IMPLEMENTATION OF COURT ORDERS INVOLVING NON-PARTIES – A WARNING FROM GUERNSEY

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Family practitioners are well-versed in avoiding potential pitfalls of implementing and enforcing settlements agreed in the family courts. Particular difficulties can arise where an order requires steps to be taken by non-parties resident outside the jurisdiction of the relevant court, potentially requiring unexpected further (and avoidable) litigation to give effect to such an order.

The case of A and C v PQ, RS and T Trustees Limited, [2019] GRC013 is a good example. It concerned an application to the Royal Court of Guernsey for the variation of a private pension scheme in order to provide child maintenance payments due pursuant to orders of the Family Division of the English High Court.

The judgment has considerable jurisprudential value in confirming that variation applications under the rule in Saunders v Vautier can be successful in relation to certain pension schemes, and also confirming the Guernsey law position of the meaning of "benefit" regarding such applications. It is also of great practical relevance in reminding practitioners of exercising caution when agreeing settlements requiring the acquiescence or support of non-parties, particularly foreign trustees.

Facts of the application

Pursuant to two consent orders made in the English High Court in 2014, **PQ**, a famous professional footballer, agreed to pay child maintenance in respect of two illegitimate children, born in 2007 (**A**) and 2012 (C) (the "**2014 Orders**"). The other parties to the 2014 Orders were **RS**, with whom PQ has two children of the marriage and a further step-child, and the mothers of A and C (**B** and **D**, acting as tuteurs).

The maintenance payments were secured against the assets of the PQ Trust, a Guernsey-law Employer Financed Retirement Benefit Plan. The trustees of the **PQ Trust**, T Trustees Limited ("**T Trustees**") were, crucially, not a party to the 2014 Orders or the High Court proceedings.

PQ and RS had agreed in the 2014 Orders to ensure the creation of two equal (50%) sub-funds of half each of the value of the PQ Trust for the benefit of A and C.

An irrevocable undertaking had also been given by PQ and RS to consent to the Royal Court of Guernsey's order in respect of putting these arrangements into effect, and the parties to the 2014 Orders had agreed to co-operate to ensure the terms of the 2014 Orders could be effectively implemented.

In the event, PQ failed to comply with the 2014 Orders, the Guernsey judge noting that he had "consistently breached" their terms. He did not make the required maintenance payments, therefore accruing liabilities to A and C of around £3.4m. He also did not ask T Trustees to create a sub-fund of the PQ Trust for A and C, by which the maintenance payments would have been secured.

A and C were therefore forced to make an application to the Royal Court under s. 57 of the Trusts (Guernsey) Law, 2007 (the "**Trusts Law**") for a variation of the terms of the PQ Trust in order to give effect to the 2014 Orders (the "**Application**").

Legal issues arising

The rule in Saunders v Vautier provides that where all of the beneficiaries of a trust are of adult age with full legal competence, they may require the trustee to vary or terminate the trust.

PQ and RS, the only adult beneficiaries of the trust, had consented to the variation to the PQ Trust by way of the irrevocable undertakings given in the 2014 Orders. This argument was ultimately accepted by the Court[1], however the decision on whether a variation was possible was not altogether straightforward, owing to the terms of the PQ Trust.

Because the class of contingent beneficiaries of the PQ Trust also included any child of PQ living at his

death, and any other person who in the opinion of the trustees is dependent on PQ for the ordinary necessaries of life on his death. Consideration needed to be given, therefore, to these contingent beneficiaries before any variation.

In Guernsey, section 57 of the Trusts Law states the Royal Court may approve any "arrangement" which varies or revokes the terms of a trust. This is curbed by section 57(2) of the Trusts Law which provides that the Royal Court shall not approve an arrangement on behalf of a minor, unborn or unascertained beneficiary unless the arrangement appears to be for their "benefit".

The Application clearly concerned an 'arrangement'; the focus of the Court's consideration was therefore on whether the arrangement could be said to be for the 'benefit' of the minor, unborn and unascertained beneficiaries, other than A and C.

On the facts before it, the Court noted that a separate sub-fund at a value of 10% of the PQ Trust assets would be carved out for the minor, unborn and unascertained beneficiaries. This had not been provided for under the 2014 Orders, which envisaged A and C enjoying the entire spoils of the PQ Trust. Other potential benefits were that the properties occupied by A and C and their mothers pursuant to the 2014 Orders would revert to the PQ Trust upon their entitlement to occupy them ceasing, at that point reverting to the benefit of PQ and any other beneficiaries.

Setting aside a specific amount of the PQ Trust for the benefit of the minor, unborn and unascertained beneficiaries was considered by the Court to be "consistent" with the "helpful" Jersey case of In the Matter of the Representation of A Trust Limited [2018] JRC 021.

Regarding any detriment to PQ's other children resulting from the proposed variation, the Court noted the distinct absence of any evidence that there would be any prejudice, other than as stated by way of "bare assertions" made in PQ's affidavits in the proceedings which the judge described "as being strong on rhetoric, but short on fact". Those affidavits had to be contrasted with the "clear and detailed" affidavits provided by B and D in support of the Application, describing in detail the evidence available in support of PQ's wealth as substantiated in the English family proceedings, and the prejudice caused to A and C if the Application were unsuccessful.

Relevantly, however, the judgment serves as a reminder to practitioners to be wary of agreeing any orders which require steps to be taken by trustees and others not before the Court. Even where reassurance is provided by these non-parties, directly or through parties to the proceedings, these will ultimately be meaningless unless separate enforcement action is taken in the foreign jurisdiction. Trustees in particular will often be unlikely to have more than a discretion to act in a certain manner, and in Guernsey will also be bound to act as "bon pere de famille" when exercising that discretion, which will require them to have regard to the needs of all of the beneficiaries, and all of the circumstances. Wherever possible, therefore, trustees should be joined to the proceedings in order to safeguard the implementation of anything that is agreed before the Court.

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[1]Following the Royal Court of Jersey in Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf [2008] JLR 430.

[2]Saunders v Vautier [1841] Cr & Ph 240.

[3]Specifically Buschau v Rogers Communications Inc [2006] 1 SCR 973 and Thorpe v Revenue and Customs Commissioners [2010] EWCA Civ 339.

On the back of these facts the Royal Court accepted, apparently without hesitation, its jurisdiction to vary the PQ Trust pursuant to the rule in Saunders v Vautier[2]. It did so after considering cases from other common law jurisdictions, which suggest that the application of the Saunders v Vautier rule to pension schemes is highly fact-specific and not altogether straight forward[3].

It is notable also that the Royal Court appeared to place considerable reliance on the undertakings given by PQ and RS in the English proceedings, which it had been argued debarred them from now opposing the Application. It is unknown whether absent those undertakings the Application would have succeeded.