Easter Term
[2015] UKSC 23
On appeal from: [2013] EWCA Civ 968

JUDGMENT

Jetivia SA and another (Appellants) *v* Bilta (UK) Limited (in liquidation) and others (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

22 April 2015

Heard on 14 and 15 October 2014

Appellants
Alan Maclean QC
Colin West
(Instructed by
MacFarlanes LLP)

Respondents
Christopher Parker QC
Rebecca Page
(Instructed by Gateley
LLP)

Intervener
Michael Gibbon QC
(Instructed by Howes
Percival LLP)

LORD NEUBERGER: (with whom Lord Clarke and Lord Carnwath agree)

Introductory

1. The facts giving rise to this appeal can be shortly summarised, although they are more fully set out in the judgments of Lord Sumption at paras 56-59 and of Lords Toulson and Hodge at paras 113-116 below.

2. Bilta (UK) Ltd is an English company which was compulsorily wound up in November 2009 pursuant to a petition presented by HMRC. Bilta's liquidators then brought proceedings against, inter alia, its two former directors, Mr Chopra, who was also its sole shareholder, and Mr Nazir; and Jetivia SA, a Swiss company and its chief executive, Mr Brunschweiler, who is resident in France ("the four defendants").

3. The pleaded claim alleges that the four defendants were parties to an unlawful means conspiracy to injure Bilta by a fraudulent scheme, which involved Messrs Chopra and Nazir breaching their fiduciary duties as directors, and Jetivia and Mr Brunschweiler ("the appellants") dishonestly assisting them in doing so. The liquidators claim (i) through Bilta, (a) damages in tort from each of the four defendants, (b) compensation based on constructive trust from the appellants, and (ii) directly from each of the four defendants, a contribution under section 213 of the Insolvency Act 1986.

4. The case against the four defendants is based on the contention that between April and July 2009, Messrs Chopra and Nazir caused Bilta to enter into a series of transactions relating to European Emissions Trading Scheme Allowances with various parties, including Jetivia, and that those transactions constituted what are known as carousel frauds. The effect of the transactions was that they generated (i) an obligation on Bilta to account to HMRC for output VAT and (ii) an obligation on HMRC to pay a slightly lower sum by way of input VAT to another company. While the input VAT was paid by HMRC, it was inherent in the fraud that Bilta would always be insolvent and unable to pay the output VAT to HMRC. The amount of output VAT for which Bilta consequently remains liable is said to be in excess of £38m.

The application to strike out

5. The appellants applied to strike out Bilta's claim against them on the ground that (i) Bilta could not maintain the proceedings in view of the principle *ex turpi causa non oritur actio*, or, to put it another way, the appellants were bound to defeat the claims against them on the basis of an illegality defence, and (ii) in so far as the claims were based on section 213, it could not be invoked against the appellants as it does not have extra-territorial effect. The application was dismissed by Sir Andrew Morritt C, whose decision was upheld by the Court of Appeal. The appellants now appeal to the Supreme Court.

6. In common with all members of the court, I consider that this appeal should be dismissed because the Court of Appeal were right to hold that (i) illegality cannot be raised by Jetivia or Mr Brunschweiler as a defence against Bilta's claim because the wrongful activity of Bilta's directors and shareholder cannot be attributed to Bilta in these proceedings, and (ii) section 213 of the Insolvency Act 1986 has extra-territorial effect.

Attribution

7. So far as attribution is concerned, it appears to me that what Lord Sumption says in his paras 65-78 and 82-97 is effectively the same in its effect to what Lords Toulson and Hodge say in their paras 182-209. Both judgments reach the conclusion which may, I think be stated in the following proposition. Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.

8. It appears to me that this is the conclusion reached by Lord Sumption and Lords Toulson and Hodge as a result of the illuminating discussions in their respective judgments - in paras 65-78 and 82-95 and paras 182-209.

9. Particularly given the full discussion in those passages, I do not think that it would be sensible for me to say much more on the topic. However, I would

suggest that the expression "the fraud exception" be abandoned, as it is certainly not limited to cases of fraud - see per Lord Sumption at para 71 and Lords Toulson and Hodge at para 181. Indeed, it seems to me that it is not so much an exception to a general rule as part of a general rule. There are judicial observations which tend to support the notion that it is, as Lord Sumption says in his para 86, an exception to the agency-based rules of attribution, which is based on public policy - or common sense, rationality and justice, according to the judicial observations quoted in paras 72, 73, 74, 78 and 85 of Lord Sumption's judgment. However, I agree with Lord Mance's analysis at paras 37-44 of his judgment, that the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question.

Section 213 of the 1986 Act

10. I agree with Lord Sumption and Lords Toulson and Hodge for the reasons they give in paras 107-110 and 210-218 that section 213 of the 1986 Act has extra-territorial effect, at least to the extent of applying to individuals and corporations resident outside the United Kingdom.

The matters in dispute

11. There are some issues on which Lord Sumption and Lords Toulson and Hodge differ. In that connection, I think that there are three areas of disagreement to which it is right to refer, and, taking them in the order in which it is most convenient to discuss them, they are as follows.

12. First, there is disagreement as to the basis upon which a defence based on illegality, or *ex turpi causa*, is to be approached – compare Lord Sumption at paras 60-63 and 98-100 with Lords Toulson and Hodge at paras 170-174. Secondly, Lords Toulson and Hodge would also dismiss this appeal on the attribution issue on the ground of statutory policy (see their paras 122-130), whereas Lord Sumption would not (see his paras 98-102). Thirdly, there are differences between Lord Sumption and Lords Toulson and Hodge as to the proper interpretation of two cases, namely *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 (see Lord Sumption at paras 79-81 and Lords Toulson and Hodge at paras 134-155), and *Safeway Foodstores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 2 All ER 841 (see Lord Sumption at para 83 and Lords Toulson and Hodge at paras 156-162).

The proper approach to the illegality defence

13. First, then, there is the proper approach which should be adopted to a defence of illegality. This is a difficult and important topic on which, as the two main judgments in this case show, there can be strongly held differing views, and it is probably accurate to describe the debate on the topic as involving something of a spectrum of views. The debate can be seen as epitomising the familiar tension between the need for principle, clarity and certainty in the law with the equally important desire to achieve a fair and appropriate result in each case.

14. In these proceedings, Lord Sumption considers that the law is stated in the judgments in the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, which he followed and developed (with the agreement of three of the four other members of the court, including myself and Lord Clarke) in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2014] 3 WLR 1257. He distinguishes the judgment of Lord Wilson in *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 as involving no departure from *Tinsley v Milligan*, but as turning on its own context in which "a competing public policy required that damages should be available even to a person who was privy to her own trafficking" (para 47). By contrast Lord Toulson (who dissented from that approach in *Les Laboratoires*) and Lord Hodge favour the approach adopted by the majority of the Court of Appeal in *Tinsley* and treat that of Lord Wilson in para 42ff of *Hounga* as supporting that approach.

15. In my view, while the proper approach to the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine Justices) as soon as appropriately possible, this is not the case in which it should be decided. We have had no real argument on the topic: this case is concerned with attribution, and that is the issue on which the arguments have correctly focussed. Further, in this case, as in the two recent Supreme Court decisions of *Les Laboratoires* and *Hounga*, the outcome is the same irrespective of the correct approach to the illegality defence.

16. It would, in my view, be unwise to seek to decide such a difficult and controversial question in a case where it is not determinative of the outcome and where there has been little if any argument on the topic. In *Les Laboratoires*, the majority did opine on the proper approach not because it was necessary to decide the appeal, but because they considered that the Court of Appeal (who had reached the same actual decision) had adopted an approach which was inconsistent with *Tinsley*. Similarly in *Hounga*, as Lord Sumption has shown in para 99, it may well not have been necessary to

consider the proper approach to the illegality defence, but it nonetheless remains the fact that it was the subject of argument, and that Lord Wilson did express a view on the point, and two of the four other members of the court agreed with his judgment.

17. *Les Laboratoires* provides a basis for saying that the approach in *Tinsley* has recently been reaffirmed by this court and that it would be inappropriate for this court to visit the point again. However, it was not argued in *Les Laboratoires* that *Tinsley* was wrongly decided, and, as Lord Toulson pointed out in his judgment, the majority decision was reached without addressing the reasoning in *Hounga*. Lord Sumption is right to say that, unless and until this court refuses to follow *Tinsley*, it is at the very least difficult to say that the law is as flexible as Lords Toulson and Hodge suggest in their judgment, but (i) in the light of what the majority said in *Hounga* at paras 42-43, there is room for argument that this Court has refused to follow *Tinsley*, and (ii) in the light of the Law Commission report, the subsequent decisions of the Court of Appeal, and decisions of other common law courts, it appears to me to be appropriate for this court to address this difficult and controversial issue – but only after having heard and read full argument on the topic.

The role of statutory policy in this case

18. As well as dismissing this appeal on the attribution issue on the same grounds as Lord Sumption, Lords Toulson and Hodge would also dismiss the appeal on the grounds of statutory policy. They suggest that it would make a nonsense of the statutory duty contained in section 172(3) of the Companies Act 2006 (and explained by them in their paras 125-127), if directors against whom a claim was brought under that provision could rely on the *ex turpi causa* or illegality defence. That defence would be based on the proposition, relied on by the appellants in this case, that, as the directors in question (here the first and second defendants, Mr Nazir and Mr Chopra) were, between them, the sole directors and shareholders of Bilta, their illegal actions must be attributed to the company, and so the defence can run.

19. I agree with Lords Toulson and Hodge that this argument cannot be correct. Apart from any other reason, it seems to me that Lord Mance must be right in saying in his para 47 that, at least in this connection, the 2006 Act restates duties which were part of the common law. It also appears to me to follow that, if Lords Toulson and Hodge are right about the proper approach to the illegality principle, then their reasoning in paras 128-130 would be correct. However, I would not go further than that, because, as I have already indicated, this is not an appropriate case in which this court should decide conclusively (in so far as the issue can ever be decided conclusively) on the

right approach to the illegality principle. It is unnecessary to decide the right approach even in order to determine whether the illegality defence can be run in relation to the section 172(3) claim in the present case.

20. That is, of course, because it is clear, for the very reasons given by Lord Toulson and Lord Hodge in paras 126-130 that a claim against directors under section 172(3) cannot be defeated by the directors invoking the defence of *ex turpi causa*. It is clear from "the language of the rule ([as] it is in a statute) and its content and policy" that the "act (or knowledge or state of mind) was *for this purpose* [not] intended to count as the act etc of the company", to quote and apply the test laid down by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507, set out by Lord Sumption at the end of his para 67.

The proper analysis of Stone & Rolls and of Safeway Foodstores

21. In para 3.32 of the Report referred to above, the Law Commission observed that "[i]t is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence", explaining that, in their view at any rate, "there was no majority reasoning" with the members of the committee "reaching different conclusions on how the defence should be applied". The confusing nature of the decision has been commented on in a number of articles (see eg Halpern *Stone & Rolls Ltd v Moore Stephens: An Unnecessary Tangle* (2010) 73 MLR 487, Watts, *Audit Contracts and Turpitude* (2010) 126 LQR 14 and *Illegality and agency law: authorising illegal action* [2011] JBL 213, Ferran, *Corporate Attribution and Directing Mind and Will* (2011) 127 LQR 239, Watson, *Conceptual Confusion: Organs, Agents and Identity in the English Courts* (2011) 23 Sing Ac Law Jo 762).

22. These critics have been joined by Lord Walker himself, who was of course a member of the majority in *Stone & Rolls*. In the course of his illuminating judgment in *Moulin Global Eyecare Trading Ltd (in liquidation) v Commissioner of Inland Revenue* [2014] HKCFA 22, (2014) 17 HKCFAR 218, he described the decision in *Stone & Rolls* as a "controversial exception" to a general rule and referred to its facts as "extreme and exceptional" - see para 133. In para 106, he rightly added that the judgment of Patten LJ in the Court of Appeal in the present case had "achieved a welcome clarification of the law in this area". Casting further doubt on the decision in *Stone & Rolls*, in para 101 of *Moulin Global* Lord Walker recanted part of his reasoning in the House of Lords.

23. It seems to me that the view that it is very hard to seek to derive much in the way of reliable principle from the decision of the House of Lords in *Stone & Rolls* is vindicated by the fact that, in their judgments in this case, Lord Sumption and Lords Toulson and Hodge have reached rather different conclusions as to the effect of the majority judgments.

24. Particularly given the difference between them as to the *ratio decidendi* of Lord Phillips's opinion, and subject to what I say in the next four paragraphs, I am of the view that, so far as it is to be regarded as strictly binding authority, *Stone & Rolls* is best treated as a case which solely decided that the Court of Appeal was right to conclude that, on the facts of the particular case, the illegality defence succeeded and that the claim should be struck out. I believe that this largely reflects the views of both Lord Sumption (see his para 81) and Lords Toulson and Hodge (see their para 152-154).

25. But it would be unsatisfactory for us to leave the case without attempting to provide some further guidance as to its effect, in so far as we fairly can. For that purpose I welcome Lord Sumption's enumeration of the three propositions which he suggests in his para 80 can be derived from *Stone & Rolls*. With the exception of the first, I agree with what he says about them, although even the second and third propositions are supported by only three of the judgments at least one of which is by no means in harmony with the other two.

26. Subject to that, I agree that the second and third of the propositions which Lord Sumption identifies in his para 80 can be extracted from three of the judgments in *Stone & Rolls*. Those propositions concern the circumstances in which an illegality defence can be run against a company when its directing mind and will have fraudulently caused loss to a third party and it is relying on the fraud in a claim against a third party. The second proposition, with which I agree, is that the defence is not available where there are innocent shareholders (or, it appears, directors). The third proposition, with which I also agree, is that the defence is available, albeit only on some occasions (not in this case, but in *Stone & Rolls* itself) where there are no innocent shareholders or directors.

27. I need say no more about the second proposition, which appears to me to be clearly well-founded. As to the third proposition, I agree with Lords Toulson and Hodge that it appears to be supported (at least in relation to a company in sound financial health at the relevant time) by the reasoning in the clear judgment of Hobhouse J in *Berg, Sons & Co Ltd v Mervyn Hampton Adams* [2002] Lloyd's Rep PN 41, which was referred to with approval and quoted from in *Stone & Rolls* by Lord Phillips (at paras 77-79) and Lord Walker (at

paras 150, 158-161), and indeed by Lord Mance, dissenting (at paras 258-260).

28. However, I note that Lord Mance suggests that it should be an open question whether the third proposition would apply to preclude a claim against auditors where, at the relevant audit date, the company concerned was in or near insolvency. While it appears that the third proposition, as extracted from three judgments in *Stone & Rolls*, would so apply, I have come to the conclusion that, on this appeal at least, we should not purport definitively to confirm that it has that effect. I am of the view that we ought not shut the point out, in the light of (a) our conclusion that attribution is highly context-specific (see para 9 above), (b) Lord Walker's change of mind (see para 22 above), (c) the fact that the three judgments in *Stone & Rolls* which support the third proposition) are not in harmony (in the passages cited at the end of para 27 above), and (d) the fact that the third proposition is in any event not an absolute rule (see the end of para 26 above).

29. I cannot agree that the first proposition identified by Lord Sumption, namely that the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality, can be derived from *Stone & Rolls* (whether or not the proposition is correct in law, which I would leave entirely open, although I see its attraction). I agree that, in paras 27-28, Lord Phillips accepted that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it, albeit that that was ultimately an *obiter* conclusion. More importantly, I do not think that Lord Walker accepted that proposition at paras 132-133: he merely identified an issue as to whether the company was "primarily … liable for the fraud practised on KB, or was merely vicariously liable for the fraud of Mr Stojevic", but as he then went on to accept that the Court of Appeal "was clearly right in holding that" the company "was primarily … liable", he did not have to address the point in question.

30. Subject to these points, the time has come in my view for us to hold that the decision in *Stone & Rolls* should, as Lord Denning MR graphically put it in relation to another case in *In re King* [1963] Ch 459, 483, be "put on one side and marked 'not to be looked at again'". Without disrespect to the thinking and research that went into the reasoning of the five Law Lords in that case, and although persuasive points and observations may be found from each of the individual opinions, it is not in the interests of the future clarity of the law for it to be treated as authoritative or of assistance save as already indicated.

31. I turn, finally, to *Safeway Foodstores*. Lord Sumption has accurately summarised the effect of the decision in his para 83. Lords Toulson and

Hodge deal with it a little more fully and much more critically in their paras 157-162. I would take a great deal of persuading that the Court of Appeal did not arrive at the correct conclusion in that case. However, I do not believe that it would be right on this appeal to express a concluded opinion as to whether the case was rightly decided, and, if so, whether the reasoning of the majority or of Pill LJ was correct. It is unnecessary to reach any such conclusion and the points were not argued in detail before us: indeed, they were hardly addressed at all.

LORD MANCE:

32. The respondent, Bilta (UK) Ltd ("Bilta"), claims damages from the appellants for losses suffered through its involvement in a carousel fraud on the Revenue. The defendants in the proceedings include Bilta's two directors, Mr Chopra who was also its sole shareholder and Mr Nazir, as well as a Swiss company, Jetivia SA ("Jetivia"), and Jetivia's chief executive, Mr Brunschweiler. Jetivia and Mr Brunschweiler are the appellants in this appeal. The scheme involved the purchase of carbon credits by Bilta from sources outside the United Kingdom (so not subject to VAT), followed by their resale (mostly at a loss, if one takes the basic resale price excluding VAT) to UK companies registered for VAT, and the remission of the proceeds to Jetivia and other offshore companies. Inevitably, the scheme rendered Bilta at all material times insolvent, it cannot meet its liabilities to the Revenue and the present claim is brought by liquidators, for the ultimate benefit no doubt of the Revenue as Bilta's creditors.

33. The appellants' defence is that Bilta was through its directors and shareholder party to illegality which precludes it pursuing its claim. I have read with great benefit the judgments prepared by Lords Toulson and Hodge, by Lord Sumption and by Lord Neuberger. Neither they, nor I understand any other member of the Court, consider that the defence can succeed, and I agree that it cannot. But there are some differences in reasoning, particularly regarding the general approach to be adopted to illegality. Save perhaps for a slight difference of view (in para 52 below) regarding *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 2 AER 814, I agree on all points in substance with Lord Neuberger.

34. This is not, in my view, the occasion on which to embark on any re-examination either of the House of Lords' decision in *Tinsley v Milligan* [1994] 1 AC 340 or of the Supreme Court's recent decisions in *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889 and *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2014] 3 WLR 1257. There was no challenge

to or detailed examination of any of these decisions. I agree however that these cases and their inter-relationship merit further examination by this court whenever the opportunity arises.

35. The present appeal raises the question whether a company can pursue its directors and sole shareholder for breaches of duty towards the company depriving it of its assets. Lord Toulson and Lord Hodge consider that the straightforward answer to the question is that that it would deprive the duties which the shareholder-directors owed Bilta of all content, if the defence of illegality were open to the appellants. But they consider that, if analysed in terms of attribution, the case is not one where the shareholder-directors' acts and state of mind can or should be attributed to Bilta. More generally, they favour a policy-based approach to illegality, but I will not examine that possibility, in view of what I have said in para 34.

36. Lord Sumption in contrast sees the case as turning on rules of attribution, which he views as applying "regardless of the nature of the claim or the parties involved" (para 86) and amongst which he identifies a rule that the acts and state of mind of a directing mind and will be attributed to a company. But he qualifies the effect of his analysis by reference to a policy-based "breach of duty exception" which covers the present case in order "to avoid, injustice and absurdity", as Lord Walker put it in a passage in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland (Hong Kong Final Court of Appeal) FACV (No 5 of 2013),* which Lord Sumption quotes in para 85. Later in his judgment however in para 92, he modifies this approach by describing it as no more than a "valuable tool of analysis".

37. In common, as I see it, with Lords Neuberger, Toulson and Hodge, and for reasons which I set out in paras 39-44 below, I do not think it appropriate to analyse the present case as one of prima facie attribution, which is then negatived under a breach of duty exception. As Lord Sumption's judgment demonstrates, it would, however, make no difference to the outcome in this case, if the matter were to be so analysed, though the plethora of difficult authority to which such an analysis has given rise, far from proving its value, argues for what is to my mind a simpler and more principled analysis.

38. One way or another, it is certainly unjust and absurd to suggest that the answer to a claim for breach of a director's (or any employee's) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it. A company has its own separate legal personality and interests. Duties are owed to it by those officers who constitute its directing mind and will, similarly to the way in which they are owed by other more ordinary employees or agents. All the shareholders of a

solvent company acting unanimously may in certain circumstances (which need not here be considered, since it is not suggested that they may apply) be able to authorise what might otherwise be misconduct towards the company. But even the shareholders of a company which is insolvent or facing insolvency cannot do this to the prejudice of its creditors, and the company's officers owe a particular duty to safeguard the interest of such creditors. There is no basis for regarding the various statutory remedies available to a liquidator against defaulting officers as making this duty or its enforcement redundant.

39. Rules of attribution are as relevant to individuals as to companies. An individual may him- or herself do the relevant act or possess the relevant state of mind. Equally there are many contexts in which an individual will be attributed with the actions or state of mind of another, whether an agent or, in some circumstances, an independent contractor. But in relation to companies there is the particular problem that a company is an artificial construct, and can only act through natural persons. It has no actual mind, despite the law's persistent anthropomorphism - as to which see the references by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 507A and 509G-H to the absence of any "ding an sich", and by Professor Eilis Ferran in *Corporate Attribution and the Directing Mind and Will* (2011) 127 LQR 239, 239-240 to the distracting effect of references to a company's "brain and nerve centre" or "hands".

40. As Lord Hoffmann pointed out in *Meridian Global* at pp 506-507, the courts' task in all such situations is to identify the appropriate rules of attribution, using for example general rules like those governing estoppel and ostensible authority in contract and vicarious liability in tort. It is well-recognised that a company may as a result of such rules have imputed to it the conduct of an ordinary employee, and this is so also in the context of illegality. By acquiescing in the overloading of the hauliers' lorries in *Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd* [1973] 1 WLR 828 the consignors' assistant transport manager and his assistant made the haulage contract unenforceable at the instance of the consignors, who were unable to recover when a lorry toppled over damaging the goods being carried. But it is not always appropriate to apply general rules of agency to answer questions of attribution, and this is particularly true in a statutory context. Particular statutory provisions may indicate that a particular act or state of mind should only be attributed when undertaken or held by a company's "directing mind and will": see eg *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, cited in *Meridian Global* at pp 507-509. In contrast in *Meridian Global* itself the company was for criminal purposes attributed with the conduct and

knowledge of the senior portfolio manager who, without knowledge of the board or managing director, had entered into the relevant transaction of which the company had failed to give notice as required by the legislation.

41. As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company? Lord Walker said recently in *Moulin Global*, para 41 that: "One of the fundamental points to be taken from *Meridian* is the importance of context in any problem of attribution". Even when no statute is involved, some courts have suggested that a distinction between the acts and state of mind of, on the one hand, a company's directing mind and will or "alter ego" and, on the other, an ordinary employee or agent may be relevant in the context of third party relationships. This is academically controversial: see Professor Peter Watts, *The company's alter ego – an impostor in private law* (2000) LQR 525; Campbell and Armour, *Demystifiying the civil liability of corporate agents* (2003) CLJ 290. Any such distinction cannot in any event override the need for attention to the context and purpose in and for which attribution is invoked or disclaimed.

42. Where the relevant rule consists in the duties owed by an officer to the company which he or she serves, then, whether such duties are statutory or common law, the acts, knowledge and states of mind of the company must necessarily be separated from those of its officer. The purpose of the rule itself means that the company cannot be identified with its officers. It is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. This is so even though the officer is the directing mind and will of the company. The same clearly also applies even if the officer is also the sole shareholder of a company in or facing insolvency. Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors.

43. At the same time, however, if the officer's breach of duty has led to the company incurring loss in the form of payments to or liability towards third parties, the company must be able as part of its cause of action against its officer to rely on the fact that, in that respect, its officer's acts and state of mind were and are attributable to the company, causing it to make such payments or incur such liability. In other words, it can rely on attribution for one purpose, but disclaim attribution for another. The rules of attribution for the purpose of establishing or negating vicarious liability to third parties

differ, necessarily, from the rules governing the direct relationship inter se of the principal and agent.

44. It follows that I would, like Lords Toulson and Hodge (para 191), endorse the observations of Professors Peter Watts and Francis Reynolds QC as editors of *Bowstead & Reynolds on Agency* 19th ed, (2010) para 8-213, in relation to the argument that a principal should be attributed with the state of mind of his agent who has defrauded him, so as to relieve either the agent or a third party who had knowingly assisted in the fraud:

> "Such arguments by defendants, though hazarded from time to time, are plainly without merit. However, in such situations imputation has no reason to operate. The rules of imputation do not exist in a state of nature, such that some reason has to be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed."

The same point is made in rephrased terms in their 20th ed (2014), para 8-213:

> "The simple point is that, were the principal deemed to possess the agent's knowledge of his own breaches of duty, and thereby to have condoned them, the principal could never successfully vindicate his rights. … [T]here is no need for an exception as such. The putative defence that the exception is used to rebut is premised on the fallacy that the principal is prima facie deemed to know at all times and for all purposes that which his agents know. As observed already, imputation never operated in such a way. Before imputation occurs, there needs to be some purpose for deeming the principal to know what the agent knows. There is none in this type of case."

45. The breach of duty exception has been more plausibly deployed in situations where the issue is the legal effect of relations between the company and a third party. For example, in *J C Houghton & Co v Nothard, Lowe and Wills* [1928] AC 1, the issue was whether the knowledge of the directors of the latter company should be attributed to it, with the effect that the latter company could and should be treated as estopped from denying that it had consented to a particular arrangement with a third party company. However, the arrangement was one that was against the company's interests and for the benefit of the third party company which the directors also controlled and which was in financial difficulties. In the words of Viscount Dunedin, both

common sense and authority in the form of *In re Hampshire Land Co* [1896] 2 Ch 743 led to the conclusion that, although "It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company", that cannot be so if the knowledge of an infringement of the company's rights is "only brought home to the man who himself was the artificer of such infringement" (pp 14-15). Even in this context it may be questioned whether an analysis involving prima facie imputation subject to exception is necessary or fruitful: see Professor Peter Watts' critique in *Imputed knowledge in agency law – excising the fraud exception* (2001) LQR 300, 316 et seq. Since it leads to a right result and involves a different context to the present, I need however say no more about that here.

46. With regard to *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 I do not propose to say very much. The potential qualification on the application of the maxim *ex turpi causa*, which the majority accepted in the case of a company with innocent shareholders indicates that they too must ultimately have regarded context as having at least some relevance to attribution, and Lord Walker has in *Moulin* now explicitly withdrawn from the position that attribution operates independently of context: see paras 41 and 101. More fundamentally, the context in which issues of attribution arose in *Stone & Rolls* was different from the present. The company's claim was against its auditors rather than against an officer. Lord Phillips at least in the majority clearly saw that as important, in particular in the light of what he viewed as the scope of an auditor's duty. I remain of the view, which I expressed in para 265 in *Stone & Rolls*, that this ought to have been the central issue in that case, not a preliminary issue about *ex turpi causa* into which the majority view, that the claim even though pursued for the benefit of the company's creditors should fail, was in the event fitted. I note that Professor Eilis Ferran takes a similar view in her article, cited at para 39 above, at p 251; see also the statement by Professor Peter Watts, *Audit contracts and turpitude* (2010) LQR 126, that "Ultimately, what divided the judges in *Stone & Rolls* was determining the classes of innocent parties whose interests the contract of audit is designed to protect" (p 14).

47. I say nothing of course about the correct answer to a question addressed in terms of what an auditor's duty would or should have been. However, so far as concerns the nature and enforceability of a company's claim for misconduct by its directing mind and sole shareholder, I remain of the views expressed in paras 224-225 in *Stone & Rolls*:

> "224. … [B]efore the House Mr Sumption's submission was that S & R could only claim against Mr Stojevic on a narrow basis for abstraction of its moneys (a proprietary claim like that mentioned by O'Connor LJ in *Caparo* …: see para 214 above);

> and that any claim against him for damages for breach of duty as an officer would be barred by the maxim *ex turpi causa* because it would involve pleading S & R's fraud on the banks. I do not accept this submission. It would mean that, if one element of Mr Stojevic's fraud on the banks had involved persuading the banks to pay the funds direct into an account represented as being S & R's but in fact Mr Stojevic's, S & R could not sue Mr Stojevic. Mr Stojevic's common law duty as a director to S & R was to conduct its affairs honestly and properly. Section 172(1) of the Companies Act 2006 now states the duty, in terms expressly based on common law rules and equitable principles (see section 170(3)), as being to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole' - a duty made expressly 'subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company': see section 172(3). Section 212 of the Insolvency Act 1986 provides a summary remedy available in the course of winding up against anyone who is or has been an officer of the company in respect of, *inter alia*, 'any misfeasance or breach of any fiduciary or other duty in relation to the company'. (This is in addition to the specific remedies that apply in circumstances of fraudulent or wrongful trading under sections 213 and 214.)
>
> 225. As between S & R and Mr Stojevic, Mr Stojevic's fraud on the banks was and is just as objectionable as the later abstraction of moneys to which it was designed to lead. In holding a director responsible in such a case, a company is as a separate legal entity enforcing duties owed to it by the director. It is not acting inconsistently, or asking the court to act inconsistently, with the law. It is a remarkable proposition, that the directing mind of a company can commit the company to a scheme of fraud and then avoid liability in damages if the company would have to plead and rely on this scheme to establish such liability. …"

48. Like Lord Neuberger, I would not endorse Lord Sumption's suggestion (paras 79 and 80) that *Stone & Rolls* establishes an apparently general and context-unspecific distinction between personal and vicarious liability as central to the application of the illegality defence. Outside the statutory sphere, where such a distinction originated and has been found useful, there is very little authority for any such distinction, and there is certainly none for

its application as a key to a resolution of issues of attribution in the context of illegality. Its origin in that context lies in a concession by counsel (Mr Jonathan Sumption QC), no doubt tactically well-judged, in *Stone & Rolls* (p 1443B-C). The only member of the House who referred to this concession as a requirement, along with turpitude, of an *ex turpi causa* defence was Lord Phillips, but he did so expressly on the basis that (para 24):

> "Those … are valid qualifications to the defence of *ex turpi causa* in the context in which it is raised on this appeal. They are not, however, of general application to the defence of *ex turpi causa*."

49. As I have already noted in para 40 above, with reference to *Ashmore, Benson*, it is not the law that the ordinary principles of attribution are replaced in the case of a company, any more than they are in the case of an individual, by some general principle that the only relevant conduct or state of mind is that of someone who is or can be treated as an alter ego or directing mind and will of the relevant company or individual. In his article *Audit contracts and turpitude*, to which I have referred in para 46 above, at p 17, Professor Watts says this about the way in which the concept of directing mind and will entered the debate in *Stone & Rolls*:

> "Their Lordships were drawn into recognising the mind-and-will concept by Mr Sumption QC's concession on the auditor's behalf … that a claimant cannot be caught by the *ex turpi causa* rule except as a result of his own conduct, 'not conduct for which he is vicariously liable or which is otherwise attributed to him under principles of the law of agency'. This is simply wrong. Generally speaking, the *ex turpi causa* rule will preclude a principal from taking advantage of an agent's illegal acts (see eg *Apthorp v Nevill* (1907) 23 TLR 575 for a human principal, and *Ashmore, Benson Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828 CA for a company). Nonetheless, as we have noted, context is important with the *ex turpi* rule, and in the case of contracts designed to deal with the risks of agents' dishonesty (such as audit and insurance contracts) the law looks to where guilt really lies."

50. With regard to the three points for which Lord Sumption suggests in para 80 that *Stone & Rolls* is authority, it follows from what I have said in paras 48-49 that I do not agree that the case is authority for the first point, viz that the illegality defence is only available to a company where it is "directly" as opposed to vicariously responsible for the illegality. As Professor Watts says,

there are no doubt some limited contexts in which this may be the appropriate analysis, but there is no such general rule. I agree with Lord Sumption's second point, viz that the House rejected the auditor's argument that merely because Mr Stojevic was the company's mind and will and sole owner, his conduct and state of mind should be attributed to *Stone & Rolls* in relation to its claim against its auditors. I have already pointed out in para 46 above that the majority was thereby at least accepting that context must have some relevance. The third point appears a factually correct representation of the outcome of *Stone & Rolls*, though the present appeal does not raise the correctness in law of that outcome, which may one day fall for reconsideration.

51. I turn to a defence of circuity of action which the appellants suggest arises on this appeal. The claim against Jetivia and Mr Brunschweiler is that they dishonestly assisted Mr Chopra's and Mr Nazir's breaches of duty towards Bilta, or were co-conspirators with Mr Chopra and Mr Nazir. On the face of it, Jetivia and Mr Brunschweiler cannot raise a defence of illegality if Mr Chopra and Mr Nazir cannot. The suggestion is that Jetivia could have a defence of circuity of action. This is, I understand, on the basis that any liability on its part arose from a conspiracy between Bilta, through Mr Chopra and Mr Nazir, and Mr Brunschweiler. Apart from this being unpleaded, I cannot, at present at least, see how a company (here Jetivia) which is through its director or other agent held liable to another company (here Bilta) for dishonestly assisting or conspiring with the latter company's directors or agents to cause loss to the latter company can then turn round and say that it has been damaged by the former company by the very liability which it has incurred to the former company. That would turn the law governing dishonest assistance and conspiracy on its head.

52. I sympathise with the views expressed by Lords Toulson and Hodge in paras 156-162 regarding the Court of Appeal decision in *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 2 All ER 814, but any decision about its correctness must be for another day, after full argument.

53. For the reasons given by Lords Sumption, Toulson and Hodge and again in agreement with Lord Neuberger, I consider that section 213 of the Insolvency Act 1986 has extra-territorial effect, and do not regard any reference to the Court of Justice as necessary.

54. It follows that I also would dismiss the appeal.

LORD SUMPTION:

55. The main issue on this appeal is the scope of the rule of public policy *ex turpi causa non oritur actio*. "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act": *Holman v Johnson* (1775) 1 Cowp 34l, 343 (Lord Mansfield CJ). It is convenient to call this the illegality defence, although the label is not entirely accurate for it also applies to a very limited category of acts which are immoral without being illegal.

The proceedings

56. Bilta (UK) Ltd is an English company which was ordered to be wound up by the High Court on 29 November 2009 on the application of Her Majesty's Revenue and Customs. Before that order was made, its sole directors were Mr Chopra and Mr Nazir. Mr Chopra was also Bilta's sole shareholder.

57. The present proceedings were brought by Bilta (through its liquidators) against the two former directors and a Swiss company, Jetivia SA, together with Jetivia's chief executive Mr Brunschweiler. There are other defendants also, but for present purposes they can be ignored. The appeal arises out of a preliminary issue on the pleadings as between Bilta on the one hand and Jetivia and Mr Brunschweiler on the other. In summary, Bilta's pleaded allegation is that between April and July 2009 the two directors caused Bilta to engage in fraudulent trading in carbon credits (European Emissions Trading Scheme Allowances) recorded on the Danish Emission Trading Registry. The fraud was very simple. At the relevant time carbon credits traded between parties both of whom were in the United Kingdom were treated as taxable supplies subject to VAT at the standard rate of 15%, but if either the buyer or the seller of the credit was outside the United Kingdom, the sale was not subject to VAT. Bilta bought carbon credits free of VAT from Jetivia. It resold them back-to-back to UK companies registered for VAT. In most cases, the onsale price of the credits net of VAT was artificially fixed at a level marginally below Bilta's purchase price, thus enabling Bilta's UK buyer to sell them on at a small profit. The proceeds of Bilta's sales, together with the VAT thereon, were paid either to Bilta and then on to Jetivia, or directly by the UK buyers to Jetivia or an offshore company called THG. Since Bilta had no other business and no assets other than the cash generated by its sales, the result was to make the company insolvent and to generate a liability on Bilta's part to account to HMRC which it was unable to satisfy.

58. As against the directors, Bilta's claim is that in breach of their fiduciary duties they organised and participated in a conspiracy to

> "defraud and injure [Bilta] … by trading in carbon credits and dealing with the proceeds therefrom in such a way as to deprive [Bilta] of its ability to meet its VAT obligations on such trades, namely to pass the money (which would otherwise have been available to [Bilta] to meet such liability) to accounts offshore, including accounts of Jetivia …" (Amended Particulars of Claim, para. 14(a))

As against Jetivia and Mr Brunschweiler, the allegation is that they were (i) liable as parties to the same conspiracy (ii) accountable as constructive trustees on the footing of knowing assistance in the dishonest diversion of book-debts due to Bilta. Jetivia, but not Mr Brunschweiler, is also said to be liable to account on the footing of knowing receipt of the proceeds of those book-debts. As against all parties, there is in addition a claim for fraudulent trading under section 213 of the Insolvency Act 1986.

59. The victim identified in the pleading is Bilta. It is not in terms pleaded that it was any part of the object of the scheme to defraud HMRC. Patten LJ in the Court of Appeal considered that the case had to be decided without regard to the possibility that HMRC were a victim. But that, with respect, seems unrealistic. In *Everet v Williams* (1725), the famous case in which two highwaymen sought an account of their partnership profits, they did not plead the nature of their business. But that did not prevent the court from looking through the gaps and circumlocutions to the substance of the transaction: see (1893) 9 LQR 197. The substance of the transactions in issue on this appeal, if the pleaded facts are true, is a fraud on HMRC, who will be the real losers. The pleadings describe a classic "missing trader" fraud. Whether it was technically a carousel fraud (in which the trader sells to a connected entity, arranges for the latter to obtain a VAT refund, then pays away the VAT collected and disappears) or the simpler so-called "acquisition fraud" where he simply disappears without accounting for VAT, does not matter. The common feature of both is the intention of the fraudster to collect VAT and disappear before it can be accounted for, and this is the aspect of the scheme which founds the pleaded case of conspiracy. The dishonesty alleged against the directors consists wholly in their having removed assets of Bilta which would otherwise have been available to pay creditors, in particular HMRC.

The illegality defence

60. Although it begs many questions, the most succinct and authoritative statement of the law remains that of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 34l, 343:

> "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis."

Thus stated, the law of illegality is a vindication of the public interest as against the legal rights of the parties. The policy is one of judicial abstention, by which the judicial power of the state is withheld where its exercise in accordance with ordinary rules of private law would give effect to advantages derived from an illegal act.

61. In the two centuries which followed Lord Mansfield's apparently simple proposition, it was among the most heavily litigated rules of common law, and by the end of the twentieth century it had become encrusted with an incoherent mass of inconsistent authority. The main reason for this was the unfortunate tendency of the common law to fragmentation, as judges examined each case in its own factual and legal context without regard to broader legal principle. By the time that the illegality defence came before the Court of Appeal in *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, the law of illegality had generated a mass of sub-rules, each appropriate to its own context, a state of affairs which necessarily gave rise to difficulty when the law had to be applied to situations which were either new or not classifiable according to existing categories. The Court of Appeal resolved this problem by treating the whole body of authority as illustrative of a process which was essentially discretionary in nature. Kerr LJ, delivering the only reasoned judgment, expressed that principle at p 35 by saying that the test was whether

> "in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks

> because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts."

That question, he suggested, needed to be approached "pragmatically and with caution, depending on the circumstances". This view of the law was unanimously rejected by the House of Lords four years later in *Tinsley v Milligan* [1994] 1 AC 340. Lord Goff of Chievely, delivering the leading judgment on this point, said that it

> "would constitute a revolution in this branch of the law, under which what is in effect a discretion would become vested in the court to deal with the matter by the process of a balancing operation, in place of a system of rules ultimately derived from the principle of public policy enunciated by Lord Mansfield CJ in *Holman v Johnson*." (p 363B).

62. The Law Commission struggled valiantly with the issue in the early years of this century, and at one point proposed a structured statutory discretion of the kind which has been adopted in New Zealand. It abandoned this proposal in the expectation that the courts would reintroduce a measure of the flexibility which *Tinsley v Milligan* had rejected. But *Tinsley v Milligan* is binding authority, subject to review in this court, and in the twenty years since it was decided, the highest court has never been invited to overrule it. In those circumstances, the law has moved in a different direction, accepting that the illegality defence depends on a rule of law which applies regardless of the equities of any particular case but seeking to rationalise an area that has generated a perplexing mass of inconsistent case-law. In its recent decision in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2014] 3 WLR 1257 at paras 19-20, this court reaffirmed the principle that the illegality defence is based on a rule of law on which the court is required to act, if necessary of its own motion, in every case to which it applies. It is not a discretionary power on which the court is merely entitled to act, nor is it dependent upon a judicial value judgment about the balance of the equities in each case: In the light of the rejection of the public conscience test, it is incumbent on the courts to devise principled answers which are no wider than is necessary to give effect to the policy stated by Lord Mansfield and are certain enough to be predictable in their application.

63. In *Les Labratoires Servier*, it was pointed out that the illegality defence commonly raised three questions: (i) what are the "illegal or immoral acts" which give rise to the defence? (ii) what relationship must those acts have to the claim? (iii) on what principles should the illegal or immoral acts of an

agent be attributed to his principal, especially when the principal is a company? *Les Laboratoires Servier* was about the first of the three questions. It is authority for the proposition that the illegality defence is potentially engaged by any act of the claimant which is criminal or dishonest or falls into a limited number of closely analogous categories. It is not disputed that the acts alleged in this case were of that kind. Various tests have been proposed for the connection which the law requires between the illegal act and the claim, but it has not been disputed that any of them would be satisfied on the facts alleged in this case. It is obvious, and apparent from the pleadings, that the claim against both the directors and Jetivia is directly founded on the VAT frauds.

64. The sole question on this part of the appeal is therefore the third. As applied to the present case, it is whether the dishonesty which engages the illegality defence is to be attributed to Bilta for the specific purpose of defeating its claim against the directors and their alleged co-conspirators. The question is whether the defence is available to defeat an action by a company against the human agent who caused it to act dishonestly for damages representing the losses flowing from that dishonesty. The Chancellor of the High Court and Court of Appeal both held that it was not. While there are dicta in the judgments below, especially in the Court of Appeal, which range wider than is really necessary, their essential reason was the same, namely that the agent was not entitled to attribute his own dishonesty to the company for the purpose of giving himself immunity from the ordinary legal consequences of his breach of duty. For reasons which I shall explain below, I think that the courts below were right about that, and I understand that view to be shared by every other member of the court.

Attribution

65. English law might have taken the position that a company, being an artificial legal construct, was mindless. If it had done that, then legal wrongs which depended on proof of some mental element such as dishonesty or intention could never be attributed to a company and the present question could not arise. In the early years of English company law, there were powerful voices which denied that a tort dependent on proof of a mental element could be committed by a company. For many years this view was principally associated with Lord Bramwell, who in a well-known dictum in *Abrath v North Eastern Railway Co* [1886] 11 App Cas 247, 250-251, declared that a fictitious person was "incapable of malice or of motive" even if the whole body of its directors or shareholders in general meeting approved its acts for improper reasons. This question was, however, settled as far as English civil law was concerned by the end of the nineteenth century. As Lord Lindley put it in *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, 426, once

companies were recognised by the law as legal persons, they were liable to have the mental states of agents and employees such as dishonesty or malice attributed to them for the purpose of establishing civil liability. In the criminal law, the notion that a corporation was incapable of committing an offence requiring mens rea persisted rather longer. It was asserted in both the first edition (1909) and the second edition (1933) of *Halsbury's Laws of England*. But it was rejected in a series of decisions in 1944: see *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146; *R v ICR Haulage Ltd* [1944] KB 551; *Moore v I Bresler Ltd* [1944] 2 All ER 515. It is now well established that a company can be indicted for conspiracy to defraud (*R v ICR Haulage Ltd* [1944] KB 551) or manslaughter before statute intervened in 2007 (*Attorney-General's Reference (No 2 of 1999)* [2000] QB 796), provided that an agent with the relevant state of mind can be sufficiently identified with it. It cannot be emphasised too strongly that neither in the civil nor in the criminal context does this involve piercing the corporate veil. It is simply a recognition of the fact that the law treats a company as thinking through agents, just as it acts through them.

66. It follows that in principle, the illegality defence applies to companies as it applies to natural persons. This is the combined effect of the company's legal personality and of the attribution to companies of the state of mind of those agents who for the relevant purpose can be said to think for it. But the principles can only apply to companies in modified form, for they are complex associations of natural persons with different interests, different legal relationships with the company and different degrees of involvement in its affairs. A natural person and his agent are autonomous in fact as well as in law. A company is autonomous in law but not in fact. Its decisions are determined by its human agents, who may use that power for unlawful purposes. This gives rise to problems which do not arise in the case of principals who are natural persons.

67. The question what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer. The leading modern case is *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, ie the board of directors acting as such or for some purposes the general body of shareholders. Lord Hoffmann, delivering the advice of the Privy Council, observed that the primary rule of attribution together with the principles of agency and vicarious liability would ordinarily suffice to determine the company's rights and obligations. However, they would not suffice where the relevant rule of law required that some state of mind should be that of the company itself. He explained, at p 507:

> "This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself" as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself."

The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its "directing mind and will" for all purposes. This was the situation in the case where the expression "directing mind and will" was first coined, *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind and will for other purposes.

> "This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy." (p 507, and see pp 509-511)

68. A modern illustration of the attribution of knowledge to a company on the basis that its agent was its directing mind and will for all purposes is *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, where the Privy Council was concerned with the knowledge required to make a company liable as a constructive trustee on the footing of knowing assistance in a dishonest breach of trust. The defendants were a one-man company, BLT, and the one man, Mr Tan. At pp 392-393, Lord Nicholls, delivering the advice of the Board, observed that Mr Tan had known the relevant facts and was therefore liable. "By the same token, and for good measure, BLT also acted dishonestly. Mr Tan was the company and his state of mind is to be imputed to the company". On the other hand, *El Ajou v Dollar Land Holdings Ltd*

[1994] 2 All ER 685 did not concern a one-man company. The issue was whether knowledge of the origin of funds received for investment by Dollar Land Holdings, a public company, could be imputed to it so as to found a liability to account as a constructive trustee on the footing of knowing receipt. Lord Hoffmann, delivering the leading judgment of the Court of Appeal and applying the principles which he would later explain in *Meridian Global*, held that the company was fixed with the knowledge of one Mr Ferdman, its part-time chairman and a non-executive director, because he had acted as its directing mind and will for the particular purpose of arranging its receipt of the tainted funds.

69. These refinements can give rise to nice questions of fact. But their application in a case like the present one is perfectly straightforward. On the pleaded facts, Mr Chopra and Mr Nazir were the directing organ of Bilta under its constitution. They constituted the board. Mr Chopra was also the sole shareholder. As between Bilta and Jetivia it is common ground on the pleadings that they were the "directing mind and will" of Bilta for all purposes, and certainly in relation to those of its functions which are relevant in these proceedings.

70. The search for a test of a company's direct or "personal" liability has sometimes been criticised as a distraction or an artificial anthropomorphism, and it is certainly true that English law might have developed along other lines. As it is, the distinction between a liability which is direct or "personal" and one which is merely vicarious is firmly embedded in our law and has had a considerable influence on the way it has developed in relation to both kinds of liability. Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else. This is one reason why the law has been able to impose it as broadly as it has. It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment, however humble and remote he may be from the decision-making process, and even if his acts are unknown to the principal, unauthorised by him and adverse to his interest or contrary to his express instructions (*Lloyd v Grace Smith & Co* [1912] AC 716), indeed even if they are criminal (*Lister v Hesley Hall Ltd* [2002] 1 AC 215). Personal or direct liability, on the other hand, has always been fundamental to the application of rules of law which are founded on culpability as opposed to mere liability. One example, as Lord Hoffmann pointed out in *Meridian Global*, is provided by the rules governing criminal responsibility, which do not usually recognise vicarious responsibility. Another is the class of statutory provisions dependent on a company's personal misconduct, such as a shipowner's right to limit his liability for a loss which is not attributable to his "personal act or omission": see article 4 of the Convention on Limitation

of Liability for Maritime Claims (1976) (Merchant Shipping Act 1995, Schedule 7, Part I), a principle derived from the nineteenth century Merchant Shipping Acts of the United Kingdom. A third example is provided by the illegality defence, which the House of Lords held in *Stone & Rolls v Moore Stephens* [2009] 1 AC 1391 to apply only to direct and not to vicarious responsibility. It is, for example, the reason why public policy precludes recovery under a liability policy in respect of a criminal act where the insured's liability is personal or direct, but not where it is purely vicarious: *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, 907. As cases like this illustrate, if the illegality defence were to be engaged merely by proof of a purely vicarious liability, it would apply irrespective of any question of attribution, to any case in which the human wrongdoer was acting within the scope of his employment. This would extend the scope of the defence far more widely than anything warranted by the demands of justice or the principle stated by Lord Mansfield. On the footing that the attribution of culpability is essential to the defence, the concept of a "directing mind and will" remains valuable. It describes a person who can be identified with the company either generally or for the relevant purpose, as distinct from one for whose acts the company is merely vicariously liable.

The exception: breach of the agent's duty to the company

71. Bilta's answer to this, which was accepted by both the judge and the Court of Appeal, is that the dishonesty of Mr Chopra and Mr Nazir is not to be attributed to Bilta, because in an action for breach of duty against the directors there cannot be attributed to the company a fraud which is being practised against it by its agent, even if it is being practised by a person whose acts and state of mind would be attributable to it in other contexts. It is common ground that there is such a principle. It is commonly referred to as the fraud exception, but it is not limited to fraud. It applies in certain circumstances to prevent the attribution to a principal of his agent's knowledge of his own breach of duty even when the breach falls short of dishonesty. In the context of the illegality defence, which is mainly concerned with dishonest or criminal acts, this exception from normal rules of attribution will normally arise when it is sought to attribute to a principal knowledge of his agent's fraud or crime but that is not inherent in the underlying principle. I shall call it the "breach of duty exception".

72. The breach of duty exception is commonly referred to as the *Hampshire Land* principle, after the judgment of Vaughan Williams J in *In re Hampshire Land* [1896] 2 Ch 743. This case did not involve any allegation of fraud. The facts were that the Hampshire Land Company had borrowed money from a building society. The borrowing required the authority of the shareholders in

general meeting, but their authority, although it was given, was vitiated by defects in the notice by which it was summoned. The issue was whether a building society was affected by notice of the irregularity so as to be prevented from relying on the internal management rule. The contention was that the building society was on notice because its secretary happened also to be the secretary of the borrower, and in the latter capacity he knew the facts. In the course of discussing that question, the judge observed at p 749:

> "If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed on the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty either of giving or receiving notice will be fulfilled where the common agent is himself guilty of fraud."

73. Vaughan Williams J's dictum was subsequently adopted by two members of the House of Lords in *Houghton & Co v Nothard, Lowe & Wills* [1928] AC 1, where the issue was whether a company was bound by an arrangement adverse to the company's interest which had been made by two of its directors for their own benefit and was never approved by the board. It was contended that the knowledge of the two directors could be attributed to the company so as to found a case of acquiescence. Viscount Dunedin (at p 14) summarily rejected the suggestion that the company could be treated as knowing about a director's breach of duty by virtue only of the knowledge of the defaulting director himself:

> "My Lords, there can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself particeps criminis, that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer, but authority is not wanting."

He then cited the dictum of Vaughan Williams J. Lord Sumner agreed, observing (p 19) that it would be "contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency".

74. These dicta are concerned only with the attribution of knowledge. The argument which they reject is that there is no breach of duty because the company must be deemed to know the facts and therefore cannot be misled or must be supposed to have consented. They are not concerned with the ambit of the illegality defence or the breach of duty exception to it. For the first full consideration of the exception, one must move forward seven decades to the decision of the Court of Appeal in *Belmont Finance Ltd v Williams Furniture Ltd* [1979] Ch 250, which is the starting point for the modern law. That case arose out of an elaborate scheme, to which Belmont's directors were party, to extract value from Belmont by causing it to buy the shares of a company called Maximum at a considerable overvalue. This was a breach of the fiduciary duties of the directors. Their object was to recycle the profit on the sale of Maximum so that it could be used to fund the purchase by three companies associated with the directors of Belmont's own shares. This was not only a breach of the directors' fiduciary duty but a criminal contravention of what was then section 54 of the Companies Act 1948. Belmont subsequently went into liquidation, and an action was brought in its name by receivers for damages for breach of duty against the directors who had authorised the transaction, and for an account on the footing of knowing receipt against the three companies. The plaintiff was met by the illegality defence. The judge dismissed the action at the close of the plaintiff's case on that ground, holding that the company was a party to the conspiracy. This was because it must be taken to have known, through its directors, that the asset was over-valued and that the purpose of the transaction was to fund the purchase of Belmont's shares. Reversing the judge, Buckley LJ said (pages 261-262):

> "But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from the general rule that a principal is affected by notice received by his agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal. So in my opinion the plaintiff company should not

> be regarded as a party to the conspiracy, on the ground of lack of the necessary guilty knowledge."

75. In *Attorney-General's Reference (No 2 of 1982)* [1984] 1 QB 624 two men were charged with theft from a company which they wholly owned and controlled. The issue was whether, for the purpose of section 2(1)(b) of the Theft Act 1968, they had appropriated the property of another "in the belief that [they] would have the other's consent if the other knew of the appropriation and the circumstances of it". The argument was that they must have had that belief because the company had no other will than theirs, so that it must be taken to consent to whatever they consented to. This argument had been accepted by the trial judge but it failed in the Court of Appeal for two reasons. One turned on the construction of the Theft Act and is of no present relevance. The other was that the decision in *Belmont Finance* "directly contradicts the basis of the defendants' argument in the present case. There can be no reason, in our view, why the position in the criminal law should be any different".

76. In *Brink's Mat v Noye* [1991] 1 Bank LR 68, gold had been stolen from Brink's Mat's warehouse and delivered to a company called Scadlynn to be melted down, recast and sold. The directors and sole shareholders of Scadlynn, who were well aware that the gold was stolen, caused the proceeds to be paid into the company's bank account and then paid away, thus leaving it without assets to meet its liabilities to Brink's Mat. The appeal arose out of an application by Brink's Mat to amend the pleadings so as to add a number of claims against the bank. The proposed amendments proceeded on the basis that since the payments into Scadlynn's bank account represented property to which Brink's Mat was beneficially entitled, it was entitled to enforce Scadlynn's rights against the bank. It was alleged that the bank was liable to Scadlynn as a constructive trustee on the footing of knowing receipt and that Brink's Mat was entitled to enforce that liability for its own benefit. One of the issues which arose was whether Scadlynn would have been precluded from advancing a claim against the bank because it had known (through its directors) about the origin of the gold. Mustill LJ, rejecting this argument, considered that "the corporate entity named Scadlynn was, however, odd the notion may seem at first sight, the victim of wrongful arrangements to deprive it improperly of a large part of its assets": p 72. Nicholls LJ, agreeing, observed (p 73):

> "On the facts alleged in the proposed amendments, Scadlynn was at all material times being used by Chappell and Palmer and others for a fraudulent purpose, viz, to realize the proceeds of sale of the robbery. But the plaintiff was not implicated in any such fraudulent purpose. On the contrary, along with the

> owners of the gold, the plaintiff was the intended victim of the scheme. Likewise, Scadlynn itself was an intended victim, in that Scadlynn was being used as a vehicle for committing a fraud on its creditors and a fraud on those beneficially interested in property held by Scadlynn. In those circumstances the fraudulent purposes of those controlling Scadlynn are not to be imputed to the company itself: see *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, per Buckley LJ at pp 261-262."

77. *Arab Bank v Zurich Insurance* [1999] 1 Lloyd's Rep 262 was a decision of Rix J arising out of a claim under the Third Parties (Rights against Insurers) Act 1930 against the liability insurer of a valuer. The valuer was alleged to have issued fraudulent valuations to induce banks to lend money to third parties. The valuations had been issued by a Mr Browne, who was the managing director and also a personal assured. The insurer defended the claim on the ground that the company was not entitled to indemnity under the policy because Browne's dishonesty was attributable to it by virtue of his knowledge. Rix J thought that Browne would on ordinary principles of attribution have been treated as the directing mind and will of the valuer for the relevant purpose (pp 278-279). But he rejected the illegality defence because it was inconsistent with the terms of the contract of insurance under which Mr Browne and the company were separately insured each for his own interest (pp 272-273). It followed that only Mr Browne would be precluded from recovering. The attribution of his knowledge to the company would be contrary to the agreement to insure their interests separately. The company's liability was therefore purely vicarious. Having made these points, Rix J dealt briefly (and *obiter*) at p 282 with the question of attribution. He said that although Browne's valuations were frauds on the lending banks, the valuer itself should be treated as a "secondary victim", first because Browne's frauds exposed it to liability to the banks, and secondly because Browne's conduct involved "such a breach of duty to [the valuer] as in justice and common sense must entail that it is impossible to infer that the knowledge of his own dishonesty was transferred to [the valuer]." He thought that the position might well be different in the case of a one-man company.

78. *McNicholas Construction Co Ltd v Customs & Excise Commissioners* [2000] STC 553 arose out of a classic VAT fraud against the Customs and Excise. The fraudsters submitted invoices to McNicholas for VAT in respect of non-existent goods and services. The company's site managers, who were in league with them, procured the VAT to be paid to them. The VAT was then reclaimed as input tax from the Customs and Excise. The scheme inflicted a loss on the Customs & Excise but the net financial effect on the company was neutral. The Customs & Excise claimed statutory penalties on the basis that

that the company's conduct was dishonest. This case was simply about attribution. The illegality defence did not arise, for McNicholas was claiming nothing. Dyson J held that as a matter of construction the statute implicitly fixed the company with the knowledge of those of its employees who handled its VAT payments, including the site managers. The company argued that knowledge of the fraud should nevertheless not be imputed to it because it was a victim of the fraud, which exposed it to statutory penalties. Rejecting this argument (at paras 55-56), the judge said:

> "In my judgment, the tribunal correctly concluded that there should be attribution in the present case, since the company could not sensibly be regarded as a victim of the fraud. They were right to hold that the fraud was "neutral" from the company's point of view. The circumstances in which the exception to the general rule of attribution will apply are where the person whose acts it is sought to impute to the company knows or believes that his acts are detrimental to the interests of the company in a material respect … It follows that, in judging whether a company is to be regarded as the victim of the acts of a person, one should consider the effect of the acts themselves, and not what the position would be if those acts eventually prove to be ineffective. As the tribunal pointed out, in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 the company suffered a large fine for contempt of court on account of the wrongful acts of its managers. The fact that their wrongful acts caused the company to suffer a financial penalty in this way did not prevent the acts and knowledge of the managers from being attributed to it. The [breach of duty exception] is founded in common sense and justice. It is obvious good sense and justice that the act of an employee should not be attributed to the employer company if, in truth, the act is directed at, and harmful to, the interests of the company. In the present case the fraud was not aimed at the company. It was not intended by the participants in the fraud that the interests of the company should be harmed by their conduct."

The Court of Appeal approved this reasoning in rejecting a somewhat similar argument in *Bank of India v Morris* [2005] BCC 739. The facts of this case, baldly summarised, were that BCCI had placed deposits with Bank of India on unusual terms as part of a scheme to window-dress its accounts at the year-end. The liquidators of BCCI brought proceedings against Bank of India under section 213 of the Insolvency Act on the ground that it had been knowingly party to the carrying on of business by BCCI with intent to

defraud. The judge found that the general manager of the Bank of India had deliberately turned a blind eye to what was going on, and that his knowledge was attributable to the bank. The bank advanced an argument somewhat similar to that which had been advanced by McNicholas before Dyson J. The Court of Appeal rejected it for the same reason, namely that the general manager's acts were not targeted at Bank of India: see paras 114-118.

79. This was the state of the authorities when *Stone & Rolls v Moore Stephens* [2009] 1 AC 1391 came before the courts. *Stone & Rolls* was a company created solely for the purpose of defrauding banks. It never did anything else. The author of the frauds was a Mr Stojevic, its sole director, manager and shareholder. The action was brought by the company at the instance of its liquidators against the auditors on the basis that if they had exercised due skill and care, they would have discovered that the company had no legitimate business. The course of frauds against the bank would then have ceased earlier than it actually did. They claimed the losses said to have been incurred as the direct result of the company's course of fraudulent behaviour continuing for longer than it would otherwise have done. The House of Lords held that the illegality defence applied and upheld the order of the Court of Appeal striking out the proceedings. It is a difficult case to analyse, because it was decided by a majority comprising Lord Phillips, Lord Walker and Lord Brown and there are significant differences between the reasoning of Lord Walker (with whom Lord Brown agreed) and Lord Phillips. But the fact that they differed on critical points does not undermine the authority of their speeches on those points on which they were agreed.

80. Lord Phillips and Lord Walker were agreed on three points for which the case is accordingly authority. The first was that the illegality defence is available against a company only where it was directly, as opposed to vicariously, responsible for it: see Lord Phillips at paras 27-28. Lord Walker refers to this at paras 132-133 and must have taken the same view, for if vicarious liability was enough to engage the illegality defence the attribution of Mr Stojevic's knowledge to the company (with which the whole of the rest of his speech is concerned) would have been irrelevant. This is because the company was vicariously liable for Mr Stojevic's defaults whether or not it was treated as privy to them. Secondly, the majority was agreed in rejecting the primary argument of the auditors that once it was shown that the directing mind and will of a company (whether generally or for the relevant purpose) had caused it to defraud a third party and that the company was relying on that fraud to found its cause of action, the illegality defence necessarily barred the claim. Both Lord Phillips (para 63) and Lord Walker (para 173) rejected this submission as too broad, because it would involve the attribution of the agent's dishonesty to the company even if there were innocent directors or shareholders. Accordingly, both of them regarded it as critical that *Stone &*

Rolls was a "one-man company", ie a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders. Third, Lord Phillips and Lord Walker were agreed that, as between a "one-man" company and a third party, the latter could raise the illegality defence on account of the agent's dishonesty, at any rate where it was not itself involved in the dishonesty.

81. There are difficulties about treating *Stone & Rolls* as authority for any wider principles than these. There are two main reasons for this. The first is that Lord Phillips and Lord Walker differed in their reasons for holding that the illegality defence could be taken against a one-man company. Lord Walker adopted the "sole actor" principle, a label which he derived from the case-law of the United States, but which he supported by reference to ordinary principles of English company law. Lord Phillips on the other hand was guided by the principle that a loss is recoverable only if the relevant duty was to protect against loss of that kind: *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191. He regarded this as expressing a rule of policy, which led him to conclude that Mr Stojevic constituted the entire constituency whose interests the auditors were bound to protect. It followed in his opinion that there was no reason not to attribute his state of mind to the company for the purposes of the illegality defence. The second reason is that Lord Phillips's view that it was no part of the purpose of an audit report to protect the interests of current or prospective creditors was peculiarly his own. Although Lord Walker agreed with it (see para 168), the proposition was not part of his reasoning on the impact of illegality. This has proved more controversial than any other feature of the reasoning in the case: see, for example, E Ferran, "Corporate attribution and the directing mind and will" (2011) 127 LQR 239, paras 251-257. The scope of an auditor's duty and its relationship to the illegality defence may one day need to be revisited by this court, but it is not an issue in this appeal.

Application to claims by the company against the defaulting agent

82. The real issue in the present case is a different one. Does the illegality defence bar a claim by the company against the dishonest agent who procured the fraud, in the same way as it bars a claim by the company against an honest outsider who is said to be liable to indemnify them? In *Stone & Rolls* the question whether the illegality defence would have been available to Mr Stojevic to defeat an action by the company did not arise directly, but it was considered by every member of the committee. Lord Phillips did not express a concluded view. Lord Walker presumably thought that the company could not have sued Mr Stojevic, since he regarded them as co-conspirators and likened their case to an action for an account between highwaymen (paras 187-188). Lord Scott and Lord Mance thought that Mr Stojevic could not

have raised the defence against the company. Since then the position as between the company and its dishonest agent has reached the Court of Appeal twice, in *Safeway Stores Ltd v Twigger* [2011] All ER 841, where the illegality defence succeeded, and in the present case where it failed. The same question was considered, although it did not arise directly, by the Court of Final Appeal of Hong Kong in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue FACV (No 5 of 2013)* (decided on 13 March 2014), in which Lord Walker gave the leading judgment.

83. *Safeway Stores* was an action against a number of directors and senior employees of a supermarket group who by exchanging pricing information with competitors had caused the company to contravene section 2 of the Competition Act 1998. Under section 36 of the Act, the company became liable to a penalty, provided that the OFT was satisfied that it had committed the infringement "intentionally or negligently". Safeway was not a one-man company, but the statutory scheme had the peculiarity, which was critical to the reasoning of the Court of Appeal, that the offence was not capable of being committed by the individuals directly responsible. The Act imposed the prohibition and the resulting penalty only on the company. It was held that this required the attribution of the infringement to the company and its non-attribution to the defendants. On that ground, it was held that to apply the breach of duty exception so as to allow recovery of the penalty from the defendants would be inconsistent with the statutory scheme. The decision is not authority for any proposition applying more generally.

84. In the present case, the Court of Appeal dealt with the question as a matter of general principle and reached a different conclusion. Patten LJ, delivering the leading judgment, considered that the answer depended on the duty which was sought to be enforced and the parties between whom the issue was raised. In an action against the company by a third party who had been defrauded, the company was responsible. But it did not follow that the company was to be treated as responsible for a fraud for the purposes of an action against the dishonest director. In such an action, the illegality defence cannot be available, whether the damages claimed arose from the liability which the company was caused to incur to a third party or from the direct abstraction of the company's assets. Patten LJ's reasoning on these points is encapsulated in paras 34 and 35 of his judgment:

> "34. …attribution of the conduct of an agent so as to create a personal liability on the part of the company depends very much on the context in which the issue arises. In what I propose to refer to as the liability cases like *El Ajou, Tan, McNicholas* and *Morris,* reliance on the consequences to the company of attributing to it the conduct of its managers or directors is not

> enough to prevent attribution because, as Mummery LJ pointed out, it would prevent liability ever being imposed. As between the company and the defrauded third party, the former is not to be treated as a victim of the wrongdoing on which the third party sues but one of the perpetrators. The consequences of liability are therefore insufficient to prevent the actions of the agent being treated as those of the company. The interests of the third party who is the intended victim of the unlawful conduct take priority over the loss which the company will suffer through the actions of its own directors.
>
> 35. But, in a different context, the position of the company as victim ought to be paramount. Although the loss caused to the company by its director's conduct will be no answer to the claim against the company by the injured third party, it will and ought to have very different consequences when the company seeks to recover from the director the loss which it has suffered through his actions. In such cases the company will itself be seeking compensation by an award of damages or equitable compensation for a breach of the fiduciary duty which the director or agent owes to the company. As between it and the director, it is the victim of a legal wrong. To allow the defendant to defeat that claim by seeking to attribute to the company the unlawful conduct for which he is responsible so as to make it the company's own conduct as well would be to allow the defaulting director to rely upon his own breach of duty to defeat the operation of the provisions of sections 172 and 239 of the Companies Act whose very purpose is to protect the company against unlawful breaches of duty of this kind. For this purpose and (it should be stressed) in this context, it ought therefore not to matter whether the loss which the company seeks to recover arises out of the fraudulent conduct of its directors towards a third party (as in *McNicholas* and *Morris)* or out of fraudulent conduct directed at the company itself which the Chancellor accepted was what is alleged in the present case. There is a breach of fiduciary duty towards the company in both cases."

Patten LJ declined to apply the sole actor principle for two reasons. First, he considered that it had no place in the context of a claim by the company against the fraudulent director, because it would be inconsistent with the duty of the directors to have regard to the interests of creditors and to the statutory restrictions on the ratification of breaches of the duty of directors. Secondly, he regarded it as having the support of only Lord Walker and Lord Brown in

Stone & Rolls and did not accept that it was "now an established feature of English law for all purposes".

85. *Moulin Global Eyecare Trading Ltd FACV (No 5 of 2013)* was an application for judicial review of the decision of the Hong Kong Commissioner of Inland Revenue to reject a claim by Moulin for the repayment of tax overpaid in a previous years of assessment. Repayment had been claimed on the ground that the company's profits for the reference year had been fraudulently inflated by certain of its then directors. The Commissioner contended that no repayment could be claimed because the dishonesty of the directors was attributable to the company. In the Court of Final Appeal the claim failed because neither of the two provisions of the Inland Revenue Ordinance relied upon applied as a matter of construction. For present purposes, the relevant provision was section 70A which provided for the reopening of an assessment on the ground of "error". Lord Walker, with whom the majority of the court agreed, held that there was no error because for the purpose of preparing the company's tax returns, its directing mind and will consisted of the two directors who knew the facts and had deliberately falsified them. Their dishonesty was therefore to be attributed to the company. "A deliberate lie is not an 'error' for the purposes of that section." Lord Walker considered that the ordinary rules of attribution should apply unless the breach of duty exception was engaged. He resiled from the view that he had expressed in *Stone & Rolls* (at para 145) that the fraud exception applied generally to any issue as to a company's notice, knowledge or complicity. Reviewing the authorities in the light of the Court of Appeal's decision in the present case, he concluded that the breach of duty exception was in fact of limited application. Its rationale was to prevent the illegality defence from barring a claim by a company against its own agents. He summarised the proper scope of the exception as follows, in para 80:

> "The situation to which it most squarely applies (and some would say, the only situation to which it should properly be applied) is where a director or senior employee of a company seeks to rely on his own knowledge of his own fraud against the company as a defence to a claim by the company against him (or accomplices of his) for compensation for the loss inflicted by his fraud. The injustice and absurdity of such a defence is obvious, and for more than a century judges have had no hesitation in rejecting it."

It is clear that Lord Walker numbered himself among the "some" who would say that this was the only situation in which the fraud exception should properly be applied. At para 106(4) of his summary, he said:

> "The underlying rationale of the fraud exception is to avoid the injustice and absurdity of directors or employees relying on their own awareness of their own wrongdoing as a defence to a claim against them by their own corporate employer."

And at para. 106(6):

> "But the exception does not apply to protect a company where the issue is whether the company is liable to a third party for the dishonest conduct of a director or employee."

86. The problem posed by the authorities is that until the Court of Appeal's decision in this case, they have generally treated the imputation of dishonesty to a company as being governed by tests dependent primarily on the nature of the company's relationship with the dishonest agent, the result of which is then applied universally. This was the point made by Lord Walker in *Stone & Rolls* at para 145, from which he resiled in *Moulin*. The fundamental point made by the Court of Appeal in this case and the Court of Final Appeal in *Moulin* is that, while the basic rules of attribution may apply regardless of the nature of the claim or the parties involved, the breach of duty exception does not. I agree with this. It reflects the fact that the rules of attribution are derived from the law of agency, whereas the fraud exception, like the illegality defence which it qualifies, is a rule of public policy. Viewed as a question of public policy, there is a fundamental difference between the case of an agent relying on his own dishonest performance of his agency to defeat a claim by his principal for his breach of duty; and that of a third party who is not privy to the fraud but is sued for negligently failing to prevent the principal from committing it.

87. There are three situations in which the question of attribution may arise. First, a third party may sue the company for a wrong such as fraud which involves a mental element. Secondly, the company may sue either its directors for the breach of duty involved in causing it to commit that fraud, or third parties acting in concert with them, or (as in the present case) both. Third, the company may sue a third party who was not involved in the directors' breach of duty for an indemnity against its consequences.

88. In the first situation, the illegality defence does not arise. The company has no claim which could be barred, but is responding to a claim by the third party. It will be vicariously liable for any act within the course of the relevant agent's employment, and in the great majority of cases no question will arise of attributing the wrong, as opposed to the liability, to the company. Where

the law requires as a condition of liability that that the company should be personally culpable, as Lord Nicholls appears to have assumed it did in *Royal Brunei Airlines*, the sole function of attribution is to fix the company with the state of mind of certain classes of its agents for the purpose of making it liable. The same is true in cases like *McNicholas*, involving statutory civil penalties for quasi-criminal acts. It is also true of cases like *El Ajou* where the relevant act (receipt of the money) was unquestionably done by the company but the law required as a condition of liability that it should have been done with knowledge of some matter. This will commonly be the case with proprietary claims, where vicarious liability is irrelevant.

89. A claim by a company against its directors, on the other hand, is the paradigm case for the application of the breach of duty exception. An agent owes fiduciary duties to his principal, which in the case of a director are statutory. It would be a remarkable paradox if the mere breach of those duties by doing an illegal act adverse to the company's interest was enough to make the duty unenforceable at the suit of the company to whom it is owed. The reason why it is wrong is that that the theory which identifies the state of mind of the company with that of its controlling directors cannot apply when the issue is whether those directors are liable to the company. The duty of which they are in breach exists for the protection of the company against the directors. The nature of the issue is therefore itself such as to prevent identification. In that situation it is in reality the dishonest directors who are relying on their own dishonesty to found a defence. The company's culpability is wholly derived from them, which is the very matter of which complaint is made.

90. This would be obvious if the company were suing the agent for a criminal or dishonest act committed against it where there was no third party involved: for example where the agent had embezzled the company's funds and made off with them. This was the situation before the Court of Appeal in *Attorney-General's Reference (No 2 of 1982)* [1984] 1 QB 624, when the notion of attribution and the inference of consent were alike rejected. The position would have been no different if consent had been more than an inference, for example because the fraudsters had procured the company's express consent in their capacity as its sole directors or shareholders: see *Prest v Prestodel Resources Ltd* [2013] 2 AC 415, 491. As Lord Browne-Wilkinson put it in *Director of Public Prosecutions v Gomez* [1993] AC 442, 496-497,

> "… it would offend both common sense and justice to hold that the very control which enables such people to extract the company's assets constitutes a defence to a charge of theft from the company. The question in each case must be whether the extraction of the property from the company was dishonest, not

whether the alleged thief has consented to his own wrongdoing."

Where the directors simply embezzle the company's funds the question of attribution arises but the illegality defence does not. There is no wrongdoing by the company. But the analysis would be precisely the same if there were. This was the position in *Belmont Finance Ltd v Williams Furniture Ltd* [1979] Ch 250, where the directors' scheme for abstracting the company's assets necessarily involved a criminal contravention by the company of the Companies Act. The Court of Appeal declined to attribute knowledge of the conspiracy to the company so as to make it party to the scheme. This was because the company's claim was against the directors who had authorised the transaction. They could not raise the illegality defence by fixing the company with knowledge of their own plans, for the same reason that the defendants in *Attorney-General's Reference (No 2 of 1982)* could not raise the defence of consent on that basis. This is so whether the company is a one-man company or not, because the objection to the attribution of the culpable directors' state of mind to the company is that they are being sued for abusing their powers. It is the same objection whether they were one, some or all of the directors and whether or not they were also shareholders. In *Belmont Finance*, it was held on appeal from the judgment after trial that the directors' knowledge was not to be attributed to Belmont although the transaction was formally approved by the Board and completed under the company's seal: see [1980] 1 All ER 393, 398. If the fraudulent agent cannot raise the defence of illegality in these circumstances, the same must be true of third parties who are under an ancillary liability for participating in the fraudulent agent's wrong: co-conspirators, aiders and abetters, knowing assisters and receivers, and so on. That was the basis on which in *Belmont Finance* it was held that the companies who sold the Maximum shares at an overvalue and acquired Belmont's shares were potentially liable along with the culpable directors of Belmont.

91. The position is different where the company is suing a third party who was not involved in the directors' breach of duty for an indemnity against its consequences. In the first place, the defendant in that case, although presumably in breach of his own distinct duty, is not seeking to attribute his own wrong or state of mind to the company or to rely on his breach of duty to avoid liability. Secondly, as between the company and the outside world, there is no principled reason not to identify it with its directing mind in the ordinary way. For a person, whether natural or corporate, who is culpable of fraud to say to an innocent but negligent outsider that he should have stopped him in his dishonest enterprise is as clear a case for the application of the illegality defence as one could have. *Stone & Rolls* was a case of just this kind. Leaving aside the admittedly important question of the scope of an

auditor's duty, if the illegality defence had not applied in that case, it could only have been because (i) the company was treated in point of law as a mindless automaton, or (ii) the defence could never apply to companies even in circumstances where it would have applied to natural persons. Neither proposition is consistent with established principle.

92. The technique of applying the general rules of agency and then an exception for cases directly founded upon a breach of duty to the company is a valuable tool of analysis, but it is no more than that. Another way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in *Meridian Global* that the attribution of legal responsibility for the act of an agent depends on the purpose for which attribution is relevant. Where the purpose of attribution is to apportion responsibility between a company and its agents so as to determine their rights and liabilities to each other, the result will not necessarily be the same as it is in a case where the purpose is to apportion responsibility between the company and a third party.

93. This makes it unnecessary to address the elusive distinction between primary and secondary victimhood. That distinction could arise only if the application of the breach of duty exception depended on where the loss ultimately fell, or possibly on where the culpable directors intended it to fall. If, however, the application of the exception depends on the nature of the duty and the parties as between whom the question arises, the only question is whether the company has suffered any loss at all.

Application to Bilta

94. As between Bilta and its former directors, the present action is brought to recover compensation for breach of the duties which they owed to the company. They are alleged to have broken those duties by causing it to conduct its business in a manner calculated to prevent it from meeting its obligation to account to HMRC for VAT. In particular, they are alleged to have caused the proceeds of the sales to UK purchasers, together with the VAT charged on them, to be paid out to Jetivia. Those proceeds were either the property of Bilta (in those cases where they reached Bilta's accounts), or were owed to Bilta (in those cases where they were paid by the UK purchasers directly to Jetivia). In either case, they represented assets of Bilta. Since the issue thus stated arises directly between the company and its directors, the fraud exception applies and the illegality defence cannot lie. Whether the payment out to Jetivia of funds which may represent the fruits of the fraud is truly a loss may well be a difficult question, but it is a different question which will have to be examined in the light of all the facts at a trial. It does not affect the application of the fraud exception.

95. Jetivia and Mr Brunschweiler are in no different position from the directors, since the claim against them is that they were party to the directors' misfeasance. They are said to have participated in the conspiracy to defraud Bilta, and to have knowingly assisted the directors' breach of their fiduciary duties. The claim against Jetivia for an account on the footing of knowing receipt is likewise based on an allegation of participation in the directors' misfeasance, since it is based on that company's knowledge (through Mr Brunschweiler) that the receipts represented assets of Bilta which the directors had caused to be paid to Jetivia in breach of their fiduciary duties.

96. Before leaving these questions I should briefly refer to two further arguments of the appellants. The first is that if Jetivia is liable to Bilta for conspiring with Bilta's directors, then Bilta is liable on the same basis to Jetivia for conspiring with Mr Brunschweiler against Jetivia. The claim therefore fails for circuity. The Court of Appeal ignored this ingenious and problematical argument, and I would do so too. The facts which would be necessary to found it are not agreed or even pleaded. The second argument is that Bilta has suffered no loss because they had not been deprived of any assets that they had legitimately acquired. In the words of Lord Phillips in *Stone & Rolls*, at para 5, "if a person starts with nothing and never legitimately acquires anything, he cannot realistically be said to have suffered any loss". Lord Walker (para 171) agreed. These observations were, however, made with reference to the facts of that case, which had been found in great detail by Toulson J in parallel proceedings between the defrauded banks and Stone & Rolls. It is not in my opinion appropriate to examine how far they are analogous to the facts of the present case at a stage of the proceedings when those facts are far from clear.

97. For these reasons, which substantially correspond to those of the Court of Appeal and those expressed by Lord Toulson and Lord Hodge in the second part of their judgment (on attribution), I would dismiss the appeal on the illegality defence. So far as that point is concerned, this is enough to decide the present appeal.

Policy

98. I add to my judgment on this point only because Lord Toulson and Lord Hodge would also decide the appeal on the ground that the application of the illegality defence is inconsistent with a statutory policy requiring directors to have regard to the interests of the creditors of an insolvent or prospectively insolvent company. Since I am unwilling to follow them down that route, I should briefly explain why.

99. Given that the illegality defence is based on public policy, it is understandable that policy should have been invoked in a number of academic and judicial analyses of these problems. It is, however, important to bear in mind the proper role of policy in the law of illegality, for arguments based upon it can easily degenerate into the kind of discretionary weighing of the equities which was rejected in *Tinsley v Milligan* and *Les Laboratoires Servier v Apotex Inc.* The fact that the illegality defence is based on policy does not entitle a court to reassess the value or relevance of that policy on a case-by-case basis. In a broad sense, any rule of law which imposes civil liability in respect of a wrong may be described as a reflection of legal policy. It does not follow that the courts may apply the illegality defence or not according to the relative importance which they attach to the policy underlying it by comparison with desirability of allowing an otherwise sound claim to succeed. This was the essential problem about the reasoning of the Court of Appeal in *Les Laboratoires Servier*, which explains why this court felt unable to adopt that reasoning while arriving at the same result.

100. The illegality defence is based on the subordination of private rights and liabilities to certain interests belonging to the public sphere. The underlying rationale, as I sought to explain in *Les Laboratoires Servier*, at paras 23 and 25, is that the rights of private parties to remedies in private law may be overridden if the claims based on them are founded on "acts which are contrary to the public law of the state and engage the public interest". These are acts which engage what in French and other civil law systems would be categorised as interests belonging to the *ordre public* or, as a writer has put it, "that part of law that is not at the free disposition of private individuals" (R de Lange, "The European Public Order", *Erasmus Law Review* 3 (2007), 11). This is why a judge, as a public officer, may be required to take a point on illegality of his own motion, contrary to the ordinary adversarial practice of the English courts. And it is why ordinary private wrongs, sounding in tort or contract, do not give rise to the illegality defence.

101. Courts normally examine the policy rationale of a rule of law in order to discover what the rule is, not in order to decide whether they approve of its application in a particular case. The scope for conflict between competing public policies is therefore limited. It is, however, implicit in the reasoning in *Les Laboratoires Servier* that there is one situation in which an examination of competing policies may be required, and that is where a competing public policy (as opposed to a competing legal interest) requires the imposition of civil liability notwithstanding that the claim is founded on illegal acts. A good example is a claim for damages for breach of EU or national competition law, which may in certain circumstances succeed notwithstanding that it is founded on a contract or other act which is unlawful: Case C-453/99 ECR I-6314 *Crehan v Courage Ltd* at paras 34, 36; *Crehan v*

Inntrepreneur Pub Co CPC [2004] 2 CLC 803 at paras 149-153. This was because the correction by an award of damages of the economic effects of the breach of public competition law is required in order to give effect to its purpose.

102. More recently, a somewhat similar question came before this court in a very different context in *Hounga v Allen* [2014] UKSC 47. This was a claim for unlawful discrimination in relation to the claimant's dismissal. Eighteen months before her dismissal, Ms Hounga's employer had conspired with her to bring her into the United Kingdom under a false identity and had arranged for her to receive a visitor's visa for six months. The factual basis on which the appeal was argued was that "by dismissing her Mrs Allen discriminated against Miss Hounga in that on racial grounds, namely on ground of nationality, she treated Miss Hounga less favourably than she would have treated others": see para 3. It was contended that in these circumstances the claim was barred because it was founded on the illegal conspiracy. There was no doubt that the relevant illegality constituted turpitude and no issue about attribution. The question was whether the employee's unlawful entry into the United Kingdom was sufficiently connected to her dismissal. Because Ms Hounga had no right to work in the United Kingdom, her contract of employment was illegal and unenforceable. But she had a distinct cause of action for the statutory tort of discrimination: see paras 24-25. To make good that cause of action Ms Hounga did not rely, and did not need to rely on the circumstances in which she had entered into the United Kingdom, either by way of pleading or by way of evidence. They were in reality no more than background facts. The reliance test, which had been adopted in *Tinsley v Milligan*, is the narrowest test of connection which is consistent with the existence of an illegality test at all, and by that test, Ms Hounga would certainly have been entitled to succeed. But in *Cross v Kirkby* [2000] EWCA Civ 426, the Court of Appeal had suggested a wider test of connection, dependent on whether the illegal act was "inextricably bound up with" the facts on which the cause of action depended even if it was unnecessary to rely on it. This would have substantially extended the range of cases in which the illegality defence could apply. Lord Wilson (with whom Baroness Hale and Lord Kerr agreed), regarded the question whether the "inextricable connection" test applied to the facts of that case as the "bigger question": see para 41. He answered it by holding that international conventions against human trafficking required that compensation should be available, so that the "inextricably bound up" test could not be applied in those circumstances. The court was not purporting to depart from *Tinsley v Milligan* without saying so. It simply recognised the case before it as one in which a competing public policy required that damages should be available even to a person who was privy to her own trafficking. Lord Hughes (with whom Lord Carnwath agreed) did not agree with the majority's construction of the relevant conventions, but agreed in the result on the ground that the illegal entry was

not sufficiently closely connected with the dismissal. The result was that although the panel disagreed on the effect of the conventions, so far as the law of illegality was concerned, there was no inconsistency between their approaches. On the footing that the conventions required a right of damages to be available, the illegality defence failed on both grounds. The result of *Hounga v Allen* would have been exactly the same even if Ms Hounga had entered the United Kingdom legally or had done so illegally by her own unaided efforts (so that no question of trafficking arose) and the Allens had merely known of and taken advantage of that fact. In its recent decision in *R (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17, the Court of Appeal was divided on the significance of *Hounga* although it was able to decide the case without reference to it. Arden LJ expressed some scepticism about its significance as a statement of principle of general application. It will be apparent from what I have said that I have considerable sympathy for her approach.

103. In the present case, Lord Toulson and Lord Hodge have suggested that such a relevant countervailing public policy may be found in the rule requiring the directors of an actually or potentially insolvent company to have regard to the interests of creditors. I would prefer to leave this question open for two reasons.

104. The first is that it is not by any means clear that the duty of directors to have regard to the interests of creditors does require the imposition of civil liability notwithstanding the illegality defence. It is true that many of the central principles and detailed rules of company law are matters of public policy. They do not simply sound in private law. This is in particular true of those rules which impose duties for the benefit of third parties, such as creditors, who are not party to the contract of incorporation. These rules include rules for the conservation of capital, and for ensuring that companies do not trade while insolvent. More generally, section 172 of the Companies Act 1972, which includes among the general duties of directors a duty to "promote the success of the companies for the benefit of its members as a whole", treats the interests of members as corresponding to those of employees, suppliers, customers and, in certain respects the public at large. The common law goes further than this, treating the interests of an actually or prospectively insolvent company as synonymous with those of its creditors: *West Mercia Safetyware v Dodd* [1988] BCLC 250. The duty to have regard to the interests of creditors is not one of the general duties of directors identified in the statute, but the common law duty is preserved by section 172(3) of the Act, notwithstanding the directors' obligation to serve the interests of members. However, it does not follow that the public policy reflected in these principles requires the imposition of civil liability on directors notwithstanding the illegality defence. One reason is that although the general duties of directors

have effect notwithstanding any enactment or rule of law, by way of exception to this the company may in principle validly authorise something which would otherwise be a breach of those duties: Companies Act 2006, section 180(4) and (5). Another is that the Companies Acts confer on the liquidator of a company in the course of winding up a wide range of statutory powers which enable effect to be given to these principles whether or not an ordinary civil action is available. These include not only provisions for misfeasance proceedings against directors and other officers, but provisions for recovering the dissipated assets of insolvent companies from third parties. These points were not fully developed in argument, and I do not think that it is desirable to resolve them on the present appeal. As presently advised, I cannot accept that sections 172 and 180 are a sufficient answer to Jetivia's reliance on the illegality defence.

105. There is, however, a more fundamental reason why I would prefer not to go down this path in the present case, which is that it is unnecessary and undesirable. This is a case about attribution. It was approached in that way in both courts below, and that seems to me to be realistic. The problem about the policy argument is that it focuses too narrowly on the status of Mr Chopra and Mr Nazir as directors and on the insolvency of this particular company given the way in which they caused it to carry on business. In my opinion, it is perfectly clear that the illegality defence would fail even if these particular features of the facts were not present, just as in *Hounga v Allen*, the illegality defence would have failed even if Ms Hounga had not been trafficked. The company would be entitled to claim against Mr Chopra and Mr Nazir (and any collaborator of theirs) for their breach of duty to the company even if those gentlemen had not been directors but mere agents who happened to be the company's directing mind and will for the relevant particular purpose. It is equally clear that the company would be entitled to claim against them if it were solvent. I am unwilling to decide this case on a basis which invites distinctions between different situations which are irrelevant to the principle that we are applying. I would be extremely reluctant to see the law of illegality revert to the multiplicity of micro-topics and sub-rules which once characterised it. I agree with Lord Toulson and Lord Hodge that Occam's Razor is a valuable analytical tool, but only if it is correctly understood. *Entia non sunt multiplicanda praeter necessitatem*. Do not gratuitously multiply your postulates.

Insolvency Act 1986, section 213

106. This is a short point and a straightforward one.

107. Section 213 of the Insolvency Act provides:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

The appellants' case is that the provision has no extraterritorial effect and therefore no application to Jetivia which is domiciled in Switzerland or Mr Brunschweiler, who is domiciled in France. In effect the submission is that in subsection (2) "any persons" means only persons in the United Kingdom. In my opinion this argument is misconceived.

108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.

109. The English court, when winding up an English company, claims world-wide jurisdiction over its assets and their proper distribution. That jurisdiction is not universally recognised, but it is recognised within the European Union by articles 3 and 16 of Council Regulation (EC) No 1346/2000. In *Schmid v Hertel* [2014] 1 WLR 633, the Court of Justice of the European Union considered these articles in the context of the jurisdiction of the German courts to make orders setting aside transactions with a bankrupt. It held not only that articles 3 and 16 applied to such orders, but that member states must be treated as having power to make them notwithstanding any limitations under its domestic law on the territorial application of its courts' orders.

110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted

its assets. None of them have any express limits on their territorial application. Another such provision, section 238, which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in *In re Paramount Airways Ltd* [1993] Ch 223. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213.

111. I would accordingly dismiss the appeal on this point also.

LORD TOULSON AND LORD HODGE:

112. When the directors of a company involve it in a fraudulent transaction, is the company barred by the doctrine of illegality from suing them and their accessories for losses caused by their breach of fiduciary duty? Secondly, does section 213 of the Insolvency Act 1986 ("IA 1986"), which empowers a liquidator of a company registered in the United Kingdom to seek financial contributions from persons involved in the company's fraudulent trading, have extra-territorial effect? These questions arise on an appeal by Jetivia SA ("Jetivia") and Mr Brunschweiler against the dismissal of their applications for the summary dismissal or striking out of the claims against them.

113. Bilta (UK) Ltd ("Bilta"), a company incorporated in England, seeks through its joint liquidators, Mr Hellard and Mr Ingram, to recover damages or equitable compensation in respect of its alleged loss. As against the directors, Bilta claims damages for conspiracy or equitable compensation for breach of fiduciary duty. The conspiracy is alleged to have been an unlawful means conspiracy, and the unlawful means are the directors' alleged breach of their fiduciary duties. As against Jetivia and Mr Brunschweiler, Bilta claims damages for conspiracy or compensation for dishonest assistance in the directors' breach of their fiduciary duties. Since the matter comes before the court on Jetivia's and Mr Brunschweiler's application for the claims against them to be summarily struck out or dismissed, it is to be assumed for present

purposes that the factual allegations made in Bilta's amended particulars of claim are capable of proof, and there is no need to repeat the word "alleged" whenever referring to the defendants' conduct. The liquidators also pursue a separate claim for fraudulent trading under section 213 of IA 1986. Jetivia is a Swiss company and Mr Brunschweiler, who is resident in France, is its sole director.

114. Bilta had two directors, Mr Nazir and Mr Chopra ("the directors"), who are the first and second defendants. Mr Chopra owned all the issued shares. Bilta was registered for the purposes of VAT. Its only trading activity, which took place between 22 April and 21 July 2009, was trading in European Emissions Trading Scheme Allowances ("EUAs"), which are commonly known as carbon credits. EUAs were treated as taxable supplies under the VAT Act 1994 until 31 July 2009. Since then they have been zero-rated. The VAT status of supplies of the EUAs at the relevant time explains Bilta's activities.

115. In short, Bilta bought large numbers of EUAs from overseas suppliers, including Jetivia, free of VAT, and sold them in the UK with VAT to companies described as "first line buffers", which immediately sold them on. The price for which Bilta sold the EUAs was lower before VAT than the price at which it bought, and Bilta was therefore never going to be in a position to meet its liabilities to HM Revenue and Customs ("HMRC"). Bilta had minimal capital and was insolvent virtually from the outset. The money payable to Bilta, including the VAT due to HMRC, was either paid to Bilta and paid on by it to its overseas supplier, or was paid by the first line buffer (or a later company in the chain) directly to Bilta's supplier, or was otherwise paid to offshore accounts. At the end of the chain the EUAs would be resold to a company outside the UK, generating a right to a VAT refund. It is a familiar kind of carousel or missing trader fraud.

116. Bilta was insolvent throughout the period of its trading in EUAs. In that three-month period, Bilta sold more than 5.7m EUAs for about £294m. Its liability for VAT on those transactions amounts to £38,733,444. It did not submit any VAT returns to HMRC. On the application of HMRC Mr Hellard and Mr Ingram were appointed provisional liquidators of Bilta on 29 September 2009. They commenced the company's claim against the defendants who were its directors and other parties, including the appellants. The company was compulsorily wound up on 25 November 2009. The proceedings were amended on 13 October 2011 to include the liquidators' claims under section 213 of IA 1986.

117. Patten LJ has set out the principal allegations in Bilta's particulars of claim in paras 9-14 of his impressive judgment. We can therefore summarise them

very briefly. Bilta's pleaded case focuses on the injury done to it rather than to HMRC. It alleges that the appellants among others were parties to a conspiracy to defraud and injure it by depriving it of the money needed to pay its VAT liabilities and thereby rendering it insolvent. The conspirators knew that their fraudulent scheme involved the breach by Mr Nazir and Mr Chopra of their fiduciary duties as directors of Bilta. Against its directors Bilta claims compensation for breach of fiduciary duty, damages for unlawful means conspiracy and a contribution under section 213 of IA 1986. Against the appellants Bilta alleges that they were parties to the conspiracy to defraud it, that they are liable for dishonestly assisting Mr Nazir and Mr Chopra in the breaches of their fiduciary duties to it and (under section 213) for carrying on its business with intent to defraud creditors.

118. On 30 July 2012 Sir Andrew Morritt, the Chancellor of the High Court, dismissed the appellants' application for summary dismissal of the claims. He held that the maxim *ex turpi causa non oritur actio* (no action may be founded on illegal or immoral conduct) was not available as a defence to Bilta's directors or the appellants and that section 213 of IA 1986 had extra-territorial effect. The Court of Appeal (the Master of the Rolls, Rimer and Patten LJJ) in a judgment dated 31 July 2013 dismissed the appellants' appeal.

119. The principal issues raised by this appeal in relation to the defence based on the maxim *ex turpi causa* are (i) the purpose of that maxim and its application in relation to Bilta's claims and (ii) the circumstances in which and mechanisms by which the knowledge of directors and other persons is attributed to a legal person such as a registered company. The other issue is whether section 213 of IA 1986 has extra-territorial effect. We deal with each in turn.

Illlegality: ex turpi causa non oritur actio

120. At the heart of Bilta's claims is the allegation that the directors acted in breach of their fiduciary duties to the company, in concert with others including Jetivia and its director, Mr Brunschweiler. Although the directors have played no part in the current proceedings, it is rightly accepted by the parties to the appeal that in relation to the defence of illegality there is no distinction to be drawn between the position of Jetivia and Mr Brunschweiler and that of the directors. The primary question for the court is whether Bilta's claim against the directors for breach of fiduciary duty is barred by the doctrine of illegality. If so, the claim for damages for conspiracy must equally fail, since the breach of fiduciary duty constitutes the unlawful means on which Bilta relies. And the converse also applies.

121. The appellants argue that Bilta's claims against its directors are barred by reason of the criminal nature of its conduct under their control. Its function was to serve as a vehicle for defrauding HMRC, and it is submitted that the doctrine of illegality bars it from suing the directors who caused its participation in the scheme, and their co-conspirators, as a means of recovering the company's loss for the benefit of the company's creditors.

122. In any case where the defence of illegality is raised, it is necessary to begin by considering the nature of the particular claim brought by the particular claimant and the relationship between the parties. So we start with the nature of the directors' duty to Bilta.

123. It is well established that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties of a company which is able to meet its liabilities, because in the case of the former the director's duty towards the company requires him to have proper regard for the interest of its creditors and prospective creditors. The principle and the reasons for it were set out with great clarity by Street CJ in *Kinsella v Russell Kinsela Pty Ltd (in liquidation)* (1986) 4 NSWR 722, 730:

> "In a solvent company the proprietary interests of the shareholders entitle them as the general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

124. This passage was cited with approval by Dillon LJ in *West Mercia Safetywear v Dodd* [1988] BCLC 250, 252-253. The principle now has statutory recognition in the Companies Act 2006. In Part 10, Chapter 2 of the Act, concerning the general duties of directors, section 172 provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…
>
> …
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

125. Section 180 (5) provides that the general duties under the Act have effect (except as otherwise provided or the context otherwise requires) notwithstanding any enactment or rule of law. A director of an insolvent company is not directly a fiduciary agent of the creditors and cannot be sued by an individual creditor for breach of the fiduciary duty owed by the director to the company (*Yukong Line Ltd v Rendsburg Investments Corporation (No 2)* [1998] 1 WLR 294).

126. Instead, the protection which the law gives to the creditors of an insolvent company while it remains under the directors' management is through the medium of the directors' fiduciary duty to the company, whose interests are not to be treated as synonymous with those of the shareholders but rather as embracing those of the creditors.

127. Such protection would be empty if it could not be enforced. To give effect to it, this action is brought by the liquidators in the name of the company to recover, for the benefit of the creditors, the loss caused to the company by the directors' breach of their fiduciary duty.

128. It is argued on behalf of the appellants that it would offend against the doctrine of illegality for the claim to succeed. It is said that the fact that the errant directors were in sole control of the company makes it unlawful for the company to enforce their fiduciary duty towards it. If this were the law, it would truly deserve Mr Bumble's epithet – "a ass, a idiot". For it would make a nonsense of the principle which the law has developed for the protection of the creditors of an insolvent company by requiring the directors to act in good faith with proper regard for their interests.

129. It has been stated many times that the doctrine of illegality has been developed by the courts on the ground of public policy. The context is always

important. In the present case the public interest which underlies the duty that the directors of an insolvent company owe for the protection of the interests of the company's creditors, through the instrumentality of the directors' fiduciary duty to the company, requires axiomatically that the law should not place obstacles in the way of its enforcement. To allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required. It would not promote the integrity and effectiveness of the law, but would have the reverse effect. The fact that they were in sole control of the company and in a position to act solely for their own benefit at the expense of the creditors, makes it more, not less, important that their legal duty for the protection of the interests of the creditors should be capable of enforcement by the liquidators on behalf of the company.

130. For that reason in our judgment this appeal falls to be dismissed. The courts would defeat the very object of the rule of law which we have identified, and would be acting contrary to the purpose and terms of sections 172(3) and 180(5) of the Companies Act, if they permitted the directors of an insolvent company to escape responsibility for breach of their fiduciary duty in relation to the interests of the creditors, by raising a defence of illegality to an action brought by the liquidators to recover, for the benefit of those creditors, the loss caused to the company by their breach of fiduciary duty. In everyday language, the purpose of the inclusion of the creditors' interests within the scope of the fiduciary duty of the directors of an insolvent company towards the company is so that the directors should not be off the hook if they act in disregard of the creditors' interests. It would be contradictory, and contrary to the public interest, if in such circumstances their control of the company should provide a means for them to be let off the hook on the ground that their illegality tainted the liquidators' claim.

131. There would be much to say for ending this judgment at this point, except that it would be wrong not to identify the principal counter arguments and show that we have considered them. There is an attendant risk, in going on at further length, of losing sight of the simple and central point that the defence of illegality would undermine the rule of law, reinforced by Act of Parliament, which exists for the protection of those for whose benefit the action is brought, namely the creditors who have a right to such assets as the liquidators may recover in the name of the company. We see no need, for example, to get into the subject of attribution and the *Hampshire Land* principle in order to decide the appeal, but in discussing it (as we do below) we hope by the end to achieve some simplicity and clarity.

132. We turn to the question whether any authorities present an impediment to this approach and whether they require reconsideration.

133. Mr Alan Maclean QC's primary submission was that it follows from the decision of the House of Lords in *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 that Bilta's claims are barred by the doctrine of illegality by reason of its being a "one-man company" which engaged in deliberate fraud.

134. *Stone & Rolls* has been a much debated and much criticised case. A lot of the criticism stems from the fact that there were five judgments running to nearly 100 pages, the judges were divided three to two, and differing reasons were given by the majority. The claim was by a company in liquidation against the firm of chartered accountants, who had acted as its auditors, for negligence and breach of contract in failing to detect and report that the company's business consisted mainly of defrauding banks (by obtaining credit through presenting false documents purportedly relating to commodity trading which was fictitious). The company was under the complete control of a Mr Stojevic. When the bank which was the principal victim discovered the fraud it sued the company and Mr Stojevic and obtained judgment for over $90m. The judgment was unpaid, the company was put into liquidation and it brought proceedings through the liquidators against the accountants for the benefit of the creditors. Negligence was admitted, but the accountants applied successfully to strike out the action on the ground of illegality. The shares in the company were held by an Isle of Man company, whose shareholders were nominee companies acting under a trust. In the proceedings brought by the bank Mr Stojevic was evasive about the beneficial interest behind the trust, although he acknowledged that he had a beneficial interest in the company, and there was no evidence to suggest that any innocent person had a share in it. All but one of the House of Lords (Lord Scott) proceeded on the basis that the company was Mr Stojevic's company in the fullest sense.

135. The opinions of the majority (Lords Phillips, Walker and Brown), although differently expressed in various ways, have in common that they identified two features which were critical to their analysis. One concerned the scope of the accountants' duty. The other was the fact that no one who had any part in the ownership or management of the company was unaware of the fraud which the accountants failed to detect and report. Put shortly, the majority (in disagreement with Lord Mance) held that the accountants owed no contractual or tortious duty of care in respect of the interests of the creditors, notwithstanding that the company's solvency depended on the fraud being undetected. Their sole duty was to report to the company the matters which the directors and shareholders ought to know for the purpose of making informed decisions. If those people were already aware of and complicit in the fraud, that fact provided a complete barrier to the claim. Lord Phillips was explicit that the case turned critically on whether the auditor's duty extended to protecting those for whose benefit the claim was brought. He also observed

that one fundamental proposition appeared to him to underlie the reasoning of Lord Walker and Lord Brown – that the duty owed by an auditor to the company was for the benefit of the interests of the shareholders, but not those of the creditors – and that here lay the critical point of difference of opinion between them and Lord Mance (para 68).

136. While it would shorten this judgment considerably if we were to say simply that the present case is plainly distinguishable from *Stone & Rolls* on its facts, since this case concerns directors who unquestionably owed duties for the protection of the interests of the creditors (unlike the auditor, according to the opinions of the majority in *Stone & Rolls*), the case has caused so much difficulty that it would be wrong for us to leave it there. It is therefore necessary to analyse the judgments in closer detail before expressing our final view about its status.

137. Lord Phillips summarised his conclusions (para 18) before developing his analysis. He said that those for whose benefit the claim was brought (the creditors) fell outside the scope of any duty owed by the accountants; and that the sole person for whose benefit the accountants' duty was owed (Mr Stojevic, who owned and ran the company) was himself the person responsible for the fraud. In those circumstances he said that *ex turpi causa* afforded a defence.

138. Lord Phillips made some comments about the law of illegality and the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340. He rejected the idea that *Tinsley v Milligan* laid down a universal test of *ex turpi causa*. It was concerned with the effect of illegality on title to property. It established that once title had passed, it could not be attacked on the basis that it passed pursuant to an illegal transaction. If title could be asserted without reliance on the illegality, the defendant could not rely on illegality to defeat the title (para 21). But he did not believe that it was right to proceed generally on the basis that the reliance test could automatically be applied as a rule of thumb, because it was necessary to consider the policy underlying the *ex turpi causa* maxim in order to decide whether the defence was bound to defeat the claim (para 25).

139. Lord Phillips said that the underlying policy in relation to contractual obligations could be divided into two principles: the court will not enforce a contract which is expressly or impliedly forbidden by statute or is entered into with the intention of committing an illegal act; and the court will not assist a claimant to recover a benefit from his own wrongdoing. In the instant case the claim is not brought for the benefit of the shareholder/directors, but for the benefit of the defrauded creditors for whose benefit the relevant duty

was owed. Whereas in *Stone & Rolls* no such duty was owed for the benefit of the creditors, in this case it was. On Lord Phillips' analysis of *Tinsley v Milligan* there is no inconsistency between that decision and the reasons which we have given for dismissing this appeal.

140. Lord Phillips considered the consequences of the primary argument advanced by the accountants in a case where the company carried on a legitimate business and had honest shareholders, but the person who was in charge of running it ("its directing mind and will") involved it in fraudulent trading, which its auditors negligently failed to discover and report. In such circumstances any claim by the company for the benefit of the shareholders, whose interests the auditors should have protected, would according to the accountants' argument be barred by the very wrongdoing which the auditors' negligence had allowed to occur (paras 29-30). Lord Phillips did not accept that if *Stone & Rolls* had been a company with independent shareholders, which had been "high-jacked" by Mr Stojevic, its claim would necessarily have been defeated by reason of the reliance test or the underlying principle of public policy (para 63).

141. Lord Phillips considered that where a company's complaint was that its directing mind and will had infected it with turpitude, if *ex turpi causa* was not to apply, "the reason should simply be that the public policy underlying it does not require its application" (para 60). That would be a very easy conclusion where all the shareholders were innocent (para 61). He considered that the situation would be more problematic if some shareholders were innocent and some were not, but it was not necessary for the court to solve that problem in the case of *Stone & Rolls*, because it had no innocent shareholders. In short, whether *ex turpi causa* applied was dependent on identifying the underlying public policy and on identifying for whose benefit the action was being brought.

142. In *Stone & Rolls* (as in the present case) there was a good deal of argument about "attribution" and the application of the so-called *Hampshire Land* principle (*In re Hampshire Land Co* [1896] 2 Ch 743), but in a passage which is important to Lord Phillips' analysis he said that the real issue was not whether the fraud should be attributed to the company but whether *ex turpi causa* should defeat the company's claim for breach of the auditor's duty, and that this depended critically on whether the scope of the auditor's duty extended to protecting those for whose benefit the claim was brought (para 67).

143. Lord Phillips proceeded to examine that issue and he concluded that the accountants owed no duty for the protection of the company's creditors.

(That, of course, places them in stark contrast with the directors of an insolvent company.) In examining that question Lord Phillips cited with approval the decision of Hobhouse J in *Berg, Sons & Co Ltd v Mervyn Hampton Adams* (1992) [2002] Lloyd's Rep PN 41. That was also a claim by a company in liquidation, brought for the benefit of its creditors (banks and discount houses), against a firm of chartered accountants which had acted as the company's auditors. The company operated under the sole control of a Mr Golechha, who was the beneficial owner of its entire share capital. The accountants were found to have acted with lack of proper skill in accepting too readily assurances given to them by Mr Golechha about the recoverability of certain debts owed to the company. The judge found that the auditors ought to have qualified the company's accounts. At the relevant time the company was not insolvent, but it was accepted (as indeed the accountants had said in a letter to Mr Golechha) that it was foreseeable that the company's bankers and discount houses with whom it did business might place some reliance on its audited accounts. The company asserted, but did not prove, that Mr Golechha's conduct had been fraudulent. The claim failed on various grounds, including reasons directly comparable to the position in *Stone & Rolls.*

144. Lord Phillips quoted (paras 78 and 79) the following passages from Hobhouse J's judgment:

> "It follows [from the decision of the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605] that the purpose of the statutory audit is to provide a mechanism to enable those having a proprietary interest in the company or being concerned with its management or control to have access to accurate financial information about the company. Provided that those persons have that information, the statutory purpose is exhausted. What those persons do with the information is a matter for them and falls outside the scope of the statutory purpose. In the present case the first plaintiffs have based their case not upon any lack of information on the part of Mr Golechha but rather upon the opportunity that the possession of the auditor's certificate is said to have given for the company to continue to carry on business and to borrow money from third parties. Such matters do not fall within the scope of the duty of the statutory auditor."
>
> …

> "However one identifies the company, whether it is the head management, or the company in general meeting, it was not misled and no fraud was practised on it. This is a simple and unsurprising consequence of the fact that every physical manifestation of the company Berg was Mr Golechha himself. Any company must in the last resort, if it is to allege that it was fraudulently misled, be able to point to some natural person who was misled by the fraud. This the plaintiffs cannot do."

145. Lord Phillips observed that this comment demonstrated that *Hampshire Land* had no application to the facts of that case, but that it also had wider implications (para 80). It supported the proposition that the law could not rationally hold the auditor liable when the entire shareholder body and the entire management was embodied in a single individual who knew everything because he had done everything. The passages set out above correspond with and support the twin factors to which we have referred (para 26) as central to the reasoning of the majority – the limited nature of the auditors' duty, and the knowledge of everyone involved in the ownership and management of the company about the matters which the auditors failed to discover and report to them. Lord Phillips returned to those points at the end of his judgment (para 86).

146. Lord Walker concluded that he would apply what he referred to as the "sole actor" principle to a claim made against its former auditors by a company in liquidation, where the company was a one-man company engaged in fraud, and the auditors were accused of negligence in failing to call a halt to the fraud (para 168). He defined what he meant by a one-man company, by reference to what Hobhouse J had said in *Berg v Adams*, as "a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned" (para 161). He cited *Berg v Adams* as a clear case of a one-man company, which did not involve fraud, but in which every physical manifestation of the company was Mr Golechha himself who knew all about the irrecoverable loans; and there is a clear echo of Hobhouse J's judgment in Lord Walker's explanation for rejecting *Stone & Rolls'* claim (para 168). He said that any duty of care owed by the auditors was to the company as a whole, not to current or prospective creditors, and that there was no protection which the auditors could give to the company if the only human embodiment of the company knew all about its fraudulent activities.

147. Lord Walker's judgment was a great deal more detailed than that summary, because he considered the various arguments advanced by the company, but his critical reasoning was that the auditors were in a very different position

from the company's directors (para 190), their duty of care was limited in the way that he identified, and the company's sole actor knew all that was to be known.

148. Lord Brown agreed with Lord Walker. He said that the claim against the accountants ran diametrically counter to the principles established in *Caparo* and was difficult to reconcile with Hobhouse J's decision in *Berg v Adams* (para 202). In that case (see para 144 above) Hobhouse J had said that the claim against the accountants was based on the opportunity which possession of the auditor's certificate was said to have given for the company to continue to carry on business and borrow money, but such matters did not fall within the scope of the auditor's duty. Similarly, said Lord Brown, the assumed negligence of the accountants had enabled the company to continue to carry on business, in this case stealing rather than borrowing from third parties.

149. What divided the minority (Lords Scott and Mance) from the majority is that they took a different view about the classes of parties in respect of whose interests the auditors owed a duty of care. They both regarded the insolvency of the company as critical, but Lord Mance set out his reasoning more fully. He held that just as a director's fiduciary duty to a company which is insolvent or bordering on insolvency embraces a duty to the company's creditors, a parallel principle applied to the auditor, so that the duty of care owed by an auditor to such a company embraced a duty to have regard to the interests of the creditors. He distinguished *Berg v Adams* because in that case the company was solvent at each audit date (paras 260 and 265). He said that the fact that *Stone & Rolls* was insolvent at each audit date was critical. He defined the issue as being whether the auditors' duty to the company extended, like the directors', beyond the protection of the interests of shareholders in a situation where the auditors ought to have detected the company's insolvency. He observed that the centrality of this issue may have been obscured by the spread of argument over other issues (para 265). He considered that it was not inconsistent with *Caparo* to hold that the company was entitled to pursue a claim against the auditors for loss resulting from its breach of its duty in failing to detect that the company was subject to a continuing fraudulent scheme in circumstances in which it was insolvent (paras 269-271).

150. Lord Scott emphasised the public policy foundation of the doctrine of illegality. For this reason he differentiated between an action for damages for breach of the auditors' duty of care brought by a solvent company and a similar action brought by an insolvent company. If the company had remained solvent, an action against the auditors which would have enabled Mr Stojevic to benefit from any damages would have offended the *ex turpi causa* rule. But the company was insolvent and there was no possibility of

Mr Stojevic benefitting from any damages recoverable from the accountants. There was therefore no public policy reason to bar an action against the auditors based on their breach of duty. "The wielding of a rule of public policy" he said, "in circumstances where public policy is not engaged constitutes, in my respectful opinion, bad jurisprudence" (paras 119-122).

151. Critics of *Stone & Rolls* for being over long and diffuse have a fair point, and commentators and practitioners have found the case difficult. Lord Walker himself commented in *Moulin Global Eyecare Trading Ltd (in liquidation) v The Commissioner of Inland Revenue*, HKFCA, final Appeal (*No 5 of 2013)* (Civil), 13 March 2014, that it is difficult to extract a clear ratio from the speeches of the majority, and he praised the Court of Appeal in the present case for achieving a welcome clarification of the law (paras 100 and 106). We have endeavoured to apply Occam's razor in concentrating on the critical features of the case: the scope of the auditors' duty and the inability of the company to show that anyone who had any part in the ownership or management of the company was misled by the auditors' negligence, which was a prerequisite for the company's claim to succeed.

152. Much of the difficulty of *Stone & Rolls* is that the treatment of the issues was more roundabout, for example with much discussion of principles of attribution. We have already referred to the fact that Lord Phillips considered that the real issue was not about attribution, but about the scope of the auditors' duty, and to Lord Mance's comment that the centrality of this issue had been obscured by the spread of argument over other issues. The centrality of the point was further emphasised by the parallel with *Berg v Adams* which each of the majority drew in their judgments. That parallel had nothing to do with the fraudulent nature of *Stone & Rolls'* business. The restricted nature of the auditors' duty and the knowledge of those in charge of the company had the same significance whether the nature of the business was fraudulent (*Stone & Rolls*) or not (*Berg v Adams*). Likewise, Lord Mance's ground for distinguishing *Berg v Adams* had nothing to do with whether the business was lawful or fraudulent. Lord Mance distinguished Hobhouse J's decision because the insolvency of *Stone & Rolls* at the time of the statutory audits made all the difference in his view to the scope of the auditors' duty. We are not of course concerned in this case to revisit the point of disagreement between Lord Mance and the majority on that question. The finding that all whose interests were the subject of the auditors' duty of care knew the facts which the auditors failed to detect was dispositive. The conclusion of the majority that the claim was therefore barred by illegality may be seen as a reflection upon the illegal nature of the conduct as a matter of fact and perhaps a perceived need to bring their conclusion within the scope of the issues as argued, but it was not the illegality which on a proper analysis of their reasoning drove the conclusion. As Lord Phillips observed, the

fundamental proposition which underlay the reasoning of Lord Walker, Lord Brown and himself was that the auditors owed no duty for the benefit of those for whose benefit the claim was brought. It necessarily followed that the claim should be struck out.

153. Lord Sumption analyses the case differently. There is no disguising the fact that serious difficulties arise from the different ways in which the majority expressed themselves. The Law Commission in its report on *The Illegality Defence* (2010) Law Com 320, commented at para 3(32):

> "It is difficult to anticipate what precedent, if any, *Stone & Rolls* will set regarding the illegality defence. Though there was a majority verdict, there was no majority reasoning, with all their Lordships reaching different conclusions on how the defence should be applied."

154. We conclude that *Stone & Rolls* should be regarded as a case which has no majority ratio decidendi. It stands as authority for the point which it decided, namely that on the facts of that case no claim lay against the auditors, but nothing more.

155. *Stone & Rolls* in any event does not support Mr Maclean's primary submission that in the present case Bilta's claims are barred because it was a one-man company. The duty of the directors was significantly different from the duty of the statutory auditors, and *Stone & Rolls'* attempt to compare the two was rejected by the majority (see, for example, Lord Walker at para 190), although it found favour with Lord Mance. The fact that *Stone & Rolls* was a one-man company was relevant because it meant that the company was unable to point to anyone involved in the ownership or management of the company who was adversely affected by the accountants' failure to discover what that one man had concealed from it. But it does not follow that the person in charge of a one-man company can never be liable for any form of wrongdoing towards the company. As Lord Mance pointed out in *Stone & Rolls* (para 230), the controller of a one-man company who dishonestly strips its assets is guilty of theft from the company (*Attorney-General's Reference (No 2 of 1982)* [1984] QB 624). If the majority had agreed with Lord Mance's view as to the scope of the auditors' duty, it is plain from their reasoning that they would not have struck out the action, albeit that it was a one-man company and its activities were fraudulent. They saw the claim as an attempt to get around *Caparo*, whereas Lord Mance saw no conflict with *Caparo*.

156. Mr Maclean also relied on the decision of the Court of Appeal in *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] 2 All ER 841. The issue was whether a company could recover the amount of financial penalties imposed on it by the Office of Fair Trading, for anti-competitive activity in contravention of the Competition Act 1998, from the directors or employees who were responsible for the illegal activity in breach of their contractual and fiduciary duties to the company. The court held that the claim was barred by the illegality principle.

157. The leading judgment was given by Longmore LJ. His reasoning was as follows:

i) The company's liability to the OFT was not a vicarious liability for the wrongful conduct of its directors or employees, because the Competition Act did not impose any liability on the directors or employees for which the company could be held vicariously responsible. The liability under the Act was imposed on the company itself, which acted (as any company must) through agents.

ii) The liability was therefore the "personal" liability of the company, so that its claim against the directors and employees was based on its own wrongdoing.

iii) Its claim was therefore barred by illegality.

iv) It was not open to the company to argue that it was a victim of the directors' and employees' misconduct, and to rely on the *Hampshire Land* principle, because the statutory scheme imposed responsibility on the company.

v) It was unnecessary to consider the position if the company's liability had been strict, because the OFT could only impose a penalty under the Competition Act if the infringement had been committed intentionally or negligently by the company.

158. If that reasoning is sound, it would support Mr Maclean's argument that the doctrine of illegality should apply in the present case, although this would have nothing to do with Bilta being a one-man company.

159. We disagree with the reasoning. We have been greatly helped by the analysis provided by Professor Watts in a characteristically lucid article, *Illegality and agency law: authorising illegal action* [2011] JBL 213.

160. Safeway's direct liability (or "personal" liability in the words of the Court of Appeal) under the Competition Act arose through the acts of its directors and employees as its agents, but should the company therefore be denied the right to hold its errant directors and employees to account? We agree with Professor Watts' proposition that

> "… it simply does not follow that because under the law of agency a principal becomes directly a party to an illegal agreement as a result of its agents' acts, it is thereby to be deprived of its rights under separate contracts, not otherwise illegal, with its employees and other agents to act in its interests and to exercise due care and skill. Indeed, it would not follow even if the 1998 Act *were* found to have invoked some sui juris concept of direct liability other than the law of agency.
>
> In the absence of some countervailing policy reason, it is not just for someone who falls foul of a statute by reason of the acts of its employees or other agents to add to its burdens and disabilities by depriving it of any recourse against those employees or other agents."

161. Unless there are special circumstances, the innocent shareholders should not be made to suffer twice. The reasoning in *Safeway*, if taken to its logical conclusion, would also mean that the company could not lawfully dismiss the errant employees or directors; for to rely on their misconduct would be to rely on its own misconduct, as Professor Watts has observed. It might be argued that unfair dismissal is different, but that could only be on public policy grounds.

162. Reference to public policy takes us to the only basis on which we consider that the decision of the Court of Appeal in *Safeway* may have been justified. Pill LJ considered that the policy of the Competition Act would be undermined if undertakings were able to pass on their liability to their employees. That may have been a sound reason for striking out Safeway's claims, and we express no view as to the merits of the decision. We accept that there may be circumstances where the nature of a statutory code, and the need to ensure its effectiveness, may provide a policy reason for not permitting a company to pursue a claim of the kind brought in *Safeway*.

163. In *Bowman v Secular Society Ltd* [1917] AC 406 the House of Lords established the principle that the illegality of a company's objects does not make its existence invalid in law. Put broadly, a company has the same power to act illegally as an individual. Lord Parker of Waddington also stated at 439:

> "[I]f the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorised by the memorandum."

164. That is a generalisation. It would be harsh on directors if the law were to impose strict liability, and to do so would exceed the general duties of directors set out in the Companies Act. But the reasoning of Longmore LJ would negate the company's right of recourse against the director who acted in breach of his fiduciary duty if his conduct as its agent was such as to give rise to a direct liability of the company to a third party. That would be inconsistent with the dictum of Lord Parker and contrary to ordinary principles of agency. As we have said, where the liability arises under a statute, there may in some circumstances be cause to conclude that the statutory scheme would be undermined by allowing the principal to enforce its ordinary right of recourse against its agent, but that would be a departure from ordinary rules of agency based on the specific nature of the statutory scheme and the requirements of public policy arising from it.

165. *Brink's Mat Ltd v Noye* [1991] 1 Bank LR 68 provides an illustration of the application of Lord Parker's dictum. The proceeds of the theft of gold bullion from a warehouse owned by the plaintiffs were laundered through the bank account of a company called Scadlynn Ltd with Barclays Bank. The directors and sole shareholders of Scadlynn were signatories of the account and drew cheques on it for cash totalling nearly £8m over four months. The plaintiffs sought to enforce rights which Scadlynn was said to possess against the bank in consequence of the payments out of its account. The issue before the Court of Appeal (Mustill and Nicholls LJJ and Sir Roualeyn Cumming-Bruce) was whether the pleading should be permitted. This raised the question, among others, whether it was open to Scadlynn to sue the bank in respect of withdrawals made or authorised by the company's sole directors and shareholders. The court held that there was no reason why Scadlynn, which was being put into compulsory liquidation, should be prevented from enforcing such a claim for the benefit of the creditors who would look to the assets for the satisfaction of their debts. Nicholls LJ described the existence of the directors' fiduciary duties to the company as a means by which the law sought to protect the company's creditors. In that context, Mustill LJ rightly described Scadlyn as being an intended victim of arrangements intended

dishonestly to deprive it of a large part of its assets and Nicholls LJ agreed with him.

166. Mr Maclean submitted that there was no scope for applying the *Hampshire Land* principle (so as not to attribute the directors' conduct to Bilta because they were acting in fraud of the company) in the circumstances that Bilta is a one-man company and in any event that Bilta's role in the fraud was that of villain and not victim. The argument proceeds on the false premise that Bilta's role must be characterised in the same way both as between Bilta and HMRC and as between the company and its directors; and that the attribution of the fraud to the company for the first purpose applies equally when considering the second. We do not consider the question of attribution to be the real issue in this case. The real issue is simpler: whether it is contrary to public policy that the company, through the liquidators, should enforce for the benefit of its creditors the duty which the directors owed for the protection of the creditors' interests as part of their fiduciary duty to the company. In this respect we echo Lord Phillips' observation in *Stone & Rolls* (para 67) that the real issue was not whether the fraud should be attributed to the company, but whether *ex turpi causa* should defeat the company's claim for breach of the auditors' duty. This, as he said, depends critically on whether the scope of that duty extends to protecting those for whose benefit the claim was brought. The answer to that question in the present case is clear. The directors' fiduciary duty to the company did extend to protecting the interests of those for whose benefit the claim is brought. However, because the issue of attribution loomed large in the course of argument (as it did in *Stone & Rolls*), and because the topic has caused a fair amount of confusion, we address it below in the hope of providing some clarification.

167. Mr Maclean further submitted that Bilta's claims fall within the illegality principle because the claims are inextricably linked with, and it is relying on, its own dishonest actions. The flaw in this argument is that when a company is insolvent or on the border of insolvency its interests are not equated solely with the proprietary interests of its owners. Company law requires that the interests of creditors receive proper consideration by the shareholders and directors. Although the creditors are not shareholders, as creditors they are recognised at that point as having a form of stakeholding in, or being a constituency of, the company which is under the management of the directors, and their interests are to be protected at law through the directors' fiduciary duty to the company, which encompasses proper regard for the creditors' interests. It is therefore misleading to say that when the company, through the liquidators, brings an action against the directors for breach of that duty, the company (whose interests *ex hypothesi* include the interests of those for whose benefit the duty is owed and the action is brought) is claiming in respect of "its" dishonest actions.

168. The argument about reliance harks back to *Tinsley v Milligan*. We have referred (at para 138) to Lord Phillips' treatment of that case in *Stone & Rolls* and to his statement that whether *ex turpi causa* should apply should depend on whether the public policy underlying it required its application. *Tinsley v Milligan* sparked a debate which has continued ever since then. This is not surprising because the judges in that case themselves considered the law to be very unsatisfactory, but they were of the opinion that it was beyond judicial reform, although it was based on public interest and was a common law doctrine. Lord Goff referred to the New Zealand Illegal Contracts Act 1970, which provides that the court may deal with an illegal contract "howsoever as the court in its discretion thinks just". He suggested that there should be a full inquiry, and said that he would be more than happy if a new system could be evolved which was satisfactory in its effect and capable of avoiding indiscriminate results.

169. The Law Commission studied the subject over many years with wide consultation. It did not recommend that the court should have an open ended discretion. However, it agreed with the great majority of consultees and commentators that the law was in an unsatisfactory state if, in the words of Lord Browne-Wilkinson in *Tinsley v Milligan*, "The effect of illegality is not substantive but procedural". The objections were well expressed by McHugh J in the High Court of Australia in *Nelson v Nelson* (1995) 184 CLR 538, 609 (and many others have written or spoken in similar vein):

> "The [reliance] rule has no regard to the legal and equitable rights of the parties, the merits of the case, the effect of the transaction in undermining the policy of the relevant legislation or the question whether the sanctions imposed by the legislation sufficiently protect the purpose of the legislation. Regard is had only to the procedural issue; and it is that issue and not the policy of the legislation or the merits of the parties which determines the outcome. Basing the grant of legal remedies on an essentially procedural criterion which has nothing to do with the equitable positions of the parties or the policy of the legislation is unsatisfactory, particularly when implementing a doctrine which is founded on public policy."

The Law Commission did not recommend that the solution should be statutory. Its reason or primary reason was not the difficulty of obtaining Parliamentary time for law reform, although that has been a serious problem. Its study of various possible legislative models did not result in it finding an altogether satisfactory version, but there also appeared to the Commission to be signs of fresh judicial thinking since *Tinsley v Milligan*. It considered that judicial reform was the best way forward and it made recommendations to

that end. The Commission suggested that it was within the power of the courts to develop the law in a way which was neither simply discretionary nor arbitrary and indiscriminate, but which had regard to the underlying public policies, and its recommendations were intended to assist the courts in that direction.

170. In *Gray v Thames Trains Ltd* [2009] AC 1339, para 30, Lord Hoffmann said that the doctrine is founded not on a single rationale but number of policy objectives. His observation was echoed by Lord Phillips in *Stone & Rolls* (at para 25). We have given our reasons for saying that application of the doctrine in the present context would undermine the purpose and relevant provisions of the Companies Act for the protection of the creditors of insolvent companies through the duty imposed on the directors towards the company.

171. There may be cases which are less clear cut where there are public policy arguments which pull in opposite directions. *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 was such a case. The claimant was a victim of unlawful discrimination occurring within the context of a contract of employment, which was contrary to the terms on which the claimant had been permitted to enter the United Kingdom. Lord Wilson, giving the judgment of the majority, adopted Lord Phillips' statement in *Stone & Rolls* that the reliance test was not to be applied automatically but that it was necessary to consider the policy underlying *ex turpi causa* in order to decide whether it should defeat the claim. He referred next to the test of inextricable link and said that he would conclude that the link was missing. But he did not consider that to be the determining question for reasons which he set out in the critical part of his judgment under the heading "Public policy". He said (para 42):

> "The defence of illegality rests upon the foundation of public policy … 'Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification': *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?'"

172. Lord Wilson examined what, if any, considerations of public policy underlying the doctrine of illegality, in particular the importance of preserving the integrity of the legal system (highlighted by McLachlin J in

Hall v Hebert [1993] 2 SCR 159), militated in favour of applying the defence to defeat Miss Hounga's claim, and he judged them scarcely to exist. He considered next the second question which he had posed in para 42. He concluded that there was an important aspect of public policy to which application of the defence would run counter, namely the protection of victims of trafficking, about which the United Kingdom was party to a European Convention. Lord Wilson described as fanciful the idea that an award of compensation to the claimant would give the appearance of encouraging others to enter into illegal contracts of employment, whereas its refusal might engender a belief among employers that they could discriminate against such employees with impunity (para 44), and he said that to uphold the defence of illegality would run strikingly counter to the prominent strain of current public policy against trafficking and in favour of protection of its victims (para 52). He concluded his judgment by saying:

> "The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront."

173. Lord Sumption says that the illegality defence is not dependent on a judicial value judgment about the balance of the equities in each case, and he cites *Tinsley v Milligan* and *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55 [2014] 3 WLR 1257. In *Tinsley v Milligan* the House of Lords disapproved the "public conscience" test which had been developed by the Court of Appeal. But that decision did not preclude this court from adopting the approach in *Hounga v Allen* set out above at para 129 above. Lord Wilson's statement was one of principle. It was made after a review of the authorities in which Lord Wilson referred to the rejection of the public conscience test in *Tinsley v Milligan* (para 28). Lord Wilson's statement was part of the ratio decidendi in *Hounga v Allen* because it formed the foundation for the conclusion in the final paragraph of the judgment, to which we have referred at para 174. It is not the court's practice consciously to depart from an earlier decision of the House of Lords or Supreme Court without saying so. No member of the court in *Les Laboratoires Servier* suggested that the court's approach in *Hounga v Allen* had been wrong. The issue in *Les Laboratoires Servier* was whether the doctrine of illegality should be expanded beyond the reach of previous authorities to include a tort of strict liability. The decision is not inconsistent with ratio of *Hounga v Allen*. Some of the dicta are in a different direction from *Hounga v Allen* but that is not a sufficient reason to conclude that the majority consciously meant to disapprove the approach in *Hounga v Allen*. Since the hearing of the appeal, the Court of Appeal has considered *Hounga v Allen* and *Les Laboratoires Servier* in *R (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17. Sales LJ, with whom McCombe LJ agreed, analysed them at paras 51 to 61 and

adopted the analytical framework of Lord Wilson in weighing the considerations of public policy in favour of and against applying the ex turpi causa defence in the particular circumstances. He did not consider *Les Laboratoires Servier* to be incompatible with that approach and he applied Lord Wilson's guidance at para 70 and following. Arden LJ dissociated herself from the reliance on *Hounga v Allen* by the majority (paras 111 to 112). The analysis of Sales LJ accords with our views.

174. The Law Commission's report has been considered in some detail by the Court of Appeal on two occasions, *Les Laboratoires Servier* and *Parkingeye Ltd v Somerfield Stores Ltd* [2013] 1 QB 840. In a chapter in "English and European Perspectives on Contract and Commercial Law: Essays in honour of Hugh Beale", Professor Andrew Burrows, writing before the decision of this court in *Les Laboratoires Servier* commended these decisions as an example of the work of the Commission helping to influence judicial law reform. The report has not so far been considered in any detail by this court, nor has this court been invited to review the decision in *Tinsley v Milligan*. The differences between Lord Sumption and us suggest to us that there is a pressing need for both. In any future review the court would undoubtedly wish to examine the law in other countries and particularly the judgments of the High Court of Australia in *Nelson v Nelson*, all of which merit reading.

Conspiracy

175. For the reasons explained we have concentrated on the claim against the directors for breach of fiduciary duty, which the appellants are said dishonestly to have assisted. It is difficult to see that the claim for conspiracy adds anything. Mr Maclean argued that the real conspiracy was to injure HMRC and that it is artificial to regard there as having been a conspiracy against Bilta, when it was in truth nothing more than a vehicle for defrauding HMRC. It may be that Bilta will fail to establish the conspiracy alleged, but the merits of that argument are not fit for determination on a summary application. Bilta has a triable case, and the only issue before the court is whether it must fail for illegality. In that respect the appellants are on no stronger ground in relation to conspiracy than in relation to the breach of fiduciary duty relied on as the unlawful means. It is perhaps worth observing that in *Berg Sons & Co Ltd v Adams* Hobhouse J noted that there was no allegation of conspiracy by the accountants and Mr Golechha to defraud the company (p 1066), implying that this would have made a potential difference. In this case there is an allegation of conspiracy between the directors and others to defraud the company. It does not alter the analysis to say that the aim of the dishonest director shareholders was to make a dishonest profit for themselves and their accomplices at the expense of HMRC, for this itself

involved a breach of fiduciary duty towards Bilta (representing the interests of its creditors) and the intentional causation of loss to Bilta.

Loss

176. Mr Maclean submitted that Bilta suffered no loss since it began life with negligible assets and never acquired any lawful assets, so it had none to lose. He relied on an obiter dictum of Lord Phillips to similar effect in *Stone & Rolls* (para 5), but Lord Mance observed (para 231) that to cause a deficit to a company making it insolvent is to cause it loss. Lord Phillips described his own remark as an initial impression and it was no part of his reasoning.

177. In *Brink's Mat Ltd v Noye* one of the arguments advanced by the bank was that Scalynn suffered no loss because it never had any property of its own and held the proceeds of the bullion on trust. The argument was dismissed. Nicholls LJ observed that a director was as much in breach of fiduciary duties which he owed to the company if he misappropriated property of which the company was a trustee as if he misappropriated property belonging beneficially to the company.

178. A company's profit and loss account and its balance sheet may be positive or negative. When the directors caused Bilta to incur VAT liabilities, and simultaneously caused it to misapply money which should have been paid to HMRC, leaving the company with large liabilities and no means of paying them, the directors caused it to suffer a recognisable form of loss.

Circuity

179. The appellants also submit that if Bilta is entitled to a remedy against Jetivia because it conspired with Bilta's directors, so also is Jetivia entitled to claim against Bilta for conspiring with Mr Brunschweiler against it. There is, it is submitted, circuity of action. In our view Jetivia will be liable only if it is established that it knowingly assisted in the fraud against Bilta, which would result from Mr Brunschweiler's knowledge and actions being attributed to it. We discuss attribution below. If the fraud against HMRC was designed to benefit Jetivia and the other overseas suppliers, we see no reason why there should not be such attribution and doubt if Jetivia would have a claim against Bilta. But, as Lord Sumption states, the facts relevant to this issue have not been pleaded.

Attribution

180. The issue of attribution arises in the context that Mr Nazir and Mr Chopra were the only directors of the company and Mr Chopra was its sole shareholder. Bilta in its amended particulars of claim (at para 42) referred to them as its "directing mind and will". While there is a role in our law for the concept of the directing mind and will of a company, it is important to analyse that role and in particular to avoid the dangers of ascribing human attributes to a non-natural person such as a company.

181. In most circumstances the acts and state of mind of its directors and agents can be attributed to a company by applying the rules of the law of agency. It has become common to speak of "the *Hampshire Land* principle" or the "fraud exception" as the exception to an otherwise general rule that attribution occurs. It is our view that "the fraud exception" is not confined to fraud but is simply an instance of a wider principle that whether an act or a state of mind is to be attributed to a company depends upon the context in which the question arises. "The fraud exception", applied to prevent an agent from pleading his own breach of duty in order to bar his principal's claim against him, is the classic example of non-attribution. But it is not the only one.

182. We set out our conclusions on the importance of context to the process of attribution in paragraphs 202–209 below. Before then, we examine the case law which has led us to those conclusions.

183. The starting point in an analysis of attribution is the recognition of the separate personality of the company, which the House of Lords recognised long ago in *Salomon v Salomon & Co Ltd* [1897] AC 22 and which this court recently confirmed in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415. A company, the creation of law, is, in Lord Halsbury's words (*Salomon* at p 33), "a real thing" and has a legal existence even if it is controlled by one person. Because the company is not a natural person it can operate only by the acts of its officers, employees and agents. In *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471, Lord Cranworth LC stated:

> "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can act only by agents."

Similar statements about the necessity of agency can be found in *Ferguson v Wilson* (1866) LR 2 Ch App 77 (Cairns LJ at p 89) and *Citizen's Life Assurance Co Ltd v Brown* [1904] AC 423, (Lord Lindley at p 426).

184. While a company cannot act but through the agency of others, it can incur obligations and have rights; and directors, including a sole director who is also the sole shareholder of a company, owe it the general duties set out in sections 171 to 177 of the Companies Act 2006. The company can also incur liability to a third party because the law holds it responsible for the tortious acts and omissions of an employee.

185. Lord Diplock stated the principles in a contractual context in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848:

> "My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, ie companies, that the parties promise to one another that something will be done. … Such a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done ...
>
> Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from 'vicarious liability' – a legal concept which does depend upon the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it. In the interests of clarity the expression should, in my view, be confined to liability for tort."

186. Such vicarious liability is indirect liability; it does not involve the attribution of the employee's act to the company. It entails holding that the employee has committed a breach of a tortious duty owed by himself, and that the

company as his employer is additionally answerable for the employee's tortious act or omission.

187. A company can incur direct liability in at least three circumstances. First, the provisions of company legislation, a company's constitution (its articles of association, including provisions of a company's memorandum of association now deemed to be provisions of its articles by section 28 of the Companies Act 2006 ("the 2006 Act")) and the non-statutory rules of company law provide that certain acts of its board of directors are treated as the acts of the company. For example, in the Companies (Model Articles) Regulations 2008 (SI 2008/3229) Schedule 3, article 3 provides that "[s]ubject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company". Similarly, certain resolutions of the shareholders in general meeting are treated as the acts of the company. Further, the non-statutory "consent principle", that shareholders who have a right to vote may by unanimous agreement bind the company in a matter in which they had power to do so by passing a resolution at a general meeting (*In re Duomatic Ltd* [1969] 2 Ch 365), is preserved by section 281(6) of the 2006 Act.

188. Secondly, a company can also incur direct liability through the transactions of agents within the scope of their agency (actual or apparent). Thus, when an agent commits his or her company to a contract, the company incurs direct liabilities (and acquires rights) as a party to the contract under ordinary principles of the law of agency.

189. Thirdly, a statute or subordinate legislation or a regulatory body's code or rules of the common law or equity may impose liabilities or confer rights on a company. For example, a company as a legal entity is owed by its directors the general duties set out in sections 171 to 176 of the Companies Act even when the controlling director is also the sole shareholder.

190. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, Lord Hoffmann (at p 506) pointed out that it is a necessary part of corporate personality that there should be rules by which acts are attributed to the company. First, he identified the "primary rules of attribution" from company law, which is the first of the direct forms of liability which we describe above. He then referred to the general principles of agency and vicarious liability which in most circumstances determine a company's rights and obligations (p 507B). He recognised that there was a third category where, exceptionally, a rule of law expressly or impliedly excludes attribution on the basis of those general principles. For this third category, which is relevant to the third form of direct liability (above), he

stated: "the court must fashion a special rule of attribution for the particular substantive rule". He described the fashioning of that special rule of attribution in these terms (p 507E-F):

> "This is always a matter of interpretation: given that it is intended to apply to a company, how is it intended to apply? Whose act (or knowledge or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

191. The relevance of the context in which the question is asked – "Is X's conduct or state of mind to be treated as the conduct or state of mind of the company for the purpose in hand?" – is not limited to Lord Hoffmann's third category. The legal context, ie the nature and subject matter of the relevant rule and duty, is always relevant to that question. In *Bowstead & Reynolds on Agency* (20th ed 2014) Professor Peter Watts and Professor Francis Reynolds stated (at para 8-213):

> "Before imputation occurs there needs to be some purpose for deeming the principal to know what the agent knows."

In the 19th ed the learned editors made the same point in the same paragraph thus:

> "The rules of imputation do not exist in a state of nature, such that some reason must be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed."

We agree; an analysis of the relevant case law supports that view in relation to each category of rules of attribution. We turn first to the special rules of attribution which Lord Hoffmann saw as providing the answer in exceptional cases when the other rules did not determine the company's rights and obligations.

192. Thus, in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, the Merchant Shipping Act 1894 excluded the liability of a ship-owner for loss or damage if it occurred "without his actual fault or privity". That phrase prevented the ship-owner incurring such liability vicariously. The

House of Lords treated the fault of Mr J M Lennard, who was a director of another company which managed the ship, was registered in the ship's register as the manager, and was also a director of the ship-owning company, as the fault of the latter company. Both Viscount Haldane LC and Lord Dunedin, who gave the only substantive speeches in the case saw the question as one of statutory construction which depended on the particular facts of the case. In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, the supermarket company was charged with an offence under the Trade Descriptions Act 1968. It pleaded a defence under section 24 of the Act namely (a) that the commission of the offence was due to the act or default of another person, in this case the manager of the store at which the misleading representations as to price had occurred, and (b) that it had taken all reasonable precautions to avoid the commission of such an offence. The House of Lords upheld that defence. Like the Divisional Court, the House of Lords treated the store manager as "another person" for the purpose of section 24 of the Act and focused on the question whether the task of taking reasonable precautions was that of the board of the company or was delegated to its store managers. It construed the statutory defence as allowing an employer who was personally blameless to escape liability and held that in this case the board of directors had not delegated their management functions to the shop managers. As a result Tesco established the statutory defence.

193. As in each case the court is engaged in the interpretation of a particular statute and in its application to particular facts, other statutory provisions have given rise to different approaches. Thus in *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037 the Divisional Court was concerned with the offence in section 11 of the Video Recordings Act 1984 of supplying a video recording to a person under the age specified in the classification certificate. The court rejected *Tesco's* statutory defence that it had neither known nor had reasonable grounds to believe that the purchaser was under 18. It distinguished *Tesco Supermarkets Ltd v Nattrass*, holding that the knowledge or information that the section 11(2) defence addressed was that of the employee who supplied the video film to the purchaser and not that of the company's senior management.

194. In *Attorney General's Reference (No 2 of 1982)* [1984] 1 QB 624, to which we referred in para 155 above, the Court of Appeal had to consider whether a person or persons who through shareholding and directorship had total control of a company were capable of stealing the property of the company. This involved, among other things, considering section 2(1)(b) of the Theft Act 1968 which provides that a person's appropriation of property is not regarded as dishonest "if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it". The Court of Appeal held that the company could not

be regarded as "the other" for the purpose of this provision because the mind and will of the defendants fell to be treated as the mind and will of the company. The defendants could be charged with theft of the company's property and their appropriate defence (if made out) would be that they appropriated the property in the honest belief that they had the right to deprive the company of it (section 2(1)(a)). Again, the court approached the question of attribution as one of statutory construction.

195. In *McNicholas Construction Co Ltd v Customs and Excise Commissioners* [2000] STC 553 Dyson J attributed to a main contractor the knowledge of its site managers that fraudulent invoices for sub-contract labour were being created, in circumstances in which the main contractor suffered no loss because it could claim input VAT but evaded income tax. Section 60 of the Value Added Tax Act 1994 imposes civil penalties on a person who dishonestly acts or omits to act for the purpose of evading VAT. Dyson J recorded that it was common ground in that case that the knowledge and dishonest acts of the site managers could be attributed to the main contractors only if a special rule of attribution, of which Lord Hoffmann had written in *Meridian*, could be applied. He stated (para 44):

> "The question in each case is whether attribution is required to promote the policy of the substantive rule, or (to put it negatively) whether, if attribution is denied, that policy will be frustrated."

He held (paras 48-49) that the statutory policy of discouraging the dishonest evasion of VAT would be frustrated if the knowledge of the employees of a company who had to play a part in the making and receiving of supplies, as well as those involved in its VAT arrangements, were not attributed to the employing company. Further, as the participants in the fraud had not intended to harm the interests of their employing company, there was no basis for excluding such attribution.

196. The Court of Appeal took a similar approach in *Morris v Bank of India*, [2005] 2 BCLC 328 which concerned a claim for fraudulent trading under section 213 of the Insolvency Act 1986. The court upheld Patten J's finding that the knowledge, which the general manager of Bank of India's London branch had of BCCI's fraud, was to be attributed to his employers for the purpose of section 213. In paras 156-162 above we discussed *Safeway Stores Ltd v Twigger*. What is relevant for present purposes is that the court in that case looked to the wording and policy of the relevant statute in order to determine whether the acts and the intention or negligence underlying those acts were to be attributed to the company.

197. It is not only in the field of statute that the court, when deciding whether to attribute another's act or state of mind to a company, has regard to the purpose of the rule of law which is in play. In the different context of a claim based on knowing receipt of the proceeds of a fraud, the Court of Appeal in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 had to consider whether the knowledge of an agent who was also the director of a company should be attributed to that company. Mr Ferdman, who was a non-executive director of Dollar Land, had made the arrangements by which Dollar Land acquired an interest in assets in which others had invested funds that they had earlier obtained by fraud. He had acted without the authority of a resolution by Dollar Land's board. Because Mr Ferdman managed and controlled the transactions, the court attributed his knowledge to the company, treating him as the directing mind and will of the company in relation to those transactions. The court recognised that different persons could be treated as the directing mind and will of a company for different purposes (Rose LJ at p 699h and Hoffmann LJ at p 706e). While a Mr Stern generally managed Dollar Land, Mr Ferdman was for the purpose of the receipt of the funds the company's mind and will, and on that basis his knowledge of the fraud was attributed to the company. The plaintiff's alternative basis of attribution on the ground of agency failed. We see force in the suggestion by the editors of *Bowstead & Reynolds on Agency* (at para 8.214) that the rules of agency could have resulted in imputation of knowledge in that case. But in the event the court decided otherwise. Thus the only basis on which Mr El Ajou succeeded was the attribution of Mr Ferdman's knowledge to the company based on the concept of a person being a company's directing mind and will in relation to a particular transaction. Similarly, although in that case it was not necessary to do so in order to establish Mr Tan's accessory liability for dishonest assistance of a breach of trust, the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (p 393B-C) attributed Mr Tan's objective dishonesty to the travel agency company which he controlled.

198. The courts have also had to consider questions of attribution of knowledge or actions in a contractual context such as that of an insurance policy. In that context the terms of the insurance policies are relevant and can be decisive as the court seeks to give effect to the intentions of the parties as expressed in their contract. In *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 Rix J addressed a professional indemnity policy which covered the legal liability of both a company which provided estate agency and valuation services and its directors. The assumed facts included the assertion that one of the directors, who was the managing director, had made a number of fraudulent valuations in the company's name. The plaintiffs obtained judgments against the company, which went into liquidation, and sought to enforce them against the insurance company under the Third Parties (Rights against Insurers) Act 1930. Zurich purported to avoid the policy on the basis

of the director's fraud. But the insurance policy included fidelity insurance which indemnified the company against liabilities resulting from the fraudulent acts of a director. Because he construed the policy as insuring the company and its directors as separate insureds, the logic of the policy was that the guilty knowledge and conduct of a director could not be attributed to the company for the purpose of giving effect to the insurance contract even if he were the directing mind and will of the company in relation to the particular transactions. He referred to Lord Hoffmann's analysis of a special rule of attribution which we have quoted in para 190 above, and held that in the context of the particular contract he was not prepared to find that the fraudulent director was the directing mind and will of the company (pp 278-279). In *Morris v Bank of India* [2005] 2 BCLC 328 the Court of Appeal (at paras 122-124) explained the *Arab Bank* case as a case which rested on the construction of the terms of the insurance contract.

199. In *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 ("*Belmont No 1*"), the Court of Appeal considered a claim by the receiver of an insolvent company ("A") that its shareholders and directors had dishonestly conspired to use A's funds to purchase shares in another company ("B") at an excessive price and thereby give unlawful financial assistance to the shareholders of B to purchase A's shares. The Court of Appeal held that the directors' knowledge that they were effecting an illegal transaction should not be imputed to A because the object of the conspiracy was improperly to deprive A of a large part of its assets. Buckley LJ (pp 261-262) explained the non-attribution on the basis that when an agent, who is acting in fraud of his principal, has knowledge which is relevant to the fraud, that knowledge is not imputed to the principal to defeat the company's claim against the conspirators (as to which rule see *Bowstead & Reynolds on Agency* 20th ed 2014 paras 8-207 (article 95 rule 4) and 8-213). When the case returned to the Court of Appeal after a retrial, (*Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 ("*Belmont No 2*")) the court's findings made clear that the transaction had been approved by resolution at a formal board meeting of A and completed at two further board meetings, including by the sealing by A of the share transfers of B's issued share capital (Buckley LJ at p 398G-H). Although the transaction was clearly subject to what Lord Hoffmann in the *Meridian Global Funds* case [1995] 2 AC 500 described as the primary rules of attribution, the knowledge which some of A's directors (Mr James and Mr Foley) had of the illegal transaction and their misfeasance was not attributed to A so as to bar its claim but was attributed to the defendant parent companies of which they were officers.

200. We think that the court would have reached the same conclusion in the *Belmont* case if it had approached the question of attribution on the basis that the board of directors of A was its "directing mind and will" because the

company was pursuing a claim against, among others, its directors for conspiracy. Were it otherwise a company could not vindicate its rights against its directors and those who assisted them or benefited from the conspiracy. This approach is consistent with the older case of *Gluckstein v Barnes* [1900] AC 240, in which the promoters of a company, who also comprised its entire board of directors, were aware of a secret profit which they made on the asset which they had sold to the company. The House of Lords looked at the question of disclosure in the context of the particular claim. The Earl of Halsbury LC thought that it was absurd to suggest that the knowledge of those who were hoodwinking the shareholders should be treated as disclosed to the company (p 247) and Lord Robertson (p 258) agreed, stating colourfully that "the boardroom was occupied by the enemy".

201. Finally, in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*, to which we have referred, the Court of Final Appeal of Hong Kong was concerned with a claim by way of judicial review by an insolvent company's liquidator to be entitled to object out of time to tax assessments and obtain repayment of the tax paid on the basis that its former management had fraudulently inflated its profits over several years. The company's entitlement to object out of time and also to claim repayment based on error in its tax returns depended on whether the company was attributed with its managers' knowledge of the fraud. The majority of the court held that the company was to be attributed with the knowledge of its management. In the leading judgment, which contained an admirable analysis of the law, Lord Walker of Gestingthorpe NPJ supported an approach to the attribution to a company of a director's knowledge in civil cases which had regard to the factual situation in which they arose and the purpose of the legal rules that were in play. See his summary (at para 129). He distinguished between:

(i) claims by the company against its directors or employees and their accomplices for loss which the company suffered as a result of their wrongdoing, where it was absurd to allow the directors or employees to rely on their own awareness of their wrongdoing and attribute it to the company as a defence against its claim, and

(ii) third party claims against a company for loss caused to the third party by the misconduct of a director or employee, where the dishonesty of the director or employee would not prevent his act and knowledge being attributed to the company.

202. It is clear from those cases that a finding that a person is for a specific purpose the "directing mind and will" of a company, when it is not merely descriptive, is the product of a process of attribution in which the court seeks to identify

the purpose of the statutory or common law rule or contractual provision which might require such attribution in order to give effect to that purpose. Similarly, when the question of attribution arises in the context of an agency relationship, the nature of the principal's or other party's claim is highly material as the learned editors of *Bowstead and Reynolds* discuss at para 8-213. Even when the primary rules of attribution apply, where the transaction is approved by the board of directors and completed under company seal as in *Belmont (No 2)*, the court will not attribute to a company its directors' or employees' knowledge of their own wrongdoing to defeat the company's claim against them and their associates. We agree with Lord Walker in *Moulin's* case when (at para 113) having discussed the Court of Appeal's judgment in this case he stated:

> "the crucial matter of context includes not only the factual and statutory background, but also the nature of the proceedings in which the question [of attribution] arises."

203. In our view, that applies to the knowledge of directors whether one applies the primary rules of attribution of the company's constitution (the cases of *Gluckstein v Barnes* and *Belmont (No 2)*), the rules of attribution of agency (*Belmont (No 1)*), or the special rules of attribution which Lord Hoffmann discussed in the *Meridian Global Funds* case. Where a company's liability is only vicarious, it is attributed with responsibility for the act of the other, usually the employee; but neither the other's act nor his or her state of mind is attributed to the company.

204. It is helpful in the civil sphere, to consider the attribution of knowledge to a company in three different contexts, namely (i) when a third party is pursuing a claim against the company arising from the misconduct of a director, employee or agent, (ii) when the company is pursuing a claim against a director or an employee for breach of duty or breach of contract, and (iii) when the company is pursuing a claim against a third party.

205. In the first case, where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant. In this context, the company is like the absent human owner of a business who leaves it to his managers to run the business, while he spends his days on the grouse moors (to borrow Staughton LJ's colourful metaphor in *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136, 1142). Where the rules of agency do not achieve that result, but the terms of a statute or contract are construed as imposing a direct liability which requires such attribution, the court can invoke the concept of the directing mind and will as

a special rule of attribution. Thus where the company incurs direct liability as a result of a wrongful act or omission of another (as in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* and *McNicholas Construction Co Ltd v Customs and Excise Comrs*) it is deemed a wrongdoer because of those acts or omissions. If it is only vicariously liable for its employee's tort, it is responsible for the act of the other without itself being deemed a wrongdoer and without the employee's state of mind being attributed to it.

206. In the second case, where the company pursues a claim against a director or employee for breach of duty, it would defeat the company's claim and negate the director's or employee's duty to the company if the act or the state of mind of the latter were to be attributed to the company and the company were thereby to be estopped from founding on the wrong. It would also run counter to sections 171 to 177 of the 2006 Act, which sets out the director's duties, for the act and state of mind of the defendant to be attributed to the company. This is so whether or not the company is insolvent. A company can be attributed with knowledge of a breach of duty when, acting within its powers and in accordance with section 239 of the 2006 Act, its members pass a resolution to ratify the conduct of the director. But, as this court discussed in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, para 41, shareholders of a solvent company do not have a free hand to treat a company's assets as their own. Further, as we have discussed, actual or impending insolvency will require the directors to consider the interests of the company's creditors when exercising their powers. This might prevent them from seeking such ratification. Similarly, where a company ratifies a breach of duty by an agent or employee, it must be attributed with the relevant knowledge. But otherwise, as the courts have recognised since at least *Gluckstein v Barnes* [1900] AC 240, it is absurd to attribute knowledge to the company and so defeat its claim.

207. In the third case, where the company claims against a third party, whether or not there is attribution of the director's or employee's act or state of mind depends on the nature of the claim. For example, if the company were claiming under an insurance policy, the knowledge of the board or a director or employee or agent could readily be attributed to the company in accordance with the normal rules of agency if there had been a failure to disclose a material fact. But if the claim by the company, for example for conspiracy, dishonest assistance or knowing receipt, arose from the involvement of a third party as an accessory to a breach of fiduciary duty by a director, there is no good policy reason to attribute to the company the act or the state of mind of the director who was in breach of his fiduciary duty. If the company chose not to sue the director who was in breach of his duty, the third party defendant could seek a contribution from him or her under the Civil Liability (Contribution) Act 1978. We have set out above why we

consider that the defence of illegality is not available to a company's directors or their associates who are involved in a conspiracy against the company or otherwise act as accessories to the directors' breach of duty. Equally, there is no basis for attributing knowledge of such behaviour to the company to found an estoppel.

208. In the present case Patten LJ rightly stated that attribution of the conduct of an agent so as to create liability on the part of the company depends very much on the context in which the issue arises. He said that as between the company and the defrauded third party, the company should be treated as a perpetrator of the fraud; but that in the different context of a claim between the company and the directors, the defaulting directors should not be able to rely on their own breach of duty to defeat the operation of the provisions of the Companies Act in cases where those provisions were intended to protect the company (paras 34 and 35).

209. We agree. Accordingly, if, contrary to our view, the doctrine of illegality were insensitive to context and to competing aspects of public policy, the rules of attribution would achieve the same result and preserve Bilta's claim.

Insolvency Act 1986 section 213

210. The appellants' second challenge is that the court's powers under section 213 of IA 1986 do not extend to people and corporations resident outside any of the jurisdictions of the United Kingdom.

211. Section 213 of IA 1986 provides:

> "(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.
>
> (2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

212. The appellants accept that the English courts have jurisdiction *in personam*. Their challenge is to the court's subject matter jurisdiction as discussed by Hoffmann J in *MacKinnon v Donaldson, Lufkin and Jenrette Securities Corpn* [1986] 1 Ch 482, 493 and Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd and Others (No 2)* [2008] 2 All ER (Comm) 1099, paras 30 and 31. It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary (*Ex p Blain* (1879) 12 Ch D 522, James LJ at p 526). That principle has evolved into a question of interpreting the particular statute (*Clark v Oceanic Containers Inc* [1983] 2 AC 130, Lord Scarman at p 145, Lord Wilberforce at p 152; *Masri v Consolidated Contractors (UK) Ltd and others (No 4)* [2010] 1 AC 90, Lord Mance at para 10; and *Cox v Ergo Versicherung* [2014] AC 1379, Lord Sumption at paras 27-29). In *Cox* Lord Sumption suggested that an intention to give a statute extra-territorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect (para 29).

213. In our view section 213 has extra-territorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding up order is worldwide (*Stichting Shell Pensioenfonds v Krys* [2015] 2 WLR 289 at paras 34 and 38). The section provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business.

214. In our view the Court of Appeal reached the correct decision in *In re Paramount Airways Ltd* [1993] Ch 223, in which it held that the court had jurisdiction under section 238 of IA 1986 (which empowers the court to make orders against any person to reverse transactions at an undervalue) to make an order against a foreigner resident abroad. Sir Donald Nicholls V-C expressed the view (p 239D-E) that Parliament did not intend to impose any limitation on the expression "any person" in sections 238 and 239 of IA 1986 and that it must be left to bear its literal, natural meaning. We reach the same conclusion in relation to the use of that expression in section 213 for essentially the same reasons. The section, like sections 238 and 239 and also section 133 (which concerns the public examination of persons responsible for the formation and running of a British company) share the statutory context of the winding up of a British company. The Court of Appeal considered section 133 in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. Peter Gibson J, who produced the leading judgment, expressed the views (a) that Parliament could not have intended that a person who had been responsible for the state of affairs of an insolvent British company should escape liability to be investigated simply because he was not within the jurisdiction (p 354G-H) and (b) that reasons of international comity would not prevent the summoning for public examination of a person who had participated in the running of a British company (p 356E). Hirst LJ said (p 360G-H) that the process of investigating why a company had failed would be frustrated if a non-resident director were immune from public examination. Again, that reasoning is in our view both correct and equally applicable to section 213.

215. The appellants argued that it was wrong that they should be required to defend themselves against a claim when it would only be after the substantive hearing that the court could decide whether to exercise its jurisdiction on the basis that the defendants were sufficiently connected with England. We do not agree. While the court which hears the claim will have to decide whether in all the circumstances the appellants are sufficiently connected with England, we think that the respondents have a good arguable case that they are. The substance of the section 213 allegation is that the appellants were party to a conspiracy to defraud Bilta in the context of a wider VAT fraud, that they were parties to the conduct of Bilta's business to that end, and that Jetivia obtained the proceeds of that fraud. If Bilta's liquidators establish those allegations after trial, we think it is likely that the court would decide to exercise its jurisdiction under section 213 of IA 1986 against the appellants, their foreign residence notwithstanding.

216. Bilta's liquidators also asserted that the English courts had jurisdiction by virtue of article 3(1) Council Regulation 1346/2000 on insolvency proceedings ("the European Insolvency Regulation"). It provides:

> "The courts of the member state within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

217. In *Schmid v Hertel* (Case C-328/12) [2014] 1 WLR 633, the Court of Justice of the European Union ("CJEU") held (a) that article 3(1) conferred international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them (para 30) and (b) that the court of the relevant Member State had jurisdiction to hear and determine an action to set aside a transaction by virtue of insolvency that is brought against a person who is not resident in the territory of a Member State (para 39). Thus, Bilta's liquidators submitted, the European Insolvency Regulation, so interpreted, conferred jurisdiction against both appellants. On the other hand, the appellants submitted that the question whether the territorial reach of section 213 of IA 1986 was worldwide was now governed by the European Insolvency Regulation, whose natural meaning was that it related to relationships between Member States and not with third party states. Mr Maclean said that the decision in *Schmid* was controversial and suggested that there should be a reference to the CJEU to determine whether the section 213 proceedings were covered by the European Insolvency Regulation.

218. We do not think that it is necessary to rely on the European Insolvency Regulation as the Court of Justice has interpreted it in *Schmid* in order to determine whether there is subject matter jurisdiction against Jetivia. If the proceedings against Jetivia were not covered by the Regulation, there is a basis for the exercise of subject matter jurisdiction in our domestic law, as we have discussed above. There is therefore no need for a reference to the CJEU.

Conclusion

219. We therefore would dismiss the appeal.