# Fraudulent Directors and the Impact on Companies: Victims or Wrongdoers?

*by* ALAN SHEELEY & MEHMET KARAGÖZ*

## ABSTRACT

*This article provides an analysis of the recent UK Supreme Court decision in Jetivia SA and another v. Bilta (UK) Ltd (in liquidation) and others in which it was decided that a company can pursue its claim against its directors for a breach of duty and that it will not be prevented from doing so by the illegality defence (ex turpi causa non oritur actio) on the basis that the knowledge of the directors is not attributed to the company. Furthermore, the Supreme Court decided that section 213 of the Insolvency Act 1986 (fraudulent trading) has extra-territorial effect. In addition to this, the Supreme Court identified that the proper approach to the illegality defence needs to be reviewed by the Supreme Court as soon as appropriately possible. However, the illegality defence was considered to some extent in the judgment.*

## I. INTRODUCTION

The UK Supreme Court's recent decision in the case of *Jetivia SA and another v. Bilta (UK) Ltd (in liquidation) and others*[1] is likely to see considerable debate around the application of the principle of the illegality defence and the rules of attribution. The facts of the case required the Justices to consider: (i) the purpose of the illegality defence (*ex turpi causa non oritur actio*) and the circumstances in which knowledge of directors is attributed to a company, (ii) whether a company can pursue its directors for breaches of duty towards the company where such breaches deprive the company of its assets, and (iii) the extra-territorial effect of section 213 of the Insolvency Act 1986 (fraudulent trading). This article aims to analyse the case and explore the reasoning adopted by the Justices in reaching their respective conclusions.

## II. THE FACTS

Bilta (UK) Limited (Bilta) is a company incorporated in England and registered for the purposes of VAT. The company was compulsorily wound up in November 2009 pursuant to a petition presented by HMRC. The liquidators of Bilta brought proceedings against,

* Alan Sheeley is a Partner at Pinsent Masons LLP where he heads the firm's Civil Fraud and Asset Recovery Team. He is an expert on advising on both foreign and domestic commercial frauds. He has acted on cases involving breach of fiduciary duties and trust, breach of directors' duties, fraudulent misrepresentations, employee fraud, deceit and conspiracy. He has also advised extensively and obtained numerous worldwide freezing orders and disclosure orders involving various jurisdictions. Mehmet Karagöz is a solicitor in the Pinsent Masons LLP London Civil Fraud and Asset Recovery Team. He has advised on both foreign and domestic commercial frauds and has successfully obtained numerous freezing injunctions against both individuals and companies. He has also obtained disclosure orders against third parties including financial institutions and email providers.

1 [2015] UKSC 23; [2015] 2 WLR 1168.

inter alia, its two former directors, Mr Nazir and Mr Chopra. Mr Chopra was also the sole shareholder of Bilta. The claim was also brought against Jetivia SA, a Swiss company, and its chief executive, Mr Brunschweiler, who is resident in France. The claim alleged that Mr Nazir and Mr Chopra breached their fiduciary duties as directors of Bilta and that Jetivia SA and Mr Brunschweiler dishonestly assisted them in doing so. The claim also alleged that Mr Nazir, Mr Chopra, Jetivia SA and Mr Brunschweiler were parties to an unlawful means conspiracy to injure Bilta by a fraudulent scheme.

The conspiracy alleged was that between April 2009 and July 2009, Mr Nazir and Mr Chopra caused Bilta to enter into a series of transactions relating to European Emissions Trading Scheme Allowances (known as carbon credits) with various parties, including Jetivia SA. It was alleged that those transactions constituted what is known as a 'carousel fraud'[2]. Bilta made no profit on the transactions. Furthermore, it never received or retained the proceeds of sale as they were paid away to overseas traders. The effect of the fraud was that Bilta was deprived of its ability to meet its VAT obligations on the trades. Its liability for VAT on the transactions amounted to over £38 million.

Jetivia SA and Mr Brunschweiler, (the Appellants), applied to strike out Bilta's claim on the basis that: (i) the Appellants were bound to defeat the claims against them on the basis of a defence of illegality (*ex turpi causa non oritur actio*) and, (ii) that section 213 of the Insolvency Act 1986 did not have extra-territorial effect. The application was dismissed by Sir Andrew Morritt C,[3] whose decision was upheld by the Court of Appeal.[4] Before analysing the decision of the Supreme Court, it will be helpful to briefly consider the illegality defence and the rules of attribution.

## III. ILLEGALITY DEFENCE – *EX TURPI CAUSA NON ORITUR ACTIO*

The illegality defence prevents the claimant from grounding its claim on its own illegal acts. It is based on a rule of public policy. As explained in *Chitty on Contracts*:

> 'The benefit of the public, and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract.'[5]

Any discussions relating to the illegality defence often begins with the statement of

2 The fraud involves a company (the importer) obtaining a UK VAT registration and (a) purchasing goods from a company outside of the UK but within the European Union and importing them to the UK (without VAT being charged as it is a cross border transaction within the European Union), and (b) selling the goods to a VAT registered UK company (at a higher, VAT inclusive price). The VAT, in an honest trade, should ordinarily be retained by the importer and paid to HMRC. However, in a carousel fraud, the importer often disappears without paying the VAT to HMRC. The purchaser within the UK is often known as a 'buffer'. A carousel fraud usually involves several buffers which has the effect of putting distance between the importer and the ultimate exporter. The goods are subsequently exported to another European Union member state without VAT being charged which allows the exporter to reclaim the VAT from HMRC. This is the VAT the exporter paid to its supplier when purchasing the goods. This can be repeated many times, often with the same goods going round in a 'carousel'. HMRC will often only become aware of the fraud (usually some months later) when the importer fails to account for the VAT it charged on the first sale to the VAT registered UK company (i.e. the buffer) and disappears; as will the exporter with the VAT it has reclaimed from HMRC.

3 [2012] EWHC 2163 (Ch); ); [2013] 2 W.L.R. 825.

4 [2013] EWCA Civ 968; ; [2014] Ch. 52. Lord Dyson MR, Rimer and Patten LJJ.

5 J. Chitty & H. G Beale, *Chitty On Contracts*, 31st Edition (London: Sweet & Maxwell, 2013), Chapter 16, 16-007.

Lord Mansfield CJ in *Holman v. Johnson:*

> '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*.'[6]

## IV. ATTRIBUTION

A company is a legal entity wholly separate from its members with rights and liabilities of its own. This was recognised by the House of Lords in *Salomon v. Salomon & Co Ltd*[7] and recently confirmed by the Supreme Court in *Prest v. Petrodel Resources Ltd:*

> 'Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company.'[8]

As the company is a separate legal entity, and is not a natural person, it operates through the acts of its directors and agents. Ordinarily, the acts and state of mind of the company's directors and agents are attributed to the company by applying the rules of the law of agency.

## V. THE SUPREME COURT'S DECISION

The Supreme Court unanimously dismissed the appeal of the Appellants in relation to both the illegality defence and the application of section 213 of the Insolvency Act 1986. It was held that the illegality defence could not operate to bar Bilta's claims against the Appellants. This was on the basis that the conduct of the directors could not be attributed to the company in the context of a claim against the directors for a breach of their duties. It was also held that section 213 of the Insolvency Act 1986 had extra territorial effect.

## VI. ATTRIBUTION ANALYSIS

Lord Neuberger (with whom Lord Clarke and Lord Carnwath agreed) summarised, what he believed to be, the conclusion of all the Justices on the question of attribution:

> '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,

6 (1775) 1 Cowp 341, 343.

7 [1897] AC 22.

8 [2013] 2 AC 415 per Lord Sumption at para. 8.

> and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.'[9]

Lord Mance explained that the key to any question of attribution is found in considerations of context and purpose. He referred to the comments of Lord Hoffman in the Privy Council decision of *Meridian Global Funds Management Asia Ltd v. Securities Commission,*[10] and stated:

> '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?'[11]

He went on to explain that the acts, knowledge and state of mind of the company need to be separated from its officers.[12] This was even so where an officer is the directing mind and will of the company or the sole shareholder of the company. This approach is of course consistent with the separate legal identity of the company. As Lord Mance identified:

> '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.'[13]

Bilta was a victim of the wrongdoing of its directors. Those same directors (or third party accomplices) could not subsequently attribute the directors' knowledge and actions of wrongdoing on Bilta so as to be able to raise and rely on a defence of illegality. To allow the directors (or third party accomplices) to be able to rely on the illegality defence in these circumstances is inequitable and unjustifiable.

Lord Mance went on to explain that in the context of claims by third parties against the company as a result of a director's breach of duty, the director's acts and state of mind are attributable to the company. This approach is also consistent with the comments of Patten LJ in the Court of Appeal,[14] with which Lord Toulson and Lord Hodge expressly agreed.[15] Patten LJ identified that attribution depended on the context in which the issue arose. He went onto explain that the company would not be treated as a victim in the context of a claim by a third party:

> '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

9 [2015] UKSC 23 para. 7.

10 [1995] 2 AC 500.

11 [2015] UKSC 23 para. 41.

12 [2015] UKSC 23 para. 42.

13 [2015] UKSC 23 para. 38.

14 [2013] EWCA Civ 968.

15 [2015] UKSC 23 paras 208 and 209.

the loss which the company will suffer through the actions of its own directors.'[16]

However, the company would be treated as a victim in the context of a claim by the company against the director who has breached his or her duty. This was the case regardless of whether the wrongdoing of the director was aimed at a third party or the company itself. In both cases there is deemed to be a breach of fiduciary duty:

> 'But, in a different context, the position of the company as victim ought to be paramount ... 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 on 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.'[17]

The position was succinctly summarised by Lord Mance:

> 'In other words, it can rely on attribution for one purpose, but disclaim attribution for another.'[18]

Lord Neuberger, in agreement with Lord Mance's analysis, summarised the position of attribution; it depended on the nature and factual context of the claim in question.[19] Lord Sumption identified that the attribution of legal responsibility for the act of an agent 'depends on the purpose for which attribution is relevant.'[20] Lord Toulson and Lord Hodge explained 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'[21] and that in the context of an agency relationship 'the nature of the principal's or other party's claim is highly material...'.[22]

The Supreme Court also briefly discussed what has commonly been known as the 'fraud exception' or the 'Hampshire Land principle' (in reference to the judgment of Williams J in *In re Hampshire Land)*.[23] The principle is an exception to the general rules of attribution and it applies in certain circumstances to prevent the knowledge of the agent from being attributed to the principal when the agent commits a fraud (or indeed breach of duty). As summarised by Lord Phillips in *Stone & Rolls Ltd*:

> 'The rationale for Hampshire Land has been said to be that it is contrary to common sense and justice to attribute to a principal knowledge of something that his agent would be anxious to conceal from him.'[24]

16 [2013] EWCA Civ 968 para. 34.

17 [2013] EWCA Civ 968 para.35.

18 [2015] UKSC 23 para.43.

19 [2015] UKSC 23 para. 9.

20 [2015] UKSC 23 para. 92.

21 [2015] UKSC 23 para. 181.

22 [2015] UKSC 23 para. 202.

23 [1896] 2 Ch 743.

24 *Stone & Rolls Ltd (In Liquidation) v. Moore Stephens (a firm)* [2009] UKHL 39 per Lord Phillips at para. 43.

Lord Neuberger was in agreement with Lord Sumption and Lord Toulson and Lord Hodge in that the expression 'the fraud exception' should be abandoned as it is not limited to cases of fraud.[25] Lord Sumption referred instead to the term 'breach of duty exception'.[26]

## VII. ILLEGALITY DEFENCE

Whilst the Supreme Court was unanimous in dismissing the appeal relating to the illegality defence, there were differences of opinion between the reasoning of the respective Justices. The clearest difference of opinion was between the reasoning of Lord Sumption and the reasoning of Lords Toulson and Hodge.

Lord Toulson and Lord Hodge were of the view that context was always important when considering the illegality defence and that the starting point was to consider 'the nature of the particular claim brought by the particular claimant and the relationship between the parties.'[27] They considered the case within the context of an insolvent company and directors' duties to creditors. They explained that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency requires the directors to have proper regard for the interests of creditors and prospective creditors. In such circumstances, their Lordships were of the view that to enable the directors to avoid their duty on the basis of the illegality principle would be 'contradictory, and contrary to the public interest.'[28] They were also of the view that such a decision would be contrary to sections 172(5) and 180(5) of the Companies Act 2006.

Lord Sumption expressly disagreed with the reasoning of Lord Toulson and Lord Hodge. He explained that the illegality defence was a rule of law and not a discretionary power for the Court. Furthermore, he added that it was not dependent upon a judicial value judgment about the balance of the equities in each case.[29] Lord Sumption was of the view that the illegality defence is based on public policy and referred to the comments of Lord Goff of Chieveley in the House of Lords decision in *Tinsley v. Milligan* which he considered was binding authority.[30] In that case, Lord Goff of Chieveley had stated:

> 'It is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.'[31]

Lord Goff of Chieveley acknowledged that the rules of illegality are 'indiscriminate in their effect', and are therefore capable of 'producing injustice'.[32] Nevertheless, Lord

25 [2015] UKSC 23 para. 9.

26 [2015] UKSC 23 para. 71.

27 [2015] UKSC 23 para. 122.

28 [2015] UKSC 23 para. 130.

29 *Ibid*., para. 62.

30 [1994] 1 A.C. 340.

31 *Ibid*., at 355.

32 [1994] 1 A.C. 340 at 364.

Goff Chieveley explained that he did not consider it appropriate to replace the principles established in the authorities, stretching back over 200 years, with a discretionary system.

Lord Neuberger and Lord Mance considered that the current case was not an appropriate one to decide the proper approach to the defence of illegality. However, they emphasised the need for a review of the defence of illegality by the Supreme Court 'as soon as appropriately possible.'[33] Lord Toulson and Lord Hodge also considered that there was a pressing need for a review of both the decision in *Tinsley v. Milligan*[34] and the report of the Law Commission on the illegality defence.[35] It should be noted that the Law Commission's report appeared to advocate an approach to the illegality defence consistent with Lord Toulson's and Lord Hodge's comments. The Law Commission report stated:

> 'We have reached the conclusion that it is not possible to lay down strict rules about when the illegality defence should apply. Instead, the courts should consider the policy rationales that underlie the defence and apply them to the facts of the case. On the one hand, the courts should attempt to do justice between the parties, enforcing the rights set down by law. On the other hand, the courts must not permit a claimant to profit from a wrong. They should deter illegal conduct and not allow the legal system to be abused by criminals.'[36]

## VIII. THE DECISION IN *STONE & ROLLS*

The Justices also provided their views on the proper interpretation of the reasoning in the House of Lords decision in *Stone & Rolls Ltd (In Liquidation) v. Moore Stephens (a firm)*.[37] The reasoning given by the five Law Lords in *Stone & Rolls* has resulted in much debate regarding the *ratio decidendi* of the case. The case decided, three[38] to two[39], that where a 'one-man company' had deliberately engaged in serious fraud, the principle of *ex turpi causa* prevented it from claiming that its auditors were in breach of their duty of care in failing to detect that fraud.

The Law Commission's observations on *Stone & Rolls* were cited by both Lord Sumption and Lord Toulson and Lord Hodge in their judgments in the present case. Paragraph 3.32 of the Law Commission Report stated:

> '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.'[40]

Lord Toulson and Lord Hodge acknowledged the difficulties arising from the way the

33 [2015] UKSC 23 paras 15 and 34.

34 [1994] 1 A.C. 340.

35 The Illegality Defence (2010) Law Com 320 dated 17 March 2010.

36 *Ibid*., para. 1.4.

37 [2009] UKHL 39.

38 Lord Phillips, Lord Walker and Lord Brown.

39 Lord Scott and Lord Mance.

40 The Illegality Defence (2010) Law Com 320 dated 17 March 2010 at para. 3.32

majority expressed themselves in the case of *Stone & Rolls*. They concluded that *Stone & Rolls* should be regarded as a case which has no majority *ratio decidendi* and that it should stand as authority for the point it decided on the facts of the case 'but nothing more.'[41] On the other hand, whilst Lord Sumption considered there were three propositions which could be extracted from the majority judgments in *Stone & Rolls,* Lord Neuberger only agreed with the second and third of those propositions. The two propositions he agreed with were that: (i) the defence of illegality was not available where there are innocent shareholders or directors, and (ii) the defence was available, in some circumstances where there are no innocent shareholders or directors.[42] Lord Neuberger considered that with the exception of these two propositions, the case of *Stone & Rolls* should not be treated as authoritative or of assistance.[43]

## IX. SECTION 213 OF THE INSOLVENCY ACT 1986

The Supreme Court unanimously held that section 213 of the Insolvency act 1986 has extra-territorial effect. Section 213 of the Insolvency Act 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.'

Perhaps fittingly, at paragraph 213 of the Supreme Court's judgment, Lord Toulson and Lord Hodge identified the ease with which money and intangible assets could potentially be transferred outside of the country. Furthermore, the fact that individuals are able to exercise control over companies from outside of the jurisdiction and in the light of the ease of modern travel which enables fraudsters to abscond abroad, they rightly commented that:

> '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.'[44]

## X. INNOCENT SHAREHOLDERS AND THE VGM PRINCIPLE

A point which was not considered in any real detail, and indeed did not necessarily need to be determined by the Supreme Court, was the position of a company which has been the victim of a fraud by its director/shareholder which also impacts on innocent shareholders i.e. where the company was not wholly owned by the fraudulent director. A situation could

41 [2015] UKSC 23 at para. 154.

42 [2015] UKSC 23 at para. 26.

43 [2015] UKSC 23 at para. 30.

44 [2015] UKSC 23 at para. 213.

conceivably arise whereby the company (with numerous shareholders, both fraudulent and innocent) successfully recovered its losses from the fraudulent director/shareholder and any third parties involved in the fraud. In this situation it is possible that the fraudulent director/shareholder could potentially benefit from his own wrongdoing either through the increase in the value of the shareholding or via distributions. We raise this point as it was briefly mentioned by Lord Toulson and Lord Hodge in their reference to Lord Phillips' comments in *Stone & Rolls* regarding the problems which may arise in the context of innocent shareholders.[45]

Lord Mance in *Stone & Rolls* considered that in these circumstances the English Courts would have the opportunity to consider building on the VGM principle.[46] The VGM principle emanates from the case *In re VGM Holdings Ltd*[47] which enables the company to impound the defaulting director/shareholder's share of a distribution. Therefore, in circumstances where a company had not received full compensation for a wrongdoing by its director and was due to make a distribution to the defaulting director/shareholder, the company could impound the defaulting director/shareholder's share of the distribution as well as amounts due to the defaulting director/shareholder to satisfy the liability of other defaulting directors who are jointly and severally liable with him.[48] Lord Mance agreed with the approach of the Court of Appeal in *Brink's-Mat Ltd v. Noye*[49] that some process designed to achieve the ends of justice would without doubt prevent the fraudulent shareholders from profiting by their dishonesty. The point was succinctly put by Lord Mance:

> 'The common law is not so barren as to be unable to achieve in this area what Lord Goff of Chieveley once described in another context as "practical justice".'[50]

The potential application of the VGM principle was also identified by Sir Andrew Morritt C when the Applicants' application was first heard in the Chancery division.[51] Whilst in *Stone & Rolls* Lord Phillips expressed some doubt about whether the law provided a mechanism for achieving the point expressed by Lord Mance,[52] we consider that the Court should be open to exploring and developing the VGM principle in appropriate circumstances.

The attraction of the VGM principle is evident in that it enables justice to be done by preventing a fraudulent director/shareholder from benefitting from his own wrongdoing without penalising innocent shareholders. We wholeheartedly agree with the comments of Lord Toulson and Lord Hodge in this case that 'unless there are special circumstances, the innocent shareholders should not be made to suffer twice.'[53]

45 [2015] UKSC 23 at para. 141.

46 [2009] UKHL 39 at para. 253.

47 [1942] Ch 235.

48 [2009] UKHL 39 at para. 254.

49 [1991] 1 Bank LR 68.

50 [2009] UKHL 39 at para. 254.

51 [2012] EWHC 2163 (ch) at para. 48.

52 [2009] UKHL 39 at para. 61.

53 [2015] UKSC 23 at para. 161.

The extent to which the VGM principle should be developed will need to be carefully considered in order to ensure the rights of the director/shareholder are not unjustifiably encroached. However, it is hoped that with the proper and principled development of the VGM principle, especially in the context of solvent companies, it could provide a useful and efficient method of enforcement for companies which have fallen victim to the actions of fraudulent director/shareholders.

## XI. CONCLUSION

The UK Supreme Court was right to dismiss the appeal in relation to both the illegality defence and in relation to the application of section 213 of the Insolvency Act 1986. Whilst there are differences in some of the reasoning of the Justices as to why the appeals should be dismissed, and indeed as to the proper application of the illegality defence, the decision brings some clarification to this area of the law which should avoid arguments of little merit regarding attribution and the illegality defence. We agree that the illegality defence needs to be considered in more detail by the Supreme Court in the appropriate case and hope that this will take place sooner rather than later.

We are also of the view that in the context of the illegality defence, the law should be developed to enable the Court to adopt a flexible approach which allows a degree of discretion in order to do justice in each case. Whilst such an approach may import a degree of uncertainty into cases involving the illegality defence, we consider that ultimately, justice should prevail and the cost of uncertainty is therefore a price worth paying. Lord Mance also identified the benefits of a broad discretion in that it would '*achieve an element of equity in iniquity*'.[54] Such an approach would require an express departure from the reasoning of the House of Lords in *Tinsley v. Milligan*.[55] Nevertheless, it appears there is room for further development in this area of the law and we look forward to seeing how the ambit of the illegality defence will be interpreted and applied in the future.

54 J. Mance, Ex turpi causa – when Latin avoids liability, *Edinburgh Law Review*, 18(2) (2014): 175–192.

55 [1994] 1 A.C. 340.