Liability for dishonest assistance in a breach of fiduciary duty

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The basic principles

Any person who assists in a breach of a fiduciary duty, such as a breach of trust, will be personally liable to account to the beneficiaries of that fiduciary duty for any loss caused by that breach of duty if the defendant has acted dishonesty.[2] In commercial practice there are a number of contexts in which such liability may be significant. "Dishonest assistants", that is those who may be held liable for dishonest assistance in a breach of fiduciary duty, may include investment advisors providing advice to trustees, employees of companies who direct the activities of such companies to their clients, and solicitors advising trustees as to the management of those trusts. In the armoury of a beneficiary's heads of claim when seeking to recovery any loss stemming from a breach of trust, dishonest assistance has become a significant pillar in litigation alongside claims for breach of trust against trustees, claims to follow or to trace assets, and claims for knowing receipt of assets in breach of trust.

This article sets out the basis of a claim for dishonest assistance. Of particular interest at the time of writing is a slew of case law dealing with the meaning of the term "dishonesty" for the purposes of this claim: in particular two Privy Council,[3] two House of Lords[4] and one recent Court of Appeal decision[5] in recent times.[6] The particular question has been whether the test should be subjective or

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[2] On which see generally GW Thomas and AS Hudson, *The Law of Trusts*, Oxford University Press, chapter 30; AS Hudson, *Equity & Trusts*, 5th edition, Routledge Cavendish Publishing, 2007, chapter 20; Lord Nicholls, 'Knowing receipt: the need for a new landmark' in Cornish (ed) *Restitution: Past, Present and Future* (Oxford: Hart, 1998). *Barnes v Addy* (1874) 9 Ch App 244; *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Smith New Court v Scrimgeour Vickers* [1997] AC 254; *Corporacion Nacional del Cobre De Chile v Sogemin Metals* [1997] 1 WLR 1396; *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171; *Wolfgang Herbert Heinl v Jyske Bank* [1999] Lloyd's Rep Bank 511; *Thomas v Pearce* [2000] FSR 718; *Grupo Toras v Al-Sabah* (2000) unreported, 2 November, CA; *Twinsectra v Yardley* [2002] 2 All ER 377; *Derksen v Pillar* [2002] All ER (D) 261; *Dubai Aluminium Company Ltd v Salaam* [2002] 3 WLR 1913, [2003] 1 All ER 97. Earlier cases on knowing assistance include *Fyler v Fyler* (1841) 3 Beav 550, 49 ER 1031; *Attorney-General v Leicester Corp* (1844) 7 Beav 176; (1844) 49 ER 1031; *Eaves v Hickman* (1861) 7 Beav 176; *Mara v Browne* [1896] 1 Ch 199; and the comments of Ungoed-Thomas J on the nature of the remedy in *Selangor v Cradock (No 3)* [1968] 1 WLR 1555, 1579.

[3] *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Barlow Clowes v Eurotrust* [2006] 1 All ER 333.

[4] *Twinsectra v Yardley* [2002] 2 AC 164; *Dubai Aluminium v Salaam* [2002] 3 WLR 1913; [2003] 1 All ER 97.

[5] *Abou-Rahmah and Others v Abacha and Others* [2005] EWHC 2662 (QB), [2006] 1 Lloyd's Rep 484, Treacy J; On appeal to [2006] EWCA Civ 1492, CA.

[6] Not to forget a large number of High Court decisions referred to in the footnotes below.

objective: a matter which has seemed to have been solved by one decision only to be inadvertently unpicked by the next. First, however, I shall outline the requirements for this claim. For ease of reference the term "breach of trust" shall stand for "breach of any fiduciary duty", and the term "beneficiary" shall stand for "any purposes who takes a benefit from any fiduciary duty".[7]

The foundations of dishonest assistance

The basis of liability

There are two elements to the defendant stranger's liability: first, that the defendant must have assisted in the breach of trust and, secondly, that that assistance must have been dishonest. Liability for dishonest assistance is a secondary form of liability in that the dishonest assistant will be sued either once the trustees' liability for breach of trust has been established or only if the trustees cannot be held liable for breach of trust for some reason. The liability is secondary then to the primary liability of the trustees. Moreover, the liability of the dishonest assistant is based on fault: the defendant is held liable both for the act of assisting in the breach of trust and also for her fault in doing so dishonestly. The loss for which the stranger must account to the beneficiaries is the loss which stems from her assistance in the breach of trust.[8] Without a breach of trust there would be no loss for which to account.[9]

The test here is therefore not really a test of "dishonesty" at all but rather it is really a question of deciding: what would an honest person have done in these circumstances from an objective standpoint and furthermore did the defendant do what an honest person would have done?[10] Liability is therefore predicated on failing to act honestly, rather than strictly on acting dishonestly: so one need not have lied nor need one have been actively deceitful.[11] This is considered in the next section.

The debate in outline

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[7] *Dubai Aluminium v Salaam* [2002] 3 WLR 1913; [2003] 1 All ER 97, para 9.
[8] *Derksen v Pillar* [2002] All ER (D) 261, [32].
[9] *Royal Brunei Airlines v Tan* [1995] 2 AC 378.
[10] See, generally on this topic, GW Thomas and AS Hudson, *The Law of Trusts* (Oxford University Press, 2004), ch. 30.
[11] [1995] 2 AC 378, 386. This approach was followed in *Corporacion Nacional del Cobre De Chile v Sogemin Metals* [1997] 1 WLR 1396; *Twinsectra v Yardley* [1999] Lloyd's Rep Bank 438 CA; *Dubai Aluminium v Salaam* [1999] 1 Lloyd's Rep 415 CA; *Heinl v Jyske Bank* [1999] Lloyd's Rep Bank 511; *Thomas v Pearce* [2000] FSR 718; *Taylor v Midland Bank Trust Co* [2002] WTLR 95. *Dubai Aluminium v Salaam* [2002] 3 WLR 1913, [2003] 1 All ER 97. Notably the majority of the House of Lords in *Twinsectra v Yardley* [2002] 2 AC 164 also approved this approach, with the exception of a slight gloss painted on this approach by Lord Hutton (despite his concurrence with Lord Nicholls in *Dubai Aluminium v Salaam* in the House of Lords, as considered below).

A summary of the discussion to follow would run in this fashion. The movement of the test for what was formerly referred to as 'knowing assistance' into a test for 'dishonesty' began in *Royal Brunei Airlines v Tan*[12] in the opinion of Lord Nicholls in the Privy Council. This was a straightforwardly objective test. In the subsequent decision of the House of Lords in *Twinsectra v Yardley*[13] the speech of Lord Hutton suggested that this test should not be purely objective but rather should be a hybrid of subjective and objective elements, as considered below, with the unintended effect that a person who considered his subjective morality to be an excuse for objectively dishonest behaviour would not be liable for assistance in a breach of trust. It appeared at first blush, although it is uncertain, that a majority of the House of Lords concurred with this view. Lord Nicholls reasserted his objective approach in the House of Lords in *Dubai Aluminium v Salaam*,[14] a case which appears to have been overlooked in this area perhaps because it does not appear in the electronic legal databases primarily under cases on 'dishonest assistance' but rather on the liability of partners. This issue was put to the test in *Barlow Clowes v Eurotrust*[15] where a unanimous Privy Council, whose joint opinion was delivered by Lord Hoffmann, sought to explain that Lord Hutton had not meant what he appeared to have said. Latterly, the Court of Appeal in *Abou Rahmah v Abacha*[16] have purportedly followed *Royal Brunei Airlines* but nevertheless re-introduced subjective elements to the test for dishonesty. These are matters we shall have to take in stages.

The decision in *Royal Brunei Airlines v Tan*

In *Royal Brunei Airlines v Tan*[17] the appellant airline contracted an agency agreement with a travel agency, BLT. Under that agreement BLT was to sell tickets for the appellant. BLT held money received for the sale of these tickets on express trust for the appellant in a current account. The current account was used to defray some of BLT's expenses, such as salaries, and to reduce its overdraft. BLT was required to account to the appellant for these moneys within thirty days. The respondent, Tan, was the managing director and principal shareholder of BLT. From time to time amounts were paid out of the current account into deposit accounts controlled by Tan. BLT held the proceeds of the sale of tickets as trustee for the appellant. In time, BLT went into insolvency. Therefore, the appellant sought to proceed against Tan for knowingly assisting[18] in a breach of trust. The issue between the parties was whether 'the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee'.

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[12] [1995] 2 AC 378.
[13] [2002] 2 AC 164.
[14] [2002] 3 WLR 1913.
[15] [2006] 1 All ER 333.
[16] [2006] EWCA Civ 1492.
[17] [1995] 2 AC 378.
[18] The liability was generally referred to before the decision in *Royal Brunei Airlines v Tan* as being "knowing assistance".

Lord Nicholls in *Royal Brunei Airlines v Tan* held that a breach of trust by a trustee need not have been a dishonest act *on the part of the trustee*. Rather, it is sufficient that an accessory has acted dishonestly for that accessory to be fixed with personal liability for the breach. The test as set out by Lord Nicholls created a test of 'dishonesty'. The trustee's own state of mind is unimportant. In describing the nature of the test for dishonesty in this context in *Royal Brunei Airlines v Tan* Lord Nicholls held that:[19]

> '... acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance. This is an objective standard.'

Therefore, the question which this test requires the court to ask is not what the defendant thought personally, but rather what an honest person would have done if they had been placed in the same circumstances as the defendant. From the remainder of this judgment it is clear that dishonesty in this context covers situations in which there has been either fraud, or a lack of probity or some reckless risk-taking which calls the defendant's honesty into question.

There is a notable extension of this doctrine by Lord Nicholls in *Royal Brunei Airlines v Tan* in the Privy Council explicitly in the area of advisors in investment transactions, to the effect that:

> 'All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.[20]

The clear conclusion to be drawn from this passage is this: if an advisor promotes a course of action which is considered by the court to have been reckless, then that will contribute to the advisor being found to have been "dishonest" in this very stylised meaning of that word in this context. There is no other interpretation which may be placed on these words in the context of his lordship's opinion. Lord Nicholls was speaking explicitly about investment and intentionally advocating an extension of liability. The test for recklessness leading to dishonesty may be derived from failing to act in accordance with common market practice for that type of client and thus may be derived from financial regulation of the appropriate market. That the test is an objective test means that regulatory norms are appropriate to decide what an honest investment advisor ought to have done in the circumstances.

[19] [1995] 2 AC 378, 386.
[20] *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 387.

Twinsectra v Yardley: the mooted development of the combined test for "dishonesty"

In *Twinsectra v Yardley*,[21] Lord Hutton suggested that it was not sufficient to hold a person liable for dishonest assistance to show that an objectively honest person would not have acted in the way that the stranger acted. Rather, his Lordship held that it would be necessary for the stranger to have understood subjectively that other people would have considered his behaviour to have been dishonest. Thus, a solicitor who assisted in the breach of a trust by sanctioning the payment of a lender's money to his own client in breach of a solicitor's undertaking to which he had become bound, was held not to have been dishonest because the majority of the House of Lords did not consider either that he had been dishonest in general terms and furthermore because he had not understood that other people might have considered his actions to have been dishonest. While that decision of the majority purported *in toto* to approve the test in *Royal Brunei Airlines v Tan*, Lord Hutton introduced a combined subjective-objective test in the following fashion.[22]

> There is, in my opinion, a further consideration [*than deciding whether the test is one of knowledge or dishonesty as set out by Lord Nicholls*] 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 the 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 [*sic*] 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.

This form of the test, therefore, clearly added an important second, subjective element to the test of dishonesty. The effect of this combined test was that a defendant could escape liability by demonstrating that she did not understand that an objectively honest person would have considered her behaviour to have been dishonest. It was unclear, however, whether or not the remainder of their Lordships (including Lord Hoffmann), all of whom gave short speeches, intended to concur with this specific aspect of Lord Hutton's speech or not.

According, *inter alia*, to the decision of Lewison J in *Ultraframe (UK) Ltd v Fielding*,[23] the effect of the decision of the House of Lords in *Twinsectra v Yardley* was that the test for dishonesty in this context had changed subtly but

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[21] [2002] 2 AC 164.
[22] *Twinsectra v Yardley* [2002] 2 All ER 377, 387. Italicised portions added for clarity. This approach was applied without comment by Peter Smith J in *Manolakaki v Constantinides* [2004] EWHC 749, [167].
[23] [2005] EWHC 1638 (Ch), [2005] All ER (D) 397, para [1481].

significantly to the effect that the defendant must be shown to have understood that she had acted dishonestly and not simply that an honest person would not have acted as she had done. (That is: it is not simply the imagination of some trusts lawyers which considered that this is what Lord Hutton meant.) However, the very different explanation which is given of this aspect of Lord Hutton's speech by Lord Hoffmann in *Barlow Clowes v Eurotrust* is considered below.

Dubai Aluminium v Salaam: the retreat from the combined test for "dishonesty"

Latterly, Lord Nicholls confirmed his view that liability for dishonest assistance is predicated on the 'equitable wrong of dishonest assistance in a breach of trust or fiduciary duty'.[24] In such circumstances, even though the stranger is not an express trustee of a trust, by virtue of dishonestly assisting a breach of trust the stranger is *construed* to be liable as though he was in fact a trustee. Consequently, the liability in this context is that of accounting to the beneficiaries for the loss caused by the breach of trust as a 'constructive trustee'. Thus, the sort of personal liability ordinarily imposed on trustees to account in the event of a breach of trust is imposed on strangers who are construed to be liable as though trustees.[25] So, in *Dubai Aluminium v Salaam* the House of Lords considered the liability of the members of a partnership for the dishonest breach of duty of one of the partners: this required, *inter alia*, the consideration of the scope of liability for dishonest assistance. In that case Lord Nicholls described the liability for dishonest assistance as being that of a 'constructive trustee'[26] whose 'misconduct … gives rise to a liability in equity to make good resulting loss'.[27] This analysis was predicated both on Lord Nicholls' own decision in *Royal Brunei Airlines v Tan*[28] and on the older judgment in *Mara v Browne*,[29] where a partnership was held liable for a breach of fiduciary duty committed by one of the partners.[30] No mention was made in his Lordship's speech of the approach taken in *Twinsectra v Yardley* which purported to introduce a subjective element to the objective notion of dishonesty in *Royal Brunei Airlines v Tan*.

The decision in *Barlow Clowes v Eurotrust*

The facts in Barlow Clowes v Eurotrust

The decision of the Privy Council in *Barlow Clowes v Eurotrust*[31] related to the collapse of Barlow Clowes International Ltd ("Barlow Clowes"). Barlow Clowes

[24] *Dubai Aluminium v Salaam* [2002] 3 WLR 1913, [9].
[25] See *Target Holdings v Redferns* [1996] 1 AC 421.
[26] *Dubai Aluminium v Salaam* [2002] 3 WLR 1913, para 40.
[27] [2002] 3 WLR 1913, para 40.
[28] [1995] 2 AC 378.
[29] [1896] 1 Ch 199, 208, *per* Lord Herschell.
[30] Cf *In re Bell's Indenture* [1980] 1 WLR 1217, 1230, *per* Vinelott J.
[31] [2006] 1 All ER 333.

had attracted approximately £140 million from private investors. The bulk of that money was dissipated by Peter Clowes and his associates on other business ventures and on "extravagant living".[32] This particular appeal related to funds which were paid through a company called International Trust Corporation (Isle of Man) Ltd ("ITC") the controlling mind of which was a man called Henwood. At first instance, this action related, *inter alia*, to the liability of ITC and of Henwood in dishonestly assisting Peter Clowes and his associate Cramer in misappropriating investors' funds from Barlow Clowes and related companies. It was found that there was no commercial purpose for these transactions.

The appeal brought before the Privy Council related to Henwood's claim that he had not acted dishonestly. Henwood appealed against the Acting Deemster's finding at first instance that he had dishonestly assisted Peter Clowes and Cramer on the basis that there was insufficient evidence to support such a finding. To cut a long story short, Henwood appears to have been seduced by the prospect of going into business with Cramer and Clowes. This was said to have informed Henwood's attitude to Cramer and Clowes's business practices. Henwood approved the transfer of the money from ITC to Cramer so that Cramer could pursue personal business interests. The judge at first instance found that Henwood "knew enough about the origins of the money to have suspected misappropriation and that he acted dishonestly in assisting in its disposal".[33] The judge further found that after June 1987 Henwood "strongly suspected"[34] that the monies passing through ITC had come from private British investors. Consequently it was held that no honest person could have assisted Peter Clowes and Cramer if those suspicions were correct. Henwood, we are told, has "consciously decided not to make inquiries because he preferred in his own interest not to run the risk of discovering the truth".[35]

The defence based on 'dishonesty'

Henwood argued, further to the speech of Lord Hutton in *Twinsectra v Yardley*, that he had not appreciated that other people would have considered his actions to have been dishonest and therefore that he ought not to have been liable for dishonest assistance.[36] Lord Hoffmann expressed the unanimous view of the Privy Council in the following, unequivocal terms: "[t]heir Lordships consider that by ordinary standards such a state of mind is dishonest".[37] In support of this statement, Lord Hoffmann then considered the argument raised at first instance that Henwood lived by a different moral code and that by his own moral standards obeying instructions from his clients, Peter Clowes and Cramer, took

[32] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [1].
[33] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [8].
[34] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [11].
[35] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [11].
[36] Relying on Lord Hutton's dicta in *Twinsectra v Yardley* at [2002] 2 AC 164, 174.
[37] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [12].

priority in a way that excluded all other moral claims to his attention. In the words of the Acting Deemster (the judge at first instance), Henwood had an

> "... exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important.[38] Mr Henwood may well have thought this to be an honest attitude, but, if so, he was wrong".[39]

The Privy Council held that the test was a purely objective test, following the decision in *Royal Brunei Airlines v Tan*, and that neither Lord Hutton nor Lord Hoffmann should have been taken to have suggested anything to the contrary in *Twinsectra v Yardley*.[40] Consequently, Henwood was held to have been dishonest. Consequently, counsel for Henwood argued that Henwood had not appreciated that his actions would be considered to be dishonest and therefore that Henwood could not be a dishonest assistant.

Re-establishing the objective test for "dishonesty"; re-reading Twinsectra v Yardley

Significantly, though, the second limb of the test is whether or not the defendant realised that *other people* would have considered his actions to have been dishonest and not that *the defendant himself* thought that the action was dishonest. Consequently, on this basis, Henwood's argument (had his evidence been credible) would have been successful in theory if he could have shown that, even though an honest person would not have acted as he had acted, he did not himself appreciate that other people would have considered his actions to have been dishonest.

The key passage from Lord Hoffmann's judgment in *Barlow Clowes v Eurotrust* is as follows:[41]

> 'The judge stated the law in term largely derived from the advice of the Board given by Lord Nicholls of Birkenhead in *Royal Brunei Airlines v Tan*. In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris*

[38] That is, Henwood argued that he considered his loyalty to Cramer and Clowes, his clients, as being more important than the rights or interests of any other person.
[39] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [12].
[40] *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [15]-[16] and [18].
[41] [2006] 1 All ER 333, [10].

Insurance Co Ltd[42]. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.'

So, what results is a re-affirmation that the test is an objective test. However, whereas Lord Nicholls suggested considering what an honest person would have done and measuring the defendant's actions against the hypothetical actions of this honest person, Lord Hoffmann suggests that "ordinary standards" will be the standard against which the court will decide whether or not the defendant's subjective mental processes had been dishonest. It is suggested that asking what an honest person would have done is almost a counsel of perfection (but not in the pejorative sense which people often use that term). Asking what an honest person would have done means identifying an almost ideal course of conduct untainted by any moral impropriety. An objective set of standards may, however, permit some level of [moral equivalence] between things which are deemed "honest" and things which are deemed to be "dishonest".

Subjectivity again? *Abou-Rahmah and Others v Abacha and Others*

The recent decision of the Court of Appeal in *Abou-Rahmah v Abacha*[43] has complicated matters again with two different statements of the relevant principles. The facts of that case, briefly put, were as follows. The claimants were contacted by the second defendant and were offered a share in a trust fund of US$65 million which the first defendant claimed he was trying to get out of Benin. To gain access to this money, or so the claimants were told, it was necessary to make a number of payments, totalling US$1.375 million, to various government agencies. The claimants paid the amounts which they were asked to pay. It transpired, however, that this was a scam. Shortly afterwards, the defendants absconded with the money. The claimants sought to recover their losses from a variety of third parties who had been involved with this scam in various ways. This particular piece of litigation concerned a claim brought by the claimants against a bank into which a two payments totalling US$625,000, which had been taken from the claimants as part of the scam, had been paid.

At first instance, Treacy J followed the hybrid subjective-objective test for dishonesty which was set out by Lord Hutton in *Twinsectra v Yardley* (as set out above): the decision in *Barlow Clowes v Eurotrust* was reached after the trial had ended, although Treacy J had accepted skeleton arguments on the nature of the

[42] [2003] 1 AC 469.
[43] [2006] EWCA Civ 1492; [2007] Bus LR 220.

test.[44] On appeal to the Court of Appeal, Rix LJ stated the principles underpinning dishonest assistance in the following terms:[45]

> 'It would seem that a claimant in this area needs to show three things: first, that a defendant has the requisite knowledge; secondly, that, given that knowledge, the defendant acts in a way which is contrary to normally acceptable standards of honest conduct (the objective test of honesty or dishonesty); and thirdly, possibly, that the defendant must in some sense be dishonest himself (a subjective test of dishonesty which might, on analysis, add little or nothing to knowledge of the facts which, objectively, would make his conduct dishonest).'

This passage is simply a misunderstanding of the debate which has followed *Royal Brunei Airlines v Tan* – a debate which his lordship addressed in those parts of his judgment which followed the passage quoted above and which dealt with dishonest assistance. What is a misunderstanding, it is suggested, is the inclusion of the first and second requirements: what was required by Lord Nicholls in *Royal Brunei Airlines v Tan* was a purely objective test to decide whether or not the defendant had been dishonest. It is not a test of what the defendant knew; rather it is only a question of what an honest person would have done in the circumstances and whether or not the defendant lived up to that standard of honesty. Failure to be honest in this sense renders a person dishonest. It was Lord Hutton's now discredited suggestion in *Twinsectra v Yardley* – that the defendant must *also* be proved to have appreciated that other people would have considered her behaviour to have been dishonest – which brought in this element of subjective dishonesty to the previously entirely objective test of dishonesty. However, as Rix LJ recognised, the unanimous decision of the Privy Council in *Barlow Clowes v Eurotrust* sought to return the test to its purely objective state in *Royal Brunei Airlines v Tan*. Therefore, the reference to knowledge which Rix LJ makes should not be made if, as Rix LJ claimed to be doing, the law is to be returned to its purely objective state in *Royal Brunei Airlines v Tan*. What Rix LJ has achieved instead, ironically enough, is an affirmation of the hybrid subjective-objective test for dishonesty in *Twinsectra v Yardley*.

Arden LJ set out the following summary of the principles relating to dishonest assistance:[46]

> 'In *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd*,[47] the Privy Council considered the case law of England and Wales on the issue of the element of dishonesty necessary for liability under this head. Its interpretation of that case law was that it is unnecessary to show subjective dishonesty in the sense of consciousness

[44] [2005] EWHC 2662, [2006] 1 Lloyds Rep 484.
[45] [2006] EWCA Civ 1492, [2007] Bus LR 220, [16].
[46] [2006] EWCA Civ 1492, [2007] Bus LR 220, [59a].
[47] [2006] 1 All ER 333.

> that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour. This is the first opportunity, so far as I am aware, that this Court has had an opportunity of considering the decision of the Privy Council, and in my judgment this court should follow the decision of the Privy Council.'

It is possible that a similar confusion to that identified with Rix LJ appears in this passage from Arden LJ: to whit, following the test in *Barlow Clowes v Eurotrust* and yet suggesting that it is sufficient to make out a finding of dishonesty if the defendant "knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour". It is true that proof that the defendant knew that her behaviour would be considered to be dishonest according to normal standards of behaviour would mean that the defendant would be held to have been dishonest: however, the defendant would not be found to have been dishonest because she understood the nature of her actions, but rather because her actions offended the normal standards of behaviour. The test for dishonesty requires that the defendant did not act as an honest person would have acted: it does not matter whether or not the defendant appreciated the commonly held view of her actions as being dishonest. It is an objective test. This formulation by Arden LJ blurs that point.

Arden LJ laid great emphasis on the following idea from the opinion of Lord Nicholls:[48]

> 'As Lord Nicholls said in the *Royal Brunei* case, honesty has "a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated."'

But this passage is being taken totally out of context. It is a discussion of *honesty* – not *dishonesty* – and refers to *dishonesty* as being "its counterpart" immediately after the passage which Arden LJ has quoted. The key passage emerges immediately before the sentence which Arden LJ has quoted. That passage read:[49]

> 'Whatever may be the position in some criminal or other contexts ..., 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 circumstance. This is an objective standard.'

Then Lord Nicholls held "This may seem surprising", and *only then* did he speak the words quoted by Arden LJ. In other words his lordship was pointing out that his insistence on a purely objective test may seem counter-intuitive at first – and

[48] [2006] EWCA Civ 1492, [2007] Bus LR 220, [66].
[49] [1995] 2 AC 378, 386.

that honesty may seem to connote subjective notions – but that in truth objectivity was nevertheless the keynote. After the passage quoted by Arden LJ, and references to a common understanding of there being some subjectivity in discussions of honesty and dishonesty, Lord Nicholls then changed tack completely and held the following, focusing on pure objectivity and speaking out clearly against form of subjectivity:[50]

> '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.'[51]

It could not be plainer. Lord Nicholls was demanding a test which enabled the defendant to use subjective standards of morality to excuse her from liability for conduct which would have been held to be dishonest by reference to purely objective standards of honesty. Arden LJ was therefore quoting a passage entirely out of the context of the opinion of Lord Nicholls in *Royal Brunei Airlines v Tan*, an approach which has been approved by the Privy Council in *Barlow Clowes v Eurotrust* and notionally even by Arden LJ. It cannot be acceptable that a person escapes liability for dishonesty simply by claiming that she did not think what she did was dishonest. That may be sufficient to keep someone out of prison in the criminal law, but it is insufficient when a court is called upon to decide whether or not an objectively dishonest person should be required to compensate the victim of her actions.

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[50] *Ibid*; [1995] 3 All ER 95, 106. Cf *Walker v Stones* [2001] QB 902.
[51] This last sentence contains an unfortunate reference to 'appropriation', whereas it is not necessary for the operation of the assistance liability that the defendant receive the property into his possession: the term 'appropriation' here should be read as referring to participation in the act of appropriation of property from the trust fund without passing possession or control of it to the defendant.