# *The nature of Saunders v Vautier applications: does the court have a discretion to refuse?*

Article

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# The nature of *Saunders v Vautier* applications: does the court have a discretion to refuse?

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## Introduction

This article puts forward – contrary to generally held views – two related contentions about the rule in *Saunders v Vautier*:[1] the rule that (basically) allows beneficiaries of full capacity, who are wholly entitled to the benefit of trust assets, to collapse the trust and take its property in disregard of the trust's terms. First, it is an oversimplification to see the rule as based on a beneficiary's equitable beneficial *ownership* of the trust assets. Secondly, and relatedly, the court has a *discretion* to refuse applications.

As to the first point, the argument will be that the right to exercise the *Saunders v Vautier* power cannot be satisfactorily explained as simply deriving from a beneficiary's equitable beneficial ownership of trust assets. Because, while the party exercising the power will usually be equitable beneficial owner, all too often they will not be. Consequently, it will be suggested, the rule in *Saunders v Vautier* is best understood as one that *confers* rights of ownership, rather than one inherently *derived from* prior ownership, in the context of beneficiary trusts; and as one that also applies outside that beneficiary trust context altogether.

This leads onto the second point. By demonstrating that the rule in *Saunders v Vautier* does not involve exercise of a power arising from existing ownership, the oft-stated proposition that property rights are not discretionary can be sidestepped.[2] The scope of that proposition looks debatable in itself.[3] But insofar as it has force to suggest that that property rights are not discretionary, it is easier to make the case that the courts have a discretion to refuse *Saunders v Vautier* applications if they are understood as not involving assertions of an existing proprietary right. It will be argued here that there is unquestionably *some* discretion to refuse these applications – although its scope may be unclear. (Of course, the *Saunders v Vautier* power is usually exercised without resort to litigation: requests are addressed to the trustees. The substantial issue then is whether, in a suitable case, trustees might refuse a request, in the expectation that their refusal would be upheld by the courts.)[4]

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[1] (1841) 4 Beav 115, 49 ER 282.

[2] The authority usually cited for this is *Foskett v McKeown* [2001] 1 AC 102 (HL), where Lord Millett, delivering the leading judgment, said (127): 'Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and reasonable". Such concepts, which in reality mask decisions of legal policy, have no place in the law of property …' And Lord Browne-Wilkinson added (109): 'It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary.'

[3] Certainly there can be a strong element of discretion when some specific defences are raised, even to claimed proprietary rights. For example, illegality (see *Patel v Mirza* [2016] UKSC 42, [2017] AC 467; and on its 'highly discretionary' test, see James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14). Or 'unclean hands' (on this maxim's relationship with illegality, see Nicholas J McBride, 'The Future of Clean Hands' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart 2018)). The existence of this special type of discretion is taken for granted here. When asking whether the courts have a discretion to refuse *Saunders v Vautier* applications, we are instead looking for a *more general* discretion, to refuse an application *on its merits*.

[4] Trustees risk being penalised in costs for an improper refusal: *Re Knox's Trusts* [1895] 2 Ch 483 (CA).

# Formulating the rule in Saunders v Vautier

First to examine the emergence of, and define, 'the rule in *Saunders v Vautier*'.

## *The decision in the case itself*

In *Saunders v Vautier*,[5] the settlor's will directed that valuable stock in the East India Company be held on trust for a child beneficiary. The income was to be accumulated until the beneficiary was 25, and then the capital and accumulated income were to be transferred to him. The beneficiary, on reaching 21, the age of majority at the time, claimed an immediate transfer of the whole fund. It was held that the beneficiary was indeed entitled to an immediate transfer of the fund at 21. Lord Langdale MR, not purporting to decide anything new, held simply:[6]

> 'I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.'[7]

## *The narrow formulation and the wide formulation of the rule*

The decision in *Saunders v Vautier* was therefore that an adult beneficiary, under no disability, wholly entitled to the trust property, is able to override a stipulation in the trust terms for postponement of possession. And that narrow point alone is sometimes stated as being 'the rule in *Saunders v Vautier*'.

But, usually, the decision is seen as authority for a wider proposition, which can be inferred from the specific decision on this limited point.[8] As usually stated, this wider 'rule in *Saunders v Vautier*' is that, where a beneficiary is sui juris – adult and of sound mind – and is entitled to the whole beneficial interest, they can terminate a trust and take the property out, even though this violates any of the trust terms. And it follows that several beneficiaries can do this: if they are all sui juris, between them entitled to the whole beneficial interest, and unanimously agreed. And it follows that beneficiaries can use this power to simply vary the terms of a trust, rather than terminating it.[9] Equally, beneficiaries can exercise the power over

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[5] (1841) 4 Beav 115, 49 ER 282. Aleksi Ollikainen-Read, 'The Origin and Logic of *Saunders v Vautier*' [2020] Conv 296 provides historical context.

[6] (1841) 4 Beav 115, 49 ER 282, 116.

[7] At a later hearing, *Saunders v Vautier* (1841) Cr & Ph 240, 41 ER 482, it was disputed whether the beneficiary *was* entitled to the whole beneficial interest under the trust. The wording of the will was that the property was to be held upon trust to accumulate the income until the beneficiary should attain 25, and then to transfer the capital and accumulated income to the beneficiary, his executors, administrators, or assigns, absolutely. It was suggested this meant the beneficiary was not entitled to anything *unless* he reached 25; so that, if he did not reach 25, the property would have to go to others, under a gift of the residue of the testator's estate in his will; meaning those others had a potential interest in the trust property. However, the trust was held by Lord Cottenham LC to mean instead that the beneficiary was wholly entitled to the property, but that he was not to receive it into his possession until he was 25; and so if he died before he was 25, it was still his property, and could pass under his will, or to his next of kin. In technical terms, the beneficiary was found to have a *vested*, not merely a *contingent* interest.

[8] Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 69.10: '[T]he *Saunders v Vautier* principle has developed well beyond utilisation for stopping accumulations.'

[9] The existence of a power to vary trusts is sometimes questioned, because of its potential to foist on trustees a different trust from the one they agreed to: but see Joel Nitikman, 'Variation Under the Rule in *Saunders v Vautier*: Yes or No?' (2015) 21 T&T 923. (cf Ying Khai Liew and Charles Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart 2018), 92-96.)

some severable *part* of a trust's assets, if they hold the whole beneficial interest in that part – provided this will not unduly prejudice the remainder of the trust.[10]

The wider rule was statutorily recognised and extended by the Variation of Trusts Act 1958, which enables the court to approve an exercise of the power on behalf of those not able to exercise it themselves, because not sui juris – for example, children – or not ascertained.

A settlor cannot exclude the *Saunders v Vautier* power by declaring the beneficiary shall *not* be free to take the trust property in disregard of the settlor's stipulated terms: *Stokes v Cheek.*[11] However, a well-advised settlor can act indirectly to prevent the power arising, by limiting the beneficiary's entitlement under the trust. And often use of the power is excluded in practice, without any artificial design to achieve this on a settlor's part, simply through the natural fragmentation of the beneficial interest involved in the trust.

# The basis of the rule in Saunders v Vautier

Turning to the basis of the rule in *Saunders v Vautier*.

### *The general view: the rule has a proprietary basis*

The general view is that the *Saunders v Vautier* power is one a beneficiary holds *because they are equitable beneficial 'owner' of the trust assets*.[12] For example, an oft-cited statement of principle is that of Mummery LJ, delivering the leading judgment in the Court of Appeal in *Goulding v James*:[13]

> '[T]he consent principle embodied in the rule in *Saunders v Vautier* … recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, *to exercise their proprietary rights* to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.'

Matthews elaborated this view, saying:[14]

> '[The rule in *Saunders v Vautier*] illustrates and exemplifies the idea of beneficial (or "equitable") ownership or property … the idea of *exclusive decision-making.* If I give something to you, then the "property" idea should mean that it is yours to deal with as you please. "Property" means – indeed, etymologically, has to mean – that *you* decide.

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[10] This authorities on this point are considered below.

[11] (1860) 28 Beav 620, 54 ER 504. The facts and decision are explained below. (cf Joseph Jaconelli, 'Premature Trust Termination' [2020] Conv 29, 39-42.)

[12] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 22.014. Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 69.2. John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 29.030. Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), para 11.4.1. Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 528. Warren Barr and John Picton (eds), *Pearce & Stevens' Trusts and Equitable Obligations* (8th edn, OUP 2022), 605. Alastair Hudson, *Principles of Equity and Trusts* (2nd edn, Routledge 2022), sect 4.1. (cf JE Penner, *The Law of Trusts* (12th edn, OUP 2022), paras 3.62-3.65. Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), sects 2.6.1-2.6.2. Jessica Hudson, Ben McFarlane, and Charles Mitchell (eds), *Hayton, McFarlane and Mitchell on Equity and Trusts* (15th edn, Sweet & Maxwell 2022), paras 12.072-12.073. Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 295-97. Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011), sect 10.4. AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), para 19-019.)

[13] [1997] 2 All ER 239 (CA), 247 (emphasis added).

[14] Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v. Vautier*' (2006) 122 LQR 266, 273-75 (notes omitted).

> I should not be able, consistently with the idea of property, to make something your "property", and then *tell you how to deal with it* … Whatever the subject-matter of the trust, it no longer belongs to the settlor or (obviously) the testator, and the decision whether to enjoy it or destroy it is no longer one for him. Instead it is ultimately a decision for those who benefit from the trust.'

### *Repugnancy reasoning*

Within this proprietary view, a bedrock strand of reasoning has been the suggestion that, in particular, a settlor's stipulation for postponement of possession beyond the age of majority is repugnant to a gift to the beneficiary. For example, in an oft-cited explanation of the *Saunders v Vautier* rule, Page Wood V-C said in *Gosling v Gosling*:[15]

> 'The principle of this Court has always been to recognise the right of all persons who attain the age of [majority] to enter upon the absolute use and enjoyment of the property given to them [absolutely] by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age … *If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain [majority]… [T]he Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.*'

However, repugnancy reasoning should lead to the settlor's stipulation being void outright; not, as conventional statements of the rule in *Saunders v Vautier* conceive, a stipulation that is initially binding, but which a sui juris and wholly entitled beneficiary has the right to choose to override. In cases where settlors have stipulated for postponement of possession, the element of repugnancy reasoning has been so strong that Cantlie has argued that 'the rule in *Saunders v Vautier*' in fact encompasses two separate rules:[16] (1) a rule based on repugnancy, by which stipulations for postponement of possession after the age of majority are simply void; and (2) a distinct rule by which sui juris and wholly entitled beneficiaries have the right to decide to collapse trusts contrary to their *other* terms. And void-for-repugnancy reasoning does indeed seem, in particular, to underlie the Court of Appeal's purported application of the rule in *Saunders v Vautier* in *IRC v Hamilton-Russell Executors*, when a settlor stipulated for postponement of possession.[17] However, this void-for-repugnancy approach is not consistent with conventional statements of the rule in *Saunders v Vautier*; including in the House of Lords, in case law dealing specifically with a settlor's stipulation for postponement of possession. In *Berry v Green*,[18] a postponement case, Lord Maugham LC, delivering the leading judgment, said:

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[15] (1859) John 265, 70 ER 423, 272 (emphasis added).

[16] Ronald B Cantlie, 'A Case of Mistaken Identity: The Rule in *Saunders v. Vautier* and Section 61 of the Trustee Act of Manitoba' (1986) 15 Manitoba LJ 135.

[17] [1943] 1 All ER 474 (CA). The decision – at least as explained in the books, which overlay its apparent void-for-repugnancy reasoning – is said to be authority for the very odd proposition that trustees can themselves invoke the *Saunders v Vautier* power to override a settlor's stipulation for postponement of possession, and simply hand the trust fund over to the beneficiary or pay it into court. See Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 69.5; Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 22.019. It is one thing to say that a stipulation for postponement is void, which is what the court appears to have purportedly ruled; however, it is quite another thing to suggest that it is a binding term of the trust, but one trustees can choose to override – by use of a rule supposedly designed to further the interests of beneficiaries, used in a manner that may be contrary to the interests of those beneficiaries.

[18] [1938] AC 575 (HL), 582.

> '[I]t is not now in dispute that the rule in *Saunders v. Vautier* … has no operation unless all the persons who have any present or contingent interest in the property are sui juris and consent.'[19]

Therefore, assuming these conventional statements of the rule in *Saunders v Vautier* are correct, repugnancy reasoning, although influential, cannot be the basis of the rule. Such reasoning certainly could not explain the many later cases where the rule has been applied, when stipulations for postponement of possession were not an issue. As *Moffat's Trusts Law* comments:[20]

> '[The reasoning in *Gosling v Gosling*, above] is in substance our old and somewhat dubious friend the repugnancy doctrine … If developments from the original rule in *Saunders v Vautier* had rested solely on the repugnancy doctrine, a rule of much narrower scope than that subsequently recognised in [later case law] would have resulted… There was, after all, no repugnancy in the nature of the interests [in later cases].'

### *Futility reasoning*

Other reasoning has also been used to explain the rule in *Saunders v Vautier*. In particular, the futility of enforcing the trust terms against the beneficiary. That is, had the court in *Saunders v Vautier* ruled that the beneficiary must wait until he was 25 for the trust property, the beneficiary could nevertheless have immediately assigned his interest under the trust for value – although as a right to only the future enjoyment of property, the assignment would not have commanded the trust property's full value of course. Lord Langdale MR said (obiter) in *Curtis v Lukin*:[21]

> 'The case of *Saunders* v. *Vautier* … is, I apprehend, [explained in this way]. It has frequently happened in this Court, that a testator has given to an individual an absolute vested interest … [but] nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases, the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession; he has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain; the Court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment. The Court has, in such cases, ordered payment on his attaining twenty-one.'

This is also a form of proprietary reasoning. It assumes the beneficiary is owner of an equitable beneficial interest in the trust assets, which the beneficiary can then assign. This is therefore

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[19] See also *Wharton v Masterman* [1895] AC 186 (HL), 198, where Lord Davey said, '[T]he Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit.' And Lord Macnaghten, rather than talking about an immediate right – despite the terms of the will – *to* accumulations instead spoke about (194) a right to 'to call upon the trustees to hand over' accumulations.

[20] Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 296.

[21] (1842) 5 Beav 147, 49 ER 533, 155-56.

equally incapable of being an acceptable general rationale for the rule: because, just as with the traditional proprietary explanation, it cannot account for the many situations where a party exercising the *Saunders v Vautier* power is not such an owner. In other words, it has a flaw that is coextensive with that in the usual proprietary reasoning.

### *Realism about the basis of the rule*

Langbein has already put forward a compelling argument that the proprietary basis for the rule in *Saunders v Vautier* – that a beneficiary has the *Saunders v Vautier* power because they are equitable beneficial 'owner' of the trust assets – is not a legally coherent justification for the rule; and, indeed, that the rule cannot be rationally justified at all.[22] However, the focus here will be different. The aim will be to demonstrate that the proprietary basis is also not consistent with the case law – when viewed as a whole.

The starting point in examining the authorities should be what looks like a considered dismissal of the proprietary basis by our highest court. The House of Lords reviewed the rule in *Saunders v Vautier* in *Wharton v Masterman*.[23] Lord Herschell LC, delivering the leading judgment, apparently found the proprietary basis to the rule unconvincing; but said the rule is so deeply established in authority that it cannot now be questioned:[24]

> 'The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
> It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognised that it would not be proper now to question it.'

Lord Davey, concurring, also seemingly found the basis of the rule indeterminate; but suggested the rule reflected a judicial distaste for restrictions on the enjoyment of gifted property:[25]

> 'The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.'

So the House of Lords has pronounced *Saunders v Vautier* a rule with no clear basis; but nevertheless binding; perhaps rooted in little more than an instinctive judicial dislike of settlors restricting gifts. Expositions of the rule – in textbooks, etc – should arguably pay greater attention to these judgments: at the moment these sentiments appear very much neglected.

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[22] John H Langbein, 'Why the Rule in *Saunders v. Vautier* is Wrong' in PG Turner (ed), *Equity and Administration* (CUP 2016). (cf Paul Matthews, 'Why the Rule in *Saunders v. Vautier* is Wrong: A Commentary' in PG Turner (ed), *Equity and Administration* (CUP 2016); and also Derwent Coshott, 'Contextualising the Rule in *Saunders v Vautier*: a Modern Understanding' (2020) 136 LQR 658.)

[23] [1895] AC 186 (HL).

[24] [1895] AC 186 (HL), 193.

[25] [1895] AC 186 (HL), 198-99.

## Charitable trusts – exercise of the Saunders v Vautier power by non-owners

The House of Lords had good reason to express scepticism about a proprietary basis to the rule in *Saunders v Vautier*, given the decision they were making in *Wharton v Masterman.*[26] That is, that even where a trust is declared in favour of a charitable institution, the *Saunders v Vautier* power can be exercised by the charity – whether it is incorporated or not.

The point was not spelled out by the House of Lords, but the decision involves recognising exercise of the *Saunders v Vautier* power by *those who are clearly not equitable beneficial 'owners' of the trust assets*. It might be arguable that a corporate charity would be exercising the power as 'owner' – and would then be constrained by its own constitution to charitable use only once it received the property. But in the case of a charitable unincorporated association, the association is clearly not equitable beneficial 'owner' of the trust property: the property is to be received by the association's trustees on a trust for charitable purposes.[27] So, this exercise of the *Saunders v Vautier* power cannot be based on equitable beneficial 'ownership' of the trust assets.[28]

Furthermore, in a situation where there was no specific charitable institution to exercise the *Saunders v Vautier* power, it was recognised the Attorney-General may do so, in *Re Green's Will Trusts*.[29] And by extension, so may the Charity Commission.[30] There is even authority whereby the courts appear to have empowered *the trustees of a charitable trust* to, in their discretion, *unilaterally* override a settlor's stipulation for accumulation under the *Saunders v Vautier* doctrine, in the interests of the trust's charitable purpose: *Re Knapp*.[31]

So, in the context of charitable trusts, we have a list of parties who can, or might be able to, exercise the *Saunders v Vautier* power, despite clearly not being equitable beneficial owners of the trust assets. The risks of misunderstanding posed by the narrative that the rule in *Saunders v Vautier* has a proprietary basis – that it vindicates equitable beneficial ownership – can be seen from a recent passing remark in the judgment of the Court of Appeal in *Children's Investment Foundation Fund (UK) v A-G*.[32] Presumably (and understandably) unmindful of the above authorities on charities, and under the influence of the proprietary narrative, the judgment of Richards, Newey LJJ and Dame Elizabeth Gloster included:

> '[Counsel] also made reference to the rule in *Saunders v Vautier* (1841) Beav 115 … In the case of a charity, [counsel] said, the Attorney General represents the beneficial

[26] [1895] AC 186 (HL).

[27] For the differing ways in which corporate and unincorporated charities receive gifts, see *Re Vernon's Will Trusts* [1972] Ch 300n (Ch), esp 303, and *Re Finger's Will Trusts* [1972] Ch 286 (Ch).

[28] Taking matters a possible stage further, for a suggestion – both statutory and judicial – that even a non-charitable body might be able to exercise the *Saunders v Vautier* power to claim the property of a charitable trust, if payment to the body would constitute the only means of discharging the charitable trust's purpose, see *HM Attorney General v Zedra Fiduciary Services (UK) Ltd* [2020] EWHC 2988 (Ch), [19]-[21]. The case discusses the Superannuation and other Trust Funds (Validation) Act 1927, s 9(1), passed to ensure the National Debt Commissioners could not exercise the *Saunders v Vautier* power to take immediately funds that were settled, to accumulate for a period, in trusts for the charitable purpose of paying down the national debt.

[29] [1985] 3 All ER 455 (Ch), esp 459. (cf *Re Jefferies* [1936] 2 All ER 626 (Ch) – but see WHD Winder, 'Charity as a Legal Person' (1938) 54 LQR 25.)

[30] Charities Act 2011, s 114.

[31] [1929] 1 Ch 341 (Ch). (Note that the Attorney-General was broadly supportive of upholding the stipulation for accumulation: see the reported arguments of counsel. The short judgment may be informed by the 'repugnancy' strand of reasoning sometimes said to underlie the rule in *Saunders v Vautier*; but, as we have seen above, repugnancy is not a credible general explanation of the rule – and it is particularly difficult to see the supposed repugnancy in the case of a charitable trust.)

[32] [2018] EWCA Civ 1605 [2019] Ch 139, [58].

> interest. None the less, it is hard to see how the rule can apply in the case of a charity…'[33]

The instance of charitable trusts might be thought an 'exception that proves the rule'. However, we shall see this is not a one-off exception. Rather, it is just the start of a slippery slope in the case law for the supposed proprietary basis for the *Saunders v Vautier* power. Ultimately, the 'exceptions' to the supposed proprietary basis become so many that assertions it constitutes a 'rule' cease to be credible.

## Beneficiary trusts – exercise of the Saunders v Vautier power by non-owners

Moving on from public, charitable trusts, to private trusts for beneficiaries. It is suggested that here, too, there are numerous instances of exercise of the *Saunders v Vautier* power that simply cannot be based on equitable beneficial 'ownership' of the trust assets.

It is submitted there are types of (fixed)[34] beneficiary trusts where the beneficiary cannot meaningfully be described as equitable beneficial owner of the trust assets.[35] In particular, a beneficiary can only meaningfully be described as equitable beneficial owner of the trust assets if their beneficial entitlement under the terms of the trust is *to* the trust assets.[36] A beneficiary cannot meaningfully be described as equitable beneficial owner of the trust assets if their only beneficial entitlement under the terms of the trust is instead – as it is in some trusts – *to have the trust fund expended or otherwise used for their benefit by the trustee*. That is, a right to have another person expend or use property they own for one's benefit is not beneficial 'ownership' of that property; nor, indeed, any kind of beneficial 'property right'. In legal categorisation, the difference in beneficial entitlement between these two types of trust is that between property and obligation. Nevertheless, the authorities show beneficiaries can use the *Saunders v Vautier* power even in these trusts where their beneficial entitlement under the trust terms is limited to having the trust fund expended or used for their benefit by the trustee –

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[33] The court was not wholly wrong. It seems that, in truth, only an attenuated form of the rule in *Saunders v Vautier* applies to charitable trusts: see David Wilde, 'How Far Does the Rule in *Saunders v Vautier* Apply to Charitable Trusts?' [2023] Conv 236.

[34] Discretionary trusts are dealt with separately below, as an a fortiori case.

[35] To some this is heresy. For them, it is definitional that a 'beneficiary' *must* be equitable beneficial owner of the trust assets: a person who is not is simply not a 'beneficiary' in the legal sense of the word. To the contrary, see David Wilde, 'Trusts and Purposes - Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, esp 155-59. There *is* a sense in which a beneficiary can legitimately *always* be called 'equitable owner' of the trust assets – but it is a *limited* sense. It is perhaps helpful to isolate this. RC Nolan, 'Equitable Property' (2006) 122 LQR 232 is the foremost consideration of beneficiaries' rights. He identifies that what is commonly referred to as their 'equitable ownership' is (254) a 'bundle of rights', which he dissects. In particular, he explains a beneficiary has two core rights. First (see esp 236), a right against the trustee to due performance of the trust, which is a personal right against the trustee alone. Secondly (see esp 251), a right to exclude others in general from the benefit of the trust assets, which is a property right. (Lord Sumption JSC gave a powerful judicial endorsement of this view (obiter) in the Supreme Court in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [82]-[83] – cited with approval in Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 60.) Nolan's second right – the right to exclude others in general from the benefit of the trust assets – provides the sense in which a beneficiary can always be spoken of as 'equitable owner' of the trust assets. But, crucially for present purposes, Nolan's first right – the right against the trustee to due performance of the trust, in other words the beneficiary's *beneficial* entitlement – is, as Nolan says, not necessarily a proprietary right.

[36] Basically meaning they must have an entitlement to receive a distribution of income or capital from the trust; although the beneficiary will often enjoy their interest by using the trust assets in specie rather than taking receipts – for example, occupying land rather than receiving rents from it

meaning the power has been regularly exercised by parties who were not equitable beneficial owners of the trust assets.[37] Turning to examples.

### *Trusts to purchase property in the name of the beneficiary*

If a trust directs the trustee to use trust funds to purchase property in the name of the beneficiary, it is established that a sui juris beneficiary is entitled to take the sum of money required for the purchase, rather than having the trust to purchase performed. This is usually understood as an exercise of the *Saunders v Vautier* power. The leading case is *Stokes v Cheek*.[38] It is commonly cited as authority for the proposition that a settlor cannot choose to exclude the *Saunders v Vautier* power.[39] In that case, the settlor's will directed trustees to use money to buy annuities for beneficiaries. She added:

> 'And I declare that no one of the annuitants hereinbefore named shall be, nor shall the executors or administrators of any of them be, *allowed to accept the value of the annuity* to which he or she, respectively, shall be entitled, in lieu thereof…'

Sir John Romilly MR held the beneficiaries could nevertheless take the trust money, instead of having it used to purchase annuities for them.

By the terms of the trust, the only beneficial entitlement of the beneficiaries was a right to the purchase for them of annuities by the trustees. And the settlor *specifically stipulated* that the beneficiaries were not to get the trust money instead: in effect, that they were *not* equitable beneficial owner of the trust funds. The only beneficial property right acquired by the beneficiaries would be in the items purchased, once bought for them as owners. So, we appear to have the *Saunders v Vautier* power exercised by beneficiaries who were not equitable beneficial owners of the trust property.[40]

The judge's only reasoning was a variant on the futility rationale identified above as a possible justification for the rule in *Saunders v Vautier*. He said:[41]

> 'I have, on several occasions, held that annuitants are entitled to receive the money necessary to purchase their annuities.
> It would be an idle form to direct an annuity to be purchased, which the annuitants might sell immediately afterwards.
> The annuitants are entitled to such a sum as would be required to purchase their annuities.'

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[37] Some might argue that such a beneficiary obtaining the trust fund through exercise of the *Saunders v Vautier* power *proves* that they are equitable beneficial owner of the trust property. But this is to get things the wrong way round. The trust itself, according to its terms, does not entitle the beneficiary to any of the trust property. Ownership is only obtained through a rule of equity – the *Saunders v Vautier* power – that allows the beneficiary *to collapse the trust*.

[38] (1860) 28 Beav 620, 54 ER 504.

[39] Eg, Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), para 11.4.1; Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 527; Jessica Hudson, Ben McFarlane, and Charles Mitchell (eds), *Hayton, McFarlane and Mitchell on Equity and Trusts* (15th edn, Sweet & Maxwell 2022), para 12.068.

[40] This type of trust may not appear significantly different from a normal beneficiary trust, one for simple distribution of the trust property to the beneficiary. The only difference is that, instead of the beneficiary receiving the trust fund itself, the beneficiary is to receive other property purchased with it. The beneficiary ends up with property of equal value either way. And indeed, where the terms of the trust are slightly different, directing instead that property be purchased as a trust asset and then transferred to the beneficiary, the distinction disappears. So the practical difference between this sort of trust and a normal beneficiary trust is barely perceptible. But the analytical difference is real – and it becomes clearer as we examine examples of other situations.

[41] (1860) 28 Beav 620, 54 ER 504, 621-22.

This differs slightly from the futility reasoning used to justify *Saunders v Vautier* itself, by highlighting the possibility of selling *the property to be purchased for the beneficiary on execution of the trust*. Elsewhere, a beneficiary's right to take the trust fund rather than receive a purchase stipulated by the trust, has been justified using instead the simple equitable beneficial ownership reasoning usually said to underlie *Saunders v Vautier*. Sir William Grant MR held in *Perason v Lane*:[42]

> '[W]here money is given [on trust] to be laid out in land, which is to be conveyed to *A.*, though there is no gift of the money to him, yet in equity it is his; and he may elect not to have it laid out…'

Revealingly, he reasoned regarding such a beneficiary:[43]

> 'It is true, in the [trust fund itself, as opposed to the property stipulated to be purchased with it], they had no interest legal or equitable, expressly limited to them: but the equitable interest in that [trust fund] must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *Cestui que trust.* In order to ascertain, who they are, in such a case a Court of Equity inquires, for whose benefit the trust was created; and determines, that those, who are the objects of the trust, have the interest in the thing, which is the subject of it…'

In other words, the judge concocted a supposed equitable beneficial ownership of the trust fund in the beneficiary – after first conceding it was not there under the terms of the trust – from a proposition we now see clearly to be false, given our modern familiarity with discretionary trusts in particular: that property in a beneficiary trust *must* have an equitable beneficial owner at all times.

### *Trusts for expenditure on enhancing the beneficiary's property*

In *Re Bowes*,[44] a settlor's will left £5,000 'upon trust to expend the same in planting trees for shelter on the Wemmergill estate'. The owners of the estate, as beneficiaries of the trust, did not wish for this expenditure on improvement to their property, preferring to take the money instead, if possible; although they said they would not refuse the trees if it came to it. North J held the beneficiaries could exercise the *Saunders v Vautier* power to override the trust for expenditure and take the £5,000:[45]

> '[T]he owners of the estate now say: "It is a very disadvantageous way of spending this money; the money is to be spent for our benefit, and that of no one else; it was not intended for any purpose other than our benefit and that of the estate. That is no reason why it should be thrown away by doing what is not for our benefit, instead of being given to us, who want to have the enjoyment of it." I think their contention is right.'

North J assumed the beneficiaries' only beneficial entitlement under the trust was to expenditure on improvements. He assumed that if the trust for expenditure had been impossible – in particular, if the estate owner beneficiaries had flatly refused consent to planting – the trust

[42] (1809) 17 Ves Jr 101, 34 ER 39, 40.
[43] (1809) 17 Ves Jr 101, 34 ER 39, 40.
[44] [1896] 1 Ch 507 (Ch).
[45] [1896] 1 Ch 507 (Ch), 510-11.

would have failed. Meaning the *Saunders v Vautier* power was being exercised by beneficiaries taken not to be equitable beneficial owners of the trust fund itself.[46]

### *Trusts for expenditure on a beneficiary's maintenance*

In *Younghusband v Gisborne*,[47] a settlor's will left property on trust, to pay his brother £400 per year for life; but if the brother became insolvent the amount, rather than being paid to him, was instead to be applied by the trustees for the brother's personal support, clothing or maintenance. The brother became insolvent. Under the terms of the trust, his equitable beneficial entitlement was therefore no longer *to* trust property, but only to *expenditure by the trustees for his maintenance*. Indeed, the whole aim of the trust was that, on insolvency, the brother should not have equitable beneficial ownership of any property for his creditors to take. Knight Bruce V-C held the annuity was nevertheless property available for distribution to the brother's creditors, saying,[48] 'It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually.' *Lewin on Trusts* clarifies that what the insolvent's assignee on insolvency acquired was the beneficiary's *Saunders v Vautier* right to demand the trust property rather than have it expended for his benefit.[49]

### *Trusts to observe a licence for a beneficiary*

Perhaps the most clear-cut instance of a trust for a beneficiary who is not equitable beneficial owner of the trust property is where the terms of the trust confer on the beneficiary merely a licence to use trust assets. In *Re Gibbons*,[50] the Court of Appeal recognised the existence of such trusts: the usual situation being the deceased owner of a home creating by will a trust over it conferring simply a 'right of residence', typically on a surviving partner for their life.[51] There is no reason to doubt that the beneficiary of such a licence could join with those beneficially entitled to the house at the termination of their licence to exercise the *Saunders v Vautier* power over the property.[52] Once again, the beneficiary of the licence would be exercising – or at least participating in the exercise of – the *Saunders v Vautier* power, while not being equitable beneficial owner of the trust property. In some circumstances – for example where the trust property is leasehold and the licence can be expected to last for much or all of its term – the beneficiary of the licence would be the one substantially exercising the *Saunders v Vautier* power: those notionally entitled to the property at the termination of the licence might participate for little or no recompense.

### *Discretionary trusts*

*Re Smith*,[53] following *Re Nelson*,[54] is authority that the objects of a discretionary trust, if sui juris and between them entitled to the whole trust property, can collectively claim the trust

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[46] The judge said [1896] 1 Ch 507 (Ch), 510 (emphasis added): 'If [the life tenant simply refused permission to plant], *and he did not contend for anything more than that*, the legacy would fail…'. The highlighted qualifying words left open the possibility the beneficiaries could have argued that they were entitled to the trust property itself, if the settlor's stipulated trust for expenditure proved impossible: on the ground that this was the settlor's inferred intention. Such an interest is the law's usual presumption: *Re Osoba* [1979] 1 WLR 247 (CA) – at least as interpreted in David Wilde, 'Trusts and Purposes - Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, esp 145-47. But the judge clearly assumed the possible absence of any such interest when he permitted exercise of the *Saunders v Vautier* power.

[47] (1844) 1 Coll 400, 63 ER 473.

[48] (1844) 1 Coll 400, 63 ER 473, 402

[49] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 22.015 – item (5) in the list there.

[50] [1920] 1 Ch 372 (CA).

[51] For these trusts generally, see David Wilde, 'The Nature of Beneficiaries' Rights – Can there be a Trust to Observe a Licence Over Property?' (2021) 27 T&T 208.

[52] JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 7.55.

[53] [1928] Ch 915 (Ch).

[54] [1928] Ch 920n (CA, decided in 1918).

assets under the rule in *Saunders v Vautier*. But this right cannot be derived from equitable beneficial ownership. We know that the objects of a discretionary trust – mere potential beneficiaries – are not equitable owners of the property. An object of a discretionary trust owns nothing individually; nor, all collectively, are they co-owners; each has only a right to compel exercise of the discretion; and only if it is in an individual's favour do they then own the property awarded.[55]

## Powers of appointment – exercise of the Saunders v Vautier power by non-owners

*Re Christie-Miller's Marriage Settlement*[56] shows the object of a power of appointment, as the *potential* owner of an interest, must join together with those who are entitled to trust property in default of exercise of the power, in order for the *Saunders v Vautier* right to be exercised over that property. Again, we have someone who is clearly not an equitable beneficial owner of the property exercising the *Saunders v Vautier* right – or at least participating in its exercise. It may be tempting to think that the object of the power of appointment is playing just a minor, tidying-up role here, for the benefit of those entitled in default. But that is not necessarily the case. For example, it may be clear from a letter of wishes that a power to appoint all of a trust's property will be exercised in favour of the object of the power once they reach 21. Close to 21, rather than wait, that object might initiate exercise of the *Saunders v Vautier* right to take the property early, with those entitled in default cooperating for a minimal share, faced with the prospect of soon being entitled to nothing at all instead; or indeed cooperating for no share. In substance, it is the object of the power of appointment – clearly not an equitable beneficial owner – who is exercising the *Saunders v Vautier* right.

## Trustees of another trust – exercise of the Saunders v Vautier power by non-owners

If an interest under a trust is held by the trustees of a second trust, subject to the terms of that second trust, the trustees of the second trust can exercise the *Saunders v Vautier* power in respect of the first trust, although they are clearly not equitable beneficial owners of its property. For example, in *Anson v Potter*[57] property was held on trust for a life interest, and a remainder interest. The remainder interest was assigned to trustees of a marriage settlement. Bacon V-C held the holder of the life interest could combine with the trustees of the marriage settlement to exercise the *Saunders v Vautier* power, demanding transfer to them of the property from the original trust. Of course, the trustees of the marriage settlement were acting on behalf of its beneficiaries, who can be seen as ultimate equitable beneficial owners. But there is no reason why trustees could not exercise the *Saunders v Vautier* power, even if there were no currently entitled beneficiaries under their own trust, to identify as ultimate equitable beneficial owners on whose behalf they were acting. Again, we have exercise of the *Saunders v Vautier* power by parties who are plainly not equitable beneficial owners of the trust property – indeed there may be no such owners in existence.

## Those interested in an unadministered estate – possible exercise of the Saunders v Vautier power by non-owners

How far it is appropriate to treat a deceased's personal representatives as 'trustees' is not a simple question.[58] But those who stand to inherit the estate can exercise what looks very much

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[55] *Gartside v IRC* [1968] AC 553 (HL).
[56] [1961] 1 WLR 462 (Ch). See also *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, [41].
[57] (1879) 13 Ch D 141.
[58] See Roger Kerridge, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016), paras 23.48-23.54.

like the *Saunders v Vautier* power against them. In *Deonarine v Ramcharan*,[59] the Privy Council recently confirmed this. They suggested that, technically, it was not an exercise of the *Saunders v Vautier* power *only because* those who stand to inherit the estate are, on authority, not equitable beneficial owners of the estate property. But given – as demonstrated above – the *Saunders v Vautier* power *can* be exercised by parties who are not equitable beneficial owners, this technical distinguishing looks unnecessary. This may leave us with another example of *the Saunders v Vautier power itself* being exercised by parties who are not equitable beneficial owners. Lord Briggs and Lord Stephens, delivering the judgment, said:[60]

> '[Counsel] was not disposed to accept that the principle in *Saunders v Vautier*, by which the beneficiaries under a trust may, acting together, direct the trustees as to the disposal of the trust property, could be applied directly to the assets of an unadministered estate. To a limited extent he is correct. Beneficiaries named in a will do not thereby have beneficial interests in the unadministered estate. Their right is to have the estate duly administered in accordance with the law and the provisions of the will: see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694, 707. But it has never been doubted that they do have the power, acting together, to vary the terms of a will, so far as concerns the net estate after payment of debts and expenses. This was trenchantly affirmed by Mr Jonathan Sumption QC in *Crowden v Aldridge* [1993] 1 WLR 433, 439, although that was not challenged in that case. The fact that counsel could point to no more authority on the point is probably because it has never been doubted.'[61]

In *Re Bernstein*,[62] Blackburne J had previously treated personal representatives of an unadministered estate as 'trustees', for the purposes of the rule in *Saunders v Vautier*, as extended by the Variation of Trusts Act 1958; and treated the power to vary as exercisable by those interested in the estate, despite their not being equitable beneficial owners of its property – recognising this is unproblematic because the *Saunders v Vautier* power can be exercised by others who are not equitable beneficial owners of trust assets, such as objects of a discretionary trust.[63]

That serves to complete the substantial list presented here of parties who clearly can, or may be able to, invoke the rule in *Saunders v Vautier*, despite not being equitable beneficial owners of the trust assets.

## Do courts have a discretion to refuse Saunders v Vautier applications?

Turning to the issue of whether the courts have a discretion to refuse *Saunders v Vautier* applications. This would, of course, include, not simply outright refusals, but also imposing terms on the collapsing of the trust instead.

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[59] [2022] UKPC 57.

[60] [2022] UKPC 57, [22].

[61] In *Crowden v Aldridge* [1993] 1 WLR 433 (Ch), Jonathan Sumption QC (sitting as a deputy High Court judge) had said (439): 'It is not in doubt that a will, or more properly the obligations of executors in administering an estate assigned to it, may be varied by a direction given by all the relevant legatees. It is conceded that the deed would have had this effect if all the residuary legatees had executed it in this case. The exact juridical analysis of the transaction is obscure, but in my judgment it operates in the same way as a unanimous direction to trustees by all the relevant beneficiaries under a trust.'

[62] [2008] EWHC 3454 (Ch), [2010] WTLR 559.

[63] Approved *Wright v Gater* [2011] EWHC 2881 (Ch), [2012] 1 WLR 802, [3]; and *Harvey v Van Hoorn* [2023] EWHC 1298 (Ch), [27]. (And supported on practical grounds by Steve Evans, 'Variation Clarification' [2011] Conv 151.)

It has recently been judicially suggested (obiter) that there is no discretion.[64] And this is probably the prevailing view – given judicial and textbook statements of the *Saunders v Vautier* power as a right of ownership; and given their descriptions of the *Saunders v Vautier* power in unqualified terms, without any mention of a general discretion limiting it.[65]

But the case for a recognising a discretion to refuse *Saunders v Vautier* applications is strengthened once we understand that the rule in *Saunders v Vautier* is not, in fact, a proprietary right, but simply an unprincipled historical inheritance, with no clear legal basis, reflecting little more than a nineteenth-century judicial impatience with settlors restricting gifts. All the more so, given that nineteenth-century social circumstances underlying this judicial attitude were markedly different from today. Life expectancy was shorter; early death was much more common; without reliable contraception, parental responsibilities could arise early in life and for large families;[66] the modern welfare state did not exist; and there was imprisonment for debt. The imperative to get on with life in a hurry, and the need for ready money, was more pressing than today. A general judicial sympathy for overriding restrictions imposed by settlors at the time of the *Saunders v Vautier* decision was understandable. But now that social circumstances have changed so drastically since, there is no reason for the courts to remain wholly under the influence of that approach today. Particularly given the *Saunders v Vautier* power was originally only made available to beneficiaries aged 21 – the age of majority at the time – but is today available to beneficiaries as young as 18.

It is submitted that there is a discretion to refuse *Saunders v Vautier* applications clearly established in the case law. The only real question is over its scope. Applications can undoubtedly be refused, in the discretion of the court, in the interests of other beneficiaries under the trust. The case law demonstrating this will be outlined shortly. The only remaining question, therefore, is whether this discretion extends to refusing applications *in the interests of the party making the application* – or, indeed, perhaps for other reasons. It seems obvious to the present writer that the discretion should so extend – albeit only to be exercised in a suitably extreme case. It is suggested that the only reason the discretion has so far gone unstated by the courts is that there has not been such a case yet. Doubtless the spirit of the long-standing *Saunders v Vautier* authorities is that a beneficiary's autonomy is to be respected: their decision about how to use trust property in their own best interests. And so, *Saunders v Vautier* applications fall to be granted *almost* as of course. But it is submitted there must be a *residual* discretion to refuse an application in the interests of a beneficiary making the application; if the court is satisfied there is a clear and present danger to those interests, of a very serious nature, when viewed from the objective detachment of the court.

Suppose a trust similar to *Saunders v Vautier* today, where an 18-year-old beneficiary is demanding the fund immediately, rather than waiting until the age of 25. The trustees wish

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[64] *Brake v Guy* [2022] EWHC 1746 (Ch), [74]. Paul Matthews (sitting as a High Court judge) held that judgment creditors were entitled to an order compelling the debtor to draw on his pension fund in order to make payment, saying the pension providers would have 'no discretion' to refuse a withdrawal instruction made by him within the rules of the scheme, by claiming payment out for this purpose would be inconsistent with their fiduciary duty to serve the best interests of the scheme member. He added, 'It is the same as if the sole beneficiary of a trust, of full age and sound mind, directed the trustee to pay the trust fund over to him, under the so-called rule in *Saunders v Vautier*, and the trustee declined to do so, saying that it was not in the beneficiary's best interests to do so.' The passage was cited with approval by HHJ Hodge KC (sitting as a High Court judge) in *Re Lloyds British Testing Ltd* [2023] EWHC 567 (Ch), [32]. (However, for an apparent recognition by Paul Matthews (again sitting as a High Court judge) of the discretion identified below – to refuse a *Saunders v Vautier* application in the interests of other beneficiaries – see *Batt v Boswell* [2022] EWHC 649 (Ch), [139]-[140].)

[65] It should be acknowledged that in the review by the House of Lords in *Wharton v Masterman* [1895] AC 186 (HL), all of their Lordships stated the rule in unqualified terms: at 191-92 (Lord Herschell LC), 195 (Lord Macnaghten), 198-99 (Lord Davey).

[66] The beneficiary in *Saunders v Vautier* was described as having 'attained twenty-one in the month of March 1841, and, being then about to be married': (1841) Cr & Ph 240, 41 ER 482, 242.

to refuse, because they believe it is clearly contrary to the long-term interests of this immature and malleable beneficiary. The beneficiary has perhaps come into their trust inheritance through the early loss of their family, and of the guiding and restraining influence they could have provided. And the beneficiary may be, for example, in an unhealthy romance with a relationship fraudster; or expressing a firm wish to give away all of their inheritance to some religious cult; or naïvely determined to expend it all on some fashionable cause. In such a case, it would be disappointing if a court of equity – renowned for its discretionary character – were to simply throw up its hands and effectively say, 'Sadly, we have no discretion to uphold trustees seeking to protect this vulnerable beneficiary from squandering their inheritance in a manner they are liable to bitterly regret in just a short while. Oh, and by the way, the real problem is that the settlor's will was badly drafted. If the settlor wished to protect the beneficiary from their immaturity, the settlor should not have made the mistake of straightforwardly and plainly saying so, by stipulating a trust until the beneficiary was 25 – a stipulation the law allows to be overridden under a somewhat perverse nineteenth-century rule. Instead, the settlor should have employed some tricksy device to avoid the rule, of the sort expert professional conveyancers are familiar with'. Would such a response be defensible?

It would be particularly surprising for a court to say there is no discretion to refuse a *Saunders v Vautier* application in such a case, given the decision in *Re T's Settlement Trusts*.[67] The splendidly ironic ruling in that case was that the power derived from *Saunders v Vautier*, which involved a beneficiary being *given* trust property by the court at 21 despite the settlor's stipulation that he should not have it until later, could be used by the court to *deny* a beneficiary trust property at 21 despite the settlor's stipulation that she should have it then, under the extension to the *Saunders v Vautier* power in the Variation of Trusts Act 1958. In *Re T*, shortly before a beneficiary reached 21, Wilberforce J agreed to vary the trust on the application of her mother, so as to deny the beneficiary trust property at 21, by putting in place protective trust arrangements, to guard the beneficiary from her own 'alarming' immaturity and irresponsibility: the court consenting to the variation on the beneficiary's behalf, given she was a minor, as being for her 'benefit'.

## The discretion to refuse a Saunders v Vautier application that would cause undue prejudice to others

The existence of a discretion in the courts to refuse *Saunders v Vautier* applications is clear from a series of cases concerned with beneficiaries seeking to use the power to remove part of a company shareholding held within a trust, proportionate to the beneficiary's beneficial entitlement, in a way that might prejudice other trust beneficiaries, in respect of the remaining shares that were to be retained within the trust. The cases show that a fact-sensitive discretion exists, and a *Saunders v Vautier* application causing undue prejudice to the other beneficiaries will be refused, or only granted on terms.

The leading statements of the discretion are in the judgments in the Court of Appeal in *Re Marshall*,[68] where removal from a trust of part of a shareholding was permitted despite the possibility of some prejudice to the remainder. But Sir Herbert Cozens-Hardy MR, delivering the leading judgment, recognised a discretion to refuse, saying:[69]

> 'Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by

[67] [1964] Ch 158 (Ch) – cited with approval in *Re Holt's Settlement* [1969] 1 Ch 100 (Ch) and *Wright v Gater* [2012] 1 WLR 802 (Ch).
[68] [1914] 1 Ch 192 (CA).
[69] [1914] 1 Ch 192 (CA), 199.

> law, that where real estate is devised in trust for sale and to divide the proceeds between A., B., C., and D.—some of the shares being settled and some of them not—A. has no right to say "Transfer to me my undivided fourth of the real estate because I would rather have it as real estate than personal estate." The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries. But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property. It may apply to a case of a mortgage debt which you cannot conveniently split up into shares; but when you are dealing with the case of a limited company with ordinary and preference shares, you want to know a great deal more than that before you can say that the trustees are entitled to deprive an absolute owner of his right to claim a transfer.'

He continued, emphasising the fact-sensitive nature of the discretion:[70]

> 'When the case was first before us we suggested that we should like to know what were the facts about the company; what was its capital, and the number of its shareholders, and what were the special circumstances of the case; and it stood over in order that we might have better information.'

Phillimore LJ, concurring, also explicitly recognised the discretion:[71]

> 'In certain cases I think this would be a true and sound reason for refusing the appellants' request, but in this case I agree that upon the balance of conflicting rights and interests there is not enough to deprive the appellants of their prima facie right.'

Harman J later recognised the discretion in the similar case of *Re Weiner's Will Trusts*:[72]

> 'I cannot see that there is anything short of some special circumstances which would justify me in holding up these shares. The trustees have not come forward and said that there are good reasons why they do not wish to divide now, since they may be able to effect some scheme within the next year or so, and they happen to know that the plaintiff is opposed to the scheme. No special circumstances are made here.'

And Clauson J stated a general discretion to refuse *Saunders v Vautier* applications in the widest terms, in the similar case of *Re Sandeman's Will Trusts*:[73]

> '[I]t is settled law that, *prima facie*, the plaintiffs are entitled to have those shares transferred to them. *Prima facie*, that is so. But the court will not order that transfer to be made if there is some good ground to the contrary.
> The court has, I think, been rather careful never to define in precise terms exactly what would be good ground to the contrary. All I have to do in this case is to ascertain whether, on the facts now before me, there is some good ground for ignoring the plaintiffs' *prima facie* right to have half of the shares transferred to them.'

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[70] [1914] 1 Ch 192 (CA), 199.
[71] [1914] 1 Ch 192 (CA), 203.
[72] [1956] 1 WLR 579 (Ch), 584.
[73] [1937] 1 All ER 368 (Ch), 371-72.

Although he indicated that *Saunders v Vautier* applications will succeed *almost* as of course, by adding:[74]

> '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; but I cannot find, on the evidence before me, anything to suggest that such circumstances exist in this case.'

And the discretion to refuse a transfer of shares was exercised in *Lloyds Bank plc v Duker*,[75] where John Mowbray QC (sitting as a deputy High Court judge) ordered all the shares should be sold instead, with the proceeds to be divided between the beneficiaries according to their proportionate entitlements. He said:[76]

> '[While the cases do not make clear what "special circumstances" can remove a beneficiary's prima facie right to take out a share of personal property] I … get some help from another general principle. I mean the principle that trustees are bound to hold an even hand among their beneficiaries, and not favour one as against another, stated for instance in *Snell's Principles of Equity*, 28th ed., p. 225.'

A discretion to refuse *Saunders v Vautier* applications, having regard to the interests of other beneficiaries, *and possibly also the interests of others*, is also recognised in the rather different case of *Hilton v Hilton*.[77] The settlor's will empowered trustees to continue his business, a cement partnership with his son and others, until his youngest child attained 21. When the settlor's share of the business was sold, the property was directed to be divided equally amongst his children who attained twenty-one, or being daughters married under that age. It was held such children had a vested interest during the continuation of the business, and so could in principle exercise the *Saunders v Vautier* power to take their share before the sale of the business. But Malins V-C said (obiter):[78]

> 'The rule of the Court is, that where a party has an absolute vested interest in property, and can give a discharge for it, he is entitled to an immediate transfer notwithstanding any restriction on the right to possession. But I agree that, under the peculiar circumstances of this case, a transfer could not have been enforced on account of the carrying on of the business.'

## A discretion to refuse Saunders v Vautier applications in the interests of the party making the application?

In considering whether there is a residual discretion to refuse *Saunders v Vautier* applications in the interests of the party making the application, in a suitably extreme case, the starting point should be to repeat what Clauson J said in *Re Sandeman*[79] – quoted above: 'The court has, I

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[74] [1937] 1 All ER 368 (Ch), 373.
[75] [1987] 1 WLR 1324 (Ch). (cf *Hughes v Bourne* [2012] EWHC 2232 (Ch), [2012] WTLR 1333, dealing with trustees holding separate but related trust shareholdings.)
[76] [1987] 1 WLR 1324 (Ch), 1330-31.
[77] (1872) LR 14 Eq 468 (Ct Ch).
[78] (1872) LR 14 Eq 468 (Ct Ch), 475.
[79] [1937] 1 All ER 368 (Ch), 371-72.

think, been rather careful never to define in precise terms exactly what would be good ground to [refuse a *Saunders v Vautier* application].'[80]

Is there any direct authority against such a residual discretion to refuse *Saunders v Vautier* applications in the interests of a beneficiary making the application? Obiter dicta can be found pointing against *any* discretion. In particular, Laddie J said, at first instance, in *Goulding v James*:[81]

> 'It appears to me that the distinction between a *Saunders v Vautier* type of case and an application under s 1 of the 1958 [Variation of Trusts] Act is important. As [counsel] pointed out, under the former, the settlor's intentions are irrelevant. The court has no power to intervene. But the position under s 1 is quite different. In the case of such applications the beneficiaries do not have an unqualified entitlement to alter or terminate the trust and the court does have the power and, indeed, the duty to decide whether, in all the circumstances, the variation should be allowed to proceed.'

But a suggestion that the court has *no* discretion to refuse a *Saunders v Vautier* application seems plainly wrong – as the case law on refusal in the interests of other beneficiaries demonstrates. To repeat, all that is in issue is the extent of the discretion.

The strongest actual decision – and it is not that strong – pointing against a discretion to refuse *Saunders v Vautier* applications in the interests of a beneficiary making the application appears to be *Re Johnston*.[82] A testator left property on trust directing specified sums be invested for the benefit of each of his four sons on their respectively attaining 21. The investments were to be in the discretion of the trustees; but with a direction that the sums 'should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients'. Two sons had reached 21 and created various incumbrances over their interests under the will. It was held these two sons were entitled to demand the specified sums be paid to them rather than being invested. Stirling J said he would have been glad to enforce the settlor's stipulated trust for investment, which he felt had evidently (as events had transpired) been designed for good reason; but that he was constrained by authority to hold the sons were entitled to the sums – although, somewhat inconsistently, the judge then expressed surprise at the lack of authority on the point. The judge said:[83]

> 'Two of the testator's sons have attained twenty-one, and the question is, in substance, whether they are entitled to insist upon payment to themselves of the sums of £1200 and £1000, or whether the trustee has vested in him a valid discretion as to the application …
>
> The question is, does the law permit the testator to vest such a discretion in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, which, indeed, seem to be justified by the events, and I should be very glad to uphold it if I could; but it does seem to me that it is really

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[80] Clauson J may again have hinted at a general, undefined discretion in *Re Jefferies* [1936] 2 All ER 626 (Ch), 631-32. He said (obiter, emphasis added): 'It is, of course, well recognised that if, on the true construction of a will, there is a vested interest in the persons who are to take, but the testator inserts provisions which prevent such persons coming into full enjoyment of that which they are to have, the directions of the testator can, *and in certain circumstances* will be disregarded by the court. *Saunders v Vautier* deals with the case of beneficiaries who are individuals and the decision of the House of Lords in *Wharton v Masterman* deals with the case where the beneficiaries are not individuals, but are in effect charitable bodies, whether corporate or incorporate.'

[81] [1996] 4 All ER 865 (Ch), 869 (revd [1997] 2 All ER 239 (CA)).

[82] [1894] 3 Ch 204 (Ch).

[83] [1894] 3 Ch 204 (Ch), 207-9.

> an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will …
> [T]he case seems to me to fall within the class of cases … in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund, as, for example, where the testator has attempted to postpone the payment of a sum of money to which a person is absolutely entitled to a later date than the attaining of his majority: see *Saunders v. Vautier* [Cr. & Ph. 240] and *Gosling v. Gosling* [Joh. 265].
> I think also that the decision might be rested on the ground which Mr. *Phillpotts* suggested in his argument – viz., that really, when the words of the will are looked at, the testator is simply pointing out the mode in which these sums, which he had actually given to his sons, should be enjoyed by them. In that class of cases, of which *Re Skinner's Trusts* [1 J. & H. 102] is an example, the Court has said that it will not insist on the benefit intended for the legatee being taken by him *modo et forma* as the testator prescribes, on the ground that if the Court attempted to do such a thing, then it would be in the power of the legatee, the day after this had been done, to frustrate the testator's intention by disposing of the benefit which had been given him in pursuance of the testator's will. On both these grounds, it seems to me that, in the events which have happened, the discretion cannot be exercised. It is rather surprising that there should be such an absence of authority on a point of this sort; but I think the case of *Re Skinner's Trusts*, and the observations of Lord *Hatherley*,[84] support the view which I take – that the sons are absolutely entitled to their legacies.'[85]

It is, of course, faulty reasoning to say that, because there exist earlier cases in which beneficiaries were allowed to override a settlor's stipulated trust terms, *where there were no reasons for the court to refuse this in its discretion*, therefore, in a later case beneficiaries must also be allowed to override a settlor's stipulated trust terms, *even if there are reasons for the court to refuse this in its discretion*. And a fortiori it would be flawed reasoning to say this in a later case where there were, not just some, but *compelling* reasons. Insofar as *Re Johnston* points against a discretion to refuse *Saunders v Vautier* applications in the interests of a beneficiary making the application, it can be dismissed as a case where, just the vague sense in that case that the beneficiaries might waste their inheritances was not sufficiently concrete to bring the residual discretion into play.

## Wider use of the discretion?

There is scope for saying that there is a wider, *general* discretion to refuse *Saunders v Vautier* applications – not just, as so far discussed, in the interests of other beneficiaries or of the party making the application. It has been judicially suggested that the rule in *Saunders v Vautier* may not apply to some types of commercial trust, because it would be incompatible with the nature of the trust.[86] And the view that there may be special exceptions is also expressed by major

[84] Lord Hatherley was the later title of Page Wood V-C, the judge in *Re Skinner's Trusts* (1860) 1 John & H 102, 70 ER 679.
[85] See also *Webb v Oldfield* [2010] EWHC 3469 (Ch), [26]-[28]. Judge Dight said (obiter) that if the facts had been that a mother's will had declared a trust in favour of her son, with her daughter as trustee given a discretion over application of the fund, to protect the son from the consequences of his addiction, he could nevertheless exercise the *Saunders v Vautier* power to take the fund.
[86] *Law Debenture Trust Corpn v Elektrim Finance NV* [2006] EWHC 1305 (Ch), esp [14].

practitioner works.[87] The principal example they coalesce around – based on experience in other jurisdictions – is occupational pension trust funds. As it is put in *Snell's Equity*:[88]

> 'In principle, the rule in *Saunders v Vautier* may apply as much to trusts in a commercial setting as to traditional family trusts. But it should not be applied where it would undermine the fundamental commercial purpose of the transaction in which the trust device has been used. For example, the rule would not entitle the beneficiaries of a pension trust to wind up the scheme and require the trustees to pay out the scheme assets, if that would circumvent any statutory rules regulating the winding up of the scheme and frustrate the employer's purpose in providing periodic benefits during the members' retirement.'

But it has already been accepted that the rule in *Saunders v Vautier* does apply in principle to occupational pension trust funds.[89] It would seem difficult to now identify a subcategory within occupational trust funds, to call a 'type' of trust the rule in *Saunders v Vautier* does not apply to. So, the position the law appears to be groping towards in the dark is that – rather than there being 'types' of trust the rule in *Saunders v Vautier* does not apply to – instead there is always a discretion, in the case of all types of trust, to refuse a *Saunders v Vautier* application, where special circumstances warrant this. And the reason the law is struggling in the dark is that the existence of this general discretion has not yet been sufficiently brought to light.

# Conclusions

As the highest court in the land told us more than a century ago – although it is little noted – the rule in *Saunders v Vautier* is one with no clear principled basis, albeit it is a rule we are stuck with, for better or worse, from long-standing precedent: it perhaps reflects little more than an instinctive judicial dislike – in differing nineteenth-century social circumstances – of settlors restricting gifts.[90] The rule is usually justified as a right a beneficiary derives from their equitable beneficial ownership of trust assets. But this does not seem a satisfactory explanation, given the number of situations, examined here, where a party can, or may be able to, use the *Saunders v Vautier* power (or at least participate in its use, perhaps as the driving force) despite *not* being equitable beneficial owner of the trust assets. That is, parties of the following kinds. (1) Parties who are not equitable beneficial owners and have no prospect of ever becoming beneficial owners: that is, charitable institutions; the Attorney-General; the Charity Commission; trustees of a charitable trust acting unilaterally; trustees of a second trust – and it cannot be said that they are acting on behalf of the beneficiaries of that second trust, as ultimate equitable beneficial owners, if it has no currently-entitled beneficiaries. (2) Parties who are not equitable beneficial owners, although they do have the hope or expectation of becoming beneficial owners: that is, objects of discretionary trusts; objects of powers of appointment; those entitled under a deceased's unadministered estate. (3) Parties who are not equitable beneficial owners ('owners' taken here to mean *only* those beneficially entitled *to* trust property), although they do have a current beneficial entitlement, merely to use the trust property or to having it expended for their benefit by the trustees: that is, beneficiaries of trusts

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[87] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), paras 22.027-22.030. John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 29.030. See also, Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), paras 69.21-69.23.

[88] John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 29.030 (notes omitted).

[89] *Thorpe v Revenue and Customs Comrs* [2010] EWCA Civ 339, [2010] STC 964, [25]; *Dickinson v NAL Realisations (Staffordshire) Ltd* [2019] EWCA Civ 2146, [2020] 1 WLR 1122, [22].

[90] *Wharton v Masterman* [1895] AC 186 (HL).

with limited entitlements such as, to observe a licence for them; or to purchase property in their name; or for expenditure on enhancing their property; or for expenditure on their maintenance.

Although a focus on beneficiaries is natural and understandable when stating the rule in *Saunders v Vautier*, formulations of the rule might perhaps be improved by speaking about exercise of the *Saunders v Vautier* power by 'those who hold the whole beneficial entitlement, *or those who otherwise have standing to exercise the power, in particular in the case of charitable trusts*'.[91]

Once we recognise that the rule in *Saunders v Vautier* is not, in fact, a proprietary right, but simply an unprincipled historical legacy, it is easier to make the case for acknowledging a discretion to refuse *Saunders v Vautier* applications. It seems to be widely assumed there is no such discretion. But, it is submitted, it is already established in the authorities that there is a discretion: this can be seen from cases where the courts have said, and decided, applications could be refused in the interests of other beneficiaries under the trust. The only real issue is the scope of the discretion. It is submitted it must also be possible to refuse an application in the interests of the very party making the application, in a suitably compelling case – and the only reason this has not so far been apparent is that we have not yet seen such a case. Indeed, it must also be possible to refuse an application wherever there is *any* very strong reason – as hinted at in judicial and textbook discussion of 'types' of trust where use of the rule would seem manifestly inapt.

[91] Although, regarding charitable trusts, see above n 33.