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THE IRREDUCIBLE CORE OF A GUERNSEY TRUST:

The offshore trustee en bon père de famille

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This article analyses the recent decision of the Judicial Committee of the Privy Council in Spread Trustee Co Ltd v Hutcheson and considers the effect of the Board's reasoning on comparative trust law and contemporary trust practice (both on and offshore). The article situates the Privy Council's judgment in the ongoing debate over the permissible scope of trustee exemption clauses, as well the emerging stream of jurisprudence on the irreducible core approach in trust law. The article considers the standard of care that must be exercised by trustees in a number of jurisdictions, including England, Guernsey, Jersey, Scotland and South Africa. Although the irreducible core of a Guernsey trust includes the obligation of a trustee to observe the utmost good faith and act en bon père de famille, the Board failed to explain how the indemnified conduct of a grossly negligent trustee can be reconciled with that unique obligation. Guernsey and Jersey have now legislated precisely on the standard expected of offshore trustees to ensure that trustees are not permitted to act in a grossly negligent manner with impunity in their administration of Guernsey and Jersey trusts.

Introduction

1 What is the least that can be expected of a trustee? That remains a very contentious question in contemporary trust law and practice, not least because minimum standards of trusteeship differ jurisdictionally. Presently, in the offshore jurisdictions of Guernsey and Jersey, a trustee cannot be exempted for gross negligence by the terms of a trust; whereas, onshore, in England & Wales, a trustee can be so exempted from liability. The widely-reported decision of the Privy

Council in *Spread Trustee Co Ltd v Hutcheson* (“*Spread*”)¹ has added considerably to that debate, if anything, by showing just how difficult the question is to answer from legal and public policy points of view. In *Spread*, a very specific question was framed as a preliminary point of law for the Board’s opinion: whether a trustee can be exempted from liability for gross negligence by the terms of a trust under Guernsey customary law? The Board held that a trustee can be so exempted.² Rather unusually for the Privy Council, each member of the Board delivered a separate judgment and, in the result, there are three concurring and two dissenting judgments.³ It is quite unusual for the members of the Board of the Privy Council to exhibit such consternation over a question of law.⁴

2 *Spread* is not only interesting as a matter of Privy Council practice, but the entire litigation reveals itself as one of those interesting cases in which more judges decide the case in favour of the losing party than the party who ultimately prevails in the highest appellate court. Taken holistically, and setting aside the seniority of the judicial officers, six

¹ [2012] 2 AC 194; [2012] 1 All ER 251; [2012] 2 WLR 1360; [2012] 1 LRC 102; (2012), 14 ITEL 37; [2012] WTLR 317; [2012] PNL 1; [2011] All ER (D) 51 (Jul); [2011] UKPC 13 (hereinafter “*Spread* (PC)”).

² Legislative amendment has considerably changed this position, such that a trustee cannot be exempted from gross negligence by the terms of a trust after 19 February 1991. See below n 24 and nn 162–163 and accompanying text.

³ *Spread* (PC), above n 1, paras 1–80, *per* Lord Clarke; paras 81–113, *per* Lord Mance; paras 114–127, *per* Sir Robin Auld (comprising the majority); paras 128–140, *per* Lady Hale (dissenting); and paras 141–180, *per* Lord Kerr (dissenting).

⁴ Indeed, for the better part of a century until 4 March 1966, it was even forbidden for “any man” to publish a dissenting opinion of the Judicial Committee of the Privy Council. See Judicial Committee (Dissenting Opinions) Order (SRO 13 of 1966, 4 March 1966), s 3. Even after that prohibition was abolished, dissenting opinions are uncommon. The Board’s unity of judgment reflects the chameleon quality of the Committee in performing a quasi-executive role of advising the Queen on referred matters, so that Orders in Council may be made, despite the Committee being the final appellate court in the judicial hierarchy of many British dependant and overseas territories, including Guernsey and Jersey. See Howell, *The Judicial Committee of the Privy Council, 1833–1876: its Origins, Structure and Development* (1979), at 201, n 399; Smith, “*Ridsdale v Clifton*: Representations of the Judicial Committee of the Privy Council in Ecclesiastical Appeals” (2008), 19 *King’s, LJ* 551, at 569–573; Keenan & Smith, *Smith & Keenan’s English Law: Text and Cases* (2004), at 58.

judges answered the question in favour of the beneficiaries, and only three judges answered the question in favour of the trustee; that only a third of the judges decided the question in favour of the prevailing party evidences the complexity of the law in this area. Aside from the disagreement between the members of the Board, and the different perspectives of the plurality with the judges below, the complexity of the question is demonstrated by the divergent opinions among academics, practitioners and other judges.⁵ The English Law Commission has also oscillated in its position on whether statutory intervention is appropriate to resolve the uncertainty over the permissible scope of trustee exemption clauses, ultimately opting only to recommend a “rule of best practice”.⁶ And the leading authorities are couched in equivocal terms as to whether the exemption of trustee liability for gross negligence is acceptable from a public policy perspective (suggesting the general law may need legislative correction).⁷ As such, there remains considerable uncertainty about the legitimacy of broadly-drafted trustee exemption clauses, at least on the margins between gross negligence and good faith.

⁵ See *e.g.* Underhill and Hayton, *Law Relating to Trusts and Trustees*, 14th ed (1987), at 792; Matthews, “The Efficacy of Trustee Exemption Clauses in English Law”, [1989] *Conveyancer and Property Lawyer* 42; Hanbury & Martin, *Modern Equity*, 14th ed (1993), at 473–474; Cockburn, “Trustee Exculpation Clauses Furnished by the Settlor” (1993–1994), 11 *Australian Bar Review* 163; Kenny, “Living up to Expectations” (1996), 146 *New LJ* 348, at 349; Dal Pont, “The Exclusion of Liability for Trustee Fraud” (1998), 6 *APLJ* 1; Trust Law Committee, *Trustee Exemption Clauses* (1999), at 26–33; Walker, “Fraud, Fault and Fiduciary Liability” (2006), *JL Rev* 139, at 154–158; Butler & Flinn, “What is the Least that we can Expect of a Trustee? Exclusion of Trustee Duties and Exemption of Trustee Liability” [2010] *New Zealand Law Review* 459.

⁶ Compare English Law Commission, *Fiduciary Duties & Regulatory Rules: A Consultation Paper* (1992, Law Com No 124), 105, para 3.3.41; English Law Commission, *Trustee Exemption Clauses* (2002, Law Com No 171), paras 2.8, 2.22; English Law Commission, *Trustee Exemption Clauses* (2006, Law Com No 301), at 27–34, 61—the latter “best practice” proposal was accepted by the Government in a Ministerial Statement (14 September 2010). See also MacRae & Chien, “Trustee Exemption Clauses—A New Rule of Practice in England” (2007), 11 *J&GLR* 60.

⁷ *Spread* (PC), above n 1, paras 62–63, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 111, *per* Lord Mance (with whom Sir Robin Auld agreed); *Armitage v Nurse*, [1998] Ch 241 (hereinafter “*Armitage*”), at 256 *per* Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed).

3 This article will analyse the Board's reasoning in *Spread*, before going on to situate that case in a broader comparative law context, in which a number of jurisdictions are attempting to define, both through judicial reasoning and statutory reform, the essential nature of trusteeship and the legal relations that must exist when a trust is created as a matter of law—broadly, the “irreducible core” approach in trust law, by which mandatory rules of trust law override the subjective expression of a settlor when a trust is created. Particular attention will be paid to the comparative aspects of *Spread*, as a domestic perspective has already usefully been provided in this journal.⁸ As thriving international financial centres, Guernsey and Jersey have been in the vanguard of jurisdictions to legislate very precisely on the legal standard expected of trustees, with both Bailiwicks taking very robust approaches to ensure the integrity of offshore trustees and a greater degree of accountability in offshore trust administration. This is undoubtedly the best way forward for other jurisdictions, too.

Spread Trustee Co Ltd v Hutcheson

4 *Spread* involved two settlements that were made in November 1977, both of which contained an exclusion or exoneration clause that purported to relieve the trustee of those settlements from liability “except willful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable.” In other proceedings, the beneficiaries alleged various breaches of trust had occurred from acts of gross negligence occurring before 22 April 1989 and 19 February 1991.⁹ Those two dates are significant because on 22 April 1989, the Trusts (Guernsey) Law 1989 came into effect with a provision enshrining the “general fiduciary duties” of a trustee to “observe the utmost good faith and act en bon père de famille” and a further provision forbidding the terms of a trust from relieving “a trustee of liability for a breach of trust arising from his own fraud or willful misconduct” (“the 1989 Law”); on 19 February 1991, the latter provision of the 1989 Law was amended explicitly to forbid attempts to relieve a trustee of liability for “gross negligence” (“the Amendment Law”).¹⁰

⁸ Robilliard, “A Guernsey Look at *Spread Trustee* in the Privy Council” (2011), 15 J&GLR 319.

⁹ See e.g. *Stuart-Hutcheson v Spread Trustee Co Ltd*, [2002] WTLR 1213; (2002) 5 ITELR 140 (hereinafter “*Stuart-Hutcheson (GCA)*”).

¹⁰ Trusts (Guernsey) (Amendment) Law, s 1(f); *Spread* (PC), above n 1, para 2, per Lord Clarke.

5 But could the liability of a trustee for a breach of trust arising from his own gross negligence be lawfully exempted prior to each of those statutory enactments coming into force? Or, put another way, did the two statutory enactments of 22 April 1989 and 19 February 1991 introduce a substantive change in Guernsey law or were those enactments merely declaratory of the pre-existing law? That preliminary question occupied this tranche of litigation to the Privy Council, having been framed as a preliminary question for determination.¹¹ Although a preliminary question of law was the subject of determination in *Spread*, it may be of general interest to observe that the nature of the relevant conduct was such that the trustee had failed to monitor shares constituting the trust property, which resulted in considerable losses to the beneficiaries. As Hildyard, J, who acted for the respondent-beneficiaries in the Privy Council before his appointment as a *puisne* judge in the Chancery Division of the High Court of Justice, observed extra-judicially,

“[t]hese shares increased to start with, but their value over the course of years then plummeted. At no stage did the Trustee ever review and change the investment. By the end the shares were worth a fraction of their initial value. The Beneficiaries brought proceedings in Guernsey, alleging that the trustee was in grossly negligent breach of trust . . . The loss claimed was in the sum of over GBP50 million. They were met with the defence of an exoneration clause.”¹²

The preliminary question then arose as to whether that exoneration clause was effective as a matter of law.

6 At first instance, Sir de Vic Carey, Lieut Bailiff¹³ held that the 1989 Law and the Amendment Law were merely “declaratory” of the existing

¹¹ *Hutcheson v Spread Trustee Co Ltd*, 2009–10 GLR 197 (hereinafter “*Spread* (RCG)”)], para 11.

¹² Hildyard, “Prudence and Vituperative Epithets” (Lecture given to the Chancery Bar Association’s Annual Conference (London, 21 January 2012)), available on the website of the Society of Trust and Estate Practitioners: <http://www.step.org/prudence-and-vituperative-epithets>.

¹³ Hildyard, above n 12 (“The preliminary issues were first heard and determined by Sir de Vic Carey, Lieut Bailiff. He had been Solicitor General, Deputy Bailiff and then Bailiff. He was an acknowledged expert on Guernsey customary law. He had even commented on the drafting of the Guernsey trust law and served on the Advisory and Finance Committee on the introduction of the 1989 Law. It is said that Guernsey customary law lies in the breast of its foremost practitioner. His seemed a suitably ample breast on which to rest”).

law of Guernsey.¹⁴ On that footing, Carey, Lieut Bailiff went on to find that “a trustee in Guernsey has never been able to opt out of the responsibility to act honestly and to refrain from misconduct that is fraudulent or wilful” and, further, that “[a]cting with gross negligence in the discharge of one’s duties as a trustee cannot . . . be compatible with acting *en bon père de famille*”, which he could not countenance as not attaching “to a paid trustee in the discharge of his duties as a trustee of a Guernsey trust established prior to 1989” and could not see “how any clause in a trust deed completed before 1989, which purported to discharge a trustee from liability to the trust for failures to act *en bon père de famille* could have been upheld by the court.”¹⁵

7 On appeal, the Guernsey Court of Appeal¹⁶ broadly upheld Carey, Lieut Bailiff’s conclusions that, prior to the enactment of both the 1989 Law and the Amendment Law, a term of a trust instrument could not exempt a trustee from liability for gross negligence under Guernsey customary law.¹⁷ Martin, JA (with whom Vos and Montgomery, JJA agreed) said, “[t]he Lieutenant Bailiff rightly attached significance to the obligation to act *en bon père de famille*”, which included as a necessary and non-excludable element the duty to perform the trust in a manner that was not grossly negligent.¹⁸ The omission of the words “gross negligence” in the 1989 Law was “the product of a mistake”, which was corrected soon after by the Amendment Law.¹⁹ Furthermore, the 1989 Law prohibited the exclusion of liability for gross negligence, since—

¹⁴ *Spread* (RCG), above n 11, paras 48–52.

¹⁵ *Spread* (RCG), above n 11, paras 49–51.

¹⁶ The Guernsey Court of Appeal comprised Martin, Vos and Montgomery, JJA). With respect to the first two of those judges (*i.e.* Martin and Vos, JJA), Hildyard, J has observed, above n 12, “at that time [Martin, QC and Vos, QC were] leading members of the Chancery Bar.” Sir Geoffrey Charles Vos, QC had actually been appointed as a *puisne* judge of the Chancery Division of the High Court of Justice on 27 October 2009 about one month before the Guernsey Court of Appeal handed down its judgment in *Spread* on 26 November 2009 and has subsequently been elevated as a Lord Justice of Appeal at the end of last year, on 3 October 2013 .

¹⁷ *Spread Trustee Co Ltd v Hutcheson*, 2009–10 GLR 403, paras 35–38, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed) (hereinafter “*Spread* (GCA)”).

¹⁸ *Spread* (GCA), above n 17, para 40, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

¹⁹ *Spread* (GCA), above n 17, para 44, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

“[t]he prohibition in the 1989 Law on exclusion of liability for fraud is to be construed, by application of the maxim *culpa lata dolo aequiparatur*, as comprehending a ban on the exclusion of liability for gross negligence as equivalent to, or as a species of, fraud. The Amendment Law did no more than give express statutory effect to what had always been the position”.²⁰

The trustee’s appeal was dismissed. As the decision involved an interlocutory determination of a preliminary issue, no appeal lay as of right. The Guernsey Court of Appeal did have a discretion to grant leave for the defendant-trustee to appeal to the Privy Council, but refused to grant such leave for the defendant-trustee to appeal any further: in its view, the law on trustee exemption clauses was clear, especially as it had been put on an explicit statutory footing for the previous 18 years and the matter was not of “sufficient general importance to justify the attention of the Privy Council”.²¹

8 Despite the Guernsey Court of Appeal’s denial of leave to appeal, the Judicial Committee of the Privy Council granted permission to appeal, enabling the trustee to appeal.²² And, by a slim majority (3:2), the Board²³ allowed the appeal and held that it was possible to exclude liability for gross negligence until 19 February 1991—when the Amendment Law came into effect amending the 1989 Law to explicitly prohibit the exclusion of gross negligence.²⁴ Relying on the obligation of a trustee to act *en bon père de famille*, which was imposed under Guernsey law, and having Norman, and ultimately Roman (*bonus*

²⁰ *Spread* (GCA), above n 17, para 56, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

²¹ *Spread* (GCA), above n 17, para 46, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

²² *Spread* (PC), above n 1, para 6, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

²³ The “Board” of the Judicial Committee of the Privy Council hearing the appeal comprised Lady Hale, Lord Mance, Lord Kerr, Lord Clarke and Sir Robin Auld. See Hildyard, above n 12, where his Honour observed extra-judicially—

“[p]erhaps surprisingly, given that the question whether *Armitage v Nurse* correctly stated the law in England, and more than that, the question whether that decision reflected a universally held view at the English Bar, was a systemic and practical issue of trust law, no Chancery lawyer was on the Board.”

²⁴ *Spread* (PC), above n 1, paras 25–26, 34–37, *per* Lord Clarke; paras 106–112, *per* Lord Mance (with whom Sir Robin Auld agreed); paras 122–124, *per* Sir Robin Auld.

paterfamilias), rather than English, law origins, a minority of the Board would have dismissed the appeal and banished gross negligence from the realm of lawful exclusion as a matter of Guernsey customary law.²⁵ Three key points of commonality of the Board's members will be juxtaposed, and commented on interstitially, in order to bring out the finer points of departure between them.

The declaratory nature of the 1989 Law

9 At all levels, all judges found that the relevant provisions of the 1989 Law were declaratory of the pre-existing law.²⁶ However, the key point of difference was that the majority of the Board considered the 1989 Law was not only declaratory, but exhaustive, of Guernsey customary law as regards the standard expected of a trustee.²⁷ Essentially, in the Board's opinion: (a) there was no evidence of the draftsman having made a mistake; (b) it was to be inferred that the prohibition on the exclusion of liability for fraud or willful misconduct was deliberate in the 1989 Law; (c) there was no indication that the 1989 Law intended to alter the existing law to the detriment of beneficiaries generally; and (d) the exclusion of gross negligence was permissible, therefore, under Guernsey customary law, as affirmed by the 1989 Law.²⁸

10 Assuming that the 1989 Law was exhaustive of the legal position on the permissible extent of trustee exemption clauses in Guernsey, the only wrinkle left for the Board to iron out of the statutory fold was to explain the effect of the Amendment Law. Therefore, the essential premise in the Board's reasoning process was that the omission of "gross negligence" in the 1989 Law was not a drafting mistake but that the Amendment Law was responsive to some other factor.²⁹ That other factor was the parallel legislative amendment in Jersey, which was

²⁵ *Spread* (PC), above n 1, paras 139–140, *per* Lady Hale; para 179, *per* Lord Kerr.

²⁶ *Spread* (RCG), above n 11, 214 *per* Carey, Lieut Bailiff; *Spread* (GCA), above n 17, at 423–424 *per* Martin, JA (with whom Vos and Montgomery, JJA agreed); *Spread* (PC), paras 25–27, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 113, *per* Lord Mance (with whom Sir Robin Auld agreed); para 119, *per* Sir Robin Auld; paras 138–139, *per* Lady Hale; para 176, *per* Lord Kerr.

²⁷ *Spread* (PC), above n 1, para 25, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

²⁸ *Spread* (PC), above n 1, paras 25–27, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

²⁹ *Spread* (PC), above n 1, para 29, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

passed about eleven months after the 1989 Law was passed and about nine and a half months before the Amendment Law.³⁰ The Board considered that the (Guernsey) Amendment Law was enacted responsively to the Jersey Amendment Law and not to correct a mistake (*i.e.* the omission of “gross negligence” in the 1989 Law).³¹ In doing so, the Board placed considerable emphasis on the 1989 Law and the Amendment Law, effectively treating the former enactment as a codification of Guernsey law applicable to trusts and their administration and reading the relevant provisions in such a way as to leave no room for any residual role for Guernsey customary law. Thus,—

“[t]he purpose of the Law was to replace the existing customary law and to clarify the rights and obligations of trustees in Guernsey. It follows, as the Board sees it, that, unless the Law provides that it is impermissible for a trust to exclude liability for gross negligence, a term excluding gross negligence is lawful.”³²

11 The treatment of the 1989 Law as a codification of Guernsey trust law is mistaken. Although the 1989 Law did not expressly state that it was not a codifying statute on Guernsey trust law, this must be the case. That this is so is evident from the many and varied statutory amendments that have followed since the 1989 Law was enacted, which are now consolidated in the Trusts (Guernsey) Law 2007. Furthermore, the 1989 Law was heavily modelled on the Trusts (Jersey) Law 1984, which expressly provided that it was not a codifying statute.³³ That remains true of the Trusts (Jersey) Law 1984

³⁰ See below n 48 and accompanying text. It is of particular note that the relevant provision of the Jersey Amendment Law was passed on 21 February 1989.

³¹ *Spread* (PC), above n 1, paras 25–27, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 113, *per* Lord Mance (with whom Sir Robin Auld agreed); paras 119–120, *per* Sir Robin Auld.

³² *Spread* (PC), above n 1, para 22, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

³³ Trusts (Jersey) Law 1984, s 1(5) (“This Law shall not be construed as a codification of laws regarding trusts, trustees and persons interested under trusts”). See below nn 50–52 and accompanying text. See also Hoffmann, “Foreword” in Matthews & Sowden, *Jersey Law of Trusts* (1988)—

“Some lawyers on the Island, like young Victorian clergymen, went so far as to have Doubts as to whether trusts existed at all and when I was a member of the Jersey Court of Appeal, there were occasionally rumours of impending litigation in which a root and branch attack would be made on the entire concept . . . The States of Jersey therefore

today.³⁴ As such, it cannot possibly have been intended that the 1989 Law would codify Guernsey customary law. That the 1989 Law was not a codification of Guernsey trust law is evident from an earlier decision of the Guernsey Court of Appeal in relation to the very same trusts, in which it was held that the 1989 Law did not codify Guernsey customary law on the disclosure of trust information.³⁵

12 In *Stuart-Hutcheson v Spread Trustee Co Ltd* (“*Stuart-Hutcheson*”), the appellant, a nephew of the deceased settlor, and a member of a discretionary class of beneficiaries of a trust settled *inter vivos*, sought documents and information relating to the administration of the trusts.³⁶ The 1989 Law codified certain rights of a beneficiary to information from a trustee concerning the state and amount of the trust property.³⁷ But that provision explicitly applied only to beneficiaries whose interest in the trust property had vested before the commencement of the 1989 Law.³⁸ The appellant was not such a beneficiary, but was “somewhat inelegantly” described as a “non-vested discretionary beneficiary.”³⁹ He did not, therefore, have any statutory rights to the trust information sought. Clarke, JA (with whom Sumption and Tugendhat, JJA agreed) found no difficulty in holding that the appellant had such rights prior to, and subsisting after, the enactment of the 1989 Law as a matter of Guernsey customary law. Relevantly, the Court held, “[t]he 1989 Law is not expressed to be, and . . . is not, a statute codifying the whole law of trusts or even the whole law on disclosure of information.”⁴⁰ And then went on to emphasise

decided that if there was any possibility that trusts did not exist, they would have to be invented. Hence the Trusts (Jersey) Law 1984, which although not a complete code, contains a statement of most of the important rules”;

Matthews & Mowbray, QC, “Trust Law” in Bailhache (ed.), *A Celebration of Autonomy* (2005), at 103, 107–108.

³⁴ Trusts (Jersey) Law 1984, s 1(2) (“This Law shall not be construed as a codification of laws regarding trusts, trustees and persons interested under trusts”).

³⁵ *Stuart-Hutcheson* (GCA), above n 9, at 153, 155 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

³⁶ *Stuart-Hutcheson* (GCA), above n 9.

³⁷ Trusts (Guernsey) Law 1989, s 22(2).

³⁸ Trusts (Guernsey) Law 1989, s 22(2).

³⁹ *Stuart-Hutcheson* (GCA), above n 9, 145 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

⁴⁰ *Stuart-Hutcheson* (GCA), above n 9, 153 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

that the appeal had been successful because the relevant provision “did not take away . . . the pre-existing rights of the appellant under Guernsey customary law.”⁴¹ In doing so, the Guernsey Court of Appeal took a markedly different approach to the interplay between Guernsey customary law and the 1989 Law, finding that there was an important, ongoing role for Guernsey customary law to play in the regulation of Guernsey trusteeship, as regards the disclosure of trust information to persons who were not, strictly speaking, “beneficiaries” for the purposes of the 1989 Law.

13 Is that earlier approach of the Guernsey Court of Appeal in *Stuart-Hutcheson* in relation to the same Act (*i.e.* the 1989 Law) and the same trusts reconcilable with the Privy Council’s later approach in *Spread*? In *Stuart-Hutcheson*, the Guernsey Court of Appeal could have taken a similar approach to that later taken by the Privy Council in *Spread* and simply held that the 1989 Law was exhaustive and that the trustee was only obliged to disclose trust information to “beneficiaries” and not to persons who were members of a discretionary class. Fortunately, it chose not to do so.⁴² Instead, the

⁴¹ *Stuart-Hutcheson* (GCA), above n 9, 155 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

⁴² As a matter of law and public policy, it is “fortunate” because access to trust information by beneficiaries, even discretionary beneficiaries and others who are contemplated potentially to benefit from a trust, is essential to ensure accountability of offshore trusteeship, as was reflected upon by Michael Gibbon in the context of the appeal to the Privy Council arising out of a Manx trust, in *Schmidt v Rosewood*, in which he acted as junior counsel for the respondent—

“[i]t is a widely held view that any decision other than the one reached [by the Privy Counsel in *Schmidt v Rosewood* (allowing Schmidt’s appeal)] would have meant that (particularly in the offshore context) it would have been possible to create trusts that were effectively unpoliceable.”

Michael Gibbon, “Beneficiaries’ information rights” (2011) 17 *Trusts & Trustees* 27, at 30. It is fortunate that Gibbon’s client was unsuccessful in the appeal, as “unpoliceable” trusts would undermine the underlying public policy concern of ensuring that trustees are accountable for trust administration as a matter of law. See David Hayton, Paul Matthews & Charles Mitchell (eds), *Underhill and Hayton Law of Trusts and Trustees*, 17th ed. (2007), at 3—

“[t]he core primary obligation created by the settlor is the personal obligation of the trustee of the trust fund to produce accounts of the trusteeship available to be falsified (for unauthorised conduct) or

court held that “the purpose of the 1989 Law was to declare and delineate certain basic principles” and that—

“there is nothing in the 1989 Law that purports to take away any existing rights of non-vested discretionary beneficiaries to information. On ordinary principles it should be presumed not to do so in the absence of clear provision to that effect.”⁴³

It is difficult to reconcile that approach, which found that the 1989 Law was not a codifying statute, with the Privy Council’s later approach in *Spread*, in which it was effectively held that the 1989 Law exhaustively codified Guernsey trusts law.⁴⁴ In terms of reasoning process, Clarke, JA in the Guernsey Court of Appeal took the correct approach by determining: first, as a matter of Guernsey customary law, what rights the appellant had in relation to the relevant trust; and then secondly, as a matter of statutory construction, whether those pre-existing rights had been extinguished by the enactment of the 1989 Law. It follows, therefore, that Lord Clarke in the Privy Council was incorrect in reversing that approach by: first, as a matter of statutory construction, determining what the 1989 Law provided by its terms; and secondly, taking the statutory law to have exhaustively codified Guernsey law. In the absence of a clearly expressed legislative intention, a statute must not be taken to exhaustively codify the unwritten law of a particular jurisdiction.

14 The Board’s approach attributed an ambition and intention to the legislature which was not apparent from, or supported by, the

surcharged (for authorised but negligent conduct) by the beneficiaries. This is crucial so that the beneficiaries can monitor or ‘police’ the trustee’s fundamental duty to keep within the terms of the trust instrument and in doings so . . . always to act exclusively in the best interests of the beneficiaries—and so act with undivided loyalty in their best interests . . .”

Fox, “Non-excludable Trustee Duties” (2011) 17 *Trusts & Trustees* 17, at 17–20.

⁴³ *Stuart-Hutcheson* (GCA), above n 9, at 153 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

⁴⁴ See *Stuart-Hutcheson*, above n 9, at 141, in which the Editor’s Note records that—

“[t]he [*Stuart-Hutcheson*] case addresses the fundamental question whether or not the Guernsey Trusts Law is a codifying statute. In concluding that the purpose of the Trusts Law was to ‘declare and delineate certain basic principles’, the court has ensured that the body of trust law recognised by Guernsey prior to 1989 retains its significance.”

contemporaneous material that informed and supported the passing of the relevant amendments. In recommending the passing of the 1989 Law, the States Advisory & Finance Committee produced a report dated 12 February 1988 (“the 1988 Report”), in which nothing at all is said about radically changing Guernsey trust law or extinguishing any rights afforded by Guernsey customary law by the introduction of the 1989 Law. On the contrary, the 1988 Report said—

“[t]he [1989] Law would follow the general pattern of the Jersey Law . . . and would seek to set out a basic infrastructure of legal principles on the authority of which trustees, beneficiaries and settlors could operate with certainty and confidence.”⁴⁵

Now, one would expect that, if the Amendment Law brought such a significant change as to prohibit the exclusion of gross negligence for the first time in Guernsey law, then this would be reflected in the legislative report accompanying the Amendment Law. In support of the passing of the Amendment Law, however, the States Advisory & Finance Committee produced a report dated 16 March 1990, in which it proposed adding “or gross negligence” and described that amendment as being one of—

“a number of minor technical amendments to the [1989] Law which are desirable and [the Committee] considers that this is an appropriate opportunity to proceed with them.”⁴⁶

15 Despite the avowedly trivial nature of the amendment (to add the words “or gross negligence”), which itself suggests that the amendment did not significantly change Guernsey law, in the Board’s opinion, the Amendment Law was not enacted to correct an oversight, but was motivated by a similar amendment in Jersey, which was passed on 21 February 1989 (“Jersey Amendment Law”). Until the Jersey Amendment Law came into effect, “[t]here was no provision [of the Trusts (Jersey) Law 1984] which expressly set out the extent to which a Jersey trust could exonerate a trustee for breach of trust”.⁴⁷ When it came to explicitly legislating on trustee exemption clauses, Jersey proceeded straight to forbidding the terms of a trust from

⁴⁵ States Advisory & Finance Committee, “Report on the Guernsey (Trusts) Law”, 12 February 1988, *Billet d’État IX of 1988*, art VI. See also *Spread* (GCA), above n 17, 423, para 43.

⁴⁶ States Advisory & Finance Committee, *Report on Amendments to the Guernsey (Trusts) Law 1989*, 16 March 1990, *Billet d’État VIII of 1990*, art VI. See also *Spread* (GCA), above n 17, 423–424, para 44.

⁴⁷ *Spread* (PC), above n 1, para 30, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

“relieving, releasing or exonerating” a trustee from liability for breach of trust arising from a trustee’s “own fraud, willful misconduct or gross negligence”.⁴⁸ Indeed, in *Spread*, the Board held that—

“[t]he effect of the Amendment Law was to bring Guernsey law in this respect into line with what was now the equivalent provision of the law of Jersey, which had been made after the 1989 Law was passed.”⁴⁹

Pausing there, in order for there to be consistency between Guernsey and Jersey customary law, and consonant with the Board’s finding that the Guernsey Amendment prohibited the exemption of trustee liability for gross negligence for the first time in Guernsey law and was purely responsive to the analogue amendment passing in Jersey, one would expect that, like the Guernsey Amendment Law, the Jersey Amendment Law must also have brought about a significant change to Jersey law when the parallel provision was passed in Jersey. But the explanatory note that was lodged with the draft Jersey Amendment Law points to the contrary conclusion, simply stating⁵⁰—

“[t]he opportunity is also taken *to make it clear* that the terms of a trust cannot relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, willful misconduct

⁴⁸ Trusts (Amendment) (Jersey) Law 1989, art 5 (amending art. 26 of the Trusts (Jersey) Law 1984).

⁴⁹ *Spread* (PC), para 34—

“The effect of the Amendment Law was to bring Guernsey law in this respect into line with what was now the equivalent provision of the law of Jersey, which had been made after the 1989 Law was passed. The Board accepts the submission made on behalf of the trustee that the reasonable inference is that that was what led to the amendment. That conclusion is strengthened by the fact that a number of the other provisions of the Amendment Law replicated the provisions of the Jersey Amendment Law: see Annex A to this judgment, which shows that the provisions of the Amendment Law are strikingly similar to those of the Jersey Amendment Law.”

Annex A to that opinion notes “the similarities between the Jersey and Guernsey Amendments . . .” and sets-out and emphasises various provisions of “Guernsey Law” and “Jersey Law”.

⁵⁰ Finance and Economics Committee, “Explanatory Note”, lodged with the draft Jersey Amendment Law *au Greffe*, 31 January 1989) (emphasis added). See also *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Servs* 1995 JLR 352 (hereinafter “*Midland* (JCA)”), at 389, *per* Quesne, JA (with whom Southwell and Beloff, JJA agreed).

or gross negligence. Consequently the existing paragraph (9) . . . is replaced by a new paragraph (9) to this effect.”

16 Evidently, the Jersey Finance & Economics Committee did not consider that the introduction of an explicit provision prohibiting the exemption of liability for gross negligence in a trust instrument was a significant change to the pre-existing law in Jersey, but was introduced merely for clarification purposes (*i.e.* “*to make it clear . . .*”).⁵¹ In 1990, soon after the relevant amendment took effect in Jersey law, the leading text on Jersey trust law treated the amendment as merely for the purposes of clarity and stated that the position in Jersey and Scotland was the same (*i.e.* “gross negligence (*‘culpa lata’*) cannot be excluded”).⁵² So, even accepting the Board’s view that the (Guernsey) Amendment Law was purely responsive to the Jersey Amendment Law,⁵³ the Board failed to resolve the evident tension between Guernsey and Jersey law in this respect: on the one hand, the Jersey

⁵¹ It is also of note that the article by Professor Paul Matthews that was published in the January–February issue of *Conveyancer and Property Lawyer* in 1989, which concluded that it was very likely that liability for gross negligence could not validly be excluded by a trustee exemption clause in various jurisdictions, was prepared as part of the process of drafting the Jersey Amendment Law in 1989, which relevantly amended the Trusts (Jersey) Law 1984, and Professor Matthews’ article was published with the agreement of the then Solicitor-General of Jersey, Terry Sowden, QC. This tends to support the view that the relevant amendment to the Trusts (Jersey) Law 1984 prohibiting the trustee exemption clauses from relieving trustees of liability for gross negligence did not change, but merely clarified and confirmed, the pre-existing Jersey customary law.

⁵² Matthews & Sowden, *Jersey Law of Trusts*, 2nd ed (1990), at 81–82 (stating that the Jersey Amendment Law introduced—

“a new paragraph entirely [into art. 26(9) of the Trusts (Jersey) Law 1984], making it clear that it is possible for a trust deed by its terms to exclude liability of the trustee, not so much for particular losses as for breach of trust itself, except where it arises from his own fraud or wilful misconduct or gross negligence . . . In Scots law, as in Jersey law, trustees’ liability for trustees’ gross negligence (*‘culpa lata’*) cannot be excluded . . .”,

going on to quote the Scottish (House of Lords) case of *Rae v Meek* (1889), 14 App Cas 558, at 573, *per* Lord Herschell). These statements were repeated in the following edition of that text: Matthews & Sowden, QC, *The Jersey Law of Trusts*, 3rd ed (1993), at 171, para 14.8, at 172, para 14.10.

⁵³ *Spread* (PC), para 34, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

Amendment Law, which introduced the prohibition on trustee exemption clauses relieving liability for gross negligence, was simply enacted to “make it clear that the terms of a trust cannot relieve, release or exonerate a trustee from liability for . . . gross negligence” and can only be understood as being declaratory of the position under Jersey customary law; whereas, according to the Board, the analogue provision in the (Guernsey) Amendment Law brought about a significant change to Guernsey customary law, albeit being similarly described as a “minor technical amendment.” That causes a considerable break between Guernsey and Jersey law, without any persuasive justification for that difference. Indeed, having regard to the similar treatment of the advisory committees responsible for recommending the introduction of the relevant statutory provisions in Guernsey and Jersey as regards “gross negligence”, the logical conclusion is that, from a legislative perspective, Guernsey and Jersey law already prohibited the exemption of trustee liability for gross negligence *before* the explicit statutory provisions were enacted to make that clear. As such, the Guernsey Amendment Law can only be understood as correcting a legislative oversight.⁵⁴ The notion that the Guernsey Amendment Law was not enacted to correct a drafting mistake (*i.e.* the failure to include the words “gross negligence” in the 1989 Law) was a rather precarious footing for the Board to proceed in deciding the question of Guernsey customary law.

⁵⁴ But see *Midland* (JCA), above n 50, at 381 *per* Le Quesne, JA (with whom Southwell and Beloff, JJA agreed). It is of note that, although Federated Pension Servs Ltd filed an appeal against the Jersey Court of Appeal’s decision in *Midland* (JCA), leave was given by the Judicial Committee of the Privy Council (comprising Lord Browne-Wilkinson, Lord Hoffman, Lord Hutton, Sir Andrew Leggatt, the Hon. Sir Thomas Gault) for the appeal to be withdrawn after having been assured by counsel that the terms upon which the appeal would be withdrawn were for the benefit of all beneficiaries, including absent beneficiaries, with a compromise having been agreed between the parties the day before the appeal was due to be heard. For a report of the hearing at which Lord Browne-Wilkinson (on behalf of the Board of the Judicial Committee of the Privy Council) said that their Lordships would advise Her Majesty that leave ought to be given for the appeal to be withdrawn, that the terms of the relevant compromise ought to be approved and that an order ought to be made binding past, present and future beneficiaries to the compromise, see Williams, “Case Report: *Federated Pension Services Limited v Midland Bank Trustee (Jersey) Limited and Others*” (1997), 11(4) *Trust Law International* 113.

17 More fundamentally though, the problem with the Board's approach is that Guernsey customary law, being derived from previous decisions of Guernsey courts, is a matter for the judiciary, and not the legislature. It is for the court to decide what the customary law is in a particular jurisdiction, however difficult that task may be, and not to defer that decision to the legislature by approaching the task as a matter of statutory construction; whereas, it is a matter for the legislature to reform the customary law, if necessary, where it is considered wanting in some respect.⁵⁵ In treating the 1989 Law as being exhaustive of Guernsey customary law (*i.e.* as a codification of the legal position of trustee exemption clauses in Guernsey), the majority of the Board did not address whether, aside from the statutory provisions, Guernsey customary law forbade the exemption of liability for gross negligence by a trustee (that is, whether there was some residual role to be played by Guernsey customary law, even after the 1989 Law came into effect). That was the essential question.

18 There are particular difficulties with burdening statutory draftsmen in small states, such as Guernsey, with the responsibility to exhaustively codify customary law when passing a first, fundamental enactment in a field of law. Ironically enough, at the time when the 1989 Law took effect, Lenfestey (a Guernsey draftsman) published an article in the pages of the *Guernsey Law Journal* by which he sought to do two things: *first*, "to suggest that the procedure in Guernsey may point to improvements which could usefully be made in other small countries of the Commonwealth;" and *secondly*, "to record the peculiar difficulties of a legislative draftsman in a mini-state as seen from the desk or workbench of an established draftsman."⁵⁶ The Board's approach cast a large burden on the statutory draftsman in Guernsey to exhaustively state the law applicable to Guernsey trusteeship with precision in a single stroke of the legislative pen, without any minor or technical correction, and serves as a salient reminder to such draftsmen that statutes may be very strictly construed and be taken to have codified the particular field under analysis.⁵⁷ However, as argued previously, the correct approach for a court to take is to first determine

⁵⁵ *Stuart-Hutcheson* (GCA), above n 9, at 153 *per* Clarke, JA (with whom Sumption and Tugendhat, JJA agreed).

⁵⁶ Lenfestey, "Legislative Drafting in a Mini State" (1989) 7 *Guernsey Law Journal* 30, especially at 45–53 (on "The Peculiar Difficulties of a Legislative Draftsman in a Mini-State").

⁵⁷ Compare Bolles, "How Should Our Law Books Be Written?" (1905–1906), 15 *Yale, LJ* 221; Rose, "Basic Requirements of Good Legislative Drafting" (2010), 14 *J&GLR* 303, at 304; Hull, "Draftsmen's Devils" (1998), 3 *JL Rev* 243.

the relevant customary law before looking to the statutory provisions, unless there is a clear intention that a codification was intended.⁵⁸

19 Aside from the statutory provisions themselves, the only other means used by the Board to support its conclusion that Guernsey customary law did not invalidate trustee exemption clauses purporting to exonerate a trustee from liability for gross negligence was that, in the absence of any positive evidence, it could be inferred that, as the settlements involved substantial property, the settlor and the trustee had received legal advice, the effect of which was that it was possible to exclude liability for gross negligence.⁵⁹ Thus,—

“[i]f the parties had or their advisors had thought that it was contrary to Guernsey law to exclude liability for gross negligence, they would surely have excluded it in the settlements.”⁶⁰

However, no actual legal advice appears to have been tendered into evidence or considered by the Board. Besides the absence of any firm evidential basis for that inference, it is inappropriate for the court to take its lead from what parties do, or might think the law is, or by having regard to phantom legal advice.⁶¹ Given the uncertainty over

⁵⁸ As stated previously, the Guernsey (Trusts) Law 1989 cannot possibly have been intended to be a codification of Guernsey trust law, see above nn 33–35 and accompany text.

⁵⁹ *Spread* (PC), above n 1, para 36, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

⁶⁰ *Spread* (PC), above n 1, para 36, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

⁶¹ Note: the Board’s approach is quite different from that considered, but nevertheless rejected, by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349 (in which, in the context of mistake of law, the central question was whether a “common understanding” of the law between the parties was enough to deny recovery of money paid pursuant to that understanding on the basis that there was no mistake at the time of payment), at 376–384, *per* Lord Goff of Chieveley; at 398–401 *per* Lord Hoffmann, at 407–412 *per* Lord Hope of Craighead; compare 362–364 *per* Lord Browne-Wilkinson (dissenting); and at 397 *per* Lord Lloyd of Berwick (dissenting). Compare also the views of Denning, LJ in *In re Chapman’s Settlement Trusts* [1953] Ch. 218, at 279 (in which his Lordship said that the jurisdictional question there under consideration (*i.e.* the variation of a trust deed) had “taken Lincoln’s Inn by surprise” and then said—“[t]he practice of the profession in these cases is the best evidence of what the law is; indeed, it makes law”). The Board’s approach in *Spread* was vastly different from both of these cases because there was no “common understanding” amongst

Guernsey customary law in this respect, the clause may well have been included at the insistence of the trustee, with a view to testing the law, as the clause would only be read down or struck-out *pro tanto*, if the trustee's advisor was wrong.⁶² In any event, the reliance of the Board on the mere existence of a clause exempting a trustee from liability for gross negligence in the relevant trust deeds is not a proper basis for the Board to determine whether each of the clauses were themselves void as a matter of Guernsey customary law. It ought to be a matter for the Judicial Committee of the Privy Council to advise Her Majesty, the Queen on Guernsey law and not to rely on the practice of the parties in including such clauses in their trust deeds, especially when the very question the subject of the Board's advice is whether such a clause is valid as a matter of law.

Retrospectivity of the relevant Guernsey statutory law

20 In the Privy Council, Lord Clarke remarked on the "somewhat inelegant" framing of the preliminary question (in two parts) at first instance, which concentrated on the 1989 Law and the Amendment Law, rather than highlighting that the "real issue" concerned Guernsey customary law.⁶³ This appears to have been a mistake in the way the case was run; indeed, before Carey, Lieut Bailiff—

"it was common ground that, before the 1989 Law came into force, the law of Guernsey permitted a trust instrument to exclude liability for negligence or gross negligence but not liability for fraud or wilful misconduct",

and—

practitioners as to the legal position of trustee exemption clauses and, indeed, the "practice of the profession" had not even been considered—the Board's reference was to the likely existence of one legal opinion, which was not even in evidence or before the Board. In any event, neither approach would be authoritative as the House of Lords rejected such an approach in *Kleinwort Benson* and Denning, LJ's remarks were made in dissent in *In re Chapman's Settlement Trusts*.

⁶² Indeed, that position is enshrined in Guernsey law: Trusts (Guernsey) Law 2007, s 39(8). It is also the position in Jersey law: Trusts Law (Jersey), s 11(2)(a)(i), (ii), (b)(ii). See also *Midland* (JCA), above n 50, at 387–389; *West v Lazard Brothers (Jersey) Ltd*, 1993 JLR 165 (hereinafter "*West*"), 292; Dawes, *Laws of Guernsey* (2003), at 157; Kessler & Pursall, *Drafting Cayman Islands Trusts* (2006), at 94.

⁶³ *Spread* (PC), above n 1, para 4, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed), see also para 128, *per* Lady Hale.

“the [only] issue between the parties was whether the Amendment Law was retrospective in effect so as to preclude the trustee from relying on the clauses as exonerating gross negligence in respect of any breaches of trust which had occurred before 19 February 1991 when the Amendment Law came into force”.⁶⁴

Fortunately for the beneficiaries, Carey, Lieut Bailiff did not adhere to that approach in deciding the case, finding that both the relevant provisions of the 1989 Law and the Amendment Law were “declaratory” of the existing (customary) law in Guernsey and that—

“the change in emphasis introduced by the [Amendment Law], clarifying that a trustee could not exclude liability for acts of gross negligence, was a minor change.”⁶⁵

21 On appeal, the retrospectivity point failed comprehensively in both the Guernsey Court of Appeal and the Privy Council; the “real issue” between the parties was whether Guernsey customary law permitted the exemption of trustee liability for gross negligence (the very matter that was apparently common ground between the parties at first instance).⁶⁶ As “[t]he Amendment Law did no more than give express statutory effect to what had always been the position . . . [i]t follows that no question of retrospectivity arises in relation either to the 1989 Law or to the Amendment Law”, the failure of the appeal did not turn on the retrospective operation of either the 1989 Law or the Amendment Law, but on Guernsey customary law.⁶⁷ If the Guernsey Court of Appeal had found otherwise (on Guernsey customary law), the trustee would have been generally successful on the appeal, as the court held that the relevant provisions of the 1989 Law and the Amendment Law only operated prospectively.⁶⁸ Although the court saw some force in the argument that it would be unfair to impose a higher

⁶⁴ *Spread* (PC), above n 1, para 7, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

⁶⁵ *Spread* (RCG), above n 11, para 52, *per* Carey, Lieut Bailiff.

⁶⁶ *Spread* (PC), above n 1, para 7, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 113, *per* Lord Mance (with whom Sir Robin Auld agreed); paras 115 and 118, *per* Sir Robin Auld; para 128, *per* Lady Hale.

⁶⁷ *Spread* (GCA), above n 17, para 46, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

⁶⁸ *Spread* (GCA), above n 17, para 47, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

standard on a trustee retrospectively,⁶⁹ the principal reason for their view was that those enactments did not evince a general intention to operate retrospectively, nor did the relevant provisions operate in that way, although other provisions plainly did.⁷⁰

22 In the Privy Council, similar emphasis was placed on the position under Guernsey customary law, and not on the retrospectivity of the 1989 Law or the Amendment Law.⁷¹ All members of the Board found that the 1989 Law and the Amendment Law did not have retrospective effect.⁷² Although the plurality of the Board pointed out that, as the Trusts (Guernsey) Law 2007 repealed both the 1989 Law and the Amendment Law, it was “somewhat striking that nobody referred to the 2007 Law until very recently because it is presumably that Law and neither of the others which is at present the relevant statute,”⁷³ the relevant provisions of the Trusts (Guernsey) Law 2007, like the 1989 Law and the Amendment Law, did not evince an intention to operate retrospectively; the general principle being that “unless a contrary intention appears, an enactment is not intended to have retrospective operation.”⁷⁴

The correspondence between English, Guernsey, Jersey and Scots law

23 Given that the key issue in *Spread* was the position under Guernsey customary law, and the dearth of Guernsey material

⁶⁹ *Spread* (GCA), above n 17, para 47, per Martin, JA (with whom Vos and Montgomery, JJA agreed), citing *Plewa v Chief Adjudication Officer*, [1995] 1 AC 249. Although a similar approach was taken by the Board of the Privy Council on appeal, the Board considered there was “a good deal of force in this point”: *Spread* (PC), above n 1, para 74, per Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

⁷⁰ *Spread* (GCA), above n 17, para 47, per Martin, JA (with whom Vos and Montgomery, JJA agreed).

⁷¹ *Spread* (PC), above n 1, paras 64–79, per Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 115, per Sir Robin Auld; para 128, per Lady Hale.

⁷² *Spread* (PC), above n 1, paras 64–79, per Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 115, per Sir Robin Auld, para 128, per Lady Hale.

⁷³ *Spread* (PC), above n 1, para 75, per Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

⁷⁴ *Spread* (PC), above n 1, paras 65–72, per Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed), applying *Bennison on Statutory Interpretation*, 5th ed (2008), s 97.

specifically on point, one of the particularly interesting aspects of *Spread* is the extent to which Guernsey looks elsewhere for the formulation of its customary law. That question was complicated by the central, but somewhat peculiar, obligation in Guernsey trusteeship of acting *en bon père de famille*, having a distinctively civilian piquancy, but featuring in the broader context of trusteeship, which is widely understood to have been imported from the common law tradition, especially in England. The approach to be taken by the Privy Council, in such circumstances, is clear and of long-standing: although it is proper to look at related systems of law and legal commentaries, Guernsey (and Jersey) law must be interpreted in the light of its own terminology, context and history.⁷⁵ Whilst uncontroversial in theory, the various approaches taken in *Spread* demonstrate just how difficult that principle is to apply in practice, especially in the context of trusts.

24 The Guernsey Court of Appeal considered that “the usual incidents of an English trust are likely to apply in Guernsey”, but refused to accept that “the Guernsey law of trusts prior to 1989 was the result of wholesale importation of the English trust concept”, stressing that “English principles will not be applied if they are ‘inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable’”.⁷⁶ A similar approach was taken in the 1988 Report, which provided that “[the 1989 Law] would incorporate many of the principles of English trust law, but not all such principles, and not necessarily without modification”.⁷⁷ Relevantly, Guernsey did not follow English law in codifying the unique obligation of trustees to act *en bon père de famille* in the 1989 Law.

25 Dedicating himself to an analysis of, and comparison with, English and Scots law, Lord Mance considered that—

“[t]here is no reason to treat Guernsey law as following the Scottish view on this point [*i.e.* the permissible breadth of trustee exemption clauses], if it differs, in preference to the view taken

⁷⁵ *Vaudin v Hamon*, [1974] AC 569, at 582 *per* Lord Wilberforce, citing the Jersey case of *Law Cloche v La Cloche* (1870), LR 3 PC 125. Compare Southwell, QC, “The Sources of Jersey Law” (1997) 1 JL Rev 221, at 229–231; Robilliard, “Trusts of Land under Guernsey Customary Law” (2003), 7 *JLR* 251; Southwell, “The Sources of Jersey Law” in Bailhache (ed), *A Celebration of Autonomy* (2005), 31, at 32–35.

⁷⁶ *Spread* (GCA), above n 17, para 41, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

⁷⁷ States Advisory & Finance Committee, *Report on the Guernsey (Trusts) Law*, 12 February 1988; the relevant extract from the 1988 Report is quoted in *Spread* (GCA), above n 17, 422–423.

under English law with which the Guernsey law of trusts is more closely associated, as well as in preference to that taken in the Jersey Court of Appeal in the *Midland Bank* case.”⁷⁸

In a similar vein, Sir Robin Auld observed the obligation to act *en bon père de famille* remains undefined in Guernsey law and said that obligation—

“is not, in this context, a feature of or pointer to Scots Law or to any other relevant civil or Roman law doctrine or provision. Given its lack of definition and insufficiency of precision in its legal origins, it cannot be said to contrast with or qualify anything in English law. Therefore it does not preclude adoption by the Guernsey Courts of the English Court of Appeal’s solution in *Armitage v Nurse*. In addition, the nature of the trust in play here is essentially a creation of English, not Civil law.”⁷⁹

Nothing unique to Guernsey law informed the Board’s reasoning.

26 In her dissenting opinion, Lady Hale considered the Guernsey Court of Appeal’s observation that Guernsey law, with its mixed Norman and English law heritage, would not slavishly follow English law and that, in this particular respect, correct emphasis must be placed on the obligation to act *en bon père de famille*—

“even though that is clearly equivalent to the duty adopted by English law to act as a prudent man of business, it is differently phrased and has its roots in Norman, and ultimately Roman law.”⁸⁰

As such, “[a] law with those roots might well also have prohibited the exclusion of liability for gross negligence”.⁸¹ Coherency within Guernsey law dictated that the responsibility of paid professional trustees could not be less than that expected of a *tuteur* or guardian appointed by a Guernsey court, both of whom could not be exonerated for gross negligence as that would plainly be inconsistent with the obligation to act *en bon père de famille*.⁸² There is an obvious strength to that reasoning, especially given the controversy over English and Scots law, and how a Guernsey court would have read the relevant cases at the time, because it emanates from within Guernsey law.

⁷⁸ *Spread* (PC), above n 1, para 109, *per* Lord Mance (with whom Sir Robin Auld agreed).

⁷⁹ *Spread* (PC), above n 1, para 122, *per* Sir Robin Auld.

⁸⁰ *Spread* (PC), above n 1, para 139, *per* Lady Hale.

⁸¹ *Spread* (PC), above n 1, para 139, *per* Lady Hale.

⁸² *Spread* (PC), above n 1, para 139, *per* Lady Hale.

Lord Kerr was also willing to face any discordance between the law in England & Wales and that in Guernsey with “equanimity”,⁸³ and was content with the comparative application of the reasoning underlying the Scottish cases because proper regard was paid to the fiduciary quality of trusteeship, which could—

“be applied *mutatis mutandis* to the position in Guernsey where a duty to act *en bon père de famille* cannot live comfortably with the notion that a bon père should be permitted to act with impugny in a grossly negligent fashion.”⁸⁴

27 Although the Board observed the French expression “*en bon père de famille*” developed from the Roman concept of *bonus paterfamilias*, the plurality nevertheless reasoned the content of that obligation to be equivalent to the English standard expected of trustees (*i.e.* the duty to act as a reasonable and prudent trustee would act, with reasonable care and skill).⁸⁵ But a (selfish) prudent man of business is not equivalent to a (selfless) prudent father of family.⁸⁶ The Board ignored the obvious fiduciary dimension of the obligation to act *en bon père de famille*, which is not a feature of an English trustee’s duty of care,⁸⁷ being accommodated elsewhere in English trust law by the central notion of fiduciary loyalty.⁸⁸ Treating those two distinct duties with

⁸³ *Spread* (PC), above n 1, para 180, *per* Lord Kerr.

⁸⁴ *Spread* (PC), above n 1, para 179, *per* Lord Kerr.

⁸⁵ *Spread* (PC), above n 1, paras 10, 20, 29, 61–62, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); paras 121–124, *per* Sir Robin Auld; compare *Re Speight; Speight v Gaunt* (1883), 22 Ch D 727 (CA); *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 & 2)* [1980] 1 Ch 515, 534 *per* Brightman, J; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Bristol & West Building Society v Mothew* [1998] Ch 1 (hereinafter “*Bristol*”). See also Getzler, “Duty of Care”, in Birks & Pretto (eds), *Breach of Trust* (2002), at 41.

⁸⁶ *Sackville-West v Nourse* (1925), AD 516 (hereinafter “*Sackville-West*”), 534 *per* Kotzé, JA; compare *Re Speight; Speight v Gaunt* (1883), 22 Ch D 727, at 739–740 *per* Jessel, MR. See below n 89 and accompanying text.

⁸⁷ *Spread* (PC), above n 1, paras 176–177, *per* Lord Kerr. Compare Halpern, “Exoneration Clauses for Trustees and Directors and Statutory Relief from Liability” (2012) 26(1) *Trust Law International* 32, at 37; Richardson, “*Spread Trustee Company Limited v Hutcheson and Others*: Gross Negligence and Trustee Exculpation Clauses in England, Scotland and Guernsey” (2011) 9 *Trust Quarterly Review* 26, at 28.

⁸⁸ Compare. *Bristol*, above n 85, at 18 *per* Lord Millett; Scott, “The Trustee’s Duty of Loyalty” (1936), 49 *Harvard LR* 521; McClean, “The Theoretical Basis of the Trustee’s Duty of Loyalty” (1969), 7 *Alberta LR* 218; Getzler,

equivalence also presupposed the answer to the ultimate question concerning whether protection from gross negligence was inherent in the obligation to act *en bon père de famille*, as the duty to act as a prudent man of business is a default, rather than a mandatory, duty under English law with no protection from gross negligence.⁸⁹ The plurality of the Board failed to consider whether the obligation to act *en bon père de famille* might have a peculiar civilian meaning quite apart from English law, from which that phrase does not originate.⁹⁰ Furthermore, the majority of the Board ignored the fact that, unlike an English trustee's duty of care, a Guernsey trustee's obligation to act *en bon père de famille* is, and has always been, an essential and non-excludable feature of Guernsey trusteeship.⁹¹

above n 85, at 71–72. See generally Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2011).

⁸⁹ Trustee Act 2000 (UK), Schedule 1, s 7; *Armitage*, above n 7, at 253–254 *per* Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed). Compare Companies Act 2006, s 232(1)—

“Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void”,

s 750—

“Any provision contained in—(a) a trust deed for securing an issue of debentures, or (b) any contract with the holders of debentures secured by a trust deed, is void in so far as it would have the effect of exempting a trustee of the deed from, or indemnifying him against, liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions”;

Pensions Act 1995 (UK), s 33—

“Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable—(a) by a trustee of a trust scheme, or (b) by a person to whom the function has been delegated under section 34, cannot be excluded or restricted by any instrument or agreement.”

⁹⁰ See Hodge, “The Value of the Civilian Strand”, in Bailhache (ed), *A Celebration of Autonomy* (2005), at 41–49; Ogier, *The Government and the Law of Guernsey* (2005), at 78–91.

⁹¹ That is, before and after the 1989 Law was enacted, given that the 1989 Law was declaratory of the pre-existing law, see paras 9–19 (above) on “The Declaratory Nature of the 1989 Law”. See also *Spread* (PC), above n 1, para 176, *per* Lord Kerr; *Spread* (GCA), above n 17, at 420–421, *per* Martin, JA

28 There is no compelling reason why civil law permutations of the trust ought not be allowed to exist in jurisdictions with civilian influences or roots.⁹² This is neatly shown by the South African experience over the past century. In the early colonial period, English settlors widely employed “trusts” without any recognisable legal infrastructure to accommodate the trust *per se*.⁹³ This continued for a little over a century until, in 1915, the South African Supreme Court of Appeal was called upon to enforce one of these so-called “trusts”, in *Estate Kemp v McDonald’s Trustee*.⁹⁴ Innes, CJ observed—

“[t]his is a will drawn by an English lawyer and expressed in English legal phraseology: but the testator, both at the date of execution and at the date of his death was domiciled in the Cape Colony; and his dispositions must be interpreted in the light of our own law.”⁹⁵

And went on to say—

“[t]he English law of trusts forms, of course, no portion of our jurisprudence: nor . . . have our Courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law.”⁹⁶

(with whom Vos and Montgomery, JJA agreed), citing and quoting from *Lloyd v Lloyd* (Royal Court of Guernsey, 20 October 1956).

⁹² See Gretton, “Trusts Without Equity” (2000), 49 *ICLQ* 599; Gretton & Reid, “The Civil Law Tradition: Some Thought from North of the Tweed” (2007) 11 *J&GLR* 286, at 291; and see generally Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (2012); Smith (ed), *The Worlds of the Trust* (2013).

⁹³ De Waal, “The Reception of the Trust in South African Law”, in Milo & Smits (eds), *Trusts in Mixed Legal Systems* (2001), 43, at 47–48. See also Du Toit, “Jurisprudential Milestones in the Development of Trust Law in South Africa’s Mixed Legal System”, in Smith (ed), *The Worlds of the Trust* (2013), 257, at 257–258. This is not uncommon in the way that trusts are introduced into distinct legal systems that are not part of the common law tradition, even in modernity: see e.g. *Dubai Aluminium Co Ltd v Deloitte Haskins & Sells* (6 July 2001), [2001] WL 720320, *per* Thomas, J (in which a declaration of trust was made in favour of “His Highness the Ruler of Dubai” and said to be governed by the law of the Emirate of Dubai, even though the law of trusts was unknown to the law of Dubai).

⁹⁴ *Estate Kemp v McDonald’s Trustee* [1915] AD 491 (hereinafter “*Estate Kemp*”).

⁹⁵ *Estate Kemp*, above n 94, at 498.

⁹⁶ *Estate Kemp*, above n 94, at 499 *per* Innes, CJ.

Similarly Solomon, JA said—

“[t]he trustees, therefore, had merely the legal *dominium* in the property, which they were bound to administer and to apply in favour of the persons designated in the will, who in terms of the English law would be called the ‘cestui que trust.’ This is a term which is unknown to our law, though the constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at the present day.”⁹⁷

And went on to say—

“[t]he idea [*i.e.* trusts] is now so firmly rooted in our practice, that it would be quite impossible to eradicate it or to seek to abolish the use of the expression trustee, nor indeed is there anything in our law which is inconsistent with the conception. On the contrary it is thought by many writers that the trusts of English law took their origin from the *fidei-commissa* of the Roman law.”⁹⁸

29 Thus, although the court held that South African law had adopted the English terminology (*e.g.* “trust”, “trustee”, *etc*), the English law of trusts did not form part of South African law;⁹⁹ the trust was given effect to by equating it with the civilian notion of *fideicommissum*.¹⁰⁰ Although that approach was later criticised by the Supreme Court of

⁹⁷ *Estate Kemp*, above n 94, at 507.

⁹⁸ *Estate Kemp*, above n 94, at 508.

⁹⁹ *Estate Kemp*, above n 94, at 508—

“But though we have adopted the terms trust and trustee, it does not by any means follow that we have also taken over the whole or any part of the English law on the subject. For the purposes of the present case it does not appear to me to be necessary to enter into a consideration of the question to what extent, if any, we have incorporated the English law of trusts. It is sufficient for our decision to accept the position that trusts such as the one in question in this case will be recognised and enforced by our Courts, and that legal effect must be given to the intention of a testator, no matter whether that intention be expressed in terms of our own law or of the English law.”

See also Du Toit, above n 93, at 257–258. See also Frere-Smith, *Manual of South African Trust Law* (1953), at 127–129 (providing a case note of *Estate Kemp*).

¹⁰⁰ *Estate Kemp*, above n 94, at 498–503 *per* Innes, CJ, at 508, *per* Solomon, JA; at 517–518, *per* CG Maasdorp, JA.

Appeal,¹⁰¹ foundational concepts from Roman law continue to influence the development of a distinct South African law of trusts, in which—

“it is settled law that a trustee must, as *bonus et diligens paterfamilias*, conduct trust administration with the utmost good faith and in the best interests of the beneficiaries.”¹⁰²

In South Africa, as in Roman times, *bonus et diligens paterfamilias* is a person who exhibits the utmost care (*exactissima diligentia*) in performing his duties.¹⁰³ And, as Frere-Smith said—

“[o]ne standard of conduct for all . . . trustees is set by law. The standard of diligence required by the Appellate Division is that of a prudent man of business, corresponding to the Roman *bonus paterfamilias*. The Roman Law measure for tutors and curators which includes responsibility for negligence of every degree has been adopted . . . it is clear that South African Courts expect and

¹⁰¹ *Braun v Blann & Botha NNO* (1984), 2 SA 850, para 65, *per* Joubert, JA. But see Cameron *et al* (eds), *Honoré’s South African Law of Trusts*, 5th ed (2007), at 32–34; Du Toit, see above 93, at 258–259.

¹⁰² Du Toit, “The Fiduciary Office of Trustee and the Protection of Contingent Trust Beneficiaries” (2007), 3 *Stellenbosch LR* 470, at 473; Cameron *et al*, above n 101, at 262–264. Compare. Zimmermann, “Roman Law in a Mixed Legal System—The South African Experience”, in Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Scotland: The Stair Society, 1995), 41, at 74–76.

¹⁰³ *Transnet Ltd v Harrington*, [2008] ZAWCHC 60 (hereinafter “*Transnet*”), para 33, *per* Vanzyl, J (with whom Waglay and Ndita, JJ agreed); *Tijmstra v Blunt-Mackenzie* 2002 (1) SA 459 (T) (hereinafter “*Tijmstra*”). Compare Zimmermann, *The Law of Obligations: Roman Foundations of the Civil Law Tradition* (1992), at 192. In relation to the superlatives, “*diligentissimus paterfamilias*” and “*exactissima diligentia*”, in the context of *commodatum*, it is said at 208–210—

“[f]or normal negligence, we would expect to find a reference to the *diligens paterfamilias*. Can one be more diligent than diligent? The medieval lawyers evidently thought so and consequently came to distinguish various grades of negligence . . .”,

(on the liability of the depositary for *dolus* and *culpa lata*); Frere-Smith, above n 99, at 133–150 (a precedent exemption clause is annexed in Appendix III in a standard form testamentary trust, which is also repeated for other settlements (clause 24)).

exact a high standard, similar in principle to that of English equity.”¹⁰⁴

Indeed, in *Sackville-West v Nourse*, in which a beneficiary succeeded in a claim for damages for negligence against a trustee who had made an unwise investment, Solomon, ACJ and Kotzé, JA (with whom De Villiers, JA, Curlewis, AJA and Stratford, AJA agreed) said that the standard of care for English and South African trustees was the same in both jurisdictions.¹⁰⁵ That is plainly no longer true of trustee exemption clauses, as South African beneficiaries are now afforded much greater protection than English beneficiaries.¹⁰⁶

30 There are obvious linguistic similarities between the French expression “*en bon père de famille*” and the Latin expression “*bonus et diligens paterfamilias*”—a “good and diligent father of family”—and yet South Africa pays closer attention to the Roman roots in the

¹⁰⁴ Frere-Smith, above n 99, at 78.

¹⁰⁵ *Sackville-West*, above n 86, at 520 *per* Solomon, ACJ, at 533–535 *per* Kotzé, JA; Cameron, above n 101, at 235.

¹⁰⁶ See Trust Property Control Act 1988 (SA), s 9(1)—

“A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another”,

s 9(2)—

“Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)”;

compare Trustee Act 2000 (UK), s 1(1)—

“[a trustee] must exercise such care and skill as is reasonable in the circumstances, having regard in particular . . . to any special knowledge or experience that he has or holds himself out as having, and . . . if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession”—

s 1(2) defines this duty as “the duty of care”, Schedule 1, s 7 (“The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply”). Compare Cameron *et al*, above n 101, at 369–373. Previous editions of *Honoré’s South African Law of Trusts* said that trustee exemption clauses were ineffectual in regard to losses “from breaches attributable to such wilful prejudice or crass stupidity as amounts to *culpa lata*.”

formulation of its trust law.¹⁰⁷ The South African experience of the trust provides an excellent example of a jurisdiction that has not only embraced the trust, but has made the trust its own by accommodating it within the broader schema of South African law.¹⁰⁸ South Africa is not alone in its experience of accommodating the “English” trust as a matter of law, even though it arose purely as a matter of practice.¹⁰⁹ Given the extensive infrastructure and nuanced doctrine that necessarily buttresses the reception of a “trust”, such an approach must surely be the most internally rational, pragmatic and stable way of accommodating the trust into a civil law or mixed legal system. Given the English law bias exhibited by the plurality of the Board in *Spread*, one might even speculate about whether, if the Privy Council remained the highest appellate court for South Africa, whether the South African approach of reconceptualising the trust in civilian terms would have been allowed to stand apart from English law.¹¹⁰

The jurisprudential value of *Spread*

¹⁰⁷*Transnet*, above n 104; *Tijmstra*, above n 104; *Spread* (PC), above n 1, para 177, *per* Lord Kerr. See generally Pothier, *Treatise on the Law of Obligations or contracts* (ed and trans by Evans) (1806); Buckland, *Equity in Roman Law* (1911); Johnstone, *The Roman Law of Trusts* (1988); Zimmermann, above n 104; Ibbetson, *A Historical Introduction to the Law of Obligations* (1999); Cameron *et al*, above n 101.

¹⁰⁸ Trust Property Control Act 1988 (SA), s 1. See generally Cameron *et al* above n 101.

¹⁰⁹ See *e.g.* Hofri-Winogradow, “Express Trusts in Israel/Palestine: a Pluralist Trusts regime and its History”, in Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (2012), at 99–105 (for “a colonial story” of the trust in British Mandatory Palestine), at 105–117 (for “a classical ‘reception’ story” of the trust in independent Israel). See also n 93, especially insofar as the Dubai example is mentioned, and accompany text.

¹¹⁰ Note: the proximate nature of the offshore practice of trusts in Guernsey with that of England might suggest that Guernsey trust law ought also to be fairly-well aligned with English law, but this of itself does not alter the fact that Guernsey employed civilian legal terminology in framing core aspects of its trust laws, especially in adhering to the core obligation of a trustee *en bon père de famille*. Compare *Sitti Kadija v De Saram*, [1946] AC 208; [1946] UKPC 3, *per* Lord Thankerton (with whom Viscount Simon and Sir John Beaumont agreed) (considering the distinction between *fideicommissa* and trusts in the context of a Sri Lankan appeal), endorsing Lee, *Introduction to Roman-Dutch Law*, 3rd ed (1931), 372. Compare Cameron *et al*, above n 101, at 55–57.

31 In earlier pages of this journal, the importance of *Spread* has been observed to be “comparatively academic” and being “of interest to the parties alone”;¹¹¹ indeed, one of the grounds relied upon by the Guernsey Court of Appeal for refusing leave for the trustee to appeal to the Privy Council was that the matter was not “of sufficient general importance”, given that “the law for the last 18 years has, by statute, been that an exoneration clause cannot exclude liability for gross negligence.”¹¹² And, in a technical sense, that is true. As Hildyard, J put it, “the law in Guernsey has been decided for the past and changed for the future.”¹¹³ Dawes and Robilliard have, however, acknowledged the domestic and comparative worth of *Spread*.¹¹⁴ Hildyard, J has also observed that *Spread* holds much jurisprudential value, especially to English law, given the significant doubts expressed by the Privy Counsellors, who are also Justices of the Supreme Court of the United Kingdom, on the essential reasoning of Millett, LJ in *Armitage*, especially his reading of Scots law.¹¹⁵

32 Domestically, the relevant statutory provisions that now forbid and invalidate attempts to relieve a trustee from liability for gross negligence only apply to “the terms of a trust”,¹¹⁶ which, if read strictly, leaves open the possibility that, as between beneficiaries and trustees, a trustee can be exempted from liability for gross negligence in some manner other than by the trust instrument.¹¹⁷ It is unclear whether, for

¹¹¹ Dawes, “Comment” (note on *Spread* (GCA)) (2010), J&GLR 100, at 101; Robilliard, above n 8, at 328.

¹¹² *Spread* (GCA), above n 17, para 56, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

¹¹³ Hildyard, above n 12.

¹¹⁴ Dawes, above n 112, 101; Robilliard, above n 8, at 328–329.

¹¹⁵ Hildyard, above n 12.

¹¹⁶ Trusts (Guernsey) Law 2007, s 39(7), (8).

¹¹⁷ Here, I am only concerned with the primary liability of a trustee for gross negligence and not with who may ultimately be liable to pay any compensation to the beneficiaries (*e.g.* the professional insurance provider of the trustee). Although the Trusts (Guernsey) Law 2007 is silent on the question of whether a trustee is permitted to take out an insurance policy in relation to any liability that might arise for gross negligence, it is quite unlikely that an insurance policy taken out by a trustee with a professional insurer would constitute the “terms of a trust.” Perhaps the closest analogue is found in the case of directors’ liability insurance under s 233 of the Companies Act 2006 (UK), which provides that—

“Section 232(2) (voidness of provisions for indemnifying directors [that purport to exempt a director of a company (to any extent) from any

example, a separate document created after the settlement of a trust that purported to exempt a trustee for liability for gross negligence, which was agreed between all beneficiaries and the trustee, would be treated as being part of “the terms of the trust”.¹¹⁸ In order to avoid that anomaly, a Guernsey court may treat such an agreement as a variation of the (original) trust or as comprising the terms of the relevant trust. But the treatment of such documents in that way is more difficult to justify in public policy terms because one of the underlying justifications behind the inability of the terms of a trust to exempt a trustee for liability for gross negligence is that such an exemption affects third party beneficiaries, which is curable. It is also difficult to reconcile with the power of a beneficiary to “relieve a trustee of liability to him for any breach of trust [and/or] indemnify a trustee against liability for any breach of trust.”¹¹⁹ If relief can be granted by a beneficiary to a trustee specifically, why not generally? Furthermore, if relief can be given retrospectively, why not prospectively? It may be that only permitting specific exemption of liability on a case-by-case basis, retrospectively or prospectively, ensures that beneficiaries know the details of the relevant transaction for which they must bear the consequences whatever the outcome that unfolds. However, given these potential gaps in the Guernsey statutory law, *Spread* may have some on-going importance in Guernsey trust law, aside from potentially affecting the standards of fiduciary administration of property, more generally speaking.

33 Aside from that statutory peccadillo, *Spread* is important to comparative trust law, as it is a decision of the Privy Council on a very difficult question and will be regarded as being of the highest

liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void]) does not prevent a company from purchasing and maintaining for a director of the company, or of an associated company, insurance against any such liability as is mentioned in that subsection.”

Indeed, in a trust context, the taking out of an insurance policy might be advantageous in securing further protection for beneficiaries. In any event, the concern here is with the internal relationship between beneficiaries and the trustee. That is, whether the beneficiaries may bear the burden of grossly negligent conduct of a trustee and not with whom, in practical terms, might be liable to make good any loss resulting from the grossly negligent conduct of a trustee.

¹¹⁸ Trusts (Guernsey) Law 2007, s 80(1) (“‘terms of a trust’ means the written or oral terms of a trust and any other terms applicable under its proper law”).

¹¹⁹ Trusts (Guernsey) Law 2007, s 40(1).

persuasive value throughout the Commonwealth,¹²⁰ especially in those jurisdictions that have not enacted legislation on the extent to which a trustee may be relieved of liability by the terms of a trust. In England & Wales, for example, the case may be of particular importance, given that (a) the extent to which a trustee can be exempted for liability by the terms of a trust as a matter of English law has not yet been decided by the highest appellate court; and (b) the Board of the Privy Council in *Spread* comprised four current Justices of the Supreme Court of the United Kingdom—Lady Hale,¹²¹ Lord Clarke, Lord Mance and Lord Kerr—who were evenly split on that question. Lady Hale was particularly reluctant to pre-empt the determination of that question as a matter of English law, especially insofar as the Board would be taken to have upheld—

“in Guernsey law the decision of the English Court of Appeal in *Armitage v Nurse* [1998] Ch 241 although the Supreme Court of the United Kingdom has never had the opportunity to consider whether that case was rightly decided.”¹²²

34 Writing for the Board, Lord Clarke was somewhat critical of Lord Millett’s reasoning in *Armitage*¹²³ although the Board was generally supportive of Lord Millett’s conclusions.¹²⁴ A key plank in the reasoning of *Armitage* was Millett, LJ’s reading of a line of Scottish cases as not adhering to or stating any general rule of law or public policy concerning the non-excludability of gross negligence in a trust instrument.¹²⁵ Lord Clarke acknowledged that—

“[t]here is some debate in the authorities as to whether there was a rule of Scots law [to the effect that no trustee could be exonerated in respect of fraud or gross negligence] or whether the authorities which held that trustees were not so exonerated

¹²⁰ *Schmidt v Rosewood*, [2003] 2 AC 709; Mowbray, QC *et al* (eds), *Lewin on Trusts*, 18th ed (2008), 788; compare *Breakspear v Ackland*, [2009] Ch 32, at 48, *per* Briggs J.

¹²¹ Lady Hale was recently appointed Deputy President of the Supreme Court of the United Kingdom.

¹²² *Spread* (PC), above n 1, para 129, *per* Lady Hale.

¹²³ *Spread* (PC), above n 1, paras 46–52, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

¹²⁴ *Spread* (PC), above n 1, paras 53–57 *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

¹²⁵ English Law Commission, *Trustee Exemption Clauses* (2002, Law Com. No 171), para 2.54.

depended upon the true construction of the particular trust in question”,¹²⁶

but said—

“for the purposes of this appeal the Board accepts the submission made on behalf of both parties that there was a rule of Scots law or policy to [the effect that no trustee could be exonerated in respect of fraud or gross negligence].”¹²⁷

Lord Clarke went on to say that, given the Board’s acceptance that Scots law was not based solely on the construction of particular clauses but that there is a rule of Scots law or policy to the effect that gross negligence cannot be excluded—

“[i]t follows that Millett, LJ was wrong to say that the submission that it is contrary to public policy to exclude the liability of a trustee for gross negligence is not supported by any Scottish authority.”¹²⁸

35 Although Lord Mance ostensibly agreed with Lord Clarke’s opinion, it is evident from his separate opinion that he was not generally of that view.¹²⁹ Lord Mance appreciated “the consistency of the views expressed in the Scottish cases to the effect that the standard form of exemption could not cover gross negligence or culpa lata”, but thought—

“it improbable that they would be read as involving or giving rise to an absolutely inflexible rule, effectively one of public policy, precluding any trustee from exempting him, her or itself from liability for gross negligence not involving either subjective dishonesty or recklessness or dishonesty in the extended and

¹²⁶ *Spread* (PC), above n 1, para 38, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

¹²⁷ *Spread* (PC), above n 1, para 38, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

¹²⁸ *Spread* (PC), above n 1, para 48, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed). Note: English law aside, *Spread* may also affect Scots trust law, given the Board’s critique of Lord Millett’s reasoning in *Armitage*, above n 7, and Lord Mance’s somewhat incongruous separate opinion.

¹²⁹ *Spread* (PC), above n 1, paras 81–112, *per* Lord Mance (with whom Sir Robin Auld agreed).

partially objective sense recognised in this context in *Walker v Stones*.¹³⁰

36 A comprehensive review of the English and Scottish cases will not be given here, although the various *dicta* from those cases will be assembled to contextualise some brief comments.

37 In *Seton v Dawson*, the trustees were liable for gross negligence (*crassa negligentia*) in spite of a clause providing that the trustees “shall not be liable for omissions, neglect of diligence, of any kind, nor *singuli in solidum*, but each only for his own actual intrusions”. The Scottish Court of Session said—

“the general principle of our law is, that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amount to *culpa lata* . . .”¹³¹

38 In *Knox v Mackinnon*, the trustees were held liable for not acting *bona fides*. Lord Watson endorsed *Seton v Dawson* (above) and then said—

“it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees, who from motives however laudable in themselves act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer . . .”¹³²

39 In *Rae v Meek*, the trustees were liable for gross negligence (*culpa lata*) in spite of a clause drafted in similar terms to *Seton v Dawson*. Lord Herschell adopted and quoted from Lord Watson in *Knox v Mackinnon* (above) and then said—

“I have arrived without hesitation at the conclusion that there was *culpa lata* in the present case. Indeed I think that to advance money on such a security, with only such information, and under such circumstances as I have described, was a positive breach of

¹³⁰ *Spread* (PC), above n 1, para 108, *per* Lord Mance (with whom Sir Robin Auld agreed), referring to *Walker v Stones* [2001] QB 902.

¹³¹ *Seton v Dawson* (1841), 4 D 310, at 317.

¹³² *Knox v Mackinnon* (1888), 13 App Cas 753, at 765–766.

duty on the part of the trustee towards those beneficially entitled to the trust fund . . .”¹³³

40 In *Carruthers v Carruthers*, the trustees were held liable for gross negligence (*culpa lata*) despite statutory protection to similar effect as the clause in *Seton v Dawson*.¹³⁴ Lord Herschell said, “it is well settled that the clause of immunity to which I have referred does not protect in a case of *culpa lata* or gross negligence”. Lord Watson said—

“the [statutory] immunity clause . . ., or a similar immunity conferred by the terms of a trust deed, does not afford a protection to trustees against any act or omission which, according to the law, is regarded as constituting *culpa lata* . . .”¹³⁵

41 In *Clarke v Clarke’s Trustees*, an exemption clause afforded no protection to trustees from liability for grossly negligent conduct. Lord President Clyde said—

“[i]t is difficult to imagine that any clause of indemnity in a trust settlement could be capable of being construed to mean that the trustees might with impunity neglect to execute their duty as trustees, in other words, that they were licensed to perform their duty carelessly.”¹³⁶

42 It is difficult to read that consistent line of cases as other than supporting a general principle of Scots law that trustees cannot be exempted from liability for gross negligence, irrespective of the wording of the relevant exemption clause.¹³⁷ This is not, however, how Lord Mance in *Spread*, the English Court of Appeal in *Armitage* and the Jersey Court of Appeal in *Midland* read that line of Scottish cases: instead, finding that those cases merely concerned the construction of particular clauses and as stating no general principle of Scots law.¹³⁸ It

¹³³ *Rae v Meek* (1889), 14 App Cas 558, at 573.

¹³⁴ Trusts (Scotland) Act 1861, s 1.

¹³⁵ *Carruthers v Carruthers*, [1896] AC 659, at 664 *per* Lord Herschell, and 667, *per* Lord Watson, respectively (with whom Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey agreed) (it is also telling that Cragie (of the Scottish Bar), on behalf of the trustee, is reported (at 661) as having argued that “[t]rustees are not personally liable for loss sustained by the trust estate unless they have been guilty of *culpa lata*”).

¹³⁶ *Clarke v Clarke’s Trustees* [1925] SC 693, at 707.

¹³⁷ See *Spread* (PC), para 133, *per* Lady Hale; *Wyman v Paterson*, [1900] AC 271, 279 *per* Lord Macnaghten.

¹³⁸ But see *Armitage*, above n 7, at 254-256 *per* Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed); *Midland* (JCA), above n 50, at 374–381

is interesting that the appellant in *Spread* did not seek to uphold the reasoning of the English and Jersey intermediate appellate courts in *Armitage* and *Midland*, respectively. As reported in the Appeal Cases, the appellant’s counsel argued—

“[t]he analysis of the Scottish cases by the English Court of Appeal in the *Armitage* case and by the Jersey Court of Appeal in [*Midland*] is not correct. As the Guernsey Court of Appeal concluded, there appears to be a principle of Scots law that liability for culpa lata cannot be excluded. The position was not clear in 1989 . . . At present the better view is that culpa lata on the part of a trustee cannot be exempted as a matter of Scots law . . .”¹³⁹

The respondents’ counsel similarly argued—

“[c]ulpa lata expressed the notion of such an unreasonable lack of care as to be inexcusable . . . [under Scots law]: a trust deed cannot exclude liability for ‘culpa lata’, and that expression is equivalent to ‘gross negligence’.”¹⁴⁰

Despite agreement from both sides as to the position under Scots law, Lord Mance nevertheless followed the approach taken in *Armitage* and *Midland*. In doing so, Lord Mance took an exceedingly literal approach to the Scottish cases, isolating references to the words “construed” and “construction” without situating those words in the context in which they appear, nor appreciating that, if there is a fixed approach to construction of trustee exemption clauses by which the courts will never interpret such clauses to exempt liability for gross negligence, in effect, there is a substantive rule that a trustee’s liability for such negligence cannot be exempted.

43 The better reading of the Scottish cases on trustee exemption clauses remains that of the Guernsey Court of Appeal, which found—

“the Scottish cases cannot be regarded as decisions on the construction of the relevant exoneration clauses . . . they go further than that, and express a rule of law or policy to the effect

per Sir Godfray Le Quesne, QC (with whom Southwell and Beloff, JJA agreed).

¹³⁹ *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, at 199, D–E *per* Philip Jones, QC, David Johnston, QC, Jonathan Harris and Simon Howitt for the appellant (*in arguendo*) (citations omitted).

¹⁴⁰ *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194, at 205, B–D *per* Robert Hildyard, QC and John Stephens for the respondents (*in arguendo*).

that no exoneration clause can exclude liability for fraud or for gross negligence.”¹⁴¹

On appeal, Lady Hale shared that view.¹⁴² And, although not coming to a “final conclusion,” Lord Kerr considered the cases “clearly demonstrate the recognition in Scots law of a general principle that culpa lata on the part of a trustee could not be exempted in a trust deed”.¹⁴³ Again, these opinions appear to be the preferable reading of the Scottish cases.¹⁴⁴ The consequence of this is that, as Hildyard, J has observed extra-judicially—

“[i]f adopted, this approach drives a stake through an essential part of the reasoning in *Armitage v Nurse*. This signals . . . a real possibility that the Supreme Court [of the United Kingdom] might well draw the line at gross negligence.”¹⁴⁵

As such, *Spread* continues to hold much jurisprudential value; if anything, by testing the correctness of *Armitage* at the highest

¹⁴¹ *Spread* (GCA), above n 17, para 29, per Martin, JA (with whom Vos and Montgomery, JJA agreed).

¹⁴² *Spread* (PC), above n 1, para 133, per Lady Hale.

¹⁴³ *Spread* (PC), above n 1, para 174, per Lord Kerr.

¹⁴⁴ See *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd* (1998), SLT 471, at 478, per Lord McCluskey; Scottish Law Commission, *Discussion Paper on Breach of Trust* (2003, Discussion Paper No. 123), 19, para 3.16—

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

English Law Commission, *Trustee Exemption Clauses* (2002, Law Com No 171), at 19–20, para 2.54; Halliday, *Conveyancing Law and Practice*, ed Talman, 2nd ed. (1996), at 1121—

“Frequently trust deeds contain an indemnity clause entitling trustees to indemnify themselves from the fund, or even an immunity clause. The courts have regarded immunity clauses with ill-concealed contempt”, Talman then quotes Lord President Clyde in *Clarke v Clarke’s Trustees* (1925) and then says,

“[i]t is suggested that trustees require express authority to pay premiums from the trust estate on a trustee liability policy (*e.g.* breach of trust, against unknown beneficiaries): the trustees can hardly expend the trust estate on protecting themselves from their own wrongful acts or omissions.”

¹⁴⁵ Hildyard, above n 12.

appellate level, albeit by proxy in the Privy Council.¹⁴⁶ The English Court of Appeal’s reasoning in *Armitage*, especially the reliance placed on the Scottish cases, is doubtful, which suggests that in England, as well as elsewhere in the Commonwealth, the permissible scope of trustee exemption clauses needs to be authoritatively decided at the highest appellate level, or even by statutory intervention, to resolve the uncertainty.¹⁴⁷

The irreducible core of English, Guernsey and Jersey trusts

44 *Spread* provides another practical example of why it is important for there to be a clear exposition of what legal relations must necessarily exist upon the creation of a “trust” as a matter of law—that is, the “irreducible core” approach in trust law.¹⁴⁸ The legal relations comprising the irreducible core of a trust are derived from mandatory rules in the general and statutory law applicable to trusts; in this sense, a trust is conceived of as a jurisdictional creature deriving its normative structure from the applicable law. The irreducible core approach in trusts law has developed as a means not only of articulating the essential nature of a trust, but also as a way of exposing the limits on the broad freedom enjoyed by citizens to establish trusts as pure manifestations of subjective expression, thereby fixing certain standards on trusteeship. In this sense, *Spread* concerns the irreducible core of a Guernsey trust, which is evident from Lord Kerr’s observation that—

¹⁴⁶ See Aitken, “Limiting the Trustee’s Liability—Is ‘Gross Negligence’ Relevant?” (2011), 127 LQR 503, 505 (in noting *Spread*, Aitken observes— “[i]t seems clear that the blanket protection at present provided by *Armitage* itself to the delinquent trustee is likely to come under sustained attack when a suitable vehicle for the Supreme Court present itself.”

¹⁴⁷ See e.g. New Zealand Law Reform Commission, *Review of the Law of Trusts—The Preferred Approach* (2012), at 55–65, paras 3.32–3.69 (where “recklessness”, rather than “gross negligence” was recommended as the outer-limit and it was said (at 124–125, paras 3.61–3.62) that—

“[j]ust as the duty of care cannot be excluded from applying to the mandatory duties . . . liability for a negligent breach of a mandatory duty cannot be excluded. These mandatory duties are essential to the existence of the trust. Their effect would be eroded if it were possible for a trustee to avoid paying compensation for their breach through an exemption clause.”

¹⁴⁸ *Armitage*, above n 7, at 253 per Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed).

“[i]f . . . the placing of reliance on a responsible person to manage property so as to promote the interests of the beneficiaries of a trust is central to the concept of trusteeship, denying trustees the opportunity to avoid liability for their gross negligence seems to be entirely in keeping with that essential aim.”¹⁴⁹

45 The lawful scope of clauses exempting trustees from liability for breaches of trust (*i.e.* “trustee exemption clauses”), and those excluding the underlying duties that trigger that liability altogether (*i.e.* “trustee exclusion clauses”), have contributed significantly to the development of the irreducible core approach in trusts law. *Armitage* and *Spread* demonstrate that the irreducible core approach in trusts law is not a moot point of academic interest, but has real consequences in contemporary trust law and practice. A clear exposition of the content of the irreducible core of a trust in a particular jurisdiction holds predictive value for trust practice in that jurisdiction, as it permits settlors, and those advising them, to know precisely which legal relations cannot be excluded when creating a trust and, from a beneficiary’s perspective, it ensures that, irrespective of trust-drafting, certain standards will be assured in trust administration. The irreducible core approach in trust law is not a tool for construing clauses in trust instruments, but sets limits on settlor freedom, such that non-compliant clauses will be struck out, if need be.¹⁵⁰ A clause that purports to exempt a trustee for liability will be narrowly construed and, if ambiguous, construed against a person seeking to be exculpated by its terms.¹⁵¹ Indeed, in the case of professional trustees,

¹⁴⁹ *Spread Trustees* (PC), para 180, *per* Lord Kerr. Compare *Spread* (PC), above n 1; paras 46–48, at 57, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); para 106, *per* Lord Mance (with whom Sir Robin Auld agreed), paras 165–167, *per* Lord Kerr. Similar observations can be made about Jersey jurisprudence, see especially *West*, above 62, at 292. See also Warents & Curry, “Gross Negligence After *Spread Trustee v Hutcheson*: the Transition from Vituperative Epithet to Meaningful Standard” (2011), 11 *JIBFL* 671, 672 (the authors also considered *Spread* in the context of the irreducible core approach in trust law).

¹⁵⁰ Trusts (Guernsey) Law 2007, s 39(8); Trusts (Jersey) Law 1984, s 11(2)(a)(i), (ii), (b)(ii); *West*, above n 62, at 292. Compare *Midland* (JCA), above n 50, at 381.

¹⁵¹ Kessler, QC and Matthams, *Drafting Trusts and Will Trusts in the Channel Islands* (2007), at 65–66. Compare *Leerac Pty Ltd v Fay*, [2008] NSWSC 1082, para 13, *per* Brereton J; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, at 641, *per* Young, J; *AN v Barclays Private Bank*

it has been suggested that such clauses ought to be construed even more strictly.¹⁵² But no matter how strictly exemption clauses are construed, the boundaries must be set on what can and cannot be lawfully exempted and excluded as a general principle of law, aside from construction.¹⁵³

46 There is a conceptual difference between the exemption of liability flowing from a breach of duty and the exclusion of the underlying duty itself.¹⁵⁴ Indeed, this must naturally follow from the fact that equitable compensation that a trustee might be ordered to pay to restore the trust estate is only one form of remedy that might arise from a breach of trust.¹⁵⁵ The question then is whether those other remedies that might be available to beneficiaries give substance to a trust, if a trustee cannot be held liable for a breach of trust. Against the views expressed by Penner,¹⁵⁶ it is argued that, as a matter of law and public

& Trust (Cayman) Ltd (2006), 9 ITEL 630, para 71, *per* Smellie, CJ; *Midland* (JCA), above n 50, at 373–380.

¹⁵² *Midland* (JCA), above n 50, at 393. See also Cope, “A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust” (2006), 6 *QUT L & Justice*, J 118.

¹⁵³ Indeed, in *Spread*, the matter came before the court as a preliminary question of law and not for an opinion on how the particular clause in each settlement was to be construed and at no time did any judge express a view that such a course was inappropriate because the matter was purely a question of construction.

¹⁵⁴ Matthews, above n 5, at 43–44; Penner, “Exemptions”, in Birks & Pretto (eds.), *Breach of Trust* (2002), at 251; Hayton, “The Irreducible Core Content of Trusteeship”, in Oakley (ed), *Trends in Contemporary Trusts Law* (1996), 57; Butler & Flinn, above n 5, at 478–480.

¹⁵⁵ Compare *Target Holdings Ltd v Redfern*, [1996] AC 421, at 434 *per* Lord Browne-Wilkinson (with whom Lords Keith, Ackner, Jauncey, Lloyd agreed)—

“The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law . . . Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called ‘the trust estate’ what ought to have been there”;

Millett, “Equity’s Place in the Law of Commerce” (1998) 114 *LQR* 214, at 226.

¹⁵⁶ *Contra* Penner, above n 155, at 250—

“It is perfectly clear, as a matter of logic and principle, that with respect both to contracts and trusts, one could relieve a contracting party or a

policy, trusts comprise an irreducible core of legal relations that cannot be excluded (*i.e.* “duty exclusions”) and persons that owe those duties cannot be exempted from liability for failing to discharge those obligations (*i.e.* “liability exemptions”). Trusts do not have “legal substance” simply because core duties exist, if no liability will arise from breaching those duties.¹⁵⁷ To allow trustees to be exempted from liability flowing from a fraudulent breach of trust, as Penner would have it,¹⁵⁸ would make a mockery of the trust as a fundamental legal institution of any social utility and undermine the recurrent themes of accountability and enforceability that motivate the irreducible core approach in trusts law. The wholesale exemption of liability for breach of core duties raises serious concerns from a public policy perspective, as much as the exclusion of the underlying duties themselves.¹⁵⁹ As such, the conceptual distinction between duty exclusions and liability exemptions, whilst noted, should be treated rather cautiously.¹⁶⁰

trustee of all personal *liability* for breach, and yet the contract or trust have ‘legal substance’”,
at 253—

“It seems that by the ineluctable logic of seeking to determine the minimum extent of trustee duties and liability on the basis that we look to the ‘minimum’ necessary to give substance to the trust, there need be no personal liability upon the trustee at all. He may be exempted from any personal liability whatsoever. It seems to me this is right . . .”

¹⁵⁷ Compare Butler & Flinn, above n 5, at 478–480; Hayton, above n 155 (“an exemption from liability for breach of the duty to act in good faith cannot have effect, because that would empty the area of obligation so as to leave no room for any obligation”, at 58).

¹⁵⁸ Penner, above n 155, at 263 (“I would go further than Millett, LJ [in *Armitage*] and allow the relief of a trustee for personal liability even for fraudulent breaches”).

¹⁵⁹ In a contract law context, compare *Firestone Tyre & Rubber Co v Vokins & Co Ltd*, [1951] 1 Lloyd’s List LR 32 (“[i]t is illusory to say: ‘We promise to do a thing, but we are not liable if we do not do it’”, at 39 *per* Devlin, J). The *dictum* of Devlin, J has been frequently applied since then, including recently by the House of Lords, see *Homburg Houtimport BV v Agrosin Private Ltd*, [2003] UKHL 12; [2004] 1 AC 715 (relying on Devlin, J’s *dictum* to state that “an agreement without legal content is not a legally enforceable contract”, at 790 *per* Lord Hobhouse of Woodborough).

¹⁶⁰ *Contra* Penner, above n 155, at 250—

“It is perfectly clear, as a matter of logic and principle, that with respect both to contract and trusts, one could relieve a contracting party or a trustee of all personal *liability* for breach, and yet the contract or trust

47 From a comparative perspective, the irreducible core approach in trust law (e.g. the irreducible core of a Guernsey trust) provides clarity in the comparative study of trust laws, as well as an informative tool for statutory reform internationally and also for settlors in choosing which jurisdiction ought to govern trust administration. An incident of both Guernsey and Jersey trusteeship is that a trustee cannot now be relieved of liability for fraud, wilful misconduct *or gross negligence*.¹⁶¹ So an identical term purporting to exempt a trustee for liability arising from grossly negligent conduct will be struck out *pro tanto* in Guernsey and Jersey, whereas the same provision would be upheld in England.¹⁶² Thus, a higher degree of accountability is demanded of so-called “offshore trustees” than their onshore counterparts; thereby, greater protection is afforded to beneficiaries of these offshore trusts.¹⁶³ This shows that, at least insofar as the standard expected of trustees is concerned, the irreducible core of an English trust is now starkly different from that of a Guernsey or Jersey trust and that it is

have ‘legal substance.’ The simple reason is that legal duties have more functions than serving as grounds for claims for breach of them.”

Compare Matthews, above n 5, at 47—

“From a conceptual point of view, there would be grave difficulties in an exemption clause which purported to relieve a trustee from liability for *all* conscious or deliberate wrongdoing on his part (including, but not limited to, his own fraud), or which negated *all* duties on the trustee to preserve the trust assets for the benefit of the beneficiaries (whether by conferring power on the trustee to abstract trust funds for his own benefit, or otherwise). This is because in effect we would be saying that here were funds placed in the hands of the “trustee” with which he could do what he liked: it is difficult to see how this could possibly amount to a ‘trust’ at all. A useful comparison may be drawn with the notion of a contract under which one party promises to perform ‘if he wishes to,’ or on terms that he is not to be liable at all if he fails to perform. This is no contract at all, since effectively he has not promised to do anything.”

¹⁶¹ Trusts (Guernsey) Law 2007, s 39(7), (8); *Spread Trustees* (PC), para 2 *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); Trusts (Jersey) Law 1984, s 30(10).

¹⁶² Trusts (Guernsey) Law 2007, s 39(7), (8); Trusts (Jersey) Law 1984, s 11(2)(a)(i), (ii), (b)(ii); *Armitage*, above n 7, 251, *West*, above n 62, 292. Compare *Midland* (JCA), above n 50, at 381.

¹⁶³ See also *Trusts Ordinance 1990* (Turks & Caicos Islands), art 29(10) (which invalidates a term of trust “if it purports to relieve the trustee from liability arising from his own fraud, wilful misconduct or negligence”).

useful to speak of “the irreducible core of a trust” in jurisdictional rather than abstract terms.

48 Insofar as the standards of care in trusteeship are concerned, the irreducible core of an English trust is presently only “[t]he duty of . . . trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries”,¹⁶⁴ whereas the irreducible core of a Guernsey trust is that “[a] trustee shall, in the exercise of his functions, observe the utmost good faith and act *en bon père de famille*”.¹⁶⁵ Similar to the standards of Guernsey trusteeship, the irreducible core of a Jersey trust dictates that—

“[a] trustee shall in the execution of his or her duties and in the exercise of his or her powers and directions . . . act . . . with due diligence . . . as would a prudent person . . . to the best of the trustee’s ability and skill . . . and observe the utmost good faith.”¹⁶⁶

Although all of these expressions of the irreducible core concentrate on trustee duties, in order to be meaningful, it is to be implied that correlative rights arise to hold trustees to account.¹⁶⁷ Setting aside the good faith requirements in all of these trusts, the standards of Guernsey and Jersey trusteeship are higher. Although the core obligation of a Guernsey trustee is to act *en bon père de famille*, the core obligation in a Jersey trust is reduced to English terminology by the obligation to act with due diligence as would a prudent person to the best of the trustee’s ability and skill.¹⁶⁸ Given the jurisprudential

¹⁶⁴ *Armitage*, above n 7, at 253–254 *per* Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed).

¹⁶⁵ Trusts (Guernsey) Law 2007, s 22(1)—note that, unlike other provisions of the Trusts (Guernsey) Law 2007, s 22(1) is not stated to be “subject to the terms of the trust” and, therefore, presumably cannot be excluded.

¹⁶⁶ Trusts (Jersey) Law 1984, art 21(1)—note that, as noted previously, the irreducible core of a trust consists of more than the standard of care in trust administration, but extends to other mandatory rules of trust law that give rise to legal relations that must comprise a “trust” as matter of law, but the comments are directed here to standards.

¹⁶⁷ In my view, the irreducible core of a trust incorporates all non-excludable legal relations, not simply trusteeship standards and not simply trustee duties. Compare *Armitage*, above n 7, at 253–254 *per* Millett, LJ (with whom Hutchinson and Hirst, LLJ agreed); Hayton, above n 155, at 47; Fox, “Non-excludable Trustee Duties” (2011) 17 *Trusts & Trustees* 17.

¹⁶⁸ Compare *Spread* (PC), above n 1, paras 10, 20, 29, 61–62, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed); paras 121–124, *per* Sir Robin Auld); para 139, *per* Lady Hale.

commonalities in both Bailiwicks and the linguistic history of Jersey, it is somewhat curious that Jersey did not employ the French expression in its statutory law, especially given that the standards expected of a trustee (and other fiduciary office-holders) have always been high and also because the *bon père de famille* has been regarded as the predecessor to the Jersey trust.¹⁶⁹

49 In Guernsey customary and statutory law, trustees must act “*en bon père de famille*”.¹⁷⁰ For a considerable time, guardians (or *tuteurs*) have been required to act *en bon père de famille* according to their office, including administering, managing, possessing and investing, as well as dividing and determining movable and immovable assets, the property of minors under Guernsey customary law.¹⁷¹ That obligation is not only found in *tutelle*, but also in *saisie*, usufruct and in various provisions of the French Civil Code.¹⁷² Relevantly, in Jersey, a guardian will not generally be “personally liable for costs which the minor might be ordered to pay unless he has been guilty of bad faith or gross misconduct of some kind”.¹⁷³ Other fiduciary office-holders are

¹⁶⁹ *Midland Bank Trust Co Ltd v Federated Pension Servs*, 1994 JLR 276, at 289 *per* Commissioner Hamon. Compare Matthews & Sowden, QC, *The Jersey Law of Trusts*, 3rd ed (1993), ch 2 (“History of Trust in Jersey”). This may simply have been a way of Jersey making its trusts law more accessible to foreign settlors; thereby, supporting and stimulating its already thriving financial services industry.

¹⁷⁰ *Spread* (PC), above n 1, para 176, *per* Lord Kerr; Dawes, above n 62, 125, at 143; Ashton, *An Analysis of the Guernsey Law of Trusts* (1998), at 60–1.

¹⁷¹ *In re Blücher von Wahlstatt* (Royal Court of Guernsey, 4 July 1928), quoted and translated in Dawes, above n 62, at 124–125; *Spread* (RCG), above n 11, para 50, *per* Carey, Lieut Bailiff.

¹⁷² *Spread* (PC), above n 1, para 19, *per* Lord Clarke (with whom Lord Mance and Sir Robin Auld agreed).

¹⁷³ *Payne v Pirunico Trustees (Jersey) Ltd*, 2001 JLR 1 (hereinafter “*Payne* (RCJ)”), para 15, *per* Bailhache, Lieut Bailiff. Note: a line of English cases endorsed a similar principle with respect to trustees being ordered to pay the costs of a suit occasioned by their negligence, see *e.g.* *Caffrey v Darby* (1801), 6 Ves 488; 31 Eng Rep 1159 (the headnote of which reads, “Trustees charged with a loss occasioned by their negligence though without any corrupt motive: the costs followed of course”, And in which Lord Eldon (then Master of the Rolls) said (at 496, 1162)—

“Even supposing, they are right in saying, this was a very doubtful question, and they could not look to the possibility of its being so decided, yet, if they have been already guilty of negligence, they must be responsible for any loss in any way to that property: for whatever

also personally liable for costs resulting from gross misconduct in administering their office if they have failed to act *en bon père de famille*.¹⁷⁴ Like Guernsey, the *en bon père de famille* obligation standardises fiduciary offices in Jersey customary law, in which guardians *ad litem* and *tuteurs* are under the same obligation to act *en bon père de famille*.¹⁷⁵ However, in eliding the obligation to act *en bon père de famille* with the trustee's duty of care under English law, the Board failed to engage with this unique obligation in Guernsey and Jersey law and determine whether the non-excludability of gross negligence was itself a core ingredient of the *en bon père de famille* obligation, which potentially could have provided greater clarity and unity to fiduciary standards in both Bailiwicks.¹⁷⁶

50 Given that Carey, Lieut Bailiff, a highly skilled Guernsey trust lawyer,¹⁷⁷ and the Guernsey Court of Appeal had reasoned by analogy

may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence.”

¹⁷⁴ *Payne* (RCJ), above n 174.

¹⁷⁵ *Payne* (RCJ), above n 174, para 14, *per* Bailhache, Lieut. Bailiff.

¹⁷⁶ Compare Ashton, above n 171, at 60—

“the onerous duties implied by the [utmost good faith] concept are augmented by the [*en bon père de famille*] requirement which has a unique French (and a particular Norman connotation at that) meaning . . . Whilst this term is somewhat imprecise the intention of the law is clear. There is a very onerous burden on the trustee. This suggests that if the trustee's actions are questioned the onus will be on them to justify their actions and to demonstrate that they showed a higher degree of probity in their dealings than would perhaps otherwise be the case in the Commonwealth jurisdictions.”

In discussing the “Liability for Breach of Trust”, Ashton goes on later to say (at 104), with reference to Hayton's foundational piece (above n 155)—

“[i]t follows that an extensive exemption clause may either be given effect so as to negate the existence of a trust or, more likely, struck out as repugnant to the nature of the trust concept”

and then notes (at 104, n 12) “the surprising decision of the Court of Appeal in *Armitage v Nurse*”; Dawes, above n 62, 125, at 143

“The adoption of this Customary and French law expression [*i.e. en bon père de famille* in s 18(1) of the Trusts (Guernsey) Law 1989] is graphic and effective to convey the sense of responsibility. The obligation is to achieve the standard of a *prudent administrator of family wealth*”,

and 157–158.

¹⁷⁷ Hildyard, above n 12—

to other fiduciary office-holders' obligation to act *en bon père de famille* under Guernsey law prior to 1989,¹⁷⁸ it is surprising that Sir Robin Auld considered that—

“[a] Guernsey Court judge seeking before or in 1989 to resolve the undoubted uncertainty of Guernsey customary law on the issue now before the Board would have derived no assistance from recourse to the general notion of [sic] to act *en bon père de famille*.”¹⁷⁹

And concluded that—

“[t]here is no logical basis for a Guernsey Court, now or in 1989, to rely upon the *en bon père de famille* notion to prohibit exclusion of liability at the much higher threshold for ‘gross’ negligence—it is simply irrelevant at that level.”¹⁸⁰

The use of “logic” in this context is unclear: it is logical and rational to reason from within Guernsey law on how the peculiar obligation to act *en bon père de famille* had been applied to other fiduciary office-holders. Beyond ensuring the coherent development of the core standard of fiduciary office-holders in Guernsey law, the analogy between trustees on the one hand and guardians and *tuteurs* on the other is sufficiently proximate¹⁸¹—among the complex aggregate of legal relations that necessarily comprise a fiduciary office, trustees

“The preliminary issues were first heard and determined by Lieutenant Bailiff Sir de Vic Carey. He had been Solicitor General, Deputy Bailiff and then Bailiff. He was an acknowledged expert on Guernsey customary law. He had even commented on the drafting of the Guernsey trust law and served on the Advisory and Finance Committee on the introduction of the 1989 Law.”

¹⁷⁸ *Spread* (RCG), above n 11, para 50. See also *Spread* (GCA), above n 17, paras 35–39, *per* Martin, JA (with whom Vos and Montgomery, JJA agreed).

¹⁷⁹ *Spread* (PC), above n 1, para 124.

¹⁸⁰ *Spread* (PC), above n 1, para 124, *per* Sir Robin Auld.

¹⁸¹ Compare *Sackville-West*, above n 86, at 533–534 *per* Kotzé, JA—

“in dealing with the administration of the property of others by persons in a fiduciary position, our courts have adopted the rule of Roman law, as expounded by the commentators and by the Dutch jurists. They have followed and applied the precept laid down by Paulus in the *Digest* (18.1.34.7), where we are told that ‘the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to other persons acting under similar circumstances; that is to say, to curators, procurators and all those who administer the affairs of others.’ A trustee, therefore, is to be included in this category.”

occupy positions of power with a correlative liability on those for whom they must act prudently and selflessly.¹⁸² At that level, the similarity is obvious and warrants coherency.

Conclusion

51 It is particularly interesting that all judges at an intermediate and final appellate level in *Spread* were in agreement as to the broad points of principle: the relevant provisions of the 1989 Law and the Amendment Law were declaratory of pre-existing Guernsey customary law; those provisions did not have retrospective effect; and Guernsey law must be interpreted in the light of its own terminology, context and history. Despite adhering to the same general points of principle, it is remarkable that the Board could be so polarised in applying them. Whilst the excludability of gross negligence in trusteeship under Guernsey customary law has now authoritatively been decided, the position has altered considerably by statutory reform.

52 Given the reticence shown by the Privy Council to impose anything above a (very) base level duty of trustees not to commit fraud or wilful misconduct in *Spread*, if it is considered that there is a sufficient public policy imperative behind imposing a higher standard on trustees beyond performing a trust in good faith, this should be achieved by way of legislative enactment to resolve that uncertainty without waiting for a test case to be taken. Thus, the judgment ought to sound a warning for jurisdictions elsewhere in the Commonwealth that there is a pressing need for statutory reform to ensure that the law reflects the public policy incentives behind ensuring that trustees are accountable for trust administration. Whilst the progress in England & Wales has been slow on this front, and only resulted in the adoption of soft law by way of a “rule of best practice”, Guernsey and Jersey were (and still

¹⁸² See Radin, “A Restatement of Hohfeld” (1938) 51 *Harvard LR* 1141, at 1159—

“[a]s far as the Anglo-American law is concerned, one of its most characteristic institutions, the ‘trust’, is based almost wholly on the idea of power. The rights and duties of the trustee are obviously of considerable importance but what gives him his special position is his extraordinary powers.”

See also Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913), 23 *Yale, LJ* 16, at 16–19; Hohfeld, “The Relations Between Equity and Law” (1913), 11 *Michigan LR* 537; Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917), 26 *Yale, LJ* 710, at 766; Hohfeld, “Supplemental Note on the Conflict Between Equity and Law” (1917), 26 *Yale, LJ* 767, at 767.

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are) in the vanguard of jurisdictions that have legislated on this issue with clarity and precision and both Bailiwicks are to be commended for taking such initiative on this front.

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