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.

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The first issue was whether City Index and the directors could be considered to be liable "in respect of the same damage" (section 1(1)), where "damage" is defined, by section 6(1), as a liability to pay "compensation". The problem with fitting liability for "knowing receipt" into this test arises from the fact that this is traditionally described as a liability to account as though the defendant is a constructive trustee, which is receipt-based rather than loss-based: *Twinsectra Ltd.* v. *Yardley* [2002] 2 A.C. 164 at [105], *per* Lord Millett. This was not considered to be an insurmountable obstacle either for the Chancellor or for the Court of Appeal. Carnwath L.J., with whom Mummery L.J. agreed, considered the authorities, notably *Friends' Provident Life Office* v. *Hillier, Parker, May and Rowden* [1997] Q.B. 85, and concluded that he was bound to hold that a claim for "knowing receipt" fell within the language of the 1978 Act. Despite Carnwath L.J.'s analysis of the case at para. [20], *Friends' Provident* is not direct authority for this conclusion, since that case was concerned, in part at least, with a claim for breach of a constructive trust following receipt of money which the defendant knew had been paid by mistake. Crucially, however, Carnwath L.J. concurred with the decision of the Chancellor that Charter had suffered a loss and City Index was liable to make good that loss, which constituted compensation within the 1978 Act.

Arden L.J. reached the same result but by a different route, concentrating more on the nature of the remedy rather than the previous authorities. She bemoaned the fact that there was no consistency of terminology in this area (which was a cause of Carnwath L.J.' s confusion as to the nature of the decision in *Friends' Provident*). She described the expressions "constructive trust" and "liability to account" as portmanteau expressions, which she unpacked to conclude that there are two distinct types of remedy for "knowing receipt". One is to make good the claimant's loss and the other to account for profits made from the use of the claimant's property. Since Charter's claim was for the former type of remedy it followed that City Index was indeed liable to compensate Charter. Although Arden L.J. did not analyse the remedies in these terms, she essentially was drawing a distinction between literal restitutionary remedies, where the defendant's gain corresponds with the claimant's loss and the defendant gives back the value of what has been received, and disgorgement, where the defendant gives up its gain even though this was not obtained directly from the claimant, as where it has profited from the use of money obtained from the claimant by investing it. This is a useful distinction to draw, which at least enables the knowing recipient sometimes to fall within the 1978 Act, although this will ultimately depend on the nature of the liability to the claimant.

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It was as regards the second issue, concerning the extent of the contribution, that the Court of Appeal reached a different conclusion from the Chancellor. He had held that a party which is liable for "knowing receipt" should bear the full loss because the fact of receipt would never make it "just and equitable" for contribution to be ordered. This conclusion and reasoning was rejected by the Court of Appeal, essentially on the basis that the simple fact of receipt of a benefit should not preclude contribution as a matter of law or practice; everything turned on the facts. So the matter was sent for determination at trial.

However, in the course of his analysis of the law, Carnwath L.J. drew a significant distinction. Where the recipient has retained the money which had been received from the claimant or has profited from the receipt of that money (as City Index had done by £3 million), it would be just and equitable for the recipient's liability to be met from the retained money or the profits made, rather than to expect the other party to make a contribution. However, there was another £2.5 million which Charter had paid to City Index but which was not represented by any money which City Index had retained. It was as regards this amount of money that the Chancellor said that contribution should not lie, but the Court of Appeal correctly rejected this. Why should a knowing recipient not be able to claim contribution from another party who is liable to the claimant in tort? As Carnwath L.J. recognised, they are in similar positions with a potential liability being owed to the claimant. Their relative responsibility for the loss needs to be weighed, as he recognised at [29]. Relevant factors in determining what is just and equitable would include the circumstances in which City Index had dissipated this money and presumably the extent of their respective fault. No doubt the fact that City Index's liability would depend on it having acted unconscionably might mean that it would recover less contribution from a merely negligent director, but this will always turn on a careful analysis of the facts.

The implications of this decision are significant in ensuring both that certain restitutionary claims can be fitted into the statutory contribution scheme and that judicial discretion is preserved so that all the facts are taken into account when assessing the extent of contribution.

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PATENT ENTITLEMENT CLAIMS: *MARKEM* OVERRULED

IF someone other than the registered proprietor claims he is the true owner of a patent, what must he prove for the patent to be revoked or

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