

Trustee exculpation—the law, the quirks and the business sense

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Abstract

Trustee exculpation clauses: the law as it stands—what duties/liabilities fall outside the standard clause and/or cannot be lawfully excluded: the meaning of ‘wilful default’—how far it extends in practice—the borderline with dishonesty. To what extent can the supine trustee rely on a clause which excepts wilful default? See the *Weaving* decision. Is the ‘wilful default’ standard applied differently depending on remuneration, professional, and business experience? Points arising on fraud or dishonesty. Are wide-form exculpation clauses a bad thing? Special considerations affecting professional trustees: the standards applicable, and whether such clauses relied on by professional trustees bring the trust industry into disrepute. The need to explain the clause to the settlor and solicitors’ potential liability for not doing so.

Introduction

The purpose of this article is twofold: first, to explain briefly the law as it stands on trustee exculpation clauses—we think that there is a little more to it than ‘*exculpation works for everything but fraud and wilful default*’; secondly, to explore a few of the limits and quirks of the present law.

Although the law on this subject has grown out of English case law, its development is now more closely aligned to offshore trust centres such as Cayman and the Channel Islands which are the engine rooms of modern trust law.¹ Amongst the consequences of which to be aware are both the legislative and public policy differences between jurisdictions. One example of a legislative difference is the Guernsey provision limiting the ability to exculpate in new trusts (see *Spread Trustee* discussed below) and the inapplicability of many of the provisions of the Trustee Act 2000.²

We are principally concerned with professional trustees who accept their trusteeships in return for fees. Our view is that their position merits distinct consideration from that of trustees who take on the onerous office of trusteeship without remuneration and usually because of a bond of blood or friendship. There has been some recognition of this in case law, where the Courts appear to recognize that professional trustees should be subject to more demanding standards of conduct; and also in the drafting of trust instruments, where it is not so unusual to find different exculpation clauses applicable to professional and lay trustees.

1. Not the least of the reasons for this has been the impact of UK taxation.

2. Consultation amongst English trust law practitioners has shown that adoption of a similar provision in English law was widely unpopular. Amongst the reasons deduced has been practical problems surrounding legislation of this kind. Curiously, in the most widely form of trust now found in the UK—pension funds—ss 33–34 of the Pensions Act 1995 prohibit trustees of occupational pension schemes from excluding liability for negligence in the exercise of investment functions (save for the acts or defaults of a fund manager). No problems of interpretation or practicality have been encountered.

The law as it stands following *Armitage v Nurse*³ and *Spread Trustees*⁴

The validity of exculpation clauses excluding liability for conduct falling short of fraud or dishonesty is now effectively settled as a matter of English law. In *Spread Trustees*, a Guernsey case in which the clause excluded liability for conduct ‘*except wilful and individual fraud or wrongdoing*’, the question arose whether liability for gross negligence could be excluded before 1989 under Guernsey customary law? Did it follow English or Scots law? The Privy Council held that pre-1989 Guernsey law would have looked at English law.⁵ In *Armitage v Nurse* Millett LJ had held that a clause excluding liability save for actual fraud could exclude liability for

loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or willful he may have been so long as he has not acted dishonestly.⁶

The Privy Council, albeit by a 3-2 majority, held that was correct. The Guernsey Court of Appeal so held in robust terms. This approach seems likely to be followed in the Supreme Court. So liability for gross negligence, and even equitable or constructive fraud not involving actual fraud or dishonesty, may be excluded.

Such a clause can be relied on by a solicitor–trustee who prepares the will or settlement and is responsible for advising the settlor/testator of its inclusion and effect: see *Bogg v Raper*,⁷ holding that it cannot be attacked as an unauthorized benefit—being a limitation of liability rather than a benefit. But if the solicitor-trustee inserts the clause without drawing

attention to it and knowing that the settlor did not realize its effect, he will not be allowed to rely upon it: *Bogg v Raper* at [41]–[53].

Provided that the clause is clear and unambiguous, it is effective: see *Wight v Olswang*⁸ in which the provision was ineffective owing to the co-existence of two contradictory provisions in the trust instrument.

The expression wilful default in the context of an exculpation clause does not extend to want of ordinary prudence. This is in contrast to its meaning in the context of an account ordered on the footing of wilful default where want of ordinary prudence is the test: the trustee is required to account for property which ought with reasonable diligence to have been collected: see *Armitage v Nurse* (Millett LJ at 252C). This knocks on the head criticisms of Maugham J’s statement of the law in *Re Vickery*.⁹

But what wilful default entails, and the meaning of that and other related expressions (other than fraud or dishonesty) still appears less than straightforward in practice.

An exculpation clause typically excludes liability for conduct unless it falls within an exception formulated by reference to fraud, dishonesty, wilful default, wrongdoing, or words of that kind on the part of the individual trustee sought to be made liable.¹⁰ In case-specific terms, the issues are:

- i. As a matter of construction, what does the clause cover and not cover?
- ii. Does the clause cover the alleged conduct or is it within the exception?

That sounds simple, but it is worth looking a little closer at the questions which may arise.

3. [1998] Ch 241.

4. [2011] UKPC 13.

5. In contrast to Scots law—*culpa lata dolo aequiparatur*—and the Guernsey 1990 Law, English law does not recognize the concept of gross negligence.

6. 251G.

7. (1998-99) 1 ITELR 267.

8. (1998-99) 1 ITELR 783, C.A.

9. [1931] 1 Ch 572, 583.

10. See *Lewin on Trusts* (18th Ed) at 39–134 for a helpful discussion of the different limiting words used and their construction.

Does the clause bite at all?

This will still be the first question to ask, if the trustee raises such a defence. There are at least three instances of claims/liabilities to which the clause will not apply. For example:

1. *Self-dealing and voidable transactions.* A trustee is still liable to restore trust property improperly purchased from the trust unless expressly authorized by trust instrument. The typical exculpation clause simply excludes liability on the part of a trustee for loss or damage to trust property. However, the claim against the self-dealing trustee is not for loss, but restoration of trust property (*Armitage v Nurse* per Millett LJ at 253C). By parity of reasoning, other claims exercising proprietary rights or dependent on setting aside voidable transactions will be unlikely to be caught by a typical exculpation clause.
2. *Claim for personal loss.* A beneficiary may in some circumstances be able to make a claim for personal loss as distinct from loss and damage to the trust fund.¹¹ In *Fattal v Walbrook Trustees (Jersey) Ltd.*, the beneficiary sought to get round a broad clause in this way, but failed because in substance the claims were either for compensation for actual loss to the trust fund or for compensation for losses allegedly incurred by him claiming to take action on behalf of the trust fund (or for legal costs of previous proceedings which were irrecoverable for other reasons).
3. *Liability to account.* An exculpation clause cannot, we consider, protect a trustee against a liability to account. Clauses are not usually drafted by reference to obligations to account, but even if one was, we consider that the clause would pro tanto be contrary to public policy: see below. Thus a trustee could not seek to rely on a clause to refuse to provide an account of dealings, or to retain unauthorized remuneration or

unauthorized profits. An alternative explanation which might be advanced as to why the trustee cannot do so, is that it would be fraudulent or dishonest knowingly to take this stance and seek to rely on the clause.

Is the trustee seeking to exclude irreducible core duties or liability therefor?

There are, we consider, irreducible core duties other than the duty to act honestly and in good faith identified by Lord Millett in *Armitage v Nurse*, viz:

- i. The duty to collect in trust property and hold it as a fund separate from the trustee's own property.
- ii. The trustee's duty to account to the beneficiary in respect of the trust property.

Were a clause framed to exclude these duties or liability for breach of such duties, it would seem to us arguable in principle that it would render the trust illusory (to the point that it is not a trust), leaving the trustee free to treat the property as not impressed with a trust. If such a clause would otherwise be effective, it, or the offending part of it (if severable), may be so repugnant to the concept of a trust as to be impeachable as contrary to public policy.

A clause framed to exclude a core duty such as the duty to account, or liability for breach of such duty 'may be so repugnant to the concept of a trust as to be impeachable as contrary to public policy'

So it is at least arguable that the wholly supine trustee may be unable to rely on the clause where he has never even got off the starting blocks in his actions as trustee. If the clause is not invalid, his chances of relying upon it may depend on the scope

11. Where the trust holds shares in a company, the reflective loss principle and its application raises complex issues which we do not cover in this article: see *Lewin* at 39–39 to 43 and *Walker v Stones* [2001] QB 902.

of the words of exception (fraud, wilful default, etc). We return to this below.

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Construction of the exculpation clause

Exculpation clauses are far from standard and vary from the simplest comprising two or three lines¹² through to lengthy clauses which seek to legislate for every micro-detail. Issues regularly arise as to the interpretation of the actual exculpation clause before the court. *Wight v Olswang*, noted above, was one example. Another example of a slightly more detailed clause arose in *Fattal v Walbrook Trustees (Jersey) Ltd*. The clause was:

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

Walbrook, the trustee, successfully argued that the exception governed the whole clause, and the first three limbs were subsets of the fourth. The claimants argued that this made the first three limbs superfluous (which was true); that the words of exception only qualified the fourth limb (as Millett LJ had held of a similar clause in *Bogg v Raper*); and that to make sense of the third limb it must cover ‘mistakes or

omissions’ which were subject to a separate standard of conduct, namely failure to act in good faith, more culpable than negligence but not requiring proof of dishonesty. Reference was made to the expression ‘good faith’ elsewhere in the trust instrument and to Australian authorities indicating that good faith required active conduct. A passive trustee may not have a dishonest state of mind, but in being passive could not claim to have acted in good faith. Lewison J rejected this, holding that the earlier limbs were simply illustrations of the principle followed by general words to ensure nothing had been omitted: the clause was in negative terms (*no trustee shall be liable... unless...*): the trustee could therefore rely on the final limb (‘any other matter or thing’) in the absence of wilful and individual fraud or dishonesty. The decision is surely correct.¹³

Excepted conduct: wilful default compared with fraud/dishonesty

Fraud or dishonesty means something more than wilful default. Although every case of fraud or dishonesty is probably capable of being analysed as one of wilful default, a case of wilful default is not necessarily one of fraud or dishonesty.

A case which illustrates this is *Woodland-Ferrari v UCL Gp RBS*.¹⁴ W a former pension scheme trustee, was held by the Pensions Ombudsman (PO) to have committed breaches of trust in making investments in unquoted companies and dealing with assets as if they were the trustee’s own, without considering the beneficiaries’ interests—in short, a case fairly classified as wilful default. The exculpation clause excepted from its scope wilful default. Ferris J held that the finding of wilful default did not necessarily amount to one of fraud or dishonesty. Thus, arguably at least, the former trustee had been released from this debt in his bankruptcy because the fraud exception did not apply to it. (The lesson must be that if a claimant wishes to assert fraud, it needs to be pleaded.)

12. Eg the trustee shall have no liability for loss or damage to the trust fund except where it has been caused by his own actual fraud or wilful default.

13. It is also consistent with Sir Christopher Slade’s interpretation of a virtually identical provision in *Walker v Stones* [2001] QB 902, 912 at 937G.

14. [2003] Ch 115.

Judicial statements as to the meaning of wilful default in an exoneration clause still give plentiful scope for argument as to the law and its application. Consider the following:

‘conscious that, in doing the act which is complained of or in omitting to the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not’: Maugham J in *re Vickery* at 583, specifically as to the statutory indemnity in S.30 Trustee Act 1925.

Millett LJ’s comments at page 252 as to wilful default in exculpation clauses in the context of *re Vickery* do not add much and, in some respects, we find them a little confusing. The statement *‘It means a deliberate breach of trust’* contrasts with *‘Nothing less than conscious and wilful misconduct is sufficient’* and does not seem entirely apt to capture the trustee who is recklessly indifferent. We yield to none in our respect for Lord Millett, but he would be the first to say that his words are not to be construed as if they were a statute. They are judicial opinions in the light of the facts before the court and the arguments addressed. It is to the rather different problem of the wholly supine trustee to which we now turn.

The supine trustee

The question arises to what extent and for how long a trustee can rely on a clause in circumstances where he either:

- i. takes no action whatsoever to perform his duties; or
- ii. notionally performs his functions in a wholly perfunctory manner, e.g. simply following instructions from a third party and without applying his mind to what he is doing—the ‘nodding dog’.

Common sense, we suggest, requires that a professional trustee should not be able to rely on an exculpation

clause in these circumstances; and that, whilst more latitude may be accorded to the lay trustee, he should not be able to rely on it indefinitely for his own protection.

Wilful default

In *Weaving Macro Fixed Income Ltd v Peterson* (26 August 2011) this issue came before the Grand Court of the Cayman Islands Court in the context of director’s liability.¹⁵ The Macro Fund’s articles provided the directors an indemnity against liability other than any incurred by *‘his own wilful neglect or default’*. The relevant directors were independent, non-executive directors who agreed to act gratuitously (although a fee is usually paid). It was held that the absence of payment did not reduce their duties, but rather supported the case that they never intended to perform them and only acted as a favour to Mr Magnus Peterson, the controlling shareholder. Over a period of some 6 years, the directors did no more than go through the motions of performing their duties: attending board meetings, signing what was put in front of them without enquiry, never applying their minds to what they were doing or asking questions. Essentially they did the bidding of Mr Magnus Peterson: every board meeting took the form of a discussion with him and no one else. There were no agendas. The board minutes were created by him in standard form. Andrew Jones J, sitting as a Judge in the Grand Court’s Financial Services Division, held that there was wilful neglect or default

‘because they consciously chose not to perform their duties to the Macro Fund, or at least not in any meaningful way’.

He continued as follows:

‘Given their business backgrounds and experience, they must have known that the directors of an investment fund whose shares were listed . . . would be expected to act in a businesslike manner.’

15. Whereas the analogy for a different sort of fiduciary is not perfect, it is plainly a very close one.

That indicates that the standard imposed will take account of the actual background and experience of the trustee. The judge went on to conclude that they had subordinated themselves to Magnus Peterson's wishes and would have appreciated their behaviour was wrong had they appreciated that their behaviour was wrong.

On the face of it, this judgment should make alarm bells ring on the desk of any (somnolent or) supine trustee as a signal that he cannot expect to be able to rely on an exculpation clause which excepts wilful default in circumstances where he either does nothing, or just '*follows instructions without enquiry*' over an extended period.

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A few caveats should, however, be sounded:

- i. First, the outcome of an appeal against the decision is still awaited. At the time of writing, our inquiries suggest that judgment was reserved over two years ago. Our views can be no substitute for the decision of the Court of Appeal itself but we do not regard the proposition of law on which Andrew Jones J based himself to be controversial. Indeed, it is no more than the application of conventional English authority. The longer the period of time which passes during which a trustee does nothing other than to sign minutes placed before him without applying his mind to what is occurring, the harder it is for him (a fortiori as a professional) to excuse himself by saying *I was merely negligent and I was not deliberately abstaining from doing my duty*. As to whether the judge's findings

of fact stand up to the prolonged scrutiny of the Court of Appeal, we cannot tell.

- ii. Second, the judge specifically found at para [51] that one failure could not be held to be an error of judgment or negligence, because the director in question later signed minutes which falsely asserted that a meeting had taken place. Insofar as there has been a finding of dishonesty in the case, it may not therefore be as 'pure' a case of wilful default, as distinct from dishonesty, as it appears. That said, the thrust of the findings is that the directors must be treated as having known that their conduct was wrong because of their unthinking conduct and subordination of their wishes to Magnus Peterson.
- iii. Third, it may leave open the extent to which trustees who have no business experience (unlike these directors) might be able to rely on an exculpation clause in such circumstances.

Pleading of wilful default

Wilful default does not, as it formerly did, strictly require particularization as does a plea of fraud.¹⁶ In practice, however, if an unparticularized assertion of conduct amounting to wilful default is met, as it surely would be, by a Request for Further Information, the Court would surely order the information to be provided, and in the last resort strike out the claim if no proper particulars were forthcoming.

Pleading of fraud

The minimum requirement for pleading fraud as described at page 251 of *Armitage v Nurse* is:

an intention... to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent to whether it is contrary to their interests or not

16. CPR 16PD.8.2; contrast former RSCO 18 R.12.

Intentional conduct not enough per se

In English law there must be intention to commit a breach of trust entailing consciousness that it is a breach of trust or at least recklessness as to whether it is: it is not sufficient merely that there is intention to do the act which is a breach of trust. However, the position may be otherwise in other jurisdictions: see for example Jersey Law: *Midland Bank (Jersey) Ltd v Federated Pension Services Ltd*¹⁷ where the exception to an exculpation clause was for a ‘breach of trust knowingly and wilfully committed’ and this was held to cover an intentional act which the trustee did not know to be a breach of trust.

Deliberate breach of trust honestly believed to be in beneficiaries’ interests

Where does the trustee stand who deliberately conducts himself (whether by act or omission) in a way that he knows to be a breach of trust, though honestly believing it to be in the beneficiaries’ best interests? From his own standpoint, the perception may even be that he had a duty so to conduct himself, viz. it being ‘the main duty of a trustee to commit judicious breaches of trust’.¹⁸ Clearly, as Millett LJ confirmed in *Armitage* such conduct is not fraudulent or dishonest, but what if the excepted conduct is ‘wilful default’?

Our tentative view is that such a trustee is seemingly not protected by the exculpation clause, because he knows there is a breach of trust: in which case the trustee who commits the judicious breach of trust will have to seek relief under Section 61 TA 1925 or the equivalent provision in the jurisdiction which governs. The discussion in *Lewin on Trusts* at 39–134 suggests that ‘wilful misconduct’ has a similar

meaning, and that ‘wilful breach’ and ‘wilful wrongdoing’ may have a narrower meaning which might not extend to recklessness. The law is in an unhappy state as it is unlikely that draftsmen had these sorts of possible distinctions in mind, but it reinforces the importance of focusing on the language used. There may, of course, be other references to wilful default or similar expressions in the instrument which assist in construction.

Points arising on fraud or dishonesty

However, several points need to be understood in the context of determining what is honest conduct and whether, on the facts, the trustee can successfully rely on a clause excluding liability for everything short of fraud or dishonesty:

- i. The Court has to determine what are normally acceptable standards of honest conduct: the fact that a trustee genuinely believes he has not fallen below them is irrelevant: *Twinsectra Ltd v Yardley*¹⁹ as explained in *Barlow Clowes International Ltd v Eurotrust International Ltd*.²⁰ A trustee cannot set his own standards.
- ii. The Court in considering honesty has to take account of the trustee’s actual knowledge and state of awareness at the relevant time, not what a reasonable person would have known or understood: *Royal Brunei Airlines v Tan*.²¹
- iii. But the subjective test in (ii) is itself qualified by an objective standard, at least for solicitor and professional trustees. A solicitor-trustee’s belief that he is acting in the interests of the beneficiaries is not honest if, though actually held, it is so unreasonable that no reasonable solicitor-trustee could have thought what he did or agreed to do

17. [1996] PLR 179.

18. The remark was attributed to Selwyn LJ, by Sir Nathaniel Lindley in the course of argument in *Perrins v Bellamy* [1899] 1 Ch 797-8 and cited in *Armitage* at page 251C.

19. [2002] 2 AC 164.

20. [2006] 1 WLR 1476.

21. [1995] 2 AC 378.

was for the benefit of the beneficiaries: *Walker v Stones*.²² In *Fattal v Walbrook* Lewison J adopted this test for professional trustees:

“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”: Armitage 254A.

We suggest this refers to the trustee who has no honest belief that what he is doing will benefit the beneficiaries: it should not mean that a trustee in this category is excluded from relying on the clause merely because he is aware of it and that it may give him protection.

Are such ‘wide form’ exculpation clauses a bad thing?

The answer must depend on the circumstances. We entertain no doubt that exculpation is appropriate in the case of a trustee who is an unremunerated professional taking on the task because of a bond of blood or friendship. For a professional trustee, the following needs consideration:

- i. What is the nature of the trust: for example, if there are difficult and contentious family circumstances, there may be good reason for some degree of exculpation with regard to the exercise of powers other than purely administrative powers such as investment duties and powers. If, however, the trust is straightforward (eg young father contemplating premature death by cancer making clear provision for wife and children from whom he is not estranged), it may be harder to see a justification.
- ii. What is the size of the fund: for small funds, it is doubtful whether a professional trustee would take on a trust without an exculpation clause; for large funds, there will be choice and often real negotiation.
- iii. Who is the trustee: if the trustee is truly a professional trustee rather than an SPV incorporated to act as a trustee of a single family trust, exculpation seems no more appropriate than for a negligent legal adviser.
- iv. What are the settlor’s wishes after receiving independent advice: our own experience is that settlors frequently assert that their attention was not drawn to an exculpation clause or its implications in a lengthy trust instrument. Actually, we know of solicitors who would accept that they do not draw attention to exculpation clauses as being such a standard part of a trust package that it is not necessary to explain them. (*Bogg v Raper* indicates that the solicitor–trustee may be unable to rely on the clause in such circumstances, but surely this disability is limited and cannot extend to innocent co-trustees and any successor trustees, who were not privy to the solicitor–client relationship or aware of the failure.)

The Law Commission in its 2006 Report recognized the distinction between paid and unpaid trustees in its suggested rule at 6.65:

Any paid trustee who causes a settlor to include a clause in a trust instrument which has the effect of excluding or limiting liability for negligence must before the creation of the trust take such steps as are reasonable to ensure that the settlor is aware of the meaning and effect of the clause.

This must in our view be right. In the case of a professional trustee, the clause should always be drawn to the attention of the settlor and explained. The choices should be explained (perhaps greater fees to cover PI insurance). In our view, unless there is something special or unusual, an exculpation clause excluding liability for negligence should not be acceptable to settlors and testators. Cases where such

22. [2001] QB 902, 936-41.

clauses have been accepted, and are then relied on by professional trustees bring the trust industry into disrepute and inhibit settlors, particularly of sizeable trusts, from appointing professional trustees.

As many of you will know STEP has introduced its own practice rule with guidance notes.

There remain serious arguments against legislation to curtail exculpation clauses:

- i. *The infringement of the settlor's autonomy.* This is greatly weakened by the fact that trustees commonly offer 'take-it-or-leave-it' packages. The clause is generally there for this reason not because the settlor has chosen it.
- ii. *Proper protection of trustees.* Examples given by the Chancery Bar Association to the Law Commission were:
 - a. Warring factions. Will trust where testator's widow has life interest with remainder to children of previous marriage. Friction between beneficiaries.
 - b. Shares in private company settled on trust by settlor who wished that they be retained as main trust asset but no clause expressly authorizing the trustees to do so. Exposure from claim for failing to sell and diversify.
 - c. Trust comprising paintings, heirlooms, agricultural land, where there are potential disputes. The settlor may have thought an exemption clause desirable precisely for these reasons. In any event, it is an important protection for the trustee.
- iii. *Cutting down on costs to the trusts:* enabling the trustee to strike out claims, avoid protracted litigation and focus on trust administration.
- iv. *How to distinguish between clauses negating or modifying duties.* Since duties of care can be excluded, restrictions on exculpation clauses would simply lead to broader attempts to exclude the relevant duties. This was a significant factor relied on by the Law Commission (2006 Report) in deciding against recommending legislation.

- v. *Different types of trust.* Trusts range from the family trust to commercial and pension scheme trusts (where employee members are not volunteers as their pension is a form of deferred remuneration). A one-size-fits-all solution is not appropriate. Parliament has recognized this for example by enacting legislation specific to pension schemes in Section 33 of the Pensions Act 1995 precluding the exclusion or restriction of liability for breach of duties of care in investment functions.

Other points which have been advanced include:

- i. the reduction in insurance costs being passed on to the customer; and
- ii. the risk of trustees getting even more defensive if protection is reduced.

These seem weak points.

- iii. Increase of litigation as claims will not be struck out. This is not inherently a bad thing, but can be bad for the trust concerned, as noted above.
- iv. Why should the trustee not be as entitled to negotiate for his own protection as any other provider of services? Partial answers are: (a) because beneficiaries are involved: (b) because it is not just a contractual situation: and (c) because trusteeship is an onerous office.
- v. Perceived risk of business going to other countries: this is unproven, but fear of it may be a factor underlining the generally conservative attitude of the legal profession in this country and the view that legislation restricting such clauses is not desirable.

White v Jones liability of solicitors?

There is a further implication which we can only mention briefly—the possible *White v Jones*²³ liability of solicitors who have not drawn attention to or

23. [1995] 2 AC 207.

sufficiently explained exculpation clauses where settlors would not have accepted them. A settlor would not be in a position to recover because he would on any footing have donated his assets to the trust. But this seems exactly the situation in which beneficiaries might be in a position to recover. It is a moot point

whether, if loss is sustained by the trust, time runs for purposes of the negligence claim from (a) the date of execution of the trust or (b) (as seems cogently arguable) the later date when the loss is sustained in respect of which, but for the exculpation clause, the trust could have been compensated by the trustee.

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