Trustees' limitation of liability: Myths, mysteries and a model clause

Diccon Loxton and Nuncio D'Angelo*

Under Australian trust law, trustees bear unlimited personal liability for trust debts and liabilities. If they want to limit their liability to a creditor (eg to trust assets) they must agree a limit bilaterally with that creditor, to apply as a matter of contract. The law and the issues involved in doing so are complex and not always fully understood. Attempts to deal with them have yielded a wide range of approaches, but on close analysis many may only be partially effective. When typical limitation clauses are analysed, it becomes apparent that the expectations of trustees and creditors can be frustrated. In this article, the authors explore the legal framework within which these limitations operate, identify common issues in clauses currently in use and suggest and explain in detail a model clause which seeks to address them and place trustees and creditors on a more certain footing. The discussion includes consideration of the position of security trustees, ie trustees acting in a financing context who hold security on behalf of multiple creditors.

INTRODUCTION

Under Australian trust law, a trustee (including one which is the responsible entity of a managed investment scheme) bears unlimited personal liability for all trust debts, liabilities and expenses. This follows as a matter of both doctrine and legal reality. While trusts are often spoken of as entities or enterprises, they have no separate legal personality; a trust is no more than a matrix of relationships involving some property. Thus, as a matter of law, trusts as economic entities may only engage with the world, including with creditors and contracting counterparties, through their trustee.

The issue of personal liability vis-à-vis creditors and other external parties is particularly important in large commercial trusts, where debts and liabilities incurred by the trustee, including under financing arrangements, can run to the many millions and even billions of dollars.

Trustees usually seek to limit their personal liability contractually, through express limitation clauses in documents into which they enter in performing their trustee role.[1] The limitation is usually by reference to the underlying trust assets. But this is an imperfect solution for both trustees and creditors. Complex issues are involved. There is no uniformity in such clauses across the Australian market and in our experience they differ in style, content and quality. Some clauses under-protect the trustee and can leave it with unexpected personal liability, while others over-protect it and can frustrate legitimate enforcement action by creditors. Given the courts' stated wariness of limitation clauses, poor drafting risks failure to achieve the intended effect.

This article explores this complex area and proposes a model clause for consideration, together with explanatory notes. There is also a specific analysis of the position of security trustees, ie those who hold security from obligors to secure their obligations to a lending syndicate, debenture holders or other groupings of creditors, under a security trust deed.

* Diccon Loxton is a partner with Allens and Dr Nuncio D'Angelo is a partner with Norton Rose Fulbright. This article draws on a paper prepared by us for the Documentation Committee of the Australian Branch of the Asia Pacific Loan Market Association but at the time of writing that paper was yet to be fully considered by that committee; this article should not be taken as representing the views of that Committee or Association. We are grateful for the feedback received from members of that Committee and the comments of other colleagues and friends. The views expressed are our own and do not necessarily reflect the views of our firms or the experiences of any particular client. Nothing in this article should be taken as legal advice.

[1] Indeed, so common and accepted is the practice that a legal adviser who does not adequately warn an intending trustee (even an experienced one) of the issue of personal liability and the desirability of limiting it runs the risk of a negligence suit: see *Astley v Austrust Ltd* (1999) 197 CLR 1. There are common exceptions to the practice, for example, where the economic ownership of the trust and trustee is the same, or where the trustee is a single purpose company.

On the creditor side, the article concentrates more on the position of *unsecured* trust creditors than *secured* trust creditors.[2] Secured creditors have, through their security, direct access to the assets and are not affected by most of the issues that affect unsecured creditors. Usually limitation clauses will expressly allow secured creditors to enforce their security. From the point of view of the trustee the risk of personal liability is largely the same regardless of whether a creditor is secured or unsecured, and it is important for trustees to have a limitation on both situations. In relation to secured creditors, the limitation is really only necessary when the creditor is exercising remedies other than its security, in other words when it is exercising the same rights that it would have if it were an unsecured creditor.

BACKGROUND

Limitation of liability clauses for trustees generally: why are these clauses necessary?

The legal framework within which these clauses operate

Because a trust is not a juristic entity with separate legal personality, all debts, liabilities and expenses (generically, "liabilities") incurred by a trustee, even if for trust purposes, are personal.[3] This is so even if a counterparty engaging with a person knows that the person is doing so as a trustee; the mere identification of a person's trustee status in a contract is not sufficient of itself to limit its personal liability.[4]

In appropriate circumstances, a trustee may indemnify itself in relation to trust liabilities out of trust assets. That indemnity arises under general law[5] and statute[6] and also expressly under most trust instruments.[7] It is actually two different rights:

- a reimbursement or recoupment right (the trustee's right to replenish its own assets where it has discharged trust liabilities personally); and
- an exoneration right (the trustee's power to apply trust assets directly to discharge trust liabilities).[8]

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[2] While the emphasis in this article is on dealings with intending and actual creditors, the issues apply equally with respect to any contractual counterparty, including under a non-monetary contract, since they could become creditors in respect of damages for breach. For a general discussion of the trust law and other risks facing creditors of managed investment schemes, see Loxton D, "Lending to Responsible Entities of Managed Investment Schemes" (Paper presented at the Corporate Insolvency and Restructuring Forum, Sydney, 8 September 2004) available at http://www.allens.com.au/pubs/insol/pap08sep04.htm.

[3] "In respect of debts incurred by him [ie the trustee] in so carrying on the business [of the trust] he is personally liable to the trading creditors – the debts are his debts": *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 324 (Latham CJ).

[4] *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773; *General Credits Ltd v Tawilla Pty Ltd* [1984] 1 Qd R 388.

[5] *Re Blundell* (1888) 40 Ch D 370 at 376-377; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385. It is said to be integral to the institution of the trust and incidental to the office of a trustee: *Worrall v Harford* (1802) 32 ER 250; *National Trustee's Executors & Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268.

[6] See eg s 59(4) of the *Trustee Act 1925* (NSW). Other States have equivalents.

[7] The trust instrument has been described as the "third source of law … the trust instrument has primacy": Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006) at [1617]. Very little of the law of trusts is absolute or immutable; most of it is susceptible to modification in any given trust. This includes the indemnity. But there are limits; whether it is permissible to insulate trust assets for the benefit of beneficiaries by excluding the trustee's indemnity altogether is the subject of some controversy: see Heydon and Leeming, *Jacobs' Law of Trusts in Australia* at [2106]; Lindgren K, "A Superannuation Trustee's Right of Indemnity" (2010) 4 JoE 85 at 94-96; and McPherson BH, "The Insolvent Trading Trust" in Finn PD (ed), Essays in Equity (Law Book Co, 1985). See also ss 65 and 72 of the *Trusts Act 1973* (Qld) which prohibit exclusion. Section 601FH of the *Corporations Act 2001* (Cth) invalidates such provisions with respect to liquidations of managed investment schemes.

[8] *Worrall v Harford* (1802) 32 ER 250; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472. The exoneration limb may be regarded as an acknowledgement that in equity there is no need for the trustee to pay a debt or liability before claiming its indemnity: *Re Richardson; Ex parte Governors of St Thomas Hospital* [1911] 2 KB 705 at 709-710 (Cozens-Hardy MR); *Re Blundell* (1888) 40 Ch D 370 at 376.

Because the right to indemnification arises concurrently with the incurring of a liability, typically the exoneration limb will be engaged first, at the moment the trustee incurs it. If the trustee chooses to discharge that liability out of its own assets, the exoneration right lapses and the reimbursement right is engaged. Thus, the nature of the trustee's right against the trust fund in respect of a given liability at a given time depends on how the trustee has responded to that liability.

However, these rights are often conflated, and treated as the same or as a single indemnity right, because they both save trustees from the consequences of incurring trust liabilities. This occurs even though the reimbursement right is only to the trustee's personal benefit, while the exoneration right can be seen as simply part of, or overlapping with, the general power of the trustee to apply trust assets for trust purposes (in this case, to the benefit of creditors).

Both rights are subject to certain conditions.

- The first condition is that the liability to be indemnified was incurred by the trustee within trust power and "properly" – that is, in accordance with its duties and the terms of trust. If that condition is not satisfied in relation to a given liability, the trustee cannot use trust assets to indemnify itself against that liability.[9]
- The second is the "clear accounts" rule. A trustee's right of indemnity, even for a liability properly incurred, is subject to its first making good any loss or damage caused to the trust fund by previous breaches of trust (eg misappropriation of trust assets or exceeding power in a previous unrelated transaction), even though they may be entirely unrelated to the transaction which gave rise to that liability. The trustee's access is reduced by the amount necessary to make good that loss or damage.[10]

The rights of indemnity are backed by a proprietary right of the trustee to retain trust assets and use them to satisfy those rights, that is to reimburse itself or discharge its liability to creditors.[11] It is often referred to as a lien, although courts have also referred to it as a "charge", a "lien or charge" and a "lien and charge",[12] but the nomenclature is not material for present purposes.[13]

Trust creditors are creditors of the trustee; they cannot be creditors of "the trust" in any legal sense (although that expression is often used in a commercial sense). If they do not have proprietary security, then under current Australian law they have no direct access or recourse to, trust assets. They cannot obtain a writ of execution against trust assets.[14] They are given only indirect access through the trustee, and so their rights are only as good as the trustee's. Equity assists unsecured trust creditors in

[9] *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360.

[10] The clear accounts rule is so called because it refers to the state of accounts as between trustee and beneficiaries with respect to the trust estate. The jurisprudential basis for the rule is the ancient principle in *Cherry v Boultbee* (1839) 41 All ER 171 which may be stated thus: where a person entitled to participate in a fund is also obliged to make a contribution to that fund, they may not so participate unless and until they have fulfilled their obligation to contribute. Under the clear accounts rule, the process is an accounting exercise and the trustee need not actually pay its contribution first. Before the trustee is entitled to make a claim, "a balance is to be struck between what is due [by the trustee] by way of compensation and what is due [to the trustee] by way of indemnity and … if the balance is in favour of the trustee he may recover from the estate to that extent": *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 397.

[11] *Octavo Investments v Knight* (1979) 144 CLR 360; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226.

[12] *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; *Trim Perfect Australia v Albrook Constructions* [2006] NSWSC 153.

[13] One cannot have a charge or lien over one's own property. Nor is this right an encumbrance on the beneficiaries' interest in the trust assets – the interest of the beneficiaries is simply subject to the trustee's prior claim. It may be better seen simply as an incident of the trustee's interest in the trust property: see *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98.

[14] Except perhaps where they are the only trust creditor: *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26.

gaining recourse to trust assets by allowing them to subrogate to the trustee's indemnity and lien, but if there is no indemnity in relation to a liability there is nothing to which they may subrogate. Their rights are wholly derivative in nature.[15]

The clear accounts rule is particularly problematic for unsecured creditors, because it can operate to subordinate them to the interests of beneficiaries by derogating from the exoneration right. If the rule operates, a trust creditor with a perfectly good claim for a liability properly incurred by the trustee may be denied access to the trust assets, wholly or partially, as a result of misconduct of the trustee of which the creditor may be both innocent and ignorant. The result is that the beneficiaries may enjoy a windfall. This is a particularly harsh result given how helpless an intending creditor, even a reasonably cautious and diligent one, is to prevent that result. While creditors may take steps to mitigate the risk that the first condition above is not satisfied,[16] there is little they can do to protect themselves against the risk inherent in the clear accounts rule, which can be engaged by trustee misconduct which is unrelated to the creditor's engagement and which may predate or follow that engagement. This misconduct may be unknown to the creditor and indeed may be altogether unknowable.

Because the reimbursement right is unambiguously to the personal benefit of the trustee,[17] it is logical that the clear accounts rule should operate against it. With the rule in *Cherry v Boultbee* (1839) 41 All ER 171 as its jurisprudential foundation, the clear accounts rule self-evidently goes to the equities as between a trustee and its beneficiaries. But it is doctrinally troubling that it derogates from the exoneration right. While it may be seen as a personal right of the trustee, the exoneration right can also be seen as a power to apply trust assets for trust purposes, to pay liabilities incurred for trust purposes, and thus to the benefit of creditors. Trust assets applied in so doing so are not paid to the trustee for its own account, and remain trust assets until paid to the creditor.[18] The result is that the economic consequences of the trustee's misconduct can be borne by innocent creditors rather than the beneficiaries and the wrong persons are punished for the sins of the trustee. In our view, this outcome results from a failure to respect the fundamental differences between the reimbursement and exoneration rights and their conflation into a single "indemnity".

In any case, the trustee continues to be personally liable for trust liabilities whether or not the trust assets are sufficient to discharge them, even if that renders the trustee insolvent. There is no implied or inherent limitation of liability by reference to trust assets, in equity or at law, even if the trustee discloses at the outset that it is acting as a trustee.[19]

If a trust liability is due, the trustee must pay it. If there are liquid trust assets available, it can use its right of exoneration to pay the liability directly. If there are not, then (a) if it has sufficient assets of its own to pay the liability, it must pay it out of its own assets and then seek to recoup the payment by

[15] A creditor who has security over trust assets does not enforce against those assets via subrogation. Its actions are direct, by way of enforcing the security. The secured creditor's main concern is to ensure that the security is given by the trustee properly and within power. A trustee however bears a personal liability risk even if the creditor is secured. This may be of particular concern if, for example, the security fails for reasons other than the secured creditor's fault, or the secured creditor suffers a shortfall in recovery against the secured property.

[16] Such as conducting thorough due diligence on the trust, the trustee and the trust instrument, and obtaining contractual comfort from the trustee (and, if feasible, the beneficiaries) by way of representations, warranties, undertakings and other assurances.

[17] *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472; *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360.

[18] Assume the following example. A trust debt is due. Not wishing to use its own money to pay it, the trustee decides to discharge it by drawing a cheque on the trust bank account which is payable to the creditor directly. Until that money is received by the creditor, it remains trust money, and is never beneficially the property of the trustee; ownership of it does not pass first to the trustee en route to the creditor. Even if the trustee, for whatever reason, drew the cheque as payable to itself first and banked it in its personal account pending payment to the creditors, it would retain its character as trust property in its bank account: *Re Matheson; Ex parte Worrell v Matheson* (1994) 49 FCR 454; *Re French Caledonia Travel* [2003] NSWSC 1008. Thus, in relation to the right of exoneration, the trustee is little more than a conduit.

[19] *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd* [1987] FCA 332 at [244]; *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773. There are some statutory exceptions: see s 33 of the *Cheques Act 1986* (Cth), s 36(5) of the *Bills of Exchange Act 1909* (Cth) and s 254 of the *Income Tax Assessment Act 1936* (Cth).

liquidating trust assets (if it can); or (b) if it has insufficient assets of its own to pay the liability, it may be insolvent (even if there is sufficient, albeit illiquid, value in the trust fund).

A trustee can deal with this issue contractually, by inserting limitation clauses in documents with creditors and other counterparties, and many do. The courts have long supported the contractual limitation by trustees of their personal liability, so long as the limitation is expressed in clear and unambiguous terms.[20]

In essence, limitation clauses commonly in use operate by limiting the creditor's rights to the recourse the trustee has to trust assets. A limitation on recourse to a specific fund has been held to be enforceable,[21] including where the fund is a trust estate.[22]

The parties' overall objectives

Trustees (particularly those which have material personal assets or hold assets on other trusts) generally want to limit their exposure for trust liabilities to the trust assets so that their solvency is not at risk. They do not want to have to reach into their own pocket or put their own assets (or other trusts' assets) at risk. They want to limit trust creditors' recourse against them to the extent the liability may be discharged out of the trust fund, via the exoneration right. Importantly, they do not want to risk being rendered insolvent by trust debts.

From the point of view of unsecured trust creditors and counterparties, they may be asked by a trustee to look to the credit of the underlying economic entity, ie the trust estate or fund, rather than the corporate balance sheet of the trustee.[23] If they are satisfied with that credit they are usually prepared to limit the trustee's liability or their own recourse to the trust fund.[24] This necessarily means that they accept the risk that the trust fund might be inadequate in value or liquidity at the relevant time to discharge the debts owed to them. But that acceptance does not include taking risk on their *legal* rights of access to the trust assets via the trustee's right of exoneration. If that disappears they will have no recourse to the assets at all. If it is impaired then their access will be correspondingly impaired. Thus they will want to cover the possibility that access to the trust assets is lost or impaired due to trustee misconduct, and in that case they will want to look to the trustee and its own assets.[25]

While agreeing to a limitation, trust creditors and counterparties will also want to maintain sufficient rights and remedies, despite the limitation. They will want to ensure that the documents operate as written, so that, for example, the trustee cannot say that because it had no liability to pay a debt, there was no breach by a failure to pay and default interest should not accrue. It must be clear

[20] See *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 355 (Lord Cairns); *Re Anderson; Ex parte Alexander* (1927) 27 SR (NSW) 296 at 300; *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773 at 774; *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd* [1987] FCA 332; *Wilkinson v Feldworth Financial Services Pty Ltd* [1998] NSWSC 775.

[21] "In *Head v Kelk* (1961) 63 SR (NSW) 340 and in earlier cases … it was said that it is a defence to a claim for debt where there is clear evidence that the parties have agreed that the debt is only to be repaid out of a certain fund. So in *Head v Kelk*, if the parties had agreed that the debt was only to be repaid if the defendant could afford to do so, then the defendant could show that he could not afford to repay the debt and so was under no liability": *Action A1 Pty Ltd v Chin Matter No 3179/97* [1997] NSWSC 421 at 422.

[22] *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 640.

[23] In practice, counterparties dealing with independent professional trustee companies, responsible entities and custodians have little choice; they either accept there is some limitation of liability and recourse, or they do not deal. The balance sheet of such companies is not on offer (save in the very narrow negotiated exceptions discussed below).

[24] A common exception is where the economic ownership of the trustee and the trust fund is the same, for example where the trust is a stapled entity, or where shareholders in the trustee and unit holders in the trust are identical, or where a trustee is a member of a corporate group and trust beneficiaries are members of that group. In that case, it may be seen as commercially appropriate for the corporate assets and balance sheet of the trustee to be at risk.

[25] And potentially even its directors personally, under s 197 of the *Corporations Act 2001* (Cth), particularly if the trustee's personal assets are unreachable or inadequate.

that personal liability is not negated (something which might result in the limitation clause being struck down altogether as being "repugnant" to the primary obligation to pay, resulting in no limitation at all)[26] but rather is merely limited.

The operation of trustee limitation of liability clauses

Trustee limitation of liability clauses seek to address these issues and achieve an agreed allocation of risk between the trustee and unsecured trust creditors. If properly drafted, these clauses effectively insulate the trustee against personal insolvency which might otherwise arise due to trust debts.

They are purely a matter of contract and are not a feature of trust law. They must be actively sought and bargained for in respect of each debt, liability or expense incurred or to be incurred by the trustee. They bind only those creditors who agree to them. They will not usually have been bargained for with employees, utility providers, trade creditors, revenue authorities or many claimants in tort. A trustee who does not insist upon, or is unable to secure, a limitation clause in respect of a given trust liability carries unlimited personal liability for it (with the ability to indemnify itself out of trust assets, if intact).

Limitation clauses must be drafted with care. The courts will approach them with caution and construe them strictly against the trustee. This is said to be because they operate to limit or reduce the extent of the legal remedies which the counterparty would otherwise have against the trustee.[27]

Some statutory liability (including, arguably, for misleading and deceptive conduct)[28] may not be limited in this way at all.[29]

Market experience

In Australia, trustee limitation of liability clauses which seek to address the above issues have become very common. Trustee companies and funds management companies which act as trustees, responsible entities or custodians insist on them.[30] They often have their standard forms and fiercely resist deviations from those forms in negotiations. In other cases, negotiations can be protracted and difficult. They can become technical and abstruse in a way that can frustrate commercial clients and can result in a clause that is both confusing and substantively flawed. In yet other cases, they are regarded by the parties as mere "boilerplate" and not carefully reviewed or negotiated at all.

Once these clauses were very short and very simple – just a few lines. Now they are complex and often long. While superficially similar to each other, they are often different in substantial ways and in their operation. As contractual tools, these clauses are only as good as their drafting. On a close analysis many use inaccurate technical concepts and some appear to misconstrue the law. Sometimes they contain internal inconsistencies, particularly as they wrestle with competing commercial points of view, or attempt to deal with legal issues and in turn raise other issues. Some so zealously protect the trustee that on a strict reading they leave counterparties and creditors with almost no rights or recourse, inevitably inviting a court to read them down. Others give counterparties some recourse but leave them without some of the rights and remedies that they may reasonably have expected, cutting off valuable, and legitimate, avenues of recovery. On the other hand, others leave trustees exposed by not properly limiting counterparties' rights. Some of these issues have been perpetuated over time and across the market.

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[26] *Watling v Lewis* [1911] 1 Ch 414; *Producers and General Finance Corp Ltd v Dickson* (1938) 40 WALR 34.

[27] *Wilkinson v Feldworth Financial Services Pty Ltd* [1998] NSWSC 775; *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147 at [50].

[28] Section 18 of the *Australian Consumer Law*, which is found in Sch 2 of the *Competition and Consumer Act 2010* (Cth) (formerly s 52 of the *Trade Practices Act 1974* (Cth)), s 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth). There are very similar provisions in other Commonwealth and State legislation.

[29] The public policy basis for disregarding limitations and disclaimers of certain statutory liabilities is discussed by the High Court in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

[30] Some managed investment schemes and custody arrangements do not describe themselves as trusts but in essence are just that, with the responsible entity or custodian in the role of trustee.

The terms of modern longer clauses appear not to have been tested in the courts. In the typical commercial transaction there is neither the time nor the inclination to put them to rigorous analysis, particularly when there is much else is to be negotiated. One might expect that in most cases the courts could find some way through the thicket laid before them to come to a commercially sensible result, and lawyers and parties negotiating them under time and commercial pressure may well operate on that assumption, or that hope. But ultimately that is not a sensible way for the market to proceed; time and costs may be spent in litigation in the hope of getting to a sensible result, and judgments may yield unexpected (and undesirable) outcomes. A clause which deals with such a sensitive commercial subject and such a complex area of the law should recognise and avoid technical difficulties, to ensure that it achieves its commercial ends.

Security trustees' limitation of liability clauses

Security trustees adopt limitation of liability clauses which follow the general trend. They are inserted into documents between the security trustee and third parties, including the security documents with obligors, and documents with other external parties such as tripartite agreements.

However, in one aspect they depart from the practice of other trustees. The clauses are not only included in documents between the trustee and third parties but they are also often set out in the document constituting the trust (usually, a security trust deed). When included in such a document, their terms often purport to limit the liability of the security trustee not only to external counterparties but also to its own beneficiaries (and these obligations to its own beneficiaries are in any case substantially reduced by lengthy exculpation clauses elsewhere in the security trust deed). The limitation follows a standard formulation of limiting the trustee's liability to its own right to indemnify itself out of trust assets.

This presents a number of problems, both legal and commercial.

Overall, from the security trustee's point of view, it may not actually achieve much. Limitation clauses invariably contain language setting out exceptions to the liability limitations. Those exceptions cover some or all of the circumstances where the trustee's right of indemnity is lost or impaired because it acted improperly or culpably and thus where the security trustee may be personally liable to financier beneficiaries. In other words a limitation clause in this form may not limit liability for many claims by beneficiary financiers. Even where it does limit claims – eg for losses arising from conduct not addressed by the exceptions – there are still problems.

- First, the clause may be seen as reducing the liability of the security trustee below an "irreducible core" (discussed below) and to that extent will not be legally effective.
- Secondly, judges may tend to read down the clause and limit its effectiveness as against beneficiaries, possibly resulting in a corresponding reading down vis-a-vis other parties.
- Thirdly, it contains some circularity. The limitation against beneficiaries is stated by reference to the security trustee's rights with respect to the assets which the security trustee holds on trust for the beneficiaries. In other words, the security trustee is only liable to the beneficiaries to the extent of the beneficiaries' own assets (in the economic sense). It need only pay beneficiaries out of the assets that it holds for beneficiaries. Beneficiaries as a whole are no further advanced.
- Fourthly, this circularity can lead to some unfairness among beneficiaries. Take the situation in which one beneficiary suffers a loss and makes a claim against the security trustee, who is liable for the claim but can still indemnify itself out of trust assets in respect of the claim. In that situation, the trust assets, ie the assets held for all beneficiaries, can effectively be used by the security trustee to compensate just the claiming beneficiary. All beneficiaries effectively underwrite losses suffered by only one of them – in effect a form of "cross-collateralisation".
- Fifthly, where the claim is one in relation to which the security trustee cannot be indemnified out of trust assets, the relevant beneficiaries have no recourse at all – even to the security provider's assets (except where there is a separate indemnity by the security provider which covers the claim).

Security trustees may well be concerned about both layers of personal liability, being legal liability to contracting third parties and fiduciary and other liability to its beneficiaries, but these are quite different species of liability. If the intention is to limit the liability of security trustees to their beneficiaries (over and above the extensive exculpatory language commonly seen in security trust deeds), then it would be more appropriate to do so expressly and in a more conventional way.

Given that what is intended is an attenuation of the security trustee's duties and concomitant liabilities to the beneficiaries, a simpler and more correct solution is to insert a release.

If there were such a release the security trustee would remain fully personally liable in relation to any aspects which are carved out of that release (such as fraud, [gross] negligence or wilful [default/misconduct]), and the beneficiaries would retain their full suite of rights in relation to them. But personal liability would also apply in relation to any carve-outs from a normal third party type of limitation clause discussed above, and so the position in that respect is the same – the only difference is in the nature of the carve-outs. One would expect the negotiated list of carve-outs to the release or limitation as between trustee and beneficiaries to be the same regardless of the form of the clause.

THE ELEMENTS OF THE MODEL CLAUSE

In light of the above, and the widespread use of limitation clauses by trustees, security trustees, responsible entities, custodians and others, it seems appropriate to put these clauses under scrutiny and, after analysis, to propose language that seeks to address both the technical legal issues and the commercial issues in a balanced way. The suggested model clause is set out at the end of this article. Of course, in specific transactions changes may be appropriate. Parties may have different risk appetites, or may negotiate different results. The suggested clause could in some cases be considered a starting point for negotiations.

The proposed clause attempts to deal with some of the difficulties outlined above in a way which is legally effective and more closely aligned with legal principle. It also attempts to make a fair allocation of risks as between the trustees and creditors which, from experience, we believe reflects the general commercial understanding in the market.[31] The approach is to concentrate on the result to be achieved rather than to complicate or limit the drafting by over-engineered focus on the legal machinery for getting there.

The model clause is not short. Its length reflects the fact that the market has grown accustomed to seeing some issues dealt with expressly, and parties may want to take a cautious view. Its length also reflects the complexity of the issues, and a careful division of rights and protections between the parties.

The model follows in many ways the general scheme of many clauses seen in the market, but there are some important differences (although not of overall commercial substance).

Paragraph (a)

This paragraph sets the scene for the remainder of the clause.

The statement that the trustee enters into the agreement as trustee may just repeat the description of it as a party in the introductory list of the parties to the agreement (and in any case operates as a safety net if the description does not expressly mention the trust). But is important in the context of the clause as a whole to identify clearly that the trustee is acting as trustee, so that the gateway to trust assets is open, for both the trustee and (by way of subrogation or security) the counterparty.[32]

The paragraph extends the concept to pre- and post-contractual conduct and also to the transactions carried out in connection with the document. This is so that, as far as possible, access to assets, and the limitations set out later in the clause, will apply with respect to all resulting liability. It is important from the trustee's perspective that the limitations in the clause extend to all related non-contractual liability, as far as possible. But as mentioned, it may not be able to limit some statutory liability.

[31] In specific transactions, other approaches may be appropriate, depending on the nature of the transaction and the risk appetites and relative bargaining strengths of the parties.

[32] A failure to make this clear can have adverse impacts on creditors and their ability to have access to trust assets: see *Re Interwest Hotels Pty Ltd (in liq)* (1993) 12 ACSR 78.

It is not uncommon for limitation clauses to adopt language along the lines of "Trustee enters into this agreement only in its capacity as trustee of the Trust *and not in its personal capacity*". The second part is inaccurate and unnecessary. The trustee is and remains personally liable, despite the clause, even though the clause limits liability and recourse to the extent of the trust assets. However, in acknowledging current practice the model clause does assist in setting the scene (and in removing any possible suggestion the trustee may somehow also be an agent for the beneficiaries) by saying that the agreement and conduct is "only" as trustee. The language also eliminates the use of the term "in its capacity" as trustee. In this context those words are otiose and in some senses misleading.[33]

The carve-out "except where expressly stated otherwise", is not commonly seen. It modifies the limitation by merely stating a fact, particularly by reference to the disapplication provisions in para (c). Very often limitation clauses purport to say that the trustee enters into the document *only* as trustee, with no qualifier, suggesting that any and all liabilities are limited. This is plainly not correct where there is any circumstance at all in which the trustee's personal assets might be available upon enforcement by the contracting counterparty.

Paragraph (b)(i)

This is the main part of the clause. It limits liability to the extent of the trust assets, and more particularly to the extent that a liability "can be satisfied out of the assets of the Trust". This language is deliberately chosen to include both the legal and the practical availability of the trust assets and also to ensure that the trustee does not have to reach into its own pocket.

It may have been simpler, at least from the point of view of creditors, to have left the liability intact but instead limited the counterparty's recourse. But that would have left some issues for the trustee. Most notably it could, strictly speaking, be insolvent in the legal sense if there were insufficient assets to pay the liability. The liability would still be there, as one of the trustee's debts, to be counted in determining whether the trustee can pay its debts as they fall due.

The paragraph does not use the wording commonly seen in clauses of this nature of limiting liability to the right of indemnity out of trust assets. It is better to refer to the ultimate limitation, and the commercial principle that liability is limited to trust assets, rather than to select one legal mechanism for access to the trust assets, and focus on it. There is no need to refer to the right of indemnity. The words are sufficiently broad to cover assets available under the right of indemnity but also deal with other means of access which do not necessarily rely on the indemnity. These might include the enforcement of security, any available process against trust assets, and potentially a wider right to apply assets for trust purposes.

One reason to avoid express reference or limitation to the right of indemnity is to leave open the possibility of access through other means, should Australian law change to give unsecured creditors other modes of access to trust assets which do not rely on the trustee's indemnity and the creditors' ability to subrogate to it. As discussed above, the current Australian two-step route of access makes creditors vulnerable to conduct of the trustee which impairs the indemnity.[34] For so long as the law in Australia remains as such, that risk will continue but the formulation in para (b)(i) leaves open room to argue that an innocent creditor's rights are (or should be) unaffected by unrelated trustee misconduct or, therefore, the clear accounts rule.[35]

[33] The expression "capacity" in this sense does not have the legal meaning applicable in relation to natural persons or companies and other entities given legal personality by law. It simply means "role". A person (whether a company or a natural person) acting as a trustee does not have two separate capacities in any legal sense: *MacarthurCook Fund Management Ltd v Zhaofeng Funds Ltd* [2012] NSWSC 911 at [117]; *Glennon v Commissioner of Taxation (Cth)* (1972) 127 CLR 503 at 511-513.

[34] The Australian courts to date appear to have taken the position that subrogation is the *only* route by which unsecured trust creditors may have access to trust assets, even where a trustee has lost or impaired the indemnity through misconduct: *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 401. For an alternative theory of access, see the "direct access" argument and its United States trust law roots, discussed in D'Angelo N, "The Unsecured Creditor's Perilous Path to a Trust's Assets: Is a Safer, More Direct United States-style Route Available?" (2010) 84 ALJ 833.

[35] Note also the additional risk imposed on creditors by the fact that subrogation, despite often being referred to, including in the authorities, as a "right", is actually not a right or cause of action, but rather an equitable remedy, and so could be at least in

Not limiting liability by reference to the indemnity also avoids the "chicken and egg" problem seen in the drafting of some of these clauses, particularly those that limit liability to the right of indemnity. That is, on a strict application of the wording, there could be no liability without a right of indemnity, and no right of indemnity without a liability which triggers the indemnity. Some clauses compound this issue. In order to avoid the risk of cashflow insolvency of the trustee (ie where the fund is "asset rich but cash poor"), they provide that it is only liable to the extent that it is *actually indemnified* out of the trust assets. On a strict interpretation, the trustee is not liable until it receives the cash to pay the liability that does not arise until it receives the cash.[36] Alternatively some clauses by their terms avoid the balance sheet solvency problem to which trustees are exposed (ie where trust debts exceed the value of the fund) but do not protect the trustee against the cashflow insolvency problem. That is, they leave the trustee exposed to the lack of liquid trust assets sufficient to pay the liability. To insulate the trustee against personal insolvency, a limitation clause should pass to the creditor not only the risk of a shortfall in the value of trust assets but also the risk of illiquidity in the trust fund.[37] In doing so, it must be drafted carefully so as to avoid circularity or gaps.

The expression "can be satisfied" is deliberately chosen to capture both a legal and practical ability to apply trust assets to discharge trust liabilities. If a trustee is under a legal disability which is not of the type that engages the disapplication in para (c) of the clause, then the limitation should prevail. Similarly, if the trustee is unable to fully discharge a trust liability out of trust assets for purely practical or economic reasons, eg because the fund is of insufficient value or is highly illiquid, otherwise than as a result of relevant trustee misconduct, then it should not be personally liable.[38]

The model clause is designed to cover every possible liability, but avoids the traditional "laundry list" approach to inclusions and exclusions.[39] The words used are wide enough to include liability of all kinds which can be excluded (although, as mentioned above, it might not be able to exclude some types of statutory liability). But an exception is made here for negligence and it is referred to expressly. This is due to the confused state of the authorities in relation to references to negligence in indemnities, releases and exclusions. There is authority that if clauses of that nature are intended to include negligence then they must be express about that.[40] This appears to be unique to negligence; the courts do not seem to have had any difficulty extending wide words of exclusion to any other form of liability (leaving aside crime and fraud). This inclusion seeks to make abundantly clear that the trustee's liability limitation operates even if that liability arises from negligence, an outcome that might not necessarily follow if this language was omitted.[41]

Optional insert regarding beneficiaries' personal indemnity

There is an option in this paragraph to treat as trust assets, for the purposes of the clause, amounts actually received by the trustee to pay a specific liability so that the trustee would be required to hand such amounts over in satisfaction of that liability. This would mainly include amounts received by way of personal indemnity from beneficiaries (if that indemnity exists in any given case) but could also include other amounts such as insurance. This element has not often been seen in limitation clauses.

theory subject to equitable defenses such as unconscionability, acquiescence or delay, clean hands, laches, and who comes to equity must do equity. Nor can it be used to give one unsecured creditor of a trustee in relation to trust liabilities priority over other unsecured creditors of the trustee in relation to trust liabilities: see *Lerinda Pty Ltd v Laertes Investment Pty Ltd* [2009] QSC 251.

[36] Which is why some clauses that use this formulation go on to oblige the trustee to actively pursue indemnification.

[37] In respect of which, see D'Angelo N, "When is a Trustee or Responsible Entity Insolvent? Can a Trust or Managed Investment Scheme be 'Insolvent'?" (2011) 39 ABLR 95 at 107.

[38] A "trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and a loss of trust money is not per se proof of such wrong": *Re Chapman; Cocks v Chapman* [1896] 2 Ch 763 at 775.

[39] For example, some clauses we have seen use language to the effect of "any liability or obligation of whatever kind undertaken or incurred by the Trustee, whether at law, in equity or under statute, in any way connected with any representation, warranty, conduct, act, omission, agreement or transaction related to this agreement".

[40] See the discussion in D'Angelo N, "Indemnities, Gross Negligence and the Accidental Insurer" (2009) 37 ABLR 7.

[41] The common qualifier "without limitation" is not used here on the assumption that documents will have a general interpretation clause along the lines that expressions like "includes" are not to be read as exclusions or limitations.

The majority of commercial trust instruments do not contain a personal indemnity from the beneficiaries and indeed usually expressly negative such an indemnity. But beneficiary indemnities do feature in some custodian and nominee agreements and most security trust deeds.

The principle behind the optional insert is that, if the trustee receives an amount to satisfy a specific liability, it ought to be required to pay it over and not simply to sit on it as windfall, or count it as its own funds or apply it for other purposes. There is no case law directly on point, but it is reasonably arguable that the courts in most such circumstances should find that the funds are not the trustee's own personal funds to deal with as it thinks fit, but are impressed with some type of trust.[42]

The optional insert limits the extension to amounts *actually* received by the trustee.[43] The trustee should not bear credit risk on the beneficiaries. This feature may be uncontroversial in most cases, but the language also expressly provides that a counterparty has no rights to collect such amounts from the beneficiaries. This is to prevent arguments that counterparties may be subrogated to the trustee's rights in relation to any personal indemnity from beneficiaries, or might otherwise be able to force the trustee to collect from its beneficiaries.[44] Of course, counterparties may object to this latter part and want to expressly provide for such a right but that raises complex issues. Whether to allow some prospect of the counterparty/creditor being able in some way to force a collection against beneficiaries in relation to personal indemnities would be a matter for negotiation. It might be argued that if beneficiaries agree to financially support trust liabilities, then as between them and the trust creditors they should bear the risk of a shortfall in the trust fund. On the other hand, it materially changes the limited recourse nature of the transaction – the trustee is protected but the beneficiaries do not then enjoy the ability to shelter behind the trust assets.

Ultimately, whether or not the optional insert is included in documents between the trustee and external counterparties will be a matter for negotiation but it is worth remembering that, in theory at least, the trustee should be largely indifferent. The real, or economic, issue here is as between the beneficiaries and the counterparty.

Paragraph (b)(ii)

This paragraph reinforces the principle in para (i). In a sense all it does is give examples of the principle in operation, but in doing so seeks to capture the universe of possibilities. Arguably it is unnecessary, and the parties could rely on para (b)(i) and leave out all of para (ii) (except for the prohibition against taking steps to have the trustee placed in any form of insolvency administration). But the market has become accustomed to language specifying barred and permitted action in this way, and some parties may prefer to take that more cautious and certain approach.

The overriding guiding principle in para (b) is that the counterparty should be allowed to take steps that involve the trust's assets, but nothing that imperils other assets held by the trustee (whether personally or on other trusts) or the status of the trustee itself.

The paragraph first lists those rights and remedies that can be exercised in respect of trust assets (that is, the rights and remedies that a counterparty or creditor may legitimately expect to have to give it access to the trust assets without causing undue harm to the trustee's other operations and assets) before listing actions that are barred. Some clauses do the reverse, listing the barred actions before the

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[42] This trust might be, or be in the nature of, a *Quistclose* trust in which the funds are held for the benefit of the beneficiaries who pay them, pending payment in satisfaction of the liability: *Quistclose Investments Ltd v Rolls Razor Ltd (in liq)* [1970] AC 367. Perhaps they would be regarded as being trust funds subject to be main trust and held for the benefit of all beneficiaries. Depending on the arrangement, there might even be a *Carreras Rothmans* type trust for the counterparty/creditor: *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] 1 Ch 207.

[43] Whether there is a "chicken and egg" problem in relation to that particular language may depend on the drafting of the indemnity from beneficiaries.

[44] Whether a personal indemnity exists in any given case where the trust instrument is silent on the question is not a straightforward matter. Further, there is an open question as to whether trust creditors would be subrogated to any such indemnity: see D'Angelo N, "Shares and Units: The Parity Myth and the Truth about Limited Liability" (2011) 29 C&SLJ 477 at 499-450.

permitted, and listing permitted actions as exceptions to the general prohibition, but the drafting is easier this way, and in substance there is no difference.

Because some of the permitted actions can themselves create a liability, eg costs orders, there is the qualification that any liability created will be subject to the clause. This has not generally been seen in clauses in the market, but can be important. In particular, from a trustee's perspective it confirms that any resulting liability is subject to the limitation. On the other hand, from the perspective of creditors and counterparties, it means that action is not barred simply on the basis that the resulting liability is not limited – this provides the limit.

Paragraph (b)(ii)(A) and (b)(ii)(F)

In relation to liabilities subject to the limitation many clauses in the market prohibit a creditor *both* from seeking to have the trustee placed in any form of insolvency administration *and* from proving or otherwise participating in it. Subject to what is said below in relation to receivership, the first is self-evidently necessary (and is contained in para (F)), but the second is not necessarily appropriate. There is no reason in logic why a trust creditor should be prevented from participating in the liquidation or administration of a trustee for those liabilities so long as their claim is limited to trust assets and does not include the personal assets of the trustee. Where the trustee is in liquidation, it may be necessary in some circumstances to do this to gain access to trust assets. Further, trust creditors may need to be able to exercise votes as creditors. Paragraph (A) preserves this right.

Note that receivership is not a form of insolvency administration. It is a private contractual remedy given to a particular secured creditor in a security document, or a court remedy available (even to unsecured creditors) against assets in certain cases.[45] A company need not even be insolvent to be in receivership; there merely needs to have been an event triggering the secured creditor's rights (usually, an "event of default" or similar) or circumstances supporting a claim for the remedy of a court-appointed receiver. Note that the appointment of receiver does not, of itself, terminate the trustee's appointment or somehow vacate the office, unless the trust instrument expressly provides for that result.[46] The status of receivership in the context of limitation clauses is discussed below.

Paragraph (b)(ii)(B)

This is an important provision. Generally it allows the counterparty to exercise rights in respect of the trust assets. Some clauses limit the creditor to its rights "against" trust assets. This paragraph eschews that expression in favour of the more neutral "with respect to Trust assets". Leaving aside creditors whose claims are secured in the traditional sense against trust property, the only true claimants "against" trust assets are the trustee and the beneficiaries. The unsecured trust creditor's claim is a personal one against the trustee rather than a proprietary claim against the trust property, unless and until it has successfully secured the necessary orders in equity for subrogation to the trustee's (unimpaired) indemnity.[47] That said, some contractual promises may give proprietary rights, and in any event, once a creditor is subrogated, it should be able to approach the court to obtain any necessary orders with respect to the trust assets.

The provision permits a counterparty to bring a proceeding seeking orders with respect to trust assets. For example, it may be necessary to obtain orders like specific performance in order to be able to assert title to an asset, eg where the trustee is a defaulting vendor. Further, this language would allow the appointment of a court-appointed receiver over trust assets, which may be a necessary

[45] Section 67 of the *Supreme Court Act 1970* (NSW) provides that "[t]he Court may, at any stage of proceedings, on terms, appoint a receiver by interlocutory order in any case in which it appears to the Court to be just or convenient so to do". There are equivalents in other jurisdictions.

[46] Because it could frustrate enforcement, secured creditors will usually insist on the removal of any such clause from the trust instrument before transacting.

[47] *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170 at 1187-1188 (Griffith CJ); *Aluma-Lite Products Pty Ltd v Simpson* [1999] FCA 1105 at [5]; *Lerinda Pty Ltd v Laertes Investment Pty Ltd* [2010] 2 Qd R 312 at [8].

remedy to levy the equitable equivalent of execution,[48] or a remedy to protect trust assets from breaches of trust or dissipation where that may be necessary. Appointment by the court of a receiver over an asset may have the unfortunate consequences from the point of view of the trustee which are described below, but in practice it should not be a concern for reputable trustees, who will easily be able to avoid the appointment by recognising the rights of creditors, and complying with court orders and their duties. On the other hand from the point of view of unsecured counterparties, court-appointed receivership is an essential part of their armoury. It may be a necessary route for a counterparty to have any ability through the courts to ensure that trust assets are applied to satisfy the liability, or where the trustee is not recognising its rights or cooperating.

Set-off

The express mention of set-off in this paragraph is also important in clarifying that a creditor may exercise rights of set-off as against trust assets and liabilities, but only against them.

Some clauses in the market forbid the exercise of any right of set-off altogether. This would be uncontroversial to the extent it prevents any set-off between liabilities owed to or by the trustee as trustee against liabilities owed by or to it not as trustee. Arguably a general restriction on such set-off would be unnecessary. Legal, equitable and insolvency set off would not usually be available due to lack of mutuality.[49] However contractual set-off is still legally possible between liabilities owed by the counterparty to the trustee in its own right (ie not as trustee of any trust) against liabilities owed to the counterparty by the trustee as trustee. Documents between the trustee in its own right and the counterparty may contain set-off provisions wide enough to provide for such a contractual set-off. Trustees will want to avoid this as it places their own assets at risk of being used to satisfy trust liabilities.[50] A prohibition has been included in para (F) to meet possible market expectations in this regard. But a prohibition is inappropriate to the extent it prevents set-off of liabilities owed to the trustee as trustee against liabilities owed by the trustee as trustee, and so an express permission has been inserted, effectively as a carve-out.

Paragraph (b)(ii)(C)

This paragraph allows the counterparty to exercise the rights bargained for, ie its security (if any) and contractual rights. Any exercise is still subject to the overall restraint so that if, for example, the creditor suffered a shortfall on enforcement of its security, the limitation would continue to apply in respect of that shortfall.

Note that the permission for a creditor to "enforce its security" would include the appointment of a receiver or receiver and manager in relation to some or all of the secured property or the secured creditor taking possession of some or all of the secured property (and becoming a "controller" of the trustee, as defined by the *Corporations Act 2001* (Cth)). To avoid doubt, receivership is also carved out of the prohibition in para (b)(ii)(F) of the model clause. Where the security is over all of the assets in the trust fund, receivership has the effect of giving the receiver or secured creditor effective control of the trust itself.[51] Whether the appointment is over a single trust asset or the entire fund, a notice that a receiver or controller has been appointed must be filed against the trustee company at the Australian Securities and Investments Commission (ASIC) and all of its public documents must contain after its

[48] *Agusta Pty Ltd v Provident Capital Ltd* [2012] NSWCA 26.

[49] Derham suggests the matter is not so clear cut: Derham R, *The Law of Set-off* (4th ed, Oxford University Press, 2010) at [17.122]-[17.125].

[50] There are significant problems with contractual set-off in the reverse situation, ie where set-off is between an amount owed by the counterparty to the trustee as trustee (where, therefore, the receivable would be a trust asset) and a personal debt of the trustee to the counterparty. That could be a breach of trust for allowing trust assets to be applied to non-trust purposes, being the discharge of a personal debt. Clauses which allow such a set-off would be likely negotiated out, or they might be read down or struck down as invalid, and if they were not, then any counterparty exercising contractual set-off could find itself being an accessory to the breach, exposing it to various equitable remedies at the suit of the beneficiaries such as being held to be a constructive trustee for the amounts recovered.

[51] See eg *Thackray v Gunns Plantations Ltd* [2011] VSC 380. Note, in passing, that security over all of the assets of a trust does not necessarily guarantee that a creditor has security over "the whole or substantially the whole of the property of the company"

name a statement that a receiver or controller has been appointed.[52] This could be awkward for a corporate trustee that is otherwise solvent and in good standing (and who might be trustee of other trusts). Nevertheless, this is normally accepted as an incident of the role of a trustee giving security – receivership and taking possession are essential tools in the secured creditor's armoury and their exclusion would be a serious erosion of its enforcement options. So, from a creditor's perspective at least, they should not be excluded despite the limitation.

Paragraphs (b)(ii)(B), (b)(ii)(D) and (b)(ii)(E)

The model clause allows the counterparty to take proceedings which do not disturb the limitation on liability.

Many clauses in the market forbid the counterparty from commencing proceedings against the trustee "in its personal capacity" or "in any capacity other than as trustee". As discussed above, a trustee does not have separate capacities in any legal sense. Legal action against a trustee is not in a representative capacity. With some statutory exceptions it is not possible to sue a person in a representative capacity under Australian law[53] (despite some case reports identifying parties as "X in its capacity as trustee for the ABC Trust"). This can, superficially at least, lead to a clash of expectations. Counterparties may need to bring an action against the trustee seeking equitable relief such as injunction or declaration or to obtain some sort of order to have access to trust assets. Trustees on the other hand want to restrict actions which seek a judgment against them. They would be concerned that a judgment obtained against them for a contractual obligation creates a judgment debt, into which the contractual debt may merge, and without more, might not be subject to the limitation.

The drafting of paras (b)(ii)(B), (b)(ii)(D) and (b)(ii)(E) meets these expectations. There is a ban in para (E) on bringing proceedings against the trustee, but paras (B) and (D) give express permission to bring proceedings which are directed only at trust assets, or other proceedings which would be subject to the limitation or would not offend it. The counterparty is entitled to bring an action so long as resulting orders are subject to the relevant limitations. For the purposes of drafting this clause there is no need to analyse exhaustively whether that is or is not possible in the various possible jurisdictions (which would include foreign ones). To the extent it is possible, then there is no compelling reason why a counterparty should not have free reign. Ultimately, a limitation of liability clause is about protecting the trustee's personal (ie non-trust) assets (and assets held on other trusts) and thus its solvency, rather than to prevent the trustee ever becoming party to litigation or enforcement action.

Paragraph (c)

This critical paragraph operates to set out exceptions, which switch off the limitation. In effect, it describes the circumstances in which a trustee's personal assets may be placed at risk and pursued (including by pressing the trustee into liquidation or administration) in satisfaction of a liability that might otherwise be a trust liability. It is based on an underlying theory that, while contracting counterparties may be prepared to accept the risk that the trust fund may be inadequate at the relevant time to discharge all debts, they do not normally accept the risk of trustee misconduct which impairs the trustee's right of access to whatever may be in the trust fund to discharge debts.

The vast majority of trustee limitation of liability clauses seen in the market contain some wording which seeks to express this principle, although the content differs. The wording of some clauses seems to confuse (a) the loss or reduction of the trustee's right of access to trust assets with (b) the loss or reduction of the trust assets themselves. A limitation clause should normally only address the former. The latter is a business risk generally inherent in agreeing to take credit risk against the

(ie the trustee), in the sense contemplated by s 441A of the *Corporations Act 2001*, so as to give the creditor the ability to defeat the enforcement moratorium during a voluntary administration of the trustee. The voluntary administration provisions do not apply to trusts as such.

[52] Section 428 of the *Corporations Act 2001* (Cth). For the meaning of "public documents" see s 88A of the Act.

[53] See *Helvetic Investment Corp Pty Ltd v Knight* (1984) 9 ACLR 773, *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147; *General Credits Ltd v Tawilla Pty Ltd* [1984] 1 Qd R 388. See also the statutory references in n 19.

trust estate. Note that the exception in this paragraph is not absolute, but operates only "to the extent that" the relevant liability has been adversely affected. If misconduct is of the type that engages the clear accounts rule, the trustee may not have lost all of its rights and there may remain enough net value in the trustee's rights for it to be able to partially discharge trust debts out of trust assets. In that case, the trustee would be personally liable only for the shortfall. On the other hand, this approach does mean that if a trustee loses its right of access to trust assets altogether it can become liable for the whole of the obligation, without regard to the value of the trust assets. This seems to be consistent with the approach generally taken in the market.

We have seen examples of clauses which say or have the effect that exception provisions of the type described in para (c) do not apply if the relevant act(s) or omission(s) which impair the trustee's rights to access trust assets were committed by person appointed by the trustee to do things it is authorised as trustee to do, such as an agent, investment manager, custodian, nominee or sub-trustee. As a threshold point, this runs directly counter to s 601FB(2) and s 601FB(3) of the *Corporations Act* in relation to trustees which are responsible entities of registered managed investment schemes. In other cases, there may be circumstances where this language would not apply, because the trustee does not lose its right of access as a result of misconduct by a person appointed by it in good faith. But where it does lose its right of access because it is responsible for the appointee, the clause has the effect of shifting the risk of the appointee's misconduct to the counterparty, leaving them with little or no recourse. For example, if an appointee were to misappropriate trust property in a way that meant that the trustee was responsible for its actions the limitation would survive, leaving the unpaid creditors with no recourse to the trust assets or the trustee's personal assets. As creditors will usually have no say in the selection of a trustee's agents and other appointees, and those appointees will usually have been approved and appointed by and be under the control of the trustee, they would argue strongly that this would not be an appropriate allocation (or reallocation) of risk.

Paragraph (c)(i)

This is the core of the exception to the limitation. It is clear from the language that the exception is engaged if the right of access to such assets as are in the trust at the relevant time is impaired in some way but *not* if there is a shortfall in trust assets where the right of access to them is unimpaired.

The paragraph address the situation where the trustee's right of access to the trust assets (and therefore the counterparty's access) is lost or reduced because of some failure on the trustee's part. On case law this can occur where the trustee either acts beyond power or acts within power but not "properly" (which would normally involve a breach of duty or of a restriction placed upon it in the trust instrument, or fraud or criminal conduct).[54] The emphasis is on it overreaching its powers or breaching its duties as trustee – there are circumstances in which a trustee can act culpably, eg some torts (such as negligence) and misleading and deceptive conduct, and thereby become liable to other parties, and still be indemnified out of trust assets because the relevant conduct was within power and did not constitute a breach of trust.[55] The circumstances in which this clause operates should be coextensive with the circumstances in which the trustee can lose access or have its access impaired. If the field is too narrow, the counterparty is left exposed with no recourse. If it is too wide, and it operates in circumstances where access is not lost or impaired, then at best it contains irrelevant language.

In this paragraph, the language seeks to be coextensive with the risk. The critical expression is "because Trustee has acted beyond power or improperly in relation to the Trust". Traditionally, limitation clauses in the Australian market have taken a "laundry list" approach, stating that the limitation does not apply if the trustee commits an act which comes within any one of a number of categories. The list of categories varies from clause to clause and will include any or all of the

[54] *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29; *Nolan v Collie & Merlaw Nominees Pty Ltd (in liq)* [2003] VSCA 39.

[55] *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29.

following: fraud, wilful misconduct/default,[56] [gross] negligence,[57] [material] breach of trust, [material] breach of duty and others, but the market demonstrates a surprising lack of consistency in this regard.

This emphasis on characterising or particularising the causal aspect is misplaced. The real issue here only arises if the trustee has found itself in a position where its right of access has been impaired and as a result it has no ability, or a reduced ability, to discharge in full a relevant liability out of trust assets, leaving the creditor with an unsatisfied claim. If that happens, the critical (and, we would argue, the only) question then becomes this: in what circumstances should the trustee bear personal liability for the shortfall? The answer should normally be where the impairment of the right of access has arisen as a result of misconduct on its part, regardless of the nature of the misconduct. As between the creditor and the trustee, the trustee would be expected to bear the risk of its own misconduct. If the misconduct is sufficient to cause the impairment, that should be enough (bearing in mind that not all misconduct will cause impairment). It should not matter whether the misconduct could be described as fraud, wilful misconduct/default, [gross] negligence, a [material] breach of trust, a [material] breach of duty or anything else. The reference to acting "beyond power or improperly in relation to the Trust" is wide enough to encompass all circumstances in which the right of indemnity will be impaired.

In relation to trusts which are managed investment schemes, this is consistent with s 601GA(2) of the *Corporations Act*,[58] but is applicable even for those which are not. As mentioned above, equity allows a trustee to use trust assets to discharge a liability on condition that it has been incurred by the trustee in the proper performance of the trust and not beyond authority. The precise language used by the authorities to describe the condition (or, to put it another way, the limits to be placed on the right of access to trust assets for this purpose) varies but not greatly.[59] Most refer to liabilities incurred "properly",[60] although this expression has generated controversy.[61] The conventional position has

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[56] Whatever the meaning of the expression "wilful misconduct" (as to which, see *Spread Trustee Company Ltd v Sarah Ann Hutcheson* [2011] UKPC 13), the expression "wilful default" in some contexts may have a technical meaning in relation to trustees: see *Bartlett v Barclays Trust Co (No 2)* [1980] Ch 539 at 546 and *Glazier v Australian Men's Health (No 2)* [2001] NSWSC 6 at [56].

[57] It is often suggested that the expression "gross negligence" has no technical meaning under Anglo-Australian law, and some lawyers are fond of saying that therefore it has no meaning at all or that the prefix "gross" adds nothing. They may quote the famous 19th century statement that it is "merely negligence with the addition of a vituperative epithet" (Rolfe B in *Wilson v Brett* (1843) 152 ER 737 at 739, also in Willes J's judgment in *Grill v General Iron Screw Collier Co* [1866] 35 LJCP 321 at 330). Lord Millet expressed reservations along these lines in *Armitage v Nurse* [1998] Ch 241. But even if it is not a recognised separate taxonomic category or a technical term of art, that does not rob the words of their meaning. Apart from private documents, the expression appears in Australian statutes and statutory instruments. Recently, courts have tended to give the expression meaning when coming across it in documents or in statutes, on the not unreasonable proposition that parties (and Parliament) use it because they intend it to have meaning which covers a more culpable form of negligence: see the discussion in D'Angelo, n 40 at 10-11. More recently, the Privy Council discussed the difference between negligence and gross negligence, and between gross negligence and fraud or wilful misconduct, in *Spread Trustee Company Ltd v Sarah Ann Hutcheson* [2011] UKPC 13. It said that English law does recognise gross negligence in some contexts. In this context, the practical result of the difference is that, if the personal liability only arises (ie the limitation is switched off) on *gross* negligence, then if the trustee's indemnity is impaired for an act which is *mere* negligence (say, due to an express qualification on the indemnity in the trust instrument), the creditor is left without recourse. In the latter case the important feature is not the negligence, but the breach of trust which brings about the impairment.

[58] Which provides, as relevant, that "[i]f the responsible entity is to have any rights to be … indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights … must be available only in relation to the proper performance of those duties".

[59] See the conspectus in Lindgren, n 7 at 89ff.

[60] *Dowse v Gorton* (1891) AC 190 at 203 (Lord Macnaughton); *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170; *National Trustee's Executors & Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268; and *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [47]. "Such expressions as acting 'for the benefit of' 'with reference to' or 'on behalf of' the trust estate or in the discharge of his duty as a trustee are used indiscriminately in the judgments, but they all mean the same thing, namely, that the question is whether the costs, charges and expenses are properly incurred by the trustee as an incident of his administration of the estate": *National Trustee's Executors & Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268 at 279 (Williams J).

[61] Meagher JA condemned the expression "properly" as "almost meaningless": *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29 at [47] (Meagher JA). In response to this, in *Nolan v Collie & Merlaw Nominees*

been stated thus:

> To my way of thinking the conventionally stated test as to expenses "properly incurred" is merely a convenient shorthand to describe those restraints applicable to trustees who would seek to look to trust funds for the payment of their expenses and other trust liabilities. It also has the advantage of succinctly expressing the notion of propriety as underpinning a trustee's relationship with the trust estate and the beneficiaries.[62]

Perhaps these differences are semantic,[63] but it is at least clear from the authorities that the trustee's right of access to trust assets is impaired if the activity that generated the liability in question involved a breach of trust, was beyond the powers given to the trustee, or was criminal or fraudulent in nature.[64]

Paragraph (c)(ii)

In some transactions the parties may agree that it is appropriate for the limitation not to apply in respect of the resulting loss or damages if certain core representations/warranties or undertakings are breached. For example, the counterparty may be relying on a copy of the trust instrument supplied by the trustee. If that copy was incomplete, so that there were some restrictions of which the counterparty was unaware, so that the counterparty did not have access to the trust assets, say, then it should have recourse. Another might be the undertaking not to amend the trust instrument or to remove or reduce the trustee's right of indemnity from the trust assets or to replace the trustee. There may also be provisions in the agreement (or elsewhere in the documentation suite) which expressly bind the trustee personally (whether or not they also bind it as trustee).

Paragraph (d)

Clauses which deal with the issues covered in this paragraph are common but by no means universal. Nevertheless, on further analysis, they should be preferred. This paragraph covers some of the side-effects of the fact that the clause reduces liability. Where the clause operates so that the trustee is not liable to pay an amount under the documents when otherwise due, say, because there were insufficient available liquid assets, the trustee might attempt to argue that there has been no breach, and therefore no event of default, or that default interest should not accrue because there was no liability to pay the amount. Clearly that would not normally be the parties' commercial expectation, and so the argument should be expressly dealt with. From the trustee's point of view it should still be clear that the clause does not circumvent the limitation on its liability.

Also the liability to pay damages depends on securing an order. If a counterparty is not able to bring a claim because it is barred under the clause then the amount would not become payable. This paragraph addresses this issue.

Pty Ltd (in liq) [2003] VSCA 39, Ormiston JA said (Batt and Vincent JJA concurring) said "[w]ith the greatest of respect, it is by no means clear why a majority of their Honours in *Gatsios Holdings* seemed to sanction so significant a departure from accepted principle as to leave the trustee's right largely unconstrained … the majority's views would appear to leave this important area of trust law rudderless and in a state where mischievous trustees might seize upon an almost unfettered right to indemnity as justifying improper depredations of trust funds, contrary to their obligation not to abuse their position by making it 'a means of profit or benefit' to themselves" at [45]. Ultimately, the court decided to "confine what was said in [*Gatsios Holdings*] to liabilities in tort incurred by trustees and the circumstances in which they should be so indemnified" at [50]. A useful summary of the debate is contained in *Saker, in the matter of Great Southern Managers Australia Ltd (rec and mgrs apptd) (in liq) (No 2)* [2011] FCA 958 at [45]-[49]. The issue, and the differences between the courts, are explored at further length in Aitken L, "A Liability 'Properly Incurred'? The Trustee's Right to Indemnity, and Exemption from Liability for Breach of Trust" (2011) 35 ABLR 53. See also the discussion in *Australian Securities and Investments Commission v Letten (No 17)* [2011] FCA 1420 at [14]-[17].

[62] *Nolan v Collie & Merlaw Nominees Pty Ltd (in liq)* [2003] VSCA 39 at [44] (Ormiston JA, with Batt and Vincent JJA concurring).

[63] In *Re Beddoe* [1893] 1 Ch 547 the court held that the expression "properly incurred" means "not improperly incurred". This was supported by the Victorian Court of Appeal in *Nolan v Collie & Merlaw Nominees Pty Ltd (in liq)* [2003] VSCA 39.

[64] *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29.

LIMITING SECURITY TRUSTEES' LIABILITY TO THEIR BENEFICIARIES

The issues faced by security trustees are the same as for other trustees and so one would expect a limitation of liability clause for security trustees to contain materially or substantively similar provisions to clauses used by other trustees (although enforcement options may tend to be more restrictive).

However, there is an issue where a security trustee seeks to use a limitation of liability clause of this type in a security trust deed to limit not only (a) its liability to contracting third parties, such as the borrowers, guarantors and other obligors, and counterparties in tripartite agreements, but also (b) its liability to its own financier beneficiaries.

Those objectives are quite different. On the one hand, the liability described in (a) concerns the personal liability unavoidably undertaken by trustees to third parties because the security trust is not a separate legal entity. In broad economic terms, security trustees seek to make the security trust more closely resemble a limited liability corporation. On the other hand, the liability described in (b) concerns the duties and liabilities that trust law (as modified by the security trust instrument) imposes on the security trustee in favour of its financier beneficiaries. Security trustees seek to be relieved of these to as great an extent as commercially possible. The liability described in (a) is best limited by reference to trust assets; the liability described in (b) is best dealt with directly, by way of a release, rather than by limiting the recourse of beneficiaries to trust assets which are held for the beneficiaries anyway.

A release should be effective, up to a point. The courts have no objection in principle to this form of private modification of trust law between trustees and beneficiaries, subject to one very important qualification. There is at the heart of the office of trustee an "irreducible core" of minimum obligation, described as a duty to act honestly and in good faith for the benefit of the beneficiaries, which is essential and fundamental to the concept of the trust.[65] In a commercial arrangement where there is no evidence of unconscionability or other vitiating factor, the courts have been willing to allow the parties to reduce the fiduciary content of a trustee's obligations almost entirely, while warning that at some point the arrangement must cease to be a trust and may be recharacterised as "something else".[66] The NSW Supreme Court has explained that:

> a clause in a trust deed may validly exempt the trustee from obligations and liabilities other than those contained in that irreducible core of a trustee's obligation – namely, to act honestly and in good faith. It is not contrary to public policy to exclude a trustee's liability even for gross negligence, but it is to exclude liability for dishonesty or bad faith.[67]

Further, the NSW Court of Appeal has held that:

[65] *Armitage v Nurse* [1998] Ch 241, affirmed as correct by the Privy Council in *Spread Trustee Company Ltd v Sarah Ann Hutcheson* [2011] UKPC 13 at [52] (Lord Clarke). See also *Bogg v Raper* (1998/99) 1 ITELR 267; *Walker v Stones* [2001] QB 902; *Baker v JE Clark & Co (Transport) UK Ltd* [2006] EWCA Civ 464. The *Armitage* principle has been cited with approval in Australian authority: see *Re Centro Retail Ltd and Centro MCS Manager Ltd* [2011] NSWSC 1175; *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146; *Wilden Pty Ltd v Green* [2009] WASCA 38; *Bell Group (in liq) v Westpac Banking Corp (No 9)* (2008) 225 FLR 1. See also Aitken, n 61.

[66] *Citibank NA v MBIA Assurance SA* [2007] EWCA Civ 11. See also Leeming M, "The Scope of Fiduciary Obligations: How Contract Informs, But Does Not Determine, the Scope of Fiduciary Obligations" (2009) 3 JoE 181; and Trukhtanov A, "The Irreducible Core of Trust Obligations" (2007) 123 LQR 342. In relation to trustees for investors in a debt instrument issuance (eg debentures, bonds, notes, etc) see Rawlings P, "Reinforcing Collectivity: The Liability of Trustees and the Power of Investors in Finance Transactions" (2009) 23 *Trust Law International* 14.

[67] *Leerac Pty Ltd v Garrick E Fay* [2008] NSWSC 1082 at [23]. See also *ANZ Banking Group Ltd v Intagro Projects Pty Ltd* [2004] NSWSC 1054.

> if [the trustee] consciously takes [a] risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why [the trustee] should not be protected by an exemption clause which excludes liability for wilful default.[68]

Where both a release clause and a limitation of liability clause appear in the security trust deed then to avoid confusion the latter should be expressed not to apply in respect of the security trustee's liability to the beneficiaries.

It should be noted that exculpatory and limitation language may not be effective in all circumstances, such as (arguably) liability for misleading or deceptive conduct.

CONCLUSION

The trust is an ancient creature originally designed for private family purposes and, in some ways, it might be surprising that it remains so prevalent in commerce today, including for very large scale, high value transactions. Its usefulness is in its flexibility and, in some cases, revenue conveniences and lighter regulation. But those advantages come at a price for trustees and creditors. When it comes to liability for enterprise debts, liabilities and expenses, directors of companies enjoy the protection of statutory limited liability, provided they do not misconduct themselves in any relevant way. By contrast, trustees enjoy no such protection, even if their conduct is scrupulous; their liability is personal and unlimited. Limitations must be bargained for privately and contractually. Over time this has led to a wide variety of solutions, some better than others and some even failing to achieve their intended purpose from the point of view of either the trustee or the creditor or both. It is apparent that the issues, which are complex, are not always fully understood or deeply analysed.

We have sought in this article to offer some further analysis of the issues and to suggest a model clause that addresses them in a manner that is consistent with commercial understandings and risk allocation decisions which are common in the Australian market. We think it represents a moderate middle ground or a "line of best fit" based on the many variations we have seen in practice over the years. We acknowledge that, in a market where some have strongly held views on the issues and use standard clauses from which they will rarely, if ever, deviate, a model clause will not be universally accepted. Nevertheless, we have produced one, and the explanatory material in this article, in the hope of generating discussion and some greater consistency of approach.

ANNEXURE

Model limitation clause for trustees

Note: This clause may be used for limiting the trustee's liability to third parties external to the trust. It is not for use in limiting liability to beneficiaries.

(a) Trustee[69] enters into and performs this agreement[70] and the transactions it contemplates only as trustee of the Trust, except where expressly stated otherwise. This applies also in respect of any past and future conduct (including omissions) relating to this agreement or those transactions.

(b) Under and in connection with this agreement and those transactions and conduct:

   (i) Trustee's liability (including for negligence) is limited to the extent it can be satisfied out of the assets of the Trust. Trustee need not pay any such liability out of other assets. [In relation to any given liability, amounts which are not Trust assets and which have been actually

[68] *Alexander (t/as Minter Ellison) v Perpetual Trustees WA Ltd* [2001] NSWCA 240 at [62] (Stein J), quoting from *Armitage v Nurse* [1998] Ch 241 at 252. The question of what constitutes "honesty" in this context is subject to some judicial debate: see Heydon and Leeming, n 7 at [1620].

[69] Replace with defined term for the party which is a trustee. Note that, since this clause can only operate contractually, it only binds those who are party to it. Thus, references in this clause to a "party" are references to persons who are party to the document within which this clause is included.

[70] Change to "this deed" or "this document" where appropriate. Where this clause relates to a number of different documents (and the parties to this document are parties to the other documents) replace with the appropriate defined term, eg "Transaction Documents".

received by Trustee to indemnify it against that liability will be taken to be assets of the Trust (but no other party will have any rights in respect of any such indemnity)][71];

(ii) another party may only do the following (but any resulting liability remains subject to this clause):

(A) prove and participate in, and otherwise benefit from, any form of insolvency administration of Trustee but only with respect to Trust assets;

(B) exercise rights and remedies with respect to Trust assets, including set-off;

(C) enforce its security (if any) and exercise contractual rights; and

(D) bring any other proceedings against Trustee, seeking relief or orders that are not inconsistent with the limitations in this clause

and may not otherwise:

(E) bring proceedings against Trustee;

(F) take any steps to have Trustee placed into any form of insolvency administration (but this does not prevent the appointment of a receiver, or a receiver and manager, in respect of Trust assets); or

(G) seek by any means (including set-off) to have a liability of Trustee to that party (including for negligence) satisfied out of any assets of Trustee other than Trust assets.

(c) Paragraphs (a) and (b) apply despite any other provision in this agreement but do not apply with respect to any liability of the Trustee to another party (including for negligence):

(i) to the extent that Trustee has no right or power to have Trust assets applied towards satisfaction of that liability, or its right or power to do so is subject to a deduction, reduction, limit or requirement to make good, in any case because Trustee has acted beyond power or improperly in relation to the Trust; or

(ii) under [[*insert reference to selected trust representations and undertakings*] or] any provision which expressly binds Trustee other than as trustee of the Trust (whether or not it also binds it as trustee of the Trust).

(d) The limitation in paragraph (b)(i) is to be disregarded for the purposes (but only for the purposes) of the rights and remedies described in paragraph (b)(ii), and interpreting this agreement and any security for it, including determining the following:

(i) whether amounts are to be regarded as payable (and for this purpose damages or other amounts will be regarded as a payable if they would have been owed had a suit or action barred under paragraph (b)(ii) been brought);

(ii) the calculation of amounts owing; or

(iii) whether a breach or default has occurred,

(including for determining whether amounts are to be regarded as payable, calculating amounts owing, or determining whether a breach or default occurs):

(iv) the limit in paragraph (b)(i) is to be disregarded (but any resulting liability is still subject to this clause); and

(v) damages or other amounts which would have been owed had a suit or action barred under paragraph (b)(ii) been brought will be regarded as owing.

[71] Only relevant when there is a personal indemnity from beneficiaries or other source of indemnification.

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