Some thoughts upon the proper role of Equity in commercial transactions provoked by the Twinsectra case

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Introduction

In order to set the above mentioned case in an appropriate context it is necessary to briefly refer to an earlier case, *Royal Brunei Airlines v Tan*.1 This earlier case afforded the Privy Council a most welcome opportunity to review the nature and basis of the two forms of liability which a stranger to a trust may incur in the course of intermeddling with the said trust so as to receive trust property or facilitate its disposal. The Privy Council laid down the requirements for both receipt liability, about which no more need be said, and also for accessory liability. Accessory liability applies to a person who, though not themselves a trustee, nonetheless dishonestly assists in a breach of trust. In the *Tan* case Mr Tan had exploited his control over a limited company to make it divert trust money, which belonged to Royal Brunei Airlines, to support his own company. The Privy Council was called upon to clarify a number of matters, the most significant of which was the appropriate level of mental responsibility which the claimant must show so as to fix the third party with accessory liability. That such a clarification was needed was a result of the unfortunate tendency of the decisions of previous cases to involve the minute examination of what various courts appear to have truly believed to have been the thought processes and level of knowledge of the defendant at the relevant point in time. In practice this approach, which was originally intended to prevent an ‘innocent’ third party from becoming an accessory by default, served only to disadvantage the claimant whilst, ironically, facilitating the defence of the ‘dishonest’ defendant by presenting him with a broad range of semantic distinctions behind which he could attempt to camouflage his actions. For a time it seemed that *Tan* had redressed the balance between the interests of the claimant and defendant by adopting a comparatively simple and objective standard of responsibility: a person who acted in a way that a reasonable man would consider to be ‘dishonest’ was deemed to be acting in a manner that would allow him to be subject to a claim of accessory liability. According to this level of dishonesty Mr Tan was clearly responsible for his actions and was duly fixed with accessory liability. Seven years after the Privy Council gave its’ advice in *Tan*, the House of Lords were faced with an appeal which re-opened and questioned the nature and meaning of the *Tan* requirement of dishonesty. The question arose in the course of litigation between a loan company, Twinsectra, and a solicitor who had been involved in the wrongful dissemination of its money.

The Twinsectra case

Mr Yardley sought to borrow £1 Million from Twinsectra to provide short-term finance for an English property deal in which he was interested. Twinsectra agreed to make the loan but insisted that the money be paid to a solicitor who was willing to personally guarantee this advance by an undertaking and also to undertake that the money would only be released for the purpose of closing the deal in question. In so doing Twinsectra set up something very similar to a *Quistclose*² trust so as to protect their money from being applied to other purposes. Mr Yardley was not able

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2 Barclays Bank plc v Quistclose Investments Ltd [1970] AC 567

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to convince his usual solicitor, Mr Leach, to make such undertakings. Accordingly, Mr Yardley secured the services of another firm of solicitors, Sims & Roper, who were prepared to make such undertakings. Once Sims & Roper received the money on undertaking they paid most of it to Mr Leach, a sole practitioner, on the basis of an assurance from Mr Yardley that it would only be used for the purpose specified in their undertaking: unfortunately for the lender, Mr Leach, despite his knowledge of the existence of the undertaking, then released the money to Mr Yardley’s unrestricted use. Mr Yardley then set about squandering some £357,000 of Twinsectra’s money upon various transactions wholly outside the terms of the loan.

Twinsectra sued Mr Yardley, Sims & Roper and also Mr Leach arguing that he, Leach, had acted as had Mr Tan and was accordingly fixed with personal accessory liability for the value of the property lost as a result of his intermeddling. In order to appreciate the events which then unfolded it is necessary to make some mention of the progress of the case through the courts

**Twinsectra in the High Court**

This complicated and confusing case was first heard by Carnwath J who made two key findings concerning Mr Leach and the disputed issue of his accessory liability. Firstly he found that the undertakings entered into had not brought a *Quistclose* style trust into existence: the money was held upon a contractual rather than a trust basis. This finding effectively ended the accessory liability claim but Carnwath J also expressed the view that, although Mr Leach had repeatedly and deliberately ‘closed his eyes’ to the nature of the transaction in which he was involved when acting for Mr Yardley, he had not been conscious of any dishonesty in his act of releasing the money to the unrestricted use of Mr Yardley. It is, to say the least, a matter of some regret that the judge neither properly explained why he found Mr Leach to be honest, nor set out the test by which this conclusion had been reached. These findings, although open to legitimate objections concerning their relevance in the light of the subsequent discovery of a trust, would provide, if not the cause of, then at least the context for, the problems which would ultimately lead the majority of the judges in the House of Lords to hold Mr Leach to have no liability as an accessory.

**The appeal**

In the Court of Appeal Potter LJ took a very different view of the case as it related to Mr Leach, holding that there was a *Quistclose* style trust, which had been brought into existence by Twinsectra’s payment of the money, on restrictive undertakings, to Sims & Roper. In the eyes of Potter LJ, the discovery of the trust re-opened the issue of accessory liability and its associated issue of the equitable honesty of the defendant. The earlier assertion that Mr Leach was honest, despite having wilfully closed his eyes to the implications of his actions was viewed with dissatisfaction by the Court of Appeal.

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3 Mr Yardley was already involved with Mr Sims in a scheme which was intended to result in a share of a large sum of money, $49M, which officials of the Nigerian State were allegedly willing to transfer to an English company if the said company would first transfer smaller, but still significant, sums to them as bribes. It took some time for Sims and Yardley to appreciate that the large sum would never materialise.

4 The case has not yet been reported but is available as a transcript. Many of the salient points of the original judgment are quoted in the opinion of Potter LJ in the Court of Appeal, see below.

5 See Carnwath J, transcript p. 26 under the heading, ‘Was Sims a trustee for Twinsectra?’

6 See Carnwath J, transcript p.19 under the sixth point of the Judge’s conclusions.

In this case we are concerned with a solicitor who, while acting for his client as agent to receive a loan on terms negotiated by another solicitor acting for the same client, becomes aware that the other solicitor is anticipating a deliberate and immediate breach of undertaking given to the lender that the funds will be retained by that solicitor until applied for a particular purpose. Instead of declining to be involved in such anticipated course of action or at least advising his client that, if he wishes to proceed, he should deal directly with the second solicitor, he (a) approves without reservation the misapplication of £34,000 of the loan and (b) directs payment of the balance forthwith to his client account where he holds it available for disbursement to his client without reservation or restriction of any kind. It seems to me that, save perhaps in the most exceptional circumstances, it is not the action of an honest solicitor knowingly to assist or encourage another solicitor in a deliberate breach of his undertaking.8

Potter LJ viewed Mr Leach’s conduct as amounting to, at least, an example of what was formerly referred to as ‘Nelsonian knowledge’9 which, when viewed objectively in accordance with the advice given in Tan, lead directly to a finding that he was liable to Twinsectra as an accessory. Thus the Court of Appeal unanimously overrode the earlier assertion of honesty which had been made by Carnwath J.

The opinions of the majority in the House of Lords

The House of Lords10 agreed with the Court of Appeal upon the existence of a trust but, somewhat surprisingly, the majority decided, despite the eloquent and convincing dissent of Lord Millett, that, on a correct reading of the advice offered by the Privy Council in the Tan case, Mr Leach lacked the relevant form of dishonesty required to fix him with accessory liability. The majority asserted that the requirement of dishonesty explained in Tan must be understood to contain not only an objective element, as outlined above, but also a subjective appreciation by the defendant that he was acting in such a dishonest manner. The gloss involved in this ‘explanation’ of Tan’s test of dishonesty seems to adopt something very close to the test of honesty advanced in R v Ghosh11, in spite of the obvious objection that the action which Twinsectra brought against Leach was of a civil rather than a criminal nature, and regardless of the fact that the Privy Council in Tan had earlier explicitly rejected the test associated with this case.12

However this may be, the majority in the House of Lords appear to have been most troubled by the implications of an appellate body overriding primary findings of fact made by a trial court: such concern is explicit in the opinion of Lord Hutton. Lords Slynn, Steyn and Hoffmann expressly agreed with Lord Hutton when he said,

‘It is only in exceptional circumstances that an appellate court should reverse a finding by a trial judge on a question of fact (and particularly on the state of mind of a party) when the judge has had the advantage of seeing the party giving evidence in the witness box’.13

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8 See Court of Appeal transcript paragraph 108 per Potter LJ.
9 See paragraph 22 of Lord Hutton’s opinion in Twinsectra (below) for an explanation of this phrase and an example of its usage.
10 [2002] 2 All ER 377.
11 [1982] 2 All ER 689
12 [1995] 3 All ER 97 at 104
13 Paragraph 43

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Of course the true effect of the admirable sentiment expressed in this statement will depend upon the characterisation of an ‘exceptional circumstance’. It is surely at least arguable that, in proceedings concerning the existence or otherwise of accessory liability, a failure to explain a finding of honesty, when coupled with a failure to discern the existence of the trust upon which the claim was based and from which the appropriate standard of conduct is deduced, might amount to an ‘exceptional circumstance’. Lord Hutton down-played the relative importance of the initial failure to discover the existence of the trust but, with respect, the trust is essential. If the trust is removed then there can be no accessory liability: absent the trust the case, in so far as one may be said to exist at all, then descends into a largely pointless debate as to whether or not Mr Leach was dishonest according to other, unspecified, standards of conduct. Any such lack of specificity poses a significant problem. A person may be found to be honest against one standard but to be dishonest according to another, stricter, standard: to be meaningful such a finding of ‘honesty’ must surely be clearly tied to the standard of conduct against which the person has been judged. This begs a question which, with respect, seems at least as important as the protection of a trial court’s right to make findings of fact, namely, how is an appellate court to properly review the decisions of the lower courts if such courts do not adequately specify the bases from which their conclusions were drawn? This problem is far from academic: what should be the attitude of an appeal court when faced with a judgment, under which one such as Mr Leach is fixed with accessory liability, if it can not discern the reasoning of the trial judge upon the issue of dishonesty?

The majority’s shift from a test seemingly characterised by objectivity to one which requires the proof of both an objective and a subjective form of dishonesty surely requires explanation; however, before attempting this it may be useful to briefly consider the dissenting opinion advanced by Lord Millett.

**Lord Millett’s dissent**

Lord Millett argued very strongly against the view that Mr Leach’s subjective apprehensions were relevant to his accessory liability. In this respect Lord Millett advanced the view that the term ‘dishonest’ was essentially a term of art which was initially employed to remove the innocent from the ambit of the beneficiary but, from *Tan* onwards, should be understood to have been employed in an attempt to dispense with the problems attending the qualifications of the word ‘knowledge’ by which equitable responsibility had formerly been graded from non-existent to absolute. To adopt an additional and subjective requirement of dishonesty was simply to fracture the meaning of another word (dishonesty) with the result that proceedings based upon accessory liability would again degenerate into the very judicial second-guessing which had inspired the Privy Council to adopt a different terminology when considering this form of equitable wrongdoing. Lord Millett, in an echo of the Privy Council’s advice, also sought to equate the equitable wrong which may be remedied by a finding of accessory liability with the common law tort of inducing a breach of contract: he argued that it was illogical to require subjective dishonesty for the first and yet not for the second.

**Why should the majority wish to augment the objective test?**

It is both possible and indeed tempting to argue that the majority were simply wrong in their interpretation of the advice given in *Tan*, however, this argument serves to obscure the more

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14 Presumably the ultimate appeal to the House of Lords is to be understood as being included within such an ‘exceptional circumstance’.

15 Paragraph 48
fundamental aspects of the eventual outcome of the *Twinsectra* case and will be resisted. Instead, this article will attempt to expand upon the parallel, suggested by both Lord Nicholls’ and Lords Millet’s equivalence of a legal and an equitable ‘wrong’. The equivalence of a legal economic tort and an equitable form of personal liability is strongly suggestive of other equivalencies which may be adopted in order to better understand, contextualise and criticise the majority view of the *Twinsectra* case. Such criticism will be organised around a common law case which represents something of a mirror image of the majority view expressed in the *Twinsectra* case. It may prove enlightening to consider a case based upon the common law which nonetheless resembles *Twinsectra*: when one case is considered alongside the other certain common issues will be readily apparent. The most obvious common law mirror of the *Twinsectra* case has seemed to this author to be a much earlier case, which also went to the House of Lords, namely *Derry v Peek*.  

Today *Derry v Peek* seems to merit little more than passing references in some textbooks concerned with Contract Law, Torts Law and even Company Law, however, such brief references belie its true importance. *Derry v Peek* was a case heard during that delicate time in the nineteenth century when the conceptual walls which separated the principles of the common law from those of equity were undergoing a particularly Victorian process of well-intentioned and largely extemporised judicial ‘improvement’. To the temporal claim which this fact makes upon anyone interested in the development of English law, there may be added another matter of consequence: *Derry v Peek* represents a ‘road not taken’, which is to say that had the outcome of this case been different, the English law in the three areas mentioned above would now have a markedly different shape and aspect. It was in *Derry v Peek* that the House of Lords unanimously rejected the argument that ‘constructive fraud’ was sufficient to constitute the intentional tort of deceit. The notion that proving what would have amounted to an early form of ‘negligent misstatement’ could fix the defendant with the heavy liabilities accompanying the tort of deceit had recently been advanced and fostered by those in lower courts who sought to ensure that the statements of men of business would, in future, be accompanied by a greater level of veracity. *Derry v Peek* concerned a dispute between Sir Henry Peek (Bart) and the directors of a recently wound-up company, the Plymouth, Devonport and District Tramways Company, whom, he maintained, had procured his investment of £10,000 by ‘deceitfully’ claiming in their prospectus that the company had a positive right to employ steam-driven trams. The directors, of whom Derry was one, had indeed claimed that their company had a right to use steam-power, however, the true position was that the company could only employ such steam-power with the permission of the Board of Trade. Some little time after Peek’s investment, the company requested this permission only to be told that, in the opinion of the Board, the horse-drawn tram was generally to be preferred within the narrow and steep environs of those urban areas which the Company wished to serve. This decision effectively rendered the plans of the directors otiose by removing their competitive edge: the company was wound-up shortly thereafter and Peek swiftly sued to try to recover his money.

In their defence to the Baronet’s action for deceit, the directors maintained that they had told the truth as they had then understood it to be; they had not intended to deceive and had not appreciated the reality of the danger that the Board of Trade would refuse to countenance their planned steam-trams. The trial judge, Stirling J, agreed with the directors, an action for deceit could not be maintained in the absence of a proven subjective intent to deceive, or, proven subjective recklessness as to the deceitful impression the representation engendered. That a director was an innocent in the ways of the world, foolish or simply negligent was no reason to find or declare him to have been ‘fraudulent’. An honest man’s good name should not lightly be

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16 (1889) XIV App. Cas. 337 (House of Lords).
tainted by a finding of deceit, indeed, Stirling J was moved to comment, in a piece of prose which recalls one of Sir George Jessel MR’s more frequently quoted statements,\textsuperscript{17} ‘Mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about make them liable in an action of fraud’.\textsuperscript{18}

The Court of Appeal, consisting of Cotton, L.J., Sir J Hannen, and Lopes, L.J., took a different view and found that the actions of the directors were sufficient to found liability in an action of deceit. This conclusion was reached by applying equitable breach of duty concepts in relation to the common law notion of deceit. As far as the Court of Appeal was concerned, there was little or no difference between the case presently in hand and that of \textit{Edgington v Fitzmaurice},\textsuperscript{19} which it had decided some years earlier in 1885.\textsuperscript{20} In both cases money had been obtained by a company by means of misleading statements made by their directors. It is palpable in the opinions rendered by the Court of Appeal in \textit{Peek v Derry} that the court was anxious not to let the directors escape liability. Cotton, L.J. asked, ‘Had the Defendants reasonable ground for believing the statement to be true?’\textsuperscript{21} Lopes, L.J. stated his agreement with this approach, but seemed to go even further when he commented, ‘… a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law’.\textsuperscript{22}

As is well known, the House of Lords fundamentally disagreed with the Court of Appeal: the notion of ‘constructive fraud’ was firmly and unanimously rejected, the verdict of the trial court was reinstated. Lord Herschell, with whom Lord Halsbury LC and Lord Watson expressly agreed, explained that the error had arisen from, ‘… a confusion between that which is evidence of fraud and that which constitutes it’.\textsuperscript{23} After a long survey of the cases cited by Counsel for Peek, Lord Herschell was lead to conclude that the fact that the defendants had believed in the truth of their statement was sufficient to negative the suggestion of fraud upon their part. Absent dishonesty, or that recklessness as to honesty which was regarded as its equivalent, there could be no fraud and hence no action for deceit. In association with his conclusion that the statement represented an honest error, Lord Herschell pointed out that the same inaccurate representation as to the effect of the Act, i.e. that it actually provided permission, was repeated by an independent expert in the very official report which had caused the Board of Trade to withhold their consent. His Lordship then continued his opinion with an illuminating comment upon the correct approach that a court should take towards the assessment of the professed \textit{ante facto} beliefs of a defendant subjected to civil proceedings.

\textsuperscript{17} \textit{Printing And Numerical Company v Sampson} (1873) LR.19 Eq 462 at 465.
\textsuperscript{18} \textit{Peek v Derry} [1887] XXXVII Ch 541 at 558.
\textsuperscript{19} (1885) 29 Ch D 459 (Court of Appeal).
\textsuperscript{20} Some years later Bowen, LJ – a significant member of the panel in the \textit{Edgington} case – was afforded an opportunity to comment upon the confusion evident in the opinions expressed by the Court of Appeal in \textit{Derry}. ‘Cases of gross negligence, in which the Chancery Judges decided that there had been fraud were piled up one upon another until a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper ratio decidendi, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant’s conduct had been dishonest, per Bowen LJ in \textit{Le Livre and Dennes v Gould} [1893] 1 QB 491 at p 500.
\textsuperscript{21} \textit{Peek v Derry} [1887] XXXVII Ch 541 at 573, see also the opening paragraph of Sir J Hannen’s speech on the same page.
\textsuperscript{22} Ibid. at 585.
\textsuperscript{23} \textit{Derry v Peek} [1889] XIV App. Cas. 337at 369.

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‘I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe’.

It seems that, at least in the opinion of this panel of the House of Lords, it was necessary for an appellate court to test the disputed claim of honesty, and by implication the process by which this finding was made, against the standard of conduct expected from the reasonable company director.

Twinsectra and Derry: similarities and differences.

Leaving on one side, for the moment, the obvious comparison which may be drawn between the progression of the two cases through the courts, there are a number of other important aspects in which Twinsectra and Derry may be regarded as similar. Both cases were concerned with the necessary level of mental apprehension the courts required to proceed an act so as to render it actionable at the instance of the claimant: in both cases the subjective perceptions of the defendant were, ultimately, held to be essential in the furtherance of any such judicial determination. In each case an attempt by the Court of Appeal to proceed to establish liability upon a more objective basis than had been employed by the trial court was ultimately rejected by the House of Lords as this would involve, inter alia, tarnishing a man’s name with an allegation of either ‘fraud’ or ‘dishonesty’ in the course of civil appellate proceedings.

Despite these similarities there remain significant and enlightening points of divergence between the two cases. Derry, at least whilst before the Court of Appeal and the House of Lords, is clearly concerned with an attempt to modify the common law deceit measure with equitable concepts of conscionable dealing; these concepts being largely derived from the responsibilities of trustees towards their beneficiaries and others subject to the rigours of a fiduciary relationship. To this extent there may be seen to be a linkage between the arguments advanced in Derry and those which unlucky shareholders and third parties would periodically range against the bitter consequences attending the insolvent failure of a limited liability company. From Derry it may be deduced that, at least as far as matters then appeared to the judges sitting in the House of Lords, the deceit measure required no modernising augmentation with equitable principles.

Such a view is fairly typical of the attitude to the law of torts which then prevailed within the House of Lords. In the period of time proceeding and following the litigation in Derry the lower courts, and in particular the Court of Appeal, made a number of attempts to expand and reform the nature of the torts which were available to an aggrieved litigant. The nominate torts were overwhelmingly of an intentional nature: the only significant exception to this situation being the so-called ‘action on the case’ by which certain specific examples of intentional or even negligent conduct might be deemed to be actionable. Derry v Peek is one of a number of cases heard prior to 1897 in which the lower courts made attempts, both direct and indirect, to expand and generalise aspects of the antiquated English law of torts. Derry had already decided the issue for Deceit, but it was the great case of Allen v Flood in which the majority of the House of Lords firmly rejected the entire generalising trend and asserted the orthodoxy of the nominate torts. So

24 Ibid. at 380.

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effective was this rejection that it was not until the 1960’s that English law would agree to recognise that the negligent making of a statement could support a tortious liability.\(^{26}\)

Whilst *Derry* concerned the desirability of replacing an intentional form of common law liability with equitable notions of constructive responsibility, the *Twinsectra* case was concerned with the desirability of augmenting an already restricted form of equitable liability with an additional requirement of subjective dishonesty. The House of Lords in *Derry* defended the existing tort and rejected the attempt to dispense with the proof of intention, however, in *Twinsectra* the majority of their Lordships appear to have actively imported something similar to such an intention requirement: can it be that the equitable measure genuinely required augmentation from the common law? Such a conclusion would appear most unusual. One of the aspects of the earlier *Tan* opinion which had attracted general academic approval was the willingness of the Privy Council to return to equitable first principles and to dispense with the years of accumulated case law corsetry summarised, from the *Baden*\(^{27}\) case onwards, by the five degrees of responsibility which might be appended to a defendant’s ‘knowledge’ of a given state of affairs so as to fix him with, or absolve him from, accessory liability. In *Tan* the issues were re-drawn: do not make the equitably ‘innocent’ liable, however, hold those whom a reasonable man would regard as having acted in a ‘dishonest’ fashion to be personally liable as accessories. Given the simplicity of this exhortation, why should the majority in *Twinsectra* have refused to hold that a solicitor, who knew that a large fund of money was held on a restrictive undertaking, was objectively liable for releasing that specified fund to the unrestricted use of his client? With respect, a solicitor so described does not appear to present a court with many obvious points of difficulty. He is aware of the nature of an undertaking, is familiar with the concept of funds subject to special rules and also of the professional standards which are required of him both by Equity and the Law Society. Howsoever this may be, the outcome of *Twinsectra* shows that the House of Lords was indeed troubled by a state of affairs very similar to that just outlined: it is to a consideration of why this should be so that this article will now turn

**An attempt to characterise the problem facing the majority**

Before directly addressing this characterisation it may be useful to attempt to briefy place the issues facing the House of Lords in the *Twinsectra* case in a historical context by continuing to consider the parallel between this case and the earlier case of *Derry* v *Peek*. As has been mentioned, *Derry* took place at a time when English private law was approaching the end of a protracted period of reform. Earlier changes to legal procedure, instigated by legislative reform, had lead to the development of what appear to us now to be more recognisably modern notions of the nature of a contractual obligation. This development of the ‘modern’ contractual obligation lead, in turn, to a series of awkward cases\(^{28}\) in which the potential of the ‘old’ intentional torts to ‘protect’ such modern contractual developments came to be directly at issue. At the risk of oversimplification, the House of Lords, *inter alia*, had signalled an end to this particular trend in 1897 in *Allen v Flood*.

With the benefit of hindsight, the restrictive response of the House of Lords in *Allen v Flood* may be explained to have played a role in the subsequent development of non-intentional forms of tortious liability. So dominant has been the tort of negligence over the course of the twentieth

\(^{26}\) *Hedley Byrne and Co v Heller and Partners Ltd* [1964] AC 465.


century, that a tort which is not based upon negligence must now receive the extra description of ‘intentional’ in order to be understood. Whilst it still remains more accurate when describing English law to speak of, ‘a law of torts’, than, ‘a law of tort’, it sometimes appears that the generalisation resisted at the end of the nineteenth century has arisen by default, at least in intellectual terms, as the tortious paradigm is now certainly based upon negligence.\(^{29}\) The relevance of this assertion towards the *Twinsectra* case lies in the suggestion that it is presently as easy for a modern House of Lords, conditioned to think in terms of negligence, to entertain notions of intention in an emergent area of law as it formerly was for their predecessors, who were conditioned to think in terms of intention, to entertain notions of tortious liability based upon negligence.

The sceptical reader may immediately dispute the equivalence asserted in the preceding paragraph upon the basis that the accessory liability at issue is no tort, and/or, upon the basis that such liability is not of recent origin, however, despite these objections there are significant respects in which the mooted equivalence is present; these issues will be considered in turn.

**Accessory liability as a tort**

The distinction made in English law between those claims which are ‘legal’ and those which are ‘equitable’ is somewhat confusing and haphazard.\(^{30}\) Never having experienced the conceptual rigours associated with an overt process of classification, such as codification, English law still maintains many distinctions which have their origins in the time when Equity and the Common Law were administered by different courts. A number of consequences have flowed from this fact; firstly the organisation of ‘legal’ texts and education in the light of such a state of affairs, and, secondly, the associated development of a ‘legal’ aesthetic which is reluctant to perceive a ‘mere’ equitable concept as sufficiently ‘tort-like’ to warrant the description.

When viewed in outline, accessory liability does seem to possess important characteristics which are not hostile to a classification as an intentional tort, i.e., a personal liability arising from an intentional breach of a specific form of personal duty. The traditional classification of accessory liability has tended to extend little further than filing it under ‘Equity’ and noting that it is often associated with the more obviously restitutionary claim of receipt liability. However, if one attempts to classify accessory liability in terms of its curative or remedial function it is possible to argue for either a tortious or some other form of obligational classification.\(^{31}\)

**The ‘age’ of accessory liability**

It is beyond the scope of this article to attempt anything approaching a comprehensive treatment of the historical origins of what is now called accessory liability. It is not even feasible to attempt a chronological survey of the main cases from *Barnes v Addey*\(^{32}\) onwards. In the light of these admissions it may be deduced that accessory liability certainly does possess a lineage of no little duration: to this extent the second of the above mentioned objections is seemingly true. It is however an undoubted irony that the present state of accessory liability is considerably less straightforward, at least in terms of its chronology, as a result of the advice of Privy Council given in the *Tan* case. The advice of the Privy Council effected a wholesale reorganisation of accessory liability according to comparatively bald first principles. It is important to appreciate


\(^{30}\) See generally A. Burrows, ‘We do this at Common Law but that in Equity’ (2002) vol 22 OJLS 1.

\(^{31}\) As with most taxonomic dilemmas, any choice will offend at least one school of thought.

\(^{32}\) (1874) LR 9 Ch App 244
that *Tan* involved much more than a re-setting of the positive principles of accessory liability, it also involved discarding what was regarded by the Privy Council as the unnecessary sophistication of these principles. In a very real sense accessory liability was born anew in *Tan*: that judicial reactions to this liability have subsequently varied is not altogether surprising.\\n
**Another perspective**

It is interesting to speculate as to the likely outcome of the *Twinsectra* case had the circumstances of the case allowed the claimant to proceed against the defendant solicitor under the tort of negligence. The recent trend of negligence cases has demonstrated that the House of Lords is only too willing to fix a solicitor with liability for the tort of negligence for acts and omissions concerning classes of third parties seemingly having a far more tenuous claim than that possessed by *Twinsectra*. In *White v Jones* a would-be legatee’s *spes successionis*, which had been thwarted by the omission of her father’s solicitor to timeously re-amend his will, was transmuted, albeit by a majority, into a right to recover her economic ‘loss’ directly from her father’s solicitor under the tort of negligence. Even a cursory consideration of the outcome of *White v Jones* will quickly dispel any concern that the modern House of Lords presently regards itself as firmly bound to a narrow and restrictive notion of the nature and composition of the tort of negligence. Why then should the disappointed daughter be favoured with a right to recover whilst the claim of the commercial lender is refused?

**Conclusion**

This article has advanced the view that it is possible to understand the desire of the majority of the House of Lords to introduce subjective dishonesty into the assessment of accessory liability as an unhappy consequence of the long-standing civil trend away from intention, and towards negligence concepts: familiarity with the latter having adversely affected the straightforward application of the former. The case of *Derry v Peek* was employed to illustrate a period when English civil liability was dominated by concepts of intention and the then House of Lords, when faced with an attempt to introduce an unfamiliar negligence liability into their intention based law, rejected the possibility of such liability. It was then suggested that the equitable concept at the heart of both *Tan* and *Twinsectra*, accessory liability, may perhaps be better understood and classified, despite an equitable pedigree, as an intentional tort.

It remains necessary to directly address an aspect of what has elsewhere been described as being, ‘... a topical question’, namely, the proper role of equitable concepts in commercial transactions. The factual contexts of both *Tan* and *Twinsectra* involved insolvency and the claimant’s attempt to avoid its consequences by seeking to exploit the ‘longer reach’ traditionally associated with equitable remedies. That the extent to which such basic claims are presently feasible remains a question of topicality in the twenty-first century, seems to be clear evidence of the failure of English law to fully integrate its legal and equitable concepts within the more general provisions of its private and commercial laws. Of course history can explain much greater failures than those presently under consideration, however, explanation only represents a part of

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33 See for example Abbey National plc v Solicitors Indemnity Fund Ltd [1997] PNLR 306, a case heard after *Tan* but before *Twinsectra* in which *Ghosh* was considered to be of use in relation to the *Tan* test. Lord Hutton approved of the approach adopted by Steel J at paragraph 37 of his opinion in *Twinsectra*.

34 [1995] 2 AC 207.

35 This question and, for that matter, the title of this article are both adapted from the opening line of the advice given in *Tan* per Lord Nicholls, see footnote 1 above at page 381 of the report.

36 As for that matter do most *Quistclose* style cases.
the matter: it still remains necessary to address the proper role of equitable remedies in commercial cases.

The question of the role of Equity in commercial transactions is really only another way of reopening the venerable debate concerning the nature of the relationship between contract and one of the ‘lesser’ legal institutions. Such debate has already been referred to, albeit in the context of those cases concerning economic torts by which the courts were bedevilled in the latter stages of the nineteenth century. On this conceptual level, there is little difference between this aspect of these cases and those concerned with the relationship between contract and the equitable remedy of accessory liability. In each case the issue, in abstract, is how should the lesser institution interact with contract law. However, there is a significant point of divergence between the two examples, the finer points of the relationship between contract and torts may be difficult to establish, but at least the two appear to be related: accessory liability is perceived as conceptually different because of its equitable origins. That the English courts reflect such perceptions is beyond doubt, the extent to which they are aware of their drawbacks is a rather different matter. It may be that the difference in judicial attitude displayed in relation to the disappointed daughter and the commercial lender is at least partly attributable to the received classification of the ‘difference’ of equitable notions.

There are, of course, other possible explanations. However a recurrent aspect of the cases concerning accessory liability is the taxonomic difficulty afflicting those who would ‘pin-down’ what is presently referred to as, ‘accessory liability’. As mentioned above, the precise classification of this concept is a matter susceptible of different approaches, some tortious, some approaching the borders of restitution and even potentially exploring the relative no-mans-land of quasi-tortious liability. At present, however, such debate is stifled by the alleged convenience of ‘filing’ that which does not fit, within the category of Equity. Could it be that this taxonomic reaction is contributing to the difficulties surrounding the determination of the proper role of Equity in commercial activity?

Whatever may truly be the case, somehow or other Equity has come to be regarded as semi-detached from the ambit of commercial activity. It is not until those concerned with the administration of English law resolve to complete the programme of reform commenced by their Victorian forebears that it will truly be possible to attenuate the topicality of the role of equitable principles in English commercial law.

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37 Lesser in the sense of currently being dominated by.