

This report will be focusing on professional exemption clauses within equity law. When a settlor or testator creates a trust the Trustee has the option to add in exemption clauses. These are basically ways to either limit or remove liability on themselves. Due to the Trustee act 2000 (Legislation.gov.uk, 2021) not regulating this it can be used in a way that ultimately harms the beneficiary and goes against equity laws principle of fairness. This area was chosen due to the above and the fact that it is typically only used by professional trustees that receive remunerations already, whereas layman trustees typically don't do this as they would not know to. Following on from this the report will look into the current situation regarding professional exemption clauses, the benefits and negatives that currently surround them, then the reformation idea my group created to fix these issues.

The key area we have chosen to reform is the ability for Professional trustees to gain exemption clauses. We define professional trustees simply as one that gains remuneration for their work as seen under the Trustee Act 2000 S 29 - 33 (Legislation.gov.uk, 2021). Furthermore Trustee act 2000 S1 does mandate that if someone such as an accountant or solicitor take up the mantle of a trustee as a professional they will be held to a higher standard and treated as a professional. The current status of this area of equity law allows trustees to include exemption clauses within trusts. Following the precedent set in the case *Armitage v Nurse* (1998) these exemption clauses can be used to negate negligence/gross negligence. Following on the case *Bogg & Ors v Raper & Ors* (1998) set the precedent in which it is mandatory for the settlor/ testator to be informed and understand that an exemption clause is included and what it does. The law surrounding this has been intentionally left with a wide open allowing the court more power for interpretation (Lexisnexis.co.uk, 2024). One argument for this is that this wider freedom allows equity more options to award fairly. To conclude this section, one interesting concept for a lack of reform for this aspect of equity law is that the main part of trusts that is consistently developing focuses on offshore issues such as Cayman and the Channel isles due to their offshore trust centers (Molloy and Graham, 2014) . While this is just a theory it could be the reason for lack of reformation despite consistent suggestions from the law reform.

This section will be focused on the current challenges in regard to reforming the current area of law. To begin as a follow up from the previous section it could be argued that currently legislation surrounding exemption clauses for professional trustees is not as important to reform (Molloy and Graham, 2014). A weakness of this section of equity law stems from the fact that the trustee act 2000 (Legislation.gov.uk, 2021) does not attempt to regulate the broadness of exemption clauses, instead allowing the court free reign. While the reasoning for this is understandable the result is that as time progresses more litigious beneficiaries have pushed professional trustees to expand their exemption clauses leading them to become more vast and wide than envisioned in the past. Therefore beneficiaries are slowly getting less and less protection (London and Tso, n.d.). Moving on it has been argued that both the use of indemnity and exemption clauses within trust can result in damage towards the beneficiaries. The idea is that if an exemption clause exists to indemnify the trustee they can seek reimbursement from the trust if any of the beneficiaries bring a successful claim against them. The result of this is that it would lead to a reduction in the trust capital or income impacting the beneficiaries

(www.step.org, n.d.). Following on from this point, one issue that is consistently brought up by scholars is the fact that these protections for trustees are typically only used by professionals as laymen would not think to ask for it. The compounding issue of this is that laymen without protection typically don't receive remuneration, whereas professional trustees get paid and use exemption clauses to gain further protections. This could be argued to fundamentally go against equity as the protectioness remove good faith in a way (Typical trust administrative clauses, 2024).

Following on from this the focus will shift first to the strengths/reasons why exemption clauses for professionals are necessary and the benefit they may bring. To begin one major point is that a professional trustee generally is trained and has the knowledge/ skills to accurately and quickly complete the necessary tasks/ disburse correct amounts. Meaning simply that they can do the job quickly and precisely and that the exemption clause is there as a way to insure they can't be penalized for minor mistakes (spencerwest, 2021). Furthermore in relation to tax and accounting having a professional that truly understands the process is for the beneficiaries best interest (Mercer.com, 2023). Now moving onto the benefit side as previously stated trustees have a lot of duties and with the exemption clause it helps protect them from being penalized for mistakes. The benefit suggested from this is that due to the flexibility provided from no regulations it allows the court to decide whether a specific clause can be held as valid or not, therefore allowing the court to decide the fairest outcome possible (Lawdit Solicitors, 2024). Furthermore another aspect to this point is that with the added layer of protection exemption clauses can incentivise professional trustees that would otherwise stay away from this type of position to try. Also with these types of protection in place it can in decision making and allowing trustees to not feel time pressures (A legal update from Dechert's Financial Services Group d Recent Developments in the Law Relating to Trustee Exoneration Clauses, 2011). The final benefit to be mentioned comes from the fact that the light touch regulation has resulted in some unexpected positives, such as the fact that with lack of regulations on exemption clauses it has been a helpful way to control vulture funds. This is to the point that even in 2006 the Law commission praised this outcome (Molloy and Graham, 2014).

#### The bill considered:

##### The Trustee (Liability) Bill 2024

This Bill will seek to revoke the valid use of clauses to exempt or limit the liability of professional trustees in instances where there has been a breach of trust. This Bill will be applicable to all trustees who receive remuneration for their duties as a trustee, irrespective of their exact professional status.

1        *A) This Bill will be applicable immediately upon its enactment on October 29th 2024, and will be applicable to trusts enacted prior to this date.*

*B) Trusts created prior to this bill with the inclusion of exemption clauses will not be deemed as invalid in their entirety, but the exemption clause itself will no longer be applicable.*

- 2    A) *For the purpose of this Bill, a professional trustee can be defined as any trustee who charges a fee for their services that equals to a sum greater than that of their expenses.*
- B) *Specific examples of professional trustees will be made available in supplementary statutory instrument. The list is not exhaustive, and the Court reserves the right of discretion where professional status is disputed.*
- C) *Trustees not acting in a professional capacity will retain the right to use exemption clauses.*

The main challenge we wished to address was removing the exemption clause from professional trustees to ensure that full accountability can be held for the beneficiary, as trustees should always seek to safeguard the interest of the beneficiaries (Mak, 2023). To begin as can be seen within the wording this bill is designed to target all trustees that gain any kind of remunerations, whilst also changing the description of what a professional is in this context. At first glance changing the definition in this way could affect laymen if they are to receive remuneration however as seen in (Typical trust administrative clauses, 2024) typically that is not the case. One debatable aspect of this is the retrospective nature of the act, by that I mean once enacted it will affect previous trusts ongoing and possibly even finished trusts. While this is not the first type of legislation to do that as seen in job-Seekers (Back to Work Schemes) Act 2013 (Legislation.gov.uk, 2024), it is uncommon. A way in which to improve this would be to possibly enact the legislation on a later date and only affect trusts past that time, this would be a better step as it would allow more notice of the change, and fairness as that is the primary goal of equity. If this did go through with the current writing it could lead to a lot of litigation, also the issue outlined by (London and Tso, n.d.), would in fact not be resolved and would only be accentuated. While the beneficiary is the one that should benefit the most at the end it should not be at the loss of the trustee. Furthermore another positive is that while the definition of what a professional is in this context is changed, allowing room for the court to decide is a positive as it allows greater freedom for the judge. On the other hand one point that should be kept in mind is the fact that the use of exemption clauses are protections for professional trustees (spencerwest, 2021), with them removed it could affect the willingness of professionals accepting the responsibility. While the safeguard within our legislation does somewhat cover that by allowing trustees that receive no remuneration to use exemption clause, it could be argued for the amount of work trustees do they deserve payment (spencerwest, 2021). In regard to our overall goal I believe our piece of legislation has fully addressed the legislation we were aiming for. As shown in (Agnew and Purkis, 2018) the main issue with the use of exemption clauses by professional trustees is the way in which it removes accountability. Our legislation completely removed that ability along with any monetary incentives to fully incentivise the beneficiary. One controversial aspect of the legislation could be the fact that exemption clauses are not completely removed, instead it is allowed for trustees that receive no remuneration. While it could be argued that any protection for the trustee at all goes against equity in and of itself such as seen in (Agnew & Purkis, 2018). I believe moving that protection from the professionals that already have skills and knowledge in that area (Graham, Russell and McPhail, 2021) and giving exemption clauses to the layman, or at least providing them the knowledge is a fairer system.

In conclusion nothing is perfect however I believe with minor alterations and the removal of retrospective legislation I believe our group's idea could be a viable piece of legislation. The main issues highlighted is the fact that exemption clauses exist to protect trustees from unfair claims by beneficiaries, yet the goal of equity law is first and foremost fairness towards specific parties. As shown within this report exemption clauses are antithetical to this goal and can be used to harm the beneficiary. One main strength of our solution is the new identifier for a professional trustee and it allows the court to judge themselves. As seen from sources such as the law commission, one part of equity that is beneficial for most parties is that it is more lenient and allows flexibility. Giving the court this self identifying party can allow greater freedom in judging what party is considered flexible. Overall we set out to look at professional exemption clauses. It is a negative aspect in equity law as it unfairly gives partial immunity/ full immunity into the hands of professional trustees even if they commit negligence/gross negligence *Armitage v Nurse* (1998). Our proposed fix is to remove all exemption clauses for trustees that receive remuneration as it could create perverse incentives. The retrospective legislation while not new is most likely not viable for this type of law, however in my opinion it does the job it is supposed to do.

## Reference list

- Agnew, S. and Purkis, K. (2018). Trustees' indemnities—is timing everything? *Trusts & Trustees*, 24(10), pp.989–1007. doi:<https://doi.org/10.1093/tandt/tty166> [Accessed 15 Nov. 2024].
- A legal update from Dechert's Financial Services Group d Recent Developments in the Law Relating to Trustee Exoneration Clauses. (2011). Available at: [https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2011/10/recent-developments-in-the-law-relating-to-trustee-exoneration-c/FS\\_17-10-11-Recent\\_Developments\\_in\\_the\\_Law.pdf](https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2011/10/recent-developments-in-the-law-relating-to-trustee-exoneration-c/FS_17-10-11-Recent_Developments_in_the_Law.pdf) [Accessed 15 Nov. 2024].
- *Armitage v Nurse* [1997] EWCA Civ 1279
- *Bogg & Ors v Raper & Ors* (1998)
- Graham, T., Russell, D. and McPhail, T. (2021). A 'full Bhaur' attack on abuse? Misuse of trusts and mistake considered in *Bhaur v Equity First Trustees (Nevis) Limited & Ors*. *Trusts & Trustees*, 27(10), pp.964–973. doi:<https://doi.org/10.1093/tandt/ttab113>. [Accessed 15 Nov. 2024].
- Lawdit Solicitors. (2024). Trustee Self-Defence: Exemption Clauses. [online] Available at: <https://lawdit.co.uk/readingroom/trustee-self-defence-exemption-clauses> [Accessed 15 Nov. 2024].
- Legislation.gov.uk. (2021). Trustee Act 2000. [online] Available at: <https://www.legislation.gov.uk/ukpga/2000/29/contents>. [Accessed 15 Nov. 2024].
- Legislation.gov.uk. (2024). Jobseekers (Back to Work Schemes) Act 2013. [online] Available at: <https://www.legislation.gov.uk/ukpga/2013/17/contents> [Accessed 15 Nov. 2024].
- Lexisnexis.co.uk. (2024). Butterworths Journal of International Banking and Financial Law | LexisNexis UK. [online] Available at: [https://www.lexisnexis.co.uk/blog/docs/default-source/loan-ranger-documents/jibfl\\_2018\\_vol33\\_issue11\\_dec\\_pp675-677.pdf](https://www.lexisnexis.co.uk/blog/docs/default-source/loan-ranger-documents/jibfl_2018_vol33_issue11_dec_pp675-677.pdf) [Accessed 15 Nov. 2024].
- London and Tso (n.d.). The Law Commission TRUSTEE EXEMPTION CLAUSES A Consultation Paper. [online] Available at: <https://www.treasurers.org/ACTmedia/cp171.pdf>. [Accessed 15 Nov. 2024].
- MAK, C.H.W. 2023. Debts unravelled: trust law's unbiased approach to resolving sovereign defaults. *Trusts and trustees* [online], 29(5), pages 437-443. Available from: <https://doi.org/10.1093/tandt/ttad023> [Accessed 15 Nov. 2024].
- Mercer.com. (2023). The Benefits of Appointing a Professional Trustee. [online] Available at: <https://www.mercer.com/en-gb/solutions/pensions/defined-benefit-pension-schemes/the-benefits-of-appointing-a-professional-trustee/> [Accessed 15 Nov. 2024].
- Molloy, T. and Graham, T. (2014). Judicial 'essays' again; whether there is a Trustee duty of 'good citizenship'; has the Hastings-Bass problem become the Futter problem; whether gross inequality is a 'social evil' that constitutes a potential legislation risk to the Trust; stepping around, and dog-legging the Trust; the 'engine rooms of trust law'; overreaching exculpation clauses; the perils of laches; more on Marley; and a splendid new Oxford publication. *Trusts & Trustees*, 20(9), pp.859–868.

doi:<https://www.wilberforce.co.uk/pdf/ARTICLE-Trustee-exculpation—the-law-the-quirks-LC-TS.pdf> [Accessed 15 Nov. 2024].

- spencerwest (2021). Corporate trustee vs Individual trustee - 10 Things to Consider. [online] Spencer West. Available at: <https://www.spencer-west.com/news/corporate-trustee-vs-individual-trustee-10-things-to-consider/>.
- Typical trust administrative clauses. (2024). Available at: <https://www.riskassured.co.uk/app/uploads/2024/02/Typical-trust-administrative-clauses-19.02.2024.pdf>. [Accessed 15 Nov. 2024].
- www.step.org. (n.d.). An exemption clause protecting trustees can leave the trust vulnerable to claims | STEP. [online] Available at: <https://www.step.org/sponsored-content/exemption-clause-protecting-trustees-can-leave-trust-vulnerable-claims>.