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A legal update from Dechert's Financial Services Group

Recent Developments in the Law Relating to Trustee Exoneration Clauses

Exoneration clauses are used in trustee documentation in order to restrict a trustee's liability for loss or damage to the trust fund. In England, the settled law is that trustees can validly restrict liability for loss or damage which results from their own negligence, and even from their own gross negligence, but cannot restrict liability for loss which is caused by their own fraud or dishonesty. Under Jersey and Guernsey law, trustees are also prohibited from restricting liability for gross negligence.

The benefit of such clauses is that they encourage trustees who would not otherwise be prepared to accept the risky position of trustee to do so, and allow them to make decisions with appropriate speed and without undue caution—in short they provide protection for trustees in an increasingly uncertain and hostile climate. On the other hand, where beneficiaries can prove negligence on the part of the trustees, they will often be left without a remedy.

The recent English case of *Walbrook v Fattal*[1] and the Guernsey case of Spread *Trustee v Hutcheson*[2] (on appeal to the Privy Council) were attacks on standard exoneration clauses and on the relief of professional trustees, and both failed. In this *DechertOnPoint*, these developments are considered in more detail.

Background

It is often said that the role of trustee imposes onerous responsibilities and is not to be undertaken lightly. The fundamental core of trusteeship is to act in good faith and in the best interests of the beneficiaries, within the "four corners" of the trust deed, so trustees may find themselves in breach of trust even if they have done their honest best to carry out their duties but have acted *ultra vires*[3] and accordingly would be liable to their beneficiaries. While trustees are entitled to an indemnity out of the trust fund for costs, liabilities and expenses properly incurred, they are not generally entitled to be excused from the consequences of a breach of trust.

Exoneration clauses were a19th century innovation to protect innocent trustees from liability provided that the trustee had acted in good faith, the House of Lords recognising in 1861[4] that "a testator could define the duty of his trustees, and point out the extent of their liability, and the court could not extend their responsibility"—and that a clause purporting to relieve trustees of liability for failing to perform their duties was not repugnant to the notion of trusteeship.

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1 *Walbrook Trustee (Jersey) Ltd & Ors v Fattal & Ors* [2008] EWCA Civ 427.

2 *Spread Trustee Company Limited v Sarah Ann Hutcheson & Others* [2011] UKPC 13.

3 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.

4 *Wilkins v Hogg* (1861) 5 LT 467

Trust instruments may contain a variety of clauses purporting to protect trustees, including "duty exclusion clauses" (which modify the scope of duties which the trustees would otherwise owe), "extended power clauses" (authorising the trustee to do what would otherwise have been unauthorised, for instance, investment in wasting assets) and clauses indemnifying the trustee from the trust fund ("indemnity clauses")[5]. These clauses ensure that provided the trustee acts honestly, prudently, with care and within the terms of the authority conferred on him, he is not committing a breach—in contrast to exoneration clauses, which excludes liability for a breach of trust[6].

Armitage v Nurse

The case of *Armitage v Nurse*[7] is recognised as the settled law on exoneration clauses. 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"*[8].

Millett 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 dishonesty[9]. 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".

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. "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 trust, but in my opinion it is sufficient"[10].

To show "actual fraud" requires proof of dishonesty; fraud in this context "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". (Thus, Millett LJ declined to construe the word fraud "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]).

Armitage v Nurse thus remains the law, though the finer points were ironed out in subsequent judgements, which limited somewhat the protection offered by such clauses.

Draftsmen Beware

The case of *Bogg v Raper*[12], in which the trustees were sued under the principles of *Bartlett v Barclays Bank*[13] for failure to properly supervise the activities of the underlying business held by the trust, established that where there is 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

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

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

7 [1997] EWCA Civ 1279

8 Usually now the instrument would include the words "or wilful default" at the end.

9 The same rule operates in the Bahamas, although it was reached via the application of contract law: *Roywest Trust v Nova Scotia Trust*. See also Paulo Panico, *International Trust Laws* (New York, 2010, 7.41.

10 For a recent case of honest, but negligent, trustees relying on a suitably worded exoneration clause, see *Re Clapham, Barraclough v Mell* [2006] WTLR 203.

11 Steven Hayes, *Trustee Exoneration Clauses* (Trusts & Trustees, Vol. 17, No, 2, March 2011, 124).

12 *Bogg v Raper* (1998/99) 1 ITLER 267.

13 *Bartlett v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515.

it (analogous to the principle of *contra proferentem*[14]).

In *Wight v Olswang*[15] a trust instrument contained two different exoneration clauses. One of the clauses provided that no trustee would be liable for any loss to the Trust Fund by reason of any action except wilful and individual fraud and wrong doing on the part of the trustee; while a second provided that "no trustee (other than a Trustee charging remuneration for so acting) would be liable for anything save wilful misconduct or wilful breach of trust. Gibson LJ found that the presence of both clauses created ambiguity, and the effect was that the trustees could not rely on either clause to exclude liability for breaches of trust or negligence by a trustee there should be clear and unambiguous words in the settlement.

Settlor Awareness

Nevertheless, a clearly worded exoneration clause is capable of excluding liability for negligence or gross negligence. In *Bogg v Raper*, Mr Raper, one of the trustees, was the solicitor who had drafted the trust instrument. Lord Millett had to rule on whether the solicitor had therefore improperly derived a benefit from his fiduciary position (which would mean that he could not rely on the protection provided by the clause). Lord Millett found that he had not[16]. However, he did take the opportunity to state that the validity of the exoneration clause in an instrument drafted by a solicitor-trustee will depend on whether the settlor has been properly advised as to its effect. "[The trustee] was entitled to tell the Testator that he would himself insist on a wide exemption clause and would not accept office as executor without one; that he would advise [the co-trustee] to the same effect; and that others might well take the same view". For more on this, see below.

Paid Trustees

Millett LJ in *Armitage v Nurse* found that "no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly" the trustee will be protected. The test for "dishonesty" was a subjective one: if the trustees act "in good faith and in the honest belief that they are acting in the interest of the beneficiaries their conduct is not fraudulent". Even if the trustee knew that he was in breach of trust, if he honestly believed that this was in the beneficiaries' interests, he will be protected by an exoneration clause[17].

However, in the case of *Walker v Stones*[18], Slade LJ introduced an objective test for dishonesty where the trustee is paid for his services; the test is whether "the belief, though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor trustee could have thought that what he did... was for the benefit of the beneficiaries". If the trustee committed a breach of trust, believing that he was acting in the best interests of the beneficiaries, but that belief was so unreasonable that no professional could reasonably have held it, the professional trustee can be held to have been acting in a dishonest manner which would take his behaviour outside the scope of the exoneration clause[19].

Concerns

The trust industry has changed markedly since the mid-19th century; there is no doubt that larger, more valuable trusts have become increasingly common, holding complex financial assets, where tax and asset protection loom large in the trustees' minds; and with beneficiaries who are increasingly aware of their rights and prepared to take action against trustees' perceived failings. "[F]rom the perspective of yesterday's understanding of the classic elements of a trust, some mainland trust practice, and to an extent the concept itself in the private client area, has taken on something of a hair-raising character... [20]."

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14 Though, "it should be borne in mind that the trust instrument has been created by the settlor, not by the trustees acting as such. Accordingly, a *strict contra proferentem* approach is not justified: see Law Commission, Law Com No 301, 2.13.

15 (No 2) (1999/2000) 2 ITELR.

16 It has subsequently been pointed out that the solicitor did obtain a benefit—a reduction in the expense of insurance premiums which he would have otherwise paid to protect him from liability—see *Rutanen v Ballard* (1997) 424 Mass 723.

17 *Perrins v Bellamy* [1899] 1 Ch 797.

18 [2000] 4 All ER 412.

19 See also the STEP 2009 Rule of Practice (below).

20 J Glasson, *The International Trust* (2002), 14.4.

Equally, whereas 19th century draftsmen created exoneration clauses to protect lay trustees who nearly always acted without payment out of a sense of duty, many commentators find the idea of a professional services firm, charging fees, which seeks to claim the same protection anomalous. Thus Millett LJ said in *Armitage v Nurse*: "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". Nonetheless, he acknowledged that it was not for him to make new law; and that restraint of the principle that exemption clauses are valid would require Parliament to legislate.

As the Trustee Act 2000 made its way through Parliament, Lord Goodhart Q.C. expressed his concern in the House of Lords that no measures were being introduced to restrict the use of exemption clauses. To this end, the Law Commission was instructed to examine the law on exoneration clauses. The Law Commission's principal proposal[21] was that Parliament should introduce legislation to prevent trustees from exempting themselves from negligence (or gross negligence), while adding that all trustees should be able to purchase indemnity insurance from the trust fund: "there is much to be said for trust corporations and professional individuals paid for their services as trustees ... 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 (like other overheads) 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".

In the end, however, the Law Commission decided against such a solution. The Law Commission's Report[22] concluded, on the basis of responses received during the consultation process, that such a statutory provision would be detrimental to the trusts industry because:

- many trustees would be unwilling to operate on such terms because of the inherently uncertain nature of a trustee's duties[23];
- trustee indemnity insurance costs would rocket, perhaps to prohibitive levels;
- there would be a rise in defensive trusteeship—with a resulting (further) rise in operational costs and delays in the exercise of powers and discretions;
- such a provision might encourage litigation and even the growth of "compensation culture" among beneficiaries, dissipating trust funds;
- fewer professionals and/or organisations would be willing to act as trustees; and
- settlor autonomy would be reduced[24].

Settlor Awareness Revisited

A compromise was reached whereby the Law Commission opted for something far less radical—a recommendation that the Government should promote the adoption by professional and regulatory bodies in the trust industry in England and Wales of a model rule of practice providing that paid trustees or trust draftsmen who propose to include an exoneration clause in a trust instrument should take reasonable steps to ensure that the settlor is aware of the meaning and effect of the clause before execution of the deed[25].

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21 Law Commission, *Trustee Exemption Clauses* (Consultation Paper 171, 2003), at 5.4.

22 Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006).

23 The question as to whether a particular act or omission amounts to a breach of trust may well be much more difficult to determine than whether or not a particular piece of professional advice is wrong or whether lawyers or accountants have otherwise fallen short of the standards expected of them": *The Jersey approach to excluding trustee liability, Trusts and Trustees* 2007 Vol. 13, No. 7.

24 The Law Commission did recognise that in many cases there is not much settlor autonomy—such clauses will often come as a non-negotiable part of a trust deed, buried in the schedule of administrative provisions.

25 A similar conclusion was reached by the Jersey court in *West v Lazard Brothers* [1993] JLR 165. "[The settlor] cannot be bound by the terms of a 'standard form trust' or 'shelf trust' of which he had no knowledge... It may well be that Mr West's advisers failed him. It cannot be the fault of Lazard that Mr West told us that he never fully understood the terms

Nonetheless, some commentators and practitioners remain concerned that the balance is tilted too far towards trustees; that the Law Commission could have done more than introduce "a rule which really does nothing more than require a trustee to explain to a settlor in a little more detail what the settlor is being asked to sign" to overcome "what the Law Commission had previously identified in its consultation paper as a situation which was 'too deferential' to trustees"[26]. This concern is especially relevant where settlors are presented with a standard form trust deed on a "take it or leave it" basis, or where the settlors are anxious simply to achieve a result—setting up a trust—without worrying about what is likely to be perceived as a technicality.

Other Professions

In the meantime, other professions have moved to exclude liability for negligence. However,

- trustees of pension trusts (or their delegates) cannot exclude or restrict liability for breach of any obligation to take care or exercise skill in the performance of any investment function exercisable by them[27];
- unit trust deeds have traditionally sought to exempt the manager or trustee from liability for any failure to exercise due care and diligence in the discharge of functions in respect of the scheme[28];
- any provisions in a trust deed for the issue of debentures or any contract with the holders of debentures secured by a trust deed are void in so far 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[29]; and
- the auditors of a Company cannot be exempted from or indemnified against liability for breach of trust in relation to a company by that company's articles or any contract with that company[30].

Furthermore, while it is of course usual for service providers to modify their liability to their customers —even where those institutions act in fiduciary roles[31] - it has been suggested that the Financial Services Authority in the UK might not look on contractual exoneration provisions kindly and that they may not therefore offer an effective protection in regulated financial transactions[32].

Walbrook v Fattal

Nevertheless, there are no signs, at present, that the courts are willing to restrain the efficacy of exoneration clauses in private trusts. The most recent example of an attack on an exoneration clause in England is *Walbrook v Fattal*. William and Elias Fattal were settlors, protectors and life tenants of two trusts (of which Walbrook Trustee (Jersey) Limited was the trustee) and which held part of the ultimate interest in a London a mixed-use London property. The Fattals claimed that Walbrook had fallen in with David Dangoor, who was involved in the management of the property and who was—in their view, acting against their interests, in his own

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of the trust; it is the fault of Lazard that it took down half a shelf trust without attempting to give Mr West an explanation of the terms of it and (as trustee) to ensure that it confirmed with his wishes".

26 *The Jersey approach to excluding trustee liability, Trusts and Trustees* 2007 Vol. 13, No. 7.

27 s. 33(1) Pensions Act 1995

28 However, s. 253 Financial Services and Markets Act 2000 now prevents the parties from excluding such liability in the case of an authorised unit trust scheme.

29 s. 192(1) Companies Act 1985.

30 s. 310 Companies Act 2006.

31 For a case (an Australian precedent) concerning an engagement letter that successfully modified the fiduciary duties between Citigroup's Investment Banking Division and a sophisticated user of legal services, see *Securities and Investment Commission v Citigroup Global Markets Australia Pty Limited* (CAN 113 114 832) (No. 4) [2007] FCA 963; and "Contracting out of fiduciary relationships in engagement letters: the Citigroup case", Carvalho A., Trusts & Trustees, vol. 14, No. 6, July 2008.

32 Geraint and Thomas, 49.23. It should be noted that the Court of Appeal declined to apply the "reasonableness" test under the Unfair Contract Terms Act 1977 to an exemption clause (in a trust of death-in-service benefits) as a trust is not a contract. In any event, trustee duties are imposed by equity, not common law (*Derrida Baker v JE Clark & Co (Transport) UK Ltd* [2006] EWCA Civ 464).

interest and the interest of beneficiaries of other trusts which also held an interest in the property.

In the deeds creating the Fattal trusts, Walbrook had the benefit of a standard form exoneration clause [33] which read as follows:

> *"In the execution of these trusts no trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by such trustee or by any of the Trustees although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by such trustee or by any of the Trustees or by reason of any other matter or thing except wilful and individual fraud or dishonesty on the part of the trustee who is sought to be made liable".*

Readers will notice some similarity between this exoneration clause and the clause in *Armitage v Nurse* (see above). Therefore, Walbrook applied for summary judgement on the basis that the Fattals had no claim against it unless dishonesty was proved. The Fattals' counter-argument was inventive; they said that the clause should be parsed as follows [34]:

> "*In the execution of these trusts no trustee shall be liable:*
>
> *for loss to the Trust Fund arising by reason of any improper investment made in good faith;*
>
> *for negligence or fraud of any agent employed by the trustee although the employment of such agent was not strictly necessary or expedient;*
>
> *[for loss to the Trust Fund arising] by reason of any mistake or omission made in good faith; and*
>
> *[for loss to the Trust Fund arising] by reason of any other matter or thing except wilful and individual fraud or dishonesty on the part of the trustee who is sought to be made liable".*

The Fattals' argument was that in *Armitage v Nurse*, Millett LJ had stated that the core duties of a trustee were to act "honestly and in good faith"—meaning that the two concepts were distinct and separate; and that a failure to act in good faith is situated on a spectrum between negligence and dishonesty; and, further, that the third limb of the exoneration clause (on their parsing) did not seek to exclude mistakes or omissions made without good faith, and the fourth limb could also not do so (given their analysis of the core obligations of a trustee).

Such a reading would have been surprising—it would have amounted to a major change to the settled law. Lewinson J did not accept the Fattals' parsing, finding instead that an exoneration clause should be read as a whole, and that the wording of the fourth limb "could hardly be wider" so that a trustee's conduct would (as Walbrook maintained) only fall outside if he was guilty of wilful and individual dishonesty. It would appear therefore that even if a trustee is shown to have acted other than in good faith, provided he has not been dishonest, he will be protected.

Lewinson J provided a useful definition of dishonesty in the case of a professional trustee, one must show:

- A deliberate breach of trust;
- Committed by a professional trustee:
  - Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
  - Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
  - Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.

In other words, *Armitage v Nurse* was upheld for English law trusts.

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33 The exoneration clause in question was taken from the *Encyclopaedia of Forms and Precedents* (Lexis Nexis, 5th Ed, 2010, vol. 40(1)) and is similar to the clause in *Bogg v Raper* and *Wight v Olswang*.

34 A similar approach parsing exercise was adopted in *Bogg v Raper* and *Wight v Olswang*.

The Channel Islands

At present, in the common law world the permitted scope of trustee exemption clauses appears to be defined under two different standards. On the one hand, the English rule, as spelt out in *Armitage v Nurse* and followed in a few offshore jurisdictions, allows trustees to be exonerated for a loss occurring to the trust fund in any circumstances except dishonesty, although a higher standard of conduct is required of professional trustees by virtue of a rule of practice. On the other hand, the approach followed in Jersey and the statutes of many, but not all, leading offshore jurisdictions forbids limiting trustees' liability for gross negligence, or for fraud. Both standards coexist across the USA in the trust legislation of different states [35].

Unlike English trustees, Jersey and Guernsey trustees [36] cannot be excused from liability for a breach of trust caused either by their own fraud, wilful misconduct or gross negligence [37] (emphasis added). Gross negligence (which is not a concept recognised by English law) is a serious or flagrant degree of negligence, negligence which goes beyond ordinary negligence —something approaching recklessness [38].

Spread Trustee v Hutcheson

Background

The background to the case is that on 22 April 1989 the Trusts (Guernsey) Law 1989 came into effect, and provided at section 34(7) that:

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

On 19 February 1991, the 1989 Guernsey Law was amended so that section 34(7) then read:

> "*Nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct* ***or gross negligence***" (emphasis added).

The claimants in *Spread Trustee* were discretionary beneficiaries under two settlements of which Spread Trustee Company Limited ("Spread") became the sole trustee. Both settlement deeds contained a clause which purported to exonerate the trustees from all liability for anything except wilful fraud and wrongdoing, including gross negligence. The clause read as follows:

> "*In the execution of the trusts and powers hereof no trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful fraud and wrongdoing on the part of the trustee who is sought to be made liable*".

It was alleged that Spread had committed breaches of trust which amounted to gross negligence, which led to losses to the trust fund which (with interest) amounted to around £53.5 million. Some of these alleged breaches occurred before 19 February 1991, and some after. In other words, some of the breaches occurred before the Trusts (Guernsey) Law 1989 had been amended to prevent trustees exonerating themselves from gross negligence (as above). The court therefore had to determine whether a trust deed could validly exclude liability for gross negligence before 19 February 1991.

The Guernsey court at first instance held that it was not possible as a matter of Guernsey law to exclude liability for gross negligence before 19 February 1991 because of the Guernsey trustee's duty to act with due care and skill (to act *en bon père de famille*): "[a]cting with gross negligence in the discharge of one's duties as a trustee cannot, in my judgement, be compatible with acting *en bon père de famille*". On this analysis, the amendment introduced on 19 February 1991 was declaratory of the law as it already stood.

The Privy Council's Judgement

The case proceeded to the Guernsey court of appeal, and from there to the Board of the Judicial Committee of the Privy Council (which consists of

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35 See Paulo Panico, *International Trust Laws* (New York, 2010), 7.02.

36 Also Scottish trustees, who cannot exclude liability for culpa lata—see, recently, Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd (1989/99) 2 OFLR 227.

37 Article 30(10) of the Trusts (Jersey) Law, ss 39(7) and (8) of the Trusts (Guernsey) Law 2007; *West & Ors v Lazard Bros and Co (Jersey) Limited & anor* [1993] JLR 165; *Midland Bank Trust Co (Jersey) Ltd v Federated Pensions Services* [1995] 1 JLR 352.

38 *Midland Bank Trustees (Jersey) Limited v Federated Pension Services Ltd* [1996] PLR 179.

the Justices of the United Kingdom's Supreme Court). The Privy Council's judgement contains an interesting summary of the sources of Channel Islands' law. **However, the importance of the decision is that the Privy Council signalled its approval of the current law on exoneration clauses as found in *Armitage v Nurse***.

Lord Clark, giving the leading judgement, found that Guernsey trusts law was clearly based on English trusts law. Therefore, in order to determine whether it was possible, before the statutory change in 1991 (noted above), to exclude liability for gross negligence as a matter of *Guernsey* law, it would be necessary to determine whether a trustee could do so as a matter of *English* law.

The Privy Council found (by a majority of 3 to 2) that Millett LJ had been correct in *Armitage v Nurse*; the irreducible core of obligations that a trustee owes does not require a trustee to act without gross negligence. In other words, the current law on exoneration clauses received an endorsement from the Supreme Court. Lord Clark said: "Millett LJ summarised his view as being that [the exoneration clause], which excluded liability for anything other than fraud, 'exempts the trustee from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly'. The Board agrees".

However, the endorsement was not entirely ringing. Some alarm bells were sounded. Lord Kerr and Lady Hale referred to a number of concerns surrounding the decision in *Armitage*, Lord Kerr stating that "[a]lthough no investigation of the public policy arguments was undertaken, it appears that Millett LJ was alive to the opinion that it was less than satisfactory that trustees should be able to escape liability in this way for... he said that 'it must be acknowledged that the view is widely held that these clauses have gone too far, and that the 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".

Conclusions

Millett LJ's reservations about the probity of the wide exoneration clauses which are currently permitted under English law still remain. The dissenting judgements given by Lord Kerr and Lady Hale in the Privy Council may give some cause for alarm to trustees; it is possible that disgruntled beneficiaries may wish to pursue the question as to whether such clauses are repugnant to public policy.

However, *Spread Trustee* and *Walbrook* add to the increasingly long line of precedent confirming the validity of exoneration clauses; and while there does appear to be a case for paid, professional trustees accepting the risk of liability for negligence (or at least gross negligence), there are also compelling reasons for their current protection to continue. It seems unlikely that a common law court will overturn such a line of precedent; and unlikely that Parliament will revisit the question. Exoneration clauses for the time being at least are here to stay.

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This update was written by Martin Day (+44 20 7184 7565); (martin.day@dechert.com) and edited by Richard Frase (+44 20 7184 7692); (richard.frase@dechert.com).

Practice group contacts

For more information, please contact the author, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/financial_services.

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Karen L. Anderberg
London
+44 20 7184 7313
karen.anderberg@dechert.com

Peter D. Astleford
London
+44 20 7184 7860
peter.astleford@dechert.com

Gus Black
London
+44 20 7184 7380
gus.black@dechert.com

Martin Day
London
+44 20 7184 7565
martin.day@dechert.com

Peter Draper
London
+44 20 7184 7614
peter.draper@dechert.com

Richard Frase
London
+44 20 7184 7692
richard.frase@dechert.com

John Gordon
London
+44 20 7184 7524
john.gordon@dechert.com

Andrew Hougie
London
+44 20 7184 7373
andrew.hougie@dechert.com

Stuart Martin
London
+44 20 7184 7542
stuart.martin@dechert.com

James M. Waddington
London
+44 20 7184 7645
james.waddington@dechert.com

Jennifer Wood
London
+44 20 7184 7403
jennifer.wood@dechert.com

www.dechert.com