

History of the terminology dishonest assistance law equity essay

Law



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Lord Nicholls, thereby, gathered together the nineteenth century trust law precedents and reformulated them as a loss based ' accessory' liability that attaches to a third party who procures or assists in any breach of trust by the fiduciary. Moreover, from the twentieth century trust law precedents he identified a requirement of ' dishonesty' on the part of the third party. This case also has created complexity as for the meaning for dishonesty in this context. The facts of the case are, the Royal Brunei airline contracted an agency agreement with a travel agency, BLT, which under the agreement BLT was to sell tickets for the airlines. Therefore, BLT held the money received for the sale of these tickets on express trust for appellant in a current account. Commonly, the current account was used to defray some of BLT's expenses, such as salaries and to reduce its overdraft. BLT was account to the appellant to those moneys within thirty days. The respondent, Tan, was the managing director and principle shareholder of BLT. From time to time amounts were paid out of the current account into deposit accounts controlled by Tan. BLT held the proceeds of the sale of tickets as trustee for the appellant. In time, BLT went into insolvency. Therefore, the appellant sought to proceed against Tan for knowingly assisting in a breach of trust. The issue arose was whether the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of the trust by trustee. Therefore, Lord Nicholls held that a breach of trust by a trustee need not have been a dishonest act on the part of the trustee. Rather, it is sufficient that an accessory has acted dishonestly for that accessory to be fixed with personal liability for the breach. This has created a test of dishonesty. The element of state of mind of the trustee was held

irrelevant. Therefore, the nature of the test for dishonesty in this context, Lord Nicholls held that[3]:'... acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance. This is an objective standard.'Therefore, the test requires the court to ask is not what the defendant thought personally, but rather what an honest person would have done if they had been placed in the same circumstances as the defendant. The leftovers of this judgment clearly held that dishonesty in this context covers situations in which there has been either ' fraud, or a lack of probity or some reckless risk-taking'[4]which calls the defendant's honesty into question. This doctrine has been expanded by Lord Nicholls in this case as in the Privy Council explicitly in the area of advisors in investment transactions, to the effect that:' All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own'.[5]It can be concluded from the statement that, if an advisor promotes a course of action which is considered by the court to have been reckless, then that will contribute to the advisor being found to have been " dishonest" in a conventionalize meaning of that word in this context. There is no other interpretation which may be found on these words in the context of his lordship's opinion. Lord Nicholls was stating plainly about investment and intentionally advocating an extension of liability. Moreover, the test for recklessness leading to dishonesty may be derived from failing to act in accordance with common market practice for that type of client and thus

may be derived from financial regulation of the appropriate market. That the test is an objective test means that regulatory standards are appropriate to decide what an honest investment advisor ought to have done in the circumstances. In *Twinsectra Ltd v Yardley*[6], dishonesty has a subjective element. The defendant must know that his conduct would be regarded as dishonest by honest people. However, after some confusion generated by the House of Lords in this case, the Privy Council confirmed in *Barlow Clowes v Eurotrust*[7] that dishonesty was to be determined according to an objective standard[8]. Besides, Lord Nicholls' reasoning in *Royal Brunei*, focuses upon liability for breach of an express trust and, specifically, the liability of agents acting for trustees, although in his concluding remarks he refers to a breach of trust or fiduciary obligation. Much of his reasoning makes sense only in the context of express trusts. The ambit of liability is considerably widened by the fact that breaches of fiduciary duty by company directors also are treated as instances of breach of trust on the basis that the company property is treated as trust property. Further, in *Royal Brunei*, Lord Nicholls explicitly moved away from a close reading of the case law because, in his view, this approach was responsible for many of the problems besetting this area of law. Specifically, he ditched the traditional precedent of *Barnes v Addy*[9], on the ground that it had been applied as though it were a statute, and 'this approach has been inimical to analysis of the underlying concept'[10]. He then considered the matter as one of principle, taking into account all case law on third parties and breach of trust, whether binding or not. The case law was used at two steps in his reasoning. First, the nineteenth century cases involving third parties and breach of trust were

referred to in order to highlight an apparently illogical element in the reasoning of Lord Selborne in *Barnes* that directed attention to the trustee breach of trust's state of mind in order to determine whether third party should be liable. Lord Nicholls pointed to the handful of trust cases contemporaneous with *Barnes* in which a dishonest and fraudulent breach was not required where a stranger had procured, rather than assisted, the breach of trust by Fiduciary. This apparent inconsistency in the precedents presented an opportunity to reconsider the underlying concept of participatory liability in relation to breach of trust. The highlighting of these cases by Lord Nicholls was a significant innovation for they had been overlooked by many judges and scholars. Secondly, the twentieth century *Barnes* case law was discussed in relation to the touchstone for stranger's liability. In considering the relevant law, Lord Nicholls drew on the decisions of judges in other jurisdictions as well as academic commentary. He used the twentieth century cases to extract a requirement of 'dishonesty' on the part of stranger, although most of those cases did not use that terminology. Under Lord Nicholls' approach, the detail of individual cases was given much less prominence in the reasoning process, instead, the precedents were balanced with a normative inquiry as to when third parties dealing with trustees should be subjected to equitable liability. In this context, he considered scenarios that were particularly problematic in the twentieth century *Barnes* case law such as where D's conduct had been either careless or reckless. Lord Nicholls' judgment in *Royal Brunei*, is a model of senior appellate court reasoning. The strength of the judgment is that it seeks to explain, as well as expound, the relevant law. But the accessory liability

principle arrived at by Lord Nicholls in *Royal Brunei*, is flawed because his choice of relevant equitable precedents was too narrow in that he confined himself to considering cases in which there was a breach of trust. This suggests that Lord Nicholls in *Royal Brunei*, incorrectly conflated two distinct forms of liability into ‘ accessory liability’ and that his policy discussion, whilst directed to ‘ pure agents’, was given in a case that did not involve that scenario. A proper understanding of the relevant equitable precedents opens the way for a more soundly based legal principle to be formulated.[1478 words]