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SECTION 61 OF THE TRUSTEE ACT 1925: A JUDICIOUS BREACH OF TRUST?

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ABSTRACT. *This article is concerned with s. 61 of the Trustee Act 1925. It will analyse the origins, design and modern day operation of the jurisdiction to relieve a trustee from personal liability following a breach of trust. It will revisit the threshold conditions of honesty, reasonableness and fairness and, in the context of mortgage fraud, contend that this exculpatory jurisdiction ought not extend to the bare commercial trust that exists between the mortgagee and its solicitor. Defects, uncertainties and shortcomings associated with s. 61 will also be addressed.*

KEYWORDS: *trustee, breach, s. 61, relief, honesty, reasonableness, fairness.*

I. INTRODUCTION

The duties imposed on trustees are diverse, exacting and, whether imposed by the trust instrument, statute or equity, strictly enforced against an errant trustee.[1] The ingrained response is that it matters nought that a trustee in breach has acted in an honest, well intentioned and unselfish manner. As Maugham observed, "Honesty, zeal, intelligence, care, prudence, have all alike been unable to preserve him from loss in cases where the law or the facts have rendered human error possible".[2] The concept of no-fault liability, however, sits uncomfortably within a developed jurisdiction where such draconian tendencies tend to be dismissed as unjust, unreasonable and pernicious.[3] The prevailing sentiment has long been that fairness demands that there should be some protection afforded to the trustee who has acted honestly and reasonably.[4] This notion adopted statutory form with the enactment of the Judicial Trustees Act 1896, s. 3(1), which despite its nomenclature, was not limited to judicial trustees and was, moreover, retrospective in reach. Described somewhat blandly as, "not a good

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[1] See *Keech v Sandford* (1726) Sel. Cas. Ch 61.

[2] F.H. Maugham, "Excusable Breaches of Trust" (1898) 14 L.Q.R. 159, at 160.

[3] This treatment, as Lord Lindley acknowledged, "shocked one's sense of humanity and of fairness" (*Perrins v Bellamy* [1899] 1 Ch. 797, 800).

[4] See *Re Brogden* (1888) LR 38 Ch. D. 546.

example of clear and careful legislation",[5] this provision is the progenitor of the extant Trustee Act 1925, s. 61.[6] Unfortunately, the wording of both is unhelpful and apt to defy ready understanding.

As attempts to safeguard trustees had previously been undertaken on a piecemeal and ad hoc basis,[7] s. 3 was remarkable for being the first statutory provision specifically crafted to address the mischief of trustees' no-fault liability. In both its contemporary and historic forms, this jurisdiction affords the court an extensive discretion to shield a trustee[8] (but no other fiduciary[9]) who, "has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach".[10] In these circumstances, the court is empowered to relieve the trustee either in whole or in part from personal liability for the breach of trust.[11] This reformative step was not intended to impact on the ordinary law concerning trustees' duties. As Maugham pointed out, "A breach of trust before the Act remains a breach of trust after it".[12] Instead, it was a palliative measure, designed, "to introduce a new, lower, standard of breaches of trust which could be excused".[13]

While originally viewed as a necessary yet radical advance, the practical utility of this jurisdiction has lessened considerably in modern times, long having "languished in a legal backwater"[14] and perceived as, "a little used but still useful house of last resort".[15] The uncertain, expensive and time-consuming nature of relief proceedings coupled with the growth of the trustee indemnity insurance market has contributed majorly to this decline.[16] The voguish and enveloping nature of exclusion clauses served also to erase the statutory jurisdiction from the legal foreground.[17]

[5] Per Kekewich J. in *Re Tollemache* [1903] 1 Ch. 457, 466.
[6] This Act is a consolidating piece of legislation. Hence, s. 61 embodies the same policy and attacks the same mischief as its forerunner.
[7] For example, the Trustee Relief Acts 1847 and 1849 (payment into court); the Law of Property and Trustees Relief Amendment Act 1859 (indemnity clauses); the Conveyancing and Law of Property Act 1881 (retirement, appointment and vesting); and the Trustee Acts 1888 and 1893 (limitation periods and investment guidance).
[8] Including an executor: Trustee Act 1925, s. 68(17).
[9] See e.g. *Airbus Operations Limited v Withey* [2014] EWHC 1126 (QB) (an employee) and *Re Lands Allotment* [1894] 1 Ch. 616 (a company director).
[10] Equivalent provisions include Charities Act 2011, s. 191(1) (which affords the Charity Commission a discretion to grant relief to trustees and others) & Companies Act 2006, s. 1157 (which offers the court the ability to grant relief to officers of a company).
[11] Partial relief is not the norm, but can be afforded when appropriate: see *Iles v Iles* [2012] EWHC 919 (Ch).
[12] Maugham, "Excusable Breaches of Trust", p. 159.
[13] C. Stebbings, *The Private Trustee in Victorian England* (Cambridge 2002), 189.
[14] J. Lowry and R. Edmunds, "Excuses" in P. Birks and A. Pretto-Sakmann (eds.), *Breach of Trust* (Oxford 2002), 269.
[15] *Moffat's Trusts Law Text and Materials*, 6th ed. (Cambridge 2002), 595.
[16] Insurance is primarily targeted at the professional trustee market. As regards legal work undertaken by solicitors in private practice, professional indemnity insurance is compulsory (see the Solicitors Regulation Authority, *Insurance Rules* (2013)).
[17] In *Adams v Bridge* [2009] Pens.L.R. 153, s. 61 assumed relevance only following a finding that the exclusion clause was ineffective by because of the Pensions Act 1995, s. 33.

Somewhat abruptly, however, this period of quietude has ended with a series of recent cases invoking the statutory machinery. This litigation has primarily concerned conveyancers who have become unwittingly embroiled in mortgage fraud. Most frequently, the cases have involved panel solicitors who, while acting for mortgage lenders, have paid away purchase monies before the genuine completion of the transaction. This premature release of the purchase monies amounts to a breach of trust and requires the trustee to reconstitute the fund, with interest.[18] As the solicitor's retainer can never contain an exclusion clause,[19] the only available avenue for relief against a breach of trust claim is via s. 61, which in this context was aptly described by Lord Toulson as "a deus ex machina".[20]

The aim of the present article is to survey the origins, design and purpose of this recently revitalised jurisdiction. It will appraise historical and contemporary policy and practice, identify defects with the present jurisdiction and investigate the threshold concepts of honesty and reasonableness upon which the discretion is anchored. Emphasis will be placed on the comparatively uncharted direction that the trustee "ought fairly to be excused for the breach of trust". This wording adds an ethical dimension to the statutory formula,[21] which enables the court to advance broad based value judgments as to the type of trustee that should be deemed a suitable recipient of the court's benefaction and the contextual setting within which relief should be available. While in principle the scope of the jurisdiction currently embraces both professional and lay trustees alike,[22] it is to be acknowledged that the relief of paid trustees runs contrary to the founding policy of the legislation. Accordingly, the jurisdiction now performs a different function from that which was originally intended. This is, however, understandable in light of the unforeseen and radical changes in the nature of trusteeship over the subsequent years, coupled with the open ended definition of "trustee" employed within the Trustee Act 1925.[23] Nevertheless, the marked dissimilarities between paid and lay trustees cannot be overlooked and must necessarily influence how the court gauges issues of reasonableness, fairness and merit.[24] There is, unsurprisingly, an innate judicial resistance to the granting of relief to the professional trustee and this fault line is particularly exposed in the possible application of the exculpatory provision to the ephemeral trust relationship that arises between lender and solicitor.

[18] *AIB Group (UK) plc v Mark Redler & Co. Solicitors* [2014] UKSC 58; see P. Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214.
[19] Pursuant to the Solicitors Regulation Authority, *Code of Conduct* (2011) a solicitor cannot exclude liability to his client, but may in writing limit such liability to a prescribed financial level.
[20] *AIB Group (UK) plc* [2014] UKSC 58, at [69].
[21] As Maugham, "Excusable Breaches of Trust", p. 160, noted: "The question, in short, is not one of law, but of social ethics, in which the law necessarily plays a part."
[22] *Labrouche v Frey* [2016] EWHC 268; *Agouman v Leigh Day* [2016] EWHC 1324 (QB).
[23] The Judicial Trustees Act 1896 did not, however, proffer a definition.
[24] See *National Trustee Co. of Australasia v General Finance Co. Ltd.* [1905] A.C. 373; *Re Pauling's Settlement* [1964] Ch. 303.

Unlike what Lord Toulson labelled the "traditional trust',[25] this type of trust is merely, "one incident of a commercial transaction involving agency".[26] It is a mere device that facilitates the lender's business objective, dissipates once genuine completion has occurred and, as Lord Toulson advised, "it would be artificial and unreal to look at the trust in isolation from the obligations for which it was brought into being".[27] This re-sighting of the discretionary jurisdiction is, admittedly, without direct authority. Nevertheless, deductive judicial reasoning[28] and a preparedness to proceed by analogy strongly leads to the conclusion that the will-o'-the-wisp trust that exists between lender and solicitor should, as a matter of policy, commonsense and fairness, fall beyond the benevolent reach of s. 61.

II. Mischief and Machination

It is impossible to understand the design and intent of the s. 61 jurisdiction without an appreciation of the socio-legal background from which it emerged. The vantage point for this analysis is the Victorian era, which witnessed a profound transformation in the employment of the trust mechanism and its emergence as, "a powerful and essential tool in family provision".[29] The changing landscape was characterised by industrialisation and the associated increase in production, trade and investment opportunities. The trust transitioned from a mechanism geared primarily to custodianship and passive estate management to a model that embraced the active generation and distribution of income.[30] This evolutionary process entailed that the demands upon the trustee correspondingly increased: the expectations of beneficiaries changed, the obligations imposed became more onerous and the workload expanded in volume and complexity.[31] It was, as Stebbings observed, "now twice as hard to administer a trust".[32]

There were major causes of grievance amongst those who were prepared to act as a trustee and such complaints keenly demonstrated the inadequacy of the law surrounding trust administration. Nineteenth century trusteeship was primarily a personal and gratuitous role and offered, "a striking

[25] He explained in *AIB Group (UK) plc* [2014] UKSC 58, at [67], that: "A traditional trust will typically govern the ownership-management of property for a group of potential beneficiaries over a lengthy number of years".

[26] Per Lord Toulson in *AIB Group (UK) plc* [2014] UKSC 58, at [34].

[27] Ibid., at para. [71]. The Supreme Court was preoccupied with the rules relating to equitable compensation. The operation of s. 61 was only of peripheral concern.

[28] Strikingly demonstrated by the Supreme Court in *Patel v Mirza* [2016] 3 W.L.R. 399 where the traditional wisdom, as regards disallowing a claim on the basis of illegality, was overturned.

[29] Stebbings, *The Private Trustee*, p. 7.

[30] See generally W. Cornish, J.S. Anderson, R. Cocks, M. Lobban, P. Polden, K. Smith, *The Oxford History of the Laws of England 1820–1914 vol. XI Private Law* (Oxford 2010), 232–68.

[31] See *The Times*, 18 March 1895, p. 9, which asserted that "a super-human standard of perfection has been exacted; and a trustee who is not a miracle of circumspection and prudence is in peril if he happen to have to do with quarrelsome and litigious beneficiaries".

[32] C. Stebbings, "Trustees, Tribunals and Taxes: Creativity in Victorian Law" (2007) (70)2 Amicus Curiae 3.

example of altruistic virtue and disinterested devotion to duty".[33] The concept of the remunerated trustee was, moreover, distasteful and, "altogether repugnant to our habits and feelings".[34] The professional trustee was trialled in the context of the Bankruptcy Act 1869, but later denounced as a character, "who ruined its workings, plundered estates and brought discredit upon our whole system of bankruptcy law and administration".[35] This catastrophic failure served only to reinforce the notion that maintaining the amateur status of trustees was overwhelmingly in the public interest and minimised any risk of conflict between duty and personal interest. This deep-seated antagonism inevitably had negative consequences as lay trustees were usually ill-equipped and untutored to deal with novel and increasingly sophisticated responsibilities.[36] The lack of specialist skill was most pronounced in relation to the investment of trust funds, which now required a much higher degree of insight and commercial acumen. Trustees and beneficiaries alike were, as Polden observed, "bedazzled by well advertised alternatives in local authority, colonial and utility stocks, railway shares and equities, in addition to mortgages secured on building estates and commercial ventures".[37] Nevertheless, when making and revising investment decisions and exercising dispositive powers, the amateur trustee still fell to be judged by the yardstick of a prudent man of business.[38] Admittedly, the trustee could apply to the Chancery Court for directions, say, as to the appropriateness of a proposed investment, but this was still a disproportionately expensive and singularly unattractive option. Indeed, Lord Lifford described this possibility as, "subjecting trust property to … the legal robbery of that court".[39] It is, therefore, highly ironic that, in return for this protection, "the Courts of Chancery apply a more rigorous standard to the conduct of trustees than to the case of other bailees".[40] An ever-widening gap between skills acquired and standards demanded exposed the trustee to the grave risk of personal liability.

The ancient and restrictive principle of *delegatus non potest delegare* exacerbated the difficulties for trustees. As the traditional emphasis was upon the trustee's personal performance of duties, the general rule was that a delegate could not delegate, even to a co-trustee.[41] To do otherwise

[33] E. Manson, "Remuneration of Trustees and Executors" (1903) 5(1) Journal of the Society of Comparative Legislation, 185.
[34] Lord St. Leonards, *A Handy Book of Property Law*, 2nd ed. (Edinburgh 1858), 161.
[35] R. Watson Evans, "The Trustee Act 1888" (1890) 6 L.Q.R. 50, 52.
[36] As R. Watson Evans, ibid., at p. 62, noted: "a man of ordinary intelligence does not, by becoming a trustee, change his entire intellectual being and become a paragon of wisdom and prudence".
[37] P. Polden, "The Public Trustee – England 1906–1986: The Failure of an Experiment" (1989) 10 J.L.H. 228, 230.
[38] *Learoyd v Whiteley* (1886) LR 33 Ch. D. 347, 355.
[39] HL Deb. vol. 145 col. 1563 (11 June 1857).
[40] Select Committee on Trusts Administration, *House of Commons Parliamentary Papers* (1895) (248), p. iii.
[41] *Turner v Corney* (1841) 49 Eng.Rep. 677; see further P.W. Duff and H.E. Whiteside, "*Delegata Potestas Non Potest Delegari*: A Maxim of American Constitutional Law" (1929) 14 Cornell L.Rev. 168.

would amount to, "a betrayal of the settlor's wishes".[42] Although this principle did not operate as an absolute bar,[43] it did ensure that, without express authority in the trust instrument, a trustee could not delegate dispositive duties and fiduciary discretions.[44] The use of specialist agents, such as stockbrokers and solicitors, to carry out purely ministerial functions was throughout permissible.[45] Nevertheless, an agent could not be appointed to undertake duties which a trustee could perform himself or which involved a purely personal decision.[46] The trustee, moreover, remained potentially liable for the acts of his agents.[47] Personal liability remained a real threat for the trustee who exercised his dispositive functions and powers on the erroneous advice of an agent.[48] This gave rise to a keen sense of unfairness such that, in the Trustee Bill 1888, there was an abortive attempt to introduce a general power to delegate. It was a further 38 years before such powers to appoint agents[49] and to delegate[50] materialised and fuller protection was afforded to the trustee for the acts of his agents.[51]

The accentuated need for specialist skills, a difficulty in attracting lay trustees and the lack of professional trustees gave rise to the solicitor-trustee.[52] This development introduced a degree of expertise to the role. It was also to hasten a refashioning of the trust instrument to widen powers and to minimise the risk of inadvertent breach. Absent a charging clause, neither the solicitor-trustee nor his firm could directly claim remuneration for acting as trustee.[53] Nevertheless, payment could be received for advice and other legal services provided to the trust.[54] There was also the opportunity to generate further income from ancillary work stemming from the association with the trust and access to its funds. The solicitor-trustee soon became a figure of notoriety, having greatly "excited public

[42] The Law Commission, *The Law of Trusts: Delegation by Individual Trustees* (1994) Law Com. 220, at [2.1].
[43] Delegation had long been permitted in cases of legal or moral necessity: *Ex parte Belchier* (1754) Amb. 218.
[44] *Re Airey* [1897] 1 Ch. 164.
[45] *Speight v Gaunt* [1883] UKHL 1 (employment of a broker as selected by the beneficiary). It did not matter that the agent was also a trustee: *Home v Pringle* (1841) 8 Cl. and Fin. 264.
[46] *Re Brier* [1884] 26 Ch. D. 238.
[47] *Carruthers v Carruthers* [1896] A.C. 659. As Cozens-Hardy M.R. explained in *Re Allsop* [1914] 1 Ch. 1, 11: "A trustee who employs an agent must, according to the ordinary rules of law, be responsible for the acts of the agent".
[48] *Re Stuart* [1897] 2 Ch. 583.
[49] Trustee Act 1925, s. 23(1); see further G.H. Jones, "Delegation by Trustees: A Reappraisal" (1959) 22 M.L.R. 381.
[50] Trustee Act 1925, s. 25.
[51] Under the Trustee Act 1925, s. 23(1), the trustee was now liable only for want of reasonable care in appointing and supervising the agent.
[52] See C. Stebbings, "The Rule in *Cradock v Piper*" (1998) 19 J.L.H. 189. By the end of the Victorian period, at least 80% of large estates in England were in the hands of solicitor-trustees: see HC Deb. vol. 148 col. 687 (30 June 1905).
[53] *Lawton v Elwes* (1887) 34 Ch. D 675.
[54] As Stebbings, "The Rule in *Cradock v Piper*", p. 195, explains: "the two characters of trustee and solicitor would remain distinct, and there could be no conflict between duty and interest. If no conflict existed, there would be no reason for prohibiting remuneration for professional work done".

animadversion"[55] and becoming, "the bane of the affluent classes".[56] Lord Brougham went so far as to claim that, "no less than one-twentieth part of the trust funds in this country were embezzled".[57] Many solicitors were struck off the roll for misappropriating the moneys of their clients[58] and tougher sanctions for dishonest trustees were eventually introduced.[59]

The absence of an office of public trustee further compounded the problems experienced by the Victorian trustee. The possibility of such a voluntary appointment, whether the function was to be carried out by a state officer or public company, had dominated the reform agenda throughout the latter half of the nineteenth century.[60] The public trustee would, it was thought, minimise the perpetration of fraud, particularly upon widows and orphans as well as the friendless and the helpless.[61] Unsurprisingly, this alternative mode of trusteeship was vehemently resisted by the Incorporated Law Society and other representatives of the solicitors' profession and did not curry political favour with the Conservatives.[62] It was contended that the misuse of trust funds was overstated and did not justify the innovation of such an expensive and cumbersome office. Cost and circumlocution were the obstacles to its establishment.[63] Notwithstanding that such objections were dismissed by the Select Committee on Trusts Administration, no such functionary came into being until the Public Trustee Act 1906. Even then, it was a somewhat fortuitous and unexpected event.[64] Undoubtedly, this lengthy preoccupation with the beneficiary centric concept of the public trustee, served as a major distraction from the issue of trustee relief.

Against a backcloth of high standards, unrealistic expectations and no-fault liability, there emerged a serious trustee recruitment problem. In the words of Polden, "Between these millstones, the trustee was likely to be ground exceedingly small".[65] The Select Committee on Trusts Administration warned that the difficulty was very real and increasing[66] with Lord Jessel M.R. identifying, "a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them".[67] The difficulty was how best to attract

[55] Lord St. Leonards, HL Deb. vol. 145 col. 1552 (11 June 1857).
[56] G. Robb, *White-Collar Crime in Modern England: Financial Fraud and Business Morality 1845–1929* (Cambridge 2002), 93.
[57] HL Deb. vol. 145 col. 1559 (11 June 1857); see also *The Times*, 18 March 1895, p. 9.
[58] See HC Deb. vol. 133 cols. 355, 356 (18 April 1904).
[59] For example, the Larceny Act 1901 which imposed criminal sanctions for fraudulent breaches of trust.
[60] Public Trustee Bills of 1887, 1889, 1890, 1891 and 1894 all fell by the parliamentary wayside.
[61] See Sir Howard Vincent, *The Times*, 28 March 1891, p. 4.
[62] See *The Spectator*, 1 April 1905, p. 8.
[63] See Watson Evans, "The Trustee Act 1888", p. 51.
[64] See generally Polden, "The Public Trustee".
[65] Ibid., at p. 231. Maugham, "Excusable Breaches of Trust", p. 161, shared the perception that, "no position known to the law is treated so unkindly as that of a trustee".
[66] *House of Commons Parliamentary Papers* (1895) (248), iv.
[67] *Turner v Hancock* (1882) 20 Ch. D. 303, 305.

competent, honest and willing volunteers at a time when private trusteeship was a singularly unattractive venture.[68] The cause was a popular one and it was widely accepted that, "an overwhelming case has been made out for placing a trustee in a less irksome and hazardous position than is now his".[69] From the range of options considered to counteract this "trustee chill",[70] the Select Committee on Trusts Administration favoured a jurisdiction to afford relief where the court deemed it fair and reasonable to do so. This seismic shift in the legal landscape occurred, surprisingly with scant parliamentary debate, via the Judicial Trustees Act 1896 and the innovation of a pioneering jurisdiction that focused upon the ethically sensitive issue of when it is reasonable to break the law.[71] The broad and uncharted discretion to condone a breach of trust was primed to operate "under special circumstances"[72] and only as regards those hard cases where lay trustees had, "failed to live up to unattainable ideals".[73] This redemptive provision, therefore, focused upon the personal aspect of trusteeship and sought to ensure that the amateur trustee was, "no longer dealt with in the merciless fashion of a century ago".[74] It is hardly surprising that many of the earlier cases, in which relief was sought, concerned the making of unauthorised investments or authorised investments imprudently made.[75] It has, however, been suggested that the jurisdiction actually encouraged trustees to commit breaches of trust, when it was in the best interests of the trust, in the belief that they would in all likelihood be granted relief.[76]

It was never envisaged that s. 3 would shield professional trustees. Instead, the reform was designed to slow the march to professionalism by making lay trusteeship more appealing. It was, however, a product of its time, designed to tackle the urgent problems and novel tensions then associated with lay trusteeship. It was also a response to the fact that many breaches of trust were committed in compliance with the wishes of the same beneficiaries who would subsequently assert a claim for breach of trust.[77] There can be no denying that the jurisprudential setting in which the discretion was originally fashioned has long since vanished

[68] The same recruitment objective was, some 116 years later, to underscore the enactment of the Charities Act 2011, s. 192: see Charity Commission: Power of the Commission to relieve trustees, auditors etc from liability for breach of trust or duty (O.G. 98, August 2013).
[69] *The Times*, 18 March 1895, p. 9.
[70] Possibilities mooted included a statutory right to remuneration, the creation of commercial trust companies, the creation of an official trustee and entrusting the court with the discretion to sanction departures from the terms of a trust when expedient and advantageous for the beneficiaries.
[71] Appraised by Maugham, "Excusable Breaches of Trust", p. 160, as, "a new class of quasi-legal conundrum".
[72] Per Stirling J. in *Re Stuart* [1897] 2 Ch. 583, 590.
[73] L.A. Sheridan, "Excusable Breaches of Trust" [1955] 19 Conv. 420, 422.
[74] A. Underhill, *The Law Relating to Trusts and Trustees*, 7th ed. (London 1912), x.
[75] See Sheridan "Excusable Breaches of Trust", pp. 426–29.
[76] The Law Commission Consultation Paper, *Trustees' Powers and Duties* (1997) Law Com. 146, at [3.5].
[77] Lord St. Leonard, HL Deb. vol. 145 col. 1552 (11 June 1857) estimated that this was true of nine-tenths of breaches of trust.

and bears no resemblance to that of modern times. Hence, the gradual and reflexive extension of the jurisdiction to embrace paid trustees. Indeed, the major legal developments concerning the administration of trusts, coupled with the exponential growth of the professional trustee market, raise legitimate questions as to whether there remains any need for this exculpatory jurisdiction. It does not sit well within the modern context of private trusteeship and particularly so when its utilisation has nothing to do with root concepts of fairness, justice and the protection of the deserving and vulnerable. Instead, what was designed as "a fair and useful provision"[78] has been hijacked opportunistically by solicitor-trustees, with varying degrees of success, as a means of loss allocation between financial and legal organisations (and their respective insurers). This is, most certainly, far removed from the mischief at which s. 3 and its successor was intended to redress.

III. The Limits of Forbearance

Absent legislative guidance, the judiciary have throughout grappled with the meaning, import and scope of this inelegantly drafted, relieving provision. As Kekewich J. acknowledged, "The difficulty arises from the fact that the Legislature in a few words, intended no doubt to be perfectly clear and expressive, has thought fit to interfere with well-established doctrines".[79] Farwell J. echoed this sentiment, admitting that this dispensing provision is not, "applied on a thoroughly intelligible principle" and emphasising that, "the exercise of such a jurisdiction is beset with great difficulty and requires great caution".[80] Maugham felt that the jurisdiction allowed the court to, "exercise a dubious prerogative of mercy (at the expense, be it added, of a third party) in cases which are left undefined".[81] Although the modern judiciary find this allusion to mercy distasteful,[82] it remains a highly intuitive jurisdiction, which operates as a loss distribution mechanism between the trustee in default and the innocent beneficiary. As Farwell J. further explained, "the real difficulty is to say what is fair and right as between the beneficiary who entrusts his money to the trustee and the trustee who acts gratuitously on his behalf".[83] Usually, the outcome will also determine which of the parties is to be burdened with the inevitable costs of that litigation.[84]

[78] Law Reform Commission for Ireland, "Trust Law: General Proposals" (L.R.C. 92–2008), at [4.44].
[79] *Perrins v Bellamy* [1898] 2 Ch. 521, 526, 527. He added (at 527): "A large body of law is dealt with in a few words, which are apparently intended to introduce large alterations."
[80] *Re Lord de Clifford's Estate* [1900] 2 Ch. 707, 712, 713, respectively.
[81] Maugham, "Excusable Breaches of Trust", p. 159.
[82] Briggs L.J. in *Santander UK plc v R A Legal Solicitors* [2014] EWCA Civ 183, at [34], commented that "this old-fashioned description of the nature of the section 61 jurisdiction should be abandoned. In this context mercy lies not in the free gift of the court. It comes at a price".
[83] *Re Lord de Clifford's Estate* [1900] 2 Ch. 707, 713.
[84] See *Palmer* [1911] 1 Ch. 758.

A. Duty, Breach and Liability

Before the jurisdiction can arise, there must be an existing breach of trust (whether by commission or omission[85]) for which the trustee "is or may be personally liable". Out of kilter with modern expectations of disclosure, the trustee need not plead relief in advance[86] and the defence can be invoked suddenly and surprisingly once proceedings are underway.[87] It is important to note that the jurisdiction cannot be utilised to exonerate future liability[88] for as Kekewich J. acknowledged, "If the Legislature intends to confer that power on the Court, it must do so in express and unambiguous terms".[89] The use of the words "may be" was viewed by Sheridan as enabling the court to grant relief even where it was unclear that a breach of trust had actually occurred.[90] There is no doubt that the terminology is potentially problematic and the use of these particular words, as Lindley M.R. acknowledged, "point to doubtful questions of construction".[91] Sheridan's argument appears strengthened by the follow on reference to "the transaction alleged to be a breach of trust". Nevertheless, it is not to be overlooked that these words are sited in an awkward proviso emphasising that the provision is of retrospective effect. Sheridan's reasoning arguably confuses the grant of relief, which cannot be made unless there is a proven breach of duty,[92] with the application for relief which can be made by a trustee before any finding as to a breach.[93] He might, moreover, have been misdirected by the willingness of some judges to engage in *obiter* speculation as to whether relief would have been granted if a breach of duty had been proven.[94] There is simply no scope for evidential uncertainty as to whether or not there is a breach of trust.[95]

The wording of s. 61 appears emphatic in that it is expressed to cover "any breach of trust", which (it might be expected) would not usually give rise to conceptual and jurisprudential difficulties. This is not the case, however, in the context of mortgage fraud and the bare commercial trust that arises in that transactional context. The existence of a trust, as regards the lender's solicitor, is expressly imposed by Clause 10.7 of the Council of Mortgage Lenders' Handbook for England & Wales and, in

[85] *Re Allsop* [1914] 1 Ch. 1.
[86] See *Re Kirbys Coaches Ltd.* [1991] B.C.C. 130.
[87] *Re Pawson's Settlement* [1917] 1 Ch. 541. It may, of course, be necessary to order an adjournment if the defence is raised during the trial.
[88] *Re Smith* (1902) 86 L.T. 401.
[89] *Re Tollemache* [1903] 1 Ch 457, 466. The legislature did exactly this with the enactment of the Companies Act 2006, s. 1157.
[90] Hence, the trustee is spared, "the grotesque task of proving that he is in breach of trust in order to qualify for relief" (Sheridan, "Excusable Breaches of Trust", p. 425).
[91] *Re Grindey* [1898] 2 Ch. 593, 598.
[92] *Marsden v Regan* [1954] 1 W.L.R. 423; see also *Barnsley v Noble* [2016] EWCA Civ 799.
[93] As Rigby L.J. put it in *Perrins* [1899] 1 Ch. 797, 802: "The question is, what is to happen when they have in fact committed a breach of trust?"
[94] As occurred in *Palmer v Emerson* [1911] 1 Ch. 758 and *Re Houghton* [1904] 1 Ch. 622.
[95] *Re Rosenthal* [1972] 1 W.L.R. 1273; *Younger v Saner* [2002] EWCA Civ 1077.

relation to the vendor's solicitor, by the 1998 version of the Law Society Code for Completion by Post (the "Postal Code").[96] The 2011 edition of the Postal Code, however, employs a change of wording which, it has been held, no longer imposes a trust of the vendor's representative.[97] The revamped Postal Code instead envisages that the receipt of the money and completion will be simultaneous and with no period existing during which the money can be held on trust. The seller's solicitor is, moreover, not now required to investigate or take responsibility for any breach of the seller's contractual obligations. Of course, this still leaves the vendor's solicitor susceptible to a breach of trust claim in transactions that are based on the previous version of the Postal Code.

It has, furthermore, been suggested that the flouting of the so-called "self-dealing rule" (purchase by the trustee of trust property) or the "fair dealing rule" (purchase by the trustee of the beneficiary's interest) would fall beyond the reach of s. 61.[98] This assertion hinges on the conclusion of Megarry V.C. that, while personal liability will arise, these rules only impose a disability and do not amount to a breach of trust.[99] It is to be appreciated, however, that Megarry V.C. was not considering the application of s. 61 when he volunteered this distinction.[100] It is, therefore, arguable that the exculpatory reach is not diminished in such circumstances.[101] As Judge Reid put it, "The section refers to relief from liability. Liability to account is just as much liability as liability to pay damages".[102] Nevertheless, to allow a trustee to benefit by breach of fiduciary duty would seemingly run counter to the orthodox strictures of equity, namely the no-profit and no conflict rules.[103] As it is established that s. 61 cannot be employed to entitle a trustee to unauthorised remuneration,[104] it should follow that, as regards personal profits made from a transaction that also benefits the trust, s. 61 cannot be invoked.[105] The court should, instead, rely on its inherent jurisdiction to award an equitable allowance for work done where the trustee has acted in good faith and in the best interests of the beneficiaries.[106] Accordingly, and even if in principle the discretion

[96] *Purrunsing v A'Court & Co.* [2016] 4 W.L.R. 81.
[97] *P&P Property Limited v Owen White and Catlin LLP* [2016] EWHC 2276 (Ch).
[98] See the Law Commission Report, *Fiduciary Duties and Regulatory Rules* (1995) Law Com. 236, at [15.17].
[99] *Tito v Waddell (No 2)* [1977] Ch. 106, 248.
[100] He was, instead, considering whether a claim was statute barred under the Limitation Act 1939.
[101] In *Re Clark* (1920) 150 L.T.J. 94, relief was granted to a trustee who took a lease of trust property at undervalued rent.
[102] *Coleman Taymar Ltd. v Oakes* [2001] 2 B.C.L.C. 749, at [82]. This was, however, a decision concerning the equivalent provision in the Companies Act.
[103] As the Chancellor Sir Terence Etherton observed in *Santander UK* [2014] EWCA Civ 183, at [109]: "section 61 must be interpreted consistently with equity's high expectation of a trustee discharging fiduciary obligations."
[104] *Guinness plc v Saunders* [1990] 2 A.C. 663.
[105] *Sinclair v Sinclair* [2009] EWHC 926 (Ch).
[106] See *Boardman v Phipps* [1967] 2 A.C. 46.

extends to breaches of fiduciary duty, it should not be exercised in such circumstances.

It is also instructive to consider the position of so-called strangers to the trust, that is, those who intermeddle or receive trust property in breach of trust. The Trustee Act 1925, s. 68(1)(17), defines a trustee ('unless the context otherwise requires') as including a constructive trustee. The dishonest assistant must, of course, always fall beyond the reach of exculpatory relief. In *Williams v Central Bank of Nigeria*, moreover, it was held that, in the context of the Limitation Act 1980, s. 21(1)(a), dishonest assistants and knowing recipients were not "true" or de facto trustees.[107] While still liable to account as "constructive trustees", these third parties are exposed to equitable remedies merely by virtue of their participation in the unlawful misapplication of trust assets. They never assume the position of a trustee and liability arises due to their involvement in an unlawful transaction which is impugned by the claimant. Such participants are, as Millett L.J. observed, "persons whose trusteeship is merely a formula for giving restitutionary relief".[108] The same approach must necessarily permeate the definition of "trustee" for the purposes of s. 61.[109] In contrast, however, an intermeddler who lawfully assumes fiduciary obligations in relation to trust property without formal appointment (a *trustee de son tort*) would properly be categorised as a true or de facto trustee.[110] Hence, that trustee might seek statutory protection for a breach of trust in circumstances where a recipient accessory with knowledge cannot.

The reference within s. 61 to a failure to obtain the directions of the court seemingly serves only to add further uncertainty. This oft ignored aspect of s. 61 and its interaction (if any) with a breach of duty by the trustee is somewhat perplexing. Tellingly, the equivalent provision located in the Trusts (Scotland) Act 1921, s. 32(1), omits any such reference and no such allusion is to be found in the Charities Act 2011, s. 191(1). Adopting a pragmatic stance, Kekewich J. explained, "if the Court comes to the conclusion that a trustee has acted reasonably, I cannot see how it can usefully proceed to consider, as an independent matter, the question whether he has or has not omitted to obtain the directions of the Court".[111] The ability to obtain directions was after all devised as a means of avoiding a breach of trust.[112] Kekewich J. added that, "The fact that a trustee has omitted to obtain the

[107] *Williams v Central Bank of Nigeria* [2014] A.C. 1189 (SC); see also Millett L.J. in *Paragon Finance v DB Thackerar* [1999] 1 All E.R. 400. This distinction clearly has resonance in non-limitation cases: see *Dubai Aluminium Co. Ltd. v Salaam* [2003] 2 A.C. 366.

[108] *Paragon Finance* [1999] 1 All E.R. 400, 412; see also C. Mitchell, "Dishonest Assistance, Knowing Receipt, and the Law of Limitation" [2008] Conv. 226.

[109] The Law Commission Report, *Fiduciary Duties and Regulatory Rules* (1995) Law Com. 236, at [15.7], clearly proceeded on this basis.

[110] *Mara v Browne* [1896] 1 Ch. 199.

[111] *Perrins* [1898] 2 Ch. 521, 529.

[112] *Re Stuart* [1897] 2 Ch. 583.

directions of the Court has never been held to be a ground for holding him personally liable".[113] Accordingly, if the failure is disassociated from a breach of duty there can be no personal liability from which relief can be granted.[114] Unsurprisingly, Kekewich J. dismissed the reference to directions as being "difficult to follow" and having, "crept into the statute without due regard being had to the meaning of the context".[115] Absent a convenient disregard of the statutory wording,[116] it must be that the provision signposts only that a trustee can be granted relief even though he failed to obtain such potentially expensive directions.[117] The focus then rests sensibly upon the reasonableness of the trustee's actions and the fairness of granting relief and not upon whether he was in breach of trust.[118] The failure to seek directions is merely one factor that the court can take into account and, unarguably, this obscure reference should be excised from the statutory wording.

B. The Threshold Conditions

For the jurisdiction to be exercised, there must be a coalescence of three factors, namely "honesty", "reasonableness" and "fairness" and much judicial attention has been devoted to attributing meaning to these terms. Earlier authorities offer guidance by, "showing the general judicial temper" and serve to illustrate, "the type of circumstances in which relief has been granted or refused".[119] Nevertheless, the courts have long been wary about setting precedents and throughout have emphasised that each case turns upon its own facts.[120] This judicial reticence might usually be appropriate as regards the highly fact sensitive determination of what is reasonable, but the mortgage fraud cases often share such factual similarity that one case can almost certainly be a sound guide to another.[121] As to the making of a distinction between honesty and dishonesty, the courts have long been active in laying down rules and general principles in the spheres of, for example, criminal law and accessory liability. There can be no logical justification for a refusal to do so in the context of s. 61. With regard to the "ought fairly to be excused" aspect of the statutory provision, the door was opened for the court to be proactive and, guided by policy factors

[113] *Perrins* [1898] 2 Ch. 521.
[114] *Re Tollemache* [1903] 1 Ch. 457.
[115] *Perrins* [1898] 2 Ch. 521, 528, 529.
[116] By way of an alternative, the Scottish Law Commission, *Breach of Trust* (2003) Discussion Paper No. 123, at [6.9], proposed instead that "the court should be empowered to sanction a transaction that was a breach provided it was as beneficial to the trust as an arms-length transaction".
[117] Accordingly, as in *Re Evans* [1999] 2 All E.R. 777, a trustee might avoid seeking directions due to the fear of cost and yet be granted relief.
[118] See *Re Grindey* [1898] 2 Ch. 593.
[119] Sheridan, "Excusable Breaches of Trust", p. 422.
[120] *Re Turner* [1897] 1 Ch. 536.
[121] See the Chancellor in *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626, at [48].

and contemporary wisdom, shape the development of this discretionary jurisdiction. A failure to provide guidance as to the role of fairness has undoubtedly impeded the development and refinement of this jurisdiction. This is especially evident in the commercial context where those advising the parties and their respective insurers, "need to have reasonable clarity as to the application of section 61, so as to avoid every case having to be taken all the way to trial".[122] Lawyers are presently ill-equipped to advise in advance what will be the result of a potentially expensive and time-consuming application for exculpatory relief.[123]

1. The Honest Trustee

As the statutory jurisdiction is not a last refuge for scoundrels, the absence of dishonesty is an understandable prerequisite of relief.[124] When the trustee has not acted honestly, he simply fails at the first hurdle.[125] If it were otherwise, "the inference would be that … cases exist where it is reasonable to act dishonestly".[126] Although in principle the burden of proof lies with the trustee,[127] the absence of evidence to the contrary allows the court to assume that he has acted honestly.[128] Fraud and conscious impropriety are, however, much less likely to be encountered than negligence arising from inadvertent conduct.[129] The concept of honesty, as Kekewich J. admitted, "is not the grit of the section. The grit is in the words 'reasonably, and ought fairly to be excused for the breach of trust'".[130]

There has never been a universally accepted definition of "honesty" for these purposes.[131] In the context of s. 61, it should not be overlooked that acting dishonestly is a bar to relief rather than an active element in the finding of personal liability. This distinction is crucial in that it bypasses the well trodden and, admittedly, conflicting authorities concerning accessories and the imposition of personal liability for dishonest assistance. Unlike with strangers, where the test for dishonesty is primarily objective

[122] Per Briggs L.J. in *Santander UK* [2014] EWCA Civ 183, at [23].
[123] See P.S. Davies, "Section 61 of the Trustee Act 1925: Deus Ex Machina?" [2015] Conv. 379, 380.
[124] As Sheridan wryly observed, "That must be obvious even to dishonest trustees, for they do not bother to apply" ("Excusable Breaches of Trust", pp. 422, 423).
[125] *Re Second East Dulwich 745th Starr Bowkett Building Society* (1899) 68 L.J. Ch. 196. Surprisingly, this seemingly unassailable proposition was doubted by Nelson J. in *Bairstow v Queens Moat Houses plc* [2000] B.C.C. 10.
[126] Maugham, "Excusable Breaches of Trust", p. 163. Hence, a dishonest assistant to a breach of trust cannot claim statutory protection.
[127] *Re Stuart* [1897] 2 Ch. 583.
[128] *Labrouche* [2016] EWHC 268; *Various Claimants v Giambrone and Law (A Firm)* [2015] EWHC 3315 (QB).
[129] Dishonesty is more frequently pleaded in the context of relief claimed under the Companies Act 2006, s. 1157: see *Vivendi S.A. v Richards* [2013] EWHC 3006 (Ch).
[130] *Perrins* [1898] 2 Ch. 521, 527, 528.
[131] It gives rise to questions that are, "impossible to answer fully" (Maugham, "Excusable Breaches of Trust", p. 163).

in nature,[132] a predominantly subjective approach is to be adopted when disallowing the effect of s. 61.[133] This requires the court to consider what the defendant actually knew, believed or suspected at the time of the breach.[134] Honesty, as Sheridan rightly points out, "seems to denote being motivated by the interests of the trust"[135] and, hence, intended outcomes offer a crucial indicator.[136] The trustee cannot be deemed dishonest simply for failing to obtain the directions of the court[137] for as Kekewich J. pithily observed, "A trustee is honest if he has not done anything dishonest".[138] Unless the mens rea of the offence involves dishonesty, a trustee can act honestly even though he has committed a crime in the course of his trusteeship.[139]

Although objective evaluations are central to the assessment of the reasonableness of the trustee's actions,[140] they also have a residual role to play in the determination of dishonesty. A lack of honesty cannot, therefore, be limited solely to knowledge that the action taken is detrimental to the beneficiaries and it must also embrace reckless indifference as to the outcome.[141] In this sense, it is akin to the notion of "wilful default".[142] Although negligence is not to be equated with dishonesty,[143] reckless and imprudent conduct can, as Lord Nicholls acknowledged, "be a tell-tale sign of dishonesty".[144] Such was demonstrated in *LSC Finance Limited v Abensons Law Limited*[145] where a trustee solicitor acted negligently and in breach of undertaking. He offered grossly unreliable, inadequate and contradictory evidence as to why he acted in the way that he did and was said by the High Court not to have acted honestly (or, indeed, reasonably) for the purposes of s. 61.

If the trustee's honesty is challenged, questions of credibility and reliability assume centre stage. As it has been authoritatively pronounced that, "Secrecy is the badge of fraud",[146] it must follow that, "the converse is

[132] In *Royal Brunei Airlines v Tan* [1995] 2 A.C. 378, 389, Lord Nicholls explained that, "Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual".
[133] See Knox J. in *Re Produce Marketing Consortium Ltd.* [1989] 3 All E.R. 1, 6.
[134] See *Bairstow v Queens Moat House plc* [2001] EWCA Civ 712.
[135] Sheridan, "Excusable Breaches of Trust", p. 423.
[136] The trustees were honest in *Davis v Hutchings* [1907] 1 Ch. 356 because, as Kekewich J. put it (at 364), "They intended to do what was right, and in the right manner".
[137] *Re Grindey* [1898] 2 Ch. 593.
[138] *Re Second East Dulwich 745th Starr Bowkett Building Society* (1899) 68 L.J. Ch. 196, 197.
[139] For example, an offence under the Water Resources Act 1991, the Environmental Protection Act 1990 and the Health and Safety at Work etc Act 1974.
[140] As Judge Reid noted in *Coleman Taymar Ltd.* [2001] 2 B.C.L.C. 749, at [83]: "Any reasonableness test must by its very nature be objective".
[141] See Millett L.J. in *Armitage v Nurse* [1998] Ch. 241, 251.
[142] See *Barnsley* [2016] EWCA Civ 799.
[143] A solicitor's conduct did not amount to dishonesty in *Various Claimants* [2015] EWHC 3315 (QB) even though it was classified by Foskett J. (at [34]) as being, "unreasonable conduct at the high end of the spectrum of unreasonable professional conduct …".
[144] *Royal Brunei Airlines* [1995] 2 A.C. 378, 390.
[145] *LSC Finance Limited v Abensons Law Limited* [2015] EWHC 1163 (Ch).
[146] Per Millett J. in *Agip (Africa) Ltd. v Jackson* [1990] Ch. 265, 294.

true: transparency is the hallmark of honesty".[147] The cogency of the evidence required to establish dishonesty and fraud is, understandably, heightened due to the seriousness of the allegation.[148] While it is not essential that the trustee intended to profit personally from the breach,[149] personal gain, albeit perhaps trivial, remains a relevant factor in the determination of whether statutory relief is appropriate.[150] The court is permitted to consider all the circumstances known to the trustee, take on board the personal attributes of the trustee (such as status, intelligence and experience) and to evaluate the apparent motivations underlying the trustee's actions.[151]

2. The Reasonable Trustee

Having acted honestly is not enough to be granted relief[152] as the trustee must also affirmatively demonstrate that he has acted as a reasonable trustee.[153] Although the alternative descriptor of "a prudent man of business" is sometimes still employed,[154] this throwback reference potentially imports a lower standard than that expected of a reasonable trustee.[155] It misleadingly equates the standard expected of both professional and lay trustees,[156] is inflexible in that it disregards the abilities and skills of a particular trustee[157] and predates the statutory duty of care as established in the Trustee Act 2000, s. 1, which combines subjective and objective elements in establishing a trustee's duty of care. Hence, a professional trustee must surely be judged against the standard associated with that profession[158] or, if higher, by any specialist skills claimed.[159] Accordingly, the conveyancer *qua* bare trustee must act "with exemplary professional care and efficiency" and be, "careful, conscientious and thorough".[160] Unsurprisingly, the survey of the trustee's conduct in mortgage fraud cases tends to be particularly technical and detailed in nature. The court is necessarily reliant on prescribed codes of professional conduct and

[147] Per Popplewell J. in *Madoff Securities International Limited v Raven* [2013] EWHC 3147 (Comm) at [356].
[148] This is particularly so when the allegation is against a solicitor-trustee: *Clydesdale Bank plc v Workman* [2016] EWCA Civ 73.
[149] As Millett L.J. noted in *Armitage v Nurse* [1998] Ch. 241, at 251: "A trustee who acts with the intention of benefitting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself".
[150] There must be a strong case to grant relief in such circumstances: see *Towers v Premier Waste Management Ltd.* [2011] EWCA Civ 923.
[151] *Royal Brunei Airlines* [1995] 2 A.C. 378. A motive for dishonesty needs to be demonstrated as regards a solicitor-trustee: *Clydesdale Bank plc* [2016] EWCA Civ 73.
[152] *Adams* [2009] Pens.L.R. 153.
[153] *Daniel v Tee* [2016] 4 W.L.R. 115.
[154] See *Labrouche* [2016] EWHC 268.
[155] See *Daniel* [2016] 4 W.L.R. 115.
[156] As Briggs L.J. acknowledged in *Santander UK plc* [2014] EWCA Civ 183, at [30]: "It is well-established that the standard is likely to be higher for a paid than for an unpaid trustee".
[157] D. Palin, "The Trustee's Duty of Skill and Care" [1973] 37 Conv. 48, 49.
[158] See *Purrunsing* [2016] 4 W.L.R. 81.
[159] *Various Claimants* [2015] EWHC 3315 (QB).
[160] Per Rimer L.J. in *Lloyds TSB Bank plc v Markandan & Uddin* [2012] 2 All E.R. 884, at [60], [61].

guidance published by the Law Society and the Council of Mortgage Lenders and the customer due diligence obligations and checks imposed by the Money Laundering Regulations 2007.

Evidence must be adduced by the trustee that establishes the reasonableness of the his actions and, if no such material is available, there is simply no possibility of relief.[161] The solicitor/trustee, for example, is expected to provide a paper-trail demonstrating that his conduct was reasonable.[162] The beneficiary cannot, of course, sensibly be expected to identify the trustee's unreasonable conduct.[163] Much judicial attention has been devoted to this fact sensitive issue and, unlike honesty, the burden of proof must be discharged by the trustee in all cases. The court will normally take a overview of the trustee's entire conduct before making its finding.[164] While it is to be accepted that, "each case must depend upon its own circumstances"[165] the unswerving rule should surely be that, if the trustee's actions amount to negligence, that trustee will have acted unreasonably for the purposes of s. 61.[166] The provision, as Byrne J. observed, "was never meant to be used as a sort of general indemnity clause for honest men who neglect their duty".[167] Lamentably, the contrary conclusion was drawn by Gross J. who glibly accepted that, "It may seem odd, but there it is".[168] He cannot sensibly be right as it would, in the view of Deputy Judge Richard Spearman, "involve saying that trustees who have acted as no reasonable trustees could have done may nevertheless be said to have acted 'reasonably' for purposes of section 61".[169] Although trustees are not expected to achieve a standard of perfection,[170] they are likely to be denied relief when there is discernible carelessness in their conduct.[171] This is particularly so when the trustee is, say, a qualified lawyer[172] or chartered accountant.[173] The terms of the trust deed and the clarity of its wording,[174] the size

[161] *DB UK Bank Ltd. v Edmunds & Co.* [2014] P.N.L.R. 12.
[162] *Santander UK plc* [2014] EWCA Civ 183. If not, the evidence is likely to be regarded as unreliable: *Ikbal v Sterling Law* [2013] EWHC 3291 (Ch).
[163] See *Santander UK plc* [2014] EWCA Civ 183, at [112].
[164] See Briggs L.J. in ibid., at para. [97], who spoke of "Looking at the matter in the round".
[165] Per Byrne J. in *Turner v Turner* [1897] 1 Ch. 536, 542.
[166] *Re Grindey* [1898] 2 Ch. 593; c/f Companies Act 2006, s. 1157, which explicitly allows negligence and reasonableness to coexist. As occurred in *Bairstow v Queens Moat Houses plc* [2000] B.C.C. 1025, the danger lies with conflating the two quite different provisions.
[167] *Williams v Byron* [1901] 18 T.L.R. 172, 176.
[168] *The Mortgage Business plc v Conifer & Pines Solicitors* [2009] EWHC 1808 (Comm), at [27].
[169] *Daniel* [2016] 4 W.L.R. 115, at [184].
[170] Deputy Judge Nicholas Davidson commented *in Ikbal* [2013] EWHC 3291 (Ch), at [223], that "the section does not predicate that the trustee must necessarily have complied with best practice in all respects".
[171] The Scottish Law Commission, *Breach of Trust* (2003) Discussion Paper No. 123, at [6.9], commented that "Trustees who have not taken all reasonable steps have been careless and are undeserving of judicial relief".
[172] *Kemp v Sims* [2008] EWHC 2579 (Ch).
[173] *Re Windsor Steam Coal Company (1901) Ltd.* [1929] 1 Ch. 151.
[174] In both *Re Grindey* [1898] 2 Ch. 593 and *Re Allsop* [1914] 1 Ch. 1, the peculiar and obscure drafting of a will was a factor that was taken on board. Relief was afforded because the breach was caused by a reasonable misconstruction of the terms of the trust.

of the estate,[175] the competing claims of the beneficiaries,[176] the state of the relationship between the beneficiaries,[177] the particular loss,[178] overall loss[179] or risk incurred[180] and the nature of the duty breached[181] may assume obvious importance in determining where the threshold of reasonableness lies. Similarly, trustees will be expected, when appropriate, to obtain professional advice from a suitable adviser,[182] provide proper instructions to that adviser in a timely manner and to act on that advice.[183] Although this is not always a passport to relief,[184] it will usually suffice to establish reasonableness.[185] Even if the adviser turns out to be fraudulent this may not impugn the reasonableness of the trustee's actions, but it does not necessarily follow that the trustee then "ought fairly to be relieved".[186]

An issue which has generated some confusion, however, is causation. Although it is accepted that conduct which is totally immaterial to the loss will be disregarded in this assessment of reasonableness,[187] it will become apparent that recent authorities have not spoken in one voice as to what causation entails in this context and how it is to be measured. The danger lies with a mechanistic application of the "but for" test of causation rather than focusing on the respective blameworthiness of the participants' actions.[188] It is also regrettable that, in *Ikbal v Sterling Law*,[189] non-causative conduct was disregarded in its entirety with the court declining to factor such conduct into its core assessment of fairness.[190] As a

[175] An example provided by Cozens-Hardy M.R. in *Re Allsop* [1914] 1 Ch. 1, 13, related to legal advice and directions. He felt that, in a large estate, it may be only reasonable that counsel of the first rank be consulted or an application made for the direction of the Court, "whereas it would not be reasonable to insist upon all this where the estate is small".

[176] In *Re Brookes* [1914] 1 Ch. 558, the trustee did not act reasonably or fairly in awarding to one family of beneficiaries effectively the entire estate, leaving the other family with a security of no value whatsoever.

[177] *Younger* [2002] EWCA Civ 1077.

[178] The greater the degree of harm caused, the less likely it is that relief will follow: *Daniel* [2016] 4 W.L.R. 115. An absence of loss will, however, weigh heavily in the trustee's favour: *Madoff Securities International Limited* [2013] EWHC 3147 (Comm).

[179] In *Clarke v Clarke's Trustees* [1925] S.L.T. 498, relief was granted where the substantial profits made by the trustee for the beneficiaries for over 16 years stood in contrast to the comparatively trifling loss arising from a technical breach of trust.

[180] *Re Kay* [1897] 2 Ch. 518.

[181] In *Madoff Securities International Limited* [2013] EWHC 3147 (Comm), the degree of fault was venial.

[182] In *Chapman v Browne* [1902] 1 Ch. 785, the trustee was not exonerated as he had acted unreasonably in not seeking appropriate investment advice.

[183] *Cherney v Neuman* [2011] EWHC 2156 (Ch).

[184] *Re Dive* [1909] 1 Ch. 328.

[185] *Marsden* [1954] 1 W.L.R. 423.

[186] *Davis* [1907] 1 Ch. 356.

[187] As Judge Pelling explained in *Purrunsing* [2016] 4 W.L.R. 81, at [38]: "It follows that if the trustee fails to prove that his unreasonable conduct played no material part in occasioning the loss then the trustee fails at the threshold stage".

[188] See *Rippon v Port of London Authority* [1940] 1 K.B. 858, where two parties were unequally blameworthy even though they were both strictly liable for a breach of statutory duty.

[189] *Ikbal* [2013] EWHC 3291 (Ch).

[190] This is a legitimate consideration for the court to take on board in exercising its discretion: see Judge Pelling in *Purrunsing* [2016] 4 W.L.R. 81, at [38].

result, a solicitor who conducted his business in a neglectful and unreasonable manner was still afforded relief. Such a woeful neglect of professional standards should necessarily be of central relevance to the determination of whether the trustee ought to be granted discretionary relief.

3. A Deserved Outcome?

The concept of fairness lies at the heart of the statutory jurisdiction and is the most malleable of the threshold conditions. It requires the court to make an ethical judgment as to whether the demands of justice require the trustee to be relieved and, if so, to what extent.[191] Even if the trustee is honest and has acted reasonably, relief can still be denied on this basis.[192] As Sir Ford North explained, "Unless both are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances".[193] The court must, however, be aware of the example that it is setting and, "the possibility of the case being a precedent for evil".[194]

The overarching nature of fairness, therefore, invites the court to evaluate the trustee's conduct from a holistic perspective.[195] There appears to be no limitation on the range of possible considerations which may be considered, except perhaps that the inability of the trustee to pay such liability is to be disregarded.[196] Understandably, the state of mind of the trustee may assume additional relevance under this heading. There is an ethical difference between a breach committed by a trustee reasonably, but with eyes open and one which occurs from a perfectly innocent mistake.[197] The fact that a trustee has profited personally from the breach of trust[198] or retained part of the trust estate[199] would weigh heavily against him. Account may also be taken of any prior breaches of trust committed by that trustee.[200] Similarly, a finding that the trustee should have, but did not, seek the directions of the court might colour the court's perception of fairness as well as invoke issues of reasonableness.[201] If the court would have authorised the trustee's actions then relief, it should follow, would be fair. If the court would have directed otherwise, relief may well be withheld independently of the reasonableness or otherwise of the trustee's actions.[202] Post-breach

[191] See Farwell J. in *Lord De Clifford's Estate* [1900] 2 Ch. 707, 713.
[192] See *Davis* [1907] 1 Ch. 356, where the honest and reasonable employment of a solicitor, who turned out to be crooked, deprived the trustee of relief because it would be otherwise unfair on the beneficiaries.
[193] *National Trustees Company of Australasia* [1905] A.C. 373 (PC), 381.
[194] Maugham, "Excusable Breaches of Trust", p. 165.
[195] *Davis* [1907] 1 Ch. 356.
[196] *Bairstow* [2000] B.C.C. 1025.
[197] The degree of culpability is a pertinent factor: *Bairstow v Queens Moat Houses plc*, ibid.
[198] *Re In a Flap Envelope Co. Ltd.* [2003] B.C.C. 487.
[199] *Re Clark* (1920) 150 L.T. Jo. 94.
[200] *Re Turner* [1897] 1 Ch. 536; *Head v Gould* [1898] 2 Ch. 250.
[201] See *Martin v Triggs Turner Bartons* [2010] P.N.L.R. 3.
[202] See *Chapman* [1902] 1 Ch. 785.

acts and omissions may also have a significant impact upon whether relief is thought to be a fair outcome.[203] Furthermore, when there is a mixture of lay and remunerated trustees the court might think it more appropriate for the lay trustee to seek indemnity from his professional counterpart rather than to invoke the s. 61 jurisdiction.[204] The dynamic of fairness also enables the court to take into account such extraneous factors as, for example, the nature and complexity of the trust,[205] the localised impact (both negative and positive) on the interests of the beneficiaries[206] and prevailing economic and financial conditions.[207]

Significantly, there are two types of limitation that this overriding notion of fairness might engineer. The first, concerns the type of trustee that should be shielded. Although professional trustees fall within the catchment of s. 61 (admittedly more by happenstance than legislative design), any determination of fairness must legitimately involve consideration of whether the trustee is remunerated and should carry insurance.[208] As in *National Trustees Company of Australasia v General Finance Company of Australasia*,[209] relief might be denied to a trustee on the basis that it is a trust company that had received payment for its services.[210] While the Privy Council fell short of advising that relief should never be extended to a professional trustee, Sir Ford North emphasised that the position of such trustees was, "widely different from that of a private person acting as gratuitous trustee".[211] A similar theme was pursued in *Martin v Triggs Turner Bartons*, where Floyd J. concluded that, "This is not a case where the executors were lay people who acted on independent legal advice. In the absence of some factor such as this, I think the liability should lie where it falls".[212] The Law Commission also acknowledged that, "The contrast between the professional and the lay trustee is stark" and noted that, "Very different considerations apply where professional trustees are

[203] In *National Trustees Company of Australasia* [1905] A.C. 373, for example, the trustees failed to take legal steps to recover the money paid to the wrong persons and, moreover, offered no explanation for this omission.

[204] *Bergliter v Cohen* [2006] EWHC 123 (Ch). This is, however, not a hard and fast rule: see *Labrouche* [2016] EWHC 268.

[205] *Labrouche* [2016] EWHC 268.

[206] In *Re Kay* [1897] 2 Ch. 518, a trustee who wrongly paid out legatees was deemed worthy of relief because, "It would be monstrous to allow the family to go to the workhouse when he has every reason to believe that the testator has left ample means for their support" (521, 522, per Romer J.).

[207] See *Re D'Jan of London Ltd.* [1994] 1 B.C.L.C. 561.

[208] *Bergliter* [2006] EWHC 123 (Ch). There it was unfair that the loss should fall on the legatees rather than the professional executors of the estate.

[209] *National Trustee Co. of Australasia* [1905] A.C. 373.

[210] As Henderson J. acknowledged in *Cherney* [2011] EWHC 2156 (Ch), at [321], it would not be fair to excuse the firm for the breach of trust, "in view of their status as skilled professionals acting in the course of their professional business for reward".

[211] *National Trustee Co. of Australasia* [1905] A.C. 373 at 381. He added (at 381) that "it is a circumstance to be taken into account, and they [their Lordships] do not find here any fair excuse for the breach of trust, or any reason why the respondents, who have committed no fault, should lose their money to relieve the appellants, who have done a wrong".

[212] *Martin* [2010] P.N.L.R. 3, at [113].

concerned".[213] Such trustees ultimately justify their existence and charges levied by virtue of a self-claimed competence, specialism and circumspection. Commonsense and notions of fairness, therefore, must surely dictate that these trustees should look elsewhere to tackle the risk of liability. The widespread reliance upon exclusion clauses and liability insurance would persuade many that remunerated trustees are already receiving sufficient protection against their exposure to liability.[214] Although it is a matter for Parliament as to whether to exclude remunerated trustees altogether from the scope of s. 61, the concept of fairness might properly rein in the exercise of discretion in favour of such trustees to cases where the circumstances are exceptional.

Secondly, the transactional nature of the trust relationship should also assume relevance in any evaluation of fairness. It is now established that different types of trust might justifiably be treated in divergent ways[215] and that, "certain detailed rules applicable to one form of trust (a traditional trust) do not necessarily have to be applied to other forms of trust (a commercial trust) if the rationale does not sensibly apply to the latter".[216] A marked variance in scope and purpose, therefore, might legitimately, "have a bearing on the appropriate relief in the event of a breach".[217] Although the core principles of equity are undoubtedly of universal application, the s. 61 discretion is most certainly not of that fundamental character. If it were otherwise, it would apply to all fiduciaries and all trustees. There is scant merit in the granting of relief to solicitors acting on behalf of mortgage lenders in circumstances where the ensuing trust is nothing more than a commercial construct designed to give effect to the solicitor's status as the custodian of the client's fund. Such trustees should, instead, look to their insurers and factor the premiums payable into the fees levied for the professional services supplied.

IV. A Hostage to a Modern Misfortune?

Mortgage fraud is an endemic problem within contemporary society.[218] Unsurprisingly, the Law Society has highlighted the warning signs of mortgage fraud for its members, suggesting how they can best protect

[213] The Law Commission, *Trustee Exemption Clauses* (1999) Consultation Paper No. 171, at [4.12] and [4.29], respectively.

[214] There is some indirect support for this sentiment to be found in the Committee on the Modernization of the Trustee Act Report, *A Modern Trustee Act for British Columbia* (2004) B.C.L.I. Report No. 33. The authors advocated that their equivalent of s. 61 be retained, with the trade-off that the court should have the power to render an exclusion clause ineffective in relation to the breach of trust.

[215] See the totemic decisions in *AIB Group (UK) plc* [2014] UKSC 58; *Paragon Finance* [1999] 1 All E.R. 400; and *Target Holdings Ltd. v Redferns* [1996] A.C. 421.

[216] *AIB Group (UK) plc* [2014] UKSC 58, at [33].

[217] Per Lord Toulson in ibid., at [70]. This echoes the view of Lord Browne-Wilkinson in *Target Holdings Ltd.* [1996] A.C. 421, 436.

[218] The Annual Fraud Indicator Report 2016 estimates the loss to the financial services sector at some £1.3 billion per year. The Solicitors Regulation Authority in its News Release of December 7, 2016 warned

themselves and how the risk of fraud can be minimised.[219] The classic scenario concerns solicitors paying over mortgage funds to the vendor's solicitor without lawful completion having taken place. Other variations have included a solicitors' firm paying over clients' deposits to a fraudulent property developer without a compliant guarantee in place,[220] a fraudster posing as solicitor and making off with proceeds of a conveyancing transaction,[221] a breach of a solicitors' undertaking to obtain a validly executed charge before payment away of the mortgage funds to an imposter,[222] the payment over of the purchase price by the vendor's solicitor to a fraudster who was not the registered proprietor[223] and the extraordinary act of dishonesty of the mortgagor's solicitor misappropriating mortgage monies.[224]

The relationship between solicitor and client gives rise to a contractual agency and carries with it legal obligations as dictated by the terms of the solicitor's retainer and the general law.[225] Hence, the solicitor owes a concurrent contractual and tortious duty to exercise the requisite degree of skill and care in advising and representing the lender.[226] Traditionally, however, the solicitor's retainer is narrowly framed so as to minimise the scope of potential liability.[227] If the retainer requires the solicitor only to ensure that the transaction is effected, there usually is no expectation that he go beyond the instructions so given.[228] As regards the relationship with the mortgage lender, however, the instructions are more detailed and supplemented by the comprehensive provisions of the Council of Mortgage Lenders' Handbook.[229] The Handbook regulates many aspects of a conveyancing transaction that concern the lender's security, for example, as to the identity checks that a solicitor should perform, the minimum term of lease that is acceptable, the correctness of the valuation report, whether the borrower given misleading information or altered his

that email hacks of conveyancing transactions have become a major cybercrime in the legal sector, with £7 m of client losses reported in the previous year.

[219] Practice Note on Mortgage Fraud (updated July 2014), at [1.2]; see also Practice Note on Property and Registration Fraud (11/10/2010), which spotlights vulnerable owners and vulnerable transactions. This guidance is echoed within the Council of Mortgage Lenders' Handbook for England and Wales.

[220] *Various Claimants* [2015] EWHC 3315 (QB).

[221] *Schubert Murphy v Law Society* [2015] P.N.L.R. 15.

[222] *LSC Finance Limited* [2015] EWHC 1163 (Ch).

[223] *Purrunsing* [2016] 4 W.L.R. 81.

[224] *Aldermore Bank plc v Rana* [2016] 1 W.L.R. 2209. Of course, in such a case indemnity insurance would be invalidated on the basis of the policy's "dishonesty exclusion": see *Rahim v Arch Insurance Co. (Europe) Ltd.* [2016] EWHC 2967 (Comm).

[225] For example, a breach of warranty of authority. In *P&P Property Limited* [2016] EWHC 2276 (Ch), however, it was made clear that the warranty given by an agent is not normally an unqualified obligation. The basic representation is only that the agent has authority to act for a client. It does not warrant the true identity of that client.

[226] *Henderson v Merrett* [1995] 2 A.C. 145; *Godiva Mortgages Ltd. v Khan* [2012] EWHC 1757 (Ch).

[227] See *Minkin v Lansberg* [2015] EWCA Civ 1152.

[228] Cf. *Luffeorm Ltd. v Kitsons LLP* [2015] P.N.L.R. 30, where the retainer went beyond mere conveyancing and encompassed a duty to advise on the commercial risks of the transaction.

[229] In conjunction also with the Law Society's Conveyancing Protocol, Code for Completion by Post and Practice Note on Mortgage Fraud.

financial circumstances and the insurance coverage that needs to be obtained. If a lender can show that the specified steps have not been taken (e.g. by failing to report matters which may affect the lender's security[230]) then liability in contract and/or tort may ensue.[231]

There are, however, various legal obstacles placed in the way of a successful common law action and these are particularly evident in the context of mortgage fraud. As regards an action in either contract or negligence, the claimant positively has to establish that there is either a breach of a term of the contract or a lack of reasonable care and skill on the part of the conveyancer.[232] The precise scope of the adviser's liability, therefore, turns upon the construction of the terms and limits of the retainer[233] and the degree to which the client appears to need advice.[234] The common law does not imply any warranty that the solicitor will achieve the desired result[235] and, significantly, does not generally impose liability on a solicitor for fraud perpetrated by a third party.[236] Technical issues of causation can, moreover, undermine a common law claim.[237] As it is necessary for the lender to establish that the adviser's actions caused it to enter into the transaction, this necessarily involves an evaluation of what action the claimant would have taken had it been furnished with the correct information.[238] In *Godiva Mortgages Ltd. v Khan*,[239] for example, the lender was able to establish both negligence and a breach of contract, but could not show that it had suffered any loss thereby. Hence, the claim in negligence failed entirely and the claim in contract, because it was only a technical breach, succeeded only to the extent of nominal damages. It is also possible that, in a negligence (but not a breach of contract) claim, the lender could have its damages reduced because of its own contributory negligence.[240] This could occur where, for instance, the lender has employed an unrealistic loan to value ratio in a period where house prices are falling or failed to follow its own lending criteria.[241]

From the mortgagee's perspective, the action for breach of trust against the solicitor/trustee holds much allure and this is, of course, particularly so

[230] See *Mortgage Express Ltd. v Bowerman and Partners* [1996] 2 All E.R. 836; *Goldsmith Williams Solicitors v E.Surv Limited* [2015] EWCA Civ 1147.
[231] See further J.A. Jolowicz, "Contract and Tort – Solicitors – Professional Negligence Is a Tort" [1979] C.L.J. 54.
[232] See *Birmingham Midshires Mortgage Services Ltd. v George Ide Phillips* [1997] C.L.Y. 3831.
[233] *Clarke Boyce v Mouat* [1994] 1 A.C. 428 (PC).
[234] *Carradine Properties v DJ Freeman & Co.* [1999] Lloyd's Rep. P.N. 483. Hence, an experienced client (such as a mortgage lender) should have a narrower view of the retainer than an inexperienced client.
[235] *R Thew Ltd. v Reeves (No 2)* [1982] 2 Q.B. 1283.
[236] *Platform Funding Ltd. v Bank of Scotland plc* [2008] EWCA Civ 930; *Midland Bank plc v Cox McQueen* [1999] P.N.L.R. 593.
[237] *Bristol and West Building Society v Mothew* [1997] 2 W.L.R. 436.
[238] The "what if" approach: *Nationwide Building Society v Balmore Radmore* [1999] Lloyd's Rep. P.N. 241.
[239] *Godiva Mortgages Ltd.* [2012] EWHC 1757 (Ch).
[240] This would be under the provisions of the Law Reform (Contributory Negligence) Act 1945. In both contract and tort, however, the claimant is under an obligation to mitigate its loss: *Thai Airways International Public Company Ltd. v KI Holdings Co. Ltd.* [2015] EWHC 1250 (Comm).
[241] See *Birmingham Midshires Mortgage Services Ltd.* [1997] C.L.Y. 3831. There the lender's award was reduced by 60% because it failed to fully investigate the borrower's financial position and failed to follow up information it had received.

when it will be difficult to establish a contractual breach or lack of reasonable care. The solicitor, moreover, is not as well placed as he would be at common law. The bare trust imposed on the conveyancer is concerned simply with the release of the mortgage money on the completion of the transaction[242] and the taking of a corresponding security over the purchased property.[243] Whether there is fraud or not, a breach of trust occurs automatically if the money is released in other circumstances or the charge is not forthcoming.[244] Section 61, therefore, assumes importance in a breach of trust claim as it allows the court to take on board exculpating reasons based on a lack of fault. Unlike the alternative common law claims, moreover, there is no need to establish a breach of duty of care,[245] engage with matters of foreseeability of loss[246] or consider contributory negligence[247] and mitigation of loss.[248] Equitable compensation is, instead, designed to negate the breach of trust and is restorative in nature. As Sir Andrew Morritt put it, "the trust imposed on the loan moneys … could only be discharged by completion of the purchase or return of the money".[249] Consequently, extraneous matters such as falls in property values or initial overvaluations of the security are of no relevance.[250] A breach of trust action may also be attractive in that it facilitates a potential claim against a third party for dishonest assistance or knowing receipt.[251]

As regards relief for breach of trust by the solicitor/trustee, the Practice Note on Mortgage Fraud emphasises that the courts will assume a high level of competency and the exercise of due diligence on the part of the conveyancer. Understandably, the courts are heavily reliant upon the published guidance of the professional bodies, as well as the steps required by the Money Laundering Regulations 2007, and this is particularly relevant to the determination of reasonableness. Best practice and client due diligence have become the prevailing watchwords. There is, however, scant consideration of fairness in the modern authorities.[252]

[242] *DB UK Bank Ltd.* [2014] P.N.L.R. 12.
[243] See *AIB Group (UK) plc* [2014] UKSC 58, which was a remortgage case where, in breach of trust, the solicitor paid the monies away without full redemption of a prior mortgage.
[244] *Target Holdings Ltd.* [1996] A.C. 421; *Lloyds TSB Bank plc* [2012] 2 All E.R. 884.
[245] Judge Pelling in *Purrunsing* [2016] 4 W.L.R. 81, at [41], explained that "Whether the … solicitor owes a duty of care in tort … has nothing to do with whether he becomes a trustee of purchase money held by him pending completion".
[246] *AIB Group (UK) plc* [2014] UKSC 58. The Supreme Court emphasised, however, that the recoverable loss must still be shown to be a direct consequence of the breach of trust.
[247] *Various Claimants* [2015] EWHC 3315 (QB).
[248] *AIB Group (UK) plc* [2014] UKSC 58.
[249] *Nationwide Building Society* [2012] EWCA Civ 1626, at [40].
[250] *Knight and Keay v Haynes Duffell Kentish & Co.* [2003] EWCA Civ 223.
[251] See *Novoship (UK) Ltd. v Nikitin* [2015] 2 W.L.R. 526, where the dishonest assistant (as constructive trustee) was held liable to account for profits even though the claimant had suffered no loss.
[252] In *Nationwide Building Society* [2012] EWCA Civ 1626, for example, Sir Andrew Morritt took the view that, as the solicitor/trustee had acted both honestly and reasonably, he could see no ground on which the firm should be denied relief from all liability.

The starting point for contemporary analysis is *Lloyds TSB Bank plc v Markandan & Uddin*.[253] There the Court of Appeal had to consider the application of s. 61 in circumstances where a firm of solicitors was retained by a mortgage lender to act in a conveyancing transaction. Unfortunately, both its main client (the purchaser) and the vendor's solicitor were fraudsters. The property was not in fact for sale and the actual owners were unaware of the purported sale. The mortgage monies were paid over to the bogus solicitors without the firm obtaining the documentation required under the Postal Code or, at least, taking an undertaking to provide such documents. Valid completion never took place,[254] the lender received no legal charge over the property and the faux solicitors disappeared with the mortgage advance. In paying away the monies there was an undeniable breach of trust by the firm. Although the firm was the innocent victim of the fraudsters, its application for relief under s. 61 was rejected. In reaching this conclusion, emphasis was placed upon the best practice guidance prescribed in the Council of Mortgage Lenders' Handbook. It was found that there was a failure to check the veracity of the vendor's solicitor's address and to obtain key documentation and appropriate undertakings. Hence, the firm had acted unreasonably and was, "not deserving of the merciful exercise by the court of its exculpatory discretion".[255]

By way of contrast, in *Nationwide Building Society v Davisons Solicitors*[256] the fraudster used the name of a genuine solicitor, but offered a fictitious business address. The scam was designed so that, when the firm checked the address (as it did), it would appear as a genuine place of business. The Court of Appeal concluded that the duped firm had acted reasonably in accepting the apparently genuine replies to its requisitions and taking an appropriate undertaking from the person it reasonably believed to be the seller's solicitor to redeem a prior mortgage. It was felt that the solicitor's conduct complied with the Handbook as well as the Law Society's Postal Code. The issue of causation was raised by the appellate court, which took the view that any lapse from best practice was minor, did not cause or facilitate the loss and was, therefore, irrelevant.

Much was made of the causation point by the High Court in *Ikbal v Sterling Law*.[257] This case concerned mortgage fraud by a bogus vendor, who was this time represented by a genuine firm of solicitors. During his judgment, it was suggested by Deputy Judge Nicholas Davidson Q.C. that s. 61, "will afford relief to many solicitors who work conscientiously

[253] *Lloyds TSB Bank plc* [2012] 2 All E.R. 884.
[254] As Rimer L.J. explained in ibid., at [39]: "It is this exchange of money and documents that is normally referred to as completion".
[255] Per Rimer L.J. ibid., at [60].
[256] *Nationwide Building Society* [2012] EWCA Civ 1626.
[257] *Ikbal* [2013] EWHC 3291 (Ch).

but themselves fall victim to the fraudsters".[258] The firm, however, had not acted reasonably in that it had cut corners, adopted a casual attitude to its role and failed to address a problem concerning missing documentation. Nevertheless, seizing on the lead in *Davisons* case, the judge felt that there was an insufficient causal link between the solicitor's inept conduct and the loss incurred. As the loss would have occurred anyway, by virtue of the "but for test" the conduct fell to be totally discounted for the purposes of s. 61 reasonableness. The Deputy Judge clearly fell into error. It is not possible to ignore departures from best practice that increase the risk of loss, "even if the court concludes that the fraudster would nonetheless have achieved his goal if the solicitor had acted reasonably".[259] The disregard of unreasonable conduct from the assessment of fairness and the exercise of discretion also lacks legitimacy.[260] Admittedly, the Deputy Judge fleetingly considered whether relief could be denied on the basis of fairness, coupled with the fact that the solicitor was insured, but in the absence of direct authority he felt unable to venture so far. In giving the firm full relief from liability for breach of trust, the decision in *Ikbal* is clearly unsustainable. The Deputy Judge misconceived the role of causation within the framework of s. 61 and, in doing so, promoted an ignominious outcome.

Santander UK plc v R A Legal Solicitors[261] marked the next instalment in this series of the s. 61 authorities. The firm was instructed by the purchaser and Santander in connection with the purchase of a residential property. Sovereign Chambers LL.P. claimed to be instructed by the vendor, but the vendor knew nothing about any prospective sale. Sovereign Chambers was in fact a fraudster. Following the supply of forged documents to the firm, the funds were paid to the fraudster and promptly disappeared from its client account. Completion, of course, could not take place. The claimants sued the defendant firm, alleging breach of trust. The firm accepted that it was in breach of trust, but sought s. 61 relief. Unlike in the *Davisons* case, RA Legal had clearly not acted reasonably as there were numerous departures from best practice, including making inadequate requisitions, accepting inadequate replies before transferring the completion money and failing to deal with the absence of a prior mortgage discharge on the pretended completion.

Briggs L.J. returned to the theme of causation in the context of the reasonableness of the trustee's conduct. While accepting that there must be some causal connection between conduct and loss, he took the view that, "a strict causation test casts the net too narrowly for the purpose of

[258] Ibid., at para. [140].
[259] Per Briggs L.J. in *Santander UK plc* [2014] EWCA Civ 183, at [25].
[260] See Briggs L.J. ibid., at [103].
[261] *Santander UK plc* [2014] EWCA Civ 183.

identifying relevant conduct".[262] This is because, in most mortgage fraud cases, the loss is inflicted by the third-party fraudster rather than the conduct of the solicitor-trustee. Briggs L.J. also cautioned against the over-mechanistic application of the requirement to show the necessary connection between the conduct complained of and the lender's loss. He rejected any test that would catch slightly unreasonable conduct which went to the heart of a causation analysis and yet ignore highly unreasonable conduct which lay at the fringes of materiality in terms of causation.

In *Purrunsing v A'Court & Co.*,[263] Mr. Purrunsing brought a claim against both his own solicitor and the vendor's solicitor (A'Court & Co.) arising from the purported sale to him by a fraudster, who claimed to be, but was not, the registered proprietor of the property. Under the 1998 version of the Postal Code this amounted to a breach of trust by both defendants.[264] Both unsuccessfully applied for s. 61 relief. Neither defendant had acted like reasonable solicitors in the conveyancing process. Each of them was under an obligation to apply "customer due diligence" when carrying out the transaction and both had failed to do so. They ought reasonably to have concluded that there was nothing in A'Court & Co.'s possession to link the fraudster to the property.

Most recently, in *P&P Property Limited v Owen White & Catlin LLP*[265] the vendor was a fraudster who, having impersonated the true owner, disappeared with the completion monies. The purchaser brought an action against the vendor's solicitors, alleging a variety of wrongdoing, including a breach of trust. Although the High Court concluded that there was no trust arising on the facts, Deputy Judge Dicker was prepared to consider whether he would have granted relief under s. 61. Invoking the notion of client due diligence and considering the obligation to make anti-money laundering checks, he considered that the solicitor's actions were not reasonable. He felt it significant that the property was of a type which the Law Society's Practice Note on Mortgage Fraud had identified as being particularly vulnerable to fraud. It was of relatively high value, without a legal charge, unoccupied and marketed by someone living overseas. The transaction was also packaged as urgent with completion intended to take place within a short timeframe. The solicitor, moreover, had no overseas correspondence address for the client and the results of an anti-money laundering search were unsatisfactory. Bank statements produced by the client were inconsistent with the claim that the client lived and worked abroad. Considering this

[262] Ibid., at para. [24]. He added at para. [25] that "it is also too restrictive to apply a 'but for' test". The Chancellor agreed, explaining at para. [110] that s. 61 "is not a statutory gloss intended to introduce familiar causation concepts".

[263] *Purrunsing* [2016] 4 W.L.R. 81.

[264] Absent an express undertaking, in the wake of the revamped and reworded Postal Code (2011 version) the seller's solicitor will no longer be in breach of trust when paying away the monies to the bogus vendor: *P&P Property Limited* [2016] EWHC 2276 (Ch).

[265] Ibid.

catalogue of oversight and error, the conveyancer had fallen well short of the professional standards expected.

The mortgage fraud authorities mark a departure from the traditional application of s. 61. Unlike with conventional trusts and trustee malfeasance, the courts are weighed down by a painstaking analysis of the lender-solicitor retainer, which in inevitably arcane form dictates whether a trust is in existence and, if so, whether there has been a breach of that trust. It is remarkable that, in relation to the vendor's solicitor, the existence of a trust will now hinge upon which version of the Postal Code is incorporated into the retainer. The courts have also found it difficult to apply established notions of causation in cases where the loss was directly caused by the dishonesty of a third party, but facilitated by the action or inaction of an innocent solicitor. It is also noteworthy that the court's conception of reasonableness in the highly-stylised world of conveyancing is fuelled by a formulaic application of the guidelines as to best practice and due diligence set out in the Council of Mortgage Lenders' Handbook and Law Society Practice Notes. While this external guidance is of obvious value in determining whether the conveyancer has acted reasonably, it should not result in the court abdicating its discretion, particularly as to the overarching issue of fairness. The current application of the s. 61 in such instances is overly technical, seemingly, without any element of fairness or merit and fraught with difficulty. As Mitting J. commented in *Schubert Murphy v Law Society*, "it is at least unsatisfactory that a purchaser in those circumstances should be put at risk of the exercise of a discretion in a manner unfavourable to him in circumstances in which he cannot reasonably have expected to have been put at risk of any loss whatsoever".[266]

V. Conclusion

This article highlights defects in the wording, structure and operation of s. 61 of the Trustee Act 1925. The changing nature of trusteeship, the availability of liability insurance and the widespread deployment of exclusion clauses might suggest that the discretion is no longer necessary or desirable. The major inhibitor to this abandonment is the lay trustee, who will not usually carry insurance and will not have the protective shield of an exoneration provision. Parliament and the reform agencies should reconsider the continuing need for this jurisdiction and determine whether its scope should be limited to the non-remunerated trustee.[267] This narrowing of range has

[266] *Schubert Murphy* [2015] P.N.L.R. 15, at [23].

[267] It is not to be overlooked that, as the Scottish Law Commission, *Breach of Trust* (2003) Discussion Paper No. 123, at [3.41], explained: "Professional trustees are appointed on the basis that they can provide a better standard of service than ordinary untrained people. They hold themselves out as specialists in the areas in question".

already been championed in the context of exclusion clauses,[268] but has yet to be seriously considered in the context of discretionary relief.[269] If the s. 61 discretion is to survive, it will need major overhaul. Such amendments should clarify the trusts over which the jurisdiction extends, identify the breaches of trust that fall outside its catchment, jettison the unhelpful reference to seeking directions of the court and remove the opaque and misleading reference to a trustee who "may be personally liable".

Until any legislative change is forthcoming, it is for the court to make sense of its jurisdiction. It is rightly uncomfortable exercising it in favour of the conveyancer/trustee and justifies not doing so by the need to exact a high standard of care from such professionals.[270] This tendency suggests the potential redundancy of s. 61 in mortgage fraud cases and embodies the sentiment that such trustees are already receiving sufficient protection and compensation against exposure to full liability.[271] The judiciary are required by s. 61 to assess issues of fairness and this is particularly necessary when the trustee has acted honestly and reasonably. Context is, therefore, paramount. The marked dissimilarities between and traditional and transient trusts and the differing nature of the trusteeship involved points clearly towards the conclusion that the conveyancer/trustee ought not fairly to be excused for the breach of trust under s. 61. The operation of s. 61 in these conveyancing cases not only highlights the potential futility of such commercial arrangements,[272] but also fulfils a 19th century prophecy that, "Such topsy-turvy legislation may well lead to anomalies".[273]

[268] See Law Commission, *Trustee Exemption Clauses* (1999) Consultation Paper No. 171.
[269] The possibility was rejected, albeit without elaboration, by the Law Reform Commission for Ireland (*Trust Law: General Proposals* (L.R.C. 92, 2008), at [4.46]).
[270] See Law Commission, *Trustee Exemption Clauses* (1999) Consultation Paper No. 171, at [4.63].
[271] Lowry and Edmunds, "Excuses", p. 271, share this doubt as to whether relief plays any valuable role in respect of a professional trustee of a commercial trust.
[272] A futility that Lord Browne-Wilkinson warned against in *Target Holdings Ltd.* [1996] A.C. 421, 436.
[273] Maugham, "Excusable Breaches of Trust", p. 163.