Neutral Citation Number: [2016] EWCA Civ 799

Case No: A3/2014/3555(A)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE (CHANCERY DIVISION)**
**HIS HONOUR JUDGE NUGEE**
**HC-2010-000008**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2016

**Before:**
**THE CHANCELLOR OF THE HIGH COURT**
**LORD JUSTICE PATTEN**
and
**LORD JUSTICE SALES**

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**Between:**

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| **Barnsley & Ors** | **Appellant** |
| **- and -** | |
| **Noble** | **Respondent** |

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**Mr Romie Tager QC and Mr Justin Kitson** (instructed by **Addleshaw Goddard LLP**) for the **Appellant**

**Mr Joe Smouha QC and Mr Ciaran Keller** (instructed by **Debevoise & Plimpton LLP**) for the **Respondent**

Hearing date: 14th July 2016

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# Judgment Approved

## Lord Justice Sales:

1. This judgment concerns the proper interpretation of an exoneration clause contained in a will to relieve the trustees under trusts set out in the will of personal liability in respect of certain breaches of duty by them.

2. Michael Noble ("Michael") and Philip Noble ("Philip") were brothers who together built up a substantial business and property empire known as the Noble Organisation. The business side included amusement arcades, bingo halls and the operation of slot machines and gaming machines of various kinds. The Noble Organisation had a complex ownership and management structure involving a number of companies and partnerships and certain trusts for the benefit of Michael's and Philip's respective families.

3. Michael died on 19 April 2006. He had made a will ("the Will") governing the disposal of his estate ("the Estate"). The executors who were granted probate and control of the Estate under the Will were Philip, Michael's widow Gillian ("Gill") and John Barnsley (an accountant associated with PricewaterhouseCoopers, "PwC", the accountants for the Noble Organisation). The Will as drafted had also made provision for other professional executors (lawyers and an accountant), but in the event they did not take on that role.

4. After Michael's death, Philip and Gill agreed that there should be a demerger of the business side and property side of the Noble Organisation, on a basis of broad equality of value, with Philip and his family taking the business assets and Gill and her family taking the property assets. The demerger negotiations were conducted over an extended period in 2008 and 2009. It was agreed that Philip should negotiate on behalf of his side of the family and that Mr Barnsley would represent Gill and her side of the family in the negotiations. Eventually a large number of formal documents were executed by relevant persons, including Philip, at a meeting on 9-10 March 2009.

5. Litigation has arisen in relation to the demerger and the background to it is set out in considerable detail in the judgment of Morgan J in *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch) and the judgment of Nugee J in the present case. Philip's appeal from the judgment of Morgan J was dismissed by this court: [2011] EWCA Civ 1619. For the purposes of the present appeal, it is only necessary to summarise the key points on the facts.

6. Prior to the demerger, advisers of the Noble Organisation identified claims that trading companies on the business side might have to recover payments of VAT they had previously made to HM Revenue & Customs ("HMRC") in relation to bingo games and slot machines, on the grounds that it had been contrary to EU law for HMRC to claim this tax. The complex background to the claims for repayment of VAT is explained by Nugee J at paras. [11]-[80] of his judgment.

7. The full detail does not matter for our purposes. What is important is that the extent of the claims for repayment of VAT which it was believed by advisers might be available to companies in the Noble Organisation changed in the course of the demerger negotiations. A first set of claims was identified following the judgment of the ECJ in Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber*,

delivered on 17 February 2005. The implications of this ruling and other domestic judgments following it for possible claims by the Noble Organisation for repayment of VAT and another tax called Amusement Machine Licence Duty had been the subject of debate with advisers well before the demerger negotiations commenced. A first claim for repayment of what have been referred to as *Linneweber* claims had been submitted by PwC on behalf of the Noble Organisation in October 2005. As of October 2008, the *Linneweber* claims made on behalf of the Noble Organisation were for repayment of sums of the order of about £30 million.

8. However, the extent of the claims for repayment of VAT which were thought to be viable changed with an important ruling of the House of Lords in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, handed down in January 2008. In *Fleming*, the House of Lords held that a limitation provision in primary legislation in relation to certain VAT repayment claims was in breach of EU law and could not be relied upon by HMRC. The result of this was that in February 2008 HMRC announced that claims could be made for repayment of VAT representing overpaid or overdeclared output tax in accounting periods before 4 December 1996. These have been referred to as *Fleming* claims. The ability to go back to earlier periods as far back as 1973 to reclaim overpaid VAT potentially increased the amount which the Noble Organisation trading companies might recover by a substantial amount, although any claims for repayment were subject to significant uncertainties and contingencies.

9. Meanwhile, another taxpayer, The Rank Group plc ("Rank"), pursued domestic litigation against HMRC and secured a significant victory at tribunal level in May 2008 in relation to repayment of VAT on bingo gaming. On 10 November 2008 Rank announced that HMRC had repaid it £59.1 million in respect of overpaid VAT on bingo gaming, subject to the outcome of an appeal launched by HMRC. Rank was also considering claims for overpaid VAT in relation to slot machines and *Fleming* claims in respect of periods before 1997.

10. In the period until completion of the demerger the Noble Organisation and PwC continued to assess the implications of these developments and the *Fleming* case for reclaiming VAT. In a general way, Philip was kept abreast of matters, but he did not know the details or the amounts of claims.

11. After execution of the demerger documentation on 9-10 March 2009, the Noble Organisation submitted a series of additional claims for repayment of VAT: on 20 March 2009, a claim of £31.5 million in relation to gaming machines for the period 1 February 2006 to 31 January 2009; on 30 March 2009, *Fleming* claims for repayment of some £70 million in relation to gaming machines and bingo for the period 1 April 1973 to 31 October 1996; and on 30 July 2009, an additional claim for repayment of some £1.5 million in relation to bingo for the period 4 November 2002 to 1 August 2004. A further additional claim for the period 1 February 2009 to 31 January 2013 was submitted in April 2013.

12. When the scale of the additional claims for repayment of VAT, particularly the *Fleming* claims, came to be appreciated by Mr Barnsley and Gill after the demerger, they felt they had been misled by Philip in the course of the demerger negotiations about the value of the VAT repayment claims available to the business side of the Noble Organisation which would be acquired by Philip and his family under the

demerger. Relations also deteriorated as a result of arguments in relation to use by one of the trading companies of one of the properties acquired by Gill's side of the family as a result of the demerger which resulted in the *Crossco No. 4 Unlimited* litigation brought by Philip, referred to above.

13. Eventually, Mr Barnsley and Gill (with other relevant claimants) commenced the present proceedings against Philip, asserting a number of causes of action against Philip. These included causes of action in contract, in deceit (based on a statement made by Philip to Mr Barnsley at a meeting on 8 December 2008) and for negligent misstatement. The claims made against Philip also included claims for breach of duty as a fiduciary (as an executor of the Will and trustee under the Will trusts), first by infringement of the prohibition on self-dealing and secondly by failure to make full disclosure of all the information he had about the VAT repayment claims in the course of the demerger negotiations, down to the execution of the demerger documentation on 9-10 March 2009. Mr Barnsley, Gill and the other claimants did not, however, claim to rescind the demerger on the grounds of the alleged breaches of fiduciary duty. Instead, they claimed equitable compensation from Philip in respect of such breaches.

14. In a full and thorough judgment, Nugee J dismissed all these claims. The judge found that no relevant contract had been made to share the VAT repayment claims. He found that at the end of the meeting on 8 December 2008, which dealt with many other matters, Mr Barnsley, without any notice to Philip, had raised the question of how the benefit of the VAT repayment claims might be split in the demerger. There was a brief discussion lasting less than five minutes, in which Philip used words to convey the idea that he did not think the claims were likely to succeed and suggested that Mr Barnsley might like to buy them at a low price. The judge found that this was a true statement by Philip referring to his genuine and honest belief at the time regarding the prospects of success for the repayment claims and his assessment of their value. He also found that (a) Philip's statement was not one which Mr Barnsley was intended and entitled to rely on and (b) on the facts Mr Barnsley was not induced to enter into the demerger on behalf of Gill and her family interests by what was said by Philip. The judge found that Philip owed no relevant duty of care in tort.

15. The judge summarised the claim that Philip was in breach of fiduciary duty in that he acted in breach of the self-dealing rule in this way at para. [261]: (i) Philip was an executor of the Estate; (ii) the substance of the demerger was a transaction between the executors of the Estate and Philip personally; (iii) it therefore attracted the self-dealing rule which applies to transactions between a fiduciary in his fiduciary capacity and himself in his personal capacity (so that the transaction was voidable by any beneficiary *ex debito justitiae*, however fair the transaction: see *Tito v Waddell (No. 2)* [1977] Ch 106, 241A); (iv) such a transaction is in breach of the rule unless the fiduciary has obtained his principal's fully informed consent; and (v) since Philip did not obtain such fully informed consent he was in breach of the rule and liable for breach of trust.

16. At trial, Philip's primary defence to this claim was that he could take advantage of a provision in the Will which expressly permitted self-dealing in certain circumstances. This is contained in paragraph 18 of schedule 1 to the Will ("the Transactions Clause"):

> "My Trustees shall have power to enter into and complete contracts or other transactions with themselves or any of them (acting in their own interests as individuals or in some other fiduciary capacity) for the sale purchase exchange or otherwise of any part or parts of my Residuary Estate provided that:-
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> (i) every trustee personally interested therein shall have acted in good faith and either:
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> (ii) at least one of my Trustees shall have no interest in the contract or transaction (as the case may be) save as one of my Trustees or
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> (iii) (in the case of a sale purchase exchange or like transaction) an independent and duly qualified valuer instructed by and acting exclusively for my Trustees in their capacity as such shall have certified that in his opinion my Trustees will receive full value in money or money's worth pursuant to such transaction."

Although paragraph 18 referred to Michael's Residuary Estate, and his business interests did not form part of his Residuary Estate but a separate fund called his Business Fund, clause 6(4) of the Will provided that Schedule 1 also applied to his Business Fund. By clause 2 of the Will "my Trustees" meant Michael's Executors and trustees appointed under the will.

17. Proviso (iii) in the Transactions Clause was not satisfied, but Philip argued that provisos (i) and (ii) were satisfied. The judge held that Philip had acted in good faith within the meaning of proviso (i): paras. [265]-[272].

18. Philip argued that proviso (ii) was satisfied because Mr Barnsley was a trustee with no interest in the demerger transaction save as a trustee of the Will trusts (or executor). However, the judge ruled against Philip on this point. Mr Barnsley was a trustee of one of the family trusts (the 1997 No. 1 settlement) which held small shareholdings in two companies in the Noble Organisation which were the subject of the demerger transaction, and under that transaction that family trust was to acquire shares in another company in the organisation in exchange for those shareholdings; Mr Barnsley therefore had an interest in the demerger transaction (albeit not a personal beneficial interest of his own) in a capacity other than that as a trustee of the Will trusts or executor: paras. [273]-[283].

19. However, the judge upheld Philip's alternative defence, based on the exoneration clause in clause 14 of the will ("the Exoneration Clause"): paras. [284]-[292]. Clause 14 provides:

> "In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust premises arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by him or by any other trustee hereof although the employment of such agent was not strictly necessary or expedient or by reason of any

> other matter or thing except wilful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable Provided Always that in the case of any trustee hereof who or whose firm for remuneration renders legal accountancy or other professional or business services to my Trustees nothing in this Clause shall exonerate such trustee or his firm from liability for negligence or other wrongdoing in relation to the services so rendered."

It is common ground that the word "trustee" includes an executor of the Will and that the clause is accordingly capable of being applied to Philip acting in his capacity as executor. I consider the arguments which arise on this clause below.

20. Philip also put forward a number of other defences to the self-dealing claim, which the judge did not accept.

21. Finally, as regards the complaint of a breach of a fiduciary duty said to be owed by Philip to disclose to Mr Barnsley and Gill all relevant information concerning the VAT repayment contingency, this was analysed by the judge by analogy with the well-recognised fair-dealing rule applicable where a trustee purchases the beneficial interest of his beneficiary (see *Tito v Waddell (No. 2)* at p. 241A): paras. [307]-[309]. He held that Philip had a duty of full and frank disclosure to Mr Barnsley and Gill analogous to that arising under the fair-dealing rule: para. [309].

22. However, the judge held that Philip's conduct was covered by the Exoneration Clause and therefore dismissed the claim for equitable compensation based upon the allegation of breach of this duty: paras. [310]-[318]. At para. [310] he pointed out that the Exoneration Clause would not bar a claim for rescission if one was made, but in this case the only claim was for equitable compensation, which is a matter covered by the clause. Philip had not been guilty of wilful misconduct in the relevant sense: "He did not deliberately keep things back from Mr Barnsley knowing that he ought to disclose them" (para. [311]).

23. At para. [315] the judge said this:

> "Turning then to the particular matters which it is said should have been disclosed, the first is the fact that more claims had been filed since the initial claim filed by Mr Whitelaw [of PwC], and that very substantial *Fleming* claims were in preparation. I have found above that Philip knew that *Fleming* claims could be put in that would go back earlier than the existing claims, and that such claims were under preparation, but that he did not know the amount of such claims. Philip also said that he assumed Mr Barnsley knew as much about this as he did. I find that Philip did not say anything to Mr Barnsley about the *Fleming* claims being prepared, and that this was potentially material information, but that in failing to say anything about it, Philip was not deliberately or consciously acting in a way he knew to be wrong. No-one had told him he needed to keep Mr Barnsley informed about the *Fleming* claims; Mr Barnsley obviously knew about the *Linneweber*

> claims, which had been referred to in the [report by Close Brothers, who advised both sides in relation to the demerger], and Philip assumed that Mr Barnsley knew what he needed to know to negotiate the split. In fact, as appears above, Mr Barnsley did not think he needed to know the size of the claims in order to negotiate a split. It is not surprising therefore that he never sought to check on the size of the claims: if he had wanted to do so he would not have asked Philip in any event."

24. Mr Barnsley, Gill and the other claimants now appeal to this court on a number of grounds in relation to their claims for equitable compensation. Philip has put in a respondent's notice which supports the judge's judgment in dismissing those claims and seeks to resurrect other defences to those claims which the judge did not accept. However, if the judge's ruling on the meaning and effect of the Exoneration Clause is upheld, the other arguments which each side would wish to canvass on a full appeal will not arise. Therefore a direction was made for the grounds of appeal advanced by Mr Barnsley, Gill and the other claimants in relation to the Exoneration Clause to be determined first, in a separate hearing. That has been the subject of the appeal we have heard and is the issue with which this judgment deals.

25. The parties are agreed that this court should proceed on the basis of the findings of fact made by the judge.

*Discussion*

26. Mr Tager QC, for Mr Barnsley, Gill and the other claimants, presents three arguments why the Exoneration Clause does not apply to protect Philip in respect of the claims for equitable compensation in the circumstances of this case. It is said that:

    i) The Exoneration Clause has no application in respect of a breach of the self-dealing rule. The only provision in the Will which modifies the impact of that rule is the Transactions Clause, and the judge found that Philip could not bring himself within the scope of that provision. This was not an argument made below, but it is a pure point of law on the interpretation of the Will and is advanced in this court without objection from Philip and with the permission of the court;

    ii) The Exoneration Clause has no application because in negotiating the demerger and in executing the documents to give effect to it there was no evidence that Philip had consciously thought about the exercise of the power in the Transactions Clause, with the result that it could not be said that he acted "In the professed execution of the trusts and powers [of the Will]". The judge rejected this argument at paras. [285]-[288]; and

    iii) In negotiating the demerger and in executing the documents to give effect to it, Philip engaged in "wilful and individual fraud or wrongdoing" and hence could not bring himself within the protection of the Exoneration Clause. Mr Tager contends that the word "wilful" bears the very wide meaning of "intentional", in the sense that a person acts intentionally if he intends to do a specific act or consciously makes a specific omission, and that act or omission happens to constitute wrongdoing (as the claimants say Philip's conduct

> amounted to wrongdoing, as being in breach of his fiduciary duties), whether or not the person knew his act or omission was wrongful and whether or not he intended to behave in breach of his legal obligations. The judge rejected this argument at para. [291].

At paras. [289]-[290] the judge rejected another argument of Mr Tager, that the words "wilful and individual" in the Exoneration Clause governed only the word "fraud" and did not apply to "wrongdoing". Mr Tager did not seek to resurrect that argument on this appeal.

27. In my judgment, each of Mr Tager's arguments at (i) to (iii) above should be rejected. I deal with them in turn.

28. In my opinion, argument (i) is unsustainable as a matter of interpretation of the Will. The Transactions Clause and the Exoneration Clause deal with different topics. The Transactions Clause modifies the self-dealing rule and the fiduciary obligations owed by an executor or trustee: (a) if an executor or trustee deals with the Estate under a contract or transaction in which he is personally interested but where the conditions set out in the clause are satisfied, he will not have breached any obligation owed to the beneficiaries under the Will, since the executors and trustees are given express power to do just that; (b) in such a case, the beneficiaries and other trustees or executors will not be entitled to rescind the transaction; and (c) in such a case, there could be no question of the self-dealing executor or trustee being liable to pay equitable compensation, as there would have been no breach of obligation by him. The Exoneration Clause, on the other hand, only has effect in a case in which, but for the clause, a trustee would be "liable for any loss to the trust premises". *Ex hypothesi* that is not the case where the trustee has acted within the scope of the Transactions Clause.

29. Of course, where a trustee acts in breach of the self-dealing rule and cannot bring himself within the Transactions Clause, the transaction will be liable to be rescinded (if that remedy is sought and remains available) and the trustee may be liable to pay equitable compensation. The Exoneration Clause has nothing to say about the question of rescission. But it does clearly deal with the question whether the trustee should be personally liable to pay equitable compensation for any loss suffered by the Estate. Provided the conditions which are addressed in arguments (ii) and (iii) are satisfied, the operative language of the clause in relation to a lay (i.e. non-professional) executor or trustee is entirely general and unqualified: "… no trustee shall be liable for any loss to the trust premises arising by reason of [etc] …"

30. There is nothing in the language of the provision or the context to indicate that the Exoneration Clause does not apply to one category of trustee liability (i.e. for loss suffered as a result of breach of fiduciary obligation through breach of the self-dealing rule), even though it applies to all other categories of trustee liability. There is no good reason to distinguish the first category from the others. On the contrary, there is good reason why the Exoneration Clause, as it applies to lay executors and trustees, should be construed as covering all categories of personal liability for loss to the Estate. It is not plausible to suppose that Michael would have wanted his widow and his brother to be at risk of personal liability to pay compensation in circumstances where they would naturally feel a personal bond and moral obligation to take on the

potentially onerous task of being an executor of his Will and had acted honestly in doing so (see the discussion in relation to argument (iii) below).

31. Mr Tager sought to maintain that the Transactions Clause constituted a complete code for modification of the self-dealing rule so far as it applied to the executors, so that it was implicit that the Exoneration Clause should have no application in cases where the self-dealing rule was breached because an executor could not show that the Transactions Clause applies. In my view, that is not a tenable interpretation of the Will. There is nothing in the language or context of either the Exoneration Clause or the Transactions Clause to support this contention. As explained above, the Exoneration Clause clearly applies in such a case, providing the requirements set out in it are satisfied.

32. In my judgment, argument (ii) is unsustainable as well. Mr Tager submits that the word "professed" means something akin to "purported" and that one cannot purportedly exercise a power of which one is unaware. The judge said this at paras. [287]-[288]:

> "287. Mr Smouha [for Philip] submitted that this was not what the clause required. The effect of the words "in the professed execution of the trusts and powers hereof" was simply to confine the operation of the clause to acts of the Executors carried out *qua* executors. It would lead to absurd results if it had to be shown that the Executors knew they were acting under a particular power in the will.
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> 288. I accept Mr Smouha's submission. In my judgment an executor is acting in the professed (or purported) execution of the trusts and powers of a will if he is dealing, (or purporting to deal) with the estate in his capacity as executor. He need not have the terms of any particular power in mind. In the present case there is no doubt that Philip was acting as Executor on behalf of the Estate (as well as in his personal capacity): thus for example the Share Exchange Agreement entered into in relation to Addbudget as part of Step 10 was executed by Philip twice, once in his personal capacity and once by him (as well as by Mr Barnsley and Gill) expressly "as Executor of the Estate of Michael Noble (Deceased)." This was in my view plainly a transaction entered into by Philip in the professed execution of the trusts and powers of the Will. In fact those who drafted it may have had specifically in mind paragraph 9 of schedule 1 to the Will which empowered the Trustees to deal with property by way of, among other things, exchange; but it does not in my judgment matter whether they did or not. The execution of the document, and of all the other parts of the transaction to which Philip was a party in his capacity as Executor, was sufficient to attract the protection of the clause."

33. I agree with the judge's reasoning on this point. As noted by Sir Christopher Slade in this court in *Walker v* Stones [2001] QB 902 in relation to an exoneration clause which used the same phrase, "in the professed execution of the trusts and powers

hereof ..", the dictionary definition of the word "professed" includes "alleged, ostensible" (p. 935E), i.e. it refers to the actions of a trustee as they appear to the outside world, rather than to the subjective state of mind of the trustee when he acts. On that basis, Sir Christopher rejected a submission that the clause would not cover a case in which trustees were conscious that they were acting outside their powers, saying that on its true construction the clause "must apply so as to exonerate the trustees, save to the extent excluded by the clause …, for anything done by them in the *purported* execution of the trusts and powers of the … trust deed – that is to say even though in fact not done in the exercise of such trusts and powers" (p. 935E-F, emphasis in original). The other members of the court agreed with Sir Christopher Slade's judgment.

34. The force of the word "purported" as used here is to refer to external appearances regarding what powers an individual seems to be exercising, rather than to his subjective state of mind regarding whether he is consciously using powers in the trust instrument or not. Therefore, contrary to Mr Tager's suggestion that he derives support from *Walker v Stones*, it is an authority which is contrary to his submission. As Nugee J points out, on the facts of the present case, there is no doubt that in entering into the demerger transaction Philip was acting in relevant respects *qua executor* and in the purported execution of the trusts and powers set out in the Will, i.e. "in the professed execution of those trusts and powers".

35. Mr Smouha QC for Philip correctly points out Mr Tager's proposed construction of this phrase would lead to absurd results, as the judge accepted. For instance, if one executor thinks (wrongly) he is acting under a particular power and another gives no thought to that at all, the former would be exonerated from liability but the latter would not. A lay executor who read the Will but misconstrued a clause in it would be exonerated, but a lay executor who did not read the Will but reasonably followed the lead of a professional co-executor in entering into a transaction would not. Such examples can be multiplied.

36. Finally, I turn to argument (iii). In my view, this argument too must be rejected. The judge was right to dismiss it at para. [291], where he said this:

> "I … agree with what was said in *Bonham v Fishwick* [at [2007] EWHC 1859 (Ch), at [23] and [28], per Evans-Lombe J] about "wilful … wrongdoing", namely that it means "conscious and wilful misconduct", what Millett LJ referred to in *Armitage v Nurse* [1998] Ch 241 at 252E as requiring "knowing and deliberate breach of duty or reckless indifference" to the possibility of such breach: see at [28]. In the light of my findings on Philip's good faith, I find that it has not been established that Philip is guilty of such wilful wrongdoing."

37. In my opinion, on a fair reading of the phrase "wilful and individual fraud or wrongdoing on the part of the trustee" as used in the Exoneration Clause, it is clear that it has the meaning which the judge identified.

38. The reference to "wilful ... fraud" is to be explained by reason of the extended sense in which the word "fraud" is used in equitable contexts, as explained by Millett LJ in *Armitage v Nurse* at p. 250D-G (Millett LJ contrasted this with the phrase "his own

actual fraud" in the exoneration clause falling for interpretation in that case, which he construed as a reference to the tort of deceit). I think that this tends to emphasise the correctness of Nugee J's interpretation of the Exoneration Clause. The phrase "wilful fraud" means that it is a knowing and deliberate breach of a relevant equitable duty or reckless indifference to whether what is done is in breach of such duty which has to be shown. The word "wilful" here does not carry the much weaker connotation of intentional action which Mr Tager proposes.

39. The interpretation preferred by Nugee J is also borne out by consideration of the phrase "wilful ... wrongdoing" in the Exoneration Clause. In *Lewis v Great Western Railway Co.* (1877) 3 QBD 195, at 206, Bramwell LJ said, "'wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful" (emphasis in original). The Privy Council cited this statement with approval in *Spread Trustee Co. Ltd v Hutcheson* [2011] UKPC 13; [2012] 2 AC 194, at [55]. The point made by Bramwell LJ is about the natural meaning of the phrase "wilful misconduct". The same point applies in respect of the phrase "wilful wrongdoing": it is the *wrong*doing, not the doing, which must be wilful.

40. The same phrase, "wilful and individual fraud or wrongdoing on the part of the trustee", was used in the exoneration clause under consideration in *Bonham v Fishwick*. I have already referred to the meaning given to that phrase by Evans-Lombe J at first instance, which accords with my own interpretation of it. The case concerned an allegation that trustees had engaged in "wilful individual wrongdoing" in entering into a particular transaction such that they could not rely on the exoneration clause in respect of their conduct in doing so. The trustees had taken legal advice in relation to the transaction. Evans-Lombe J struck out the action on the basis that the claimants had failed to make and support by evidence any proper allegation of conscious and wilful misconduct by the trustees, with the result that they were entitled to rely on the exoneration clause and hence had a complete defence to the action. The case went on appeal: [2008] EWCA Civ 373. The appeal was dismissed.

41. Although the appeal did not put in issue Evans-Lombe J's interpretation of the relevant phrase, it is telling that Mummery LJ said this at para. [26]:

> "If the [trustees] did not act against legal advice obtained from their counsel and solicitor they would be entitled to rely on the exemption from liability under [the exoneration clause]. An allegation of wilful wrongdoing by the [trustees] would not be arguable if they heeded the legal advice in the opinion and advice letter…".

42. Mummery LJ held that it was clear that the trustees had heeded that advice. The other members of the court agreed with his judgment. Clearly, Mummery LJ's understanding of the effect of the relevant phrase in the exoneration clause in that case is not compatible with the construction proposed by Mr Tager in this case. Mr Tager suggested that it was significant that the exoneration clause in that case did not include the final proviso contained in the Exoneration Clause here in respect of professional executors and trustees, but I do not consider that this makes any difference to the construction of the relevant phrase, "wilful and individual fraud or wrongdoing."

43. There is also considerable force in the further submission made by Mr Smouha QC for Philip on this appeal that the construction proposed by Mr Tager would give rise to absurdity, and hence could not have been the meaning intended by Michael. On Mr Tager's construction, a non-professional executor would not be protected from the consequences of any intentional act or omission, even when he acted with utmost good faith (perhaps with the benefit of legal advice, as in *Bonham v Fishwick*) and with the very best of intentions; but he would be protected against the consequences of any unintentional act or omission, even when he acted in bad faith and with the worst of intentions. This makes no sense.

44. For these reasons, I would dismiss this appeal.

**Lord Justice Patten:**

45. I agree.

**The Chancellor (Sir Terence Etherton):**

46. I also agree, and like Sales LJ pay tribute to Nugee J for the comprehensiveness and clarity of his judgment. I wish to add some observations of my own because the exoneration clause in the present case is in common use and, up to the final proviso, is to be found in the Encyclopedia of Forms and Precedents.

47. I regard as plainly untenable Mr Tager's argument that clause 14 can have no application in the present case because paragraph 18 of the First Schedule to the Will is a self-contained code on self-dealing. Clause 14 and paragraph 18 are addressing different matters. Paragraph 18 confers power of self-dealing if the conditions there are satisfied. If the conditions are not satisfied, the basic principle is that the transaction is voidable by any beneficiary as of right. Clause 14 is, as appears from its express wording, addressing the different issue of the personal liability of the defaulting trustee for loss to the trust as a result of a breach of the trustee's duty.

48. I also regard as plainly untenable Mr Tager's argument that Philip cannot rely on clause 14 because his breach of the self-dealing rule was not "[i]n the professed execution of the trusts and powers" of the Will, to quote the opening words of clause 14. The appellants' argument is that that Philip cannot bring himself within those words because he never consciously thought that he was acting pursuant to paragraph 18 in the discussions and decisions concerning the treatment of the VAT repayments in the context of the de-merger. The argument is incorrect both in law and in fact.

49. So far as concerns the law, the reasoning and decision of the Court of Appeal in *Walker v Stones* [2001] QB 902 are inconsistent with the appellants' interpretation. The exoneration clause in the settlement in that case began with materially identical words to the opening words of clause 14 of the Will. Sir Christopher Slade, with whom the other two members of the Court of Appeal agreed, rejected the argument that the trustees in that case could not be said to have been acting "in the professed execution of the trusts and powers" of the settlement because they must have known that they were acting beyond their powers. He said as follows (at p. 935D-F):

> "The suggested construction of clause 15 would thus confine its operation to unconscious or accidental, as opposed to

> conscious, breaches of trust. It would afford no protection in regard to a "judicious breach of trust … In my judgment, on the ordinary use of language, this construction attaches too narrow a meaning to the phrase "in the professed execution of the trusts and powers hereof". The New Shorter Oxford English Dictionary (1993) includes among other definitions of the word "professed" the meaning "alleged, ostensible". I agree with Rattee J that clause 15, on its true construction, must apply so as to exonerate the trustees, save to the extent excluded by the clause, in particular dishonesty, for anything done by them in the *purported* execution of the trusts and powers of the Bacchus trust deed—that is to say even though in fact not done in the exercise of such trusts or powers."

50. Mr Tager's argument would turn Sir Christopher Slade's analysis on its head by depriving an honest and conscientious non-professional trustee, who acted without a particular provision of the trust deed in mind, of the benefit of the exoneration clause even though the breach of trust was entirely unconscious or accidental.

51. In any event, it is perfectly plain that the only capacity in which Philip must have thought he was acting was as executor of the Will. The discussion with Mr Barnsley and the decision about the entitlement to the VAT repayments took place in the context of the de-merger for the purposes of administering Michael's estate. Furthermore, as Nugee J noted at paragraph [288] of his judgment, Philip formally and expressly executed the relevant documents relating to the de-merger in his capacity as executor.

52. I turn to the proper interpretation of the words "except wilful and individual fraud or wrongdoing" in clause 14.

53. There are a number of reasons for rejecting Mr Tager's argument that the exclusion of "wilful wrongdoing" from the benefit of the exoneration clause means that there is excluded from exoneration all liability for any matter or thing which was intentionally carried out by the trustee whether or not there was any awareness by the trustee that it was wrongful.

54. Firstly, the natural meaning of the words is that there must be an awareness of wrongdoing, as has been said in several cases. It is sufficient to mention only the following. In *Armitage v Nurse* [1998] Ch 241 the Court of Appeal considered whether a trustee exemption clause can validly exonerate a trustee from liability for gross negligence. They held that it can. Millet LJ, with whom the other members of the Court agreed, referred to the statements in paragraph 3.3.41 of the Law Commission's consultation paper on Fiduciary Duties and Regulatory Rules: A Summary (1992) (Law Com. No. 124) that: "trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default"; "[i]t is not … clear whether the prohibition on exclusion of liability for 'fraud' in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud"; "[i]t is also not clear whether the prohibition on the exclusion of liability for 'wilful default' also prohibits exclusion of liability for gross negligence although we incline to the view that it does".

55. In addressing the question whether a trustee can be protected by a clause which purports to exonerate the trustee from liability for wilful default, Millett LJ said (at p. 252D-E) that the expression "wilful default" in the context of a trustee exclusion clause, such as section 30 of the Trustee Act 1925, means "a deliberate breach of trust" and that "[n]othing less than conscious and wilful misconduct is sufficient". Together with several cases to which Millett LJ referred in support of that meaning, he mentioned the following passage from the judgment of Maugham J in *Re Vickery* [1931] 1 Ch 572, 583:

> "a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not."

56. Maugham J had himself relied upon the judgments of Lord Sterndale MR and Warrington LJ in *Re Trusts of Leeds City Brewery Ltd's Debenture Stock Trust Deed* [1925] Ch 532, in which they expressed the view (at pp. 534 and 544) that the expression "wilful default" in an exoneration clause in a debenture trust deed meant deliberately and purposely doing something which the trustee knew, when he did it, was a breach of trust.

57. Section 30 of the Trustee Act 1925 has been repealed. It provided, among other things, for a trustee only to be answerable and accountable for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happened through his own wilful default. It was the statutory equivalent of the provision in clause 14 of the Will exonerating the trustee from loss resulting from the negligence or fraud of any agent appointed by the trustee.

58. Millett LJ also referred to *Lewis v Great Western Railway Company* (1877) 3 QBD 195, in which a question arose whether the defendant railway company could rely on a contractual provision relieving it from liability for damage or delay in the carriage of the plaintiff's goods "except upon proof that … loss, detention or injury arose from wilful misconduct on the part of the company's servants". Bramwell LJ rejected the argument of the plaintiff, which is the same as that advanced by Mr Tager in the present case, that conduct was wilful if it was not accidental. He said (at p. 206):

> "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful."

59. That statement was quoted with approval by Lord Clarke, with whom the majority of the board of the Privy Council agreed, in *Spread Trustee Co Ltd v Hucheson* [2011] UKPC 13, [1012] 2 AC 194 at paragraph [55]. That was in the context of an exoneration clause in two Guernsey settlements, which excluded from exoneration "wilful and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable" (viz identical language to that in clause 14 of the Will), and section 34(7) of the Trusts (Guernsey) Law 1989 section 34(7), which provided that nothing in the terms of a trust shall relieve a trustee of liability for breach of trust "arising

from his own fraud or wilful misconduct". Lord Clarke approved the description of "wilful default" by Millett LJ in *Armitage v Nurse* at page 252.

60. I cannot see that there is any difference in the meaning of the expressions "wilful default", "wilful misconduct" and "wilful wrongdoing" in this context. None was suggested in *Spread Trustee Co Ltd v Hucheson* and I did not understand Mr Tager to say that there is any material difference.

61. Furthermore, *Bonham v Fenner* [2008] EWCA Civ 373, a case on identical wording to the material words in clause 14 of the Will, is directly against Mr Tager's interpretation of clause 14. In that case a claim was made against trustees for breach of trust in paying a sum of money to a third party. It was alleged that, in making the payment, they had acted against legal advice. The trustees relied on an exoneration clause in the settlement. That clause, like clause 14 of the Will in the present case, excluded from exoneration "wilful and individual fraud or wrongdoing on the part of the Trustee". Mummery LJ, with whom the other members of the Court of Appeal agreed, said (at [26]) that the trustees would be entitled to exoneration from liability if they did not act against the legal advice that they had obtained. That is inconsistent with the interpretation advanced by Mr Tager that the identical wording in clause 14 of the Will precludes exoneration if the trustee's breach comprises an intentional act, whether or not the trustee appreciated it was wrongful.

62. Secondly, the fact that "wilful" governs "fraud" as well as "wrongdoing" supports the conclusion that "wilful" imports a requirement of conscious wrongdoing. In *Armitage v Nurse* Millett LJ (at pp. 250 C-G and 252H-253D) distinguished the expression "actual fraud" in the exoneration clause in that case from so-called "constructive" or "equitable" fraud, such as breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and fraud on a power, none of which requires dishonesty. The expression "wilful fraud" in clause 14 of the Will makes clear that (subject to the later proviso) such conduct will only fall outside the scope of the exoneration clause if it has been carried out with awareness that it was wrongful.

63. Thirdly, Mr Tager's interpretation of the expression "wilful wrongdoing" is inconsistent with the earlier parts of clause 14 and also deprives the clause of any practical utility. The clause divides into the following parts: (1) an improper investment made in good faith; (2) the negligence or fraud of any agent employed by the trustee or by any other trustee; (3) any mistake or omission made in good faith by the trustee; (4) any other matter or thing except wilful and individual fraud; (5) provided that nothing exonerates a remunerated professional trustee from liability for negligence or other wrongdoing.

64. The effect of Mr Tager's interpretation is to produce an inconsistency between parts (1) and (3), on the one hand, and part (4) on the other hand. In relation to investments and mistakes or omissions, the trustee is exonerated if he or she has acted in good faith. If Mr Tager is correct, the trustee is not exonerated in relation to any other breach of duty by the trustee if the act was intentional even though the trustee acted in complete honesty and good faith and even in reliance on legal advice. There is no apparent logic to such a distinction. Furthermore, since part (4) comprises by far and away the largest category of breaches of duty, it would deprive a non-professional trustee of most of the practical benefit of the exoneration clause.

65. Fourthly, Mr Tager's interpretation reduces the express distinction in clause 14 between a non-professional trustee, on the one hand, and a professional trustee, on the other hand, to one which is meaningless for all practical purposes in relation to a wide range of breaches of duty. The proviso precludes a professional trustee from exoneration in relation to any wrongdoing, whether wilful or not. If all the breaches of duty in part (4) are in any event excluded if they are intentional, even though honest and in good faith, the non-professional trustee is for all practical purposes in precisely the same position as a professional trustee in relation to all such breaches.

66. Finally, Mr Tager referred to a number of cases on the meaning of "good faith". He submitted that, in relation to paragraph 18(i), good faith means more than honest: it means acting "in a fair and open manner" and without sharp practice, requiring Philip to "put all the cards on the table" and to report to fellow trustees all that he knew about the VAT claims. Mr Tager submitted that the meaning of "good faith" in clause 14 and in paragraph 18(i) must be the same.

67. It is not necessary to consider those cases. "Good faith" appears in parts (1) and (3) of clause 4, as I have compartmentalised it above. The relevant question on this appeal, however, is whether Nugee J was correct to decide that Philip is entitled to rely on part (4) of clause 14 in view of the Judge's findings (at [311, [315] and [318]) that Philip did not deliberately keep things back from Mr Barnsley knowing that he ought to disclose them, and was not deliberately or consciously acting in a way he knew to be wrong. I consider that Nugee J was plainly correct in so deciding.