Article

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Dishonest Assistance in Singapore and Malaysia since *Barlow Clowes*

Abstract: Determining civil liability for dishonest assistance in breach of fiduciary duty requires courts to consider a combination of subjective and objective factors. Taking into account the person's experience, intelligence and reasons for acting (subjective factors), did the person have sufficient knowledge of the transaction (subjective factor) so as to render participation in the transaction contrary to ordinary standards of honest behaviour (objective factor)? The piecemeal development of this test, as well as its complexity, led to inconsistency and confusion in application. In 2006, the Privy Council in *Barlow Clowes International Ltd (in liq) v. Eurotrust International Ltd* clarified that the person accused of dishonest assistance need not actually realise that involvement in the transaction would breach ordinary standards of honesty.

This article assesses how the dishonest assistance test has been applied since *Barlow Clowes* in two Commonwealth countries: Singapore and Malaysia. The article submits that recent Singaporean and Malaysian judgments have not satisfactorily articulated the various elements of the dishonest assistance test, and thus an attempt is made to provide a clear and concise formulation of the test. The article further posits that while *Barlow Clowes* indeed added badly needed clarity, it did so only with respect to the particular issue addressed by the Privy Council's judgment. In other areas no less important – whether there is an active–passive dichotomy between dishonest assistance and knowing receipt, and the nature of wilful blindness in the non-criminal law context – fundamental questions about the contours of the test remain. The article proposes that there should not be an active–passive distinction, and that the test for wilful blindness – a type of dishonest assistance involving suspicion and turning a blind eye – should be revised to contain both subjective and objective elements.

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I. Introduction

In 2002, as a result of apparently inconsistent decisions of the Privy Council[1] and the House of Lords,[2] the test for determining dishonest assistance in breach of fiduciary duty[3] lay in a state of controversy.[4] Known for bedevilling courts,[5] the test uses both objective and subjective elements to determine whether an alleged accessory to a breach of fiduciary duty was in a "dishonest state of mind." In 2005, the Privy Council attempted to clear up the uncertainty in its now well-known decision *Barlow Clowes International Ltd (in liq) v. Eurotrust International Ltd* ("*Barlow Clowes*").[6] Legal academicians have been divided as to whether it actually did.[7]

1 The decision referred to is *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97 ("*Royal Brunei*"). The Judicial Committee of the Privy Council is the highest court of appeal for several Commonwealth countries.

2 The decision referred to is *Twinsectra v. Yardley* [2002] 2 AC 164 ("*Twinsectra*"). The House of Lords is the upper chamber of Great Britain's bicameral legislature. Until 2009, one component of the House of Lords was the Lords of Appeal in Ordinary (commonly called the "Law Lords"), which consisted of a number of judges serving as Britain's final court of appeal (except on Scottish criminal cases). In 2009, the Supreme Court of the United Kingdom was established and assumed the judicial functions of the House of Lords. Even before the judgment in *Twinsectra* was issued, commentators had been criticising the lack of clarity from *Royal Brunei*. *See, e.g.*, Alan Berg, "Accessory Liability for Breach of Trust" (May 1996) 59(3) Modern L. R. 443 at 443.

3 While the dishonest assistance test is often associated with breaches by trustees, in fact the test also applies to assistance in the misappropriation by other fiduciaries, such as company directors or partners. See Charles Mitchell, "Assistance" in Peter Birks & Arianna Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002) 139 at 160.

4 See, *e.g.*, David McIlroy, "A Return to Objectivity: The Interpretation of Dishonest Assistance in Barlow Clowes" (1 Mar. 2006) 3 IBFL 125; Patricia Shine, "Dishonesty in Civil Commercial Claims: A State of Mind or a Course of Conduct?" (2012) 1 JBL 29 at 29; Desmond Ryan, "Royal Brunei Dishonesty: Clarity at Last?" (Mar/Apr 2006) Conv. 188 at 191.

5 Compare Desmond Ryan, "Royal Brunei Dishonesty: A Clear Welcome for Barlow Clowes" (Mar/Apr 2007) Conv. 168 at 169 with *Tan Kiam Peng v. Public Prosecutor* [2008] 1 SLR 1 at 42. See also Joachim Dietrich & Pauline Ridge, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment" (2007) 31 Melbourne Univ. L. R. 47 at 80.

6 [2006] 1 All ER 333. The All England Reports version of the case is included in the 2006 Reports but the case was actually decided in 2005.

7 Compare Shine (2012), *supra* note 4 at 33 and Margaret Halliwell & Elizabeth Prochaska, "Assistance and Dishonesty: Ring-A-Ring O-Roses" (2006) 70 Conv. 465 with Ryan (2007), *supra* note 5 at 168 and Lincoln Caylor, *et al.*, "Emergence of the Mareva by Letter: Banks' Liability to Non-Customer Victims of Fraud" (May 2011) 12 BLI 197.

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This article assesses how the dishonest assistance test has been applied since *Barlow Clowes* in two Commonwealth countries: Singapore and Malaysia. The article submits that *Barlow Clowes* indeed has clarified the test, but courts continue to struggle with articulating the test's objective and subjective components. Furthermore, recent Singaporean and Malaysian judgments have raised ambiguities in other areas no less important, such as the active–passive dichotomy between dishonest assistance and knowing receipt, and the nature of wilful blindness. As a result, at least in these countries, the law related to dishonest assistance will arguably continue to be characterised by uncertainty.

Section II of the article describes the historical development of the dishonest assistance test in England. Section III then assesses formulations of the objective and subjective elements of the test in recent Singaporean and Malaysian judgments and concludes with an attempt to concisely and clearly articulate those various elements. Section IV evaluates the application of the test in the 2010 Singapore Court of Appeal case *George Raymond Zage III v. Ho Chi Kwong* ("*Zage v. Ho*").[8] This section focuses on the Court's distinction between active assistance and passive receipt. Section V analyses Malaysia's application of the test in *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors and other appeals* ("*Kuan v. Doran*"),[9] paying special attention to the Malaysian Court of Appeal's assessment of accessory liability for "wilful blindness."

A preliminary word of caution: this analysis focuses carefully on judges' choice of words. Language is always important in law, but is extraordinarily crucial in the area of dishonest assistance because the applicable tests and their articulations in judicial opinions seek to capture, in words, mental concepts – such as dishonesty, knowledge, suspicion, and wilfulness – that defy easy definitions.

II. Dishonest Assistance in English Law

A. Evolution of the Test

The development of the test for dishonest assistance in breach of fiduciary duty embodies how law at times evolves in fits and starts. The seminal decision that established accessory liability – *Barnes v. Addy*[10] – held that strangers were not

8 [2010] 2 SLR 589.
9 [2013] 2 MLJ 174.
10 [1874] LR 9 Ch App 244.

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to be made constructive trustees for merely acting as agents for trustees unless they received trust assets or knowingly assisted in a dishonest or fraudulent design.[11] Thus the equitable causes of action for "knowing receipt" and what was then called "knowing assistance" were born.

In 1995 – over 120 years later – "knowing assistance" transformed into "dishonest assistance" in *Royal Brunei Airlines Sdn Bhd v. Tan* ("*Royal Brunei*").[12] There, the Privy Council recognised the difficulty in determining an accessory's knowledge within the "gradually darkening spectrum" of a trustee's authority.[13] The "knowing" standard had led to "tortuous convolutions about the 'sort' of knowledge required."[14] In the Council's view, a test for dishonesty would be more useful.[15]

This led to the objective test for dishonest assistance. The Privy Council's words are worth repeating to establish for the reader the basic concepts upon which this article is based:

> [I]n 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.
>
> [...]
>
> [H]onesty 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.
>
> [...]
>
> 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

11 *Barnes v. Addy* [1874] LR 9 Ch App 244 at 251–52.
12 [1995] 3 All ER 97 at 109.
13 *Ibid.* at 107.
14 *Ibid.*
15 *Ibid.*

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> regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.[16]

Royal Brunei also made it abundantly clear – and this will become important in the analysis of Malaysian law – that dishonesty cannot be eluded by deliberately closing one's eyes and ears or deliberately not asking questions to avoid confirming one's suspicions.[17] Assistance can also involve inducement of the breach.[18]

The test for dishonesty after *Royal Brunei*, therefore, contained an objective component – that the defendant was "simply not acting as an honest person would in the circumstances" – and what could be characterised as two subjective components – first, that the "conduct [would be] assessed in the light of what a person actually knew at the time," and second, that there would be given "regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did." The two subjective elements can be illustrated in the case of a bank officer assisting a trustee in the improper management of trust assets. First, how much does the officer know about the transaction? Is it enough to make an honest person realise that he or she cannot honestly participate in the transaction? Second, what are the officer's qualities, intelligence, experience and reason for acting? Is she a top manager with extensive experience in similar transactions or a novice who just joined the bank? These two elements will not always be consistent, as for instance an experienced manager may nevertheless know so little about the transaction that it would not make an honest person aware of the impropriety.

Recipient liability, although not the focus of this article, acts as a complement to dishonest assistance, covering those instances in which a stranger may not have participated in the breach of duty but nonetheless knowingly received property as a result of the breach. To establish "knowing receipt," a plaintiff must prove that assets were disposed of in breach of fiduciary obligations, they were received beneficially by the defendant, and the defendant had knowledge that they were traceable to the breach.[19] The state of mind required for knowing receipt, like that for dishonest assistance, has been a source of great judicial debate and commentary, divided largely between those courts holding that constructive knowledge is sufficient and those requiring actual knowledge.[20] The current position appears to be that a defendant must simply have that

16 *Ibid*. at 105–07.
17 *Ibid*. at 106.
18 *Ibid*. at 101.
19 *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685 at 700.
20 *Bank of Credit and Commerce International (Overseas) Ltd v. Akindele* [2001] Ch 437 at 450–54 ("*Akindele*").

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amount of knowledge so as to make it unconscionable for him or her to retain the benefit of the receipt.[21] Dishonesty is not required in knowing receipt.[22]

Turning back to dishonest assistance, controversy arose when the House of Lords arguably introduced a new subjective element to the test for dishonest assistance in *Twinsectra v. Yardley* ("*Twinsectra*")[23]: that to be personally liable, defendants must be aware that their conduct transgressed normal standards of honesty.[24] Yet the decision – as pointed out in a strong dissent by Lord Millet – appeared inconsistent with the *Royal Brunei* test, in which the subjective element of the dishonest state of mind was not that the defendant knew his or her actions were dishonest according to normally accepted standards, but rather that the court must merely consider the defendant's knowledge of the circumstances at the time.[25]

Three years later, in *Barlow Clowes*, the Privy Council attempted to clear up the confusion. The Council explained that a dishonest state of mind is to be judged objectively by ordinary standards (the *Twinsectra* majority opinion had been misinterpreted) and a person's own realisation that the actions would be considered dishonest is immaterial.[26] The Privy Council clarified, therefore, that the knowledge needed to have a dishonest state of mind was merely "consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour."[27]

The *Barlow Clowes* articulation of the test has since been affirmed by the English Court of Appeal in *Abou-Rahmah v. Abacha* ("*Abou-Rahmah*")[28] and *Starglade Properties Ltd v. Nash* ("*Starglade*").[29] *Abou-Rahmah* is important for

21 *Ibid*. at 455. *Akindele* was significantly weakened by the 2004 House of Lords case, *Criterion Properties Plc v. Stratford UK Properties LLC* [2004] 1 W.L.R. 1846, which explained that recipient liability principles were not applicable to the *Akindele* circumstances. Nevertheless, the standard established by the *Akindele* Court – that the knowledge must be of such a degree as to make retention of the benefit unconscionable – has been upheld in *The Law Society for England and Wales v. Isaac & Isaac International Holdings Ltd* [2010] EWHC 1670 (Ch) and is the standard used in Singapore. See *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at 843.

22 *Akindele* at 448.

23 [2002] 2 All ER 377.

24 Until 2009, the House of Lords generally acted as the final court of appeal in the United Kingdom, while the Privy Council's decisions are generally merely persuasive authority, not binding, on United Kingdom courts.

25 *Twinsectra* at 198.

26 *Barlow Clowes* at 338.

27 *Ibid*.

28 [2006] 9 ITELR 401 at 422.

29 [2010] All ER (D) 221.

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its precedential value. As *Barlow Clowes* was merely Privy Council advice, its status as precedent in English law was uncertain; thus, the English Court of Appeal's decision in *Abou-Rahmah* to endorse *Barlow Clowes* strengthened its applicability.[30] Importantly for the analysis in this article, *Starglade* confirmed the continued relevance of what was above referred to as the two subjective prongs introduced in *Royal Brunei*; namely, that in applying the objective standard of honesty, the court must consider the knowledge – subjective prong 1 – and the qualities – subjective prong 2 – of the particular defendant.[31]

III. Articulation of the Objective and Subjective Elements of the Dishonest Assistance Test in Singapore and Malaysia

To different extents, English common law and rules of equity are applied in most Commonwealth countries outside the United Kingdom, among them Singapore and Malaysia. English common law, including the principles and rules of equity, so far as it was part of the law of Singapore immediately before 12 November 1993, continues to be part of the law in Singapore.[32] In Malaysia, subject to certain discrepancies of timing between Peninsular Malaysia and the non-Peninsular states of Sabah and Sarawak, English common law and rules of equity apply.[33] Both countries carve out exceptions for English laws that are inconsistent with local circumstances.[34] Statutes in Singapore (1994) and Malaysia (1976 and 1983) have abolished appeals to the Privy Council.[35] As *Royal Brunei* and *Barlow Clowes* – both Privy Council decisions – were issued after these Acts, they constitute merely persuasive – not binding – authorities.

30 Ryan (2007), *supra* note 5 at 172.

31 *Starglade* at para. 25.

32 *Application of English Law Act* (Cap. 7A), s. 3(1).

33 *Civil Law Act 1956* (Act 57), s. 3(1). In Peninsular Malaysia, courts apply English law as administered in England on 7 April 1956; in Sabah, 1 December 1951 (including statutes of general application); and in Sarawak, 12 December 1949 (including statutes of general application).

34 *Application of English Law Act* (Cap. 7A), s. 3(2); *Civil Law Act 1956* (Act 57), s. 3(1).

35 *Judicial Committee (Repeal) Act 1994* (Singapore); *Courts of Judicature (Amendment) Act 1976* (abolishing criminal and constitutional appeals from Malaysia) and *Constitution (Amendment) Act 1983* (abolishing civil appeals from Malaysia).

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A. Singapore

Two judicial decisions in Singapore since *Barlow Clowes* have substantively addressed the objective and subjective elements of the dishonest assistance test. While both of them appear to accept the English test without modification, re-articulation of the test in each decision will arguably contribute to a lack of clarity in applying the test in Singapore. The first, *Zage v. Ho*, established the applicability of *Barlow Clowes* in Singapore with these words:

> It therefore seems quite settled following from Lord Hoffmann's speech in *Barlow Clowes* that for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.[36]

Although the first portion of the test as articulated by the Singapore Court of Appeal accurately conveys one of the subjective elements (namely, that the defendant must have a certain level of knowledge of the transaction) and the objective element (that the knowledge would make an ordinary honest person aware of the breach), the final words of the above quotation – "if he failed to adequately query them" – appear to be misplaced and are problematic. The test as formulated in *Barlow Clowes* provides that, to be liable for dishonest assistance, a defendant must have "consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour." The Privy Council did not add to the end of this sentence: "if he failed to adequately query them."[37] By adding this phrase, the Singapore Court of Appeal has altered the dishonest assistance test from one which requires an honest person to think to himself, "this would be a dishonest transaction" to one in which he must think, "this would be a dishonest transaction if I fail to make further queries into the irregularities." The latter standard is not consistent with *Barlow Clowes*, would be difficult to apply and unnecessarily adds to the complexity of the test. "Failing to query" can be traced to the now largely discarded levels of knowledge in *Baden and others v. Sociéte Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* ("*Baden*"),[38] where the wilful and reckless failure to make such inquiries as an honest and

36 *Zage v. Ho* at 599.

37 *Barlow Clowes* at 338.

38 [1992] 4 All ER 161. Originally reported in 1983 as *Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1983] B.C.L.C. 325, the opinion was subsequently issued "more officially" in 1992. See Chris Howard, "The Mens Rea Tests for Money Laundering Offence – 1" (1998) 148 NLJ 1818. The elements of *Baden* and their continued applicability are outside the scope of this article.

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reasonable person would make was one of the five levels of knowledge that would trigger liability for what was at that time called knowing assistance.

Despite this unnecessary addition, the Singapore Court of Appeal's articulation of the test otherwise holds true to *Barlow Clowes*. Additionally, the High Court decision from which the *Zage* appeal originated (the High Court is directly below the Court of Appeal) reinforces the proper interpretation of the dishonest assistance test and goes beyond the Court of Appeal's formulation to include the second subjective element (namely, that courts must regard the "personal attributes and experience of a defendant").[39]

In a judgment issued just months after *Zage v. Ho – Swiss Butchery Pte Ltd v. Huber Ernst and others and another suit* ("*Swiss Butchery*")[40] – the Singapore High Court[41] arguably contributed further to the lack of clarity of the dishonest assistance test. Swiss Butchery Pte Ltd accused a number of defendants, including its former managing director and deputy managing director, of conspiracy and dishonest assistance in diverting its operations and business opportunity to open a competing butchery. In addressing the contours of the dishonest assistance test, the High Court appears to have glossed over various crucial elements of the test that continue to be operable:

> Prior to *George Raymond Zage III*, it was uncertain as to whether the test for honesty in a claim under dishonest assistance is an objective test or whether it is a composite test with both an objective and subjective element [...] However in *George Raymond Zage III*, Rajah JA cited *Barlow Clowes*, where the Privy Council affirmed that the objective test of honesty laid down in *Royal Brunei* was the applicable test and that the decision in *Twinsectra* did not depart from this test. [...] The Court of Appeal in *George Raymond Zage III* thus affirmed that the test for dishonest assistance is an objective test: for a defendant to be liable for dishonest assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.[42]

First, by citing *Zage v. Ho*, the High Court repeated the inappropriate phrase "if he failed to adequately query them." Moreover, while the remainder of the above excerpt is literally accurate, it does not reflect the complexity of the dishonest assistance test. In the quotation, the High Court in *Swiss Butchery* distinguished between a purely objective test and a mixed objective–subjective

39 *George Raymond Zage III v. Rasif David* [2009] 2 SLR 479 at 492 ("*Zage v. Rasif*").
40 [2010] 3 SLR 813.
41 The Singapore High Court is the second highest court in Singapore, after the Court of Appeal. Together they form the Supreme Court of the Republic of Singapore.
42 *Swiss Butchery Pte Ltd v. Huber Ernst and others and another suit* [2010] 3 SLR 813 at 821–22 (internal citations omitted).

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test, and then concluded that the test was now *completely objective*. Honesty, however, has a subjective element.[43] The subjectivity that *Barlow Clowes* held was not a part of the test was that the defendant needed to know that an ordinary honest person would consider his or her acts to be dishonest. *Barlow Clowes* did *not* eliminate the other subjective components of the test (that the defendant must have the *subjective* knowledge of the transaction so as to make an honest person realise that what he is doing is improper and that the court must consider a defendant's *subjective* experience, intelligence, qualities and the reason for acting). As discussed above, these components have been upheld in *Abou-Rahmah* and *Starglade*. In *Abou-Rahmah*, the English Court of Appeal called the dishonest assistance test "predominantly" – not solely – objective.[44] The test transformed from a predominantly subjective one to a predominantly objective one in *Royal Brunei* when it evolved from knowing assistance to dishonest assistance, not when *Barlow Clowes* clarified the holding in *Twinsectra*.

B. Malaysia

Like in Singapore, courts in Malaysia have adopted the objective and subjective elements of dishonest assistance established in *Barlow Clowes*, albeit with less reformulation. Malaysian judgments addressing accessory liability in breach of fiduciary duty more than in passing are scant. This sub-section will briefly describe three of these judgments and Section V will devote considerable attention to one of them – the 2013 Malaysia Court of Appeal judgment in *Kuan v. Doran*.

Although issued in 2001 – prior to *Barlow Clowes* – the first case, *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd* ("*Industrial Concrete*"),[45] helped establish the *Royal Brunei* dishonest assistance test in Malaysia. Choo Chin Thye, a director of Concrete Engineering Products Bhd ("CEPCO"), was accused of breach of fiduciary duties in collaborating with a rival company to take over CEPCO's core business. CEPCO claimed that the rival company, Industrial Concrete Products Bhd, and its managing director had dishonestly assisted Choo in the breach. In establishing the applicable law, the High Court in Malaya[46] – probably wisely – quoted directly from *Barnes v.*

43 *Royal Brunei* at 105–06.

44 *Abou-Rahmah* at 425; see also Jill E. Martin, *Modern Equity*, 19th ed. (London: Sweet & Maxwell, 2012) at 340.

45 [2001] 2 MLJ 332.

46 In Malaysia, the two High Courts – the High Court in Malaya and the High Court in Sabah and Sarawak – are below the Court of Appeal and the country's highest court, the Federal Court.

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Addy and *Royal Brunei*, thus avoiding the rephrasing difficulties encountered by the Singaporean courts. The High Court declined to hold the defendants liable because they had been approached by – rather than initiated contact with – Choo. Moreover, it was not unusual for a rival to refrain from demanding to see a company's Memorandum and Articles of Association, the defendants had no reason to suspect breach of fiduciary duty and they should not have been expected to investigate Choo's authority.[47]

The adherence to *Royal Brunei* continued after *Barlow Clowes* (which was issued in 2006). In *Darinco Enterprise Sdn Bhd v. Rosman Bin Salim Anor MIB Petroleum & Power Sdn Bhd*,[48] an unreported 2009 High Court decision, Darinco Enterprise Sdn. Bhd. ("Darinco"), a supplier of power plant equipment and spare parts, alleged that its competitor, MIB Petroleum & Power Sdn. Bhd. ("MIB"), had knowingly assisted in a breach of fiduciary duty perpetrated by Darinco's executive director. Like the High Court in *Industrial Concrete*, the High Court here also directly quoted lengthy passages from Lord Nicholls' opinion in *Royal Brunei* to establish the meaning of dishonesty and the contours of the subjective and objective elements.[49] In assessing the defendant's liability, the High Court focused on the contention that MIB was an accessory because its executive director, Rosman bin Salim, controlled MIB to the extent that it was his alter-ego.[50] The Court held that the evidence produced by the plaintiff fell "far short of the degree of evidence required to prove that Rosman and D2 are one and the same" and that there was no independent evidence of MIB having acted dishonestly.

The Malaysia Court of Appeal finally addressed the objective and subjective elements of the dishonest assistance test in its 2013 judgment in *Kuan v. Doran*. This case is discussed in considerable detail in Section V below; for the purposes of this sub-section it is sufficient to note that the Court of Appeal – like the High Courts in *Industrial Concrete* and *Darinco v. Rosman* – used direct quotes from long passages of *Barnes v. Addy*, *Royal Brunei*, *Barlow Clowes* and even *Abou-Rahmah* to identify and establish the applicable elements of the test.[51] In this manner, the Court of Appeal similarly avoided misstating the elements.

47 *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd* [2001] 2 MLJ 332 at 365.

48 [2009] MLJU 1251.

49 *Darinco Enterprise Sdn Bhd v. Rosman Bin Salim Anor MIB Petroleum & Power Sdn Bhd* [2009] MLJU 1251 at 5–6 (judgment page numbers were unavailable; Lexis-Nexis page numbers have been used).

50 *Darinco Enterprise v. Rosman* at 7.

51 *Kuan v. Doran* at 209, 210, 211, 219–20.

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C. Proposed Formulation of the Test

The Malaysian courts wisely avoided rephrasing the various components of the dishonest assistance test, but in their avoidance they have left future courts with the unenviable task of sifting through a whole line of English judgments to locate the appropriate elements of the test. Singaporean courts, in contrast, in their attempts to summarise the elements of the dishonest assistance test instead created unnecessary ambiguities. This sub-section is an attempt to concisely and accurately articulate the dishonest assistance test. While it is risky, given that courts continue to articulate it in different ways, it is nonetheless worth an attempt in the interest of providing a clear roadmap for the reader.

To begin, accessory liability of a stranger (*i.e.*, not a trustee or other fiduciary) in a breach of fiduciary duty can be divided into two main areas: (1) knowing receipt and (2) dishonest assistance or procurement.[52] Dishonest assistance or procurement has two components: (1) a dishonest state of mind and (2) assistance or procurement. A dishonest state of mind arises in one of two circumstances: the defendant either (a) assists in the breach with such knowledge of the transaction as to make an honest person realise that what he or she is doing is improper[53] or (b) assists after wilfully turning a blind eye to avoid learning of the impropriety that he or she suspects.[54] A further clarification is needed: in determining whether circumstance (a) has arisen, a defendant's experience,[55] intelligence,[56] qualities[57]

52 *Barnes v. Addy* at 251–52. Knowing receipt is not the focus of this article but has been discussed above in Section II.A and will be discussed in some depth below as it contrasts to dishonest assistance.

53 *Barlow Clowes* at 338. To be clear, this knowledge is actual, not constructive, knowledge. In other words, the defendant must actually have knowledge of the impropriety of the transaction, but he or she does not necessarily need to realise that it is improper. It is enough that an honest person would realise that it is improper.

54 *Royal Brunei* at 106. *Barlow Clowes* affirmed the concept. See *Barlow Clowes* at 337. Sometimes a distinction is made between, on the one hand, wilfully shutting one's eyes to the obvious and, on the other, wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; sometimes the two are treated as the same. Compare *Baden and others v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161 (distinguishing the two) and David Hayton, "Personal Accountability of Strangers as Constructive Trustees" (1985) 27 MAL. L.R. 313 at 315 (equating the two).

55 *Royal Brunei* at 107.

56 *Ibid.*

57 *Starglade* at para. 25.

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and the reason why he acted as he did[58] must be considered – this could be called the "honest person standing in the shoes of the defendant" requirement.[59]

IV. Creation of an Active–Passive Distinction in Singapore

A. *Zage v. Ho*

In addition to difficulties encountered in articulating the basic elements of the dishonest assistance test, Singaporean and Malaysian decisions issued since *Barlow Clowes* demonstrate that other thorny complications continue to impede the ability of courts to assess accessory liability. This section will focus primarily on an almost completely unexplored aspect of the dishonest assistance test that was raised in the recent Singaporean Court of Appeal decision of *Zage v. Ho*: that dishonest assistance is active, while knowing receipt is passive.

Zage v. Ho involved a jewellery company that sold precious stones to a lawyer paying with client monies held in trust. The jeweller was accused of both types of accessory liability – dishonest assistance and knowing receipt. The facts of *Zage v. Ho* read like an international crime thriller. The mastermind thief – David Rasif – was so "charming and relaxed" that he even sang and danced in the jewellery showroom while pulling off his scam.[60] Seemingly ignoring normal security protocol, the high-class jeweller – Jewels DeFred Pte Ltd – delivered 20 of the 26 pieces purchased by Rasif at night in the lobby of the Mandarin Hotel and the remaining six diamonds in the back seat of Rasif's car.[61] To add to the intrigue, Rasif ordered an associate, Lim Soon Kiang, to open a bank account in Ho Chi Minh City and carry US$400,000 in person to Bangkok. When Lim refused, Rasif had him hand over US$500,000 to "a man at a hotel room in Ho Chi Minh City."[62]

58 *Royal Brunei* at 107.

59 Whether the defendant's experience, intelligence and qualities must also be considered in determining circumstance (b) is unclear, but probably they would not. Their applicability may depend on whether wilful blindness requires subjective or objective suspicion of the impropriety. If subjective, considering the defendant's personal qualities would be unnecessary.

60 *Zage v. Rasif* at 479.

61 *George Raymond Zage III v. Ho Chi Kwong* [2010] 2 SLR 589 at 593–94 ("*Zage v. Ho*"). The price of the 26 pieces was Singapore $1,780,350.

62 *Zage v. Rasif* at 480. The plaintiffs claimed that Lim knowingly received and/or dishonestly assisted Rasif as well. The Malaysia High Court held Lim liable for dishonest assistance. This part of the judgment was not appealed.

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Wherever there is a con artist, however, there is also a victim. The plaintiffs in the case, two Americans permanently residing in Singapore, had transferred $10.6 million[63] to the law firm of David Rasif & Partners to complete the purchase of a parcel of property. Rasif, the sole shareholder of the firm, withdrew over $11 million of client funds and eventually absconded from Singapore. Before his departure, he had paid over $2 million of client money to DeFred. The plaintiffs claimed that DeFred had knowingly received and/or dishonestly assisted Rasif in misappropriating the funds.

Before the Court could apply the dishonest assistance test, it first had to decide which of the plaintiffs' claims – dishonest assistance or knowing receipt – was applicable.[64] The Court held that it would "be clearly a stretch to label DeFred's actions as dishonest assistance" because rather than assistance, the jeweller's participation was better characterised as receipt.[65] To explain, Rasif had used a Cash Cheque of $270,000 to pay for part of his jewellery purchases. The Cash Cheque contained the words "DAVID RASIF & PARTNERS" and below it the words "DAVID RASIF & PARTNERS – CLIENT'S ACCOUNTS." The cheque was eventually delivered to Ho Chi Kwong, a director and shareholder of DeFred and an "astute businessman"[66] who should have been alerted to the dishonest nature of the transaction. As DeFred was clearly the recipient of trust assets, and through its director Ho, a knowing recipient, the Court held the jeweller liable for knowing receipt.

The Court did not stop there, however. Instead, it proceeded to distinguish dishonest assistance from knowing receipt based on a difference it identified in the fundamental *nature* of the two limbs of accessory liability: DeFred's actions could not be characterised as dishonest assistance because they were passive, rather than affirmative.[67] The Court reasoned:

> While DeFred was in a very broad sense, involved in Rasif's laundering, this participation was more in the way of passive receipt than *active* assistance [...] *Dishonesty describes and qualifies action*, not passive receipt.[68]

63 The symbol "$" without any country designation refers to Singapore dollars.

64 Dietrich and Ridge argue that recipient liability "should be viewed as a subset of knowing assistance liability" because the defendant's conduct is wrongful and participatory. Dietrich & Ridge (2007), *supra* note 5 at 60.

65 *Zage v. Ho* at 608.

66 *Zage v. Ho* at 595.

67 Tang Hang Wu, "Equity and Trusts" (2009) 10 SAL Ann Rev 299 at 309, also noted the distinction.

68 *Zage v. Ho* at 608 (emphasis added).

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Characterising dishonesty as "active" introduces a new, and heretofore relatively unexplored, quality to dishonest assistance.[69] Though the Singapore Court of Appeal did not explicitly state that activeness was a necessary element of dishonesty, making such a distinction could very well lead to a perceived fundamental difference between the two types of accessory liability. It is true, of course, that dishonest assistance and knowing receipt are not the same, and it is also true that knowing receipt was probably the more appropriate branch of liability in this case. This is so, however, because – this author submits – there was clearly beneficial receipt and it was thus the stronger claim, *not* because dishonest assistance requires affirmative action.

Can dishonest assistance be passive? Joachim Dietrich observes that the type of involvement needed in dishonest assistance "has been rarely discussed," either in academic writing or case law.[70] He suggests in two articles, nonetheless, that "[t]here is no reason in principle why passive facilitation cannot suffice for assistance liability"[71] and that "one can readily accept" that a mere passive omission could qualify as "knowing assistance for breach of trust or fiduciary duty."[72] Citing former Australian Federal Court judge Paul Finn, Dietrich's findings are worth repeating:

> Professor Finn, in arguing for a general participatory liability scheme in equity, discusses the different types of involvement that may activate such liability. His fifth example is one where the "accessory" simply takes advantage of a wrong to obtain benefits flowing from such wrong. This seems to suggest that no causative link is necessary. Such a scenario also illustrates how an omission to act might suffice.
>
> In equity, *passive facilitation of a breach of fiduciary duty or trust, such as allowing one's bank account to be used to launder misappropriated trust funds, probably also suffices as "knowing receipt" or "knowing assistance"*. Finn has suggested that a third party may be a participant (accessory) in another's wrong "sometimes actively, sometimes passively". One

69 The Singapore Court of Appeal cited Richard Nolan, "How Knowing is Knowing Receipt?" (2000) 59(3) Cambridge L. J. 447 at 447, as its authority for the active-passive dichotomy. Indeed, Nolan does state that "[d]ishonesty describes and qualifies action, not a passive receipt." He reasons that dishonesty is appropriate for assistance, rather than receipt, because it is a fault element founded on culpable acts. By this, he presumably means that dishonesty somehow requires action, while the knowledge in knowing receipt does not. As support, he cites *Royal Brunei*. But that decision did not make the active-passive distinction.

70 Joachim Dietrich, "The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions" (2010) 43 Melbourne Univ. L. R. 106 at 124.

71 Dietrich & Ridge (2007), *supra* note 5 at 80.

72 Dietrich (2010), *supra* note 70 at 125. Dietrich uses the term "knowing assistance" instead of "dishonest assistance."

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> example may be where an accessory "takes advantage of the breach for his or her benefit [...] by receiving the benefits which flow from it".[73]

Dietrich's example of money laundering is a helpful one. A money laundering scheme may consist of several roles, some active and some passive. In money laundering, the bank, shell company or other intermediary that helps "clean" the money of course receives it but does not necessarily receive it for his or her benefit and use. Known as "layering," money launderers engage in a number of financial transactions through intermediaries to distance the original "dirty" money from its original placement in the financial system.[74] In many cases the receipt is for the benefit of the originating party, not the intermediary, although of course, the intermediary will naturally receive a fee for his or her services.[75] Hence, in such a situation, the corrupt but passive bank, company or casino may more appropriately be liable for knowing assistance than knowing receipt. Knowing receipt, after all, requires the receipt of trust assets for one's benefit.[76] In fact, there is no reason why a defendant could not be held liable for both dishonest assistance and knowing receipt, whether both could be characterised as active or both as passive.[77] Although a strong argument could be made that financial intermediaries knowingly involved in money laundering are indeed liable for knowing receipt because they receive an indirect benefit from the receipt in the form of fees, the nature of their beneficial receipt is clearly different from a recipient who receives trust funds solely for his or her own use and benefit. It is worth noting as well that none of the English cases thus far discussed – from *Barnes v. Addy* to *Starglade* – have made the active–passive distinction.

The Singapore Court of Appeal, of course, can very well extend Singaporean law to include a passive–active distinction between knowing receipt and dishonest assistance. Nonetheless, the introduction of this new requirement would

73 *Ibid*. at 124–25 (citing Paul D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in D. W. M. Waters ed., *Equity, Fiduciaries and Trusts* (Scarborough, ON: Carswell, 1993) at 199) (emphasis added).

74 See Mariano-Florentino Cuellar, "Criminal Law: The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance" (2003) 93 J. Crim. L. & Criminology 311 at 327.

75 See *ibid*. at 330.

76 *Agip (Africa) Ltd v. Jackson* [1990] Ch 265 at 291–92; *Twinsectra* at 194.

77 See, *e.g*., Kris Hinterseer, "The Wolfsberg Anti-Money Laundering Principles" (2001) JMLC 5 (1) at 38; Nicholas Clark, "The Impact of Recent Money Laundering Legislation on Financial Intermediaries" (1996) 14 Dick. J. Int'l L. 467 at 483; Barry A. K. Rider, "The Limits of the Law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering" (1999) JMLC 2(3) at 222.

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depart significantly from the standards established by English law and could prove problematic in the application of Singaporean law to the area of dishonest assistance. As Dietrich observes: "[I]f there were no liability for 'omissions' [in knowing assistance], then this would raise difficult probative issues and necessitate that fine conceptual distinctions between 'active' and 'passive' be drawn."[78]

Additionally, the Singapore Court of Appeal held that dishonest assistance was not the proper category of liability because "DeFred's state of knowledge was not dishonest." With respect, this conclusion appears to contradict the Court's own analysis. Given Ho's experience, the Court reasoned, he could not have considered the payment legitimate. He should have "asked why Rasif was using funds from that particular account" and should have seen the "obvious red flag being vigorously waved."[79] Recall that the standard established for dishonest assistance by the Court was "such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them." DeFred's actions, through Ho, appear to clearly satisfy this standard.

A reader may accuse the author of nit-picking over the Court's language. After all, dishonest assistance usually will be active and knowing receipt passive. These qualities, however, are not and should not be construed as inherent parts of the tests for liability. The Court's distinction, while subtle, could well lead to future misapplication of the branches of accessory liability. Moreover, the rocky development of dishonest assistance makes it clear that language – precise choice of words – is essential to uniformity and clarity in this area of the law.

B. *Yong v. Panweld Trading*

Issued just 2 years later, in 2012, the Singapore Court of Appeal's decision in *Yong Kheng Leong and another v. Panweld Trading Pte Ltd and another*[80] appears to undermine the passive/active distinction made in *Zage v. Ho*. Panweld Trading Pte Ltd brought an action against a company director's wife, Lim Ai Cheng, after her husband had put her on the payroll and paid her a salary for 17 years despite her not being an employee. The Singapore High Court judge had found that Lim was liable for knowing receipt because she had beneficially and

78 Dietrich (2010), *supra* note 70 at 125.

79 *Zage v. Ho* at 611.

80 [2013] 1 SLR 173. Although the judgment report is dated 2013, the case was decided in 2012.

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knowingly received funds channelled from her husband in breach of fiduciary duty, and that she was further liable for dishonest assistance because she had facilitated the breach by allowing her bank account to be used for the misapplication of monies and she had a dishonest state of mind because she knew the monies did not belong to her.[81]

In responding to Lim's arguments that she did not know that the payments were in breach of fiduciary duty and that she was neither sophisticated nor highly educated, the Court of Appeal noted that actual knowledge was not necessary to prove either ground. Wilful avoidance of the truth – or a suspicion "that something dishonest might be going on" – was enough.[82] The Court upheld the judgment against her, finding that she knew, or wilfully avoided knowing, that the payments were made in breach of fiduciary duty, particularly because she had been receiving the substantial payments[83] for 17 years, all the while filing returns and paying taxes knowing that she was not an employee.[84]

Wilful avoidance will be discussed in detail in the next section of this article. Perhaps the most interesting point of the case, however, for the purposes of the above analysis of *Zage v. Ho*, is that Lim had *passively* assisted her husband but was nonetheless held liable for dishonest assistance. There was no evidence from either the High Court or Court of Appeal judgment that Lim did anything more than permit her bank account to be used to receive the misappropriated funds.

Interestingly, however, a Malaysian court may also have recently inferred an active–passive distinction between assistance and receipt. The Malaysia Court of Appeal in *Kuan v. Doran* – discussed in detail below – appears to at least imply that dishonest assistance requires some sort of affirmative, positive action. The Malaysia Court of Appeal could not fathom how a lower court could find that the defendants had not "set out actively to assist Kuan" yet could still be liable for dishonest assistance. Perhaps this is evidence that the dichotomy is developing.

81 *Yong Kheng Leong and another v. Panweld Trading Pte Ltd and another* [2013] 1 SLR 173, 204 ("*Yong v. Panweld*").

82 *Ibid*. at 204–05. Citing *Comboni Vincenzo v. Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020, the Court held that wilful avoidance of knowledge was sufficient for knowing receipt. *Ibid*. Yet *Comboni v. Shankar's Emporium* relied on the five categories in *Baden and others v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161 to make this determination. These categories were formulated with, as it was called at that time, knowing assistance, rather than knowing receipt, in mind. Martin (2012), *supra* note 44 at 344. Thus, the inclusion of wilful blindness as a type of knowing receipt is questionable.

83 The total paid was $873,959.20.

84 *Yong v. Panweld* at 205.

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The recent Singaporean cases discussed above indicate that the contours of the dishonest assistance test continue to defy easy interpretation and application. The clarification in *Barlow Clowes* and the subsequent affirmations in *Abou-Rahmah* and *Starglade* have helped, but additional elucidation is necessary before applying the test becomes a reasonably manageable task. This article suggests that the active–passive distinction is superfluous and unnecessarily muddles the already clear and long-established difference between dishonest assistance and knowing receipt. Creating a distinction would require courts to hold defendants liable for only one of the two prongs of accessorial liability and would lead to complicated analyses of the difference between active and passive behaviour.

V. Cluelessness and The Wilful Blindness Test in Malaysia

The seminal Malaysian case addressing dishonest assistance since *Barlow Clowes* – and the focal point of this section of the article – is *Kuan v. Doran*. Although perhaps not as exciting as *Zage v. Ho*, *Kuan v. Doran* still had its share of alleged misdeeds. The plaintiff, Robert Doran, a citizen of the United Kingdom and resident of Dubai, entered into a joint venture with the defendant, Alan Kuan, to produce plastic staple fibre. Kuan owned 70% and Doran 30% of the joint venture company. Doran claimed that Kuan sold a factory and removed machinery to benefit himself, and fraudulently induced Doran to agree to an amendment to the company's memorandum of association that allowed Kuan to gain control of the company bank accounts and control the company's disbursement of Doran's investment. Doran further alleged that 23 other defendants, including the joint venture company, knowingly assisted[85] in Kuan's breach of shareholder agreements and fiduciary duties.

Turning to the allegations of dishonest assistance, the Malaysia Court of Appeal confirmed the applicability in Malaysia of the dishonesty test established in *Royal Brunei* and *Barlow Clowes*.[86] The Court of Appeal determined, however, that while the High Court had correctly selected the test for dishonesty, it failed to actually find such dishonesty.[87] As a result of the plaintiff's failure to plead

85 As discussed in Section II, the term "knowing assistance" has, over time, become more commonly referred to as "dishonest assistance." In the discussion herein of *Kuan v. Doran*, "knowing assistance" is used to reflect the term used by the Court.

86 *Kuan v. Doran* at 210–11.

87 *Ibid*. at 212.

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concise facts that demonstrated the defendants' dishonest state of mind, the action failed.[88]

A. Consideration of the Defendant's Intelligence in Determining a Dishonest State of Mind

Like the Singapore Court of Appeal in *Zage v. Ho*, the Malaysia Court of Appeal's analysis touches upon certain ambiguities in the dishonest assistance test. The first issue raised is whether a defendant can avoid liability due to "cluelessness." George Cheong, one of the defendants, was a director of Liberty Equity Sdn Bhd, a company wholly owned by another company wholly owned by Kuan and his family. He was also chief operating officer of the factory where the machinery in controversy had been placed. The lower court had found that Cheong was an oblivious puppet controlled by Kuan. He was not intelligent enough to have participated in Kuan's planning and "had no clue as to what he was doing."[89] The Malaysia Court of Appeal seized on Cheong's lack of intelligence to find that he therefore must have "lacked the subjective element of conscious impropriety."[90] This analysis appears correct because, as Lord Nicholls made clear in *Royal Brunei*, negligence is not enough to establish dishonest assistance.[91] Rather, dishonesty – which includes knowledge of the elements of the transaction – is an essential ingredient. Unintelligent and uninformed accessories, like Cheong, should not be held liable.

The Malaysia Court's refusal to hold Cheong liable is useful to highlight the importance of the various elements of the dishonest assistance test. Recall that the test examines whether an honest person would have acted differently under the circumstances (objective element); the defendant must have had knowledge of the elements of the transaction which rendered his or her participation contrary to ordinary standards of honest behaviour (subjective element 1); and the court must consider the defendant's intelligence, experience and the reason for acting (subjective element 2). In this case, it appears that Cheong lacked subjective prong 1 – he had no clue as to what he was doing – and the reluctance

88 *Ibid*. at 212–13.

89 *Ibid*. at 218.

90 *Ibid*. at 219. The Court's use of the term "conscious impropriety" out of its original context is questionable. Although *Royal Brunei* used the term, it qualified its use by stating that "*for the most part* dishonesty is to be equated with conscious impropriety." (emphasis added). As *Barlow Clowes* has made clear, a defendant need not believe that his or her actions are dishonest, nor even realise that an honest person would consider them to be dishonest.

91 *Royal Brunei* at 108.

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to hold him liable was further supported by subjective prong 2 – he was not intelligent enough to have been involved. Hence, an honest person standing in his shoes would not have acted differently.

B. Wilful Blindness

Equally important is the Court's analysis of the liability of Kuan's mother (a substantial shareholder in one of his companies) and wife (a director of four of his companies). The High Court had found that Kuan's mother and wife had closed their eyes to what Kuan was doing and would have realised his conflict of duties if they had only checked. Their assistance involved the second type of circumstance in which dishonest assistance arises: namely, suspicion combined with a deliberate decision not to ask questions. Referred to as "wilful blindness," "contrived ignorance" or "Nelsonian knowledge,"[92] the precise nature of this state of mind – at least in the criminal context – has been a source of extensive discussion and theorising, without any apparently satisfactory conclusion.[93] In the civil context, it remains underexplored.

Addressing wilful ignorance in American criminal jurisprudence in 1994, Robin Charlow noted that, "despite the use of wilful ignorance as a criminal mens rea for over 100 years, there is tremendous confusion in this area of law and a lurking sense that something is fundamentally awry."[94] It is generally accepted that in criminal law, wilful blindness is equated with knowledge.[95] Pinning down the precise nature of wilful blindness, however – in particular whether it *is* actual knowledge, or whether it is not actual knowledge but should be treated as such – has been challenging for courts and legal commentators.[96] A wilfully ignorant defendant is not completely unmindful of the truth, but rather believes or at least suspects it.[97] Mere suspicion, however – at least in

92 "Nelsonian" refers to a famous English one-eyed admiral who held a telescope to his blind eye so that he would not see. See Sue Farran, "Barrett and Sinclair v McCormack – Case Note" (1999) 3 J. So. Pac. L.

93 See, *e.g.*, Douglas N. Husak & Craig A. Callender, "Wilful Ignorance, Knowledge, and the 'Equal Culpability' Thesis: A Study of the Deeper Significance of the Principle of Legality" (1994) 1194 Wis. L. Rev. 29 at 35.

94 Robin Charlow, "Wilful Ignorance and Criminal Liability" (1992) 70(6) Texas L. R. 1351 at 1352.

95 David Luban, "Contrived Ignorance" (1998–1999) 87 Geo. L.J. 957 at 959; Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (London: Steven & Sons, 1961) at 159.

96 See, *e.g.*, Husak & Callender (1994), *supra* note 93 at 42.

97 *Ibid*. at 41–42.

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the view of academics Douglas Husak and Craig Callender – does not suffice.[98] Instead, the suspicion must be demanded by the evidence, the truth that the defendant ignores must be readily available to be discovered and the defendant must consciously desire not to learn the truth to preserve a defence for later – *i.e.*, the ignorance cannot be the result of laziness or stupidity.[99]

What does wilful blindness mean in the civil law context of accessory liability in breach of fiduciary duty? Some commentators have indicated that here, wilful blindness is likewise associated with actual knowledge.[100] Yet the application of criminal law standards and meanings to the context of dishonest assistance in breach of fiduciary duty has been questioned.[101] The leading English cases in accessory liability seem to indicate that wilful blindness is not actual knowledge but should nonetheless trigger liability. In what appears to be one of the earlier acceptances of wilful blindness as a ground for accessory liability, the English Chancery Division in *Baden* accepted the argument that wilful blindness permitted a court to "impute" knowledge to the defendant.[102] Although the decision's use of "knowledge," as discussed above, was criticised and has been replaced with "dishonesty," its inclusion of wilful blindness as a type of dishonesty sufficient to generate personal liability has been upheld.[103] Subsequent English cases have held that wilful blindness is something short of knowledge. For instance, the Privy Council in *Royal Brunei* reasoned: "Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, *lest he learn something he would rather not know*, and then proceed regardless."[104] In *Twinsectra*, the House of Lords, in buttressing the idea that wilful blindness triggers accessory liability, clearly considered wilful blindness to be "deemed" actual knowledge – but short of actual knowledge.[105] The Privy Council in *Barlow Clowes* similarly supported holding accessories liable for dishonest assistance when they deliberately close

98 *Ibid*. at 39.

99 *Ibid*. at 40.

100 See, *e.g.*, Simon Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 L.Q.R. 56; Charles Harpum, "Liability for Intermeddling with Trusts" (Mar. 1987) 50(2) Modern L. R. 217 at 218 n. 10.

101 See Shine (2012), *supra* note 4 at 30, 42–43; Dietrich (2010), *supra* note 70 at 109.

102 *Baden and others v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161 at 236.

103 See Howard (1998), *supra* note 38 (*citing James & Son Limited v. Smee* [1955]) 1 QB 78; *Westminster City Council v. Croyalrange* [1986] 2 All ER 353; *Eagle Trust Plc v. SBC Securities* [1992] 4 All ER 488; *Polly Peck International plc v. Nadir (No 2)* [1992] 4 All ER 769 at 777).

104 *Royal Brunei* at 106 (emphasis added).

105 *Twinsectra* at 195 (emphasis added).

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their eyes, and at the same time indicated a difference between actual knowledge and wilful blindness.[106]

While these tribunals have made it clear that wilful blindness is sufficient for accessory liability and different from actual knowledge (although deemed to be actual knowledge), they have not attempted to describe the exact contours of the concept. Considering the complicated hair-splitting that has developed over the precise meaning of the term as it is used in criminal law, it was probably wise that the judges have steered clear of the matter. Nevertheless, the lack of precision leaves courts in Commonwealth countries devoid of guidance on how to apply the test.

Turning back to *Kuan v. Doran*, the High Court had found that Kuan's mother had "closed her eyes to what Kuan was doing and happily went along with all his decisions when, if, she had only cared to check, she would have realised that Kuan had placed himself in a position of conflict with his duties to Doran and Plascon Technologies."[107] Kuan's wife did the same.[108] Disagreeing with the lower court's finding of liability, the Malaysia Court of Appeal reasoned that shutting one's eyes and "not caring to check" meant that there could have been no knowledge of the conflict of duties and thus no dishonesty.[109]

Recall, however, that there appears to be a consensus that wilfully closing one's eyes is not actual knowledge, even though it may be treated as such. Rather than finding that there could have been no knowledge and thus no dishonesty, perhaps the Court would have been better off querying whether Kuan's mother and wife suspected something and *wilfully* closed their eyes to avoid learning the truth. Unfortunately, the High Court did not qualify the phrase "closed her eyes" with an adverb such as "wilfully," on the one hand, or "ignorantly," on the other. Their state of mind – *i.e.*, whether they suspected the improper nature of the transactions and deliberately looked the other way to avoid gaining actual knowledge – was thus left unaddressed.

The facts indicate that the timing of at least Kuan's wife's appointment as director was highly suspicious and, according to the High Court, had everything to do with Kuan's plans. It was the High Court's understanding that her appointments and attendance at meetings were partially responsible for facilitating

106 The Council cited approvingly to the lower court's statement that a dishonest state of mind "may consist in suspicion combined with a conscious decision not to make inquiries *which might result in knowledge*." *Barlow Clowes* at 337 (emphasis added). See also Charlow (1992), *supra* note 94 at 1358.

107 *Kuan v. Doran* at 214.

108 *Ibid*.

109 *Ibid*. at 216.

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Kuan's physical control of the factory at issue and his appropriation of raw and processed materials.[110] These arrangements were important circumstantial evidence – a defendant need not admit wilful blindness; it can be inferred from the circumstances.[111] In addition to the suspicious timing of the appointments, the language used by the High Court – "closed her eyes" – seems to imply a certain wilfulness. The High Court could have just as easily described the defendants – and thus given a very different impression – as simply "being unable able to see" the conflict of duties.

On the other hand, it is surely not uncommon for directors and shareholders to close their eyes out of lack of interest in company affairs or fatigue in the face of their sometimes tedious duties. The phrase "had not cared to check" also gives the impression of at most negligence, rather than deliberation. Wilful blindness, at least in the criminal context, requires that the defendant be motivated to ignore suspicions in order to later be able to deny knowing the relevant facts. There is no evidence from the judgments that Kuan's mother and wife were so motivated. The Court of Appeal held that, in the end, it was not practically possible to determine whether either woman suspected anything was amiss as neither filed a separate statement of defence nor attended court.[112]

Again, a reader could justifiably reproach this analysis for focusing excessively on the subtle nuances between different words and phrases. This is, however, exactly the point. The standards for determining liability for dishonest assistance have become a complex, sometimes almost unintelligible, tangle of conflicting shades and distinctions that can turn on a single word.[113] Thus while some commentators have been optimistic about the clarifying effect of, for instance, *Barlow Clowes* and *Zage v. Ho*,[114] this article illustrates that conceptual difficulties continue to arise in applying the dishonest assistance test. It is of course the role of courts in common law countries to iron out those ambiguities. Both the Singapore Court of Appeal and the Malaysia Court of Appeal appropriately applied English precedent and appear to have reached the proper conclusions. The judgments show, nonetheless, that this area remains a "topographical and taxonomical minefield"[115] that still requires extra care.

110 *Ibid*. at 214.
111 *Eagle Trust Plc v. SBC Securities Ltd*. [1992] 4 All E.R. 488 at 497.
112 *Kuan v. Doran* at 213–14.
113 Dietrich (2010), *supra* note 70 at 107.
114 See, *e.g*., Ryan (2007), *supra* note 5 at 168; Tang (2009), *supra* note 67 at 309.
115 Ryan (2007), *supra* note 5 at 169.

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C. A Proposal for "Dishonest Blindness"

This article suggest that, with respect to the difficulties in applying wilful blindness in the context of equitable accessorial liability, it is worth considering whether wilful blindness should be replaced with "dishonest blindness." Dishonest blindness (a term created in this article) would require that the defendant had – like in dishonest assistance – such knowledge of the transaction (subjective element 1) that would make an honest person suspect that what he or she is doing is improper (objective element), and yet the defendant either closed his or her eyes or failed to see the impropriety. A defendant's experience, intelligence, qualities and reasons for acting (subjective element 2) would be considered in determining whether an honest person in the shoes of the defendant would have suspected the impropriety. Although on its surface such a change may appear radical, in fact it would be consistent with the current test for dishonest assistance and thus result in a more coherent balance between the objective and subjective elements of dishonest assistance and those of wilful blindness. The critical difference between wilful blindness and dishonest blindness is *mens rea*. With wilful blindness, at least in the criminal law context, the defendant must actually suspect the impropriety and close his or her eyes with the intent to later disclaim knowledge if all the facts come to light.[116] After all, "wilful" implies a conscious act that necessarily means an actual intent to look away. With the proposed "dishonest blindness," on the other hand, the defendant would not have to actually suspect the impropriety; rather, an honest person – taking into consideration the defendant's knowledge of the transaction and personal qualities – would suspect it.

In addition to making the objective and subjective elements of wilful blindness consistent with those of dishonest assistance, "dishonest blindness" would also obviate the need for the defendant to be examined in court. Recall that the Malaysia Court of Appeal decided that it was not possible to determine whether Kuan's mother or wife suspected anything because they did not submit a statement of defence or appear in court. Without probing one's mental state, or at least without circumstantial evidence of that mental state, courts are unable to find a defendant liable for wilful blindness. Conversely, dishonest blindness would apply an objective standard that would not require proof of the defendant's actual suspicions (although it would require evidence of the defendant's knowledge of the transaction). Finally, the adoption of a dishonest blindness test would help avoid some of the complex distinctions involved in determining the appropriate mental state of the defendant that have been encountered in criminal law.[117]

116 See Williams (1961), *supra* note 95 at 159.

117 See, *e.g.*, Luban (1998–1999), *supra* note 95 at 969; Husak & Callender (1994), *supra* note 93 at 42.

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The primary objection in moving from wilful blindness to dishonest blindness is that it would expand liability for accessories. A defendant must still have actual knowledge of the suspicious transaction but would no longer have to have actual suspicion. The closing of eyes would no longer need to be deliberate. In the criminal context, such an expansion of liability would be unwarranted, but in the civil context of equity where the objective is restoration of assets rather than punishment, there seems to be little justification for protecting accessories who should suspect a breach of fiduciary duty. As with the dishonest assistance test, the two subjective elements of the proposed "dishonest blindness" test would balance and lend a degree of fairness and flexibility to the sometimes harsh result of holding defendants to an objective standard.

VI. Conclusion

In setting out to evaluate the application of the dishonest assistance prong of accessory liability by Singaporean and Malaysian courts, this article found that conceptual difficulties were encountered in articulating the test's various components, in distinguishing between dishonest assistance and knowing receipt and in determining whether a defendant should be liable for wilful blindness. The courts of Singapore and Malaysia have the legal authority to deviate from the accessory liability standards established by English judgments, which merely constitute persuasive authorities. There may very well be legal and non-legal factors – such as differences in culture or accepted industry practices – that would justifiably influence these courts to alter the dishonest assistance test's components to fit local circumstances. In fact, the Singapore Court of Appeal in *Zage v. Ho* appeared to allude to some of these factors when determining that DeFred was not at fault for failing to question the transactions with Rasif. The court observed that in Singapore, unlike in the US or UK, there are no rules that require jewellers to implement anti-money laundering programmes.[118] The Court added that with respect to industry norms, there simply was "no such general practice of making inquiries" into customer backgrounds or standing in connection with a sale of purchase of goods – even for very large transactions.[119] Turning to issues of culture, the Court remarked that probing questions could very well offend customers, thus jeopardising a transaction.[120] Although feeling

118 *Zage v. Ho* at 609.
119 *Ibid.*
120 *Ibid.*

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offended cuts across all cultures, in this author's experience – without engaging in stereotyping – people from many Asian cultures are particularly careful to avoid embarrassing others, especially in public. Factors like these could justify a Singaporean or Malaysian court's divergence from English law in its approach to accessorial liability. Any deviations, however, should be made explicitly. In the absence of a clearly stated intent to depart from current English law, the assumption must be that deviations are the result of confusion in an area of law that "as a whole has been – and continues to be – rife with conceptual as well as practical difficulties."[121]

Three partial solutions have been proposed to assist in applying the dishonest assistance test with increased consistency: (1) a clearly defined formulation of the dishonest assistance test with its various elements should be used to guide application; (2) the distinction between "active" dishonest assistance and "passive" knowing receipt should be discarded to accommodate the wide variety of circumstances in which accessory liability arises; and (3) dishonest blindness should at least be considered as an alternative to wilful blindness to increase consistency with the dishonest assistance test and eliminate, or at least minimise, the need to scrutinise the defendant's actual state of mind.

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121 *Tan Kiam Peng v. Public Prosecutor* at 42.

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