Dishonest assistance involving solicitors: Clydesdale Bank Plc v Workman

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Case Comment

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Cases cited
Clydesdale Bank Plc v Workman [2016] EWCA Civ 73; [2016] P.N.L.R. 18; [2016] 2 WLUK 194 (CA (Civ Div))
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378; [1995] 5 WLUK 382 (PC (Bru))
Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164; [2002] 3 WLUK 573 (HL)

Tru. L.I. 185 **Introduction**

The Court of Appeal's judgment in *Clydesdale Bank Plc v Workman* raises a number of issues regarding the operation of dishonest assistance claims for a breach of trust. [1] The case involved accusations of dishonesty against two solicitors who had acted on behalf of a company, which had unscrupulously taken advantage of the absence of a charge on the HM Land Registry in favour of Clydesdale Bank Plc, trading as Yorkshire Bank. A number of important points emerge from this decision. The first point concerns the brief discussion of the Privy Council's opinion in *Royal Brunei Airlines Sdn Bhd v Tan* in relation to the test of dishonesty. [2] Although the *Twinsectra v Yardley* test has been consistently used in claims of dishonesty against solicitors in favour of the *Royal Brunei* formulation, [3] it is notable that no mention was made of the possible conflict between these two authorities. In reversing the trial judge's findings that the defendants were liable for dishonest assistance, Lewison LJ (with whom Longmore and Kitchen LJJ agreed) focused on the fact that a subsequent legal charge took priority over the Yorkshire Bank's interests. This was despite the defendants having sufficient knowledge that the Yorkshire Bank's charge should have been registered first, and also that the holder of the subsequent legal charge was aware of this. The decision indicates that the courts are continuing their efforts to protect solicitors from findings of dishonesty, but at the same time seeking to avoid the controversy of the *Twinsectra* test.

Facts

The solicitors who were accused of dishonesty were Mr Murphy (an associate) and Mr Denslow (his supervising partner), for their involvement in a mortgage fraud. They had acted throughout on behalf of Lord Edward Developments (Beechwood) Ltd ("the company'). Other significant parties in this fraud were: Mr Tibbetts the person in ultimate control of the company; Mr Stapleton, one of the company directors; Mr Hayward, who eventually obtained a fictional charge over mortgaged property, and Mr Darby, a solicitor who was apparently involved in the scheme (but who was not one of the solicitors whose ***Tru. L.I. 186*** dishonesty was being considered before the court).

In 2006, the company arranged the purchase of a property entitled "Beechwood', which also included plots 2, 3 and 4 of undeveloped land. To finance the purchase, the company arranged a mortgage with Yorkshire Bank for £1.99 million. This money was to be secured by way of a legal charge and the company executed a deed to that effect. The bank appointed Mr Billings to act as their solicitor, a partner at BPE. Although Mr Billings registered a charge against the property at Company's House, he failed to do so at HM Land Registry. The consequence was that the bank had a charge in equity over the land, but not a legal charge. [4]

It was at this stage that Mr Murphy and Mr Denslow entered the scene. They were not involved in the initial purchase of the property, but were subsequently engaged to act for the company in matters relating to the Beechwood property. In May 2007, Mr Murphy was instructed to act on behalf of the company in relation to the sale of plot 3 of the land to a Mr Davies for a total of £525, 000, with a further agreement of £750, 000 to be paid by Mr Davies for the development of the land. Mr Denslow was Mr Murphy's supervising partner. In October and November 2007, the bank contacted Mr Murphy asking for relevant documents and mentioning the mortgage. It was not until December 2007 that Mr Murphy spoke to the bank, but Mr Murphy could not find any record that the charge had been registered. Mr Murphy's next step was to contact Mr Stapleton, a director of the company, to inform him that the bank had been asking about a charge in relation to the land. Barely a week later, and without the knowledge of Mr Murphy or Mr Denslow, the company secured a charge in favour of a Mr Hayward ("the Hayward Charge') for an apparent loan of £600,000. This was registered at the Land Registry but not at Company's House. For some reason, the Land Registry failed to check the Company's House record. If it had done so, the Bank's charge on the Company House register would also have been noted under r 111 of the Land Registration Rules 2003. The result was that the Hayward charge would inevitably take priority over that of the Bank.

The next step was that Mr Tibbetts sought to purchase plots 2 (£550,000), 3 (£475,000) and 4 (£475,000). He appointed M J Darby & Co as his solicitors for this transaction. At this point, Mr Murphy questioned the sale of the land to Mr Tibbetts on the basis that there was an existing contract for the sale of the same plot to Mr Davies, notably for a higher price. The company director, Mr Stapleton, simply responded that this "was merely connected with financing' and that the plot would still be sold to Mr Davies at a later point in time. Despite the earlier exchange with the bank, it was concluded that Mr Murphy remained unaware of the bank's mortgage.

Mr Murphy was instructed to complete the sale to Mr Tibbetts "with all speed'. M. J Darby & Co sent a letter to Mr Murphy, detailing that there was a charge over the property on behalf of Mr Hayward, who in turn had acted as a representative of

Mr Tibbetts. The letter further noted that the company had failed to make payments under the charge, and that plot 2 was to be an outright sale (to be financed by Mr Tibbetts) whereas plots 3 and 4 were to be in part payment of the money owed under the Hayward charge. The letter, therefore, seemed to suggest that the company still owed more than the value of these properties. This was despite the fact that the Hayward charge was worth less than half of the total value of the three properties. Unfortunately, at no point, did Mr Murphy or Mr Denslow establish the value of the Hayward charge. Mr Murphy did carry out a search on ***Tru. L.I. 187*** the Land Registry, but this failed to reveal the extent of the Hayward charge. After taking instructions from the company, the proceeds of the sale of plot 2 were forwarded to Mr Hayward after he signed a release of his charge. At this point, BPE wrote to Mr Murphy about the bank's interest, and Mr Murphy asked the company not to release the money to Mr Hayward until the matter was resolved. Mr Murphy became aware of the bank's competing claim of the bank after the sale of plot 2, but before the sale of plot 3 and 4 had been finalised. Notably, Mr Billings had not objected to the completion of the sales of plots 3 and 4. However, the company instructed Mr Murphy to proceed with the sale and not to give details of the sale to BPE. Despite being aware of the bank's claim at this stage, and the fact that the Hayward charge had been made in favour of Mr Tibbetts, Mr Murphy followed his client's instructions and completed the sale.

The findings of the court

In the Court of Appeal, it was concluded that neither Mr Murphy nor Mr Denslow had acted dishonestly. This reversed the findings of the trial judge, who had initially concluded that their involvement in the completion of the sale of plots 3 and 4, but not their involvement in the sale of plot 2, satisfied the dishonest requirement. The trial judge had taken the view that they should have considered their position or asked for advice from the partners at their firm, the Law Society/SRA, or the risk management team at the firm, or that they should have obtained counsel's advice. By failing to do so, and through their involvement in the completion of the sales of plots 3 and 4, the judge concluded that they had defeated the legitimate interests of the bank. Lewison LJ, who delivered the lead judgment in the Court of Appeal, criticised the trial judge's conclusions on this issue. As far as the defendants were aware, the Hayward charge was valid despite the fact that they did not know the extent of the charge. Even if the bank had placed a charge on the Land Registry when the solicitors became aware of the bank's interest, it would have still lacked priority over the Hayward charge. In light of this Lewison LJ concluded that, from the defendant's perspective, the bank would only receive any payment after the Hayward charge had been satisfied.

Lewison LJ also felt that the actions of the solicitors, although possibly being reckless, were insufficient for a finding of dishonesty on the facts as found by the trial judge. The trial judge had questioned the competence of the solicitors in this case as Mr Murphy and Mr Denslow had made numerous errors such as failing to properly enquire after the bank had first claimed a charge over the land, failing to properly enquire about the somewhat curious sale to Mr Tibbetts of plots 2, 3 and 4, failing to establish the extent the Hayward charge and also proceeding with the sale of plots 3 and 4 despite their grounds for concern at that stage. Their failures were described as 'reckless' but, although recklessness could provide evidence of dishonesty, Lewison LJ noted that recklessness and dishonesty were not necessarily the same standard. Lewison LJ cited Lord Nicholls in *Royal Brunei,* [5] by explaining that recklessness can "call into question' the honesty of the defendant. However, recklessness was, in this instance, not sufficient to show dishonesty. The two solicitors had discussed their concerns together and considered which charge took priority. They had decided to follow their clients' instructions to proceed but only in light of their view of the legal issues. However, as will now be explored, the reasoning applied in reaching this conclusion is open to criticism.

Tru. L.I. 188 **The Significance of Royal Brunei**

In delivering his judgment, Lewison LJ briefly discussed *Royal Brunei v Tan* in defining dishonesty, but made no mention of the *Twinsectra* approach. Although this discussion was relatively brief, the reference to *Royal Brunei* may be interpreted by some as a further indicator that the domestic courts have now settled on *Royal Brunei* as the main authority in favour of the *Twinsectra v Yardley* approach. [6] Whereas the Privy Council in *Royal Brunei v Tan* seemingly recognised an objective standard of dishonesty, [7] in *Twinsectra* the majority of the House of Lords appeared to introduce an additional subjective limb that required the defendant to realise that they were also dishonest by the standards of others. [8] Thus, under *Twinsectra,* it would be necessary to further demonstrate the mental state of the defendant which, in practice, made it more difficult to establish dishonesty by adding a subjective limb of the test which needed to be satisfied. Lord Hoffmann, in *Barlow Clowes v Vaughan,* attempted to clarify the law by concluding that the *Royal Brunei* test was the appropriate one and that there was no need for any additional subjective limb of the test. [9] Not everyone has been convinced by this reinterpretation and, as a result, one might argue that domestic courts are required to follow *Twinsectra.* This is on the basis that both *Royal Brunei* and *Barlow Clowes*

are Privy Council opinions, whereas *Twinsectra* is a House of Lords ruling. [10] Although some commentators feel that the law was settled in favour of *Royal Brunei* by the Court of Appeal in *Abou-Rahmah v Abacha,* [11] some uncertainty remains. [12] In *Abou,* Arden LJ had firmly accepted the Privy Council's attempt to clarify *Twinsectra,* by concluding that the test remained a primarily objective one, which required dishonesty by reference to a general standard. [13] In contrast, Pill LJ and Rix LJ refused to fully commit to the same position, [14] and parts of both of their judgments implied that they were at least sympathetic to the *Twinsectra* approach. [15] In light of the controversy that has surrounded the precise formulation of the test of dishonesty, one may have expected some discussion of the appropriate test in *Clydesdale.*

Moreover, this was a case that was ripe for such a discussion. In the aforementioned *Abou-Rahmah,* the question of liability was largely determined on the trial judge's findings that the defendants had general suspicions concerning the activities of fraudsters but lacked knowledge of the particular transactions which involved the claimants. [16] As a result, the discussion of dishonesty was, to some extent, treated as obiter in *Abou-Rahmah.* But in *Clydesdale,* this was not an option as the solicitors were heavily involved in these transactions. Instead, either the court needed to provide clear guidance concerning the appropriate test or to find another means of reversing the decision. Unfortunately, the court chose the latter option. Lewison LJ mostly focused on the fact that the solicitors believed that the Hayward ***Tru. L.I. 189*** charge took priority. It was concluded that they could not be held dishonest on the basis of their honest belief that the Hayward charge took priority. This reasoning seems somewhat dismissive of the countervailing facts which supported the trial judge's conclusions on dishonesty.

It should be recalled that the defendants had been informed by the time of the sale of plots 3 and 4 that the Hayward charge was on behalf of Mr Tibbetts, the directing force of the company. They had also been informed that the Yorkshire Bank's charge should have been registered first, and it was only the negligence of Mr Billings that had prevented this. In light of this, there was sufficient evidence to show that Mr Tibbetts' conscience was affected by his knowledge that the Hayward charge should never have been given priority over that of Yorkshire Bank. Indeed, *Scottish & Newcastle Plc v Lancashire Mortgage Corp Ltd,* [17] although treated as a case of proprietary estoppel, was a case where the claimants' interests were registered after the defendants. Because the defendants in *Scottish & Newcastle* were aware that the claimant's interests should have been registered first, this provided the basis for unconscionability which bound the defendants in that case. [18] Returning to *Clydesdale,* there was certainly enough information for the defendants to realise that the company was doing something questionable and, in particular, that Mr Tibbetts was seeking to take advantage of the non-registration of the mortgagee's interest. First, there is the fact that the company had refused to allow the defendants to share information concerning the sale of the plots of land. Second, when the details of the Yorkshire Bank's interest emerged, the company decided that the sale of the land was a matter of urgency without giving any particular reason why this was so. Third, the defendants knew that the Hayward charge had been made on behalf of the person in ultimate control of the company who would have not only been aware that the Yorkshire Bank's charge should have been given priority, but also would have agreed to this in the first place. There were more than enough alarm bells in this case to indicate that the sale of plots 3 and 4 that the defendants were involved with were designed to take advantage of Mr Billings' error. It is evident from the aforementioned *Scottish & Newcastle Plc* that the court would intervene in these circumstances. Indeed, this is the type of opportunism that equity was seems designed to counteract, and it is this opportunism that the defendants had consciously assisted. [19] As a result, it is arguable that there should have been enough to satisfy the test for dishonesty from *Royel Brunei.* As Lord Nicholls stated, "an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct'. [20]

The significance of context?

Even if one agrees with the decision reached by the Court of Appeal, the reversal of the trial judge's decision would have been more readily justified on the basis of the *Twinsectra* test. The *Twinsectra* approach would have enabled the court to conclude that, regardless of whether this was objectively dishonest, as the solicitors believed that they were simply following the legal rules and thus were unaware that others would regard this as dishonest. The absence of any discussion of *Twinsectra* implies that the court wanted to find in favour of the defendants, ***Tru. L.I. 190*** but was seeking to do so in a way that avoided the controversy of applying the *Twinsectra* analysis. The absence of the *Twinsectra* test is even more notable given the fact that one of the possible reasons for modifying the test in *Twinsectra,* and the subsequent confusion, was the concern that a finding of dishonesty may lead to disciplinary proceedings for some professions. [21] Indeed, in a number of decisions involving disciplinary proceedings against solicitors, the *Twinsectra* approach has been applied as opposed to the *Royal Brunei* test. [22] Although care must be taken in reading too much into the absence of any detailed discussion of the relevant authorities, it is

also notable that the trial judge in *Clydesdale,* Pelling QC, had explicitly adopted the *Royal Brunei* approach in the original trial.[23] Both decisions in *Clydesdale,* therefore, are notable for failing to explicitly adopt the more stringent test for dishonesty that has previously been applied in the context of a solicitor.

Nonetheless, it certainly appears that the status of the defendant may have been at the forefront of the court's thinking. As explored above, this may be the real reason for concluding that the defendants could not be found to be dishonest despite the suspicious nature of the transactions. However, this is also evident from the Court of Appeal's discussion of when it is appropriate to reverse a trial judge's findings on dishonesty. Despite acknowledging that the court should not readily reverse a trial judge's conclusions on dishonesty, Lewison LJ felt that this was an appropriate case. He also refused to remit the case for retrial. Similarly, Longmore LJ noted that Lord Hoffmann's warning in *Twinsectra* against interfering with a trial judge's findings were made in a case where the Court of Appeal had found the solicitor dishonest despite the trial judge coming to a different conclusion.[24] In his view this "case is precisely the opposite way round and a finding of dishonesty in respect of a solicitor is an extremely serious matter'.[25]

The special concern that seems to arise in cases relating to solicitors has already caused much confusion and uncertainty, as seen in the aftermath of *Twinsectra.* It also raises a number of difficult questions. First, if it is appropriate to provide additional protection depending on the context, should the impact on other professions be relevant? For example, should the courts also consider whether a finding of dishonesty might have a detrimental impact on the career of a politician or a celebrity? It is hard to justify a special rule for solicitors without considering the consequences in other cases. Otherwise, the courts will give the impression that their decisions are influenced by the natural empathy that a judge may have with the plight of a fellow legal practitioner. Moreover, it would not be appropriate to conceal this special protection by adopting conflicting tests for dishonesty, as seen in *Twinsectra,* or by reasoning which seems difficult to justify, as seen in *Clydesdale.* Second, if it is open to the court to reconsider a finding of dishonesty against a solicitor, is there not an argument that it is just as important to reconsider a finding of "no dishonesty'? There is a public interest element in maintaining high standards within the legal profession. Where a solicitor has been instructed to assist in dishonest transactions, the potential liability of the solicitor provides an important role in ensuring the protection of the public and in preventing fraud.

One commentator has recently questioned the continued use of dishonesty in this context, and whether dishonesty appropriately captures the nature of the claim.[26] In the ***Tru. L.I. 191*** older case law the courts specifically avoided using the term "dishonesty', such as in *Bodenham v Hoskins* where Kindersley VC stated that "I do not think there is to be imputed to these gentlemen any design to do that which in their minds was dishonest or improper. I believe they had no such intention'. Nonetheless, the defendants in *Bodenham* were liable for not acting according to the "moral principles of a court of equity'.[27] It may be the case that the best solution is for the adoption of a separate term to replace "dishonesty', which would allow the courts to develop a more consistent basis for liability without concerning themselves with the further consequences for solicitors. Although the term "want of probity' has a similar meaning to dishonesty, it is possibly less loaded as well as being primarily used in the context of these claims and, therefore, it may be more suitable in this context. In any case, there is a pressing need for a single test for "dishonest assistance', which reflects the traditional basis of the rule as an objective standard.[28]

Concluding remarks

It is worth noting that this decision was delivered without much discussion of the previous authorities. Only two cases were cited; *Royal Brunei* in the discussion of what constitutes dishonesty, and *Twinsectra* in discussing when a trial judge's findings of dishonesty can be found. There was no discussion or acknowledgment of the controversy that has been created by these apparently conflicting authorities or the resulting uncertainty for courts and litigants. Given the dismissal of the trial judge's conclusions, and the unanimity of the court that the claim for dishonesty should fail, maybe it was felt that this was not an appropriate case to enter into those debates. Whatever one's view of the reasoning applied in the Court of Appeal, this decision demonstrates that two important questions remain to be resolved. First, what is the proper formulation of the test for dishonesty? Secondly, is it appropriate to change the test in cases where a conclusion would be regarded as a "serious matter' on the basis that a finding of dishonesty could have further implications in certain professions? In this author's view, the answer to the first question should be that this is an objective standard, reflecting the test in *Royal Brunei* and the long history of the action for dishonest assistance.[29] The answer to the second question is that, when dealing with questions concerning dishonest assistance, the courts should not try to alter the rules in light of potential disciplinary proceedings against solicitors. Despite the lack of a detailed discussion of these questions, one cannot expect this decision to be the last word on these issues.

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Footnotes

1 [2016] EWCA Civ 73.
2 [1995] 2 AC 378 (PC).
3 [2002] UKHL 12, [2002] 2 AC 164 (HL).
4 *Clydesdale Bank Plc v Workman* [2016] EWCA Civ 73, at [3]. Under s 27 of the Land Registration Act 2002 this charge was a disposition that could not take legal effect until it was registered.
5 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC), 389.
6 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164.
7 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC), 389 (Lord Nicholls).
8 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [36] (Lord Hutton). Also, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [1480] (Lewison J).
9 *Barlow Clowes v Vaughan* [2005] UKPC 37, [2006] 1 WLR 1476, [15]-[18].
10 Such problems should be avoided in the future; *Willers v Joyce* [2016] UKSC 44, [19]-[21] (Lord Neuberger).
11 [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827. See D Nolan, and J Davies, "Torts and Equitable Wrongs', in A Burrows (ed), *English Private Law,* 3rd Ed (Oxford University Press, 2013), 17.366; R Stevens, *Torts and Rights* (Oxford University Press, 2007), p 282; G Virgo, *The Principles of the Law of Restitution* (3rd Ed (Oxford University Press, 2015), pp 523-524.
12 Eg *Aerostar Maintenance v Wilson* [2010] EWHC 2032 (Ch), [184] (Morgan J) and *Electrosteel Castings (UK) Ltd v Metalpol Ltd* [2014] EWHC 2017 (Ch), [37]-[43] (Behrens J).
13 *Ibid,* [59a] (Arden LJ).
14 *Ibid,* [93]-[94] (Pill LJ) and [23] (Rix LJ).
15 *Ibid,* [94] (Pill LJ) and [16] (Rix LJ).
16 G Virgo, "Assisting the Victims of Fraud: The Significance of Dishonesty and Bad Faith' (2007) 66 CLJ 22.
17 [2007] EWCA Civ 684.
18 It may be argued that an interest under proprietary estoppel does not crystallise until it is recognised by a court, but nonetheless the claimants did have an interest which could have been taken priority in these circumstances.
19 See H Smith, "Why Fiduciary Law is Equitable' in A Gold and P B Miller (Eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014).
20 *Royal Brunei,* 391.
21 *Twinsectra,* [35] (Lord Hutton) and [134] (Lord Millett).
22 *Bultitude v The Law Society* [2004] EWCA Civ 1853, [32] (Kennedy LJ); *Bryant v The Law Society* [2007] EWHC 3043, [2009] 1 WLR 163, [148]-[149] and [153] (Richards LJ); *Rukhsana Jabeen Kiani v Solicitors' Regulation Authority* [2015] EWHC 1981 (Admin), [40] (Laing J).
23 [2013] EWHC B37 (Ch), [5], [90] and [95].
24 *Clydesdale,* [58], referring to *Twinsectra* [43].
25 *Ibid,* [58].
26 P S Davies, *Accessory Liability* (Oxford University Press, 2015), pp 116-122.
27 *Bodenham v Hoskins* [1843-60] All ER Rep 692, 697 (Kindersley VC), 697.
28 *Bodenham, ibid.*
29 *Bodenham, ibid.*