INDEMNITIES FOR RETIRING TRUSTEES

Paul Matthews

Address: Kings College, London
Email : paul.matthews@kcl.ac.uk

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"Well done, thou good and faithful servant". (Matthew, 25 v 23)

Where UK resident trustees of an English law trust retire in favour of offshore trustees, how can they protect themselves against liabilities which are then contingent or unquantified (e.g., taxation) for which they may thereafter be chargeable? In theory, they could probably retain a part of the trust fund and satisfy the liabilities out of that (see *Underhill and Hayton, Trusts and Trustees,* 14th ed. 1987, at 708). Usually that is not practical, and a deed of indemnity is sought (and obtained) from the new trustees or the sui juris beneficiaries (see e.g., *Roome v Edwards* [1982] AC 279 at 299 C-E). Are such indemnities valid, and how far are they enforceable against (a) the new trustees, (b) the trust fund, and (c) others? We consider first of all the position of the new trustees.

The General Rule

No modern professional trustee ever wishes his liability in respect of a trust and its transactions to exceed the value of the fund in his hands, and usually he seeks to avoid personal liability altogether. But in English law the general rule is that liabilities undertaken by trustees are personal and not limited to the value of trust assets *(Re Johnson* (1880) 15 Ch D 548 at 552, unless it is made clear to the other party that the trustees's liability is limited to that, or any other, extent *(Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 355).

In the United States of America the mere use of the words "as trustee" is usually sufficient to make this clear *(Scott on Trusts,* 3rd ed., paras 262-263), but in English law this is not enough: there must be more than mere knowledge that he is acting as trustee to limit the trustee's liability or to demonstrate the payment is to be made only out of the assets of the trust and not by the trustee personally *(Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 368). If it is attempted, not merely to limit the trustee's liability, but to exclude it altogether, and not to direct payment out of a particular fund, then this is simply void, as repugnant to the personal liability prima facie undertaken: *Watling v Lewis* [1911] 1 Ch 414 at 424).

It is therefore not uncommon to find indemnities being given in terms which expressly limit the new trustees' liability to the value of the trust fund handed over to them by the retiring trustees (or in their hands from time to time thereaiter). Alternatively, indemnities are sometimes given in terms purporting to bind the trust fund, "without personal liability on the part of the trustees". Do such indemnities bind the trust fund?

Power To Give Indemnities

The first question is whether the trustees had power to give the indemnity at all. Although modern trusts may contain a suitable power, older trusts usually do not, and in such cases the general law must be considered. The Trustee Act 1925 confers no express power to give such an indemnity, and, given the right of the retiring trustee to a lien on the trust fund for his trust liabilities *(Jennings v Mather* [1901] 1 QB 108 at 113-114, [1902] 1 KB 1 at 6, 9), it may be doubted how far equity would have found it necessary to imply such a power as a matter of general law. Certainly I know of no authority so holding.

However, trustees do have power to "compromise...or settle...any...claim or thing whatsoever relating...to the trust, and for any of those purposes may enter into, give, execute and do such agreements ... and other things as ... seem expedient ..." (Trustee Act 1925, s. 15). In the face of this provision, if the retiring trustees refuse to give up their claim to a lien (or, indeed, refuse to retire, where this is important) except on terms that they obtain such an indemnity, it seems right that the new trustees should have power to give one. Of course, the mere existence of a power does not mean that the trustees may always properly exercise it. It must be in the best interest of the trust in all the circumstances that the power be exercised.

The second question is, what is the consequence of the proper exercise of a power to give an indemnity to a retiring trustee? Two points can be made. First, it must be a matter of construction whether the indemnity of itself gives rise to any direct claim on the trust fund, although it is not necessary to have express words creating a charge, for an intention to do so may be inferred from all the circumstances, as where a debtor undertakes to segregate a fund and to pay the debt out of it, with no contra indications *(Swiss Bank Corporation v Lloyds Bank* [1982] AC 584, per Buckley LJ at 595G; affirmed HL ibid). But in the absence of express or implied intention to create a charge, the indemnity will not create a proprietary claim on the trust fund *(Strickland v Symons* (1884) 26 ChD 245).

Second, if the new trustee (properly giving the indemnity), is personally liable, he will be able to look to the trust fund for a counter indemnity (Trustee Act 1925, s.30(2)), and this will give rise to a lien for the new trustee. The retired trustee will in such a case usually be able, by means of the doctrine of subrogation, to look through the new trustee, directly to the lien on the trust fund which the new trustee enjoys, and in this way to make a proprietary claim on the fund (see *Re Johnson* (1880) 15 ChD 548 at 552). However, the retired trustees' property claim in such a case is subject to this, that it cannot be any better or stronger than the new trustees' own claim to reimbursement, which may be impaired by reason (for example) of their own indebtedness to the trust *(Re Johnson,* ibid).

Limited Indemnities

If the new trustees' liability under the indemnity is expressly limited, for example to the value of the trust fund in their hands, can they reduce this value, say by distributing the trust fund? If the retired trustees' claim is (for whatever reason) a claim on the trust fund, then in principle any distribution to beneficiaries, being a distribution not for value, will remain subject to the indemnity claim, even in the beneficiaries' hands. Of course, a beneficiary might not retain the distributed funds very long, but might consume them without any exchange product, and in such a case a retired trustee's proprietary claim would disappear.