Dishonest strangers

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Conveyancer and Property Lawyer

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Conv. 195 In this Editorial, I take my academic life in my hands as I cross a boundary and trespass upon the lands of my neighbours. It is not that I do not enjoy a meaty trust dispute, nor that I am shy about what seems to my students to be an old-fashioned and nostalgic approach to liabilities consequent upon a breach of trust. [1] It is, rather, that I know the issues I am about to touch on arouse strong feelings in my friends and colleagues whereas I just want to know the answer. I am (usually) reluctant to comment on the vexed issue of the test for stranger liability consequent upon a breach of trust or fiduciary duty because I have so little skin in the game. But, and this is the main reason that prompted me to write, sometimes a case comes along where the court is so palpably fed up with the back and forth of academic and judicial debate, that it is moved to say, in essence, "enough is enough"! This seems to me to be the unambiguous message of *Group Seven Ltd v Notable Services LLP* , [2] a punchy Court of Appeal decision on how dishonesty is to be established in cases of "knowing" or "dishonest" assistance. [3]

Group Seven was an appeal in a number of related actions from the judgment of Morgan J. [4] He had held, inter alia, that a Mr Landman was not liable for dishonestly assisting in a breach of trust, but that he was liable for unconscionable receipt of other, less extensive, funds (£170,000). There was no appeal against the finding of unconscionable receipt, but the claimants pursued the knowing assistance claim in the amount of €12 million, [5] hoping to prove Mr Landman's liability and thus open a route via vicarious liability to Notable LLP, a firm of solicitors in London and his employer. The fraud itself was complex, and the details are immaterial for present purposes. The important point is, instead, that the Court of Appeal took the opportunity to be clear, direct and pointed about the scope of liability for dishonest assistance consequent on a breach of trust or breach of fiduciary duty. As the court concluded, its analysis is: ***Conv. 196***

"firmly founded on the legal principles which we have derived from *Tan* , *Barlow Clowes* and *Ivey* . Those principles can now be stated in a few sentences, and in future cases they should not need detailed exposition." [6]

Indeed, no doubt to add weight to its analysis, when Henderson LJ delivered the judgment he was explicit in a way that is rare in the Court of Appeal that this "is the judgment of the court to which each of its members has contributed". [7] Likewise, it is perhaps a measure of the strength of feeling about this that the court, before overturning Morgan J on the question of dishonest assistance, reminded itself in a section of the judgment called "Appellate restraint" [8] that an appellate body should not lightly overturn a trial judge where much of his or her decision rested on the determination of, or deductions from, primary issues of fact. However, even within those confines, needs must when the Devil's driving.

The Court of Appeal took it as unarguable that four things had to be established in order to make a person liable in dishonest assistance consequent on a breach of trust. [9] First, that there was a trust in existence at the relevant time; secondly, that the trustee committed a breach of that trust; thirdly, that the defendant assisted the trustee to commit that breach of trust; and fourth, that the defendant's assistance was dishonest. And, so that no hairs could be split later:

"the same principles apply, mutatis mutandis, to a claim for dishonest assistance of a breach of the fiduciary duties which are owed to a company by its director in relation to dealings with the company's assets." [10]

In this case, the first three conditions were met and there was no appeal from Morgan J's findings in this regard. Thus, everything turned on whether the defendant's assistance was dishonest. [11] Further, and again as if to slay any lingering dragons, academic or judicial, the court emphasised that liability was not strict, nor was it based in negligence, but was triggered by the defendant's personal "lack of probity". [12] But, what did "dishonesty" mean?

In his judgment, Morgan J had gone through the relevant authorities, relying principally (and correctly as the Court of Appeal acknowledged) on *Royal Brunei Airlines Sdn Bhd v Tan* [13] and *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* , [14] although he did not have the benefit of the Supreme Court's decision in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [15] which was handed down less than three weeks after his decision in *Group Seven* . ***Conv. 197***
Unsurprisingly, (at least to me), Morgan J followed *Tan* and *Clowes* [16] recognising that the test of dishonesty was not part-subjective, part-objective, even if this is what the majority had meant in *Twinsectra Ltd v Yardley* . [17] It was an objective test, albeit one that was located in the particular conduct of the defendant. On that basis, however, he held that Mr Landman was not dishonest because he neither knew nor had turned a blind eye to the fact that the monies had been transferred to Notable LLP in breach of trust and it was this key finding that was now challenged.

上訴法院當然受益於Ivey，最高法院將不誠實的主觀-客觀Ghosh測試18委託給歷史粉碎機，並因此承認其確認的客觀測試將超越刑法

The Court of Appeal of course had the benefit of *Ivey* where the Supreme consigned the subjective-objective *Ghosh* test [18] of dishonesty to the shredder of history and in so doing recognised that the objective test it confirmed would operate beyond the criminal law. [19] Consequently, the Court of Appeal took the view that the door was shut to any further discussion and they wanted everyone to listen and understand:

"In the light of *Ivey* , it must in our view now be treated as settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in *Tan* , and that there is no room in the application of that test for the now discredited subjective second limb of the *Ghosh* test." [20]

Thus, it is irrelevant whether the defendant appreciated that his or her conduct would be regarded as dishonest by an ordinary, reasonable person. Nor does it matter if the defendant truthfully and sincerely believe that there was nothing wrong in his or her conduct. They may still be "dishonest", even if genuinely amazed that anyone else should think so. A defendant cannot escape liability by relying on their own moral code. However—and this is the tricky part—this does not mean that the defendant's "subjective knowledge and state of mind are unimportant". [21] This is because what the defendant knew, believed or understood are an important part of the factual background: "the defendant's actual state of knowledge and belief as to relevant facts forms a crucial part of the first stage of the test of dishonesty set out in *Tan* ". [22]

Or, to put it another way, first a court must establish as primary facts what the defendant knew or did not know in relation to the particular breach of trust or fiduciary duty that has taken place. This is nothing more than a piece of the factual background and

we should not be surprised at this. It does not make the test of dishonesty even faintly subjective: we are simply asking what it is that the defendant knew or understood, in the same way that we are asking did a breach of trust occur **Conv. 198* and did the defendant factually assist in it. [23] Secondly, in the light of this factual background, which includes what this defendant knew or understood, would an ordinary person say that the defendant was dishonest, irrespective of whether the defendant knew or thought or suspected they were.

As it turned out then, the actual thorny issue in *Group Seven* was the nature of the inferences to be drawn from the primary facts found by Morgan J. This is why the Court of Appeal were pre-occupied with exercising "appellate restraint". There was no argument over the law, for this is what we should now regard as "essentially a jury question, namely whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people". [24] Morgan J had concluded that, on the facts as proven, the defendant had not turned a blind-eye to the fraud and that, in consequence, he was not objectively dishonest. He was not objectively dishonest because, given the primary facts which included what he knew, no ordinary person would say he was dishonest. The Court of Appeal, however, drew a different inference and said that, on the facts as proven, the defendant clearly understood all that was happening. Consequently, given these primary findings of fact, and inferences therefrom, an ordinary decent person would have said he was dishonest. The appeal was allowed.

Of course, it is too much to hope for that this really is the last word on this, but the Court of Appeal are trying mightily hard to say that the only grounds for appeal in the future should be where there are serious doubts as to a trial judge's findings and inferences of fact. Given that these cases nearly always involve complex transactions that taken individually appear innocuous but which together form a pattern of fraud, it will not be difficult to find something to argue about. But, at least, this should not be about what the actual test of dishonesty is.

Martin Dixon

Footnotes

1 For example, I confess that I struggle with the idea that a thief can be a constructive trustee *merely* because of their unconscionable taking of another's property, and I do not understand the difference between a "real" constructive trustee and that which appears to exist in unconscionable receipt cases following *Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] A.C. 1189* . And, while I am at it, is it really the case that some constructive trustees have no fiduciary duties at all? However, I am not losing sleep over the answers.

2 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614; [2019] Lloyd's Rep. F.C. 319* .

3 I use the alternative terminology here, so that most readers will relate to the issue under discussion, but I am mindful of Lord Nicholls injunction in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378; [1995] 3 W.L.R. 64* that "Knowingly" is better avoided as a defining ingredient of the principle, and in the context of this principle, the *Baden v Societe Generale pour Favoriser le Developpment du Commerce et de L'Industrie en France SA [1993] 1 W.L.R. 509; [1992] 4 All E.R. 16* 1 scale of knowledge is best forgotten", *Tan* judgment at 392F.

4 *Group Seven Ltd v Nasir [2017] EWHC 2466 (Ch); [2018] P.N.L.R. 6* .

5 The fraud netted €100 million but €88 million had been recovered by the victims prior to this litigation.

6 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [92].

7 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [1]. The co-authors were Peter Jackson LJ and Asplin LJ.

8 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [21]–[24].

9 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [28].

10 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [28].

11 Note here, that the issue is not simply whether the defendant was dishonest, but whether his or her *assistance* was dishonest.

12 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [34], quoting from Lord Nichols in *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* . As I see it, the reason for this high hurdle (with which

I agree) is that the defendant has never had the asset for their own benefit (else in would be a receipt case) and must compensate the victim from their own pocket. This combination of personal liability in respect of a transaction where no material benefit may have accrued justifies the imposition of liability only when the high bar of dishonesty is surmounted.

13 *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378* .

14 *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd [2005] UKPC 37; [2006] 1 W.L.R. 1476* .

15 *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67; [2018] A.C. 391* .

16 And relying on *Starglade Properties Ltd v Nash [2010] EWCA Civ 1314; [2011] 1 Lloyd's Rep F.C. 102* as establishing the precedential value of these Privy Council cases.

17 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* . The court here observed, generously, that "[w]ith the benefit of hindsight, it can be seen that this case temporarily clouded, although it did not ultimately obscure, the picture painted so clearly by Lord Nicholls in *Tan* ", *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [38].

18 *R. v Ghosh [1982] Q.B. 1053; [1982] 3 W.L.R. 110* .

19 Hughes S.J.C. recognised explicitly that the meaning of dishonesty was particularly critical in civil proceedings for dishonest assistance, see *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67* at [62].

20 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [57].

21 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [57].

22 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [57].

23 "The state of a person's mind is in principle a pure question of fact, and suspicions of all types and degrees of probability may form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied", *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [60].

24 *Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614* at [57].

