THE MENTAL ELEMENT OF ACCESSORY LIABILITY IN EQUITY

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The law concerning accessory liability in equity is notoriously difficult. Many of the problems can be traced back to the *ex tempore* judgment of Lord Selborne L.C. in *Barnes v Addy*,[1] which somehow achieved almost canonical status before being re-assessed a quarter of a century ago by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan.*[2] It is now clear that the primary wrong – whether breach of trust or breach of fiduciary duty – does not necessarily need to be part of a dishonest scheme, but the accessory does need to be dishonest.[3] Yet the notion of "dishonesty" remains troublesome.

Much attention has been given to the standard of dishonesty: should it be assessed "objectively" or "subjectively"? In *Group Seven Ltd v Notable Services LLP*[4] the Court of Appeal recently confirmed that the standard of dishonesty is objective, based upon what the defendant knows. The Court of Appeal also inclined towards a "provisional view"[5] that there is no "minimum content" of what the defendant should know in order to be found liable for dishonest assistance. This merits further consideration, as it is likely to be important in future cases. It is suggested that accessory liability should only arise where the defendant knew of the essential matters of the primary wrong, or at least turned a blind eye to them. Any looser approach – where dishonesty is untied from actual (or blind-eye) knowledge of the essential elements of the primary wrong – risks accessory liability expanding beyond its proper scope.

This article will first analyse the meaning and content of dishonesty, before arguing that dishonesty adds an unnecessary and undesirable layer of complexity to the mental element of accessory liability. It would be preferable to return to a stable and restrictive mental element of actual knowledge or blind-eye knowledge. This would have the further advantage of making the law concerning accessory liability in equity consistent with its common law counterpart of inducing a breach of contract.

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[1] (1874) L.R. 9 Ch. App. 244; (1874) 43 L.J. Ch. 513.

[2] [1995] 2 A.C. 378; [1995] 3 W.L.R. 64.

[3] *Tan* was accepted as English law by the House of Lords in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 A.C. 164. However, Australian law remains much closer to the original roots of *Barnes v Addy*: see e.g. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 222; (2007) 230 C.L.R. 89; *Ancient Order of Foresters in Victoria Friendly Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43; (2018) 265 C.L.R. 1.

[4] [2019] EWCA Civ 614; [2020] Ch. 129.

[5] [2020] Ch. 129 at [102].

I Dishonesty: shifting from the primary wrongdoer to the accessory

In *Barnes v Addy,* Lord Selborne L.C. said that "strangers are not to be made constructive trustees … unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees".[6] The mental element was therefore knowledge, but it is notable that "dishonesty" was introduced into the framework of accessory liability as regards the primary wrong. This was unfortunate. After all, if the accessory knew that they were participating in a breach of trust, why should they be able to escape liability if the trustee was not dishonest but simply naïve and following the encouragement of the accessory?[7] Insisting that the primary wrong be "dishonest and fraudulent" ran contrary to earlier authority,[8] and created an uncomfortable divide between instances of inducement and assistance: only the latter required the primary wrong to be dishonest.[9]

So why did the requirement for a dishonest design appear in *Barnes v Addy*? This is a difficult question to answer satisfactorily. Charitably, it might be suggested that the nature of the case necessitated hasty judgment: this was an unreserved judgment without discussion of earlier authorities. Less indulgently, Rubin has written of Lord Selborne that "precedent was secondary to his pursuit of principle".[10] Harpum has since tellingly asked the question: "Is it perhaps impertinent to suggest that he abandoned both in *Barnes v Addy*?"[11]

In any event, the restriction that the primary wrong be dishonest was finally lifted by Lord Nicholls in his seminal judgment in *Tan*, which was approved by the House of Lords in *Twinsectra Ltd v Yardley*. This was the key issue decided in *Tan,* and the compelling advice of the Privy Council has rightly been lauded on that point. Lord Nicholls further recognised that "what matters is the state of mind of the third party sought to be made liable, not the state of mind of the trustee".[12] Such clarification was welcome. However, Lord Nicholls did not jettison dishonesty entirely, but instead shifted it from the primary wrongdoer to the accessory. Although Lord Nicholls asserted that "by common accord"[13] dishonesty was the appropriate touchstone[14] for accessory liability, based upon the defendant's subjective

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[6] (1874) L.R. 9 Ch. App. 244 at 252.
[7] *Tan* [1995] 2 A.C. 378 at 385.
[8] e.g. *Fyler v Fyler* (1841) 3 Beav. 550 at 568 (Lord Langdale M.R.); *Attorney-General v The Corporation of Leicester* (1844) 7 Beav. 176 at 179 (Lord Langdale M.R.)
[9] See e.g. *Fyler v Fyler* (1841) 3 Beav. 550, and C. Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 L.Q.R. 114. This divide was particularly unfortunate given how difficult it can be to distinguish the two conduct elements; both are elements of participation and the difference is only one of degree: P. Sales, "The Tort of Conspiracy and Civil Secondary Liability" [1990] C.L.J. 491 at 507-508. Cf. *Farah Constructions v Say-Dee* (2007) 230 C.L.R. 89 at [161]-[163].
[10] G. Rubin in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (London: Butterworths, 1984) at 400.
[11] C. Harpum, "The Basis of Equitable Liability" in P. Birks (ed.), *The Frontiers of Liability*, vol. 1 (Oxford: Oxford University Press, 1994) at p.12, fn. 33.
[12] *Tan* [1995] 2 A.C. 378 at 385.
[13] *Tan* [1995] 2 A.C. 378 at 387.
[14] It might generously be suggested that Lord Nicholls' language of "touchstone" is appropriate to describe the underlying policy of accessory liability, but it seems clear from the decision of *Tan* that Lord Nicholls thought dishonesty to be an *ingredient* of liability, which corresponds to how subsequent cases have treated dishonesty.

knowledge, it is suggested that it would have been preferable to take the opportunity to ditch dishonesty completely.[15]

II The standard of dishonesty: the objective test entrenched

In *Tan,* Lord Nicholls said that dishonesty "means simply not acting as an honest person would in the circumstances. This is an objective standard ... [and] is to be equated with conscious impropriety".[16] Defendants are not free to establish their own standards of dishonesty. Lord Nicholls was also clear that dishonesty also has a strong subjective element: it can only be assessed in light of what the defendant actually knew at the time of participation in the primary wrong.[17]

This was unfortunately distorted in *Twinsectra,* where Lord Hutton, giving the leading speech on this issue, said that "dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people".[18] This seems to allow an "escape route" for a defendant: even if a reasonable person in the defendant's position would have considered the defendant's acts to be dishonest, the defendant might avoid a finding of dishonesty if they can prove that they genuinely had a warped view of ordinary people's morality and therefore did not think that reasonable people would consider that the defendant acted dishonestly. This mirrors the approach adopted by the criminal law in *R v Ghosh*.[19] Lord Hutton decided that *Tan* did not support a different meaning of dishonesty from that adopted in *Ghosh*, despite the fact that Lord Nicholls explicitly sought to distance the civil law from this criminal concept of dishonesty.[20]

This approach of Lord Hutton was unconvincing on its own terms, as was forcefully pointed out by Lord Millett in his dissenting judgment on this point.[21] In *Barlow Clowes International Ltd v Eurotrust International Ltd*[22] the Privy Council said that the approach in *Tan* should be favoured, whilst also maintaining that this was consistent with *Twinsectra*. Although this strained interpretation of *Twinsectra* looks implausible, it can perhaps be explained on the basis that it enabled English judges to acknowledge that they were bound by the decision of the House of Lords in *Twinsectra*, but that decision should be interpreted in the same way as the Privy Council in *Barlow Clowes.* After all, the Privy Council in *Barlow Clowes* could not decide that *Twinsectra* was incorrect as a matter of English law.

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[15] See section VI below.
[16] *Tan* [1995] 2 A.C. 378 at 389.
[17] [1995] 2 A.C. 378 at 389.
[18] [2002] UKHL 12; [2002] 2 A.C. 164 at [36].
[19] *R. v Ghosh* [1982] Q.B. 1053 (CA); although see now *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; [2018] A.C. 391; *R. v Barton* [2020] EWCA Crim 575; [2020] 2 Cr. App. R. 7.
[20] e.g. Lord Nicholls prefaced his remarks about the nature of dishonesty with: "[w]hatever may be the position in some criminal or other contexts (see, for instance, *Reg. v Ghosh* [1982] Q.B. 1053)": *Tan* [1995] 2 A.C. 378 at 389.
[21] *Twinsectra* [2002] UKHL 12; [2002] 2 A.C. 164 at [104]-[146].
[22] [2005] UKPC 37; [2006] 1 W.L.R. 1476.

In any event, it is now clear that the objective approach in *Tan* should be applied, and the *Ghosh* test confined to history. This is the result of a number of decisions of the Court of Appeal,[23] and was confirmed – albeit obiter – by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd*.[24] Any doubts on this issue have been rightly dispelled by the Court of Appeal in *Group Seven*:[25]

> "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."

III Dishonesty as a mental element or a conduct element?

Some confusion persists regarding what "dishonesty" relates to: does it attach to the conduct element or mental element of accessory liability? It is suggested that dishonesty is a mental element. In *Tan* Lord Nicholls was explicit that the defendant must be at fault in order to be liable as an accessory and thought that "dishonesty" should replace "knowledge".[26] The conduct element of accessory liability is not, in isolation, dishonest: it is not in itself dishonest for a bank, for instance, to deal with a client's money. It is only if the bank is at fault in some way that dishonest assistance might arise. Dishonesty hinges upon what the defendant knows, and therefore relates to the mental element.

Nevertheless, in *Ghosh* the court said:[27]

> "Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest."

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[23] e.g. *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] 1 Lloyd's Rep. 115; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep F.C. 102.
[24] [2018] A.C. 391.
[25] [2020] Ch. 129 at [58]. See too *Magner v Royal Bank of Scotland International Ltd* [2020] UKPC 5 at [10].
[26] See too *Balfron Trustees Ltd v Peterson* [2001] I.R.L.R. 758 at 761 (Laddie J.); *Twinsectra* [2002] 2 A.C. 164 at [20] (Lord Hoffmann); *Barlow Clowes v Eurotrust* [2006] 1 W.L.R. 1476 at [10] (Lord Hoffmann).
[27] [1982] Q.B. 1053 at 1063.

That seems to have led to a conclusion that dishonesty relates to conduct. Yet in this example the man would not know that he had to pay, or even have blind-eye knowledge, so would not be dishonest anyway.[28]

In *Twinsectra,* Lord Millett also thought that dishonesty related to the defendant's conduct. His Lordship observed that "[c]ivil liability is usually predicated on the defendant's conduct rather than his state of mind",[29] and emphasised parts of Lord Nicholls' speech in *Tan* which referred to a need to "act honestly".[30] Yet immediately after suggesting that dishonesty related to the conduct of the defendant, Lord Millett proceeded to emphasise that there could be no accessory liability without the defendant's being at fault.[31]

Dishonesty is best analysed as a "fault element". This corresponds with the approach taken by the Court of Appeal in *Group Seven.* Indeed, their Lordships cited Popplewell J. in *Madoff Securities International Ltd v Raven* who said that "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".[32] But the content of dishonesty now needs to be analysed in more detail.

IV Applying the test of dishonesty

Although it has become clear that dishonesty is assessed objectively, that is only the second stage of the inquiry. As Lord Nicholls made clear in *Tan,* the first stage requires the court to determine what the defendant knew. Austin has noted that:[33]

> There are two central questions regarding knowledge. The first relates to the *content* of the third party's knowledge: must he be shown to know or understand the legal consequences of the facts or merely the facts themselves, and are claims to be distinguished from facts? The second question relates to the *quality* of knowledge sufficient for liability and, especially whether constructive knowledge will suffice.

The confusion surrounding the second question has obscured some of the difficulties inherent in the first question. *Group Seven* provides an important and interesting stimulus to consider some of those problems in more detail. Before addressing that decision directly, it is useful to outline the debates concerning the quality of knowledge, which have been considered more extensively by the courts than questions regarding the content of knowledge.

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[28] *Ivey* [2018] A.C. 391 at [60] (Lord Hughes).
[29] *Twinsectra* [2002] 2 A.C. 164 at [116]. See similarly G. Virgo, "Cheating and Dishonesty" [2018] C.L.J. 18 at 20-21.
[30] e.g. *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 at 390.
[31] Lord Millett explicitly drew an analogy with the common law tort of intentionally inducing a breach of contract, which similarly requires the defendant to be at fault: *Twinsectra* [2002] 2 A.C. 164 at [119].
[32] [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep F.C. 95 at [351].
[33] R. Austin, "Constructive Trusts" in P. Finn (ed.), *Essays in Equity* (Sydney: Lawbook Co, 1985) at p.235.

A The quality of knowledge

In *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.*, Peter Gibson J. set out the infamous "*Baden* scale of knowledge".[34] This was said to be "best forgotten"[35] by Lord Nicholls in *Tan,* since there is a "gradually darkening spectrum where the differences are of degree and not of kind".[36] Nevetheless, although the different elements on the *Baden* scale can shade into one another, they remain helpful as guides to different points on the broad spectrum of knowledge:[37]

> (i) actual knowledge;
> (ii) wilfully shutting one's eyes to the obvious;
> (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
> (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
> (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

Before *Tan*, when "knowledge" was considered to be the relevant mental element, whether or not all five points on the *Baden* scale were sufficient for accessory liability was a controversial issue. The preponderance of decided cases held that only points (i) to (iii) would lead to liability, since this was thought to ensure want of probity tantamount to bad faith.[38]

Nevertheless, there was some support for the proposition that all five elements of the *Baden* scale could lead to accessory liability.[39] This was perhaps easier to accept when the assistance had to be of a dishonest and fraudulent design: given the fraud involved in the primary wrong, a lower fault element on the part of the accessory might have been more justifiable.[40] However, consistent with the decision in *Tan*, the better view is that subjective fault should always be required for accessory liability;[41] points (iv) and (v) on the *Baden*

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[34] [1993] 1 W.L.R. 509n at 575-576; [1992] 4 All E.R. 161 at 235.
[35] *Tan* [1995] 2 A.C. 378 at 392.
[36] *Tan* [1995] 2 A.C. 378 at 391.
[37] *BCCI (Overseas) Ltd v Akindele* [2001] Ch. 437 at 455; [2000] 4 All E.R. 221 at 235 (Nourse L.J.). See too *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333; *Palo Alto Ltd v Alnor Estates Ltd* [2018] UKUT 231 (TCC); [2018] L.&T.R. 29; *National Crime Agency v Odewale* [2020] EWHC 1609 (Admin); A. Berg, "Accessory Liability for Breach of Trust" (1996) 59 M.L.R. 443; P. Birks, "Accessory Liability" [1996] L.M.C.L.Q. 1.
[38] e.g. *Carl Zeiss Stiftung v Herbert Smith & Co (No. 2)* [1969] 2 Ch. 276; [1969] 2 All E.R. 367; *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch. 250; [1979] 1 All E.R. 118; *Agip (Africa) Ltd v Jackson* [1991] Ch. 547; [1992] 4 All E.R. 451. In *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 at 454, Nourse L.J. said: "In general, the first three categories have been taken to constitute actual knowledge (or its equivalent) and the last two constructive knowledge".
[39] E.g. *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073; *Baden* [1993] 1 W.L.R. 509n.
[40] Australia has not followed *Tan* and recognises that points (i)–(iv) on the *Baden* scale can all lead to accessory liability: *Farah Constructions v Say-Dee* (2007) 230 C.L.R. 89 at [177]-[178]; *Grimaldi v Chameleon Mining N.L. (No. 2)* [2012] FCAFC 6; (2012) 200 F.C.R. 296 at [262].
[41] E.g. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2006] F.S.R. 17 at [1507] (Lewison J.); see further section VII below.

scale should be insufficient. It is artificial to equate an innocent failure to act as a reasonable man and make inquiries about the situation with knowledge of particular facts which would have been revealed as the result of such inquiries. An honest failure to act as a reasonable man is more readily equated with negligence. And negligence should never be sufficient for accessory liability.[42]

It is important to emphasise that negligence is an inappropriate mental element for accessory liability.[43] Third parties who have not voluntarily assumed any fiduciary obligations, and are not subject to a free-standing duty of care, should feel free to carry out lawful acts provided that they do not know that their acts will constitute participation in a primary wrong.[44] It would place too great a burden upon third parties to decide, after the events in question, that it would have been reasonable for them to make further inquiries before acting.[45] In *Tan*, Lord Nicholls made the important observation that:[46]

> "ordinary, everyday business would become impossible if third parties were to be held liable for *unknowingly* interfering in the due performance of such personal obligations. Beneficiaries could not reasonably expect that third parties should deal with trustees at their peril, to the extent that they should become liable to the beneficiaries even when they received no trust property and even when they were unaware and had no reason to suppose that they were dealing with trustees."

In some situations a person may owe a duty of care directly to the beneficiaries, and a claim in negligence may be possible, but that is distinct from the principle of accessory liability. It should be remembered that an important practical reason why claims are often brought against third parties is because they are able to provide satisfactory redress in situations where the primary wrongdoer cannot.[47] But a claimant should not be able to go "defendant-shopping" with impunity. A defendant should only be liable if they have knowingly participated in the primary wrong at issue. This reflects an important moral principle that underpins accessory liability: not knowingly to participate in another's wrongdoing.[48]

However, it would be inappropriate to limit any fault element to the first category of knowledge on the *Baden* scale: a person would be able to escape liability simply by refusing to draw sensible inferences or ask obvious questions on the basis of information he or she does actually know. This explains the second category of knowledge, which is often called "blind-eye knowledge", or "Nelsonian knowledge". The origins of this appellation can be found in the story that Admiral Nelson explained his refusal to follow orders to withdraw prior to the Battle of Copenhagen on the basis that he did not know about them—but this was

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[42] *Tan* [1995] 2 A.C. 378 at 387, 391-392; *Twinsectra* [2002] 2 A.C. 164 at [112]; see recently *Payroller Ltd v Little Panda Consultants Ltd* [2020] EWHC 391 (QB) at [66] (Freedman J.).
[43] C. Harpum, "The Basis of Equitable Liability" in P. Birks (ed.), *The Frontiers of Liability*, vol. 1 (Oxford: Oxford University Press, 1994) at p.16. Cf. S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 L.Q.R. 56 at 80.
[44] *Tan* [1995] 2 A.C. 378 at 391-392.
[45] C. Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 L.Q.R. 114 at 126.
[46] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 at 387 (emphasis in original).
[47] The facts of *Group Seven* are perhaps a good illustration of this: see section V below.
[48] A. Solzhenitsyn, *One Word of Truth …* (London: Bodley Head, 1972) at p.27.

only because he held a telescope to his blind eye, rather than his good eye, when "looking" at the signals being given! Such wilful conduct in seeking to avoid "actual" knowledge can sensibly be equated with "knowledge" when considering relevant mental elements for accessory liability.

Both (ii) and (iii) on the *Baden* scale are often considered to be examples of "wilful blindness". However, the two are not the same, despite some tendency to consider them together. A failure to make inquiries into what one realises is obvious might legitimately be considered to represent a similar level of fault to actual knowledge. But a failure to make such inquiries as a *reasonable* man would make is a much lower threshold. In the context of accessory liability, accepting this lower mental element in category (iii) would mean that a defendant could be liable even if they genuinely and honestly thought that there was no need to pursue matters any further; if a reasonable person would have made those inquiries, liability may nonetheless fall upon the defendant. That is tangibly different from the subjective level of fault typified in "Nelsonian knowledge".

Category (iii) therefore seems to move away from a subjective standard towards a more objective, imputed approach to knowledge on the basis of what the defendant *ought* to have known had they acted *reasonably.* Admittedly, this may be thought to describe category (ii) as well. But deliberately shutting one's eyes to the obvious (category (ii)) displays a higher level of culpability than merely failing to make the inquiries a reasonable person would have done (category (iii)), and is practically desirable because "actual knowledge" (category (i)) can be extremely difficult to prove. Where a party has an actual and real suspicion that they will be participating in a breach of trust or fiduciary duty, they proceed at their own risk.[49] This mental state has (perhaps awkwardly) been commonly categorised as a narrow form of "blind-eye" knowledge; if this were not included in the fault element of accessory liability then it would be too easy for defendants to evade sanction.[50]

B The content of knowledge

Compared to the standard of knowledge, far less attention has been paid to *what* the defendant must know. It needs to be established to what degree of specificity facts must be known. In *Brinks Ltd v Abu-Saleh (No. 3)*, Rimer J. expressed the view that a defendant must know of the existence of the fiduciary relationship, or the facts giving rise to it, before they could be made liable as an accessory.[51] By contrast, Lord Millett in *Twinsectra* thought it sufficient that the defendant be aware that the subject-matter of the trust "is not at the free disposal of the principal".[52] 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

[49] Subject to a possible defence of justification: see text to fnn.118-121 below.
[50] See section VII below. See too *Payroller Ltd v Little Panda Consultants Ltd* [2020] EWHC 391 (QB) at [66] (Freedman J.).
[51] [1996] C.L.C. 133 at 151.
[52] [2002] UKHL 12; [2002] 2 A.C. 164 at [135].

order to incur liability as an accessory.[53] *Twinsectra* was preferred to *Brinks* in *Barlow Clowes International Ltd v Eurotrust International Ltd*.[54] Lord Hoffmann, giving the advice of the Privy Council, said that:[55]

> "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 … it was not necessary to know the 'precise involvement' of [the primary wrongdoer] in the group's affairs in order to suspect that neither he nor anyone else had the right to use [the claimant's] money for speculative investments of their own."

This approach is particularly important in the context of money laundering, which was involved in *Group Seven Ltd v Notable Services LLP*. It is convenient to explore this issue more thoroughly in light of that decision.

V *Group Seven Ltd v Notable Services LLP*

Group Seven concerned a "very substantial"[56] and "brazen"[57] fraud. Group Seven and its parent company were defrauded of €100 million.[58] That money was transferred by Group Seven to a company known as AIC, which purported to lend the money to Larn Ltd, a company owned and directed by Mr. Nobre. AIC transferred the money to the client account of Notable LLP. Notable was a multi-disciplinary partnership, which held the money for the benefit of Larn. Acting on Mr. Nobre's instructions, Notable paid away some €15 million. Group Seven brought various claims, including one against Mr. Landman, an accountant who was one of the partners of Notable LLP, for dishonestly assisting breaches of trust by Larn. It was accepted that Notable was vicariously liable to Group Seven for the actions of Mr. Landman.[59]

In what the Court of Appeal called a "meticulous judgment",[60] at first instance Morgan J. held that Mr. Landman did not have the requisite mental element for dishonest assistance. The judge found that Mr. Landman deliberately and knowingly breached the Solicitors' Accounts Rules which prohibit the provision of banking facilities through a client account[61] and, objectively, knew facts which would have shown an honest and reasonable man that Mr. Nobre was not entitled to the €100 million.[62] Nevertheless, 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.[63] The

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[53] See too J. Ulph, *Commercial Fraud: Civil Liability, Human Rights, and Money Laundering* (Oxford: Oxford University Press, 2006) at [7.40]; *Ultraframe (UK) Ltd v Fielding* [2006] F.S.R. 17 at [1506] (Lewison J.).
[54] [2006] 1 W.L.R. 1476 at [19]-[28].
[55] [2006] 1 W.L.R. 1476 at [28].
[56] [2020] Ch. 129 at [2].
[57] [2020] Ch. 129 at [4].
[58] Although as a result of police action €88 million was returned to the victims: [2020] Ch. 129 at [4].
[59] [2020] Ch. 129 at [11], [27].
[60] [2020] Ch. 129 at [3].
[61] Rule 14.5 of the SRA Accounts Rules 2011.
[62] [2017] EWHC 2466 (Ch); [2018] P.N.L.R. 6 at [483].
[63] [2018] P.N.L.R. 6 at [455]-[461].

judge therefore found that Mr. Landman did not have the requisite knowledge for dishonest assistance, but the Court of Appeal disagreed. The Court of Appeal was conscious of the dangers of interfering with the careful findings of a judge who has heard live evidence on such an evaluative question,[64] but nevertheless was prepared to do so in this instance since dishonesty involved a conclusion based on primary findings of fact, and such primary findings of fact by the trial judge were not disturbed. Rather, only the inference from those primary findings – that of dishonesty – was erroneous at first instance.[65] It is important to consider the key aspects of this decision in some detail.

A Blind-eye knowledge

The Court of Appeal thought that Mr. Landman did have blind-eye knowledge of Nobre's breaches of fiduciary duty. Their Lordships relied upon *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*, where Lord Scott said:[66]

> "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 [not] 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.[67] That, in my opinion, is not warranted…"

However, the Court of Appeal in *Group Seven* went on to say that suspicions falling short of constituting blind-eye knowledge are not "wholly irrelevant" to determining whether a putative accessory has acted dishonestly.[68] Their Lordships thought that the first stage of the test of dishonesty "requires the court to ascertain all the relevant facts, including the knowledge and beliefs of the defendant".[69] The Court sensibly recognised that knowledge must be confined to actual and blind-eye knowledge, but thought that other beliefs and suspicions may also be relevant. The weight that would be given to such factors would then be a matter for the second, objective stage of the test of dishonesty. The Court concluded that:[70]

> "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 difficulty with this approach is that it is very loose. It appears to suggest that a finding of dishonesty may be made even if the defendant did not have actual knowledge or

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[64] e.g. [2020] Ch. 129 at [21]-[24].
[65] [2020] Ch. 129 at [97]-[100].
[66] [2001] UKHL 1; [2003] 1 A.C. 469 at [116], cited at [2020] Ch. 129 at [59]
[67] In the context of s.39(5) of the Marine Insurance Act 1906, but the principles regarding blind-eye knowledge are recognised to apply more generally: see e.g. *Twinsectra* [2002] 2 A.C. 164 at [22] (Lord Hoffmann).
[68] [2020] Ch. 129 at [60].
[69] [2020] Ch. 129 at [60].
[70] [2020] Ch. 129 at [60].

blind-eye knowledge of the primary wrong.[71] As Longmore J. observed at first instance in *Credit Lyonnais Bank Nederland NV (Now Generale Bank Nederland NV) v Export Credit Guarantee Department*, "[k]nowledge is one thing; suspicion is another".[72] Suspicions regarding particular facts may lead to blind-eye knowledge if deliberately ignored, but it is unclear why other, more vague suspicions that may not be related to the primary wrong at issue should be relevant to the claim for accessory liability. In *Group Seven* the Court of Appeal even said that Mr. Landman's conduct "was objectively dishonest, whatever he may have subjectively thought",[73] but this seems inconsistent with the orthodox approach to blind-eye knowledge and accessory liability. As Lord Scott observed in *Manifest Shipping*, a failure to enquire into "untargeted or speculative" suspicions does not suggest blind-eye knowledge but rather negligence, and that is an inappropriate basis for accessory liability.[74]

The Court of Appeal found that Mr. Landman did have blind-eye knowledge of Mr. Nobre's breach of fiduciary duty. Two factors appear to have weighed particularly heavily with the judges. First, Mr. Landman had accepted a bribe of £170,000 from Mr. Nobre. Mr. Landman was clearly dishonest in this respect, and it was not contested that he knew that the bribe was in order to avoid the Solicitors' Accounts Rules ("SAR"). The judge had held that knowledge of the breach of the SAR did not necessarily imply knowledge of Mr. Nobre's breach of fiduciary duties or of the primary breach of trust,[75] but the Court of Appeal disagreed, insisting that no other explanation could be given for why Mr. Landman thought Mr. Nobre wanted to avoid the SAR.[76] That was sufficient to allow the appeal. However, the Court of Appeal was also influenced by the fact that Morgan J. found Mr. Landman liable for knowing receipt as a result of accepting the bribe. This line of reasoning is less persuasive, and deserves further scrutiny.

B Relationship with knowing receipt

The Court of Appeal thought that the judge's findings as regards knowing receipt could be used to reach the same result as regards dishonest assistance.[77] But the two wrongs should be separated; seeking to elide the two creates confusion. Admittedly, both are dependent upon a primary wrong and require the defendant to be at fault, and it has been argued that knowing receipt is best viewed as a "subset" of knowing assistance.[78] Nevertheless, the better view is that liability in knowing receipt is not participatory at all.

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[71] e.g. [2020] Ch. 129 at [91]-[93].
[72] *Credit Lyonnais Bank Nederland NV (Now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep. 200 at 227; [1996] C.L.C. 11 at 42-43.
[73] [2020] Ch. 129 at [94].
[74] See fn.66 above and section VII below.
[75] [2018] P.N.L.R. 6 at [455]; cf. *R. v Lucas* [1981] Q.B. 720.
[76] [2020] Ch. 129 at [93]-[101].
[77] [2020] Ch. 129 at [61], [94].
[78] J. Dietrich and P. Ridge, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment" (2007) 31 Melbourne University Law Review 47 at 60.

Simply receiving misapplied property is inherently passive.[79] It does not necessarily contribute to the primary wrong, and may occur long after the primary breach of duty, once the property has passed through many hands. As Sheehan has put it, "[k]nowing receipt ... is a different type of wrong from dishonest assistance. It appears to be a hybrid, possibly unique in being parasitic, but non-participatory in any sense."[80]

Any amalgamation of assistance and receipt-based liability is unhelpful and could potentially have a distorting effect on each area.[81] In *Twinsectra,* Lord Millett pointed out that "[t]he 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".[82] This was cited with apparent approval by the Court of Appeal in *Group Seven.*[83] Yet the charge against a knowing recipient *is* akin to that made against a party for handling stolen property. Given the different foundations of receipt-based and accessory liability, it would be unsurprising for the mental elements to be different.

The difference in mental elements may be illustrated by the language used. In *Tan,* Lord Nicholls said that the "*Baden* scale" of knowledge was "best-forgotten", and thought the fault element for accessory liability was "dishonesty". In *Akindele*, by contrast, Nourse L.J. thought that the mental element for receipt-based liability should not be "dishonesty" but rather "unconscionability". The Court of Appeal presumably thought that "dishonesty" and "unconscionability" mean different things.[84] What needs to be shown for dishonesty is likely to be different from the requirements for unconscionability.

In *Group Seven,* Morgan J. found that Mr. Landman's knowledge was such as to make it unconscionable for him to retain the £170,000, so he was liable in knowing receipt. The judge found that the claimants had not established that Landman knew of the breach of trust within the first three categories of the *Baden* scale.[85] But Morgan J. found that Mr. Landman had constructive knowledge within the fourth point of the *Baden* scale since "Mr. Landman knew facts which would have shown an honest and reasonable man that Mr. Nobre was not entitled to the €100 million. .. [A]lthough 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."

Such a "low" mental element may perhaps be appropriate for a receipt-based claim,[86] but seems too generous in the context of accessory liability where the defendant does not necessarily receive any property, and at odds with the approach taken in other areas of the

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[79] *Ultraframe (UK) Ltd v Fielding* [2006] F.S.R. 17 at [1509] (Lewison J.), citing Morritt L.J. in *Brown v Bennett* [1999] B.C.C. 525 at 533. Cf. *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 W.L.R. 355 at [13] (Lord Sumption).
[80] D. Sheehan, "Disentangling Equitable Personal Remedies for Receipt and Assistance" [2008] R.L.R. 41 at 58. See too *Tan* [1995] 2 A.C. 378 at 386.
[81] See generally C. Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 L.Q.R. 114 and C. Harpum, "The Stranger as Constructive Trustee: Part 2" (1986) 102 L.Q.R. 267.
[82] [2002] UKHL 12; [2002] 2 A.C. 164 at [137].
[83] [2020] Ch. 129 at [43].
[84] Cf. *Tan* [1995] 2 A.C. 378 at 392.
[85] [2018] P.N.L.R. 6 at [483].
[86] See the discussion of Lord Millett in *Twinsectra* [2002] 2 A.C. 164 at [104]-[107].

law.[87] It comes close to equating liability with negligence – since Mr. Landman did not make the inquiries a reasonable person would have made – but negligence is clearly an inappropriate fault element in the context of accessory liability.[88] Nevertheless, the Court of Appeal drew upon the judge's conclusions as regards knowing receipt and said:[89]

> "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… 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."

This approach makes it easier to impose liability upon third parties as accessories. Whilst the second stage of dishonesty requires an objective evaluation, the first stage should employ a subjective test of knowledge. A defendant who does not have actual or blind-eye knowledge of the breach of trust should not be liable for dishonest assistance. That the defendant knew facts that would have put a reasonable man on inquiry may be sufficient for unconscionability in the context of knowing receipt, but not for accessory liability.[90]

C Minimum Content of Knowledge

Since the Court of Appeal concluded that Mr. Landman had blind-eye knowledge that Larn was not beneficially entitled to the money, it could swerve the difficult question of whether there was a minimum content of knowledge requirement: (blind-eye) knowledge that the defendant is participating in a breach of trust and a money-laundering scheme should clearly satisfy any requirement regarding what an accessory must know. However, the Court did indicate a "provisional view" that there should be no minimum content of knowledge anyway.[91] This leaves the law in an unclear state. Morgan J. held as part of the ratio of his decision that there was such a requirement,[92] and this has now been doubted by the Court of Appeal.

Moreover, in *Ultraframe (UK) Ltd v Fielding*, Lewison J. said that "[a]lthough it is not necessary for the dishonest assistant to know all the details of the whole design, he must, I

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[87] See e.g. *Mainstream Properties v Young* [2007] UKHL 21; [2008] 1 A.C. 1, discussed in section VII below.
[88] *Tan* [1995] 2 A.C. 378 at 387, 391-392.
[89] [2020] Ch. 129 at [94].
[90] See section VII below.
[91] [2020] Ch. 129 at [104].
[92] [2018] P.N.L.R. 6 at [411]-[440].

think, know in broad terms what the design is".[93] That "does not extend to the commission of unforeseen and uncontemplated offences".[94] As a result, "[l]iability will only be established if the assistant actually knew that the property in question was not at the disposal of the fiduciary; or (perhaps) he shut his eyes to that possibility".[95] This restrictive approach should be endorsed. The key point about the content of knowledge requirement is that the assister must know the property is not at the free disposal of the primary wrongdoer, and so know that he is participating in an infringement of the beneficiary's rights.

The most influential dicta which go further than that are to be found in the judgment of Millett J. at first instance in *Agip (Africa) Ltd v Jackson*:[96]

> "In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was "only" a breach of exchange control or "only" a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party."

The Court of Appeal in *Group Seven* appeared to approve this approach.[97] And in the context of money-laundering, there is an obvious attraction to insisting that a defendant should not be able to escape accessory liability simply by saying that they thought they were participating in a different sort of dishonest scheme.[98] But *Group Seven* should prompt further consideration of this aspect of *Agip*. The comments of Millett J. were *obiter*: the defendant was aware of the type of fraud being perpetrated on the claimants in that case. In *Twinsectra*, Lord Millett recognised that "[i]t is sufficient that he knows that the money is not at the free disposal of the principal" but again mooted the possibility that "[i]n 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".[99] But that extension was *obiter* too.

The accessory should know the type of primary wrong at issue in broad terms, since their liability "should not extend to unforeseen and uncontemplated actions by the primary wrongdoer which lay outside the scope of the joint enterprise in which he participated".[100] Accessory liability must not be too broad. The third party has not undertaken fiduciary obligations in the same manner as the primary wrongdoer, and should generally be free to act and to conduct their business without fear of being sued as an accessory – unless they know that they are participating in a breach of trust or fiduciary duty. It is worth repeating Lord

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[93] [2006] F.S.R. 17 at [1506].
[94] [2006] F.S.R. 17 at [1506].
[95] [2006] F.S.R. 17 at [1507], citing *Heinl v Jyske Bank Gibraltar Ltd* [1999] 1 Lloyd's Rep. Bank. 511 at 532 (Nourse L.J.), 532 (Sedley L.J.) and 547 (Colman J.).
[96] *Agip Africa Ltd v Jackson* [1990] Ch. 265 at 295 (Millett J.).
[97] [2020] Ch. 129 at [100]-[104].
[98] P. Davies, *Accessory Liability* (Oxford: Hart Publishing, 2015) at p.111.
[99] [2002] 2 A.C. 164 at [135].
[100] D. Hayton, P. Matthews and C. Mitchell (eds) *Underhill and Hayton: Law of Trusts and Trustees* 19th edn (London: LexisNexis, 2016) at [98.67].

Nicholls' observation in *Tan* that "ordinary, everyday business would become impossible if third parties were to be held liable for *unknowingly* interfering in the due performance of such personal obligations".[101] It is unreasonable that third parties should "become liable to the beneficiaries even when they received no trust property and even when they were unaware and had no reason to suppose that they were dealing with trustees".[102]

In *Group Seven,* the Court of Appeal gave a number of reasons for preferring the view that no minimum content of knowledge should be required. First, "dishonesty does not exist in a vacuum"; the relevant breach and assistance have to be proved and dishonesty 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".[103] But this does not give a reason why knowledge of a particular breach should not be required. Secondly, "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".[104] Cases can differ widely, but that is true generally in accessory liability where clearer guidance can nonetheless be given.[105] 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".[106] Yet the Court cited *Twinsectra* and *Barlow-Clowes* for this proposition, which do not undermine the contention that a minimum content of knowledge is indeed required.[107] Rather, they suggest the minimum content should be framed broadly, such that the defendant should know that the property was not at the free disposal of the primary wrongdoer, and that the primary wrongdoer was doing something they were not authorised to do.[108] Fourthly, "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".[109] It may be impossible to define the content of knowledge precisely, but it accords better with first principles of accessory liability[110] to demand a minimum content of knowledge, even if it cannot be defined with precision. It can at least give a guide as to what needs to be established, and make it clear that a lack of knowledge of certain elements will inevitably mean that a claim in accessory liability should not succeed.

Ultimately, the Court wanted 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

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[101] [1995] 2 A.C. 378 at 387 (emphasis in original).
[102] [1995] 2 A.C. 378 at 387.
[103] [2020] Ch. 129 at [103].
[104] [2020] Ch. 129 at [103].
[105] See Section VII below.
[106] [2020] Ch. 129 at [103].
[107] See too *TCP Europe Ltd v Perry* [2012] EWHC 1940 (QB) at [30]; *Stevenson v Singh* [2012] EWHC 2880 (QB) at [24].
[108] See section IV.B above. Cf. *Payroller Ltd v Little Panda Consultants Ltd* [2020] EWHC 391 (QB) at [69] (Freedman J.).
[109] [2020] Ch. 129 at [103].
[110] See Section VII below.

test of a minimum content of knowledge would entail".[111] The Court also said 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".[112] Yet the test which emerges from *Ivey* is not at all simple, and firmer guidance is required if the law continues to adhere to a requirement of dishonesty. Moreover, the test in *Ivey* does not really require more time to settle down since it simply reflects, in substance, the approach English courts have adopted since the decision in *Barlow-Clowes* in 2005.[113] It is suggested that the language of "dishonesty" has led to a loose test that, following *Group Seven*, is becoming divorced from a narrow requirement of knowledge. That is unfortunate, since it makes it too easy for claims against an accessory to succeed. The requirement of dishonesty should be abandoned.

VI Abandoning Dishonesty

Dishonesty is inevitably a difficult notion. This is unsurprising given how hard it is to define. In *Ivey*, Lord Hughes observed that "dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition".[114] This is not very helpful in a commercial context where certainty is highly prized.[115]

In *Royal Brunei Airlines v Tan*, Lord Nicholls held that dishonesty "means simply not acting as an honest person would in the circumstances".[116] This begs the question: what would an honest person have done? The answer appears to be: he would not have acted dishonestly. Yet this is clearly circular and does not further our understanding of dishonesty. Perhaps a degree of uncertainty needs to be tolerated given the difficulties inherent in setting legal standards.[117] But even so, dishonesty requires consideration of whether the defendant had what Lord Nicholls called "a very good and compelling reason"[118] for participating in the breach of trust or fiduciary duty. It should not be for the claimant to prove whether the defendant had such a justification for their actions; that involves matters almost exclusively within the defendant's knowledge. The better approach is to recognise a broad defence of justification: if a defendant has knowingly participated[119] in a breach of trust or fiduciary duty, then prima facie accessory liability should arise, and the defendant should bear the

[111] [2020] Ch. 129 at [103].
[112] [2020] Ch. 129 at [103].
[113] See e.g. *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] 1 Lloyd's Rep. 115; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep. F.C. 102.
[114] [2018] A.C. 391 at [48]. See too *Tan* [1995] 2 A.C. 378 at 390.
[115] Cf *UBS AG v Kommunale Wasserwerke Leipzig GmBH* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621 at [347] (Gloster L.J.).
[116] *Tan* [1995] 2 A.C. 378 at 389.
[117] See e.g. T. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) ch. 9.
[118] *Tan* [1995] 2 A.C. 378 at 389.
[119] This encompasses both actual knowledge and blind-eye knowledge as discussed in Section IV.A above: if a defendant has a particular suspicion and deliberately chooses to ignore it, that should prima facie be sufficient for accessory liability, unless the defendant can rely upon a defence.

burden of establishing a defence of justification.[120] A greater degree of vagueness may perhaps be tolerated in the context of defences since defences do not guide behaviour in the same way as the elements of liability.[121]

It is often said that "dishonesty" is best viewed as a jury question.[122] This is problematic. A "jury question" normally concerns a question of fact. But "dishonesty" is not a question of fact, but rather an attempt to apply an undefined normative standard to a particular set of facts. Establishing what that normative standard is should be a question of law. When dishonesty was introduced into the criminal law, Griew immediately lamented that asking a jury to determine such a moral question as dishonesty risked subjective judgements and inconsistent decisions.[123] Griew thought it "simply naïve" to suggest that there is a generally shared sense of "dishonesty" held by all reasonable people. The law should do better than ask juries to answer such moral questions with so little guidance. This is particularly important in the context of civil claims. After all, in the criminal context perhaps a jury is useful in setting normative standards such as dishonesty where it is seen as appropriate for community norms to apply. Yet in the private law there is no jury: judges must undertake this assessment when they may be ill-equipped to do so. It should be noted that *Barnes v Addy* itself did not involve a jury trial,[124] so the suggestion that the mental element of accessory liability involves a "jury question" seems novel and unnecessary.

Even in the criminal sphere, dishonesty is controversial. It was introduced into the criminal law relatively late in its development by the Theft Act 1968[125] and is not seen as a question of law but a moral question for the jury. That might not translate very well into the commercial environment. Judges and juries may well disagree on the same facts. *Ivey* is perhaps a good example of this. Phil Ivey is a professional gambler. He played Punto Banco at a casino in London and won £7.7 million. The casino refused to pay because it thought Ivey had cheated: Ivey had noticed that the casino's cards were marked and was able to exploit this through edge-sorting. The Supreme Court held that Ivey had breached an implied term not to cheat. The Supreme Court further held, *obiter*, that Ivey had been dishonest, even though Ivey had plausible reasons for thinking that he was acting honestly: he did not touch the cards, the cards used were provided by the casino, and the pit manager agreed to all Ivey's requests. But because a reasonable person would have considered Ivey to be dishonest, he was held to be dishonest. This is hard on Ivey on the facts, and one of the members of the Supreme Court has since recognised that a jury of ordinary members of the public may well not have found Ivey dishonest.[126] At the very least, such divergences of opinion suggest that

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[120] See generally Davies, *Accessory Liability* at pp.226-250. This mirrors the defence of justification which is well-established in the context of accessory liability in contract law: see e.g. *Edwin Hill & Partners v First National Finance Corp Plc* [1989] 1 W.L.R. 225 at 229; [1988] 3 All E.R. 801 at 804-805.
[121] J. Goudkamp, *Tort Law Defences* (Oxford: Hart Publishing, 2013) at p.139.
[122] *Ivey* [2018] A.C. 391 at [48]; *Group Seven* [2020] Ch. 129 at [55].
[123] Cf. E. Griew, "Dishonesty: The Objections to *Feely* and *Ghosh*" [1985] Crim. L.R. 341.
[124] Which is unsurprising, since jury trials were exceptionally rare in equity, even when authorised in the nineteenth century: see e.g. M. Lobban, "The Strange Life of the English Civil Jury, 1837-1914" in J. Cairns and G Macleod (eds), *The Dearest Birthright of the People of England: The Jury in the History of the Common Law* (Oxford: Hart Publishing, 2002) at p.182.
[125] *Ivey* [2018] A.C. 391 at [52].
[126] B. Hale, "Dishonesty" [2019] C.L.W.R. 5 at 13.

an appeal court should be very slow to interfere with a finding of dishonesty. In addition, they call into question Lord Nicholls' assertion in *Tan* that "[u]ltimately, 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".[127]

It is important to note that the criminal law of accessory liability does not turn upon the defendant's dishonesty but rather their knowledge.[128] It is odd that a criminal law notion that is not used for accessory liability has somehow become the requisite fault element for accessory liability in equity. That seems even more strange since the private law does not demand "dishonest" inducement of a breach of contract or of a tort. Rather, clear guidance as to what needs to be established is provided by focussing on knowledge and intention. Dishonesty is out of place in the (civil) law of accessories and should be abandoned.

As explained above,[129] dishonesty was introduced into accessory liability (although not as its mental element) by Lord Selborne L.C. in *Barnes v Addy*. That *ex tempore* judgment has had a disproportionate and unfortunate effect on the law. Although *Tan* rightly removed the shackles of dishonesty as regards the primary breach of trust, Lord Nicholls then felt unable to discard dishonesty absolutely. Instead, he noted a "common accord"[130] that dishonesty was the appropriate fault element (based upon the defendant's subjective knowledge). It is easy to agree that, if dishonesty has to be used somewhere in the context of accessory liability, it is better as a fault element than a restriction on the type of primary wrong to which accessory liability can attach. But if it is not necessary to use the language of dishonesty at all, then any "common accord" that dishonesty be the proper fault element is doubtful and should be challenged. After all, before assessing dishonesty the knowledge of the defendant must be established, and the drift away from a narrow test of subjective knowledge proposed by Lord Nicholls in *Tan,* towards a much looser approach favoured in *Group Seven*, means that the foundation of the test of dishonesty may be much less stable than originally hoped.

Lord Millett has said that "the introduction of dishonesty is an unnecessary distraction, and conducive to error".[131] Mistakes might occur because of the convoluted ways in which dishonesty has been employed, or a reluctance to label a defendant dishonest. "Dishonesty" is more evocative than "knowledge". In *Twinsectra*, Lord Hutton said that a "finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor".[132] Some judges may be reluctant to brand a defendant dishonest, and therefore shy away from imposing liability in circumstances where "knowing assistance" would be both appropriate and semantically less problematic. The label of "dishonesty" may have an unfortunate distorting effect.[133]

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[127] *Tan* [1995] 2 A.C. 378 at 391.
[128] *Johnson v Youden* [1950] 1 K.B. 544 at 546.
[129] Section I.
[130] *Tan* [1995] 2 A.C. 378 at 387
[131] *Twinsectra* [2002] 2 A.C. 164 at [134]. See too A. Berg, "Accessory Liability for Breach of Trust" (1996) 59 M.L.R. 443 at 447.
[132] *Twinsectra* [2002] 2 A.C. 164 at [35].
[133] *Attorney General of Zambia v Meer Care & Desai (A Firm)* [2007] EWHC 952 (Ch) at [347] (this point was not raised on appeal: [2008] EWCA Civ 754; [2008] Lloyd's Rep. F.C. 587).

VII Return to Knowledge

Knowledge is the foundation for accessory liability in criminal law,[134] tort law,[135] and contract.[136] Before *Tan* it was also crucial in equity. Given the problems with dishonesty already outlined, and the steadfast reluctance of any other area to embrace "dishonesty" as the mental element for accessory liability, it is suggested that it would be preferable to return to "knowing assistance" in equity.

A Strict mental element

Knowledge would require the defendant to know the type of wrong in which they are participating. This is more demanding than a test of dishonesty which is untethered from any requirement that there be a minimum content of knowledge (as in *Group Seven*). For instance, a director may ask a friend to take him to the bank to take out some money. The friend agrees to do so, and to use her mother's disabled parking permit to park on a yellow line outside the bank without receiving a parking fine. The director then withdraws £10 million of the company's money from the bank, and the friend drives him to the airport from where the director flees the country. Clearly, the friend participated in a dishonest plan, and was dishonest in using the parking permit unlawfully. If there really is no minimum content of knowledge requirement, as *Group Seven* suggests, perhaps the friend could now be liable for dishonest assistance. But that seems a strange result: if the friend had no idea that the director was withdrawing anything other than his own money, the company should have no claim against the friend, even if the friend's actions assisted the director. In order to be liable for assisting the fraud, the friend should be required to have some knowledge of the broad outline of the fraud.[137]

Dishonesty could incorporate such a minimum content of knowledge requirement, and that does appear to have been envisaged by Lord Nicholls in *Tan*. But there is simply no need to add an extra evaluative layer of dishonesty to the requirement of knowledge, especially if "knowledge" is defined restrictively such that it does not slip down the *Baden* scale of knowledge beyond points (i) and (ii). In *Twinsectra,* Lord Millett had "no difficulty in equating the knowing mishandling of money with dishonest conduct",[138] and therefore concluded that dishonesty added little to the accessory liability principle. Perhaps one advantage of "dishonesty" lies in its greater flexibility, but that leads to a lack of clarity when establishing the cause of action, and is better introduced when considering possible

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[134] *Johnson v Youden* [1950] 1 K.B. 544 at 546.
[135] Albeit such knowledge should be part of a "common design": see *Fish & Fish Ltd v Sea Shepherd* [2015] UKSC 10; [2015] A.C. 1229.
[136] *Lumley v Gye* (1853) 2 E & B 216; A. Simester and W. Chan, "Inducing a Breach of Contract: One Tort or Two?" [2004] 63 C.L.J. 132.
[137] Cf *Brinks Ltd v Abu-Saleh (No 3)* [1996] C.L.C. 133. See too A. Douglas, "The role of knowledge in dishonest assistance" [2020] C.L.J. 14.
[138] *Twinsectra* [2002] 2 A.C. 164 at [134]. See too *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511 at 523 (Nourse L.J.).

defences.[139] For example, a bank might knowingly participate in a breach of trust as part of an operation carried out by the police. In such circumstances, the bank should be able to avail itself of a defence of justification.[140] The burden should be on the defendant to establish that defence.

Parties who have not undertaken to act as fiduciaries should generally be free to act without fear of being sued by principals; restraining their freedom of action only when they know of (or deliberately turn a blind eye to) their participation in a wrong is important to protect their autonomy.[141] A "subjective" knowledge requirement also helps defendants to be aware *ex ante* of when they are running the risk of accessory liability. Defendants who know that they would be participating in a breach of trust or fiduciary duty should refrain from doing so (unless justified). This guidance is much clearer than a vague direction not to act dishonestly.

B Content of Knowledge

It should suffice for the defendant to know the "essential elements" of the wrong.[142] In the context of dishonest assistance in a breach of trust, it is enough for the defendant to know that the property is not at the free disposal of the primary wrongdoer, and that the primary wrongdoer does not act in an authorised manner. The fact that a defendant may actually know some facts but be reckless as to others does not undermine this approach:[143] actual or blind-eye knowledge of the essential elements of the wrong must be established, and if only some but not all of those elements are known then accessory liability will not arise. So, if the defendant knows that the primary wrongdoer is dealing with the property of another, but genuinely thinks they are permitted to do so, the defendant will not be liable as an accessory – even if the latter's belief is "muddle-headed and illogical". This language was used in one of the appeals in *OBG Ltd v Allan* concerning accessory liability in contract law, *Mainstream Properties v Young*,[144] which "might have been run as a claim for dishonest assistance in breach of fiduciary duty" rather than as a claim for inducing a breach of contract.[145]

It is important that the defendant know at least the *type* of primary wrong in which they are participating before accessory liability should be incurred. As Lewison J. put it in *Ultraframe (UK) Ltd v Fielding,* the defendant must "know in broad terms what the design

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[139] See text to fnn.118-121 above.
[140] Davies, *Accessory Liability* ch. 7. Such a defence appears also to have been recognised by Lord Nicholls: *Tan*, 389.
[141] *Tan* [1995] 2 A.C. 378 at 387; in different contexts, see too S. Steel, "Rationalising omissions liability in negligence" (2019) 135 L.Q.R. 484 at 493-494; S. Agnew, "The Meaning and Significance of Conscience in Private Law" [2018] C.L.J. 479.
[142] See Section IV.B above.
[143] Cf. P. Ridge and J. Dietrich, "Challenging Conceptions of Accessory Liability in Private Law" [2019] C.L.J. 383 at 406.
[144] *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at [202], discussed further in Section VII.D below. See too *British Industrial Plastics Ltd v Ferguson* [1940] 1 All E.R. 479; (1941) 58 R.P.C. 1.
[145] *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 A.C. 1174, [97]. It is also consistent with the outcome in *Twinsectra*, where the solicitor was not liable as an accessory because he was not dishonest but "may have been naïve or misguided": [2002] 2 A.C. 164 at [5] (Lord Slynn); see too [23] (Lord Hoffmann), [49] (Lord Hutton).

is".[146] So where the defendant mistakenly believes they are assisting a wrong which was not a breach of trust or fiduciary duty, that defendant may not be liable to the beneficiary at all. This is not inappropriate: for a beneficiary to have a private law claim against a third party, it is incumbent upon the former to establish a sufficient nexus with the latter. Accessory liability is, properly understood, a narrow doctrine that depends upon the accessory bearing some responsibility for the infringement of the claimant's rights, and knowingly choosing to participate in the wrong. It is important to remember that the beneficiary has a claim against their trustee or fiduciary; it is not always necessary to provide a third party for the beneficiary to sue as well.[147]

This calls into question the approach of Millett J. in *Agip*[148] where his Lordship, obiter, suggested that a defendant who thought they were "only" assisting a breach of exchange controls or tax legislation should still be liable to a defrauded beneficiary. This could perhaps be explained by drawing the type of primary wrong very widely, such that it encompasses any situation where the primary wrongdoer commits any type of fraud and conceals what is happening from a third party. That might be justifiable where the particular identity of the defrauded party may not matter very much. However, breaches of exchange control rules and tax evasions are public wrongs, not private wrongs. Knowingly participating in public wrongdoing is tangibly different from knowingly participating in civil wrongdoing.[149] A party which participates in the commission of a public wrong would not expect to be subject to the same remedies as would be available in private law; for example, a fine for breach of exchange controls may be far less than a claim by a beneficiary for compensation for loss suffered as a result of breach of trust.[150]

In any event, knowledge should include "reckless indifference". In *Emerald Construction Co Ltd v Lowthian*, Lord Denning M.R. said that "it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not".[151] Although Lord Denning M.R. used the term "recklessly", it is only in a very narrow sense that recklessness will suffice: the accessory must have consciously disregarded something he actually knew.[152] The same approach should be adopted in equity. If the defendant thought that a person was going to commit some sort of wrong, and one of the possible wrongs that the defendant was recklessly indifferent to was breach of trust or fiduciary duty, then accessory liability may still arise.

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[146] [2006] F.S.R. 17 at [1506]; see section V.C above. This approach is also consistent with the criminal law: see e.g. *R. v Bainbridge* [1960] 1 Q.B. 129; [1959] 3 All E.R. 200 and, more generally, Davies, *Accessory Liability* at pp. 43-44 and 76-77.

[147] Cf. L. Hoffmann, "The Redundancy of Knowing Assistance" in P Birks (ed), *The Frontiers of Liability*, vol. 1 (Oxford: Oxford University Press, 1994).

[148] See fn.96 above.

[149] Cf. *OBG Ltd v Allan* [2008] 1 A.C. 1 at [45]-[64] (Lord Hoffmann).

[150] See too the example of a friend driving a dishonest director given in Section VII.A above.

[151] *Emerald Construction Co Ltd v Lowthian* [1966] 1 W.L.R. 691 at 700–701; [1966] 1 All E.R. 1013 at 1017.

[152] *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at [69] (Lord Hoffmann). See too *Uavend Properties Inc v ADSAAX Ltd* [2020] EWHC 2073 (Comm) at [97]-[101].

C Uniform mental element

Ridge and Dietrich have recently suggested that accessory liability is "dynamic" in that an overall assessment of the conduct, mental state and other circumstances must be made.[153] On that basis, it may be impossible to be prescriptive about the mental element since each case requires a close analysis of the facts. This approach should be rejected. It offers little guidance about what the mental element of accessory liability should be. Such a vague and uncertain approach would be regrettable, and risks courts making impressionistic judgements which would be difficult to predict. Even if the defendant has procured, rather than assisted, the primary wrong, this may have been inadvertent: the defendant should still not be liable as an accessory unless they knew they were procuring that type of wrong. Just because procuring might be seen as a "greater" level of participation than assistance does not mean the mental element should be "lower". The fundamental principle not knowingly to participate in another's wrong applies regardless of the precise characterisation of the participation. It can be very difficult to distinguish between procurement, assistance, and other conduct elements, and there is no need to become bogged down in such intricacies.[154]

Ridge and Dietrich further assert that "it must surely be relevant, when assessing [an accessory]'s fault, that [the accessory] has profited from [a primary wrongdoer]'s conduct in having more capital investors".[155] But why is this "surely" relevant? It remains inappropriate to lower the mental element for accessory liability[156] simply because the defendant happened to benefit from the situation; any other approach would severely curtail the defendant's freedom of action and ability to profit from their prima facie lawful acts. Actual knowledge is equally required in situations where the defendant does not make a gain; liability should not be harder to establish if a defendant assists a breach of duty purely out of spite and makes no profit at all.

It is unsatisfactory to say that the fault element should vary with the facts and primary wrong at issue: a very demanding fault element should *always* be required. Ridge and Dietrich, by contrast, suggest that this is problematic and give the following example:[157]

> "If A exerts pressure on a trustee, PW, to withdraw trust funds and invest them in A's business where A has some reason to believe that this may be an unauthorised investment and breach of trust, why should A be able to respond "But I did not know; I never saw the trust instrument"?

This is a difficult example to assess. A is likely to have blind-eye knowledge, which would be sufficient for accessory liability, so A's response is unlikely to constitute a successful attempt to escape liability. It is perhaps telling that a convincing example is not provided where a party should be liable as an accessory where blind-eye knowledge is not made out.

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[153] Ridge and Dietrich, "Challenging Conceptions" [2019] C.L.J. 383.
[154] P Davies, *Accessory Liability* at pp. 21-40.
[155] "Challenging Conceptions" [2019] C.L.J. 383 at 405.
[156] Of course, the defendant's gains might be relevant for a different type of claim, such as one grounded in knowing receipt.
[157] "Challenging Conceptions" [2019] C.L.J. 383 at 405.

D Fusion

Accessory liability only depends upon dishonesty in the equitable context. At common law, the focus is instead upon whether a defendant knowingly induced a breach of contract (or tort), and the claimant does not have to prove that the defendant would be considered "dishonest". Any additional evaluative layer that might absolve the defendant of liability is, sensibly, only introduced at the defences stage when considering the defence of justification.[158] It is suggested that a similar approach should be adopted in equity.

The possibility of "fusion"[159] in this context has been raised by judges at the highest level.[160] For accessory liability in the contractual context, the mental element is recognised to hinge upon knowledge,[161] and it is clear that there is a minimum content of knowledge. For instance, in *Lumley v Gye* itself, Lumley's claim against Gye for inducing a breach of Lumley's contract with Wagner actually failed at trial: Gye honestly believed that Wagner was free to enter into a contract with Gye without being in breach of her agreement with Lumley, so Gye did not possess the requisite mental element for accessory liability.[162] And in *Mainstream Properties v Young,* Lord Nicholls similarly insisted upon knowledge of the particular breach of contract. Two employees of a property company, "Mainstream", breached their contracts of employment by diverting a business opportunity open to Mainstream to a joint venture in which they were involved. They received financial assistance from a third party, Mr. De Winter, without which they would not have been able to exploit the opportunity. Mainstream sued Mr. De Winter under the *Lumley* tort. Mr. De Winter knew of the employees' contractual duties, but believed their assurances that the transaction would not amount to a breach of duty. The House of Lords held that Mr. De Winter should not be liable as an accessory to the breach of contract because he lacked the necessary mental element. This may be surprising – a financier in Mr. De Winter's position might be expected to know of typical terms in the contract of employment – but Lord Nicholls held that even if knowledge is not present due to being "muddle-headed and illogical"[163] no accessory liability can arise.

This approach was recently approved by the Court of Appeal in *Allen v Pollock*.[164] Mr. Pollock was employed by the claimant. His contract of employment contained non-solicitation and non-dealing restrictive covenants. Mr. Pollock later resigned and went to work for a rival firm, Dodd & Co Ltd ("Dodd"). Before hiring the employee, Dodd obtained legal advice from its solicitors about whether the restrictive covenants were enforceable. That advice stated that the restrictive covenants were probably unenforceable, and on that basis

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[158] See text to fnn.118-121 above.
[159] See generally A. Burrows, "We do this at Common Law but that in Equity" (2002) 22 O.J.L.S. 1 at 293.
[160] *Tan* [1995] 2 A.C. 378 at 387 (Lord Nicholls); *Twinsectra* [2002] 2 A.C. 164 at [127]-[132] (Lord Millett); *OBG Ltd v Allan* [2008] 1 A.C. 1 at [189] (Lord Nicholls). See too recently *Lifestyle Equities CV v Santa Monica Polo Club Ltd* [2020] EWHC 688 (Ch) at [26]-[40].
[161] Davies, *Accessory Liability* at pp. 156-161. See recently *Take-Two Interactive Software Inc v James* [2020] EWHC 179 (Pat) at [34] (Falk J.).
[162] See *The Times*, 23 February 1854, p.12 and *The Times*, 6 June 1854, p.10; Waddams has observed that "the verdict is not very conspicuously reported in the law reports" (S. Waddams, "Johanna Wagner and the Rival Opera Houses" (2001) 117 L.Q.R. 431 at 456, citing 18 Jur. 468n, 23 L.T. 66, 157, 23 L.J.Q.B. 116n).
[163] *OBG Ltd v Allan* [2008] 1 A.C. 1 at [202].
[164] [2020] EWCA Civ 258; [2020] Q.B. 781.

Dodd encouraged Mr. Pollock to leave the claimant and work for Dodd instead. Although it was later held that the restrictive covenants were enforceable, both the trial judge and Court of Appeal held that Dodd was not liable as an accessory to the breach of contract. Lewison L.J. emphasised that to be liable as an accessory "[y]ou must *actually realize* that the act you are procuring *will have* the effect of breaching the contract in question. 'Will have' is not the same as 'might have'".[165] Since Dodd relied on its legal advice in good faith, it did not know that it would procure a breach of the contract, and did not recklessly turn a blind eye to that risk (since it sought legal advice).[166] Dodd honestly, but mistakenly, believed that it was not participating in a breach of contract.

However, Dietrich and Ridge have argued that accessory liability responds to the different rationales underpinning the primary breach of duty and a flexible approach is necessary.[167] This is contestable,[168] but in any event offers little guidance for what the mental element of accessory liability in equity should be: it is clearly not a reason for a mental element of "dishonesty". Equity should adopt the same mental element of knowledge as that favoured at common law: there is no reason for a different approach to be taken at law and in equity. Yet it is often suggested that the interests protected—contractual and fiduciary relationships—are so fundamentally different that accessory liability in the two areas should be kept entirely separate.[169]

Three main reasons might be given for this. None is convincing. First, only equitable liability is based upon property. This contention can be readily dismissed: there is no need, even in equity, for the primary wrong to relate to property.[170] Any difference between the two areas cannot be justified simply through making vague references to a "property flavour"[171] which does not truly underpin liability in either. The primary wrong in both areas concerns a voluntary relationship between two parties;[172] across the common law/equity divide, the defendant becomes involved in the breach of personal obligations which the primary wrongdoer has undertaken with regard to the claimant. Secondly, breach of contract may sometimes be economically "efficient", whereas this is irrelevant in the fiduciary context. Again, this is unpersuasive; the malleable arguments surrounding efficiency do not provide a satisfactory basis for differentiating between accessory liability in contract and equity.[173]

The third and best argument for distinguishing between contract and equity in this context is that presented by Loughlan. She has argued that principals in a fiduciary

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[165] [2020] Q.B. 781 at [27].
[166] Lewison L.J. left open the question of whether the result would have been different if the legal advice had merely said that it was arguable that no breach would be committed: [2020] Q.B. 781 at [36].
[167] Dietrich and Ridge, *Accessories in Private Law* (Cambridge: Cambridge University Press, 2015).
[168] Compare Davies, *Accessory Liability* (Hart, 2015).
[169] e.g. H. Carty, "Joint Tortfeasance and Assistance Liability" [1999] Legal Studies 489 at 505-513; S. Baughen, "Accessory Liability at Common Law and in Equity – 'The Redundancy of Knowing Assistance' Revisited" [2007] L.M.C.L.Q. 545 at 563.
[170] *Tan* [1995] 2 A.C. 378 at 387; *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908; [2015] Q.B. 499 at [87]-[93].
[171] T. Weir, *Economic Torts* (Oxford: Clarendon Press, 1997) p.31, fn 31.
[172] For the proposition that a fiduciary relationship is voluntary see e.g. J. Edelman, "When do Fiduciary Duties Arise?" (2010) 126 L.Q.R. 302; *Galambos v Perez* [2009] SCC 48; [2009] 3 S.C.R. 247.
[173] See further Davies, *Accessory Liability* at pp.168-170.

relationship are more vulnerable than promisees in a contractual relationship, and that such vulnerability calls for the protection of equity to a greater extent than that provided by the common law.[174] However, it is not clear that such a distinction is warranted. The accessory's liability depends upon their "involvement" with the primary wrongdoer—who is presumed to be autonomous and not vulnerable—rather than any direct impact upon the victim of the primary wrong. There is no reason why the necessary "involvement" would be more likely to be "successful" regarding a fiduciary relationship than a contract, since in both cases the accessory would need to persuade an autonomous party to breach their duty—whether that be contractual or fiduciary. The potential victim is therefore no more vulnerable to the actions of an accessory if they are a principal in a fiduciary relationship than if they were a promisee in a contractual relationship.

Any increased vulnerability a principal in a fiduciary relationship might experience is adequately protected by the more stringent remedies provided against the primary wrongdoer.[175] It might even be argued that the existence of such remedies means that a fiduciary would be *less* likely than a contracting party to commit a primary wrong to which accessory liability might attach. This is because there is already a greater deterrence factor in a principal–fiduciary relationship than in a promisor–promisee relationship; a primary wrongdoer might be more wary of committing a breach if in a fiduciary relationship, and therefore be less susceptible to "corruption" by the accessory. If the primary wrong is less likely to occur, the likelihood of accessory liability is accordingly reduced. The (perceived) greater need to protect fiduciary relationships does not require that an accessory to a breach of fiduciary duty be treated any differently to an accessory to a breach of contract; protection of principals in fiduciary relationships is achieved through the duties placed upon the fiduciary and the remedies to which the fiduciary is subjected. The above assumes that the parties are aware of the applicable legal regime, and therefore of its deterrent effect, but if the parties are unaware of the effect of the law then it seems difficult to argue that a person is more likely to breach an obligation that is characterised by the law as fiduciary rather than contractual.[176]

Insights gained from the contractual cases should therefore be applied in equity. In *Twinsectra*, Lord Millett said:[177]

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[174] P. Loughlan, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 O.J.L.S. 260. It is possible that such principals do not protect themselves to the same extent as contracting parties: see e.g. *Norberg v Wynrib* [1992] 2 S.C.R. 226 at 272; (1992) 92 DLR (4th) 449 at 487; *Pilmer v Duke Group Ltd* [2001] HCA 31; (2001) 207 C.L.R. 165 at [71]. However, for the argument that a contractual promisee can also be considered to be a vulnerable party, see e.g. J. Danforth, "Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity" (1981) 81 Columbia Law Review 1491 at 1519.

[175] e.g. an account of profits is more readily awarded for breach of fiduciary duty than a breach of contract: compare *Boardman v Phipps* [1967] 2 A.C. 46; [1966] 3 All E.R. 721 and *Attorney-General v Blake* [2001] 1 A.C. 268; [2000] 4 All E.R. 385; *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] A.C. 649.

[176] Indeed, fiduciary duties may simply be a type of contractual term in any event: see e.g. F. Easterbrook and D. Fischel, "Contract and Fiduciary Duty" (1993) 36 Journal of Law and Economics 425 at 427, 431; H. Butler and L. Ribstein, "Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians" (1990) 65 Washington Law Review 1 at 19, 30–32.

[177] [2002] 2 A.C. 164 at [132].

> "It would be most undesirable if we were to introduce a distinction between the equitable claim and the tort [of inducing a breach of contract], thereby inducing the claimant to attempt to spell a contractual obligation out of a fiduciary relationship in order to avoid the need to establish that the defendant had a dishonest state of mind."

Following *Group Seven* it may be that parties have an incentive to operate in the opposite manner to that which Lord Millett envisaged, and try to establish a fiduciary relationship when bound by a contract. That is because it may now, surprisingly, be *easier* to establish dishonesty rather than knowledge. After all, in *Group Seven* the Court of Appeal appeared willing to countenance a finding of dishonesty even if the defendant had neither actual nor blind-eye knowledge of a primary wrong, and thought no minimum content of knowledge should be required. Yet before *Group Seven*, dishonesty was generally thought to be *harder* to establish than knowledge.[178] It would be better simply to revert to a requirement of knowledge in equity – as Lord Millett himself suggested in *Twinsectra*.

VIII Conclusion

Given the broad conduct element of accessory liability in equity, it is important that the mental element be restrictive. Dishonesty has often been considered to be very narrow, on the basis that dishonesty depends upon establishing actual (or blind-eye) knowledge of the essential elements of the primary wrong. Yet recent developments suggest that dishonesty may be divorced from actual knowledge, which could, unfortunately, give a much broader meaning to dishonesty.

Birks once warned of judges being "cast adrift on the sea of an undefined and objective dishonesty".[179] Dishonesty is a problematic concept, which can cloud the key issues that need to be addressed. There is no need for an extra layer of dishonesty in addition to knowledge. Lord Nicholls in *Tan* thought knowledge was "inapt" as a mental element because it led to "tortuous convolutions about the "sort" of knowledge required"[180] but the law's experience with dishonesty has been no happier. It would be better to confront "knowledge" head-on and ensure a stable, and restrictive, mental element that would be consistent with general principles of accessory liability. In order to be liable as an accessory, a defendant must have actual knowledge that they are participating in a primary wrong, or blind-eye knowledge within category (ii) on the *Baden* scale.

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[178] D. Salmons, "Dishonest Assistance and Accessory Liability" (2017) 80 M.L.R. 133 at 138.
[179] P. Birks, "Accessory Liability" [1996] L.M.C.L.Q. 1 at 6.
[180] *Tan* [1995] 2 A.C. 378 at 391.