tool for developers seeking to avoid such restrictive covenants; it seems that for once, the grass really *is* greener on the other side.

EMMA WARING

DISCLOSURE OF A SETTLOR'S WISH LETTER IN A DISCRETIONARY TRUST

IN *Breakspear* v. *Ackland* [2008] EWHC 220 (Ch) Briggs J. ordered that a "wish letter", written by the settlor to the trustees of a discretionary settlement, should be disclosed to the trust beneficiaries. The beneficiaries had applied to the court to challenge the trustees' refusal to disclose the letter, and to invoke the court's inherent supervisory jurisdiction to order disclosure of it. There was at that stage no question of any contentious proceedings between the parties so the beneficiaries could not seek disclosure and inspection of the letter, along with any other relevant documents in the trustees' control, under Part 31 of the Civil Procedure Rules. The trustees intended, however, to wind up the trust a few years later and to apply to the court at that stage to sanction a scheme for distributing the trust assets to the beneficiaries. The contents of the settlor's wish letter would become directly relevant to that application.

Briggs J. held that the need to avoid re-considering whether the letter should be disclosed at that later stage justified an order for disclosure of it in the proceedings before him. But without that exceptional fact he would have treated the settlor's letter as confidential to the trustees. It was not enough to justify letting the beneficiaries see the letter that they wanted to plan their lives and were interested to know how the settlor might have wanted the trustees to exercise their dispositive powers in the future.

Wish letters are a common feature of modern discretionary settlements. A settlor often confers broad dispositive discretions upon the trustees. There may be nothing on the face of the trust instrument to indicate what purposes the settlor had in mind in creating the trust; which of the beneficiaries he actually wanted to benefit from the exercise of the trustees' dispositive powers; and in what order of priority they should benefit. The wish letter is a non-binding guidance from the settlor to the trustee. It indicates what things the trustees should take into account in exercising their discretions. In reality, it is likely to inform the reasons for the exercise of the trustees' appointments of capital and income to the beneficiaries. Most beneficiaries would be curious, at the very least, to know what it says.

The significance of *Breakspear* is that it holds that the trustees and the court are generally justified in keeping the wish letter confidential

from the beneficiaries. The case affirms the long-established rule that private trustees need not give reasons to the beneficiaries for the exercise of their discretions. They may therefore decline to disclose documents, such as a wish letter, which might indicate what those reasons were: *Re Londonderry's Settlement* [1965] Ch. 918. *Breakspear* affirms in English law the approach taken by the Privy Council in *Schmidt* v. *Rosewood Trust Ltd.* [2003] 2 A.C. 709 that a court may order trustees to disclose trust documents as part of its inherent jurisdiction to supervise the administration of trusts. The beneficiary's right of access to the documents does not depend on any theory that he has a proprietary interest in them which entitles the beneficiary to require the trustees to deliver them up: *cf. O'Rourke* v. *Darbishire* [1920] A.C. 581, 626 *per* Lord Wrenbury.

A recurring theme in Briggs J.'s judgment is whether the confidentiality of wish letters leaves trustees sufficiently accountable to their beneficiaries. He acknowledged the growth in recent years of general societal expectations about the accountability of people who manage property or exercise powers on behalf of others. The trustees' duty to account to the beneficiaries is now recognised as an element of the "irreducible core" of trusteeship: *e.g.*, *Armitage* v. *Nurse* [1998] Ch. 241, 253 *per* Millett L.J. It cannot be excluded by a settlor in drafting the terms of the trust instrument, or avoided by trustees in their administration of the trust.

But appeals to a broad notion of accountability are not enough to justify disclosure of all documents, such as a wish letter, which beneficiaries may think are relevant to the trustees' administration of the trust. To say that accountability is part of the irreducible core of trusteeship only begs the question of what the trustees are actually required to account for. The content of the irreducible core is defined by the non-excludable duties which any one legal system recognises as binding on trustees. Accountability is a question of positive law. In most Commonwealth systems, trustees' duties are generally confined to their financial management of the trust assets. Their duty is not to deal with the assets in a way that exceeds their limited equitable authority under the terms of the trust instrument and the general law. That explains why the trust financial statements and the trust instrument must almost invariably be disclosed to the beneficiaries: *cf. Re The Lemos Trust Settlement* [1992–93] C.I.L.R. 26. They contain the information that enables the beneficiaries to hold the trustees accountable for the performance of their actual legal duties: *e.g.*, *Schmidt* v. *Rosewood Trust Ltd.* [2003] 2 A.C. 709; *Foreman* v. *Kingstone* [2004] 1 N.Z.L.R. 841. But trustees are free to exercise their dispositive discretions as they wish, provided that they do so in good faith, for a proper purpose and without taking into account irrelevant

matters: *e.g.*, *Lady Wellesley* v. *Earl of Mornington* (1855) 2 K. & J. 143; *Re Hastings-Bass* [1975] Ch. 25. If the trustees stay within the proper bounds of their discretion, they owe no further duties. There is nothing more for which they can be made to account to the beneficiaries.

The rule that trustees need not give reasons for the exercise of their discretions may not lie in an out-dated, paternalistic idea of trusteeship: *cf. Hartigan Nominees Pty Ltd* v. *Rydge* (1992) 29 N.S.W.L.R. 404, 419–421 *per* Kirby P. It still holds good although many modern trustees are fee-charging corporations which provide specialist asset-management services. The reason may lie instead in two fundamental – but easily overlooked – features of the private donative trust.

First, the trustees actually own the assets that they manage. Subject to recognised equitable restraints, they have the power to deal with those assets as their own property. Secondly, the beneficiaries only have such limited equitable rights against the trustees and the trust assets as the settlor chooses to grant them. Their rights typically come to them gratuitously. They cannot claim all the privileges of owning those assets since that is simply not a status that they enjoy. As mere donees of a gift, they may have to be content with what they are given.

D.M. Fox

CONTRIBUTION REVISITED

In *City Index Ltd.* v. *Gawler* [2007] EWCA Civ 1382, [2008] 2 W.L.R. 950 the Court of Appeal considered two important issues concerning the application of the Civil Liability (Contribution) Act 1978 where one party is liable for "knowing receipt". Both issues had previously been considered by the Chancellor, Sir Andrew Morritt (noted [2007] C.L.J. 265). The Court of Appeal affirmed his decision on the application of the 1978 Act to a knowing recipient but disagreed with his conclusion on the extent of contribution.

The issues in *City Index Ltd.* v. *Gawler* arose from the theft of £9 million from Charter plc by an employee in breach of fiduciary duty. This sum had been received by City Index, which knew of the employee's breach of fiduciary duty and so was liable for unconscionably receiving the money. Charter's claim against City Index was settled for £5.5 million. City Index then sought contribution in respect of this amount under the 1978 Act from certain directors of Charter on the ground that, but for the directors' negligence, the employee's fraud would have been detected and so the money would not have been transferred to City Index.