

Legal update: Rusnano Capital AG

Insights - 12/03/2020

Introduction

The Guernsey Court of Appeal in *Molard International (PTC) Limited and Pullborough Int. Corp v Rusnano Capital AG (in liquidation)*, has recently upheld the Deputy Bailiff's interpretation of Section 53(3) of the Trusts (Guernsey) Law 2007 (the Law) that a sole beneficiary can use that section of the Law to terminate a discretionary trust even if the trust instrument contains a power to add further beneficiaries.

The Royal Court decision

Rusnano Capital AG (**Rusnano**), an entity in liquidation, was the sole named member of a class of discretionary beneficiaries of the RN Pharma Trust (the **Trust**). Rusnano sought an order, which was opposed by Molard International (PTC) Limited (the **Trustee**) and Pullborough International Corp (the **Enforcer**), that the Trust be terminated and the trust fund, which comprised mainly of shares in Pro Bono Bio PLC, be distributed to it. The trust instrument contained the power to add further beneficiaries which the trustees had not yet exercised.

Section 53(3) of the Law states that *“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.”*

Section 80(1) of the 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.”*

The main question for the Court to determine was whether the fact that the trust instrument contained a power to add further beneficiaries meant that Section 53 (3) could not be invoked by the sole beneficiary to terminate the Trust.

The Trustee and Enforcer submitted that since Section 53 (3) reflects the rule from the English case of *Saunders v Vautier* (the **Rule**) and since it was established under English law that the Rule could not be invoked if there was a power to add to the class of objects, Section 53(3) could not be

invoked by Rusnano.

The Royal Court held that Rusnano could terminate the trust since it was the sole beneficiary and the power to add further beneficiaries did not change its entitlement to do so. In coming to this conclusion, the Deputy Bailiff relied on his construction of the Law and Section 53 (3) in particular and agreed with the Royal Court of Jersey case *In re Exeter Settlement* 2010 JLR 169 that a person who is a possible object of a power to add beneficiaries is not a beneficiary unless or until that power is exercised in his favour.

The decision was appealed by the Trustee and Enforcer to the Guernsey court of Appeal.

The Court of Appeal decision

The Guernsey Court of Appeal in its decision handed down in December 2019 upheld the decision and reasoning of the Deputy Bailiff as to the proper construction of Section 53(3) of the Law. The Section did have its origins in the Rule but had been modified by the Guernsey Law.

However, since the Court still had a discretion under Section 53 (4) of the Law to grant relief, but the Deputy Bailiff has not considered whether to exercise this discretion at first instance, the matter would be remitted back to the Royal Court for him to do so.

The Court of Appeal Judgment confirmed that while Guernsey trust law has its origin in English trust law, and therefore English trust principles are incorporated into its law, this is only so to the extent that Guernsey customary law and legislation have not modified the English principles. Section 53 (3) of the Law, when properly construed, is an example of such a modification. It does not reflect the exact terms of the Rule.

The Court also addressed the concern that, as a consequence of this decision, there is now a "floodgate risk" regarding Red Cross trusts. These are trusts that where at the time of their inception, the settlor has intentionally not named any primary beneficiaries but does name a charitable default beneficiary (such as the Red Cross) and the trustees are given a wide power to add beneficiaries. The purpose behind this structure is to give the trust an extra layer of secrecy but the charity is not usually intended to benefit by the settlor. Theoretically there is now a "floodgate risk" that default charities of such Guernsey trusts could now, following this decision, invoke section 53 (3) to terminate the trust and effectively "seize" the trust assets against the wishes of the settlor.

The Court of Appeal regarded these concerns as overblown. First, Section 53 (4) of the Law effectively provides an element of protection against such termination by conferring on the Royal Court a discretion to refuse to terminate a trust in spite of the conditions under subsection (3) being fulfilled. Secondly, as pointed out by the Deputy Bailiff, it is quite possible that the default charitable beneficiary will not know that it has this status and so will be unable to invoke Section 53 (3). Furthermore, if default charities did start terminating trusts in this matter, they would soon

find that they were no longer named as default beneficiaries. The Court of Appeal judges added that the trustees, now aware of this decision, could add further beneficiaries to prevent this and/or include that the class of beneficiaries is defined as including "issue".

Conclusion

The Guernsey Court of Appeal has clarified that a sole beneficiary may bring a discretionary trust to an end pursuant to Section 53 (3) of the Law even if the trust instrument contains an as yet unused power to add beneficiaries. It has pointed out that the discretion of the Court in Section 53 (4) provides a protective mechanism trustees could utilise to prevent such termination. It has also suggested ways in which trustees can modify discretionary trusts to avoid the risk of Section 53 (3) being utilised.

This judgment is of equal importance in Jersey. Article 43(3) of the Trusts (Jersey) Law 1984 is in the same terms as Article 53(3) of the Law and the Court of Appeal's decision is likely to be highly persuasive in circumstances where there is no reason to believe that the law on this issue between the Bailiwicks should not be aligned.

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