Dishonest assistance

Tim Akkouh discusses the reformulation of the *Twinsectra* test in the wake of *Barlow Clowes*

THE TEST FOR DISHONEST ASSISTANCE LAID down by the House of Lords in *Twinsectra v Yardley* [2002] UKHL 12; [2002] 2 AC 164 has now been reformulated: *Barlow Clowes v Eurotrust International Ltd* [2005] UKPC 37; [2005] All ER (D) 99; (2005) 149 SJ 1279.

Facts of *Barlow Clowes*

Eurotrust arose out of the fraudulent offshore investment scheme instigated by Peter Clowes in the mid-1980s. Clowes' scheme, run through the Gibraltar company Barlow Clowes International Ltd, purported to offer high returns from the investment of investors' funds in UK gilt-edged securities. In truth, the scheme was established to fund the lavish lifestyles of Clowes and his associates. After the collapse of the scheme in 1988, Clowes was convicted and sent to prison.

The *Eurotrust* case itself concerns the dissipation of investors' funds by a company called International Trust Corporation (Isle of Man) Ltd (ITC) in around 1987. ITC first became involved with Barlow Clowes when it was approached by one of Clowes' associates in 1985, and instructed to form and administer a number of offshore companies. Payments were then routed through these offshore companies to other offshore companies. This circuitous movement of funds had no commercial purpose, although it made the origin of the funds much harder to establish. In about June 1987, ITC became more closely involved in the affairs of Barlow Clowes, with its directors having discussions with Clowes about the possibility of ITC being integrated into the Barlow Clowes group.

ITC's principal directors were Peter Henwood and Andrew Sebastian. The liquidator of Barlow Clowes claimed that ITC and Henwood and Sebastian had dishonestly assisted in Clowes' breaches of fiduciary duty by failing to make inquiries as to the probity of payments that ITC was instructed to make. The most significant payment complained of was a transfer by ITC of £6m into the bank account of one of Clowes' close associates on 7 July 1987. The liquidator's claim succeeded before Hazel Williamson QC, the Acting Deemster of the Isle of Man High Court, in respect of payments amounting to approximately £8.6m that were made with the assistance of ITC and Sebastian, and in respect of payments totalling £6.8m that were made with the assistance of Henwood.

Both Sebastian and ITC appealed unsuccessfully to the Manx Court of Appeal on the basis that the actions brought against them were barred by the effluxion of time. Henwood successfully appealed on the basis that the Acting Deemster's decision was not supported by the evidence before her. The liquidator duly appealed against this finding to the Privy Council.

The appeal was heard by Lords Nicholls, Steyn, Hoffmann, Walker and Carswell, with Lord Hoffmann delivering the sole judgment. In allowing the appeal, the Privy Council clarified the requirements for a successful dishonest assistance claim. The decision is of importance as the Privy Council's reasoning significantly departs from the approach to dishonest assistance adopted by the House of Lords in *Twinsectra* (above).

Test for dishonest assistance

For the Privy Council, a two-stage test

should be used to determine whether a defendant has dishonestly assisted a breach of trust or fiduciary duty. The first stage is to identify the defendant's state of mind. This is a question of fact, to be determined, "since there is no window into another mind", by drawing inferences from what a defendant knew, said and did in relation to a transaction both at the time the transaction took place and subsequently: see para 26. As a result of the process of identifying a defendant's state of mind, a judge may conclude, for example, that a defendant suspected that the funds that he was helping to transfer had been misappropriated and that the defendant had decided not to ask questions about the transactions in which he was assisting.

The judge should then, thought the Privy Council, assess whether the defendant's state of mind would be viewed as dishonest by ordinary people. If his state of mind would be so viewed, the defendant has committed dishonest assistance, regardless of whether he thinks that what he has done is dishonest or whether he thinks that ordinary people would regard his actions as dishonest. As Lord Hoffmann put it:

> "If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by a different standard." (para 10)

This point is reiterated in para 15, where Lord Hoffmann states that a defendant's knowledge of a transaction only has to be such "as to render his participation contrary to normally acceptable standards of honest conduct. It [does] not require that he should have had reflections about what those normally acceptable standards were".

Applying these tests, the trial judge had found that Henwood had consciously decided not to make inquiries as to the origin of the funds that he was asked to transfer because he preferred "in his own interest not to run the risk of discovering the truth" (para 11). As this state of mind was dishonest by ordinary standards, it did not matter that Henwood's own moral standards led him to the "warped" view that "it was not improper to treat carrying out clients' instructions as being all-important" (para 12).

A change in direction?

For those unfamiliar with the House of Lords' ruling in *Twinsectra*, the foregoing analysis may seem both unsurprising and straightforward. Yet the Privy Council's ruling in *Eurotrust* is fundamentally inconsistent with the House of Lords' *Twinsectra* reasoning. In *Twinsectra*, Lord Hutton analysed the decision of Lord Nicholls in *Royal Brunei Airways v Tan* [1995] 2 AC 378, and argued: "I do not think that Lord Nicholls was stating that in this sphere of equity a man can be dishonest even if he does not know that what he is doing would be regarded as dishonest by honest people." (para 32). As if this sentiment was not clear enough, Lord Hutton concluded his *Twinsectra* speech by stating: "Therefore, I consider 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…" (at para 36)

Lord Hoffmann explains the tension between the decisions in *Twinsectra* and *Eurotrust* on the basis that there is "an element of ambiguity in [Lord Hutton's] remarks which may have encouraged a belief… that *Twinsectra* had… invited inquiry… into [the defendant's] views about generally acceptable standards of honesty" (at para 15). With respect, however, there is no ambiguity in Lord Hutton's remarks in *Twinsectra* (nor in the remarks of Lord Hoffmann in *Twinsectra* at para 20). They clearly intended to impose a requirement that the defendant realise that his actions would be regarded as dishonest by ordinary people. This is why Lord Millett vigorously dissented from the reasoning of their other Lordships, arguing that the appropriate test should be an "objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person in similar circumstances… But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was" (at para 121).

Therefore, it seems that the Privy Council were somewhat brazen to insist that their decision in *Eurotrust* merely clarifies an element of ambiguity present in reasoning of the majority of the House of Lords in *Twinsectra*. It is submitted that it radically alters the *Twinsectra* doctrine.

Conclusion: a welcome change in approach

Nevertheless, the Privy Council's decision in *Eurotrust* is to be heartily welcomed. The *Twinsectra* reasoning overly restricted liability as it was always open to a defendant to successfully defend a claim made against him on the basis that he believed that his behaviour was objectively honest. As Lord Millett pointed out in *Twinsectra*, "consciousness of wrongdoing is an aspect of mens rea and an appropriate condition of criminal liability: it is not an appropriate condition of civil liability" (at para 127). Indeed, there is also a strong argument in favour of the *Eurotrust* approach on the basis that it is consistent with the approach of the civil law to economic torts: see Lord Millett's comments at paras 127-132 of his speech in *Twinsectra*.

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