Court of Appeal considers the test for dishonest assistance following *Ivey*

In *Group Seven v Notable Services LLP*[1] the Court of Appeal considered and applied the two stage test of dishonesty set out by the Supreme Court in *Ivey v Genting*[2] in a claim for dishonest assistance in a breach of trust by various members of a legal disciplinary practice.

It overturned certain factual findings by the judge relating to the knowledge of one of the members of the legal disciplinary practice and held him liable for dishonest assistance in a breach of trust. The legal disciplinary practice was held to be vicariously liable for the member's actions. The Court of Appeal also declined to hold that there was a "minimum content of the knowledge" which an accessory must have in order to be held liable for dishonest assistance.

The Fraud

In November 2011 a Swiss company Allseas Group SA was persuaded to invest in a medium term note investment opportunity following the promise of vast returns on its investment. Allseas incorporated a subsidiary company, Group Seven Ltd, for that purpose. The investment was in fact an elaborate fraud on Allseas and Group Seven.

Allseas transferred €100m to Group Seven who in turn paid those funds on to Allied Investment Corporation Ltd (AIC). AIC was a Maltese company which had been incorporated in October 2011 for the purpose of the fraud. AIC in turn purported to lend the money to Larn Ltd, a company owned and directed by one of the fraudsters Mr Nobre. Larn directed the payment of its "loan" into the client account of Notable Services LLP, a legal disciplinary practice. Notable's members included an accountant called Mr Landman, and two solicitors called Mr Meduri and Ms Ciserani. As part of its compliance obligations, Notable sought to verify the source of the funds. It obtained a reference of good standing of Mr Nobre from Liechtensteinische Landesbank (Switzerland) Ltd (the Bank). In fact, Mr Nobre had procured the assistance of a Mr Louanjli, a relationship manager at the Bank, who gave the false reference. Mr Louanjli received €561,860 for his role in the fraud.

Mr Nobre then gave instructions to Notable to make a series of forty payments out of its client account. Notable paid away €15m before the fraud was unravelled. One of these payments was for £170,000 to Nisroy Investment Inc, a Panamanian company. This company was owned by Mr Landman.

Group Seven obtained judgment against a number of the fraudsters in 2013 and 2014 but failed to recover the entirely of its losses. Mr Nobre was convicted, amongst other things, of various counts of money laundering in November 2016 in connection with his

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1. [2019] EWCA Civ 614.
2. [2017] UKSC 67.

involvement in the fraud. Following its failure to recover all of its losses from the primary fraudsters, Group Seven and Larn turned its attention to Notable and the Bank in two separate actions[3].

The findings of Morgan J

Group Seven and Larn sued (amongst others) Mr Meduri and Mr Landman of Notable for dishonest assistance in a breach of trust and Mr Louanjli for deceit, conspiracy (with Mr Nobre) to injure Group Seven by unlawful means, and for dishonestly assisting a breach of trust. It also sued Notable and the Bank for their vicarious liability for the actions of their employees.

Morgan J gave a 150 page judgment on 6 October 2017. He made extensive findings of fact.

He found that Mr Landman permitted the payments out of the firm's client accounts in circumstances where he knew that there was no underlying transaction to which the payments pertained. He made those payments knowing that he was acting in breach of rule 14.5 of the Solicitors Accounts Rules 2011 prohibiting the provision of banking facilities through a client account.

He held that Mr Landman's conduct in relation to the payment requests made by Mr Nobre was dishonest. Mr Landman knew facts which would have shown to an honest and reasonable person that Mr Nobre was not entitled to the €100m. Crucially though, he did not know or have blind-eye knowledge that **Larn** was not the beneficial owner of the €100m and that it was not entitled to use that money as if it were its own. Accordingly, his conduct did not constitute dishonest assistance of a breach of trust.

Similarly, Mr Meduri was not dishonest and did not actually know or have blind-eye knowledge that Larn was not the beneficial owner of the €100m and that Larn was not entitled to use that money as if it were its own. Accordingly, his conduct did not constitute dishonest assistance of a breach of trust.

Group Seven's claim against Notable failed because neither Mr Meduri nor Mr Landman was liable for dishonest assistance in a breach of trust. Larn's claim against Notable failed for the same reasons.

As to Mr Louanjli, the judge held that he did have grounds for suspicion that Mr Nobre had come by the money dishonestly and that by providing a reference he was assisting in money laundering. His statements to Notable influenced Notable's behaviour in a relevant way and assisted Larn to commit a breach of trust. Accordingly he was liable for dishonest assistance in Larn's breach of trust and conspired to injure Group Seven by unlawful means. The bank was vicariously liable for Mr Louanjli's wrongdoings.

He further held that Notable's dishonest conduct in relation to the Solicitors' Accounts Rules and/or Mr Landman's dishonesty did not break the chain of causation between Mr Louanjli's statements and Group Seven's losses.

The £170,000 paid to Nisroy on behalf of Mr Landman was paid in exchange for his assistance in facilitating payments out of Notable's client account and accordingly Mr Landman was liable for unconscionable receipt of the those funds. Mr Louanjli was liable to Group Seven for his unconscionable receipt of the sum of €561,860 to provide the references to Notable.

3. See *Group Seven and others v Nasir and others* [2017] EWHC 2466 (Ch).

Larn's claim against Mr Louanjli for dishonestly assisting Mr Nobre's breach of fiduciary duty to Larn was not defeated by Mr Nobre's illegality.

As a result of the judge's findings, Group Seven obtained judgment against Mr Louanjli and Mr Elbeid (an employee of Barclays Capital in Paris, who was also involved) for €9,179,850 and against Mr Landman for £173,000. Judgment was entered in the Larn proceedings against Mr Louanjli, Mr Elbied and the Bank in amounts to be determined, to be reduced by sums received by Group Seven.

The Court of Appeal's decision in relation to Dishonest Assistance

There were a number of appeals against Morgan J's findings by Group Seven and Larn, and Mr Louanjli and the Bank. However, the most significant of these concerned whether the judge's findings in relation to dishonest assistance by Mr Landman were correct.

Group Seven and Larn challenged the judge's approach to the test for dishonest assistance. The Bank went further and argued that, on the basis of the judge's factual findings about Mr Landman, he was bound to find that Mr Landman (and therefore Notable) were liable in dishonest assistance.

This aspect of the appeal therefore turned on whether Mr Landman's assistance in procuring payments out of Notable's client account comprised dishonest assistance in a breach of trust by Larn. The judge at first instance had declined to make this finding because he held that Mr Landman did not have actual or blind-eye knowledge that the money in the client account was not beneficially owned by Larn. He held that it was not enough that Mr Landman had:

- acted dishonestly in facilitating the payments out of the firm's client account
- provided the assistance which formed a central part of the claimants' case, and
- received a bribe of £170,000 to do so.

The judgment was given jointly by Lord Justice Henderson, Lord Justice Peter Jackson and Lady Justice Asplin. They noted that following *Ivey v Genting Casino (UK) Ltd*[4] there was no longer any uncertainty as to whether a defendant had to appreciate subjectively that his or her actions were dishonest by the standards of reasonably honest people. In *Ivey* Lord Hughes confirmed that the test in *Twinsectra*, as clarified by *Barlow Clowes*, was the correct approach. He went on to say:

"When dishonesty is in question the fact-finding tribunal must first 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. When once his actual state of mind as to knowledge or belief as to facts is established, 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. **There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest**." [emphasis added].

The decision in *Ivey* was given shortly after Morgan J gave judgment in this case. The Court of Appeal considered the test in *Ivey* when assessing whether the trial judge had correctly determined whether Mr Landman's assistance was dishonest. It started by considering whether the trial judge had reached correct findings of fact in relation to his knowledge. Unusually, it

4. UKSC 67.

held that the trial judge had erred in his finding that Mr Landman did not have blind-eye knowledge that the €100m was not beneficially owned by Larn. This was the cornerstone of the trial judge's decision to find that Mr Landman was not liable for dishonest assistance.

The Court of Appeal was influenced amongst other things by the fact that the judge, in determining that Mr Landman was liable for unconscionable receipt of the £170,000, found that Mr Landman knew facts which would have shown to an honest and reasonable man that Mr Nobre was not entitled to the €100m. It held that the judge was engaging in substantially the same two stage test required in relation to dishonest assistance. It therefore followed that Mr Landman's conduct in relation to the €100m was objectively dishonest, whatever he may have subjectively thought.

That dishonesty extended not only to the payments which were made out of Notable's client account but also to the receipt of the money into the client account; if an honest and reasonable person would have concluded that Mr Nobre was not beneficially entitled to the €100m, it would also have been obvious to such a person that Mr Nobre was seeking to use Notable's client account to launder the money, and that any steps taken to facilitate that purpose would constitute dishonest assistance in a scheme intended to defraud the true beneficial owner of the money.

The Court of Appeal said that the trial judge had erred in adopting a compartmentalised approach Mr Landman's conduct ie by considering the steps taken on receipt of the funds separately from the steps taken on payment out of them. He was wrong to find that Mr Landman had understood Larn was entitled to the money and to use it as it pleased in circumstances where Mr Landman knew that he had taken a bribe in relation to facilitation of the movement of money through the client account and dishonestly withheld that information from his colleagues who were undertaking the relevant compliance checks on the source of the funds.

Accordingly the Court of Appeal held that Mr Landman must have had blind-eye knowledge that the €100m was not beneficially owned by Larn and was liable for dishonest assistance in a breach of trust.

The Court of Appeal was invited by Notable's counsel to consider whether there was a minimum content of knowledge which an accessory must have to be held liable for dishonest assistance in a breach of trust. Notable contended that an accessory must know in broad terms what the nature of the underlying breach of trust is in order to be found liable.

Having made the findings that it did, the Court of Appeal declined to determine this point. However, it did give a provisional view that the simplicity of the two stage test for dishonesty which now emerged from *Ivey* should not be complicated by the addition of a further legal requirement in relation to the minimum content of knowledge which must be satisfied.

Comment

This appeal ultimately turned on the reversal of a finding of fact made by the judge at first instance. It is unusual for the Court of Appeal to disrupt primary findings of fact made by a trial judge who had the benefit of hearing all the evidence.

The judgment provides an insight into the application of *Ivey* in the context of a dishonest assistance claim against a professional practice. The Court of Appeal rejected the trial judge's narrow approach and took into account a wider range of factors in determining that the accessory had sufficient blind-eye knowledge.

The Court of Appeal also declined to hold that there is a minimum level of knowledge of the breach of trust for an accessory to be found liable. The consequence of the first instance decision was that a claimant needed to show not only that the defendant acted dishonestly and that its conduct assisted the breach of trust, but also that the defendant knew the broad outline of the fraud or at the very least knew that the trustee was not entitled to deal with the money in the way in which it was dealing with it. That was a helpful decision for defendants in circumstances where they had an honest belief that the funds paid out of client account were held on trust for its client and that its client could deal with them freely. That principle has now been weakened.

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