In depth

Trust-owned companies and the irreducible core of the trust

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Abstract

The recent Hong Kong Court of Final Appeal case of *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* upheld the effectiveness of anti-*Bartlett* clauses. This gives rise to the question of whether a trust-corporate structure, coupled with a well-drafted anti-*Bartlett* clause, leaves any room for trust obligations. Through the lens of the law on trust-owned companies, this article thus seeks to reconceptualise the 'irreducible core of trust obligations'. It argues that the irreducible core means the minimum duties which are necessary to preserve the integrity of the trust concept. It draws a distinction between core and mandatory duties, in that the 'bells and whistles' one adds in specific contexts may be mandatory duties reflecting appropriate policies, instead of core duties necessary for a trust to exist. It accordingly considers the proper content of the irreducible core, as distinguished from other mandatory duties.

In modern wealth management, the emergence of trust-corporate structures has increasingly posed a challenge to the orthodox conception of a trust. Settlors often set up dynastic trusts that hold corporate structures. By interposing a company between a trust and its underlying assets, settlors may leave the trustee 'out of the picture' and retain maximum control over asset management. Further, settlors often include trustee exemption clauses in the trust instrument to further strengthen control of the company without the trustee's interference. One classic example is the so-called anti-*Bartlett* clauses. These are exemption clauses relieving trustees, who hold a controlling shareholding in a company, of the *Bartlett* duty—the duty to enquire and, if necessary, interfere in the conduct of the company's affairs.[1]

The recent Hong Kong Court of Final Appeal (HKCFA) case of *Zhang Hong Li v DBS Bank (Hong Kong) Ltd*[2] upheld the effectiveness of such clauses. The Court's emphasis on settlor autonomy is certainly welcome to the wealth management industry, but its implications for the trust are yet to be seen. In particular, the trust-corporate structure, coupled with a well-drafted anti-*Bartlett* clause, may constitute a potential trespass on the 'irreducible core of trust obligations'—a concept commonly invoked in the area of trustee exemption clauses. Essentially, the 'irreducible core' requires the trustee to owe certain minimum duties which can never be removed, for otherwise the arrangement can no

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1. *Bartlett v Barclays Bank Trust Co Ltd (No.1)* [1980] Ch 515.

2. (2019) 22 HKCFAR 392; [2019] HKCFA 45, noted R Davern, 'Trustee Residual Obligation: No Basis for It' (2020) 26(2) Trusts & Trustees 154, SYC Leung, 'The Approach for Ascertaining a Trustee's Duties and Liabilities, Effectiveness of Anti-Bartlett Provisions, and Equitable Compensation for Breach of Trust or Fiduciary Duty: Zhang Hong Li & Ors v DBS Bank (Hong Kong) Ltd & Ors [2019] HKCFA 45' (2020) 26(3) Trusts & Trustees 235, and D Russell and T Graham, 'Anti-Bartlett Provisions: A Rod for a Trustee's Own Back?' (2020) 26(4) Trusts & Trustees 284.

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longer meaningfully be a trust. If these trust-corporate structures leave no room for these trust obligations, what exactly is left of this core?

It is therefore the aim of this article to reconceptualise the irreducible core, through the lens of the law on trust-owned companies, which saw an increasing tension between proprietary and obligational views of the trust. The focus of this article would be on duties of trustees holding a controlling shareholding in a company (i.e. trust-corporate structure), but these may have wider implications for the irreducible core.

Indeed, this enquiry is relevant both in theory and in practice. Jurisprudentially, modern developments of trust law, as seen in these trust-corporate structures and relevant offshore trusts (most notably offshore trusts under the Virgin Islands Special Trusts Act 2003 in the BVI—or 'VISTA trusts'), may require an updated understanding of the irreducible core. The idea of the irreducible core was first conceived by Professor Hayton in his seminal article[3] and adopted by the English Court of Appeal in the landmark case of *Armitage v Nurse*.[4] According to *Armitage*, this irreducible core includes the duty to act 'honestly and in good faith'. However, over the following two decades, it seems that the idea has received little further refinement. Perhaps a re-understanding of the irreducible core would provide insight into the true essence of the trust which is consistent with modern practice. Relevantly, the content of the irreducible core is also significant for the wealth management industry in practice, as it would inform the development of legally permissible trust products.

This article is divided into three main sections. The first considers the current law on the irreducible core of trust obligations and exemption clauses. The second then examines the current law on the trust-corporate structure, focussing on two common techniques of excluding the *Bartlett* duty: (i) anti-*Bartlett* clauses; and (ii) VISTA trusts. The third section explores what the preceding section means for the irreducible core. Ultimately, this article proposes that the irreducible core means the minimum duties which are necessary to hold the trustee accountable to preserve the integrity of the trust concept. As such, the duty of 'honesty and good faith' may be necessary but may not be sufficient, because other duties may be necessary to give content to essential elements of a trust. The *Bartlett* duty is one possible candidate in the specific trust-corporate context. Further, core duties are a subset of mandatory duties: in some cases, the 'bells and whistles' one adds in specific contexts may be mandatory duties reflecting appropriate policies, instead of core duties necessary for a trust to exist. Therefore, the content of mandatory duties may vary according to the context, which may either necessitate specific core duties to preserve the trust concept or warrant additional mandatory duties based on policy reasons. Regardless, extrinsic policies cannot redraw the boundaries of the irreducible core itself.

> *The irreducible core means the minimum duties which are necessary to hold the trustee accountable to preserve the integrity of the trust concept*

The irreducible core of trust obligations and exemption clauses

The irreducible core of trust obligations defines the limits of trustee exemption clauses. *Armitage v Nurse* remains the leading authority here, although the issue has also been considered by the Privy Council in *Spread Trustee Co Ltd v Hutcheson*.[5] As Millett LJ (as he then was) explained in *Armitage*, the 'irreducible core of obligations' owed by trustees included the duty 'to perform the trusts honestly and in good faith for the benefit of the beneficiaries', but did not include any duty of skill or care.[6] As to the idea of 'dishonesty' or 'fraud', it 'connotates at the minimum an intention on the part

3. D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press 1996).
4. [1998] Ch 241.
5. [2011] UKPC 13; [2012] 2 AC 194.
6. *Armitage v Nurse* (n 4 above), 253H.

of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not'.[7] Thus, exemption clauses would protect the trustees so long as they do not act dishonestly, no matter how indolent, imprudent or negligent they are.

In particular, there are two types of exemption clauses: (i) clauses excluding *duties* (e.g. anti-*Bartlett* clause); and (ii) clauses excluding *liabilities*.[8] As will be seen below, the irreducible core in effect does not discriminate between these two types of exemption clauses.

Excluding duties

As the bare minimum of trusteeship, the irreducible core highlighted by Millett LJ (as he then was) obviously suggests that it is impossible to exclude 'the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries'.

In this connection, the English Court of Appeal decision in *Citibank v MBIA Assurance*[9] may not fit comfortably with this approach. In that case, the trust deed stated that a guarantor, MBIA, had the right to instruct the trustee, Citibank, as to the exercise of its discretion, and that the trustee would not be liable for breach of trust if it followed these instructions. Arden LJ held that such a term could legitimately operate to exempt the trustees from liability if they did follow the guarantor's instructions.[10] However, it seems that the effect of the clause was that, when the guarantor told the trustee what to do, the trustee simply had to do it, regardless of the beneficiaries' interests. This apparently contradicts a core element of the trust; as Millett LJ (as he then was) highlighted in *Armitage*, the trustees' duties must be performed *for the benefit of the beneficiaries*. This perhaps reflects the practical reality that 'rules governing the trustee/beneficiary relationship that would otherwise arise where the device of trust is employed are discarded and replaced by purely contractual arrangements'.[11]

Even so, one should not reject the case too quickly. Arden LJ also noted that there were other clauses in the trust deed where the trustee had 'a real discretion to exercise'.[12] Indeed, the trustee still owed a broader duty of loyalty, and hence its power was not unconstrained. What this case raises is an issue not addressed by *Armitage v Nurse*. The *Armitage* formulation pertains only to the *manner* of the trustee's performance, i.e. honestly and in good faith. On the contrary, *Citibank* may reflect the core interest of the beneficiary, i.e. that the trust property should not be disloyally appropriated by the trustee. It is submitted that the same reasoning as to self-benefit may be extended to cover others such as the settlor: apart from a duty not to self-deal, the trustee owes a duty not to deal with the trust property for the benefit of non-beneficiaries more generally, including the settlor. This simply flows from the proprietary nature of the trust, i.e. that the trust property beneficially belongs to the beneficiaries only, and correlatively, belongs to no one else, whether that person is the trustee or the settlor.

Excluding liabilities

The irreducible core, which was couched in terms of liability (honesty and good faith) in *Armitage*, is clearly also significant for purported exemptions of liability. In particular, as to liability for gross negligence, as the irreducible core does not include a duty of skill or care, Millett LJ (as he then was) held that it was not repugnant to the trustees' duties, nor contrary to public policy, to allow exemption from liability for gross negligence, which differed only in degree from ordinary

7. *Ibid.*, 251E.
8. P Matthews, 'The Efficacy of Trustee Exemption Clauses in English Law' [1989] Conv 42, 43.
9. [2007] EWCA Civ 11; [2007] 1 All ER (Comm) 475.
10. *Ibid.*, [82].
11. A Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123 LQR 342, 346.
12. *Citibank v MBIA Assurance* (n 9 above), [82].

negligence.[13] This was confirmed in the Privy Council case of *Spread Trustee*.[14] Their Lordships doubted whether 'gross negligence' represented any distinct degree of fault in this area of law, and 'it is difficult to see why the line should be drawn between negligence and gross negligence'.[15] Any reform, if it was thought necessary, should come from Parliament.[16]

The courts have sometimes adopted a more objective approach to dishonesty. For instance, in *Walker v Stones*,[17] the English Court of Appeal held that an exemption clause could not be relied on, at least in the case of a solicitor trustee, where he had committed a deliberate breach of trust which no reasonable solicitor trustee could have thought was for the benefit of the beneficiaries, even if he genuinely believed that it was.

The trust-corporate structure

Parties utilise the trust-corporate structure for various reasons. As succinctly summarised by Yip, these include: (i) limitation of trustee's liability; (ii) separating asset management from trust administration; (iii) tax efficiency; and (iv) limiting access to information concerning the underlying assets.[18] In short, settlors seek to retain maximum control over the underlying assets and to keep the trustee 'out of the way'. Perhaps it is for this reason that the courts are all the more eager to impose certain duties on the trustee here to preserve the integrity of the trust concept.

Of course, in whatever context, trustees owe a general duty of care. According to *Speight v Gaunt*,[19] trustees must act honestly; and must take, in performing his managerial role, 'all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own'.[20] The common law formulation has now been largely overtaken by the statutory duty of care: s1 of the Trustee Act 2000.[21]

Yet in the particular context of the trust-corporate structure, the courts have refined the duty of trustees holding a controlling shareholding in a company. This is known as the *Bartlett* duty, named after the case of the same name.[22] In that case, the trust property comprised majority shareholding in a family private company, which held certain properties. The board of directors then embarked on speculative developments, resulting in a great loss to the trust shareholding. Brightman J held the trustee liable, reasoning that it was not sufficient that it believed the directors to be competent and capable of running a profitable business. Citing *Speight v Gaunt*, Brightman J held that the trustee's duty was 'to conduct the business of the trust with the same care as an ordinary prudent man of business would extend to his own affairs'.[23] Hence, the trustee should not have been content with the information it received as shareholder, but should have required the board to inform and consult it so that it could intervene if necessary to safeguard the interest of the trust. In other words, there

13. *Armitage v Nurse* (n 4 above), 254.
14. In that case, a professional trustee was allegedly in breach of trust in failing to investigate breaches by previous trustees. It was further alleged that the professional trustee was grossly negligent. The issue was whether at the relevant times, it was possible as a matter of Guernsey law for the trustee to rely on an exemption clause. Endorsing *Armitage*, the majority held that Guernsey 'would have looked to the law of England', so it was possible to exclude liability for gross negligence: *Spread Trustee Co Ltd v Hutcheson* (n 5 above), [45] (*per* Lord Clarke).
15. *Ibid.*, [62] (*per* Lord Clarke).
16. *Ibid.*, [111] (*per* Lord Mance).
17. [2001] QB 902, citing the test of dishonesty in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 in the context of accessory liability. See also *Barnsley v Noble* [2016] EWCA Civ 799; [2017] Ch 191.
18. M Yip, 'Trust-owned Companies: Understanding the Trustee's Duties' (2017) 31 TLI 185, 186.
19. (1883) 9 App Cas 1.
20. *Ibid.*, 19 (*per* Lord Blackburn); see also *Learoyd v Whiteley* (1887) 12 App Cas 727, 733 (*per* Lord Watson). In the investment sphere, the trustee's duty is 'not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide': *Re Whitely* (1886) 33 Ch D 347, 355 (*per* Lindley LJ), endorsed in *Cowan v Scargill* [1985] Ch 270, 289; *Nestlé v National Westminster Bank Plc* [1994] 1 All ER 118, 126, 140.
21. In *Richards v Wood* [2014] EWCA Civ 327, [31], Lewison LJ did not consider that s 1 'materially altered the test' in *Speight*. Section 1(1)(a) involves a subjective element relating to any extra knowledge or experience of the trustee personally, whereas s 1(1)(b) objectively relates to persons engaged in the trustee's business or profession generally. Schedule 1, paragraph 7 of the Act further provides that the duty of care can be excluded by the trust instrument.
22. *Bartlett v Barclays Bank Trust Co Ltd (No.1)* (n 1 above).
23. *Ibid.*, 531, endorsed by Lord Clarke in *Spread Trustee Co Ltd v Hutcheson* (n 5 above), [20].

was a duty to enquire into or interfere in the conduct of the company.[24]

In response, settlors seek to circumvent this through various techniques, including: (i) anti-*Bartlett* clauses; and (ii) VISTA trusts. These are discussed in turn below.

*Anti-*Bartlett *clauses*

In the case of a trust-corporate structure, trust deeds often contain the so-called anti-*Bartlett* clauses relieving trustees of the *Bartlett* duty. Hence, they fall within the first type of exemption clauses mentioned above—exclusion of duty. Strictly speaking, they may not always completely negate the duty, but rather limit the circumstances where the duty would arise. Depending on how extreme they are, anti-*Bartlett* clauses may be divided into different types with different effects.[25] They are each considered below from the least extreme.

First, some anti-*Bartlett* clauses give the trustee a *power* to leave the conduct of the company's affairs to the directors. These clauses may not do much, for that power must still be exercised for the benefit of the beneficiaries. As found by the Law Commission in the context of such an anti-*Bartlett* clause, '[a] trustee who fails to exercise a power when he or she should do so commits a breach of trust. In this example, liability is incurred by the trustee without any need to strike down the duty exclusion clause.'[26]

Secondly, many anti-*Bartlett* clauses take the form of an exclusion of any duty to *supervise* or to *interfere* in the management of the company. An example can be seen in the Schedule to the BVI Trustee Act 1961.[27] However, in *Appleby Corporate Services (BVI) Ltd v Citco Trustees (BVI) Ltd*,[28] the BVI High Court held that such clauses would not effectively exclude the trustee's duty to *enquire*, which was different from interfering in the management of the company. Of course, in practice, it may be questioned whether these are really two different duties: enquiry into the company's performance often requires some form of interference, such as changing the articles so as to get the fullest information.[29] It may be artificial to distinguish between these two duties.

Thirdly, some clauses may work the other way round, relieving the trustee of any duty of *enquiry* unless put on enquiry. An example can be found in the STEP Standard Provisions.[30] In the same vein, it has been suggested that such clauses are limited to excluding the preliminary duty of keeping abreast of what is going on in the company's affairs. If the trustee does become aware of circumstances which call for enquiry, no protection is given thereafter should he remain supine.[31] Again, this may run into the same difficulties as above.

Fourthly, more extreme forms of anti-*Bartlett* clauses seek to achieve complete exclusion of both the duty to enquire and the duty to interfere. As the learned authors of *Lewin on Trusts* have observed, such clauses will afford no protection if the trustee does not stand aloof from the company. For instance, a corporate trustee which supplies employees as directors of a company held by the trust will have chosen to conduct its affairs

24. Ultimately, this could be done by adopting 'the draconian course of threatening to remove, or actually removing, the board in favour of compliant directors': *Bartlett v Barclays Bank Trust Co Ltd (No.1)* (n 1 above), 530. See also *Gestrust SA v Sixteen Defendants* [2016] EWHC 3067 (Ch); cf. *Highmax Overseas Ltd v Chau Kar Hon* [2014] HKCA 248. Brightman J then sought to avoid the practical difficulties of such a course by finding that '[t]he members of the board were reasonable persons, and would . . . have followed any reasonable policy desired by the bank had the bank's wishes been indicated to the board': *Bartlett v Barclays Bank Trust Co Ltd (No.1)* (n 1 above), 530.

25. See *Lewin on Trusts* (19th ed, Sweet & Maxwell 2014), [34-059]; A Child and J Hilliard, 'Disputes over Trusts That Hold Corporate Structures' (2016) 22(9) Trusts & Trustees 1015.

26. Law Commission of England and Wales, *Trustee Exemption Clauses: A Consultation Paper* (Law Com CP No. 171, 2003), [4.91].

27. Paragraph 8 of the Schedule to the BVI Trustee Act 1961: 'THE Trustees shall not be bound or required to interfere in the management or conduct of the affairs or business of any company in which the Trust Fund may be invested (and whether or not the Trustees have the control of such company) And so long as no trustee of this instrument has notice of any wilful negligence wilful default or fraud or dishonesty on the part of the directors having the management of such company they may leave the same (including the payment or non-payment of dividends) wholly to such directors . . ..'

28. (2014–15) 17 ITELR 413 (BVI HC).

29. See A Child and J Hilliard (n 25 above), [30]–[34].

30. *Standard Provisions of the Society of Trust and Estate Practitioners* (2nd ed, Society of Trust and Estate Pratitioners 2013), [16].

31. *Lewin on Trusts* (n 25 above), [34-059(4)].

and may be liable accordingly.[32] Yet is such clause effective in the usual situation where the trustee does stand aloof from the company? In the recent case of *Zhang Hong Li*, the HKCFA answered this question in the affirmative. There, a married couple, Zhang and Ji, were settlors of a Jersey family trust. The trust asset was the sole share in a private investment company. To retain control over the company's investment activities, Ji was appointed its investment advisor, and the trust deed also contained anti-*Bartlett* clauses which sought to comprehensively exclude the trustee's duty to enquire or intervene. Relying on Professor Matthews' expert evidence as to Jersey law, the Court of Appeal below held that, notwithstanding the anti-*Bartlett* clauses, the trustee owed a residual or high-level duty to act in circumstances where no reasonable trustee would refrain from doing so.[33] However, the HKCFA overturned that decision, holding that the anti-*Bartlett* clauses were effective in excluding the *Bartlett* duty unless the trustee had actual knowledge of dishonesty. The 'high-level supervisory duty' was rejected as 'plainly inconsistent with the anti-*Bartlett* provisions'.[34] The top court further explained that Professor Matthews' expert evidence should be understood as meaning that the residual obligation to act only arose 'in cases involving actual knowledge of dishonesty not covered by the anti-*Bartlett* provisions'.[35] The court concluded that there was no basis for 'some implied, non-derogable external duty' overriding 'the parties' chosen scheme'.[36] Therefore, it seems that a comprehensive exclusion of the *Bartlett* duty, if carefully worded, may be effective.

Fifthly, yet more sweeping clauses provide that trustees have a positive duty not to interfere, and are instead bound by the directions given by the settlor or a protector. However, in these circumstances, the power to give directions is often fiduciary,[37] meaning that if that power is abused, the trustee may continue to owe a duty to bring the matter before the court.

In short, courts were often reluctant to give full effect to anti-*Bartlett* clauses. This gives rise to the question of whether the *Bartlett* duty is part of the irreducible core. *Zhang Hong Li* represents a marked departure from this trend, recognising the effectiveness of properly drafted anti-*Bartlett* clauses. Indeed, the Court there expressly stated that 'the residual obligation referred to by Matthews is not to be equated with the "irreducible core of obligations"' which did not include 'the duties of skill and care, prudence and diligence'.[38] The rest of this article will seek to reconcile these views, and consider whether the irreducible core is really irrelevant in the present context.

Zhang Hong Li represents a marked departure from this trend, recognising the effectiveness of properly drafted anti-Bartlett clauses

VISTA trusts

Alternatively, settlors may use a statutory regime which expressly removes the *Bartlett* duty. In the BVI, the Virgin Islands Special Trusts Act 2003 removed the *Bartlett* duty in relation to 'VISTA trusts'. Section 15(1) expressly provides that a trustee has no fiduciary responsibility or duty of care in relation to any of the assets or the affairs of the company except in relation to an intervention call (which means a call by an interested person under section 9(1) for a trustee to intervene in the affairs of a company). Section 15(2) expressly excludes three areas of potential duty or liability,

32. *Ibid.*, [34-059(5)].
33. [2018] HKCA 435.
34. *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* (CFA) (n 2 above), [45].
35. *Ibid.*, [62].
36. *Ibid.*, [64].
37. *Lord Vestey's Executors v IRC* [1949] 1 All ER 1108, 1115D, 1120F, 1132A-D (*per* Lord Simonds).
38. *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* (CFA) (n 2 above), [65].

including the duty to enquire as to the grounds for an intervention call. VISTA trusts are particularly useful where reserved powers do not provide a full solution, e.g. where the settlor cannot have direct control at shareholder level by reserving full investment powers.[39] As a side note, it is also possible to set up STAR trusts for similar purposes. STAR trusts—offshore trusts in the Cayman Islands—are enforced by an 'enforcer' appointed by the settlor.[40] Settlors may define the purposes of STAR trusts in a way that achieves the same effect as a VISTA trust.[41]

Implications for the irreducible core

Approach to examining the irreducible core

Three preliminary issues must first be addressed in order to identify the proper approach to re-examining the irreducible core. First, what is the theoretical basis for the irreducible core of trust obligations? It is submitted that the primary theoretical basis is the integrity of the trust concept. For example, amongst the first who proposed the idea of the irreducible core, Professor Hayton wrote that '[t]he beneficiaries' rights to enforce the trust and make the trustees accountable for their conduct with the correlative duties of the trustees to the beneficiaries are at the core of the trust.'[42] He concluded that any provisions apparently reducing the deal to one for the benefits of the trustees or of the settlor (or protector) must either be struck out as repugnant to the original deal for the benefit of the beneficiaries or be implemented as the real deal.[43] In *Armitage v Nurse*, Millett LJ (as he then was) explained the concept in similar terms[44]:

> there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is *fundamental to the concept of a trust.* If the beneficiaries have no rights enforceable against the trustees there are no trusts. . . . The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the *minimum necessary to give substance to the trusts.* (emphasis added)

As is apparent from these expositions, the irreducible core of trust obligations means the minimum duties necessary to hold the trustee accountable to the beneficiaries for his duties and powers over the trust property. Without these obligations, there can no longer be a trust. While there is no consensus between the two quotes as to which duties the trustee must be accountable for, they at least agree on the rationale behind the irreducible core, which is to preserve the integrity of the concept of a trust. As suggested by Professor Mitchell, a possible approach is therefore to start with the principle that a trust cannot exist unless the trustees are held accountable, and then to ask what core duties are needed to give content to this principle.[45] As will be proposed in the next subsection, there are certain core elements of the trust concept, and the irreducible core of trust obligations ensures that all these are present in the trust.

There are certain core elements of the trust concept, and the irreducible core of trust obligations ensures that all these are present in the trust

The second issue is whether the irreducible core should be defined in terms of the minimum content of duties or minimum liability of the trustee. In gist, it will be argued that, although the irreducible core places limits on both duty-excluding clauses and liability-excluding clauses,[46] the core itself should be

39. *International Trust Disputes* (OUP 2012), [23.71].
40. See *Cayman Islands Trusts Law* (2011 revision), Pt VIII, replacing Special Trusts (Alternative Regime) Law 1997.
41. A Child and J Hilliard (n 25 above), [40].
42. D Hayton (n 3 above), 47–49.
43. *Ibid.*, 62.
44. *Armitage v Nurse* (n 4 above), 253.
45. C Mitchell, 'Good Faith, Self-denial and Mandatory Trustee Duties' (2018) 32(2) TLI 92, 100.
46. See section 'The irreducible core of trust obligations and exemption clauses' above.

defined in terms of duties only, as certain duties are necessary to give substance to the trust, whereas the trustee's liability is not, though exclusion of liability is sometimes disallowed for another reason unconnected to the core.

The core itself should be defined in terms of duties only

Strictly speaking, the irreducible core includes trustees' *duties* only, and not their liability, which may also depend on the degree of their fault. Hence, the formulation in *Armitage v Nurse* was criticised by Professor Penner[47]: Millett LJ's essential core duty boils down to a duty not to commit fraud, such that the core duty is determined according to a standard of fault (or the manner in which the trustee breaches his duty), not a kind of duty. This confuses the nature of duty with the nature of liability. For Professor Penner, one could relieve a trustee of personal liability for breach of trust, and yet the trust still has 'legal substance', because legal duties have more functions than serving as grounds for claims for their breach; there are profound legal consequences of the trust obligation, independent of the trustee's liability, including segregation of the trust property from the general assets of the trustee, as well as consequences of a breach of trust even in the absence of the trustee's personal liability (e.g. possible personal claim against third parties and proprietary claim).

Therefore, prohibition on the exclusion of liability (be it for a core duty or not) rests on a ground independent of the need to preserve the minimum core: from a proprietary perspective, such exclusion is a personal benefit conferred on the trustee by the settlor, which cannot run with the property and justify the proprietary consequences of a trust.[48] In a nutshell: (i) exclusion of a core duty is not allowed because it offends the irreducible core; and (ii) exclusion of liability for breach of that duty is not allowed not because it directly offends the irreducible core, but because of another reason, the proprietary argument above. Thus, ultimately, the irreducible core is defined by *duties* only.

The third issue pertains to the distinction between core and mandatory duties. In defining the essential elements of the trust, Professor Ho drew a distinction between essential and mandatory elements of the trust.[49] The essential elements that are necessary for an arrangement to be a trust are of course mandatory. Yet not all mandatory rules of the trust are essential for the existence of the trust. For example, the doctrine of illegality is mandatory due to policy reasons. Similarly, core duties that are essential to the integrity of the trust concept are clearly mandatory. As will be seen below, in specific contexts (e.g. trust-corporate context), there may be specific duties which are essential and so part of the core, as well as other mandatory duties based on policy considerations.

There may be specific duties which are essential and so part of the core, as well as other mandatory duties based on policy considerations

The integrity of the trust concept, the duty/liability distinction and the core/mandatory distinction provide good guidance for examining the irreducible core. The irreducible core, which comprises the minimum content of duties only, is primarily based on the integrity of the trust concept. As to what these duties are, any duties that satisfy certain conditions which are necessary to preserve the concept of a trust should fall within the irreducible core and become mandatory. Nonetheless, as seen in the law on trust-owned companies, mandatory duties may go beyond the irreducible core; other considerations may come into play to further refine the scope of mandatory duties in specific contexts. In the following discussion, this article would first seek to define the conditions for the irreducible core, before

47. JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002), 250–252.
48. *Ibid.*, 262–263.
49. L Ho, 'Trusts: The Essentials' in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013), 2.

looking to the law on trust-owned companies to identify other relevant considerations and accordingly determine the content of the irreducible core and other mandatory duties.

Conditions for the irreducible core

In her account of 'the essentials' of the trust, Professor Ho proposed a possible structure for considering them according to different relationships amongst the various parties *inter se*, and between parties and trust assets.[50] The core elements proposed here will be structured in a similar manner, though the focus is slightly different as the elements here will act as conditions for the irreducible core. Further, although the so-called beneficiary principle (whereby validity depends on the presence of beneficiaries) is often juxtaposed with the enforceability principle (whereby validity depends on the presence of someone who can enforce the trust), as will be argued below, the trust is better seen as reflecting both principles. Thus, broadly speaking, it is proposed that there are three core elements of a trust:

i. *as between trustee and beneficiary/object*, the trustee must act for the benefit (more precisely, in the best interests) of the beneficiaries/object of the trust[51];
ii. *as between beneficiary (or any enforcer) and trust property/third parties*, there must be someone to enforce the trust[52]; and
iii. *as between trustee and trust property*, the trustee must be accountable in relation to the trust property.[53]

As will be explained below, these also constitute the conditions for duties to fall within the irreducible core. Each of these core elements will first be examined.

As to (i), *as between trustee and beneficiary/object*, the trust is essentially an institution for the benefit of others. The element of benefit can be seen as a common thread in all types of trusts. The trust property may be held for the benefit of beneficiaries, or, in the case of charitable trusts, to further some legally permitted purpose for the public benefit.[54] This is related to the so-called beneficiary principle (which requires the presence of beneficiaries for there to be a valid trust), subject to necessary modification to cover charitable trusts as discussed below. The beneficiary principle is sometimes understood in proprietary terms, but as will be argued below, this may be problematic. On a proprietary view, it is said that there must be someone having beneficial ownership of the trust property. The trust property beneficially belongs to the beneficiaries, and correlatively, belongs to no one else, including the trustee or the settlor. This is consistent with the analysis in *Citibank v MBIA Assurance* above.[55] While this proprietary view may explain some trusts like fixed trusts, as well as much orthodox doctrine like the principle in *Saunders v Vautier*,[56] it fails to adequately capture other types of trusts such as discretionary trusts and charitable trusts, where it may be difficult to find a beneficial interest, let alone ownership. Hence, one way to retain the idea of the beneficiary principle is to discard the language of beneficial interest/ownership. Yet, as pointed out by Professor Ho, the concept of benefit may still be problematic. It describes a particular result rather than the purpose or motivation of the trustee's action, so a subjective test may be more appropriate. 'Benefit' may also be too broad; the key is to seek the 'best interest' of the beneficiary, not just any benefit. Thus, more precisely, the duty is best formulated as

50. *Ibid.*, 3 and 4.
51. Cf. *ibid.*, s IID.
52. Cf. *ibid.*, s IIC in relation to beneficiary and the trust assets/third parties, though the focus here is slightly different as here the person enforcing the trust may not be confined to the beneficiary.
53. Cf. *ibid.*, s IIA.
54. For the requirement of 'public benefit' for charitable trusts, see Charities Act 2011 (UK) s 2(1)(b); *R (Independent Schools Council) v Charity Commission* [2012] Ch 214.
55. See text to nn 9–12 above.
56. (1841) 4 Beav 115. Under the principle, beneficiaries may direct the trustee to transfer the trust property to them and thereby terminate the trust.

one to act in what the trustee considers honestly and in good faith to be the best interest of the beneficiary/object.[57]

The element of benefit can be seen as a common thread in all types of trusts

As to what 'best interest' means, this is actually loyalty in the broadest sense.[58] It is submitted that it is different from the fiduciary duty to avoid a conflict of interest under the no-conflict rule, though there is overlap. In relation to the no-conflict rule in the fiduciary context, Professor Penner has argued that the duty is not really concerned with loyalty as commonly understood, but is better seen as a duty of 'deliberative exclusivity': the fiduciary is not required to identify subjectively with his principal's interests, but is required to exclude his own, and any third party's, interests from consideration.[59] Indeed, specific fiduciary rules like the no-conflict rule merely give practical effect to the underlying core duty of loyalty to act in the best interest of the beneficiary/object. As earlier illustrated by the *Citibank* case,[60] while these specific fiduciary rules may be excluded, the core duty that justifies them is essential to the integrity of the trust concept and cannot be excluded.[61] The concern of the core duty of loyalty here is whether the trustee positively prioritises and pursues the best interest of the beneficiary/object.

As to (ii), *as between beneficiary (or any enforcer) and trust property/third parties*, a core requirement of the trust is the presence of someone to enforce it. Indeed, courts are gradually moving away from the proprietary view towards a so-called 'obligational' view of the trust.[62] Under the obligational view, beneficiaries do not have rights directly in trust assets; instead, a trust will arise whenever trustees' duties are sufficiently defined and enforceable. The proprietary/obligational debate probably falls outside the scope of this article, but suffice it to say, the trust may be seen as embodying both dimensions: as mentioned above, the proprietary view may be helpful when analysing trusts like fixed trusts which are clearly for the benefit of specific persons. On the other hand, the obligational view, especially the idea that there must be someone who can enforce the trust, is no doubt gaining ground. There is a considerable wealth of authority that suggests that even those not having a proprietary interest in the trust property may pursue proprietary remedies such as tracing. When the property is recovered, it goes back to the trust fund rather than to the claimant directly. The rights of residuary legatees are a good case in point.[63] These plainly suggest that a proprietary interest is not a pre-requisite for these rights. Instead, as Professor Mitchell observed when comparing rights of estate beneficiaries and trust beneficiaries, beneficiaries are given rights for a different reason, namely to ensure that the settlors' and testators' instructions are properly carried out by the trustees and executors who have promised to perform them.[64] In other words, this ensures the enforceability of the trust obligations.

A core requirement of the trust is the presence of someone to enforce it

In terms of who can enforce the trust, for non-purpose trusts, that just happens to be those who benefit from the trust under (i) above—understandably so as they will also have an incentive to do so. As to char-

57. L Ho (n 49 above), 15–18.
58. *Ibid.*
59. JE Penner, 'Distinguishing Fiduciary, Trust, and Accounting Relationships' (2014) 8 J Eq 202.
60. See n 9 above.
61. L Ho (n 49 above), 18.
62. See e.g. *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch), affirmed on appeal to the CA ([2011] EWCA Civ 1544) and UKSC ([2012] UKSC 6); *Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424.
63. *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC).
64. See C Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing 2019) 282.

itable trusts, they are enforceable by the Charity Commission and the Attorney-General.[65] One connection between enforceability and the irreducible core can be seen in the beneficiaries' right to information. As Professor Hayton argued, knowledge of the trust is necessary to make the trust effectual with the trustees being accountable to the beneficiaries.[66] If the beneficiaries are not aware of this, no one can enforce the trust. This can be addressed by adding the right to information to the minimum content of a trustee's positive duties.

As to (iii), *as between trustee and trust property*, as a matter of property law, given the asset-partitioning function of a trust, trustees are bound to account to the beneficiaries for what they have done with the trust property, whether in their administrative or dispositive role.[67] One of the distinguishing features of the trust is the immunity or ring-fencing of the trust assets from the claims of the trustee's creditors in the event of his bankruptcy, and of his successors in the event of his death.[68] Applying Professor Mitchell's approach,[69] without ensuring the trustee's accountability as to the trust property to preserve this function, a trust simply cannot exist. Trustees should therefore owe a minimum duty of stewardship of trust property, or at least a duty to refrain from misapplication or misappropriation of it. Of course, trustees' accountability may also be related to (ii) in that the beneficiary's rights are correlative to the duties of the various parties involved in trust administration, including the trustee.

Trustees should therefore owe a minimum duty of stewardship of trust property, or at least a duty to refrain from misapplication or misappropriation of it

It is submitted that these three core elements of the trust also constitute the conditions for the irreducible core of trust obligations. Duties which are necessary to give effect to any one of these elements should be part of the core, because without any one of these elements supported by the relevant duties, that element will be absent and there is no trust. Therefore, while the core elements of a trust are cumulative, the conditions for the irreducible core are alternatives. As to the required link between the duty and the respective element/condition, this should be one of necessity, meaning that a duty will fall within the core only if it is absolutely necessary to ensure that the particular element in question is present in the trust.

Content of the irreducible core and other mandatory duties

Pulling the threads together, the focus of our reassessment of the irreducible core should be on the substantive content of the duties, rather than questions of liability, i.e. standards of fault. The primary theoretical basis for the irreducible core is the integrity of the trust concept, which embodies the three conditions mentioned above. These conditions determine the minimum content of duties that should be included in the core and thus become mandatory. Further, in specific contexts, the mandatory duties may go beyond the irreducible core, as the court may take into account other considerations like settlor freedom and extrinsic policies, and add mandatory duties which do not undermine the integrity of the trust concept. However, the court cannot remove duties from the core as that would be repugnant to the core, i.e. the trustee would no longer meet the minimum standard of accountability which is necessary for a trust to exist.

Applying the three conditions, the starting point is that the irreducible core should not be confined to duties of honesty and good faith in *Armitage*, but may also include, for example, the duty to act in what the trustee honestly and in good faith believes to be the best

65. Charities Act 2011 (UK) ss 15(1), 114 and 115(7).
66. D Hayton (n 3 above), 49–52.
67. *Ibid.*, 48.
68. See L Ho (n 49 above), 7–10.
69. See n 45 above.

interests of the beneficiaries (to satisfy condition (i)), the duty to inform the beneficiaries that they are beneficiaries (to satisfy condition (ii)), the duty to get in the trust property (to satisfy condition (iii)), etc. Indeed, a similar approach can be seen in the New Zealand Trusts Act 2019, which lists mandatory in addition to default duties. Mandatory duties can be found in sections 23–27. Section 26, for instance, provides for a mandatory duty to act for the benefit of beneficiaries or to further the permitted purpose of the trust. On the other hand, other duties like the duty of care in the context of investment may fall outside the irreducible core. If it is understood as being no more than a duty to refrain from misapplication or misappropriation of trust assets, it may still fall within the core, protecting the beneficiaries' beneficial entitlement and ensuring accountability as to trust property. Yet if it requires the trustee to achieve a level of return, this is something additional to the core of a trust.[70]

As mentioned above, in specific contexts, courts may choose to enlarge the scope of mandatory duties when applying these conditions and taking into account other considerations. These additional considerations may be gleaned from the law on trust-owned companies. Three examples suffice.

First, the obligational view of the trust may inform what counts as mandatory, e.g. in the present trust-corporate context. This view may be rooted in the libertarian idea that trusts exist to facilitate settlors' intention, and so can include whatever duties determined by the settlor. Accordingly, the scope of mandatory duties may be modified by the settlor in that the settlor may choose to include additional duties which can or cannot be excluded. That said, there are of course limits. The integrity of the trust concept remains the primary basis for the irreducible core, and should take precedence over settlor autonomy. Settlors can only add mandatory duties beyond the core if this is consistent with the integrity of the trust concept, and cannot cut down on the core as this will undermine that concept. *Zhang Hong Li* aptly exemplifies this vision. In view of the traditionally stringent regulation of different types of anti-*Bartlett* clauses,[71] *Zhang Hong Li* seemed to turn the tide, allowing the *Bartlett* duty to be undermined by the trust instrument. It appears that the HKCFA endorsed an idea of 'freedom of trust' akin to 'freedom of contract'. According to the HKCFA, any residual obligation can only operate outside the scope of the existing anti-*Bartlett* clause in question (in this case, arising in cases of 'actual knowledge of dishonesty'), and yet nothing can override the anti-*Bartlett* clause,[72] the irreducible core being irrelevant.[73] In effect, this means that the trustee's duties are determined entirely by the trust instrument. On such view, the settlor's intention may determine the content of mandatory duties. However, what was not mentioned in *Zhang Hong Li* is that there should be a limit to settlor autonomy as mentioned above: The settlor may only choose to include additional mandatory duties, but he should not be able to remove duties from the core.

Settlors can only add mandatory duties beyond the core if this is consistent with the integrity of the trust concept, and cannot cut down on the core as this will undermine that concept

Secondly, the *Bartlett* case itself also suggests that extrinsic policies, such as the special skill of paid professional trustees, may warrant additional mandatory duties. There is a policy argument that the scope of mandatory duties for professional trustees should be larger than that for gratuitous trustees in that the former should include a duty of care. A commonly cited proposition from *Bartlett* is that a higher standard is

70. See JE Penner (n 47 above), 264.
71. See subsection 'Anti-*Bartlett* clauses' above.
72. See text to nn 34–36 above.
73. See text to n 38 above.

expected of paid trustees. Although, strictly speaking, such a proposition in *Bartlett* relates to the general duty of care, *Spread Trustee* suggests that it is relevant to mandatory duties as well. In *Bartlett*, Brightman J was of the opinion that 'a higher duty of care is plainly due from someone like a trust corporation which arises on a specialised business of trust management. . . . A professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have.'[74] In other words, a distinction should be drawn between lay and professional trustees.[75] As suggested in the dissenting judgments by Lady Hale and Lord Kerr in *Spread Trustee*, the same reasoning may apply to mandatory duties. Lady Hale remarked that to prevent a trustee from excluding liability for gross negligence might be considered 'a good thing – perhaps particularly in the light of the development of professional trustees and the modern approach to exemption clauses in consumer contracts'.[76] As is apparent from the quote, this is due to policy considerations, not because it is essential to the concept of trust. Hence, from a purely policy perspective, there is a strong case that a duty of care should be mandatory for professional trustees, but not gratuitous trustees.

From a purely policy perspective, there is a strong case that a duty of care should be mandatory for professional trustees, but not gratuitous trustees

Thirdly, the scope of the core may also be larger for trusts holding corporate structures in that an additional *Bartlett* duty may be included in the core for such trusts and consequently become mandatory. Of course, *Zhang Hong Li* casts much doubt on this view. In *Zhang Hong Li*, the HKCFA's ruling (that the *Bartlett* duty can be excluded unless there is actual knowledge of dishonesty) was solely based on the parties' chosen arrangement, and not on the irreducible core. Given the *Armitage* decision, perhaps it was understandable that the HKCFA held that the *Bartlett* duty is a duty of skill/care, and so is not part of the core. However, there are potential difficulties. *Walker v Stones*[77] introduced a more objective approach to dishonesty: dishonesty is to be assessed at the standard of a reasonable person in light of what the defendant knew. In this sense, in cases where no reasonable trustee would refrain from exercising the relevant power, the *Bartlett* duty should arguably be part of the core because the trustee's conduct equates to 'dishonesty' according to *Walker v Stones*, and so falls within the *Armitage* formulation of the core. More broadly, there may be a risk in all these lines of reasoning based on standards of fault. As mentioned,[78] the irreducible core ultimately should not be determined by standards of fault, but by duties that can preserve the integrity of the trust concept; the *Armitage* formulation confuses duty with liability.

The better view is that, in the context of trust-corporate structures, the *Bartlett* duty should be part of the irreducible core as long as it meets any of the relevant conditions on the facts of the case (i.e. it is necessary to ensure that any of the core elements of a trust exists). In most cases, it meets condition (i) as the *Bartlett* duty is necessary to ensure that the trustee prioritises the interests of the object over those of others, notably the settlor. As held in the *Bartlett* case itself, the rationale behind the *Bartlett* duty is to enable the trustee to safeguard the interests of the beneficiaries.[79] Without the duty, the *settlor* (who is in control of the company without the trustee's interference) may speculate with the trust fund for his own private purposes, inconsistent with the beneficiaries' interests. To put it in proprietary terms, the *Bartlett* duty ensures that the beneficiaries' beneficial entitlement to the property would not be

74. *Bartlett v Barclays Bank Trust Co Ltd (No.1)* (n 1 above), 534.
75. See also *Gestrust SA v Sixteen Defendants* (n 24 above) (concerning a professional T company which sought directions with regard to the defence of pending litigation against companies owned by the trust); cf. *Highmax Overseas Ltd v Chau Kar Hon* (n 24 above).
76. *Spread Trustee Co Ltd v Hutcheson* (n 5 above), [137]; see also [180] (*per* Lord Kerr).
77. See n 17 above.
78. See text to nn 46–48 above.
79. *Bartlett v Barclays Bank Trust Co Ltd (No.1)* (n 1 above), 534.

defeated by third parties like the settlor.[80] As mentioned above, this is also consistent with the analysis in *Citibank*: the trust property beneficially belongs to the beneficiaries and no one else.[81] It may also satisfy condition (iii) (accountability as to property). The *Bartlett* duty is necessary to hold the trustee accountable in relation to the trust property, because a controlling shareholding in the company represents virtually all of the assets of the trust. Indeed, Professor Hayton was also of the view that an anti-*Bartlett* clause is largely repugnant to the concept of trusteeship for similar reasons.[82] While the underlying assets held by the company are not owned by the trust due to separate legal personality, the reality of the situation may demand that the corporate assets be treated as trust assets.[83] The interposition of a company merely facilitates asset management by the board of directors.[84] The *Bartlett* duty is thus necessary to cover these substantial assets. To exclude such duty is effectively to oust almost all of the trustee's accountability as to the trust property. All in all, in most cases, the efficacy of a company-holding trust necessitates the *Bartlett* duty in order to hold the trustees to the minimum core content of trusteeship, in terms of beneficiaries' best interest as well as accountability as to substantial trust assets. This may explain the court's traditional unease about anti-*Bartlett* clauses prior to *Zhang Hong Li* (HKCFA) and the search for some 'residual obligation' as in *Zhang Hong Li* (Court of Appeal). Settlors should not be able to exclude the *Bartlett* duty insofar as exclusion would offend the core.

> *In most cases, the efficacy of a company-holding trust necessitates the Bartlett duty in order to hold the trustees to the minimum core content of trusteeship, in terms of beneficiaries' best interest as well as accountability as to substantial trust assets*

The above illustrates that while the three conditions set the baseline for the irreducible core, the court may impose additional mandatory duties in specific contexts (whether as part of the core as in the case of the *Bartlett* duty, or outside the core based on extrinsic policies). On the other hand, the court cannot reduce the core for any reason. VISTA trusts and other offshore trusts serve as an example. *Prima facie*, these trusts may justify the need for a reduction of the irreducible core to accommodate modern trusts. These trusts illustrate the emergence of legal devices that may not truly resemble a trust in the traditional sense. However, this concern cannot creep into the core to reduce its scope, for that would be a contradiction in terms. Nonetheless, the approach in *Zhang Hong Li* may still be relevant. Practitioners or jurisdictions may choose to cut down the irreducible core in exceptional circumstances, i.e. through statutory regimes like VISTA trusts or other offshore trusts, though of course the arrangement may risk being denied recognition as a trust in the common law world.[85] It may also be characterised as illusory or sham trust in common law jurisdictions.[86] It has been observed that modern offshore trusts, where there are no fixed beneficiaries and trustees have no duty to make distributions, are a 'kind of deformation of the trust device' and risk invalidity: there are no real beneficiaries with rights capable of enforcing the trust.[87]

Conclusion

The trust-corporate structure reflects a tension between the integrity of the trust concept and settlor autonomy, and also between proprietary and obligational models of the trust. The traditional narrative of the trust is increasingly challenged by purely contractual

80. See JE Penner (n 47 above), 264; *Underhill and Hayton: Law of Trusts and Trustees* (19th ed, LexisNexis 2016), [48.58].
81. See text to nn 9–12 above.
82. D Hayton (n 3 above), 55–56.
83. *Re Poyiadjis* [2004] WTLR 1169, [32]. Cf. *Gestrust SA v Sixteen Defendants* (n 24 above), [51] and [52].
84. See text to n 18 above.
85. See e.g. Hague Convention on the Law applicable to Trusts and on their Recognition of 20 October 1984 (which is currently in force in the UK, Hong Kong and some other jurisdictions).
86. See *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch).
87. L Smith, 'Massively Discretionary Trusts' (2017) 70(1) Current Legal Problems 17, 52.

arrangements. Nonetheless, the integrity of the trust concept remains the primary concern of the irreducible core of trust obligations. There are certain core elements of a trust, and the irreducible core is the minimum necessary to ensure trustee accountability to give effect to them. Broadly speaking, these elements include loyalty, enforceability and accountability as to trust property. After all, the trust is an institution for the benefit of the beneficiaries, not the trustee/settlor/protector.

In the context of trust-owned companies, the recent recognition of the effectiveness of anti-*Bartlett* clauses in the HKCFA case of *Zhang Hong Li*, as well as the use of VISTA trusts, calls for a renewed understanding of the irreducible core in view of modern developments of trusts law. One possibility is to draw a distinction between core and mandatory duties, in that mandatory duties may go beyond the irreducible core. The specific context of each case may either necessitate a specific duty to be included in the core to preserve the trust concept or warrant additional mandatory duties due to policy reasons. Notwithstanding *Zhang Hong Li*, this article argues that the *Bartlett* duty is a possible example of a core duty in the specific trust-corporate context: such context may necessitate the *Bartlett* duty in order to hold the trustees accountable to the beneficiaries alone in relation to the whole trust property, so that a trust can exist. The opposite, however, is not true: as its name suggests, the irreducible core should be inviolable despite other considerations like settlor autonomy and the fit with modern trusts. The only 'exception' is perhaps statutory intervention, as in the case of VISTA trusts, but it is difficult to conceive them as actual trusts in the common law world. On such view, extrinsic policies like settlor autonomy as emphasised in *Zhang Hong Li* remain relevant as they may fine-tune the overall content of mandatory duties, but this should be subject to one qualification: these policies cannot remould the irreducible core itself. A purely obligational view of the trust, or indeed over-emphasis on other considerations, may risk eroding the irreducible core to vanishing point. Ultimately, in determining the scope of the irreducible core, the focus should be placed on the integrity of the trust concept, rather than technical distinctions of liability or extraneous considerations.

Ultimately, in determining the scope of the irreducible core, the focus should be placed on the integrity of the trust concept, rather than technical distinctions of liability or extraneous considerations

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