SAUNDERS v VAUTIER AND THE RECOGNITION OF SPECIAL CIRCUMSTANCES

A view as to why the NZ Courts should not trump a beneficiary’s indefeasible interest in trust property.

The rule in Saunders v Vautier (1841) 41 ER 482, which has long been a part of New Zealand’s common law, provides that an adult beneficiary who is *sui juris* (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property, or an aliquot share of capital and income as the case may be, may at any time require the immediate transfer of the property to him (or them) and consequently terminate the trust.

The rule recognizes the rights of beneficiaries, who are *sui juris* and absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of the testator or settlor who wished to hold property under the continuing trusts, powers and limitations of a trust instrument.

Where all the beneficiaries together seek distribution, and jointly wish to terminate the trust, there is often little difficulty as no prejudice to a beneficiary, or a class of beneficiaries, will arise. Difficulties more commonly occur where one or more beneficiaries seek distribution of their aliquot share of trust property against the wishes of their fellow beneficiaries. In that context there are two limitations that the Court will consider when determining whether a *Saunders* distribution order is appropriate.

The first limitation is against the division of real property. The authority (*In re Horsnaill* (1909) 1 Ch 631 and *In Re Marshall* (1914) 1 Ch 192 at 199) and principle behind this limitation is clear; "an undivided share of real estate never fetching quite its proper proportion of the proceeds of sale of the entire estate". Further, for those beneficiaries who oppose distribution of real property, the law has fortunately yet to grapple with the fair division of the settlor’s family home or sports car.

The second limitation, and without doubt the more unsettled of the two, relates to what the cases have called "special circumstances", "prejudice" or "grounds to the contrary" (I will tend to refer to the terms jointly as “special circumstances”). Neither the UK, Australian nor New Zealand Courts have seen fit to define what “special circumstances” exactly are, and Clausen J in *Re Sandeman’s Will Trusts; Sanderson v Hayne* [1937] 1 All ER said that “the Court has I think been rather careful never to define in precise terms exactly what would be good ground to the contrary”.

Justice Mackenzie in the New Zealand High Court recently considered whether "special circumstances" could preclude the distribution of shares held in a private company in the case of Gough v Strahl [2013] NZHC 3184. In reaching his decision Justice Mackenzie relied on English and Australian case law which I discuss below. Of particular importance in this case was the New South Wales Supreme Court decision of *Re Henley (In the Estate of Weinstock)*. In that case Justice Slattery compares the US and UK approaches to the distribution of trust property and concluded, as does Justice Mackenzie, that the commonwealth approach should be adopted.

*The US Approach*

The US Supreme Court does not apply the rule in *Saunders* and rather considers a distribution of this nature as a policy decision. The US cases have adopted the view that the Courts are under a duty to uphold the directions of the settlor and any distribution going against the settlor’s
directions will only be made if it does not contradict public policy. The question to be asked is "how far should a settlor be permitted to control not only the disposition but the enjoyment of property?"

The US courts seem less willing than commonwealth courts to recognize the proprietary rights that a beneficiary has in absolutely vested trust property. When the owner of property conveys legal title to another, who then becomes its sole owner, a provision that the recipient may receive the income but may not use the capital until he or she reaches a certain age, or satisfies some contingency, would likely be unenforceable. However, when the disposition is through a trust, it is easier to uphold such a provision since the beneficiary who wishes to compel the trustee to hand over the trust property has to first go through the courts, who are under a duty to carry out the settlor's intentions. With the default position being that the settlor's directions should be followed, it is likely that outcomes of such cases in the US will differ from the commonwealth position under *Saunders*, where distribution is made by default (unless special circumstances exist).

It appears on the face of it that the US approach places too much weight on the directions of the settlor and too little weight on the proprietary rights of the beneficiary. If US courts refuse to grant a distribution to an absolutely vested beneficiary on the grounds that it contradicts the settlor's directions, there is a concern that they are, to some extent, authorizing the settlor to control property that they have gifted into a trust; a principle that clearly contradicts the position in NZ that the beneficiaries are the equitable owners of property.

**The Commonwealth Approach and Special Circumstances**

As alluded to above, the UK approach is premised less on the settlor's intention and more on the fact that the beneficiary, who has a vested and indefeasible interest in trust property, is entitled to call for the distribution of their property. The default position, where the *Saunders* requirements are satisfied, is that distribution will be made; the onus being on those who oppose distribution to show that there are special circumstances that will result in them being prejudiced, and which will justify a refusal to distribute.

The distribution of cash or shares in public companies is unlikely to give rise to special circumstances as the division of such assets is simple. Further, the value of such assets are typically unaffected by distribution. The leading UK and Australian authorities which address special circumstances typically involve the call for the distribution of shares in private companies as distribution (and the division of share ownership which necessarily follows) can, in some instances, affect share value and company control. That is the question currently before the High Court in *Gough v Strahl*.

In *Re Sandeman's Will Trusts, In Re Weiner* (UK) and *In Re Henley* (Australia) are three leading cases in which special circumstances were alleged on the basis that the distribution of shares held in a private company to some beneficiaries would be prejudicial to the other beneficiaries. In each case the claims were rejected and distribution was ordered on the *Saunders* principle.

All three cases, in the context of a call for distribution of shares in a private company, support the view that a beneficiary who has a vested and indefeasible interest in trust property is, *prima facie*, entitled to have that property distributed to him. Each of the authorities focuses on the proprietary rights of a vested beneficiary. In *Re Sandeman's Will Trusts* Clausen J explained:

"I can conceive that there might be circumstances – they would have to be very special – which would justify the court in refusing to give effect to the plaintiffs' rights... It is quite plain that the plaintiffs' rights must be given effect to"

In *Re Weiner* Harman J considered whether losing control of a private company through distribution of shares amounted to special circumstances, a question that was also addressed in the other two leading authorities. It was argued unsuccessfully that the mere fact that a controlling interest was held in a company, and would not be held if the shares were divided, was enough for the Court to refuse distribution. Harman J responded saying "I cannot take that view at all. it would mean, in effect, that there could never be a division, because that must always involve the loss of control".
As noted above, the New South Wales Supreme Court considered "special circumstances" in detail in the case of Re Henley, and in doing lent support to the UK authorities mentioned above. Re Henley again involved the distribution of shares held in a private company. Slattery J provides a detailed overview of the UK approach to the rule in Saunders since its inception and is a decision that Justice Mackenzie found "particularly helpful" in deciding whether to allow distribution in Gough v Strahl.

The policy behind the Saunders rule in Australia is that any restriction on the enjoyment by a beneficiary who is sui juris of a vested interest is inconsistent with the nature of that interest and must be disregarded. The policy is clearly based in the property rights of the beneficiary, far removed from the US "settlor's directions" approach.

Re Henley recognized that neither the settlor, the trustee nor any other beneficiary can act to fetter the indefeasible interest that a beneficiary acquires upon vesting. To fetter property rights by withholding property from a vested beneficiary would frustrate the very nature of vesting. As noted by Lord Davey in the 1985 decision of Wharton & Warwick v Masterman "the Court of Chancery has always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest."

The NZ Court of Appeal in Re Lushington (1964) recognized the proprietary rights that a beneficiary is entitled to uphold under the Saunders rule; Turner J explaining in no uncertain terms:

"In the ordinary case in which the law established by Saunders v Vautier and Wharton v Masterman is applied, a donee is saying, 'Property has been given to me and is mine, and I am going to do what I choose with it, no matter what the donor may have wished,' and, whatever may be thought about his ingratitude, the Courts are compelled to hold that he is within his legal rights"

This approach was given affect to by Justice Mackenzie in Gough v Strahl and is an approach that should not be ignored lightly by a claim of special circumstances or prejudice. Further, the approach should not be tainted by the directions of a settlor, no matter how explicit.

In Gough v Strahl Justice Mackenzie had little trouble in determining, on a factual setting not dissimilar from Re Henley, that inter-family conflict and the potential for financial loss to other beneficiaries are not matters which may properly be held to constitute special circumstances in the context of a claim for distribution.

Prior to the decision in Gough v Strahl there was a fear that NZ Courts may overlook the simple fact when considering what has become an overcomplicated area of trust law, which is that neither the settlor, nor the trustee, own the trust property. The proprietary interests of a beneficiary, whether contingent or vested, should always be the paramount consideration in the context of claim for distribution of trust property.

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