Judgment 28 /2009 **Hutcheson et al v Spread Trustee Co Ltd – Royal Court (Civil Action File 906) – 23 June 2009**

Statutory interpretation – Trusts (Guernsey) Law, 1989, as amended in 1991 – provision that the terms of a trust cannot relieve a trustee of liability arising from gross negligence – whether retrospective effect prior to 1991 or 1989 – Guernsey and Jersey legislation compared – held that the 1991 statutory provision as to gross negligence was declaratory rather than novel – acting with gross negligence not compatible with acting en bon père de famille – held that the exoneration clause as to gross negligence was ineffective both before and after the legislation of 1989 and 1991 – leave granted to appeal to the Court of Appeal (See Judgment 10/2009)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 906

The 23rd day of June 2009 before Sir De Vic Graham Carey, Lieutenant Bailiff, sitting alone

Between

SARAH ANN ACATOS HUTCHESON et al

Plaintiffs

-v-

SPREAD TRUSTEE COMPANY LIMITED

Defendant

Whereas on the 18th June the Lieutenant Bailiff gave consideration to a preliminary issue pursuant to his order of 25th February 2009 and heard thereon Advocates J. P. Greenfield and I.C. Swan counsel for the Plaintiff and Defendant respectively the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and

1. held on the preliminary issue that the inability of the terms of a trust to relieve the trustee of liability for a breach of trust arising from his own gross negligence applies to breaches of trust occurring prior to 19th February 1991 (the date on which the Trusts (Amendment) (Guernsey) Law, 1990 came into force) and to breaches of trust occurring prior to 22nd April 1989 (the date on which the Trusts (Guernsey) Law, 1989 came into force);
2. ordered that the Defendant pay the Plaintiffs' costs of the preliminary issue to be taxed on a recoverable basis if not agreed;
3. gave the Defendant leave to appeal the decision on the preliminary issue;
4. fixed the period of the 8th - 26th February 2010 for the trial of this matter;
5. set this matter down for a review hearing on 30th July 2009, not before 3.30 p.m.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
23.06.09

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between **SARAH ANN ACATOS HUTCHESON et al** **Plaintiffs**

-v-

SPREAD TRUSTEE COMPANY LIMITED **Defendant**

Judgment of Lieutenant Bailiff Carey on Preliminary Issue

Advocate for the Plaintiffs: **J P Greenfield**
Advocate for the Defendant: **I C Swan**

Date of hearing: **15th May 2009**

Date Judgment handed down: **23rd June 2009**

Cases, texts & legislation referred to:

1) The Trusts (Guernsey) Law 1989.
2) *McCormack v Waterman (Royal Court) 19th December 2001*
3) *Midland Bank Trust Company Limited (Jersey) Limited, Establishment Committee and Day v Federated Pension Services [1995 JLR 352]*.
4) Bennion Statutory Interpretation a Code 5th Edition, at section 97.
5) *Plewa v Chief Adjudication Officer 1995 1AC 249*
6) *Bartlett v Barclays Bank Trust Co Ltd (1981) All ER at 152*
7) *Armitage v Nurse [1998] Ch 241 at page 256*

Introduction

1. The question that I am being asked to decide as a preliminary issue, pursuant to an Order made by me on the 25th February last, arises in proceedings that were commenced nearly five years ago. The Plaintiffs are discretionary beneficiaries under two settlements made in November 1977 by the late Mr Peter Acatos, and the Defendant is the present trustee of those settlements.

2. Put very briefly, the Plaintiffs allege that they are entitled to compensation for substantial losses that have occurred in the underlying portfolio of investments of the settlements, resulting from failures on the part of the Defendant and its predecessors as trustees to protect the interests of the Plaintiffs as discretionary beneficiaries.
3. Each of the settlements contain an exoneration clause in the following 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."*

4. The Plaintiffs are alleging that the failings of the Defendant and the previous trustees, which principally involve a failure to diversify the trust assets, amounts to a breach of trust which inter alia results from acts of gross negligence on the part of the Defendant and its predecessors as trustees. The Defendant pleads in its defences that the exoneration clause referred to above, protects it from any liability for breach of trust flowing from its gross negligence.

The Guernsey Legislative Background

5. I have noted that the settlements were created in 1977. At that time, trusts were regularly being created and declared to be subject to the laws of this Island. However, there was considerable uncertainty as to what precisely the law relating to trusts was. The problem, in summary, was that the Royal Court applying Norman Law in which Guernsey Law has its roots, never developed the body of jurisprudence relating to the regulation of trusts that the courts of Equity developed over the centuries in England. It is not necessary for me to rehearse in this judgment where Guernsey law stood at the time the settlements were created. For discussion on the state of the trust law prior to the enactment of the Trusts (Guernsey) Law 1989, see the judgment of Day DB in *McCormack v Waterman (Royal Court) 19th December 2001*.

6. In 1988, the States resolved to introduce legislation to regulate trusts. The Policy Letter introducing the subject [Billet d'Etat IX of 1988 Article VI] proposed legislation broadly on the lines of earlier legislation passed in 1984 in Jersey, although as we shall see, the way in which the Bailiwicks developed their respective laws differed in material respects.

7. The Trusts (Guernsey) Law 1989 ("the 1989 Law") came into force on the 22nd April 1989. Section 34(7) in its original form stated:

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

8. Shortly after the law came into force, certain amendments were deemed to be desirable to the original legislation. The States accordingly passed the Trusts (Amendment) (Guernsey) Law 1990 ("the 1990 Law"), which came into force on the 19th February 1991. The material change for the purposes of this judgment was Section 1 (f) added to the end of Section 34(7) of the 1989 Law the words: *"or gross negligence"*.

9. The Defendant claims that the exoneration clauses protected it in respect of breaches of trust involving gross negligence occurring before 19th February 1991, as opposed to those occurring after that date, which the Defendant concedes would not be capable of being protected by an exoneration clause in respect of a breach involving gross negligence.

10. The Plaintiffs contend that the operation of the relevant provision of the 1991 Law is retrospective so that the exoneration clause does not protect the Defendant (or the former and/or retiring trustees) from liability from breaches of trust which constituted gross negligence committed before the 19th February 1991.

The Question To Be Determined As A Preliminary Issue

11. This is:

    a) *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 the 19th February 1991 (the date on which the Amendment Law came into force) and*
    b) *If it does, whether it applies to breaches of trust occurring prior to the 22nd April 1989 (the date on which the 1989 law came into force).*

12. It was Mr Swan, on behalf of the Defendant, who made the running in the argument that there should be a separate trial of the preliminary issue. Mr Greenfield was, and remains to a certain extent, less sure. As frequently happens with preliminary issues, the arguments as they developed on either side became somewhat more involved and we have landed up having to review in some detail, the history of the legislation and the way it developed both in Guernsey and in Jersey.

13. The exoneration clause is in similar terms in each of the Settlements and reads:

> *"In the execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust Fund in consequence of the failure loss or depreciation 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".*

14. I propose to outline the arguments of Mr Swan to the effect that applying the general rules of statutory interpretation, the amendment made in 1991 can only speak from the 19th February of that year and cannot be interpreted in a way that will remove the effect of an exoneration clause in the terms I have recorded on breaches of trust committed before that date. I will then record Mr Greenfield's response thereto and in particular what he has to say in relation to the decision of the Jersey Court of Appeal in the case of *Midland Bank Trust Company Limited (Jersey) Limited, Establishment Committee and Day v Federated Pension Services [1995 JLR 352]*. That case held that a provision added to the Jersey Trust Law in 1989 outlawing the right of trustees to rely on exemption clauses not only for fraud and wilful misconduct, but also for the first time, gross negligence could be construed as being of retrospective effect back to the time that the original trust law was introduced in Jersey in 1984.

The Defendants' Contentions

15. The starting point of the Defendant's argument is the basic principle of statutory interpretation reflected in *Bennion Statutory Interpretation a Code 5th Edition,* at section 97:

> *"Unless the contrary intention appears and enactment is presumed not to be intended to have retrospective operation"*

In the commentary thereon, the author says:

> *"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular act is likened to a floodlit, switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel the law applying to it should be the law in force today, not tomorrow's backward adjustment of it……..*

> *The basis of the principle against retrospectivity "is no more than simple fairness which ought to be the basis of every legal rule"".*

16. Later in the paragraph, *Maxwell* on the Interpretation of Statutes is quoted as follows:-

> *"It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the act or arises by necessary and distinct implication."*

17. A relatively recent example of the application of this principle is to be found in the decision of the House of Lords in *Plewa v Chief Adjudication Officer 1995 1AC 249*.

18. Mr Swan on behalf of the Defendant, argues that there is no contrary intention discernable from the context of the legislation or clear implication that there was an intention that the legislation should be retrospective. He draws attention to the Policy letter of 1990 [Billet d'Etat No. VIII of 1990, Article VI]. The Policy letter was mainly concerned with problems relating to foreign rules of forced heirship and again there is reference to the desirability "that the legal basis of such trusts should be beyond doubt and should be on the same basis as trusts established in other jurisdictions such as the Isle of Man and Jersey".

19. The only reference in the Policy letter to the particular provision which is now for me to consider, namely the additional words *"and gross negligence"* is in the last two paragraphs of the Policy letter which read as follows:-

> *"The Committee is also advised that there are a number of minor technical amendments to the law which are desirable and consider that this is an appropriate opportunity to proceed with them.*
>
> *The proposed changes relate to the validity of trusts; trustees' expenses; jurisdiction of the court; liability of the trustees and the recovery of property disposed of in breach of trust."*

20. Mr Swan argues that one can read nothing into that somewhat brief direction for the preparation of legislation to indicate that the States is intending it to be retrospective and the finished article is likewise silent on retrospectivity.

21. Mr Swan goes on to remind me that we are not concerned with the particular facts of this case, but that the question I have to ask myself is what effect does the amendment of 1990 have on every Guernsey trust then in existence. Mr Swan argues that it is not fair suddenly to move the goal posts and impose liability on trustees, retrospectively for honest incompetence, even if amounting to gross negligence. Trustees may have been comfortable with accepting office on the basis that the trust deed provided that they could only be liable if they were guilty of fraud or wilful misconduct. They may not have been prepared to accept office if they were to be potentially liable for gross negligence. It is this issue of fairness that should weigh heavily against allowing an interpretation that would give the new provision retrospective effect.

The Plaintiff's general submissions on retrospectivity

22. Mr Greenfield does not directly challenge the principles outlined in *Bennion* to which I have referred, but challenges their applicability to circumstances of this case. The Plaintiff's argument is firstly that as it is inconceivable that the section 34(7) had the effect of exonerating trustees from liability arising from their own fraud or wilful misconduct committed before the law was enacted that the same rules should apply to the additional restriction introduced in 1990 in respect of gross negligence.

23. Mr Greenfield on behalf of the Plaintiff makes the point that professional people such as the principals of the Defendant would, in normal course, be liable for gross negligence in the exercise of their professional duties and therefore it is not unfair that when discharging the role of a professional trustee, they should be held liable for actions of gross negligence in the exercise of their duties as trustees even if they had previously thought that they would get away with the most appalling incompetence, so long as they were not actually stealing trust money.

24. Mr Greenfield goes on to point out that section 1(f) of the 1990 law does not have the effect of imposing any new duty on a Trustee. What is happening is that he is having withdrawn from him the right to rely on a clause excluding his accountability for acts arising from his gross negligence. In these circumstances it is argued by Mr Greenfield that once the States had decided to prohibit gross negligence exclusions it would have required clear and express words if the consequence of the new provision was to be that Trustees should remain entitled to avoid liability for breaches of trust involving gross negligence, committed at an earlier date.

25. Mr Greenfield responded on the fairness point and quoted the case of *Plewa* in greater detail and the adoption by Lord Woolf of the principle identified by Staughton LJ in *Social Security Secretary v Tunnicliffe [1991] 2 All ER 724* , to which I will return. Mr Greenfield distinguished *Plewa* in saying that the change in the legislation with potentially retrospective application affected third party rights whereas here what was at issue was the right of a trustee to avoid the consequences of his own grossly negligent acts.

26. Before looking at the decision of the Jersey Court of Appeal in *Midland Bank Trust* , I should record the different statutory histories leading up to the adoption in both bailiwicks of provisions prohibiting the reliance by trustees on clauses in Trust deeds excluding liability for acts of gross negligence.

The Jersey Legislation

27. The original piece of legislation in Jersey was The Trusts (Jersey) Law 1984 ("The 1984 Jersey Law") which law was amended by the Trusts (Amendment) (Jersey) Law 1989 ("The 1989 Jersey Law"). I adopt the summary of the main provisions of both laws contained in *Midland Bank Trust* at the top of page 369.

> *In Art. 1(1) "trust" is defined as including-*
>
> *"(a) the trust property; and*
> *(b) the rights, powers, duties, interests, relationships and obligations under a trust …."*
>
> *"Terms of a trust" are defined as meaning-"…the written or oral terms of a trust, and also means any other terms made applicable by the proper law." Art. 1(5) provides: "This Law shall not be construed as a codification of laws regarding trusts, trustees and persons interested under trusts." Article 10, which is headed "Validity of a Jersey Trust," provides, inter alia:*
>
> *"(2) A trust shall be invalid-*
>
> *(a) To the extent that-*
>
> *(i) It purports to do anything the doing of which is contrary to the law of Jersey …*
> *(b) To the extent that the court declares that- …..*
> *(ii) The trust is immoral or contrary to public policy …"*

Article 17, headed "Duties of a trustee," provides:

"(1) A trustee shall in the execution of his duties and in the exercise of his powers and discretions:

(a) act-

(i) with due diligence;
(ii) as would a prudent person;
(iii) to the best of his ability and skill; and

(b) observe the utmost good faith."

Article 20, headed "Powers of a trustee," provides, inter alia: "(2) A trustee shall exercise his powers only in the interests of the beneficiaries and in accordance with the terms of the trust."

Article 26, headed
"Liability for breach of trust," and which was amended by the 1989 Law, provided before amendment, inter alia:

"(1) A trustee who commits or concurs in a breach of trust shall be liable for –

(a) the loss or depreciation in value of the trust property resulting from such breach; and
(b) the profit, if any, which would have accrued to the trust property if there had been no such breach.
……

(9) Subject to the terms of the trust, a trustee shall not be liable-
…….

(b) for any loss to the trust property unless such loss is due to -

(i) his wilful default, act or concurrence; or
(ii) his neglect or failure to exercise reasonable care to prevent such loss.

By art. 5 of the 1989 Law, two relevant amendments were made. There was inserted at the beginning of art. 26 a new paragraph (A1): "Subject to this Law and to the terms of the trust, a trustee shall be liable for a breach of trust committed by him or in which he has concurred. " Also, for para. (9) there was substituted a new para. (9): "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."

Article 30, as enacted in 1984, provided, inter alia:

"Indemnity of retiring trustee

(1) When a trustee resigns, retires or is removed, he shall duly surrender trust property in his possession or under his control.

(2) A trustee who resigns, retires or is removed and has complied with paragraph (1) shall be released from liability to any beneficiary, trustee

or person interested under the trust for any act or omission in relation to the trust property or his duty as a trustee except actions-

(a) arising from any breach of trust to which such trustee (or in the case of a corporate trustee any of its officers or employees) was a party or to which he was privy; ….

(3) Any provisions in the terms of a trust purporting to indemnify a trustee to an extent greater than is provided by this Article shall be invalid."

By art. 7 of the 1989 Law, the following amendments were made to art. 30:

(a) A new heading was substituted: "Position of outgoing trustee."
(b) In para. (1) there were inserted at the beginning of art. 30 the words "Subject to paragraph (1A)."
(c) After para. (1) there was inserted a new paragraph (1A): "A trustee who resigns, retires or is removed may require to be provided with reasonable security for liabilities whether existing future contingent or otherwise before surrendering trust property."
(d) In para. (2), at the end of the opening words, "liability" was substituted for "actions."
(e) Paragraph (3) was deleted (no doubt because it was considered to be superseded by the new art. 26(9)).

The 1989 Law also added a new art. 8A, dealing with transfers of property to a trust. Paragraph (3) of this new article provides:

"For the avoidance of doubt it is declared that the provisions of this Article shall apply notwithstanding any other provisions of this Law and shall apply only to transfers or dispositions of property made to a trust after the commencement of [the 1989 Law], but this declaration shall be without prejudice to the validity or otherwise of transfers or dispositions made before that time."

The Guernsey Legislation

28. Section 34 (1) of the Trusts (Guernsey) Law 1989 deals with the issue of liability for breach of trust in the following terms:-

"34(1) Subject to the provisions of this law and to the terms of the trust, a trustee who commits or concurs in a breach of trust is liable for –

(a) Any loss or depreciation in value of the trust property resulting from the breach and,
(b) Any profit which would have accrued to the trust had there been no breach.

The important words are those at the beginning, *"subject to <u>the provisions of this law</u> and to <u>the terms of the trust</u>."* (my emphasis)

29. The *<u>provisions of the law</u>* must mean section 34(7) which provides that nothing in the terms of the trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct (later amended to add gross negligence - see the 1990 law). The *<u>terms of the trust</u>* must refer to the exoneration clause, which I have set out in paragraph 13.

30. Mr Swan argues forcefully that the differences in the way that the laws developed requires a different approach to retrospectivity in Guernsey from that adopted by the Court of Appeal in

Jersey. The pre 1989 situation in Jersey was that under Article 26(9) of the 1984 Jersey Law it was not possible to exclude liability for "neglect or failure to exercise reasonable care", He submits that the effect of the 1989 amendment was to advantage trustees in that a trust deed could exclude such liability, albeit not for gross negligence. In Guernsey the position was different. Before the enactment of 1991 Law a trust deed could validly restrict liability for gross negligence, whereas after the amendment it could not.

31. In *Midland Bank Trust* the court held that on its interpretation of the exculpation clause (any doubt as to its construction being resolved against the trustee), the trustee had not in the circumstances of that case been able to persuade the court that it should be excluded from liability for what it had done wrong in that its actions had been in breach of trust and had been knowingly and wilfully committed.

32. The exculpation clause in *Midland Bank Trust* was in somewhat different terms. It provided as follows:

> *"Rule 29*
> *The trustee shall be indemnified against all liabilities incurred by it in the execution of the trust hereof and the management and administration of the scheme and shall have a lien on the fund for such indemnity and the trustee shall not be liable for anything whatever, other than a breach of trust knowingly and wilfully committed."*

33. In summary, the facts of *Midland Bank Trust* were that the Respondent had been the trustee of one of the States of Jersey Pension Funds for a number of years and a decision was made to transfer management of the fund to another bank. There was a two month delay in handing over the funds whilst the Respondent mistakenly believed that it could not transfer the funds to the new manager, without completion by the States of a customer agreement in accordance with the provisions of the English Financial Services Act 1986.

34. In the interim, the stock market had gone up and the States were claiming damages for the loss of the opportunity to reinvest the fund whilst the market was at a lower level. The Jersey Court of Appeal engaged in a full review of the English and Scottish cases dealing with exemption clauses in trusts. It looked at the wording of Rule 29 in detail and had to decide on the proper meaning of the words *"trustees shall not be liable for anything whatever other than a breach of trust knowingly and wilfully committed"* and preferred an objective interpretation of these words to the effect that notwithstanding the exculpation clause, the trustee is liable if it knowingly and wilfully commits an act which amounts to a breach of trust, regardless of whether at the time of commission, the trustee knew that it was committing such a breach.

35. The court therefore held that the exculpation clause did not protect the trustee, but notwithstanding that finding went on to consider the effects of the 1984 Jersey law and the 1989 Jersey law on the limits of the exculpatory clause Rule 29 (*Issue 2* at the top of page 386 of the judgment). The court took the questions of interpretation of the 1984 Jersey Law and the amendment of 1989 separately and first asked itself what the unamended sections of the law meant.

36. Article 26(1) and (9) have already been quoted above extract taken from page 369 of the judgment. After quoting it again, Le Quesne J A said this at page 387:

> *"Paragraph 26 (9) introduced an exemption from the liability thus affirmed. It*
> *Is not the initial liability,but the exemption to it which is made "subject to the terms of the trust." In other words, the terms of the trust can*
> *override the exemption. This they do if they reduce the ambit of the*
> *exemption. In such a case, para. (9) confers immunity over a certain area.*

> *The trust confers immunity over a part of that area and by clear implication provides that there shall be no exemption beyond that part. The two provisions are therefore inconsistent, in the sense that they cannot both operate. By virtue of the opening words of para. (9), the provision of the trust prevails.*
>
> *What is the position if the terms of the trust purport to enlarge the area of the exemption? In such a case, para. (9) confers immunity over a certain area; the trust confers immunity over both that area and an additional area as well. The trust does not affect the statutory exemption, but adds to it a further measure of exemption. It is not the statutory exemption which is then being made subject to the terms of the trust, but the initial liability as it remains after the statutory exemption has operated on it. The 1984 Law did not provide for its terms to be overridden in this way and the terms of the trust do not enlarge the statutory exemption. In our judgment, therefore, Mr. Clyde-Smith is right in his submission that para. (9) makes it possible for the terms of a trust to reduce the ambit of the statutory exemption, but not to enlarge it. The exemption which Rule 29 purported to grant was greater than that granted by para. (9). This purported extended exemption was not covered by the words "subject to the terms of the trust." Article 26 therefore prevailed and the exemption provision of Rule 29 was ineffective so far as concerns, inter alia, negligence of FPS as the trustee."*

37. This passage again helps to emphasise the different state that Jersey law was in prior to the 1989 amendment, from that which pertained in Guernsey prior to the 1990 Guernsey amendment.

38. Le Quesne JA then considers the effect of the amendments made to the 1984 law by the 1989 law. At the foot of page 387, Le Quesne JA records that Article 5 of the 1989 law replaced Article 26(9) of the 1984 law with a provision in the following terms:-

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

39. After further discussion on the retrospectivity of the provision, during which he contrasts the fact that the *donner et retenir* amendment was only to apply to future settlements so as not interfere with the outcome of a case currently pending in Jersey, he says this at the foot of page 388:

> "*What appears to us to be conclusive is the approach of the House of Lords in Plewa v. Chief Adjudication Officer which is the latest authority on the retrospective operation of statutes. Lord Woolf, with whose speech the rest of their Lordships agreed, referred more than once to the relevance of unfairness, and quoted the formulation of the principle by Staughton, L.J. in Social Security Secy. v. Tunnicliffe ([1991] 2*

All E.R. at 724):

> *". . . Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears."*

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."

40. Le Quesne JA continued to draw support for the view that the amendments made by the 1989 Jersey law to the 1984 Jersey law were to be treated as being of retrospective effect by looking at the explanatory notes issued when the draft 1989 law was lodged at the Greffe.

41. The judgment concludes the findings of the Court on this particular issue at the foot of page 389 in the following terms:

> *"The aim of the legislature in amending arts. 26 and 30 was primarily to clarify rather than to change provisions intended in 1984 to have the effect made clear by the 1989 amendments. It is consistent with that aim to treat the 1984 Law as amended in 1989 as having effect in relation to trusts then in existence and to breaches of trust taking place between the coming into force of the 1984 Law and the coming into force of the 1989 amendments. In our judgment, therefore, the new art. 26(9) was intended to affect liability for antecedent breaches of existing trusts. It follows that after the commencement of the 1989 law, the new art. 26(9) prevented the application of Rule 29 to a case of gross negligence."*

Guidance derived from Midland Bank Trust

42. The first point for me to ask myself is what approach I should be taking to a decision of the Jersey Court of Appeal such as this. Whereas I am bound by decisions of the Guernsey Court of Appeal, Jersey decisions can be no more than highly persuasive, depending on the proximity of the point decided in Jersey to the point that I am having to decide in Guernsey. I also acknowledge that I am bound by decisions of the Court of Appeal and the Privy Council, but that I am not bound by o*biter dicta* in any judgment of those courts, although such dicta may on occasion be highly persuasive.

43. Mr Swan has emphasised the *obiter* nature of what I have quoted in the judgment in *Midland Bank Trust* but inevitably the significance of the difference between the *ratio decidendi* and o*biter dicta* will on occasion be less where one is dealing with a judgment that is at best highly persuasive.

44. There is clear evidence that the enactment of a trust law in Guernsey stemmed from a desire to keep in step with Jersey and this can be directly inferred from the reports in the Billets d'Etat previously cited and from the fact that much of the legislation is similarly worded. The law was to ensure clarity to the benefit of both those who were wishing to better themselves and the insular economy by establishing businesses as "commercial and professional trustees" and those who were going to be settlors and beneficiaries of trusts. The latter needed to have the reassurance that Guernsey was a suitable place to bring their wealth for looking after.

45. I have taken note that the judgment of the Jersey Court of Appeal was reached in circumstances where there had been a somewhat different legislative history to that experienced in Guernsey, but the basic principles are the same in both Islands and indeed the Guernsey legislation relating to the issue in question before me is now in very similar terms to that in Jersey.

46. The Jersey Court of Appeal looked at the point that Mr Swan has urged very strongly on behalf of the Defendant, namely that it is grossly unfair to remove retrospectively the protection which a trustee may hitherto have enjoyed, exculpating them from responsibility for acts of gross negligence.

47. The Court of Appeal in Jersey has clearly expressed itself as not being impressed by such arguments, the last passage I have quoted from, page 389 of the judgment could not be more clear, namely that there is nothing unfair in removing from a fiduciary practising in the financial services industry today protection from claims of gross negligence as well as claims for wilful default or fraud.

48. I have over the years, in a number of decisions, most of which have not been formally published because they have been in the nature of *Beddoes* applications or applications from Trustees for approval of rearrangements or distribution where the interests of minors are engaged, from time to time in argument expressed a feeling that the gentler treatment and lower aspirations of English courts in respect of the way in which trustees, who in the past often accepted office out of a sense of duty to the beneficiaries rather than in the expectation of high professional reward, conducted themselves, were perhaps no longer appropriate in the age of the establishment in this island of a thrusting financial services industry, a strong part of which is engaged in canvassing the wealthy for the right to look after their assets in exchange for substantial fees.

49. Consequently I find myself empathising with the remarks of Brightman J in an authority not previously known to me, *Bartlett v Barclays Bank Trust Co Ltd (1981)1 All ER at 152* quoted by Le Quesne JA at page 381 of *Midland Bank Trust*:

> *"So far I have applied the test of the ordinary prudent man of business. Although I am not aware that the point has previously been considered, except briefly in Re Waterman's Will Trusts, I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained trust officers and managers, with ready access to financial information and professional advice, dealing with and solving trust problems day after day, the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. Just as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable*

> *for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have. The advertising literature of the bank was not in evidence (other than the scale of fees) but counsel for the bank did not dispute that trust corporations, including the bank, hold themselves out as possessing a superior ability for the conduct of trust business, and in any event I would take judicial notice of that fact. Having expressed my view of the higher duty required from a trust corporation, I should add that the bank's counsel did not dispute the proposition."*

50. I also take note of the sentiment of Millett LJ as he then was, in *Armitage v Nurse [1998] Ch 241 at page 256*

> *"At the same time, it must be acknowledged that the view is widely held that these clauses have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence should not be able to rely on a trustee exemption clause excluding liability for gross negligence. 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 clause 15 of the settlement 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."*

Conclusions

51. I have to say that based on principles enunciated in Bennion and in Maxwell and the careful approach of the House of Lords in *Plewa* to the effect that unfairness must be avoided in retrospective interpretation of statutory amendments, I began with considerable sympathy with the arguments of Mr Swan. I acknowledge the great difference for being accountable for acts of incompetence committed in good faith (which can so easily be categorised as gross negligence whatever be the precise parameters of this recently refined subclass of tort) and those committed in bad faith which should be so easily identifiable by the perpetrator. However not for the first time my initial response to a question before me has been challenged by a decision of three distinguished judges of our Court of Appeal albeit that they were sitting in Jersey construing a similar provision of the Jersey Trusts law.

52. In *Midland Bank Trust*, the alleged failings of the Defendant clearly arose in 1988 and 1989 well after the Law of 1984 was enacted. No issue arose as to the effect of the legislation on anything that had occurred prior to the enactment of a Trust law in Jersey. There is no guidance as to whether the Article 26(9) was to be construed as disentitling a trustee from benefit from an exculpation clause where the breach of trust or act of gross negligence occurred prior to the enactment of any legislation. It would appear that this is the reason why it has been considered appropriate to divide the question before me into two parts as previously recited.

53. I do not consider that it is necessary when interpreting the effect of section 1(f) of the 1990 Law to make any such distinction. Either the States of Guernsey were making a fundamental change to the law relating to the liabilities of Trustees which was so novel and revolutionary that it could not have been in anyone's contemplation that it was to apply to prior acts and omissions of Trustees in respect of Trusts already in existence or it was a " for avoidance of

doubt" provision of the kind so often sought by those who are anxious as to what is the law in this small jurisdiction where much of the customary law has remained untested and under clarified over the centuries. If it was the latter there is a strong argument for saying that prior failings by trustees amounting to gross negligence would not be excused by the exculpation clause.

54. The extrinsic evidence points to the legislature being of the mind that what it was enacting was a minor matter – see the 1990 Policy letter, but that cannot be conclusive in deciding what the law was prior to the enactment of the 1990 Law. A similar proposal in Jersey was treated in a similar vein – see the notes to the draft projet when it was lodged at the Greffe referred to at page 389 of Le Quesne JA's judgment.

55. Mr Greenfield makes the point that it would be strange if the provision prescribing reliance on an exculpation clause in cases of fraud and wilful misconduct found in the original 1989 version of Clause 34(7) was retrospective whereas the addition introduced by section 1(f) of the 1990 Law was not. In my view it is clear that the original section 34(7) was declaratory – a trustee in Guernsey has never been able to opt out of responsibility to act honestly and refraining from misconduct that is fraudulent or wilful

56. Section 18 (1) of the Law of 1989 provides that

> *"A trustee shall, in the exercise of his functions, observe the utmost good faith and act* ***en bon pere de famille"***

57. In my view, again this 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. A classic statement of the role of a guardian of a minor is to be found in a Judgment of de Sausmarez B in the matter of *Count Lothair Blucher von Wahlstatt* in 1928, helpfully quoted in translation in *Dawes Laws of Guernsey* at page 124.

> *"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 and also, if it is for the benefit and advantage of the minors in the opinion of the competent authority in the material jurisdiction, and after obtaining the approval of the relevant authority when required, the said tuteurs have full power to make acquisitions on behalf of the said minors and to dispose of their movable and immovable assets, whether by alienation or mortgage, and even to renounce an interest, as appropriate in the circumstances, and full power to carry on judicial proceedings, whether as claimant or defendant, and to act before or during every judicial process, together with every power to do, sign, seal, approve and register every legal document and instrument to the above effect."*

58. I cannot countenance the argument that the obligation to act *en bon pere 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 pere 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 pere 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 pere de famille* could be equally fraught with difficulty.

60. Following these conclusions and fortified by the judgment in *Midland Bank Trust*, I reject the argument of Mr Swan that it is unfair to his client that the provisions of section 34(7) as amended should in effect negative the effect of the exoneration clause to earlier failings on the part of his client. My answer to both the questions posed is therefore "Yes"

