Revision Box Questions: Guidance for approach

Revision Box Chapter 16

1. In joining these materials on breach of trust together with the study of trusteeship in Chapters 13 and 14, ensure that you can answer the following questions.

(a) What is meant by breach of trust and how is a breach of trust committed?

Generally any failure to comply with duties he falls subject to as a trustee will result in a trustee committing a breach of trust. This covers duties arising from the trust instrument itself or ones found in the general law relating to trusteeship applying in default of this, with a breach capable of subsisting as engaging in a prohibited action or failure to engage in what is required. These characteristics of breach are summarised very effectively in Armitage v Nurse (1998), and liability arises where such an act or omission has been committed giving rise to a loss for the trust estate.

(b) How does breach of trust differ from breach of a fiduciary duty?

Breach of fiduciary duty is different, because unlike breach of trust, breach of fiduciary duty instead of governing unlawful acts of trustees instead focuses on situations where a prima facie lawful act becomes a wrongful act only because of the fiduciary obligation of loyalty that is imposed by equity. Differences in the basis for liability are best understood through appreciating that for breach of trust this follows loss experienced by the trust, whilst for breach of fiduciary duty, wrongdoing has given rise to a personal profit for the fiduciary. For breach of trust liability arises because a wrongful act/omission committed has resulted in loss to the trust estate, and which must be compensated for. Breach of a fiduciary duty is said to arise where an otherwise lawful act has become unlawful because equity will not allow a fiduciary’s personal interests to conflict with duties owed to his principal.

(c) What are the remedial consequences of breach of trust compared with breach of duties at common law arising from breach of contract or commission of a tort?

There are no degrees of fault attached to a breach of trust, with liability catching equally the innocent mistake of an honest trustee and the dishonest trustee alike. Once causation between the breach committed and the loss to the trust estate the trustee becomes liable for all losses experienced through the mechanism of equitable compensation. Unlike common law damages awards, all losses are compensable: there are no remoteness rules and a beneficiary isn’t required to engage in loss mitigation.

(d) What defences are available to a trustee acting in breach?

There are a variety of defences to be aware of here. The most important ones are: beneficiary consent to or participation in the breach; passage of time through limitation or through application of the doctrine of laches; wide power under s 61 Trustee Act 1925 to excuse honest and reasonable trustees from liability for breach of trust.
2. From reading the chapter materials and any Online Resource Centre materials, ensure that you understand the significance of trustee exemption clauses (TECs) by considering:

- what is meant by TECs;
- what issues arise in the use of TECs; and
- what the implications for trusts law might be in the growing use of these mechanisms for restricting/excluding liability for breach of trust.

TECs or trustee exemption clauses seek to exclude liability that may otherwise be incurred in the course of trusteeship in the event of a breach of trust being committed. The widespread use of TECs was identified in the Revision Box questions for chapter 14 as a factor which made it difficult to assess the net effect of changes in law to trusteeship, in terms of whether this on balance conferred greater freedom to trustees or imposed enhanced liability on those who undertake trust services provision by way of a profession or business. The use of TECs is widespread amongst professional trustees and at common law their extensive scope for validity was confirmed in Armitage v Nurse (1998). Alarmed by how TECs could validly exclude liability for everything short of a trustee’s ‘actual fraud’, a Law Commission Report in 2002 set in motion a far reaching debate on the appropriate use of TECs. This movement identified the tensions embodied in the valid use of TECs: these are centrally balancing considerations of settlor autonomy and particularly beneficiary protection alongside and against the availability of a range of affordable trusts services. The Law Commission’s recommendation was for an industry-wide adoption of a rule of practice to limit scope in the use of TECs to negligence, and only where the existence of such a clause is drawn to the attention of the settlor. In making this recommendation the Law Commission was praised for listening to all sides and proposing a ‘proportionate risk-based approach to the issue’, and following wide adoption in the trust services industry occurring from 2010, this approach was approved in the Privy Council in Spread Trustee Ltd v Hutcheson (2011). But for many it leaves unanswered concerns about the whether the Law Commission should have concluded in favour of TEC use at all, particularly on account of the already structurally asymmetrical relationship between trustee and beneficiary.