## Trustees' duties: exemptions and exonerations

It is easy to speak indiscriminately about exemption clauses and exoneration clauses but there is a crucial distinction between a trustee being exempted from liability for a breach of duty and a trustee being exonerated from being subject to any such liability.

Trustees who benefited from being exempt from liability for a breach of trust did actually commit a breach of trust, which may affect their reputation and, in some circumstances, could still lead to their removal or to an injunction, as pointed out by Lord Walker in *Futter v HMRC* [2013] UKSC 26 at [89].

However, where an exoneration clause releases or ousts a particular duty, then there can be no breach of duty: an exonerated trustee is an innocent trustee. Moreover, if legislation prevents trustees from escaping liability for gross negligence, a settlor can circumvent this by conferring upon the trustees the benefit of an exoneration clause ousting a particular duty and so ousting any breach of that duty that might otherwise give rise to a negligence liability.

It is common to find in trust deeds either a basic, short exemption clause or a lengthy anti-Bartlett ouster clause, developed as a response to *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515. In line with STEP recommendations and *Bogg v Raper* (1998) 1 ITELR 267*,* the settlor needs to be put fully in the picture. The best way to do this is by a recital of the settlor acknowledging that the trustee would not have accepted the trusteeship but for the protection afforded by the trust instrument having therein the relevant enumerated clauses.

### Broad short exemption clauses

The basic position, as in England and established by Millett LJ (as he then was) in *Armitage v Nurse* [1998] Ch 241, is that settlors in their trust instruments may expressly exempt their trustees from liability for negligent breaches of trust, whether ordinary or gross negligence is involved, but not for dishonest breaches of trust. The duty to act honestly is part of the irreducible core content of trusteeship.

Moreover, as stated in *Armitage* at 251 and glossed by the Court of Appeal in *Walker v Stones* [2001] QB 902 at 939, a trustee, having the benefit of an exemption clause except for his fraudulent conduct, may take a risk by

deliberately committing a breach of trust (eg by indulging in unauthorized conduct) without incurring any liability for fraudulent conduct if honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, subject to the proviso that "the trustee's 'honest belief', though actually held, was not so unreasonable that, by any objective standard, no reasonable trustee" of his standing "could have thought that what he did or agreed to was for the benefit of the beneficiaries." This proviso is now reflected in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391, which, in overruling *R v Ghosh* [1982] QB 1053, establishes that a person's conduct is dishonest if, in the light of his subjective state of knowledge or belief of the facts as found by the court, his conduct was dishonest by the standards of ordinary decent people.

The onus of proof is upon the claimant facing an apparently effective exemption clause to prove that the defendant trustee was dishonest*: Sofer v SwissIndependent Trustees SA* [2019] EWHC 2071 (Ch), [2020] EWCA Civ 699, [20] reversing the High Court but not on this point.

Thus, a trustee should feel well-protected by a short and simple clause, "No Trustee shall be liable for any conduct amounting to a breach of trust or fiduciary duty unless such conduct was personally dishonest."

Where, however, the trust fund is a large one where the trust fund comprises significant controlled shareholdings that would enable the trustee to intervene in the affairs of underlying companies, and where the settlor is requiring the trustee to act in ways that are well beyond the range of normal trustee activities, a trustee is justified in seeking more detailed, more focused protection that will hold his conduct out as innocent conduct. As the price of the trustee potentially exposing itself to huge liabilities for indulging in required speculative conduct the trustee can negotiate so as to obtain protection by way of exoneration or ouster clauses, the more specific the better.

**Broad anti-Bartlett exoneration clauses**

Such clauses were a frightened response to Bartlett *v Barclays's Bank Trust Co Ltd* [1980] Ch 515. The case established that a trustee of a controlled underlying company had a duty to ensure that it was in receipt of an adequate flow of information in time to enable the trustee to use its controlling shareholding to

protect the value of its shareholding. All that the trustee had done was to attend annual meetings and receive the annual reports.

The trustee was held liable for causing a loss of £580,000 by not intervening in a speculative land development opposite the Central Criminal Court at the Old Bailey in London. However, it was allowed to offset a £271,000 gain from a similar breach of trust in respect of a speculative land development in Guildford,

A typical anti-*Bartlett* clause, extended beyond controlling shareholdings, was as follows. "The Trustee shall not be bound or required to interfere in the management or conduct of the affairs or business of any company in which the Trust Fund may be invested (whether or not the Trustee has the control of such company) and so long as the Trustee has no actual knowledge of any fraud or dishonesty on the part of the directors having the management of such company it may leave the same wholly to such directors without being liable for any loss thereby."

What, however, if a beneficiary argued. "OK, you're not bound or required to interfere unless having actual knowledge of dishonesty, but, surely, you have power to intervene, so why should you not be subject to a residual obligation to exercise such power if no reasonable professional trustee could fail to interfere?

This was firmly rejected "as plainly inconsistent with the anti-Bartlett provisions" by the Hong Kong Final Court of Appeal in a judgment in which Lord Neuberger, the then President of the UK Supreme Court participated*: IQEQ (NTC) Trustees Asia (Jersey) Ltd v Arboit and Sutton* [2019] HKFCA 45.

IQEQ concerned a Jersey Trust of an underlying company set up by a husband and wife. The trustee had the widest possible powers of a natural person who beneficially owns the trust assets with an expressly authorized highly aggressive speculative investment policy allowing much leveraging and providing scope for massive gains or massive losses: indeed, the beneficiaries' claims were for over US$58million. Such vulnerability for potentially massive losses led the trustee to negotiate comprehensive exoneration clauses in paras 4 and 5 of the First Schedule to the Trust.

In summary, the clauses stated that the Trustee shall not be under any duty, nor shall it be bound to interfere in the business of the company but shall leave the

management of the company to its directors and officers with no duty to supervise them unless the Trustee has actual knowledge of any dishonesty relating to the business of the company. The Trustee shall not be under any duty to obtain or seek to obtain any information regarding the conduct of the business of the company and shall assume that such information as is supplied to it by any person relating to the company is accurate and truthful unless the Trustee has actual knowledge to the contrary, and the Trustee shall not be under any duty to take any steps to ascertain whether or not the information is accurate and truthful.

These clauses that negated or ousted the above duties were held to mean what they said and could not be disapplied by some implied clause to the effect "unless, in all the circumstances no reasonable professional trustee should accept that its power to intervene has been ousted."

This would wholly undermine the protection negotiated by the trustee as the fundamental basis for agreeing to take on the burdens of an exceptional trusteeship. The co-settlors had determined the extent of their bounty, conferring upon the beneficiaries the hopes of benefiting from massive gains but balanced by the burden of possibly suffering great losses that would be irrecoverable from the trustee.

A trustee cannot evade the core obligation to intervene if having actual knowledge of dishonest conduct in the affairs of a trust

To determine whether X has actual knowledge you first look at X's subjective state of knowledge or belief of the facts, then whether objectively X's conduct was honest or dishonest according to the standards of ordinary decent people: *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2021] EWCA Civ 535, [2021] 1 WLR 3507.

"Actual knowledge" includes "blind-eye" knowledge, which requires two conditions to be satisfied: (i) the existence of a suspicion that certain facts may exist (ii) a conscious decision to refrain from taking any steps to confirm their existence. However, as the Master of the Rolls further stated at [41], "The suspicion in question must be firmly grounded and targeted on specific facts and the deliberate decision not to ask questions must be a decision to avoid obtaining

confirmation of facts in whose existence the individual has good reason to believe."

To establish "blind-eye" knowledge of a defendant company, the Master of the Rolls held at [42] "It was not possible to aggregate two innocent minds to make a dishonest whole." He endorsed Nugee J, who had held in the court below [2020] EWHC 2232 (Ch) at [50] "It is not possible to make out a case of fraud against a person or a corporate entity by saying that where thee are two agents , or an agent and a principal , one of the two knew something and the other of the two knew something else and if you put them together and the same knowledge was held by the same person there would have been a knowing fraud or dishonesty."

**Specific ouster clauses for circumstances of particular trusts**

Commonly, there will be found clauses expressly authorizing a trustee to act despite a conflict of personal interest and fiduciary duty. Such a clause may even authorize a trustee to benefit himself where he is one of the discretionary objects of a power, as in *Re Beatty's WT* [1990] 3 All ER 844 at 846. As recently pointed out, however, in *Grand View Private Trust Co Ltd v Wen-Young Wong* [2022] UKPC 47 there remains the inexcludable fiduciary duty of a trustee not to exercise a power for an improper purpose perverse to any sensible expectation of the settlor (the "proper purposes" doctrine, formerly called the "fraud on a power" doctrine). Thus, a trustee as one of many objects of a discretionary power would not be able to appoint the whole capital to himself unless the trust instrument indicated that the settlor contemplated such a possibility.

There may also be a provision authorizing a trustee of a discretionary trust when exercising his discretionary power to make distributions of capital or income amongst objects of the power, to make a distribution to any object without the need first to consider the merits of claims of any other object, so ousting the basic duty of a trustee to be fully informed of relevant matters.

The trustee's personal duty to manage the trust fund and distribute income and capital can be ousted by permitting delegation of these functions or be restricted by requiring the consent of some designated person(s).

Fundamentally, however, there is an irreducible obligatory core content of a trust that cannot be ousted. As Millett LJ stated in *Armitage v Nurse* [1998] Ch 241 at

253, “There is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust . If the beneficiaries haver no enforceable rights against the trustees, there are no trusts.” The beneficiaries are entitled as of right to a court order that the trustee produces accounts detailing what the trustee has done in the course of the trusteeship. This is, as Lord Millett pointed out in *Libertarian Investments Ltd v Hall [*2013] HKFCA 93, “the first step in a process which enables [a beneficiary] to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good.”

These beneficiary’s rights cannot be ousted whether directly or indirectly by requiring the written consent of the settlor or another designated person before the beneficiary can take any action.

**Conclusion**

A trustee negotiating with a prospective settlor has plenty of opportunities to minimize its exposure to liabilities and so keep its insurance premiums at a reasonable level and so also its fees.

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