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## DISHONEST ASSISTANCE

# The legal pendulum swings back

*Mark Pawlowski outlines a recent Court of Appeal ruling on the meaning of dishonesty where there is accessory liability*



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Over the last decade, judicial controversy has surrounded the meaning of dishonesty in the context of the liability of a third party who has assisted in a breach of trust. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] Lord Nicholls used the word in an objective sense as meaning not acting as an honest person would in the circumstances. An element of subjectivity was, however, inevitable in this formulation since honesty could only be assessed properly in the light of what a person actually knew at the relevant time, as distinct from what a reasonable person would have known or appreciated. Crucially, however, this did not mean that an individual would be free to set up their own standard of honesty in order to avoid the consequences of their actions. According to his Lordship:

... honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.

On this reasoning, therefore, an individual would be characterised as dishonest notwithstanding that they did not realise that what they were doing was dishonest by ordinary standards of honest people.

### Ruling in *Twinsectra*

Unfortunately, the majority of the House of Lords in *Twinsectra Ltd v Yardley* [2002] reached a different conclusion. According to Lord Hoffmann, accessory liability required a dishonest state of mind – in other words, a consciousness on the part of the defendant that they were transgressing ordinary standards of honest behaviour. On this formulation, therefore, a person would not be acting dishonestly if they knew of the facts that created the trust and its breach, but had not been aware that what they were doing would be regarded by honest people as being dishonest. Lord Hutton made the point even more clearly:

... for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men.

The 'combined test' of the majority rejects, therefore, a purely subjective standard (whereby a person is only regarded as dishonest if they transgress their own standard of honesty) and also discards the purely objective standard (whereby a person is dishonest only if their conduct is dishonest by the ordinary standards of honest people). According to Lord Millett, however, who gave a strong dissenting judgment, civil liability did not normally require a guilty mind. In the civil context, liability was usually dependent on the defendant's course of conduct rather than their state of mind. Accordingly, in his view, dishonesty did not require the defendant to be aware that they were acting contrary to objective standards of behaviour. In the words of Lord Millett:

In my opinion, Lord Nicholls was adopting an objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person placed in similar circumstances. Account must be taken of subjective considerations such as the defendant's experience and intelligence and his actual state of knowledge at the relevant time. But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was.

On this approach, therefore, like in *Tan*, the only subjective elements are those relating to the defendant's knowledge, experience and attributes. Significantly, the objective elements concern both the standard of honesty and the recognition of wrongdoing. This rejection of subjective dishonesty also led his Lordship

**'The two-stage test endorsed by the Privy Council has been welcomed by academics and practitioners as avoiding the absurdity of a defendant successfully escaping liability by simply arguing that they believed that their conduct was objectively honest.'**

to conclude that knowledge was the determining ingredient for accessory liability and that there should be a return to the traditional description of this head of equitable liability as arising from 'knowing' (as opposed to 'dishonest') assistance in a breach of trust. In this connection, although it was not necessary, in his view, that the defendant should have knowledge of the details of the trust or the identity of the beneficiaries, it was essential (at the very least) that they should have knowledge that they were assisting in a dishonest scheme. In particular, knowledge of the various arrangements by which a person obtained control of money and participation in a dealing with money in a manner that was known to be unauthorised would be enough.

### **Barlow Clowes**

The majority ruling in *Twinsectra* was followed three years later by the Privy Council decision in *Barlow Clowes International Ltd v Eurotrust International Ltd & ors* [2005]. In this case, the defendants argued that liability for dishonest assistance required a dishonest state of mind on the part of the defendant. This,

in turn, involved a subjective mental state but the standard set by law to measure that dishonesty was objective. The formulation mirrors the combined test promulgated by the majority in *Twinsectra* and one may be forgiven for thinking that the defendants' understanding of what constituted dishonesty in this context was entirely correct in law and unimpeachable. However, the

participating, but also into their own views about what constituted acceptable standards of honesty. Contrary to this belief, dishonesty did not require the defendant to have thought about what those standards were – consciousness of dishonesty meant simply consciousness of those elements of the transaction that made participation transgress ordinary standards of honest behaviour. On this

*To suggest that the Tan and Twinsectra decisions can be reconciled simply on the basis of ambiguity is to understate seriously the divergence in judicial thought expressed in them.*

Privy Council disagreed. Lord Hoffmann, who delivered the judgment of the Committee, accepted that there was an 'an element of ambiguity' in his own remarks (and those of Lord Hutton) in *Twinsectra* that had spurned the mistaken (academic) belief that dishonesty invited an enquiry not merely into the defendant's mental state about the nature of the transaction in which they were

point, the Privy Council affirmed the notion that it was sufficient if the defendant had entertained a 'clear suspicion' that the relevant disposals in this case were of money held on trust. It was not necessary for the defendants to know all the details surrounding the misappropriation of investors' money or, for that matter, the existence of the trust or the facts giving rise to the trust. In line with

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the remarks of Lord Millett (and Lord Hoffmann) in *Twinsectra*, a person could know (and clearly suspect) that they were assisting in a misappropriation of money without knowing that the money was held on trust or what a trust actually meant.

There is no doubt that the Privy Council decision marked a significant change in direction (if not an about-face) from the previous majority ruling in *Twinsectra*. Interestingly, two of their Lordships in *Barlow Clowes* (Lords Steyn and Hoffmann) had also represented the majority in *Twinsectra*, so the difference

standards of honest people. If the court so decides, the defendant is liable for dishonest assistance regardless of whether or not they were aware that their conduct was dishonest. This straightforward approach has, therefore, much to recommend it even though, strictly speaking, it is wholly at odds with the majority reasoning in *Twinsectra*.

To suggest, however, that the two decisions can be reconciled simply on the basis of ambiguity is to understate seriously the divergence in judicial thought expressed in them. There is no doubt from the speeches of both Lords

defendants might possibly be involved in money laundering, he did not have any particular suspicions about the two transactions in question. On this basis, therefore, the trial judge had been correct to acquit the defendants of dishonesty.

Interestingly, Arden LJ characterised the *Barlow Clowes* decision as a clarification of the previous law and a recognition that the requirement of conscious wrongdoing was a 'wrong interpretation' of the *Twinsectra* ruling. Although, according to her Ladyship, adherence to strict precedent was important to create and maintain legal certainty, it was possible, in very exceptional circumstances, for the Court of Appeal to follow a Privy Council decision in preference to a previous ruling of the House of Lords: see, eg, *R v James* [2006]. In the instant case, the Privy Council decision in *Barlow Clowes* had expressly clarified English law so that, following its ruling, an appeal to the House of Lords would have been a pointless exercise. For all practical purposes, therefore, bearing in mind that the members of the Privy Council are also usually members of the Appellate Committee of the House of Lords, the result of an appeal would almost certainly have been a foregone conclusion. Unlike *James*, however, her Ladyship did not characterise the *Barlow Clowes* decision as necessarily a refusal of, or even a departure from, the majority in *Twinsectra*. Instead, it was to be viewed as providing 'guidance as to the proper interpretation to be placed on it' as a matter of English law. On this basis, the *Tan* and *Twinsectra* cases could be 'read together to form a consistent corpus of law'.

### Conclusion for practitioners

Despite the foregoing analysis, Arden LJ also openly recognises that the decision in *Barlow Clowes* 'could probably have been reached without consideration of the *Twinsectra* decision for the purpose of English law'. The obvious inference from this is that the majority ruling has become largely redundant as a precedent and may safely now be consigned to the judicial waste paper bin as having little or no relevance in determining liability for knowing assistance. Moreover, the clear rejection of subjective dishonesty, it is submitted, now paves the way for a return to orthodoxy and the acknowledgment of Lord Millett's synthesis that the defendant's knowledge is the more appropriate basis for imposing accessory liability on strangers to the trust. ■

### Arden LJ pointed out that it was possible, in very exceptional circumstances, for the Court of Appeal to follow a Privy Council decision in preference to a previous ruling of the House of Lords.

in approach (tacitly recognising Lord Millett's dissent) was even more surprising. Be that as it may, the two-stage test endorsed by the Privy Council has been welcomed by academics and practitioners as avoiding the absurdity of a defendant successfully escaping liability by simply arguing that they believed that their conduct was objectively honest. The first stage of the Privy Council's test requires the court to identify the defendant's state of mind. Since 'there is no window into another mind', the only way to achieve this is by drawing appropriate inferences from what the defendant knew, said and did in relation to the transaction, both at the time it took place and subsequently. The second stage requires the court to assess whether the defendant's state of mind would be viewed as dishonest by the ordinary

Hoffmann and Hutton in the House of Lords that the majority in *Twinsectra* intended to impose a requirement of conscious wrongdoing on the part of the defendant. It is equally obvious that Lord Millett's dissent promulgated a rejection of this approach, basing the defendant's accessory liability on a strictly objective assessment of their conduct. There is no doubt, therefore, that the Privy Council decision marks an effective 'rowing back' towards Lord Millett's minority view.

### Latest Court of Appeal ruling

Significantly, the most recent decision of the Court of Appeal in *Adnan Shaaban Abou-Rahmah v Al-Haji Abdul Kadir Abacha* [2006] has openly recognised this conflict and has held that the law laid down in *Twinsectra*, as interpreted in *Barlow Clowes*, represents the current law of England and Wales. So the defendant's dishonesty is to be judged by reference to an objective standard of honest behaviour without any additional requirement of conscious wrongdoing. The Court of Appeal has also confirmed that it is not necessary to show that the person assisting knew of the existence of the relevant trust (or fiduciary relationship) and/or that the transfer of funds involved a breach of trust (or fiduciary duty). Consistent with the view expressed in *Barlow Clowes*, it is enough that the person assisting had a clear suspicion that the money was held in trust. So, in *Abou-Rahmah* itself, although the bank manager had a general suspicion that the

*Adnan Shaaban Abou-Rahmah v Al-Haji Abdul Kadir Abacha* [2007] WTLR 1

*Barlow Clowes International Ltd & ors v Eurotrust International Ltd & ors* [2004] WTLR 1365 (IoM HC); [2005] WTLR 1453 (PC)

*R v James* [2006] EWCA 14 (Crim)

*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378

*Twinsectra Ltd v Yardley & ors* WTLR [2000] 527 (CA); WTLR [2002] 423 (HL)