

TRUST LAW COMMITTEE CONSULTATION PAPER

TRUSTEE EXEMPTION CLAUSES

1.0 INTRODUCTION

1.1 In *Armitage v Nurse*¹, Millett LJ (as he then was), speaking of exemption clauses, said

“It must be acknowledged that the view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence, should not be able to rely on a trustee exemption clause excluding liability for gross negligence. Jersey introduced a law in 1989 which denies effect to a trustee exemption clause which purports to absolve a trustee from liability for his own ‘fraud, wilful misconduct or gross negligence’... If clauses such as clause 15 of the settlement are to be denied effect, then in my opinion this should be done by Parliament which will have the advantage of wide consultation with interested bodies and the advice of the Trust Law Committee”.

1.2 Thus, the Court of Appeal gave effect to a clause that exempted a trustee from liability “unless such loss or damage shall be caused by his own actual fraud”. Such clause exempted the trustee from all liability for negligence, English law (unlike Scots law) not distinguishing between negligence and gross negligence in the absence of the terms of a statute or of a contract requiring such distinction to be drawn.

¹[1998] Ch 241 at 256

2.0 TERMINOLOGY

2.1 The first matter to consider is what constitutes a trustee exemption clause. In broad terms, there are two different kinds of clause. The first is the typical clause like that in *Armitage v Nurse* which excludes the *liability* of the trustee for having committed a breach of trust. In this case there is a duty, the duty is breached, and were it not for the clause, there would be a liability to the beneficiaries. However, the clause takes away that liability or in some way mitigates or reduces it.

2.2 The second kind of clause is one which does not exclude the liability, but excludes the *duty*, or at least reduces it, in the first place. Logically, such a clause ought to be considered prior to that which excludes liability, for, if there is no duty, there can never be a liability. In this paper we consider both types of clause. Because the second type of clause may produce the same substantive effect as the first, one's initial reaction is to think that any reform of the law must cover both types, although one has to consider whether outlawing clauses that cut down trustees' duties will lead to too great a loss in the flexibility and utility of the trust concept.

2.3 As an example of the second type of clause, excluding duties, there is the Privy Council decision of *Hayim v Citibank*². In that case a testator appointed Citibank to be executor of his American will on terms that the executor "shall have no responsibility or duty with respect to" a house in Hong Kong until the death of the survivor of the testator's very elderly brother and sister. The property was given by a Hong Kong will to another executor on trust for Citibank as executor of the American will. Citibank, actuated by goodwill towards the testator's siblings, who were living in a house forming part of the property in Hong Kong, declined during the siblings' lives to take steps to have the house in Hong Kong sold for the benefit of the beneficiaries of the American will, who wished the sale to take place. Substantial losses were incurred by the delayed sale of the house. The Privy Council³ held that that clause was "understandable and explicable". To avoid

²[1987] AC 730

³ at 746

death duties on the deaths of the siblings and to avoid putting them at the mercy of the beneficiaries, the clause

“was intended to enable [Citibank] to decide that although Albert and Maisie were not beneficially interested in the house, nevertheless Albert and Maisie should be allowed to remain in the house. The testator gave effect to that intention by a provision which relieved Citibank from all responsibility and duty to the beneficiaries in respect of the house”.⁴

2.4 Both kinds of exemption clauses can work in different ways. They can work in an ‘all or nothing’ mode, so that the clause excludes *all* liability for particular breaches of trust, or they can work at different levels and degrees. These levels or degrees are usually degrees of seriousness of the breach of trust in question. Typically one could look at the descending order of seriousness in the following terms:

- (i) fraud
- (ii) deliberate default
- (iii) recklessness
- (iv) gross negligence
- (v) negligence (where the trustee’s accounts are surcharged⁵ with the amount which would have appeared but for the trustee’s failure to act properly)
- (vi) strict liability (arising from falsification of the trustee’s accounts).

2.5 One question is how far the first three overlap. It is clear from cases such as *Armitage v Nurse* itself, and *Royal Brunei Airlines and Tan*⁶, that ‘fraud’ for the purposes of breach of trust liability

⁴ Lord Templeman, however, accepted that if the house were used to benefit the trustees, they could be accountable to the beneficiaries for breaking the “no profit” and “no conflict of duty and personal interest” rules.

⁵ On surcharging and falsifying accounts, see Lord Justice Millett in (1998) 114 LQR 225-227

⁶ [1995] 2 AC 378

does not refer to the tort of deceit, but instead to conduct which the trustee does not honestly believe is in the beneficiary's interest. Moreover, this is intended to be an objective standard rather than a subjective one. Indeed, Millett LJ in *Armitage v Nurse*⁷ stated that dishonesty "connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not". On that basis, fraud and recklessness are equated.

2.6 Deliberate default in the sense of a conscious breach will often be dishonest but it may be honest, Millett LJ stating⁸ "By consciously acting beyond their powers (as, for example, by making an investment which they knew to be unauthorised) the trustees may deliberately commit a breach of trust but if they do so in good faith and in the honest belief that they are acting in the best interests of the beneficiaries, their conduct is not fraudulent".

Gross Negligence

2.7 The further question arises as to whether gross negligence is really part of fraud for this purpose. In *Armitage v Nurse*⁹ Millett LJ considered that, whereas in civilian systems like Scotland gross negligence could properly be regarded as equivalent to fraud (*culpa lata dolo aequiparatur*), in English law,

"While we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree. English lawyers have always had a healthy disrespect for the latter distinction"

⁷ [1998] Ch 241 at 251

⁸ Ibid

⁹ at 254

2.8 The force of the decision of the Court may thus be diminished as apparently influenced by the assumption that the Court had to choose either to outlaw or to accept all clauses exempting trustees from liability for negligence because serious consideration should not be given to the option of only outlawing exemption from liability for gross negligence. After all, there is a long and respectable line of authority (not cited to the Court) dealing with the concept of gross negligence in the common law, and distinguishing it from ordinary negligence. This has occurred in a number of contexts, including bailments (where in certain cases a bailee is only liable for gross negligence, in the absence of any contractual provision) and contracts. In a bailment case, *Giblin v McMullen*¹⁰, Lord Chelmsford, giving the opinion of the Privy Council, thought that despite the suggestion that gross negligence was nothing more than ordinary negligence with the addition of a vituperative epithet, there *was* a difference between the varying degrees of negligence, and that the term gross negligence might usefully be retained as descriptive of that difference. Lord Chelmsford referred with approval to the judgment of Crompton J in *Beal v The South Devon Railway Company*¹¹ who said:

“It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says: ‘There is a certain degree of negligence to which everyone attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them...’.”

2.9 In *The Hellespont Ardent*¹² Mance J, considering the effect of certain indemnity and exemption

¹⁰(1868) LR 2 PC 317

¹¹(1864) 3 H & C 337

¹² [1997] 2 Lloyds Rep 547, 586-588. See also various Canadian cases on the meaning of “gross negligence” which were endorsed by the Jersey Court of Appeal in *Midland Bank Trustees (Jersey) Ltd v Federated Pension Services Ltd* [1996] PLR 179, holding that “gross negligence” in a statute “means a serious or flagrant degree of negligence”, so the trustee was not exempted from liability when guilty of “a serious, unusual and marked departure” from the normal standard of conduct of a paid professional trustee.

clauses in commercial contracts, said:

“‘gross’ negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and generally impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk... I see no difficulty in accepting that (a) the seriousness or otherwise of any injury that might arise, (b) the degree of likelihood of its arising and (c) the extent to which someone takes any care at all are all potentially material when considering whether particular conduct should be regarded as so abhorrent as to attract the epithet of ‘gross’ negligence.”

2.10 Thus, in the law of bailment and where a contract or statute uses a term like gross negligence the courts can find a sensible meaning for such term.

3.0 THE PRESENT ENGLISH LAW

3.1 There are two aspects to the question of what is the current English law. One must consider first those few areas of the English law where particular statutory provisions operate, and second the general law subject to those statutory provisions.

Companies Act 1985

3.2 In the Companies Act 1985, section 192 deals with provisions in debenture trust deeds which purport to exempt or indemnify a trustee from or against liability for breach of trust. Sub-section (1) provides that:

“Subject to this section, any provision contained -

- (a) in a trust deed for securing an issue of debentures, or
- (b) in any contract with the holders of debentures secured by a trust deed,

is void insofar as it would have the effect of exempting a trustee of the deed from, or indemnifying him against, liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions”.

3.3 It will be noted that this provision invalidates a clause exempting from mere negligence, let alone anything more serious. Similarly, section 310 of the Companies Act 1985¹³ renders void

“Any provision, whether contained in the company’s articles or in any contract with the company or otherwise, for exempting any officer of the company or any person (whether an officer or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company”.

3.4 Where it applies, this provision in fact goes even further than section 192, because it has the

¹³ Explained in *Movitex Ltd v Bulfield* [1988] BCLC 104 so as to reconcile it with Table A, Article 85

effect of striking down a clause that exempted from liability for a completely innocent breach of trust (ie strict liability).

Financial Services Act 1986

3.5 The Financial Services Act 1986, section 84, deals with exclusion clauses in unit trust deeds:

“Any provision of the trust deed of an authorised unit trust scheme shall be void insofar as it would have the effect of exempting the manager or trustee from liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the scheme”.

Again, this would prevent the exclusion of liability for negligent breach of trust, although not for exemption from liability for innocent breach of trust.

Pensions Act 1995

3.6 Thirdly, there is the Pensions Act 1995, which by section 33 has the effect of preventing the exclusion of liability for breach of trust in relation to investment functions. Section 33(1) provides that:

“Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable -

(a) by a trustee of a trust scheme or

(b) by a person to whom the function had been delegated under section 34,

cannot be excluded or restricted by any instrument or agreement”.

Sub-section (2)¹⁴ extends the notion of excluding or restricting liability, in much the same way as in the Unfair Contract Terms Act 1977, s 13(1), to cases of making the liability or its enforcement subject to restrictive or onerous conditions, excluding or restricting any right or remedy in respect of the liability, subjecting a person to any prejudice in consequence of his pursuing any such right or remedy or excluding or restricting rules of evidence or procedure.

Unfair Contract Terms Act 1977

3.7 There is, of course, also the question of how far the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994 can apply. Although an argument has been made for applying these rules to the *original* professional trustees in a trust containing a remuneration clause¹⁴ there is a strong argument to the contrary, based on the undoubted legal position that trustees do not receive remuneration by virtue of a contract but as, in effect, conditional beneficiaries under the terms of the trust.¹⁶ Of course, the argument in favour of application of the unfair contract terms legislation is very much weaker when considering the position of subsequently appointed trustees, who had no dealings with the settlor.

Trustee Act 1925

3.8 Finally, one should consider the inter-related sections 23(1) and 30(1) of the Trustee Act 1925. Section 23(1) authorises trustees and personal representatives to employ and pay agents, and then provides that they “shall not be responsible for the default of any such agent if employed in good faith”. Section 30(1) is concerned to make a trustee accountable only for his own acts and neglects

¹⁴ Set out below, para 7.10

¹⁵ See W. Goodhart [1980] Conv 333 and Kenny (1982) 126 SJ 631, though Lord Goodhart has since said that he thinks he “was probably wrong”: see (1996) 10 Trust Law International 38, 43

¹⁶ See *Re Duke of Norfolk Settlements Trusts* [1982] Ch 61, 77A (on which Lord Goodhart relies in suggesting that his earlier view was “probably wrong”), and *Galmerrow v National Westminster Bank plc*, unreported, 20 December 1990, Harman J; Robert Ham, QC (1995) 9 Trust Law International 21, 25

and not for those of others that lead to certain losses “unless the same happens through his own wilful default”.

3.9 Trustees, of course, are liable to account on the footing of wilful default which includes a want of ordinary prudence¹⁷ viz. negligent breaches of trust as well as deliberate or reckless breaches. Thus, an exemption clause expressly stating “My trustees shall not be liable for any loss arising from their own wilful default” must exempt a trustee from liability for negligent, reckless or deliberate breaches, unless dishonest. One would thus expect an exemption clause expressly stating, “My trustees shall not be liable for any loss unless the same happens through their own wilful default” to exempt a trustee from liability unless guilty of a negligent, reckless or deliberate breach of trust, as was the position in the nineteenth century.¹⁸

3.10 However, Maugham J in Re Vickery¹⁹ opined that the common law meaning of “wilful default”, extending only to deliberate and reckless misconduct and used in contracts and in articles of companies to protect company directors, applied where under (the consolidating) section 30(1) a trustee was not to be liable unless guilty of wilful default. Thus, a trustee should not be liable unless guilty of a deliberate or reckless breach of trust. This was endorsed in *obiter dicta* by the Court of Appeal in Armitage v Nurse²⁰, so that the common law meaning remarkably prevails over the hallowed equitable meaning of wilful default in exemption clauses exempting from liability unless there is wilful default but not in exemption clauses exempting from liability for wilful default.

¹⁷ *Speight v Gaunt* (1883) 9 App Cas 1, *Bartlett v Barclays Bank Trust Co* [1980] Ch 515, *Armitage v Nurse* [1998] Ch 241

¹⁸ *Re Brier* (1884) 26 Ch D 238, 243, *Re Chapman* [1896] 2 Ch 763, 776, *Speight v Gaunt* (1883) 9 App Cas 1, 14, 22-23; Law of Property Amendment Act 1859 s.31, Trustee Act 1893 s. 24

¹⁹ [1931] 1 Ch 572 where the defendant had only been guilty of an error of judgment, not negligence

²⁰ [1998] Ch 242

3.11 This position is most unsatisfactory: one would expect the traditional fundamental equitable meaning of wilful default to apply in all cases where trustees are liable, or not intended to be liable, for wilful default or unless guilty of wilful default. It is also most unsatisfactory that the court did not consider the relationship between section 30(1) and section 23(1) nor the views thereon expressed in many learned publications²¹.

3.12 From a 1999 perspective it is, of course, possible to construe section 23(1) at its simple face value so that once the trustee has in good faith employed the agent he “shall not be responsible for the default of any such agent”: thus, he is absolutely exempted from liability by the umbrella of an honest appointment of an agent. Even then, one may well have qualms in this consumer protection era that trustees, normally subject to onerous duties, can be allowed to escape so lightly merely by employing agents.

3.13 From a 1926 perspective, a trust lawyer would then construe section 23(1) in the light of the traditional duty²² to select and supervise agents with common prudence in the restricted circumstances where they could be employed and of the automatic strict liability of trustees for agents employed outside those restricted circumstances. Thus, when section 23(1) in revolutionary fashion allowed agents to be used in any circumstances, he would probably construe its last clause as reassuring trustees that the price of the right to use agents in any circumstances was not that the trustees should be automatically strictly responsible for the default of such agents but that their traditional liability remained if agents were honestly appointed but not selected or supervised with common prudence. Section 23(1) should therefore be construed as if it ended “and shall not be automatically strictly responsible for the defaults of any such agent if employed in good faith, without prejudice to their duty to select and supervise an agent with common prudence.”

²¹ G. H. Jones (1959) 22 MLR 381, J. E. Stannard [1979] Conv 345, Underhill & Hayton, Law of Trusts & Trustees (15th Ed) pp 622-624, R. Ham, QC [1995] 9 TLI 21

²² *Munch v Cockerell* (1840) 5 My & Ct 178, *Rowland v Witherden* (1851) 3 Mac & G 568, *Speight v Gaunt* (1883) 22 Ch D 727, 9 App Cas 1

3.14 On the assumption that the Re Vickery meaning of wilful default is correct and that section 23(1) should be taken at its face value, the Law Commission has provisionally recommended in a Consultation Paper²³ that the law be reformed so the above provisions be repealed and so that trustees have wide powers of delegation to agents but are under a duty to select and supervise the agents with some canvassed standards of care. Publication of the Law Commission Report is expected soon, finalising an appropriate standard of care e.g. to exercise reasonable care taking account of any special knowledge or experience that the trustee has or holds himself out as having or, in the case of a professional trustee, of any such special knowledge or experience that he can reasonably be expected to have. We strongly support these proposals.

General Law

3.15 Let us now consider the general law. Until 1997, this was difficult to state with any precision, although there were helpful summaries in the Law Commission Consultation Paper No 124 and the Law Commission Report No 236. However, the Court of Appeal in *Armitage v Nurse* considered a large number of decisions, both of England and Scotland, as well as the decision of the Jersey Court of Appeal in *Midland Bank Trustee (Jersey) Limited v Federated Pension Services*²⁴. Millett LJ on behalf of the Court of Appeal said²⁵

“I accept the submission made on behalf of Paula that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trusts. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient...

I agree with the conclusion of the Jersey Court of Appeal that all [the cited] cases are

²³ Trustees’ Powers and Duties Consultation Paper No 146 (1997)

concerned with the true construction of the particular clauses under consideration or of similar clauses in standard form in the 19th century. None of them deals with the much wider form of clause which has become common in the present century, and none of them is authority for the proposition that it is contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to have that effect.”

3.16 Accordingly, the Court of Appeal was not prepared to hold that a clause in a trust deed purporting to exclude liability for all breaches of trust except fraud was contrary to public policy and invalid.

3.17 More recently, in *Bogg v Raper*²⁶, the Court of Appeal made it clear that an executor or trustee who drafts the trust of a testator or settlor can properly benefit from a very broad exemption clause so long as he called the settlor’s attention to it and its effect, without any need to advise him to take separate and independent legal advice. This treats such broad exemption clauses as unexceptional as remuneration clauses, leaving some solicitors uneasy enough to write a covering letter drawing the prospective settlor’s attention to the clause and advising him to take independent legal advice.

4.0 COMPARATIVE LAW POSITION

“Common law”

4.1 All countries have a strict *contra preferentem* approach to the construction of exemption clauses, and all prevent a trustee exempting himself from liability for dishonesty. In America, some states disallow exemption from liability for gross negligence, while others allow it in the absence of a statutory prohibition for particular types of trust²⁷. In *Robertson v Howden (No 2)*²⁸ the Court of

²⁴ [1996] PLR 179

²⁵ [1998] Ch 241 at 253 and 256

²⁶ [1998] Times 22 April

²⁷ Generally, see Scott on Trusts (4th ed) para 222

Appeal in New Zealand held that the law of New Zealand was the same as in England and, indeed, in Scotland in not allowing exemption clauses to protect trustees against positive breaches of duty. Over a century later, this is of little assistance. In *Re Poche*²⁹, the Surrogate Court of Alberta purported to follow the Scots cases of *Seton v Dawson*³⁰, *Knox v Mackinnon*³¹ and *Rae v Meek*³² (the latter two in the House of Lords), and held that

“A trustee must be held responsible for any loss resulting from his gross negligence, regardless of *any* provision in the trust instrument relieving him from such liability” (emphasis supplied).

4.2 In Australia, there is a dearth of case law³³ but in a high profile charitable trust (the AIDS Trust of Australia) with trustees including the Governor General of Australia and the President of the New South Wales Court of Appeal, the trustees were expressly exempted from liability except in the case of dishonesty or any wilful act or omission known to be a breach of trust: experienced legal advisers clearly thought that this was valid.

4.3 In Scotland, there is a long line of cases dealing with the true construction and effect of exemption clauses in trust instruments. The most recent case is that of *Lutea Trustees Limited v Orbis Trustees Guernsey Limited*³⁴, decided by the Inner House of the Court of Session (the

²⁸ (1892) 10 NZLR 609

²⁹ (1984) 6 DLR (4th) 40

³⁰ (1841) 4 Ct Sess Cas (2nd) 310

³¹ (1888) 13 App Cas 753

³² (1889) 14 App Cas 558

³³ Ford & Lee, Principles of the Law of Trusts (3rd ed) para 18060

³⁴ 1997 SCLR 735, 1998 SLT 471, discussed 1998 8 O.T.R. 81 (R. Ashton)

equivalent of the Court of Appeal). In this case the trust deed provided *inter alia* that

“The trustees shall not be in any way liable for any loss suffered as a result of the exercise of any of any of the powers given to them by these presents or for any fall in value of or for the validity and sufficiency of investments, securities and others held by them or on their account whether made or retained by the trustees or for omissions or for neglect in their management or for one another or for factors, attorneys, solicitors, accountants, stockbrokers, agents or others appointed or employed by them except that they were habit and repute responsible at the time of their appointment or employment but each for his or her own actual personal intromissions only”.

4.4 There was also a provision that the trustee’s exercise of discretionary powers, including that of investment, “should not be called into question upon any ground whatever except fraud”. At the request of the settlor, who was beneficially interested in his trust, the trustees lent US\$940,000 from the trust fund to an individual who agreed to repay double that sum in 22 days time on the security only of a pledge of shares in a company which appeared to have been worthless but the trustee did not investigate the value of such shares. Lord McCluskey said³⁵

“I can, however, find nothing in the terms of the trust deed that would excuse the defenders from incurring liability to the trust in respect of the loss resulting from grossly negligent intromissions with the trust estate. Indeed counsel for the defenders and reclaimers expressly accepted that neither the terms of the trust deed nor the common law would enable the trustees to avoid liability for the consequences to the trust estate of *culpa lata*. ... For these reasons, and standing the acceptance by counsel for the defenders and reclaimers that the immunity provisions in the trust deed give no protection in respect of gross negligence, I consider that the temporary judge was right”.

4.5 One obvious problem is that Scottish cases purport to rely on the Roman law concept or maxim

³⁵ 1998 SLT 471 at 478 and 479

“*culpa lata dolo æquiparatur*” (gross negligence is equivalent to fraud or bad faith) which is not a maxim of the common law as Millett LJ has pointed out³⁶ and which has had a flexible meaning in Roman times³⁷. It does, however, seem clear that Scots and English law are now different in that gross negligence cannot be excluded in Scots trusts but it can in English trusts.

Statutory Reform

4.6 Turning now to modern offshore trust legislation, there are a considerable number of jurisdictions which have legislated for a limit to exemption clauses of one kind or another. A basic provision is found in the Belize Trustee Act 1992, section 50(6), which provides:

“Nothing in the terms of a trust shall relieve the trustee of liability for a breach of trust arising from his own fraud or wilful misconduct”.

4.7 The original form of equivalent provision in Guernsey was the same. But this was subsequently amended to the same effect as Article 26(9) of the Trust (Jersey) Law 1984, as substituted in 1989:

“Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct *or gross negligence*” (emphasis supplied).

4.8 So if (as the Jersey Court of Appeal in *Midland Bank* held), gross negligence means something less than wilful misconduct, the Jersey and Guernsey position is more favourable to beneficiaries than that in Belize. More favourable still to beneficiaries is the provision in the Turks & Caicos

³⁶ [1998] Ch 241 at 254

³⁷ See R Zimmerman, *The Law of Obligations* pp 462-463 and D N MacCormick in *Studia et Documenta Historiae et Iuris* (1972) p183

Islands, where, by the Trusts Ordinance 1990, Article 29(10),

“A term of the trust shall be invalid if it purports to relieve the trustee from liability arising from his own fraud, wilful misconduct or negligence”.

In other words, it extends even to the case of an exemption clause purporting to exonerate from mere negligence liability. Thus in the Turks & Caicos Islands, the only kind of breach of trust liability that can be expressly exempted is that for strict liability, ie innocent breach of trust.

4.9 It is also worth noting that the Turks & Caicos Islands, Jersey and Guernsey all have legislation making directors of corporate trustees liable as guarantors for breaches of trust committed by their companies, although subject to relief by the court if the director was unaware of the breach, without being reckless nor negligent, or could not have prevented the breach by exercising his rights as director or shareholder.

5.0 THE CONTRACTUALISATION OF TRUSTS

5.1 A feature of modern trust law is the tendency to treat trusts as though they were contracts. This has always been a problem with lawyers from civilian jurisdictions, because they do not have a trust concept of their own. Thus there has long been a tendency to ‘pigeon-hole’ the trust by finding the closest analogy in their own legal system. For many of those civilian legal systems, it is a contract. After all, in those systems third parties, who benefit from the performance of a contract between others, have the right to sue for breach of contract, just as beneficiaries under a trust have a right to sue for breach of trust. The Swiss often treat trusts as a kind of agency, ‘*mandat*’. The French draft law relating to trusts (in which the concept was called *fiducie*) was expressly a form of fiduciary contract. The fact that such a civilian transaction may be completely gratuitous is irrelevant. In civil law there is no doctrine of consideration, and, indeed, a donation is a form of contract.

5.2 What is perhaps surprising, and even worrying, is that in modern times even Anglo-Saxon equity lawyers have taken to analogising from contract to trust eg in the arguments over whether the

Unfair Contract Terms Act and the Unfair Terms in Consumer Contracts Regulations can apply to a trust instrument. Although there are many cases holding that trustee remuneration clauses are to be treated as gifts or legacies to trustees³⁸, both judges and commentators alike insist on making the contract analogy.

5.3 So, for example, in *RoyWest Trust Corporation (Bahamas) Limited v Savannah NV*³⁹, Georges CJ had to construe an exemption clause in a trust instrument. He said⁴⁰

“There would seem to be no reason why in relation to the application and interpretation of an exclusion clause a trust deed should differ in any way from *any other contract*. The words of Lord Diplock in *Photo Production v Securicor Ltd*⁴¹ appear to be apt...

Substituting for the reference to commercial contracts a reference to trust deeds would seem to make the reasoning [of Lord Diplock] directly applicable to this case...”

5.4 Again, in *Armitage v Nurse*, Millett LJ said⁴²

“It is, of course far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. *What is true of a contract must be equally true of a settlement.*”

It is true that Millett LJ does not, as Georges CJ did, treat a trust *as if it were* a contract. But he was not prepared to treat them as sufficiently different for the purposes of this particular point.

³⁸ See *Re Gee* [1948] Ch 284, *Re Pooley* (1888) 40 Ch D 1, *Re Thorley* [1891] 2 Ch 613, *Re White* [1898] 2 Ch 217 and *Re Brown* [1918] WN 118

³⁹ (1987) Butterworth’s Offshore Cases and Materials, Volume 1 at 61

⁴⁰ at 79-80 (emphasis supplied in italics)

⁴¹ [1980] AC 827 at 850

⁴² [1998] Ch 241 at 254 (emphasis supplied in italics)

5.5 However, the comparison with contract can be misleading. There are two main reasons. Firstly, this is a property relationship and not a contractual one. Secondly, it is a fiduciary arrangement rather than a commercial one.

A Property Relationship

5.6 It is true that a trust is (or normally is) a voluntary arrangement. It is an exercise of free will by a settlor. But so is the grant of an easement in land. It is well settled in English law that a landowner cannot grant an easement in gross. Nor, more generally, can a property owner create a property interest which vests outside the perpetuity period. So although we say that it is open to a property owner to do what he wishes, this is not quite true. There are limitations.

5.7 In the two examples quoted, the choice for the landowner is between doing things in a certain way, and not doing them at all. Why is this? Surely it is because a property relationship impacts on third parties, ie other than the parties to the transaction. There is a public interest which goes wider than the mere interests of the parties.

5.8 This is not to say that there is necessarily a public interest at work which would apply in relation to exemption clauses in trust instruments. What should be made clear is that it cannot be blindly accepted that, just because a particular principle is accepted in relation to contract, that same principle ought to apply in relation to trusts. If a sufficient public interest can be shown for the limitation of freedom of action in relation to the creation of trust interests, then an appropriate rule can be recognised to exist, or created, in order to serve that public interest.

5.9 It is also worth noting in passing that even where contracts are concerned, the hallowed principle of freedom of contract has been very much reduced by both judicial and legislative intervention in the 20th century. A very high proportion of all contracts made today are in fact what the French call '*contrats d'adhésion*', ie contracts where one takes it or leaves it on certain terms

and there is no chance to negotiate or alter those terms. You either do the transaction as prescribed, or you do not do it at all. The case law on contractual exemption clauses, and the legislative pronouncements, including the Unfair Contract Terms Act 1977, have radically reduced freedom of contract in the classical, Ansonian sense.

A Fiduciary Relationship

5.10 The second distinction to take into account is that a trust is a *fiduciary* relationship and not a merely commercial one. The idea of a commercial arrangement is one of two equal parties each looking after his or her own interest. This may in *some* cases be true of the relationship between settlor and trustee. The analogy with contract is strongest there, but, once the trust is set up, the settlor ceases to have any role to play in that capacity. In particular, he has no right to enforce the trust. Instead, it is for the beneficiaries, for whose benefit the trust property has been given, to do so. However, they had no part in negotiating the trust terms, and they start off in a position of ignorance and weakness. This weakness is exacerbated to the extent (increasingly common in modern trusts) that wide discretions and powers and immunities are conferred on the trustee so that the pure trust obligation becomes a diminished or flawed obligation. The trust relationship is *fiduciary* in the sense that it is recognised that one party is in need of protection or care such that the other is obliged to provide it and owes special duties of honesty and loyalty as part of that arrangement. Indeed, the imbalance in the respective positions of trustee and beneficiary, and the duties of honesty and loyalty owed by the trustee to the beneficiary in order to redress that balance, may well be a good reason for limiting the effectiveness of exclusion clauses in the first place.

5.11 Of course, as Millett LJ emphasised in *Armitage v Nurse*, it does not follow from the fiduciary nature of the relationship that the core obligations of a trustee owed to the beneficiary include the duties of skill and care, prudence and diligence. But they could do if statute so provided⁴³ or if a prospective trustee putting forward the draft trust instrument to the settlor is regarded as a fiduciary

⁴³ E.g, South African Trust Property Control Act 1988 s 9

subject to the “no profit” and “no conflict” rules. In *Baskerville v Thurgood*⁴⁴ an exemption clause in a contract between prospective parties found to be in a fiduciary relationship was held by the Court of Appeal of Saskatchewan to be unenforceable by the fiduciary:

“It is inconceivable to me, having regard to the origins essence, and purpose of the concept of fiduciary relation, that it could be otherwise - that the clause could operate in the face of the breach of fiduciary duty which occurred here. It would be altogether offensive to the concept, if not destructive of it, where someone in the position of Mr Thurgood is able to hide behind such a clause in such a contract in such circumstances...”

6.0 OTHER CONSIDERATIONS

6.1 In considering whether it is appropriate for some restriction on the freedom of a settlor to create a trust in such terms as he thinks appropriate, there are other factors to take into account.

Trustee as Beneficiary

6.2 Allusion has already been made⁴⁵ to those English cases which treat remuneration clauses as effectively gifts to trustees. One could take the same view in relation to an exemption clause, as amounting to a gift to the trustee of the cost of insuring against the risk, the saving of money also counting as a benefit for the purpose of unjust enrichment principles⁴⁶. The rules of undue influence and unconscionability in the creation of a trust instrument may also have a role to play in special circumstances. Moreover, the English rules on the strict construction of exemption clauses against those who seek to rely on them is well-established also in the trusts context⁴⁷. A further

⁴⁴ (1992) 100 Sask R 214

⁴⁵ See footnote 38

⁴⁶ *Herman v Smith* (1984) 34 Alta LR (2nd) 90

⁴⁷ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, 536-537, *Bogg v Raper* [1998] Times 22 April, *Wight v Olswang* [1998] Times 17 September

factor is that certain legal professional rules or ethics, at any rate in the past, were said to prohibit, or at least discourage, the drawing of trust instruments in which a professional trustee could take the benefit of an exemption clause. Even today, senior experienced trusts draftsmen still regard it as somewhat going against the grain to include an exemption clause protecting professional trustees as a matter of course⁴⁸. At the very least, if they were instructed to draw such a clause they would write an advice which specifically pointed it out and its effect. (It has to be said that younger draftsmen do not all take the same view. The ethics are changing.)

Power of the Court to Relieve

6.3 There is also the existence of the jurisdiction of the court in section 61 of the Trustee Act 1925 to consider. Under that section

“If it appears to the court that a trustee... is or may be personally liable for any breach of trust... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same”.

Some commentators⁴⁹ consider that this, bar a little fine tuning, is all that is needed. However, it has to be borne in mind that the courts have expressed themselves as unlikely to apply that provision in favour of a professional, paid trustee⁵⁰. Furthermore, a discretionary power of the court to relieve is inherently uncertain, and leads to more litigation: better a fixed standard⁵¹.

⁴⁸ See Kessler (1998) 6 PTPR 137, 141-142, and in his book Drafting Trusts and Will Trusts (4th ed) pp 61-63; also Robert Ham QC in (1995) 9 Trust LJ 25

⁴⁹ Kessler, first *loc cit*, 142-143

⁵⁰ *National Trustee Co of Australasia v General Finance Co Ltd* [1905] AC 373, 381, *Re Pauling's Settlement* [1964] Ch 303, 339

⁵¹ See page 24-25 below

Reluctance to take on Trusteeship?

6.4 A further point to take into account is, or may be, the practical consequences of including or not including an exemption clause in a trust instrument. One argument commonly met with in practice for including an exemption clause is that, without such a clause, it may be difficult or even impossible to obtain a professional trustee in due course to become trustee of the trust. It is difficult to know how much weight to accord that argument. It is undermined by the experience of offshore jurisdictions whose trust laws contain restrictions on how far liability can be limited. For example, trustees in Jersey or in the Turks & Caicos Islands do not refuse to take on Jersey trusts or Turks & Caicos Trusts, and instead insist on having their trusts governed by (say) the law of the Cayman Islands or the law of England. Perhaps it is more to do with simply ensuring a level playing field, ie that there is an exemption to the maximum amount permitted by law, but if that is not very much, well then everyone is in the same boat.

Contribution

6.5 A further consideration is the question of contribution, for example where a beneficiary sues a negligent trustee, and the trustee brings in as a third party a professional adviser. Section 2(3) of the Civil Liability (Contribution) Act 1978 states:

“Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to:-

(a) any limit imposed by or under any enactment **or by any agreement** made before the damage occurred ...

the person from whom the contribution is sought shall not by virtue of any contribution

awarded under section 1 above be required to pay in respect of the damage a greater sum than the amount of those damages as so limited or reduced.”

6.6 Suppose trustee T commits a negligent breach of trust, contributed to (but not wholly caused) by the negligent advice of solicitor S. Beneficiary B sues T for breach of trust. T brings in S for a contribution. The trust instrument contains an enforceable exemption clause, protecting the trustee from liability for the breach of trust. Is that trust provision “any agreement”? If it is, it is taken into account, and hence S will be protected even though an independent action by T against S on behalf of the trust would have succeeded, but if the provision does not amount to “any agreement”, it must be ignored so S will not be protected. Presumably, the latter is intended, but the law may need clarifying.

Excluding Duties

6.7 Having so far only considered clauses which exempt from liability for breach of duty, one must consider the question of how far clauses should be allowed to exclude duties altogether. The difficulty is to establish which duties should be capable of being excluded, and which should not. In *Armitage v Nurse*, as has already been mentioned, Millett LJ said that the only duties that were fundamental were those of honesty and loyalty. But even these terms are sufficiently vague to make it difficult to say with precision in any particular case whether or not a particular duty which might be considered ripe for exclusion did or did not infringe those general principles⁵². This problem is considered further below.

Special Cases

6.8 Lastly, there is the question of special cases. Should exceptions be made for special cases such as trusts for the mentally handicapped or charitable trusts (where the Charities Acts 1992 and 1993

⁵² Compare s 3(2)(b)(i) of the Unfair Contract Terms Act 1977, preventing a party by reference to any contract term from claiming to be entitled to render a contractual performance “substantially different from that which was expected of him”

in imposing duties on trustees may deter persons from acting as trustees), or where the trustees are particular categories of person such as trust corporations or individuals paid for acting as trustees? Some regulatory regimes do in fact draw a distinction in such cases. The Unfair Contract Terms Act and the Unfair Terms in Consumer Contracts Regulations particularly distinguish between consumer contracts and business contracts. The IMRO rules prohibit exemption clauses where the customer is a 'private' investor, as opposed to a 'professional' or 'business' investor.

7.0 SUGGESTIONS OF POSSIBLE REFORMS

Simple Rule

7.1 At one extreme one could have a fairly simple rule, as in Jersey or Guernsey, or as in the Financial Services Act. It would be a provision that would affect all trusts and trustees falling within the scope of the provision. The more general the provision, the less distinction being made between different classes of trust or different classes of trustee, then the easier and cheaper it is to administer, though the more broadly it attaches. Thus, for example, in 1984 the Ontario Law Reform Committee recommended that no term of a trust

“should be valid to the extent that it purports to exonerate trustees from liability for failure to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person”.

Sophisticated Regime

7.2 At the other extreme, one could have a very sophisticated system which effectively gave enormous discretion to the court to strike down an exemption clause if it felt in all the circumstances that the clause was unfair, taking into account such factors as the identity of the trustee, whether he is paid or unpaid, the nature of the trust (including the identity of the beneficiaries) the value of the trust property, whether the clause purports to exclude duties or just liabilities, whether there is a monetary cap on liability which is reasonable in all the circumstances, whether insurance is available at reasonable cost, whether the settlor was offered different options, and so on⁵³. The problem with such a sophisticated system is that it is not only complex to operate and therefore puts up the cost, it also requires every case to be argued because professionals will not be able to advise in advance what will be the result of the application. In this respect it rather

⁵³ E.g. G McCormack [1998] Conv 100, 114

resembles section 61 of the Trustee Act 1925⁵⁴, and therefore if this were the preferred approach, it might be better to strike down *all* exemption clauses (even those exempting strict liability only) so that all cases are catered for by section 61 (perhaps as amended).

Extra Formality

7.3 Yet another approach might be not so much to prohibit exemption clauses or clauses excluding duties in any or all circumstances, but merely to require special formality or support for them to become valid and effective. For example, there could be rules requiring a settlor in all cases to sign a form that (as ought to be done under the current law where the trustee has prepared the trust instrument) he had executed the trust instrument after his attention had been drawn to the exemption clause and its effect had been explained to him; or there could be rules for not permitting such clauses to be valid unless the settlor was offered an alternative option which did not include the clause in question (but perhaps at a higher rate of remuneration). This would do far less violence to the principle of freedom of action for property owners, and would go some way towards protecting the settlor from being bamboozled into agreeing to something he does not really understand. But it would do nothing to protect beneficiaries in the event that the settlor really did know what he was doing and decided deliberately that he wanted the beneficiaries to have limited rights. (Of course, this may not be unacceptable in itself.)

Excluding Duties but not Liabilities

7.4 A further possibility would be to permit the exclusion of certain duties in the trust instrument but not permit any exclusion of liability. Thus, the only way in which liability could be excluded would be upfront by an express exclusion of a specified duty in the first place. The difficulties with this are first, how to choose the duties in question, and second, that it may produce too rigid a system, in that although in today's society certain duties might well be rightly excluded, there is no

⁵⁴ See para 6.3 above

saying that tomorrow's society may not be different and thus require the law to be changed in every generation.

Our Current Preference

7.5 Our current preference would be for a relatively rigid rule - therefore less costly and difficult to operate - which, nonetheless, incorporated some elements to meet concerns which have been expressed about professional trustees.

7.6 **First**, we would of course retain the existing rule concerning liability for dishonest breach of trust (which extends to loss caused by reckless indifference to one's responsibilities as trustee). Such liability cannot be excluded as *Armitage v Nurse* reveals, so that a statutory provision to such effect seems unnecessary (unless a codified provision is favoured).

7.7 **Second**, we would favour a statutory provision to the effect that

a trustee remunerated for his services as trustee (but not an executor-trustee who received a legacy as a token of the testator's affection or esteem, being of a significant lesser value than the amount of remuneration that might reasonably be expected to be paid for the services as executor-trustee) may not rely on an exemption clause excluding liability for breach of trust arising from negligence.

7.8 A key issue is whether the appropriate level should be negligence or gross negligence. There is much to be said for trust corporations and professional individuals paid for their services as trustees, (like solicitors, barristers and accountants) to accept the price of liability for negligence in acting as a paid trustee and to insure against such risk, with the premiums being reflected in the fees for the services provided. After all, solicitors, barristers, accountants and doctors proud of their expertise accept liability for negligence in exercising their professions and insure against such risk. However, one can understand that, in these litigious times, a professional trustee will prefer only to be liable for gross negligence (and dishonesty) so that there is a certain amount of "clear water" between the

trustee and any disgruntled beneficiary: it is easy to sue in respect of a mistake which arguably amounts to negligence where one could not sue if having to prove gross negligence. Nevertheless, if a professional trustee were taken to task by a prospective settlor-client over the inconsistency between emphasising the high quality of its expertise and yet requiring exemption from liability for negligence, would not the trustee abandon requiring such exemption? Therefore, our provisional view is to outlaw exclusion of liability for negligence whether ordinary or gross.

7.9 If consultees favour only outlawing exclusion of liability for gross negligence, we believe it sensible, as in other jurisdictions, to leave “gross negligence” undefined, leaving it to the court to develop its meaning in relation to the merits of particular cases. However, a further point arises from a professional trustee having to exercise the special care and skill that it (or he or she) professes to have⁵⁵, and not just the care and skill of the ordinary prudent business person expected of unpaid trustees. Some may therefore consider it better to add a proviso to our provision, “provided that the mere failure of such a trustee to exercise the care and skill required of an unremunerated trustee shall not of itself amount to gross negligence [and shall not displace the onus of proof upon a beneficiary to prove that the trustee was guilty of gross negligence] **OR** [but shall raise a presumption of gross negligence that the trustee shall need to rebut]”. We seek guidance here if consultees prefer the appropriate level to be gross negligence rather than, merely, negligence.

7.10 Our provision would cover only remunerated trustees. Unremunerated trustees would be free to rely on exemption clauses to exclude liability up to, but not including, dishonest breach of trust⁵⁶. After all, if trustees are unpaid, it does not seem reasonable to expect them to have to pay for insurance cover. Our provision would not cover services provided to a trustee by a third party

⁵⁵ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, 534, *Re Waterman's* [1952] 2 All ER 1054

⁵⁶ The Ontario Law Reform Committee (1984) took a different view:

“A professional trustee should be carrying insurance, and a non-professional trustee who is sufficiently unsure of his competence to require such safeguards should not accept the office”.

under an agreement containing an exemption clause (because the trustee is not relying on it vis-à-vis the beneficiaries), nor non-trustee services provided by a trustee to himself (because, insofar as those services are charged for, they are not charged for *as trustee* but as third party professional). The phrase ‘exemption clause’ could be defined as it is in, for example, the Pensions Act 1995, s 33(2) (dealing with exemption clauses in certain pension trusts):

“In this section, references to excluding or restricting liability include -

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; or
- (c) excluding or restricting rules of evidence or procedure”⁵⁷.

7.11 **Third**, if thought desirable to prohibit clauses excluding duties (and so ousting any liabilities for breach of duties), it may be possible to mirror the prohibition on clauses exempting liability for breach of duty in some such formula as the following:

a provision in a trust purporting, whether wholly or partly, to negative a positive duty that in the absence of such provision would otherwise lie on the trustee is void to the extent that such trustee could not rely on an exemption clause purporting to relieve from liability for breach of such duty.

7.12 It will be seen that that simply refers to attempts to exclude *positive* duties. The point of doing this is an attempt to reduce as far as possible the area of settlor freedom of action with which it is

⁵⁷ This in fact tracks almost word for word UCTA 1977, s 13(1) (another example of trusts following the contractual example)

necessary, in the public interest, to interfere. This would for example cover the case of the duty of the trustee to supervise a company in which the trust had a shareholding or a trustee with no *duty* to sell an ancestral home (cf the Trusts of Land and Appointment of Trustees Act 1996, s 4), but who nonetheless retained a duty to consider whether or not to sell. An attempt to exclude the duty to consider sale would fall within the scope of this provision.

7.13 But what about an attempt to exclude *negative* duties, eg not to invest other than as authorised by the Trustee Investment Act 1961, by enlarging the powers of trustees? Suppose a power to invest in “quadratic bonds”, which would otherwise be an unauthorised and therefore unlawful investment. It seems that no provision equivalent to that for positive duties is needed in relation to such exclusion of negative duties, because the effect of such an exclusion would be to permit something to be done which would otherwise automatically be a breach of trust, and it will still have to be judged whether it was indeed an appropriate exercise of such power in all the circumstances for the trustee to do what is being considered. In other words, a power to do a thing is not a power to do it badly. If it is done badly, then there will be liability for breach of trust.

7.14 The definition of ‘positive’ is however problematic. In the law of restrictive covenants, case law has fairly satisfactorily distinguished positive covenants (whose burden will not be transmitted) from negative ones (whose burden will), but trustee duties are often more nebulous, and most of them can be expressed in either a positive or a negative form. A duty to take reasonable care to preserve the trust property can be rephrased as a duty not to be negligent, for example. If the positive/negative distinction is acceptable in substance, but regarded as unsatisfactory as a potential draftsman’s loophole, at least two other means of distinguishing duties exist. One would be a list enumerating the duties which were subject to the rule. However, it would seem better to define duties in terms of their effect on the trustees. If negating the duty concerned left the trustee with a *power* to do the action if he chose with liability if exercise of such a power contravened the trustee’s

duty of care, then the restriction would not apply. Thus one should add a proviso:

providing that if negating a particular duty affords the trustee power to take particular action then this prohibition shall not apply.

7.15 *Upon reflection, we doubt the utility of such a complex prohibition.* The circumstances of each trust can be so various that what normally cannot be justified can be justified in special circumstances. A settlor with £10 million spare may wish his trustees to speculate with the money as if they were speculating on their own beneficial behalf and could afford to lose all the capital without it affecting their standard of living. A settlor, who or whose son is managing director of a company, and who transfers 99% of the shares to trustees, may not wish the trustees to be under any duty to diversify investments or to monitor or intervene in the affairs of the company while he or his son is managing director.

7.16 When such specific duties are being excluded, they have to be excluded expressly on the face of the trust instrument and the settlor will need to be put clearly in the picture so as to appreciate what is being done. The attraction of the trust concept is its flexibility so that it is malleable enough to be adapted to an infinite variety of circumstances. Thus consultees' guidance is welcomed.

7.17 **Fourth**, in the light of circumstances appearing from the last two paragraphs, some may consider it unacceptable that a settlor, on proper and independent advice as to the effect of what he proposes to do, cannot restrict his trustees' liability (fraud apart) as he thinks fit.

7.18 To deal with this, one could provide:

“The above provisions shall not apply to any provision in a trust where it is proved that before the creation of the trust the settlor was given advice in writing, by a person reasonably competent in drafting trust documentation, and independent of the proposed trustee of the trust, drawing the settlor's attention to the scope and effect of the provision concerned”.

7.19 This, although making the creation of a trust more expensive, would permit the strong-minded settlor to achieve his own object, without the risk that the case is one of a settlor who did not really understand or appreciate the extent of the trust's terms. Indeed, if this facility is to be provided, some may consider that the exemption clause provisions should extend to *all* trustees, professional or non-professional. On that basis, all trustees would be able to rely on exemption clauses, but only if they proved prior written advice to the settlor.

7.20 Finally, should the suggested prohibitory provisions only apply to trusts governed by English law or should they extend to regulating trustees subject to the jurisdiction of the English courts by making the provisions apply to such trustees irrespective of the law governing the trusts that they manage; for, otherwise, the new provisions could easily be avoided? There seems much to be said for such extension but we welcome the views of consultees eg, as to whether or not it would be sensible to restrict such extension to trustees carrying on their trusteeship services in England.

8.0 CONCLUSION

8.1 Overall our present view is that it is not justified to leave the law in its present state. Our provisional preference is to stipulate that a trustee remunerated for his services as trustee cannot rely on an exemption clause excluding liability for negligence (and worse), at all events where the trustee cannot prove that prior independent advice was given to the settlor. Our proposals are prospective only so as only to affect trusts arising after the statute comes into force: trustees of wills executed before then can always refuse to take on the trusteeship if worried over loss of their exemption from liability for negligence.

8.2 Please provide us with further guidance by filling in the following questionnaire; the more responses we receive, the greater the validity of the Report we will produce.

QUESTIONNAIRE

1 Do you regard the current legal position as satisfactory?

No ☐

Yes ☐ because

IF NOT SATISFACTORY:-

2 Should statute prohibit a person paid for services as trustee from relying on a clause exempting the trustee from liability for breach of trust arising from (a) gross negligence or (b) as we provisionally favour (para 7.8), negligence?

(a) ☐ or (b) ☐

If Yes to 2(a):-

Should gross negligence (para 7.9) (a) be left undefined or should there be (b) a proviso that the mere failure of such a paid trustee to exercise the care and skill required of an unpaid trustee shall not of itself amount to gross negligence [and (i) shall not displace the onus of proof upon a beneficiary to prove that the trustee was guilty of gross negligence] or [(ii) but shall raise a presumption of gross negligence that the trustee shall need to rebut]

(a) ☐ or (b) ☐ (i) ☐ or (ii) ☐

3 Should such prohibition extend to unpaid trustees (para 7.10) and relate to (a) gross negligence or (b) negligence?

No ☐

Yes ☐ (a) ☐ or (b) ☐

4 Should exceptional treatment apply to any special type of trust (para 6.8) eg, for disabled persons or for charity?

No ☐

Yes ☐ in the case of

because

5 Although we do not provisionally favour this (para 7.15), should statute (para 7.11-7.14) extend the prohibition in 2 above to prevent reliance upon a clause excluding a positive duty that a trustee would otherwise be subject to, except where such negating of a duty affords the trustee power to take particular action (because improper exercise of such power will result in liability for breach of trust, which cannot be ousted owing to 2 above)?

No ☐

Yes ☐

6 The prohibition in 5 above should not apply where it is proved that before creation of the trust the settlor was given advice in writing by a person reasonably competent in drafting trust documentation and independent of the proposed trustee of the trust, drawing the settlor's attention to the scope and effect of the provision concerned.

Inapplicable due to "no" to 5 ☐ or No ☐

Yes ☐

7 Indeed, the prohibition in 2 above should not apply in the circumstances detailed in 6 above (para 7.17-7.18).

Inapplicable due to "No" to 2 ☐ or No ☐

Yes ☐

8 Should the prohibition apply (para 7.20) (a) only to trusts governed by English law or extend (b) to all trustees subject to the jurisdiction of the English courts?

(a) ☐

(b) ☐

(c) ☐ a restricted version of (b) viz.

9 Should s. 2(3) Civil Liability (Contribution) Act 1978 be clarified restrictively (para 6.6) so that a trust instrument is not “any agreement”?

Yes ☐

No ☐

10 On prospectivity (para 8.1), any new statutory provisions should apply only to trusts taking effect after the statute comes into force, testamentary trusts taking effect at the testator’s death, so that it is not the date of executing the will that is the crucial date. Do you agree?

Yes ☐

No ☐

11 Please add any further comments that may assist.