

# An exemption clause protecting trustees can leave the trust vulnerable to claims

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The *Trustee Act 2000* imposed a statutory duty of care on trustees, with any unintentional breach of trust leaving trustees vulnerable to personal and potentially unlimited liability: an uncomfortable reality for anyone taking on this role in an unpaid voluntary capacity.

Exemption clauses within trust deeds, perhaps as a result, have become much more commonplace, acting as a counterweight to ensure that trustees are not deterred from taking on the role. An exemption clause can protect the trustee from breach of trust claims made against them, with potential financial reimbursement from the trust itself.

While it is understandable that settlors choose to include an exemption clause within a trust agreement, it has been argued that these clauses may prejudice beneficiaries. So, for example, if an exemption clause exists to indemnify the trustee, the trustee would be able to seek reimbursement from the trust if one or more of the trust beneficiaries brings a successful claim against them. This would result in a reduction in trust capital or income, directly impacting on the beneficiary(s) who made the original claim.

## **Case Study: *Armitage v Nurse* (1984)**

*Armitage v Nurse* related to a marriage settlement that was varied by order of the court in 1984.

The settled property, a farm estate, was managed by a company whose directors were the mother and grandmother of Paula, the claimant beneficiary. Between 1984 and 1987, there was a substantial fall in the value of the land and Paula claimed that the trustees were in breach of trust and had failed in the management and investment of the fund, which resulted in substantial loss to the trust and in particular to her as beneficiary.

The trust settlement contained a trustee exemption clause, which had been sanctioned by a judge of the High Court, and stated that: '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.'

The England and Wales Court of Appeal (EWCA) held that this clause exempted the trustees from liability for loss or damage to the trust property, 'no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly.'

It was contended by Paula that there was a case for 'equitable fraud,' in that the trust had not been fairly managed to benefit all beneficiaries. However, this was also rejected by the EWCA, which stated that the use of the word 'actual' in the exemption clause had been deliberately used to exclude equitable fraud. The judge held that 'actual fraud' required proof of dishonesty, and he accepted a formulation put forward by counsel for the trustees to the effect that fraud in this context 'connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.'

Director of Castleacre Hugo Johnsen says: 'This case study highlights how trustees, beneficiaries and the trust itself are all vulnerable. A trustee indemnity policy will offer protection against claims to the trustees and the trust. These policies can have an important advantage for the beneficiary too because if there is a loss to the trust because of the actions of a trustee, the policy will react to reimburse the trust.'

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