[2011] UKPC 13
Privy Council Appeal No 0007 of 2010

JUDGMENT

Spread Trustee Company Limited (Appellant) *v* Sarah Ann Hutcheson & Others (Respondent)

From the Court of Appeal of Guernsey

before

Lady Hale
Lord Mance
Lord Kerr
Lord Clarke
Sir Robin Auld

JUDGMENT DELIVERED BY
Lord Clarke
ON

15 June 2011

Heard on 13 - 14 December 2010

Appellant	*Respondent*
Phillip Jones QC	Robert Hildyard QC
Jonathan Harris	John Stephens
David Johnston QC	
Simon Howitt	
(Instructed by Mayer Brown International LLP)	(Instructed by Harcus Sinclair)

LORD CLARKE:

Introduction

1. This is the judgment of the Board with which Lord Mance and Sir Robin Auld have agreed but to which they have added concurring judgments, with which I agree.

2. On 22 April 1989 there came into force in Guernsey the Trusts (Guernsey) Law 1989 ("the 1989 Law"), which for the first time made statutory provision for Guernsey trusts. It provided by section 34(7):

> "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."

Subsection (7) was amended by section 1(f) of the Trusts (Amendment) (Guernsey) Law 1990 ("the Amendment Law") by the addition of the words "or gross negligence" at the end. The Amendment Law came into force on 19 February 1991.

3. In the proceedings which have given rise to this appeal the respondents ("the beneficiaries") claim damages for breaches of trust in connection with two settlements made in November 1977. The claims are made against the appellant trustee company ("the trustee"), which is a professional trustee and was appointed as the sole trustee of the settlements on 10 July 1990. The beneficiaries allege that the trustee failed to identify and investigate breaches of trust on the part of previous trustees, some of which occurred before 22 April 1989 and some between 22 April 1989 and 10 July 1990. It appears that these allegations involve or may involve the question whether there were such breaches of trust on the part of the previous trustees. Some of the breaches of trust alleged directly against the trustee occurred between 10 July 1990 and 18 February 1991 and some occurred thereafter. The total claim is now just under £53.5m together with interest. It is not

necessary to investigate the facts relevant to either liability or quantum in order to resolve the issues in this appeal.

4. Two issues were ordered to be tried as preliminary issues, which were somewhat inelegantly framed as follows:

> i) whether the inability of the terms of a trust to relieve a trustee of liability for a breach of trust arising from his own gross negligence applies to breaches of trust occurring prior to 19 February 1991; and
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> ii) if it does, whether it applies to breaches of trust occurring prior to 22 April 1989.

5. Each of the settlements contained an exclusion or exoneration clause in these terms:

> "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 and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable."

The beneficiaries allege breaches of trust resulting, inter alia, from acts of gross negligence.

6. The preliminary issues were first heard and determined by Lieutenant Bailiff Sir de Vic Carey. He answered both preliminary issues in the affirmative. The trustee appealed to the Court of Appeal in Guernsey. The Court of Appeal, comprising Mr John Martin QC, Mr Geoffrey Vos QC and Ms Clare Montgomery QC, dismissed the appeal and refused permission to appeal to the Privy Council. Permission was however subsequently granted by the Judicial Committee.

First instance

7. Before the Lieutenant Bailiff it was common ground that, before the 1989 Law came into force, the law of Guernsey permitted a trust instrument

to exclude liability for negligence or gross negligence but not liability for fraud or wilful misconduct. The issue between the parties was whether the Amendment Law was retrospective in effect so as to preclude the trustee from relying on the clauses as exonerating gross negligence in respect of any breaches of trust which had occurred before 19 February 1991 when the Amendment Law came into force. The beneficiaries argued that the legislation applied retrospectively to all such breaches of trust. The trustee argued that it did not.

8. The Lieutenant Bailiff answered both preliminary issues in the affirmative, but he did so on the basis of his own analysis of the position, which can be summarised in this way. Section 18(1) of the 1989 Law provides:

> "(1) A trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille."

That provision is declaratory of the existing law. Before 1989 the responsibility of a paid trustee could not have been less than that of a person appointed by the court as tuteur or guardian of a minor. He then quoted at para 57 of his judgment an extract from the judgment of de Sausmarez B in the matter of *Count Lothair Blucher von Wahlstatt* in 1928, as translated in Dawes' "Laws of Guernsey" at p 124. The extract included this:

> "They (Tuteurs)
>
> … have the duty to oversee the maintenance, welfare and education of the said minors, according to their station, and full power and authority to hold, possess, manage and administer (acting always as a prudent head of the family) and to divide and determine the movable and immovable assets of the said minors and to invest and alter the investment of the said minors' monies and to approve and sign all legal documentation and instruments to the above effect …"

9. The Lieutenant Bailiff expressed his conclusions in paras 58 and 59 as follows:

> "58. I cannot countenance the argument that the obligation to act en bon père de famille did not attach to a paid trustee in the discharge of his duties as a trustee of a Guernsey trust

established prior to 1989. Like section 34(7) in its original form section 18(1) was declaratory of the then existing law. Acting with gross negligence in the discharge of one's duties as a trustee cannot, in my judgment be compatible with acting en bon père de famille.

59. I further cannot see how any clause in a Trust Deed completed before 1989, which purported to discharge a trustee from liability to the trust for failures to act en bon père de famille could have been upheld by the Court. I conclude therefore that the change of emphasis introduced by the 1990 Law clarifying that a Trustee could not exclude liability for acts of gross negligence was a minor change. I have alluded to the uncertainty of the law defining the parameters between gross negligence and negligence, but it may well be that defining the extent of the duty to act en bon père de famille could be equally fraught with difficulty."

At para 60 he rejected the submission that it was unfair to hold that the effect of section 34(7) as amended was to negative the effect of the exoneration clause in respect of earlier failings of the trustee. He answered both preliminary questions in the affirmative.

10. It is accepted on behalf of the beneficiaries and was held by the Court of Appeal that the Lieutenant Bailiff's reasoning cannot be accepted. It proves too much. It confuses the content of the duty of the trustee under section 18(1) of the 1989 Law with the extent to which a trust instrument can relieve a trustee from liability for failure to comply with his duty. It is no doubt the duty of a trustee under the section to act prudently and thus to exercise all reasonable care and skill to be expected of a trustee. If the Lieutenant Bailiff's analysis were correct it would not be possible in law to exclude liability in respect of any breach of trust, as for example to exclude negligence. Yet it is common ground between the parties that a clause excluding what may be called ordinary negligence is and was always in principle valid and enforceable under the law of Guernsey.

The Court of Appeal

11. The judgment of the Court of Appeal was given by Martin JA. It dismissed the appeal. Accordingly, like the Lieutenant Bailiff, it answered both preliminary issues in the affirmative. Its reasoning was not, however,

the same as that of the Lieutenant Bailiff. It may, in very brief terms, be summarised in this way.

i) Neither section 34(7) of the 1989 Law, as originally enacted, nor section 34(7) as amended by the Amendment Law, applied as such to breaches of trust committed before the dates on which those enactments took effect, namely 22 April 1989 and 19 February 1991 respectively: para 38.

ii) The position under English law as to whether an exemption clause could validly exclude liability for gross negligence was, as at 1989, at best unclear, and a Guernsey lawyer asked to advise at that time on the position under English law would have been as likely as not to have come to the conclusion that under English law it was not possible for a trustee to avoid liability for gross negligence: paras 13, 25 and 26.

iii) The position under Scottish law was clear: as a matter of general principle it was not possible for a trust deed to exclude liability for culpa lata, that is for gross negligence: para 26.

iv) In any event, even if English law had permitted the exclusion of liability for gross negligence in 1989, such a principle was inconsistent with Guernsey customary law: para 34.

v) Although there was no Guernsey case or text prior to 1989 that said that a clause in a trust deed which excluded liability for gross negligence was invalid (or indeed valid), Guernsey customary law would have followed the Scottish model, based as it was on the civilian law maxim culpa lata dolo aequiparatur (gross negligence is equivalent to fraud) and because Guernsey had a mixed legal system like Scotland, with civilian and common law origins: paras 34 and 37. In this regard the Board respectfully disagrees with the view expressed by Lord Kerr at para 145 that the primary basis upon which the Court of Appeal decided the case was that the fundamental obligation to act en bon père de famille was

incompatible with the notion that a trustee could be exempted from gross negligence in the administration of the trust: (compare paras 32 and 34).

vi) The failure to state expressly in section 34(7) of the 1989 Law that liability for gross negligence, as well as liability for fraud or wilful misconduct, could not be excluded, was a mistake: para 36.

vii) In any event, on its true construction, the word "fraud" in section 34(7) of the 1989 Law included culpa lata, because culpa lata dolo aequiparatur: para 37. So the amendment to section 34(7) produced no change of substance in the law of Guernsey: para 36.

The issues

12. It is common ground that there was no relevant legislative provision in Guernsey before the 1989 Law. It is also common ground that there was no decision of a Guernsey court before 1989 which answers the question in what circumstances it was lawful for a trustee to exclude his liability for a breach of trust. It is, however, further common ground that it was not lawful for a trustee to exclude such liability if it arose from his own fraud or wilful misconduct but that it was lawful to do so if it arose from his own negligence. The issue between the parties is whether it was lawful to do so if it arose from his gross negligence.

13. There was much argument about the content of the customary law of Guernsey before 1989. The trustee says that that law should be (and would have been) taken from English law. The beneficiaries, on the other hand, say that the law should be taken from a number of sources, notably Scots law and Roman law. They also say that, if English law is a relevant source, it is far from clear that a lawyer in Guernsey would have regarded the effect of English law to be that a trustee could lawfully contract out of his gross negligence. It appears to the Board that, given that the 1989 Law has played a central part in the arguments to date, it would be sensible to begin with a consideration of the 1989 Law and the Amendment Law.

The 1989 Law and the Amendment Law

14. There was no report of a body such as the Law Commissions in England and Scotland which led to the 1989 Law. However, on 12 February 1988, the President of the States Advisory and Finance Committee ("the Committee") submitted a letter to the President of the States of Guernsey which was entitled "Trusts Law". The Committee said that it had recently had cause to consider the state of Guernsey law concerning trusts with a view to ascertaining the desirability of legislation to recognise trusts formally and to regulate their conduct. It identified the fundamental question as being whether such legislation would benefit those concerned with the setting up of trusts, beneficiaries and trustees and whether it would indirectly benefit Guernsey's standing as a finance centre by the removal of any uncertainty in law that might presently exist.

15. The letter continued:

> "The roots of Guernsey law lie in Norman customary law which is in many respects similar to English common law. The courts of Normandy and the common law courts of England did not recognize trusts and, in England, trust law evolved by decisions of the courts of equity which have never formed part of our customary law. Whilst the Royal Court has developed a limited equitable jurisdiction and has recognised trusts there is considerable uncertainty as to what the law of Guernsey is in many areas relating to trusts.
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> With the increasing establishment of Guernsey trusts by persons both resident and non-resident in the Island, and the general acceptance of the Jersey Trusts Law of 1984, the Committee's conclusion was that there was a need to dispel the present uncertainty concerning trusts in Guernsey.
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> …
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> The Law would cover trusts of personalty but not trusts of realty in the Bailiwick (except insofar as it conferred powers on the courts to vary trusts). The latter will continue to be governed by the customary law. The Law would follow the general pattern of the Jersey Law (although it would not invalidate trusts of realty) and would seek to set out a basic infrastructure of legal principles on the authority of which trustees, beneficiaries and

> settlors could operate with certainty and confidence. It would incorporate many of the principles of English trust law, but not all such principles, and not necessarily without modification.
>
> It should not be thought, however, that the object of this proposed legislation is simply to accommodate commercial and professional trustees. It would also be of considerable advantage to beneficiaries (the persons who stand to benefit from the proper management of trust property) to know exactly what the trustees must do, and what remedies they will have in the event, say, of a threatened dissipation of trust funds. It would similarly be of great comfort to would-be settlors, who wish to place assets in the hands of trustees to be administered for their chosen beneficiaries, to know that firm and clear duties are placed by law on the trustees and that there is clear provision for action and redress in the event of a breach of trust. The Law would seek in particular to confer very wide supervisory powers on the Court to ensure that these classes of people are properly protected."

The letter concluded by recommending that the States approve the enactment of legislation governing trusts which would confirm, for the avoidance of doubt, the validity in Guernsey of trusts, and which would make provision in respect of 14 listed topics, including the duties and powers of trustees and the liability of trustees for breach of trust. The letter did not however give details of any of these topics.

16. The 1989 Law was the consequence of the States accepting the recommendations in that letter, which recognised that there was considerable uncertainty as to what the law of Guernsey as to trusts was. The purpose of the legislation was to resolve that uncertainty, to do so following the general pattern of Jersey Law and to incorporate many, but not all, of the principles of English trust law and not necessarily without modification. The last of the paragraphs quoted above from the letter made it clear that it was intended both to accommodate commercial and professional trustees and to be of advantage to beneficiaries so that they would know what trustees must do and what remedies they would have in the event of a breach of trust. The letter also made it clear that the Law was to replace Guernsey customary law, which would only continue to apply in the case of trusts of realty outside the Law.

17. It is important to note that the proposed Law was put out to wide consultation before it was enacted. It can thus be expected that those in Guernsey concerned about the balance to be struck between the interests of

settlors and beneficiaries on the one hand and trustees, including professional trustees, on the other hand will have made their views known so that the States could legislate for what they regarded as a fair balance. The letter makes it clear that the Law was to provide in particular for the duties owed by trustees on the one hand and the consequences of breach of those duties on the other.

18. It appears to the Board that there is little, if any, room for doubt as to the true construction of the 1989 Law. The basic duties of a trustee are to observe the utmost good faith and act en bon père de famille as set out in section 18(1) quoted above. Section 18 is part of a number of sections headed "Duties of trustees" and there is a side note to section 18 itself which reads "General fiduciary duties". Section 18(2) provides that a trustee must execute and administer the trust and exercise his functions in accordance with the provisions of the 1989 Law "and, subject thereto, (a) in accordance with the terms of the trust and (b) only in the interests of the beneficiaries". In the words of their respective side notes, sections 19 to 24 provide for a duty to get in and preserve trust property (19), a duty not to profit from trusteeship (20), a duty to keep accounts (21), a duty to give information (22), a duty to keep trust property separate (23) and a duty of co-trustees to act together (24). Sections 25 provides for the impartiality of trustees. Section 26 to 33 set out the powers of trustees.

19. As to section 18(1), there is no significant difference between the parties as to the nature of the duty to act en bon père de famille. The Lieutenant Bailiff referred to them in his quotation from the 1928 case cited above. The French expression en bon père de famille appears to have developed from the Roman concept of bonus paterfamilias. In French law the expression is used in a number of different contexts: see eg Articles 601, 627, 1137, 1374, 1728 and 1766 of the Code Civil. In Guernsey it is found not only in relation to tutelle, but also to saisie and usufruct. So, for example, the duty of the usufructier in relation to both real and personal property is to act en bon père de famille.

20. In the context of the duty of a trustee, the Guernsey Court of Appeal held at para 31 that the duty to act en bon père de famille was a duty to act as a prudent man of business. It so held on the basis that no doubt the obligation so to act implies a standard of care similar to that required of trustees in England, citing *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] 1 Ch 515. In short the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill. As Brightman J explained in *Bartlett* at p 534, in the case of a professional trustee that means with the particular care and skill to be expected of such a person The Board accepts

that that is indeed a correct description of the nature of the duty imposed by section 18(1) of the Law.

21. Section 34 is part of a series of sections headed "Liability for breach of trust". Section 35 gives a beneficiary the power to relieve a trustee for a breach of trust and to indemnify a trustee in respect of such a breach. It will be recalled from para 1 above that section 34(7) provides:

> "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."

In the opinion of the Board that provision is clear. A trust could not lawfully include a term excluding the trustee's liability for breach of his obligation to act en bon père de famille arising from his own fraud or wilful misconduct. It is implicit (if not explicit) in the subsection that a trust could relieve a trustee for a breach of trust arising from other causes. Otherwise there would have been no point in expressly prohibiting the exclusion of liability for fraud and wilful misconduct. It follows that it could relieve a trustee for a breach of trust arising from negligence or gross negligence.

22. It is common ground that under the Law it was permissible for a trustee to exclude liability arising from his negligence. However, it is submitted (and the Court of Appeal held) that under the Law it was not permissible to exclude liability for gross negligence. The Board rejects that submission. The purpose of the Law was to replace the existing customary law and to clarify the rights and obligations of trustees in Guernsey. It follows, as the Board sees it, that, unless the Law provides that it is impermissible for a trust to exclude liability for gross negligence, a term excluding gross negligence is lawful.

23. In section 34(7) the States expressly prohibited the exclusion of liability of a trustee for a breach of trust arising from his own fraud or wilful misconduct. It did not so provide in the case of a breach of trust arising from negligence or gross negligence. It seems to the Board that, unless gross negligence is included within "fraud or wilful misconduct", its exclusion is not prohibited. The Board does not agree with the suggestion made in the course of the argument that that expression is wide enough to include gross negligence. A comparison between paras 36 and 37 of its judgment suggests that the Court of Appeal was somewhat equivocal on the point.

24. In para 36 the Court of Appeal said this:

> "36. It is, of course, the case that the 1989 Law in its unamended form did not prohibit the exclusion of liability for gross negligence. Like the Lieutenant Bailiff, however, we do not regard that as implying a deliberate intention to change the pre-existing law. Nor do we think it indicates a belief that the exclusion of liability for gross negligence had previously been permissible. On the contrary, it seems likely that the omission was the product of a mistake."

25. The first sentence of that paragraph is a clear statement that, on the true construction of section 34(7) of the 1989 Law, the Law did not prohibit liability for gross negligence. It follows that, on the face of it, a term permitting the exclusion of liability for both negligence and gross negligence was permissible in Guernsey as from 22 April 1989 when the Law came into effect. The Board agrees with both the Lieutenant Bailiff and the Court of Appeal that there is no indication that, in enacting section 34(7), the States intended to change the existing law in this regard. However, the Board does not agree with the view expressed in the third sentence of para 36, namely that subsection (7) does not indicate a belief that the exclusion of gross negligence had previously been permissible. That conclusion depends upon the validity of the opinion expressed in the fourth sentence, namely that it seems likely that the omission was the product of a mistake.

26. There is no evidence to support that conclusion. It seems to be based on the conclusion reached by the Court of Appeal in the earlier paragraph of the judgment that the customary law of Guernsey prohibited the exclusion of gross negligence. That is not a satisfactory basis for the conclusion. There is no evidence that the draftsman did not give careful thought to section 34(7). He or she must have decided to prohibit only the exclusion of liability for fraud or wilful misconduct. The inference the Board draws is that that was a deliberate decision and not a mistake. It was an important subsection, especially since the letter quoted above makes it clear that one of the purposes of the 1989 Law was to specify the basis of liability for breach of trust.

27. If it was a deliberate decision, it seems to the Board to provide significant support for the conclusion that the customary law before 1989 was to the same effect as section 34(7). The purpose of the subsection was to provide a balance between the interests of beneficiaries of a trust on the one hand and the interests of trustees on the other. If, as the Board concludes, the effect of the subsection, on its true construction, is to recognise that the prohibition of negligence and gross negligence is lawful and if, as the Court of Appeal says, the subsection was not intended to change the existing law, it follows that such prohibition was lawful under the pre-existing customary law. It is also extremely unlikely that the States deliberately changed the pre-

existing law in a way which was less favourable to beneficiaries than it had been before. So, if the terms of section 34(7) were deliberate, and not a mistake, they support the conclusion that they reflect the customary law in this regard. Given that there is no evidence of a mistake, the Board prefers that conclusion to that expressed by the Court of Appeal.

28. However, the Court of Appeal gave a further reason for its conclusion in the second part of para 36, in which it referred to the fact that the Amendment Law was preceded by a similar letter to that quoted above. After saying in some detail that the proposed amendment was intended to prevent dispositions in trust being defeated by the application of foreign forced heirship rules, the Court of Appeal added that the letter continued by saying that there were a number of minor technical amendments to the Law which were desirable and considered that this was an appropriate opportunity to proceed with them. The proposed changes related to the validity of trusts, trustees' expenses, jurisdiction of the court, liability of trustees and the recovery of property disposed of in breach of trust. The Court of Appeal concluded thus:

> "Far from suggesting that the prohibition on the exclusion of liability for gross negligence was a serious change, or even a novelty, these statements make clear that the amendment was regarded as minor and technical. That could only have been the case if the amendment produced no change of substance to the existing law."

29. That reasoning was deployed by the Court of Appeal in support of its conclusion that the terms of the unamended section 34(7) of the 1989 Law mistakenly excluded a reference to gross negligence, which was rectified in 1990. However, the Board accepts the submission made on behalf of the trustee that the better view is that it derived from amendments to the law of Jersey.

30. The Trusts (Jersey) Law 1984 ("the Jersey Trusts Law") set the law of trusts in Jersey on a statutory footing. Although it was not identical to English law, it reflected many of its principles. Article 26(9) provided that, subject to the terms of the trust, a trustee was not be liable for any loss to the trust property unless such loss was due to "(i) his wilful default, act, or concurrence; or (ii) his neglect or failure to exercise reasonable care to prevent such loss". There was no provision which expressly set out the extent to which a Jersey trust could exonerate a trustee for breach of trust. The 1989 Law did not reproduce article 26(9) of the Jersey Trusts Law. It included section 34(7), which did not have an equivalent in the Jersey Trusts Law.

There is no reason to conclude that the States made a mistake in not following Jersey at that time. On the contrary, given the fact that the letter of 12 February 1988 quoted above expressly referred to the Jersey Trusts Law, it is a reasonable inference that specific consideration was given to what to include and what to exclude.

31. The 1989 Law was passed by the States on 17 March 1988, sanctioned by Order in Council on 7 February 1989, registered on 21 March 1989 and (as stated above) came into force on 22 April 1989. The Jersey Trusts Law was amended by the Trusts (Amendment) (Jersey) Law 1989 ("the Jersey Amendment Law"), which was passed by the States of Jersey on 21 February 1989, sanctioned by Order in Council on 13 June 1989 and registered on 21 July 1989. It can thus be seen that the Jersey Amendment Law was passed about 11 months after the 1989 Law.

32. Article 26(9) of the Jersey Trusts Law was repealed by article 5 of the Jersey Amendment Law, which replaced the existing article 26(9) with a new provision in these terms:

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

It can immediately be seen that the Amendment Law is in almost identical terms, except that the words "release or exonerate" do not appear after "relieve". The Amendment Law was passed on 7 December 1990, sanctioned by Order in Council on 19 December 1990 and registered on 19 February 1991. The explanatory note issued when the draft Jersey Amendment Law was lodged on 31 January 1989 said that the opportunity was also taken to make it clear that the terms of a trust could not relieve, release or exonerate a trustee from liability for a breach of trust arising as stated in the new article 26(9). The Guernsey report dated 16 March 1990 simply described the addition of the words "or gross negligence" to section 34(7) of the 1989 Law as an amendment.

33. The effect of the Amendment Law was to bring Guernsey law in this respect into line with what was now the equivalent provision of the law of Jersey, which had been made after the 1989 Law was passed. The Board accepts the submission made on behalf of the trustee that the reasonable inference is that that was what led to the amendment. That conclusion is strengthened by the fact that a number of the other provisions of the Amendment Law replicated the provisions of the Jersey Amendment Law: see

Annex A to this judgment, which shows that the provisions of the Amendment Law are strikingly similar to those of the Jersey Amendment Law.

34. For these reasons, the Board concludes that the Court of Appeal was wrong to hold that the omission of gross negligence in the original form of section 37(4) was a mistake. On the contrary, it seems to the Board to be a pointer to what was thought to be the law of Guernsey before that. It agrees with both the Lieutenant Bailiff and the Court of Appeal that section 37(4) was not intended to change the law in a way adverse to the interests of beneficiaries. However, it follows that, if the omission of gross negligence was not a mistake, the fact that section 37(4) prohibited only terms excluding liability for fraud and wilful misconduct supports the conclusion that that was the position under Guernsey customary law before 1989.

35. In these circumstances the Board is unable to agree with the conclusions of the Court of Appeal set out in para 37 of its judgment as follows:

> "Accordingly, we consider that the Lieutenant Bailiff was right to hold that the position, both before and after the 1989 Law came into force, was that a trustee exoneration clause could not exclude liability for gross negligence. That was the case before the 1989 Law took effect; and it self-evidently was the case after the Amendment Law took effect. In the intervening period, the position was that on the face of it a trust instrument could absolve a trustee from liability for anything except fraud or wilful misconduct; but that does not have the consequence that in that period alone, liability for gross negligence could have been excluded. The prohibition in the 1989 Law on exclusion of liability for fraud is to be construed, by application of the maxim *culpa lata dolo aequiparatur*, as comprehending a ban on the exclusion of liability for gross negligence as equivalent to, or as a species of, fraud. The Amendment Law did no more than give express statutory effect to what had always been the position. It follows that no question of retrospectivity arises in relation either to the 1989 Law or to the Amendment Law."

The Board sees no basis for concluding, as a matter of construction, that the prohibition of a term excluding fraud prohibits a term excluding gross negligence on the basis of the maxim culpa lata dolo aequiparatur. If the draftsman had intended to exclude gross negligence, it would have been done expressly as it was in the Amendment Law. As the Court of Appeal itself said

in the first sentence of para 36 quoted above, the 1989 Law in its unamended form did not exclude gross negligence.

36. A further pointer to the conclusion that Guernsey customary law did not prohibit terms excluding liability for gross negligence is to be found in the exclusion clause in these settlements. They involved substantial property and it seems to the Board to be a reasonable inference that they were drafted in the light of advice given to both the settlor and the trustees. Yet, as the Board reads the clause, it excludes liability for negligence and gross negligence. It excludes liability for loss caused by reason of any mistake or omission made in good faith and only excludes from that exclusion "wilful and individual fraud and wrongdoing". Gross negligence is not "wilful and individual fraud and wrongdoing". If the parties or their advisers had thought that it was contrary to Guernsey law to exclude liability for gross negligence, they would surely have excluded it in the settlements.

37. In short, the Board's conclusions may be summarised in this way. There is no case or text before 1989 which assists in answering the question what was the customary law of Guernsey in any relevant respect. In these circumstances, the most valuable pointer to the correct answer to the question whether a term excluding gross negligence was contrary to Guernsey customary law before 1989 is the 1989 Law. The fact that section 34(7) of that Law only forbids terms excluding gross negligence is good evidence that that was the position under Guernsey law before that. There is no reason to think that that subsection was not carefully considered and, given, as both the courts below recognised, that the 1989 Law would be most unlikely to have introduced a provision less favourable to beneficiaries than before, the Board does not agree with the Court of Appeal that it was not permissible for a trust to include a term excluding liability for gross negligence as a matter of Guernsey customary law.

English and Scots law

38. It is appropriate to consider briefly the further reasoning of the Court of Appeal. In essence it held that, viewed as at 1989, English law was not clear, whereas there was a rule of Scots law that no trustee could be exonerated in respect of fraud or gross negligence and Guernsey customary law would have followed Scots law. There is some debate in the authorities as to whether there was a rule of Scots law to that effect or whether the authorities which held that trustees were not so exonerated depended upon the true construction of the particular trust in question: see eg, in the English Court of Appeal, *Armitage v Nurse* [1998] Ch 241 per Millett LJ (with whom Hirst and Hutchison LJJ agreed) at 254E to 256A and, in the Jersey Court of

Appeal, *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1995] JLR 352 per Sir Godfray Le Quesne QC, giving the judgment of the court, which included Mr Richard Southwell QC and the Honourable Michael Beloff QC, at pp 374 - 381. However, for the purposes of this appeal the Board accepts the submission made on behalf of both parties that there was a rule of Scots law or policy to that effect. The question is whether it was a rule which was part of the customary law of Guernsey before 1989.

39. In answering the question whether the Court of Appeal was correct to hold that the Scots rule would have been adopted in Guernsey, it is perhaps relevant to note that the expression en bon père de famille was not used in Scots law. Its origin was, as the words suggest, French and owed something to the Roman law concept of bonus paterfamilias. However, it was not of course derived from English law and might therefore suggest some law other than English law. It might indeed be said that since Scots law has civil law origins, which English law does not, Guernsey might choose the Scots rule as the relevant rule governing the validity of exemption clauses. The Board does not, however, think that the expression en bon père de famille points one way or the other. There is no significant dispute as to the content of the relevant duty. As stated above, it is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill. That duty is the same as the duty of a trustee in both England and Scotland: as to England see *Bartlett* supra and as to Scotland see, to similar effect, *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1998 SLT 471 per the Lord Justice Clerk, Lord Cullen, at page 473.

40. The Board entirely accepts that Guernsey looks to other jurisdictions for assistance in developing particular areas of the law. As Lord Wilberforce put it in *Vaudin v Hamon* [1974] AC 569 at 582E, Guernsey law must in the end be interpreted in the light of its own terminology, context and history. In the case of trusts, which had been recognised there for many years before 1989, it looked in particular to the law of England. This can be seen from the letter of 12 February 1988 quoted above. It can also be seen from the decision of the Court of Appeal, comprising Clarke P and Sumption and Tugendhat JJA, in *Stuart-Hutcheson v Spread Trustee Co Ltd* (2002) 5 ITELR 140, which concerned these very trusts. The question was whether a discretionary beneficiary with no vested interest was entitled to demand information relating to the trust. As the Court of Appeal in the instant case pointed out at para 11, the relevance of the case lies in the discussion of the Guernsey law relating to trusts prior to 1989.

41. At para 19 Clarke P, with whom the other members of the court agreed, said that trusts do not form part of Norman law from which Guernsey customary law is, in part, derived. He noted that the trust is, in origin, an

English law concept, developed by English judges and by the courts in countries whose law is, or is derived from, English law. He then noted that well before 1989 the concept of a trust and the concomitant duties of a trustee and the rights of a beneficiary had been recognised in Guernsey. He quoted from the judgment of the Deputy Bailiff in that case, reported at (2001) 3 ITELR 683, 689 - 690, and referred to an article by Advocate Robilliard entitled "Foundations of Guernsey as a Trust Jurisdiction" in Vol 2 No 8 (1996) Trust and Trustees pp 6 -10.

42. Clarke P then said this at para 20:

> "That, prior to the 1989 Law, trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did so because settlors established trusts, whether inter vivos or by will, the validity of which was recognised and, where necessary, enforced by the Royal Court. In addition the legislature in a number of Laws recognised and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable The trustee's obligation to account for his execution of the trust is a characteristic of a trust, as is recognised by article 2 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (Cmnd 9494): see the Schedule to the English Recognition of Trusts Act 1987."

43. In para 21 Clarke P said that he found support for that approach in *CK Consultants (Plastics) Ltd v Vines and Barnett Christie Finance Ltd*, unreported 1982, in which it was held that constructive trusteeship was recognised in Guernsey. After quoting a passage from the judgment of Frossard DB in that case, Clarke P concluded:

> "In other words, the recognition and acceptance of trusts in Guernsey carried with it the need to seek guidance from jurisdictions which have a law of trusts, and recognition of the

> concept of constructive, as well as express trusteeship, as an integral part of the law of trusts."

44. In the Court of Appeal in the instant case, the court quoted those passages. It then considered the English and Scots law on exclusion clauses and referred to a number of cases which pointed to the fact that the Guernsey law of trusts owed its origins to sources other than English law. It concluded at para 31 that the law of trusts was an amalgam of principles derived partly from English law and partly from civilian law. Finally it said at para 33:

> "In general terms, we accept the proposition set out in *Stuart-Hutcheson v Spread Trustee Co Ltd* to the effect that the usual incidents of an English trust are likely to apply in Guernsey. That is primarily because the rules relating to trusts have generally advanced further there than elsewhere. We do not accept, however, that the Guernsey law of trusts prior to 1989 was the result of wholesale importation of the English trust concept; and we stress the qualification expressed by this Court in that case, namely that English principles will not be applied if they are 'inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable.'"

45. In the opinion of the Board the decision in the *Stuart-Hutcheson* case provides a strong pointer to the conclusion that before 1989 the Guernsey courts would be more likely to have looked at and followed English law than Scots law. The Court of Appeal in the instant case accepted the proposition that the usual incidents of an English trust were likely to apply in Guernsey. The Board entirely accepts that English law would not be imported wholesale and that it would have to yield to a provision of Guernsey customary or statute law. However, the problem here is that there was no specific Guernsey customary law which had focused on the extent of permissible exclusions, so that the general principle identified in *Stuart-Hutcheson* would be likely to have been applied. In addition, there is no evidence that Guernsey at any stage looked at the law of Scotland. In these circumstances it appears to the Board to be more likely than not that it would have looked to the law of England. The question then arises what it discovered or would have discovered.

46. The Court of Appeal said at para 13 that *Armitage v Nurse* stated what the law had always been in England. In that case, clause 15 of the settlement exempted the trustees from all loss save that caused by actual fraud. At p 253E Millett LJ identified the question as being whether a trustee

exemption clause can validly exclude liability for gross negligence. His answer was yes. His essential reasoning can be seen from this passage between pp 253E and 254E:

> "It is a bold submission that a clause taken from one standard precedent book and to the same effect as a clause found in another, included in a settlement drawn by Chancery counsel and approved by counsel acting for an infant settlor and by the court on her behalf, should be so repugnant to the trusts or contrary to public policy that it is liable to be set aside at her suit. But the submission has been made and we must consider it. In my judgment it is without foundation.
>
> There can be no question of the clause being repugnant to the trust. In *Wilkins v Hogg* (1861) 31 LJCh 41, 42 Lord Westbury LC challenged counsel to cite a case where an indemnity clause protecting the trustee from his ordinary duty had been held so repugnant as to be rejected. Counsel was unable to do so. No such case has occurred in England or Scotland since.
>
> I accept the submission made on behalf of Paula that 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 have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence.
>
> The duty of 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 trusts, but in my opinion it is sufficient. As Mr. Hill pertinently pointed out in his able argument, 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. It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement. It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other. The doctrine of

> the common law is that: 'Gross negligence may be evidence of mala fides but is not the same thing:' see *Goodman v Harvey* (1836) 4 A & E 870, 876, per Lord Denman CJ. But while we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree. English lawyers have always had a healthy disrespect for the latter distinction. In *Hinton v Dibbin* (1842) 2 QB 646, Lord Denman CJ doubted whether any intelligible distinction exists; while in *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600, 612 Willes J famously observed that gross negligence is ordinary negligence with a vituperative epithet. But civilian systems draw the line in a different place. The doctrine is culpa lata dolo aequiparatur; and although the maxim itself is not Roman the principle is classical. There is no room for the maxim in the common law; it is not mentioned in *Broom's Legal Maxims*, l0th ed (l939)."

47. Millett LJ added that the submission that it was contrary to public policy to exclude the liability of a trustee for gross negligence was not supported by any English or Scottish authority. He said that two English cases were relied upon, namely *Wilkins v Hogg* (1861) 31 LJ Ch 41 and *Pass v Dundas* (1880) 43 LT 665. As to *Wilkins v Hogg*, he said that Lord Westbury accepted that no exemption clause could absolve a trustee from liability for knowingly participating in a fraudulent breach of trust by his co-trustee but that, subject to that, Lord Westbury was clearly of the opinion that a settlor could, by appropriate words, limit the scope of the trustee's liability in any way he chose. As to *Pass v Dundas*, Millett LJ recognised that Sir James Bacon V-C stated the law as being that the clause before him protected the trustee from liability unless gross negligence was established but said that that statement was plainly obiter.

48. As already noted and as appears from p 254F-G and pp 255A - 256A of the report, Millett LJ considered the relevant Scots law in some detail. He analysed a number of cases and concluded that they were all decided as a matter of construction of the particular clause. The Board has already indicated that, at any rate for the purposes of this appeal, it accepts the submission made on behalf of the parties that Scots law was not based solely on the construction of particular clauses but that there is a rule of Scots law or policy to the effect that gross negligence cannot be excluded because in Scots law culpa lata dolo aequiparatur. It follows that Millett LJ was wrong to say that the submission that it is contrary to public policy to exclude the liability of a trustee for gross negligence is not supported by any Scottish authority.

49. The Court of Appeal in this case did not challenge the conclusions reached by Millett LJ on the position in English law. The trustee did however take issue with three points which he made. The first was the point referred to above, namely his conclusion that Scots law depended upon the construction of particular term of the settlement and not a rule of Scots law.

50. The second was Millett LJ's statement (set out in the above quote) that while English law regards the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, it regards the difference between negligence and gross negligence as merely one of degree. It was submitted that that was wrong because English law does distinguish between simple negligence and gross negligence. Some examples will suffice. A gratuitous bailee is only liable for gross negligence. A claimant for damages for wrongful arrest of a ship must prove that the arrest was malicious or the result of gross negligence or, in the old language crassa negligentia: see eg *The Collingrove, The Numida* (1885) 10 PD 158, 161. A mortgagee in possession of property was at one time not liable to the mortgagor for a loss in value caused by want of reasonable care but was liable for gross negligence. Alderson B put it thus in *Wragg v Denham* (1836) 2 Y&C Ex 117 at 122:

> "It is not necessary to go to the length of shewing fraud in the mortgagee: gross negligence is sufficient."

The present position is different. A failure to take reasonable care is sufficient: see *Fisher & Lightwood's Law of Mortgage*, 12th ed (2006) at pp 595-603. However, in *Halsbury's Laws of England,* vol 16(2) at para 569, it is stated that in a contest between an equitable incumbrancer and a legal mortgagee, the latter will not be postponed on the ground of his conduct unless he had been guilty of direct fraud or of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority. The concept of gross negligence also appears in section 2 of the Libel Act 1843. Finally, gross negligence is one of the bases upon which a person can be convicted of manslaughter: *R v Adomako* [1995] 1 AC 171.

51. Those examples simply show that English law does recognise gross negligence in some contexts. They also show that English law recognises the difference in legal principle between negligence and gross negligence and between those types of negligence and fraud. To describe negligence as gross does not change its nature so as to make it fraudulent or wilful misconduct.

52. The third point arose out of Millett LJ's statement at p 254D-E that, although the maxim culpa lata dolo aequiparatur is not Roman, the principle is classical. It is not necessary for the Board to resolve the question whether that statement is correct in order to determine the issues in this appeal. The critical point is that *Armitage v Nurse* correctly states English law as it stands at present. The question raised by the Court of Appeal is whether a court deciding what Guernsey customary law was before 1989 would have reached the same conclusion. As stated above, it held that the position under English law as to whether an exemption clause could validly exclude liability for gross negligence was, as at 1989, at best unclear, and a Guernsey lawyer asked to advise at that time on the position under English law would have been as likely as not to have come to the conclusion that under English law it was not possible for a trustee to avoid liability for gross negligence: paras 13, 25 and 26.

53. The basis of that view was a passage in an English Law Commission consultation paper in 1992 entitled "Fiduciary Duties and Regulatory Rules, A Summary" (Law Com No 124) at para 3.3.41 and an article by Professor Matthews entitled "The Efficacy of Trustee Exemption Clauses in English Law" [1989] Conv 42, which was published in January 1989. It will be recalled that the 1989 Law was passed on 17 March 1988, so that, although the article may have been sent to the publishers, there is no evidence that it was available before the Law was passed.

54. Para 3.3.41 of the consultation paper states:

> "Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for 'fraud' in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for 'wilful default' also prohibits exclusion of liability for gross negligence although we incline to the view that it does."

> In *Armitage v Nurse* Millett LJ expressed his disagreement with that tentative statement, at any rate so far as trustee exclusion clauses are concerned. He noted at p 252C that the expression "wilful default" is used in the cases in two senses. He put it thus:

> "A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: see eg *In re Chapman; Cocks v Chapman* [1896] 2 Ch 763. In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, it means a deliberate breach of trust: *In re Vickery; Vickery v Stephens* [l93l] 1 Ch 572. The decision has been criticised, but it is in line with earlier authority: see *Lewis v Great Western Railway Co* (1877) 3 QBD 195; *ln re Trusts of Leeds City Brewery Ltd's Debenture Stock Trust Deed; Leeds City Brewery Ltd v Platts (Note)* [1925] Ch 532 and *In re City Equitable Fire Insurance Co Ltd* [1925] Ch 407. Nothing less than conscious and wilful misconduct is sufficient. The trustee must be conscious that, in doing the act which is complained of or in omitting to do the act which it 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:' see *In re Vickery* [l93l] 1 Ch 572, 583, per Maugham J.
>
> A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default."

55. The Board agrees with counsel for the trustee that English law is clear that in this class of case it is not permissible to exclude wilful misconduct as described by Millett LJ in the above passage. As Bramwell LJ put it in *Lewis v Great Western Railway* (1877) 3 QBD 195, at p 206,

> "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful."

Millett LJ summarised his view at p 251 F-G as being that clause 15, 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.

56. Professor Matthews' article suggested that it was very likely that neither liability for gross negligence nor duties leading to such liability could be validly excluded. However, it is plain that the Court of Appeal in *Armitage v Nurse* did not agree with him. One reason is no doubt that he did not refer to any of the English cases referred to by Millett LJ in para 46 above. The same is true of the Court of Appeal in the instant case.

57. In the course of this appeal the Board was referred to the cases cited by Millett LJ in the above passage and invited to consider whether his opinion is correct. It has considered both the cases referred to by Lady Hale and Lord Kerr, including the dicta in the Scottish House of Lords cases to which they refer, and the doubts expressed by the Law Commission after the decision in *Armitage v Nurse* to which Lady Hale has referred. It has however concluded that the Court of Appeal was correct for the reasons given by Millett LJ. In short in all the circumstances the Board prefers the approach of the court in *Armitage v Nurse* to the views of Professor Matthews, to the tentative views of the Law Commission and to those of the Court of Appeal in Guernsey in this case. It seems to the Board to be much more likely than not that a Guernsey lawyer or judge or the Board itself, considering the position under English law before 1989, would have looked at the cases cited by Millett LJ and would have reached the same conclusions as he did.

58. It is noteworthy that in *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* the Jersey Court of Appeal rejected the submission that under English law it was not permissible to exclude liability for gross negligence. They also rejected the same submission as a matter of Jersey customary law before the Jersey Trusts Law 1984: see 1995 JLR 352, 378-379 and 381. It is likely that the same conclusion would have been reached in Guernsey.

59. Further the Board notes that in *Dawes' Laws of Guernsey,* 2003, it is stated that the 1989 Law is an excellent codification which, for the most part, follows well-established English principles. As stated earlier, and indeed as stated by Professor Matthews in para IX of his article, on the true construction of section 34(7) of the 1989 Law, it follows from the prohibition of the

exclusion of liability for fraud and wilful misconduct that the exclusion of liability for negligence and gross negligence is permitted. Dawes plainly took the view that such an exclusion is permissible under English law.

60. It was submitted on behalf of the respondent that Millett LJ was wrong in *Armitage v Nurse* (at p 253H) to identify the irreducible core obligations of a trustee as being limited to acting honestly and in good faith and as not extending to acting without gross negligence. In the course of his discussion of the Law Commission paper Millett LJ noted between page 252H and 253D that it was considering the position of fiduciaries as well as trustees and said that in such a context it was sensible for it to consider the exclusion of liability for equitable fraud. However, he took the view that it was not necessary to consider the argument disputing the ability of a trustee exemption clause to exclude liability for equitable fraud or unconscionable behaviour on the facts of *Armitage v Nurse* because no such conduct was pleaded. In putting that question to one side Millett LJ was drawing a clear distinction between the fiduciary duties owed by the trustee on the one hand and the duty of care owed by the trustee on the other. Millett LJ added at pp 253H to 254A that, in any event, if such conduct had been alleged, the clause excluding liability for gross negligence would not be effective to relieve the trustee from liability because in such situations the trustee "would be acting recklessly in the proper sense of the term". Such subjective recklessness would amount to wilful misconduct.

61. In the light of Lord Kerr's conclusions at para 177 that the essence of the duty to act en bon père de famille is fiduciary, two points of relevance to the present case follow from this part of Millett LJ's judgment. First, where, as here, what is alleged against the trustee is a breach of the duty of care owed to the beneficiaries by the trustee, the fiduciary duties of the trustee are of no relevance. Nothing in the fiduciary duties owed by the trustee alters the standard of the duty of care owed by it. In the opinion of the Board, the suggestion that the standard of the duty of care owed by the trustee is somehow elevated by reference to concomitant fiduciary duties elides the fundamental distinction between the fiduciary duties owed by the trustee on the one hand and the duty to exercise care and skill owed by the trustee on the other. Secondly, the exemption from liability in respect of a trustee's gross negligence is not inimical to the fiduciary duties owed by a trustee for the simple reason that the absence of honesty and good faith inherent in the failure to perform fiduciary duties would take such conduct outside the scope of such an exemption.

62. In any event, it is difficult to see why the line should be drawn between negligence and gross negligence. If, as is common ground, the essential obligation is to act as a prudent trustee would act, namely with

reasonable care and skill, it can be said with force that the core obligation of a person acting en bon père de famille includes a duty to act with reasonable care and skill and thus without negligence. In these circumstances there might be much to be said for saying, as a matter of policy, that it is not permissible to exclude liability for any breach of that duty.

63. Yet it is common ground that ordinary negligence, that is a failure to act with reasonable care and skill, can lawfully be excluded under both Guernsey customary law and English law. It appears to the Board that, if a line was to be drawn between negligence and gross negligence, it would have had to be drawn by statute, both in Guernsey and England, as was done in Guernsey by the 1990 Amendment Law. In these circumstances, subject to the issue of retrospective effect, the Board concludes that under the customary law of Guernsey the parties could lawfully agree that the liability of the trustee arising out of its negligence or gross negligence was excluded.

Retrospective effect

64. The beneficiaries say that the 1989 Law and the Amendment Law have retrospective effect, with the result that the prohibition of clauses in settlements which exclude liability for gross negligence in section 34(7) of the 1989 Law as amended by the Amendment Law, is effective to defeat reliance upon the relevant clause in respect of all breaches of trust, whenever they occurred. The Court of Appeal resolved this issue in favour of the trustee by holding at para 38 of its judgment that it had no retrospective effect. The beneficiaries say that it was wrong to do so.

65. The general principle is not in dispute. It is stated in *Bennion on Statutory Interpretation*, 5th ed (2008) at section 97 as being that, unless a contrary intention appears, an enactment is not intended to have a retrospective operation.

66. Section 72(1) of the 1989 Law provides:

> "Subject to section 74, and except where provision to the contrary is made, this Law applies to trusts created before or after the commencement of this Act."

Section 74(1) provides:

> "Nothing in this Law –
>
> (c) affects the validity of anything done in relation to a trust before the commencement of this Law;
>
> (d) affects the validity of a trust arising from a document or disposition executed or taking effect before the commencement of this Law."

67. The effect of those sections is that section 34(7) as amended applies to these settlements, notwithstanding the fact that they were made long before the 1989 Law and the Amendment Law were enacted or came into effect. The simple point made on behalf of the beneficiaries is that section 34(7) is directed not to acts or events but to the terms of the trust. It prohibits reliance on a term in a trust which excludes the trustee's liability for fraud, wilful misconduct or gross negligence. On its ordinary and natural meaning, it focuses on the permissible terms of the trust and thus on the moment of reliance and must include breaches of trust whenever they occurred.

68. While the Board sees the force of that submission, it is unable to accept it. There is nothing in the express terms of either the 1989 Law or that Law as amended that expressly provides that it prohibits reliance on a clause in a trust which was valid when made and at the time of the alleged breach of trust. The construction advanced on behalf of the beneficiaries thus in fact gives the 1989 Law as amended retrospective effect. If the States had intended that effect they would surely have made that clear in the Law.

69. The 1989 Law shows that the States did so provide expressly when they thought it appropriate. As the Court of Appeal observed at para 38, section 50 of the 1989 Law, which gives the court power to relieve a trustee from liability, applies to "a breach of trust, whether committed before or after the commencement of this Law". The Board agrees with the Court of Appeal that section 50 indicates that when the States intended the Law to apply to past events it said so specifically and that the absence of any similar statement in section 34(7) makes it clear that it was not intended to apply to past events.

70. It is submitted on behalf of the beneficiaries that the question is whether section 74 should be read as preserving the effect and availability to a trustee of an exemption clause in respect of acts of gross negligence prior to the commencement of the Law. However, that depends upon the true construction of section 72 and, in the opinion of the Board, section 72 does not provide that the 1989 Law applies to acts or omissions before its

commencement. It merely provides that the Act applies to trusts created both before and after its commencement. If it had been intended that the Act should have retrospective effect in the sense that it was to apply, for example, to breaches of trust committed before it came into force, it would have expressly so provided, as it did in section 50.

71. The Court of Appeal also pointed to the fact that the Amendment Law makes no reference to any of its provisions being of retrospective effect, except for the introduction of a new section 11A(3) introduced by section 1(c) of the Amendment Law, which deals with forced heirship and expressly applies "whenever the trust, transfer or disposition in question arose or was made". The point was further made that there is no similar provision in section 1(f), which amended section 34(7) of the 1989 Law.

72. In these circumstances, in the opinion of the Board, there is nothing in either the 1989 Law or the Amendment Law which amounts to the contrary intention referred to by *Bennion*, and the Court of Appeal was correct to hold that the provisions cannot be construed as preventing reliance on an exoneration clause in respect of events occurring before they came into effect.

73. In the course of the argument there was some debate about the correctness of the following statement of the Jersey Court of Appeal in *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* at p 389:

> "We see nothing unfair in preventing a trustee from taking advantage of immunity from liability for his gross negligence. A case like this is not a case of action taken by a trustee in reliance upon protection believed by him to exist, for a trustee could hardly contend that he decided to act with gross negligence because he thought he was protected from the consequences."

74. The beneficiaries rely upon the statement, whereas it is said on behalf of the trustee that it is not sound because a trustee may act honestly and still be guilty of negligence or gross negligence, and that it is not credible that trustees lower their standards because they cannot be liable for gross negligence. However, the trustee adds, a person may well be willing to become a trustee knowing that he will only be liable for damages if he is guilty of fraud or wilful misconduct. It might also be added that the availability and cost of insurance may be affected by the terms of the trust. If gross negligence cannot be excluded, trustees may wish to insure against

liability arising out of gross negligence, which may be expensive. In all these circumstances it is said that, contrary to the dictum stated above, it is not fair that, if a person becomes a trustee on the basis of a term that he will not be liable for damages for gross negligence, he should subsequently be held liable by reason of the retrospective effect of a statute. There seems to the Board to be a good deal of force in this point. However, whether it is right or not, the question is whether there is anything in the statutes which points to a contrary intention of the kind referred to by *Bennion*.

75. For these reasons, on the basis of the case as it was presented to the Court of Appeal and, until a late stage, in this appeal, the Board concludes that the decision of the Court of Appeal on retrospectivity was correct. However, before the Board the beneficiaries relied upon a statute which was not referred to in the Court of Appeal or in the written cases initially prepared for this appeal. It is the Trusts (Guernsey) Law 2007 ("the 2007 Law"), which repealed both the 1989 Law and the Amendment Law and came into force on 17 March 2008. It is somewhat striking that nobody referred to the 2007 Law until very recently because it is presumably that Law and neither of the others which is at present the relevant statute.

76. Section 39(7)(a) of the 2007 Law is in substantively the same terms as section 34(7) of the 1989 Law as amended and section 39(8) substantially replicates section 72 of the 1989 Law. However sections 39(7)(b) and 39(8)(b)(ii) are new.

77. Section 39(7) and (8) provide:

"(7) The terms of a trust may not -

(a) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful conduct or gross negligence, or

(b) grant him any indemnity against the trust property in respect of any such liability.

(8) For the avoidance of doubt, and without prejudice to any other provision of this Law –

(a) subsection (7) applies to a trust whenever created, and

(b) a term of a trust is invalid to the extent that it purports to –

(i) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence, or

(ii) grant him an indemnity against the trust property in respect of any such liability."

78. As the Board reads the beneficiaries' supplement to their case, the 2007 Law is relied upon as confirmation of their submissions under the earlier statutes. They submit that by section 39(8)(a) the prohibition of clauses exempting liability arising out of inter alia gross negligence in section 39(7) applies to a trust whenever created and by section 39(8)(b) a term of a trust is invalid to the extent that it purports to exempt such liability. Those provisions are expressly stated to be for the avoidance of doubt. The beneficiaries say that section 39(8) thus confirms their earlier submission that the effect of the prohibition which was previously in section 34(7) of the 1989 Law as amended and which is now in section 39(7) of the 2007 Law is to invalidate the offending term to the prescribed extent. They say that the effect of that provision is that such a term is to that extent unavailable to a trustee, whatever the date of the breach of trust for which relief is sought because there is no valid provision to which recourse may be had. They also refer to section 83(3) and 84(1)(c) which do not seem to the Board to carry the matter much further.

79. The Board has reached the conclusion that these submissions face substantially the same difficulties as those discussed above. On the beneficiaries' case they are in substance of retrospective effect. So the question is whether, applying the principles in *Bennion*, the 2007 Act contains any express provision giving the statute retrospective operation or other contrary intention appears in it. The Board has concluded that it does not. The States could have provided expressly that the prohibition in section 39(7) applies to breaches of trust which occurred before the Law came into force. They did not. Moreover the 2007 Law contains in section 55 an equivalent section to section 50 of the 1989 Law. Section 55 expressly applies to breaches of trust "whether committed before or after the commencement of this Law". As in the case of the 1989 Law, the States could have made it clear that the prohibition in section 39(7) was to have effect in respect of such breaches. It did not do so. In these circumstances, for much the same reasons as above (and as given by the Court of Appeal), the Board concludes that section 39(7) does not have retrospective effect.

Conclusion

80. For these reasons the Board will humbly advise Her Majesty that the appeal be allowed. The Board answers the question raised by the first preliminary issue in the negative. On that footing the question raised by the second question does not arise.

Annex A

Note the similarities between the Jersey and Guernsey Amendments which are underlined.

<u>Example 1</u>

Jersey Law: Article 4 of the Jersey Amendment Law 1989 inserted the following underlined words into Article 22(2) of the Jersey Trusts Law 1984:

"A trustee may reimburse himself out of the trust for or pay out of the trust all expenses <u>and liabilities reasonably</u> incurred in connexion with the trust."

Guernsey Law: Sections 1(e) of the Guernsey Amendment Law 1990 inserted the following underlined words into section 30(2) of the Guernsey Trusts Law 1989:

"A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses <u>and liabilities</u> properly incurred in connection with the trust."

<u>Example 2</u>

Jersey Law: Article 8 of the Jersey Amendment Law 1989 inserted the following underlined words into Article 39(2) of the Jersey Trusts Law 1984:

"Notwithstanding paragraph (1), the trustee may <u>require to be provided with reasonable security for liabilities whether existing future contingent or otherwise before distributing trust property</u>."

Guernsey Law: Section 1(i) of the Guernsey Amendment Law 1990 inserted the following underlined words into section 48(2) of the Guernsey Trusts Law 1989:

"The trustees may <u>however require that they be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before so distributing the trust property</u>."

<u>Example 3:</u>

Jersey Law: Article 6 of the Jersey Amendment Law 1989 amended Article 28(2) of the Jersey Trusts Law 1984 so as to provide:

"(1) Subject to paragraph (2), where in any transaction or matter affecting a trust a trustee informs another party to the transaction or matter that he is acting as trustee, a claim by such other party in relation to that transaction or matter shall extend only to the trust property.

(2) Nothing in paragraph (1) <u>shall affect the liability of a trustee for breach of trust.</u>

(3) Where in any such transaction or matter as is referred to in paragraph (1), a trustee fails to inform such other party that he is acting as trustee <u>and</u> <u>that party is otherwise unaware of it</u>, the trustee shall –

(a) be personally liable to such other party in respect thereof; and

(b) have a right of recourse to the trust property by way of indemnity against such personal liability."

Guernsey Law: Sections 1(g) and 1(h) of the Guernsey Amendment Law 1990 inserted the following underlined words into section 37 of the Guernsey Trusts Law 1989:

"(2)If the trustee fails to inform the third party that he is acting as trustee <u>and the third party is otherwise unaware of the fact</u> –

(a) he incurs personal liability to the third party in respect of the transaction or matter; and

(b) he has a right to indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust.

(3) Nothing in this section prejudices <u>a trustee's liability for breach of trust or</u> any claim for breach of warranty."

<u>Example 4</u>

Jersey Law: Article 9 of the Jersey Amendment Law 1989 inserted the following underlined words into Article 50(3) of the Jersey Trusts Law 1984:

"Without prejudice to the liability of a trustee for breach of trust, trust property which has been alienated or converted in breach of trust or the property into which it has been converted may be followed and recovered unless –

(a) it is not identifiable; or (b) it is in the hands of a bona fide purchaser for value without notice of a breach of trust <u>or a person (other than the trustee himself) deriving title through such a person.</u>"

Guernsey Law: Section 1(j) of the Guernsey Amendment Law 1990 inserted the following underlined words into section 67(b) of the Guernsey Trusts Law 1989:

"Without prejudice to the personal liability of a trustee, trust property which has been charged or dealt with in breach of trust, or the property into which it has been converted, may be followed and recovered unless –

(a) it is no longer identifiable; or

(b) it is in the hands of a bona fide purchaser for value without notice of the breach of trust <u>or a person (other than the trustee) who derived title through such a purchaser.</u>"

LORD MANCE:

81. I concur in the advice of the Board given by Lord Clarke. But I add these observations, first, because the view I take of the relevance of English and Scottish law is perhaps slightly different and, secondly, because of the dissenting views expressed by two members of the Board which heard this appeal.

82. The appellant trust company is said to have failed to identify and investigate breaches of trust occurring (a) prior to 22 April 1989, when the Trusts (Guernsey) Law 1989 came into force and (b) between 22 April 1989 and 10 July 1990, when the 1989 Law was in the unamended form which it had until 19 February 1991 when the Trusts (Amendment) (Guernsey) Law 1990 came into force.

83. In period (a), whether a trustee could by contract exclude himself from liability for gross negligence was a question of Guernsey customary law. In period (b), it was a question of statutory construction, the background to which might include Guernsey customary law as well as English or Scottish law to the extent to which the drafters may be thought to have had principles of either in mind. But I also agree with Lord Clarke that, if it is clear that the 1989 Law permitted a trustee to exclude liability for gross negligence, that may itself shed some light on prior Guernsey customary law, on the basis that there is no indication or real likelihood that the drafters of the 1989 Law would have intended to change the prior legal position to give added protection to trustees to beneficiaries' corresponding disadvantage.

84. In principle, it is for the Board, as the final appeal court, to determine what Guernsey customary law was prior to 22 April 1989. In *Vaudin v Hamon* [1974] AC 569, 581-582, Lord Wilberforce cautioned against attempts to draw on other legal systems to ascertain Guernsey law by analogy, stating that:

> "If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter".

85. He went on to note that:

> "While it may be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle."

86. He concluded:

> "Thus, although as this Board has pointed out in *La Cloche v La Cloche* (1870) LR 3 PC 125, it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms, the particular legal provision under examination in any case, in this case the Guernsey law as to prescription, must in the end be interpreted in the light of its own terminology, context and history."

87. In the present case, if English or Scots law is of relevance to the ascertainment of Guernsey law prior to 22 April 1989, it must be English or Scots law as it would have been held to be at the highest level, that is by the appellate committee of the House of Lords. In this connection, English or Scottish law is not only relevant if or in so far it was prior to 22 April 1989 clear what it was. The Board may have to form its own view as to what English law or Scottish law would have been held to be. Any case relating to matters occurring prior to a particular date is likely to come on after – maybe many years after - that date has passed. The law is not infrequently open to argument until clarified after the event. Sometimes also previous case-law at the same or a lower instance requires re-interpretation or is not followed.

88. In a considerable number of Scottish cases, courts have expressed views on the question whether trustees could rely upon exception clauses to exempt them from liability in respect of gross negligence or culpa lata: see, in particular, *Seton v Dawson* (1841) 4 D 310, *Knox v Mackinnon* (1888) 13 App Cas 753, *Rae v Meek* (1889) 14 App Cas 558, *Carruthers v Cairns* (1890) 17 R 769, *Wilson v Guthrie Smith* (1894) 2 SLT 338, *Carruthers v Carruthers* [1896] AC 659, *Wyman v Paterson* [1900] AC 271, *Clarke v Clarke's Trustees* 1925 SC 693 and *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1998 SLT 471.

89. Many of these cases concerned a standard form of clause along the lines that trustees should "not be liable for omissions, neglect, or diligence of any kind, nor singuli in solidum, but each only for his own intromission" – intromission here being used in the sense of positive intervention or intermeddling. In *Seton v Dawson*, the distinction between the position in case of intromission and other cases was subjected to criticism by the Lord Ordinary, with some apparent justification. Be that as it may, the Inner House held, in the words of the judgment of Lord Cockburn (p 630), that, even in the absence of any intromission, "the general principle of our law is, that neither the protecting clause which occurs in this particular deed, nor any of the usual

clauses framed for such object, can be held to liberate trustees from the consequences of such gross negligence as amount to culpa lata".

90. Earlier cases had referred to culpa lata as equating with fraud, or with that crassa negligentia quae aequiparatur dolo: *Blain v Paterson* (1836) 14 Shaw 361 and *Cowan v Crawford* (1836) 14 Shaw 744. In *Knox v Mackinnon*, Lord Watson saw no reason to doubt that a clause in the above or similar terms "will afford a considerable measure of protection to trustees who have bona fide abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, and of the persons whom it concerns. He went on:

> "But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of culpa lata, or gross negligence on his part, or of any conduct which is inconsistent with bona fides. I think it is equally clear that the clause will afford no protection to trustees, who from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially entitled to the funds which they administer".

91. The actual basis of the decision was the latter duty, since the Lord Ordinary had found that the trustees had allowed monies to remain outstanding to accommodate the debtor, and not by way of bona fide investment. Lord Fitzgerald limited his agreement with Lord Watson to this basis.

92. In *Rae v Meek*, however, the House directly applied Lord Watson's analysis, but it did so expressly as a matter of construction. Lord Herschell, in a speech with which Lord Watson and Lord Fitzgerald both simply agreed, said of the clause (p 572):

> "Such a provision, in terms identical or not distinguishable in their effect, is a common one and is to be found in many trust deeds. It does not now come before the Courts for construction for the first time. Its effect was considered with great care in the case of *Seton v Dawson*…. And it has been the subject of discussion in several cases since the date of that decision. I adopt the law as laid down by Lord Watson in [*Knox v Mackinnon*], which I think is well warranted by the authorities."

The reference to "construction" is worth note.

93. In *Carruthers v Carruthers* the House simply proceeded on the basis that "it is well settled" that a clause protecting trustees in respect of omissions, as distinct from intromissions, "does not protect in the case of culpa lata or gross negligence" (p 664, per Lord Herschell). That leaves open whether the rule is one of construction or law.

94. *Carruthers v Cairns* concerned a differently worded clause, under which trustees were not to be liable singuli in solidum, or for any omissions or neglects of their agents, factors or managers, "but they shall be liable for wilful default and no further". The case is confused by the dislike expressed by both the Lord President and Lord M'Laren for a House of Lords' ruling that the law required of gratuitous trustees the same degree of diligence as a man of ordinary prudence would exercise in the management of his own affairs. That was the context in which the Lord President said that he had, however, no hesitation or reluctance in holding the defendant liable on the simple ground that the loss of trust funds had been caused by gross negligence (p 780).

95. The treatment of the exempting clause was also confused. The Lord President, with whom Lord M'Laren concurred, interpreted it as confirming the trustee's liability for a failure of duty. In other words, he took the same broad view of "wilful default" as was held at the time in England in relation to the liability of trustees (*In re Chapman* [1896] 2 Ch 763). On that view, wilful default included any "want of ordinary prudence". Later, of course, a different view was taken of such words, first in the context of directors' liability under articles of association (*In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407) and then, still controversially, in relation to trustees under section 23 of the Trustee Act 1925 (*In re Vickery* [1931] 1 Ch 572).

96. Lord Shand in *Carruthers v Cairns* thought that any point arising on the terms of the clause was answered by the two cases of *Knox v Mackinnon* and *Rae v Mee*k, saying "It is impossible to distinguish between the clauses of immunity in those cases and the present". If anything, this tends to suggest that the scope of such clauses is a matter of construction.

97. *Wilson v Guthrie Smith* was a decision of the Outer House on a clause providing that none of the trustees should become "liable or responsible for any cause, matter, or thing except his own wilful and intentional misdoing". Lord Stormonth Darling said that "Clauses of indemnity, unless worded in some altogether exceptional way, do not protect trustees against positive

breach of duty, however excusable or even laudable the motive which may have led to it", citing *Seton v Dawson* and *Knox v Mackinnon*. There was however no suggestion of any such breach, eg in the form of an improper motive, in *Wilson v Guthrie Smith* itself. However, he went on to say that he could not distinguish the words from "wilful default" and, under reference to *Carruthers v Cairns*, that "gross neglect of duty amounts to wilful default, even although there is no bad motive on the part of the defaulting trustee" (p 339).

98. In *Wyman v Paterson* trustees left monies with an agent without any control or check. In response to reliance placed (apparently for the first time in the case before the House) upon an exempting clause in the usual Scottish form, the Earl of Halsbury LC said that he had "great difficulty in weighing the exact amount of what is described as negligence", but that he did not think that the question of negligence arose upon the facts. He held that there was (irrespective of any negligence) a plain breach of duty. References by him and Lord Macnaghten to gross negligence must be read in this light. Only Lord Shand concluded that the trustees were unable to rely upon the clause because their neglect amounted to "that great or gross negligence known as culpa lata", to which Lord Watson and Lord Herschell gave effect in *Knox v Mackinnon* and *Rae v Meek*.

99. In *Clarke v Clarke's Trustees*, the clause merely provided that the "trustees shall not be liable for omissions nor for each other but each for his own actual intromissions only". Lord President Clyde said that:

> "It is difficult to imagine that any clause of indemnity in a trust settlement could be capable of being construed to mean that the trustees might with impunity neglect to execute their duty as trustees, in other words, that they were licensed to perform their duty carelessly. There is at any rate no such clause in this settlement".

That statement was expressly directed to construction. But it is on any view too widely expressed (not to mention somewhat emotively, in describing an exempting clause as a licence to act carelessly). No-one suggests that it is impossible to exclude liability for carelessness simpliciter. The question is whether it is possible under Scottish law to exclude it for culpa lata or gross negligence.

100. In *Lutea Trustees*, the clause provided that the trustees were not to be liable "for omissions or for neglect in their management or for one another or

for factors, attorneys, …. agents or others appointed or employed by them ….. but each for his or her own actual personal intromissions only”. It was “not in dispute that it would provide no defence if the degree of the defenders’ breach of trust was high enough to amount to culpa lata” (p 473, per Lord Justice Clerk Cullen). Lord McCluskey (at p 476) recorded that:

> “Under reference to Wilson and Duncan, *Trusts, Trustees and Executors* (2nd ed), chap 28, and *Rae v Meek*, it was submitted that an immunity clause of this kind fell to be construed strictly. That case and *Seton v Dawson* established that an immunity clause of this kind would give immunity for such lack of care as was covered by its terms. Counsel …. expressly accepted, however, that the clause in the present case, although in a modern form and capable of conferring a greater degree of immunity than some of the older clauses, did not excuse the trustees from liability for the consequences of culpa lata.”

101. This passage treats the issue as one of construction. At p 478 Lord McCluskey returned to the same theme, saying that he had:

> “no difficulty in accepting the defenders’ submission that, in determining the trustees’ duties and the standard of care which is required in the performance of those duties, it is right to take full account of the terms of the trust deed, in the context of the common law as explained, applied and developed in the cases quoted, from *Seton v Dawson* in 1841 to the present day….”

He went on:

> “I can find, however, nothing in the terms of the trust deed that would excuse the defenders from incurring liability to the trust in respect of loss resulting from grossly negligent intromissions with the trust estate. Indeed counsel …. expressly accepted that neither the terms of the trust deed nor the common law would enable the trustees to avoid liability for the consequences to the trust estate of culpa lata.”

These passages fall short of an endorsement of any idea that it is as a matter of public policy or law impossible to exclude liability for gross negligence.

102. The passage quoted from *Wilson and Duncan,* 2nd ed (1975), records only that:

> "A clause of this [i.e. the standard] type does not give protection against a "positive breach of duty" – *crassa negligentia* or *culpa lata* or any conduct which is inconsistent with *bona fides*".

Curiously, *Wilson and Duncan* cites the later English authorities on the meaning of wilful neglect or default (*In re City Equitable* and *In re Vickery*) immediately after referring to *Carruthers v Cairns* and *Wilson v Guthrie Smith*, in the first and possibly both of which cases the previous view of "wilful default" (expressed in *In re Chapman*) was influential.

103. Turning to English cases, *Wilkins v Hogg* (1861) LT (NS) 467 and *Pass v Dundas* (1880) 43 LT (NS) 665 concerned clauses providing that a trustee "shall be answerable only for losses arising from his own default" and "not for involuntary acts, or for acts or defaults of his co-trustee …." and particularly that he should not be obliged to see to the due application of any money paid over to a co-trustee, nor be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same moneys, but could require from the co-trustee an account of the application of moneys and insist on the replacement of any misapplied. In *Wilkins v Hogg* the Lord Chancellor held that:

> "This clause excludes the possibility of any liability except for actual misappropriation".

He went on to say that the clause excluded liability for handing over money without securing its due application, for permitting a co-trustee to receive money without making due inquiry as to his dealing with it and for abstaining to take the needful steps after becoming aware of a breach of trust, adding:

> "There remained therefore only personal misconduct in respect of which a trustee acting under this will could be responsible, such as collusion – handing over money with a reasonable suspicion, or ground of suspicion, that misapplication was intended."

Applying ordinary principles of construction, this could be thought an interpretation generous towards the trustee: it is not perhaps obvious that the

latter part of the clause should be read as excluding liability for negligence, especially when the earlier part making the trustee answerable for his own default could be read as covering such losses. But I can put that thought aside.

104. In *Pass v Dundas* Bacon V-C in the light of *Wilkins v Hogg* treated the clause as protecting a trustee from loss sustained in the course of administering the trust estate, "unless you can impute to him gross negligence or personal misconduct". It is not clear from where he derived the reference to gross negligence, and in the event he held that there was neither gross negligence nor personal misconduct.

105. In "The efficacy of trustee exemption clauses in English law", by Professor Paul Matthews (1989) Conveyancer and Property Lawyer (published after the Trust (Guernsey) Law 1989), Bacon V-C's dictum was treated as applying to any exemption clause, rather than the particular clause there in issue, and the thesis was advanced that "liability for gross negligence (or fraud) cannot be excluded, even by an express clause purporting to do so". If that were so, the surprising result would exist that the common law disallowed exempting provisions that were permitted under section 30 of the Trustee Act 1925 on the construction put upon that section in *In re Vickery*. In any event, Bacon V-C's dictum is an inadequate basis upon which to construct such a thesis, and is, as I have observed, not itself supported by Bacon V-C's reference to *Wilkins v Hogg*.

106. English law will construe exempting provisions strictly, but there is in my opinion no general principle of English law which could preclude trustees from exempting themselves from liability for gross negligence. The position is in this respect was and is as stated in *Armitage v Nourse* [1998] Ch 241 and in the Jersey Court of Appeal in *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* 1995 JLR 352, where the Scottish cases which I have considered and others from various other jurisdictions are analysed in an instructive judgment. I note that in a chapter in *Trends in Contemporary Trust Law* ed A J Oakley (1996), "The Irreducible Core Content of Trusteeship," written after the latter decision, Professor David Hayton endorsed the same view, referring in a footnote to *Knox v Mackinnon* and *Rae v Meek* with the comment that "in context the wording of some exemption clauses may be construed contra proferentem as not extending to omissions considered to be gross negligence".

107. More recently, in *Walker v Stones* [2001] QB 902 the Court of Appeal followed and explained *Armitage v Nurse*. It is unnecessary on this appeal to go into the question of the standard of dishonesty discussed in *Walker v Stones*, where the Court of Appeal concluded that it could include an

objective element, embracing conduct such that no reasonable person could have believed it honest: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164. That point was not argued before the Board.

108. I appreciate the consistency of the views expressed in the Scottish cases to the effect that the standard form of exemption could not cover gross negligence or culpa lata. But I think it improbable that they would be read as involving or giving rise to an absolutely inflexible rule, effectively one of public policy, precluding any trustee from exempting him, her or itself from liability for gross negligence not involving either subjective dishonesty or recklessness or dishonesty in the extended and partially objective sense recognised in this context in *Walker v Stones*. Even if gross negligence is treated as equivalent to fraud for the purposes of construction, it does not follow that it is contrary to public policy or impossible to exclude liability on the part of a trustee for gross negligence, not involving dishonesty or wilful (including reckless) misconduct.

109. However, whether that is so or not, I also confirm my agreement with the advice of the Board given by Lord Clarke. There is no reason to treat Guernsey law as following the Scottish view on this point, if it differs, in preference to the view taken under English law with which the Guernsey law of trusts is more closely associated, as well as in preference to that taken in the Jersey Court of Appeal in the *Midland Bank* case.

110. This conclusion is reinforced by consideration of the Law Commission's views. It is true that Law Commission Consultation Paper No 124 Fiduciary Duties and Regulatory Rules (1992) expressed doubts about the English legal position, following upon Professor Matthews' article, which I have already considered. The more relevant report in the present context is that on Trustee Exemption Clauses (Cm 6874) (July 2006). The Law Commission there departed from the earlier provisional view expressed in its consultation paper of January 2003, which had been that the law should intervene drawing a distinction between professional and other trustees and restricting the formers' freedom to contract out of liability for *any* negligence. In its 2006 report and after extensive consultation and reconsideration the Law Commission now proposed a rule of practice, enforceable in accordance with the codes of conduct or regulatory and professional bodies, whereby any *paid* trustee including a clause exempting from any type of negligence must before creation of the trust take reasonable steps to ensure the settlor's awareness of its meaning and effect. The argument on the present appeal is in contrast that any provision exempting from liability for gross negligence should be regarded as invalid as a matter of law, whether the trustee be professional or not, paid or not.

111. This highlights potential difficulties which would be likely to trouble any court contemplating the introduction or recognition of any absolute rule of public policy affecting the freedom of settlors and trustees to shape the relationships they enter into by exempting provisions covering eventualities falling short of dishonesty or deliberate or wilful wrongdoing. I of course accept this is an area where the legislator could, and in the event by the Trusts (Amendment) (Guernsey) Law 1990 did, decide to intervene on a relatively blunt basis, without discriminating between different categories of trustee, although only in relation to liability for gross negligence, not for all negligence. But, in relation to circumstances falling short of dishonesty or wilful misconduct, courts do best to leave the nature and extent of any intervention in parties' own arrangements to legislators.

112. In the present case, the exemption clause is worded in terms which leave no doubt that the parties agreed that the trustees should be liable only in the event of wilful and individual fraud or wrongdoing. Again I leave aside whether or not that may involve some objective element as indicated in *Walker v Stones*. For the reasons given in the advice of the Board delivered by Lord Clarke and also for the further reasons I have given, I see no reason to regard this clause as contrary to public policy or invalid in respect of gross negligence.

113. Equally, there is in my view no basis upon which to treat the Trusts (Guernsey) Law 1989 as having any effect beyond precluding the exemption of trustees from liability in the event of fraud or wilful misconduct. Only by the Trusts (Amendment) (Guernsey) Law 1990 did the Guernsey legislator (following a lead given by the Jersey legislator) go further, and invalidate any attempt to exclude a trustee from liability for gross negligence.

SIR ROBIN AULD:

114. I respectfully agree with the judgments of Lord Clarke and Lord Mance and, equally respectfully, disagree with the judgments of Lady Hale and Lord Kerr, on the first issue in this appeal. Accordingly, I concur with Lord Clarke and Lord Mance in holding that neither Guernsey customary law nor the 1989 Law prior to its amendment in 1991 prohibited, as a matter of law or public policy, exclusion of liability by a trustee for gross negligence in the conduct of his beneficiary's affairs.

115. I respectfully agree with all the other Members of the Board on the second issue, namely that the 1990 Amendment Law introducing such prohibition did not have retrospective effect.

116. I add a few remarks on the first issue only.

117. On the plain meaning of the words, and as a matter of logic and common sense, the terms "negligence" and "gross negligence" differ only in the degree or seriousness of the want of due care they describe. It is a difference of degree, not of kind, as stated by Millett LJ in *Armitage v Nurse* [1998] Ch 241. Gross negligence, like negligence not so qualified, may be committed in good faith and, therefore, without dishonesty or wilfulness. Indeed, dishonesty - an inherent ingredient of fraudulent or wilful misconduct - is the antithesis of negligence, an inadvertent falling short of a duty to take reasonable care in all the circumstances. To describe such inadvertence, as "gross" does not turn it into fraudulent or wilful misconduct.

118. Before and since the 1990 Amendment Law Guernsey customary law has permitted exclusion by trustees of liability for their negligence. The exclusion clause in the trustees' instruments of appointment here, consistent with that understanding, expressly confined their exemption from liability to conduct falling short of "wilful and individual fraud and wrongdoing". The question for the Board, as Lord Mance has highlighted, is whether, as a matter of construction in their context, those words exclude liability, or whether there is some fundamental principle of law or public policy peculiar to trustees' liability to beneficiaries for breach of duty that overrides such exclusion.

119. The 1989 Law, the first Guernsey statutory visit to the topic, strongly supports the view that there is no such fundamental and overriding principle. Its wording, in providing that "[n]othing in the terms of a trust shall relieve a trustee for a breach of trust arising from his own fraud or wilful misconduct", embodies the clear distinction between "negligence" on the one hand and misconduct of a dishonest and/or wilful nature on the other. The 1990 Amendment Law, in adding the words "or gross negligence", cannot, as indicated by Lord Clarke and Lord Mance, sensibly be regarded as recognition of a mistake by the 1989 Law draftsman, but rather as new law in line with the recent statutory change made in Jersey.

120. The purpose of the 1989 Law had been to incorporate and replace a number of uncertainties in the then Guernsey law, in particular as to trusts of personalty (though not of realty, save for variation) within the jurisdiction

with many, though not all, aspects of English law. It recognised a need to accommodate increasing recourse by overseas, as well as Guernsey, residents to Guernsey jurisdiction in trust matters. If the 1989 Law draftsman had intended to prohibit trustees' liability for gross negligence, along with fraud and wilful misconduct, he would surely have done so, as he or his successor did two years later in the 1990 Amendment Law when prompted by the Jersey change.

121. But what of the introduction or acknowledgement in section 18(1) of the 1989 Law of an obligation of a trustee to act en bon père de famille as well as with utmost good faith? There was much debate before the Board about the nature and significance of the former expression. Counsel for the beneficiaries urged the Board to regard it as connoting a more fundamental or, in some way, higher duty than that of reasonable care and skill in the conduct of a beneficiary's affairs. There are three difficulties in that approach.

122. First, the term to act en bon père de famille was and remains undefined in Guernsey law. It is not, in this context, a feature of or pointer to Scots Law or to any other relevant civil or Roman law doctrine or provision. Given its lack of definition and insufficiency of precision in its legal origins, it cannot be said to contrast with or qualify anything in English law. Therefore it does not preclude adoption by the Guernsey Courts of the English Court of Appeal's solution in *Armitage v Nurse*. In addition, the nature of the trust in play here is essentially a creation of English, not Civil law. A Guernsey Court judge seeking before or in 1989 to resolve the undoubted uncertainty of Guernsey customary law on the issue now before the Board would have derived no assistance from recourse to the general notion of to act en bon père de famille.

123. Secondly, it follows, in my view, that there is no basis for the expression to act en bon père de famille in the trustee/beneficiary relationship to impose any higher - in the sense of a wider or more sensitive - obligation on a trustee than that of a duty to act with reasonable care and skill in all the circumstances to protect and advance the beneficiary's interests in the matters entrusted to his care. A Guernsey Court in 1989 would have had to look at the matter in its context and circumstances – the nature and terms of the trusts, the relationship between the trustees and beneficiaries and, of course, contingencies affecting the values of the trust investments. See *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515 and *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1998 SLT 471, per the Lord Justice Clerk, Lord Cullen, at p 473 to similar effect. I, therefore, respectfully agree with Lord Clarke that there is no identifiable difference between the nature and extent of a trustee's duty to act with reasonable care in all the circumstances to advance and protect the beneficiary's interests and that of a duty to act en

bon père de famille before or after its statutory deployment as part of the law of Guernsey in the 1989 Law.

124. Thirdly, even if there were some special understanding in Guernsey Law in or before 1989 of the application to the trustee/beneficiary relationship of the expression to act en bon père de famille, it would have been a reason to prohibit exclusion of liability of a trustee from *all* negligence, not just "gross" negligence, as Lord Clarke noted in para 62 of his judgment. The higher the duty, the lower the threshold at which it is engaged. There is, therefore, no logical basis for a Guernsey Court, now or in 1989, to rely upon the en bon père notion to prohibit exclusion of liability at the much higher threshold for "gross" negligence – it is simply irrelevant at that level.

125. I make the same three points about the *fiduciary* nature of a trustee's duty to his beneficiary for which the beneficiaries contended, namely the elastic concept of culpa lata in Roman and civil law jurisprudence and literature. If there were a higher fiduciary duty than that of reasonable care, it is irrelevant to the question of its exclusion of liability for a "gross" breach of such duty.

126. By way of postscript as to the state of Guernsey law in 1989, I note the views of Lady Hale and Lord Kerr on the vulnerability of the competing claims of Scottish and English jurisprudence and the preference of Lord Clarke and Lord Mance for the English solution. I do not, with respect, consider it a useful exercise to debate whether a Guernsey Court in 1989 *would* have taken a different course from that now in England, based on views in other jurisdictions or on some instinct as to the input of the en bon père obligation. As to the latter, reliance on differing views or instincts of Guernsey's Lieutenant Bailiff and Court of Appeal in this case, albeit deserving respect, is an insecure foundation for determining what a "Guernsey Court" *would* or *should* have decided had the issue been before it some 20 or more years ago.

127. What matters is what a pre-1991 Guernsey Court *should* have decided as a matter of Guernsey law on a logical and otherwise legally correct process of reasoning – an outcome that might also have required examination by the Board at the time. It is an issue on which the present Board – given the extensive material and submissions put before it – is as well placed as the Lieutenant Bailiff and Court of Appeal, then or now, to determine.

LADY HALE:

128. This case is about the law of Guernsey. We are called upon to decide two issues: (i) if the courts of Guernsey had been called upon to decide, before 19 February 1991, whether it was permissible for a trust deed to exclude the trustees' liability for gross negligence, what would they have decided? And (ii) if they would have decided that such an exclusion was permissible, does the prohibition of such exclusions in section 34(7) of the Trusts (Guernsey) Law 1989, as amended by the Trusts (Amendment) (Guernsey) Law 1990 apply to grossly negligent breaches of trust occurring before the date when the amendment came into force? The Court of Appeal held that the answer to question (ii) was "no" and the whole Board agrees with them. The real issue, therefore, is whether the Board should also agree with both the Lieutenant Bailiff in the Royal Court and the Court of Appeal that the answer to question (i) is also "no". In my view we should.

129. The problem is that, in order to disagree with the Courts in Guernsey, the Board has to reach two conclusions, both of which are questionable: (i) that it is reasonably clear what the law of England and Wales was in 1988; and (ii) that the Courts in Guernsey would have followed English law, rather than taken their own view in the light of the different views taken in other jurisdictions and of the distinctive character of Guernsey law. Thus, if this appeal succeeds, this Board will be taken to have decided a question which has never been decided at this level by the Courts of England and Wales. It will be taken to uphold in Guernsey law the decision of the English Court of Appeal in *Armitage v Nurse* [1998] Ch 241 although the Supreme Court of the United Kingdom has never had an opportunity to consider whether that case was rightly decided. It seems to me that this Board should be slow to depart from the concurrent views of the Courts of Guernsey as to what was the law of Guernsey in 1988 when to do so might be taken to pre-empt consideration of the issue in the Courts of the United Kingdom.

130. Such caution would be inappropriate if it were crystal clear what the law of England and Wales was in 1988. But I share the closely argued view of the distinguished English lawyers in the Guernsey Court of Appeal that it is not. The Trust Law Committee, an independent group of academic and practising lawyers specialising in the Law of Trusts, chaired by Sir John Vinelott and based at King's College London, observed in their 1999 Consultation Paper on *Trustee Exemption Clauses* that "Until 1997, [the general law] was difficult to state with any precision, although there were helpful summaries in the Law Commission Consultation Paper No 124 and Law Commission Report No 236" (para 3.15).

131. I was party to the Law Commission's Consultation Paper No 124 on *Fiduciary Duties and Regulatory Rules* (1992) but Professor Jack Beatson, now Mr Justice Beatson, was its principal begetter. The Chairman of the Commission at that time was soon to become Lord Justice Peter Gibson, a Chancery Judge, and the other two Commissioners were Trevor M Aldridge, a property law specialist, and Richard Buxton QC, later Lord Justice Buxton. That paper pointed out that "it is clear that trustees are subject to a core level of duty from which they cannot be exempted. . . . As well as this core level of duty it seems that a trustee may not exclude liability for 'wilful default'. There is however uncertainty as to whether liability for gross negligence can be excluded" (para 3.3.6). The first instance decision *In re Vickery* [1931] 1 Ch 572, giving a restricted meaning to "wilful" default in section 30(1) of the Trustee Act 1925, had been criticised by, among others, *Underhill and Hayton* (*Law Relating to Trusts and Trustees*, 14th ed, (1987), p 552) as departing from the traditional trust law meaning established in cases such as *In re Chapman* [1896] 2 Ch 763. The decision also did not deal with "a contrary line of authority on clauses exculpating trustees for 'wilful default' which it had been assumed the legislative precursors of section 30 had put into statutory form. These cases support the proposition that trustees cannot be exculpated from liability for breach of trust arising from gross negligence or bad faith." The cases in question were *Wilkins v Hogg* (1861) 5 LT 467, *Pass v Dundas* (1880) 43 LT 665, and *Wyman v Paterson* [1900] AC 271. The Commission concluded (para 3.3.41):

> ". . . trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for 'fraud' in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for 'wilful default' also prohibits exclusion of liability from gross negligence although we incline to the view that it does".

132. Law Commission Consultation Papers make every attempt to research the existing law as thoroughly as it can be researched. Identifying the current law is a necessary step before deciding whether it needs to be changed and if so in what way. The discussion in Consultation Paper No 124 is particularly noteworthy in two respects. First, the Commission did not consider or assume that there was a stark difference between English and Scots law. It cited *Wyman v Paterson*, which is the last in the line of Scottish House of Lords cases holding that trustees cannot be relieved of liability for their own gross negligence. *Wyman v Paterson* contains clear statements that there is no difference between English and Scottish law. At p 279, Lord MacNaghten confidently declared that "If the gentlemen whose conduct is impugned had

been English trustees acting in the execution of an English trust the case against them would have been, I think, too clear for argument". Lord Shand, too, at p 286, was of the opinion that there was "no real distinction between the common law of Scotland and that of England". Admittedly, those statements were not made expressly in connection with the scope of the immunity clause, as opposed to the general duties of trustees; but they were directed towards the overall conclusion, which was to be drawn from the combination of those duties and the limited scope of the immunity clause. This was a case in which the trustees had allowed the trust funds to be held in the name of their solicitor for many months, during which time he had been able to misappropriate it. The immunity clause in question went beyond protecting them against the misdeeds of their agents and sought to protect them from their own omissions or neglect of management. Their own counsel accepted that it could not protect them against "gross errors" but argued that it did protect them against "minor carelessness such as this". The majority held that this was a positive breach of trust, but the Lord Chancellor, the Earl of Halsbury, Lord MacNaghten and Lord Shand respectively referred to its being "very gross negligence", "gross neglect" or "culpa lata". Their observations as to the permissible scope of trustee immunity clauses are entirely general.

133. With the greatest of respect to Millett LJ, in *Armitage v Nurse*, and to Lord Mance in this case, therefore, I share the view of the Guernsey Court of Appeal that it is difficult to accept that the decision in *Wyman v Paterson*, or the statements of principle in the earlier House of Lords' cases of *Knox v Mackinnon* (1888) 13 App Cas 753, *Rae v Meek* (1889) 14 App Cas 558, and *Carruthers v Carruthers* [1896] AC 659 which preceded *Wyman v Paterson*, turned on the precise wording of the immunity clause in question. Indeed, neither party has so argued before this Board. The clauses in *Knox v Mackinnon, Rae v Meek* and *Wyman v Paterson* provided that the trustees should not be liable for omissions or neglect but only for their own "actual intromissions"; that in *Carruthers v Carruthers* was to similar effect. On their face, these would have exonerated the trustees for their failures in these cases, but it was held as a matter of principle that they did not. While I accept that there is no clear statement that the law on immunity clauses is the same both north and south of the border, it is difficult to read *Wyman v Paterson* in any other way. Nor can the statements of principle be attributed only to the Scottish Law Lords. Lord Herschell took the lead in both *Rae v Meek* and *Carruthers v Carruthers*.

134. The second notable feature of the Law Commission's discussion is its treatment of the case of *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407, which featured heavily in the appellant's argument before the Board but not in the reasoning of Millett LJ in *Armitage v Nurse*. It is cited by the Law Commission for the very clear statement by Warrington LJ in the Court of Appeal, when dealing with the argument that the definition of "wilful

neglect and default" adopted by Romer J was inconsistent with previous authority on the liabilities of trustees: "I think there is great danger of being misled if we attempt to apply decisions as to the duties of trustees to a case as to the conduct of persons in the position of the auditors in this case" (pp 523-524). The case is about the extent of the duties of directors and auditors, and the meaning of an immunity for everything except "their own wilful neglect or default". Both the *City Equitable* case, and the earlier case of *In re Trusts of Leeds City Brewery Ltd's Debenture Stock Trust Deed (Note)* 1925] 1 Ch 532, are cited by the appellant in this case more for the remarkable fact that it was not argued in either case that an auditor, director or trustee could not be excused liability for gross negligence. The subject is not discussed in the cases at all, despite the eminence of the lawyers involved. No authorities at all are discussed in the *Leeds City Brewery* case, which was clearly regarded as a case on the facts, and the House of Lords authorities mentioned above are not mentioned at all in the *City Equitable* case. In the circumstances, I have the greatest difficulty in attaching to their negative characteristics the weight which the appellant would have us attach to them. It would be remarkable indeed if any decided case were to be regarded as authority for a proposition which was never argued and never mentioned in the judgments.

135. Obviously, when the Law Commission makes a prediction about how a point may be decided if it arises in future, it may well be wrong. And so it proved to be when *Armitage v Nurse* was decided, long after the Guernsey legislature had decided what Guernsey law should be. But that decision was itself almost immediately subject to criticism by serious scholars of the subject. The Trust Law Committee's Consultation Paper on *Trustee Exemption Clauses* in 1999 comments upon the Court's reluctance to distinguish between ordinary and gross negligence thus (para 2.8):

> "The force of the decision . . . may thus be diminished as apparently influenced by the assumption that the Court had to choose either to outlaw or to accept all clauses exempting trustees from liability for negligence because serious consideration should not be given to the option of only outlawing exemption from liability for gross negligence. After all, there is a long and respectable line of authority (not cited to the Court) dealing with the concept of gross negligence in the common law and distinguishing it from ordinary negligence".

The Committee went on to point, among other cases, to the decision of Mance J in *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547, and concluded (para 2.10) that "in the law of bailment and where a contract or a statute uses a term like gross negligence the courts can find a sensible meaning for such term."

136. The Law Commission's project on the powers and duties of trustees resulted in the Trustee Act 2000. This removed many of the existing restrictions on the powers and duties of trustees but did nothing to restrict the inclusion of wide trustee exemption clauses in trust instruments. During the passage of the Bill through Parliament, Lord Goodhart argued that paid professional trustees, and trust companies providing trustee services as part of their business, should only be entitled to rely on an exemption clause if it satisfied the test of reasonableness in the Unfair Contract Terms Act 1977. The Government responded by promising to refer the matter to the Law Commission. The Law Commission's Consultation Paper No 171 on *Trustee Exemption Clauses*, published in 2002, made the following comments on *Armitage v Nurse*:

> "2.54 It must be admitted that the authority of *Armitage v Nurse* (as a decision of the Court of Appeal not the House of Lords) is not entirely free from doubt. The view taken of the nineteenth century Scottish cases does not accord with the understanding of these decisions north of the border, where it is generally believed that trustees cannot invoke an exemption clause to escape liability for gross negligence, or, as it is there termed, culpa lata. While there is no reason why the English and Scottish law should be identical in this respect, the reliance placed by Millett LJ on the Scottish cases was clearly an important part of his reasoning, and should that reliance be shown to have been misplaced, the authority of the decision may thereby be called in question.
>
> 2.55 The English Court of Appeal was influenced by the decision of the Jersey Court of Appeal in *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* , where Sir Godfray Le Quesne QC, having considered the Scottish authorities, adopted a construction approach to trustee exemption clauses. This was not necessary for the decision in the case, as Jersey's legislative regulation of such clauses operated to deny the trustees recourse to the clause."

The fact that, in its later Report on *Trustee Exemption Clauses* (2006, Law Com. No 301), the Commission came up with a compromise solution which fell short of adopting Lord Goodhart's proposal is neither here nor there. Law reformers have to take the law as it has currently been decided to be, and those whom they consult will be divided amongst those who consider it to their advantage and those who do not. It is by no means unknown for a higher court subsequently to take a different view of the law (see, for

example, *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519).

137. The above references are, I believe, more than enough to show that the reasoning in both *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1995] JLR 352 and *Armitage v Nurse* is open to serious question. There was, no doubt, a body of opinion (perhaps particularly amongst professional trustees and their advisers) which hoped that English law was as the Court of Appeal eventually decided it to be. Equally, there was a body of opinion which considered that the law was not clear, that it might well be as the House of Lords had held it to be in the Scottish cases, and that the exclusion of liability for gross negligence "was void as being repugnant to the nature of a trust or contrary to public policy" (see Law Commission Consultation Paper No 171, para 2.22, referring to A Kenny, "Living up to Expectations" (1996) 146 NLJ 348, 349; P Matthews, "The Efficacy of Trustee Exemption Clauses in English Law" [1989] Conv 42; *Hanbury and Martin*, *Modern Equity*, 14th ed 1993, pp 473-474; *Underhill and Hayton*, *Law Relating to Trusts and Trustees*, 14th ed (1987), p 792). These references are enough to show that this was not an eccentric or unusual view. Some would also think this a good thing – perhaps particularly in the light of the development of professional trustees and the modern approach to exemption clauses in consumer contracts.

138. Sir de Vic Carey in the Royal Court did not engage in a close analysis of either the Scottish or the English law on trustee exemption clauses. He considered that both the 1989 Act and the 1990 amendment were declaratory of the existing law. The prohibition in section 34(7) in its original form and the underlying obligation in section 18(1) to act en bon père de famille were clearly declaratory of the existing law. Acting with gross negligence could not be compatible with acting en bon père de famille and so the 1990 amendment was also a clarification and thus (as it was said to be) a minor or technical matter rather than a substantive change in the law.

139. I accept that that reasoning may prove too much (even though, as the Court of Appeal pointed out at para 34, the Lieutenant Bailiff did distinguish between the standard to be expected and the possibility of exoneration). Acting with ordinary negligence is also incompatible with the obligation to act en bon père de famille but it is not suggested that the law of Guernsey prohibited the exclusion of liability for ordinary negligence. However, that is not a good reason to disagree with the Lieutenant Bailiff's conclusion as to what the law would have permitted before the 1990 amendment. If that law would not have permitted the exclusion of liability for gross negligence, then the amendment was, as reported to the States, only a minor change. The Court of Appeal did engage in a close analysis of the English and Scottish law and

made the same criticisms of the reasoning in *Armitage v Nurse* as were made by the Trust Law Committee and the Law Commission. They concluded that, even if the premise that Guernsey law would have followed English law were correct, it had not been shown that English law would have allowed the exclusion of liability for gross negligence. They bolstered this conclusion by declining to accept that Guernsey law, with its mixed Norman and English law heritage, would have slavishly followed English law in any event. This, to my mind, is where it is right to emphasise the duty to act en bon père de famille – even though that is clearly equivalent to the duty adopted by English law to act as a prudent man of business, it is differently phrased and has its roots in Norman, and ultimately Roman, law. A law with those roots might well also have prohibited the exclusion of liability for gross negligence. As the Lieutenant Bailiff said, the responsibility of a paid trustee could not be less than that of a person appointed by the Court as Tuteur or Guardian of a minor. Acting with gross negligence was incompatible with such duties. Indeed, I suspect that even an English lawyer would regard it as unacceptable that a guardian of the estate of a minor might be excused liability for gross negligence.

140. If, as I believe is clear, English law on the subject was not settled in 1988, I see no reason why we should disagree with the Guernsey courts' conclusion as to how Guernsey law would have decided the matter then. On this, it seems to me that the instinct of the Lieutenant Bailiff is as reliable a guide as any. In my view this appeal should be dismissed.

LORD KERR:

141. What is a trustee? The dictionary definition is "one who is trusted, or to whom something is entrusted; a person in whom confidence is put". A legal definition is "one to whom property is entrusted to be administered for the benefit of another". Jowitt's dictionary of English Law, 3rd ed (2010), describes an active trustee (as opposed to a passive trustee, which, for present purposes, is not relevant) as one who has to perform administrative duties, such as managing the trust property, receiving income and paying it over to the cestui que trust (in common parlance, the beneficiary). The duties and liabilities of active trustees are said to be of infinite variety; but generally such a trustee is bound to take the same care in acting for his cestui que trust as he would, as a prudent man, in acting for himself. Central to the notion of trusteeship, therefore, is the reposing of reliance on a responsible person or agency to manage property in a manner that will benefit those who are the beneficiaries of the trust.

142. This appeal is concerned with the limits under Guernsey law that trustees may properly set on their liability to beneficiaries in relation to the discharge of the duties associated with their trusteeship. In particular, were they entitled to rely on a term in the trust settlement exempting them from liability for gross negligence? The defendant (which is the appellant in this appeal) avers that it is entitled to rely on an exoneration clause in two settlements made in 1977. The relevant clause provides:

> "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 and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable."

143. The respondents are discretionary beneficiaries under the settlements. They claim that the appellant was grossly negligent in the investment policy that it operated in relation to those settlements and in its failure to bring proceedings against the former trustees for breach of trust. The appellant denies this but says that, in any event, it could not be held liable for gross negligence for any acts or omissions before 19 February 1991. That is the date on which an Amendment Law came into effect providing that nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own gross negligence.

144. This question was tried as a preliminary issue by the Lieutenant Bailiff, Sir de Vic Carey, and he held that the customary law of Guernsey, before any statutory provision in this area had been enacted, did not permit a trustee to exempt itself from liability for fraud, wilful misconduct or gross negligence in the administration of a trust. In consequence, when in 1989 the Trusts (Guernsey) Law provided that nothing in the terms of a trust shall relieve a trustee of liability from breach of trust arising from his own fraud or wilful misconduct this was nothing more than declaratory of pre-existing law. Likewise, when in 1990 the 1989 Law was amended to add the words "or gross negligence" to the list of conduct from which a trustee could not be exempted from liability, this too was merely declaratory of the law as it had existed.

145. The appellant appealed. The Court of Appeal upheld the decision of the Lieutenant Bailiff. It had been argued before that court that, in the absence of any explicit statement as to the customary law of Guernsey on the question, it should be assumed that English law would have been followed by

a court deciding the issue before the 1989 Law. That argument was rejected, the Court of Appeal concluding that the law of trusts in Guernsey would not slavishly follow English trust law on the question whether gross negligence could be exempted by a settlement provision. It held that Guernsey law in this area was an amalgam of principles derived partly from English law and partly from civil law jurisdictions. Although the roots of Guernsey law lay in Norman customary law and, as the court acknowledged, the courts of Normandy did not recognise trusts, it did not follow that every incident of the law of trusts as developed by courts of equity in England should be imported into Guernsey customary law. Fiduciary relationships containing some elements of trust obligations were features of Guernsey customary law long before 1989 and a number of these plainly derived from the customary law of Normandy. Thus, it was a core duty of a trustee in Guernsey to act en bon père de famille. This was not an English law concept. It derived from French law and other civil law systems. Importantly, the Court of Appeal held that while the obligation to act en bon père de famille implied "a standard of care similar to that required of trustees in England, namely that of a prudent man of business", the English standard was not the source of the duty owed by a trustee in Guernsey nor was it comprehensive of the extent of that duty. In effect, the court decided that the fundamental obligation to act en bon père de famille was incompatible with the notion that a trustee could be exempted from gross negligence in the administration of the trust.

146. This was the primary conclusion of the Court of Appeal and the principal reason for its dismissal of the appellant's appeal. A supplementary line of reasoning has provided the focus for the main attack by the appellant on the court's decision. This – essentially secondary – line of reasoning had two different but related strands. First the Court held that the law of England, at the time of the enactment of the 1989 Law and the Amendment Law in 1990, was not clear on the question whether a trustee could, by the terms of the trust settlement, be exempted from liability for gross negligence. English law could therefore provide no reliable guidance as to what the customary law of Guernsey on this subject was or should be held to be. Secondly, and in contrast with the position in England, "there was a rule of Scottish law that no trustee could be exonerated in respect of his fraud or gross negligence". While it was, in the view of the Court of Appeal, uncertain whether, in 1989, such a rule would be held to apply in England, there was academic support for the view that it did. Because, however, the position in Scotland was clear, the law of Guernsey "would have followed the Scottish model, based as it was on the civil law maxim culpa lata dolo aequiparatur" (gross negligence is equal to fraud).

English law before 1989

147. The appellant criticised the Court of Appeal's consideration of the position at English law before 1989. It was suggested that this was confined to a passing reference to the decisions in *Wilkins v Hogg* (1861) 5 LT 467; 31 LJ Ch 41 and *Pass v Dundas* (1880) 43 LT 665 and then merely because they had featured in the judgment of the Jersey Court of Appeal in *Midland Bank Trust Company (Jersey) Ltd v Federated Pension Services* 1995 JLR 352. At para 22 the Court of the Appeal in the present case said this about those cases:

> "… the Jersey Court of Appeal in the *Midland Bank* case considered two English cases: *Wilkins v Hogg* (1861) 5 LT 467; 31 LJ Ch 41 and *Pass v Dundas* (1880) 43 LT 665. The first of these contained remarks indicating that no indemnity clause could protect a trustee who knowingly committed a breach of trust, but that otherwise a settlor was at liberty to define the trustees' duties and the extent of their liability. The case does not deal with gross negligence, but the general tenor of the remarks suggests that a suitably worded exoneration clause could have excluded liability for such negligence. By contrast, *Pass v Dundas* appears to have proceeded in part on the basis of an acceptance of the argument of counsel for the trustee that an indemnity clause would protect the trustee against liability unless gross negligence or personal liability were established against him."

148. As a basis for the mooted uncertainty in English law this does seem rather slender. The appellant has argued that there are later decisions in England which bear more directly on this issue. Before turning to those it should be noted that the Court of Appeal did not rely solely on the dichotomy between these two cases as evidence of the state of uncertainty in English law. It referred to the consideration of the question by the Law Commission which had addressed the issue in its Consultation Paper No 124 *Fiduciary Duties and Regulatory Rules* (1992) where it said at para 3.3.41:

> "Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for "fraud" in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for "wilful default" also prohibits exclusion of liability for gross negligence although we incline to the view that it does."

149. The appellant was dismissive of the Law Commission's reasoning, observing that they appeared to have been heavily influenced by an article by Professor Paul Matthews in the Conveyancer and Property Lawyer, Jan-Feb 1989, 42-54 in which he postulated that it was "very likely that neither liability for gross negligence nor duties leading to such liability can be validly excluded". The appellant undertook an elaborate critique of this article designed, I believe, to demonstrate the fallacy of the proposition that I have quoted in the preceding sentence and thereby to undermine the Law Commission's expression of doubt as to whether gross negligence could be validly excluded under English law. I do not find it necessary to embark on a protracted assessment of the criticisms made by the appellant of the article because I do not believe that these provide a definitive answer to the question whether the Court of Appeal was wrong to conclude that the state of English law on the question was uncertain, much less whether they were wrong in their principal and primary conclusion that, prior to 1989, Guernsey customary law did not permit exclusion of a trustee's liability for gross negligence. I feel obliged to comment, however, that, if the Law Commission was, as the appellant has claimed, "heavily influenced" by Professor Matthews' article, they were remarkably lukewarm in their endorsement of his conclusion on this subject.

150. Of course, Professor Matthews' article and the Law Commission's observations on the state of the law both occurred after the 1989 Law had been passed by the States. This had happened on 17 March 1988 but it was not until 7 February 1989 that an Order in Council was obtained whereby it came into force. The appellant is therefore right in its assertion that neither the views of the Law Commission nor the firmly expressed opinion of Professor Matthews could have affected a judgment made before 1989 as to whether English law on the question was uncertain. But is it correct in its claim that any Guernsey lawyer "who considered the authorities and textbooks" would have advised that it was legally permissible under English law to exclude liability for gross negligence on the part of a trustee and that it is "certain" that any English Chancery practitioner would have done so?

151. One must begin the examination of the validity of these claims by considering the cases which, the appellant says, the Court of Appeal ought to have looked at before deciding that the state of English law on whether gross negligence on the part of a trustee could be excluded was uncertain.

152. The first of these is *In re Trusts of Leeds City Brewer Ltd's Debenture Stock Trust Deed, Leeds City Brewer Ltd v Platts (Note)*(1921) [1925] Ch 532. This was a claim by a company against trustees of its debenture stock, one of whom, Mr Platts, was a former managing director of the company and another, Mr Beevers, its former auditor. Clause 30 of the trust deed provided

an indemnity for the trustees by the company in relation to the execution of the trusts or "in respect of any matter or thing done or omitted (without their or his wilful default) …". Clause 32 authorised the trustees to act on the advice of certain professionals and exempted them from liability in so acting. It also contained general provisions to the following effect: -

> "(2) The trustees or trustee shall not be responsible for the consequences of any mistakes or oversight or error of judgment or forgetfulness or want of prudence on the part of the trustees or trustees or of any attorney, receiver agent or other person appointed by them or him hereunder.
>
> (3) The trustees or trustee shall, as regards all the trusts, powers, authorities and discretions hereby vested in them or him have absolute and uncontrolled discretion as to the exercise thereof whether in relation to the manner or as to the mode of and time for the exercise thereof and in the absence of fraud they or he shall in no wise be responsible for any loss, costs, damages or inconvenience that may result from the exercise or non-exercise thereof."

153. Mr Beevers, the auditor of the company, bought as trustee a hotel in Scarborough, knowing that Mr Platts, the managing director, had a controlling interest in the company that owned the hotel. He knew that, by the sale, Mr Platts was getting rid of the debentures and mortgages on the hotel. He had bought these for £9000 but they had a face value of some £12000. On the sale of the hotel, not only did Mr Platts receive a pecuniary advantage in the form of payment of unsecured debts but he was also paid management fees. The hotel that was the subject of the sale was a residential hotel and not a normal investment venture such as the plaintiff company would embark upon and in the event proved a less than prudent purchase. It was held that Mr Beevers ought to have made further inquiries before committing the plaintiff company to the sale. Lord Sterndale MR, however, felt that he might be protected under clause 30. The Master of the Rolls, in common with the other members of the court, found that, in any event, clause 32(2) provided a complete defence to the claim since this exempted Mr Beevers from liability for everything other than actions that he wilfully and intentionally undertook, knowing them to be a breach of his duty as trustee.

154. It is, I believe, important to note that the judge at first instance in the *Leeds Brewery* case had found that Mr Beevers had wilfully done what he knew to be wrong. The focus of the appeal, and much of Lord Sterndale's judgment and those of Warrington and Younger LJJ, was concerned with a

challenge to this central finding. Indeed, the judgments (all of which appear to have been delivered ex tempore) were largely taken up with a rehearsal and a review of the facts and the challenge to the trial judge's findings on them. No argument was made that the defendants should be held liable because of what appeared to be accepted was Mr Beevers' gross negligence. Indeed, in its written case on this appeal the appellant has accepted that neither the judges nor counsel in *Leeds Brewery* had considered that there might be a general principle of English trusts law prohibiting the exclusion of liability for gross negligence. The case had proceeded on the basis that there was no principle that prevented a trust deed from excluding liability for all acts other than those which amounted to wilful misconduct.

155. This is, from an historical perspective, unsurprising. The situation of the (on one view) hapless Mr Beevers is a world away from a professional trust company such as the appellant which undertakes the administration of a trust fund with the specific commission that it should do so for the benefit of those who stand to profit from it and which charges fees for the discharge of that particular function. It seems to me, therefore, that counsel advising the appellant in 1989 whether a trustee might validly be exonerated from liability for gross negligence, is unlikely to have been confident, on the authority of the *Leeds Brewery* case, that this was the position. No argument to that effect had been presented to the court in that case. No judicial pronouncement on that question had been made. The situation of a company such as the appellant was markedly different from that of Mr Beevers. Advice that the decision in the *Leeds Brewery* case (which did not directly raise, much less address the issue), would be determinative of the question of possible exemption from gross negligence would be, at best, foolhardy.

156. That the *Leeds Brewery* case was one which was decided largely on its own particular facts is perhaps reflected in the circumstance that it was not reported at the time that judgment was given but appears only as a note appended to the report of the second case on which the appellant relies, *In re City Equitable Fire Insurance Company Ltd* [1925] 1 Ch 407. In that case, during the winding up of the company it was discovered that there was a substantial shortfall of funds, largely attributable to the fraud of the managing director. On a misfeasance summons the liquidator sought to make other directors liable for negligence in respect of losses occasioned by investments and loans. It was accepted that they had acted honestly, although not necessarily non-negligently, throughout. Article 150 of the company's articles of association provided that directors were not to be liable for acts and defaults leading to loss or damage that "might happen in the execution of their respective offices or trusts … unless the same [should] happen by or through their own wilful neglect or default respectively". Romer J held that an act or omission to do an act on the part of a director was wilful where the person who acts or omits to act, knows what he is doing and intends to do what he is

doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing , and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty.

157. Romer J's articulation of the scope of wilful neglect or default followed the reasoning of the Court of Appeal in *Lewis v Great Western Ry Co* (1877) and *Forder v Great Western Ry Co* [1905] 2 KB 532 both of which were concerned with the meaning of the phrase, "wilful misconduct" in exclusion clauses in contracts for the carriage by the defendants of the plaintiffs' goods. Although he acknowledged that these were different contexts from that which he was considering, he felt able to draw on these in reaching his conclusion as to the extent of the duty required of a director in the performance of his functions without wilful neglect or default. At p 441 he said:

> "There is not, so far as I know, an authority in which the meaning of 'wilful default' in the ordinary trustee indemnity clause has been determined or even considered. I am therefore at liberty to place upon article 150 the construction which appears to me to be warranted by the authorities in which the meaning of 'wilful default', 'wilful neglect' and 'wilful misconduct' has been determined in other connections."

158. It is important to remember that the decision in the *City Equitable* case depended on an analysis of whether wilful neglect, default or misconduct could equiparate with gross negligence. It did not directly address the question whether gross negligence could be excluded as a basis for liability on the part of a trustee, although, of course, it is implicit in the judgment that such liability was in fact excluded by the words in the articles of association. In view of the time which has elapsed since the decision was made, however, and the change in the legal landscape in the general area of liability for professional negligence, it is at least relevant to bear in mind that the propriety of permitting a professional trustee to exempt himself from every brand of negligence, even of the grossest kind, did not fall under scrutiny. That a trustee could be so exempted was taken as a given; the conclusion that this was so was not the product of analysis. Moreover, the decision that Romer J reached was based on what he clearly regarded as a novel instance of analogical reasoning involving the importation of conclusions from the significantly different context of commercial contracts. Whether a similar analogy would have been drawn in, say, 1988 is at least open to question.

159. For these reasons, I believe that, in relation to its application to the position of trustees such as the appellant in the present case, the decision in *City Equitable* should be treated with some caution. The need for circumspection is enhanced by observations of Warrington LJ in the Court of Appeal in the *City Equitable* case. At pp 523-524 he said:

> "… I think that there is great danger of being misled if we attempt to apply decisions as to the duties of trustees to a case as to the conduct of persons in the position of the auditors in this case."

160. Those words were, of course, prompted by the consideration that in the case of trustees there were "certain definite and precise rules of law as to what a trustee may or may not do in the execution of his trust". Nevertheless, they serve as an appropriate warning about the danger of assuming that the scope of a trustee's obligations can readily be circumscribed in a way that is considered suitable in other contexts such as commercial agreements. In the latter sphere those who suffer a disadvantage by the negligence of one of the parties to the contract will customarily have been privy to the agreement and in a position to directly influence its terms. In contrast, a beneficiary to a trust who might suffer grievously as a consequence of a trustee's gross negligence may not have had any input into the terms of the trust settlement.

161. The other decided cases on which the appellant relied were largely concerned with what was described in its written case as the "conceptual dividing line between fraud or dishonesty (or wilful misconduct) on the one hand and negligence, even gross negligence, on the other". One can accept readily that such a dividing line appears from these authorities but that does not answer the critical question as to how English law would have reacted to a claim in 1989 that a professional trustee should not be able to rely on the terms of a trust settlement to exempt itself from liability for gross negligence. None of those cases addressed that question directly.

162. The appellant also relied on various academic commentaries that would have been available to counsel advising in 1989. Each of these, in so far as they addressed the question of whether gross negligence on the part of a trustee could be exempted, either appeared to assume that this was so without further examination or relied on the decision in *Wilkins v Hogg*. As to the latter, the decision was not directly concerned with the question whether gross negligence on the part of a trustee could be exonerated although, as the Court of Appeal in the present case accepted, the tenor of the judgment suggested that a suitably worded exoneration clause could have excluded liability for such negligence. This seems to me to provide something conspicuously short

of a firm foundation on which to give unqualified advice that English law in 1989 was bound to recognise the validity and enforceability of such a clause.

163. Nevertheless, it is inevitable, I think, that one must acknowledge that the issue was not as open-ended as the Court of Appeal has portrayed it. Although, in my opinion, the position was not at all certain, there was an ample basis for advice in 1989 that English law would *probably* give effect to a clause exonerating a trustee from liability for gross negligence. But does this affect the final conclusion that the Court of Appeal reached? In my judgment it does not. Before giving the reasons for that view, however, it is necessary to consider the decision in *Armitage v Nurse* [1998] Ch 241, not least for the insight that it can provide on the question of how certain was the law in this area before that decision was given.

Armitage v Nurse

164. The plaintiff, a seventeen year old girl, was entitled in remainder to settled land to be held in trust until she was forty.

165. Clause 15 of the settlement provided that no trustee should be liable for any loss or damage to the plaintiff's fund unless it was caused by his own actual fraud. It was submitted on the plaintiff's behalf that a trustee exemption clause that purports to exclude liability for everything except actual fraud was void for repugnancy or against public policy. That argument was rejected by the Court of Appeal. Millett LJ (with whose judgment Hirst and Hutchison LJJ agreed) said at pp 253-254:

> "I accept the submission made on behalf of Paula [the plaintiff] that 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. …But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of 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 trusts, but in my opinion it is sufficient."

166. Now it is true that Millett LJ had earlier said that it was a bold submission that a clause such as that under consideration in the appeal, taken, as it had been, from a standard precedent book and to the same effect as a clause found in another, approved by counsel acting for an infant settler and by the court on her behalf should be considered to be so repugnant to the

trusts or contrary to public policy that it should be set aside. But it seems to me that this observation did no more than reflect the assumptions as to the validity of such clauses that had previously been made – assumptions, moreover, made without any examination of the competing public policy issues that arise in such cases. Millett LJ did not embark on an examination of the public policy arguments on their intrinsic merits. He simply concluded that these had been determined by earlier authority and since it was "far too late" to suggest that the exclusion in a contract of liability for ordinary negligence is contrary to public policy, the same should hold true for settlements. No explanation was offered as to why that should automatically follow and, for the reasons given at para 160 above, I do not consider that this should be an inevitable consequence.

167. Although 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 at p 256 B-C he said this:

> "… 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. Jersey introduced a law in 1989 which denies effect to a trustee exemption clause which purports to absolve a trustee from liability for his own 'fraud, wilful misconduct or gross negligence'. The subject is presently under consideration in this country by the Trust Law Committee under the chairmanship of Sir John Vinelott. If clauses such as clause 15 are to be denied effect, then in my opinion this should be done by Parliament, which will have the advantage of wide consultation with interested bodies and the advice of the Trust Law Committee."

168. It is interesting to consider how a Guernsey court in 1988 would have reacted to the suggestion that it should follow English law in this area, if a statement such as that set out in the preceding paragraph had been then available. It seems to me to be entirely probable that it would have been extremely reluctant to follow English law on this question, not only because of the reservations about its propriety that appear to be implied in the passage quoted but also because the principle that a trustee was required to act as a bon père de famille was so deeply embedded in Guernsey customary law.

The Scottish cases

169. As of 1988, the position in Scotland on the public policy arguments was, on one view, distinctly clearer than in England. This is not a view which Millett LJ shared. Indeed, from his judgment in *Armitage v Nurse* it is clear that he believed that the relevant Scottish cases merely involved decisions on the proper construction to be given to the particular clauses under consideration. None of these was considered to be authority for the proposition that it was contrary to public policy to exclude liability for gross negligence by an appropriately worded clause. In the present case the Court of Appeal cast doubt on the correctness of that view and, in my opinion, they were right to do so.

170. In *Seton v Dawson* (1841) 4 D 310 the clause on which the trustees had relied purported to exempt them from omissions or neglect of diligence, of any kind. They were to be liable only for "actual intromissions". The majority decision was to the effect that "the general principle of Scots law [was] that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amount to culpa lata". It was held that the trustees had not been guilty of actual intromission but they were nevertheless liable. This can only have been on the basis that they had been neglectful of their diligence. In effect the purported exemption was held not to have been efficacious to provide the protection that it sought to supply and this can only have been on the basis that there was a general principle of Scots law that culpa lata on the part of trustees could not be the subject of an exemption from liability.

171. A comparable clause was under consideration in the case of *Knox v Mackinnon* (1888) 13 App Cas 753. At 765 Lord Watson said this about the clause:

> "I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bona fide abstained from closely superintending the administration of the trust, or who have .committed mere errors of judgment … But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence on his part …"

172. In *Rae v Meek* (1889) 14 App Cas 558 the exoneration clause provided that the trustees should not be "answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromission of each other or of their factor, but each for his or her actual intromissions under deductions of all payments bona fide made in fulfilment of the premises". Lord Herschell who delivered the main speech followed the line of authority established by *Seton v Dawson* and *Knox v Mackinnon*, approving the statements of principle to be found in both earlier cases.

173. In *Carruthers v Carruthers* [1896] AC 659 a provision that a gratuitous trustee "shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions" was implied into the trust instrument by the Trustees (Scotland) Act 1861. At p 667 Lord Watson said:

> "The immunity clause of the Act of 1861, or a similar immunity conferred by the terms of a trust deed, does not afford a protection to trustees against any act or omission which, according to the law, is regarded as constituting culpa lata".

174. All the cases to which I have referred (and indeed some others) were considered by the Court of Appeal. No more detailed examination of these is required, however, for present purposes. It is sufficient, it seems to me, to say that the cases clearly demonstrate the recognition in Scots law of a general principle that culpa lata on the part of a trustee could not be exempted in a trust deed. Whether that is an unassailable principle is not, in my opinion, of significant moment in the current debate. As it happens, I believe that there is sufficient in these cases to sustain the Court of Appeal's conclusion that the law in Guernsey, *if required to do so*, was more likely to have followed the Scottish model than the rather less well defined – and, moreover, less readily defensible – law of England and Wales.

175. A final conclusion on that question is not essential, however, in my opinion, in order to dispose of this appeal. As I have pointed out, the Court of Appeal's principal and primary finding was that the fundamental obligation to act en bon père de famille was incompatible with the notion that a trustee could be exempted from gross negligence in the administration of the trust. The view that Guernsey law would have followed the Scottish model (whatever that may have been) was a secondary line of reasoning, not in the least essential to its primary finding. For that reason I find it neither necessary nor profitable to enter on the dispute between the parties as to

whether, on a proper view of the present state of the law in Scotland, it is only dolus on the part of a trustee that cannot be exonerated and whether, drawing on the classical sources which pre-occupied much fine argument not only during the hearing but subsequent to it, culpa lata may indeed be excluded from a trustee's liability by a suitably worded exoneration clause in a trust deed.

Recognition of a Trust Law in Guernsey before 1989

176. In "*Foundations of Guernsey as a Trust Jurisdiction*" (1996) Trusts and Trustees Vol 2 (8), pp 5-9, Advocate St J A Robilliard stated that "a basis of trust law was recognised and developed in Guernsey for a considerable period before the Trust Law came into force and indeed the Trust law is clearly based on this assumption". It has not been disputed that under Guernsey trust law a trustee was required to act en bon père de famille and that this was a feature of the law both before and after the enactment of the 1989 Law. The statutory requirement so to act provided for in section 18 of the Trust Law is no more than declaratory of the law as it existed, therefore. Two conclusions can be drawn from this history. The first is that the duty to act en bon père de famille, because it has no counterpart in English law, marks a distinct difference between the two systems. Secondly, the prominence given to the principle by its inclusion in the 1989 Law reflects its importance in Guernsey law.

177. As the respondents have pointed out, in English trust law, the core duties of a trustee are loyalty and fidelity - *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 at 18F. Although a trustee in English law owes a duty of care, it is not fiduciary in nature. By contrast, the essence of the duty to act en bon père de famille is fiduciary. What could the duty to act as a bon père (a good father) be other than to act in a fiduciary capacity? And this duty is central to the relationship between the trustee and the beneficiary. Ultimately, it appears to me that the notion of exempting from liability a trustee's gross negligence is not only inimical to the fiduciary duty that he owes to the beneficiary under Guernsey law, it is wholly destructive of the essential feature of the relationship between the two.

178. The respondents have accepted (I believe correctly) that Guernsey customary law permits the exoneration of a trustee from some aspects of the duty to act en bon père de famille. A conscientious father might be forgiven a lapse that amounted to a failure to take reasonable care. But to permit exemption for gross negligence is of a different order entirely. I agree with the respondent's submission that if this obligation could be avoided where there was gross negligence it would be deprived of any enforceable substance

beyond that of the duty to act in good faith. The incompatibility between, on the one hand, the fiduciary duty to act as a good and conscientious father would in the handling of a child's affairs and, on the other, the notion that he could be excused from gross negligence in dealing with those affairs is both obvious and elementary.

179. It is on the fiduciary nature of the duty that the Scottish cases concentrated in deciding that culpa lata as opposed to culpa levis could not be exempted. This approach also underlay the decision in the Canadian case of *In re Poche* (1984) 6 DLR (4th) 40. And it was, at least partly, because the duty owed by a trustee was considered in *Armitage v Nurse* not to be fiduciary in nature that it was felt possible to overlook the obvious policy arguments against permitting a trustee to exempt himself from liability for his own gross negligence. I therefore believe that reference to the Scottish cases is valid and helpful, not because they supply a clear answer where the English cases do not, but because the reasoning that underlies them viz that the fiduciary nature of the duty owed by trustees in Scots law cannot be reconciled with the view that a trustee can exempt himself from gross negligence can be applied mutatis mutandis to the position in Guernsey where a duty to act en bon père de famille cannot live comfortably with the notion that a bon père should be permitted to act with impunity in a grossly negligent fashion.

Conclusions

180. I would therefore have favoured the dismissal of this appeal. The fact that this would have resulted in discordance between the law in England and Wales and that in Guernsey could have been faced with equanimity, I believe. If, as I suggested at the beginning of this judgment, the placing of reliance on a responsible person to manage property so as to promote the interests of the beneficiaries of a trust is central to the concept of trusteeship, denying trustees the opportunity to avoid liability for their gross negligence seems to be to be entirely in keeping with that essential aim.