However, the Forfeiture Act raises difficulties of its own, notably the formula to be applied. The statute is not particularly helpful. Apart from requiring the court "to have regard to" the conduct of the offender and the deceased, and to such other circumstances as appear to be material, all that is specified is that the court should not make a modification order unless "the justice of the case" requires the effect of the forfeiture rule to be modified: s. 2(2). In *Dunbar* v. *Plant,* the Court of Appeal held that this did not mean that the correct approach was "to do justice between the parties", in this case Miss Plant, the offender, and the parents of Mr. Dunbar, representing his estate. The first and paramount consideration must be (according to the majority) whether the culpability of the beneficiary's conduct was such as to justify application of the forfeiture rule at all. Where the death has resulted from a suicide pact, the survivor would normally attract sympathy rather than prosecution, and the appropriate order would be to give total relief against forfeiture. In setting aside the judge's order (for partial relief only), the majority were influenced by the fact that the assets destined for Miss Plant had not derived from the deceased's family, and that the family would be acquiring an "unwelcome windfall". Mummery L.J., dissenting, would have upheld the judge's order, as the moral claims and wishes of the deceased's family, who would be entitled to take on application of the forfeiture rule, were material and should be given weight.

There remains considerable uncertainty over the method of application of the statutory discretion. It is notable that in all reported cases where relief from forfeiture has been granted, modification of the rule has been total: see *Re K* [1986] Ch. 180, *Re H* [1991] 1 F.L.R. 441, *Re S* [1996] 1 W.L.R. 235, and now *Dunbar* v. *Plant.* It seems that once the judge determines that the moral culpability of the offender demands relief from the consequences of the forfeiture rule, it is difficult to find a satisfactory rational basis on which to divide the spoils.

STUART BRIDGE

TRUSTEES' EXEMPTION CLAUSES

IN *Armitage* v. *Nurse* [1997] 3 W.L.R. 1046, the Court of Appeal determined what the effect would be of including in a trust instrument an exemption clause ("an *Armitage* exemption clause") which purported to absolve a trustee of that trust from all liabilities

https://doi.org/10.1017/S0008197300134336 Published online by Cambridge University Press

except those arising from his or her "actual fraud". Millett L.J. gave the only judgment. He made two important points.

The first point

A trustee's breach of trust constitutes "actual fraud" if it was committed dishonestly. A trustee who commits a dishonest breach of trust will not therefore be able to escape liability for his or her conduct by reference to an *Armitage* exemption clause because such a clause does not purport to exempt him or her from liability for that sort of conduct. Millett L.J. thought that a trustee's breach of trust is dishonest only if he or she knowingly committed the breach of trust and did so for ulterior purposes, not in order to advance the best interests of the beneficiaries.

The second point

The courts will never refuse to give effect to an *Armitage* exemption clause. So if there is an *Armitage* exemption clause in a trust instrument the trustees of that trust will always be able to escape liability for their breaches of trust so long as they are committed honestly. There are, traditionally, two reasons why the courts may refuse to give effect to an exemption clause in a trust instrument.

The first is that to give effect to the exemption clause would free a trustee from liability for breach of an obligation which must be enforceable for him or her to be a trustee at all: to give effect to the exemption clause would be repugnant to the trust. Millett L.J. thought that giving effect to an *Armitage* exemption clause would never be repugnant to the trust. He argued that the only enforceable obligation to which a trustee must be subject is an obligation to "perform the trusts honestly and in good faith" (at 1056B–C). A trustee who breaches this obligation is never exempted from liability by an *Armitage* exemption clause. Breach of this obligation constitutes "actual fraud".

The courts might also in a particular case refuse to give effect to an exemption clause if to do so would be contrary to public policy. Millett L.J. said that it was not for the courts to decide whether or not it was contrary to public policy in a particular case to give effect to an *Armitage* exemption clause. This question would be better decided by Parliament which could consult with all the interested parties on this matter. So Millett L.J. thought that, until Parliament pronounces on this matter, the courts should never refuse to give effect to an *Armitage* exemption clause on the grounds of public policy.

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Lessons

First, it used to be thought that a trustee who knowingly committed a breach of trust—and was therefore guilty of "wilful default" —could never rely on an exemption clause in the trust instrument to defeat the claim of his or her beneficiaries against him or her for breach of trust. This is no longer the case. A trustee who knowingly commits a breach of trust thinking that to do so is in the best interests of the beneficiaries will not be held liable for breach of trust to those beneficiaries if there is an *Armitage* exemption clause in the trust instrument.

Second, over a century since fusion between the courts of law and the courts of equity, the courts still treat common law and equitable duties differently. A professional person cannot exclude or limit his or her liability for negligence by reference to a term in a contract he or she has entered into if the inclusion of that term in that contract was "unreasonable" (Unfair Contract Terms Act 1977, ss. 2(2), 11). In contrast, a professional trustee who negligently but honestly commits a breach of trust is allowed to rely on an *Armitage* exemption clause in the trust instrument without any inquiry into whether it was reasonable to include such an exemption clause in the trust instrument. This difference in treatment seems unjustifiable.

Third, Millett L.J. took a restrictive approach to the question—what enforceable obligations do all trustees have? He was correct to do so. To say that D holds property on trust for P is not to say much about the obligations owed by D to P. Regrettably, this elementary point was overlooked in *Westdeutsche Landesbank* v. *Islington L.B.C.* [1996] A.C. 669. The issue in that case was whether D, to whom P mistakenly paid money, had to pay the money back to P with compound interest for the time D held that money. Counsel and their Lordships assumed that this turned on whether D held the money on trust for P when D received it. Not so: the fact that D holds money on trust for P does not necessarily mean that D has an obligation to P to invest that money at compound interest, for which interest D then becomes accountable to P. If the contrary is true—as counsel and their Lordships assumed in *Westdeutsche Landesbank*—then an unfairness is created when someone holds property on trust for another because certain facts are true but he or she is not aware of those facts. Lord Browne-Wilkinson, delivering the leading judgment in *Westdeutsche Landesbank,* sought to avoid this unfairness by holding that no one could hold property on trust for another as a result of certain facts being true if he or she was not aware of those facts (at 705C–E). This proposition will wreak great havoc on the law of trusts in future years unless we recognise

https://doi.org/10.1017/S0008197300134336 Published online by Cambridge University Press

that it was based on an incorrect assumption about the law and is therefore incorrect itself. Millett L.J.'s judgment should help us to do this.

NICHOLAS J. MCBRIDE

BIGGER AND BETTER GUNS FOR MINORITY SHAREHOLDERS?

Is the arsenal of weapons at the disposal of disgruntled minority shareholders sufficiently well-stocked at the present time? The Law Commission was given an extremely wide remit: to "carry out a review of shareholder remedies ... and to make recommendations". The need for reform is widely acknowledged, but respondents to the Consultation Paper No. 142 on this topic were less than enthusiastic about some of the suggested changes. The Commission has now published its Report No. 246, *Shareholder Remedies.*

The principal remedies available to minority shareholders who are dissatisfied with the way in which the company is being run are, of course, the derivative action, for wrongs done to the company, the unfair prejudice remedy under sections 459–461 of the Companies Act 1985, for wrongs done to the shareholder (and, in certain circumstances, for wrongs done to the company, *e.g. Re Saul D. Harrison & Sons plc* [1995] 1 B.C.L.C. 14), and the enforcement of the shareholder's personal rights under the articles of association. The last of these has received scant attention from the Law Commission, which recommends no reform, despite voluminous academic writings which are indicative of the confused state of the law in relation to section 14. Of the other two, the Law Commission is clear that "the derivative action is of much less importance in practical terms than the statutory remedy under section 459", an insight which will hardly surprise academics or practitioners.

As regards the unfair prejudice remedy, the Law Commission's concerns echo those of Harman J. that "[p]etitions under section 459 have become notorious to the judges of this court—and I think also to the Bar—for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them ..." (*Re Unisoft Group Ltd. (No. 3)* [1994] B.C.L.C. 609). To tackle these concerns the Report recommends a series of case management measures designed to give courts greater powers, for example to hear preliminary issues and dismiss those parts of a claim which the court regards as having no realistic prospect of success. It is unfortunate that the Law Commission has not addressed the concerns surrounding case management, particularly the research done in the US which suggests that case management may actually increase the cost of litigation, by generating more work for lawyers.

https://doi.org/10.1017/S0008197300134336 Published online by Cambridge University Press