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Terminating a Trust: Issues which may arise

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How does a trust come to an end?

- No assets
  - Terms of the trust
  - Appointment or advancement
- Court variation under Variation of Trusts Act 1958
- Saunders v. Vautier

Issues arising on termination

1. Should trustees try to prevent trust from ending?
2. Check scope of trustees' powers if they are exercising
3. Who will receive trust assets?
4. Tax consequences
5. Protecting trustees after termination
6. Distribution documentation
7. Trust administration + final accounts

Saunders v. Vautier (1841)

- Ordinarily, beneficiaries cannot compel trustee to act or deprive him/her of a discretion.
- But beneficiaries can, if they have capacity, and are together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct, even if the trust deed contains express provisions for the determination of the trust.
- Rule permits beneficiaries, acting together, to depart from settlor's original intentions.

Hughes v. Bourne [2012] EWHC 2232 (Ch)

- Trustees applied to High Court for directions as to whether or not to sell the principal asset of the trust, a controlling shareholding in a family company which published local newspapers. Trustees received an offer which they considered exceptionally favourable – inaction would lose that offer. Beneficiaries objected.
- Held – no sale permitted – beneficiaries could direct Trustees what to do.

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Applying Saunders to discretionary trusts

- Vexed question: what about discretionary trusts, where potential beneficiaries are not yet in existence and might be remote?
- *HMRC v. Thorpe* [2009] EWHC 611 (Ch):

> *"The Scheme shall provide any or all of the following benefits:-*
>
> *i) In the event of the death of the member whilst in the employ of the Employer, a lump sum;*
>
> *ii) A pension payable to the member;*
>
> *iii) A pension payable to a widow and/or Dependant in the event of the member's death after the relevant date [whichever is the earlier of the member's death or retirement]; and*
>
> *iv) A pension payable to the widow and/or Dependant of the member in the event of his death whilst in the employ of the Employer."*

<u>*Applying Saunders to discretionary trusts*</u>

- <u>*HMRC v. Thorpe*</u> [2009] EWHC 611 (Ch):

  (Special Commissioners): "46. The Appellant accepted that there was a ***<u>theoretical possibility</u>*** *that he* ***<u>might</u>*** *remarry or that he* ***<u>might</u>*** *have dependants within the meaning of the rules of the Scheme. However, he argued that there was* ***<u>no practical possibility</u>*** *of any appointment being made in favour of such a person because any pension that he might take would exhaust the trust fund. In my judgement, that is not sufficient. There remained* ***<u>the possibility</u>*** *that persons other than the Appellant might be entitled to an interest under the trusts of the Scheme. In the circumstances, the Appellant was not entitled to the whole beneficial interest and, accordingly, was not entitled to call for a transfer of the trust property under the rule in Saunders v. Vautier."*

Rusnano Capital AG v. Molard International (PTC) Limited & Pullborough International Corp [2019] GRC 011; [2019] GCA 077

- Expectation that "usual incidents" under English trusts law will apply to the Guernsey law of trusts "*unless they [are] inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable*" *Stuart-Hutcheson v. Spread Trustee* (Unreported 9/2002)

- Section 53(3), Trusts (Guernsey) Law, 2007:

  > *"Without prejudice to the powers of the Royal Court under subsection (4) [which affords the Court with an overriding discretion not to permit the termination of a trust], 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 a legal disability, they may require the trustees to terminate the trust and distribute the trust property among them."*

- Mere codification of the rule in *Saunders v. Vautier*?

Rusnano v. Molard

- Section 80(1): *beneficiary* means "*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised*".

- *"…just because there is a real possibility that the power to appoint additional beneficiaries might be exercised, it does not follow that anyone who [Pullborough] has in mind is a beneficiary for the purposes of the 2007 Law and, more particularly, section 53(3)"*

- *"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… 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.* <u>*Re Exeter Settlement*</u> 2010 JLR 169

Rusnano v. Molard – Court of Appeal

- The Court of Appeal upheld the Royal Court's decision on section 53(3)

- Remitted the unresolved section 53(4) element of the original application to the Royal Court:

> *"53(4) The Royal Court…may…direct the trustees to distribute, or not to distribute, the trust property, or…make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fit."*

Red Cross Trusts

- Court of Appeal: "*we are not necessarily too discouraged at the possible effect [of section 53(3)] on such trusts. We question whether they are as common nowadays as perhaps they once were and whether they are to be encouraged in an international finance centre such as Guernsey, with a high reputation for upholding international standards*"
- Legitimate reasons for Red Cross trusts
- Impact on non-Red Cross discretionary trusts?

English law following *Rusnano*

- Where is the line between *Thorpe* and *Rusnano*?
- Thorpe distinguished *Saunders*
- Development of the *Saunders v. Vautier* principle?

Issues arising on termination

1. Should trustees try to prevent trust from ending?
2. Check scope of trustees’ powers if they are exercising
3. Who will receive trust assets – checking entitlement and identity of beneficiaries
4. Tax consequences
5. Protecting trustees after termination
6. Distribution documentation
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Issue 1 – preventing a trust from ending

- If not in best interests of beneficiaries for the trust to end, Trustees might consider:
  - Whether they have the power to defer the beneficiaries' entitlement – either under the Trust Deed or using statutory power under s.32, Trustee Act 1925
  - Whether they can vary trust

Issue 2 – check scope of powers

- If Trustees intend to exercise their powers to end the trust, then:
  - Check the terms of the express power provided (appointment, advancement or transferring to another trust)

Issue 3 – Who will receive trust assets

- Again, check the terms of the trust instrument and any related documents to ensure the class of beneficiaries is properly identified. Has a power to add or remove beneficiaries been exercised which should be taken into account?
- May well be appropriate to consult with the beneficiaries and see if they have any preferences that can properly be taken into account.
- Checking identity of beneficiaries

Issue 4 – Tax consequences

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Issue 5 – Protecting trustees after termination

- In relation to third parties – personal liability
- In relation to beneficiaries - right to an indemnity:

Investec Trust v. Glenalla Properties [2019] AC 271 at [59(v)]:

"A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate… To secure his right of indemnity, the trustee has an equitable lien on the trust assets…"

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Statutory footing – s.31, Trustee Act 2000

- Administration expenses - s.31(1), Trustee Act 2000:

  ***31.— Trustees' expenses*.**

  (1) A trustee—(a) is entitled to be reimbursed from the trust funds, or

  (b) may pay out of the trust funds,

  expenses *properly incurred by him when acting on behalf of the trust.*

- *Price v. Saundry* [2019] EWCA Civ 2261 – codifies then existing law

- *"…gives statutory force to the trustee's ancient common law right of indemnity from the trust fund"* (*First National Trustco v. Page* [2019] EWHC 1187 (Ch)) at [180]

Satisfaction of the right of indemnity

- First charge or lien over trust property
  - Priority over beneficiaries
  - Rights of reimbursement, exoneration, retention, and realisation

Right of retention/equitable lien

- Present liabilities - to the extent needed for the purpose (*Re Knox's Trusts (*1895))
- Contingent or future liabilities - to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions (*Jennings v Mather* [1902] 1 KB 1 at 9); *Concord Trust v The Law Debenture Trust Corporation Plc* [2005] 1WLR 1591 at [34].
- Proper inquiries as to contingent or future liabilities (*Wester v Borland* [2007] EWHC 2484 (Ch))
- A beneficiary cannot compel a transfer of the trust fund to a beneficiary who has become absolutely entitled to some or all of the trust property or his assign, until the trustee's just demands have been met (*Ex p. James* (1832) 1 Deac & Ch 272)
- If the Trustee makes a distribution to beneficiaries, then it is vitally important that the right to an indemnity is expressly preserved.

Practical steps to protect trustees

- Retain assets until liabilities provided for
- Delay taking action
- Expressly preserve the lien on distributions
- Contractual indemnities
- Contractual limitation on liability:
  - *Muir v. City of Glasgow Bank and others* (1879) 4 App Cas 337
  - *First Tower Trustees Ltd and another v. CDS (Superstores International) Ltd* [2017] 4 WLR 73
- Seek release from beneficiaries
- Insurance

Concluding remarks

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