Chapter 17: Breach of trust

1) ‘Contrary to the view of the Law Commission, an absolute prohibition in the use of all trustee exemption clauses should represent the direction of reform. This approach is justifiable on account of the way in which trusteeship places its occupants in positions of power and advantage in respect of trust property. Such an approach is also necessary, given the plethora of case law involving not only trustees lacking in probity, but also illustrating palpable lack of competence and care exhibited in the management of trust property’.

Discuss this statement, drawing attention to the validity of the views it is expressing.

2) ‘In its work undertaken in relation to trustee exemption clauses (resulting in the Report of 2006) the Law Commission was entirely correct to conclude that the continuing use of such mechanisms is not only unavoidable, but that this is necessary to ensure trusts services remain affordable and even available, and that ultimately their continuing use is in the interests of all parties involved’.

Discuss this statement, indicating whether you agree, and providing support for your assessment.

Brief guidance notes:

Both questions have as their premise the liability incurred by trustees following their commission of a breach of trust, and are more narrowly focused on the ways in which trustees can protect themselves from the consequences of being found to be in breach. Thus both questions will need some introduction which explains this, with some indication of what is meant by breach of trust and how it arises, and what liability actually follows therefrom. Still in the early stages of the responses both questions require progression from a more general consideration of breach to one on exclusion clauses, explaining what they are, and how they work, and explaining the currency of their consideration in light of the Law Commission’s work. Then both questions require an examination of the proposals for reform arising from the Law Commission’s Report on Trustee Exemption Clauses in the light of the views which are being expressed about trusteeship and its occupants respectively in the questions themselves.
3) ‘The growing professionalisation of the provision of trustee services brings in to focus a completely new context for considering breach of trust’.

Discuss.

4) ‘Today it is of course the case that the term ‘trustee’ is far more likely to denote professional persons or corporations providing trusts services than an ‘amateur’ trustee, but the issues underlying breach of trust remain unaltered. The purpose of the rules surrounding breach of trust has always been to protect beneficiaries against action or inaction which is incompatible with the administration of the trust estate, and to ensure on the part of the trustee a commitment to act in accordance with the terms of the trust’.

Discuss.

**Brief guidance notes:**

Both these questions are takes on the work on trusteeship which cuts across all three chapters, in the light of the ‘changing face’ of trusteeship brought by the new professional trustee. Both questions will involve a general consideration of the implications for traditional approaches of the law to manage the conduct of trustees arising from a new breed of trustees, and how this might become particularly important in the context of a breach. The first question is much more openly focused for an individual response to determine what the key issues are, whereas the second provides a framework built around the protection of the beneficiary which must provide the basis for the response.

5) ‘The distinction which needs to be drawn between breach of trust and conduct which amounts to being breach of a fiduciary duty is a very important one, and one which is not given nearly enough emphasis in cases or academic commentary.

**Brief guidance notes:**

This question picks up on the materials in chapter 17 which is at heart an analysis of breaches duty which are committed by trustees which do amount to being a breach of trust, as distinct from breach of the special rules imposed by equity to ensure that fiduciaries (including trustees) act wholly and unequivocally in the interests of their principal. This requires you to reflect on a number of core themes within this chapter, starting with what is said at the outset about what amounts to being a breach of trust. The starting point for this is Millett LJ’s judgment in *Armitage v Nurse*
[1997] where he lists a series of acts and omissions in respect to trustees’ duties which will amount to being a breach of trust. In this regard, this question also provides a backward linkage to chapters 14 and particularly 15 dealing with trusteeship: it is also a link forward to the materials on ‘beneficiary actions’ in chapter 18. In considering what might distinguish breach of trust from breach of fiduciary duty, the materials in the Textbook encourage you to think about what trustees are expected to do in carrying out the trust. If they fail to do what is expected of them for the proper running of the trust, then this amounts to a breach of trust. If a trustee engages in conduct which is quite proper, and even expected of him—such as dealing with trust assets, or securing or exploiting opportunities which should arise for the trust, then he won’t commit a breach of trust. But as the Textbook explains, in doing such things it is possible for him to breach the duty of loyalty imposed by equity to ensure impartial action on the part of fiduciaries in the performance of their functions. As the materials in chapter 17 note (with cross references back to chapter 14’s consideration of the fiduciary nature of trusteeship) there are also remedial differences between breach of trust and breach of fiduciary duty. From this you need to come to a view on whether it is very important to stress this distinction and perhaps illustrate this with cases and commentary that does/not deal adequately with the legal distinctions involved. And in doing so it would also be helpful to point out how points of commonality can be found between these two different concepts through the availability of equity’s actions relating to missing property, as developed in chapter 18.