Neutral Citation Number: [2019] EWCA Civ 614

Case Nos: A3/2017/3205, 3194, 3190, 3189, 3183, A3/2018/0694, 0695
and A3/2017/3204, 3195, 3188, 3187, 3182, A3/2018/0692,0693

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MORGAN J
[2017] EWHC 2466 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Between:

(1) GROUP SEVEN LIMITED
(a company incorporated under the laws of Malta)

(2) RHEINGOLD MANAGEMENT INCORPORATED
(a company incorporated under the laws of Panama) **Appellants**

- and -

(1) NOTABLE SERVICES LLP

(2) MARTIN LANDMAN **Respondents**

And Between:

EQUITY TRADING SYSTEMS **Appellant**

- and -

(1) NOTABLE SERVICES LLP

(2) MARTIN LANDMAN **Respondents**

And Between:

LLB VERWALTUNG (SWITZERLAND) AG (formerly known as LIECHTENSTEINISCHE LANDESBANK (SWITZERLAND) LIMITED)
(a company incorporated under the laws of Switzerland) **Appellant**

- and -

(1) GROUP SEVEN LIMITED
(a company incorporated under the laws of Malta)

(2) RHEINGOLD MANAGEMENT INCORPORATED
(a company incorporated under the laws of Panama)

(3) NOTABLE SERVICES LLP

(4) MARTIN LANDMAN **Respondents**

And Between:

LLB VERWALTUNG (SWITZERLAND) AG (formerly known as LIECHTENSTEINISCHE LANDESBANK (SWITZERLAND) LIMITED)
(a company incorporated under the laws of Switzerland) **Appellant**

- and -

(1) EQUITY TRADING SYSTEMS LIMITED

(2) NOTABLE SERVICES LLP

(3) MARTIN LANDMAN **Respondents**

And Between:

OTHMAN LOUANJLI **Appellant**

- and -

(1) GROUP SEVEN LIMITED
(a company incorporated under the law of Malta)

(2) RHEINGOLD MANAGEMENT INCORPORATED
(a company incorporated under the laws of Panama)

(3) NOTABLE SERVICES LLP
(4) MARTIN LANDMAN **Respondents**

And Between:

OTHMAN LOUANJLI **Appellant**

- and -

(1) EQUITY TRADING SYSTEMS LIMITED

(2) NOTABLE SERVICES LLP

(3) MARTIN LANDMAN **Respondents**

- -
- -

Jeffrey Chapman QC, Simon Atrill and Simon Paul (instructed by **Mishcon de Reya LLP**) for **Group Seven Limited, Rheingold Management Inc and Equity Trading Systems Ltd**
William Flenley QC and Francis Bacon (instructed by **Caytons Law**) for **Notable Services LLP**
Sonia Tolaney QC and Michael Ryan (instructed by **Pinsent Masons LLP**) for **LLB Verwaltung (Switzerland) AG**
Aidan Casey QC and Emily Moore (instructed by **FPG Solicitors**) for **Mr Louanjli**
Philip Hackett QC and Faisal Saifee (instructed by **Janes Solicitors**) for **Mr Landman**

Hearing dates: 6th-8th and 11th March 2019

- -

Approved Judgment

Lord Justice Henderson, Lord Justice Peter Jackson and Lady Justice Asplin:

1. This is the judgment of the court to which each of its members has contributed.

INTRODUCTION AND OVERVIEW

2. These appeals concern the scope of liability for dishonest assistance in a breach of trust and for vicarious liability in such circumstances. The parties are a range of professionals and organisations who in one way or another became secondary actors in a very substantial fraud.

3. The appeals are from the order of Morgan J dated 6 October 2017. He heard two actions which were tried together at a hearing lasting eight weeks. The citation for his meticulous judgment, which runs to 151 pages, is [2017] EWHC 2466 (Ch). The two actions are referred to in his order as the "Group Seven Proceedings" and the "ETS Proceedings" although in his judgment he referred to the latter as the "Larn" proceedings, Larn Ltd. being the former name of Equity Trading Systems Limited ("ETS").

4. The backdrop for both sets of proceedings was a brazen fraud by which Allseas Group SA, a company registered in Switzerland, ("Allseas") was defrauded of €100 million. The fraud was followed by an attempt to launder the proceeds using the client account of a London firm of solicitors Notable Services LLP ("Notable"). Notable was a multi-disciplinary partnership, whose members included Mr Martin Landman, an accountant, and Mr Francesco Meduri and Ms Cristina Ciserani, both solicitors. The money laundering was partly successful but as a result of police intervention €88 million was returned to Allseas. The present proceedings concern attempts to recover the unreturned balance from Notable and others, including from a bank employee (Mr Othman Louanjli), who dishonestly provided information to Notable in support of one of the main fraudsters, and from the bank that employed him, LLB Verwaltung (Switzerland) AG, formerly known as Liechtensteinische Landesbank (Switzerland) Ltd ("LLB" or "the Bank").

5. The complex events that led up to the transfer of the €100 million to Notable's client account and the circumstances surrounding the payments from that account are set out in full detail in Morgan J's judgment and it will be necessary to pick out some of his more important factual findings when considering the issues to which they relate. At this stage an overview will suffice.

6. Allseas had formed a subsidiary company, Allseas Group Ltd in order to invest the sum of €100 million. That company changed its name to Group Seven Limited ("Group Seven"). Allseas transferred €100 million to Group Seven which transferred it to Allied Investment Corporation Ltd ("AIC"), a company which had been incorporated in Malta in October 2011 for the purpose of the fraud. AIC, which had promised Group Seven a huge return on its investment, in turn purported to lend the money to Larn Ltd ("Larn"), a company owned and directed by one of the fraudsters, Mr Louis Nobre (whose initials formed the company's name). It was AIC that

transferred the monies to Notable's client account in November 2011, where it was held for the benefit of Larn. Mr Nobre then gave instructions to Notable to make some forty payments out of its client account. Acting on these instructions, Notable paid away some €15 million. One of the payments (number 42) was for £170,000 to Nisroy Investments Inc. ("Nisroy"), a Panamanian company. The Judge found that this company acted on Mr Landman's instructions and that the payment was Mr Landman's 'personal fee' (dishonestly concealed from other members of Notable) for helping Mr Nobre to use Notable's client account to make the other payments.

7. In November 2012, Group Seven assigned its causes of action in the Group Seven Proceedings to Rheingold Management Inc ("Rheingold"), but it is more convenient to refer to the claims as being made by Group Seven, as the Judge did.

8. As part of his scheme to persuade Notable to make the payments out of its client account, Mr Nobre enlisted Mr Louanjli to make false statements to Notable in November 2011 about Mr Nobre's good standing with LLB. LLB, which ceased its banking activities at the end of 2013, traded as a private bank, principally in Switzerland, but it also had a small representative office in Abu Dhabi. Mr Louanjli was employed in that office as a relationship manager, in which capacity he introduced Mr Nobre and Larn to LLB. It is a feature of the case that a number of Mr Louanjli's more senior colleagues smelled a rat and were not prepared to accept Mr Nobre or Larn as a client (albeit that an account was opened briefly in the name of Larn) and that the references provided by Mr Louanjli were given later and without the knowledge of anyone at the Bank. For these services to Mr Nobre, Mr Louanjli and a Mr Sebastien Elbied, who worked for Barclays Capital in Paris, received between them the sum of €1 million, that being the first of the payments made by Notable. It was paid to Mr Elbied's company Renaissance Ltd. ("Renaissance") and Mr Louanjli's share (in the end €561,860) was paid on to his own company Bridge Ltd ("Bridge").

9. Group Seven and Rheingold had brought earlier proceedings against various prime movers in the fraud. The Defendants in those proceedings were AIC, Mr Marek Rejniak, Mr Paul Sultana, Larn and Mr Nobre. The claim against Larn and Mr Nobre was compromised by a Tomlin order made on 4 April 2012 which provided for the repayment to Group Seven of certain sums. These payments were not made and Group Seven obtained judgment against Larn and Mr Nobre in the sum of €11,143,192.11. On Group Seven's application, an administration order was made in relation to Larn and it was placed in liquidation on 24 May 2013. As for Mr Nobre, in February 2016, he was convicted on six counts of money laundering and three counts in connection with the possession of fraudulent banking documents. The first two counts of money laundering related to the €100 million. He received a total sentence of 14 years' imprisonment.

10. The proceedings against the other Defendants, apart from Larn and Mr Nobre, were tried by Peter Smith J in 2014. At the trial the only active Defendant was Mr Sultana. The judge handed down his judgment in June 2014: [2014] EWHC 2046 (Ch). He held that AIC, Mr Rejniak and Mr Sultana had committed a fraud on Group Seven. He rescinded the loan agreement between Group Seven and AIC as being a sham and entered judgment in favour of Rheingold against AIC, Mr Rejniak and Mr Sultana for

damages for fraud in the sum of €9,179,850.48. Mr Sultana appealed to the Court of Appeal but his appeal was dismissed on 25 June 2015: [2015] EWCA Civ 631.

11. The Group Seven proceedings with which the present appeal is concerned had two main strands:

(1) Against Notable, Mr Landman and Mr Meduri (but not Ms Ciserani, whose honesty has never been questioned) for compensation for dishonest assistance in relation to breaches of trust by Larn in relation to the €100 million in the Notable client account. It was alleged and accepted that Notable was vicariously liable to Group Seven for the actions of Mr Landman and Mr Meduri. Group Seven also claimed against Notable and Mr Landman for unconscionable receipt of trust monies, in the case of Notable, the fees that it had charged and in the case of Mr Landman the £170,000 bribe paid to Nisroy for his benefit.

(2) Against Mr Louanjli for deceit, for conspiracy with Mr Nobre to injure Group Seven by unlawful means, and for dishonestly assisting a breach of trust. Group Seven claimed against the Bank that it was vicariously liable for Mr Louanjli's dishonest assistance and conspiracy (but not for his unconscionable receipt of the moneys). It also claimed against Mr Elbied in the same terms as against Mr Louanjli.

12. The Larn proceedings were legally very similar to the claims made by Group Seven, save that Larn's claim for dishonest assistance involved alleged breaches of fiduciary duty owed by Mr Nobre in his capacity as the director of Larn. However, the fact that Larn was itself party to the fraud in relation to Group Seven has given rise to issues potentially affecting Larn's claims which do not affect Group Seven's claims. In addition, Larn originally claimed against Notable for alleged negligence in breach of a duty of care owed by it (as Larn's solicitor) to Larn but that claim was not pursued at the end of the trial.

The Judge's decision

13. In summary, in relation to the claims with which these appeals are concerned, the Judge found that:

(1) Mr Landman deliberately and knowingly broke Rule 14.5 of the SRA Accounts Rules 2011 ("the Solicitors' Accounts Rules") which prohibits the provision of banking facilities through a client account, and his conduct in relation to Mr Nobre's requests for payments was dishonest: [338].

(2) Objectively, Mr Landman knew facts which would have shown an honest and reasonable man that Mr Nobre was not entitled to the €100 million: [483].

(3) However, Mr Landman did not actually know or have "blind-eye knowledge" that Larn was not the beneficial owner of the €100 million or that Larn was not entitled to use that money as if it were its own, and in the absence of such knowledge his conduct did not constitute dishonest

assistance of the alleged breaches of trust and fiduciary duty: [455-456, 460-461].

(4) Mr Meduri was not dishonest and did not actually know or have blind-eye knowledge that Larn was not the beneficial owner of the €100 million or that Larn was not entitled to use that money as if it were its own: [449].

(5) Accordingly, Notable, Mr Landman and Mr Meduri are not liable for dishonestly assisting a breach of trust: [472].

(6) Mr Landman is, however, liable for unconscionable receipt of the £170,000 bribe paid to Nisroy: [484].

(7) Mr Louanjli dishonestly assisted in Larn's breach of trust and conspired to injure Group Seven by unlawful means; he had solid grounds for suspicion that Mr Nobre had come by the money dishonestly and that he was assisting in money laundering: [512, 524].

(8) Mr Louanjli's statements to Notable influenced Notable's behaviour in a relevant way and assisted Larn to commit a breach of trust: [497].

(9) The chain of causation between Mr Louanjli's statements and the losses to Group Seven was not broken by Notable's conduct in breaking the Solicitors' Accounts Rules or by Mr Landman's dishonesty: [513].

(10) The Bank is vicariously liable to Group Seven for Mr Louanjli's wrongdoing in dishonestly assisting Larn's breach of trust and in conspiring to injure Group Seven by unlawful means: [554-555].

(11) Mr Louanjli is liable to Group Seven for his unconscionable receipt of the sum of €561,860, being his share of the €1 million paid out to him from Notable's payment to Renaissance: [529].

(12) Larn's claim against Notable for dishonestly assisting Mr Nobre to breach his fiduciary duty to Larn fails for the same reason as Group Seven's claim, namely that Notable believed that Larn was the beneficial owner of the money: [563].

(13) Although Larn could in theory claim to recover the £170,000 paid by Notable to Mr Landman, it would not be appropriate to enter judgment in Larn's favour where Group Seven, the beneficial owner, has already successfully claimed this money from Mr Landman: [564]. The same applies to the claims for unconscionable receipt against Mr Louanjli and Mr Elbied, as Group Seven had already succeeded against them: [567].

(14) Larn's claim against Mr Louanjli and Mr Elbied for dishonestly assisting Mr Nobre's breach of fiduciary duty to Larn succeeds in a sum to be determined and is not defeated by Mr Nobre's illegality: [565-566].

(15) The Bank is vicariously liable to Larn for Mr Louanjli's wrongdoing: [569].

(16) Based on these findings, judgment was entered in the Group Seven proceedings against Mr Louanjli and Mr Elbied for €9,179.850.48 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. Contribution claims were to be dealt with following the hand down of the judgment.

This short summary cannot be a substitute for a consideration of the Judge's own careful reasoning.

The grounds of appeal

14. There are three appellants: (1) Group Seven/Larn, (2) Mr Louanjli, and (3) the Bank.

15. Dealing firstly with the appeal by the Bank, permission to appeal was granted by the Judge in two respects:

(1) against the conclusion that Mr Landman and Notable were not liable for dishonest assistance, given his findings of fact about Mr Landman; and

(2) against the conclusion that the Bank was vicariously liable for Mr Louanjli's conduct.

16. Permission was then granted by Longmore LJ to the Bank on a further five grounds, which are in reality sub-grounds to (1) above and can be broadly summarised in the proposition that the Judge was wrong to find that the bribe to Mr Landman was simply in exchange for securing the *authorisation* of the payments out by Notable as opposed to securing the *acceptance* of the funds by Notable in the first place, when the circumstances giving rise to the finding of unconscionable receipt evidenced knowledge or blind-eye knowledge by Mr Landman that Mr Nobre/Larn were not entitled to the money. Permission to appeal was <u>not</u> granted on one ground, by which it was argued that the Judge erred in concluding that Mr Louanjli's statements had materially caused the breach of trust or that there was assistance, reliance and causation to establish liability on the part of the Bank either in dishonest assistance or conspiracy. In refusing permission, Longmore LJ stated that this was a primary finding of fact that this court would not reverse, but that the refusal was not intended to preclude the "chain of causation" argument, for which permission was given to Mr Louanjli.

17. Group Seven/Larn appeal on similar grounds, alleging that the Judge mis-stated and mis-applied the test for dishonest assistance.

18. Permission was granted by Longmore LJ to Mr Louanjli on two grounds which both assert that the Judge should have found a break in the chain of causation. At the same time, permission was refused in respect of a range of other grounds challenging the factual findings about Mr Louanjli's actions and overall honesty.

19. There are in addition a number of Respondent's Notices.

20. The grounds of appeal can therefore be grouped into three categories:

    (1) issues arising in relation to liability for dishonest assistance in a breach of trust;

    (2) issues concerning causation; and

    (3) issues concerning vicarious liability.

    The parties have distilled these matters into a list of issues, which are better addressed as they arise.

Appellate restraint

21. Before turning to the issues themselves, it is important to bear in mind the proper approach of an appeal court. First-instance decisions will contain judicial conclusions that fall on a spectrum ranging from pure findings of primary fact at one end to pure questions of law at the other. In between are multifactorial assessments, evaluations and inferences drawn from primary facts, exercises of judicial discretion and mixed questions of fact and law. At one end of the spectrum, the appeal court will rarely even contemplate reversing a trial judge's primary findings of fact. This appellate restraint extends also to the trial judge's evaluation of the significance of factual findings or the inferences to be drawn from them. The degree to which this restraint should be exercised in the individual case may, however, be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case or from first-hand experience of the testing of the evidence. In the end, however, no first-instance judicial conclusion is altogether immune from appeal and where a decision is shown to be wrong or to result from a serious procedural error, it is the duty of the appeal court to say so.

22. These long-standing principles, based on a combination of practical and policy considerations, have been thoroughly analysed by the House of Lords and by the Supreme Court in decisions such as:

    Biogen Inc v Medeva plc [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Twinsectra v Yardley* [2002] UKHL 12; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; *Re B (A Child)* [2013] UKSC 33; *McGraddie v McGraddie* [2013] UKSC 58; and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41

    and by this court in, for example:

    Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; *Smech Properties Ltd v Runnymede BC* [2016] EWCA Civ 42; *JSC Bank v Ablyazov* [2018] EWCA Civ 1176; and *British Council v Jeffery* [2018] EWCA Civ 2253.

23. Extensive citation from these authorities is not necessary. For their general effect, it is sufficient to recall one extract, concerning the approach to findings of primary fact

and resulting evaluations, from the recent judgment of Longmore LJ in *Ablyazov* at [40-43]:

> "40. It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts.
>
> 41. Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. As it was put in the majority judgment of the Supreme Court of Canada in *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted by Lord Reed JSC in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 33): "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole." In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:
>
> > "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."
>
> See *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 4). Furthermore, not every detail of the relevant evidence need or can be captured in the reasons given by the judge. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:
>
> > "[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

40. Even where it could in principle be done, for an appellate court in a case involving a substantial body of evidence to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making. Unlike conclusions of law, findings of fact have no status as precedent in future cases and are therefore only capable of affecting the result of the case at hand. Considerations not only of efficiency in time and cost but also of fairness dictate that the judge's conclusions on such points should generally be treated as final. In the words of White J giving the opinion of the United States Supreme Court in *Anderson v City of Bessemer* [1985] 470 US 564, 575 (quoted with approval by the UK Supreme Court in the *McGraddie* case at para 3):

> "… the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' … rather than a 'tryout on the road'"…"

The same point has been made using a different metaphor by Lewison LJ in *Fage UK Ltd v Chobani* UK Ltd [2014] EWCA Civ 5, para 114(ii), when he said:

> "The trial is not a dress rehearsal. It is the first and last night of the show."

41. For these reasons the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is "plainly wrong": see e.g. *McGraddie v McGraddie*, [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion "cannot reasonably be explained or justified" (ibid). As Lord Reed also stated in the *Henderson* case (at para 62):

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached."
>
> Another formulation of the test, which has also been approved at the highest level, is that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293, para 129 (Mance LJ) approved in *Assicurazioni Generali SvA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, para 17 (Clarke LJ) and by the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46."

24. Directing ourselves in accordance with these principles, we now turn to the issues.

ISSUE 1: DISHONEST ASSISTANCE

25. Group Seven and Larn challenge the Judge's legal approach to the test for dishonest assistance. The Bank supports that challenge and, going further, argues that on the basis of his factual findings about Mr Landman, the Judge was bound to find that he, and therefore Notable, were liable in dishonest assistance. Group Seven and Larn are neutral in respect of the Bank's wider appeal. These challenges are disputed by Notable and by Mr Landman.

26. The fundamental issue which we therefore have to consider is whether the Judge was wrong to conclude that Mr Landman was not liable as an accessory for dishonestly assisting breaches of trust by Larn (in its capacity as trustee of the €100 million held in Notable's client account) and breaches of fiduciary duty by Mr Nobre (in his capacity as a director of Larn) when Mr Landman procured or otherwise helped to bring about the disputed payments made from Notable's client account in November 2011. As we shall explain, it is now common ground that all but one of the necessary ingredients of such accessory liability on the part of Mr Landman were present. What was in issue was the requirement of personal dishonesty by him. The Judge held that this crucial requirement had not been established in relation to the relevant breaches of trust and fiduciary duty, because (put shortly) he found that Mr Landman did not know (or have blind-eye knowledge) that the money in the client account was not beneficially owned by Larn and was not at Larn's free disposal. In the absence of such knowledge, it was insufficient, according to the judge, that Mr Landman *did* act dishonestly in facilitating the payments which were made out of the client account. Nor was it enough that his actions formed a central part of the assistance upon which the claimants relied, or that Mr Landman had received a bribe of £170,000 to perform them.

27. We have already observed that, if Mr Landman was liable for dishonestly assisting the relevant breaches of trust and fiduciary duty, Notable accepts that it too would be vicariously liable for the same loss as that occasioned to the claimants by Mr Landman's dishonest conduct. Nor, if liability is established, is there any dispute about the sums which Mr Landman and Notable should be ordered to pay to the claimants in order to make good the unauthorised payments from the client account.

28. In a little more detail, it is agreed that in order to find a person liable for dishonest assistance of a breach of trust, it is necessary to establish that:

    (a) there was a trust in existence at the material time;

    (b) the trustee committed a breach of that trust;

    (c) the defendant assisted the trustee to commit that breach of trust; and

    (d) the defendant's assistance was dishonest.

    It is also agreed that the same principles apply, mutatis mutandis, to a claim for dishonest assistance of a breach of the fiduciary duties which are owed to a company by its director in relation to dealings with the company's assets.

29. At an early stage of his oral submissions to us on behalf of the claimants, Mr Chapman QC made good the contention that, on the Judge's unchallenged findings of primary fact, it is now clear that elements (a), (b) and (c) are satisfied in each action, leaving only the element of dishonesty in issue.

30. So far as Group Seven is concerned, the Judge recorded at [408] the acceptance of the Notable defendants in their pleaded defence that at all relevant times Larn's interest in the money in the Notable client account was held on trust for Group Seven. This was the consequence of the order of Peter Smith J in the earlier proceedings declaring that the purported loan agreements between Group Seven and AIC and between AIC and Larn were void and of no effect. Thus the basic requirement of the existence of a trust was satisfied. The €100 million in the client account of Notable was held by Notable on trust for Larn, which in turn held it on a bare trust for Group Seven. As to the relevant breach of trust, it was common ground at trial that this consisted of the payment away by Larn of approximately €15 million of trust monies for Larn's or Mr Nobre's own purposes, and not for the purposes, or with the consent, of the beneficial owner of the money, Group Seven: [409]. Nor was there any dispute about the third element of the cause of action, as it was clear that Notable did assist Larn's breach of trust in paying out the €15 million: [410]. As Mr Chapman reminded us, the position was that the signatures of both Mr Landman and Mr Meduri were needed in order to authorise payments from Notable's client account. The conclusion was therefore inescapable that, by signing the necessary documents, both Mr Landman personally and Notable provided the necessary assistance for Larn's breach of trust.

31. With regard to Larn's claim against the Notable defendants, the position was substantially similar. As the judge said, at [560]:

> "For the Group Seven claims, the relevant trust was the trust under which Larn held its interest in the Notable client account

> on trust for Group Seven. For the Larn claims, the relevant trust arises from the fiduciary duty owed to Larn by Mr Nobre as a director of Larn in relation to the assets of Larn. It is established law that the principles as to dishonest assistance… apply to a breach of a fiduciary duty of that kind in the same way as they apply to a breach of trust."

Equally, there was no dispute that Mr Nobre committed breaches of his fiduciary duty to Larn, or that the Notable defendants assisted him to commit those breaches. At trial, the Notable defendants were all represented by the same solicitors and counsel, and in their written opening submissions it was expressly accepted that the only requirement of dishonest assistance which was in dispute was whether the defendant's conduct was dishonest.

Dishonesty: the legal test

32. The modern law on the role of dishonesty as an essential ingredient of accessory liability for breach of trust stems from the seminal judgment of the Privy Council in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 ("*Tan*"), delivered by Lord Nicholls of Birkenhead. Before then, the prevailing view was that accessory liability for breach of trust would arise only if a third party (i.e. a non-trustee) "assist [*ed*] with knowledge in a dishonest and fraudulent design on the part of the trustees", to quote from the classic formulation by Lord Selborne L.C. in *Barnes v Addy* (1874) L.R. 9 Ch. App. 244, 251-252, cited by Lord Nicholls at 382B. Hence the previous label for the tort as "knowing assistance".

33. The issue which the Board had to resolve in *Tan* was "whether the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee", as Lord Selborne's formulation appeared to dictate: see 384D. After giving some examples of the difficulties inherent in that formulation, Lord Nicholls said at 386E that to resolve the issue it was "necessary to take an overall look at the accessory liability principle". A conclusion could not be reached "on the nature of the breach of trust which may trigger accessory liability without at the same time considering the other ingredients including, in particular, the state of mind of the third party." He then considered, and rejected, the extreme positions that (a) a third party who does not receive trust property ought never to be liable directly to the beneficiaries merely because he assisted the trustee to commit a breach of trust or procured him to do so, and (b) that there should be strict liability, extending even to the case where a third party deals with a trustee without knowing, or having any reason to suspect, that he is a trustee, or to the case where the third party knows that he is dealing with a trustee, but has no reason to know or suspect that the transaction in question is inconsistent with the terms of the trust. As Lord Nicholls said, at 387D:

> "The law has never gone so far as to give a beneficiary a remedy against a non-recipient third party in such circumstances. Within defined limits, proprietary rights, whether legal or equitable, endure against third parties who were unaware of their existence. But accessory liability is concerned with the liability of a person who has not received any property. His liability is not property-based. His only sin is

> that he interfered with the due performance by the trustee of the fiduciary obligations undertaken by the trustee."

34. Lord Nicholls continued, at 387G:

> "Given, then, that in some circumstances a third party may be liable directly to a beneficiary, but given also that the liability is not so strict that there would be liability even when the third party was wholly unaware of the existence of the trust, the next step is to seek to identify the touchstone of liability. By common accord dishonesty fulfils this role."

After making extensive reference to previous English and Commonwealth authority on the appropriate test for fault-based liability, and observing that "[m]ost, but not all, commentators prefer the test of dishonesty", Lord Nicholls in an important passage discussed what is meant by "dishonesty" in the present context. He said, at 389B-E:

> "Whatever may be the position in some criminal or other contexts (see, for instance, *Reg. v. Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. 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."

35. After referring to some of the problems caused by the taking of different types of risk, Lord Nicholls pointed out (at 390E) that the liability of a trustee for breach of trust is strict, and has nothing to do with his honesty or lack of honesty:

> "If he departs from the trust terms he is liable unless excused by a provision in the trust instrument or relieved by the court. The analysis of the position of the accessory, such as the

> solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly; but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do?
>
> The only answer to these questions lies with keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific."

36. Lord Nicholls added, at 390G:

> "Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person… Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.
>
> Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."

37. Lord Nicholls went on to dismiss negligence as a sufficient test for third party liability, together with the concept of unconscionable conduct, before stating the following conclusion, at 392F:

> "Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. "Knowingly" is better avoided as a defining ingredient of the principle, and in the context of this principle, the *Baden* [1993] 1 WLR 509 scale of knowledge is best forgotten."

38. The next case at the highest level which we need to consider is the decision of the House of Lords in *Twinsectra Limited v Yardley* [2002] UKHL 12, [2002] 2 AC 164 ("*Twinsectra*"). With the benefit of hindsight, it can be seen that this case temporarily clouded, although it did not ultimately obscure, the picture painted so clearly by Lord Nicholls in *Tan.* The facts were rather complex, but the relevant issue, in essence, was whether a solicitor, Mr Leach, was liable for dishonestly assisting in a breach of trust when he made certain payments on the instructions of his client, Mr Yardley, out of a sum of money which Mr Leach had received from another firm of solicitors, Sims, which held the money subject to an undertaking that it would be retained by them until applied in the acquisition of property on behalf of Mr Yardley, and would be utilised solely for that purpose. Contrary to the terms of the undertaking, Sims did not retain the money until it was applied in the acquisition of property by Mr Yardley. Instead, on being given an assurance by Mr Yardley that it would be so applied, they paid it to Mr Leach, who was aware of the undertaking, but took no steps to ensure that the money was utilised for that purpose and simply paid it out upon Mr Yardley's instructions. As a result, some £357,000 was used by Mr Yardley for other purposes, and the original loan of £1 million by Twinsectra to Mr Yardley was not repaid. Twinsectra then sued all the parties involved, including Mr Leach for dishonest assistance on the basis that the payment by Sims to Mr Leach in breach of the undertaking was a breach of trust.

39. Reversing the Court of Appeal, and restoring the decision of the trial judge (Carnwath J), the House of Lords held by a majority (Lord Millett dissenting) that Mr Leach was not liable because he honestly believed, as the judge had found, that the money was at the free disposal of Mr Yardley.

40. The main difficulty with the case is that the majority purported to follow the principles stated in *Tan*, but interpreted them as requiring application of the combined test for dishonesty which had been held to apply in the criminal law in *R v Ghosh* [1982] QB 1053 ("*Ghosh*"). According to this test ("the *Ghosh* test"), a finding of dishonesty requires not only the application of an objective standard of honesty, but also subjective knowledge by the defendant that what he was doing would be regarded as dishonest by honest people. This appears most clearly from the speech of Lord Hutton, and from the speech of Lord Hoffmann at [20] where he said:

> "For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles [*i.e. those laid down by the Privy Council in Tan*] 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."

See too the speech of Lord Steyn at [7], where he agreed that "a finding of accessory liability against Mr Leach was only permissible if, applying what Lord Hutton has called the combined test, it were established on the evidence that Mr Leach had been dishonest."

41. A further difficulty with *Twinsectra* is that the dissenting member of the court, Lord Millett, disagreed with the substitution in *Tan* of dishonesty for knowledge as the

touchstone for accessory liability for breach of trust. Nevertheless, Lord Millett was in favour of adopting a purely objective test, although he considered it preferable to retain the traditional description of this head of equitable liability as arising from "knowing assistance": see [134]. In reaching this conclusion, Lord Millett pointed out, in our view correctly, that Lord Nicholls in *Tan* had rejected the *Ghosh* test of dishonesty, including its subjective second limb. As Lord Millett said, at [121]:

> "In my opinion Lord Nicholls was adopting an objective standard of dishonesty by which the defendant is expected to attain the standard which would be observed by an honest person placed in similar circumstances. Account must be taken of subjective considerations such as the defendant's experience and intelligence and his actual state of knowledge at the relevant time. But it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was."

42. Lord Millett then said that this was the way in which Lord Nicholls' use of the term "dishonesty" had been widely understood by commentators with practical experience in the field (including in influential articles by William Blair QC and Andrew Stafford QC), as well as by Mance LJ in *Grupo Torras SA v Al Sabah* [1997] CLC 1553. Lord Millett added, at [122]:

> "The only subjective elements are those relating to the defendant's knowledge, experience and attributes. The objective elements include not only the standard of honesty (which is not controversial) but also the recognition of wrongdoing. The question is whether an honest person would appreciate that what he was doing was wrong or improper, not whether the defendant himself actually appreciated this."

43. On the question of knowledge, Lord Millett also made some important observations at [135] to [137], albeit on the assumption that knowledge rather than dishonesty should be the touchstone for accessory liability:

> "135. The question here is whether it is sufficient that the accessory should have actual knowledge of the facts which created the trust, or must he also have appreciated that they did so? It is obviously not necessary that he should know the details of the trust or the identity of the beneficiary. It is sufficient that he knows that the money is not at the free disposal of the principal. In some circumstances it may not even be necessary that his knowledge should extend this far. It may be sufficient that he knows that he is assisting in a dishonest scheme.
>
> 136. That is not this case, for in the absence of knowledge that his client is not entitled to receive it there is nothing intrinsically dishonest in a solicitor paying money to him. But I am satisfied that knowledge of the arrangements which constitute the trust is sufficient; it is not necessary that the

> defendant should appreciate that they do so. Of course, if they do not create a trust, then he will not be liable for having assisted in a breach of trust. But he takes the risk that they do.
>
> 137. The gravamen of the charge against the principal is not that he has broken his word, but that having been entrusted with the control of a fund with limited powers of disposal he has betrayed the confidence placed in him by disposing of the money in an unauthorised manner. The gravamen of the charge against the accessory is not that he is handling stolen property, but that he is assisting a person who has been entrusted with the control of a fund to dispose of the fund in an unauthorised manner. He should be liable if he knows of the arrangements by which that person obtained control of the money and that his authority to deal with the money was limited, and participates in a dealing with the money in a manner which he knows is unauthorised. I do not believe that the man in the street would have any doubt that such conduct was culpable."

44. It is convenient at this point to set out some equally influential observations on the topic of knowledge made by Lord Hoffmann, when explaining why in his view Mr Leach should be acquitted of dishonesty:

> "22. … I do respectfully think it was unfortunate that the judge three times used the expression "shut his eyes" to "the details", or "the problems", or "the implications". The expression produces in judges a reflex image of Admiral Nelson at Copenhagen and the common use of this image by lawyers to signify a deliberate abstinence from inquiry in order to avoid certain knowledge of what one suspects to be the case: see Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] 2 WLR 170, 179, per Lord Hobhouse of Woodborough, and Lord Scott of Foscote, at pp 207-210. But, as my noble and learned friend Lord Millett points out, there were in this case no relevant facts of which Mr Leach was unaware. What I think the judge meant was that he took a blinkered approach to his professional duties as a solicitor, or buried his head in the sand (to invoke two different animal images). But neither of those would be dishonest.
>
> 23. Mr Leach believed that the money was at the disposal of Mr Yardley. He thought that whether Mr Yardley's use of the money would be contrary to the assurance he had given Mr Sims or put Mr Sims in breach of his undertaking was a matter between those two gentlemen. Such a state of mind may have been wrong. It may have been, as the judge said, misguided. But if he honestly believed, as the judge found, that the money was at Mr Yardley's disposal, he was not dishonest.
>
> 24. I do not suggest that one cannot be dishonest without a full appreciation of the legal analysis of the transaction. A person

> may dishonestly assist in the commission of a breach of trust without any idea of what a trust means. The necessary dishonest state of mind may be found to exist simply on the fact that he knew perfectly well that he was helping to pay away money to which the recipient was not entitled. But that was not the case here. I would allow the appeal and restore the decision of Carnwath J."

45. We can now move on to the decision of the Privy Council, on appeal from the Court of Appeal of the Isle of Man, in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 ("*Barlow Clowes*"). Both Lord Nicholls and Lord Hoffmann were members of the Board, together with Lord Steyn, Lord Walker of Gestingthorpe and Lord Carswell. The judgment of the Board was delivered by Lord Hoffmann. The facts arose from the well-known Barlow Clowes scandal in the mid-1980s, concerning a fraudulent offshore investment scheme which attracted £140 million from mainly small United Kingdom investors. Some of these funds had been paid through bank accounts in the Isle of Man administered by Eurotrust, one of whose principal directors was a Mr Henwood. The issue before the Board was whether Mr Henwood had given dishonest assistance to the misappropriation of the funds, as the trial judge had found. The Staff of Government Division of the High Court of the Isle of Man then allowed Mr Henwood's appeal, on the ground that the judge's conclusion was not supported by the evidence.

46. In dealing with this issue, the Board had to consider whether Mr Henwood could properly be found liable for dishonest assistance, in the absence of a finding by the trial judge that he was subjectively aware that his conduct would by ordinary standards be regarded as dishonest.

47. Lord Hoffmann recorded, at [10], that the trial judge (Hazel Williamson QC) had stated the law in terms largely derived from *Tan*. He continued:

> "10. … In summary, she said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make enquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.
>
> 11. The judge found that during and after June 1987 Mr Henwood strongly suspected that the funds passing through his

> hands were monies which Barlow Clowes had received through members of the public who thought they were subscribing to a scheme of investment in gilt-edged securities. If those suspicions were correct, no honest person could have assisted Mr Clowes and Mr Cramer to dispose of the funds for their personal use. But Mr Henwood consciously decided not to make enquires because he preferred in his own interest not to run the risk of discovering the truth.
>
> 12. Their Lordships consider that by ordinary standards such a state of mind is dishonest."

48. Lord Hoffmann went on to consider the submission made for Mr Henwood that his state of mind could not be regarded as dishonest unless Mr Henwood was aware that it would by ordinary standards be so regarded. That argument was supported, as one would expect, by reference to Lord Hutton's speech in *Twinsectra*, with which the majority in that case (including Lord Hoffmann) had agreed. However, the submission was rejected. While accepting that there had been "an element of ambiguity" in Lord Hutton's remarks, Lord Hoffmann said, at [15], that Lord Hutton's reference to "what he knows would offend normally accepted standards of honest conduct":

> "meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were."

49. In a similar vein, Lord Hoffmann then said, at [16], that his own earlier statement that a dishonest state of mind meant "consciousness that one is transgressing ordinary standards of honest behaviour":

> "was… intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were."

50. In the light of this clarification, a point of some nicety in the law of precedent arose. Were courts below the level of the Supreme Court now bound to follow the explanation of *Twinsectra* provided in *Barlow Clowes*, even though *Twinsectra* was a decision of the House of Lords and *Barlow Clowes* (like *Tan*) was a decision of the Privy Council? Fortunately, we do not need to resolve this question, because the Judge dealt with it in terms which we consider to be correct, and have not been challenged before us, at [415]:

> "I consider that the short answer to Mr Flenley's submission is that the Court of Appeal in Starglade Properties Ltd v Nash [2011] 1 Lloyd's Rep F.C. 102 has held, as part of its ratio, that the decision in Barlow Clowes, and in particular its explanation of the decision in Twinsectra, contained a correct statement of English law. I am bound [*and, we would add, so is this Court*]

> by the decision in Starglade and accordingly I will proceed on the basis that Barlow Clowes contains a correct statement of English law and that the earlier decision in Twinsectra is now to be understood in the light of the explanation of it given in Barlow Clowes."

51. In any event, even if there were any room for doubt on this point, it has now been dispelled by the most recent high level case which we need to consider at this stage of our analysis. We refer to the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 ("*Ivey*"), judgment in which was delivered on 25 October 2017 less than three weeks after Morgan J had handed down his judgment in the present case. The issue in *Ivey* was whether a professional gambler, who unknown to the casino had adopted an edge-sorting strategy which gave him an advantage in a game of pure chance, was able to recover his winnings of over £7.7 million from the defendant. The casino argued that the claimant was in breach of an implied term in the gaming contract between them that he would not cheat, and that he had also committed the offence of cheating contrary to section 42 of the Gambling Act 2005, and so was not entitled to found his claim on his own criminal conduct. The claimant admitted the implied term, but denied cheating or committing any criminal offence. The trial judge dismissed the claim on the ground that, although neither dishonesty nor deception was involved, the claimant's play amounted to cheating for the purposes of the implied term. This decision was upheld, by a majority, in this Court: see [2016] EWCA Civ 1093, [2017] 1 WLR 679.

52. The Supreme Court dismissed Mr Ivey's further appeal, holding that cheating had the same meaning both in the context of an implied term not to cheat and when applying section 42 of the 2005 Act. In the context of games and gambling, the expression carried its own inherent stamp of wrongfulness, and whether the relevant course of conduct amounted to cheating, given the nature and rules of the game concerned, was a jury question to be determined objectively.

53. The judgment of the court was delivered by Lord Hughes JSC. In the context of the criminal law, the case is of particular significance for the court's rejection of the *Ghosh* test of dishonesty with its subjective second stage. As Lord Hughes said, at [59]:

> "There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so. On the contrary, it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable."

54. Lord Hughes added at [60], after consideration of an example posited in *Ghosh* of a man who comes from a country where public transport is free, and on his first day here travels on a bus without paying:

> "The answer to the court's question is that "dishonestly", where it appears [*in the Theft Act 1968*], is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts."

55. In an important passage, Lord Hughes also considered the role of dishonesty in civil proceedings:

> "62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in [*Twinsectra*], the law is settled on the objective test set out by Lord Nicholls of Birkenhead in [*Tan*]: see [*Barlow Clowes*], *Abou-Rahmah v Abacha* [2007] Bus LR 220 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in the *Barlow Clowes* case [2006] 1 WLR 1476, para 10 by Lord Hoffmann, who had been a party also to the *Twinsectra* case:
>
> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."
>
> 63. Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose."

56. After a full review of the criminal case law since *Ghosh*, Lord Hughes then stated his conclusions at [74] and [75]. He said that the second leg of the *Ghosh* test does not correctly represent the law, and that the test of dishonesty is as set out by Lord Nicholls in *Tan* and by Lord Hoffmann in *Barlow Clowes* at [10]. Lord Hughes continued:

> "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."

Accordingly, as Lord Hughes explained at [75], if (contrary to his previous conclusion) the concept of cheating at gambling included an additional legal element of dishonesty, it would be satisfied by the application of the above test. It may be that Mr Ivey was truthful when he said that he did not regard his conduct as cheating, but that could not amount to a finding that his behaviour was honest. Whatever his own views on the question may have been, Mr Ivey's conduct constituted cheating, and it was also dishonest.

57. 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.

Actual knowledge and blind-eye knowledge

58. The discussions of knowledge by Lord Hoffmann and Lord Millett in *Twinsectra* indicate that knowledge of a fact may be imputed to a person if he turns a blind eye to it, as Nelson is supposed to have done at Copenhagen, or if in legal parlance he deliberately abstains from enquiry in order to avoid certain knowledge of what he already suspects to be the case. It is convenient to use the expression "blind-eye knowledge" to denote imputed knowledge of this type. In the context of dishonest assistance for breach of trust or fiduciary duty, it was common ground before us, and

we consider it correct in principle, to equate blind-eye knowledge with actual knowledge for the purposes of the first stage of the test laid down in *Tan* and endorsed in *Barlow Clowes* and *Ivey*. It is important, however, to understand the limits of the doctrine. It is not enough that the defendant merely suspects something to be the case, or that he negligently refrains from making further enquiries. As the House of Lords made clear in the *Manifest Shipping* case, the imputation of blind-eye knowledge requires two conditions to be satisfied. The first is the existence of a suspicion that certain facts may exist, and the second is a conscious decision to refrain from taking any step to confirm their existence: see the speech of Lord Scott at [112], and the observations to similar effect of Lord Hobhouse at [25]. The judgments also make it clear that the existence of the suspicion is to be judged subjectively by reference to the beliefs of the relevant person, and that the decision to avoid obtaining confirmation must be deliberate.

59. Furthermore, Lord Scott (with whose speech Lord Steyn and Lord Hoffmann agreed) said at [116]:

> "In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to obtain confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity. That, in my opinion is not warranted by section 39(5) [*of the Marine Insurance Act 1906, which provides that the insurer is not liable for any loss attributable to unseaworthiness where, with the privity of the assured, the ship is sent to sea in an unseaworthy state*]."

As this quotation indicates, the issue in *Manifest Shipping* arose in the context of marine insurance; but the principles there stated apply with equal force to the law of accessory liability, as Lord Hoffmann's reference to *Manifest Shipping* in *Twinsectra* at [22] makes clear.

60. Where the conditions for imputation of blind-eye knowledge are satisfied, a person is treated for the purposes of establishing liability for dishonest assistance as if he had actual knowledge of the relevant facts. We do not think it follows from this, however, that suspicions which fall short of constituting blind-eye knowledge are wholly irrelevant to the question whether an alleged accessory has acted dishonestly. The first stage of the test, as it is now understood, requires the court to ascertain all the relevant facts, including the knowledge and beliefs of the defendant. Even though knowledge, in this context, must now be taken to be confined to actual and blind-eye knowledge, we see no reason in principle why a person's beliefs may not include suspicions which he harbours, but which in and of themselves fall short of constituting blind-eye knowledge. The existence of such suspicions, and the weight (if any) to be attributed to them, are then matters to be taken into account at the objective second stage of the test. Or to make the same point in a different way, the existence of a legal technique for imputing constructive knowledge, if certain conditions are satisfied, should not be taken as implicitly restricting the scope of the subjective enquiry into a person's state

of mind and beliefs at the first stage. 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.

The decision of the Judge

61. The Judge's discussion and conclusions in relations to Group Seven's claims against Notable, Mr Landman and Mr Meduri run from [405] to [493]. For present purposes, we can ignore paragraphs [488] to [493], which concern certain direct claims against Notable. We will, however, need to look at the Judge's conclusions relating to Mr Landman's unconscionable receipt of the £170,000 paid by Larn to Nisroy, for any light which those conclusions may throw on the Judge's treatment of the dishonest assistance claims and his reasons for exonerating Mr Landman from such liability.

62. The Judge dealt much more briefly with the claims by Larn against the Notable defendants, at [560] and [563] to [564]. It has not been suggested that any material distinction should be drawn between the Group Seven and Larn claims in the context of dishonest assistance, so we can concentrate on the Judge's analysis and findings in relation to the Group Seven claims.

63. After explaining that the only issue in relation to the dishonest assistance claims against the Notable defendants was whether the assistance was dishonest, the Judge embarked on a lengthy review of the authorities on dishonesty which runs from [411] to [440]. As we have done, he cited extensively from *Tan*, *Twinsectra* and *Barlow Clowes*. At [424], he quoted a passage from *Barlow Clowes* to which we have not so far referred, in which Lord Hoffmann considered the question of what Mr Henwood needed to know in order to be held to be dishonest. Lord Hoffmann said, at [28]:

> "First, it was not necessary… that Mr Henwood should have concluded that the disposals were of monies held in trust. It was sufficient that he should have entertained a clear suspicion that this was the case. Secondly, it is quite unreal to suppose that Mr Henwood needed to know all the details to which the court referred before he had grounds to suspect that Mr Clowes and Mr Cramer were misappropriating their investors' money. The money in Barlow Clowes was either held on trust for the investors or else belonged to the company and was subject to fiduciary duties on the part of the directors. In either case, Mr Clowes and Mr Cramer could not have been entitled to make free with it as they pleased. In *Brinks Ltd v Abu-Saleh* [1996] CLC 133, 151 Rimer J expressed the opinion that a person cannot be liable for dishonest assistance in a breach of trust unless he knows of the existence of the trust or at least the facts giving rise to the trust. But their Lordships do not agree. Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means: see the *Twinsectra* case [2002] 2 AC 164, para 19 (Lord Hoffmann) and para 135 (Lord Millett). And it was not necessary to know the "precise involvement" of Mr Cramer in the group's affairs

> in order to suspect that neither he nor anyone else had the right to use Barlow Clowes money for speculative investments of their own."

64. After quoting this passage, the Judge said at [425]:

> "Paragraph [28] in Barlow Clowes is interesting in that Lord Hoffmann refers to "a clear suspicion" of a breach of trust being sufficient. Further, he held that an accessory could suspect that he was assisting in a misappropriation of money without knowing that the money was held on trust or what a trust meant. Finally, Lord Hoffmann referred with approval to paragraph [135] in the dissenting judgment of Lord Millett in Twinsectra, which I have quoted above."

We would respectfully endorse those comments, which seem to us to reinforce the point that clear suspicions may play a part when examining the state of mind of an accessory. Similar points were also made by Rix LJ in *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827, at [37] to [39], quoted by the Judge at [428].

65. It is unnecessary for us to make further reference to the other Court of Appeal and High Court authorities to which the Judge referred, particularly as we have the benefit, which he did not, of the decision of the Supreme Court in *Ivey*.

66. After observing that there was no dispute about the vicarious liability of Notable if either Mr Landman or Mr Meduri dishonestly assisted a breach of trust, the Judge began by considering the position of Mr Meduri. He found it helpful to approach the matter in two stages: see [442]. The first stage was to examine what Mr Meduri knew or suspected about the ownership of the €100 million and what he knew or suspected as to Larn's entitlement to use that money as if it were its own. The second stage was to assess Mr Meduri's conduct in relation to the approval by Notable of the payments requested by Mr Nobre.

67. In relation to Mr Meduri's actual knowledge, the Judge found it was "relatively clear to Mr Meduri that some at least of the payments authorised on 15 November 2011 were not for investment purposes", that being the purpose specified in the loan agreement between AIC and Larn: [443]. The Judge also accepted Mr Meduri's evidence that "he believed that the loan agreement was simply a paper transaction between connected companies to allow Larn to have the use of the money in the United Kingdom in a way which was tax efficient as distinct from an arms-length loan intended to have provisions which had to be observed": ibid. Without fuller explanation, this may seem to have been a benevolent finding; but Mr Meduri is clearly entitled to the benefit of it, and in the absence of any appeal by Group Seven from the Judge's exoneration of Mr Meduri, we are in no position to criticise it.

68. The Judge next considered what Mr Meduri suspected as to the ownership of the money and/or Larn's entitlement to use it as if it were its own. The Judge directed himself, at [445], about the requirements of blind-eye knowledge, by reference to the *Manifest Shipping* case.

69. The Judge then observed at [446] that, before 15 November 2011, "there were obviously questions which needed to be asked as to where the €100 million had come from and how it was that Larn was able to transfer it to the Notable client account." There were two main reasons for this: first, that anti-money laundering regulations required Notable to ask questions as to the source of the funds; and secondly, Mr Nobre was "an unusual character who was in many respects secretive", and from an objective standpoint he should have been regarded with a level of suspicion, and questioned about his background and alleged wealth.

70. The Judge continued:

> "The difficulty for Group Seven's case of dishonesty, in so far as it is based on there being grounds for suspicion of Mr Nobre, is that Notable, and Mr Meduri in particular, did ask questions. He took advice as to the questions he should ask. He then endeavoured to pursue those questions. The advice from Mr Choudhury of the Law Society was that he could only go so far and there would come a point when he could draw a line and form a judgment as to what he was dealing with."

71. Applying *Manifest Shipping*, the Judge was "not persuaded that Mr Meduri had blind eye knowledge of these matters". Nor did he have a "clear suspicion" as that phrase is used in the authorities, nor had he acted in reckless disregard of others' rights or possible rights: [447]. The Judge further found, at [448], that:

> "Mr Meduri considered that he had asked appropriate questions and that Mr Nobre had provided adequate answers to those questions which entitled Mr Meduri to proceed on the basis that Mr Nobre was entitled to deal with the money as his own."

72. Having found that Mr Meduri had neither actual nor blind-eye knowledge that Larn was not the beneficial owner of the €100 million, or that Larn was not entitled to use that money as if it were its own, the Judge moved on to consider Mr Meduri's conduct in relation to the approval by Notable of the payments requested by Mr Nobre. The Judge referred to his earlier findings that, in authorising the payments, Notable had in various ways failed to comply with the Solicitors' Accounts Rules. However, Notable and Mr Meduri were entitled to rely on the advice given by Mr Choudhury. Based on that advice, Notable and Mr Meduri set about establishing two things: first, that they had done proper checks on the recipients of payments; and secondly, that Notable knew enough about the underlying transactions to which the payments related. Mr Meduri had made himself primarily responsible for the first of those tasks, and effectively left the second of them to Mr Landman. The Judge considered that Mr Meduri was entitled to leave the second task to Mr Landman, who was the client partner and had repeatedly told Mr Meduri that he knew about the underlying transactions: [451].

73. In relation to Mr Meduri's performance of the first task, the Judge said he "would not rate his performance very highly and perhaps it was incompetent", but he was "clear that Mr Meduri was not dishonest in these respects": [452].

74. The Judge then set out his final conclusion on Mr Meduri's alleged dishonesty at [453]. He commented that Mr Meduri had not had to deal with a similar situation in the past, and was not very experienced or well prepared for dealing with it. He "very wisely sought advice and he genuinely tried to follow it". Furthermore, "he was more dazzled than suspicious about the enormous amount of money he was dealing with and the exotic character and behaviour of Mr Nobre". He also wanted to avoid any confrontation with Mr Nobre, and wanted Notable's fees to be paid out of the €100 million. Taking all these matters into account, in addition to those he had already considered, the Judge declined to find that Mr Meduri was dishonest.

75. Having acquitted Mr Meduri of dishonesty, the Judge then turned to consider the position of Mr Landman. He began by observing, at [454], that his position was "much more complicated" than that of Mr Meduri, but he nevertheless found it helpful to approach the matter in the same two stages, i.e. first to examine what Mr Landman knew or suspected about the ownership of the money and Larn's entitlement to use it, and secondly to assess Mr Landman's conduct in relation to the approval by Notable of the payments requested by Mr Nobre.

76. As before, the Judge began his examination of stage one by considering what Mr Landman actually knew, as distinct from what he might have suspected. His findings about actual knowledge were as follows:

> "455. … It is not clear to me that Group Seven ever did allege that Mr Landman actually knew that the money was not owned by Larn or that Group Seven ever did put that allegation to Mr Landman in cross-examination. I confess that I am highly suspicious as to what Mr Landman might have found out from Mr Nobre which he did not share with the court in the course of his evidence. I am particularly suspicious about what he might have found out in the period from 4 to 14 November 2011 when he was in very close contact with Mr Nobre and he also had contact with Mr Louanjli. I am quite sure that Mr Landman has not been frank with the court about what was happening and what was discussed in that period. However, my suspicion as to the possibilities which there might have been during that period for Mr Landman to find out about the source of the €100 million is simply not enough for me to make a finding on the balance of probabilities that Mr Landman knew that the money did not belong to Larn.
>
> 456. Group Seven does allege that Mr Landman knew that Larn was not entitled to use the money as if it were its own because of the terms of the loan agreement between AIC and Larn. I have already considered this point when addressing the position of Mr Meduri. In the end, I consider that I must make the same findings in relation to Mr Landman, and for the same reasons, as I did in relation to Mr Meduri."

77. We would observe at this point that it is difficult to understand why the Judge apparently felt obliged ("must") to make the same findings in relation to Mr Landman as he had made in relation to Mr Meduri at [443], namely that he believed the loan agreement to be "simply a paper transaction between connected companies to allow Larn to have the use of the money in the United Kingdom in a way which was tax efficient". We have to accept that Mr Meduri genuinely held that belief, however improbable it may seem, but why should the same be said of Mr Landman? Unlike Mr Meduri, he had agreed to accept a bribe of £170,000, which was to be paid to him out of the €100 million, and which he would never receive unless the money was first paid into Notable's client account. Self-evidently, a corrupt payment of that nature could never have formed part of a legitimate tax planning strategy.

78. The Judge then considered the separate question of what Mr Landman suspected about the ownership of the money and Larn's entitlement to use it. He recalled his conclusion that Mr Meduri did not have blind-eye knowledge, and said at [457]:

> "I have carefully considered whether I am able to make the same findings in relation to Mr Landman. I have found this a difficult assessment given Mr Landman's propensity for dishonesty. I have to ask myself whether Mr Landman's state of mind amounted to a firmly grounded suspicion as to where the €100 million had come from and whether he deliberately decided to avoid asking questions as to the source of the money."

79. The Judge then considered and answered this question in the next three paragraphs, which we need to set out in full:

> "458. As to the extent of Mr Landman's suspicion as to where the €100 million came from, there must have been times during his long association with Mr Nobre when he considered that Mr Nobre was a fake. He described him as "a con man" in August 2011. However, even before the €100 million arrived, he did not always think that Mr Nobre was a fake. This is shown by the fact that he spent [*a lot of*] time seeking to assist Mr Nobre with his proposed investments. He also paid, or caused to be paid, Mr Nobre's bills to Savills and GRM. When the €100 million arrived, Mr Landman seems genuinely to have thought that he had been wrong to have doubts about Mr Nobre. Mr Landman then thought that Mr Nobre had been right all along and that he was indeed a very rich man.
>
> 459. As to whether Mr Landman deliberately refrained from asking questions about the source of the money because he did not want to know the source of the money, I must take proper account of the fact that Notable did ask a large number of questions on that topic. Notable took advice about how to go about that process and the task was carried out, principally by Mr Meduri and Ms Ciserani. I have held that Mr Meduri and Ms Ciserani believed that Notable had asked the appropriate questions and had been [*given*] adequate answers. As to Mr

> Landman, it is in his favour that it was he who proposed to Notable in the first place that it instruct solicitors to advise Notable on the steps it should take as a protection against money laundering. At that stage, it is clear that Mr Landman genuinely wanted that advice and expected Notable to follow it. Mr Landman also knew that at the end of the process, Mr Meduri and Ms Ciserani were satisfied with the outcome and that they were entitled to proceed on the basis that Mr Nobre was able to deal with the money as his own. I have considered whether the evidence supports a finding that Mr Landman sought to manipulate the process of enquiry being carried out by Mr Meduri and Ms Ciserani and what the effect of such a finding should be. I have referred earlier to interventions by Mr Landman when he suggested that Ms Ciserani should not look into something and when he was critical of Ms Ciserani after the event for, it seems, trying to be thorough. I have also considered the implications of the information which Mr Nobre gave to Vogt about AndBanc and Mr Landman's direction to Mr Nobre not to tell Mr Meduri about that matter. Those points give me cause for concern but my overall conclusion is that Mr Landman allowed Mr Meduri and Ms Ciserani to carry out the process of enquiry which Mr Landman had started and that he was entitled to rely on their conclusion that Mr Nobre had provided adequate information as to the source of the funds.
>
> 460. Finally, on the question of blind eye knowledge, I have reflected again on the fact that I have found Mr Landman to have a propensity for dishonesty. His persistent lying at the trial was a bad example of that. Further, he consistently lied to Mr Meduri on 15 November 2011 as to his alleged knowledge of the underlying transactions. His lies to Mr Meduri showed that he wanted to help Mr Nobre and, of course, he was being well paid by Mr Nobre for acting in that way. I therefore wish to consider whether these findings taken with any other relevant considerations would justify the conclusion on the balance of probabilities that Mr Landman had blind eye knowledge that the money was not beneficially owned by Larn or that Larn was not entitled to use it. In the end, I am not satisfied that I can make that finding. I am not persuaded that the fact that Mr Landman has a dishonest propensity and was dishonest in relation to the authorisation of payments justifies a finding that he was dishonest in this further respect also, when the evidence actually points the other way."

80. The paragraphs which we have just quoted give rise to a number of obvious questions, and they lie at the heart of much of the argument which we heard on the issue of dishonest assistance. For now, we would merely make the following points. First, the Judge's discussion seems to have been confined to the question of blind-eye knowledge, and whether the test which he had formulated at the end of [457] was satisfied. Secondly, the Judge was clearly much influenced by the fact that Notable

obtained advice on money laundering from Stewarts Law and the Law Society, and it was Mr Landman who first proposed that solicitors should be appointed to give that advice. The Judge expressly regarded this as a point in Mr Landman's favour, and found that Mr Landman "genuinely wanted that advice and expected Notable to follow it". But the Judge does not deal directly with the critical point that Mr Landman deliberately withheld from his colleagues at Notable, as he did from Stewarts Law and the Law Society, that he was in the process of negotiating a bribe of £170,000 from Mr Nobre. As was frankly conceded in the course of the hearing before us, the proposed transactions, including receipt of the €100 million into Notable's client account, could not possibly have proceeded if Mr Landman had imparted this vital knowledge. It would at once have been obvious that no reputable firm of solicitors could have anything to do with such a client or his supposed wealth, nor would Stewarts Law and the Law Society have advised as they did. Further, the Judge seems to have skirted this point, and failed to recognise its true significance, when he merely said (at [460]) that Mr Landman's lies to Mr Meduri "showed that he wanted to help Mr Nobre and, of course, he was being well paid by Mr Nobre for acting in that way". Indeed, it is a striking feature of the judgment that the Judge nowhere uses the word "bribe" to describe the undoubtedly corrupt payment which Mr Landman negotiated with Mr Nobre. Thirdly, the Judge said at the end of [459] that Mr Landman was entitled to rely on the conclusion reached by his colleagues that Mr Nobre had provided adequate information as to the source of the funds, without explaining how Mr Landman could have been so entitled when he deliberately kept them in the dark about his corrupt financial interest in the transaction.

81. The Judge began the second stage of his consideration at [461]. He did so on the footing that, as he had just found, Mr Landman was proceeding on the basis that the €100 million was Larn's money and that Larn was prima facie entitled to deal with it as it pleased. Even on that footing, however, Notable was not unrestricted in the assistance it could give Larn, because it was bound by the Solicitors' Accounts Rules. In that connection, the Judge reminded himself of the findings which he had already made at [459], repeating that "Notable and Mr Landman in particular were entitled to rely on the advice given by Mr Choudhury".

82. The Judge then referred, at [463], to the detailed findings he had made about the role played by Mr Landman in relation to the approval by Notable of the payments requested by Mr Nobre. The Judge said:

> "I have found that Mr Landman dishonestly said, time and time again, that the test as to knowledge of the underlying transaction was satisfied when he knew that it was not."

83. The Judge next explained that in his view the findings which he had made, when taken together, gave rise to "an issue of principle" which he needed to resolve. He said that he had raised this issue with counsel during closing submissions, and had received submissions on how to resolve it. On behalf of Group Seven, Mr Chapman QC had submitted that all the ingredients of dishonestly assisting a breach of trust were established in relation to Mr Landman, because Mr Landman had provided assistance by authorising payments to be made out of Notable's client account, and in giving that authorisation he had acted dishonestly. In support of this submission, Mr Chapman relied on *Madoff Securities International Ltd v Raven* [2014] Lloyd's Rep F.C. 95, where Popplewell J said at [351]:

> "So accessory liability on the part of a dishonest assistant requires no more from his point of view than the actus reus of assisting by participation in the transaction, and the mens rea of dishonesty."

84. This submission was countered by Mr Flenley QC for the Notable defendants, who relied on the judgment of Lewison J (as he then was) in *Ultraframe v Fielding* [2005] EWHC 1638 at [1506], where he said:

> "Although it is not necessary for the dishonest assistant to know all the details of the whole design, he must, I think, know in broad terms what the design is. Liability as a dishonest assistant, as the law has developed, is a secondary liability akin to the criminal liability of one who aids and abets the commission of a criminal offence. In that context, there are well developed principles for determining when an aider and abettor is to be treated as having participated in a joint enterprise. Criminal liability as an accessory depends on proof that the accessory intended, foresaw, or contemplated that an offence would or might be committed in furtherance of the joint enterprise. But it does not extend to the commission of unforeseen and uncontemplated offences which are outside the scope of the joint enterprise. The fine details of these principles need not be discussed here."

Mr Flenley's submission was that Mr Landman could not be an accessory to Larn's breach of trust, when he thought that Larn was using its own money to make payments which it wished to make. Mr Landman's dishonest breach of the Solicitors Accounts' Rules should not impose upon him the same liability as if he had been found guilty of knowingly assisting Larn to commit a breach of trust.

85. The Judge then set out his conclusions, in a passage which again we need to quote in full:

> "468. I do not think that the precise point raised in this case, based on the combination of my findings of fact, is expressly covered by any earlier authority, although the comments of Lewison J in Ultraframe might be said to be a good signpost. I am not persuaded that the analysis in the Madoff case is of direct assistance. The question in that case was completely different and I think that it would be misleading to take the remarks in that case out of the context in which they were expressed.
>
> 469. The issue I am now addressing might be said to raise a policy question. If I were to hold Mr Landman liable in the way contended for by Group Seven, he would be liable for losses that he could not have foreseen. Although he should have foreseen that he was exposing himself, and Notable, to liability for breach of the Solicitors Accounts Rules, and that would be a liability to disciplinary proceedings, it would turn out that he

> was liable for all the consequences of Larn's breach of trust, when he did not know that Larn was committing a breach of trust.
>
> 470. In some areas, the law takes a strict approach to the liability for dishonesty. In the tort of deceit, the victim is entitled to recover all damage directly flowing from the tort and there is no requirement that the losses be foreseeable. It was said in Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 at 167: "it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen" and this was approved by the House of Lords in Smith New Court Ltd v Scrimgeour Vickers [1997] AC 254. However, it is one thing to say that a wrongdoer is liable for the unforeseeable consequences of that wrongdoing and another to say a wrongdoer who has committed one wrong is liable for the consequences of a different wrong, which he did not commit.
>
> 471. The question for me is whether what Mr Landman dishonestly did was to assist a breach of trust when he did not have the relevant knowledge as to there being a breach of trust. I think that I would have to extend the basis of the liability for dishonest assistance of a breach of trust to hold him liable and I am not persuaded that such an extension is justified. My conclusion is that Mr Landman is not so liable.
>
> 472. It follows that I hold Notable, Mr Landman and Mr Meduri are not liable for dishonestly assisting a breach of trust."

86. Next, the Judge turned to the claim against Mr Landman for unconscionable receipt of trust monies. It is common ground that this cause of action required knowledge by Mr Landman that the assets which he received were traceable to a breach of fiduciary duty, and that the requisite state of knowledge for this purpose was that it "must be such as to make it unconscionable for him to retain the benefit of the receipt": see *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 (CA) at 455. The principal sum of trust money which Mr Landman was alleged to have received was, of course, the payment of £170,000 to Nisroy. In relation to this sum, the Judge made the following findings at [481]:

> "As to the £170,000, this sum was negotiated by Mr Landman with Mr Nobre. The agreement was that Mr Nobre would make this personal payment to Mr Landman in return for his assistance in allowing Notable's bank account to be used for Mr Nobre's benefit. In order to disguise the fact that the payment was a personal payment to Mr Landman, he channelled the payment through Nisroy who were acting as his nominee in this respect… On the basis of these findings, I consider that the whole of the £170,000 was received by Mr Landman's nominee and was therefore received by Mr

> Landman. It does not matter what Mr Landman went on to direct should be done with the money."

87. In considering whether Mr Landman's state of knowledge was such as to make it unconscionable for him to retain the £170,000, the Judge found assistance in the *Baden* scale of knowledge, despite its rejection by Lord Nicholls in the context of dishonest assistance, and despite the "grave doubts about its utility in cases of knowing receipt" expressed by Nourse LJ in *Akindele* at 455B. Against that background, the Judge found it to be established that Mr Landman had knowledge within the fourth *Baden* category, that is to say "knowledge of circumstances which would indicate the facts to an honest and reasonable man": see *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509 at 575-576.

88. The Judge continued, in [483]:

> "In particular, I find that Mr Landman knew facts which would have shown an honest and reasonable man that Mr Nobre was not entitled to the €100 million. I have already made detailed findings as to what was known to Mr Landman and although I have found that subjectively he thought that Mr Nobre was entitled to the money I consider that objectively an honest and reasonable man would not have reached that conclusion. Without repeating at length the facts which are of principal importance supporting this objective conclusion, I refer to the following matters in particular:
>
> (1) The information which Mr Nobre gave about himself and his alleged charitable foundations showed that much of what Mr Nobre said was pure fantasy;
>
> (2) Mr Landman never saw any evidence of actual trading or commercial investments by Mr Nobre;
>
> (3) For a man who allegedly had vast wealth, Mr Nobre was surprisingly unable to pay his bills as he went along;
>
> (4) The suggestion that Mr Nobre's ability to stay for a long period in an expensive hotel showed that he was a wealthy man was exploded in August 2011;
>
> (5) In August 2011, following the information provided to Mrs Landman by Victoria Weir, Mr Nobre should objectively have been considered as a "con man";
>
> (6) Mr Nobre's explanations as to why he could not transfer his money from his other bank account were inherently suspicious:
>
> (7) Mr Nobre's reply to Vogt, containing information about his dealings with Mr Milton and AndBanc should have rung

> an alarm bell that a reputable bank would not accept the money from Mr Nobre;
>
> (8) Mr Nobre's explanations as to where the money was coming from were inconsistent;
>
> (9) The amount of €100 million which was paid into Notable's client account was a different amount from that previously stated by Mr Nobre and came from a different source;
>
> (10) A reasonable man would have asked himself why Mr Nobre wanted Notable to do something which Notable was not allowed to do, namely, use its client account as a bank account for Mr Nobre, making the payments requested by him even where Notable was not involved in the underlying transaction or even independently aware of the underlying transaction."

89. The Judge then expressed his conclusion on this part of the case, so far as Mr Landman was concerned, at [484], holding that it was "plainly unconscionable" for him to seek to retain the £170,000. The Judge added (ibid):

> "An important factor in this assessment is that Mr Landman obtained his £170,000 in return for deliberately and dishonestly breaking the Solicitors Accounts Rules and dishonestly misleading Notable as to his involvement in, or knowledge of the transactions which led to Notable paying away some €15 million on and after 15 November 2011."

Discussion

90. It is convenient to begin by looking at the simplest way in which Group Seven advances its case on the issue of dishonesty, as reflected in its first ground of appeal. The argument rests on two key findings of fact made by the Judge: first, that the payments made from Notable's client account assisted the breach of trust by Larn; and secondly, that Mr Landman's conduct in authorising the payments was dishonest. On the strength of those findings, submits Mr Chapman, and by application of the two stage test first laid down in *Tan* and subsequently endorsed in *Barlow Clowes* and *Ivey*, the conclusion is inescapable: Mr Landman was guilty of dishonestly assisting Larn's breach of trust. His dishonesty related to, and facilitated, the very actions which constituted the relevant assistance. Furthermore, his conduct was plainly dishonest when objectively judged by application of the standards of ordinary decent people. This is all that is needed to establish liability, says Mr Chapman, and it is irrelevant if (as the Judge also found) Mr Landman genuinely believed that the €100 million was Larn's money and Larn's to deal with as it pleased.

91. A similar analysis is relied upon in relation to Larn's own claim. The same actions by Mr Landman facilitated the breaches of fiduciary duty owed by Mr Nobre to Larn, and there was the same causative dishonesty on the part of Mr Landman, even

assuming in his favour that he believed the €100 million to be at Larn's free and unfettered disposal.

92. The difficulty with this simple approach, in our view, is not that it betrays any error of law. On the contrary, it seems to us to be firmly founded on the legal principles which we have derived from *Tan*, *Barlow Clowes* and *Ivey*. Those principles can now be stated in a few sentences, and in future cases they should not need detailed exposition. Rather, the difficulty is that there seems to us to be an air of unreality in addressing the question as one of legal principle based on the Judge's findings of fact, when some of the Judge's critical findings are themselves under challenge in the Bank's appeal, and when the first stage where dishonesty is in question, as *Ivey* teaches us, is to ascertain subjectively "the actual state of the individual's knowledge or belief as to the facts". It therefore makes more sense, in our view, to begin with the facts, and in particular with the Judge's findings at [458] to [460] that Mr Landman did not have blind-eye knowledge that the €100 million was not beneficially owned by Larn or that Larn was not entitled to deal with it as it chose.

93. We have already alluded to some of the obvious questions which are prompted by those findings: see [80] above. Those questions are thrown into even sharper relief when they are contrasted with the findings which the Judge made in relation to Mr Landman's alleged unconscionable receipt of the £170,000 paid to Nisroy as his nominee. It will be recalled that the Judge expressly found, at [483], that "Mr Landman knew facts which would have shown an honest and reasonable man that Mr Nobre was not entitled to the €100 million". The Judge added (ibid) that he had "already made detailed findings as to what was known to Mr Landman and although I have found that subjectively he thought that Mr Nobre was entitled to the money I consider that objectively an honest and reasonable man would not have reached that conclusion." The reasons which the Judge then summarised as providing support for his conclusion included, as the tenth and final point, that a reasonable man in Mr Landman's position would have asked himself "why Mr Nobre wanted Notable to do something which Notable was not allowed to do, namely, use its client account as a bank account for Mr Nobre", in circumstances where Notable was not involved in , or even independently aware of, the underlying transactions.

94. In our view, that part of the Judge's analysis and conclusions cannot be faulted, and unsurprisingly there is no appeal against his finding of unconscionable receipt in relation to the £170,000 payment to Nisroy. But the significant point, for present purposes, is that the Judge was here engaging in substantially the same two stage analysis as the law requires in relation to dishonest assistance, and finding by application of an objective test that an honest and reasonable person in Mr Landman's position, and knowing the facts which he did, would have concluded that Mr Nobre was not entitled to the €100 million. If that is so, it must follow that Mr Landman's conduct in relation to the €100 million was objectively dishonest, whatever he may have subjectively thought, and that the dishonesty extended not only to the payments which were made out of Notable's client account, but also to the prior receipt of that sum into the client account. If an honest and reasonable person would have concluded that Mr Nobre was not beneficially entitled to the €100 million, 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 deliberately taken to facilitate that

purpose would constitute dishonest assistance of a scheme intended in one way or another to defraud the true beneficial owner of the money.

95. It seems to us, therefore, that the clear logic of the Judge's unchallenged findings of fact in relation to Mr Landman's receipt of the £170,000 is that Mr Landman must also have been guilty of dishonest assistance of the breaches of trust and fiduciary duty by Larn and Mr Nobre respectively. How, then, did the Judge, who clearly found and considered the facts with meticulous care, come to reach the contrary conclusion? In the first place, as it seems to us, he erred by applying to Mr Landman the same compartmentalised approach as he had adopted in relation to Mr Meduri's conduct, examining separately the initial decision to accept the deposit of the money into Notable's client account and the payments which were then made out of the account on Mr Nobre's instructions. That approach may have made sense in relation to Mr Meduri and Ms Ciserani, who were kept in the dark by Mr Landman about the corrupt payment of £170,000 which he had negotiated with Mr Nobre in late October/early November 2011, and who were therefore entitled to rely on the guidance and advice received by Notable from Stewarts Law and the Law Society. But the same obviously cannot be said of Mr Landman, because his negotiation of the payment, and his concealment of it from his colleagues, Stewarts Law and the Law Society, were self-evidently dishonest.

96. Furthermore, since Mr Landman's receipt of the £170,000 was itself dependent on the prior payment of the €100 million into the client account, it was in our view impossible to insulate his dishonesty in assisting the making of payments out of the account from his equally dishonest conduct in facilitating the initial receipt of the €100 million into the account. With great respect to the Judge, it seems to us that this error of approach fatally infected his analysis of Mr Landman's conduct on the issue of dishonest assistance, and that if he had stood back and reviewed the position as a whole, the only conclusion to which he could reasonably have come is that Mr Landman's whole course of conduct in relation to the €100 million, from late October 2011 onwards, was objectively dishonest, even if he did at times manage to persuade himself that Mr Nobre might after all be a very wealthy man. Ultimately, in our view, Mr Landman is condemned by his own actions, which speak for themselves. Had he been acting honestly, he would not have negotiated the £170,000 bribe with Mr Nobre, nor would he have taken steps to conceal it from his colleagues, Stewarts Law and the Law Society, nor would he have given perjured evidence about all these matters to the Judge at the trial.

97. For similar reasons, we find ourselves reluctantly driven to the conclusion that the Judge's finding in [460] about the absence of blind-eye knowledge by Mr Landman as to the beneficial ownership of the €100 million in the hands of Larn cannot stand. As we have pointed out, the Judge was much influenced in reaching this conclusion by the fact that it was Mr Landman who first proposed that Notable should instruct external solicitors to advise it on the steps it should take to avoid involvement in money laundering. But if such advice was to be worth anything, it clearly had to be based on full and honest disclosure of all the relevant facts to those solicitors, including the personal payment which Mr Landman had negotiated with Mr Nobre. Such disclosure would, of course, have brought the entire project to an immediate halt, and in its absence we are unable to understand how the Judge can have thought that Mr Landman should be given any credit for making the initial proposal. On the

contrary, it can only be seen as a cynical move on his part, designed to facilitate the receipt of the €100 million into the client account, which was the essential first step before any payments out of the account, including the £170,000, could be made. Similarly, and with equal reluctance, we have to say that we can see no proper foundation for the Judge's conclusion at the end of [459] that Mr Landman was entitled to rely on the view formed by his innocent colleagues, Mr Meduri and Ms Ciserani, that Mr Nobre "had provided adequate information as to the source of the funds." Far from exonerating him, Mr Landman's conduct in allowing his colleagues to carry out their enquiries in ignorance of the full facts must have been at the very core of his dishonest strategy.

98. At the end of [460], the Judge, while recognising that Mr Landman had "a dishonest propensity and was dishonest in relation to the authorisation of payments", declined to make a finding that he was also dishonest in relation to the beneficial ownership of the money by Larn "when the evidence actually points the other way". It was unclear to us what evidence actually pointing the other way the Judge had in mind at this point, and it was in our view telling that counsel for Mr Landman and Notable were unable to provide us with a satisfactory answer to this question, beyond pointing to the flawed steps taken by Notable to obtain external advice. Mr Hackett QC, for Mr Landman, also referred in this context to the contemporary email traffic between Mr Nobre, Mr Landman and Notable, from 22 October 2011, when Mr Nobre first referred to a proposed personal payment of £20,000 to Mr Landman, to 31 October 2011, when Mr Landman reminded Mr Nobre of his earlier "promise" to make him a personal payment of £150,000 in a text message, culminating in the meeting between Mr Landman and Mr Nobre on 4 November 2011, when the Judge found (at [191]) that Mr Nobre finally agreed to pay Mr Landman a personal fee of £170,000. Mr Hackett was, however, quite unable to explain to us how this discreditable history could possibly have amounted to evidence telling in favour of Mr Landman. It follows, in our view, that if (as we think) the Judge's findings in favour of Mr Landman in [459] cannot stand, there is nothing else which could have justified his conclusion on blind-eye knowledge in [460].

99. In differing from an important evaluation by the trial judge we remind ourselves of the need for appellate restraint, but note that although he heard Mr Landman give evidence for several days, the Judge did not express his evaluation and conclusion on this issue as resting to any significant extent upon an assessment of that oral evidence (see the discussion of this at paragraph 21 above). Accordingly, while the Judge's advantage in this respect must be taken into account, it cannot in this instance be conclusive. Furthermore, we are satisfied (as we have explained) that the Judge's analysis of the evidence was vitiated by significant errors of approach.

100. For these reasons, we are satisfied that Mr Landman must have had blind-eye knowledge that the €100 million was not beneficially owned by Larn, and that the money was not at Larn's free disposal. The Judge's undisputed primary findings create an irresistible inference that Mr Landman clearly suspected (if indeed he did not actually know) that the money was not Larn's, and that he consciously decided to refrain from taking any step to confirm the true state of affairs for fear of what he might discover. On that footing, the conclusion that Mr Landman had the requisite dishonesty to support the dishonest assistance claims must in our judgment follow, subject only to a question of law which is advanced by Notable in response to the

claimants' appeal. That question of law is whether there is a minimum *content* of the knowledge which an alleged accessory must possess in order to be held liable for dishonest assistance in a breach of trust or fiduciary duty. Notable submits that this is a separate question from the *standard* of knowledge which the accessory must possess, and which for the purposes of this appeal Notable accepts is the standard laid down in *Barlow Clowes* and *Ivey*. Notable's contention in relation to the *content* of knowledge is that the accessory must at least know, in broad terms, what is the nature of the underlying breach of trust, or in other words what the design of the principal wrongdoer is. Notable submits that the Judge was right to hold, at [468], that "a good signpost" is to be found in the dicta of Lewison J in *Ultraframe* at [1506], where he said that although it is not necessary for the accessory to know "all the details of the whole design, he must, I think, know in broad terms what the design is."

101. Some academic support for this submission may be found in Professor Paul Davies' monograph on Accessory Liability (Hart Publishing, 2015) at pp 109-114 and 42-47, where the author supports the view expressed by Lord Millett in *Twinsectra* that it is enough for the defendant to be aware that the subject-matter of the trust "is not at the free disposal of the principal": see *Twinsectra* at [135], quoted at [43] above. As Professor Davies comments, at p 111:

> "The latter approach is preferable: the defendant should not need to know the precise nature of the relationship between the primary wrongdoer and claimant in order to incur liability as an accessory…This approach is particularly important in the context of money laundering: a defendant should not be able to escape liability by insisting that he or she was "only" participating in a breach of exchange control or tax evasion."

A footnote then refers to *Agip Africa Ltd v Jackson* [1990] Ch 265 at 295, per Millett J.

102. In view of the conclusions which we have reached on Mr Landman's blind-eye knowledge, it is unnecessary for us to rule on this issue of law. Counsel for Notable made it clear in their written submissions, and Mr Flenley QC repeated orally, that the minimum level of knowledge test would be satisfied if (as we have now held) Mr Landman had blind-eye knowledge that Larn was not beneficially entitled to the €100 million and was unable to deal with it as it chose. This concession was in line with the passage we have quoted from Professor Davies' book, and in the context of money laundering must in our view be correct.

103. Since it is unnecessary for us to express a concluded view on the question, and since anything we said on it would be obiter, we think it better to leave the question for decision in a case where it is essential to the outcome. Nevertheless, 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. We say this for a number of reasons. First, the concept of dishonesty does not exist in a vacuum. In a case of alleged dishonest assistance, the relevant breach of trust and the relevant acts of assistance will always have to be pleaded and proved. It is in that context that the question whether the defendant acted dishonestly will have to be considered, having regard to the totality of the defendant's

actual knowledge, blind-eye knowledge, and (we would be inclined to add) subjective beliefs falling short of blind-eye knowledge. Secondly, in answering that question, the extent of the defendant's knowledge and beliefs, and their relationship both with the underlying trust and with the acts of assistance relied upon, will always be highly material matters for the court to consider, and the more tenuous the connection, the less likely it is that the objective standard of dishonesty will be met. But the facts of possible cases are so infinitely various that it would in our view be wrong to lay down, as a matter of law, any minimum threshold or content for the defendant's knowledge before the test can be satisfied. Thirdly, there is already ample guidance in the case law to the effect that knowledge falling far short of detailed knowledge of the specific breach of trust may suffice to ground liability. It is enough to refer, by way of example, to the comments of Lord Hoffmann and Lord Millett in *Twinsectra* at [24] and [135] respectively, and to the observations of Lord Hoffmann in *Barlow Clowes* at [28]. Fourthly, and as a corollary to the last two points, if a legal test were to be formulated, it could only be framed in the most general of terms, and as such would have little practical utility while generating further disputes in a field of law which has had more than its fair share of doctrinal controversy. In short, therefore, and without deciding the point, our preference would be to allow the unified test of dishonesty which the Supreme Court has recently pronounced in *Ivey* to settle down and be applied by trial judges in the context of claims for dishonest assistance, without the added layer of complexity which the test of a minimum content of knowledge would entail.

104. To conclude our discussion of this part of the appeal, therefore, we respectfully consider that the Judge was wrong to acquit Mr Landman of dishonestly assisting the breaches of trust and fiduciary duty by Larn and Mr Nobre, and that the appeals of Group Seven, Larn and the Bank on this issue must be allowed.

ISSUE 2: CAUSATION

105. Mr Louanjli and the Bank each argue that the extent of the Judge's findings about Mr Landman's dishonesty concerning the payments from the Notable account must negative his conclusion that Mr Louanjli's fraudulent misrepresentations themselves played a causative role in the making of the payments. They argue that the Judge should have found that Mr Landman's actions were the effective cause of Group Seven's losses and amounted to a break in the chain of causation. These contentions would, they argue, gain further force if Mr Landman was found by this court to be liable for dishonest assistance. These assertions are disputed by the other parties.

106. The Judge's findings of fact on this issue appears in Part 6 of the judgment. At [497-498] he said this:

> 497. The real question is whether Mr Louanjli's statements and his email did assist Larn. I find that they clearly did assist Larn. Larn and Mr Nobre were seeking to satisfy Notable as to the source of the money in question. Larn and Mr Nobre wanted Mr Louanjli to support their case as to the source of the money in question. On 3 November 2011, Mr Louanjli appears to have been prepared to support Larn and Mr Nobre and he sought to

do so. On 14 November 2011, Mr Louanjli was much more reluctant to commit himself by putting in writing anything too specific. Nonetheless he was persuaded by Mr Nobre to write the email which he sent on that day. Notable asked a number of questions and was given various bits of information which Notable used to form its assessment as to the source of the money. Notable wanted to know what Mr Louanjli would say. Notable took what he said into account. What Mr Louanjli said encouraged Notable to regard Mr Nobre as reliable and to believe that he was entitled to deal with the money as his own. The issue is not whether Notable would have acted in the same way without Mr Louanjli's oral statements and his email. The question is whether his oral statements and his email influenced Notable's behaviour in a relevant way. It is also not relevant to ask whether Notable were reasonable in relying on what Mr Louanjli had said or written. It is certainly possible to examine his statements and his email and to question whether anything of real substance was said. Nonetheless, based on the detailed evidence given on the point by Mr Meduri and Ms Ciserani as to the part played by Mr Louanjli's oral statements and his email, I am satisfied that they influenced Notable's behaviour in a relevant way and assisted Larn to commit a breach of trust.

498. I accept that Notable wanted to have reliable, good quality information, in writing, as to the source of funds. However, despite its efforts, what Notable received was the oral confirmation on 3 November 2011 and the email of 14 November 2011, both from Mr Louanjli, and the Armajaro reference. Together, this information was not good quality information and the conversation on 3 November 2011 was not in writing, although Ms Ciserani made a written note of what was said. Nonetheless, Notable regarded the statements from Mr Louanjli as deserving of some weight. Mr Meduri told Mr Choudhury that Mr Louanjli was Mr Nobre's banker and had basically backed up Mr Nobre's account of matters. The fact that Mr Louanjli did not come to London did not prevent Notable relying on what he had said. After all, it would have been a major step for Mr Nobre's banker to travel from Morocco to London to confirm the information provided and Notable do not appear to have been surprised that he did not in the end do so. Although Ms Ciserani had invited Mr Louanjli to amend her draft affidavit and he did not provide any affidavit, that was not seen by Notable as cancelling the effect of what Mr Louanjli had stated on 3 November 2011. If Mr Louanjli had wanted to correct what he had said on 3 November 2011 it was open to him to do so and he did not do so. When Mr Choudhury told Mr Meduri that the email of 14 November 2011 did not provide any information about the source of the funds, Mr Meduri was still of the view that the fact that Mr Nobre had introduced him to Mr Louanjli and that Mr Louanjli had backed up Mr Nobre's

> account of matters was of real importance in carrying out checks on Mr Nobre and on the monies. As to whether Notable was determined to accept the money and make the payments requested by Mr Nobre, I find that Ms Ciserani and Mr Meduri were influenced in being prepared to accept the money by the statements made by Mr Louanjli. As to Mr Louanjli's contention that Notable was dishonest, I have found that Mr Meduri and Ms Ciserani were not dishonest although Mr Landman was dishonest in a different way, namely, in relation to his authorisation of the payments made at the request of Mr Nobre.

105. So the Judge found that Mr Louanjli's interventions clearly did assist Larn to commit a breach of trust by influencing Notable's behaviour in a relevant way. The scope of the appeal brought by Mr Louanjli and the Bank is, as stated above, limited in that, when granting permission to bring arguments about the chain of causation, Longmore LJ refused permission to the Bank and to Mr Louanjli to advance a ground asserting that Mr Louanjli's statements on 3 November 2011 had not materially caused or assisted the breach of trust. He described this as an attack on a primary finding of fact that this court would not reverse. In our view, this is the correct approach for us to take to Mr Louanjli's communications on both 3 and 14 November 2011. The appeal must be considered on the basis of the primary facts found by the Judge.

106. The Judge dealt quite shortly with the causation argument at paragraph 513:

> 513. It might be said that what Mr Louanjli assisted Mr Nobre to do was to cause Notable to accept the €100 million into its bank account but that acceptance did not cause any loss to Group Seven; Group Seven only suffered loss when Notable paid away about €15 million on or after 15 November 2011. Could it then be said that Notable's conduct in breaking the Solicitors Account Rules and Mr Landman's dishonesty in authorising those payments broke the chain of causation between Mr Louanjli's dishonesty and Group Seven's loss? Or could it be said that Notable's breach of the Rules and Mr Landman's dishonesty were not foreseeable so that Mr Louanjli is not liable for the resulting loss? I do not consider that Notable's conduct in making the payments broke the chain of causation or was not foreseeable. Mr Louanjli's dishonesty assisted Mr Nobre in persuading Notable to accept the money into its client account and that enabled Notable to make the payments requested by Mr Nobre. Further, it was wholly foreseeable that Mr Nobre would use the Notable client account to launder the money. That was the whole point in Mr Nobre paying the money into that account in the first place and I have found that Mr Louanjli knew that there was a strong case that Mr Nobre was engaged in money laundering.

107. His further conclusion was therefore that Notable's subsequent actions in paying away the money did not break the chain of causation and that it was foreseeable.

108. On behalf of Mr Louanjli, Mr Casey QC and Ms Moore note that the framework here is somewhat unusual in that Mr Louanjli and Mr Landman were operating independently of each other, albeit both were orchestrated by Mr Nobre. They addressed us on the principles governing causation and intervening conduct in the criminal and tortious context, engaging concepts of intervening voluntary conduct, remoteness, directness, *novus actus interveniens* and foreseeability. In relation to dishonest assistance Mr Casey argued for what he called a modern approach: what is the extent of the loss for which a defendant should as a matter of fairness, justice and reasonableness be held liable? The law should, he says, require that the assistance be a direct cause of the breach and the loss. In oral argument, Mr Casey referred to dicta of Longmore LJ in *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 at [107-8] to the effect that there is no reason why common law rules of causation, remoteness and measure of damage should not apply to a claim based on equitable wrongdoing by a non-fiduciary third party.

109. As to the facts, Mr Casey and Ms Tolaney QC maintain that Mr Louanjli was not to know that Larn's money was not being placed in a safe haven when it was lodged with Notable, or foresee that Notable would breach the Solicitors' Accounts Rules and make payments. They argue that Notable's breach broke the chain of causation, rendering Mr Louanjli's dishonesty no more than part of the history of events.

110. We do not consider it necessary to rehearse the arguments in greater detail for these reasons:

(1) We accept the legal analysis of the respondents. On authority, the matter must be approached in two stages. It must be shown that the conduct in fact assisted the breach of trust, and that the loss directly resulted from the breach of trust. The test at the first stage is that the assistance given must be more than minimal: *Baden v Société Générale* [1994] 1 WLR 509 at 574. The test at the second stage is that the loss in fact resulted from the breach of trust: *Grupo Torras SA v Al-Sabah* [2001] Lloyds Rep Bank 36 at [119], *AIB Group v Mark Redler* [2014] UKSC 58 at [135]. As it is put in Underhill and Hayton: *Law of Trusts and Trustees* 19th ed at 98.56:

> "… a claimant must at least show that the defendant's actions have made the fiduciary's breach of duty easier than it would otherwise have been. But the causation requirement for dishonest assistance is no stronger than this, and it is no answer to a claim, for example, that the claimant's loss would have occurred anyway, because the wrongdoing fiduciary would have committed the breach even if the defendant had not assisted him."

(2) It is made clear by *Target Holdings v Redferns* [1996] AC 421 at 434E and by *AIB* (above) at [136] that there is no warrant for introducing common law concepts into this area of the law in the manner proposed by the appellants. What must be shown is that the conduct assisted the breach of trust and that but for the breach of trust the loss would not have occurred. The statements in *Novoship* arose in the different context of a claim for an account of profits and do not assist the appellants in the present circumstances.

(3) Even if (contrary to our view) there were some substance in the appellants' advocacy of some stricter test of causation, so that there needed to be a direct link between the assistance and the loss, as opposed to the breach of trust and the loss, it would not avail them on the facts of this case. Without the payments out of the Notable account, Mr Louanjli himself could not have succeeded in being paid. On the Judge's finding, his interventions at critical moments in the chronology had precisely the effect that he and Mr Nobre intended. That finding, which goes some way beyond what was necessary to fix Mr Louanjli with accessory liability, is unassailable.

(4) Nor do we consider that our conclusion in relation to Mr Landman's liability for dishonest assistance has any effect on our conclusion on the issue of causation. That conclusion is premised on the Judge's primary findings of fact, which have not been disturbed in any way.

111. Looking at the matter overall, there was abundant evidence to support the Judge's conclusion on the issue of causation and the appeal on these grounds comprehensively fails.

ISSUE 3: VICARIOUS LIABILITY

112. The Bank challenges the Judge's attribution to it of vicarious liability for Mr Louanjli's wrongdoing in dishonestly assisting in Larn's breach of trust and in conspiring to injure Group Seven by unlawful means. Group Seven/Larn seek to uphold the Judge's decision on this issue.

113. It will be recalled that on the Judge's findings, the wrongdoing took the form of the oral statements made on the telephone by Mr Louanjli to Mr Meduri of Notable on 3 November 2011 ('the 3 November statements'), parts of which were deliberately misleading, and the failure to correct those statements in the email of 14 November 2011 ('the 14 November email'). The Judge found that the 3 November statements were relied upon by Notable, encouraged it to regard Mr Nobre as reliable and to believe that he was entitled to deal with the €100 million as his own, and assisted Larn to commit a breach of trust, and that accordingly all the elements of dishonest assistance were established in relation to Mr Louanjli: [497, 498, 507, and 508-514].

114. The Judge stated that he "would not have held that Mr Louanjli had the actual authority of LLB to act dishonestly in his own interests and not in the interests of LLB" [533]. He also stated that "**if** Mr Louanjli had apparent authority to make the statements which he made on 3 and 14 November 2011, by reason of LLB holding Mr Louanjli out to Notable as having such authority, then LLB would be liable to Notable for the wrongdoing involved in the making of those statements" (emphasis added). However, he held that LLB did not hold Mr Louanjli out in any way to Group Seven and "the claim by Group Seven against LLB is not best understood as a case of LLB being liable to Group Seven by reason of any apparent authority of Mr Louanjli." [536]. The Judge did not decide the question of apparent authority, therefore, nor did he approach the matter on that basis. Instead, he recognised that an employer's

vicarious liability for the wrongdoing of an employee is not confined to wrongdoing which is within the actual or apparent authority of the employee and went on to state that the "test which is instead applied to determine whether in a particular case the employer is vicariously liable for the employee's wrongdoing is to ask whether the conduct in question was sufficiently closely connected with the work which the employee was authorised to do so that the conduct should be regarded as within the scope of the employee's employment and so that the employer should be held liable for it." [537]. He went on to determine whether LLB was liable for Mr Louanjli's conduct on that basis.

115. There is no express criticism of the Judge's choice of the "close connection" test or of his analysis of the relevant legal principles by reference principally to *Lister v Hesley Hall Ltd* [2002] 1 AC 215, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 and *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, including in particular Lord Toulson's most recent explanation of the test at [44-45]. Having already made detailed findings in relation to the 3 November statements, the 14 November email and Mr Louanjli's employment, to which we shall refer in detail below, the Judge went on at [550] to summarise the factual matters which he considered to be of particular relevance for the purposes of applying the legal principles which he had identified. They were:

> "(1) Mr Louanjli was employed by LLB as a relationship manager;
>
> (2) Mr Louanjli had been the LLB relationship manager for Larn/Mr Nobre;
>
> (3) When Mr Louanjli made the relevant statements on 3 November 2011 and sent the relevant email on 14 November 2011, he was acting or purporting to act as the representative of LLB and he was giving information or purporting to give information which emanated from LLB;
>
> (4) Mr Louanjli's statements were made, and the email was sent at the request of Larn/Nobre, and for the purpose of assisting Larn/Mr Nobre;
>
> (5) Mr Louanjli did not have the actual authority of LLB to do what he did;
>
> (6) Notable believed that Mr Louanjli was acting within his authority;
>
> (7) Notable would not have known of the limitations imposed by LLB on Mr Louanjli's authority;
>
> (8) Mr Louanjli did what he did in his own interests and he was not seeking to advance the interests of LLB;
>
> (9) Mr Louanjli was dishonest."

116. The Judge then considered submissions about Mr Louanjli having pursued his own interests, the commercial context and the lack of relationship between LLB and Group Seven in the following way:

> "551. . . In November 2011, Mr Louanjli was pursuing his own interests and was not seeking to confer benefits on LLB. However, this finding does not mean that Mr Louanjli was on "a frolic of his own" with the result that LLB was not liable for his actions. Similarly, this finding does not mean that his actions were not closely connected with the work which Mr Louanjli was authorised to do. Nor is this case like the case of Kooragang. In this case, Mr Louanjli's position at LLB was central to the statements which he made. Notable wished to hear from Mr Louanjli because he was described to them as Larn/Nobre's relationship manager at LLB. It was important that Mr Louanjli was able to describe what LLB had done and its relationship with Larn/Nobre. Mr Louanjli's statements were expressed to be made by him as a relationship manager at LLB and not otherwise.
>
> 552. LLB also submitted that this case was unlike Lister and Mohamud. This is a commercial case and those cases were not. It was submitted that LLB did not have any relationship with the victim, Group Seven. LLB did not delegate to Mr Louanjli the performance of some task which Group Seven had asked LLB to perform. LLB said that all that had happened was that LLB's employment of Mr Louanjli had given him the opportunity to act the way he did but that was not enough to found vicarious liability for his actions: see per Lord Clyde in Lister at [45]. I do not accept the submission that the legal principle is altered on account of the fact that this is a commercial case. Dubai Aluminium was a commercial case. Further, the authorities cited say that the same legal principle applies whether the wrongdoing is in a commercial or a non-commercial context. It is true that there was no relationship between LLB and Group Seven. But the tort of dishonest assistance of a breach of trust does not involve a direct relationship between the wrongdoer and the victim. The wrongdoer is an accessory who assists someone who may have a direct relationship with the victim. The principles established by the authorities apply irrespective of the kind of wrongdoing established and those principles have been applied to a case of dishonest assistance of a breach of trust: see Dubai Aluminium. I do not consider that this was a case where Mr Louanjli's employment by LLB merely gave him an opportunity to commit the wrongdoing in the sense considered by Lord Clyde in Lister. Here, Mr Louanjli's employment with LLB as a relationship manager for Larn/Nobre allowed Mr Louanjli to pass on information about LLB's relationship with Larn/Nobre and the statements made by Mr Louanjli were expressed to be made on behalf of LLB, a matter which was important to Notable."

117. Lastly, the Judge concluded that approaching the matter broadly: (i) Mr Louanjli was employed by LLB to act as a relationship manager for those doing business, or applying to do business, with LLB; (ii) he was not assisted by the expert evidence about Mr Louanjli's employment, the experts having failed to approach the matter broadly and having approached the matter from within the world of Swiss banking rather than outside it in relation to persons dealing with such banks; and (iii) ". . . [S]tatements made by Mr Louanjli, ostensibly as a relationship manager of LLB, at the request of the person in respect of whom he was the relationship manager, were sufficiently closely connected with the scope of his employment by LLB as to make it just for LLB to be liable for those statements and Mr Louanjli's wrongdoing, even though Mr Louanjli was acting in his own interests and was dishonest." [554].

118. The imposition of vicarious liability is a question of law based on the primary facts as found and requires the court to come to an evaluative judgment. It is necessarily highly fact sensitive. See *Mohamud* at [50] and [54] per Lord Dyson; *Weddall v Barchester Healthcare Ltd* [2012] IRLR 307 per Aikens LJ at [68]; *Maga v Archbishop of Birmingham & Anr* [2010] 1 WLR 1441 per Lord Neuberger MR at [43]; and *Dubai Aluminium Co Ltd v Salaam & Ors* [2003] 2 AC 366 per Lord Nicholls at [24]. Accordingly, although the Judge's factual findings are not challenged, it is important to have a full understanding of the factual basis for the Judge's conclusion. It is necessary, therefore, to set out the findings in more detail.

119. The Judge's central findings of fact in relation to the 3 November statements and the 14 November email are at [78-182] and [232]. He also dealt with the steps taken by Notable in relation to Mr Louanjli at [190] and [195], and with Mr Louanjli's knowledge of internal banking matters relating to Mr Nobre and Larn and the nature of his employment at [368-385]. Although we have summarised the most important of those findings, reference should be made to the judgment itself for the full details.

120. In relation to the 3 November statements, the background was that Notable was seeking confirmation of the origin of the €100 million. Mr Nobre stated that he had an account at LLB and that the money had come from that account and that Mr Meduri and Ms Ciserani of Notable should speak to Mr Louanjli. Mr Louanjli was employed by LLB as a relationship manager and was the relationship manager for Mr Nobre/Larn. Mr Nobre produced Mr Louanjli's business card which carried the logo of LLB. It named Mr Louanjli as "Director Private Banking". It referred to the full name of LLB and to its Abu Dhabi representative office. The card gave Mr Louanjli's numbers for his landline, fax and mobile. It also gave an email address for Mr Louanjli on an email account belonging to LLB. Nothing turns on the description of Mr Louanjli as a "Director". The description was incorrect and was not relied upon.

121. Mr Nobre telephoned the mobile number on Mr Louanjli's business card in the presence of Mr Meduri and Ms Ciserani. The content of Ms Ciserani's note of what was said by Mr Louanjli on the speaker phone is set out in the judgment at [180]:

> "Mr Louanjli confirmed that he works for Liechtensteinische Landesbank, is based in Abu Dhabi and that the bank is based in Switzerland. He also confirmed the following:

> a. Mr Nobre has been the bank's client since a certain amount of time
>
> b. They have successfully completed the KYC procedure on source of funds
>
> c. They are aware that the funds were sent from them to Allied's [AIC's] bank account at Bank of Valletta.
>
> Mr Louanjli agreed to provide a written confirmation of the above on the bank's letterhead and his copy passport."

The phrase "since a certain amount of time" in Ms Ciserani's note was a reference to a long time or a longstanding relationship. Mr Louanjli agreed to provide written confirmation of what he had told Notable on LLB's letterhead and it was agreed that Notable would email Mr Louanjli at both his LLB and his Hotmail email addresses with the terms of the declaration which Notable wished him to make: [181-182]. In fact, Mr Louanjli never provided the written confirmation.

122. Subsequently, Google searches were carried out by Notable on LLB and Mr Louanjli amongst others and Notable contacted LLB by telephone and was told that Mr Louanjli worked for LLB in Abu Dhabi as a relationship manager: [190] and [195]. Ms Ciserani then emailed Mr Louanjli at his two email addresses. In her email she stated amongst other things:

> "We understand that Mr Louis is known to your bank, that you completed the KYC procedures and were fully satisfied about the source of funds.
>
> We also understand that you will send us a written confirmation of the above.
>
> Please also confirm that you are aware that the funds have been transferred from Mr Louis's account to Allied Investment Corporation Ltd at Bank of Valletta. . . "

123. On 14 November 2011, Mr Louanjli sent the 14 November email to Mr Landman from his LLB email address, in which he was described as a "Relationship Manager". The email contained standard wording which referred to LLB and gave its address in Zurich and its telephone and fax numbers. The email stated:

> "**Subject**: LARN
>
> Dear Martin
>
> I would like to confirm That Mr. Louis Nobre is well known to the Bank and did satisfy to the KYC and due diligence that we did run during his account opening process.
>
> Hope this will Help.

> Please feel free to contact me if you have any queries.
>
> Best Regards,
>
> Yours sincerely
> Liechtensteinische Landesbank
> (Switzerland) Ltd.
>
> Othman Louanjli
> Relationship Manager"

124. In relation to Mr Louanjli's knowledge of internal banking matters concerning Mr Nobre and Larn and his authority, the Judge found that: Mr Louanjli had dealt with the setting up of a bank account for Larn at LLB in May 2011 and that it had been closed in June of that year [368] and [373]; that he had signed a document stating that he had received, read and understood LLB's Directives and appreciated that they were binding on him [376]; that Mr Louanjli was party to a conversation in which LLB had stated that it was impossible to accept the transfer of €100 million which arrived in October 2011, which would be sent back and that if Larn wanted to deposit it, LLB would have to do "KYC" ("know your client" checks) on Larn [379]; that he received a memo in which it was stated that LLB should refrain from any relationship with Larn or Mr Nobre [383]; that thereafter, Mr Louanjli tried hard on behalf of Mr Nobre to find another bank [384]; and that Mr Louanjli knew that a series of banks had refused to provide banking facilities to Larn and Nobre but that he wanted to help because he hoped to make a lot of money out of Mr Nobre and that Mr Nobre had promised him a payment to induce him to work for him and help place the €100 million at another bank [385].

125. The Judge addressed the terms of Mr Louanjli's employment and the limitations upon his authority in the following terms:

> "533. . . . There was considerable examination at the trial of the terms and conditions of Mr Louanjli's employment and of the various internal documents within LLB which imposed limitations on his behaviour or gave direction as to how Mr Louanjli should conduct himself as an employee. . .
>
> 535.There was considerable discussion as to the role of a relationship manager employed by a Swiss bank. There was expert evidence as to the typical arrangements within Swiss banks as to the giving of "references" for customers, when such references were permitted, the form they were permitted to take, the persons who were typically authorised to give them and the number of signatures required for any such reference. However, this evidence as to the typical position within Swiss banks did very little to inform me as to the apparent position as would be perceived by third parties, particularly third parties who were not principally operating in Switzerland but who, like Notable, consisted of professionals operating in the United Kingdom,

> although they also operated outside the United Kingdom (including Switzerland). On the facts of this case, I find that Notable did believe that Mr Louanjli as a relationship manager of LLB was authorised to give information to Notable when requested to do so by his client."

126. In this regard, Ms Tolaney QC referred us to Mr Louanjli's contract of employment, the "Directives" which applied to him and the expert evidence in relation to the role of a relationship manager in a Swiss bank, to which the Judge had been referred. First, his employment contract provided, amongst other things, that his duties and responsibilities were those normally expected of a Relationship Manager, including but not limited to those set out in the first schedule to the contract. They were the acquisition of a new client base out of the Abu Dhabi office of LLB for private banking purposes and directly reporting to the head of that office. It was also stated expressly that he would abide by all internal policies and "observe and conform to the standards, rules and customs… appropriate to his position as a Relationship Manager."

127. Secondly, we were referred to two LLB Directives, one entitled "Signing Authority" and the other "Letters of confirmation and recommendation". The first was concerned with the authority to sign documents (including correspondence) on behalf of LLB under which it entered into an obligation or commitment. Para 7.1 set out the ranks of employees with power to sign on LLB's behalf and did not include the rank of "Relationship Manager", and para 7.2.1 made clear that two authorised signatures were necessary in order to be binding. The second directive was concerned with letters of recommendation in the sense of statements about the period or type of business relationship between the client and LLB which might be requested for specific purposes such as a business start-up in a particular country and other confirmations about a client's financial circumstances: see clauses 1 and 3. Having drawn express attention to the fact that issuing such confirmations exposes the bank to "not inconsiderable legal risk" (see clause 1), it made clear that letters of confirmation or recommendation could not be given for people or companies that had never maintained a relationship with LLB, they could only be issued for existing clients who amongst other things had been a client for at least three years, official forms must always be used rather than formulations prescribed by the client, they must be addressed to a specific addressee and must be addressed to the client or a third party specified by the client in writing: see clauses 4b) - e) and 5a). Clause 6.1 also contained a procedure by which a confirmation should be processed which included sending two completed but unsigned copies to the Legal and Compliance department for authorisation. Thirdly, we were referred to what was described as the Signing Register for the Canton of Zurich which does not include Mr Louanjli's name. The Signing Register does not appear to be referred to in the judgment.

128. Lastly, in this regard, we were referred to the joint report of the experts in relation to Swiss banking. Amongst other things, they broadly agreed that: clear procedures have to be followed and that joint signatures are required for banking references although the expert on behalf of Group Seven stated that references can also be given in certain circumstances informally by email or orally outside such procedures (para 3); that a relationship manager usually has an interface with the client and would be the natural person to whom a client would direct a request for a reference and may

provide non-banking related services to their clients (paras 7 and 11); that references would not be supplied to ex-clients (para 18); that Swiss banks have procedures for giving written references "to mitigate the risk of breach of client confidentiality and banking secrecy laws, to control potential liabilities to third parties and to prevent fraud within the bank" (para 19); that they agree why a bank would not refer to "KYC" within a reference (para 20); and that LLB's directives are typical (para 26). They disagreed about whether a banking reference can be given in the form of an email or by telephone (para 28).

129. Although points were taken in the written argument on behalf of LLB, for which her predecessor was responsible, Ms Tolaney did not pursue the argument that the Judge had been wrong at [549] to state that the "close connection" test applied where the wrongdoing of the employee consists of dishonestly assisting a breach of trust or conspiracy to injure by unlawful means or that the test applied where the wrongdoing is in a commercial context. Also, she did not pursue an argument that the Judge had been wrong to dismiss the proposition that LLB's behaviour in refusing to accept the money from Larn/Mr Nobre amongst other things, should be contrasted with the "foolishness and gullibility" of Group Seven in being defrauded. The Judge held that Mr Louanjli as a dishonest wrongdoer did not have a defence of contributory negligence on the part of the victim and nor did LLB have such a defence to its vicarious liability: [553].

130. However, Ms Tolaney does criticise the Judge's overall conclusions about the field of activities entrusted to Mr Louanjli and whether there was a sufficiently close connection between the position in which he was employed and his wrongful conduct for LLB to be made liable under the principle of social justice. She submits that if the Judge had applied the test properly he could have come to only one conclusion on the evidence and that was that there was insufficient connection to render LLB liable. She says that the Judge focussed incorrectly on the subjective belief of Notable rather than approaching Mr Louanjli's field of activities from an objective standpoint, having taken into account the evidence in relation to his role and the express limitations placed upon it and the usual authority of a relationship manager at a Swiss bank. She says that the evidence shows clearly that a relationship manager does not give references (even in the widest sense) on behalf of clients and certainly not ex-clients of the bank and it is not within such a person's usual authority to provide the kind of information conveyed in the 3 November statements, which included whether "KYC" procedures had been completed. She says that to do so in relation to Mr Nobre who had never been a client of LLB at all and Larn who was no longer a client was obviously outside Mr Louanjli's usual authority, and she also drew attention to the irregular form of the 14 November email which did not comply with either of the LLB directives which applied to Mr Louanjli.

131. She also submits that it was clear on the facts that Mr Louanjli was "moonlighting" or on a "frolic of his own", that the Judge was wrong to distinguish the circumstances from those in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 (as he did at [551]) and that at best or worst, LLB merely provided Mr Louanjli with an opportunity for his wrongdoing.

132. Ms Tolaney also addressed us about the nature of a bank reference, which she suggested was of an entirely different nature from the 3 November statements and the

14 November email, and she referred us to *Playboy Club London Ltd & Ors v Banca Nazionale Del Lavoro SPA* [2014] EWHC 2613 (QB) in this regard. In the light of the fact that Mr Chapman on behalf of Group Seven did not contend that the 3 November statements were formal references and the Judge himself used the term in inverted commas at [535], we do not need to consider this aspect of the matter any further.

133. In response, Mr Chapman QC on behalf of Group Seven submits that the Judge applied the *Mohamud* test properly and was entitled to draw the inferences he did. He says that part of the field of activities of a relationship manager of a bank is to be privy to confidential banking information about his clients and if he communicates that internal banking information to a third party with the consent of the client, his conduct is within the field of his activities when looked at broadly. He says that the same is true if the relationship manager does so with the purported authority of someone he describes to a third party as a client. He is as much within his field of activities as he would be if the person were actually a client.

134. Further, Mr Chapman accepts that the question of whether there is a sufficiently close connection between the conduct and the fields of activity to render the employer liable must be viewed objectively, but he submits that the Judge was right to rely upon what Mr Meduri and Ms Ciserani of Notable thought. He says that they can be taken as analogues of the objective person with the relevant knowledge. He also says that the Judge was quite right to decide that the circumstances in the *Kooragang* case were entirely different because in this case it was central to the dishonest assistance that the statements were purportedly made by LLB and were about LLB's relationship with Larn/Mr Nobre whereas in *Kooragang*, the surveyor was conducting an entirely separate business.

135. Before turning to the relevant legal principles and our conclusions, it is important to remind ourselves that when determining whether LLB was vicariously liable for Mr Louanjli's wrongdoing, the Judge reached an evaluative judgment in relation to a question of law, based on the facts as found. Accordingly, we must not be tempted simply to substitute our own evaluative judgment for that of the Judge. The question for us is whether the Judge erred in law in his conclusion given his unchallenged findings of fact.

136. It is not in dispute that vicarious liability in tort requires "first a relationship between the defendant and the wrongdoer and secondly, a connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct." See *Mohamud* per Lord Toulson at [1]. As Lord Reed JSC put it in *Cox v Ministry of Justice* [2016] AC 660, the companion appeal to *Mohamud,* at [2]:

> "The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant? . . . "

137. Lord Reed went on to note that the relationship in which vicarious liability can operate is classically one of employment and the connection is that the employee commits the act or omission in the course of his employment, that is to say, within the field of activities assigned to him: see [15]. Having referred to the five policy reasons for the imposition of vicarious liability in an employer/employee situation which Lord Phillips PSC (with whom the other members of the court agreed) set out at [35] of his judgment in the *Christian Brothers* case [2013] 2 AC 1, Lord Reed considered three of those factors, in particular, at [23] and [24]. They were the fact that (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor. Para [23] is relevant here:

> "23. These three factors are inter-related. The first has been reflected historically in explanations of the vicarious liability of employers based on deemed authorisation or delegation, as for example in *Turberville v Stampe* (1698) 1 Ld Raym 264, 265 per Holt CJ and *Bartonshill Coal Co v McGuire* (1858) 3 Macq 300, [1858] UKHL 3_Macqueen_300, 306 per Lord Chelmsford LC. The second, that the tortfeasor's activity is likely to be an integral part of the business activity of the defendant, has long been regarded as a justification for the imposition of vicarious liability on employers, on the basis that, since the employee's activities are undertaken as part of the activities of the employer and for its benefit, it is appropriate that the employer should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him: see, for example, *Duncan v Findlater* (1839) 6 Cl & Fin 894, 909-910; (1839) MacL & Rob 911, 940, [1839] UKHL MacRob_911, per Lord Brougham and *Broom v* Morgan [1953] 1 QB 597, 607-608 per Denning LJ. The third factor, that the defendant, by employing the tortfeasor to carry on the activities, will have created the risk of the tort committed by the tortfeasor, is very closely related to the second: since the risk of an individual behaving negligently, or indeed committing an intentional wrong, is a fact of life, anyone who employs others to carry out activities is likely to create the risk of their behaving tortiously within the field of activities assigned to them. The essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not. This idea has been emphasised in recent times in United States and Canadian authorities, sometimes in the context of an economic analysis, but has much older roots, as I have explained. It was reaffirmed in the cases of *Lister* and *Dubai Aluminium*. In the latter case, Lord Nicholls of Birkenhead said at para 21:

> "The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged."'

138. Lord Nicholls described the policy behind vicarious liability in relation to acts which are not authorised further in *Dubai Aluminium Ltd v Salaam & Ors* [2002] UKHL 48, [2003] 2 AC 366 in the following way:

> "22. This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope.
>
> 23. If, then, authority is not the touchstone, what is? Lord Denning MR once said that on this question the cases are baffling: see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 724. Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223-224 and 230. McLachlin J said, in *Bazley v Curry* (1999) 174 DLR (4th) 45, 62:
>
> > 'the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization).' (Emphasis added)
>
> To the same effect is Professor Atiyah's monograph *Vicarious Liability in the Law of Torts*, (1967) p 171:'The master ought to be liable for all those torts which *can fairly be regarded* as

> reasonably incidental risks to the type of business he carried on'. (Emphasis added)"

Such an approach was endorsed by Lord Toulson in *Mohamud* at [39] – [43].

139. It is not in dispute that "the sufficient connection test" developed in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, applied in the *Dubai Aluminium* case and most recently in the *Mohamud* case and the social policy behind it, applies in this case. There is also no doubt that Mr Louanjli was employed by LLB. The issue on this appeal concerns the second requirement, namely whether there was sufficient connection between the employment and Mr Louanjli's conduct to make it just that LLB should be legally responsible for the consequences of Mr Louanjli's conduct.

140. Lord Toulson explained the court's task in relation to the second requirement in *Mohamud* in the following way:

> "44. In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly … .
>
> 45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. *Lloyd v Grace, Smith & Co* [1912] AC 716, *Pettersson v Royal Oak Hotel Ltd* [1948] NZLR 13 and *Lister v Hesley Hall Ltd* were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in *Warren v Henlys Ltd* any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant.
>
> 46. Contrary to the primary submission advanced on the claimant's behalf, I am not persuaded that there is anything wrong with the *Lister* approach as such. It has been affirmed

> many times and I do not see that the law would now be improved by a change of vocabulary. . ."

141. Lord Toulson also confirmed that the employee's motive is irrelevant: *Mohamud* at [48]. In that case, the forecourt attendant's behaviour appeared to be motivated by personal racism. Lord Toulson stated, however, that that was "neither here nor there." Furthermore, the fact that an employee acts for his own benefit rather than that of his employer, does not of itself take the conduct outside the scope of his employment for the purposes of vicarious liability: see *Lloyd v Grace Smith*, *Lister* at [17] and [72] – [73] and *Dubai Aluminium* at [128].

142. With those principles in mind, we turn to the criticisms of the judgment. We have concluded, although the question is not an easy one, that the Judge's conclusions, on the facts as found, reveal no material error of law. He approached the question of Mr Louanjli's fields of activities and whether there was sufficient connection between the activities and the wrongdoing in the common sense way which Lord Toulson's analysis and explanation of the test requires.

143. In coming to this conclusion, we agree, nevertheless, with Ms Tolaney that when deciding what a wrongdoer's field of activities is it is relevant, in general terms, to consider that person's contract of employment and any directives about the way in which he should carry out his functions which form part of the terms and conditions. However, this is only the beginning of the enquiry and cannot be determinative or prescriptive. If it were, the scope of vicarious liability would be narrow indeed and the majority of the central cases in this area of the law would have been decided differently. The question must be addressed broadly. As Lord Nicholls explained in the *Dubai Aluminium* case at [22] quoted by Lord Toulson in *Mohamud* at [41], "agents may exceed the bounds of their authority or even defy express instructions" and as a result, "the law has given the concept of 'ordinary course of employment' an extended scope." As Scarman LJ observed in *Rose v Plenty* [1976] 1 WLR 141 at [147-148] "the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion which he has originated leads to damage to another." As Lord Toulson pointed out in *Mohamud* at [40] "the risk of an employee misusing his position is one of life's unavoidable facts." See also Lord Reed in *Cox* at [23].

144. It is, no doubt, with this universal truth in mind that LLB's recommendation directive states that issuing confirmations exposes the bank to "not inconsiderable legal risk" and that it was for this reason that LLB sought to control that activity. The fact that when making the 3 November statements and sending the 14 November email Mr Louanjli was acting outwith his employment contract, therefore, does not lead inevitably to the conclusion that LLB are not vicariously liable for his conduct and did not prevent the Judge from deciding that the two stage test in *Mohamud* was satisfied. It is trite law that the question which the Judge had to answer must be approached more broadly.

145. Secondly, we agree with Ms Tolaney that the usual authority of someone in the role of the wrongdoer is of some relevance when reaching a conclusion about the nature of a

job and the field of activities entrusted to him or her. However, it is not the complete answer any more than the precise terms of his contract of employment can be. Moreover, usual authority must not displace the approach described by Lord Toulson in *Mohamud*. The question must be addressed broadly in the light of all of the circumstances of the case. It is important not to seek to import a yardstick of authority into that broad enquiry. As Lord Nicholls stated in the *Dubai Aluminium* case at para [23], albeit in the context of actual authority, "authority is not the touchstone."

146. Thirdly, we also agree that the nature of the job and whether there is sufficient connection between it and the wrongdoing must be considered from an objective standpoint, viewed in the light of all the circumstances. To put it another way, the question should be addressed from the perspective of the reasonable observer with knowledge of the relevant context. It seems to us that that is inherent in Lord Toulson's criticism and analysis of the Australian case of *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at [29] of his judgment in *Mohamud*.

147. *Deatons* was a case in which a barmaid whilst on duty in a hotel had injured a customer who asked to speak to the manager. She threw a glass of beer over him and then threw the glass in his face, causing him the loss of sight in one eye. Lord Toulson explained that the High Court of Australia held that there was no basis for finding that the barmaid was acting in the course of her employment. It rejected the argument that her conduct was incidental to her employment because it was an improper method of responding to an inquiry from a customer and rejected the argument that her conduct was an improper mode of keeping order. Dixon J gave two reasons: first, that she did not throw the glass in the course of keeping discipline, and secondly, that she was not in charge of the bar, but was working under the supervision of another woman. See *Mohamud* at [29]. Lord Toulson went on to criticise the conclusions in the following way:

> "30. I agree that it was tortuous and artificial to describe the barmaid's conduct as a mode of performing what she was employed to do, but that does not make the result just. In a broader sense it occurred in the course of her employment. She was employed by the hotel proprietor to serve customers. She was approached in that capacity by a customer, and ordinary members of the public would surely expect the company who employed her to serve customers to have some responsibility for her conduct towards them. And it surely cannot be right that the measure of the company's responsibility should depend on whether she was the head barmaid or an assistant. The customer would have no knowledge what were the exact limits of her responsibilities."

148. In our judgment, therefore, the Judge did not fall into error by taking account of Notable's belief that Mr Louanjli was acting within his authority: [550(6)]. In taking the view he did, the Judge was not approaching the question subjectively. He was approaching the matter from the perspective of an informed third party. In the context of this case, in which there was no contact between the ultimate victim and the wrongdoer, we consider that the Judge was entitled to view Notable/Mr Meduri and

Ms Ciserani as examples of observers from outside the Swiss banking world, who had knowledge of the relevant circumstances. They stand for the ordinary member of the public or the customer in the bar in Lord Toulson's explanation of the *Deaton* case.

149. Although we accept that the Judge might have dealt rather more fully with the expert evidence, we also consider that his view of it is consistent with Lord Toulson's approach. The Judge stated that the evidence did not assist him to answer the question of how to characterise Mr Louanjli's employment because the experts had not approached the matter broadly and had focussed on the matter from the perspective of the world of Swiss banking rather than from that of persons dealing with such banks: [554(2)]. The internal workings of Swiss banks, like the contract of employment and the directives, would be unknown to the objective third party. As a result, they could only form a starting point or background to the enquiry and could not provide a definitive answer to the question with which the Judge was concerned.

150. Furthermore, as Mr Nobre and Larn were treated as synonymous by the Judge and by Notable when seeking reassurance about the €100 million, it seems to us that there is nothing in Ms Tolaney's point that the Judge refers at [551(2)] to Mr Louanjli as having been the relationship manager for Larn/Nobre despite the fact that he never held that position in relation to Mr Nobre. Nor do we consider that the Judge erred in reaching a conclusion that in the circumstances, viewed objectively, a relationship manager in a private Swiss bank was the first port of call for information about the standing and creditworthiness of a customer or former customer. Such a conclusion was not inconsistent with the totality of the expert evidence, compiled purely from the perspective of the Swiss banking community, and reflected the risk which LLB was seeking to guard against by means of its directives. We consider, therefore, that the Judge was entitled to take account of the matters which he set out at [551(1), (2), (4), (5), (6), (7) and (9)].

151. Lastly, we agree with Mr Chapman that the Judge was entitled to find that despite the fact that Mr Louanjli was pursuing his own interests and was not seeking to benefit LLB, he was not on a "frolic of his own". As the Judge pointed out at [551], the fact that Mr Louanjli was not seeking to benefit LLB does not mean that his conduct was not within the nature of his job viewed broadly and that there was not sufficient connection between the position in which he was employed and his wrongful conduct to make it right for LLB to be held liable under the principle of social justice. The argument that in order to establish vicarious liability it was necessary to show that the employee's misdeed was committed for the employer's benefit was rejected by the House of Lords long ago in *Lloyd v Grace, Smith & Co* [1912] AC 716.

152. In considering whether, nevertheless, the conduct was within the nature of his job viewed broadly and that there was sufficient connection between the position in which Mr Louanjli was employed and his wrongful conduct, in our view, the Judge was entitled to take into account the matters which he set out at [551] and [552] and listed in summary at [550(3)]. As the Judge noted at [551], the 3 November statements were made and the 14 November email was sent when Mr Louanjli was acting or purporting to act as a representative of LLB, he was giving information which purportedly emanated from LLB, his position at LLB was central to the statements which he made, Notable wished to hear from Mr Louanjli precisely because he was described to them as Larn/Nobre's relationship manager at LLB and it was important

that Mr Louanjli was able to describe what LLB had done and its relationship with Larn/Nobre. Mr Louanjli's statements were expressed to be made by him as a relationship manager at LLB and not otherwise, and Notable made checks to confirm that Mr Louanjli was employed by LLB: [190, 195, 551 and 554(3)].

153. It follows that we also agree with Mr Chapman that the Judge was entitled to decide that the circumstances which the Judge described at [551] were different from those in the *Kooragang* case. In that case, the "rogue" valuations were given by Rathborne without there being any connection with the defendant's business other than the use of their letterhead and corporate signature. They were completed by Rathborne acting as an employee of a former client of the defendant, on its instructions, at their premises and using their staff. The facts in this case were very different. The connection between the wrongdoing, Mr Louanjli's role at LLB and LLB itself was much closer and an essential element in the wrongdoing. Accordingly, it seems to us that the Judge was entitled to hold that the circumstances were dissimilar from those in *Kooragang*, that there was sufficient connection between the 3 November statements and Mr Louanjli's role and that he was not merely using LLB's email account and the office mobile phone in the same way as the stationery had been used by the surveyor.

154. The imposition of vicarious liability is an extremely fact-sensitive exercise. We consider that there is no error of law in the Judge's decision in relation to vicarious liability and we dismiss the appeal in relation to that issue for the reasons set out above.

CONCLUSION

155. For the reasons given above we:

(1) Allow the appeal of Group Seven, Larn and the Bank in relation to the liability of Notable and Mr Landman for dishonest assistance.

(2) Dismiss the appeals of Mr Louanjli and the Bank in relation to the issue of causation.

(3) Dismiss the appeal of the Bank in relation to its vicarious liability for the wrongdoing of Mr Louanjli.

156. We end by thanking counsel and those who instruct them for the high quality of their arguments and the efficiency of the preparation for this appeal. We invite them to submit a draft of the necessary orders.