TIFFANYANY WIGHT

First Appellant

FELIX WIGHT

Second Appellant

- v -

SIMON OLSWANG

First Respondent

ROGER PETERS

Second Respondent

Date of Judgment: 29 April 1999

JUDGMENT

(As Approved by the Court)

(Crown Copyright)

LORD JUSTICE PETER GIBSON: This is the judgment of the court.

Once again this court is asked to determine the meaning and effect of certain trustee exemption clauses intended to exempt trustees from liability for certain acts or omissions for which they otherwise would or might be liable. The subject has recently been considered in two cases before this court: Armitage v Nurse [1998] Ch.241 and Bogg v Raper The Times, 22

April 1998. But the issues raised in the present case turn primarily on the true construction of the particular clauses of the Settlement with which this appeal is concerned.

The Settlement was made on 20 December 1982 by Robin Wight ("the Settlor") of the one part and the Settlor and his wife as trustees of the other part. By the Settlement the Trust Fund therein defined was directed to be held by the trustees subject to an overriding power of appointment exercisable by the trustees in favour of a defined class of beneficiaries and subject thereto on specified trusts. The trustees were given wide administrative powers including powers of investment and of sale, and by clause 4 they could permit what did not consist of money to remain invested for so long as they in their absolute discretion should think fit. The power of appointing new trustees was vested in the Settlor during his life and he had the power to appoint individual or corporate trustees. The clauses particularly material to this appeal are the following:

"11 In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the Trust Fund arising by reason of any investment or investments made in good faith or for the negligence or fraud of any agent custodian sub-custodian investment adviser or investment manager employed by it or him or by any other Trustee hereof although the employment of such agent custodian or sub-custodian investment adviser or investment manager was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any other matter or thing except wilful and individual fraud and wrong doing on the part of the trustee who is sought to be made liable ....

15(A) Any Trustee hereof (other than the Settlor or any spouse of the Settlor) being a person engaged in any profession or business shall be entitled to be paid all usual professional or proper charges for business transacted time expended and acts done by him or his firm in connection

with the trusts hereof including acts which a trustee not being in any profession or business could have done personally

(B) The Trustees and any other body corporate .... (whether or not the same shall be a Trust Corporation) which may at any time be appointed to be a Trustee or the sole Trustee of these presents may as such Trustee as aforesaid act upon its standard conditions in force at the date of its appointment as Trustee hereof (as if the same were herein set out) and may charge and deduct remuneration as provided by those conditions and such corporate Trustee's standard scale of fees in force at the date of its appointment with power to charge remuneration in accordance with any later standard scale of fees of such corporate Trustee for the time being in force ....

18(A) Every discretion or power hereby or by law conferred on the Trustees shall be an absolute and uncontrolled discretion or power and no Trustee shall be held liable for any loss or damage accruing as a result of the Trustees concurring or failing to concur in the exercise of such discretion or power

(B) No Trustee (other than a Trustee charging remuneration for so acting) shall be liable for any error of judgment or mistake of law or other mistake or for anything save wilful misconduct or the wilful breach of this Trust by such Trustee and each Trustee shall be held harmless against any claims losses death duties taxes and impositions arising in connection with the Trust Fund or any part thereof".

On 25 January 1990 the trustees exercised the overriding power of appointment in such a way that in the events which have happened the Trust Fund became held for the three children of the Settlor who are living at the expiration of the Trust Period defined in the Settlement or who earlier have attained or will attain the age of 25 years. Two of the children, Tiffany and Felix Wight, are the Plaintiffs.

The Trust Fund initially consisted of 100, but to that were added substantial holdings in Aegis plc ("Aegis"). On 23 January 1991 the trustees held 228,014 ordinary shares and 3,465 convertible cumulative preference shares in Aegis. On that day the Settlor and Mrs. Wight retired as trustees and the Settlor appointed two practising solicitors, the First Defendant, Simon Olswang, and the Second Defendant, Roger Peters, as trustees in their place. Mr. Olswang is the senior partner in Simon Olswang & Co. and Mr. Peters is a partner in Gordon Dadds. At the time of Mr. Olswang's appointment his firm was one of two firms which had been appointed solicitors to Aegis. On 22 January 1991 at a meeting between Mr. Olswang, Mr. Peters and the Settlor, Mr. Olswang disclosed that his firm were solicitors to Aegis and he instructed his assistant solicitor to check whether there were any Stock Exchange or Insider Trading Regulations which might interfere with the trustees' freedom to dispose of shares in Aegis.

On 9 April 1991 the trustees, having regard to the desirability of diversification and to the potential volatility of Aegis ordinary shares and having taken advice from the stockbrokers to the trustees, decided in principle that the ordinary shares should be sold. That day they sold 50,000 ordinary shares at 2.30 per share. On 25 April 1991 Mr. Olswang wrote to Mr. Peters saying that in his professional capacity he was in receipt of price-sensitive 'information relating to Aegis and that for the time being he was not in a position to give any instructions in relation to share sales. Mr. Peters that day replied, stating that the stockbrokers were keeping the position under daily review and that he would report to Mr. Olswang regularly. On 26 April Mr. Olswang repeated the position he was in and said that he believed this would preclude any dealings until he was out of "purdah". Mr. Peters on 30 April replied saying that he believed Mr. Olswang to be correct in his approach and asked when he would come out of purdah. On 7 May Mr. Peters was informed by the stockbrokers that they had received an offer for 250,000 Aegis shares at 2.10 per share. Mr. Peters consulted Mr. Olswang who stated that he was still unable to deal, and so the stockbrokers were told that the trustees could not accept the offer. On 24 June Mr. Olswang told Mr. Peters that he had become free to

comment on the sale of the shares. By then the market price had fallen to about l.80 per share.

Between 3 April 1992 and 10 November 1993 142,000 shares were sold by the trustees at prices between 1.17 and 18p per share. To the remaining 32,014 ordinary shares were added 139,506 ordinary shares received on the conversion of the convertible preference shares. 64,506 ordinary shares were sold in 1996 at prices between 50p and 61p per share, leaving in the Trust Fund a holding of 75,000 ordinary shares which in June 1997 were said to have a market value of about 60p per share.

The Plaintiffs commenced proceedings on 20 March 1997, claiming that the assets of the Trust Fund had been diminished in value by breaches of duty and trust committed by Mr. Olswang or Mr. Peters or both of them, for which the Plaintiffs sought to obtain an order that compensation be paid to the Trust Fund. In para.14 of the Amended Statement of Claim Mr. Olswang, when considering whether to accept appointment as a trustee of the Settlement, is said to have owed to the Settlor and his wife as the then trustees of the Settlement and to the beneficiaries under the Settlement "a fiduciary duty and/or a duty to take reasonable care (a) to consider whether he was likely to be able properly to perform the duties and exercise the powers of a trustee under the Settlement and (b) (if he came to the conclusion that he might not be able to do so) to inform [the Settlor] and/or the existing trustees of that fact." In para.15 it is alleged that in breach of those duties Mr. Olswang failed prior to or at the time of his appointment to consider whether there was a risk that he might be prevented or inhibited by the provisions Company Securities (Insider Dealing) Act 1985 ("the 1985 Act") from participating in a decision whether or not to sell Aegis shares as a result of his receipt of price-sensitive information. In para.16 it is alleged that Mr. Olswang in breach of trust failed, after his appointment as trustee and until shortly before 25 April 1991, to consider whether there might be a similar risk and alternatively to inform Mr. Peters or the Settlor that he considered there to be such a risk.

In para. 18 it is alleged that each of Mr. Olswang and Mr. Peters as solicitors owed a duty to the trustees of the Settlement to act with reasonable care and skill when giving legal advice in relation to the affairs of the Settlement. It is alleged in para.20 that in breach of that duty and of their duties as trustees Mr. Olswang and Mr. Peters failed on and after 25 April 1991 to consider whether Mr. Olswang could by reason of s.7 of the 1985 Act safely participate in a decision whether or not to sell the Aegis shares on the advice of the stockbrokers.

A further breach of trust by Mr. Olswang and Mr. Peters is said to have occurred in respect of an alleged resolution by them on 13 September 1991 to sell half of the 178,014 ordinary shares then held by them. It is alleged in para.22 that it was agreed between them that Mr. Olswang would speak to the Settlor about the proposed sale and that after that Mr. Peters would instruct the stockbrokers to sell. In para.23 it is alleged that neither trustee took any sufficient steps to implement that decision. It is alleged in para.24 that had the decision been implemented, 89,007 ordinary shares would have been sold in September 1991 at about 2.15p per share.

Each of Mr. Olswang and Mr. Peters put in a Defence denying the alleged breaches and relying on clauses 11 and 18 of the Settlement. On 20 January 1998 Master Dyson directed the determination as a preliminary issue of the question whether:

"if the breaches of trust and duty alleged in paragraphs 15 16 20 and 23 of the amended Statement of Claim are established the Defendants or either of them would be exempted from liability for any and if so which of the said breaches by clauses 11 or 18 of the Settlement."

That issue came before Ferris J. In a reserved judgment he held that Mr. Olswang and Mr. Peters as paid trustees could not rely on clause 11; there was a conflict between clause 11 and clause 18(B) and clause 18(B) must prevail over clause 11. But, he held, they could rely on clause 18(A). He then considered the pleaded breaches. He held that Mr. Olswang was not protected from the breaches alleged in para.15 of the duties alleged in para. 14, on the footing that the judge was required to assume that those duties were owed, though he made clear his doubts as to whether the duties were in fact owed. He further held that Mr. Olswang was not protected from the breach of trust alleged in para.16. But he held that Mr. Olswang and Mr. Peters were protected by clause 18(A) from the breach of duty alleged in para.20 and from the breach of trust alleged in para.23. Accordingly the judge by his order of 30 June 1990 declared that neither clause 11 nor clause 18(B) would protect Mr. Olswang or Mr. Peters for liability for any breaches of trust or duty alleged in paras.15, 16, 20 or 23, that clause 18 (A) would not protect Mr. Olswang from liability for the breaches of trust and duty alleged in paras.15 and 16, but that clause 18(A) would protect Mr. Olswang and Mr. Peters from liability for the breaches of trust and duty alleged in paras.20 and 23 and ordered that the action against Mr. Peters be dismissed.

The Plaintiffs have appealed, seeking a declaration that clause 18(A) does not protect Mr. Olswang and Mr. Peters. By a Respondent's Notice Mr. Olswang cross-appeals from the judge's order. In particular he challenges the judge's conclusion that clause 11 gave him no protection. Mr. Peters by a Respondent's Notice had asked that the judge's decision should be affirmed on grounds according with those advanced by Mr. Olswang in his Respondent's Notice. However, we were informed shortly before the hearing of the appeal that the Plaintiffs and Mr. Peters had reached a settlement of their dispute subject to the approval by this court on behalf of Felix Wight, who is under 18, of the terms. We gave that approval. Mr. Peters has therefore played no part in this appeal.

It is convenient to start with the cross-appeal of Mr. Olswang on clause 11. It is not seriously in dispute that the terms of clause 11 are inconsistent with clause 18(B), though Mr. Steinfeld Q.C. for Mr. Olswang said that in some respects the two clauses arguably do not cover precisely the same ground; for example, he says, it is not clear that clause 11 covers a mistake of law, referring as it does only to "any mistake". For our part, we would have thought that "any mistake" did cover a mistake of any kind including a mistake of law. By clause 11, read literally and in isolation, every trustee in the professed execution of the trusts and powers of the Settlement is exempted from liability for any loss to the trust fund arising -

(1) by reason of any investment or investments made in good faith, or

(2) for the negligence or fraud of any agent, custodian, sub-custodian, investment

adviser or investment manager employed by it or him or any other trustee of the Settlement, or

(3) by reason of any mistake or omission made in good faith by any trustee of the Settlement, or

(4) by reason of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the trustee sought to be made liable.

By clause 18(B) every trustee (other than a trustee charging remuneration for so acting) is exempted from liability for -

(a) any error of judgment, or

(b) any mistake of law. or

(c) any other mistake, or

(d) anything save wilful misconduct or wilful breach of trust by such trustee.

In other words it is envisaged by that clause that the trustee charging remuneration may be held liable for the matters enumerated in limbs (a) to (d). Save for the consistent preservation of liability for wilful wrongdoing,

the inconsistency between clause 11 and clause 18(B) in respect of the trustee charging remuneration seems to us plain.

A new point is taken by Mr. Steinfeld, who did not appear before the judge. It is one which was conceded below. However, as it is a pure point of law, we can, and in the absence of opposition by Mr. Turnbull for the Plaintiffs we did, permit that concession to be withdrawn (see Pittalis v Grant [1989] Q.B. 605). The point now taken is that the words in parenthesis 'in clause 18(B), "(other than a trustee charging remuneration for so acting)", do not apply to a trustee entitled to charge and charging for professional services only under clause 15(A). Mr. Steinfeld submitted that clause 15(A) does not provide for a trustee to charge remuneration for acting as a trustee, but only to be paid all usual charges for business transacted, time expended and acts done not only by himself but also by his firm in connection with the trusts. He contrasted that with clause 15(B) which expressly allows a corporate trustee "as such Trustee ... [to] act upon its standard conditions .... and .... charge .... remuneration as provided by those conditions". He pointed out that to limit the words in parenthesis in clause 18(B) to a corporate trustee charging remuneration under clause 15(B) would cause the whole problem presented by the preliminary issue to disappear. He drew our attention to current standard terms of two bank trust corporations. They allow those trust corporations to charge specified charges on an annual basis regardless of the time actually expended on the trust. He also showed us precedents in the Encyclopaedia of Forms and Precedents 5th ed. 1997 Reissue in support of a submission that whilst it was usual to exclude trust corporations from the benefit of trustee exemption clauses, it was unusual to exclude professional trustees.

We are not persuaded by these submissions, attractively though they were presented. Clause 15 has been inserted in the Settlement without regard to the fact that some of its wording is wholly inapposite. It appears to have been taken from a precedent of a settlement the trustees of which were corporate trustees; hence the opening words of clause 15(B), "The Trustees and any other body corporate". By common consent they must be read as

“Any body corporate”. That careless drafting and other infelicities in the Settlement (for example the use of the conjunction “and” between “fraud” and “wrong doing” in limb(4) of clause 11, when “or” must have been intended) does not encourage a literal approach to the construction of the Settlement. It is to be noted that clause 15(A) is expressed to apply to any trustee being a person engaged in any business (or profession) and so applies to a corporate trustee. The function of clause 15(B) is to allow a corporate body which has standard conditions for acting as trustee to charge according to the conditions from time to time in force and the charges allowed by those conditions may differ from those allowed by clause 15(A). Bearing in mind that the Settlement was made in 1980, we do not think that we are in a position on the material before us to agree or disagree with Mr. Steinfeld’s submission on how usual or unusual an exception for trust corporations or for professional trustees from trustee exemption clauses was at the material time. Nor does it really matter. Clause 15(B) is expressly not limited to trust corporations. Further it is not suggested that no corporate trustee charges on the basis of business transacted, time expended and acts done as trustee, and Mr. Turnbull told us that to his knowledge there are corporate trustees who so charge. The precedents to which Mr. Steinfeld drew to our attention included one in which provision was made for a professional paid trustee to be excluded from a trustee exemption clause. That is hardly surprising. As Potter L.J. observed in the course of argument, such a trustee may well have insurance to protect him against liability while acting as trustee, whereas the unpaid trustee probably will not. If the professional trustee charges for his services in acting as trustee, it is not unreasonable for a settlor to require that he be liable for loss caused by his acts or omissions. Certainly this court expects a paid trustee to exercise a higher standard of diligence and knowledge than an unpaid trustee (see, for example, Re Waterman’s Will Trusts [1952] 2 All E.R. 1054 at p.1055 per Hannan J.).

If Mr. Steinfeld is right, the intention of the Settlor in using the words in parenthesis in

clause 18(B) was to limit the exclusion from the trustee exemption clause not to all paid trustees nor to all trust corporations nor to all corporate

trustees but to those corporate trustees who charge remuneration in accordance with standard conditions. The corporate trustee which charged only in accordance with clause 15(A) for business transacted, time expended and acts done as trustee would not be excluded. That distinction does not seem to us to be likely to have been intended. No comparable precedent of a clause limited in that way was shown to us. If one asks whether a trustee, who is a solicitor or accountant or stockbroker and charges his usual professional charges for business transacted or time expended or acts done by him as trustee, is charging remuneration for acting as trustee, the answer is surely "Yes". The words "charging remuneration" are not a term of art. "Remuneration" in its natural meaning encompasses any payment for services rendered. If the words in parenthesis in clause 18(B) are given their ordinary meaning, the sensible result is achieved that those trustees who are not paid for acting as trustees can avail themselves of the exemption but those who are paid, whether corporate trustees, in accordance with their standard terms or in accordance with clause 15(A), or individuals, are excluded from the exemption

For these reasons, therefore, we would reject Mr. Steinfeld's submission on the new point.

Mr. Steinfeld next attacked the reasoning employed by the judge in concluding that clause 11 of the Settlement had to yield to clause 18(B). The judge had relied on the decision of the House of Lords in Elderslie Steamship Co. v Borthwick [1905] A.C. 93 relating to how to construe two conflicting clauses in a contract. In that case a bill of lading prepared by the shipowner contained in large print a wide and general exemption clause and in small print a narrower exemption clause conditional on the shipowner taking reasonable steps. The Earl of Halsbury L.C. applying ordinary canons of construction said that each of the parts of the contract must be read so as to give effect to the whole of it if possible. He continued at p.96: "the only mode of so reading is to read the first part of it thus: "I am not to be liable for this", and then what comes after it by way

of exception, “I shall not be liable unless I have failed to take all reasonable means against the injury that has happened”. In that way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract, and give effect to the words which the parties have agreed to Lord Macnaghten, whilst of the same opinion, was unable to reconcile the two clauses and calling the document ambiguous he said at p.96: “It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.” Lord Lindley was also of the same opinion and agreed that the bill of lading did not employ terms sufficiently plain to the shipper and did not relieve the shipowner from liability.

The Elderslie case must be read bearing in mind that it relates to a contractual document between parties at arm’s length as distinct from a settlement between a settlor as settlor and himself and his wife as trustees which would have been couched in the language which the settlor alone wanted. On no account could the Settlor or his wife be personally affected by the words in parenthesis in clause 18(B) as he and his wife, even if they became persons otherwise entitled to charge, were expressly excluded from any right to charge. In Bogg v Raper Millett L.J. (with whom Waller and Chadwick L.JJ. agreed) discussed the approach which the court should adopt to the construction of an exemption clause in a will or settlement. Reference had been made to Chitty on Contracts 27th ed. (1994) para. 14-009 where it had been pointed out that there are two related principles in play: one, that the burden of proving that a case falls within the provisions of an exemption clause lies with the party relying on the clause, so that any ambiguity will be resolved against him; the other, that in a case of ambiguity, the words of the document will be construed against the party who made the document and seeks to rely on them. Millett L.J. commented:

“In the case of a contract these two principles march together, for it is assumed that the party responsible for the inclusion of the exemption clause is the party able to rely on it. In the case of a will or settlement, however, the two principles point in different directions. The document is

the unilateral work of the testator or settlor through whom the beneficiaries claim. There is no inherent improbability that he should intend to absolve his executors or trustees from liability from the consequences of their negligence. They accept office on the terms of a document for which they are not responsible, and are entitled to have the document fairly construed according to the natural meaning of the words used."

This court was therefore saying that there was a difference between exemption clauses in a contract and exemption clauses in a will or settlement. But earlier Millett L.J. had said of a particular trustee exemption clause:

"It was common ground that the clause should be restrictively construed and that anything which was not clearly written 'in should be treated as falling outside it; see Armitage v Nurse (supra) at pp. [255G-256A] and the cases there cited which indicate that liability can be excluded only by clear and unambiguous words".

That is plainly right and accords with one of the two grounds on which, as we see it, the Elderslie case was decided. There, as here, there was no ambiguity in either of the two provisions taken alone. The ambiguity arose from the combination of the two provisions in the same instrument and that was to be resolved against the shipowner seeking to rely on it. In the Elderslie case the shipowner was also the originator of the document and to that extent there is a factual difference. But there can be no doubt that the trustee claiming exemption will not have his liability excluded unless he comes clearly within the exemption, and that he cannot do if there is ambiguity created by the two inconsistent clauses.

The other ground for the decision in the Elderslie case was that each of the parts of the instrument must be read so as to give effect to the whole if possible, and this could only be done by treating the first general exemption as subject to the exception contained in the condition in the second provision. In our judgment, the appropriateness of that approach is

not peculiar to contractual documents. It is only common sense that whether the instrument is a contract or a settlement the entire instrument must be read as a single document and inconsistent provisions must be reconciled so far as possible. We cannot see how clause 11 and clause 18 (B) can be reconciled save by reading the reference to a trustee in clause 11 as subject to an exception, where it is a matter which falls within one or more of limbs (a) to (d) of clause 18(B), for a trustee charging remuneration. That does least violence to the language of the Settlement, clause 11 continuing to have full effect in relation to trustees other than those charging remuneration. This is an application of the ordinary principle of construction that general words do not derogate from particular words.

We would therefore uphold the judge's decision on this point.

We turn next to the judge's decision on clause 18(A). The judge said that clause 18(A) only exonerated a trustee from liability for loss or damage accruing as a result of the exercise or non-exercise of a discretion or power and that liability of this kind was one form of liability which on the face of it is also covered by clause 18(B). He therefore found an apparent overlap between the two parts of clause 18(B) in that an unpaid trustee would be protected by sub-clause (B) even if sub-clause (A) had not been included. However, he said that he did not find himself compelled to the same conclusion on clause 18(A) as on clause 11 for two reasons. The first was the structure of clause 18(A), its two sub-clauses forming part of a single clause and he said that it was difficult to suppose that sub-clause (B) was intended to nullify the exonerating part of sub-clause (A) in respect of paid trustees. He relied on the absence from sub-clause (A) of the words in parenthesis in sub-clause (B). The second was that sub-clause (A) dealt with powers and discretions and the consequences of their exercise or non-exercise whereas sub-clause (B) dealt with the general liability of trustees. The overlap between clause 11 and clause 18(B) he described as much more extensive than the overlap between the two sub-clauses of clause 18. He therefore read the words in clause 18(B) "anything save wilful

misconduct or the wilful breach of this Trust by such Trustee" as incorporating after the word "anything" the words "not mentioned in sub-clause (A)".

With all respect to the judge, his conclusion on clause 18 is a little surprising. He does not appear to have considered the purpose of the provisions in sub-clause (A) and in particular why it might have been thought appropriate to exempt from liability a trustee concurring in the exercise or non-exercise of a power or discretion. Insofar as he was accepting an overlap and inconsistency between sub-clause (A) applying to every trustee and sub-clause (B) applying to a trustee other than a paid trustee, we do not find his attempted distinction of his own reasoning in relation to clause 11 very convincing. Further, if words are to be imported, he does not explain why it was night to write words into sub-clause (B) instead of writing the words in parenthesis in sub-clause (B) into the trustee's exemption from liability in sub-clause (A).

Mr. Turnbull submitted that the judge misconstrued clause 18. His primary submission was one which he advanced to the judge but which is not referred to in the judgment, perhaps because the judge thought little of it. It was that the latter part of clause 18(A) should have a very narrow construction, its purpose being to make clear that the trustee would not be liable for exercising or not exercising a discretion or power merely because the court considered the trustees' grounds unreasonable or merely because the court would not have exercised the discretion or power in the same way. He pointed out that clause 18(A) did not purport to exempt a trustee from liability for a breach of trust committed in the course of the exercise or non-exercise of a power or discretion. On that construction he argued that there was no inconsistency between sub-clause (A) and sub-clause (B). His alternative submission was that if the latter part of sub-clause (A) does give exemption for loss accruing as a result of a breach of trust committed in the course of concurring or failing to concur in the exercise of a discretion or power, it should be construed as not applying to a paid trustee.

Mr. Steinfeld accepted that the first part of clause 18(A) was intended to perform the function for which Mr. Turnbull argued. He agreed that its purpose was to prevent the court from going into the reasons why the trustees did or did not exercise a discretion or power. He also accepted that the purpose of the second part of clause 18(A) was to exempt a trustee from liability in such a case. He too said that clause 18(A) dealt with different points from clause 18(B) which was concerned with breaches of trust. Thus far, it seems to us, Mr. Turnbull and Mr. Steinfeld were at one, and the judge's approach in finding an overlap between the two was different. But where Mr. Steinfeld departed from Mr. Turnbull was on the application of clause 18(A) to the facts. Mr. Steinfeld argued that what was really being complained about in the present case was the failure by the trustees in April and September 1991 to exercise the power to sell or the exercise of the power to retain and that such a complaint was precisely what clause 18(A) was designed to prevent. Mr. Steinfeld argued that even where the complaint was that in April 1991 Mr. Olswang made an error of law over s.7 of the 1985 Act, that only provided the underlying reason why the trustees did not sell the Aegis shares, and Mr. Olswang was protected by clause 18(A) in respect of that.

We shall consider first the question of construction and revert to the application of the clause so construed to the facts later.

It is in our opinion correct that the first part of sub-clause (A), in making every discretion or power conferred on the trustees an absolute and undoubted discretion or power, must have been intended to enable the trustees to act without consulting or obtaining the consent of any beneficiary or anyone else and to limit the scope for intervention by the court. The second part of the clause, whilst on its face exempting every trustee from liability does so only in relation to loss or damage accruing as a result of the trustees concurring or failing to concur in the exercise of the absolute and uncontrolled discretion or power. It is significant that there is

no reference to, for example, a breach of trust or other impropriety in the exercise or non-exercise of the power and that to our mind suggests that the scope of the second part of the same sub-clause (A) is limited as Mr. Turnbull suggests. The wording of the second part indicates that the loss which is exempted is that which accrues merely as a result of the trustee concurring or failing to concur. Further as Mr. Turnbull pointed out, if the wording is construed as covering any breach of trust committed in the exercise or non-exercise of the power or discretion, that would purportedly exclude a wilful or dishonest breach of trust, which in the light of limb (4) of clause 11 and limb (d) of clause 18(B) cannot have been intended. Moreover, sub-clause (A) would be inconsistent with sub-clause (B), a construction which should be avoided particularly when both form part of the same clause. The judge's solution of importing words into sub-clause (B) was a bold one, which again should be avoided if possible. Finally, it is to be borne in mind that whilst professional trustees are entitled to have professionally drawn exemption clauses for which they are not responsible fairly construed according to the natural meaning of the words used, the court should not be astute to construe an exemption clause beyond its natural meaning. To exclude liability for breaches of trust or negligence by a trustee there should be clear and unambiguous words in the Settlement. We do not find them in clause 18(A) which on the face is limited to exempting a trustee from liability for loss or damage accruing only from the trustee concurring or failing to concur in the exercise of an absolute and uncontrolled discretion or power.

For these reasons we accept Mr. Turnbull's primary submission as correct and we would respectfully differ from the construction by the judge of clause 18.

We return to Mr. Steinfeld's submissions on the facts. We see considerable force in many of the criticisms which he makes of the Plaintiffs pleaded case. But the preliminary issue is worded on the basis of a hypothesis that the breaches of trust and duty alleged in paras 15, 16, 20 and 23 are established. That seems to us, as it did to the judge, to require the court to

assume the establishment of those breaches and that does not give scope to the court to decide on the preliminary issue whether those pleaded breaches are sustainable. There is no application to strike out which is before us, and it seems to us inappropriate for this court to rule on whether the relevant pleadings are demurrable. Similarly we think it inappropriate to determine the informal application which Mr. Turnbull made to us to amend further the Amended Statement of Claim in the form of draft amendments of paras. 18, 19 and 20. Mr. Turnbull submitted that the amendments were intended to make clear what is already pleaded in para. 18 But it is at least arguable that they go further than that and Mr. Steinfeld has indicated that the amendments would be resisted as introducing a new cause of action after the limitation period had expired. If the application to amend is pursued, then that should de done by an appropriate application to the High Court.

Because of the conclusion which we have reached on the construction of clause 11 and clause 18, we would allow the Plaintiffs appeal and discharge that part of the judge's order by which he declared that clause 18 (A) would protect Mr. Olswang from the breaches of trust and duty alleged in paras. 20 and 23 and we would substitute a declaration that clause 18(A) would not protect him from those breaches of trust and duty.

Order: Appeal allowed with costs of appeal against First Defendant, costs of cross appeal by First Defendant to be paid by First Defendant, First Defendant not to be entitled to reimburse himself from trust fund in respect of his costs of appeal or cross appeal or cross appeal or of appeal or cross appeal ordered to be paid by him.. Legal aid taxation of appellants' costs of appeal and cross appeal, costs below to be costs in the cause.

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