Royal Brunei dishonesty: clarity at last?

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Conv. 188 "I shall speak of "Royal Brunei dishonesty', an appellation which I hope that the airline will tolerate with the stoical indifference which the citizens of Wednesbury bear the attribution to them of that particular degree of unreasonableness." [1]

Introduction

In the course of delivering the advice of the Privy Council some 10 years ago in *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming,* [2] Lord Nicholls of Birkenhead famously identified dishonesty, rather than knowledge, as the appropriate touchstone in determining the question of whether liability ought to be imposed upon a stranger who has assisted in a breach of trust or fiduciary duty. Lord Nicholls in the course of his "magisterial opinion" [3] considered that the requirement of dishonesty was preferable to that of knowledge because the latter inevitably gave rise to difficulties of degree and had led the courts into "tortuous convolutions" [4] in their efforts to ascertain the precise nature of the knowledge possessed by defendants, "when the truth is that "knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind". [5] Under *Royal Brunei,* a dishonest state of mind was said to comprise either knowledge that the transaction is one in which a person cannot honestly participate (for example, a misappropriation of other people'smoney), or suspicion combined with a conscious decision not to make inquiries which might result in knowledge. Crucially, under *Royal Brunei,* although a dishonest state of mind is a subjective mental state, the standard ***Conv. 189*** by which the law determines whether it is dishonest is objective. As Lord Nicholls explained in *Royal Brunei* [6]:

"Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard."

Under *Royal Brunei,* then, the meaning of dishonesty appeared tolerably clear. Although it contained a limited element of subjectivity--with regards to the impugned conduct, the individual defendant must have engaged in a course of "advertent conduct", [7] to be assessed in light of the defendant's actual awareness at the relevant time--the test for assessing dishonesty did not require that the defendant himself or herself should have appreciated that the conduct was dishonest: if by ordinary standards a defendant's mental state would be characterised as dishonest, it was irrelevant that the defendant adhered to a different moral code or did not appreciate that his or her actions transgressed those ordinary standards of honesty.

The majority position in *Twinsectra*

With the shift away from a requirement of knowledge to one of dishonesty in *Royal Brunei,* it appeared that the "tortuous convolutions" which had hitherto characterised the knowing assistance jurisprudence had at last been settled. But in the aftermath of *Royal Brunei,* confusion arose as to the precise relationship between the subjective and objective elements of Lord Nicholls's formulation, and *Royal Brunei* was, somewhat surprisingly, construed in some quarters as imposing a requirement that the defendant should have appreciated that his or her conduct was dishonest by ordinary standards. [8] As is well known, less than seven years after *Royal Brunei,* the majority of the Appellate Committee of the House of Lords ***Conv. 190*** in *Twinsectra Ltd v Yardley* [9] appeared to adopt just such a surprising construction of the dishonesty standard contemplated by Lord Nicholls in *Royal Brunei.* In the course of his opinion in *Twinsectra,* with which the majority agreed, Lord Hutton--or so it appeared--took the view that liability for dishonest assistance under *Royal Brunei* would be incurred only by those who were self-consciously dishonest. According to Lord Hutton, the test for dishonest assistance under *Royal Brunei* apparently consisted of two distinct questions which together made up a combined objective/subjective test for assessing dishonesty. The first comprised a purely objective assessment: would an honest person have done what the defendant did? The second, however, appeared clearly to import an element of subjectivity: if the answer to the first question was in the negative, did the defendant appreciate this when opting to proceed with the course of conduct in question? The key passage in Lord Hutton's opinion in *Twinsectra* [10] bears repetition:

客觀評估：一個誠實的人會做被告所做的事嗎？ 然而，第二個似乎顯然引入了
主觀性元素：如果第一個問題的答案是否定的，那麼被告在選擇繼續相關行為時是否理解了這一點？

"There is, in my opinion, a further consideration which supports the view that 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. A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been "dishonest' in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest. … I consider that the courts should continue to apply that test and that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he

should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

Lord Hoffmann, agreeing with Lord Hutton, added in the course of his own brief opinion in *Twinsectra* that a dishonest state of mind meant "consciousness that one is transgressing ordinary standards of honest behaviour". [11] It will be recalled that Lord Millett in *Twinsectra* issued a forceful dissenting opinion in ***Conv. 191*** which his Lordship argued, inter alia, that "[t]here is no trace in Lord Nicholls' opinion that the defendant should have been aware that he was acting contrary to objective standards of dishonesty", [12] and further pointed out that the effect of the majority approach in Twinsectra--requiring not only dishonest conduct but also a dishonest state of mind--was to bring the *Royal Brunei* test very close to the criminal law test for dishonesty laid down in *R v Ghosh,* [13] notwithstanding that Lord Nicholls in *Royal Brunei* had expressly rejected the application of that test in the civil context. [14] With respect, Lord Millett's interpretation arguably reflected more accurately the approach of Lord Nicholls in *Royal Brunei,* who had indeed expressly rejected any requirement of consciousness on the part of the defendant that his conduct would be considered dishonest by ordinary persons. [15]

It thus appeared in the wake of the majority ruling in *Twinsectra* that, while the House of Lords had endorsed the approach towards assessing dishonesty laid down in *Royal Brunei,* the majority had fallen into the "misconception" [16] of construing the opinion of Lord Nicholls in the earlier case as having posited a combined objective/subjective test for dishonesty in cases of dishonest assistance. Misconception or otherwise, the better view appeared to be that *Twinsectra* had indeed effected a significant change for the future application of the *Royal Brunei* test for dishonesty. Thus Tjio and Yeo could comment in the aftermath of *Twinsectra* that the majority holding in that case:

"requires all previous decisions applying the *Royal Brunei* test of dishonesty to be scrutinised with great care; they cease to have precedential value unless they can be said to have actually applied the combined test". [17]

Another commentator could predict with apparent confidence post-*Twinsectra* that "it would appear that the test for dishonest assistance in a breach of trust has now been firmly established". [18] Now, three-and-a-half years on from the judgment of the House of ***Conv. 192*** Lords in *Twinsectra,* the Privy Council has delivered something of a volte face via a judgment that disavows the existence of any divergence between its earlier advice in *Royal Brunei* and the later approach of the House of Lords in *Twinsectra.* In an important opinion delivered in October 2005 in the case of *Barlow Clowes International Ltd (in liquidation v Eurotrust International Ltd,* [19] the Privy Council has now advised that the above interpretation of *Twinsectra* is apt to mislead; that the majority in *Twinsectra* did not seek to nuance or alter in any way the test laid down by the Privy Council in *Royal Brunei*; and that the test to be applied to a defendant's mental state in an action for dishonest assistance is objective; so that, in the words of one commentator, [20] after *Barlow Clowes,* "*Royal Brunei* is all you need to know".

The approach in *Barlow Clowes*

The background to *Barlow Clowes,* insofar as is material, was that in the mid-1980s C, through a Gibraltar company (BCI Ltd), operated a fraudulent investment scheme purporting to offer high returns on the investment of funds in UK gilt-edged securities. Some of the investors' funds were paid during 1987 through bank accounts maintained by companies administered from the Isle of Man by the first defendant, Eurotrust Securities (Eurotrust), a company providing off-shore financial services. The second and third defendants were the principal directors of Eurotrust. In proceedings in the Common Law Division of the High Court of the Isle of Man, BCI Ltd claimed that the second and third defendants and, through them, Eurotrust, had dishonestly assisted C and one of his principal associates in misappropriating the investors' funds. In the High Court of the Isle of Man, the acting deemster, Hazel Williamson QC, held, [21] inter alia, that the second defendant, Mr Henwood, was liable for dishonestly assisting in the misappropriation of sums paid away in 1987. She found that during and after June 1987 the second defendant strongly suspected that the funds passing through his hands were moneys which BCI Ltd had received from members of the public who believed that theywere subscribing to an investment scheme in gilt-edged securities. In light of those suspicions, no honest ***Conv. 193*** person could have assisted C and his associate to dispose of the funds for their personal use. The deemster found that the second defendant's conscious decision not to make inquiries amounted to a calculated strategy on his part to avoid running the risk of discovering the truth. Such a state of mind is dishonest; yet the deemster found that Mr Henwood may well have lived by different standards and seen nothing wrong in what he was doing. He had an:

"exaggerated notion of dutiful service to clients, which produced the warped moral approach that it was not improper to treat carrying out the clients' instructions as being all-important. Mr Henwood may well have thought this to be an honest attitude, but, if so, he was wrong, and was dishonest by the standards of ordinary decent people." [22]

The deemster further found the first and third defendants liable for dishonest assistance. All three defendants appealed to the Staff of Government Division of the High Court. The first and third defendants' appeals were dismissed, but Mr Henwood's appeal was allowed on the ground that it was not supported by the evidence.

On appeal on this point by BCI Ltd to the Privy Council, counsel for Mr Henwood argued that his state of mind as found by the deemster was not dishonest unless Mr Henwood was aware that it would by ordinary standards be regarded as dishonest. Only in such a case could he be said to be *consciously* dishonest. But it was clear that the deemster hadmade no finding aboutMr Henwood's opinions about normal standards of honesty: the only finding was that by normal standards he had been dishonest but that his own standard was different. In support of the proposition that this finding did not satisfy the *Royal Brunei* test for dishonesty, counsel relied upon the passages in the opinions of Lords Hutton and Hoffmann in *Twinsectra* which have been set out above. A unanimous Judicial Committe--which, significantly, included Lords Nicholls and Hoffmann--rejected counsel's argument on this point and upheld the findings of the deemster with regard to Mr Henwood. The Judicial Committee sought to clarify the effect of the majority's approach in *Twinsectra* and Lord Hoffmann, who delivered the advice of the Board, had this to say about the passage set out above from the opinion of Lord Hutton in *Twinsectra*:

Conv. 194 "Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to "what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were." [23]

With regard to his own opinion in *Twinsectra* including the statement that a dishonest state of mind meant "consciousness that one is transgressing ordinary standards of honest behaviour", [24] Lord Hoffmann in *Barlow Clowes* explained that this was merely intended to require:

"consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also to require him to have thought about what those standards were." [25]

With respect, the suggestion that the above passages in *Twinsectra* were apt to create "an element of ambiguity" seems rather an understatement; nor does this passage of their Lordships' judgment in *Barlow Clowes* offer a particularly obvious interpretation of the phrase just quoted from Lord Hoffmann's opinion in *Twinsectra.* The requirement of "consciousness that one is transgressing ordinary standards of honest behaviour" [26] which was expressly identified by Lord Hoffmann in *Twinsectra,* given its most natural construction, appeared plainly to require evidence of consciousness on the part of the defendant that his conduct fell short of honest behaviour, as opposed to mere awareness on his part of the constituent elements of his conduct. The same point applies a fortiori to the more detailed treatment afforded by Lord Hutton in *Twinsectra* to the mindset of the defendant in dishonest assistance cases. If, as the Privy Council in *Barlow Clowes* suggests, certain academics were led into error in their interpretation of these passages in *Twinsectra,* their error ***Conv. 195*** was a most understandable one. [27] While the Privy Council has now restored what appears to be the better interpretation of the *Royal Brunei* test--that there is no requirement for the purposes of establishing dishonesty that the defendant himself or herself was aware that his or her conduct was dishonest--its reading of the majority opinions in *Twinsectra* in such a manner as to disavow any disparity between the approach taken therein and the earlier approach of Lord Nicholls, is surprising. Equally puzzling is the absence in *Barlow Clowes* of any reference to the dissenting opinion of Lord Millett in *Twinsectra,* itself having provided further support for the proposition that the majority opinions did indeed interpret *Royal Brunei* as importing a subjective element into assessing a defendant's state of mind for the purposes of the dishonesty test. [28] Be that as it may, the seemingly obvious anomaly between *Royal Brunei* and *Twinsectra* has now been laid to rest, since the Judicial Committee in *Barlow Clowes* has stoutly concluded that the principles adopted by the majority in *Twinsectra* are "no different from the principles stated in *Royal Brunei*". [29]

Conclusion

In the course of his opinion in *Royal Brunei* Lord Nicholls observed that "[i]n most situations there is little difficulty in identifying how an honest person would behave".[30] A consideration of *Twinsectra* and *Barlow Clowes* provides a salutary reminder that the simplicity of this proposition belies the formidable difficulties confronting judges who must apply the *Royal Brunei* test. In spite (or because) of these difficulties, the interpretation offered by the Judicial Committee in *Barlow Clowes* of the approach of themajority in *Twinsectra*-- while it by no means constitutes an obvious reading of the opinions in that case-- is to be welcomed for at least three reasons. First, the Privy ***Conv. 196*** Council has now brought closure to the ambiguity engendered by *Twinsectra* as to the true test posited by Lord Nicholls in *Royal Brunei.* Secondly, as suggested above, the *Barlow Clowes* interpretation of *Royal Brunei* appears to comprise a more accurate reading of *Royal Brunei* than had been provided by the majority in *Twinsectra.* Furthermore, the judgment will be welcomed by those who regarded the apparently pro-defendant approach evinced in the majority opinions in *Twinsectra* as going "too far"[31] in the context of secondary civil liability.

To summarise, the effect of the advice of the Privy Council in *Barlow Clowes* is to confirm that liability under *Royal Brunei* requires a dishonest state of mind on the part of the assistant in a breach of trust. Such a state of mind might consist of knowledge that the transaction was one in which the assistant could not honestly participate or it might consist of suspicion combined with a conscious decision not to make inquiries which might result in knowledge. Crucially, the ruling confirms that, although a dishonest state ofmind is a subjectivemental state, the standard by which the law determines whether a state of mind is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant adhered to different standards or that he was unaware that his conduct would be objectively regarded as dishonest.

One further point should be noted about the advice of the Privy Council in *Barlow Clowes.* The Judicial Committee has taken the opportunity to confirm that in order for liability for dishonest assistance to be imposed, it is not necessary that the defendant be shown to have been aware at the material time of the existence of the trust or that its breach was taking place. Rather, it is "sufficient that he should have entertained a clear suspicion that this was the case".[32] As Lord Hoffmann explained, a person can know, and can certainly suspect, for example, that he is assisting in a misappropriation of money without knowing that the money is held on trust "or even what a trust means".[33] This is, under *Royal Brunei,* entirely orthodox,[34] and scarcely needed restating[35]; yet as developments in the decade that has elapsed between *Royal Brunei* and *Barlow Clowes* remind us, it is wise ***Conv. 197*** in the sphere of dishonest assistance to proceed with the utmost caution when attempting to identify those constituents of this sphere of liability which are conclusively fixed or immutable.

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Footnotes

1 *Per* Lindsay J. in *HR v JAPT* [1997] C.L.Y. 692; CH 1995 H No.6588, March 19, 1997, Ch D.
2 [1995] 2 A.C. 378.
3 *Per* Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164 at 195.
4 At 391.
5 At 390.
6 At 389.
7 ibid.
8 This was evidenced, for example, in the approach of Steel J. in *National plc v Solicitors Investment Fund Ltd* [1997] P.N.L.R. 306 at 310.
9 [2002] 2 A.C. 164.

10 At 174.
11 At 170.
12 At 197.
13 [1982] Q.B. 1053.
14 At 389.
15 That this was the position taken by Lord Nicholls in *Royal Brunei* appears to be put beyond doubt by his Lordship's observation that "if a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour" (at 389).
16 R. Thornton (2002) 61 C.L.J. 224 at p.224.
17 H. Tjio and T. M. Yeo (2002) 118 L.Q.R. 502 at p.507.
18 J. Ross (2002) 152 N.L.J. 883 at p.884.
19 [2005] UKPC 37; [2005] W.T.L.R. 1453.
20 C. Mitchell, "Dishonest Assistance in a Breach of Trust", Comment posted October 11, 2005, Obligations Discussion Group website (*http://www.ucc.ie/law/odg/messages*).
21 [2004] W.T.L.R. 1365.
22 [2004] W.T.L.R. 1365 at 1401.
23 *Barlow Clowes* at [15].
24 At 170.
25 At [16].
26 *Twinsectra* at 170.
27 Nor does it appear that this "mistaken" interpretation of *Twinsectra* was confined to academic circles: see fn.8 above, and the judgment of the Court of Appeal in *Harrison v Teton Valley Trading Company* [2004] EWCA Civ 1028; [2004] 1 W.L.R. 2577, particularly the opinion of Pill L.J. at [45].
28 Speaking of the interpretation of *Royal Brunei* offered by Lord Millett in his dissenting opinion in *Twinsectra,* Lord Hoffmann, for example, had remarked in that case that he did not think it "fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*" (*Twinsectra* at 170).
29 *Barlow Clowes* at [18].
30 At 389.
31 S. B. Elliott and C. Mitchell, "Remedies for Dishonest Assistance"(2004) 67 M.L.R. 16 at fn.12; M. P. Thompson [2002] Conv. 387.
32 At [28].
33 *Ibid.*
34 Though the Judicial Committee in *Barlow Clowes* points out that in *Brinks Ltd v Abu-Saleh* [1996] C.L.C. 133, 151 a contrary approach had been taken.
35 *Twinsectra,* 171 (per Lord Hoffmann) and 202 (per Lord Millett).

