

1. Gerald made an agreement with Baron to facilitate the sale of Gerald's hotel: The Grand Mario Hotel. It was Baron's job to identify and introduce suitable potential purchasers. Baron would be paid a commission of 10% of the sale price but he was told that he had to disclose his appointment to potential purchasers. Baron identified Wayne as a potential purchaser and successfully negotiated the purchase price of £50m on Wayne's behalf, but never informed him of the agreement with Gerald.

Gerald paid Baron £5m in commission. Baron purchased a house for £1m. Baron gave £1m to his wife Ruth, who asked where it came from and was told that she should mind her own business and be grateful. Baron also asked Frank, his solicitor, to use the remaining £3m to purchase a yacht for Baron. Frank did not consider it his responsibility to enquire where the money came from; rather he just had to do as his client demanded.

Wayne discovers the commission Gerald paid to Baron. The house is now only worth £750 000. Ruth has invested the £1m wisely and it is now worth £2m. The yacht sank on its maiden voyage and had not been insured.

Advise Wayne as to whether he may make any claims under a constructive trust.

Suggested Answer

This question concerns fiduciary duties and the constructive trust, and third party liability under *Barnes v Addy*. Wayne must be advised whether Baron owes him a fiduciary duty making him liable for the secret commission he made whilst acting for Wayne. Wayne may also have an equitable claim against third parties to the trust Ruth and Frank on the basis of knowing receipt and dishonest assistance. In addition Frank's firm may also be liable under vicarious liability.

Fiduciary – Baron is a fiduciary because he has fiduciary duties because he owes loyalty/fidelity to Wayne when negotiating the sale of the hotel on Wayne's behalf (*Bristol & West BS v Mothew* e.g. *Reading v A-G* and direct comparison with *FHR European Ventures v Cedar Capital Partners*).

Fiduciary duty – there are common law duties, such as the duty of care, but fiduciary duties are ones linked to fidelity and loyalty (Dr Finn, *Mothew*). Listed in *Bray v Ford*, repeated by Millett LJ in *Mothew*, includes to act in good faith, not to profit out of the trust, not to act for own benefit.

Secret profit – there is a duty not to profit from the trust (*Keech v Sandford*) and secret profits are not permitted (*Boardman v Phipps*). The reason for this is to protect the fiduciary from himself (*Bray v Ford*).

Remedy – the proprietary remedy of a constructive trust is available, as well as being liable to restore the trust funds under *Target Holdings v Redfems*. Constructive trusts are available in bribery and secret commission cases despite the property never having belonged nor intended to belong to Wayne, going against *Lister v Stubbs* in the Supreme Court case of *FHR European Ventures* which chose to follow *Reid*. This is because of the objectionable nature of bribes and secret commissions, the latter relevant here and seen to undermine the commercial world as the vendor is likely to sell for less if he wasn't paying a secret commission. Thus the commission affects the transaction. Lord Neuberger said a constructive trust remedy was applied because it was practical, made common sense and for those wider public policy reasons.

Constructive trust – over the house which is now worth less, so Baron is liable to account for what is missing i.e. £4.25m for the money given away, the sunk yacht and the loss of value in the house (*Reid, FHR European Ventures*).

Equity allows the claimant to pursue a remedy against third parties i.e. *Barnes v Addy* categories: trustee de son tort/intermeddler, knowing receipt, dishonest assistance.

Ruth – may be liable under knowing receipt. The test under *Re Montague* and *BCCI v Akindele* is whether her knowledge is such to make it unconscionable for her to keep the property. That this is the correct test has been confirmed by the Privy Council in *Arthur v Attorney-General for the Turks and Caicos Islands*. This test requires a high degree of knowledge, which Ruth does not seem to possess, making her not liable.

Frank – may be liable for dishonest assistance. The test under *RBA v Tan* is the objective test of whether Frank is dishonest by the ordinary standards of honest people, but with the subjective element as to whether his conduct was advertent, judged upon is knowledge, experience, intelligence and reasons for acting. *Twinsectra v Yardley* arguably introduced a stronger subjective element with a *mens rea* requirement that the defendant know that he is being dishonest by the standards of honest people. Thus Frank could escape liability if he is ignorant of what honest people would do. However *Barlow Clowes* Lord Hoffman (also appearing in *Twinsectra*) said that the tests under both cases were the same and there was no *mens rea* requirement, which would make the dissent by Lord Millett in *Twinsectra* rather confusing given the test he described was *Tan*. It may be argued that under *Twinsectra* Frank is less likely to be liable given that he does not consider it his job to ask where the money comes from, and thus may not know that honest solicitors would need to do so (money-laundering regulations). However under *Tan* he is more likely to be liable because his conduct was clearly advertent i.e. deliberate and what he is doing is not how an honest solicitor would act. The Supreme Court has confirmed that the objective approach in *Tan* is the correct one, making Frank a constructive trustee.

Frank's firm – Frank's firm may be liable under vicarious liability for the acts of wrongdoing of their partner. The test in *Dubai Aluminium v Salaam* is whether what he has done is in the ordinary course of business, or closely related to the ordinary course of business. This goes against *Mara v Browne* that anything that is done wrong cannot be in the ordinary course of business because that is not what they are employed to do. Given that Frank is acting for Baron who is apparently his client, as opposed to his friend, this would appear to

be the ordinary course of business, and of course assuming that he is meant to be undertaking such transactions for clients.