1. Trustees have different duties of care, according to their knowledge, experience and professional qualifications. Are these workable distinctions?

Suggested Answer
See 14.1
The duty of care existed before the Trustee Act 2000 because it had been developed in the case law. The standard was what would an ordinary prudent man of business do in those circumstances and could be found in cases like *Learoyd v Whiteley* (1886) LR 33 Ch D 347. It had also been held that professional trustees owed a higher duty of care in *Bartlett v Barclays Bank Trust Company Limited* [1980] Ch 515. It may be that section 1 of the 2000 Act merely re-enacts the case law, which is one school of thought. The other is that it is intended to change the duty of care of trustees and now trustees will have to be judged by their individual skill and experience. This could presumably mean that in the same circumstances one trustee could be liable and the other not. For example, one trustee could be a professional and one could be an unqualified family member. This goes against the usual approach in equity, that all the trustees bear responsibility. See 14.4.1 and 14.4.2.

2. Should equitable compensation be determined by principles of causation, as suggested in *Target v Redferns* [1996] 1 AC 421?

Suggested Answer
See 14.3
The law had seemed clear from old cases such as *Nocton v Lord Ashburton* [1914] AC 932 which held that trustees had a strict duty to restore the trust fund if they were in breach of trust. *Target v Redferns* cast some doubt on this by suggesting that this was unduly harsh, if the trust was merely a commercial arrangement. Liability should be determined by the common law principles of whether the breach of trust actually caused the financial loss. The old rule, however, should remain for the traditional family trust.
The Supreme Court looked at the issue again in *AIB v Redler* [2014] 3 WLR 1367. Their Lordships made clear that a breach of trust would lead to equitable compensation and the trust fund should be restored. A breach of trust was not the same as a breach of contract or a tort, for example remoteness of damage was not an issue in trusts law, but causation was still relevant to the level of compensation. The court refined the approach outlined in *Target v Redferns* and said that what underlay the trust had to be looked at. It could well be a contractual relationship, as in this case and in *Target.* In both cases it was only appropriate to compensate for the loss caused by the breach. The solicitors' breach of trust did not cause all the loss suffered by the bank when lending money. The court must look closely at the facts in each case to determine the right approach. Similar ideas can be found in *Bristol and West Building Society v Mothew* [1998] Ch 1: there are different types of equitable compensation and only the more serious, fiduciary breaches of trust should carry the full duty of restitution. Causation is also relevant to the section 61 Trustee Act breach of trust defence (see 14.6.4). If the fraud of the trust would have happened anyway,

irrespective of the trustees' breach of trust, the trustees should be excused for their breach of trust: *Ikbal v Sterling Law* [2013] EWHC 3291.

FURTHER READING: S Elliot and J Edelman, 'Money Remedies against Trustees' (2004) 18 TLI 116.

A. Televantos and L Maniscalco 'Stay on Target: Compensation and Causation in Breach of Trust Claims' [2015] Conveyancer 348.

3. Should all trustees be held equally liable for breaches of trust?

Suggested Answer

See 14.4 and 14.6.4.

The general rule is that they are all equally liable, even if a trustee is less experienced or less qualified than the other trustees. Even if the other trustees do all the work, that does not excuse the inactive trustee. The idea is that each trustee should be watching what his colleagues are doing, in order to ensure that the beneficiaries are protected. Only in extreme circumstances can a trustee put all the blame on the other trustee or trustees. This would involve one trustee, say, committing fraud completely unknown to the others: *Bahin v Hughes* (1886) LR 31 Ch D 390 and *Head v Gould* [1898] 2 Ch 250.

It is possible, though for the courts to excuse a breach of trust under s. 61 Trustee Act 1925, if the trustee has acted honestly and reasonably and ought fairly to be excused. That means that the courts can look carefully into the facts of a case and determine levels of liability. Even under that section though, it is unlikely that the court would excuse a trustee who left all the work to the other trustees and never questioned what they were doing: *Re Second East Dulwich 745th Starr Bowkett Building Society* [1899] 79 LT 726.

FURTHER READING: (1955) 19 Conv (NS) 420 L Sheridan, 'Excusable Breaches of Trust'.

4. Is it acceptable for an exemption clause to protect a trustee from being sued?

Suggested Answer

See 14.6.1

It is not correct to say that an exemption clause will completely protect a trustee from being sued. Even a widely drafted exemption clause, such as the example given in *Armitage v Nurse* [1997] 2 All ER 705, will not prevent a trustee being sued for dishonesty or fraud. It does, however, protect a negligent trustee.

This approach was upheld by the Privy Council in *Spread Trustee v Hutcheson* [2012] 1 All ER 251. A trustee exemption clause can protect a trustee being sued for negligence or even gross negligence. The court would not, however, permit a trustee exemption clause preventing legal action for "wilful misconduct", which would be a breach of trust. Trustees must perform their basic duties.

The width of a typical exemption clause has been criticised by the Law Commission, for instance, why should a trustee escape liability for gross negligence? Parliament

has not legislated on the matter, but instead the trustee industry has been encouraged to regulate itself. Clients should be warned of the existence and effect of such exemption clauses. We saw in Question 2 that the liability of trustees can be extensive and, if they could not protect themselves with exemption clauses, it might become difficult to recruit enough trustees, particularly professional trustees.

FURTHER READING:
K.C.F. Loi 'Gross negligence and trustee exemption clauses in the Privy Council: Spread Trustee v Hutcheson' [2011] Conveyancer and Property Lawyer 521.

5. Do beneficiaries really have enough legal knowledge to consent to a breach of trust?

Suggested Answer
See 14.6.2 and 14.6.3.
The burden would be on the trustees to establish that the beneficiaries understood and freely consented to the breach of trust. In our example, *In Re Pauling's Settlement Trusts* [1964] Ch 303, it is made clear that the beneficiaries do not have to have technical knowledge, but must fully understand what had happened. Even though they were adults they were still capable of being under undue influence, making their consent worthless. In *Bolton v Curre* [1895] 1 Ch 544, Mrs Blood was an adult and consented in writing to the breach of trust. The court still decided that she did not know of or consent to the breach of trust. Her husband had instigated the breach, so he was the one who was held liable, together with the trustees, who had agreed to do what Mr Blood wanted.

6. Should a six year limitation period apply to all breaches of trust?

See 14.7.
Section 21 of the Limitation Act 1980 lays down that the basic limitation period is six years. The exceptions are for fraud or removal of trust property and for future beneficiaries. These extended limitation periods are attractive to litigants, so the courts wish to limit their use to cases where there really is a trust involved, rather than cases which could just have well been brought for breach of contract.
Paragon Finance v D.B. Thakerar & Co. [1999] 1 All ER 400 prevented claimants suing outside the six year limitation period, by claiming that there was a breach of fiduciary duty and therefore a constructive trust. Millett LJ held that there were two types of constructive trust. The first was a "real trust" where the constructive trustee actually held the trust property. This was not subject to the six year time limit. An example of this type of constructive trust is *James v Williams* [1999] 3 All ER 309. The second type of constructive trust is imposed where there is fraud, as a means of recovering compensation from a fiduciary. This is not a "real trust" and is more like a breach of contract, so a six year limitation period is appropriate.
This approach was followed by the Supreme Court in *Central Bank of Nigeria v Williams* [2012] 3 All ER 579. Constructive trusts for knowing receipt of trust property,

or dishonest assistance in removing trust property, also fell into the second type of constructive trust and the court action had to start within six years of the wrong.

Time begins to run for beneficiaries when they actually come into possession of their interests: *Cattley v Pollard* [2007] 2 All ER 1086. Six years is still the limit, but that might start many years after the actual breach of trust.

Even if there is no statutory time limit, under the old equitable doctrine of laches, the court can still prevent actions commencing so long after events happened that a trial would be unfair: *Catley v Pollard*, *Fisher v Brooker* 2009 WL 2207252