

## Wilful Blindness

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#### A. Introduction – a commonplace concept about which people can often disagree

1. The purpose of this paper is to introduce a discussion of the concept of "wilful blindness".
2. Wilful blindness is a legal concept used as a means of drawing an inference about what a person knew, most often where there is some doubt about that person's honesty.
3. The concept of wilful blindness is used as a concept both in criminal and civil law. In relation to the criminal law (where is used to be called "connivance"<sup>1</sup>), it has been observed that it is an "unstable" rule<sup>2</sup>, which however is commonly, employed, particularly where an accessory has to be found to have the same mens rea as the principal offender<sup>3</sup>. The concept is also put to use in relation to statutory conspiracies and, of course, anti money laundering legislation.
4. In the civil law wilful blindness has a place in, amongst other things,

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<sup>1</sup> "The word "conniving" is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect, is likely to occur." See Lord Westbury in *Gipps v Gipps and Hume* (1864) 11 HLC

<sup>2</sup> G. Williams, *Criminal Law the General Part* (1953), p.158, para.56

<sup>3</sup> Ibid at 395, paragraph 132.

the law relating to non-disclosure in insurance contracts<sup>4</sup>, the tort of misfeasance in public office<sup>5</sup> and the accessorial “wrongs” of the tort of intentionally interfering in contractual relations and of dishonest assistance in the breach of fiduciary duties. The concept may additionally come into play where a fiduciary seeks the consent of his or her principal to what otherwise would be a breach of fiduciary duty – in which case the fiduciary cannot blindly assume that the principle to whom the duty is owed has been fully informed so that the consent to the breach is real.

5. The instability of the concept observed in the criminal law also applies to the civil law: the talk to be given in conjunction with this paper will concern itself in part with the decision at first instance and on appeal of *Abou-Rahmah & Anor v Abacha & Ors* [2005] EWHC 2662, [2006] EWCA Civ 1492 [2007] 1 Lloyd's Rep 115, where different judicial views about what did and what did not constitute wilful blindness were given.
6. A striking example of this can be found in the decision of Sedley LJ in *Mainstream Properties Ltd v Young & Ors* [2005] EWCA Civ 861 who in a grudging assent remarked that:

*“I agree, for the reasons given by Lady Justice Arden, that this appeal should be dismissed.*

*I do so with misgivings. Mr De Winter's conduct was not*

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<sup>4</sup> See, for example, *Economides v Commercial Union Assurance Co Plc* [1997] EWCA Civ 1754, [1998] QB 587.

<sup>5</sup> See, for example the discussion of the concept in *Three Rivers District Council and Others v. Governor and Company of The Bank of England* [2000] UKHL 33; [2000] 3 All ER 1; [2000] 2 WLR 1220.

*exactly creditable. The enquiries he made ("inquiries" would be too strong a word) were eminently unlikely to reveal what he must have suspected was the case: that Messrs Young and Broad were moonlighting at Mr Moriarty's expense. He secured the reassurance he required from a source which was pretty much guaranteed to provide it.*

*Another judge might have found that Mr De Winter was putting a telescope to a blind eye. But Judge Norris's measured findings are entitled to respect in this court. Given the present law on knowing inducement of breach of contract, I accept that they exonerate Mr De Winter from liability. It would not take a major shift in the boundaries at present delineated by authority to alter this, but this court is no position to do more than has been so clearly and comprehensively done by Lady Justice Arden in assembling, explaining and applying the extant authorities."*

**B. Wilful Blindness distinguished from constructive notice**

7. The concept of wilful blindness is related to, but distinct from, the concept of constructive notice. The difference is explained by Spencer Bower's explanation of Lord Esher MR's statements in *English and Scottish Mercantile Investment Co v Brunton* 1982] 2 QB 700, CA as follows:

*"Thus Lord Esher MR at pp 707, 708 of English and Scottish Mercantile Investment Co v Brunton 1982] 2 QB 700, CA is careful to explain how readily and liberally, though he refuses to allow that "constructive notice" is the right term to be applied to the process, an inference of knowledge may be drawn from proved fraudulent abstention from inquiry. "There*

*is", he there says, "an inference of fact known to common lawyers which comes somewhat near to it. When a man has statements made to him of something which is against him, and he abstains from making further inquiry because he knows what the result would be-or, as the phrase is, he "wilfully shuts his eyes"-then judges are in the habit of telling juries that they may infer that he did know what was against him... there is no question of constructive notice, or constructive knowledge about inference; it is actual knowledge which is inferred."*<sup>6</sup>

8. Accordingly, wilful blindness must be kept distinct from rules of law that infer, without proof, knowledge by a party of a further fact from the proved actual knowledge of that party of a primary fact where knowledge of that primary fact would naturally have led to knowledge of the secondary fact. For example:

- (1) from the proved actual knowledge of the existence of a document, or of part of its contents, the law in general presumes notice of the contents; or
- (2) where a person is entering upon the transaction which necessarily involves the existence of an instrument at the back of it, such as a sublease which presumes the existence of an original or head lease, or a policy of reinsurance subject to the terms of the original policy, the person in question is produced at knowledge that all the usual, ordering a typical terms, conditions and clauses of that original superior lease or policy, but not of any unusual or extraordinary restriction, condition causal stipulation therein unless and until having been given "a fair opportunity" of inspecting instrument, he has neglected to

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<sup>6</sup> Spencer Bower, *Actionable Non-Disclosure* at paragraph 4.36, p82, footnote 1.

avail himself of it.<sup>7</sup>

9. A further distinction was drawn by Lord Sumner in *The Zamora* [1921] AC at 812 is that there must be a wilful shutting of the eyes, when he observed that:

*"There are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when discovered may be uninteresting or distasteful. To refuse to learn any more about the subject or anything at all then is a wilful but real ignorance. On the other hand, a man is said not know because he does not want to know, where the substance of the thing is borne in upon his mind with the conviction that full details or precise proofs may be dangerous because they may embarrass his denials or compromise this protests. In such a case he flatters himself that while ignorance is safe, 'tis folly to be wise, but then he is wrong for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation or disguise."*

10. A similar distinction was made by Devlin J in *Roper v Taylor Garages (Exeter)* [1951] 2 TLR 284 at 288:

*"...a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [wilful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge]."*

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<sup>7</sup> Spencer Bower, Actionable Non-Disclosure at paragraph 4.31, p76.

11. Finally it is helpful to set out the analysis of various forms of knowledge made by Peter Gibson J. in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509 and cited by Millett J. in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 293:

*"Knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J. in Baden's case [1993] 1 W.L.R. 509 as comprising: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. According to Peter Gibson J., a person in categories (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know' (category (ii)) or because he regarded it as 'none of his business' (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot*

*complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."* (emphasis added)

12. Whilst doubt was cast on the utility of the above analysis in *Royal Brunei v Tan* [1995] 2 AC 378 in the particular context of dishonesty it is submitted that the above analysis remains of use in considering particular aspects of knowledge and Millet J's analysis of the issue as a "jury question" provides at least one obvious answer as to why judges, including appellate court judges, will differ on questions of wilful blindness.

### **C. Honesty**

13. Lord Nicholls said in *Royal Brunei* that an honest person does not:

*"deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless ... Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will indicate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained..."*

14. In *Twinsectra*, Lord Slynn said that "*Prima facie, shutting one's eyes*

*to problems or implications and not following them up may well indicate dishonesty” .*

15. Lord Hoffmann noted, however, that the fact that someone perhaps took a narrow approach to a set of circumstances and might have “ shut his eyes” to wider potential issues did not necessarily make someone dishonest. The absence of further inquiry in itself did not automatically signify dishonesty--if it was deliberate then it might do, but it might simply be evidence of a slightly blinkered approach to the discharge of professional duties.
16. In *Barlow Clowes*, the Privy Council reiterated that if a person had solid grounds for suspicion, which he consciously ignored, that the transaction in which he was participating involved dealing with misappropriated funds, then the person would be regarded as dishonest for accessory liability purposes.

**D. Dishonesty and Wilful Blindness: Deceit**

17. It is convenient to set out the basic rules for the tort of deceit, which may be found in the following three statements<sup>8</sup>:
18. Lord Herschell in *Derry v. Peek*<sup>9</sup>:

*"First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2)*

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<sup>8</sup> Each of which was recently reindorsed by the Court of Appeal in *AIC Ltd v ITS Testing Services (UK) Ltd "The Kriti Palm"* [2006] EWCA Civ 1601 (28 November 2006), [2007] 1 Lloyd's Rep 555 [256]-[259].

<sup>9</sup> (1889) 14 App Cas 337 at 374.

*without belief in its truth, or (3) recklessly, careless whether it be true or false."*

19. Bowen LJ in *Angus v. Clifford*<sup>10</sup>:

*"Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind is to be drawn – evidence which consists in a great many cases of gross want of caution – with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence."*

- (a) Further to this, a statement is also made fraudulently if the defendant had ‘blind eye knowledge’ of its falsity. Blind eye knowledge is established where the defendant has a firmly grounded suspicion that specific and relevant facts do exist and, because he does not want to know the facts, he deliberately decides to avoid obtaining confirmation of facts in whose existence the defendant has good reason to believe<sup>11</sup>.

(2) Devlin J in *Armstrong v. Strain*<sup>12</sup>:

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<sup>10</sup> [1891] 2 Ch 449 at 471.

<sup>11</sup> *Manifest Shipping v Uni-Polaris Insurance* [2003] 1 AC 469 at paras 24-26 and 112-116).

<sup>12</sup> [1951] 1 TLR 856 at 871

*"A man may be said to know a fact when once he has been told it and pigeon-holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty. When Judges say, therefore, that wickedness and dishonesty must be present, they are not requiring a new ingredient for the tort of deceit so much as describing the sort of knowledge which is necessary."*

- (a) Further to this, if fraud is proved, the motive of the person guilty of it is immaterial. Nevertheless, in trying to decide whether a person made a statement fraudulently it must be relevant to consider the reason for doing it. Although the test is subjective and is not concerned with negligence, in determining whether or not the defendant did in fact know or believe the statement was false, and in determining what inference can be made from the facts as to the defendant's knowledge and belief, the defendant's means of knowledge and the grounds for the belief are weighty factors for consideration<sup>13</sup>.

20. Finally, it is necessary to say something about inequality of access to information. Bowen LJ said in *Smith v Land and House Property Corporation* that "*if the facts are not equally known to both sides, then a statement of opinion by one who knows the facts best involves very*

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<sup>13</sup> *Barings Plc v Coopers & Lybrand* [2002] 2 BCLC 410

*often a statement of a material fact, for he impliedly states that he knows facts which justifies his opinion”*<sup>14</sup>. Lord Evershed MR said in *Brown v Raphael* that “it suffices for the application of the principle if it appears that, between the two parties, one is better equipped with information or the means of information than the other”<sup>15</sup>.

**E. Accessory liability: Subjective standards in the common law – “vindicating honesty at expense of intelligence”**

21. In *OBG Limited and others v. Douglas* [2007] UKHL 21 Lord Hoffman at [39] – [41] said as follows:

*“To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, in which the plaintiff’s former employee offered the defendant information about one of the plaintiff’s secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal*

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<sup>14</sup> (1884) 28 Ch D 7 at 15.

<sup>15</sup> [1958] Ch 636

*McKinnon LJ observed tartly ([1938] 4 All ER 504, 513) that in accepting this evidence the judge had "vindicated [his] honesty...at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract."*

**F. Accessory liability: Objective Standards in Equity?**

22. In *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd & Ors*<sup>16</sup> the Privy Council, in an advice given by Lord Hoffman, resolved an "element of ambiguity" in the law concerning liability for dishonest assistance in breach of fiduciary duty. The decision is also an important example of liability being established against a professional who deliberately ignored the suspicious aspects of the transactions in which he was assisting.
23. *Barlow Clowes* concerned an appeal by an employee of a company which provided offshore financial services in the Isle of Man. The company and its employees had facilitated certain suspect banking transactions on behalf of a client. The appeal principally involved one of the employees, Mr Henwood, who had "strongly suspected" that the funds being banked on behalf of his client arose from fiduciary breaches. Mr Henwood consciously decided not to make inquiries about the transactions because he preferred in his own interest not to run the risk of discovering the truth. Additionally it was found that Mr Henwood had an

*"exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to*

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<sup>16</sup> (Isle of Man) [2005] UKPC 37, [2006] 1 WLR 1476

*treat carrying out clients' instructions as being all important. Mr Henwood may well have thought this to be an honest attitude, but, if so, he was wrong."*

24. Mr Henwood was found liable at first instance. But he was successful on appeal because it was thought the necessary facts to ground an inference of dishonesty were absent. In essence it was thought that before an inference of dishonesty could be drawn Mr Henwood needed to know essentially all the details of the scheme in which he was assisting before he could have had grounds to suspect it was dishonest.
25. On this point, the Privy Council described the intermediate appellate court's reasoning as a "travesty of the judge's findings".
26. This led Mr Henwood to rely the following passage in Lord Hutton's reasons in *Twinsectra Ltd v Yardley*<sup>17</sup>:

*"35. 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.*

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<sup>17</sup> [\[2002\] 2 AC 164](#), 174

*"36. ... 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."* (underlining mine)

27. There is an obvious conflict between what is said at paragraph [35] and what is said at paragraph [36]. This conflict had led some commentators to claim that *Twinsectra* had departed from the law as previously understood. In short, it had been claimed that what is said in paragraph [35] gave rise to a “moral idiot” defence, in that it invites inquiry not merely into the participant’s mental state about the nature of the transaction in which he or she was participating but also into his or her views about generally acceptable standards of honesty.
28. Lord Hoffman succinctly buried this argument. He conceded that Lord Hutton’s reasoning in *Twinsectra* was ambiguous. However he explained that the reference to “what he knows would offend normally accepted standards of honest conduct” in the passage quoted above meant only that the 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 the participant should have had reflections about what those normally acceptable standards were.
29. Lord Hoffman also took the opportunity to clarify a passage of his own in *Twinsectra*. He had there said that a dishonest state of mind meant “consciousness that one is transgressing ordinary standards of honest behavior”. He further explained this as being “intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behavior”

(emphasis added). It did not, he said, also require the participant to have thought about what those standards were.

30. This decision is to be welcomed on three fronts. *First*, it resolves ambiguity in *Twinsectra* which added an unwelcome element of uncertainty in the pursuit of participants in fiduciary breaches. *Secondly* it provides a cautionary example of a civil court (on this occasion the intermediate appellate court) being overly wary of drawing inferences of dishonesty. Lord Hoffman helpfully pointed out that since there is no window into another's mind, the only way to form a view on these matters is to draw inferences from what the participant knew, said and did, both then and later, including what was said in evidence. *Thirdly*, it is a useful example of liability being founded upon the willful blindness of a professional to investigate clearly suspicious transactions.
31. The precise status of *Twinsectra* remains uncertain in England given that its "clarification" occurred in the Privy Council.<sup>18</sup> However the current law appears to be helpfully summarised by Sir Anthony Clarke MR in an article entitled *Claims against Professionals: Negligence, Dishonesty and Fraud* [2006] 22 Professional Negligence 70-85, adopted by Peter Smith J in the last mentioned case at para.357.

*"The test is an objective one, but an objective one which takes account of the individual in question's characteristics, experience, knowledge etc. ....It is a test which requires a court to assess an individual's conduct according to an objective standard of dishonesty. In doing so, a court has to*

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<sup>18</sup> See *Abouh-Rahmah v Abacha* [2006] EWCA Cav 1492, where the Court of Appeal favoured an acceptance of the "clarification". See also Evans-Lombe J's review of the authorities in *Statek Corp v Alford* [2008] EWHC 32 (Ch).

*take account of what the individual knew, his experience, intelligence and reasons for acting as he did. Whether the individual was aware that his conduct fell below the objective standard is not part of the test. "*