Exculpation Clauses in Trust Instruments

A Report prepared for the British Columbia Law Institute
by its Committee on the Modernization of the *Trustee Act*

BCLI Report No. 17, March 2002

The members of the *Trustee Act* Modernization Committee are:

Dr. D.W.M. Waters, Q.C. - Chair
Kathleen Cunningham
Margaret Mason
Scott Sweatman
Professor J.M. MacIntyre, Q.C.
Professor Keith Farquhar
Arthur L. Close, Q.C. - Executive Director, BCLI
Greg Blue - Reporter

British Columbia Law Institute

1822 East Mall
University of British Columbia
Vancouver, B.C.
Canada V6T 1Z1

Voice: (604) 822-0142
Fax:(604) 822-0144
E-mail: bcli@bcli.org
WWW: http://www.bcli.org

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

> (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
>
> (b) promote improvement of the administration of justice and respect for the rule of law, and
>
> (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

The British Columbia Law Institute gratefully acknowledges the financial support of the Law Foundation of British Columbia in carrying out its work

---

Canadian Cataloguing in Publication Data

Main entry under title:

Report on exculpation clauses in trust instruments

ISBN 1-894278-13-5

1. Trusts and trustees - Canada. 2. Liability (Law) - Canada.
I. British Columbia Law Institute.
KE798.L5R46 2002 346.71105'9 C2002-910257-X
KF745.R46 2002

Introductory Note

The British Columbia Law Institute has the honour to present:

Report on Exculpation Clauses in Trust Instruments

This Report is the fifth of a series of reports that form part of a large project on the Trustee Act and related laws. It is aimed at introducing reforms that will allow the law to meet the present-day requirements of trusteeship. While the *Trustee Act* remains an important statute affecting a great variety of legal

relationships, many of its provisions are out of keeping with present-day conditions and practices and some provisions are so seriously outdated as to be significant obstacles to efficient trust administration.

This project one of the first undertaken by the Institute, is being carried forward on our behalf by our *Trustee Act* Modernization Committee whose members were appointed by the Board of the Institute to reflect the wills and trusts Bar, the professional fiduciary sector, and academic specialists in trust law.

This Report contains recommendations for changes to the Trustee Act aimed at clarifying the legal effect of so-called "exculpation clauses." An exculpation clause is a provision contained in a trust document that purports to excuse the trustee from liability for conduct that may constitute a breach of that trust. Such a clause sits uneasily with other policies of trust law aimed at holding trustees accountable for their wrongs. These policies reflect a view that there is an "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust" and, for that reason, an exculpation clause should not exonerate a trustee from liability for loss. Hence, an exculpation clause will not excuse the trustee who has acted dishonestly.

There is, however, a spectrum of conduct between dishonesty and totally innocent breach of trust where the case for denying the trustee the protection fo the clause is less clear-cut. This is a gray area, rife with uncertainty and conflicting case law. The recommendations set out in this Report have two aims. First, they seek to clarify the role and effect of exculpation clauses. Second, they seek to strike an appropriate balance between legal policies aimed at the protection of beneficiaries and the rights of settlors to include provisions in trust instruments aimed at the protection trustees.

The recommendations of the *Trustee Act* Modernization Committee set out in this Report have the full support and endorsement of the institute and its Board and we commend them for implementation.

Gregory K. Steele
Chair, British Columbia Law Institute

March 5, 2002

TABLE OF CONTENTS

I. The Legal Background

Provisions which relieve a trustee from liability for the negligent administration of a trust are in widespread use. They appear in commercial trusts, conventional family trusts, and testamentary instruments.[1] They are known by many names, including "exculpatory clauses," "exoneration clauses," "immunity clauses," "exemption clauses," and "excusing clauses."[2]

The language of such exculpatory clauses is most often sufficiently broad to relieve a trustee from the consequences of any degree of negligence, however careless, so long as the personal conduct of the trustee falls short of fraud with wilful wrongdoing.[3]

The law is settled that there is an "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust."[4] For that reason, an exculpation clause cannot exonerate a trustee from liability for loss, howsoever that loss occurs, as[5]

> the essence of a trust is a beneficiary's right of recourse against the trustee for proper administration, and if the beneficiary is altogether denied that recourse it is highly questionable whether the settlor has created a trust at all.

Some uncertainty exists, however, as to whether the irreducible core obligations of a trustee are

involved if effect is given to an exculpation clause which relieves a trustee of liability for gross negligence. In other words, it is uncertain whether Canadian courts will give legal effect to exculpation clauses which relieve against losses arising from gross negligence.

This is an issue on which the leading English authority and the American jurisprudence part company. While the English Court of Appeal[6] sees no public policy or other legal ground to find such exculpatory clauses unenforceable, the courts of the United States generally view the exoneration of a trustee's gross negligence to be against public policy.[7] Moreover, statute law in the State of New York,[8] and the island of Jersey[9] render such exculpatory clauses unenforceable. The legal position in England and in the United States are examined in greater detail in Appendices A and B to this Report.

The legal position in Canada is less clear-cut. There is apparently only one Canadian authority directly on point, and it concludes that exculpatory clauses cannot relieve against liability for gross negligence: *Re Poche*.[10] In doing so, Hetherington J., then of the Surrogate Court of Alberta, adopted the broader remarks in the Scottish cases[11] which the English Court of Appeal, in *Armitage*, later found to express no binding general principle:[12]

> I am persuaded by the reasoning in these cases. In my opinion, a trustee must be held responsible for any loss resulting from his gross negligence, regardless of any provision in the trust instrument relieving him from such liability.

The exculpatory clause in *Poche* was written in wide terms, so as to apply to "... any loss not attributable to her [the trustee's] own dishonesty or to a wilful commission of any act known by her to be a breach of trust ..."[13] Nevertheless, the court would not relieve the trustee of her liability in failing to call in all the assets of the estate or in keeping estate accounts "... since the conduct of [the trustee] ... which caused ... loss was grossly negligent, she is not relieved from liability ..."[14]

Since the English Court of Appeal has now read the Scottish cases upon which Hetherington J. based her judgment as pronouncing no general principle, and has even rejected the desirability of a principle that would disallow the exoneration of gross negligence, the issue is very much open in all Canadian judicial forums except the trial level courts of Alberta. There is considerable uncertainty as to outcome, given the evident divergence of judicial opinion in England and the United States and in *Re Poche* as to the dictates of public policy.

The Committee believes it is highly desirable to clarify the law of this province concerning exculpation clauses. Uncertainty of this kind is always an undesirable feature of the law. In due course, the courts may be given an opportunity to consider the position but both the timing and the outcome of judicial clarification is unpredictable. This also carries with it the risk, as we see it, that a Canadian court might adopt the reasoning of the English Court of Appeal in *Armitage* v. *Nurse* and so end up "clarifying" the law in a way that many observers, including this Committee, regard as undesirable.[15]

It is our present view that the legal status of exculpation clauses is a matter that is ripe for legislative restatement in one form or another. In the following section we consider some of the variables that surround this issue.

II. The Parameters of the Debate

A. Degrees of Trustee Dereliction

When a breach of trust occurs, the trustee's conduct may fall anywhere within a fairly wide spectrum of possibilities. At one extreme is palpable fraud on the part of the trustee. At the other extreme is a wholly innocent breach of trust for which the law imposes strict liability on the trustee. Some observers suggest there are six possible degrees of trustee dereliction:[16]

- fraud
- willful conduct
- recklessness
- gross negligence
- "ordinary" negligence
- innocent breach of trust (strict liability)

Obviously these degrees shade into one another. Some may overlap totally in particular circumstances and remain distinct in others.[17] In the debate over exculpation clauses the focus tends to be on the dividing line between fraud and gross negligence[18] with the status of willful conduct and recklessness being somewhat uncertain.

In a way it is odd that the debate should turn on this question. Gross negligence is a civil law concept rather than a common law concept and it appears to have been imported into the debate through the Scottish cases.[19] The tendency of the common law has usually been to depreciate any attempt to distinguish between gross negligence and ordinary negligence.[20]

The English Trust Law Committee suggested that the difficulty was, perhaps, overstated concluding that the courts are normally able to find a sensible meaning for "gross negligence" when the occasion arises.[21] Western Canadian courts have had some experience in dealing with the concept of gross negligence in a different context. It was formerly a feature of the guest passenger legislation in the western provinces that a gratuitous passenger could not sue the driver of the vehicle unless the driver was guilty of "gross negligence." The difficulty in distinguishing between gross negligence and ordinary negligence was frequently the subject of critical comment by the courts.[22]

B. Settlor Autonomy and Risk Allocation

The exculpatory clause is, at bottom, a risk allocation device. Its purpose is to shift the risk of any loss flowing from a breach of trust from the trustee, who would ordinarily be liable, to the beneficiaries. Provisions which seek to allocate risk among parties is a familiar feature of modern commercial contracts. Their widespread acceptance in the commercial context appears to have created a climate in which they seem to be increasingly regarded as acceptable in other areas. One of these areas is the law of trusts.

The English Trust Law Committee described what they referred to as "the contractualization of trusts"[23] and set out examples of cases where the courts were prepared to apply contract law principles to a trust relationship. They concluded with the observation that:[24]

> However, the comparison with contract can be misleading. There are two main reasons.

> Firstly, this is a property relationship and not a contractual one. Secondly, it is a fiduciary arrangement rather than a commercial one.

Their subsequent analysis proceeded to elaborate on that observation.

> In a business context the widespread use of these clauses reflects commonly accepted notions of freedom of contract - the parties should be free to negotiate their own arrangements.

An analogous concept in this sphere of trust law might be referred to as "freedom of settlement" and reflects the view that the law should interfere as little as possible with the ability of the settlor to shape the trust in a way he or she sees fit.

The use of exculpation clauses in commercial contracts is based on a paradigm of two parties having roughly equal bargaining strength arriving at an optimal arrangement. One factor that may influence risk allocation is which party, if either, is better placed or is willing to insure against the risk.

How far are these factors applicable to the creation of a trust? A major difference is that the party to whom the risk is shifted, the beneficiary, will not necessarily be a party to the negotiation. It is questionable how far beneficiaries are able to insure against the risk of a breach of trust. Is it reasonable to expect them to do so?

In many cases there will be no negotiation between the settlor and the trustee in any meaningful sense of the word. When the trustee is a corporation, such as a trust company, the exculpation clause might be one of a number of provisions contained in the trustee's *pro forma* documentation that is presented to the settlor on a take-it-or-leave-it basis.[25]

It is possible to envisage circumstances in which the settlor might wish to clothe the trustee with the strongest measure of protection possible.

> **Example:** Mr. X owns a block of assets. He executes a declaration of trust with respect to these assets stating that he holds them on trust for himself for life with the remainder to a favourite charity. He includes in the trust instrument a broadly worded exculpatory clause designed to protect himself, during his lifetime, and his estate, after his death, from any claims on part of the charity alleging mismanagement of the trust.

The use of the exculpatory clause in this kind of case is one way of achieving the settlor's goal although there may be others.

Case law suggests that at the other extreme some settlors are not aware, or adequately made aware, of the meaning and effect of these clauses.

C. The Character of the Trustee

An examination of the *Trustee Act* reveals that it does not distinguish between various kinds of trustees. One trustee is treated like any other. The B.C. *Trustee Act*, for instance, imposes no higher standard of care upon a professional trustee than is imposed on a lay person as trustee. For the purposes of the present discussion, however, trustees can be grouped into three broad classes:

- The first group is made up of trustees who have some special relationship with the settlor, perhaps as a family member or close friend. These trustees receive no remuneration but act only out of a personal sense of obligation to the settlor and the beneficiaries.
- The second group of trustees consists of persons who have the same kind of personal links to the settlor as those in the first group but with the difference that these trustees take remuneration for providing trusteeship services. We have in mind here the remuneration that all trustees are entitled to under section 88 of the *Trustee Act*.[26]

- The third group comprises what might be characterized as "professional trustees." These are entities like trust companies and corporations and individuals such as private client accountants and estate administration lawyers. These entities and individuals hold themselves out as having a special expertise in trust management. Their remuneration may also be based on section 88 of the *Trustee Act* but more often it flows from an express term of the trust instrument.

Should the group into which the particular trustee falls have any bearing on the ability of that trustee to claim relief under an exculpation clause in the trust instrument?

Some would argue that the professional trustee should never have the benefit of an exculpation clause. Most professions assume the consequences of their own negligence as a professional obligation and insure against it. It is difficult to see why the provision of trusteeship services should be an exception to this general rule. The argument concludes that a good case can be made that professional trustees should have only limited, or no, access to the benefit of exculpation clauses.

At the other extreme, the family member or friend who serves as trustee without reward is in a different position. While some entertain the view that trusteeship is not a sinecure and that those who accept the task should accept also the consequences, there is a significant amount of opinion to the effect that it is much easier to forgive negligence on the part of such a trustee and if an exculpation clause provides a vehicle for relief to that trustee it is not wholly objectionable.

The middle group of trustees is a source of greater difficulty. It is possible to take two different views of their position. One view is that no distinction should be drawn between this group and the professional trustees. The trustee who accepts remuneration should certainly be prepared to accept the full responsibility that goes with it. The opposing view is that the acceptance of statutory remuneration should not, of itself, debar the well meaning "amateur" trustee from the benefit of an exculpation clause.

One difficulty with an approach to exculpation clauses which turns solely on the characteristics of the trustee is its lack of flexibility. It creates an all-or-nothing position - either the clause applies or it does not - and there is no opportunity to factor in the conduct of the trustee which constitutes the breach.

D. Other Sources of Relief for Trustees

An important feature of the *Trustee Act* is section 96:

> **96.** If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the

> breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

Essentially, this provision gives the court a discretion which allows the court to examine the trustee's conduct against standards of honesty and reasonableness and gives the court the ability to exonerate the trustee wholly or in part.

A key feature of section 96 is the flexibility it gives to the court, and the jurisprudence that surrounds the section suggests that it has been applied in this spirit. For example, the court, if it thinks that appropriate, may distinguish, and has distinguished, between professional trustees and unrewarded family members. In one particular case a breach was committed by two co-trustees, one a professional and the other a family member. In applying this section the court relieved the "personal" trustee of liability while holding the professional corporate trustee fully liable.[27]

Section 96 is widely regarded as working well and it might legitimately be asked whether anything more is really needed. The English Trust Law Committee considered whether the equivalent English provision might be relied on as the sole source of trustee relief. It was their conclusion that "... a discretionary power of the court to relieve is inherently uncertain and leads to more litigation: better a fixed standard."[28]

E. Impact on Trustee Services

A further consideration is the possible effect, if any, the limitation or disallowance of exoneration might have upon the supply of trustee services or any upward influence on the cost of those services. The English Trust Law Committee offered the following observations.[29]

> One argument commonly met with in practice for including an exemption clause is that, without such a clause, it may be difficult or even impossible to obtain a professional trustee in due course to become trustee of the trust. It is difficult to know how much weight to accord that argument. It is undermined by the experience of off-shore jurisdictions whose trust laws contain restrictions on how far liability can be limited. For example, trustees in Jersey [where statute provides that gross negligence may not be the subject of exoneration] ... do not refuse to take on Jersey trusts ... and insist on having their trusts governed by (say) ... the law of England [where there is no such legislation].

It is indeed possible that some professional trustees will withdraw from the field if they are unable to take advantage of an exculpation clause that excludes liability for all but personal wrongdoing. On the other hand, it can be argued that the consumers of trusteeship services will, in fact, benefit if the market is cleared of would-be professional trustees who are prepared to carry on business only under conditions which put beneficiaries at significant risk.

So far as increased costs are concerned, it is our impression that the market for the provision of trustee services is quite competitive and the impact of limiting the applicability of exculpatory clauses on their price structures would be negligible.

F. The Scope of Reform

1. Negativing a Duty

The English Trust Law Committee observed that a clause that relieves a trustee of liability for a breach of duty is only one approach to protecting the trustee. It is possible to frame a trust instrument so that, by its terms, it excludes the duty entirely. A duty which is excluded by the terms of the instrument cannot be the subject matter of a breach and therefore the question of excusing the trustee from liability for the breach simply does not arise.

For example, in our Report on Statutory Powers of Delegation by Trustees we proposed that a trustee exercising a power of delegation be under a duty to exercise prudence in selecting the person to whom a power, authority, or discretion is delegated and in supervising the conduct of that person. A trust instrument might stipulate that the trustee is not to be under the duty to supervise, and the result as to the trustee's legal position is little different than if the trustee had been exempted from liability for a breach of the duty.

This raises the question whether reforming legislation, whichever direction it takes, should expressly cover off this possibility with an expansive notion of "exculpation."

2. Transition Issues

If a restated rule concerning exculpation clauses is implemented through legislation, should it apply to trusts created before that implementation? The normal rule is that legislation operates only prospectively although retrospective operation can be expressly provided for. Given the uncertainty that surrounds the present legal position in this province, we believe a good case can be made for having a restated rule operate retrospectively so that it also provides guidance in relation to existing trusts. This approach is embodied in our final recommendation (*see* Part VI).

3. Conflict of Law Issues

We have also considered whether any reform measure should speak to conflict of law issues. Such a measure, we think, should apply only where the a trust is governed by British Columbia law or where a foreign law refers back to the law of this province. However, this result would flow from the existing conflicts rules, so we would but confirm that law.

III. Options for Reform

There appear to be four different options open to us in addressing exculpation clauses and possible reform. The core issue is one of risk allocation and where, ultimately, the decision making power should lie.

A. Endorse Total Settlor Autonomy

The first option is simply to do nothing in relation to exculpation clauses. In theory, this leaves the allocation of risk as a matter for the settlor to determine and would constitute the maximum deference to settlor autonomy. It is accepted by all courts and opinion that fraud and dishonesty cannot be the subject-matter of exculpation. For the settlor to waive liability for such conduct is contrary to public

policy. Subject to this qualification, however, settlor autonomy is a position taken by some academic writers both in the U.S. and in the U.K. Nevertheless, in British Columbia there is another consideration. Doing nothing would simply perpetuate the uncertainty in the current law generated by the tension between *Re Poche* and the more recent English cases. If maximum deference to settlor autonomy is to be the goal, then it would be necessary to clarify the law through a provision of the *Trustee Act* stating that exculpation clauses are effective according to their terms.

B. Endorse Limited Settlor Autonomy

A second option is that tentatively adopted by the English Trust Law Committee which is to give effect to exculpation clauses except insofar as they seek to exonerate from liability for gross negligence. Risk as to such negligence would always fall upon the trustee. It is our conclusion to this point that attempting to define the validity of exculpation clauses with reference to degrees of trustee dereliction is an unsatisfactory approach. In particular, we are uncomfortable with any formulation that might require that the courts distinguish between gross negligence and ordinary negligence. We are concerned that too often whether negligence so found is to be perceived as "gross" or "ordinary" lies in the eye of the beholder. We also referred earlier to the hostility displayed by the Canadian courts toward drawing this distinction, so that, despite the distinctions drawn in the bailment cases referred to by the English Trust Law Committee, we doubt that the reintroduction of this concept into British Columbia law would be a welcome development. However, there are precedents for this course of action in statutes enacted in the State of New York and in Jersey, Channel Islands.[30]

C. Abolish Exculpation Clauses

The third option is for the *Trustee Act* to abolish exculpation clauses entirely. This places the risk directly on the trustee with no possibility of settlor-provided relief. Risk with regard to negligence of any degree, as well as liability for fraud and dishonesty, is always upon the trustee as the perpetrator of the conduct.

D. Let Relief be in the Discretion of the Court

The fourth option is to provide that determining the allocation of risks should ultimately rest with the courts. Two approaches are possible.

1. Onus on Trustee to Seek Relief

The first is to enact a legislative provision denying legal validity to exculpation clauses, and providing that section 96 of our *Trustee Act* the sole source of relief for trustees. This would place the onus on the trustee to approach the court to seek relief under the section from the consequences of the trustee's default.

2. Onus on Beneficiary to Seek Relief

The second approach would be to empower the courts to relieve the beneficiary from the consequences of an otherwise-valid exculpation clause. This would shift the burden to the beneficiary of seeking relief from the court and would show somewhat greater deference to the principle of settlor autonomy.

IV. Our Analysis

It is our belief that a legislative statement of some kind concerning the status and enforceability of exculpation clauses is desirable. The current uncertainty should not be perpetuated. There remains the question of what the contents of that statement should be.

While the concept of settlor autonomy is entitled to great respect, it should not be permitted to override the protection of beneficiaries which has been the central concern of the law of trusts for hundreds of years. Even in the contractual arena the concept of freedom of contract is hedged in by a number of limitations which are expressly concerned with the protection of weaker parties.[31]

We see court discretion as playing a central role in any regime providing relief for trustees and, as we have suggested above, the question is whether a provision comparable to section 96 of the *Trustee Act* should be the sole source of relief or whether exculpation clauses might still have some role to play.

A particularly difficult issue concerns the position of the professional trustee. On the one hand it can be argued that the professional trustee, who is held out as having professional expertise in the area of trust management and who usually prepares the documentation that embodies an exculpation clause, should not be permitted to take the benefit of it.[32]

At the other end of the scale is the clearly professional trustee, normally a trust corporation, that holds trust property on the express terms that the trustee is not to interfere in, or have any responsibility for, the management of the property. An example would be where the trust assets are shares in a private corporation, and the trust indenture specifies that the trustee play no part in the conduct of the business. The trustee is simply to hold title, and in the trust indenture is exculpated. The trustee might fairly wish to plead the benefit of the exculpation clause if the business suffers loss through fraud or negligence in the administration, and there is an allegation that the trustee had a duty to warn.[33]

Issues like these raise doubts as to the value of drawing lines, whether between trustees or varieties of conduct and leads to a consideration of putting relief on some kind of discretionary footing. This approach, however, falls within the critical comments of the English Trust Law Committee quoted earlier - that the discretion is inherently uncertain and leads to more litigation and that fixed standard is preferable.[34]

We suggest there are two answers to this criticism. The first is that there is always a measure of tension, when creating a legal rule, between a formulation that promotes certainty of outcome but which can operate arbitrarily and a rule which operates flexibly in attempting to do justice between the immediate parties, but at the cost of some uncertainty as to the outcome. In past years, certainty of outcome was a value which was always accorded great weight with society, which was prepared to tolerate a degree of occasional injustice that might result.

The past few decades have seen a marked shift toward the adoption of flexible rules and British Columbia appears to have gone as far as any jurisdiction in the common law world in embracing this approach. Section 96 of the *Trustee Act*, copied from English legislation of the late nineteenth century, is itself an example of this flexible approach and it has been part of our law for many years. A further example is the operation of our *Family Relations Act*[35] where the division of family property between

spouses essentially rests on a discretion in the court to arrive at a just result.[36] Similarly, the courts exercise powers under the *Wills Variation Act*[37] to achieve what they regard as a fair distribution of a testator's property where the will does not achieve that result.[38] While we do not necessarily approve of the latter developments, it is our perception that British Columbia lawmakers have increasingly adopted a flexible approach to defining the rights of parties.

Second, we do not accept uncritically the suggestion of the English Trust Law Committee that a discretionary power leads to more litigation. It must be remembered that any issue regarding the effect of an exculpation clause will arise only where there has been some breach of a duty by a trustee which has caused a loss to the trust. Almost by definition there will be litigation in the air. If litigation is to be avoided the parties must reach a settlement, and always in the back of the parties' minds will be what the court would likely do if the matter proceeds to judgment.

It is our perception that, given our experience with section 96, if an application were brought under a discretionary power, the parties would be in at least as good a position to predict how the court would react to the facts and issues as if they (the parties) were trying to forecast the outcome were courts to construe an untested provision that defined the reach of an exculpation clause in terms of the extent of trustee culpability.[39]

V. The Consultation Paper

A. The Tentative Proposal

The analysis set out above essentially reflects the tentative conclusions set out in a Consultation Paper that preceded this Report.[40] The Paper went on to express a preference for a rule that would nullify the effect of exculpation clauses and make section 96 of the *Trustee Act* the sole source of relief for trustees in default. As the Paper observed:

> So far as section 96 is concerned, arguably everyone should have a higher comfort level with a provision that has been on the statute books for some time, which has an accumulation of case law, and with which the parties are familiar. Reliance on section 96 of the *Trustee Act* should carry with it greater certainty and be of greater assistance to the parties in avoiding litigation than the possible alternatives.

The Consultation Paper set out as its tentative proposal a draft provision to give effect to this view. The drafting strategy adopted was to amend section 96 of the *Trustee Act* with the current section 96 becoming subsection (1) of the new provision and subsequent subsections dealing with exculpation clauses.[41]

B. The Response to the Consultation Paper

Although the Consultation Paper was circulated widely among interested persons and groups it elicited a relatively small response. The response it did receive was almost wholly from the trustee sector with little heard from those who might be thought to speak for beneficiaries.

The responses we did receive were uniformly critical of the tentative proposal. The main concerns

raised in the responses were that the proposal was insufficiently sensitive to the principle of settlor autonomy[42] and the possibility of "trustee chill."[43]

We have considered these responses carefully and, as will be seen, they have had some impact on our final conclusion and recommendations.

VI. Final Conclusions and Recommendations

We do not retreat from the view that, at bottom, the legal consequences of an exculpation clause must rest on a judicial discretion. We believe, however, this can be achieved without wholly nullifying the effect of such a clause. In our analysis we raised the possibility that an alternative régime of discretionary relief might be created that would be triggered by the presence of an exculpation clause in a trust instrument.

This régime would take as its point of departure that such a clause is effective according to its terms and that the onus should be on the beneficiary to apply to the court and satisfy it that relief from the legal consequences of the clause is justified. This would carry with it somewhat more uncertainty than the original proposal set out in the Consultation Paper but if, as originally suggested, this change took place in the context of an amendment to section 96 the concern over uncertainty would be somewhat alleviated.

Our final recommendation, therefore, is that section 96 of the *Trustee Act* be replaced by a provision comparable to the following:

> 96. (1) If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but
>
> (a) has acted honestly and reasonably, and
>
> (b) ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach,
>
> then the court may relieve the trustee either wholly or partly from that personal liability.
>
> (2) Without limiting subsection (1) and subject to subsection (3) an exemption clause in a trust instrument is effective according to its terms to relieve a trustee of liability for a breach of trust.
>
> (3) Where it appears to the court that the conduct of a trustee
>
> (a) would constitute a breach of trust, and
>
> (b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be excused

the court may declare that

> (c) any exemption clause contained in the trust instrument is ineffective in relation to the breach of trust, and
>
> (d) the liability of the trustee for breach of trust be determined as if the trust instrument did not contain the clause.

(4) In this section, "exemption clause" means a provision of a trust instrument that excludes or restricts liability including

> (a) making the liability or its enforcement subject to restrictive or onerous conditions;
>
> (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of that person pursuing any such right or remedy; or
>
> (c) excluding or restricting rules of evidence or procedure or which purports to negative a duty that, in the absence of such provision, would otherwise lie on the trustee.

(5) This section applies whether or not the trust was created before it came into force.

VII. Acknowledgments

We would like to thank all those who took time to consider and comment on the Consultation Paper that preceded this Report. We would also like to acknowledge the contribution of David Gill who produced research materials that assisted the Committee in the preparation of Part I of this Report and its two appendices.

Appendix A - The English Legal Position

Since the decision of the English Court of Appeal in *Armitage* v. *Nurse* it is clear that the English courts will give effect to exculpatory clauses which unambiguously relieve against the liability arising from a trustee's gross negligence.

In *Armitage*, the court considered a clause which provided that:[44]

> no trustee shall be liable for any loss or damage ... at any time or from any cause whatsoever unless..caused by his own actual fraud.

The court found the clause to be "plain and unambiguous," and held that the words "actual fraud" excluded constructive fraud or equitable fraud so as to require proof of a "dishonest intention."[45] Such dishonesty involves at minimum:[46]

> ... an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.

In the court's view, the clause would exempt a trustee from liability no matter how "indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly."[47] Therefore, so long as the trustee was acting with an honest belief that his grossly negligent or wilful actions (wilful in the sense of a deliberate breach of trust)[48] were in the best interests of the beneficiaries, the clause would exempt the trustee from liability.

In reaching its conclusions, the court dismissed arguments based on the definition of a trust and public policy. While acknowledging there existed an irreducible core of obligations, being the *sine qua non* of a trust, the court rejected the submission that:[49]

... these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion, it is sufficient.

As for public policy, the court in *Armitage* began with the observation that public policy did not prevent a party to a contract from excluding liability for ordinary negligence, and "...what is true of a contract must be equally true of a settlement." Moreover, Lord Justice Millett, as he then was, (who wrote the Court's judgement) was loathe to make a public policy distinction between ordinary and gross negligence:[50]

> It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other...but while we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree. In *Hinton* v. *Dibber,* (1842) 2 QB 646 Lord Denman doubted whether any intelligible distinction exists.

Lord Justice Millett saw no legal authority impeding the court's conclusions:[51]

> The submission that it is contrary to public policy to exclude the liability of a trustee for gross negligence is not supported by any English or Scottish authority.

The cited authorities[52] consisted of two English and six Scottish cases. The court found the English authority of *Wilkins* v. *Hogg* went no farther than to say that an exemption clause could not absolve a trustee from liability for knowingly participating in a fraudulent breach of trust by his co-trustee.[53] In the other English authority, *Pass* v. *Dundas*, the trustee was held absolved by the exculpatory clause, and hence remarks by Bacon V.C. to the effect that the clause protected the trustee from liability unless there was gross negligence were "plainly *obiter*."[54]

As for the Scottish cases, Lord Justice Millett viewed them as "... merely decisions on the true construction of the particular [exculpatory] clauses under consideration, which were in common form

at the time ..."[55] and that "none of [the cases are] authority for the proposition that it is contrary to public policy to exclude liability for gross negligence by an appropriate clause clearly worded to have that effect."[56]

Having found the exculpatory clause to be enforceable and sufficiently clear to exculpate all but dishonest actions, the court in *Armitage* then examined the pleadings before it and determined that they failed to allege dishonesty (although there was probably gross negligence).[57] The court therefore held, on a preliminary question arising in the action, that the exculpatory clause relieved the trustees from liability for the alleged breaches.

While the English law is that an exculpatory clause may relieve against the effects of gross negligence, the clause must be "restrictively construed," such that "... anything not clearly within it should be treated as falling outside it ..."[58] However, a clause which provides for "... no liability ... by reason of ... any mistake or omission made in good faith by any trustee ..." is sufficiently clear to absolve the trustees of liability for negligence, and apparently gross negligence in failing to take proper action and to keep themselves informed with respect to the management of trust assets (being the management of a company whose shares constituted the principal asset of the trust) which were being dramatically dissipated by the manager.[59]

The mere fact that the exculpatory clause is inserted into a trust instrument by a solicitor or other person in a fiduciary relationship with the settlor does not render the clause unenforceable.[60] For example, a solicitor is "... entitled to tell the testator that he would himself insist on a wide exemption clause and would not accept office as executor without one ..."[61] The solicitor may take the benefit of an exculpatory clause (just as he might take any benefit under a will that he drafted) upon showing that the "... testator knew and approved of the contents of the will and ... there was nothing in the way of advantage taken or influence exercised by the solicitor."[62] Where the exculpatory clause is "... no wider than many similar clauses found in the precedent books ..." then "it cannot excite suspicion ..." by the mere fact of its inclusion, and if there is no reason to think that the testator did not know or approve of its inclusion, the clause will be effective.[63] However, it is otherwise if the clause is inserted "... without calling the settlor's attention to it and knowing that the settlor did not realise its effect ..."[64]

Appendix B - The American Legal Position

In general, exculpatory clauses are ineffective under American law where:

- The act or omission giving rise to liability falls outside the scope of the clause;
- Enforcement of the clause, (or part of the clause relied upon) is against public policy;
- The clause was improperly inserted into the trust instrument.[65]

As under the English law, exculpatory provisions are strictly construed, and "...the trustee is relieved of liability if he commits a breach of trust only to the extent to which it is clearly provided that he should be relieved..."[66] However, the American case-law has a broader view than the English as to the breaches of trust which cannot be relieved against on the ground of public policy. Such breaches fall into four categories:

- Breaches committed in bad faith;
- Intentional breaches;[67]
- Breaches committed through "reckless indifference to the interests of beneficiaries;"
- Breaches through which the trustee personally profits.[68]

Gross negligence falls into the third category of reckless indifference to the interests of beneficiaries.[69] As stated in *Browning* v. *Fidelity Trust Co*.:[70]

> a trustee cannot contract for immunity from liability for acts of gross negligence.

Scott & Fratcher, in *The Law of Trusts* go farther and state that it is "arguable" that a "provision in the trust instrument relieving the trustee from liability even for ordinary negligence is against public policy." The rationale is the "growing feeling" that "certain duties" and "certain standards of conduct are applicable to the relationship between trustee and beneficiaries, and that these are so necessarily inherent in the relation that they cannot be dispensed with by any provision in the trust instrument."[71]

Statute law in the state of New York provides that any attempt to grant an executor or testamentary trustee immunity from liability "for failure to exercise reasonable care, diligence and prudence is deemed contrary to public policy."[72] A statutory exoneration clause in the state of Connecticut relieves a fiduciary of liability in respect of losses arising from the retention, sale or operation of any business or real estate interests so long as the trustee is acting in good faith and exercising reasonable care, but expressly excludes acts of "gross negligence."[73]

The exculpatory clause will not be given effect if it was improperly inserted, as where such insertion constituted an "abuse of a fiduciary or confidential relation to the settlor."[74] However, such abuse does not arise by the mere fact that the trustee drafted the trust instrument, or even from the pre-existence of a fiduciary relationship; it appears that the existence of such a relationship may only place an onus upon the fiduciary "... to show that the consent of the settlor to the insertion of the provision was knowingly and freely given..."[75] In this regard, the American law does not apparently depart so greatly from the English.

Appendix C - Further Information on the Project and the Committee

This report is the fifth made by the *Trustee Act* Modernization Committee of the British Columbia Law Institute. The earlier reports made by the Committee recommended changes to the provisions of the *Trustee Act* dealing with investment by trustees (including "total return" investing), their statutory remuneration and their powers of delegation. Since this report is one of a series, we thought it appropriate to provide a brief explanation of project and the Committee's objectives and methodology.

This is one of the first projects undertaken by the British Columbia Law Institute after its formation in 1997. The Committee, through which the Institute is carrying out this project, is addressing various aspects of the *Trustee Act* that are in need of reform in a series of short consultative documents and reports. The consultative documents, which contain proposals for reform and the explanation for them, are circulated to interested sectors such as the trust proposals. They are also be made available to the public upon request. Following this consultation phase, the Committee develops a final position

on the matters addressed by the proposals and presents recommendations for legislative change in a report that is submitted to the Attorney General.

The ultimate aim of the Committee is to prepare comprehensive draft of a reformed *Trustee Act* in modern, easily comprehended language. The statute will contain new provisions required for the legal financial climate in which trustees now fulfil their duties as well as those elements of the existing Act that must be retained.

The members of the Trustee Act Modernization Committee are:

Dr. Donovan Waters, Q.C. (Chair)
Professor James MacIntyre, Q.C.
Arthur L. Close, Q.C.
Margaret Mason
Kathleen Cunningham
Professor Keith Farquhar
Scott Sweatman
Greg Blue (Reporter)

Our Supporters

The British Columbia Law Institute wishes to thank all those individuals and firms who provided financial support in the past year.

Partner
The Advocate

Benefactor
James M. MacIntyre, Q.C.
Hon. Mr. Justice Grant D. Burnyeat
Blake, Cassels & Graydon
Borden Ladner Gervais
Steele Urquhart Payne
Stikeman Elliott

Associate
Hon. Bryan Williams, Q.C.
Hon. Chief Justice Donald C.J. Brenner
Hon. Martin Taylor, Q.C.
Hon. Mdm. Justice M. Anne Rowles

Supporter
Master Ronald Barber
Hon. Mr. Justice Randall S.K. Wong

Friend

Hon. Chief Justice Lance G. Finch
Ian Donaldson, Q.C.
Hon. Mdm. Justice Risa Levine
Arthur Close, Q.C.
Hon. Mdm. Justice Carol Huddart
Hon. Mdm. Justice Heather Holmes
Hon. Mr. Justice Duncan Shaw
J. Parker MacCarthy, Q.C.
Hon. Mr. Justice Kenneth Smith
Margaret Ostrowski, Q.C.
Hon. Judge David R. Pendleton

Anonymous Donations

Support in Kind

Faculty of Law, University of British Columbia

Footnotes

1
In "Exculpatory Clauses in Trust Instruments," David Steele, [1995] 14 Estates and Trusts Journal 216 at 217 n. 5 ("Steele") the author observes that exculpatory clauses are commonplace in real estate investment trusts, mutual fund trusts, trusts for bondholders or debenture holders, and that the use of such clauses in trust instruments dates back at least two centuries, citing Bartlett v. Hodgson, (1785) 1 T.R. 42, 99 ER 962 (KB).

2
Such provisions will be referred to as "exculpatory clauses" in this Report.

3
Steele provides an example of a clause in common use in family trusts which exonerates trustees for responsibility respecting "any error in judgment or for any act of omission or commission not amounting to actual fraud." In the Report on the Law of Trusts, Ontario Law Reform Commission (1984) ("OLRC 1984") noted at p. 39 that "trust instruments drawn in this Province, whether testamentary or inter vivos, very often exonerate the trustee from liability for any loss arising in the administration of the trust, if the trustee has acted in good faith."

4
Armitage v. Nurse, [1997] 3 W.L.R. 1046, [1998] Ch. 241 (C.A.) (hereafter "Armitage").

5
D. Waters, The Law of Trusts in Canada 2nd ed. (Toronto: Carswell: 1984) at pp. 756-7 ("Waters").

6

Armitage.

7
See Scott, The Law of Trusts (4th ed. W. Fratcher) Vol. III at paras. 222 and 222.3 ("Scott on Trusts").

8
Scott on Trusts, 4th, para. 222.3; Esliclis, Powers and Trust-Law, s. 11-1.7 (testamentary trusts).

9
Trusts (Amendment)(Jersey) Law, 1989, Art. 5 (c) provides "Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence." In Armitage at para. 45 the Court refers to the law introduced in Jersey and notes that if such exculpatory clauses are to be denied effect, then it ought to be "... done by Parliament which will have the advantage of wide consultation with interested bodies and the advice of the Trust Law Committee ..."

10
Re Poche, (1984) 6 DLR (4th) 40 (Alta. Surr. Ct.).

11
Reference is made to Seton v. Dawson, (1841) 14 Scottish Jurist 115 (S.C.); Knox v. MacKinnon, (1888) 13 App. Cas. 753; Rae v. Meek, (1889) 14 App. Cas. 558; Carruthers v. Carruthers, [1896] A.C. 659; Wyman v. Patterson, [1900] A.C. 271.

12
Poche at p. 55.

13
Poche at p. 54.

14
Poche at p. 55.

15
The English Trust Law Committee in a recent consultation paper on "Trustee Exemption Clauses" described the current legal position in England as unsatisfactory and went on to consider a number of possible reforms. This paper is cited hereafter as "TLC."

16
TLC para 2.4.

17
In most cases fraud will involve willful conduct on part of the trustee but it is possible to have deliberate breach of trust committed by the trustee in good faith and in the honest belief that it is in the best interests of the beneficiaries. TLC para 2.6.

18
Armitage.

19
Scotland is a civil law jurisdiction.

20
TLC para 2.7.

21
TLC para 2.10. The Trust Law Committee pointed to a line of cases involving bailment.

22
Highway Traffic Act, R.S.A. 1980, c. H-7, s.182; The Vehicles Act, R.S.S. 1965, c. 377, s.168; Highway Traffic Act, R.S.M. 1970, c. H-60, s.145. See cases: Engler v. Rossingol, (1975) 64 D.L.R. (3d) 429; Studer v. Cowper [1951] S.C.R. 450; McCulloch v. Murray [1942] S.C.R. 141. See literature: Singleton, "Gross Negligence and the Guest Passenger," (1973) 11 Alta. L. Rev. 165; MacArthur, "Gross Negligence and the Guest Passenger," (1960) 38 Can. B. Rev. 47; A.M. Linden, Canadian Tort Law, 6th ed. at 173-75 (Toronto: Butterworths, 1997).

23
Paragraphs 5.0 to 5.5. See also John H. Langbein, "The Contractarian Basis of the Law of Trusts," 105 Yale L. J. 625 (1995).

24
Ibid para. 5.5.

25
Some relief may be found in the contra proferentem rule that is used in construction of written documents where an ambiguous provision is interpreted against the person who selected the language.

26
The statutory right to remuneration was considered at length in this Committee's report on "Statutory Remuneration of Trustees and Trustee Accounts," (BCLI Report No. 7, April 1999).

27
Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302.

28
TLC para 6.3.

29
TLC para 6.4.

30
Supra, notes 8 and 9.

31
Consumer Protection Act, R.S.B.C. 1996, c. 69.

32
Bogg v. Raper, (1998/99) 1 I.T.E.L.R. 267 (England, C.A.). Another issue is how one defines "professional trustee" in this context? What about the friend or family member who takes remuneration under s. 88 of the Trustee Act? Can a distinction be drawn between that trustee and the professional trustee who also looks solely to s. 88 for remuneration?

33
Froese v. Montreal Trust Co., (1996) 20 B.C.L.R. (3d) 193, 137 D.L.R. (4th) 725 (B.C.C.A.). Leave to appeal to S.C.C. denied, (1997) 88 B.C.A.C. 240n.

34
Supra at n. 28.

35
R.S.B.C. 1996, c. 128.

36
Specifically, the court has a discretion to depart from the 50%-50% division that is the default position under the Act.

37
R.S.B.C., c. 490.

38
Tataryn v. Tataryn Estate, [1994] 2 S.C.R. 807.

39
For instance, in Re Will Trust of James Williams (dec.), (2000) 2 I.T.E.L.R. 313., a decision of the Minnesota Court of Appeals, it was held that exculpation from liability for "any mistake or error of judgment made by [the trustee] in good faith" did not include negligence.

40
British Columbia Law Institute, Consultation Paper on Exculpation Clauses in Trust Instruments (October, 2000).

41
The additional subsections of the revised s. 96 would have provided: (2) Where the instrument creating a trust contains an exemption clause, that clause is not effective to relieve a trustee of liability for a breach of trust. (3) Subsection (2) does not limit the right of a trustee to apply to the court for relief under subsection (1). (4) In this section, "exemption clause" means a provision of a trust instrument that excludes or restricts liability including (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of that person pursuing any such right or remedy; (c) excluding or restricting rules of evidence or procedure or which purports to

negative a duty that, in the absence of such provision, would otherwise lie on the trustee.

42
See Part II (B) of this Report.

43
See Part II (E) of this Report.

44
Armitage v. Nurse, [1997] 3 W.L.R. 1046, [1998] Ch. 241 (C.A.) at para. 14.

45
Armitage at paras. 15-19.

46
Armitage at para. 22.

47
Armitage at para. 24. The belief of a solicitor-trustee that he is acting in the interests of beneficiaries is not characterized as "honest" if, though actually held, is so unreasonable that by an objective standard, no reasonable solicitor-trustee could have thought what he did or agreed to do was for the benefit of the beneficiaries - Walker v. Stones, [2000] 4 All E.R. 412 (C.A.). The court limited this propositon to the case of a solicitor-trustee, in part, on the basis that "the test of honesty may vary from case to case, depending on, among other things, the role and calling of the trustee."

48
Armitage at paras. 26-27.

49
Armitage at para. 33.

50
Armitage at paras. 34-35.

51
Armitage at para. 36.

52
Armitage at para. 36 et seq. The authorities are: Wilkins v. Hogg, (1861) 31 L.J. Ch. 41; Pass v. Dundas, (1880) 43 L.T. 665; and the Scottish authorities of: Knox v. Mackinnon, (1888) 13 App. Cas. 753; Rae v. Meek, (1889) 14 App. Cas. 558; Wyman v. Paterson, [1900] A.C. 271; Clarke v. Clarkes Trustees, [1925] S.C. 693; Seton v. Dawson, (1841) 14 Scottish Jurist 115 (S.C.); Carruthers v. Carruthers, [1896] A.C. 659.

53
In "Exculpatory Clauses in Trust Instruments," David Steele, [1995] 14 Estates and Trusts Journal 216 ("Steele") at 225 the author states that Wilkins v. Hogg does not "...indicate clearly how far a settlor

may go in excluding liability ... the only indication of a limitation ... comes in the following passage from the judgment of the Lord Chancellor: "... if one trustee paid over money to, or permitted money to come to the hands of his co-trustee, with the knowledge that it would be misapplied, no indemnity clause would protect him from the consequences ..." at (1861) 31 LJ. Ch. 41 at 43.

54
Armitage at para. 37; Pass v. Dundas at 666.

55
Armitage at para. 38. As an example of the approach, the court considered Lord Watson's statement in Knox v. Mackinnon to the effect that "...such a clause is ineffectual to protect a trustee against the consequences of culpa lata, or gross negligence on his part..." as a reference only to the particular clause in question. Similar clauses were at issue in Seton v. Dawson and Rae v. Meek, and Lord Herschell in the latter decision adopted the quoted passage from Lord Watson's speech.

56
Armitage at para. 44.

57
Armitage at paras. 64, 30. The allegations were that (a) the trustees, in breach of trust, appointed a family company to farm lands belonging to the plaintiff infant beneficiary; (b) the trustees improperly supervised the family company; (c) the trustees failed to make proper inquiry as why the value of the plaintiff infant beneficiaries land had fallen dramatically while similar lands belonging to the mother of the infant beneficiary (also a beneficiary under the same trust) had appreciated in value; (d) the trustees didn't obtain proper interest on a loan from the trust to the mother of the infant beneficiary: Armitage at 51et seq.

58
Bogg v. Raper, (1998/99)1 I.T.E.L.R. 267 (Eng. CA) at para. 28; Wight v.Olswang,[1999] EWJ No. 2120 (Eng. CA) at para. 23 (where ambiguity in the conflicting clauses prevented the exclusion of liability).

59
Bogg.

60
Bogg at para. 50.

61
Bogg at para. 45.

62
Bogg at para. 46.

63
Bogg at para. 49 et seq.

64
Bogg at para. 50.

65
See Scott, The Law of Trusts (4th ed. W. Fratcher) Vol. III at para. 222 ("Scott on Trusts").

66
Scott on Trusts at para. 222.2.

67
As already noted in Armitage, at para. 27, the Court viewed the clause sufficiently broad and effective to exonerate intentional breaches of trust, so long as the breach was not motivated by dishonesty.

68
Scott on Trusts at para. 222.3.

69
Steele at 232, n. 78, who refers to R.O. Schwartz "Exculpatory Clauses - Their Legal Significance," (1966) 1Real Prop. Prob. & Tr. J. 530 at 532, and Richard Gross, "Exculpatory Clauses Invoked by the Individual Trustee," (1967) 5 III. CLE 99 at 101-3.

70
250 F 321at 325 (3rd Cir 1918); cert denied 248 US 564 (1918).

71
Scott on Trusts at para. 222.3.

72
Ibid.

73
Ibid, referring to Powers & Trust Law at para.11-1.7.

74
Conn. Gen. Stat. para. 45-100e (1989) s. 38, "The fiduciary is hereby exonerated from any liability resulting from its retention, sale or operation, whether due to losses, depreciation in value or actions taken or omitted to be taken with respect to any business, farm or real estate interests held in an estate or trust, nor shall the fiduciary be liable for any loss to or depreciation of any other estate or trust property so long as it is acting in good faith in the management thereof and exercising reasonable care and diligence, but the fiduciary is not exonerated from his own bad faith, wilful misconduct or gross negligence," quoted in Steele, at 231.

75
Scott on Trusts at para. 222.4.