



Welcome to the latest issue of Serle Speak. This issue is concerned with fraud, addressing areas including mortgage fraud and the liability of co-directors of a fraudster in a corporate setting. From a procedural perspective, articles tackle the role of the privilege against self-incrimination in the context of search orders and the prospect of appeal upon the discovery after the event of

deception at trial. On this page I explain the development of the attitude of the Courts to the decision in *Twinsectra v Yardley* and the appropriate test for dishonest assistance. Included with this issue is the Chambers' review of 2009. **ANDREW MORAN**

The status of *Twinsectra*

It will be recalled that in *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164, the majority of the judicial committee (Lords Slynn, Steyn and Hoffmann) agreed with the opinion of Lord Hutton that the correct test to be applied in cases where a defendant was alleged dishonestly to have assisted in a breach of trust or fiduciary duty was the so-called "combined test" (at paragraph 27, page 172 C-D), "A standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'". Lord Hutton stated (at paragraph 36): "Therefore I consider that the courts should continue to apply that test and 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". Lord Millett dissented from this view and stated that it was (or, in the event, ought to be) sufficient

that a defendant knew the facts which made it wrongful for him to assist in a breach of trust (see paragraphs 121 and 144). Lord Hoffmann delivered a brief opinion concurring with the opinion of Lord Hutton in which he stated (at paragraph 20): "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".

In *Barlow Clowes International Ltd v Eurotrust International Ltd and others* [2006] 1 WLR 1476, the Privy Council considered an appeal from the Isle of Man Court of Appeal by the appellant plaintiffs, the liquidators of the investment company Barlow Clowes International Ltd. One of the issues before the Privy Council was whether the judge at first instance, who had delivered her judgment before *Twinsectra* was decided, had applied the correct test in finding the respondent defendant liable for dishonest assistance

in a breach of trust. The defendant submitted that the judge at first instance had applied an objective test and that this was the wrong test in the light of the decision in *Twinsectra*. The Privy Council rejected this submission. Lord Hoffmann delivered the opinion of the Board and, referring to paragraphs 35 and 36 of Lord Hutton's judgment in *Twinsectra*, stated (at paragraph 15) that there may have been an element of "ambiguity" in Lord Hutton's judgment and that what Lord Hutton meant was that the defendant's knowledge of the transaction in question had to be such as to render his participation contrary to normally accepted standards of honesty.

Whilst the decision itself in *Barlow Clowes* has been welcomed in some quarters, scepticism has been expressed as to the means by which the Privy Council dealt with the decision of the House of Lords in *Twinsectra* (see, for example, TM Yeo (2006) 122 LQR 171, describing the "clarification" of *Twinsectra* as "unconvincing"). How, then, has the decision in *Twinsectra* fared in English courts?

In *Bultitude v The Law Society* [2004] EWCA Civ 1853, the Court of Appeal (Kennedy, Laws and Arden LJJ) considered *Twinsectra* in the context of an appeal from the disposal by the Divisional Court of an appeal from the Law Society Solicitors' Disciplinary Tribunal. The Court of Appeal held unanimously that the ratio of *Twinsectra* yielded a combined test for dishonesty as described in the opinion of Lord Hutton in that case. (Followed in *Bryant v The Law Society* [2007] EWHC 3043 (Admin), (Richards LJ and Aikens J.), a decision postdating *Barlow Clowes*.)

In a different context, that of trade marks, in *Harrison v Teton Valley Trading Co Ltd* [2004] 1 WLR 2577, the Court of Appeal (Pill, Arden LJ and Sir William Aldous) considered the meaning of "bad faith" for the purposes of section 3(6) of the Trade Marks Act 1994. Sir William Aldous (at paragraphs 25 and 26) referred to Lord Hutton's conclusion that the combined test was "the true test for dishonesty" and stated that he accepted the reasoning of Lord Hutton as applying to considerations of bad faith. Arden LJ agreed with Sir William Aldous and Pill

LJ (at paragraph 42). Pill LJ agreed with Sir William Aldous (at paragraph 43) and stated (at paragraphs 44 and 45) that the combined test stated by Lord Hutton was appropriate to apply and that what was required was a "realisation by the applicant that what he was doing would be regarded by honest people as in bad faith".

The combined test set out in *Twinsectra* was considered by the Court of Appeal in *Rahman and others v Abacha and others* [2007] 1 Lloyd's Rep. 115. Noting the controversy as to the impact of *Barlow Clowes* on *Twinsectra*, Rix LJ stated (at paragraph 23) that "I need not enter into that controversy for the purposes of this appeal" and Pill LJ (a member of the Court of Appeal in *Harrison*) agreed with this approach (at paragraph 91). Arden LJ (a member of the Court of Appeal in both *Bultitude* and *Harrison*) accepted (at paragraph 65) that *Barlow Clowes* had "clarified" that the interpretation of *Twinsectra* yielding a combined test for dishonesty was "a wrong interpretation". Subsequently, in the *Attorney-General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch), Peter Smith J (at paragraph 366) preferred the *Barlow Clowes* test of dishonesty. Evans-Lombe J (at paragraphs 98-100) adopted the *Barlow Clowes* test in *Statek Corporation v Alford and another* [2008] EWHC 32 (Ch), though the Judge did not expressly refer to *Twinsectra*.

On the English authorities, *Twinsectra* has been considered on three occasions by the Court of Appeal. On two occasions (*Bultitude* and *Harrison*) the Court of Appeal held that *Twinsectra* laid down a combined test for dishonesty. On the third occasion, in *Rahman v Abacha*, the majority of the Court of Appeal declined to engage in the debate whether *Twinsectra* had been correctly interpreted by the Privy Council in *Barlow Clowes*. It would appear, therefore, that *Twinsectra* has received authoritative interpretation in England on two occasions and that on those authorities the test laid down by the House of Lords is the combined test referred to above.

ANDREW MORAN acted for the Respondent in *Barlow Clowes*.





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Liability of directors for negligent omissions: a subjective or objective test?

ONE ISSUE RAISED BY THE *LEXI HOLDINGS PLC* LITIGATION (ARISING FROM THE COLLAPSE OF THE BRIDGING FINANCE COMPANY HEADED BY SHAIID LUQMAN WITH A DEFICIT OF OVER £80M) WAS THE LIABILITY OF SHAIID’S CO-DIRECTORS, HIS SISTERS MONUZA AND ZAURIAN LUQMAN, FOR THEIR FAILURE TO PREVENT FRAUDS COMMITTED BY SHAIID.

The negligent failure of each sister to meet her duties was established at the summary judgment stage with the question of causation deferred to trial.

At trial, Briggs J asked himself (i) what would the sisters have done had they met the duties which they owed to the company and (ii) what would the effect of any such steps have been, i.e. he held that he must “construct a necessarily hypothetical edifice so as to ascertain what would probably have happened if the relevant duties had been performed.”

In constructing this edifice, the learned Judge attached considerable weight to the fact that Shaid had consistently been shown to be a “persuasive, sophisticated, charming

and highly intelligent” liar. Accordingly, he determined that whilst the sisters were on notice of matters that ought to have caused them to make inquiry of Shaid (including his previous criminal conduct and the scale of a purported directors’ loan account), had they done so Shaid would simply have fobbed them off. Consequently, the learned Judge held that even if the sisters had done what they ought to have done to fulfil their duties, they would not have prevented Shaid’s frauds.

In effect, therefore, Briggs J applied a subjective test to the question of causation; he asked what, as a matter of fact, would the directors have done, and what would then have happened? The Court of Appeal rejected this



approach; as held in *Re Westmid Packing Services Ltd*, it is not proper for a director to allow himself to be dominated or bamboozled by another director and directors cannot rely on the dishonesty of another person in order to escape their own responsibilities. Accordingly, the question of causation must be objective: the court is not to ask what would a director found to be in breach of his duties have done, but rather, what should he have done?

Applying this analysis, the Court held that the sisters should have informed

“...it is not proper for a director to allow himself to be dominated or bamboozled by another director and directors cannot rely on the dishonesty of another person in order to escape their own responsibilities.”

the company’s auditors of their concerns about Shaid. Further, had they done so, an unqualified audit report would not have been given, no further funds would have been advanced to the company, the bankrolling of Shaid’s frauds would have been terminated, and the company’s losses prevented.

⊕ RUTH HOLTAM acted for the administrators of *Lexi Holdings Plc* as junior counsel to Philip Marshall QC.

Appealing deception

NORMALLY, A PARTY WILL ONLY BE PERMITTED TO ADDUCE FURTHER EVIDENCE ON THE HEARING OF AN APPEAL IF IT CAN SATISFY THE THREE CONDITIONS LAID DOWN IN *LADD V MARSHALL* [1954] 1 WLR 1489.

Where, however, the evidence sought to be adduced shows a *prima facie* case of fraud or deception, the courts adopt a more liberal approach to the first *Ladd v Marshall* condition. The evidence may be allowed in even if it could have been obtained with reasonable diligence for use at the trial.

In *Couwenbergh v Valkova* [2004] EWCA Civ 676, Ward LJ stressed that regardless of whether the three criteria laid down in *Ladd v Marshall* are satisfied:

“...there remains the crucial overriding consideration of fairness and justice. We are very strongly of the view that if there is a risk that a fraud has been perpetrated on the court, then the court should whenever possible allow the truth to come out.”

“...the Court of Appeal is made aware that there may well have been an attempt by one party to deceive the other and the court”



Additional considerations apply in the case of alleged forgery of documents. As Chadwick LJ pointed out in *Daly v Daly* (Lawtel, 24 October 2002), where the evidence of forgery which is sought to be adduced is credible and cogent, the Court of Appeal is made aware that there may well have been an attempt by one party to deceive the other and the court; so that a trial which ought to have been a fair trial may well have been rendered an unfair trial by that party's conduct. In those circumstances the requirements of doing justice are likely to point strongly towards admitting that evidence. It would, he said, be a reproach to the administration of justice if a party who had set out to deceive the court and the other side were able to say, once his deception had been found out, that, if only the other side had been more astute, the deception would have been discovered earlier. The object of an attempt to deceive is that the deception should not have been discovered.

⊕ DANIEL LIGHTMAN appeared in the Court of Appeal in *Chahal & Sons Ltd v RSC Holland BV* [2009] EWCA Civ 881 applying to adduce fresh evidence after trial showing a document to have been forged.

Mortgage fraud and rectification of the land register

SINCE THE INTRODUCTION OF THE LAND REGISTRATION ACT 2002 THE INCIDENCE OF MORTGAGE FRAUD HAS INCREASED.

Typically a fraudster forges the signature of the registered proprietor on a legal charge, which is then registered on the title. The fraudster fails to pay the loan instalments and the lender sells the property to a purchaser, who is then registered as the proprietor in place of the real owner.

The issue is whether the court or the land registrar has jurisdiction to reinstate the real owner under the provisions for alteration of the register contained in section 65 and schedule 4 to the Act. These confer jurisdiction to alter the register for the purpose of “correcting a mistake”. The issue therefore is whether the registration of the purchaser is a mistake.

“...the mortgage lender has power to sell the property in exercise of his power of sale.”

The issue arises because section 58(1) of the Act provides that if, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration; and section 52(1) provides that the proprietor of a registered charge is to be taken to have the powers of disposition conferred by law on the owner of a legal mortgage.

By virtue of these provisions the mortgage lender has power to sell the property in exercise of his power of sale. This being so, how can the registration of the purchaser be a



mistake? Such a construction would seem to contradict sections 52(1) and 58(1) and undermine the state guarantee of title. On the other hand, it would also inflict a grave injustice on the true owner, who has been deprived of his property through no fault of his own.

This issue arose in *Odogwu v Vastguide Ltd* [2008] EWHC 3565. The Chief Land Registrar asked to be joined as a defendant to make representations. Before the trial however he conceded that the court had jurisdiction. The purchaser then followed suit, and the concessions were embodied in a court order. The purchaser then sought to renege on its concession, but was held to be estopped from doing so.

In the result, the issue still remains to be resolved, and in a recent case, *Ijacic v Game Developments Ltd*, the Deputy Adjudicator referred to the present “lively debate” on this topic. But the concession made by the Chief Land Registrar in *Odogwu* would suggest that anyone now seeking to argue that the court does not have jurisdiction will be facing an uphill task.

⊕ NICHOLAS ASPREY appeared for the claimant in *Odogwu v Vastguide Ltd*, led by Alan Boyle QC.

Search orders: a potential trap?

REFUSAL TO COMPLY WITH A SEARCH ORDER CAN CAUSE ENORMOUS DETRIMENT TO BOTH THE APPLICANT AND THE RESPONDENT. HOWEVER THE SCOPE OF ONE PARTICULAR BASIS FOR REFUSING TO COMPLY, THE PRIVILEGE AGAINST SELF-INCRIMINATION, REMAINS UNCLEAR.

In *C plc v P* [2008] Ch 1 P was the subject of a search order in proceedings for breach of confidence and misappropriation of intellectual property. P was concerned about self-incrimination other than for offences in relation to the intellectual property. P's solicitor was aware of the prior decision of Lyndsay J in *O Ltd v Z* [2005] and following advice, P asserted his privilege and handed his computers and materials to the independent solicitor pending an application to the court for directions. This was consistent with the process set out in the standard form of search order. Following an agreement between the parties to image only part of the materials a computer expert discovered illegal pornography and applied to the Court for directions.

Uniquely, the Home Secretary and Attorney-General both intervened. Evans-Lombe J found, as Lyndsay J had on similar facts, that P was entitled to claim privilege. The judge held, however, that he was entitled to depart from precedent where it was incompatible with the ECHR and the balance was in favour of protecting public rights under Articles 2, 3 and 8. It was also appropriate, he reasoned, to bring English law privilege into line with the minimal Article 6 privilege which did not extend to independent evidence.

The Court of Appeal held the judge was wrong to depart from precedent in these circumstances: the minimal rights under the Convention could not be used to abrogate greater rights under English law. However the majority held that there was no precedent to depart from in the present case because there has never been any privilege that attached to independent evidence under English law. Production of documents could only be refused where it was the subject of a "testimonial obligation" to



disclose and verify the existence of documents. Lawrence Collins LJ, in the minority, noted that there is almost no trace of this distinction in the authorities and it gives no weight to the wording of section 14 of the Civil Evidence Act 1968.

Leave to appeal to the Lords was granted but later rescinded because the appeal would be academic: the police interrogated the computers and concluded that no offence had been committed.

Litigants now face huge uncertainty

Litigants now face huge uncertainty: the standard form of search order itself at paragraph 11 expressly recognises that privilege exists in independent documents entirely contrary to *C plc*. Is this a potential trap? Should a respondent be advised that *C plc* was correctly decided and there is no privilege or alternatively assert privilege and argue that *C plc* is contrary to *Rank Film Distributors v Video Information Centre* [1982] AC 380 (HL)? Eventually the Supreme Court will have to decide. In the meantime lawyers must form their own view.

⊕ DAVID CASEMENT QC appeared for P in *C plc v P*.

Chambers news

People

We are delighted that since our last Serle Speak David Casement QC and Professor Jonathan Harris have both joined us as tenants.

David is an established chancery commercial practitioner. He was called to the English Bar in 1992 as an Astbury Scholar and to the Irish Bar in 1997. In his chancery practice he has advised and litigated in large-scale company and insolvency cases, trusts, property and security disputes as well as related professional negligence claims. In commercial practice he has acted in entertainment, sports and media cases including confidentiality and restraint of trade disputes. Chambers & Partners says he is "...academically brilliant and tactically astute" and "Peers consider him to be 'a very effective advocate,' citing his 'engaging style and disarming personality'".

Jonathan's practice covers all areas of commercial and chancery law. He has a pre-eminent reputation in the field of private international law and is an editor of the leading work *Dicey, Morris and Collins, The Conflict of Laws*. His work in the area of international trusts is equally renowned. He is the author of *The Hague Trusts Convention* and a contributor to *Underhill and Hayton, Law of Trusts and Trustees* and to *International Trusts Laws*.

We were also pleased to welcome Paul Adams and Thomas Elias who both became members in October following the completion of their pupillages. Congratulations also to

Philip Marshall QC who has been admitted as a member of the Chartered Institute of Arbitrators.

Legal Directories

Serle Court has continued to go from strength to strength in the directories. In the Legal 500 2009 directory we gained 10 new individual recommendations, taking the total to 95 and as a set we are recommended in 10 practice areas.

We also continue to feature strongly in Chambers & Partners 2010. We now have 94 individual recommendations placing us 4th in the 'recommendations per member' table. Individual highlights include Philip Jones QC and Philip Marshall QC who are both ranked as 'stars at the bar'. Only 11 other barristers are included in this prestigious category. As a set we are recommended in 11 practice areas and only 4 other sets in the country are recommended in more.

We continue to be extremely grateful to all our clients who continue to recommend us so highly.

Award nominations

We were nominated as Chambers of the Year at four separate awards ceremonies: the STEP Private Client Awards, the Lawyer Awards, the British Legal Awards and the Legal Business Awards. We also received three nominations at the year's Chambers & Partners Bar Awards - Chancery set of the year, Chancery junior of the year and Client Service set of the year and we were thrilled to be awarded the Client Service award.

Edited by Tim Collingwood



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