I've got the power: *Saunders v Vautier* in the context of massively discretionary trusts

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Abstract

In two judgments in 2019 and 2020, the Guernsey Court of Appeal upheld the judgment of the Guernsey Royal Court in *Rusnano Capital AG (in liquidation) v Molard International (PTC) Limited and Pullborough International Corp* [2019] GRC 011 in relation to the statutory "*Saunders v Vautier*" provisions under the Trusts (Guernsey) Law, 2007. The position, in Guernsey at least, remains therefore that beneficiaries of a discretionary trust can require trustees to terminate a trust and distribute the trust property, even in circumstances where a broad power to add further (unspecified) beneficiaries exists. This article considers the position, on any view unsettled, in England and Wales (as well as other jurisdictions which still rely on the common law interpretation) of the so-called rule in *Saunders v Vautier* in light of the somewhat contradictory case law and authorities, particularly in the context of trusts where the dispositive discretions effectively displace the beneficial interests.

In recent years a type of discretionary trust has become increasingly popular: trusts dubbed "massively discretionary" by Professor Smith,[1] in which the broad discretionary powers of the trustee effectively govern the entire trust structure. In trusts such as these, the trustees may have a power to add anyone in the world as a beneficiary of the trust, and the intended beneficiaries of the trust may not be named as such in the trust instrument.

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Such trust structures have placed strain on a number of fundamental trust concepts. One area of tension, which has recently come under consideration in the Guernsey Court of Appeal, is the ability of beneficiaries to call for the trust property under statutory provisions derived from the rule in *Saunders v Vautier* ("the Rule") where there is an unfettered power to add further beneficiaries. Whilst the position is now decided in Guernsey following the judgment in *Molard International (PTC) & Anor v Rusnano Capital AG (in liquidation)* [2019] GCA077, the somewhat contradictory *obiter dicta* of

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1. Lionel Smith, Massively discretionary trusts, Trusts & Trustees, Volume 25, Issue 4, May 2019, Pages 397–421.

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the appellate and lower courts on the English law position[2] indicates the uncertainty which still exists on the point in England and Wales. The Court of Appeal in *Rusnano* indicated a preference for what this paper will term the "indefeasibility" approach – that the Rule is not applicable where there is a power to add beneficiaries, because it cannot be said in such circumstances that the class of beneficiaries is closed. The Deputy Bailiff (as he then was) on the other hand at first instance expressed support for the converse position, termed the "temporal approach" by Charlotte Beynon in a previous article for this journal[3] – that the determination of a class needs to "crystallise at any given point in time"[4] and the question of whether the class is closed should not be rejected simply on the basis of an unfettered power of appointment.

This paper will consider the arguments for both positions and the possible impact of each.

The rule in *Saunders v Vautier*

The rule in *Saunders v Vautier* allows a beneficiary to terminate a trust and take legal ownership of the trust property to which he or she is beneficially entitled. The Rule developed in the context of fixed trusts,[5] and it is as the application of the Rule has moved away from this context that uncertainty has crept in. In *Saunders* itself, East India Company shares were to be held on trust until the legatee reached the age of 25. The court held that the legatee was entitled to call for the assets when he reached majority at 21. As Professor Matthews has pointed out, this was not a legal innovation in 1841 and it may be something of an accident of history that the Rule bears the name it does.[6]

Where matters became more challenging was as the Rule was further developed to include application to traditional discretionary trusts.[7] The extension of the Rule required that all the members of the beneficial class give their consent to the termination of the trust, the *ratio* for this being given in *In Re Smith* [1928] Ch. 915.

> What is to happen where... two people together are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them or for their benefit? [I]n such a case you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund.

Of course, where all the members of the beneficial class are to be treated as if they formed one person it is vital that all the members of the class consent to the termination of the trust, and that the class is closed so that a potential beneficiary is not deprived of their interest. *Saunders v Vautier* cannot apply unless "all persons who have, or may have, an interest in the trust property are of full age and capacity and all consent."[8]

Indefeasibility and beyond: against applying the Rule

Indefeasibility

The Guernsey Court of Appeal did not give any authority for their *dictum* which suggested support of the indefeasibility approach. However, it seems likely that they were informed by Lewin on Trusts (then 19th Edition) ("**Lewin**"), to which they were referred by the Appellant. Lewin originally put forward the traditionally accepted view that *Saunders v Vautier* cannot

2. The Court of Appeal at Paragraph 42 was willing to proceed on the assumption (without deciding) that "*it may well be the case under English law that the Rule is not applicable to a discretionary trust where there is a power to add beneficiaries, because it cannot be said in such circumstances that the class of beneficiaries is closed.*" The Deputy Bailiff at Paragraph 32 of the Royal Court Judgment commented *obiter* that it struck him as arguable on the indication given in the English authorities that "*the question of whether a 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*".

3. Charlotte Beynon, The rule in *Saunders v Vautier*: To the 'residuary beneficiary', the spoils?, *Trusts & Trustees*, Volume 25, Issue 10, December 2019, Pages 963–968.

4. *Rusnano Capital AG (in liquidation) v Molard International (Ptc) Limited and Pullborough Int Corp* [2019] GRC011.

5. *Saunders v Vautier* [1841] 4 Beav 115, 49 ER 282, *Josselyn v Josselyn* (1837) 9 Sim. 63.

6. Paul Matthews, The comparative importance of the rule in Saunders v Vautier, LQR, Vol. 122, 2006, Page 266.

7. As in *McPhail v Doulton* [1970] UKHL 1 – where the trustee is obliged to distribute the trust property in its entirety, but has a discretion as to which members of a group or class are to receive the property.

8. *Lewin on Trusts* (20th Edition, London 2020) 22-020.

be exercised in a trust with a broad power of appointment granted to the trustee, without the consent of the objects[9] although now concedes in its most recent update that "the point is not fully resolved."[10] Two authorities were referenced to support this proposition. Perhaps the most famous is the *dictum* of Lord Walker in *Schmidt v Rosewood* [2003] 2 AC 709 that the object of a mere power:

> has the negative power to block a family arrangement or similar transaction proposed to be effected under the rule in *Saunders v Vautier*[11]

Lord Walker's *dictum* needs to be considered alongside the *ratio* of *Schmidt*, in which the Privy Council held that a beneficiary's right to seek disclosure of trust documents is not tethered to a beneficiary's equitable ownership of trust property, and that a potential object of a dispositive power accordingly also has standing to seek trust information. In so holding Lord Walker stated, at ¶51, that:

> Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, **although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion.** (emphasis added)

The Privy Council found in *Schmidt* that the Appellant's status as the possible object of a broad power was not sufficient to entitle him to the due administration of the trust—what was further needed was that he was an object who may be regarded as "having exceptionally strong claims to be considered."[12]

Returning to Lord Walker's *obiter* comment about the Rule, and taking it alongside the statement in *Miskelly v Arnheim* [2008] NSWSC 1075 that the exercise of the Rule is dependent on the beneficiaries' entitlement to the **due administration of the trust**, it would seem that if, when the court considers access to trust information, it is to distinguish on a factual basis between those who are entitled to the due administration of the trust, then the same distinction must apply to its approach to those persons who are entitled to require or conversely thwart the termination of a trust under the rule in *Saunders v Vautier*.

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The proposition that the mere existence of a power of addition can bar a beneficiary from terminating the Trust, is therefore contrary to the *ratio* of *Schmidt*. Furthermore, it would follow from this that not only could anyone in the world seek disclosure of trust information, but anyone in the world would also *prima facie* have standing to challenge any decision of the Trustee to make a distribution on the basis that the Trustee had failed to take into account the possibility that the Appointor's power of addition might be used in their favour. This cannot be right.

The proposition that the mere existence of a power of addition can bar a beneficiary from terminating the Trust, is therefore contrary to

9. *Lewin on Trusts* (19th Edition, London 2014) 24-017.
10. *Lewin on Trusts* (20th Edition, London 2020) 22-023.
11. *Schmidt v Rosewood* [2003] 2 AC 709 Paragraph 41.
12. *ibid* Paragraph 68(2).

the ratio of Schmidt. Furthermore, it would follow from this that not only could anyone in the world seek disclosure of trust information, but anyone in the world would also prima facie have standing to challenge any decision of the Trustee to make a distribution on the basis that the Trustee had failed to take into account the possibility that the Appointor's power of addition might be used in their favour. This cannot be right.

The same reasoning can be applied to the case of *In re Trafford's Settlement* [1985] 1 Ch 32, which has also been cited as authority for the proposition that if a trust contains a power to add anyone in the world as a beneficiary, the "class" of beneficiaries is not "closed," such that the trust cannot be terminated under the Rule.[13] That case establishes is that if a trust is for the benefit of an identified class of beneficiaries in circumstances where all who may become members of that class are not yet "in existence" or "ascertained" (in that case, unborn children and unmarried wives), the trust may not be terminated by a beneficiary who *is* ascertained and in existence.[14] The objects of a trust with defined beneficiaries or beneficial classes and the objects of a broad power of addition to the same trust, taken together do not constitute a "class" of beneficiaries, and the objects of a power of addition do not have any beneficial interest in the trust property. It is wrong to apply a rule which protects the rights of those already inside the beneficial class (albeit that the holder of those rights may not exist yet or may never come into existence) to the non-rights of those outside the beneficial class, for the reasons set out above. After all, whilst the former are beneficiaries or will become so by operation of the trust instrument, the latter are incapable of becoming beneficiaries independently and may only become so by act of trustee exercising its fiduciary duties in the interests of the trust's existing objects. It is difficult to imagine how a trustee, when faced with a request to terminate a trust under the Rule, could properly exercise such a power to add further beneficiaries in the interests of those to whom it currently owes its duties.

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The second authority given in Lewin is *Re Sharp's Settlement Trusts* [1973] CH. 331.[15] Pennycuick V.-C. made the following statement in that case:

> The word 'absolute' in its ordinary use in legal language denotes complete beneficial ownership and dominion over property, and I should have thought it an entirely unnatural use of the word to apply it to an interest which can be destroyed at any time by the exercise of a power or the fulfilment of a condition with the consequence that the property must be retained by the trustees until the power or the condition is spent.

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13. Cited in both *Rusnano Capital AG (in liquidation) v Molard International (PTC) Limited & Anor [2019]* GRC011 and *Orb ARL v Ruhan* [2015] EWHC 262 (Comm).
14. See page 40 of *In re Trafford's Settlement* at F-H (as quoted by the Deputy Bailiff at ¶28 of the Judgment).
15. The case did not consider the Rule itself, but rather s.31 of the Trustee Act 1925.

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One strand firmly supports the view that *Saunders v Vautier* does require an indefeasible interest. An orthodox English statement of the rule is found in *Goulding v James* [1997] 2 All ER 239, 247:

> 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.[16]

This line of authority, as expressed above, seems predicated on the premise that the exercise of the rule in *Saunders v Vautier* is an expression of the beneficiary's proprietary right in the trust property.[17]

On the other hand, a second strand of authority sees the exercise of the rule in *Saunders v Vautier* not as rooted in proprietary rights, but as a power of the beneficiaries with a correlative liability on the part of the trustees. This is the formulation posited by the New South Wales Court of Appeal in *Beck v Henley* [2014] NSWCA 201 [33], summarising the position in the High Court of Australia in *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53 [44].

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This follows the idea expressed in Lewin that the fact that the objects of a discretionary trust do not have absolute and indefeasible interests makes no difference to their power to terminate the trust under *Saunders v Vautier*, but that it is sufficient that they are the only persons entitled to the due administration of the trust.[18] It is interesting to compare this line of reasoning to that expressed in *Re Smith*,[19] described above, which could be understood as suggesting that, since the group of discretionary beneficiaries are to be understood in the same capacity as one person, the group of discretionary beneficiaries as a whole does have a proprietary right in the property, because the trustee is bound to dispose of the trust property to the class as a whole.

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16. Emphasis added. This statement was previously tracked in *Lewin on Trusts* (19th Edition, London 2014) 24-009 although has been softened somewhat in the most recent update (20th Edition, London 2020) 22-016.
17. *Saunders v Vautier* [1841] 4 Beav 115, 49 ER 282, *Josselyn v Josselyn* (1837) 9 Sim. 63.
18. *Lewin on Trusts* (20th Edition, London 2020) 22-022. The authority cited for this proposition is *Miskelly v Arnheim* [2008] NSWSC 1075, another Australian case.
19. [1928] Ch. 915.

Settlor's intentions

There is a further argument, beyond the need for an indefeasible interest, often put forward in support of the proposition that trusts in which the trustee has a broad power of addition cannot be terminated without the consent of all the objects of the power - namely that this would be contrary to the settlor's intentions, particularly in the context of "Red Cross" trusts.[20]

Red Cross trusts are a form of trust with two defining features:

a. a charity (commonly the Red Cross) is the only strict beneficiary of the trust; and
b. the trustee is granted a discretionary power to distribute the trust property to persons specified in the trust instrument (either by name or by reference to a class).

The Red Cross or other charity is named in order to satisfy the beneficiary principle and ensure the validity of the trust, and the trust instrument is accompanied by a letter of wishes informing the trustee of the way in which the settlor hopes the trustee will exercise its dispositive power. This allows the beneficiaries to retain a degree of anonymity. An extreme form of this trust structure is the so-called "Black Hole" trust. In these, the Red Cross or other charity is once again named as the only beneficiary, but no objects of a dispositive power are identified – the trustee is simply given a broad power to add anyone in the world as a beneficiary. It is only when this power is exercised by the trustee that the identity of the beneficiary intended by the settlor becomes known.

The idea that the named beneficiary should not be able to terminate a trust in either of these circumstances is surprising when one considers that:

a. It is explicitly recognised that the rule in *Saunders v Vautier* "*may be invoked even though it will defeat the known intentions of the settlor or testator*"[21];
b. The relevant intentions of the settlor are those expressed in the trust instrument. "*Lifetime settlements are no different from other documents in that the subjective intentions of their authors are irrelevant. What counts is the objective meaning that the words of the document convey to the court*"[22]; and
c. A trust may be considered a sham if the trust instrument presents an intention that is not the intention of the parties. Preventing a named beneficiary from exercising their proprietary rights on the basis that they are contrary to some intention of the settlor not contained within the trust instrument puts the trust in question at great risk of being considered a sham. Arguably the courts should not be predisposed to protect trusts of this nature.

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The Royal Court of Guernsey at first instance in *Rusnano* considered the implications of the Judgment on "Red Cross" or "Black Hole" trusts. McMahon DB (as he then was) noted that allowing the exercise of the Rule where there is a power of addition confirms that such default beneficiaries may likely have the power to terminate the trust and claim the trust fund 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

20. *Lewin on Trusts* (20th Edition, London 2020) 22-023.
21. *ibid* 22-016.
22. *ibid* 7-004.

(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.*"[23] The Guernsey Court of Appeal also accepted that their decision would leave Red Cross trusts vulnerable to termination by the charity, wholly contrary to the settlor's intentions. They were "*not necessarily too discouraged*" by that effect, questioning whether such trusts are "*to be encouraged in an international finance centre such as Guernsey, with a high reputation for upholding international standards.*"[24] In the authors' view, it is unlikely that the courts of England and Wales would be eager to take a more lenient approach.

Treatment in England and Wales and beyond

If the "indefeasibility" approach is not the correct one, how then are the courts to determine which class of people must give consent to a *Saunders v Vautier* termination in the context of a massively discretionary trust? The prevailing alternative method is what Charlotte Beynon, in an earlier article for this journal,[25] has dubbed the "temporal approach" – for the courts to hold that in a massively discretionary trust the existing class of beneficiaries represents a closed class with the result that its members, once all ascertained and of full age, could collectively bring the trust to an end.

There is only one English authority addressing this point directly. Cooke J in *Orb ARL v Ruhan* [2015] EWHC 262 (Comm) – who did not have to determine the issue finally – held at ¶118 that there was a real prospect of success in the argument that the mere existence of a power to add beneficiaries does not mean that the beneficial class cannot be considered "*closed*" for the purposes of the present beneficiaries' exercising their right to terminate the trust under the rule in *Saunders v Vautier.*

More persuasive authority is found in the law of Jersey. The impact of a broad power to add beneficiaries was considered in the context of a trust *variation* in *Mubarik v Mubarak* [2008] JLR 430. The Variation of Trusts Act 1958 (in the UK), is analogous to article 47 of the Trusts (Jersey) Law 1984 (as amended) (the "**Jersey Trusts Law**"), the relevant provision in *Mubarik*. It was described in *Goulding v James* [1997] 2 All ER 239, 247 as "*a statutory extension of the consent principle embodied in the rule in* Saunders v Vautier."

The decision in *Mubarik* followed English divorce proceedings in which the wife had obtained an order of the English court purporting to vary a Jersey trust from which her husband as settlor and power-holder had previously excluded her from benefit. Whilst the Royal Court of Jersey could not enforce the English matrimonial order (due to the firewall provisions in article 9 of the Jersey Trusts Law), it treated representations that the husband had made to the Jersey court as constituting his consent to a variation of the trust under article 47 of the Jersey Trusts Law. The consent of all the other adult beneficiaries was also forthcoming, and the Jersey court decided that it would be appropriate to provide consent on behalf of the minor and unborn beneficiaries (as it had power to do under articles 47(1)(a) and 47(1)(c) of the Jersey Trusts Law).

The husband (as settlor) retained, however, a power to add or exclude beneficiaries under the terms of the trust instrument. He argued that the court therefore did not have consent from all of those interested in the trust sufficient to allow the Jersey court to effect the variation. In his case, because the Jersey court did not have the power to supply the consent on behalf of potential objects of his power of addition of beneficiaries, the Jersey court did not have the power to supply the requisite consent to a variation of all those interested in the trust.

This submission failed. McNeill JA, giving the leading judgment, reasoned, at ¶113, as follows:

23. [2019] GRC011, paragraph 34.
24. [2019] GCA077, Paragraph 43.
25. Charlotte Beynon, The Rule in *Saunders v Vautier*: To the 'residuary beneficiary', the spoils?, *Trusts & Trustees*, Volume 25, Issue 10, December 2019, Pages 963–968.

> I am not persuaded that where there is a wide power of appointment, such as one covering all persons throughout the world, the mere existence of a power, without release, in effect bars approval of an arrangement. I am not at all persuaded that such a power can properly be characterized as fiduciary in that there is no defined class within which there are individuals who have the right to expect their interests to be taken into account by the person in whom the power is vested.

Rusnano

Molard International (PTC) & Anor v *Rusnano Capital AG (in liquidation)* [2019] GCA077 was ultimately a case of statutory interpretation and decided on the basis of a provision in Guernsey statute which is not mirrored in England and Wales. It cannot therefore be said to provide compelling authority as to the application of the Rule in that jurisdiction and others further afield which rely on English common law principles. However, it does provide a useful example of the difficulties of applying the Rule in a massively discretionary trust context, and a potential legislative approach to resolving them.

Rusnano Capital AG ("**Rusnano**") was the sole existing beneficiary of the RNPharma Trust. The trustee had a discretionary power to add any person as an additional beneficiary. Rusnano made an application to the Guernsey Royal Court under section 53(3) of the Trusts (Guernsey) Law, 2007 (the "**Trusts Law**") to require the trustee of the trust 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.

The application under s53(3) was opposed on the basis that this broad power to add meant that any person was a potential beneficiary, and therefore that not all beneficiaries were in existence and had been ascertained.

The Guernsey Court of Appeal upheld the decision of the Royal Court that the potential object of a broad power of appointment did not constitute a beneficiary for the purposes of s53(3). It found that whilst s53(3) of the Trusts Law was a codification of the principle in *Saunders v Vautier*, it was also a modification of that principle.[26] The question before the court was therefore one of statutory interpretation where the application of English common law had no bearing to the extent (if any) that it differed.

Section 80(1) of the Trusts Law defines a beneficiary as "*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised.*" In deciding that the object of a power to add beneficiaries does not fall within this definition, the Guernsey Court of Appeal relied upon the observations of Birt B in *Re the Exeter Settlement* [2010] JLR 169 [29]–[30]:

> 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 object 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.

26. Relying on the *Bond v Equiom Trust (Guernsey) Limited* (4 June 2018, Guernsey Judgment 24/2018) [25].

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The court further held that "*all the beneficiaries*" ought not to be interpreted to mean "*all the potential beneficiaries*" or "*all the persons who may become beneficiaries in the future.*" This was for two reasons – first that the provision made perfect sense without the additional words, and second that where the Trusts Law wishes to include not only beneficiaries but also those who may become beneficiaries in the future, it specifically says so.[27]

In short, the decision in *Rusnano* demonstrates how clear trusts legislation can cut through the difficult common law uncertainties surrounding the exercise of the Rule in massively discretionary trusts. Whilst the position in Guernsey may be unwelcome to some in that it allows the "residuary" beneficiary in Red Cross trusts potentially to "scoop the pot," it has the benefit of providing certainty, and trust instruments can be drafted or amended to mitigate the consequences of the *Rusnano* decision now that those consequences are clear.[28]

Consequences for trusts

The potential consequences for trusts if a broad power of addition does not prevent the exercise of the rule in *Saunders v Vautier* have already been explored.[29] These were perhaps summarised best in by the Court of Appeal in Rusnano by Birt J:

> As to potential consequences, we accept that existing Red Cross trusts may [. . .] be vulnerable to the theoretical risk of the named charity seeking to terminate the trust under the subsection.
>
> But this can be easily addressed by the trustees exercising the power of addition at this stage so as to add further beneficiaries before the charity makes any such demand for termination.
>
> Furthermore, as we have indicated above, provided the class of beneficiaries is defined as including issue, there can be no question of the beneficiaries being able to utilise section 53(3) as long as there is any possibility of future issue being born.[30]

But what of the consequences for trusts if it does? This would mean that settlors were provided with a drafting mechanism by which they could ensure that the named but not "intended" beneficiaries of the trust were never able to exercise their "proprietary" right in the trust property. A beneficiary who is never intended to actually benefit from the trust, and who will never be able to enforce their rights, fundamentally undermines the concept of what it is to be a beneficiary, and the integrity of the trust itself.

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27. Section 52(c) of the Trusts Law provides that trust property is to be held on resulting trust for the settlor where "*there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust*".

28. Cumming, Avis and Fennemore (2019), "*What's in a name? That which we call a rose, By any other name would smell as sweet" The so-called rule in Saunders v Vautier and beyond*", XXIV International Trust Litigation Conference, Geneva (https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3Ac4082348-56bd-47b2-a083-e36420b60900)

29. See Paragraphs 20–25 and 39.

30. [2019] GCA077.

Conclusion—a red cross for Red Cross Trusts?

In conclusion, when it comes to the exercise of the Rule in massively discretionary trusts with non-fiduciary powers of addition, there is not compelling authority either for the indefeasibility or the temporal approach. Until the question of whether the exercise of the Rule relies on an absolute interest on the part of the beneficiaries is resolved, the uncertainty as to its application will continue.

However, we would suggest that the consequences of an object of a broad power of addition being able to block the exercise of the rule in *Saunders v Vautier* are such that the courts should not allow it. No *Rusnano* equivalent, in which the courts have had to decide finally either way, has yet occurred in England and Wales. When it does, the courts may well wish for the legislative certainty found in Guernsey—but that is in the gift of Parliament.

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