

Appeal against the decision of the Court permitting the Trustee to terminate the Trust and distribute the trust fund as the sole beneficiary pursuant to section 53(3) of Trusts (Guernsey) Law 2007

[2019]GCA077

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 527

Before:

**John Martin QC
David Perry QC
Sir Michael Birt**

In the Matter of the R N Pharma Trust

Between:

(i) Molard International (PTC) Limited	Appellants
(ii) Pullborough International Corp	
-and-	
Rusnano Capital AG (in liquidation)	Respondent

**Advocate A C Williams for the Appellants
Advocate R G Morris for the Respondent**

Judgment handed down: 17th December 2019

Birt JA

1. This is the judgment of the Court.
2. This is an appeal by Molard International (PTC) Limited (“the Trustee”) and Pullborough International Corp (“Pullborough”) (together “the Appellants”) against a decision of the Deputy Bailiff dated 20th March 2019 whereby he held that the Respondent (“Rusnano”) was entitled to require the Trustee as trustee of the RN Pharma Trust (“the Trust”) to terminate the Trust and distribute the trust fund to Rusnano as sole beneficiary pursuant to section 53(3) of the Trusts (Guernsey) Law 2007 (“the 2007 Law”).

Factual Background

3. The factual background is set out very clearly in the Deputy Bailiff’s judgment and we gratefully draw substantially from his description of events. Rusnano 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 Pavel Erochkin was an employee within the group and worked on a transaction whereby investment was made by the group in Pro Bono Bio PLC (“PBB”), a United Kingdom company. The shareholding in PBB in respect of that investment was to be held through the Trust and the Appellants were both incorporated in the British Virgin Islands to perform functions in relation to the Trust. The Trustee is the trustee and

Pullborough is the appointor and enforcer of the Trust. Both the Trustee and Pullborough have at all times been owned by Mr Erochkine.

4. As the Deputy Bailiff pointed out in his judgment, there is some dispute between the Rusnano group and Mr Erochkine as to the background to the creation of the Trust, but it was agreed before the Deputy Bailiff that it was not necessary for these issues to be resolved in order to determine the question of law which he was asked to decide.
5. The Trust was created on 25th July 2014 by a declaration of trust executed by the Trustee as original trustee and Pullborough as enforcer. It is governed by Guernsey law and shares in PBB were allotted to the Trustee as trustee of the Trust.
6. The principal trusts are set out in Clause 3.1 of the trust deed in the following terms:-

“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 income 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 Trustees 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 discretion by instrument direct.”

It is common ground that there has never been a time when there have been no beneficiaries and accordingly the purpose trust referred to in Clause 3.1.1 has never come into effect.

7. Pursuant to Clause 4, in default of appointment, the trust fund is to be held at the expiration of the trust period for such one or more of the beneficiaries as the appointor might appoint, failing which for the beneficiaries then living or in existence in equal shares.
8. By Clause 1.1.2, “Beneficiaries” is defined as meaning those persons described in Schedule 4 and any persons subsequently added to the class of beneficiaries. Schedule 4 contained only the name of Rusnano.
9. Under Clauses 5 and 6, the appointor has wide ranging overriding power to direct the Trustee to declare new mandatory or discretionary trusts in favour of one or more of the beneficiaries or to transfer the trust fund to a foundation or to other trustees for the benefit of a beneficiary.
10. Clause 7 confers power upon the appointor to add as beneficiaries such one or more persons or class of persons as the appointor shall in its absolute discretion determine. Clause 8 contains a power in the appointor to exclude beneficiaries. Neither power has been exercised. It follows that Rusnano has at all times since the creation of the Trust been the sole beneficiary.
11. The powers of the appointor pursuant to Clauses 3, 5, 7 and 8 could not be exercised before the Listing Date, which, in the events which have happened, was 31st December 2017.
12. By letter dated 6th March 2018 the liquidator of Rusnano wrote to the Trustee indicating that he was undertaking the exercise of gathering in Rusnano’s assets. He invoked section 53(3) of the 2007 Law and, because Rusnano was the sole beneficiary of the Trust, required the Trustee to terminate the Trust and distribute the trust property (which consisted essentially of the PBB shares) to Rusnano. The Trustee and Pullborough did not accept that Rusnano had the right to call for the trust property and accordingly the dispute which came before the Deputy Bailiff was whether Rusnano was entitled to invoke section 53(3) of the 2007 Law.

Relevant provisions of the 2007 Law

13. The key provision which fell to be construed by the Deputy Bailiff was section 53(3). Section 53 provides as follows:-

“Termination of trusts

53(1) On the termination of a trust the trust property shall, subject to subsection (2), be distributed by the trustees within a reasonable time in accordance with the terms of the trust to the persons entitled thereto.

(2) The trustees may however require that they be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before so distributing the trust property.

(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 fit.”

14. Other provisions of the 2007 Law relevant to the decision which the Deputy Bailiff had to make are as follows.
15. Section 80(1) 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*”.
16. Section 1 provides:-

“Existence of a trust

1. 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.”**

17. Finally, section 8(1) is in the following terms:-

“Beneficiaries of a trust

8(1) 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.**

(2) 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.”

The Judgment of the Royal Court

18. Before the Deputy Bailiff, Rusnano argued that it was the sole beneficiary of the Trust and therefore entitled to call for distribution of the trust property pursuant to the section 53(3). The fact that there was a power to add beneficiaries did not alter the position because objects of a power to add beneficiaries were not beneficiaries unless or until the power was exercised in their favour.
19. The Trustee and Pullborough, on the other hand, submitted that section 53(3) was merely a codification of the principle of English law known as the rule in Saunders v Vautier (1841) Cr & Ph 240 (“the Rule”). They submitted that the Rule could be prayed in aid only where all persons entitled absolutely and indefeasibly under a trust to the whole of the income and capital of a trust

property had been ascertained and are *sui juris*. The Respondent was merely the sole current member of the discretionary class of beneficiaries and, because there was power to add to the class of beneficiaries, it meant that the class was not closed as was required under the Rule. Accordingly section 53(3) should be construed as if a reference to ‘all the beneficiaries’ was read as meaning all the potential beneficiaries.

20. The Deputy Bailiff accepted the arguments of Rusnano. He considered that the issue had to be determined by reference to the wording of the 2007 Law and section 53(3) in particular. He did not consider it appropriate to treat section 53(3) as introducing into Guernsey law the jurisprudence in other jurisdictions relating to the Rule without having regard to the wording of the 2007 Law itself. The issue had to be resolved by construing section 53(3), which was the provision under which the application had been brought.
21. In this respect, he had regard to the definition of ‘beneficiary’ in section 80(1) as meaning ‘*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised*’. He agreed with the observation of the Royal Court of Jersey in Re Exeter Settlement 2010 JLR 169 at [29] to the effect 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 Deputy Bailiff held therefore that the fact that there was a power to add any person in the world as a beneficiary did not affect the position because that power had not been exercised and accordingly there was in fact only one beneficiary, namely Rusnano. It therefore fell within section 53(3) and was entitled to require the Trustee to terminate the Trust.
22. The Deputy Bailiff went on to consider some of the jurisprudence in relation to the Rule at paragraphs 26 – 31 of his judgment before concluding in the following terms at paragraph 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 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 with the Applicant in requiring [the 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 Trust] that such an exercise needs to crystallise at any given point in time and that 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.”

Grounds of Appeal

23. We would summarise the grounds set out in the Notice of Appeal as follows:-

1. The Deputy Bailiff erred in law in concluding that Rusnano was a beneficiary of the Trust within the meaning of the 2007 Law.
2. Even if, contrary to the above, Rusnano was a beneficiary, the Deputy Bailiff was wrong in law to hold that all the beneficiaries of the Trust are in existence and have been ascertained (within the meaning of section 53(3)) in circumstances where other beneficiaries may be appointed under the power to add beneficiaries in Clause 7 of the trust deed. Each of those potential beneficiaries is a person in whose favour a power to distribute trust property may (in future) be exercised and is therefore a beneficiary for relevant purposes.
3. Even if, contrary to the above, the conditions in section 53(3) are satisfied, the Deputy Bailiff has a discretion under section 53(4) to decline to grant relief where appropriate but failed to consider whether to exercise this discretion.

Advocate Williams did not pursue Ground 1 before us and accepted that Rusnano was a beneficiary of the Trust and indeed was the sole beneficiary at present.

Submissions on appeal

24. Advocate Williams accepted that this case concerns the correct construction of section 53(3) of the 2007 Law but submitted that the language in a statute must be read in its context and by reference to its purpose, with context being understood in its widest sense. In support of this assertion he referred to the speech of Viscount Simonds in Attorney General v Prince Ernest Augustus of Hanover [1957] AC 436 at 461 where Viscount Simonds said:-

“For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use ‘context’ in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.”

25. He further submitted that the Court is entitled to have regard to the consequences of a particular interpretation; a statute cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it; see R v Committee of Lloyds Ex p. Moran (1983) The Times 24 June.

26. He argued that the relevant context for the purpose of construing the 2007 Law (and its predecessor the Trusts (Guernsey) Law 1989 (the “1989 Law”)) was that Guernsey law in relation to trusts was derived from the position under English law. In support of this assertion he referred to the dictum of Christopher Clarke JA in Stuart-Hutcheson v Spread Trustee Company Limited (2002) Guernsey CA, 299 at [20]:-

“20. That, prior to the 1989 Law, trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did so because settlors established trusts, whether inter vivos or by will, the validity of which was recognised and, where necessary, enforced by the Royal Court. In addition the Legislature in a number of Laws recognised and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be

regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable.”

27. There was, he submitted, nothing in Guernsey customary law prior to the introduction of the 1989 Law which rendered the Rule inapposite or inapplicable. On the contrary, section 48(3) of the 1989 Law and Section 53(3) of the 2007 Law (which are in identical terms) were clearly intended to reflect the Rule. This was the view of the Deputy Bailiff himself in Bond v Equiom Trust (Guernsey) Limited (4 June 2018, Guernsey judgment 24/2018) where at [25] he said:-

“The rule taken from the case of Saunders v Vautier....(and which can be regarded as codified by section 53(3)) is summarised as follows in paragraph 24-009 of Lewin on Trusts (19th Ed).....”

It was also the view of the Royal Court of Jersey in Re The Turino Consolidated Limited Retirement Trust [2008] JRC 100 where, in respect of the equivalent provision to section 53(3) in the Trusts (Jersey) Law 1984, Birt DB said at [40]:-

“It is trite law (the Rule in Saunders v Vautier....) that where all the beneficiaries of a trust are in existence, have been ascertained and are of full age, they may require the trustees to terminate the trust. This is reflected in Article 43(3) of the Trusts Law.”

28. Thus, whilst accepting the distinction between a beneficiary and an object of a power to add beneficiaries as described in Re Exeter Settlement and adopted by the Deputy Bailiff in the present case, Advocate Williams nevertheless submitted that section 53(3) had to be construed having regard to the content of the Rule and should be taken as a direct reflection of the Rule.
29. Turning to the substance of the Rule, Advocate Williams referred to a number of cases such as In Re Smith [1928] 1 Ch 915; In Re Nelson [1928] 1 Ch 920 and In Re Trafford’s Settlement [1985] 1 Ch 32. We do not think it necessary to go into these cases because Advocate Williams accepted that, although originally the Rule only applied where all the persons absolutely and indefeasibly entitled to the whole of the income and capital of the trust property were ascertained and *sui juris* and decided to terminate the Trust and call for distribution of the trust property to themselves, the principle has been extended to trusts where the interests of the beneficiaries are only discretionary. He accepted that the position was accurately set out in Lewin on Trusts (19th Edition) at 24-016 in the following terms:-

“The questions 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 a 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 fact that the objects do not have absolute and 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.” [emphasis added]

In support of the assertion that all the beneficiaries of a discretionary trust can between them agree to terminate the trust, Lewin refers not only to the cases mentioned earlier in this paragraph but also to the Australian case of Miskelly v Arnheim [2008] NSWSC 1075; (2008 – 09) 11 ITEL 381 at [38] – [40].

30. However, Advocate Williams submitted that, as suggested in the emphasised passage above, this only applies where the class of discretionary beneficiaries is closed. That cannot be so where

there is a power of addition to the class of beneficiaries. He submitted that in all the cases where the beneficiaries of a discretionary trust have been successful in terminating a trust pursuant to the Rule, there has been no possibility of the class being added to. He suggested that the following extract from Lewin at 24-017 was an accurate summary of the position:-

“It is perhaps less obvious that the existence of a power of appointment vested in the trustees, not being a trust power, precludes a termination without the consent of the objects of the power....; in the ordinary case of a settlement, neither the settlor nor the trustees nor, in our view, the beneficiaries can destroy a power of appointment unless specifically authorised to do so by the terms of the settlement. The interests of the objects may not be proprietary interests in the trust property but the same is true of the interests of the objects of a discretionary trust taken individually. 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.”

31. He also prayed in aid an obiter observation in Schmidt v Rosewood Trust Limited [2003] 2AC 709 where at [40] and [41] Lord Walker of Gestingthorpe said the following:-

“40. This passage... gives a very clear and eminently realistic account of both the points of difference and the similarities between a discretionary trust and a fiduciary dispositive power. The outstanding point of difference is of course that under a discretionary trust of income distribution of income (within a reasonable time) is mandatory, the trustees’ discretion being limited to the choice of the recipients and the shares in which they are to take. If there is a small, closed class of discretionary objects who are all sui juris, their collective entitlement gives them a limited power of disposition over the income subject to the discretionary trust, as is illustrated by In re Smith [1928] Ch. 915 and In re Nelson (1918) reported as a note to In re Smith at p.920. But the possibility of such a collective disposition will be rare, and on his own the object of a discretionary trust has no more of an assignable or transmissible interest than the object of a mere power.

41. Apart from the test for certainty being the same and the fact that an individual’s interest or right is non-assignable, there are other practical similarities between the positions of the two types of object. Either has the negative power to block a family arrangement or similar transaction proposed to be effected under the rule in Saunders v Vautier (1841), 4Beav. 115 (unless in the case of a power the trustees are specifically authorised to release, that is to say extinguish, it). Both have a right to have their claims properly considered by the trustees. But if the discretion is exercisable in favour of a very wide class the trustees need not survey mankind from China to Peru (as Harman J, echoing Dr Johnson, said in In re Gestetner Settlement [1953] Ch. 672, 688-689) if it is clear who are the prime candidates for the exercise of the trustees’ discretion.”

He submitted that this made it clear that the agreement of an object of a mere power (such as a power to add to the class of beneficiaries) was necessary for the beneficiaries to be able to terminate a trust pursuant to the Rule.

32. On the basis that the legislature was seeking to adopt the Rule, Advocate Williams submitted that so far as possible, section 53(3) should be interpreted in a manner consistent with the Rule. He

pointed out that the definition of ‘beneficiary’ (in section 80(1)) applies “*unless the context otherwise requires*”. He submitted that the context does otherwise require in section 53(3). The beneficiaries referred to there must be a closed class of beneficiaries. The class cannot be closed where there is a power of addition.

33. Advocate Williams further submitted that the construction placed upon section 53(3) by the Deputy Bailiff would have unfortunate consequences. These consequences were most likely to have an impact on what are often referred to as ‘Red Cross’ trusts, a discretionary trust, which when set up contains only one named beneficiary, namely a charity such as the Red Cross. There will invariably be a power to add beneficiaries and it is the expectation that this power will be exercised in due course to add the intended beneficiaries, such as members of the settlor’s family. If the Deputy Bailiff’s decision was correct, the named charity would be able to call for the entirety of the trust property at any time before the power of addition is exercised. This consequence would make Guernsey unattractive to many settlors.
34. Finally, in relation to Ground 3, he submitted that section 53(4) conferred a discretion on the Court even where the requirements of section 53(3) were satisfied. In this case there were factual disputes between the parties in relation to the purpose behind the establishment of the Trust and resolution of these factual disputes was necessary before a fair conclusion could be reached about whether the Trust should or should not be terminated. The Deputy Bailiff should have considered whether to exercise his discretion under section 53(4) but he did not do so. This Court should therefore remit the matter to the Royal Court to determine the factual disputes and then decide pursuant to its discretion under subsection (4) whether or not to permit the termination of the Trust at the instance of Rusnano.
35. Advocate Morris submitted that the Deputy Bailiff came to the right conclusion for the right reasons. The question at issue was the correct construction of section 53(3). The term ‘beneficiary’ was defined in section 80(1) as being ‘*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised*’. The Deputy Bailiff was correct to adopt the distinction articulated in Re Exeter Settlement between a beneficiary and an object of a power to add beneficiaries. The object of a power is not a person in whose favour a power to distribute trust property could be exercised prior to the power to add being exercised. It followed that Rusnano was and remained the only beneficiary. As there was only one beneficiary and that beneficiary wished to terminate the Trust, the requirements of section 53(3) were satisfied. It was not a proper process of interpretation to consider what the Rule in Saunders v Vautier involved under English law and then incorporate those requirements without regard to the terms of section 53(3). As to section 53 (4), he accepted that this gave the Court an overriding discretion but submitted that it was now too late for the Appellants to raise the point as it had not been raised before the Deputy Bailiff.

Discussion

36. We can begin by accepting, subject to qualification, a number of Advocate Williams’ submissions.
37. First, we accept that, when construing a statute, it is proper to have regard to the context and to the other matters mentioned by Viscount Simonds referred to above at para 24. However, the duty of the Court is to construe the words used in the statute. As Lord Neuberger put it in Williams v Central Bank of Nigeria [2014] AC 1189 at [72]:-

“When interpreting a statute, the court’s function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material

and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613, ‘We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used’.”

38. To like effect is the observation of Lord Hoffmann in Attorney General of Belize v Belize Telecom Limited [2009] 1 WLR 1988 at [16]:-

“16. ... the court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”

39. Secondly, we can accept the proposition described by Christopher Clarke JA in the passage from Spread Trustee quoted at para 26 above to the effect that the Guernsey law of trusts is likely to have incorporated the provisions of English law unless inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable. Indeed, the position has been affirmed in the judgment of the Privy Council delivered by Lord Hodge in the recent case of Investec Trust (Guernsey) Limited v Glenalla Properties Limited 2018 GLR 97 where he said the following:-

“57. Before addressing Art.32, some preliminary observations need to be made. The TDT is a discretionary trust established under the law of Jersey. In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with the English law of trusts. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to English trust law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependant on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey.

58. The TJJ is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJJ fall to be construed.” [Emphasis added]

40. To like effect is the observation of Lord Clarke in the Privy Council in Spread Trustee Co Limited v Hutcheson [2012] 2 AC 194 where he said at [16] with reference to the 1989 Law:-

“The purpose of the legislation was to resolve that uncertainty, to do so following the general pattern of Jersey law and to incorporate many, but not all, of the

principles of English trust law and not necessarily without modification...
[Emphasis added.]

41. As Lord Hodge and Lord Clarke make clear, English trust law has in certain respects been modified by statute in Jersey and Guernsey. Thus the question for determination in this case is whether the Rule as it applies in English law has been modified by section 53(3).
42. Thirdly, we do not think it necessary to determine whether Advocate Williams is correct in submitting that, for the reasons which he put forward, if the matter were to be determined by reference to the Rule as it exists under English Law, Rusnano would not be entitled to terminate the Trust. We are 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.
43. Fourthly, we accept that the Deputy Bailiff's decision will have the effect on Red Cross trusts described at 24-017 of Lewin quoted at para 30 above. We have to say that we are not necessarily too discouraged at the possible effect 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. However, other trusts would be similarly affected. A discretionary trust where the beneficiaries were described as *'the children and remoter issue of the settlor'* would not be affected because, until there was no possibility of any remoter issue being born in the future, all the beneficiaries would not be *'in existence'* as required by section 53(3). However, a discretionary trust whose beneficiaries were described as *'my wife X and my children A, B & C'* could be brought to an end by A, B, C and X resolving to do so even if there was an intention to exercise a power to add grandchildren or spouses of A, B or C as beneficiaries at a later stage.
44. Fifthly, we agree with Advocate Williams' concession that the object of a power to add beneficiaries is not a beneficiary within the meaning of section 80(1). We agree with the observation of Birt B in the Exeter Settlement at [29]-[30] as follows:-

“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.”

45. Sixthly, whilst, in a general sense, as indicated by the Deputy Bailiff in Equiom and Birt DB in Turino Consolidated Trust, we can accept that the Rule may well have been the inspiration for section 53(3) (and the equivalent Jersey provision), we cannot necessarily infer an intention to incorporate every detailed aspect of the Rule. As Lord Neuberger made clear in the passage from Williams cited above (and as the Deputy Bailiff correctly held), ultimately the Court must determine what is meant by the words which the States has chosen to use when enacting section 53(3). That was also the decision of the Royal Court in Coutts (Guernsey) Limited v Ellister

(unreported 21 May 1988) where Hancox LB made it clear that the position was governed by section 48(3) of the 1989 law (the predecessor of section 53(3)) and not by the rule in Saunders v Vautier. Thus he said at page 2 of the transcript:

“I do agree with Mrs Allen that the Guernsey provisions are those which are relevant and although [the Rule] may be of some persuasive assistance ... the court must have regard to the provisions of the Guernsey law.”

46. Accordingly we turn to consider the words used in section 53(3). Having done so, we are driven to the conclusion that the Deputy Bailiff’s construction of the subsection is correct.
47. The key phrase to be construed is ***“where all the beneficiaries are in existence and have been ascertained”***. Section 80(1) 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.”* As stated above at para 44, this definition does not include a person who may become a beneficiary at some stage in the future having been added as a beneficiary pursuant to the power to add but is not at present a person in whose favour the power to distribute trust property may be exercised. If one stands back and asks the question ‘who are the beneficiaries of this trust?’, the only answer can be that there is one beneficiary which is Rusnano. Rusnano is the only entity in whose favour at present the Trustee may exercise a power to distribute trust property.
48. Advocate Williams submitted that, because subsection (3) is meant to reflect the Rule, the words ‘all the beneficiaries’ must be interpreted to mean ‘all the potential beneficiaries’, or ‘all the persons who may become beneficiaries in the future’. But those are not the words which subsection (3) uses. One would therefore have to read in the additional words suggested by Advocate Williams. We can see no good ground for doing so when the provision makes perfect sense without those words.
49. Furthermore, where the 2007 Law wishes to include not only beneficiaries but also those who may become beneficiaries in the future, it specifically says so. Thus section 52(c) 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.”* If the States had intended to provide that, in order to exercise the power to terminate under subsection (3), one must have the agreement not only of all the beneficiaries but also those who may become beneficiaries in the future, it could easily have so provided in the same way as it has in section 52 (c). It is to be noted that section 52(c) is the immediately preceding section to section 53(3) and that sections 52 and 53 are the two sections which come under the heading *“failure, lapse and termination of trusts”*.
50. Furthermore, as Perry JA pointed out in argument, section 53(4) incorporates by reference section 69(2) where, as Advocate Williams accepted, the word ‘beneficiary’ carries the meaning conferred upon it by the definition in section 80(1). If the submission of Advocate Williams is correct, the word ‘beneficiaries’ carries a completely different meaning in section 53(3) from the meaning which it has both in section 52 and in section 69(2), which by incorporation is an integral part of section 53(4). Whilst we acknowledge that the definition in section 80(1) applies ‘unless the context otherwise requires’, we can see no good reason for the States to use the word ‘beneficiaries’ with a different meaning in section 53(3) and we do not consider that the context ‘otherwise requires’.
51. We appreciate that this means that section 53(3) may well not reflect the exact terms of the Rule as it applies under English law but, as the observations of Christopher Clarke JA in Spread Trustee, Lord Hodge in Investec and Lord Clarke in Spread Trustee quoted above make clear, the question is whether any rule of English law has been modified by a Guernsey statute. For the reasons which we have given, we are satisfied that it has.

52. As to potential consequences, we accept that existing Red Cross trusts may, as a result of the Deputy Bailiff's interpretation of section 53(3), 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. In any event, the potential consequences cannot outweigh what we consider to be the proper construction of subsection (3). If that construction is ultimately felt not to be appropriate, it will be a matter for the States to amend section 53 accordingly.
53. We turn therefore to consider section 53(4), which we have set out at para 13 above.
54. It was common ground between Advocate Williams and Advocate Morris that the effect of subsection (4) is to confer on the Royal Court a discretion to refuse termination of a trust and distribution of the trust property even where the requirements of subsections (3) are satisfied. In other words, even if all the beneficiaries are in existence and have been ascertained and have required the trustees to terminate the trust and distribute the trust property, the Royal Court may, on the application of a person who falls within the list mentioned in section 69(2), order that the trust property not be distributed and that the trust not be terminated. The Royal Court can in its discretion therefore override the right of termination conferred on beneficiaries under subsection (3).
55. We agree with counsel that this is the effect of subsection (4). Subsection (3) is specifically made subject to subsection (4) by the introductory words "*Without prejudice to the powers of the Royal Court under subsection (4)*". It is clear therefore, that the Royal Court may make an order under subsection (4) notwithstanding satisfaction of the requirements of subsection (3). Furthermore, the words used in subsection (4) are very wide. They enable the Royal Court, amongst other matters, to make an order directing the trustees not to distribute the trust property and such other order in respect of the termination of the trust as it thinks fit.
56. We emphasise that section 53(4) only comes into play if someone applies to the Royal Court pursuant to the subsection. We would expect that, where the requirements of subsection (3) are satisfied and all the beneficiaries have required the trustees to terminate the trust and distribute the trust property, the trustees will normally accept the situation and comply with the requirements of the beneficiaries. In this situation there will be no question of any application to the Royal Court or consideration of section 53(4). But if the trustees (or some other person mentioned in section 69(2) consider that for some reason termination is not appropriate, (as perhaps might be the case in a Red Cross trust) they may apply to the Royal Court to see if the Royal Court is willing to override the decision of the beneficiaries and direct that the trust not be terminated and the trust property not distributed.
57. In summary, whilst the States have provided in subsection (3) that beneficiaries may require termination of the trust in circumstances where they would not necessarily be able to do so by application of the Rule under English law, the States have also provided an element of protection against the termination of trusts by conferring a discretion on the Royal Court under subsection (4) to refuse termination of the trust notwithstanding fulfilment of the requirements under subsection (3).
58. Advocate Morris submitted that it is not open to Advocate Williams to rely on subsection (4) at this stage. The issue was not before the Deputy Bailiff and therefore it is too late for it to be raised on appeal.

59. We do not agree. The application brought by Rusnano stated expressly that it was brought “*pursuant to sections 53(3), 53(4) and 69*” of the 2007 Law. There was therefore an application under section 53(4) before the Royal Court. As the Act of 10 September 2018 and paragraph 3 of the Deputy Bailiff’s judgment make clear, the parties agreed that the issue before the Deputy Bailiff was the narrow issue of law as to whether Rusnano had the right to terminate the Trust pursuant to subsection (3). It was therefore agreed that no evidence would be adduced and that the Deputy Bailiff did not have to make any findings of fact. In those circumstances it is hardly surprising that the Deputy Bailiff did not consider the effect of subsection (4); he had not been requested to do so.
60. It is true that paragraph 1 of the consent Act drawn up following the Deputy Bailiff’s decision authorised the Trustee to terminate the Trust and distribute the trust property to Rusnano, but that paragraph was expressly made subject to the outcome of the Appellants’ appeal. The Appellants’ included their argument about the effect of subsection (4) in their Notice of Appeal. We conclude that there is therefore an application under subsection (4) before the Royal Court which has not yet been ruled upon and accordingly it is open to the Appellants to raise the matter before this court and ask that, if we are against them on the construction point, we remit the matter to the Royal Court for determination.
61. In our judgment, that is the appropriate course. It is clear that there is a dispute between the parties as to whether, when the Trust was established, it was intended to be solely for Rusnano’s benefit or whether there was an intention that Mr Erochkin and/or his team should benefit to some extent from the success of the investment in PBB through the mechanism of the Trust.
62. The Royal Court will have to resolve that dispute of fact before it can consider how to exercise the discretion conferred upon it pursuant to section (4) and therefore whether or not to override the termination by Rusnano.
63. Accordingly, we allow this appeal to the extent of holding that the termination of the Trust by Rusnano remains subject to the discretion of the Royal Court under subsection (4) and remitting the application under that subsection to the Royal Court for determination.