section 53, terminate the Trust, and receive the Trust property.

In opposition to the application, the Trustee and Appointor had raised authorities concerning the application of the 'rule' in *Saunders v Vautier* which put in issue the extent to which beneficiaries may terminate a trust when a power to appoint further beneficiaries exists. In his discussion of these submissions, McMahon DB quoted at length an extract from *Orb ARL v Ruhan* [2015] EWHC 262 (Comm) in which Cooke J had considered the question "as to whether or not, in circumstances where there are two named beneficiaries, but the trustees have power to appoint additional beneficiaries, there can be said to be a closed class at any point in time before the trust comes to an end." Cooke J had concluded that "it is not clear, on the current state of the law, whether the class is in fact a closed class at any point in time where the trustees have not made such a direction [to add a person to the class of beneficiaries]", and held that it must be at least arguable that the class was closed such that the beneficiaries could call in the trusts under the 'rule' in *Saunders v Vautier*.

McMahon DB held, however, that whilst "interesting", it was a "fundamental flaw" to attempt to introduce such issues into Guernsey law insofar as they departed from the wording of section 53(3) of the Trusts Law. As he reiterated, "the way to interpret section 53(3) turns on whether or not there is any other beneficiary who does not join in with the Applicant in requiring the [Trust] to be terminated, which would defeat the Application." He did not therefore consider that what was required was a further inquiry into whether or not the class of beneficiaries was a "closed class" as discussed in the *Orb* case, because that is "not the way section 53(3) reads."

## Wider Considerations

There are two further particular points of interest arising from the judgment. The first is that (whilst not relevant to the court's decision) McMahon DB did go so far as to raise at paragraph 32 the point that even if the *Saunders v Vautier* 'closed class' issue discussed in the *Orb* case were to be applied to the present facts, "it strikes me as arguable...that such an exercise needs to crystallise at any given point in time and the question of whether the class is closed should not be rejected simply on the basis that just about anyone in the whole world might at some future date be added as a beneficiary by the Appointor." This is a notable addition to the discussion of the relevance of the existence of a power to add beneficiaries to the ability of the existing beneficiaries to terminate a trust under *Saunders v Vautier*, which may be drawn upon by courts in jurisdictions not covered by the Trusts Law.

Secondly, the court also considered the implications of the Judgment to so called "Red Cross" or "Black Hole" trusts, in which 'primary' beneficiaries are not included in the trust at the point of its creation, and are instead left to be added at a later date, with a 'default' beneficiary



(often the Red Cross) sustaining the structure as the named beneficiary. McMahon DB noted that the Judgment confirms that such default beneficiaries may likely have the power to terminate the trust and claim the trust fund under section 53 of the Trusts Law before the 'principal' beneficiaries are added. He suggested, however, that charities regularly used as 'default' beneficiaries (a) "will not know about the settlor's possible bounty", and (b) may in any case choose not to terminate the trust out of concern that it would subsequently no longer be the preferred charity in such cases: "*an immediate windfall may not be a sound longer-term strategy.*"

## Conclusion

This case therefore establishes the important point that section 53 of the Trusts Law creates an independent statutory mechanism for the termination of trusts by beneficiaries which, whilst derived from the 'rule' in *Saunders v Vautier*, must be interpreted by its own wording, and without importing into Guernsey law authorities dealing with *Saunders v Vautier* which are not relevant to that wording. Under Guernsey law therefore (and arguably also in Jersey where section 43(3) of the Trusts (Jersey) Law, 1984 is on substantially similar terms), the existence of a power to add beneficiaries will not prevent the beneficiaries of a trust from terminating the trust under section 53 of the Trusts Law.

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