In my view, it would require legislation to recast dishonest assistance as a common law wrong remediable only in damages (cf. P. Devonshire [2015] C.L.Q. 222). Further, it would not be a prudent exercise of judicial method to move in that direction by judicial fiat: see further P. Ridge (2008) 124 L.Q.R. 445, at 450–52.

Reading *Novoship*, one asks whether equity was so bereft of available principle to flesh out what Sir Owen Dixon may have considered the implied or even disguised criterion of causation respecting liability to account for dishonest assistance, as to necessitate recourse to a restrictive common law analogy from actions in negligence for damages. One possibility would be to ask whether the profit for which the account was sought was derived "by reason of" the dishonest assistance because that dishonesty at least materially contributed to, even if not immediately causing, the derivation of the profit on the Henriot charters, and to recognise, by adaptation of what Lord Wilberforce remarked in *Phipps v Boardman*, that it was irrelevant that the making of the profit had involved the taking of risks on the market. This approach would effectuate the purpose of equity in attaching liability for dishonest assistance. It would lead to dismissal of the challenge to the order of the primary judge in *Novoship* for an account.

THE HON. WILLIAM GUMMOW

Former Justice of the High Court of Australia

ATTRIBUTING ILLEGALITIES

THE Supreme Court's decision in *Jetivia SA v Bilta (UK) Ltd. (in liquidation)* [2015] UKSC 23; [2015] 2 W.L.R. 1168 contains some important developments for the rules of corporate attribution and the defence of illegality.

Bilta was used by its directors and their conspirators as a vehicle for VAT fraud. It bought "carbon credits" in the EU from one conspirator (where they were zero-rated for VAT purposes) and sold them on for a lower price in the UK to another conspirator (where they were standard-rated). Consequently, Bilta became insolvent and was unable to satisfy its liabilities to the taxman. Its liquidators brought claims at common law against the conspirators for breach of fiduciary duty, unlawful means conspiracy, and dishonest assistance. The defendants applied to strike out the action on the basis that the former directors' unlawful activities could be attributed to Bilta. The company would thus have to rely on its own illegality to sustain its claim, falling foul of the illegality defence.

A company is a legal person and so can only act by natural people. The rules of attribution determine when an act or state of mind of an individual

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becomes the act or state of mind of a company. Before *Jetivia*, the leading authority was *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 1 A.C. 500. There, Lord Hoffmann adopted a tripartite approach to corporate attribution. First, a company can act by its primary rules of attribution, typically where its board or shareholders pass a resolution in accordance with its constitution. Secondly, a company can also act by general rules of attribution, drawn principally from agency and vicarious liability principles. Thirdly, however, the legal rule of attribution in question, when properly construed with its context and purpose in mind, can exceptionally cut across the prima facie position such that an individual's act or state of mind is not attributed to a company (at 506–07).

Jetivia moves on from *Global Meridian* in one key respect. Properly understood, the third principle is not exceptional; the "legal context, i.e. the nature and subject matter of the relevant rule and duty, is always relevant" when considering whether an act or state of mind of an individual should be attributed to a company (at [191], per Lord Toulson and Lord Hodge). Lord Sumption showed more fidelity to the structure adopted in *Meridian Global* by first considering prima facie attribution and then certain exceptions (at [67]–[70]). But Lord Sumption importantly conceded that this approach was no more than a "valuable tool of analysis" to assist in answering the question of context posed by his judicial brethren (at [92]).

The Supreme Court held that it was not open to the former directors to attribute their unlawful conduct to Bilta in the context of Bilta bringing breach of duty claims against the directors. Lord Toulson and Lord Hodge, for the majority, reasoned that attributing the directors' conduct to the company and thereby barring its claim would negate the very existence of the directors' duties, contrary to the relevant sections of the Companies Act 2006 and various other important company law principles. The legal context therefore meant that it was not appropriate to attribute the directors' illegality to the company (at [203]). Lord Sumption reached the same position but framed it as a "breach of duty exception" to prima facie attribution (at [71]–[97]).

The Justices stressed that the legal context of the claim was equally important when a company sues a third party who is not a director or other agent of the company, but where the wrongdoing of an agent of the company remains in some way legally relevant. For example, where the claim is that the third party was an accessory or conspirator to a breach by an agent of the company, the agent's breach should not be attributed to the company. On the other hand, wrongdoing should be attributed to the company where the company's claim is against an auditor who has negligently failed to catch a director's fraudulent activities, or against an insurer in circumstances where a company agent has failed to disclose a material fact (at [91], per Lord Sumption; [207], per Lord Toulson and Lord Hodge). Put

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simply, in the former case, the company is considered by the law to be a victim – in the latter, a villain.

Context is thus now king. Yet, despite being endorsed only by Lord Sumption, it is submitted that the prima facie rules of primary and general attribution should remain queen. Any transaction or dispute involving a company is predicated on the rules of corporate attribution. A context-sensitive approach, varying from case to case, brings with it a degree of uncertainty. Retaining the prima facie rules as an "analytical tool" gives welcome guidance for those operating and interacting with corporate bodies.

Two other points of interest should be noted. First, *Stone & Rolls v Moore Stephens* [2009] 1 A.C. 1391 now retains little precedent value. It "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" (at [154], per Lord Toulson and Lord Hodge). Though Lord Sumption attempted to draw three principles from the case (at [80]), only one was accepted by his brethren, namely that the illegality defence cannot *always* be asserted where the company's directing mind and will has perpetrated the illegality on which the company's claim is founded. Even in that case, as Lord Mance put it, "context must have some relevance" (at [50]).

Secondly, the Justices reiterated an important distinction between the primary rules of attribution and attribution by agency on the one hand, and vicarious liability on the other. In the former cases, the company is considered to act "directly" or "personally"; in the latter, it is *responsibility* for the wrongdoing, and not the wrongdoing *itself*, which is attributed to the company (at [70], per Lord Sumption; [186], [203], per Lord Toulson and Lord Hodge). This explains, for instance, why corporate criminal responsibility based on culpability must be established by attributing to the company the mens rea of its directing mind and will, and not by using the rules of vicarious liability available for civil wrongdoing.

It also, in Lord Sumption's judgment, supported another principle arising from *Stone & Rolls*, namely that the illegality defence can only be available against a company where it is directly, as opposed to vicariously, responsible for the illegality (at [80]). The other four Justices robustly, and rightly, rejected this proposition, taking some apparent delight in pointing out that the only authority for it was a tactical concession by counsel in *Stone & Rolls*, a Mr. Jonathan Sumption Q.C. (see in particular [48]–[49], per Lord Mance). Here, too, the question turns on legal context and not the mode of attribution.

Turning to *ex turpi causa*, this is the third case in recent times in which the Supreme Court has considered the defence: see *Allen v Hounga* [2014] UKSC 47; [2014] 1 W.L.R. 2889 (noted [2015] C.L.J. 13) and *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] A.C. 430. It

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will not be the last. There were substantial disagreements between the Justices on the nature of the defence. Lord Neuberger took the remarkable step of stating that "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" (at [15]).

The divergent judicial views on the defence of illegality can be summarised thus. Lord Sumption, consistently with his previous judgment in *Apotex*, considered that the proper approach remained that of the House of Lords in *Tinsley v Milligan* [1994] 1 A.C. 340. The defence was not dependent on "judicial value judgment" but applied whenever the necessary connection between the illegal act and the claim is established (at [60]–[64]). Lord Toulson and Lord Hodge, influenced by Lord Wilson's judgment in *Hounga*, preferred a more flexible, policy-based approach. On the facts, they held that the defence should not apply because of the public interest in enforcing the duty owed by directors of an insolvent company to its creditors (at [120]–[130]). Lord Neuberger and Lord Mance chose to keep their powder dry on this occasion (at [17], [52]).

It is regrettable that the Justices did not consider themselves able to give a full reconsideration to *Tinsley v Milligan* in the present case. Responsibility for the predicament in which they found themselves can be attributed to the Justices in *Apotex* who, with the exception of Lord Toulson, seemed to ignore outright the decision of their brethren just three months earlier in *Hounga*. As Professor Charles Mitchell has put it, such an indifference to precedence has had a "corrosive effect on the coherence of [the] private law doctrine": (2015) 131 L.Q.R. 323. There is not space in this note to consider the merits of respective sides of the debate; suffice it to say, it is to be hoped that in the near future the Supreme Court will bring the same level of clarity to the defence of illegality as it has in this case to the rules of attribution.

William Day

Email: williamday31@googlemail.com

ANTI-SUIT INJUNCTIONS IN ARBITRAL AWARDS: ENFORCEMENT IN EUROPE

THE status of anti-suit injunctions in Europe has long given rise to controversy. The decision of the Court of Justice of the European Union in Case C-536/13, *Gazprom OAO* [2015] All E.R. (EC) 711 sheds a new light on the relationship between anti-suit injunctions and the European jurisdiction regime embodied in the Brussels Regulation (Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). In this much anticipated judgment, the Court of

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