KEY POINTS

- The Privy Council in *Spread Trustee v Hutcheson* reaffirmed the position in English law that a trustee may exclude liability for gross negligence.
- The concept of gross negligence is, nonetheless, of increasing relevance in trusts and commercial transactions as a result of statutory reforms and the express incorporation of a gross negligence standard in trust deeds and contracts.
- The courts have begun to develop useful guidelines to determine whether a defendant's conduct amounts to gross negligence.

Feature

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Gross negligence after *Spread Trustee v Hutcheson*: the transition from vituperative epithet to meaningful standard

This article explains the relevance and the definition of the concept of gross negligence after the decision of the Privy Council in *Spread Trustee v Hutcheson* [2011] UKPC 13.

INTRODUCTION

In the case of *Spread Trustee v Hutcheson* [2011] UKPC 13 the concept of 'gross negligence' and its place in the law of trusts in Guernsey and England was considered by the Privy Council.

The first part of this article considers the significance of that decision for the concept of 'gross negligence' and the second part goes on to consider what is actually meant by the phrase 'gross negligence' and how it will be applied by the courts.

PART I: *SPREAD TRUSTEE V HUTCHESON*

The issues

Hutcheson concerned a breach of trust claim against Guernsey trustees. The trustees defended the claim on the basis that they were not liable for loss caused by their own negligence or gross negligence because of an exoneration clause in the trust deed which protected them from liability except in the case of 'wilful and individual fraud and wrongdoing'. The law of Guernsey had subsequently been changed by statute to prohibit trustees from excluding liability for gross negligence. The bulk of the breaches alleged by the beneficiaries had occurred prior to that change in the law. Both the first instance judge in the Royal Court and the Court of Appeal in Guernsey had found, albeit for different reasons, that the trustees could not rely on the exclusion clause to protect them from breaches of trust which amounted to gross negligence. The Privy Council was asked to decide whether it was possible for trustees to exclude liability for gross negligence, as a matter of the general law of Guernsey, prior to the statutory prohibition from doing so.

The decision

The Privy Council overturned the Guernsey Court of Appeal by a majority of three to two. The majority (Lord Mance, Lord Clarke and Sir Robin Auld) concluded that, as a matter of Guernsey (and also English) common law, it was possible for a trustee to exclude liability for gross negligence. In reaching this conclusion they relied on the decision of the Court of Appeal in *Armitage v Nurse* [1998] Ch 241.

While the decision of the majority in *Hutcheson* reaffirms that trustees may exclude liability for gross negligence, the case presented the Privy Council with an opportunity to re-examine some of the issues of principle and authority that had been raised in *Armitage v Nurse*. Accordingly the majority commented on, clarified, and corrected some details of the judgment of Millet LJ in *Armitage*. Interestingly, Lady Hale, although in the minority, made the bold suggestion that the reasoning in *Armitage v Nurse* was open to considerable criticism.

Clarification of *Armitage v Nurse*

The majority in *Hutcheson* firmly approved of the decision in *Armitage v Nurse* which established that a clause which excluded liability for 'gross negligence' was not, in the law of England and Wales, contrary to public policy. In his judgment in *Armitage* Millett LJ (as he then was) considered a number of Scottish authorities in which exclusion clauses had been held not to cover 'gross negligence' and concluded that these decisions had been based on the construction of the clauses in each case and did not represent a general public policy.

Hutcheson suggests that might not be the correct conclusion. Lord Clarke accepted, at least for the purposes of the appeal in front of him, that the Scottish cases cited to Millett LJ in *Armitage* and to him had in fact decided that as a matter of Scottish law liability for gross negligence could not be excluded. The minority agreed with him. It follows from this that, contrary to what has occasionally been suggested, there can be nothing inherently problematic about drawing a line between negligence and gross negligence. The Privy Council simply concluded that for such a line to be drawn in the law of trusts in Guernsey (or indeed England and Wales) either a statutory reform would be required or there would have to be an express incorporation of a 'gross negligence' standard into a trust deed or a contract.

Is this the last word on the subject?

It is clearly useful and comforting for trustees and other financial professionals to know that their exclusion clauses will successfully protect them from an allegation of gross negligence. However, *Hutcheson* was the decision of a narrow majority. Lady Hale at least held that, first, the law of England at the relevant time (in fact 1989) was not clear as to whether liability for gross negligence could be excluded; and second that the reasoning of Millett LJ in *Armitage* was open

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to criticism. The decision in *Hutcheson* is only directly relevant to Guernsey. It remains possible, though perhaps unlikely, that a differently constituted Supreme Court may wish to re-examine *Armitage v Nurse*. It is implicit in Lady Hale's judgment at least that she considered it may not have been correctly decided.

PART II: WHAT DOES 'GROSS NEGLIGENCE' ACTUALLY MEAN AND DOES IT MATTER?

The continuing relevance of 'gross negligence'

Unless *Armitage v Nurse* is overruled by the Supreme Court at some future time, trustees of English settlements will continue to be able to exclude liability for 'gross negligence'. It may be tempting to conclude, as Rolfe B did in *Wilson v Brett* (1843) 11 M & W 113, that 'gross negligence' is therefore merely a 'vituperative epithet', that is, of no particular relevance to the modern lawyer. Such a conclusion would be very wrong indeed. Rather, *Hutcheson* is one of a number of recent cases that has highlighted the use of 'gross negligence' in various areas of the law that are of considerable interest.

Various jurisdictions, including Jersey and Guernsey have introduced statutory reforms that expressly prohibit the exclusion of liability for gross negligence by trustees. In these jurisdictions at least, a workable definition of 'gross negligence' is of very great interest to all participants in the trust industry. If the alleged facts in *Hutcheson* had taken place today there is no doubt that the Guernsey courts would have to apply the standard of 'gross negligence' to determine the liability of the trustees.

Recent cases have also illustrated the fact that a 'gross negligence' standard is often incorporated into the express terms of commercial transactions whether in the field of shipping (*The Hellespont Ardent* [1997] 2 Lloyd's Rep 547), banking (*JP Morgan Chase v Springwell Navigation* [2008] EWHC 1793 (Comm)), investment advice (*Camarata Properties v Credit Suisse* [2011] EWHC 479 (Comm)) or commodity trading (*Marex Financial v Fluxo-Cane* [2010] EWHC 2690 (Comm)) to name but a few.

Moreover, 'gross negligence' has been a relevant standard in a number of different areas of practice even at common law: in the law of bailment where it has been held that a gratuitous bailee is liable only for gross negligence (*Giblin v McMullen* (1868) LR 2 PC 317); in partnership disputes where there is some authority that the test for whether a partner must bear all the loss he has caused is whether he has been grossly negligent (*Tann v Hetherington* [2009] EWHC 445 (Ch)); and perhaps the most exotic example, in admiralty actions *in rem* damages can be obtained for the wrongful arrest of a ship only if there has been malice or gross negligence (*The Numida* (1885) 10 PD 158).

Undoubtedly the concept of 'gross negligence' is one which the courts of a number of jurisdictions will continue to come across on a regular basis. A clear and workable definition of 'gross negligence' is therefore essential.

A question of degree

In contrast to the approach of some American courts where 'gross negligence' has been held to require a degree of subjective recklessness (*Browning v Fidelity Trust Co* (1918) 250 F 321), the clear view of the courts in England and the Channel Islands is that the difference between ordinary negligence and 'gross negligence' is only one of degree. As the Privy Council said in *Hutcheson* 'on the plain meaning of the words, and as a matter of logic and common sense, the terms 'negligence' and 'gross negligence' differ only in the degree or seriousness of the want of due care they describe.'

The importance of this point was emphasised by the decision of the Royal Court of Jersey in *Freeman v Ansbacher Trustees* [2009] JLR 1 where the plaintiff sought to amend her claim to include an allegation that the facts originally pleaded amounted to 'gross negligence'. Due to limitation issues, the amendment could not be allowed if the allegation of 'gross negligence' was a distinct cause of action from the original claim in negligence. The Royal Court allowed the amendment and held that 'gross negligence' denoted only a degree of culpability and was not a distinct cause of action from the negligence claim that had already been pleaded.

Towards a more workable test

Some attempts to distinguish ordinary negligence from 'gross negligence' have not been entirely satisfactory in producing a clear method of distinguishing between these two standards. For example, in the Jersey case of *Midland Bank v Federated Pension Services* [1995] JLR 352 the Jersey Court of Appeal defined 'gross negligence' as 'a serious or flagrant degree of negligence' but gave little practical guidance as to how the courts should make such distinctions.

The development of a clear test for 'gross negligence' is far from complete but a useful start to this process may be derived from the judgment of Mance J (as he then was) in *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547. In that case, Mance J closely analysed the law on the subject from a number of jurisdictions and the following non-exhaustive list of relevant factors for determining whether actions amount to 'gross negligence' may be derived from his judgment: (i) the existence of a high degree of risk of loss or damage; (ii) the foreseeability of that high degree of risk; (iii) the seriousness of the loss which ought to have been foreseen; (iv) the extent to which the defendant took any precaution to avoid the risk.

These factors (and others that future decisions dealing with the concept may add in due course) may form the basis of a more refined test for 'gross negligence' although it is inevitable that some difficulties will always arise in applying that standard to the precise facts of a particular case, though perhaps no more than the difficulties of applying a negligence standard at all.

CONCLUSION

While *Hutcheson* appears to confirm that liability for 'gross negligence' is not part of the irreducible core of obligations owed by the trustee of an English settlement, the concept is alive and well in a wide variety of different contexts. The search for a more refined definition of 'gross negligence' is therefore of some general importance and it is vital that the courts attempt to approach the concept with analytical rigour in the interests of commercial certainty and legal principle. ■