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Trustees discretion in management powers, breach of exemption clauses and defences available to trustee.

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Abstract

In the administration of trusts the exercise of powers and discretions by trustees is based on the powers vested in the Trustee Act 1925 and 2000. There has been much consideration of this specific aspect of trust law, and in particular the rule as to trustee liability from breach of exemption clauses. The courts have intervened when the trustees have breached their duty and there has been an allegation of fraudulent dealings by the trustee. The dishonesty and fraudulent dealings can be distinguished from honest mistakes and there are various defences for the protection of trustees. Under Limitation Act 1980 the doctrine of laches does not bar a claim by a beneficiary. This paper enquires about the exemption clauses in trusts, distinguishes between an honest mistake from a deliberate act and how the courts have narrowed down the liability to regulate trustee decision-making and the defences available for trustees.

Key words

Fiduciary duty, Management of trusts, Exemption clauses, *Armitage v Nurse* [1998] Ch 24, *Bogg v Raper* (1998/99) 1 ITEL 267; *Re Hastings-Bass* [1975] Ch 25

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Introduction

The trust deeds may contain a variety of clauses intending to protect trustees, including "duty exclusion clauses" (which contain the scope of duties which the trustees would otherwise be in debt of), "extended power clauses" (delegating the trustee powers that would otherwise have been unauthorised, such as investment in depreciating assets), and clauses indemnifying the trustee from the trust fund ("indemnity clauses").² These clauses ensure that provided the trustee acts as a fiduciary, with diligence and within the terms of the authority conferred on him, he is not committing a breach of trust. The exoneration clauses includes liability for a breach of trust because they exempt the trustee from all liability.³ There needs to be an examination of the breach of trust that leads to bankruptcy of the trust and the liability of the trustee.

The trustees have various powers which are given to them by law to administer trusts mainly under the Trustee Act 1925 and the Trustee Act 2000. These are statutory powers by which the trustees have to exercise due care and attention in the relationship between the trustee and beneficiary.⁴ They can delegate their own powers and also exercise a Power of Attorney.⁵ The trustee can delegate the power to apply the income of a trust for the benefit and maintenance of young beneficiaries and to make advances from trust capital.⁶ There is a power of appropriation based on the right of the trustee to draw from an estate the chattels instead of cash in satisfaction of a legacy or an entitlement to the residuary estate. If the asset is worth more than the beneficiary's entitlement then the asset may be sold to the beneficiary.⁷

Under the standard power provided under s41 of the Administration of Estates Act 1925, appropriations can only be made with the consent of the relevant beneficiary and if that

² Trustee Exemption Clauses (Law Com. No. 301), 2.1.

³ Thomas and Hudson, *The Law of Trusts* (2nd Ed.), 21.41.

⁴ Part I (sections 1-2) of the Trustee Act 2000 introduces a new safeguard for beneficiaries in the form of a statutory duty of care which will apply to trustees in the exercise of their new wider powers under the Act. The circumstances in which the duty will apply are listed in Schedule 1.

⁵ Trustee Act 2000. Section 11. Delegation of trustee's functions by power of attorney.

(1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) A delegation under this section—

(a) commences as provided by the instrument creating the power or, if the instrument makes no provision as to the commencement of the delegation, with the date of the execution of the instrument by the donor; and

(b) continues for a period of twelve months or any shorter period provided by the instrument creating the power.

⁶ Under section 25 Trustee Act 1925 a trustee can give a power of attorney for a period of 12 months:

⁷ Under section 32 of Trustee Act 1925 it is possible for trustees to advance capital onto beneficiaries. Unless the Will expressly provides, trustees can only advance half of the beneficiary's share onto them. This is often varied in Wills to allow the entire amount to be advanced on.

beneficiary is a minor then their parent or guardian may accept on their behalf.⁸ In the case of a trust arising from a Will it is the testament which will define how those powers should be increased, varied or restricted. Under Sections 31 and 32 of the Trustee Act 1925 the trustees have the power to expend finances on the trust and remunerate the agent in a prudent manner.⁹ In considering whether a trustee is in breach of trust the court will apply an objective test; what would a reasonably prudent trustee have done in these circumstances.¹⁰

This road map of this paper consists of three parts which are as follows: Part A concerns the management of a trust and exemption clauses that allow the trustees the discretion to act without incurring liability. Part B discusses how the courts interpret the intention of the trustee and if the trustee has caused damage to the beneficiaries interests by deliberate acts as against a mistake. Part C examines the defences available to the trustees to avoid liability to the beneficiaries, overriding of time limits in the insolvency of trust. The issues are dealt within the context of the case law and the decisions of the judges and how they interpret the legislation in order to determine a breach of trust.

1. Exemption clauses and duty of the trustee

The testator upon vesting property in the trust deeds invariably includes a exemption clauses which exclude or restrict liability, except in cases of loss or damage caused by the trustee's own mistake or actual fraud. The exemption clauses are valid and effective to exclude liability for ordinary and gross negligence but they cannot when there has been liability for fraud on the basis that there is an irreducible core obligation binding on trustees to act honestly and in good faith. A trustee, relying upon such an exemption clause, will, therefore, only be liable if he acted fraudulently.

This principle was stated in *Armitage v Nurse*¹¹ where the trust instrument contained what is now a common exemption clause, which stated that:

*"[no] trustee shall be liable for any loss or damage which may happen to [the trust] fund or any part thereof or the income thereof at any time or any cause whatsoever unless such loss or damage shall be caused by his own actual fraud".*¹²

Millet LJ found that a trustee who has a suitably worded exemption clause *can* exempt himself from all liability for breaches arising from any of his actions *except* his own actual fraud or

⁸ Where a beneficiary is a minor (under 18) and not married or is required to attain an age higher than 18 to become entitled to capital left to them in trust then trustees will be obliged to manage the trust funds until they attain the relevant age.

⁹ In *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, it was held there is a general rule that trustees only have power to pay proper costs incident to the execution of the trust. At 1324.

¹⁰ *Wight v Olswang (No 2)* [2000] EWCA Civ 310

¹¹ [1998] Ch 241

¹² Clause 15

dishonesty⁹. Thus, if a trustee has been negligent—even grossly negligent—he will be protected "no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly".¹³ A trustee cannot, however, exclude liability for fraud or wilful wrongdoing. The rationale is that the "irreducible core" of a trust is the trustee's obligation to act honestly in the best interests of the beneficiaries. A trust in which the beneficiaries cannot enforce this obligation is not a trust. However, the irreducible core does not extend to the equitable duty to exercise due care, skill, prudence and diligence in managing trust assets. It was held that the "*duty of the trustees is to perform the trusts honestly and in good faith for the benefit of the beneficiaries which is the minimum necessary to give substance to the trust, but in my opinion it is sufficient*"¹⁰.

Millet LJ held that the word fraud was used "*more widely than its common law sense of dishonesty or conscious wrongdoing [to] include breach of fiduciary duty, fraud on the power, undue influence and unconscionable bargains – the broader concepts known collectively as 'equitable fraud', and in which dishonesty is not a necessary factor*".¹¹ However, an exemption clause could not be relied upon if it was included "*without calling the settlor's attention to it and knowing that the settlor did not realise its effect*".¹⁴ If the testator did not know and approve of the inclusion of the exclusion clause, the trustee may still rely upon the clause. This was an instance of a less stringent approach to the liability of trustees because of a trustee exemption clause excluding liability.

The Law Commission (LC) has stated that while "*it is not possible to assess precisely what the impact of restricting trustees' reliance on exemption clauses would be, we have concluded that there is a significant risk that any such legislation could lead to adverse consequences more damaging than anticipated by the CP. Such impact would be likely to be felt most keenly by beneficiaries, the very group intended to benefit from reform*".¹⁵

The LC has affirmed "*that any statutory prohibition of reliance on trustee exemption clauses would restrict the autonomy of settlors to determine the terms on which they settle assets on trust. This would, in turn, limit the flexibility of the trust and in doing so detract from one of its greatest attractions*".¹⁶ The trustee was exonerated in *Armitage* on the basis that the liability was limited to the exclusion of liability clause and he would not be acting in bad faith by insisting that he should not be liable for any default beyond that specified in the exclusion of liability clause. He had not concurred to accept further liability as trustees unless their liabilities were excluded by the trust instrument.

In pleading exemption clauses the exact scope of these clauses need to specified by the trustees.¹⁷ Irrespective, of these exclusions the courts have a wide discretion to override this requirement

¹³ Para [251]

¹⁴ para. [255])

¹⁵ The Law Commission (LAW COM No 301) Trustee Exemption Clauses, 2006, Executive Summary para 1.10

¹⁶Ibid para 1.11

for beneficiaries where there has been fraudulent dealings. The trustee can be defined as acting fraudulently if he intends to pursue a particular course of action, either knowing that he is committing a breach of duty, or recklessly being careless whether there is a breach of duty.¹⁸ The reckless indifference might encompass wilfully neglecting the obvious facts or wilfully and recklessly failing to make such enquiries as an honest and reasonable man might make.¹⁹

There are exemption clauses included in a trust deed that exclude liability for fraud and the courts apply an objective standard in the case of a breach of trust which is not committed deliberately based on the honesty in dealing with the trust property.²⁰ It may be sufficient if the trustee's conduct is contrary to the normally acceptable standards of honest conduct.²¹ In *Barnes v Tomlinson*²² the following principles were accepted as governing the law which are that it is for the court to determine what are the normally acceptable standards of honest conduct; and(ii) the fact that a defendant genuinely believes that he has not fallen below the normally acceptable standards of honest conduct is irrelevant.²³ There is another perspective which is that the test of dishonesty combines subjective and objective elements.

In *Twinsectra v Yardley*²⁴ the trustee intended to lend money to the beneficiary for the purchase of property without specifying which property. The solicitor acting for the beneficiary had given an undertaking to trustee in the following terms:

*"The loan moneys will be retained by us until such time as they are applied in the acquisition of property on behalf of our client. The loan moneys will be utilised solely for the acquisition of property on behalf of our client and no other purposes".*²⁵ The trustee paid over the loan amount to the solicitor A who then paid it to another solicitor B acting for the trustee. He used the loan for purposes other than the purchase of property".²⁶

¹⁷ "Given the relatively unrestricted nature of trustee exoneration clauses, it can be strongly argued that one of the prime concerns of trust law, namely the protection of the beneficiaries, has weakened over the course of time". Alexandra Usilova, Reliance on a professional trustee: a case for a change to the rule in *Armitage v Nurse Trusts & Trustees*, Volume 22, Issue 8, October 2016, Pages 923–939, <https://doi.org/10.1093/tandt/ttw116>

¹⁸ *Spread Trustee Company Ltd v Hutcheson* [2012] 1 All ER 251 at 251D-E; 252 E-F

¹⁹ *Baden v Societe Generale*[1993] 1 WLR 509, at 575-6

²⁰ *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] WTLR 1453

²¹ paras. [14]-[15]).

²² [2007] WTLR 377

²³ para. [78]

²⁴ [2002] 2 AC 164

²⁵ Para 10

²⁶ Para 11

The trustee claimed that the payment from A to B amounted to a breach of the undertaking and thus a breach of trust in which B had assisted. Lord Hoffman ruled "*The terms of the trust upon which Sims held the money must be found in the undertaking which they gave to Twinsectra as a condition of payment. Clauses 1 and 2 of that undertaking made it clear that the money was not to be at the free disposal of Mr Yardley. Sims were not to part with the money to Mr Yardley or anyone else except for the purpose of enabling him to acquire property*".²⁷

His Lordship stated "*the effect of the undertaking was to provide that the money in the Sims client account should remain Twinsectra's money until such time as it was applied for the acquisition of property in accordance with the undertaking. For example, if Mr Yardley went bankrupt before the money had been so applied, it would not have formed part of his estate, as it would have done if Sims had held it in trust for him absolutely. The undertaking would have ensured that Twinsectra could get it back. It follows that Sims held the money in trust for Twinsectra, but subject to a power to apply it by way of loan to Mr Yardley in accordance with the undertaking*".²⁸

This establishes a principle that the court should not simply consider what an honest trustee would have done, but rather whether or not the trustee realised that an honest trustee would have considered his actions to have been dishonest. The implication is that a subjective element has since been woven into the test of dishonesty with the effect that a trustee will be able to rely on an exemption clause if he can demonstrate that he did not consider his actions to have been dishonest but provided that he held that belief reasonably.

2. Dishonesty and honest mistake

The standard of liability in which the trustee has caused damage to the beneficiaries interests has to be evaluated based on whether it was a deliberate acts or a mistake. The formulation of a clearly drafted exoneration clause is capable of excluding liability for negligence or gross negligence. The clause drafted by solicitor/trustee confers a duty on the trustee to explain the usual terms under which trustees and executors would be appointed and to inform the testator that they would need a wide exemption clause and would not accept office without one. This process would be in circumstances where there is a will or a testament that is being drafted.

In *Bogg v Raper*²⁹ Mr Raper, one of the trustees was the solicitor who had drafted the trust instrument in the form of a will that conveyed property as non lifetime transfer. The trustees were sued under the principles of *Bartlett v Barclays Bank*³⁰ for failure to properly supervise the activities of the underlying business held by the trust. The established grounds were if there is

²⁷ Para 12

²⁸ Para 13

²⁹ (1998/99) 1 ITELR 267

³⁰ In *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* ChD 1980 a claim was made against a trustee for compensation for losses incurred during the administration of the trust. LJ Brightman held "*For a court to order an account by a trustee on the basis of wilful default, and make the defendant liable not only for assets which have come to their hands but also in respect of assets which ought to have come to their hands, the claimant must plead and prove at least one act of wilful default. Higher standards may be expected of professional trustees.*" At 874 .

any uncertainty as to construction, an exoneration clause will be construed restrictively in the manner which is least favourable to the trustee who purports to rely upon it similar to the principle of *contra proferentem*.³¹

The Court of Appeal rejected the argument that this should prevent them from invoking the clause on the basis that they would receive a benefit from infringing their fiduciary duty to the testator. Millett LJ held that an exemption clause in the will did not confer a benefit on the trustees, but simply defined the extent of their liability. "*The Clause 12 had four limbs. It exonerates the trustees from any loss to the estate arising by reason of: (1) any improper investment made in good faith; (2) the negligence or fraud of any agent employed by any of the trustees; (3) any mistake or omission made in good faith; or (4) any other matter or thing except wilful or individual fraud or wrong-doing on the part of the trustee who is sought to be made liable*".³²

Millet LJ stated that "*Unlike a trustee charging clause, it does not enable the executors and trustees to profit from their position; but it protects them from loss thereby. The inclusion of the Clause does not, therefore, conflict with the rule that, in the absence of clear words, a trustee may not profit from his trust*".³³

The benefit conferred could be enjoyed by any person assuming the role of trustee in relation to the trust and was not only for those who had participated in the drafting of the testator's will.³⁴ The court did not regard the solicitor having obtained a benefit in the form of the expense of insurance premiums that would otherwise have been payable to protect him from liability.³⁵ The courts will not accept an exclusion clause that creates an ambiguity or confusion in the minds of the testator and will void that for uncertainty.³⁶

There is no such presumption of knowledge and approval in the case of a lifetime settlement and a trustee, who wishes to take advantage of an exemption clause, for which he was responsible, should have advised the testator of its effect. The trustee exemption clauses can be relied upon by a trustee even if he was the person who drafted that provision, with the effect that the trustee can be exonerated from liability,³⁷ These provisions are stated to be construed narrowly by the courts when the issue arises of a breach of trust.³⁸

³¹ The contra proferentem rule allows a contract clause to be construed against the party that is seeking to rely upon it. However it is only available where an ambiguity remains after application of the accepted principles of contract interpretation: *Metrickon Homes Pty Ltd v Great Lakes Insurance SE* [2017] VSC 749 at [37].

³² Para 33

³³ Para 47

³⁴ Para 48

³⁵ This has been criticised by scholars and practitioners alike. Hayton & Marshall, *The Law of Trusts and Equitable Remedies* (11th ed 2001) para 9-311. See also cases cited at para 9-310: *Baskerville v Thurgood* (1992) 100 Sask LR 214 and *Rutanen v Ballard* (1997) 424 Mass 723, 733.

³⁶ In *Wight v. Olswang* [2000] WTLR 783 the will contained two inconsistent exemption clauses. One was limited in its application to trustees not charging remuneration for acting; the other was not. The Court held that this disparity created an ambiguity and the trustees were not protected from liability by either clause.

³⁷ *Bogg v. Raper* (1998/99) 1 ITELR 267

The mismanagement of trust funds will lead to action by the beneficiary which will lead to the trustee enacting defences available under common law or statute.³⁹ Trustees include express trustees, personal representatives, and trustees holding on implied or constructive trusts. In the case of a beneficiary with only a future interest in the trust property, time will only begin to run from the date when the interest falls in (s. 21(3)). A person interested under a discretionary trust or a power of appointment does not have an interest until the trustees exercise their discretion or appoint property.

In *Walker v Stones*⁴⁰ it was held that the solicitors who are appointed as trustees can commit a breach of the trust if they act dishonestly. The test is based on the subjective evaluation that he was being honest but that there would be a test of reasonableness in the determination of honesty. The trustee may be held to have acted dishonestly if he deliberately commits a breach of trust, e.g. by benefiting non-beneficiaries, even in the belief that he was acting honestly, if that belief is so unreasonable that it is by any objective standard.⁴¹

The impact of the decision is 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*".⁴²

The Court held that the very notion of trustees limiting their liabilities could be contrary to the notion of a minimum duties of trusteeship but also accepted that such liability can in principle be limited. This is contingent upon the trustee acting honestly and provided that the trustee acts reasonably in the belief of acting in good faith of his actions. Therefore, in this instance it was not open to the solicitors acting as trustees to contend that they did not foresee that their actions would have been considered to have been fraudulent by an objective person. Further, they did not consider their actions, which were dishonest to have been in the interests of the beneficiaries.

³⁸ *Wight v. Olswang* [2000] WTLR 783

³⁹ There is "a strong element of strict liability in the sense of liability which is not dependent on showing negligence or unreasonableness on the part of the trustee" See R Ham, "Trustees' Liability" (1995) 9 *Trust Law International* 21. There is statutory protection afforded by s. 61 Trustee Act 1925 in such a situation—but this is extremely rarely used.

⁴⁰ [2001] QB 902

⁴¹ at 939 B-E; 941 C-D).

⁴² Alistair Hudson, *Equity and Trusts*, 7 Edition, 2013, p 419

3. Defences available for breach of trust

The trustee can raise the equitable doctrine of laches in his defence based upon the expiry of the limitation period under the Section 61 of the Limitation Act 1980. This states :

If it appears to the court that a trustee, whether appointed by the court or otherwise, 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 direction of the court in the matter in which he committed such breach, the court may relieve him either wholly or in part from personal liability for the same.

The starting point is six years from the date on which the right of action accrued, i.e. the date of the breach (not the date of the loss). The six year period will not run against a beneficiary whose entitlement is contingent upon attaining a certain age or upon the occurrence of a future event, until the interest has vested.⁴³ If there is dishonesty then under section 21(1) of the Limitation Act 1980 there is no limitation period in respect of any fraud or fraudulent breach of trust, or to recover trust property that the trustee has taken for himself.⁴⁴ However, if there is unreasonable delay on the part of claimant in pursuing the claim and the trustee's position has been prejudiced by that delay, the Courts may not (in the judge's discretion) permit the claim to proceed. The consent of the beneficiaries will also exonerate the trustee and there is a defence to a claim for breach of trust if the claimant beneficiary consented to or concurred with the breach.

In *Re Pauling's Settlement Trusts*⁴⁵ it was held that the trustee will still have a defence if he were to subsequently litigate provided he had the complete information and was aware of his actions in giving consent.⁴⁶ The court has to consider all the circumstances in which the concurrence of the beneficiary was granted in order to evaluate whether it is fair and equitable that he should be entitled to proceed with the claim. It is not necessary for the consenting beneficiary to have benefitted from the breach of trust, although that may be deemed significant.⁴⁷

The relief is also only given when the trustee has been found to be in breach in court which then has to consider exercising its discretion. Even if the trustee has acted in an honest and reasonable way the court may not exercise its discretion, particularly if the trustee is a professional and has been paid for his services.⁴⁸ The trustee must show that he acted both

⁴³ *Armitage v Nurse* [1988] Ch 241, Court of Appeal

⁴⁴ Sec 21 (1) No period of limitation applies to an action by a beneficiary under a trust, being an action:
(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

⁴⁵ [1962] 1 WLR 86; [1964] CH 303

⁴⁶ at 730

⁴⁷ *Fletcher - v - Collis* 1905 2 Ch 24

⁴⁸ *R E Hawlings Settlement Trust* 1964

honestly and reasonably. Usually, on an application under s. 61, there is no issue as to honesty and of greater significance is reasonableness. If the nature of the breach is a failure to act in accordance with the reasonable standard of care to be expected of trustees, it is onerous to satisfy this test.⁴⁹

Section 62 of the Trustee Act 1925 states that "*where a trustee commits a breach of trust at the request in writing of the beneficiary the court has discretion to use the beneficiary's interest in the trust to indemnify the trustee who has committed a breach. Under section 62 it is not necessary to show that the beneficiary actually benefitted from the breach*".

However, the section is of greater relevance in respect of technical breaches of trust, e.g. where the trustees have exceeded their administrative powers, or where there has been a distribution to the wrong beneficiary, on a reasonable misinterpretation of the trust instrument or of the law. It will be more difficult for a paid trustee to satisfy the test of reasonableness and the fact that a lay trustee has acted on legal advice may be significant, but not conclusive.

An example of a case where relief was given is *Re Evans*⁵⁰ where the defendant had distributed her mother's intestate estate to herself on the assumption that her brother, from whom she had not heard for 30 years, was dead. She sought legal advice, and had purchased a missing-beneficiary policy covering about half of the capital value of the estate (which proved insufficient to meet her brother's claim when he reappeared four years later). The court held that she was entitled to partial relief and the defendant's liability was limited to the amount which could be met from a sale of a house forming part of the estate, which was still at her disposal. The estate was relatively small; she was a lay person; she had acted on the advice of her solicitors; and some provision had been made for her brother's potential claims.

The beneficiaries may be able to extend the limitation period if, for instance, there has been "deliberate concealment". In *Cave v Robinson Jarvis & Rolf (a firm)*⁵¹, Lord Millett stated :

*Section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose.*⁵²

In *Williams v Fanshaw Porter & Hazelhurst (a firm)*⁵³ Park J held

⁴⁹ *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515).

⁵⁰ [1999] 2 All ER 777

⁵¹ [2002] UKHL 18, [2002] 2 All ER 641, [2002] 2 WLR 1107

⁵² Para 26

*"There is no duty on trustees to advise beneficiaries that there has been a breach of trust. However, it would deprive the "deliberate concealment" exception of any force if a trustee could plead limitation, where the trustee has consciously decided not to inform beneficiaries of a breach of trust. The trustee should not be able to claim that he was under no duty to advise the beneficiaries of the breach and, therefore, that there is no deliberate concealment".*⁵⁴

It is onerous to rely upon a "mistake" because this has to be a fundamental ingredient of the cause of action. In *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs*⁵⁵ it was held that even a claim that trustees have mistakenly paid money to a non-beneficiary is not grounded on a mistake. The doctrine of mistake has been re formulated as the rule in *Hastings-Bass* which applies to trustees in circumstances where the good faith is not compromised by the bad advice received and is defined as follows :

"Where a trustee is given discretion as to some matter under which he acts in good faith, the court should not interfere with his action, notwithstanding that it does not have the full effect which he intended unless 1) what he has achieved is unauthorised by the power conferred on him or Where he has acted outside of the power conferred on him or 2) it is clear that he would not have acted as he did a) had he not taken into account considerations which he should not have taken into account or b) had he not failed to take account considerations which he ought to have taken into account." (Lord Justice Brown)⁵⁶

This principle was invoked in *Pitt v Holt / Futter v Futter*⁵⁷ when the trustees received incorrect advice on the tax consequences in the exercise a particular discretion. There were two offshore trusts which contained "stockpiled gains" for Capital Gains Tax purposes and the trustee made various distributions to beneficiaries which inadvertently triggered a tax charge. The entitled beneficiaries included the wife who following her husband's road accident (in which he sustained serious head injuries), was appointed as her husband's receiver under Mental Health legislation. She placed his accident compensation into a settlement which led to inheritance tax consequences. When the High Court found in favour of both of the above parties based on the principle in *Hastings-Bass*, the Inland Revenue appealed.

⁵³ [2004] EWCA Civ 157

⁵⁴ para 14(iv)).

⁵⁵ [2010] EWCA Civ 103).

⁵⁶ Re Hastings- Bass [1975] Ch 25

⁵⁷ [2011] EWCA Civ 197

The matter reached the Supreme Court which held that the original decision in *Hastings-Bass* had been misconstrued in subsequent cases. The correct principle was stated as follows by Lord Walker's leading judgment.

*The court must decide whether it would be unjust or unconscionable to leave a mistake uncorrected and look at the whole matter. Whether the transaction should be set aside if there has been a mistake will depend on whether there is a 'causative mistake of sufficient gravity'. This will only be satisfied where there is a mistake as to the law or nature of a transaction on some basic matter of law or fact.*⁵⁸:

The *Hastings Bass* rule has been applied more widely in the occupational pensions cases where there have been unintended consequences of trustee decisions. The appropriate remedy in such circumstances is for the trustees to seek damages against their advisers for negligence as a consequence of the mistake. The practical consequences of trustees making a mistake are difficult to resolve but it is now established that to protect beneficiaries against the improper conduct of trustees the court has imposed a less stringent test on trustees' decision-making duties and removed any form of strict liability on trustees who diligently obtained and implemented competent advice which turned out to be wrong.

Conclusion

The fiduciary duty imposes on trustees both a common law duty of care and a statutory duty to the beneficiary in the manner in which the trust is administered. The common law duty is to take such care as an ordinary prudent man would take if he made an investment for the benefit of other people for whom he felt morally bound to provide. The statutory duty under Section 1 of the Trustee Act 2000 has regard in particular to any special knowledge or experience that a trustee has or if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that occupation.

The modern trust deeds invariably include wide exemption clauses excluding or restricting liability except in cases of loss or damage caused by the trustee's own actual fraud. These exemption clauses are valid and as the ruling in *Armitage v Nurse* established is effective to exclude liability for ordinary and gross negligence. However, they cannot exclude liability for fraud on the basis that there is an obligation on the trustees binding them to act honestly and in good faith.

The present state regarding liability is contained in the *Re Hastings-Bass* rule, which structured the rule within the framework of the relationship between trustees and beneficiaries, and the supervision of the court. This interaction rests on the fiduciary relationship and the best interests

⁵⁸ Para 109

of the trust take precedence over all other considerations. Therefore, even where the trustees commit a breach of duty, the rule in *Hastings-Bass* means their decision is voidable but not automatically void.

If the trustees commit a mistake the true requirement for rescission is that there must be a 'causative mistake of sufficient gravity', which must be assessed by a close examination of the facts. The court must make a judgement based on the facts of the case, about whether it would be unconscionable or unjust to leave a mistake uncorrected. The good faith requirement is crucial and the trustee need to act in the best interests of the beneficiaries in order to avoid liability arising from breach of the trust.