

## CHAPTER 24

**THE RIGHT TO CALL FOR THE TRUST PROPERTY****1. DISTRIBUTION AT THE END OF THE TRUST****Undivided shares***Trust shareholdings*

**24–05** NOTE 42. AT THE END ADD: See § 9–84.

**2. BRINGING THE TRUST TO AN END****Conversion of special trust into simple trust—the rule in *Saunders v Vautier***

**24–07(3)** NOTE 52. AT THE SECOND SENTENCE ADD: *Austin v Wells* [2008] NSWSC 1266 at [12].

**24–07(6)** AFTER THE FIRST SENTENCE OF THE TEXT ADD: If a fund is held in trust for a beneficiary absolutely subject to a discretion of the trustee as to the mode of its application for the beneficiary, the beneficiary is entitled to the transfer to him of the whole of the fund.<sup>58a</sup>

**24–08** NOTE 66. FOR THE REFERENCE TO Scott, *The Law of Trusts*, SEE NOW Scott and Ascher, *The Law of Trusts* (5th edn), Vol.V, §§ 34.1 *et seq.* AT THE END ADD: In connection with the rule in *Saunders v Vautier* generally, see Matthews (2006) 122 L.Q.R. 266.

*Position of trustee*

**24–09** NOTE 67. AT THE END OF THE FIRST SENTENCE ADD: *McKnight v Ice Skating Queensland Inc.* [2007] QSC 273; (2007–08) 10 I.T.E.L.R. 570 at [35]. Likewise, a trustee in whom a lease is vested cannot be compelled by the beneficiaries to act in such a way as to put him in breach of his obligations to his landlord under the lease: *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA Civ 1311; [2010] 1 W.L.R. 1216 at [45].

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<sup>58a</sup> *Webb v Oldfield* [2010] EWHC 3469 (Ch).

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**When the principle does not apply***Persons interested*

- 24–12** NOTE 72. ADD: *Thorpe v R.C.C.* [2009] EWHC 611 (Ch); [2009] S.T.C. 2107 at [45] (affirmed [2010] EWCA Civ 339; [2010] S.T.C. 964) (rule has no application where there are future beneficiaries not yet in existence, however unlikely it may be that they will come into existence). Cf. §§ 5–59, 26–44 to 26–54.

AFTER THE FIRST SENTENCE OF THE TEXT INSERT: A requisite consent may be given either by the beneficiary concerned joining in an agreed termination of the trust with the other beneficiaries, or by way of irrevocable unilateral direction by that beneficiary to the trustees.<sup>72a</sup>

*Objects of dispositive powers*

- 24–13** NOTE 76. AT THE END ADD: For the objects to terminate the trust in this way, it is necessary that they (together with beneficiaries with fixed interests) are the only persons who are or may become entitled to due administration of the trust, but there is no requirement for their rights to be indefeasible: *Miskelly v Arnheim* [2008] NSWSC 1075; (2008–09) 11 I.T.E.L.R. 381 at [38]–[39].

NOTE 82. AT THE END ADD: See too *Re IMK Family Trust* [2008] JCA 196; [2008] J.L.R. 430 at [41], [109]–[115] where the Jersey CA took the view (in the context of variation of trust proceedings) that an effective variation could be made even though the trust contained a wide power of addition of beneficiaries conferred on a beneficiary (who was taken as having consented to the variation) during his lifetime and after his death on the trustees (who appear to have had no power to release this power).

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<sup>72a</sup> Compare § 45–89 (online supplement). For a case where a beneficiary was held to have consented by way of irrevocable unilateral direction to the trustees, see *Re IMK Family Trust* [2008] JCA 196; [2008] J.L.R. 430 at [116]–[124].

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*Capacity*

- 24–15** NOTE 84. DELETE THE LAST SENTENCE AND REPLACE BY: Mental Health Act 1983, s.1(2) is amended by Mental Health Act 2007, s.1 with effect from November 3, 2008: Mental Health Act 2007 (Commencement No.7 and Transitional Provisions) Order 2008 (SI 2008/1900).
- 24–16** NOTE 88. AT THE END ADD: *Cf.*, in Canada, *Drescher v Drescher’s Estate* [2007] NSSC 352; (2007–08) 10 I.T.E.L.R. 679.

*Special cases*

- 24–17** AT THE END OF THE TEXT ADD: In theory, the rule applies to pension trusts, but subject to the terms of the trust and to the rules according to which the fund is held.<sup>95a</sup>

**Controlling trustees’ discretions—declaring new trusts**

- 24–20** NOTE 14. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 66.25.
- 24–21** NOTE 15. ADD: *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358; (2007–08) 10 I.T.E.L.R. 689 at [55]–[56].

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<sup>95a</sup> *Thorpe v R.C.C.* [2010] EWCA Civ 339; [2010] S.T.C. 964 at [25]. In Canada, it has been said that the rule in *Saunders v Vautier* does not apply to pension trusts there, see *Buschau v Rogers Communications Inc* [2006] SCC 28; (2006–07) 9 I.T.E.L.R. 73, not considered in *Thorpe*. As an absolute rule, however, this was doubted in *Kidd v Canada Life* [2010] ONSC 1097, although the point was not there decided. In practice, there are likely to be contingent benefits payable which will prevent the rule from being used in the context of a pension trust, and so in practice the position in England and Canada is likely to be the same.