Ward L.J. gave a non-exhaustive list of facts and circumstances to be taken into account when deciding whether the duty had been discharged, including "the cost of taking precautions balanced against the gravity of the risks of injury"; this suggests that the standard is an objective one, and that the 1984 Act did not codify *British Railways Board* v. *Herrington* [1972] A.C. 877 in so far as that decision permitted consideration of a *particular* occupier's financial position in determining whether he had discharged his duty to a trespasser. Admittedly the £15,000 estimated cost of deterrent planting was not very great, but Congleton Borough Council doubtless had many other demands on its resources. The likely response of public authorities to this nannyish decision (which appears to be the first successful claim by an adult under the 1984 Act) will be to fence off any open stretches of water on their properties, thereby denying access altogether to those who merely wish to picnic or dip their toes in the water.

C.A. HOPKINS

DISHONEST ASSISTANCE: GUILTY CONDUCT OR A GUILTY MIND?

CHANCERY lawyers have for many years awaited a definitive House of Lords ruling on the mental element required to make strangers to a trust liable for knowing or dishonest assistance in a breach of trust, and for knowing receipt of trust property. The appeal in *Twinsectra Ltd.* v. *Yardley* [2002] UKHL 12, [2002] 2 All E.R. 377 provided the opportunity for resolution of the issue in the former case but not the latter; the degree of knowledge required for a knowing receipt claim remains for final determination on another occasion.

The detailed facts of the case need not detain us unduly. Yardley was a businessman described by Lord Millett as "an entrepreneur with a number of irons in the fire" (para. [54]), and one major area of his activity was property development. Yardley negotiated a short-term loan of £1 million from Twinsectra Ltd. which, it was explicitly stated in the loan agreement, was to be used solely for the acquisition of property and for no other purpose. The defendant, Leach, was Yardley's solicitor. Leach secured the release of the loan funds to himself and subsequently paid them out to Yardley without taking steps to ensure that the money would be spent in the way specified. In the event some £357,000 was misapplied by Yardley (being utilised to pay off existing debts rather than for the purchase of property) and became irrecoverable.

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Twinsectra sought to make Leach personally liable to account to them for that sum on the basis that he had assisted in a breach of trust on Yardley's part.

The House of Lords were unanimous in ruling that Yardley held the loan moneys on trust, that his misapplication of the moneys amounted to a breach of trust, and that Leach had factually assisted that breach by his actions. The issue which divided their Lordships was whether Leach had the mental element necessary for liability.

The majority of the House adopted the standard of "dishonesty" laid down by Lord Nicholls in the Privy Council in *Royal Brunei Airlines* v. *Tan* [1995] 1 A.C. 378. Lord Nicholls in that case had spoken of dishonesty as comprising both a subjective and an objective element: subjective in that it denoted "advertent conduct" assessed in the light of the defendant's actual knowledge and not what a reasonable person would have known or appreciated, but objective in that the standard of honesty would not vary with the higher or lower moral values of each individual. As Lord Nicholls encapsulated it, "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" (p. 389).

The precise meaning and relationship of the subjective and objective aspects of Lord Nicholls' dishonesty test have been the source of some confusion since the *Tan* decision. In particular, the misconception arose that the subjective element required the defendant to be aware that what he or she was doing fell below accepted standards of honest behaviour (see, for example, *Abbey National plc* v. *Solicitors Indemnity Fund Ltd.* [1997] P.N.L.R. 306, 310). Unfortunately the majority of the House of Lords in *Twinsectra* adopted the same misreading of Lord Nicholls' judgment. Lord Hutton, with whom the three other majority judges all expressed agreement, laid down at para. [27] a two-stage "combined test" for dishonesty, requiring both that "the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people" (objective) and that "he himself realised that by those standards his conduct was dishonest" (subjective). This second element, however, is nowhere to be found in Lord Nicholls' speech. The subjectivity to which his Lordship referred was merely that inherently embedded within the notion of dishonest conduct itself: acts which were deliberate or advertent, carried out with knowledge of the circumstances in which they were committed, but not necessarily of the moral censure which might attach to them. Lord Nicholls in *Tan* made only one passing

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reference to awareness of wrongdoing, and that, far from stating it as in any sense a requirement for liability, was merely to observe as a matter of fact that "in most cases, an honest person should have little difficulty in knowing whether a proposed transaction ... would offend the normally accepted standards of honest conduct" (p. 391).

Lord Millett, dissenting from the view of his brethren in *Twinsectra*, pointed out that the second stage of Lord Hutton's combined test, requiring not only culpable conduct but also a culpable state of mind, came close to the criminal law standard of dishonesty enshrined in *R.* v. *Ghosh* [1982] Q.B. 1053, which was specifically rejected by Lord Nicholls in *Tan*, and which would appear inappropriate as a condition of civil liability. Lord Millett himself would have preferred a test based upon the defendant's conduct alone, albeit assessed in the light of his or her subjective state of knowledge at the time: "it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was" (para. [121]). This approach not only represents a better reading of Lord Nicholls' original judgment, but also appears to set a more realistic standard for establishing liability on the part of those assisting in breaches of trust. The test adopted by the majority of the House will mean that many, like Mr. Leach, will escape liability, since consciousness of wrongdoing is a difficult thing to prove. It also, as Lord Millett remarked, creates an unfortunate anomaly when compared with the tort of inducement of breach of contract, where a dishonest state of mind is not a requirement of liability: a reversal of the usual expectation that equity sets higher standards of conduct than does the common law.

The other noteworthy aspect of the *Twinsectra* case is that it provided a vehicle for Lord Millett at last to set down in the judicial forum his distinctive analysis of the true nature of the *Quistclose* trust, which he had enunciated extra-judicially in a seminal article in the Law Quarterly Review in 1985 ("The Quistclose Trust: Who Can Enforce It?" (1985) 101 L.Q.R. 269). Of the five Law Lords only Lord Millett went into any detail regarding the characteristics of the trust imposed upon Yardley's loan moneys, and indeed such an analysis was not strictly necessary for the determination of the appeal. His Lordship's scholarly and most helpful exposition must therefore, unfortunately, be regarded as obiter.

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