Dishonesty: The Impact of Group Seven and Ivey

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Summary of the talk given by William Flenley QC at the Hailsham Chambers Professional Indemnity seminar at the Lloyds Building on 25 January 2018.

1. There is a distinction, in speaking of dishonesty, between

(i) the standard of knowledge. This is the question of what counts as dishonesty for the purposes of, for example, exclusions from cover in professional indemnity policies, or a claim for dishonest assistance in breach of trust. What test does the court, or an arbitrator, apply to decide whether a given person was dishonest?

And

(ii) the content of knowledge. In the specific context of claims for dishonest assistance in breach of trust, this is the question of what the defendant has to be dishonest about, what facts does s/he need dishonestly to know in order to give rise to liability?

The Standard of Knowledge

2. On this issue, there has been a debate as to an inconsistency between the decisions of the House of Lords in Twinsectra v Yardley and the Privy Council in Barlow Clowes v Eurotrust. At Court of Appeal level, Starglade Properties v Nash favoured the Barlow Clowes approach, but arguably Twinsectra is binding House of Lords authority which trumps both Starglade and the Privy Council authority of Barlow Clowes. Now, in Ivey v Genting Casinos Ltd [2017] 3 WLR 1212, the Supreme Court has expressed a clear preference for the Barlow Clowes approach. Strictly speaking, the Supreme Court’s view was obiter and not binding, but in practice it seems highly likely to be followed. A first instance court may say that, regardless of Twinsectra, it is bound by Starglade. This is what Morgan J did, before Ivey, in Group Seven v Nasir [2018] PNLR 6. A first instance court deciding the matter now is likely to bolstered by the dicta in Ivey, and to apply the Barlow Clowes/Ivey approach.

3. On that basis, in order to prove dishonesty, it will be necessary (Ivey para [74])

(i) to “ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he
held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held.” It is suggested that the question is therefore (a) to ask which facts the claimants says that the defendant dishonestly knew, and then (b) to decide whether or not the defendant in fact, subjectively, knew some or all of those facts.

Then

(ii) “the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.”

But, rejecting the Twinsectra approach, “there is no requirement that the defendant must appreciate that what he has done is, by [the] standards [of ordinary decent people], dishonest.”

Hence it was no defence for Mr Ivey to say that he genuinely believed that his approach to gambling with playing cards was honest, and was ‘legitimate gamesmanship’. The approach involved persuading the croupier to take steps which enabled Mr Ivey to know from the back of the cards which numbers were on the front of the cards; the game involved what was supposed to be a blind bet as to what numbers were on the cards dealt. The trial judge held that Mr Ivey did believe that his practice was honest, but Mr Ivey was still dishonest according to the Supreme Court.

4. This approach therefore removes one possible defence for those accused in civil law of dishonesty.

**Blind Eye Knowledge**

5. This is knowledge based on the proposition that the defendant suspected certain facts, but avoided investigating further, because s/he did not want to know what the investigation might reveal.

6. In *Group Seven v Nasir*, Morgan J accepted a submission based on *Manifest Shipping v Uni-Polaris*, that in order to have blind eye knowledge a defendant must have “a suspicion that the relevant facts do exist and [must have made] a deliberate decision to avoid confirming that they exist.” But “the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe.” It will not be enough to prove that the defendant has a basis for speculation as to wrongdoing, the test of blind eye knowledge is fairly difficult to satisfy.

**The Content of Knowledge, in claims for dishonest assistance in breach of trust**

7. In a claim for dishonest assistance in breach of trust, the claimant must prove 4 elements:
(i) that there was a trust of the claimant’s money;

(ii) that the trustee breached the trust, for example by not using the money in the way that the trust required;

(iii) that the defendant’s conduct assisted the trustee in breaching the trust, and

(iv) that the defendant’s assistance was dishonest.

8. In Group Seven v Nasir [2018] PNLR 6 the first 3 elements were admitted and only element (iv) was in issue. The claimant, Allseas, had been persuaded by fraudsters to part with €100m, on the basis that it would be safely invested in US government debt. The fraudsters were the trustees; they breached the trust by paying the money away with a view to passing it through the accounts of a limited liability partnership called Notable, and out to beneficiaries no doubt connected to the fraudsters. Notable were told that the money belonged to Larn Ltd, a company controlled by a Mr Nobre.

9. Notable paid away €12m before the police caused the rest of the money to be frozen. As to the €12m, Allseas sued Notable, and some members of Notable, for dishonest assistance in breach of trust. One defendant was an accountant. As a member of Notable, he was regulated by the Solicitors Regulation Authority. The accountant was involved in money laundering checks relating to the $100m. The judge, Morgan J, held that the accountant had been dishonest in the way that he applied those checks: he had told a lawyer colleague at Notable that he knew that a particular money laundering test had been satisfied in relation to numerous transactions, when in fact he knew that it had not been satisfied.

10. The claimants argued that (a) the accountant’s action had assisted the breach of trust, (b) the accountant had acted dishonestly, hence he was liable for dishonest assistance in breach of trust.

11. The judge rejected this. He accepted the submission that it was not enough to prove that the accountant had been dishonest in a general sense. It had to be shown that the accountant had had dishonest knowledge of either the overall scheme of the fraud, or at least that he had dishonestly known that his client, Larn/Nobre, was not entitled to deal with the money in the way in which it was dealing with it. The judge held that the accountant believed that Larn & Nobre were entitled to deal with the money as their own. Hence the claim for dishonest assistance failed.

12. The judge did give permission to appeal on this point and the appeal is proceeding, but, at least for the moment, a claimant seeking to prove that a defendant dishonestly assisted in a breach of trust needs to prove not only that the defendant acted dishonestly, and that the defendant’s conduct assisted the breach of trust.
The claimant must also prove that the defendant knew either the broad outline of the fraud, or knew that the trustee was not entitled to deal with the money in the way in which it was dealing with it. Proving dishonesty, but only in relation to money laundering regulations, will not be sufficient.