

BFSLA Conference Queenstown 2014
"No laughing matter: trustee LOL clauses – trustee and financier perspectives"

Model limitation clause for trustees

- (a) Trustee enters into and performs this agreement 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 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)]¹;
 - (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, the winding up of Trustee or 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 any security 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 clauseand may not otherwise:
 - (E) bring proceedings against Trustee;
 - (F) take any steps to have Trustee wound up or 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 limitation, reduction, deduction, obligation to make good or to clear accounts, in any case because Trustee has acted beyond power or improperly in relation to the Trust; or
 - (ii) in connection with [*insert reference to selected trust representations and undertakings*] or any [other] provision which expressly binds Trustee other

¹ Only relevant when there is a personal indemnity from beneficiaries or other source of indemnification.

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 in determining the following:
- (i) whether amounts are to be regarded as payable (and for this purpose damages or other amounts will be regarded as 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 event of default has occurred,
- but any resulting liability will be subject to the limitations in this clause.