

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
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TRUST LAW REVIEW: LIABILITY OF TRUSTEES TO THIRD PARTIES

The Scottish Law Commission today publishes Discussion Paper No 138 on Liability of Trustees to Third Parties.

The Discussion Paper is the seventh paper in the Commission's Trust Law Review Programme. It puts forward proposals which aim to clarify the nature of trustees' liability arising from their administration of the trust, both personally and in their role as trustees.

1. Contractual Liability

In Scotland it is generally accepted that trustees are personally liable on a contract entered into in the course of their duties as trustees unless they expressly contract out of such liability. To limit the liability they must expressly contract "as trustees" or "*qua* trustees". The mere use of the word "trustee" after the trustee's name is insufficient as it is regarded as purely descriptive. If the trustees merely describe themselves as such or fail to mention their position at all they will be personally liable on the contract. This personal liability is coupled with a right of relief against the trust estate. The Commission thinks that personal liability is imposed too readily as trustees may be putting their personal patrimonies at risk even where they have carried out their duties properly. It proposes that where trustees disclose their representative capacity, or where the third party is otherwise aware that they are so acting, the trustees should not be personally liable on the contract. Where the trustees do not limit their liability, but have a right of relief against the trust, the Commission asks if the third party should have a direct right of recovery against the trust patrimony.

In relation to *ultra vires* contracts made by trustees the Commission proposes that Section 2(1) of the Trusts (Scotland) Act 1961 should be amended so that all onerous transactions relating to the trust estate between the trustees and a third party are unchallengeable on the ground that the transaction was at variance with the terms and purposes of the trust, and asks whether good faith on the part of the third party should be a requirement of this. The third party to an *ultra vires* contract should continue to be restricted to claiming against the trustees' private patrimonies and not the trust patrimony.

The Discussion Paper also deals with the execution of deeds by trustees. The Commission proposes that a deed bearing to be granted by all the acting trustees should be formally valid if it is executed by a quorum of them as defined by law or in the trust deed. There should be a new statutory provision whereby a deed in favour of an onerous grantee validly executed by or on behalf of trustees is not to be void or challengeable on the grounds of procedural irregularity.

2. Delictual and Other Liability

It seems to be the case in Scots law that trustees may be sued personally for delicts committed by them, their employees and their agents. It is wrong that trustees' private patrimonies should always be at risk from the negligence of employees and agents and this fact has led to an increasing reluctance to take up the mantle of trusteeship. The Commission proposes that damages should only be payable from the trustees' private patrimonies if, and only to the extent that, they were personally at fault. If the trustees were at fault it should still be competent for the court to award damages partly from the trust patrimony.

Likewise, where liability arises out of the trustees' ownership or control of trust property or under environmental legislation only the trustees' trust patrimony should generally be liable. Trustees' private patrimonies should be liable only if, and to the extent that, they were personally at fault.

3. Liability for Litigation Expenses

Although awards of expenses are at the discretion of the court the general rule that the successful party is awarded costs tends to be followed where trustees engage in litigation. There are three main types of award of expenses against persons such as trustees who litigate in a representative capacity. The first is where the interlocutor awards expenses against the trustees "as trustees", the second is where the interlocutor awards expenses against the named trustees personally, and the third awards expenses against the named trustees without any further qualification. The third is the normal form. Whilst such an award leaves open the question of the trustees' right of relief against the trust estate, and could discourage trustees from indulging in rash litigation, it could be argued that the present system is too discretionary and potentially too onerous on trustees. The Commission asks whether trustees' liability for litigation expenses should be set out in new legislation or whether any other changes to current practice should be made. The Paper also invites views on whether there is any need for a procedure where the trustees are given prior authority to litigate by the court or an experienced practitioner or advocate, and are thus immune from liability.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Drummond Young, a Court of Session judge. The other Commissioners are Professor George L Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Colin J Tyre QC. The Chief Executive is Malcolm McMillan.

2. Further information can be obtained by contacting Charles Garland, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gov.uk).

3. The paper may also be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.