

Persistent problems with the objective dishonesty test

The cases following the admirably clear decision in *Barlow Clowes v Eurotrust* have proved themselves broadly incapable of applying the equally admirably clear test in *Royal Brunei Airlines v Tan*. The sections to follow consider some more recent decisions which have experienced problems with its application. It is an odd thing that even though Lord Nicholls was so very clear in *Royal Brunei Airlines v Tan* that the test for “dishonesty” in dishonest assistance was an entirely objective test, and even despite the confirmation of that position by the Privy Council in *Barlow Clowes v Eurotrust*, there have nevertheless been a surprising number of cases which have assumed that the test is comprised of two elements: the first, a requirement that the defendant must have been demonstrated to have been dishonest by the standards of honest people and, secondly, that the defendant herself must have realised that. This was the approach seemingly taken by Arden LJ in *Abou Rahmah v Abacha*, even though she purported to be applying an objective test. It is suggested that her ladyship’s approach is simply wrong both because it misapplies the test in *Royal Brunei Airlines v Tan* and because it is wrong philosophically. I shall take each in turn. First, these cases avowedly follow the decisions in *Royal Brunei Airlines v Tan* and in *Barlow Clowes v Eurotrust* and therefore they ought not to permit any reference to whether or not the defendant appreciated that honest people would consider her behaviour to have been dishonest: they are considered in the next section. Secondly, it is too easy for a defendant to escape liability simply by saying that she had not realised that reasonable people would consider them to be dishonest. In this way, the more immoral a defendant is, the less likely she is to be found dishonest.

Apparent judicial difficulties with applying an objective test literally

A slightly different, third approach to the test for dishonesty has been suggested by Sir Anthony Clarke MR in an article to the effect that the test is an objective one but that nevertheless the court should take into account the circumstances in which the defendant was acting and the level of experience which the defendant had. His lordship suggested in that article as follows:¹

‘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 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.’

This approach is still inserting subjectivity into the test. What is one supposed to do having decided that the defendant is “experienced” and “intelligent”? Presumably, one is to be held liable because of one’s experience and intelligence, whereas the stupid and

¹ Clarke, “Claims against professionals: negligence, dishonesty and fraud” [2006] 22 *Professional Negligence* 70-85.

inexperienced are to escape liability because of their stupidity and inexperience, even though their actions would by definition have been considered to be dishonest by honest and reasonable people. The purpose of this area of law is to protect the position of beneficiaries of fiduciary arrangements: therefore the risk of the stupidity of third parties dealing with the trust is thrown onto the beneficiaries. That has never been the approach of equity. Nevertheless, in *AG Zambia v Meer Care & Desai & Others*² Peter Smith J held that this was the proper approach, and this approach was followed in *Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd*.³

So in *Markel* the defendant contended that he was not dishonest because of the circumstances in which he was acting: i.e. he asked the experienced bond traders with whom he was dealing whether or not all was well with a series of bond transactions and contended that he was entitled simply to rely on their answers without considering the matter further himself. The defendant contended therefore that he had not been dishonest because he had relied on the answers given to his questions by the professionals whom he was entitled to trust with those transactions. It is suggested that this is a question which goes to the question of whether or not honest and reasonable people would have thought his behaviour had been dishonest. That is simply a part of the decision as to whether or not in those circumstances an honest person would have acted as the defendant acted. It is definitively not a question as to whether or not the defendant subjectively appreciated that her own behaviour was dishonest according to social mores. Therefore, it is suggested that this should not be considered to be a distinct, third approach to the question of dishonesty at all but rather that it should be considered to be necessarily a part of the question as to whether or not the defendant was dishonest by the lights of honest and reasonable people, as required by Lord Nicholls in *Tan*.

Nevertheless, in *Markel* the judge, Tearnse J, spent a large amount of the latter stages of his judgment considering what *the defendant* honestly thought and did not think, as opposed to deciding *objectively* what did the judge consider an honest person would have thought. So, despite his lordship's analysis of the law, his approach lapsed almost absent-mindedly into a subjective examination of the defendant's own state of mind.⁴ In that judgment many pages were spent on analysing the appropriate objectivity of the test for dishonesty and then, remarkably enough, many more pages considering the evidence as to what the defendant subjectively thought. This was his lordship's error. If the test is one of objective dishonesty, then it cannot matter at all what the defendant thought subjectively because objective dishonesty (as set out in *Tan*) requires asking only what an honest and reasonable person would have done in the circumstances.

² [2007] EWHC 952 (Ch).

³ [2008] EWHC 1135 (Comm), [2008] All ER (D) 10.

⁴ See, for example, *ibid.*, para [209]: "For these reasons I have reached the conclusion that he did not honestly believe that his conduct in signing bonds in excess of the stated limits was justifiable" and more generally the defendant's motive of taking this role that he wanted "a quiet life": none of this can matter because all that matters is what would an honest person have done in the circumstances. Elsewhere in the same case, where two other defendants were demonstrated to have assisted a breach of a company's fiduciary duties dishonestly (without there being any real question that they had been dishonest on any basis), then those two defendants were held liable for "knowingly assisting" [sic] to the beneficiary of that fiduciary relationship; see para [237].

So, our first persistent problem with the application of the objective test in the cases is that the judges often lapse into questioning the subjective mind-set of the defendant even though the test requires that we do not consider it. What would be acceptable is to ask what an honest person would have done in those circumstances; what is not acceptable is to ask what the defendant subjectively thought would have been honest in the circumstances. An objective test requires that *the judge* decide what an honest person would have done in the circumstances; or perhaps if there is a formal regulatory code in existence the judge should ask whether the defendant complied with it because such a regulatory code could be taken as a statement of what a person should have done in the circumstances.⁵ The objective test requires only that the view of the honest person be established. What the defendant thought does not matter: as was made clear in *Barlow Clowes v Eurotrust*. There are other cases in which High Court judges have tried to gloss the objective test in other ways.

For example, in *Attorney General of Zambia v Meer Care & Desai*⁶ Peter Smith J constructed a peculiar test for dishonesty to the effect that it “is essentially a question of fact whereby the state of mind of the Defendant had to be judged in the light of his subjective knowledge but by reference to an objective standard of honesty”⁷ and that “[t]he test is clearly an objective test but the breach involves a subjective assessment of the person in question in the light of what he knew at the time as distinct from what a reasonable person would have known or appreciated”. It is not at all apparent from the leading authorities considered above why anyone should think that this is so. If the test is an objective test then it definitively does *not* require questioning the defendant’s subjective state of mind. If one nevertheless wants this hybrid test to be the test in English law then one must stop pretending that one is applying the test set out by Lord Nicholls in *Royal Brunei Airlines v Tan* or in *Dubai Aluminium v Salaam* or the Privy Council in *Barlow Clowes v Eurotrust*, as considered above. On appeal, the Court of Appeal in *Attorney General of Zambia v Meer Care & Desai*⁸ observed Smith J’s use of this odd test in relation to dishonest assistance but did not cite any of the House of Lords, Privy Council or even Court of Appeal decisions considered thus far in its own deliberations as to the nature of the liability, which is really quite odd. This is of a piece with the frankly mistaken approach of Arden LJ in *Abou-Rahmah v Abacha* discussed above. There are decisions of the High Court which purport to be using an objective test but which nevertheless cannot stop themselves from delving into the subjective state of the defendant’s own attitudes, knowledge and beliefs.

The meaning of “dishonesty” in other contexts relating to professionals

⁵ See Alastair Hudson, *The Law of Finance* (Sweet & Maxwell, 2009), Chapter 3.

⁶ [2007] EWHC 952 (Ch).

⁷ *Ibid*, para [334].

⁸ [2008] EWCA Civ 1007, para [151] *et seq*. The Court of Appeal ultimately failed to find any dishonesty on the facts of the case.

In *Bryant v Law Society*⁹ an interesting example of the test of “dishonesty” arose before the Divisional Court in relation to two solicitors who were involved, in contravention of the Law Society’s regulatory system on money laundering and other fraudulent transactions, in what was allegedly professional misconduct involving dishonesty. The solicitors’ clients organised for large payments to be made through their solicitors instead of through a bank as the parties’ contracts required without the solicitors asking any questions of their clients. The circumstances of the payments bore all the hallmarks of money laundering and were exactly the sort of transactions described as being prohibited in the relevant Law Society circulars. The criminal law test of dishonesty set out famously in *R v Ghosh*¹⁰ requires first that one identify what is objectively dishonest, and secondly that one ask whether or not the defendant was aware that his conduct was dishonest. In *Bryant v Law Society* one of the solicitors in question suggested that he honestly believed that what he was doing was honest and reasonable. The court considered that the test of “dishonesty” to be applied by the tribunal was a test which took into account the solicitor’s own perspective on what was honest. The solicitors were found, on the application of the subjective test, nevertheless to have committed professional misconduct.

The question remains as to the operation of this test in the abstract. As with *Barlow Clowes v Eurotrust*, what of the situation in which the professional contends that her behaviour was subjectively reasonable and honest. The concern must be that because the defendant was so anti-social as to have an inappropriate sense of the proprieties of life and thus to have a personal morality which meant that she considered her objectively dishonest behaviour to be subjectively honest, then she would escape liability. Without wishing to over-dramatize, this is the attitude of sociopaths: “I think what I am doing is acceptable, even though the rest of you say you think something else.” What the court should have found in *Bryant* was that because this person by his own admission had no understanding of the requirements of proper behaviour then he should be held liable for dishonesty. In *Twinsectra v Yardley* the majority of the House of Lords excused a solicitor from liability on the basis that it was a serious thing to condemn a professional man for dishonesty if he had not appreciated subjectively that that would be considered to be the case; and in *Bryant v Law Society* the court expressed concern at the notion that a solicitor might otherwise be subjected to liability when he might not have realised that his actions would have been considered to have been dishonest by honest people. A better approach, it is suggested, would be to hold professional people (above all others) to an objective standard of honest behaviour. Professional people acting in their professional capacities should be expected to be rational and compliant with the appropriate professional ethics and regulatory rulebooks in the conduct of their duties. To excuse them on the basis of their imperfect understanding of what other people expect is for the law to demonstrate a sort of moral cowardice.

This urge to protect professional people on account of their own moral weakness must stop. Leaving the criminal context aside for a moment, the question for private law is to identify what the law considers to be honest in the abstract (that is, objectively) and then

⁹ [2009] 1 WLR 163.

¹⁰ [1982] QB 1053.

to measure individual defendants up against that standard. One of the principal roles of law is to judge. Another role (of property law and contract law in particular) is to offer models to the citizenry by reference to which they can organise their communal activities. In either event, the role of the law is to judge which structures and activities are worthy of the support of law and which are not. Therefore, the law does not need to pander to the subjective standards of honesty and dishonesty of any individual defendant. Instead, the law stands in judgment over them. It is a matter for the criminal law to decide how squeamish it is about criminalising people who did not realise that ordinary decent people would have considered their behaviour to be dishonest, but there is no reason why anyone (solicitor or not) should escape liability to compensate a claimant under private law simply because they were similarly unconscious of the standards of the society around them. Ignorance of the law is generally considered to be no defence; so why should ignorance of the standards of honest conduct be similarly a defence. This urge to require that the defendant must realise that what she was doing was contrary to social mores is weak-kneed liberalism of the most obvious kind. Liberalism is tolerant and open-minded: it is therefore weak when it is confronted by people who simply refuse to play the game, to recognise ordinary standards of common decency, and so forth. So, instead of condemning people who would be thought dishonest by the reasonable person, liberalism of this weak sort excuses them from liability if they had failed to notice what was evident to honest people and apologises for having troubled them. Our private law should condemn such people so as to protect those objective standards simply for the ethical imperative of preventing unconscionable benefit being taken from inappropriate behaviour and also *pour encourager les autres*.