Application for a Trust to be terminated and the Trust Fund to be distributed

[2019]GRC011

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

RUSNANO CAPITAL AG (in liquidation) **Applicant**

-and-

(1) MOLARD INTERNATIONAL (PTC) LIMITED

(2) PULLBOROUGH INTERNATIONAL CORP **Respondents**

Hearing date: 13th February 2019

Judgment handed down: 20th March 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: **Advocate R G Morris**
Counsel for the Respondents: **Advocate A C Williams**

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
Saunders v Vautier (1841) Cr & Ph 240
Bond v Equiom Trust (Guernsey) Limited (unreported, 4 June 2018)
The Trusts (Guernsey) Law, 1989
The Trusts (Jersey) Law 1984
McPhail v Doulton [1971] AC 424
In re Exeter Settlement 2010 JLR 169
Jackson, *Certainty of Beneficiaries in Jersey and the First Principles of Trust Law* (2015) 19 Jersey & Guernsey Law Review 236
The Human Rights (Bailiwick of Guernsey) Law, 2000
Lewin on Trusts (19th ed.)
Thomas on Powers (1998 edition)
CPT Custodian Pty Limited v Commissioner of State Revenue [2005] HCA 53
Goulding v James [1997] 2 All ER 239
In re Trafford's Settlement [1985] 1 Ch 32
In re Nelson (Note) [1928] Ch 920
Re Smith [1928] 1 Ch 915
Orb ARL v Ruhan [2015] EWHC 262 (Comm)
Murphy v Murphy [1999] 1 WLR 282, 290
Schmidt v Rosewood [2003] 2 AC 709

Introduction

1. By an Application dated 14 March 2018, Rusnano Capital AG, a company incorporated in Switzerland and which is in liquidation, relies on sections 53 and 69 of the Trusts (Guernsey) Law, 2007 to seek an order against the Trustee of the RNPharma Trust, Molard International (PTC) Limited, the First Respondent, and also that Trust's Enforcer, Pullborough International Corp, the Second Respondent, that the trust be terminated and the trust fund, being primarily shares in Pro Bono Bio PLC ("PBB"), be distributed to the Applicant forthwith.

2. The Application is supported by a First Affidavit of Irina Rapoport, sworn on 14 March 2018. In response, Pavel Erochkine, who is the beneficial owner of the two Respondents and has been the director of the First Respondent since 10 May 2018, has sworn a detailed Affidavit dated on 14 June 2018. In reply, the Applicant has provided an Affidavit of Valeria Lukyanova, sworn on 3 August 2018 and a Second Affidavit of Ms Rapoport, sworn on 16 August 2018. Where there are matters of dispute between the parties' evidence, however, this Court is not invited to resolve them for the purposes of determining this Application. Indeed, Advocate Williams, on behalf of the Respondents, went so far as to suggest that it would be premature to do so on the basis that a significant portion of the evidence adduced relates to other proceedings in which Mr Rapoport and Mr Erochkine will be witnesses, where factual findings will need to be made. Instead, the parties have agreed certain uncontested facts for the purpose of resolving whether or not the relief sought by the Applicant is available in law.

3. For the purposes of the Application, Advocate Williams refers to the manner in which Ms Rapoport summarises the position in her Second Affidavit as being "*the only issue that remains in this Application is whether or not the First Respondent as trustee is obliged to act upon the Applicant's request to terminate the trust and distribute the assets to it*". Advocate Morris, on behalf of the Applicant, has proceeded on that basis. Accordingly, I do not need to do more than summarise the uncontested facts in order to place that issue into its proper context, and so have dealt with the Application on the basis that it requires a ruling on the ambit of section 53 of the 2007 Law

Brief facts

4. The Applicant is an entity within a group where the ultimate parent company is a Russian state-owned entity, JSC Rusnano. The purpose of that group is to invest in the nanotechnology industry. Mr Erochkine was an employee within the group, although the precise terms on which he was employed do not fall to be determined in relation to this Application. Immediately prior to his employment ending on 31 July 2017, his immediate line manager was Ms Rapoport. One of the investments identified as being a target for investment was PBB, a United Kingdom company. As part of the transaction on which Mr Erochkine worked, the shareholding in PBB in respect of that investment was to be held through the RNPharma Trust and two companies incorporated in the British Virgin Islands were created with assistance from persons within Saffery Champness, which would administer them as their corporate service provider, to perform functions in relation to that Trust. Those two companies are the two Respondents. When these proceedings were begun, Saffery Champness wished to resign from further involvement in the structure created, including providing directorship services, and so Mr Erochkine became the director of the First Respondent and another person became the director of the Second Respondent.

5. The RNPharma Trust deed was executed on 25 July 2014 on behalf of the two Respondents, with directors of Rysaffe Administrateurs Sarl, an entity of Saffery Champness, being the signatories. Clause 13 provides that it is a Guernsey trust. The initial trust property was £10. However, when the further shares in PBB were issued on 11 September 2014, they were allotted to the First Respondent as the trustee of the RNPharma Trust. Shortly before that, on 3 September 2014 an Instrument of Amendment was executed to change the date in the definition of "Listing Date" at clause 1.1.13 from 31 December 2016 to 31 December 2017.

6. The principal trusts are set out in clause 3.1 as follows:

> "*Until and subject to and in default of any payment or appointment under Clause 5.1 the Trustees shall hold the Trust Fund and the income thereof during the Trust Period as follows:*
>
> *3.1.1 at any time when there are no Beneficiaries to pay or apply the whole or such part (if any) of the Trust Fund and the income thereof in or towards the fulfilment of the Purpose at such times and in such manner as the Trustees may in their discretion think fit;*
>
> *3.1.2 subject as aforesaid the Trustees shall stand possessed of the Trust Fund upon trust to accumulate the same by way of compound interest investing it and the resultant income thereof in the acquisition of any investments or other property authorised hereunder and all accumulations of income so made shall be held as additions to the Trust Fund for all purposes but with power at any time to treat the accumulations already then so made (or any part thereof) as current income;*
>
> *3.1.3 subject as aforesaid the Trustees shall appoint pay or apply the income of the Trust Fund to or for the benefit of all or such one or more of the Beneficiaries (if any) exclusive of the other or others of them as are then living or existing and in such shares if more than one and in such manner generally as the Appointor shall in its absolute discretion from time to time by instrument direct;*
>
> *3.1.4 subject as aforesaid the Trustee shall at any time or times apply the whole or any part or parts of the income accumulated under Clause 3.1.2 as if it were income arising in the then current year to or for the benefit of all or such one or more of the Beneficiaries (if any) exclusive of the other or others of them as are then living or existing and in such shares if more than one and in such manner generally as the Appointor shall in its absolute discretion from time to time by instrument direct; and*
>
> *3.1.5 subject as aforesaid the Trustees shall at any time appoint pay or apply the whole or any part of the Trust Fund whether or not in specie to or for the benefit of all or such one or more of the Beneficiaries (if any) exclusive of the other or others of them in such shares if more than one and in such manner generally as the Appointor shall in its absolute direction by instrument direct.*"

By clause 1.1.2, "Beneficiaries" is defined to mean "*those persons described in Schedule 4 or any person or class added by instrument pursuant to the provisions of this instrument save to*

*the extent that any such person becomes an Excluded Person and "**Beneficiary**" has a corresponding meaning*". In Schedule 4, only the name of the Applicant appears. By clause 1.1.1, "Appointor" is defined by reference to Schedule 3, in which the Second Respondent is named.

7. Clause 5 of the trust deed enables the Appointor to direct the Trustee "*in relation to the whole or any part of the capital of the Trust Fund or its income*" to "*declare trusts in favour of all or any one or more of the Beneficiaries*", which "*may be either mandatory or discretionary and may create any interest whatsoever in either the capital or income or both whether absolute or limited and whether vested or contingent and whether in possession or in reversion and whether revocable or irrevocable*". However, in accordance with clause 5.7:

> "*No direction for the appointment application or payment of any part or the whole of the income or capital of the Trust Fund under this Clause or sub-Clauses 3.1.3 to 3.1.5 may be given or made by the Appointor prior to the Listing Date.*"

By clause 1.1.13, as amended, "Listing Date" is defined as "*The earlier of the Company being listed on a recognised stock exchange and 31 December 2017*". Clause 1.1.5 defines "Company" as PBB. It is common ground that PBB was not listed on a recognised stock exchange prior to the end of 2017.

8. Clause 7 deals with the power to add beneficiaries:

> "*7.1 The Appointor subject to clause 7.3 has power by instrument revocable during the Trust Period or irrevocable to add as Beneficiaries such one or more persons or a class of persons (none being Excluded Persons) as the Appointor shall in its absolute discretion determine subject to such terms conditions or restrictions and for such period as may be specified in such instrument and such instrument shall specify the date (not being earlier than the date of the instrument but during the Trust Period) from which such person shall be so added.*
>
> *7.2 The Appointor shall give notice of any such instrument to the Trustees and the Enforcer.*
>
> *7.3 The power conferred on the Appointor under Clause 7.1 may not be exercised by the Appointor prior to the Listing Date.*"

It is common ground that the Appointor has not exercised this power. The consequence is that the only named Beneficiary is the Applicant.

9. Clause 8 enables the Appointor to "*declare that a person a class or member of a class named or specified (whether or not ascertained) … who or which is would or might but for this Clause be or become a Beneficiary or a class of Beneficiaries or be otherwise capable of benefiting under this Trust*" shall be excluded, in whole or in part from future benefit, shall cease to be a Beneficiary or a class or shall be an Excluded Person. By clause 8.6, this power was not exercisable before the Listing Date. It is common ground that this power has not been exercised by the Second Respondent since it has been available.

10. Clause 10 provides that "*The Trustees and the Appointor have power by instrument revocable during the Trust Period or irrevocable to release or to any extent restrict the future exercise*

of any powers conferred on them by this Trust or by law notwithstanding the fiduciary nature of any such power." The Respondents have not acted in this way.

11. By a letter dated 6 March 2018, the liquidator of the Applicant wrote to the First Respondent as Trustee of the RNPharma Trust indicating that he was undertaking the exercise of gathering in the Applicant's assets. He invoked section 53(3) of the 2007 Law (albeit incorrectly referring to it as a 2008 Law) and, because the Applicant is the sole beneficiary, required the Trustee to terminate the Trust and distribute the trust property. On the same day, he wrote to the Second Respondent informing it that he had written in these terms to the Trustee.

The parties' contentions

12. The Applicant submits that the Application can be resolved by construing the provisions in the 2007 Law on which it relies. There is no issue that the Applicant is named as the Beneficary in the trust instrument and so has standing by virtue of section 69(2)(d) to seek an order in respect of "*the execution, administration or enforcement*" of the Trust or in respect of "*any trust property, including an order as to the … distribution thereof*" (section 69(1)(a)(i) and (iv)). More particularly, section 53 relating to the termination of trusts is engaged:

> "*(3) 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.*
>
> *(4) The Royal Court, on the application of any person mentioned in section 69(2), may –*
>
> > *(a) direct the trustees to distribute, or not to distribute, the trust property, or*
> >
> > *(b) make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fits.*"

13. Advocate Morris suggests that the critical phrase in section 53(3) is whether "*all the beneficiaries are in existence and have been ascertained*". His solution is to construe that phrase by reference to other provisions in the 2007 Law, particularly sections 1 and 8. In doing so, he draws a distinction between someone who is a beneficiary and someone who is a potential object of the power the Appointor has pursuant to clause 7 to add one or more beneficiaries. Accordingly, the effect of section 53 must operate at a given point in time and, in the absence of any such appointment, the position is that the Applicant is the only beneficiary of the RNPharma Trust. Whatever the terms of the Trust (ie, "*notwithstanding the terms of the trust*"), its position as the sole beneficiary enables it to require the First Respondent to terminate the Trust and distribute the trust property to the Applicant as the sole beneficiary of it.

14. Advocate Williams relies on section 53(3) being merely the codification of the so-called rule in *Saunders v Vautier* (1841) Cr & Ph 240, which is how I described it at para. 25 in *Bond v Equiom Trust (Guernsey) Limited* (unreported, 4 June 2018), so that the cases dealing with that rule as it has been explained and developed elsewhere can be prayed in aid to show that it

is 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 *sui juris* that they are entitled to terminate the trust in this fashion. The position of the Respondents is that the Applicant must be regarded as having no beneficial interest in the trust property. Instead, its status is as the sole current member of the discretionary class of beneficiaries, which means it is an object of the dispositive powers in the Trust. Because there is a power to add to the class of objects, it means that class is not closed, as required before section 53(3) is met. The appropriate way to construe section 53(3) is if the reference to "*all the beneficiaries*" is read as meaning all the potential beneficiaries. He further refers to the likely effect that a finding in favour of the Applicant will have "*to defeat the terms of the many trusts, both in Guernsey and elsewhere, which have been drafted along these lines*", referring to what have been described as "*black hole trusts*".

Discussion

15. I take the view that my primary task on this Application is to interpret the relevant provisions in the 2007 Law. Although I referred to section 53(3) as having codified the rule in *Saunders v Vautier*, repeating a submission made in *Bond v Equiom*, 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. The provision is a re-enactment of what was originally in section 48 of the Trusts (Guernsey) Law, 1989. The legislative scheme for trusts in Guernsey also owes many of its origins to what was found in the Trusts (Jersey) Law 1984. 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. Neither Advocate has found anything of assistance from Jersey in relation to the provision in the 1984 Law from which section 48 , and now section 53, has been drawn.

16. Section 80(1) defines "beneficiary" as meaning "*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised*". This is further apparent from section 1, which provides:

> "*A trust exists if a person (a "**trustee**") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –*
>
> *(a) for the benefit of another person (a "**beneficiary**"), whether or not yet ascertained or in existence, and / or*
>
> *(b) for any purpose, other than a purpose for the benefit only of the trustee.*"

It is clear that the Applicant satisfies this definition. The question is whether or not there is any other person who also satisfies this definition as a beneficiary already in existence and ascertained.

17. Further assistance is found in section 8 of the 2007 Law. Subsection (1) provides:

> "*A beneficiary shall be –*
>
> *(a) identifiable by name, or*

(b) ascertainable by reference to –

(i) a class, or

(ii) a relationship to another person, whether or not living at the time of the creation of the trust or at the time by reference to which, under the terms of the trust, members of a class are to be determined."

Subsection (2) provides that "*The terms of a trust may provide for the addition or removal of a person as beneficiary or for the exclusion from benefit of a beneficiary either revocably or irrevocably.*"

18. Section 8 deals more particularly with the issue of certainty of objects, as one of the three certainties required for a valid express trust, as has been explained as a matter of English law in *McPhail v Doulton* [1971] AC 424. In this context, Advocate Morris refers to the decision of the Royal Court of Jersey in *In re Exeter Settlement* 2010 JLR 169. In that case, when the trust was executed, the identity of the named charity as beneficiary had been omitted from the Schedule into which it was meant to be inserted. It was meant to be the Royal National Lifeboat Institution. There was a power to add beneficiaries, but that power would not assist if the trust were invalid from the outset. The question, therefore, was whether the trust could be declared valid despite not identifying any beneficiary or, if not, whether rectification was available. The Court decided that rectification was possible but, in rejecting arguments relating to the original validity of the trust, commented on the difference between being a beneficiary and someone in respect of whom a power to add beneficiaries could be exercised:

> "*29 In our judgment, one must return to first principles. A beneficiary of a discretionary trust is a person in whose favour a discretion to distribute income or capital of a trust may be exercised. Trustees may only exercise their power to distribute income or capital in favour of a person who is a beneficiary. It is the beneficiaries who are the objects of the discretionary trust. They must be sufficiently certain to satisfy the requirement as to certainty of objects.*
>
> *30 A power to add beneficiaries is something completely different. It means what it says. 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. Until that moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust. The sole right that he has is as a possible object of the power to add beneficiaries.*"

19. That decision has attracted some academic commentary, to which I was also referred. For example, Jackson's article *Certainty of Beneficiaries in Jersey and the First Principles of Trust Law* (2015) 19 Jersey & Guernsey Law Review 236 (at para. 3) helpfully explains how the typical operation of black hole trusts (also sometimes referred to as Red Cross Trusts due to the frequency with which that charity is used as the default beneficiary), where the primary beneficiaries are often not named at all, or only by reference to a smaller group than intended by the settlor. She continues (at para. 4):

> "*This structure gives the trust an extra layer of secrecy. It limits the information given both about, and to, trust beneficiaries. Until someone is actually appointed into the class there is no legal record as to their existence as a beneficiary. Further,*

only beneficiaries are prima facie entitled to information about trust accounts under art 29 of the Trusts (Jersey) Law 1984. A person does not fulfil the art 1 definition of "beneficiary" by being mentioned in the settlor's letter of wishes. Black hole trusts are vulnerable to misuse for tax evasion and money laundering. They may be shams disguising pure nomineeships. However, a settlor may have genuine reasons for desiring an extra layer of secrecy, for example, in the context of legitimate asset protection, or "to provide for persons who he did not judge capable of handling the knowledge of their position – or who might, in his view, abuse it"."

In para. 19, she explains:

"*The rule requiring the existence of a beneficiary is found in art 11(2)(a)(iv) of the Trusts (Jersey) Law 1984, and is an enactment of the English beneficiary principle: a trust shall be invalid if "it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose". As shown above, the reason for the requirement for certainty of object is to enable trustees to perform their duties, and to ensure that the court can adequately exercise its supervisory jurisdiction over trusts. The basis of the beneficiary principle is the trustee's obligation to account to the beneficiary: a highly valued constituent of the Jersey trust. Maitland's view of the trust was, in essence, an obligation enforceable by the beneficiaries against the trustee. Hayton elaborated on the core nature of the obligation as the trustee's duty to account to the beneficiaries for their stewardship of the trust property. Without this, there can be no trust. This was recognised by the English Court of Appeal in Armitage v Nurse, in which Millett LJ commented that "[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts." The trustee's obligation to account, as a legal obligation, must be supported by the existence of someone with a corresponding right of enforcement through the courts, usually the beneficiary: hence the need for art 11(2)(a)(iv) of the Trusts (Jersey) Law 1984. Without this, a trust would only be what Pothier would term an "imperfect obligation" and on Hohfield's rights analysis, could not be a legal obligation at all. This was articulated in Re Astor's Settlement Trusts–*

> *"[A] trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement.""*

20. There is no direct equivalent of article 11(2)(a)(iv) of the 1984 Jersey Law in the 2007 Law. However, section 11(2) could be said to be in broadly similar terms in that it provides that:

"*A trust is invalid and unenforceable to the extent that – ...*

(c) it has no beneficiary identifiable or ascertainable under section 8(1), unless –

(i) it is for a charitable purpose, and / or

(ii) it is for a non-charitable purpose in relation to which it is valid and enforceable by virtue of section 12(1) ...".

Section 12 provides:

"*(1) A trust for or including non-charitable purposes created by an instrument in writing and the terms of which provide for –*

(a) the appointment of an enforcer in relation to the trusts' non-charitable purposes, and

(b) the appointment of a new enforcer at any time when there is none,

is valid and enforceable in relation to its non-charitable purposes.

(2) It is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes.

(3) The appointment of a person as enforcer of a trust has no effect if the person is also a trustee of the trust."

21. These provisions demonstrate how section 1, relating to the existence of a trust, is developed in more detail. A trust either has one or more beneficiaries, who is or are identifiable by name or ascertainable by reference to a class or a relationship to another person, even if not yet in existence. If there is no such beneficiary, then the trust must be a purpose trust, whether that purpose is charitable or non-charitable but, if non-charitable, there must be an enforcer who cannot also be the trustee. The purpose element of the RNPharma Trust found in clause 3.1.1 and detailed in Schedule 2 in the trust instrument, which relates to the shareholding in PBB, only arises if there are no Beneficiaries. Because it is common ground that there always has been a Beneficiary, namely the Applicant, as Advocate Morris has pointed out, the purpose element has no bearing on this Application.

22. Bearing in mind the similarities of approach across the two Islands, I am satisfied that the distinction drawn in the ***Exeter Settlement*** case is applicable in Guernsey. Without looking beyond the provisions in the 2007 Law, if the First Respondent were asked the question "how many beneficiaries are there at present of the RNPharma Trust?", the only accurate and so permissible answer would be "one, the Applicant". If the question were posed differently as "how many beneficiaries of the RNPharma Trust might there be at some point in the future?", I suspect that the answer would probably not be the same. However, 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).

23. I can deal swiftly with the submission Advocate Williams made that in section 53(3) the reference to "*all the beneficiaries*" should be read as "*all the potential beneficiaries*". As a matter of principle, Advocate Williams did not offer any support for that submission. Had the legislature intended to extend the meaning of "beneficiary" as set out in section 80(1) in this way, I think it would have expressed the provision in those broader terms. I can find no justification for reading in such a word to the provision. Advocate Williams did not, for example, seek to argue that this has any basis in section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000. (Had he done so, such a submission would have received short shrift, which is no doubt why he refrained from advancing it.) Further, unlike the general tenor of his submission, to which I will now turn, he did not suggest that the general jurisprudence about the rule in ***Saunders v Vautier*** supported such a construction. In my judgment, the word in section 53(3) falls to be construed in accordance with section 80(1) and so cannot extend to

potential beneficiaries, especially in the light of the reasoning given in the *Exeter Settlement* case.

24. Having regard to the content of the 2007 Law, I am satisfied that the proper way to interpret section 53 is to find that the Applicant is the sole beneficiary of the RNPharma Trust. It is currently the only person able to advance equitable rights relating to that Trust. It is the only person in respect of which the First Respondent could apply any of the trust fund. Being the sole beneficiary, in my judgment, the Applicant is entitled to invoke section 53 and seek relief on the termination of the Trust for the trust property to be distributed to it.

25. The whole thrust of Advocate Williams' submissions in opposition to the Application is based on treating section 53(3) as if it means that anything to do with the rule in *Saunders v Vautier* can still be introduced into Guernsey law, without having further regard to the wording in the 2007 Law itself. In my view, this shows the fundamental flaw in the approach taken. However, I will address his submissions in more detail in order to explain why I have found that way. In doing so, I will also deal with some of the submissions made by Advocate Morris which, in my view, did not need to be raised because the Application is always going to be resolved through construing the provisions under which it has been brought.

26. Looking at how the rule in *Saunders v Vautier* is described and analysed in *Lewin on Trusts*, 19th ed., Advocate Williams first refers to para. 24-016:

> "*The question arises how far the existence of dispositive powers vested in the trustees (or others) will prevent the beneficiaries from terminating the trusts under the principle of Saunders v Vautier. In the case of a discretionary trust, each of the objects as an individual has no more than a right to the due administration of the trust, including a right to proper consideration; but it is nonetheless clear that, as long as the class of objects has closed, the trust can be terminated by all of them acting together.*"

The next paragraph also contains the following passage, which supports Advocate Williams' submission about the potential consequences of a finding in favour of the Applicant:

> "*There is, indeed, authority which is inconsistent with the possibility that an outstanding power of appointment can be defeated, without the consent of the objects, by recourse to the principle of Saunders v Vautier. If it could, the common form of offshore settlement in which the only named beneficiary is a charity, typically the Red Cross, and the trustees have a mere power to add further beneficiaries, the charity not being intended to benefit significantly or at all and the power of addition often being left unexercised for some years, would be vulnerable to termination by the charity, wholly contrary to the settlor's intentions. But there can be no doubt that if the trustees, being authorised to do so, release any dispositive power vested in them, or if a third party donee is willing and able to do so, the remaining beneficiaries will be able to terminate the trust. It may well be, too, that if an outstanding power cannot lawfully be exercised in the particular circumstances it can be ignored when considering the application of Saunders v Vautier.*"

Advocate Williams points out that the powers in the trust instrument have not been released and that the continuing power to add beneficiaries means that the class of objects has not closed.

27. The modern formulation of the rule, which Advocate Williams suggests should be adopted in Guernsey, is set out in *Thomas on Powers* in a passage quoted from page 176 of the 1998 edition by the High Court of Australia in *CPT Custodian Pty Limited v Commissioner of State Revenue* [2005] HCA 53, a case that involved a unit trust in which all the issued units were owned by a single person (at para. 47):

> "*Under the rule in Saunders v. Vautier, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.*"

He also drew attention to the way in which the principle had been described by Mummery LJ in *Goulding v James* [1997] 2 All ER 239, 247, quoted in para. 43:

> "*The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.*"

28. On the issue of the closed class, Advocate Williams relies upon *In re Trafford's Settlement* [1985] 1 Ch 32, which involved a discretionary trust where, in respect of the income of the trust funds, the trustees were directed to "*pay or apply the same to or for the benefit of the settlor and … any wife whom he may marry and the child or children or issue of the settlor … or any of them as the trustees shall in their absolute discretion think fit*". The settlor remained unmarried and childless up to his death. The Inland Revenue subsequently asserted that the value of the settled funds fell to be included in the deceased settlor's estate because he had been beneficially entitled to an interest in possession of the funds. Peter Gibson J disagreed, explaining (at page 40):

> "*When income is received by the trustees of a discretionary trust of income, the sole object of a class which is not yet closed cannot in my judgment claim an immediate entitlement to that income. It is always possible that before a reasonable time for the distribution of that income has elapsed another object will come into existence or be ascertained and have a claim to be considered as a potential recipient of the benefit of that income. So long as that possibility exists, the sole object's entitlement is subject to the possibility that the income will be properly diverted by the trustees to the future object once he comes into existence or is ascertained. Indeed, in strictness the entitlement of the sole object is only an entitlement that the trustees should consider whether to pay income to him.*"

29. Just before reaching that conclusion, comment was made about *In re Nelson (Note)* [1928] Ch 920, to which Advocate Morris referred. (This was a decision from 1918, added to the report of *Re Smith* [1928] 1 Ch 915.) In that case, the class of discretionary objects was a man, his wife and child or children. There was one daughter who had attained the age of 21. Collectively, they assigned their rights by way of a mortgage. The question was whether the income should be applied to the mortgagee or the man, his wife and child. Unsurprisingly, the English Court of Appeal held that the three beneficiaries, being sui juris, could make what amounted to an absolute gift through assigning their rights by way of this mortgage. Advocate Morris suggests this decision supports the contention that the rule in *Saunders v Vautier* has been applied in the context of a discretionary trust.

30. In this context, Advocate Williams also refers to the way the issue was dealt with by Cooke J in *Orb ARL v Ruhan* [2015] EWHC 262 (Comm). This decision related to an application for leave to amend a claim form and particulars of claim and related relief, during the course of which consideration was given as to whether a potential proprietary claim asserted on behalf of the defendant in respect of some assets that had been transferred away from a settlement could succeed in law. Although both Advocate Williams and Advocate Morris in reply highlighted the conclusion in para. 118, I have found the preceding paragraphs, referring to some of the material I have just mentioned, helpful:

> "*115. In Re Smith [1928] 1 Ch 915, the named discretionary beneficiaries were a Mrs Aspinall and her three adult children, of whom one had died. It was held that she was of an age when it was impossible that she could have further issue and in consequence, she, the surviving two children and the personal representatives of the deceased child were held to be entitled to the whole fund. Romer J held that the four of them could come to the court and demand that the trustees hand over the fund to them.*
>
> *116. In Lewin (ibid.) at paragraph 24-016, the authors state that, as long as the class of objects has closed, the beneficiaries can terminate a discretionary trust under the principle of Saunders v Vautier even though each of the discretionary objects, as an individual, has no more than the right to the due administration of the trust, including the right to proper consideration. In those circumstances the trust can be terminated by all of them acting together. The fact that the objects do not have absolute indefeasible interests, indeed do not have interests in the strict sense at all, makes no difference: it is sufficient if they are the only persons entitled to the due administration of the trust.*
>
> *117. The question therefore arises 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. Reliance is placed upon In re Trafford's Settlement [1985] 1 Ch 33, a decision of Peter Gibson J that a settlor of discretionary trust funds for a class which included himself, any wife whom he might marry and any children, did not, immediately before his death, unmarried and childless, have a beneficial entitlement to an interest in possession in the funds. He did have a "present right of present enjoyment" although he was the sole beneficiary in existence under the discretionary trust at that time. Until his death there was always the possibility that the class of beneficiaries might increase, were he to marry even though, in the event that happened, he alone was entitled to the income and would have been able to prevent the trustees applying the income to anyone other than himself. The trustees were not bound to distribute the income to the settlor at any point immediately prior to his death however. He could not therefore be said to have an immediate absolute entitlement to the income and a distinction was drawn between his situation and that of a sole object of a closed class.*
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> *118. It is true that the possibility exists of the trustee directing that a person or charity should be added to the class of beneficiaries at any point prior to the expiry of the trust but 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. The settlor's intentions are irrelevant in a Saunders v Vautier situation as the closure of a present right of enjoyment of the income is to the same as an inability to call in the trust. Whilst In re Trafford's Settlement supports Mr Adkin's arguments, in my*

judgment it cannot be said that Mr Waller has no realistic prospect of success in arguing that the class is closed since the addition of beneficiaries to the class depends not upon external events but upon decisions made by the trustee himself. It must be arguable that the existing class of discretionary beneficiaries, named as such, represent a closed class so that they can call in the trusts."

31. In the light of these principles, Advocate Williams submits that the rule in *Saunders v Vautier* is not a rule of construction, but something more fundamental because it shows that it requires an absolute, vested and indefeasible interest in the capital and income of the property. In the absence of such a proprietary interest over the whole trust property, there is no justification for overturning the settlor's wishes or stipulations. In doing so, he also seeks to draw further support from passages in *Murphy v Murphy* [1999] 1 WLR 282, 290 and *Schmidt v Rosewood* [2003] 2 AC 709 (at paragraphs 40 and 41), to which I do not feel I need to refer, before summarising the Respondents' case as being that the Applicant is unable to rely upon the rule in *Saunders v Vautier* because it can be invoked only where the beneficial class is closed, which only occurs where it is incapable of expansion, which is not the case in relation to the RNPharma Trust. Advocate Morris, on the other hand, suggests that those cases demonstrate that what matters is to work out who is entitled to the due administration of the trust and such a person will be a beneficiary rather than a potential object of a power to be added as a beneficiary.

32. However interesting the development of the rule in *Saunders v Vautier* is across Commonwealth jurisdictions, I do not need to resolve any of the issues raised by Advocate Williams in order to determine this Application. 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. 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*". There has been no suggestion that the Applicant is under legal disability and, as a corporation, the reference to it being a minor has no application. It has been common ground throughout that the only named beneficiary is the Applicant. Accordingly, 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 RNPharma Trust to be terminated, which would defeat the Application. The Applicant has persuaded me that the existence of the power for the Appointor to add one or more beneficiaries does not affect the conclusion that can be reached at any given moment in time as to who the beneficiaries of this Trust are. This is because until that power is actually exercised, the only beneficiaries that are identifiable under the test found in the 2007 Law are those who are properly beneficiaries under its provisions. Concentrating on who is a beneficiary, as defined in the 2007 Law, I am satisfied that all the beneficiaries have been ascertained as of now, and that the Applicant exists and so is entitled to invoke section 53(3). Even if looking for a closed class, which I stress is not the way section 53(3) reads, similar to the indication given in the *Orb* case, it strikes me as arguable in relation to the RNPharma Trust 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.

33. This conclusion may not be what was intended when section 48 of the 1989 Law, now section 53 of the 2007 Law, was enacted. It may be that the outcome results in a different approach from that which would follow from applying the rule in *Saunders v Vautier* without having regard to any domestic statutory intervention. However, if that is so, then rectifying such a

problem rests with the legislature rather than this Court. The task of this Court is to interpret the legislation and not to disregard what are, in my view, the clear terms of the 2007 Law.

34. In my judgment, the situation in which this Application has been brought comes within section 53(3). The Court is expressly required to disregard the terms of the RNPharma Trust and to determine whether all the beneficiaries are in existence and have been ascertained. This is not a trust where the class of beneficiary has to be ascertained by reference to any relationship set out within its terms. The Applicant is the named beneficiary and the power exists to add others. But that power has not been exercised, so there continues to be a sole beneficiary. Whether or not the ability of that sole beneficiary to terminate the Trust was in the mind of the settlor has no bearing on the proper way in which to construe what is on the face of the 2007 Law. Further, I do not accept the suggestion from Advocate Williams that finding in favour of the Applicant will defeat the terms of many trusts, whether in Guernsey or elsewhere. If it might, as I have just noted, the solution lies in the legislature re-visiting the provisions in the 2007 Law. However, those with the power to appoint further beneficiaries (or exclude those who are named) will need to be alive to the possibility that an unperfected set of beneficiaries could take the step that the Applicant has taken. If the trust were what has been called a Red Cross Trust, it is quite possible that the default charitable beneficiary, if the only named beneficiary, will not know about the settlor's possible bounty and so be unable to invoke section 53(3). However, even if a charity knew that this option existed, the charity may choose not to terminate the trust on the basis that I suspect that such a charity would quickly discover that it will no longer be the preferred charity in such cases going forwards. In other words, an immediate windfall may not be a sound longer-term strategy. I do not think that the consequences are going to be as far-reaching as Advocate Williams has suggested they might be.

Conclusion

35. For the reasons I have given, I am satisfied that the relief sought by the Applicant in the Application should be granted. As the sole beneficiary of the RNPharma Trust, the Applicant is entitled to require the First Respondent to terminate the Trust and distribute the Trust Fund to it. There may be some ancillary issues about satisfying any expenses to which the First Respondent is entitled but, subject to any such issues being resolved, in principle it means that the shares in PBB are to be distributed to the Applicant.