Summative assessment exercise - outline answer

The remedy which the beneficiaries are most likely to seek against the trustees is an account for the losses they have suffered, which is the traditional trust method of compensation. The liability of the trustees is, so far as possible, to put the fund in the position it would have been in had the breach of trust not occurred. It will first of all be necessary to consider the basic extent of the trustees' liability to account to ('compensate') the fund, secondly to consider whether they might raise any defences to the beneficiaries' action and finally, to consider whether, if they cannot raise a defence, the court will relieve the trustees of the consequences of their breach.

First, how much compensation will the trustees be liable to pay? This breaks down into two important sub-questions. One, what will be the quantum of capital repayment? Second, is interest payable, and if so, how much?

The Court of Appeal had held that beneficiaries should be able to recover the lost value of the trust property calculated at the peak value of that property during the period of the continuing breach of trust (*Jaffray* v *Marshall* [1993] 1 WLR 1285). This case has, however, been overruled by the House of Lords in *Target Holdings* v *Redferns* [1995] 3 All ER 785. In that case their lordships held that the quantum of capital repayment in a successful action for compensation should be equivalent to the plaintiff's actual loss assessed at the date of the court hearing with the full benefit of hindsight. The trustees should only be liable to compensate to the extent that they, 'on a common sense view' caused the loss. However, in *Target* their Lordships were dealing with a bare trust in a commercial context. The instant case does not involve a bare trust in a commercial context, it is a traditional trust which has come to an end, the beneficiaries having both now reached the age of 21. Nevertheless, Lord Browne Wilkinson stated that 'in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of compensation is the same (as for a bare trust in a commercial context), i.e. the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust'.

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As regards interest on the compensatory award, the crucial question is whether interest will be simple or compound, the former being interest charged on capital alone, the latter being interest charged on capital plus interest. An award of compound interest is usually reserved for cases where the trustee has used misapplied trust funds for their own private purposes (*Wallersteiner* v *Moir* [1975] 1 QB 373). The award of compound interest is designed to ensure that the trustee does not retain any profit from their breach. Accordingly, an award of simple interest is probably appropriate in the present case, as there appears to be no possibility that the trustees could have profited from their breach. Simple interest will be charged from the date of the misapplication of the trust funds through the unauthorised investment.

Next we turn to consider defences which might be available to the trustees. The trustees will be immune to the beneficiaries' claims if they can show that the claims are time-barred under the Limitation Act 1980 or barred because of undue delay ('laches') in bringing the action. It will also be a defence to a claim to show that the beneficiary bringing the action had instigated, consented to, or acquiesced in, the breach of trust. However, this defence may not be raised against beneficiaries who were not party to such instigation, consent or acquiescence. Claims are generally time-barred under the Limitation Act if they are brought more than six years after the breach of trust occurred. The breach in the present case occurred two years ago, so the beneficiaries are still within time to claim. In fact, their position is even better than that. At the date of breach Bill was 16 and Barbara was 17, and the six years do not begin to run against each of them until they have turned 18. Neither can their consent to the unauthorised investment be raised as a defence against them, as they were both infants in the eyes of the law at the time they gave their consent.

So far it would appear that the trustees have no answer to the beneficiaries' claim. They may, however, be able to claim some degree of relief from the full extent of the claim. In particular, Tracy and Barry might seek to be indemnified by Tricia on the ground that she is a solicitor with a controlling influence over them (*Re Partington* (1887) 57 LT 654). It will not, however, be presumed that Tricia had a controlling influence, the issue will be decided in the light of the experience, expertise and personal fortitude of the other trustees. On the other hand, Tricia and Tracy might look to Barry to meet a large part of

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their liability. Barry was 18 at the time of the breach to which he was a party, so he cannot plead lack of capacity to consent. As well as being a trustee, Barry is a beneficiary under the trust and the usual rule in such a case is that the trustee-beneficiary will not be able to claim his beneficial entitlement until he has made good his default. Nevertheless, the good news for Barry is that his interest under Theresa's will arises from trusts which are quite distinct from those under which Bill and Barbara are entitled. It follows that the usual rule will not apply in the present case (*Re Towndrow* [1911] 1 Ch 662). At the final hearing of the claim, the judge, if he concludes that the trustees are jointly and severally liable for the breach, will no doubt apportion liability between the trustees according to whatever is 'just and equitable' (Civil Liability (Contributions) Act 1978).

In conclusion, the trustees will be liable to compensate for lost capital, plus simple interest thereon, and the court will apportion the judgment debt against the trustees in whatever proportions appear to be just and equitable. The trustees will not be able to set-off, against the lost value of the shares, the large dividends made thereon, because the profit and loss arose from a single breach of trust (*Bartlett* v *Barclay's Bank Trust Co. (No. 2)* [1980] 1 All ER 139 can be distinguished). Nor will the trustees be relieved of liability under the Trustee Act, s. 61. Relief will only be given under this section if the trustees have acted, *inter alia*, reasonably. Tricia, Tracy and Barry should be advised that they have not acted reasonably, and that their honesty and good intentions will not save them from what could amount to extensive liability to compensate Bill and Barbara.

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