powers of courts and arbitrators to "prevent such abuse" in practice (at [67]). For an illuminating, and more pessimistic, discussion of procedural manoeuvring, contrast Lopucki and Weyrauch, "A theory of legal strategy" (2000) 49 Duke L.J. 1405.

The House of Lords' decision will, unfortunately, serve to encourage those who repudiate contracts to delay paying damages, which rather undermines the rule in *Hochster* v. *De la Tour* (1853) 2 E. & B. 678 that, on acceptance of an anticipatory breach, the victim has an immediate "accelerated" claim for damages.

JONATHAN MORGAN

CONTRIBUTION: COMPENSATION VERSUS RESTITUTION

THE Civil Liability (Contribution) Act 1978 enables a defendant, who has discharged a liability to compensate the claimant for damage, to seek contribution from another defendant who is liable to compensate the claimant for the same damage. This statutory language causes difficulties where one defendant is liable to make restitution, usually for unjust enrichment, and the other party is liable to compensate the claimant for loss suffered due, for example, to the commission of a tort or breach of a contract. In such circumstances can the party who is liable to make restitution be regarded as liable for damage and, crucially, does the language of compensation encompass gain-based restitutionary remedies? The decision of Sir Andrew Morritt C. in *Charter plc* v. *City Index Ltd.* [2006] EWHC 2508 (Ch), [2007] 1 W.L.R. 26, provides useful clarification of the operation of the law of contribution in such circumstances.

The claimant company was the victim of a theft of £9 million which had been transferred by an employee of the claimant to City Index Ltd. to finance the employee's gambling with City Index. The claimant company sued City Index for knowing receipt of property in breach of fiduciary duty. City Index argued that the claimant's directors and auditors (known as the Part 20 defendants) had been negligent in not detecting the theft earlier and accordingly they should be liable to make contribution to City Index under the 1978 Act.

There were three distinct stages in the judge's analysis of the law of contribution. First, he concluded that City Index and the Part 20 defendants were liable for the same damage, in the sense that the liabilities were causatively connected because, had the Part 20 defendants not been negligent, the money would not have been stolen from the claimant and received by City Index (at [49], cf. the decision of the House of Lords in *Royal Brompton Hospital NHS Trust* v.

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Hammond [2002] 1 W.L.R. 1397 involving unrelated claims in contract and tort).

Secondly, although the remedy for knowing receipt is restitutionary (Lord Millett in *Twinsectra Ltd.* v. *Yardley* [2002] UKHL 12, [2002] 2 A.C. 164, at [105]) the judge had to consider whether the liability could still be treated as compensatory within the language of the 1978 Act. He concluded that the dictum of Lord Steyn in *Royal Brompton Hospital NHS Trust* v. *Hammond* [2002] 1 W.L.R. 1397, to the effect that restitutionary relief cannot be treated as compensatory, was obiter. So he was bound by decisions of the Court of Appeal (including *Friends' Provident Life Office* v. *Hillier Parker May and Rowden* [1997] Q.B. 85 and *Niru Battery Manufacturing Co.* v. *Milestone Trading Ltd. (No. 2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm.) 289) to conclude that a broad interpretation of compensation should be adopted. Consequently, he decided that, even though the remedy for knowing receipt is restitutionary, it could also be considered to be compensatory because the theft of money had caused damage to the claimant and City Index was liable to compensate the claimant for this damage.

From the perspective of a trial judge who is trying to reconcile contradictory dicta from previous decisions with apparently precise statutory language, this is a technically satisfactory decision. But it is problematic. The remedy for knowing receipt is categorically a gain-based remedy. Whilst it is true that this claim is parasitic on there having been a breach of trust or fiduciary duty, which will have involved damage being suffered by the trust or principal, the remedy which is awarded is assessed by reference to what the defendant had received and not what the claimant had lost. Compensation does not come into it, unlike the action for dishonestly assisting a breach of trust or fiduciary duty. This is important, for if a trustee has stolen £1 million from the trust and the defendant has knowingly received only half of this, the defendant's liability will be assessed by reference to what he had received and not by what the trust had lost.

The nature of the judge's conclusion is further evidence that the distinctions between restitution and compensation and between gain and loss is becoming increasingly fluid. This fluidity of analysis of the characteristics of remedies has now reached its low-point in the recent dictum of Chadwick L.J. in *WWF - World Wide Fund for Nature* v. *World Wrestling Federation Entertainment Inc.* [2007] EWCA Civ. 286, at [58], that the remedy of an account of profits for breach of contract is compensatory damages. But this deprives "compensation" of any sensible meaning. Compensation should focus on loss suffered and restitution on gains made.

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The problem in the context of statutory contribution claims is, of course, that the 1978 Act is unfortunately worded in confining the regime to compensation. There is no reason in principle why one defendant who was liable to make restitution to the claimant should not obtain contribution from someone else who is also liable to the claimant but for a compensatory remedy instead. But to fit the round peg of restitution within the square hole of compensation is unnecessary and can only serve to confuse.

Once he had concluded that the statutory contribution regime was engaged the judge went on to the final stage to consider whether a contribution claim would be likely to succeed on the facts. Statutory contribution is not available as of right but through the exercise of judicial discretion to determine the availability and extent of contribution by reference to what is just and equitable. Bearing in mind that City Index's liability was founded on knowing receipt (with the key test of liability being one of unconscionability), whereas that of the Part 20 defendants was based on negligence, it might be thought that City Index was more blameworthy and so should bear more of the ultimate liability. But the judge concluded that City Index should bear the whole liability because only it had received the benefit of the payment; only it had made a gain through the retention and use of the money for its own purposes. This is a perfectly acceptable conclusion to reach, and is in fact consistent with a wide range of authorities. However, it does mean that we are left with the supreme irony that to get within the statutory contribution regime City Index's liability was treated as compensatory, but contribution was ultimately denied precisely because the liability was restitutionary. Restitutionary liability needs to hide behind the cloak of compensation to gain entry to the statutory scheme, but, once entry has been gained, the cloak is ripped away to reveal its true identity in order to determine whether contribution will be awarded.

GRAHAM VIRGO

REMEDIES FOR INTERFERENCE WITH A PRESCRIPTIVE RIGHT TO LIGHT

THE Coase theorem famously posits that if transactions are costless then the initial allocation of a property right will not affect its ultimate use. The parties will bargain to allocate the right to whichever of them values it more highly: Coase (1960) 3 J. Law & Econ. 1.

The theorem was formulated in the context of competing uses of neighbouring land. The defendant's use of his own land might so interfere with that of his neighbour that the neighbour would have an

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