



12 May 2023

Delegated Powers and Law Reform Committee
By email only

Dear Mr McMillan,

Views on section 65

Thank you for your letter of 10 May, and for inviting me to give evidence earlier this week. I hope my evidence was helpful to you. I enjoyed the session.

In relation to your follow-up question, I have a few thoughts. I sit on the Law Society of Scotland's Trusts and Succession sub-committee, so I had some input into their consultation response. However, having left legal practice a decade ago, I left the points in relation to expenses to those with more recent litigation experience.

The SLC report explains the difficulties here. It is quite difficult to find a fair balance between protection of trust assets and the interests of beneficiaries, and the risk, or perceived risk, for trustees.

I think s.65 as drafted reflects the current law well and starts with the statement that a trustee generally does not have personal liability. But I do understand the Law Society of Scotland's concerns. Most clauses in s.65(3) are sensible, but it might be difficult to predict what would be seen as "unnecessary" in s.65(3)(a). Is a case "unnecessary" just because the trustees lose? Is it on the basis of prospects of success? I think this could be a deterrent to litigation and leaves scope for further litigation on interpretation.

Regarding insurance, yes, the possibility of trustees obtaining insurance might offset this in some cases. However, I would caution against relying on insurance to protect trustees. I am aware from acting as a charity trustee that insurance premiums can be quite expensive and there are not many insurers offering this specialist insurance. In particular, smaller trusts and charities may not be willing or financially able to protect their trustees via insurance, and indeed these are the charities most likely to run low on funds if litigation occurs.

I am sorry this is not an area where I can see an easy answer, but I hope my thoughts are of some help.

Yours sincerely,

Yvonne Evans

Yvonne Evans
Senior Lecturer in Law, Solicitor (non-practising), FHEA
y.a.evans@dundee.ac.uk
+44 (0)1382 384589