

SECTION 61: *DEUS EX MACHINA*?

Paul S. Davies*

Section 61 of the Trustee Act 1925 provides that:

“61. Power to relieve trustee from personal liability

If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but 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, then the court may relieve him either wholly or partly from personal liability for the same.”

This provision affords the court the power to excuse a trustee’s breach of trust. It was originally intended¹ to ensure that lay persons would not be deterred from acting as trustees, since the court could exercise its discretion under section 61 to relieve them from liability if they acted honestly and reasonably.² But given the increasing prevalence of professional trustees, it was thought that section 61 might become of much reduced importance. One leading study suggested that, “[l]eft alone, section 61 may continue to lie dormant, rising only occasionally to rescue a lay trustee from liability for a technical but negligent breach of duty”.³

However, section 61 has not simply withered on the vine. Instead, it has been of central importance to a series of recent decisions concerning the liability

* Associate Professor, Faculty of Law, University of Oxford; Fellow, St Catherine’s College. This article is based in part on a presentation at the 18th Annual Lawyers’ Liability Seminar organised by the Professional Negligence Bar Association at Gray’s Inn in October 2014. I am grateful to the organisers, to those present for their comments, and to Imran Benson for comments on an earlier draft. The usual disclaimers apply.

¹ In its earlier incarnation in section 3 of the Judicial Trustees Act 1896, which section 61 replicates in all material respects.

² However, it has been argued that “this provision has not been especially successful in reassuring trustees that nothing unreasonable is expected of them, because it makes no promises as to the kinds of situations in which relief will be given, and the courts have tended to avoid making any in applying it”: S. Gardner, *An Introduction to the Law of Trusts* 3rd ed (OUP, 2011) 188.

³ J Lowry and R Edmunds, ‘Excuses’ in P Birks and A Pretto (eds) *Breach of Trust* (Hart, 2002) 293.

of solicitors who act as trustees in conveyancing transactions.⁴ Yet these decisions are not easy to reconcile, particularly as regards what constitutes “acted reasonably”. This is unfortunate: clarity about the nature and function of section 61 is required.

In some respects, it might be thought impossible usefully to consider the principles underpinning relief under section 61, since “the court should be slow to gloss the general words of a statute, all the more so where it confers a broad discretion”.⁵ Indeed, it has been said that “[i]t is seldom helpful to compare conduct found to be reasonable or not in one case with that of another”;⁶ given the importance of a particular set of facts to the exercise of the court’s discretion, no one precedent will bind the exercise of a subsequent court’s discretion.⁷ However, judicial statements that “[i]t would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section”⁸ should nonetheless be treated with caution. It is important that some guidance is established to enable parties to predict the outcome of disputes and to give judges some assistance when considering whether a trustee should be excused for the breach of trust.⁹ As Briggs LJ noted in *Santander UK Plc v RA Legal Solicitors*, this is particularly important “in a business context in which those advising the lender and the solicitors, 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, with a full investigation of all potentially relevant circumstances, so as to obtain a particular trial judge’s discretionary decision”.¹⁰

This need for predictability and clear guidance should be taken seriously, especially when it is borne in mind that a trustee who makes a successful application under section 61 will have his or her costs paid for by the

⁴ See notably *Lloyds TSB Bank plc v Makandan & Uddin* [2012] EWCA Civ 65, [2012] 2 All ER 884; *Nationwide Building Society v Davisons* [2012] EWCA Civ 1626, [2013] PNL 12; *Iqbal v Sterling Law* [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9; *Santander UK Plc v RA Legal Solicitors* [2014] EWCA Civ 183, [2014] PNL 20.

⁵ *RA Legal* [2014] EWCA Civ 183, [2014] PNL 20 [23] (Briggs LJ).

⁶ *Davisons* [2012] EWCA Civ 1626, [2013] PNL 12 [48] (Sir Andrew Morritt C).

⁷ A Sheridan, “Excusable Breaches of Trust” [1955] Conv 420, 437; J Lowry and R Edmunds, ‘Excuses’ in P Birks and A Pretto (eds) *Breach of Trust* (Hart, 2002) 277.

⁸ *Re Turner* [1897] 1 Ch 536, 542. See too *Re Kay* [1897] 2 Ch 518, 524 (Romer J).

⁹ See further [below](#).

¹⁰ *RA Legal* [2014] EWCA Civ 183, [2014] PNL 20 [23] (Briggs LJ).

unsuccessful beneficiary, despite the latter being entirely innocent as well.¹¹ Yet in the recent decision of the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co*, Lord Toulson thought that section 61 might be used as a “deus ex machina”,¹² which appears to be unsatisfactory. Maugham once wrote that section 61 “permits judges to exercise a dubious prerogative of mercy”,¹³ but the better view is surely that expressed by Briggs LJ in *RA Legal*:¹⁴

“Relief under section 61 is often described as an exercise of mercy by the court. In my judgment the requirement to balance fairness to the trustee with a proper appreciation of the consequences of the exercise of the discretion for the beneficiaries means 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.”

The Court of Appeal has recently shown itself to be prepared to overturn decisions made by first instance judges on the reasonableness of a trustee’s actions and the availability of relief under section 61.¹⁵ It is therefore clear that trial judges do not have an entirely free hand when deciding whether or not to grant equitable relief. Principled guidance should be available. The Supreme Court refused permission to appeal the decision on section 61 in *RA Legal* since “the application does not raise an arguable point of law of general public importance”.¹⁶ This might be regretted: it is still not entirely clear what needs to be shown for claims for relief under section 61 to succeed.

The importance and scope of section 61

The remedies available for breach of trust have been the subject of much recent discussion. Most significantly, the Supreme Court, in *AIB Group (UK) Plc v Mark Redler & Co*,¹⁷ emphasised that a beneficiary should only be able to recover “equitable compensation” for losses caused by the trustee’s breach of

¹¹ *Palmer v Emerson* [1911] 1 Ch 758, 770 (Eve J). Admittedly, the court does have a discretion to decide otherwise if there has been some other unsatisfactory conduct on the part of the trustees: *Re Allsop* [1914] 1 Ch 1, 14 (Cozens-Hardy MR).

¹² [2014] UKSC 58; [2014] 3 W.L.R. 1367 [69] (Lord Toulson).

¹³ F Maugham, “Excusable Breaches of Trust” (1898) 14 LQR 159, 159.

¹⁴ *RA Legal* [2014] EWCA Civ 183, [2014] PNLR 20 [34].

¹⁵ See notably *Davisons* [2012] EWCA Civ 1626, [2013] PNLR 12 and *RA Legal Solicitors* [2014] EWCA Civ 183, [2014] PNLR 20.

¹⁶ Application refused on 31 October 2014 (Lord Neuberger, Lord Sumption and Lord Reed: UKSC 2014/0095).

¹⁷ [2014] UKSC 58; [2014] 3 W.L.R. 1367.

duty.¹⁸ This emphasis on causation is significant, and might have an impact upon the application of section 61 of the Trustee Act.¹⁹ In any event, it is worth highlighting that, although here are *dicta* which suggest that equitable compensation should be made to equate with common law damages,²⁰ the principles underpinning compensatory remedies may differ in equity and the common law,²¹ and the available defences may not be the same either. It is entirely appropriate for section 61 to continue to be employed as a defence to claims for breach of trust, even though such a defence is not available to concurrent common law claims which might arise on the same facts.

Indeed, the fact that liability for breach of trust is strict makes it likely that claims for breach of trust will continue to prove attractive to claimants. Unlike common law claims for breach of a contractual or tortious duty of care, the claimant beneficiary does not need to prove that the trustee acted negligently in failing to comply with the terms of the trust instrument.²² Instead, the onus is clearly placed on the trustee to prove that he or she acted reasonably. This is obviously advantageous to the beneficiary, but it also seems appropriate. After all, the trustee undertakes to act in the best interests of the beneficiary, and “[t]he beneficiary may not be in a position to know all that occurred in the chain of events leading to the breach of trust”.²³ In some instances, though, holding the trustee liable when he or she acted wholly reasonably may be too harsh, and section 61 is necessary in order to be able to grant relief. As Briggs LJ commented in *RA Legal*, it is “the principal mechanism by which the law tempers the rigour of a trustee’s otherwise strict (i.e. not fault-based) liability where a fraudulent intervention in a conveyancing transaction of which the purchaser’s solicitor is entirely unaware causes an unauthorised disposal of the lender’s advance in breach of trust.”²⁴ The fact that the burden is placed on the trustee to prove he or she acted honestly and reasonably and ought fairly to be excused for the breach of trust was crucial to the successful appeal in *RA Legal*: the Court of Appeal thought that the trial judge was insufficiently demanding on

¹⁸ See P Davies, ‘Remedies for Breach of Trust’ (2015) 78 MLR 681.

¹⁹ See **below**.

²⁰ Eg *AIB* [2014] UKSC 58; [2014] 3 W.L.R. 1367 [71] (Lord Toulson); *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64 [155] (Lord Neuberger).

²¹ For further discussion, see J Glistler, “Breach of trust and consequential loss” (2014) 8 Journal of Equity 235.

²² *RA Legal* [2014] EWCA Civ 183, [2014] PNLR 20 [19] (Briggs LJ).

²³ *ibid* [112] (Etherton C).

²⁴ *ibid* [19] (Briggs LJ).

this point.²⁵ Indeed, Briggs LJ noted that “the incidence of the burden of proof may frequently be crucial to the outcome”.²⁶

There are further advantages in pursuing the equitable claim over the common law claim if the beneficiary wishes to sue third parties to the breach of trust. This is because section 61 is personal to the trustee: it excuses the liability of the trustee, but does not mean that there has been no breach of trust.²⁷ Thus a third party might still be liable for dishonestly assisting that breach of trust, or for knowingly receiving property in breach of trust. For example, in *Re Smith*,²⁸ the trustee was a widow who lived in the country and employed a firm of solicitors to act as her agents. The solicitor’s clerk fraudulently obtained the trustee’s signature on certain cheques and induced her to initial alterations to the cheques. He then absconded with the money. The trustee was held to have committed a breach of trust, but her liability was excused. If the clerk had been sued as an accessory to the breach of trust, the morally innocent quality of the trustee’s breach of trust should clearly not afford him a defence.

What is less clear is whether dishonest assisters and knowing recipients can themselves rely upon section 61 as a defence. In *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA*, Peter Gibson J left open the possibility of an accessory to a breach of trust being able to rely upon section 61,²⁹ but some commentators have argued that dishonest defendants will not have been acting ‘honestly and reasonably’ and therefore cannot benefit from section 61.³⁰ It is suggested that an accessory to a breach of trust should be able to rely upon a defence of justification,³¹ but this is distinct from section 61: an accessory to a breach of trust is not a trustee so does not fall within the scope of section 61.³² The same reasoning might apply to knowing recipients, since the Supreme Court in *Williams v Central Bank of Nigeria*³³ held that neither dishonest assistants nor knowing recipients should be considered to be trustees. However, the nature of liability as a knowing recipient

²⁵ *ibid* [55] (Briggs LJ).

²⁶ *ibid* [56] (Briggs LJ).

²⁷ As section 61 itself says, ‘the court may relieve [the trustee] either wholly or partly from personal liability’. Cf *Perrins v Bellamy* [1899] 1 Ch. 797, 801 (Lindley MR).

²⁸ (1902) 86 LT 401 (Ch D). cf *Re Stuart* [1897] 2 Ch 583, 590.

²⁹ [1993] 1 WLR 509, 609.

³⁰ eg C Harpum, ‘The Stranger as Constructive Trustee: Part 2’ (1986) 102 LQR 267, 290.

³¹ As recognised by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC), 389.

³² See generally P Davies, *Accessory Liability* (Hart, 2015) chs 7 and 8.

³³ [2014] UKSC 10, [2014] 2 WLR 355.

is somewhat unclear,³⁴ and it may be that a person who actually receives property, knowing that it has been misapplied in breach of trust, should in turn owe the duties of a trustee.³⁵ If so, relief under section 61 may, in unusual circumstances, be appropriate.³⁶

It is suggested that section 61 will not be applied where the beneficiary's claim is for an account of profits – whether that be against a dishonest assister, knowing recipient, or even against the trustee him or herself. This seems to have been the view of Proudman J in *Sinclair v Sinclair*.³⁷ Whilst it has been pointed out that her Ladyship did so without reference to the contrary conclusion reached by HHJ Reid QC in *Coleman Taymar Ltd v Oakes*,³⁸ regarding the statutory jurisdiction to relieve company directors under section 727(1) of the Companies Act 1985 (which is now section 1157 of the Companies Act 2006),³⁹ it has now been made clear that little assistance should be derived from the provisions of the Companies Act when interpreting section 61 of the Trustee Act 1925. As Briggs LJ put it in *RA Legal*, it would be “wrong, by any process akin to reverse engineering, to interpret section 61 by reference to the historically more recent and undoubtedly more difficult provisions now to be found in section 727 of the Companies Act 1985”.⁴⁰ Where a beneficiary seeks an account of profits the court should, at the very least, be “slow” to relieve a trustee from liability using the statutory provisions.⁴¹ It would be preferable for the court instead to grant the trustee an equitable allowance in situations where the trustee's liability should be excused;⁴² courts should maintain the prophylactic policy of deterring trustees from profiting from their trusteeship.

³⁴ S Watterson, “Limitation of actions, dishonest assistance and knowing receipt” [2014] CLJ 253.

³⁵ For a powerful argument that knowing recipients are in fact trustees, see C Mitchell and S Watterson, “Remedies for Knowing Receipt” in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart, 2010).

³⁶ In *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch. 447, 458, Dillon LJ, with whom Sir Edward Eveleigh agreed, refused to excuse the trustee under section 61 on the particular facts, but did not say that it was not possible for a knowing recipient to rely on section 61.

³⁷ [2009] EWHC 926 (Ch); [2009] 2 P. & C.R. DG15 [76].

³⁸ [2001] 2 B.C.L.C. 749.

³⁹ M Conaglen, “The extent of fiduciary accounting and the importance of authorisation mechanisms” [2011] CLJ 548, 572.

⁴⁰ *RA Legal* [2014] EWCA Civ 183, [2014] PNLR 20 [32].

⁴¹ *Re Pauling's Settlement Trusts* [1964] Ch. 303, 339; M Conaglen, “The extent of fiduciary accounting and the importance of authorisation mechanisms” [2011] CLJ 548, 573.

⁴² Cf *Boardman v Phipps* [1967] 2 AC 46; *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908; [2015] 2 W.L.R. 526. See too J Lowry and R Edmunds, ‘Excuses’ in P Birks and A Pretto (eds) *Breach of Trust* (Hart, 2002) 293.

Section 61 applies where the trustee “is or may be personally liable for any breach of trust”, but it is important to note that the “may be” does not allow a trustee to seek to be excused for future breaches; the provision is intended to cover past events only, but removes the need for the trustee first to establish that there has definitely been a breach of trust.⁴³ This is sensible, and ensures that the provision is broadly applicable. Indeed, although the provision may originally have been motivated by the position of lay trustees, it is clear that it “applies to all kinds of trustees, lay and professional”.⁴⁴ However, whether the trustee is a professional or a lay person may be relevant when considering whether or not the discretion to grant relief should be exercised.⁴⁵

The elements of section 61

“Honestly”

A trustee who has not acted honestly does not deserve to be excused for the breach of trust by the court. This seems uncontroversial, and probably explains why there are few cases where dishonesty has been an issue on applications for relief under section 61. However, as Nicholas Davidson QC, sitting as a Deputy High Court Judge in *Ikbāl v Sterling Law*, rightly observed, the fact that dishonesty may not be alleged “does not dispose of the issue: it is for the trustee affirmatively to prove honesty, and the fact that those acting for the beneficiary may not have enough material to justify alleging dishonesty in a Statement of Case does not relieve the trustee of that task”.⁴⁶ The burden lies squarely on the trustee.

It is also important to offer some guidance on the meaning of “honesty”. Sheridan wrote that “[n]o authoritative definition of honesty has been propounded, but it seems to denote being motivated by the interests of the trust”.⁴⁷ A trustee who tries to act in the best interests of the trust should not be characterised as “dishonest”. However, the meaning of “dishonesty” is somewhat troubled in equity: in the context of accessory liability there has been much debate about whether it should be assessed purely subjectively⁴⁸ or

⁴³ *Re Smith* 1902 (Kekewich J); *Re Grindley* [1898] 2 Ch 593; *Re Tollemache* [1903] 1 Ch 457; *Re Rosenthal* [1972] 1 WLR 1273. Cf *Perrins v Bellamy* [1899] 1 Ch. 797, 801.

⁴⁴ *RA Legal* [19] (Briggs LJ).

⁴⁵ See below.

⁴⁶ [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9 [226].

⁴⁷ A Sheridan, “Excusable Breaches of Trust” [1955] Conv 420, 423.

⁴⁸ *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

objectively.⁴⁹ The latter view is preferable,⁵⁰ and should be adopted in the context of section 61 claims as well. But how demanding should the standard be? In the context of exclusion clauses, it appears that a more demanding standard is exacted from professional trustees than lay trustees,⁵¹ such that where a professional trustee – in that case a solicitor – acts under a belief that “was so unreasonable that no reasonable solicitor-trustee could have held that belief”⁵² then the court will not find that that trustee acted honestly. This seems equally appropriate in the context of section 61, although it does perhaps blur the boundary a little between the requirements that the trustee acted “honestly” and “reasonably”.

“Reasonably”

Much of the modern controversy surrounding section 61 concerns the scope of “acted reasonably”. Clearly, whether or not a trustee acted reasonably will depend very much on the particular circumstances of any given case. Sheridan wrote that:⁵³

“What is reasonable in any particular circumstances is naturally a question of fact. But the inquiry might be hampered by the absence of an accepted criterion of reasonableness. In fact, prophecy of what judges will do is to some extent hampered by not being quite sure what is meant by reasonableness, but the judges do not seem to be at any loss. Whether by instinct or from their own experience they appear to be forthright and certain on the whole in their assessments.”

Whilst the meaning of “reasonableness” remains somewhat opaque,⁵⁴ it no longer appears to be the case that the judges do not seem to be at any loss. This might be evidenced by the fact that the Court of Appeal overturned the decisions of the trial judges in both *Davisons*⁵⁵ and *RA Legal*,⁵⁶ and by

⁴⁹ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

⁵⁰ *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 Lloyd’s Rep 115; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] Lloyd’s Rep FC 102; see generally P Davies, *Accessory Liability* (Hart, 2015) ch 4.

⁵¹ See eg *Walker v Stones* [2001] QB 902, discussing *Armitage v Nurse* [1998] Ch 241.

⁵² *Walker v Stones* [2001] QB 902, 941 (Sir Christopher Slade).

⁵³ A Sheridan, “Excusable Breaches of Trust” [1955] Conv 420, 424.

⁵⁴ The standard has tended to be that of the “ordinary businessman”: see eg *Re Grindley* [1898] 2 Ch 593, 601 (Chitty LJ).

⁵⁵ [2012] EWCA Civ 1626, [2013] PNL R 12.

somewhat conflicting comments in a string of decisions concerning solicitors' liability for breach of trust. It is helpful to examine these decisions in chronological order.

*Lloyds TSB Bank plc v Markandan & Uddin*⁵⁷

The defendant was a firm of solicitors ("M&U") which was acting for the claimant lender on a mortgage loan. The lender transferred £742,500 to M&U, which the latter held on trust with instructions to advance the money to the vendors upon completion of the purchase of the particular property in return for a first legal charge in favour of the lender. Unfortunately, M&U was the victim of a fraud: it transferred the money to what it believed to be a firm of solicitors acting for the vendors, thought to be called Deen Solicitors, but in fact M&U transferred the money to fraudsters who made off with it. Although there was a genuine firm of solicitors called Deen Solicitors in Luton, the fraudsters purported to be acting from a branch office in London which did not in fact exist.

M&U had therefore transferred the mortgage funds in breach of trust: there was no completion of the transaction and therefore no authority to part with the money. M&U sought relief under section 61. This was unhesitatingly rejected by both the trial judge and the Court of Appeal. Although M&U had acted honestly, it had not acted reasonably. In particular, M&U had failed to check that Deen Solicitors actually had an office at the address given in London, and failed to take adequate steps to verify the transaction after the bogus solicitors had breached certain undertakings. As Rimer LJ put it,⁵⁸

"Whilst it is impossible not to have sympathy for M&U in becoming enmeshed in the fraud, the judge's conclusion was that, by these two shortcomings, they brought their misfortune upon themselves. If they had instead performed their role as solicitors with exemplary professional care and efficiency, but had still parted with the loan money in circumstances that were objectively reasonable, the decision on the section 61 application might have been different.

⁵⁶ [2014] EWCA Civ 183, [2014] PNL R 20.

⁵⁷ [2012] EWCA Civ 65, [2012] 2 All ER 884.

⁵⁸ *ibid* [60]-[61] (Rimer LJ).

It is, therefore, the discretionary power under section 61 that provides the key to the claimed unfairness of holding a solicitor liable for breach of trust in circumstances such as the present. The careful, conscientious and thorough solicitor, who conducts the transaction by the book and acts honestly and reasonably in relation to it in all respects but still does not discover the fraud, may still be held to have been in breach of trust for innocently parting with the loan money to a fraudster. He is, however, likely to be treated mercifully by the court on his section 61 application. M&U's conduct of the transaction was, however, found to fall short of the standard that merited such mercy.”

*Nationwide Building Society v Davisons*⁵⁹

The facts of this case were similar to those in *Markandan & Uddin*. The solicitors paid away mortgage monies advanced by a lender in breach of trust since, again, the monies were transferred to a fraudster and there was no completion of the transaction as demanded by the terms of the solicitor's retainer. Davisons was the firm of solicitors acting for the lenders. Davisons was dealing with a person purporting to be Mr Gill, practising in the name of Rothschild, from premises in Small Heath. Unlike the defendant solicitors in *Markandan & Uddin*, Davisons checked on the websites of the Law Society and Solicitors Regulation Authority which said that Mr Gill was a duly qualified solicitor and that Rothschild had branches in Birmingham and Small Heath. Satisfied by these checks, Davisons proceeded with the transaction. However, although there was indeed a Mr Gill practising in the name of Rothschild in Birmingham, the supposed Mr Gill practising in Small Heath was an imposter and there was no branch of Rothschild in Small Heath. The fraudster made off with the mortgage monies, and the lender sought recourse against its solicitors.

Three months prior to Davisons paying away the mortgage monies, the real Mr Gill had become aware of the fraudulent Mr Gill's claiming to act from premises in Small Heath and promptly notified the Law Society and Solicitors Regulation Authority. Remarkably, neither body took steps to remove that address from their websites until after this fraud had been completed, which meant that the information on their websites upon which Davisons relied was

⁵⁹ [2012] EWCA Civ 1626, [2013] PNLR 12.

inaccurate.⁶⁰ Davisons argued that, since it had undertaken the proper steps to check the existence of the purported solicitors with whom it believed to be dealing, relief under section 61 should be granted, notwithstanding the recent decision in *Markandan & Uddin*.

Catherine Newman QC, sitting as a deputy judge of the High Court, refused to excuse Davisons under section 61. She relied upon *Markandan & Uddin* which seemed to set a high standard: “exemplary professional care and efficiency” was expected, so that the transaction should be conducted by the bank “in all respects”. Although the judge accepted that Davisons acted honestly, she did not think Davisons had acted reasonably, notably because it did not insist upon receiving an undertaking in the Law Society’s recommended form that the prior charge upon the property would be redeemed on completion and that evidence of its discharge would be provided after completion. Moreover, Davisons did not receive replies to Requisitions in the form requested, which expressly draws attention to the required undertakings.⁶¹ The judge concluded that “a careful and diligent solicitor would expect to be clear in his own mind that he had an express, not an implied, undertaking, still less a mere promise to give an undertaking in the future, on a matter so important”.⁶²

The decision of Catherine Newman QC seems to fit comfortably with the demands of *Markandan & Uddin*. And on appeal, Morritt C recognised that *Markandan & Uddin* did indeed establish propositions which were binding.⁶³ However, he took a different view of the facts and thought that the only undertaking possibly lacking was the undertaking to submit evidence of the discharge of the mortgage, and that “no such documents could be provided in advance of completion by which time Davisons would have parted with the purchase money anyway”.⁶⁴ The Chancellor appeared to adopt a somewhat less stringent approach in insisting that:⁶⁵

“[section 61] only requires [the trustee] to have acted reasonably. That does not, in my view, predicate that he has necessarily complied with best practice in all respects. The relevant action must at least be connected

⁶⁰ [2012] EWCA Civ 1626, [2013] PNLR 12 [5].

⁶¹ [2012] All ER (D) 141 [47].

⁶² *ibid* [48].

⁶³ [2012] EWCA Civ 1626, [2013] PNLR 12 [27].

⁶⁴ *ibid* [47].

⁶⁵ *ibid* [48]-[50].

with the loss for which relief is sought and the requisite standard is that of reasonableness not of perfection.

... The lapse from best practice, if any, did not cause the loss to Nationwide. Given that [the trustee] acted both honestly and reasonably I can see no ground on which Davisons should be denied relief from all liability.”

*Ikbal v Sterling Law*⁶⁶

The claimant in this case was not an institutional lender but Mr Ikbal. Mr Ikbal wanted to purchase a property, and for that reason transferred £315,000 to his solicitors, Sterling Law (“Sterling”), to be transferred to the vendors upon completion. Unfortunately, the firm of solicitors which purported to act for the vendor were fraudsters, who had no authority to act for the actual owner of the property. Sterling was duped by the fraud, and paid away the purchase monies to the fraudsters. Sterling did not have the authority to transfer the purchase monies otherwise than in exchange for documents giving Mr Ikbal ownership of the property. There was therefore a breach of trust.

On the question of relief under section 61, Nicholas Davidson QC, sitting as a Deputy High Court Judge, was very critical of the conduct of Sterling. The judge noted that there had been a failure to use the correct procedure for the Postal Code, and said:⁶⁷

“standardised procedures have been introduced to enable the efficient use of time and resources but with safeguards designed to maintain proper protection of clients. The rash of cases about frauds exploiting the postal completion system suggests to me that it is important that solicitors should be scrupulous in the use of such procedures and not cut corners. The defendant’s approach was casual – not making the express agreement, and reading the answers to Requisitions to fit the assumption which was being used instead of express agreement. I do not consider that reasonable.”

The judge also found that Sterling had acted “very unreasonably indeed” in taking so long to realise that the TR1 form had not been received and was

⁶⁶ [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9.

⁶⁷ *ibid* [232].

overdue.⁶⁸ Nevertheless, the judge thought himself bound by *Davisons* to find that the unreasonable conduct was not relevant to the question of whether the defendant was acting reasonably for the purposes of section 61, although he was keen to stress that “[t]his is, and is only, because of the lack of causal connection between the defendant’s behaviour and the loss”.⁶⁹ This is because the outcome would have been the same had the use of the Postal Code expressly been agreed, and the failure to obtain the TR1 form happened after the loss had occurred. Apparently with some reluctance, given his “particularly strong view of the ineptitude after ‘completion’”,⁷⁰ the judge concluded that the relevant work had been conducted reasonably, and what he called “the causation point”⁷¹ meant that he should grant relief under section 61.

*Santander UK Plc v RA Legal Solicitors*⁷²

The fraud in *RA Legal* was similar to that in *Ikbāl*. RA Legal was a firm of solicitors acting for both the purchaser and claimant lender in the purchase of a residential property. RA Legal transferred the purchase monies – £150,000 from the mortgage lender and £50,000 from the purchaser – to Sovereign Chambers LLP (“Sovereign”), a firm of solicitors who purported to act on behalf of the vendor. Sovereign was a firm in good standing with the Law Society, but was nonetheless a fraudster: it had no authority to sell the property on behalf of the vendor. The lender sued RA Legal for breach of trust in paying away the mortgage monies otherwise than upon completion.

The trial judge, Andrew Smith J, followed the lead of the Court of Appeal in *Davisons* and only considered conduct that was connected with the claimant’s loss.⁷³ Moreover, the judge referred to section 727(1) of the Companies Act 1985 by analogy and held that “reasonableness” for the purposes of discretionary relief from liability was not the same as a common law duty of care.⁷⁴ Andrew Smith J excused RA Legal from liability under section 61.

⁶⁸ *ibid* [233].

⁶⁹ *ibid* [237].

⁷⁰ *ibid* [240].

⁷¹ *ibid* [243].

⁷² [2014] EWCA Civ 183, [2014] P.N.L.R. 20.

⁷³ [2013] EWHC 1380 (QB); [2013] P.N.L.R. 24 [67].

⁷⁴ *ibid* [69].

The decision of Andrew Smith J was overturned by the Court of Appeal. Significantly, the analogy with the Companies Act was criticised by Briggs LJ.⁷⁵ Under the Companies Act regime, a person can be guilty of negligence, and yet still satisfy the court that he acted reasonably and should be excused; this has been noted to be “odd”.⁷⁶ Briggs LJ firmly observed that “[n]o such oddity appears in section 61, and in my view the judge was wrong to equate the two relieving provisions. I consider that the test of reasonableness rather than perfection identified in the *Davisons* case is amply sufficient for comparable cases under section 61, and calls for no further elaboration”.⁷⁷ This may be slightly surprising: earlier authorities suggest that a trustee who is sued for a negligent breach of trust might nonetheless be excused under section 61.⁷⁸ It is, however, welcome: particularly in the context of professional trustees, a negligent trustee should not be considered to have acted reasonably.⁷⁹

The Court of Appeal also seemed to inch away from the analysis on causation in *Davisons*, which explains why the appeal was allowed.⁸⁰ Briggs LJ said that “some element of causative connection will usually have to be shown, and that conduct (even if unreasonable) which is completely irrelevant or immaterial to the loss will usually fall outside the court’s purview under section 61”.⁸¹ A causal link will therefore not always be required. His Lordship emphasised this point when he urged:⁸²

“caution against an over-mechanistic application of the requirement to show the necessary connection between the conduct complained of and the lender’s loss. There may be highly unreasonable conduct which lies at the fringe of materiality in terms of causation, and only slightly unreasonable conduct which goes to the heart of a causation analysis. It would be wrong in my view to allow this purely mechanistic application

⁷⁵ See above

⁷⁶ *Re D’Jan of London Ltd* [1993] BCC 646, 649 (Hoffmann LJ).

⁷⁷ [2014] EWCA Civ 183, [2014] PNLR 20 [32].

⁷⁸ *Re Smith* (1902) 86 LT 401 (Ch D); D Paling, “The Trustee’s Duty of Skill and Care” [1973] Conv 48; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* 18th edn (LexisNexis, 2010) §93.14.

⁷⁹ See further below.

⁸⁰ In *Schubert Murphy (A Firm) v The Law Society* [2014] EWHC 4561 (QB) [23] Mitting J observed that “[t]here is perhaps a division of approach to this issue [of relief under section 61] demonstrated by *Davisons* ... and *RA Legal*”.

⁸¹ [2014] EWCA Civ 183, [2014] PNLR 20 [28].

⁸² *ibid* [29].

of a causation-based test for the identification of relevant conduct to exclude the former from any consideration under section 61.”

Briggs LJ thought that RA Legal acted unreasonably in providing a Certificate of Title certifying that it had investigated title when that investigation was incomplete. His Lordship was unimpressed by the fact that such conduct was not uncommon amongst solicitors in order to encourage lenders to transfer the mortgage funds in good time and to avoid delays. Briggs LJ thought that “the pretence that the investigation of title has been completed when it has not is a method of dealing with that difficulty which borders on dishonesty. It is nothing to the point that, if subsequently revealed defects are properly addressed, it causes the lender no loss. On the contrary, [counsel’s] submission that unqualified certificates are frequently given prematurely involves the implicit admission that this is done deliberately, rather than by accident. If so, it simply makes the misconduct all the more serious”.⁸³

Nonetheless, Briggs LJ was prepared to accept that the premature Certificate of Title was irrelevant to the claimant’s loss, since there was “an insufficient type of connection, being purely historical and entirely irrelevant to the risk of a subsequent fraud”.⁸⁴ But his Lordship thought that RA Legal’s departure from best practice⁸⁵ by making inadequate requisitions and accepting inadequate replies to them was in fact serious and consequential. The absence of any written commitments by Sovereign to hold the completion monies to the order of RA Legal was also significant. RA Legal was unable to take summary means of enforcement to protect the lender from the loss of its money because RA Legal did not have an undertaking from Sovereign to discharge the prior charge on or after completion, nor did RA Legal have written confirmation that until completion properly occurred it could demand the immediate return of the completion monies. Briggs LJ further thought it was “wholly unreasonable”⁸⁶ for RA Legal not promptly to warn the lender that its money was at risk. Asking himself the question of “whether the trustee’s relevant conduct was reasonable taken as a whole”,⁸⁷ Briggs LJ found that it was not. There were numerous departures from best practice, and, even though the fraud would probably have

⁸³ *ibid* [60].

⁸⁴ *ibid* [61]; see too [110] (Etherton C).

⁸⁵ Which may be synonymous with “reasonable practice”, although this is not clear; Briggs LJ referred to “best or reasonable practice”: *ibid* [25].

⁸⁶ *ibid* [97].

⁸⁷ [2014] EWCA Civ 183, [2014] PNLR 20 [97].

been successfully achieved even if RA Legal had acted reasonably,⁸⁸ relief under section 61 was inappropriate. His Lordship concluded that the actions of RA Legal⁸⁹

“represent departures from a sophisticated regime, worked out over many years, whereby risks of loss to lenders and lay clients are minimised, even if not wholly eradicated. Where solicitors fail, in serious respects, to play their part in that structure, and at the same time are swindled into transferring and then releasing trust money to a fraudster without authority, they cannot expect to persuade the court that it is fair to excuse them from liability, upon the basis that they have demonstrated that they have in all respects connected with that loss, acted reasonably.”

It is unclear how comfortably this sits with *Davisons*. Although Briggs LJ said that he did not mean to depart from *Davisons*, since the departures from best practice in that case were “far less serious and of no consequence in achieving for the lender the protection against risks of loss which the Completion Code is intended to provide”,⁹⁰ the tenor of the reasoning of Briggs LJ seems quite different. After all, unreasonable conduct that is not connected with the loss seems potentially relevant under the scheme of Briggs LJ. Any significant departure from best practice committed by the solicitor-trustee appears likely to prevent reliance upon section 61.⁹¹

Etherton C agreed with the judgment of Briggs LJ, but added some comments of his own. He noted that, when considering whether there is a “sufficient connection” between the unreasonable conduct of the trustee and loss suffered, it is important that “section 61 must be interpreted consistently with equity’s high expectation of a trustee discharging fiduciary obligations”.⁹² The Chancellor concluded that section 61 does not introduce a particular test of causation, and is instead “an exceptional statutory jurisdiction to relieve a trustee from liability despite equity’s stringent duties imposed on trustees”.⁹³ Although it has been suggested that the Chancellor’s judgment might be understood to focus more on the burden of proof than does the judgment of

⁸⁸ *ibid* [66].

⁸⁹ *ibid* [100].

⁹⁰ *ibid* [101].

⁹¹ S. Charlwood, “Conveyancing solicitors’ liability for breach of trust” (2014) 30 P.N. 102, 106.

⁹² [2014] EWCA Civ 183, [2014] P.N.L.R. 20 [109]

⁹³ *ibid* [110].

Briggs LJ,⁹⁴ there does not seem to be a significant difference between the members of the Court of Appeal, which is emphasised by the fact that Proudman J agreed with both judgments.⁹⁵ The Chancellor did say that “[i]t will be sufficient to preclude relief under section 61 if, for example, the trustee fails to satisfy the court that his or her unreasonable conduct did not materially contribute to the opportunity for the loss or did not materially increase the risk of such loss”,⁹⁶ but this is consistent with the reasoning of Briggs LJ. If the unreasonable conduct materially increases the risk of loss, then relief under section 61 should not be granted. But this is not exhaustive of situations where unreasonable conduct will be held to bar relief. Admittedly, this issue may also raise the next question of whether the trustee “ought fairly to be excused”.⁹⁷

Reasonableness: connecting links

It is difficult to be clear about the emphasis that should be placed upon the connection between the trustee’s unreasonable conduct and the loss suffered. Given the Supreme Court’s recent insistence, in *AIB Group (UK) Plc v Mark Redler & Co*,⁹⁸ on the need for a causal link between the trustee’s breach of trust and the beneficiary’s loss, it might be thought consistent to demand a similar test of causation in the context of section 61. However, it is suggested that there remains much force in the comments of Etherton C in *RA Legal* that equity has high expectations of a trustee, and this should make a court circumspect about restricting the ambit of section 61. Whilst entirely irrelevant conduct should be disregarded,⁹⁹ the court should be slow to find a lack of causal link between unreasonable conduct and the losses suffered. The fact that the fraudulent scheme would have succeeded anyway is not sufficient for a trustee to gain the protection of section 61. Any unreasonable conduct that increases the risk of there being a breach of trust should generally lead to a refusal to grant relief under section 61. Codes of practice have evolved in order to minimise the risks of transactions going wrong, so departures from such codes should lead to the court’s being reluctant to exercise its discretion under section 61. This seems to be the result of *RA Legal*, which places a higher onus

⁹⁴ S. Charlwood, “Conveyancing solicitors’ liability for breach of trust” (2014) 30 P.N. 102, 106.

⁹⁵ [2014] EWCA Civ 183, [2014] P.N.L.R. 20 [104].

⁹⁶ *ibid* [111].

⁹⁷ See **the next section**.

⁹⁸ [2014] UKSC 58; [2014] 3 W.L.R. 1367.

⁹⁹ Charlwood has suggested the example of failing to carry out a coal mining search which would have come back negative anyway: S. Charlwood, “Conveyancing solicitors’ liability for breach of trust” (2014) 30 P.N. 102, 106.

on trustees than *Davisons* and seems more consistent with the comments made in *Markandan*. This should be supported: all trustees – solicitors included – should be encouraged to meet the high expectations demanded of equity and comply with their obligations as trustees. However, the judgment in *RA Legal* casts some doubt upon whether or not the outcome of the section 61 application in *Ikbāl* was correct. *Ikbāl*, of course, was decided before the decision of the Court of Appeal in *RA Legal*,¹⁰⁰ but in *Ikbāl* the unreasonable conduct was so serious, that it seems likely that the reasoning of the Court of Appeal in *RA Legal* leads to the conclusion that relief should not have been granted under section 61. Indeed, this seems to have been the inclination of the trial judge in *Ikbāl*, had he not felt otherwise constrained due to *Davisons*. The reasoning in *RA Legal* should be supported.

“Ought fairly to be excused”

If the trustee acted honestly and reasonably, then the court must decide whether the trustee ought fairly to be excused for the breach of trust. It has been suggested that this requirement adds little: where the first two requirements are satisfied, relief should be granted under section 61. In *Perrins v Bellamy*, Kekewich J expressed the view that “in general and in the absence of special circumstances, a trustee who has acted “reasonably” ought to be relieved, and that it is not incumbent on the Court to consider whether he ought ‘fairly’ to be excused, unless there is evidence of a special character shewing that the provisions of the section ought not to be applied in his favour”.¹⁰¹

However, the reasoning of Kekewich J may have taken a broader approach to “reasonableness” than has been taken in more recent cases. The ambit of the second requirement for relief under section 61 is now more restricted if only relevant conduct – in the sense of conduct causally related to the beneficiary’s loss – needs to be reasonable, and this opens up the possibility that the third requirement of “fairness” should play a more important role. This approach is apparent from both *Davisons*¹⁰² and *RA Legal*.¹⁰³

¹⁰⁰ The judge referred to the first instance decision of Andrew Smith J in *RA Legal*, which was of course later overturned on appeal: see eg [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9 [225].

¹⁰¹ [1898] 2 Ch. 521, 528; affirmed on appeal: [1899] 1 Ch. 797.

¹⁰² Eg [2012] EWCA Civ 1626, [2013] PNLR 12 [41] (Morritt C).

¹⁰³ eg [2014] EWCA Civ 183, [2014] PNLR 20 [103] (Briggs LJ).

Nevertheless, it is no doubt the case that courts will be inclined to grant relief under section 61 where a trustee acted honestly and reasonably. So what sort of factors might make it unfair to do so? There is no restriction on the range of possible considerations,¹⁰⁴ and it is “essentially a matter within the discretion of the judge”.¹⁰⁵ However, the courts are clearly more reluctant to relieve professional, paid trustees from liability than lay trustees acting entirely voluntarily.¹⁰⁶ This is understandable: the court should be slow to weaken the protection afforded to a beneficiary by excusing a professional trustee from failing to comply with his or her duties, which is the very thing he or she is paid to do.

A further consideration in this regard may be whether or not the trustee is insured against the relevant loss. In *Ikbal*, the judge noted that it is mandatory for solicitors to maintain insurance much larger than the loss occasioned in that case.¹⁰⁷ However, the judge ultimately expressed no view on the relevance of this. It is always a difficult question to determine what the impact of insurance should be;¹⁰⁸ trustees must pay insurance premiums, and these may rise if substantial liability is more frequently incurred. It is nevertheless suggested that professional trustees who are insured should not lightly be excused from failing to comply with their duties: the interests of the innocent beneficiary require protection, and it is appropriate to demand that trustees comply with a high standard.

The identity of the beneficiary could, however, be relevant. It is clear that courts should have regard to the effect of the grant of relief on the beneficiary.¹⁰⁹ The court might generally be more prepared to grant relief to a professional trustee where the beneficiary is also a commercial entity who is insured and can be expected to absorb its loss. On the other hand, if the beneficiary is a private individual without the benefit of adequate insurance, granting relief to the trustee under section 61 could have particularly hard consequences on the beneficiary and may not be fair. As Briggs LJ said in *RA Legal*, “[a]n institutional lender may well be insured (or effectively self-insured)

¹⁰⁴ A Sheridan, “Excusable Breaches of Trust” [1955] Conv 420, 438.

¹⁰⁵ *Marsden v Regan* [1954] 1 WLR 423, 435 (Evershed MR).

¹⁰⁶ *National Trustees Co of Australasia v General Finance Co of Australasia* [1905] AC 373, 381; *Re Pauling’s ST* [1964] Ch 303, 338-339.

¹⁰⁷ *Ikbal* [2013] EWHC 3291 (Ch); [2014] P.N.L.R. 9 [242]. See eg Solicitors Act 1974.

¹⁰⁸ See generally R Merkin and J Steele, *Insurance and the Law of Obligations* (OUP, 2013).

¹⁰⁹ *RA Legal* [33] (Briggs LJ); *Marsden v Regan* [1954] 1 WLR 423, 434 (Evershed MR); *Bartlett v Barclays Trust Co. (No.1)* [1980] Ch 515, 538 (Brightman J).

for the consequences of third party fraud. But an innocent purchaser may have contributed his life's savings to the purchase and have no recourse at all other than against his insured solicitor, where for example the fraudster is a pure interloper, rather than a dishonest solicitor in respect of whose fraud the losers may have recourse against the Solicitors' Compensation Fund".¹¹⁰ Such comments should be endorsed, albeit only as part of a wider discretion to be exercised by the courts, but further suggest that the outcome in *Ikbāl* is dubious and may have been different had it been decided after the decision of the Court of Appeal in *RA Legal*, since in *Ikbāl* the claimant beneficiary was not an institutional lender.

Although the identity of the beneficiary might be relevant, it should be noted that it is unlikely that section 61 will avail a trustee who wishes to assert a defence of contributory negligence. At first instance in *Markandan & Uddin*,¹¹¹ Roger Wyand QC, sitting as a Deputy High Court Judge, noted that there was nothing in *Vesta v Butcher*¹¹² which indicated that contributory negligence should be extended to instances of breach of trust. The judge then went on to state that section 61 "could have provided for the conduct of the beneficiary to be taken into account as the Defendant here wishes. It did not and it is not for the Court to extend the law in a way that was not done by the legislature".¹¹³ The judge's conclusions on contributory negligence were not pursued on appeal,¹¹⁴ and should be supported: the focus of section 61 is firmly placed on the trustee who has committed the breach of trust, not the beneficiary. It might further be argued that a beneficiary should not be expected to take steps to protect his position against a trustee's breach of trust.¹¹⁵

It might finally be noted that although section 61 demands that the trustee be excused not only for the breach but also "for omitting to obtain the directions of the court", this does not seem to add anything and does not warrant separate consideration.¹¹⁶ As Kekewich J sensibly observed in *Perrins v Bellamy*, "I do not see how the trustee can be excused for the breach of trust without being also

¹¹⁰ *RA Legal* [2014] EWCA Civ 183, [2014] P.N.L.R. 20 [33].

¹¹¹ [2010] EWHC 2517 (Ch); [2011] P.N.L.R. 6, [42].

¹¹² *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852 (HL); [1988] 3 W.L.R. 565 (CA).

¹¹³ [2010] EWHC 2517 (Ch); [2011] P.N.L.R. 6, [42].

¹¹⁴ *Markandan & Uddin* [2012] EWCA Civ 65, [2012] 2 All ER 884 [7].

¹¹⁵ Cf *AIB* [2014] UKSC 58; [2014] 3 W.L.R. 1367 [135] (Lord Reed). For further discussion of contributory negligence in the context of claims for breach of fiduciary duty, see *Nationwide Building Society v Balmer Radmore* [1999] P.N.L.R. 606, 672-677 (Blackburne J).

¹¹⁶ Compare F Maugham, "Excusable Breaches of Trust" (1898) 14 LQR 159, 163.

excused for the omission referred to, or how he can be excused for the omission without also being excused for the breach of trust”.¹¹⁷ It does, however, emphasise that if the trustee should have asked the court for directions prior to the conduct that constituted a breach of trust, the court will be very unwilling to grant relief.

Conclusions: striking a balance

Section 61 of the Trustee Act 1925 remains an important provision in the context of remedies available for breach of trust. This has been particularly significant in recent disputes between lenders and solicitors. The decision of the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co*¹¹⁸ might be thought to have been somewhat trustee-friendly and a blow to lenders in limiting the amount of “equitable compensation” to losses caused by the breach of trust. But a balance needs to be struck. Trustees should not easily escape liability altogether by virtue of being excused under section 61. Beneficiaries under a trust – including lenders – deserve better protection. Trustees should have to work very hard to prove that they acted honestly, reasonably and ought fairly to be excused.

¹¹⁷ [1898] 2 Ch. 521, 528.

¹¹⁸ [2014] UKSC 58.