

### 8.5.1 The validity of exclusion of liability clauses under case law

#### *The trustees' right to exclude their liabilities by express provision in the trust instrument*

The trustees' liability for breach of trust may be excluded completely or limited by an express provision to that effect in the trust instrument.<sup>1</sup> Such exclusion of liability provisions take effect as equitable provisions and not as contractual provisions.<sup>2</sup> A number of different expressions are used in this context to describe effectively the same material. Strictly, "exclusion of liability" clauses seek completely to prevent the trustees from liability for any breach of trust; whereas "limitation of liability" or "exemption of liability" clauses usually seek only to prevent trustees from being liable for breach of trust for particular acts or omissions. Commonly, however, all of these terms are used as though they are synonymous and concerned with attempting to limit the liability of trustees for breach of trust for identified categories of behaviour, such as negligence or carelessness or mistake. There are also clauses which seek to exclude the trustees' liabilities by extending their powers such that anything which might otherwise be a breach of trust falls under the trustees' impliedly extended powers so as not to constitute a breach of trust at all. Similar in effect are "duty modification" clauses which alter the extent of the trustees' duties so as to effectively exclude liability for breach of trust. In this discussion the term "exclusion of liability" clause shall be used to refer to all of these intentions, except where the context requires otherwise.

Technically it is the settlor who provides for the trustees' exclusion of their liabilities when the settlor creates the trust instrument and declares the trust. However, in practice it will be professional trustees who will either be solicitors responsible for drafting the trust instrument who will therefore include an exclusion of liability provision in that instrument, or else they will insist that whoever does draft the trust instrument includes such an exclusion of liability provision.<sup>3</sup> Therefore, while the settlor technically grants this immunity from liability for breach of trust to the trustees, in practice it is more likely to be the trustees themselves who ensure that it happens and who dictate the terms on which it takes effect.

Trustees are permitted therefore to elude liability for breach of trust if there is a provision in the trust instrument which excludes their liability for the particular type of breach which is complained of. Liability for breach of trust, as described in chapter 18 in detail, may otherwise arise on breach of an express provision of the trust instrument, or on breach of some provision of the Trustee Act 2000, or on breach of some obligation imposed by the case law, as discussed generally in this chapter 8 and in chapter 9. It is the trust instrument which must exclude liability for breach of trust for present purposes, as opposed to the various defences to actions of breach of trust which excuse liability as opposed to preventing it arising in the first place. Thus, by way of example, liability based on a negligent breach of trust will only be excluded if the trust instrument is drafted so as to exclude liability for negligent acts by the trustees.

#### *The decision in Armitage v Nurse*

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<sup>1</sup> *Armitage v Nurse* [1998] Ch 241; *Taylor v Midland Bank Trust Co* (2000) 2 ITELR 439; *Bogg v Raper* (1998) *The Times*, 22 April; *Wight v Olswang* (1999) *The Times*, 18 May. This approach has also been followed in pensions law, with the following cases all concerned with the interpretation of trustee exemption provisions: *Elliott v Pensions Ombudsman* [1998] OPLR 21; *Woodland-Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch), [2003] Ch 115; *Seifert v Pensions Ombudsman* [1997] 4 All ER 947; *Duckitt v Pensions Ombudsman* [2000] OPLR 167; *Alexander Forbes Trustee Services Ltd v Halliwell* [2003] EWHC 1685 (Ch), [2003] Pens LR 269.

<sup>2</sup> *Re Duke of Norfolk Settlement Trusts* [1982] Ch 61, 77.

<sup>3</sup> See, however, *Bogg v Raper* (1998/99) 1 ITELR 267, 281 – a case in which the trustees were permitted to rely on the exclusion clause which they had drafted. See also Law Commission, "Trustee Exemption Clauses" (2006), para 2.13.

The leading case in this area is the decision of the Court of Appeal in *Armitage v Nurse*<sup>4</sup> which held that a clause excluding a trustee's personal liability in all situations, including loss caused by the trustee's own gross negligence, except in cases of the trustee's own dishonesty, would be valid. Consequently, that trustee would not have been held liable for breach of trust even if he had caused loss to the beneficiaries through his own grossly negligent breach of trust. In that case the claimant was a beneficiary under a trust which held agricultural land among the trust property. The trustees of that settlement were also directors of a company which farmed the land which was held on trust. The value of the land had fallen substantially in value, it was alleged, on the basis of the negligence of the trustees in their management of it. The trustees, therefore, sought to rely on their exclusion of liability clause to prevent any liability for breach of trust on grounds of this alleged negligence. The Court of Appeal held that the trustees could rely on the exclusion of liability clause. The exclusion of liability clause in that settlement provided that no trustee would be liable for any loss or damage caused to the trust fund unless it was caused by any trustee's "own actual fraud". It was held that this exclusion clause would be effective even where it purported to limit that trustee's liability for gross negligence. Millett LJ held that it was permissible for a trustee to exclude her liability for all defaults including gross negligence, except that a trustee could not exclude her own liability for breach of trust if that breach of trust was caused by her own fraud or dishonesty. Earlier authorities which had suggested that gross negligence could not be excused were not followed.<sup>5</sup> On the *Armitage v Nurse* approach to this area of law, a trustee exemption clause will be effective in relation to the matters for which it seeks to exclude the trustee's liability for breach of trust, in the words of Millett LJ,<sup>6</sup> "no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he had not acted dishonestly".

#### *Interpretation of the trust instrument*

It was held in *Armitage v Nurse* that the older case of *Wilkins v Hogg*<sup>7</sup> enabled a settlor to limit the liabilities of her trustees if she so wished and provided that such an intention to exclude the trustees' liabilities was set out in the trust instrument.<sup>8</sup> The exclusion of liability clause will be given its natural meaning but the settlor's intention to exclude the trustees' liabilities must be plain.<sup>9</sup> The court's role when faced with an exclusion clause is that the court

'must construe the words of the exemption clause in light of the conduct complained and decide whether liability has been excluded by the terms of the clause. In carrying out this exercise the clause must be construed fairly according to the natural meaning of the words used.'

Therefore, a trustee will not necessarily have her liabilities for breach of trust excluded entirely, unless the appropriate clause in the trust instrument envisaged the exemption of liability for the particular fault complained of.

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<sup>4</sup> [1998] Ch 241.

<sup>5</sup> See *Pass v Dundas* (1880) 43 LT 665, as held by Millett LJ at [1998] Ch 241, 256..

<sup>6</sup> Followed in *Barracough v Mell* [2005] EWHC 3387 (Ch), [2006] WTLR 203, [90].

<sup>7</sup> (1861) 31 LJ Ch 41.

<sup>8</sup> *Armitage v Nurse* [1998] Ch 241, 255, where it was required that the settlor make her intention plain.

<sup>9</sup> *Armitage v Nurse* [1998] Ch 241, 255. See also *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1996] PLR 179, 192; *Bogg v Raper* (1998/99) 1 ITELR 267, 280; *Wight v Olswang (No 2)* (1999/2000) 2 ITELR 689 on this point.

### *Dishonesty*

The question of what constitutes “dishonesty” is complex in this context. The meaning of “dishonesty” in relation to the law on dishonest assistance is considered in detail in section 20.2. In relation to liability for breach of trust, the Court of Appeal in *Walker v Stones*<sup>10</sup> was asked to consider whether or not a solicitor had been dishonest. The question arose whether or not a solicitor could be dishonest if he did not subjectively appreciate that he was being dishonest because he believed that he was acting in the best interests of the trust. It was held by Nourse LJ that a solicitor could not escape a finding of dishonesty in this fashion if no reasonable solicitor acting as trustee would have considered it to be honest to act in that way. In *Armitage v Nurse*, Millett LJ held that “actual fraud”, as described in the trust instrument in that case, meant simply “dishonesty”.<sup>11</sup> Where trustees will be liable for breach of trust if they act dishonestly, then the appropriate test for identifying dishonesty here has been held by Millett LJ to require

... at the minimum an intention of 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.<sup>12</sup>

This subjective approach to dishonesty, based on the defendant’s knowledge, is at odds with the objective test for dishonesty set out in *Royal Brunei Airlines v Tan*<sup>13</sup> as considered in Chapter 20 in relation to dishonest assistance.<sup>14</sup>

*An intentional breach of trust is not necessarily a dishonest breach of trust*

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<sup>10</sup> [2001] QB 902.

<sup>11</sup> [1998] Ch 241, 251.

<sup>12</sup> This approach is followed in *Gwembe Valley Development Co v Koshy* [2004] 1 BCLC 131, 170; *Newgate Stud Company v Penfold* [2004] EWHC 2993, [249], per David Richards J. Cf *Isaac v Isaac* [2004] All ER (D) 71.

<sup>13</sup> [1995] 2 AC 378.

<sup>14</sup> See section 20.2 generally.

It has been held that an intentional breach of trust is not necessarily a dishonest breach of trust.<sup>15</sup> The clearest example of this initially surprising proposition is that in which a trustee deliberately embarks on a course of action which she knows to be in breach of trust but which she genuinely believes will be in the best interests of the beneficiaries ultimately.<sup>16</sup> This would still be a breach of trust but it would not be dishonest. Consequently, if the trustee's liability were excluded by a provision in the trust instrument, which nevertheless did not exclude liability for dishonesty, then that trustee could rely upon that exclusion of liability clause even if her breach of trust had been deliberate because it would not necessarily be dishonest. So, in *Woodland-Ferrari v UCL Group Retirement Benefits Scheme*<sup>17</sup> two trustees of a pension fund were removed from office having committed breaches of trust which caused the trust a shortfall in excess of £870,000. The trustees claimed to be entitled to rely on an exclusion of liability clause contained in the trust instrument. The question arose as to whether or not there had been a "fraudulent breach of trust" for the purposes of s281 of the Insolvency Act 1986. It was found that the word "fraudulent" in this context would require "dishonesty". Not enough had been pleaded in detail before the Pensions Ombudsman to disclose a finding of dishonesty, nor even of wilful default. On the facts it was found that even though the trustees had caused the trust assets to be invested in investments in which they also had interests, nevertheless it had not been proven that there had been anything "dishonest" about their breach of trust on the facts. The test for "dishonesty" combined references to *Armitage v Nurse* and *Walker v Stones*. Consequently, the finding of the Pensions Ombudsman that a statutory demand be levied against the trustees was to be set aside because a "fraudulent breach of trust" had not been proved on the facts. What emerges from this case, nevertheless, is the proposition that a "deliberate breach of trust" is not necessarily a "fraudulent" nor a "dishonest" breach of trust, relying on *Armitage v Nurse*.

#### *Cases after Armitage v Nurse*

The *Armitage v Nurse* approach has been approved in four subsequent cases. First, in *Bogg v Raper*<sup>18</sup> the Court of Appeal considered a claim that trustees had failed to exercise sufficient control over the trust property which comprised a controlling shareholding in a private limited company. In such circumstances trustees would ordinarily be required to ensure that they exercised sufficient scrutiny of the company's activities because the shareholding grants them control enough to do so. The trust instrument, however, excluded the trustees' liability for "any loss" provided that they acted in good faith. The court held that the exclusion of liability clause meant that the trustees bore no liability for breach of trust in this context. The Court of Appeal also rejected an argument to the effect that the trustees, being the solicitors and accountants to the trust, should not be permitted to rely on language in the trust instrument which they had drafted and included. It was held that this was not a benefit conferred on the trustees but rather simply defined the extent of their liabilities.<sup>19</sup>

<sup>15</sup> *Armitage v Nurse* [1998] Ch 241, 250; *Taylor v Midland Bank Trust Co Ltd* Unreported, 21 July 1999, per Ratte J in the Court of Appeal; *Woodland-Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354, [2003] Ch 115.

<sup>16</sup> This was the example used by Millett LJ in *Armitage v Nurse* [1998] Ch 241, 250.

<sup>17</sup> [2002] EWHC 1354, [2003] Ch 115.

<sup>18</sup> (1998/99) 1 ITCLR 267.

<sup>19</sup> It has been suggested that, not only did this confer a benefit by permitting the trustees to exclude themselves from liability in a manner which they had engineered in advance, but also that this constituted a benefit in that it saved the trustees the insurance premiums necessary to protect themselves against liability otherwise: see Hayton & Mitchell, 2005, 9-311.

Secondly, *Wight v Olswang (No2)*<sup>20</sup> followed the underlying principle in *Armitage v Nurse* in theory. However on the facts of that case there were two clauses which were contradictory. One of those clauses purported to exclude the trustees' liabilities for breach of trust, whereas the other did not. It was held that the trustees could not rely on the purported exemption of liability provision because it was not clear that it disclosed an intention on the part of the settlor, when read with the other clause, to exclude their liabilities in the manner for which they contended.

Thirdly, in *Barraclough v Mell*<sup>21</sup> there was a clause in a will trust which provided that the trustee's liability for breach of trust was to be excluded "unless the same shall have happened through his own personal act done by him either with the knowledge that it was wrongful or without any belief that it was rightful and not caring whether or not it was wrongful". This case therefore addresses a lacuna in the law as described by Millett LJ in *Armitage v Nurse*. Strictly speaking, on the basis that Millett LJ in *Armitage v Nurse* permitted exclusion of liability for negligence but not for dishonesty, it was therefore unclear whether or not a breach of trust caused by the trustee's own recklessness – falling somewhere between gross negligence and dishonesty, it is suggested – could be excluded by an exclusion of liability clause in the trust instrument. This exemption of liability provision in *Barraclough v Mell* considers just such a provision based on recklessness in that the trustee need not care whether or not the breach was wrongful. Judge Behrens QC appeared to accept that this provision would be enforceable, without any point being taken on whether or not recklessness should be considered to fall on the permissible or impermissible exemption clause side of the line. Instead Judge Behrens QC proceeded on the evidence to consider whether or not the trustee had acted wrongfully in making payments out of the trust fund which she was not authorised to make under the terms of the trust. It was found that she had not known of the wrongfulness of her actions and that she had acted immediately to seek to recover the money when the true nature of her actions was brought to her attention: therefore, it was found that she was entitled to rely on the exclusion of liability provision and so was not liable for breach of trust.

Fourthly, in *Baker v JE Clark & Co (Transport) UK Ltd*<sup>22</sup> a widow brought a claim against a trustee of a company pension scheme for failing to make a payment out of the trust after her husband, who was an employee of the company, had died. The trust instrument contained an exclusion of liability provision to the effect that:

"None of the trustees shall be liable for the consequence of any mistake or forgetfulness ... or for breach of duty or trust whatsoever, whether by commission or omission unless it shall be proved to be made, given, done or omitted in personal conscious or bad faith of the trustees or any of them".

Thus, the exclusion of the trustees' liability was intended to be total, except for breaches committed knowingly in bad faith. On the facts it was not proved that the trustee had acted in bad faith. Therefore, the trustee was entitled to rely on the exemption clause and therefore bore no liability for breach of trust. The trustee had not brought the exemption of liability clause to the attention of the beneficiaries when they had contributed to the pension fund (as settlors, therefore) but that was not considered by the Court of Appeal to be any objection to the effectiveness of the exemption of liability clause.<sup>23</sup>

### *The nature of trustees' obligations if they may be limited by exclusion clauses*

<sup>20</sup> (1999/2000) 2 ITEL 689.

<sup>21</sup> [2005] EWHC 3387 (Ch), [2006] WTLR 203.

<sup>22</sup> [2006] EWCA Civ 464.

<sup>23</sup> A further point was alluded to by Tuckey LJ, which impacts on the discussion at para 21.2.4 concerning the overlap between contract law and trusts law which, by extrapolation, suggests that even if a trust were to be interpreted as being based on the principles of contract law then trustee exemption clauses required by the trustees could be ineffective by dint of the Unfair Contract Terms Act 1977.



Trustees' exclusion of liability clauses raise important questions as to the nature of the obligations of a trustee in general terms. There are two ostensibly competing lines of authority. The first line of authority, in short, holds that any express provision in a trust deed, or some collateral contract, which purports to limit the liability of the trustees will be given full force and effect by the courts.<sup>24</sup> The most important recent case in this line is that of *Armitage v Nurse*<sup>25</sup> (decided before the enactment of the Trustee Act 2000<sup>26</sup>) In explaining the limit of the trustee's obligations, Millett LJ had the following to say:

[T]here 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 trust. 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 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 ... a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.

His lordship acknowledged the notion that there is a minimum content beneath which the office held is not the office of a trustee. Nevertheless, a trustee who excludes her liability for all loss caused by breach of trust (except losses caused by her own actual fraud) will not be subject to any liability for breach of trust. Thus, while it is accepted that one does not have an arrangement which can properly be defined as being a trust if the obligations imposed on the fiduciary are too slight, almost all of the liabilities ordinarily associated with being a trustee can be excluded. The question of course remains: what is the minimum content beneath which one will not be trustee at all? Denying the existence of any duty of care and skill is at odds the general duty of care provided in s 1(1) of the Trustee Act 2000 (enacted after the decision of the Court of Appeal in *Armitage v Nurse*) which requires that a trustee "must exercise such care and skill as is reasonable in the circumstances", thus imposing a partial duty to take care and to exercise skill if that provision is not expressly excluded in the trust instrument. Nevertheless, the approach of the court in *Armitage v Nurse* was to pitch that minimum content at merely requiring the trustee to act honestly; the court would have held differently if the trustees had acted dishonestly or fraudulently because in such a situation the exclusion clause would have had no effect. To demonstrate that there has been fraud would be difficult to prove in a situation in which the trustee did not take any direct, personal benefit.<sup>27</sup> The duties of acting honestly and in good faith are seemingly not capable of being excluded. By way of further example, the trustees' duty to account<sup>28</sup> to the beneficiaries cannot be excluded by the trust instrument because it is one of the core obligations of trusteeship.<sup>29</sup>

The test for dishonesty which was applied by Millett LJ required that

... at the minimum an intention of 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.<sup>30</sup>

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<sup>24</sup> *Armitage v Nurse* [1998] Ch 241; *Taylor v Midland Bank Trust Co* (2000) 2 ITELR 439; *Bogg v Raper* (1998) *The Times*, 22 April; *Wight v Olswang* (1999) *The Times*, 18 May.

<sup>25</sup> [1998] Ch 241, [1997] 2 All ER 705: adopting the language of DJ Hayton.

<sup>26</sup> Considered in para 9.3 below.

<sup>27</sup> This issue is considered at para 9.3.7 below in relation to investment of trust funds.

<sup>28</sup> As considered in para 8.4.8 above. See GW Thomas and AS Hudson, 2004, 358, para 10.130.

<sup>29</sup> *Armitage v Nurse* [1998] Ch 241, 253, per Millett LJ.

<sup>30</sup> This approach is followed in *Gwembe Valley Development Co v Koshy* [2004] 1 BCLC 131, 170; *Newgate Stud Company v Penfold* [2004] EWHC 2993, [249], per David Richards J. Cf *Isaac v Isaac* [2004] All ER (D) 71.

This is, it is suggested, a predominantly subjective approach to dishonesty, being based on the defendant's knowledge, is at odds with the objective test for dishonesty set out in *Royal Brunei Airlines v Tan*<sup>31</sup> as considered in Chapter 20.<sup>32</sup>

Nevertheless, in general terms, to find that the office of trusteeship equates to a requirement merely of acting honestly and of rendering accounts does not appear to make the office of trustee different in quality from many other, non-fiduciary relationships. Millett LJ even adopted the words of Sir Nathaniel Lindley MR to the effect that as 'my old master, the late Selwyn LJ, used to say "The main duty of a trustee is to commit judicious breaches of trust"'.<sup>33</sup> The effect of these dicta is that the trustees' duties are not to avoid breaches of trust but rather a trustee will still be obeying the letter of the law in performing her duties if she only commits breaches of trust which are permitted within the precise terms of her trusteeship. In truth, what the Court of Appeal was doing in *Armitage v. Nurse* was recognising the preference for professional trustees to be able to restrict their liabilities by means of contract. The exclusion clause in that case was upheld as being valid because to have done otherwise might be to rob professional trustees of the protection of wide-ranging exclusion clauses in the future with the result that they may refuse to act. The principal objection to this approach is that the fiduciary nature of the trust relationship is thus transformed into a merely contractual relationship between settlor and trustee. If exclusion clauses can displace many of the trustee's obligations to act in the utmost good faith, not to permit conflicts of interest, and to invest as though managing the property of someone who whom the trustee felt morally bound to provide, then the nature of trusteeship fails to have any particular resonance.

More specifically, the decision in *Walker v Stones*<sup>34</sup> took a subtly but significantly (I would suggest) different tack to the decision in *Armitage v Nurse*. The issue in *Armitage v Nurse*, strictly put, was to decide whether or not the trustees had acted dishonestly within the meaning of the exclusion clause in that case. A similar provision was contained in the trust deed in *Walker v Stones*. The trustees of a discretionary trust in this case, who were solicitors, were exempted from all liability except "wilful fraud or dishonesty". The Court of Appeal in *Walker v Stones* took the view that the proper test to be applied in deciding whether or not a trustee had acted dishonestly was that applied by the Privy Council in *Royal Brunei Airlines v. Tan*<sup>35</sup> to the effect that one should consider whether or not the trustee had acted as an honest trustee would have acted in the circumstances. The consequences of such a test is that the court does not look to see whether or not the trustee has acted deceitfully, but rather considers the objective notion of whether she failed to do what an honest person would have done. This latter, objective approach is far broader than asking the question whether or not the trustee knew that she was being deceitful. In relation specifically to exclusion of liability clauses, the court in *Walker v Stones* was of the view that if the trustee took the view unreasonably that her actions were honest then the exclusion clause could not be relied upon. Therefore, the notion of honesty which was bound up in the precise terms of these particular exclusion clauses is broadened here again to make trustees liable for any breach of their duties which they could not reasonably have considered to be honest exercises of their duties. Consequently, it was not open to the solicitors acting as trustees in that case to argue that they did not realise that their behaviour would have been considered to have been dishonest by an objective person nor that they considered their actions (though objectively dishonest) to have been in the interests of the beneficiaries.

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<sup>31</sup> [1995] 2 AC 378.

<sup>32</sup> See section 20.2 generally.

<sup>33</sup> [1998] Ch 241, 250, [1997] 2 All ER 705, 709, quoting *Perrins v Bellamy* [1899] 1 Ch 797, 798, per Sir Nathaniel Lindley MR.

<sup>34</sup> [2001] QB 902. This case has been doubted in relation to its findings on the issue of reflected loss in *Gardner v Parker* [2004] BCLC 554 in the wake of the decision of the House of Lords in *Johnson v Gore-Wood* [2002] AC 1, [2001] 1 All ER 481, *Giles v Rind* [2002] 4 All

However, the test of dishonesty in *Royal Brunei Airlines v Tan* was purportedly altered significantly by the House of Lords subsequently in *Twinsectra v Yardley*<sup>35</sup> to the effect that one should not simply consider what an honest trustee would have done but rather one should *also* consider whether or not the trustee realised that an honest trustee would have considered her actions to have been dishonest. Even the Court of Appeal in *Abou-Rahmah v Abacha*<sup>37</sup> seemed to accept that the defendant's own knowledge of her dishonesty was required, even though the court was ostensibly rejecting the *Twinsectra* approach.<sup>38</sup> Therefore, a subjective element has since been layered onto this test by the House of Lords with the effect, it is suggested, that the trustee will be able to rely on the exclusion of her liability if she can demonstrate that she did not consider her actions to have been dishonest and provided that she held that belief reasonably. Significantly, even the court in *Walker v Stones* does not find that the very notion of trustees limiting their liabilities could be contrary to the notion of a minimum content of trusteeship but rather accepted that such liability can in principle be limited provided always that the trustee be required to act honestly and provided that the trustee acts reasonably in the belief in the propriety of her actions. Rather trustee exemption clauses can be relied upon by a trustee even if the trustee was the person who drafted that provision, with the effect that the trustee can procure her own freedom from liability,<sup>39</sup> albeit that such provisions may well be construed narrowly.<sup>40</sup> While *Walker v Stones* was a case limited to liability for fraud and dishonesty relating specifically to solicitors acting as trustees, and while *Armitage v Nurse* was a case dealing specifically with liability for gross negligence, there is a clear distinction between these two Courts of Appeal where the former took a strict approach to the liability of trustees in spite of a trustee exemption clause whereas the latter chose to consider the trustees to be excluded from liability to the extent of their exemption clause.<sup>41</sup>

The issue could be considered in the following manner. The trustee would argue that she only agreed to act as a trustee on the basis that her liability was limited to the extent of the exclusion of liability clause. Therefore, the trustee would not be acting in bad conscience by insisting that she should not be liable for any default beyond that specified in the exclusion of liability clause because she did not agree to be bound by anything else. Thus, on the one hand it could be said on behalf of the trustees that they did not agree to act as trustees unless their liabilities were excluded by the trust instrument. Alternatively, it might be said that if someone agrees to act as a trustee then she must be taken to accept the general obligations of good conscience and good management required of a trustee and therefore that to allow extensive exclusion clauses to be effective subverts the necessary stringency of the office of trustee. Thus, on the other hand, it could be argued that acting as a trustee should be deemed necessarily to incorporate a range of obligations which include liability to account for breach of trust which cannot be excluded at all if the obligations which are owed by trustees are to remain special and unique to the particular office of being a trustee. There is no perfect answer to this debate: either the trustees escape liability and impose a loss on the beneficiaries, or the trustees are forced to bear liabilities which they had not agreed to bear.

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ER 977, [2003] 1 BCLC 1.

<sup>35</sup> [1995] 2 AC 378. See now also *Twinsectra v. Yardley* [2002] 2 WLR 802, [2002] 2 All ER 377.

<sup>36</sup> [2002] 2 WLR 802, [2002] 2 All ER 377.

<sup>37</sup> [2006] EWCA Civ 1492.

<sup>38</sup> See the exhaustive discussion of these cases in section 20.2.

<sup>39</sup> *Bogg v. Raper* (1998) *The Times*, 12 April.

<sup>40</sup> *Wight v. Olswang* [2000] WTLR 783.

<sup>41</sup> See Trust Law Committee, *Trustee Exemption Clauses* (Consultation Paper), June 1999, especially paras 3.7 and 8.1.



This issue is considered further in chapter 21 *Commerce, International Trusts Law and Dealing with Property*.<sup>42</sup>

### *Statutory restrictions on limitation of liability*

There are important categories of trustee who are not permitted to exclude their liabilities for breach of trust. The restrictions on exclusion of liability are all provided for by statute as part of public policy. So, pension fund trustees are not permitted to exclude their liabilities;<sup>43</sup> trustees of unit trusts are not permitted to exclude their liabilities;<sup>44</sup> and trustees of debenture trusts are not permitted to exclude their liabilities.<sup>45</sup>

### *The oddity of the commercial trusts*

It seems to me that what Millett LJ was seeking to do in *Armitage v Nurse, inter alia*, was to make the trust more attractive to commercial people. More specifically, it seems that Millett LJ was seeking to make the office of trustee more attractive to commercial, professional people who will wish to act as trustee but who will not want to assume the very broad liabilities which ordinarily come with that office. In consequence, to make trusts law seem commercially astute, Millett LJ held that trustees should be able to restrict their liabilities by insisting on the inclusion of an express provision to that effect in the trust instrument – an approach which was approved of expressly in *Bogg v Raper*, as considered above. However, while the trusts case law is seeking to make itself appear to be more commercial, the most commercial aspects of financial law are moving in the exact opposite direction. As set out in the immediately preceding section there are three categories of trustees, who are involved in the most advanced investment structures in the modern economy, who are not permitted to exclude their liabilities. They are not permitted to exclude their liabilities because public policy recognises that the imposition of stringent fiduciary duties on trustees, including full liability for breach of trust, is essential if those trustees are to be held in check and required to act in the most professional manner possible. This, it is suggested, is a standard of behaviour which should be required of all trustees in all circumstances.

The present organisation of the law on trustee exemption clauses contains one tremendous paradox, namely that the more professional a trustee is, the more like she is to have a term included in the trust instrument which governs her action to exclude her liability when she acts negligently in the discharge of her fiduciary duties; whereas, a non-professional trustee who would probably not know that such a provision could be included in a trust instrument would therefore be held fully liable for breach of trust if he causes some loss to the trust despite never having held herself out as being a professional trustee in the first. Thus, the qualified and experienced professional trustee escapes liability for causing loss completely, whereas the non-qualified and inexperienced trustee will bear full liability. There is something intuitively wrong with that, I would suggest.

### *The Law Commission's reform proposals*

The Law Commission has made proposals for an extra-statutory change to the law dealing with the exclusion of trustees' liabilities in its paper "Trustee Exemption Clauses".<sup>46</sup> The somewhat toothless proposal that was made in this paper was to avoid legislation imposing duties on trustees and instead to rely on a statement of best practice

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<sup>42</sup> Para 22.2.4.

<sup>43</sup> Pensions Act 1995, s 33.

<sup>44</sup> Financial Services and Markets Act 2000, s 253.

<sup>45</sup> Companies Act 2006, s .

<sup>46</sup> Law Commission, *Trustee Exemption Clauses*, Law Com No 301 (Cmd 6874).

whereby professional trustees should be required to bring any exclusion clause to the attention of the settlor and to ensure that the settlor understands its effect, at the time of creating the trust. Thus, a welcome distinction is drawn between professional and non-professional trustees. However, there is no meaningful obligation – certainly no legal obligation – to be placed on trustees to control their use of exclusion clauses.