

DISHONEST ASSISTANCE

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Articles

Sir Anthony Clarke MR — “*Claims against professionals: negligence, dishonesty and fraud*” (2006) 22 Professional Negligence 70-85

T.M. Yeo — “*Dishonest Assistance: a Restatement from the Privy Council*” (2006) 122 LQR 171

Robert Walker — “*Fraud, Fault and Fiduciary Liability*” (2006) Jersey Law Review

Survey by Dr Stefan Fafinski and Dr Emily Finch: www.honestylab.com

The leading cases

Barnes v Addy (1874) LR 9 Ch App 244

“Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not property trustees, if they are found either making themselves trustees *de son tort*, or actually participate in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of Equity

may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

R v Ghosh [1982] 1 QB 1053

The criminal test of “dishonesty”. The jury must first determine whether the defendant had acted dishonestly by the standards of ordinary and honest people and, if they found that he had, they must then consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.

Belmont Finance Corporation Ltd v Williams Furniture [1979] Ch 250

Established that the inclusion of a fraudulent design was a necessary element of the liability of a person dishonestly assisting.

Baden, Delvaux v Société Générale [1993] 1 WLR 509

Five types of knowledge: “(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.”

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

“Whatever may be the position in some criminal and 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. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. 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. In most situations there is little difficulty in identifying how an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.”

Twinsectra Ltd v Yardley [2002] 2 AC 164

Lord Hoffmann: “For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.”

Lord Millett (dissenting): “The gravamen of the charge against the accessory is not that he is handling stolen property, but that he is assisting a person who has been entrusted with the control of a fund to dispose of the fund in an unauthorised manner. He should be liable if he knows of the arrangements by which that person obtained control of the money and that his authority to deal with the money was limited, and participates in a dealing with the money in a manner which he knows is unauthorised. I do not believe that the man in the street would have any doubt that such conduct was culpable.”

Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd [2006] 1 WLR 1476

“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.”

“On the facts of the *Twinsectra* case, neither the judge who acquitted Mr Leach of dishonesty nor the House undertook any inquiry into the views of the defendant solicitor,

Mr Leach, about ordinary standards of honest behaviour. He had received on behalf of his client a payment from another solicitor whom he know had given an undertaking to pay it to Mr Leach's client only for a particular use. But the other solicitor had paid the money to Mr leach without requiring any undertaking. The judge found that he was not dishonest because he honestly believed that the undertaking did not, so to speak, run with the money and that, as between him and his client, he held it for his client unconditionally. He was therefore bound to pay it upon his client's instructions without restriction on its use. The majority of the House of Lords considered that a solicitor who this view of the law, even though he knew all the facts, was not by normal standards dishonest.”

More recent cases

Fresh 'N' Clean Wales Ltd v Miah [2006] EWHC 903

Abouh-Rahmah v Abacha [2006] 1 All ER (Comm) 247, approved [2006] EWCA Civ 1492

Attorney General of Zambia v Meer Care & Desai (a firm) [2007] EWHC 952

Bryant v Law Society [2009] 1 WLR 163