

**Judgment 49/2009**

**Spread Trustee Company Ltd v Hutcheson et al – Court of Appeal (Civil Appeal 405) – 26 November 2009**

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1. **Statutory interpretation – Trusts (Guernsey) Law, 1989 as amended in 1991 – appeal from Royal Court finding that an exoneration clause as to gross negligence was ineffective both before and after the legislation of 1989 and 1991 – Jersey, English and Scottish authorities considered – concept of acting en bon père de famille – material before the States of Guernsey when legislating in 1989 and 1991 – Law of 1991 did no more than give statutory effect to what had always been the position - appeal dismissed**
2. **Application for leave to appeal to the Judicial Committee of the Privy Council – no right of appeal as the decision was interlocutory – leave to appeal refused – Respondents entitled to bring the matter to trial without further delay**

(See Judgments 10/2009 and 28/2009)

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

**Civil 405**

**The** 26<sup>th</sup> November, 2009 before John Vandeleur Martin, QC, presiding, Geoffrey Charles Vos, QC and Clare Patricia Montgomery, QC

**SPREAD TRUSTEE COMPANY LIMITED**

**Appellant**

**V**

**SARAH ANN ACATOS HUTCHESON AND OTHERS**

**Respondents**

In the matter of the appeal by the Appellant from the decision of the Royal Court on 23<sup>rd</sup> June, 2009 on a preliminary issue;

Whereas, on 14<sup>th</sup> and 15<sup>th</sup> September, 2009 THE COURT HEARD Advocates I C Swan and J P Greenfield, for the Appellant and the Respondents respectively, thereon and  
**RESERVED JUDGMENT;**

THE COURT this day ISSUED JUDGMENT in the attached terms and:-

1. HELD that the Royal Court was right to hold that the position, both before and after the Trusts (Guernsey) Law, 1989 came into force, was that a trustee exoneration clause could not exclude liability for gross negligence;
2. DISMISSED the appeal; and
3. AWARDED COSTS of the appeal to the Respondents, on the standard recoverable basis

AND THE COURT, having considered on the papers the application by the Appellant dated 9<sup>th</sup> November, 2009 for leave to appeal to Her Majesty in Council, this day ISSUED its Ruling in the attached terms and REFUSED the application.

K H TOUGH  
Registrar of the Court of Appeal

Approved Judgment  
26 November 2009

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

(CIVIL DIVISION)

26 November 2009

**Before:**

John Martin Esq, QC, Presiding  
Geoffrey Vos, Esq, QC  
Clare Montgomery, QC

**Between:**

SPREAD TRUSTEE COMPANY LIMITED

Appellant

and

SARAH ANN ACATOS HUTCHESON and others

Respondents

Advocate I C Swan for the Appellant  
Advocate J P Greenfield for the Respondents

**Cases**

*Stuart-Hutcheson v Spread Trustee Co Ltd* (2002) 5 ITELR 140  
*Armitage v Nurse* [1998] Ch 241  
*Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* 1995 JLR 352  
*Seton v Dawson* (1841) 4 D 310  
*Knox v Mackinnon* (1888) 13 App Cas 753; (1888) 15 R (HL) 83  
*Rae v Meek* (1889) 14 App Cas 558; *sub nom Raes v Meek* (1889) 16 R (HL) 31  
*Carruthers v Carruthers* [1896] AC 659; (1896) 23 R (HL) 55  
*Wyman v Paterson* [1900] AC 271; (1900) 2 F (HL) 37  
*Clarke v Clarke's Trustees* 1925 S C 693  
*Wilkins v Hogg* (1861) 5 L T 467; 31 L J Ch 41  
*Pass v Dundas* (1880) 43 L T 665  
*Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1998 SLT 471  
*R v Adomako* [1995] 1 AC 171 at 187  
*Giblin v McMullen* (1868) LR 2 PC 317  
*The Hellespont Ardent* [1997] 2 Lloyds Rep 547, 586-8)  
*Lloyd v Lloyd* (unreported, 20 October 1956)  
*C K Consultants (Plastics) Ltd v Vines and Barnett Christie Finance Ltd* (unreported, 10 February 1982)  
*Selwood v Madeley* (unreported, 19 December 2001)  
*Bartlett v Barclays Bank Trust Co Limited* [1980] 1 Ch 515  
*Plewa v Chief Adjudication Officer* [1995] 1 AC 249

**Texts**

The Trusts (Guernsey) Law, 1989  
The Trusts (Amendment) (Guernsey) Law, 1990  
Fiduciary Duties and Regulatory Rules, A Summary (Law Com No 124),  
The Trustees (Scotland) Act, 1861

Scottish Law Commission, Discussion Paper on Breach of Trust, September 2003 (Discussion Paper No 123)

Robilliard, "Foundations of Guernsey as a Trust Jurisdiction (1996) Trusts & Trustees", vol 2(8), p5

Robilliard, "Trusts of Land under Guernsey Customary Law", Jersey Law Review, October 2003

Loi Supplémentaire á la Loi Des Successions, 1890

Gretton & Reid, "The Civil Law Tradition: Some Thoughts from North of the Tweed", Jersey & Guernsey Law Review, October 2007

## **Martin JA:**

This is the judgment of the Court.

1. This is an appeal from a decision of Sir de Vic Carey, Lieutenant Bailiff, dated 23 June 2009 on preliminary issues concerning the effect on trustee exoneration clauses of provisions of the Trusts (Guernsey) Law 1989 ("the 1989 Law") and the Trusts (Amendment) (Guernsey) Law 1990 ("the Amendment Law"). Taken together, the relevant provisions state that nothing in the terms of a trust shall relieve the trustee of liability for a breach of trust arising from fraud, wilful misconduct or gross negligence. The preliminary issues raise the question of when this prohibition took effect. The substance of the Lieutenant Bailiff's determination was that the relevant provisions were merely declaratory of the existing law, and that it had never been possible under Guernsey law to exclude the liability of a trustee for gross negligence. The trustee appeals from that decision with leave of the Lieutenant Bailiff.

2. The appellant is the present trustee of two settlements, known respectively as the Peter Acatos No 2 Settlement and the Peter Acatos No 3 Settlement, constituted by deeds dated 12 November 1977. They are governed by the laws of the Island of Guernsey. Clause 22 of each deed is 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".

3. In the proceedings, the respondents (who are discretionary beneficiaries under the settlements) allege against the appellant that in relation to the investment policy it adopted it acted in a way said to amount to gross negligence. The allegations are denied; but the appellant says that, even if they are true, it is entitled to be exonerated from liability under the clause in respect of its actions prior to 19 February 1991.

4. The significance of this date is that it is the date on which the Amendment Law came into effect. As its name suggests, the Amendment Law made amendments to the 1989 Law, which had itself taken effect on 22 April 1989. The amendments included an amendment to section 34(7). As originally enacted, section 34(7) was in the following terms:

"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";

but section 1(f) of the Amendment Law added at the end the words "or gross negligence".

5. In these circumstances, preliminary issues were ordered to be tried in the following terms:

"(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 19 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 22 April 1989 (the date on which the 1989 Law came into force)".

6. As we have indicated, the Lieutenant Bailiff answered both questions in the affirmative. His reasoning was as follows. First, he regarded the primary issue as being the proper identification of the intention of the legislature when the Amendment Law added the words "or gross negligence", an issue he expressed in this way:

"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".

He then considered section 34(7) in its unamended form (preventing reliance on an exoneration clause in cases of fraud or wilful misconduct), and held that that section 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". He also held that section 18(1) of the 1989 Law - which provides that "a trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille" - was likewise declaratory of the existing law; and then he said this:

"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.

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."

7. The appellant trustee attacked on three main grounds the judge's conclusion that prior to the 1989 Law the customary law of Guernsey was that no provision in a trust deed could exonerate a trustee from liability for gross negligence. First, it was said that the conclusion was unsupported by authority and was contrary to the common position of the parties at first instance. Secondly, it was suggested that the judge had mistakenly confused the question of the standard expected of a trustee with the question whether the terms of a trust could exonerate a trustee who fell short of that standard. Thirdly, it was said that the absence of any reference to gross negligence in section 34(7) of the 1989 Law as originally enacted was a strong indication that the customary law had previously permitted the exclusion of a trustee's liability for gross negligence.
8. The appellant then contended that, had the judge come to the correct conclusion about the state of Guernsey customary law before the Amendment Law came into effect, he would have recognised that that Law introduced an important change which was unlikely to have been intended to have retrospective effect. It would in any event be unfair to trustees who had accepted office on the basis that they would be liable only for fraud and wilful misconduct if the Amendment Law were construed so as to make them potentially liable in respect of acts which, at the time when they occurred, would have been covered by an exoneration clause.
9. The respondents supported the judge's conclusions as to the state of Guernsey customary law, but also contended that the correct construction of the statutory provisions was that once they came into effect they prohibited reliance on an exoneration clause in relation to gross

negligence even if the events in question had occurred prior to the coming into force of the 1989 Law.

10. It seems to us that the proper way to approach the questions of construction of the 1989 Law and the Amendment Law that arise under the preliminary issues is to investigate first how the law of Guernsey stood in relation to trusts immediately prior to the enactment of the 1989 Law.
11. The starting point for that investigation is the decision of this Court in *Stuart-Hutcheson v Spread Trustee Co Ltd* (2002) 5 ITEL 140. In that case the plaintiff, who we are told was an uncle of the present respondents, sought disclosure of trust documentation; and the substance of the Court of Appeal's decision was that in Guernsey, as in England, a discretionary beneficiary had a right to trust information. For present purposes, the relevance lies in the discussion (appearing primarily at paragraphs 19 to 21) of the Guernsey law relating to trusts prior to 1989. At paragraph 20, Clarke JA said this:

"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".

Clarke JA then proceeded (in paragraph 21) to consider the case of *C K Consultants (Plastics) Ltd v Vines and Barnett Christie Finance Ltd*, which we deal with in paragraph 29 below, and concluded thus:

"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".

12. Advocate Swan, for the appellant, submitted that we should follow this approach, and that - unless there was some Guernsey authority which came to a contrary conclusion on a specific topic - the Guernsey law of trusts prior to 1989 should be assumed to be the same as the English law of trusts. On that footing, he suggested, the position in Guernsey in respect of exoneration clauses was that identified in England in the well-known decision in *Armitage v Nurse* [1998] Ch 241, which established that it was possible to exclude liability for gross negligence; and he pointed out that the position in Jersey was the same as a result of the decision of the Jersey Court of Appeal in *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services* 1995 JLR 352.
13. Before we consider those two cases in detail, we make the obvious point that neither of them had been decided by the time the 1989 Law came into force. The Guernsey legislature cannot therefore have taken them into account; and although it is no doubt the case that the decision of the English Court of Appeal in *Armitage v Nurse* stated what the law had always been in England, at the time the 1989 Law was enacted the position in England was at best unclear. In a 1992 consultation paper, *Fiduciary Duties and Regulatory Rules, A Summary* (Law Com No 124), the English Law Commission said this:

"Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. ... 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".

14. Both because it was first in time, and because it had a substantial influence on the decision in *Armitage v Nurse*, we consider the *Midland Bank* case first. It was a claim for breach of trust arising out of the failure of the trustee to transfer the trust funds to a new investment manager, the failure arising from the trustee's mistaken belief that it could not do so until a customer agreement had been executed in accordance with the English Financial Services Act 1986. Before the mistake was discovered and the funds transferred, they had been placed on deposit and had earned less than they would have done if invested. The trustee sought to rely on an exoneration clause which provided that "the trustee shall not be liable for anything whatever other than a breach of trust knowingly and wilfully committed". The Jersey Court of Appeal held that the clause did not protect the trustee, for two main reasons: first, that the breach had been "knowingly and wilfully committed" because the trustee's actions were deliberate and carried out with full knowledge of the consequences; and secondly, because the Jersey legislation precluded reliance on the clause. What is relevant to the present discussion is the extended examination by the Court of the question whether Jersey law permitted a trustee to protect himself by an appropriately worded clause against liability for anything except a fraudulent breach of trust. On that matter, the Court's conclusion (expressed at 1995 JLR 378-9) was as follows:

"We were referred to an interesting article by one of the co-authors of *The Jersey Law of Trusts*, Matthews, *The Efficacy of Trustee Exemption Clauses in English Law, The Conveyancer and Property Lawyer*, 42 (1989), in which Mr Matthews reached the conclusion (based on, *inter alia*, the cases we have cited above) that an exculpatory clause probably could not exclude liability for fraud and other intentional wrongdoing or gross negligence, but could exclude liability (if clearly and unequivocally drafted) for negligence consisting merely of want of ordinary prudence .... The suggestion that there is a rule of law to that effect, which cannot be overridden by an exculpatory or duty-defining clause however widely drawn, is in our judgment not supported by the authorities we have cited, except that liability for fraud cannot be excluded. Otherwise all turns on the true construction of the exculpatory clause in its proper context, applying the principles of construction already set out".

15. The cases referred to in that passage are a series of mainly Scottish cases. We consider them in the next and subsequent paragraphs. They were also considered in *Armitage v Nurse*; and Millett LJ said the following about them (at [1998] Ch 256):

"I agree with the conclusion of the Jersey Court of Appeal that all these cases are concerned with the true construction of the particular clauses under consideration or of similar clauses in standard form in the 19<sup>th</sup> century. None of them deal with the much wider form of clause which has become common in the present century, and none of them are authority for the proposition that it is contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to have that effect".

16. The first of the Scottish cases is *Seton v Dawson* (1841) 4 D 310, a decision of the Court of Session. The relevant clause provided that the trustees "shall not be liable for omissions, neglect of diligence, of any kind, nor *singuli in solidum*, but each only for his own actual intrusions". One of the trustees was deputed to sell assets of the trust; but the other trustees failed over a period of some eight years to ensure that he accounted for the monies he had received, and by the end of that period he had become bankrupt owing money to the trust. It was held that the other trustees had been guilty of gross negligence and so were liable for breach of trust. The majority of the consulted judges said (at p 317) that

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

We find it impossible to see how this decision can be treated as turning on the proper construction of the exoneration clause. The trustees were not held liable for their "own actual intromissions": indeed, the minority of the judges made clear in terms that this was not a case of actual intromission (at p 318), and nothing in the reasoning of the majority suggests that they regarded the matter differently. On the face of it, the trustees were held liable for their omissions or neglect of diligence; and the imposition of liability in such circumstances is directly contrary to the clear wording of the clause. That can only have been as a result of a policy of the law. The majority say as much: what they are applying is a "general principle of our law" against which no exoneration clause can stand. Similarly, the minority speak of the trustees' "*crassa negligentia*, which undoes all legal or equitable claims on their part to protection, even under such a clause in their favour as is here founded on". If the case is to be treated as merely a decision on the construction of the particular clause, the natural meaning of these apparent expressions of principle must be ignored. Moreover, the decision would then be explicable only on the ground that the clause in question (and the other "usual clauses") did not cover the relevant conduct; but it is hard to think of any wording more clearly apposite to the facts of the case than that which relieved the trustees from liability for "omissions, neglect of diligence, of any kind".

17. The next case is *Knox v Mackinnon* (1888) 13 App Cas 753 (also (1888) 15 R (HL) 83), a decision of the House of Lords. The exoneration clause in that case, similar to that in *Seton v Dawson*, provided that the trustees "shall not be liable for omissions, errors, or neglect of management, nor *singuli in solidum*, but each shall be liable for his own actual intromissions only". The trustees sold a property to one of the beneficiaries, leaving a proportion of the price outstanding on inadequate security. The beneficiary subsequently became bankrupt, causing a loss to the trust. The majority of the House of Lords dealt with the case on the footing that the trustees had not acted *bona fide*, and the only one who dealt at any length with the exoneration clause was Lord Watson. After quoting the clause, he said the following (at pages 765-6):

"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 *bonâ 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. *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 interested in the funds which they administer. I agree with the opinion expressed by Lords Ivory, Gillies, and Murray in *Seton v Dawson* to the effect that "clauses of this kind do not protect against positive breach of duty"" (emphasis added).

This passage is *obiter*, and we do not place undue reliance on it; but we consider that the sentence we have emphasised expresses a rule of Scottish law, not merely an accepted construction of a standard clause. If the contrary were true, the implication would be that an appropriately-worded clause could exclude liability not only for gross negligence but also for "conduct which is inconsistent with *bona fides*"; but the exclusion of liability in the latter circumstance is universally acknowledged to be inconsistent with the very nature of a trust.

18. In *Rae v Meek* (1889) 14 App Cas 558 (*sub nom* *Raes v Meek* (1889) 16 R (HL) 31), again a House of Lords case, the trustees had lent the trust fund on the security of unfinished houses

in course of erection under a building speculation. They claimed the benefit of an exoneration clause which provided that they 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 bonâ fide made in fulfilment of the premises". The clause was held not to protect them. The main speech was given by Lord Herschell; and after quoting the terms of the clause he said this (at 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* long before the preparation of the trust deed with which we have to deal. 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 this House [in *Knox v Mackinnon*], which I think is well warranted by the authorities."

He then quoted the latter part of the passage from *Knox v Mackinnon* that we have set out above, starting at the words "It is settled in the law of Scotland ...", and continued (at p 573) thus:

"It is impossible to draw any hard-and-fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed culpa lata. But I have arrived without hesitation at the conclusion that there was culpa lata in the present case. Indeed I think that to advance money on such a security, with such information, and under such circumstances as I have described, was a positive breach of duty on the part of the trustee towards those beneficially entitled to the trust fund. I feel some regret at being compelled to arrive at the conclusion that the defender is liable, for I should be most unwilling to press hardly against any trustee who has acted honestly and without any improper motive. But it is the bounden duty of the Courts to enforce against trustees the obligations they have undertaken and to protect the trust funds committed to their charge".

Despite the reference to similar clauses having been previously construed by the Courts, we do not regard this as a decision on construction. It does not proceed on the basis of a lack of bona fides; and, although it would be possible to regard the reference to a positive breach of duty as indicating that the case was considered to be one of actual intromission, we consider that the reference is designed to justify the finding of gross negligence. Any other view would make the finding that there had been gross negligence redundant. In our opinion, this case amounts to an authoritative confirmation that there was a rule of law, at least in Scotland, that prevented exoneration from liability for gross negligence.

19. *Carruthers v Carruthers* [1896] AC 659 (also (1896) 23 R (HL) 55), once again a decision of the House of Lords, concerned trustees who had appointed a factor to administer the trust property but had failed to comply with their express obligation to require him to furnish annual accounts. There was implied into the trust instrument by section 1 of the Trustees (Scotland) Act 1861 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". The decision was that the provision did not protect the trustees. Lord Herschell said merely that it was well settled that the statutory provision did not protect in a case of culpa lata or gross negligence; and Lord Watson, after suggesting that the trustees' acts might not properly be regarded as omissions, said that even on the assumption that they were:

"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" (at p 667).

This does not appear to us to be a process of construction: the exemption from liability in respect of "omissions" could hardly be simpler or clearer, and to treat it as applying only to omissions that are not the product of gross negligence is permissible only by the application of a rule of law or policy.

20. The exoneration clause in *Wyman v Paterson* [1900] AC 271 (also (1900) 2 F (HL) 37) provided that the trustees "shall not be liable for omissions or neglect of management, or singuli in solidum, but each only for his own actual intromissions". The trustees left uninvested in the hands of their law agent for a period of six months the proceeds of sale of a bond, and the sum was lost when the law agent became bankrupt. The House of Lords regarded the trustees' conduct as amounting to a positive breach of duty and on that ground as falling outside the scope of the exoneration clause; and only Lord Shand (at p 287) made reference to gross negligence. We do not think that this case advances matters; but it is worth noting that Lord Macnaghten said (at p 279) that if the case had concerned "English trustees acting in the execution of an English trust the case against them would have been ... too clear for argument ", and that it had "not been suggested that there is any difference between the law of England and the law of Scotland as to the duties and liabilities of trustees in regard to the custody and investment of trust funds". These remarks do not have specific reference to exoneration clauses, but taken out of context might be thought to indicate that the effect to be given to them in England was the same as that given to them in Scotland.
21. The last of this series of Scottish cases is *Clarke v Clarke's Trustees* 1925 S C 693. Trustees had retained certain shares until they became worthless, and had retained on deposit for 2½ years a substantial sum which should have been distributed to the beneficiaries. The chief relevance of this case, in which the Court of Session held that an exoneration clause did not avail the trustees, lies in the following passage from the judgment of Lord President Clyde (at p 707):

"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".

In relation to this passage, the Jersey Court of Appeal in the *Midland Bank* case said (at 1995 JLR 377):

"These words must not be taken out of context. We read them as directed to the construction of the indemnity clauses common in Scottish (and English) trusts. Lord President Clyde was emphasising that if trustees are to be held not to be liable for the consequences of their negligence, then the exclusion of such liability must be clearly and unequivocally set out in the indemnity clause".

Whilst we do not disagree with the last sentence, we observe that both the Lord President's statement and the gloss put upon it by the Jersey Court of Appeal relate to negligence of any kind, not just to gross negligence. The case may suggest a view that trustees should not be able to exclude liability for negligence generally; but in our opinion it does not indicate that the ability to exclude liability for gross negligence depends on construction.

22. In addition to these Scottish cases, the Jersey Court of Appeal in the *Midland Bank* case considered two English cases: *Wilkins v Hogg* (1861) 5 L T 467; 31 L J Ch 41, and *Pass v Dundas* (1880) 43 L T 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.

23. As we have indicated, we consider that the Scottish cases cannot be regarded as decisions on the construction of the relevant exoneration clauses. In our view, they go further than that, and express a rule of law or policy to the effect that no exoneration clause can exclude liability for fraud or for gross negligence. This appears to have been the view of the Scottish courts as recently as 1998: in *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* 1998 SLT 471 Lord McCluskey said (at p 478):

"I can, however, find nothing in the terms of the trust deed that would exclude the defenders from incurring liability to the trust in respect of the loss resulting from grossly negligent intromission with the trust estate. Indeed, counsel for the defenders and reclaimers 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*".

Moreover, even after the decision in *Armitage v Nurse*, the Scottish Law Commission took the same view: in its *Discussion Paper on Breach of Trust*, September 2003, (Discussion Paper No 123), it said (at paragraph 3-16):

"In our view, however, the Scottish law on immunity clauses remains as stated in the 19<sup>th</sup> century cases. Gross negligence or gross breach of duty is regarded as tantamount to dole or fraud and cannot be excused: *culpa lata dolo aequiparatur*".

24. We now return to *Armitage v Nurse* itself. It concerned an exoneration clause in the following terms:

"No trustee shall be liable for any loss or damage which may happen to Paula's fund or any part thereof or the income thereof at any time or from any cause whatsoever unless such loss or damage shall be caused by his own actual fraud".

We have already quoted, in paragraph 15 above, Millett LJ's view about the effect of the Scottish cases. The passage in which he expresses his conclusion on the validity of the exoneration clause comes prior to that (at pp 253-4), and is in the following terms:

"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*, 10<sup>th</sup> ed. (1939)."

25. We can understand why, in these circumstances, English law might be reluctant to follow Scottish law. If there is no clear conceptual distinction between gross negligence and negligence of any other kind, it may be difficult to regard a duty to act without gross negligence as one of the core obligations of a trustee. To take the opposite view might imply that it is also one of the core obligations that a trustee should act without negligence of any sort. We do not think, however, that it would have been obvious in 1989 that English law would ultimately take this position. Gross negligence is recognised in certain areas of English law - for example, in the criminal offence of manslaughter by gross negligence and in bailment. In respect of the former, the analysis of Lord Mackay in *R v Adomako* [1995] 1 AC 171 at 187 affirmed that, although the use of gross negligence in cases of manslaughter may, to a certain extent, involve an element of circularity, that was not fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as gross. This would depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred: "An attempt to specify that degree more closely is I think likely to achieve only a spurious precision." In respect of bailment, see the analysis of the English cases in *Giblin v McMullen* (1868) LR 2 PC 317, where the Privy Council in an Australian appeal took the view that there was a difference between varying degrees of negligence, and that the term gross negligence might usefully be retained as descriptive of that difference: "though degrees of care are not definable, they are with some approach to certainty distinguishable". The expression gross negligence will also be construed when it arises in a contractual context (see, for example, *The Hellespont Ardent* [1997] 2 Lloyds Rep 547, 586-8). We think it would have been perceived as possible for the English courts to adopt the Scottish approach, whatever its origin.
26. Thus we consider that the position in relation to indemnity clauses immediately prior to the 1989 Law taking effect was that there was a rule of Scottish law that no trustee could be exonerated in respect of his fraud or gross negligence, but that it was uncertain whether or not a similar rule applied in England. There was academic support for the view that it did, including the 1989 article referred to in the *Midland Bank* case (paragraph 14 above). We have mentioned, in paragraph 13 above, that in 1992 the English Law Commission inclined to the view that the rule applied in England; and we think that the obstacle in principle to English law following Scottish law would not have been obvious. In these circumstances, we think that a Guernsey lawyer, asked to advise on the matter in 1989, would have been as likely as not to come to the conclusion that under English law it was not possible for a trustee to avoid liability for gross negligence. Even if, therefore, Advocate Swan's basic submission - that the Guernsey law of trusts would have followed English law on this topic - is correct, he has failed to establish that the consequence is that Guernsey law would have permitted a trustee to rely on an exoneration clause in respect of gross negligence.
27. In fact, however, we consider that the suggestion that Guernsey law slavishly followed English law in relation to trusts is too simplistic. On this aspect of the case, we have derived considerable assistance from two articles by Advocate Robilliard dealing with the history of trusts in Guernsey: *Foundations of Guernsey as a Trust Jurisdiction* (1996) Trusts & Trustees, vol 2(8), p5; and *Trusts of Land under Guernsey Customary Law*, Jersey Law

Review, October 2003. Fiduciary relationships containing some elements of trust obligation were features of Guernsey law long before 1989, and a number of them plainly derive from the customary law of Normandy (which provides the foundation of Guernsey customary law). An example is the law relating to *saisie*, a customary law procedure under which creditors take control of the property of their debtor. The property would be vested in one creditor for the benefit of all; but if the income of the property proved inadequate to clear the debts the creditor might be declared *saisie héréditaire* and extinguish the interest of the debtor. In the 1817 report of the Royal Commissioners, it is said of a *saisie héréditaire* that "he still continues merely as a trustee". A statutory example is the Loi Supplémentaire à la Loi Des Successions of 1890, which permitted parents to direct by will that the *legitime* of their children (the children's entitlement to a portion of their parents' movable property) should be put *en fidécommis* for the life of their children or a lesser period. The effect was to create a life or lesser interest under a trust, but the mechanism is one which derives from Roman law roots.

28. This mixed heritage has been recognised in a number of decisions of the Royal Court. In *Lloyd v Lloyd* (unreported, 20 October 1956), a claim to recover land on the basis that it was held by a nominee, Sherwill B said in his summing up to the Jurats the following:

"You have heard today from Mr Ogier that this right arises out of the equitable jurisdiction of the Courts in England. Now we have been forced, to a certain extent, to accept some sort of equivalent jurisdiction in regard to trusts. We have no law on the subject (except that we have to act "en bon père de famille") and we have been compelled, in a very small number of instances, to adopt principles the like of those which have been long since adopted in the United Kingdom by the Courts of Equity, just because there was nothing else to be done. There was no other way of dealing with those matters, but, in this case, I think we are primarily and principally a Common Law Court ...".

29. In *C K Consultants (Plastics) Ltd v Vines and Barnett Christie Finance Ltd* (unreported, 10 February 1982), Frossard DB dealt in his summing up to the Jurats with the question "whether and to what extent the law of trusts, and in particular the doctrine of constructive trusts, is part of the law of Guernsey". He referred to *Lloyd v Lloyd*, and then said this:

"It is of interest to note that this very Court is trustee of various charitable funds and Pothier, the learned author of customary law, himself, in Volume VII p.547 recognises a fidéi-commis which is, of course, translated, a trust. I accept that our law of trusts has not progressed as in England and we do not have the many statutes on trusts as England has. Nevertheless, I am of opinion that trusts are recognised in Guernsey and for guidance we seek reported decisions in other jurisdiction[s] but disregard their statute. ... I now turn to the more difficult question and that is, is the concept of constructive trusts part of our law. In my opinion, I answer, yes, because we recognise trusts".

30. Finally, in *Selwood v Madeley* (unreported, 19 December 2001) Day DB considered whether the concept of constructive trust applied to joint purchases. He said this:

"For my part, I think that much confusion has arisen unnecessarily with regard to whether or not equitable principles can apply in Guernsey, and, perhaps to a much lesser extent, whether trusts generally have been, and are, recognised, outside the Trusts Law.

It is all a question of definition. The Royal Court has never developed its jurisdiction as a Court of Equity, as happened in England and Wales, because of the harsh and limited jurisdiction of the common law courts in that jurisdiction. A similar development was never necessary in Guernsey, as the Royal Court has always been prepared to try and do justice, or provide equity, and thereby adopt and apply equitable principles, when it is appropriate to do so, including a recognition of the

concept of trusts. For all of which, see, inter alia, the Approbation (e.g. relating to recision); Jeremie (e.g. para 14,203 et seq); the principle, whose origins are shrouded in the mists of time, of "*en bon père de famille*"; the status, duties and obligations of the *saisie hérédital* (see e.g. Gallienne, at p. 104, and the Saisie Order – 2(3)); members of the Royal Court having held certain funds as trustees and on an equitable basis for very many years; the recent jurisprudence of the Royal Court (both *Beachcomber Hotels* [unreported, 21 April 1989] and *C K Consultants (Plastics) Ltd*); the large number of statutory trusts, either created or envisaged on subjects ranging from testamentary matters in the 19th century to social insurance matters in the 1970s; the widespread practice of many decades, at the least, of creating trusts, either testamentarily or inter vivos; and the equally established practice of real property being held, not just on statutory authority, by trustees."

31. In our view, these materials indicate that the law of trusts in Guernsey prior to 1989 was an amalgam of principles derived partly from English law and partly from the civilian law. We find it of particular interest that, in 1956, the only principle acknowledged as being of general application to trusts was that a trustee should act *en bon père de famille*: see *Lloyd v Lloyd*. No doubt the obligation to act *en bon père de famille* implies a standard of care similar to that required of trustees in England, namely that of a prudent man of business: *Bartlett v Barclays Bank Trust Co Limited* [1980] 1 Ch 515. But the significance lies in the use of the phrase itself: it is one which is derived from French law and is otherwise encountered in Guernsey in the context of *tutelle* and *curatelle* (guardianship), an area which itself is heavily influenced by customary and French law. It has no place in English trust law.
32. The Lieutenant Bailiff rightly attached significance to the obligation to act *en bon père de famille*. We do not think that Advocate Swan is justified in his suggestion that the Lieutenant Bailiff confused the question of the standard expected of a trustee with the question whether the terms of a trust could exonerate a trustee who fell short of that standard. After stating that acting with gross negligence was incompatible with acting *en bon père de famille*, the Lieutenant Bailiff said "I further cannot see..." that any clause discharging a trustee from liability for failure to act *en bon père de famille* could have been upheld. The word we have emphasised shows that he did not regard the inability of an exoneration clause to absolve a trustee from liability for gross negligence as a logical consequence of the existence of the standard, but was instead expressing a conclusion as to the position under Guernsey law prior to the 1989 Law. In terms, his statement goes too far, since it is capable of applying to any failure to observe the requirement to act *en bon père de famille*; but in respect of gross negligence his conclusion was right.
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".
34. In our judgment, to regard the view of trustee exoneration clauses now prevalent in England following *Armitage v Nurse* as representing the law of Guernsey before 1989 would be inconsistent with Guernsey customary law. In the light of the mixed ancestry of Guernsey trust law which we have identified above, we consider that the law of Guernsey as to the permissible extent of such clauses would have followed the Scottish model, based as it was on the civilian law maxim *culpa lata dolo aequiparatur*. The position in Scotland was clear, unlike that in England; Scottish law was also a mixed system, with civilian and common law origins (see *The Civil Law Tradition: Some Thoughts from North of the Tweed*, Gretton & Reid, Jersey & Guernsey Law Review, October 2007); and the adoption of the maxim was consistent with the standard, itself derived from the civilian law, expressed in the requirement

to act *en bon père de famille*. We are fortified in this view by the fact that the Lieutenant Bailiff, who practised in this jurisdiction for many years before becoming Bailiff, plainly considered it to have been the position.

35. The consequence of our conclusions so far is that the 1989 Law took effect against the background of an unexpressed customary law position that a trustee exoneration clause could not excuse gross negligence. We must now consider whether or not there is any inconsistency between that view of the matter and the material put before the States of Guernsey when it was asked to approve trust legislation. The material consists of a report dated 12 February 1988 from the States Advisory and Finance Committee, which contains the following relevant statements:

"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. ... 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."

These statements provided a partial basis for the proposition set out in *Stuart-Hutcheson v Spread Trustee Co Ltd* (at p 154) that "the purpose of the 1989 Law was to declare and delineate certain basic principles", and they certainly support that proposition. What they also show, however, is that the 1989 Law was not designed slavishly to follow English principles of trust law, and that the background was at least in part an awareness of the Norman origins of Guernsey customary law. We find nothing in the statements to suggest that the legislature was invited to take a different view about the state of Guernsey law in relation to exoneration clauses in 1989 from the one we have formed.

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. The Amendment Law was also preceded by a report to the States from the States Advisory and Finance Committee, dated 16 March 1990, explaining the purpose of the proposed Law. Almost all of it is taken up with an explanation of the proposed provisions designed to prevent dispositions in trust being defeated by the application of foreign forced heirship rules; but it also says this:

"The Committee is also advised that there are a number of minor technical amendments to the Law which are desirable and considers 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 trustees, and the recovery of property disposed of in breach of trust."

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.

37. 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.
38. If we had come to the opposite conclusion, we would have taken the view that the prohibition on the exclusion of liability for gross negligence applied only in respect of acts occurring after the Amendment Law took effect. The reason for this is not the argument advanced by Advocate Swan, supported by reference to *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, that it would be unfair retrospectively to change the position of a trustee (although we see force in that argument); it is that both the 1989 Law and the Amendment Law contain indications that in the relevant respects neither was intended to have retrospective effect. The 1989 Law is expressed, by section 72(1), to apply to trusts created before or after commencement of the Law; but section 34(7) gives no indication as to whether or not it is intended to apply to acts occurring before the Law came into force. However, section 50, 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", indicating that when the legislature intended the Law to apply to past events it said so specifically. The absence of any similar statement in section 34(7) seems to us to make it clear that that section was not intended to have retrospective effect. Similarly, the Amendment Law gives no express indication whether or not the addition of the words "or gross negligence" was intended to have effect in relation to events occurring before the Amendment Law itself came into effect; but the new section 11A(3) of the 1989 Law (introduced by section 1(c) of the Amendment Law), which deals with forced heirship, expressly applies "whenever the trust, transfer or disposition in question arose or was made". Again, the contrast between that provision and the absence of any similar provision in clause 1(f) makes clear that the latter was intended only to have prospective effect. We do not think that the provisions can be construed as preventing *reliance* on an exoneration clause after they came into effect in respect of events occurring before then: the general principle that legislation is not to have retrospective effect unless it expressly so provides means that the consequences of actions should not be changed retrospectively.
39. For all these reasons, we consider that the Lieutenant Bailiff answered the preliminary issues correctly, and we dismiss the appeal.

**Approved Judgment  
26 November 2009**

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

**(CIVIL DIVISION)**

**26 November 2009**

**Before:**

**John Martin Esq, QC, Presiding  
Geoffrey Vos, Esq, QC  
Clare Montgomery, QC**

**Between:**

**SPREAD TRUSTEE COMPANY LIMITED**

**Appellant**

**and**

**SARAH ANN ACATOS HUTCHESON and others**

**Respondents**

**RULING ON APPLICATION FOR LEAVE TO APPEAL**

**Advocate I C Swan for the Appellant  
Advocate J P Greenfield for the Respondents**

**Cases**

*Havilland Estates Limited v Channel Island Ceramics Limited* (Appeal No 164/2, 18 January 1993)

*White v Brunton* [1984] 1 QB 570

*Salter Rex & Co v Ghosh* [1971] 2 QB 597

**Texts**

Court of Appeal (Guernsey) Law 1961

**MARTIN JA:**

1. This is the ruling of the Court on the Appellant's application dated 9 November 2009 for leave to appeal to the Privy Council.
2. We refuse leave to appeal. Our reasons are as follows.
3. The Appellant asserts that an appeal lies as of right under section 16 of the Court of Appeal (Guernsey) Law 1961. That section provides that

“No appeal shall lie from a decision of the Court of Appeal ... without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling”.

4. In *Havilland Estates Limited v Channel Island Ceramics Limited* (Appeal No 164/2, 18 January 1993) this Court held that a “decision” of the Court of Appeal fell within section 16 only if it was a final or definitive decision, not merely an interlocutory decision. We adopt that distinction.
5. The decision from which the Appellant seeks leave to appeal was made on preliminary issues. By reference to the English Court of Appeal authority of *White v Brunton* [1984] 1 QB 570, the Appellant contends that a decision determining a preliminary issue is final, not interlocutory. We do not accept that contention.
6. In Guernsey, as in England, the ordinary rule is that the nature of the application determines whether the resulting order is final or interlocutory. If the application is such that, whichever way it is decided, it will finally determine the matter in litigation, the order made on the application is final; otherwise it is interlocutory. This approach, derived from *Salter Rex & Co v Ghosh* [1971] 2 QB 597, was adopted in this jurisdiction in *Havilland Estates Limited v Channel Island Ceramics Limited*, and is recognised as the general rule in *White v Brunton* (at 573B).
7. *White v Brunton* represents an exception to the general rule. It decides that a decision will be final if it is made following a split hearing and there would have been a right of appeal without leave if both parts had been heard together and the order had been made at the end of the complete hearing. In that case, a preliminary issue was directed on the question whether or not the defendant was under a contractual obligation to contribute to the cost of construction or maintenance of an access road. In substance, although not in form, the preliminary issue was a trial of liability. The decisive feature was that the issue was not an issue preliminary to a final hearing, but the first part of the final hearing: see at p573G.
8. The same cannot be said of the preliminary issues in this case. They were designed to establish whether or not a case of gross negligence could in principle succeed. The Respondents’ success on the issues means that the trial can go ahead: but, if it does, it will be the whole trial, including the question whether the Appellant’s conduct amounted to gross negligence, not just part of it. The preliminary issues are equivalent to an application to strike out the proceedings as disclosing no cause of action (which is plainly interlocutory), not to the first part of a hearing split as to liability and damages. We think that our decision was interlocutory, and that section 16 of the 1961 Law does not apply.
9. For these reasons, we conclude that the Appellant is not entitled to leave as of right. We nevertheless have a discretion to grant leave, but we do not think it would be appropriate to exercise it in favour of the Appellant. The preliminary issues relate to the state of the law in Guernsey prior to 1991. On any footing, the law for the last 18 years has by statute been that an exoneration clause cannot exclude liability for gross negligence. Most claims arising before 1991 will no longer be maintainable: it is likely to be only in a small number of cases, where a beneficiary sues after attaining majority, that the issue can have relevance. In those circumstances, we do not consider that the matter is of sufficient general importance to justify the attention of the Privy Council. We consider that the appropriate time for any appeal is after determination of liability – at which time section 16 of the 1961 Law will inevitably apply. We bear in mind that there will be a saving in time and cost if the Appellant succeeds on a further appeal brought now; but the matter has already twice been determined against the Appellant, and we think that the Respondents are entitled to bring the matter to trial without further delay.