

ESSEX COURT CHAMBERS
BARRISTERS

Arbitrators
AT 24 LINCOLN'S INN FIELDS



DISHONEST ASSISTANCE

Essex Court Chambers



Professor Paul S. Davies



Naomi Hart

Arbitrators at 24 Lincoln's Inn Fields



Sir Jack Beatson

THE MENTAL ELEMENT OF ACCESSORY LIABILITY IN EQUITY

Paul S. Davies

Group Seven Ltd v Notable Services LLP [2019] EWCA Civ 614; [2020] Ch. 129 at [58]:

“In the light of *Ivey*, it must in our view now be treated as settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in *Tan*, and that there is no room in the application of that test for the now discredited subjective second limb of the *Ghosh* test. That is not to say, of course, that the subjective knowledge and state of mind of the defendant are unimportant. On the contrary, the defendant’s actual state of knowledge and belief as to relevant facts forms a crucial part of the first stage of the test of dishonesty set out in *Tan*. But once the relevant facts have been ascertained, including the defendant’s state of knowledge or belief as to the facts, the standard of appraisal which must then be applied to those facts is a purely objective one. The court has to ask itself what is essentially a jury question, namely whether the defendant’s conduct was honest or dishonest according to the standards of ordinary decent people.”

At [60]:

“The state of a person’s mind is in principle a pure question of fact, and suspicions of all types and degrees of probability may form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied.”

At [104]:

“we would also indicate a provisional view, for what it is worth, that the simplicity of the two stage test for dishonesty which now emerges from the authorities should not be complicated by the introduction, as a matter of law, of a minimum content of knowledge which must be satisfied.”

Compare:

Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164 at [134] (Lord Millett):

“But the introduction of dishonesty is an unnecessary distraction, and conducive to error.”

Pittmore Pty Ltd v Chan [2020] NSWCA 344 at [176] (Leeming JA):

“I doubt that “dishonesty” is the right word to describe the test of liability of a person who procures or induces a breach of trust or fiduciary duty. It is far from being a test which is clear-cut in this context ...”

P Davies, “The Mental Element of Accessory Liability in Equity” (2022) 138 LQR (forthcoming)

P Davies, *Accessory Liability* (Hart, 2015) ch.4

DISHONEST ASSISTANCE AND ACCOUNTS OF PROFITS

Naomi Hart

Where dishonest assistance is established, the defendant is held liable as if they were a trustee. The defendant may be required to:

- 1) Compensate the trust for losses flowing from the dishonest assistance; or
- 2) Account for profits which accrued as a result of the dishonest assistance.

***Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 419**

The nature of liability as a trustee

At [82]:

“The nature of the liability, as it seems to us, is that the knowing recipient or dishonest assistant has, in principle, the responsibility of an express trustee. That responsibility would include, in an appropriate case, a liability to account for profits.”

The requirement of trust property

At [89]:

“We agree that in order to found liability for knowing receipt there must be trust property. After all, receipt of trust property is the gist of the action.”

However, at [93]:

“We therefore conclude that the remedy of an account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misapplication of trust property.”

Causation

At [96]:

“A fiduciary’s liability to account for a secret profit does not depend on any notion of causation.”

However, at [107]:

“Where a claim based on equitable wrongdoing is made against one who is not a fiduciary, we consider that, as in the case of a fiduciary sued for breach of an equitable (but non-fiduciary) obligation, there is no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy.”

At [114]:

“But in our judgment the simple ‘but for’ test is not the appropriate test. In our judgment what Mr Nikitin acquired as a result of his dishonest assistance (and also as a result of Mr Mikhaylyuk’s breach of fiduciary duty) was the use of the vessels at the market rate. That was merely the occasion for him to make a profit. The real or effective cause of the profits was the unexpected change in the market.”

Proportionality

At [119]:

“We consider that where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then ... the court has a discretion to grant or withhold the remedy. ... One ground on which the court may withhold the remedy is that an account of profits would be disproportionate in relation to the particular form and extent of wrongdoing.”

***Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993**

At [109]–[135]:

The remedy is a personal one against the dishonest assistant and does not create a proprietary remedy enforceable against third parties the third party does not become a constructive trustee of the profit made by him so as to enable the claimant to pursue a proprietary remedy in respect of the profit.

Arbitrators

AT 24 LINCOLN'S INN FIELDS



DISHONEST ASSISTANCE AND MULTIPLE DEFENDANTS

Sir Jack Beatson

A. The basic position

A person who renders dishonest assistance to a breach of trust or fiduciary duty:

- (1) Will be jointly and severally liable for any loss which the beneficiary suffers as a result of the breach.
- (2) Will be liable to disgorge any benefit/profit the assistant itself has made from its dishonest assistance in the breach or from the underlying breach of trust.

But save in cases of bribery an assister is not liable to pay an amount equal to the profit another defendant has made which produced no loss to the claimant.

Ultraframe (UK) Ltd v Fielding & Ors [2005] EWHC 1638 (Ch), [2006] FSR 17 at [1589] – [1597] and [1600] – [1601]

Bilta (UK) v NatWest Markets PLC & Mercuria Energy [2020] EWHC 546 (Ch) at [159], [531] – [537], and [577]– [578]

- (3) Therefore, save for cases of bribery and claims against a trustee the liability of the assister for profits/gains is several.
- (4) Ultimately, however, the matter will depend on the precise duty of the assistant and will be highly fact sensitive. Where the assistant and the person who has been assisted are trustees so that the assister has a duty in respect of the trust property to look out and supervise the other trustee, it may be liable to pay an amount equal to the profit the other trustee has made which produced no loss to the claimant (although in that case the liability would be primary rather than as an accessory).

B. Effect of settlement by D1 on other defendants

- (1) **A claim for compensation for loss:** a recovery from D1 must generally be taken into account in calculating the amount of a concurrent claim against (an) other defendant(s) but it does not if the claim against the other defendant(s) is an additional separate claim: See the cases discussed in *FM Capital Partners Ltd v Marino* [2020] EWCA Civ. 245, [2021] QB 1 at [56] – [59]
- (2) **Restitutionary claim for a tort of equitable wrong:** Because claims against D2 and D3 are not concerned with loss to the claimant the claimant's recoveries from D1 do not affect D2 and D3's liability to make restitution of gains or to account for any profits made: *FM Capital Partners Ltd v Marino* at [48] – [55] and *Burrows*, Law of Restitution (3rd ed.) 629-30
- (3) **Apportioning recoveries under a settlement:** In a more complex scenario, a claimant is entitled to allocate recoveries from a settling defendant, subject only to the requirement that the allocation not be obviously unsustainable: *FM Capital Partners Ltd v Marino* at [69] – [73]

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