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The author considers company fraud and the illegality defence in light of Bilta (UK) Ltd (in liquidation) v Nazir (No 2) [2015] 2 WLR 1168.

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Anthropomorphism and attribution; carousel fraud and the illegality defence (part 1)

Andrew Bowen, QC, FCIARB

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Introduction

Can directors who are the company's 'directing mind and will' defeat a claim brought against them by the company for breach of duty by attributing their own wrongs to the company and pleading the illegality defence (*ex turpi causa*)? In *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2015] 2 WLR 1168, a value added tax (VAT) fraud case, the Chancellor of the High Court, the Court of Appeal ([2014] Ch 52) and a seven justice Supreme Court ([2015] 2 WLR 1168) unanimously rejected that argument but there was disagreement in the Supreme Court between Lord Sumption JSC on the one hand and Lord Toulson and Lord Hodge JJSC (in a joint judgment) on the other as to the basis for doing so. The foundation of the defendants' submission, that the directors' fraudulent acts were to be attributed to Bilta and that *ex turpi causa* barred the claim, was the majority decision of the House of Lords in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] AC 1391, a bank loan fraud case. As will be seen, *Stone & Rolls* was scrutinised by all the courts in *Bilta* with differing degrees of respect; if this article is the story of *Bilta* it is also the story of *Stone & Rolls*.

The decisions in *Bilta* and *Stone & Rolls* explored some of the legal fictions underlying the separate legal personality of a company. In order to personalise that separate legal personality the law attributes to it the mind and will of the natural person or persons managing and controlling its actions, usually the directors. Those same natural persons owe statutory fiduciary duties to the company in relation to their actions as its directing mind and will. At times *Stone & Rolls* resembled a disjointed game of Cluedo where the crime was clear but the law struggled to identify whether the victim was also a villain. Both the Court of Appeal and the Supreme Court in *Bilta* resolved this dilemma by finding that, depending on the context, a company could be both.

What Happened in Bilta: a classic 'missing trader' fraud

European Emissions Trading Scheme Allowances, known as carbon credits, were prior to 31 July 2009 standard rated for VAT. In what Lord Sumption described as a very simple carousel fraud on Her Majesty's Revenue and Customs (HMRC), Bilta (UK) Ltd, incorporated in England and registered for VAT, between April and July 2009 bought €294m worth of carbon credits from a Swiss company, Jetivia SA (zero rated for VAT) and sold them back to back to United Kingdom registered entities which were registered for VAT so that the UK sales generated VAT. The sale proceeds and VAT received by Bilta was in turn paid to Jetivia and other offshore companies. Bilta never had any substantial assets of its own other than the cash and VAT generated by the sales (Lord Sumption JSC in *Bilta* at para.57) and the purpose and effect of the conspiracy was to deprive Bilta of the sale proceeds so that it was insolvent from the moment that it entered into the back to back transactions (Patten LJ in *Bilta* at para.22). Bilta was unable to pay the £38m output VAT and was compulsorily wound up in November 2009 on HMRC's petition. The liquidators sued Bilta's two directors (one of whom was its sole shareholder) and *inter alia* Jetivia and its sole director to recover the £38m on the ground of a conspiracy to defraud Bilta by depriving it of its ability to meet its VAT obligations which involved breaches of fiduciary duty. Jetivia would be liable only if it knowingly assisted in the fraud against Bilta which would result from its directors' knowledge and actions being attributed to it. HMRC would ultimately benefit from the claim as Bilta's creditor (Lord Mance JSC in *Bilta* at para.32). Bilta's action was pled on the directors' breach of fiduciary duties owed to the company and their obligation to act in the interests of creditors where the company is or was likely to become insolvent.

Jetivia applied for summary dismissal of the claim on the basis that it would be defeated by the illegality defence. Although Jetivia made the application the critical relationship was between Bilta and its directors, Lord Sumption JSC noting in *Bilta* that it was common ground that the directors were Bilta's directing mind and will in relation to the functions relevant to the proceedings [at para.69]. In essence, Jetivia argued that Bilta was a 'one man company' to which the fraud of its directors was to be attributed so that it was the villain rather than the victim of the fraud and could not rely on it in its action against the directors. If the claim against the directors was barred so was the conspiracy action against Jetivia. In making the application and in its subsequent appeals Jetivia argued that the *ratio decidendi* of the House of Lords' decision in *Stone & Rolls* was applicable and that the first instance judge was bound by that decision. Unfortunately for Jetivia the Supreme Court held that the decision in *Stone & Rolls* had only a very restricted *ratio decidendi*, or even none at all. In response to Jetivia's application, Bilta distinguished *Stone & Rolls* on the ground that it was in fact the victim and not the villain and also that the duties were owed as directors, and not auditors, and extended to the interests of creditors.

Ex turpi causa non oritur actio

Ex turpi causa, also referred to as the illegality defence, is a public policy principle that '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 341). It is based on the need to preserve the integrity of the legal system, applies automatically and inflexibly and is not subject to a 'public conscience test' which requires a 'value judgment' by the court. The majority of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 held that a claimant could not succeed if, in order to make good his claim, he had to rely on his own illegal conduct; the minority preferred a broader test of whether the claim was tainted by illegality. The principle is 'unforgiving and uncompromising' (Rimer LJ in *Stone & Rolls* at para.107).

In *Bilta*, Lord Sumption JSC and Lords Toulson and Hodge JJSC disagreed about whether a director's duty to have regard to the interests of creditors when a company was insolvent or verging on insolvency was a relevant public policy consideration which could trump the public policy underpinning the illegality defence.

Attribution

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 is the leading modern case on attribution. The issue was whether the knowledge of investment managers should be attributed to the company to establish the company's liability for breach of stock market regulations. Lord Hoffmann cautioned that the anthropomorphism of likening a company to a human body, with a brain, nerve centre and hands, might distract attention from the fact that attribution was a question of construction rather than metaphysics: "it is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company" [at para.511G–H]. That caution is echoed in *Bilta*. Lord Sumption JSC noted at para.70 that the attribution to an agent of the company's directing mind and will has been criticised as an 'artificial anthropomorphism', Lords Toulson and Hodge JJSC at para.180 said that while there was a role in the law for the concept of the directing mind and will of a company, it was important to analyse that role and to avoid the 'dangers of ascribing human attributes to a non-natural person such as a company', and Lord Mance JSC said at para.39 that the company "has no actual mind, despite the law's persistent anthropomorphism". More radically, in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 3 HKC Lord Walker NPJ suggested that it might be better if the directing mind and will concept were to fade away as a general concept [at para.106(2)]. This caution qualifies the fulsome *dicta* of Viscount Haldane LC in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* at [1915] AC 705 at p.713 ("the directing mind and will of the corporation, the very ego and centre of the personality of the corporation") and of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at p.170 ("A corporation...must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company.") and refocuses attention on the purpose for which attribution is sought.

In *Meridian Global Funds* Lord Hoffmann outlined a tripartite classification of the rules by which acts were attributed to the company: (i) the primary rules of attribution derived from company law statutes and the company's constitution, typically the articles; (ii) the general rules of attribution derived from the principles of agency, since not every act on behalf of the company could be expected to be the subject of a resolution of the board or unanimous decision of the shareholders; servants and agents appointed by the company whose acts, by a combination of agency and the primary rules of attribution, count as the company's acts; (iii) exceptional cases where the primary and general rules of attribution would defeat the intention of the law that a particular rule should apply to a company, in which case the court must fashion a 'special rule of attribution' for the particular substantive rule. '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' [at para.507E–G].

The fraudulent acts or knowledge of the agent will be attributed to the company where it is necessary to establish the company's personal liability for the purposes of a statutory offence. The 'fraud exception' (also in English law known as the *Hampshire Land* principle after *In re Hampshire Land Co* [1896] 2 Ch 743 and following *Bilta* referred to as the 'breach of duty' exception) provides that in an action for breach of duty against the directors there cannot be attributed to the company a fraud practised against it by its agent even where the agent's acts and mind would be attributed to establish the company's personal liability. In *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250 Buckley LJ at pp.261–262 justified the exception on the ground that the company was the victim of the directors' scheme to deprive it improperly of its assets, giving rise to the victim and villain analysis which in *Stone & Rolls* distracted attention from Lord Hoffmann's search for the purpose of the attribution. Lord Neuberger JSC in *Bilta* thought it 'not so much an exception to a general rule as part of a general rule' [at para.9].

In *Arab Bank plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 Rix J introduced the concept of the company as a 'secondary victim' where an agent's frauds against a third party had exposed the company to liability to that third party. Lord Sumption JSC in *Bilta* thought the distinction between primary and secondary victimhood elusive; in his view the distinction could only arise if the application of the exception depended on where the loss fell, whereas if it depended on the nature of the duty and the relevant parties then the only question was whether the company had suffered any loss at all [at para.93]. Elusive distinctions are never easy to apply.

What happened in *Stone & Rolls*

A fraudster, S, used the claimant company S & R to defraud banks by presenting false letters of credit and then paying away the multi-million dollar funds to corporate accomplices. As in *Bilta* it was essentially theft via and from the company. S was S & R's CEO, a shadow director and its controlling mind and will (its ultimate ownership was obscure). The defendant MS was S & R's auditor during the period of the fraud. One of the banks sued both S & R and S to recover its funds. Toulson J (as he then was) upheld the claim although he did not analyse (since the issue had not been raised) whether S & R's liability was founded on vicarious liability for S's fraud or attribution of knowledge ([2003] 1 Lloyd's Rep 383). S & R went into liquidation and the liquidator in turn sued MS on the basis that, had the firm performed its duty, the fraud would have been discovered earlier and the company's losses would not have been so extensive. The bank, as a major creditor of S & R, would be the main beneficiary of the action. It was accepted that the bank was unable to sue MS because the latter owed no duty of care to S & R's creditors. MS applied to strike out the action on the ground that the claim was barred by the illegality defence because it was founded on S's fraud which was attributed to S & R. S & R responded that: (i) the illegality defence could not prevent it from suing to recover its own losses caused by the individual who was its directing mind and will in relation to the frauds because the company was a victim of the frauds and should not have knowledge of those frauds attributed to it, (ii) the fraud was 'the very thing' which the firm should have been astute to expose so no rule of public policy should afford the firm a defence to the claim (following *Reeves v Comr of Police of the Metropolis* [1999] QB 169 that *ex turpi causa* had no application where the wrong was the very thing the defendant had a duty to prevent).

Stone & Rolls in the High Court and Court of Appeal

The first instance judge, Langley J (at [2008] Bus LR 304) refused to strike out the action. On the issue of attribution he adopted the victim/villain analysis which formed the basis of the *Belmont* rule; where an officer or employee of a company committed a fraud on the company itself, the officer's knowledge of his own fraud was not the knowledge of the company. He weighed up that, on the one hand, the primary victims were the banks and the fraud had undoubtedly exposed S & R to liabilities it could not meet; on the other hand, S & R had lost nothing to which it was entitled and was in a real sense the perpetrator of the fraud. His conclusion was that in the circumstances it would be artificial not to fix S & R with S's wrongdoing and artificial to describe it even as a secondary victim. Faced with the same issue today the judge would have the option, ultimately adopted by the Court of Appeal and the Supreme Court in *Bilta*, to find that the company could be the villain in the fraud against the bank and the victim in relation to the director's breach of duty (the issue of the auditor's liability would still be a different issue). Having found that the fraud could be attributed to S & R he was faced with the company's 'the very thing' submission. While he said that *Reeves*'s case was the 'key question', he did not directly answer it but held that he did not think the 'conscience of the ordinary citizen' would find anything so repugnant in the claim against the auditor to justify the 'unforgiving and uncompromising operation' of *ex turpi causa*. That of course was exactly what he was not allowed to find in light of *Tinsely v Milligan*.

When MS, represented at this stage by Jonathan Sumption QC, appealed to the Court of Appeal ([2009] 1 AC 1391) it was common ground that the judge had been wrong to apply the 'conscience' test but S & R argued that he had arrived at the right result and repeated its original submissions that, firstly, S's fraud could not be attributed to it as it was the victim and, secondly, even if S's fraud was attributed to S & R, *ex turpi causa* was trumped by 'the very thing' argument. MS did not dispute that

ex turpi causa would bar a claim brought by a company relying on its own wrong if knowledge of that wrong was attributed to it but argued that S & R, a 'one man' company, could not rely on the *Belmont* rule of non-attribution since it only applied where there was at least one other human agent in the company capable of being deceived since principles of justice and common sense did not require the fiction of separate legal personality to be carried to the 'extreme point at which the company is either mindless or else does not know what is in the only human mind that it in fact has'. Rimer LJ (with whom Keene LJ agreed) rejected that submission and held that the rule could apply where the fraud of the company's directing mind and will was targeted against the company itself at [para.45]. He also rejected S & R's submission that the *Belmont* rule was a 'discretionary judicial switch' which would allow the liquidator's action but prevent the same action if it had been brought on behalf of the company by the fraudulent director pre-liquidation.

The arguments boiled down to MS submitting that the *Belmont* rule applied only where the company was the intended victim, and that incidental or consequential damage to the company was irrelevant, and S & R submitting that the *Belmont* rule applied where a third party was the intended victim but the company also suffered material consequential damage. Once again the 'critical question' for the court was whether the company was victim or villain; if it was the former then the fraud would not be attributed to it but if the correct analysis was that the company carried out the fraud and that its claim to be a victim was based on the liabilities it incurred as an inevitable consequence of the fraud then it was the villain and, if it was a victim, it was only in a subsidiary and immaterial sense (Rimer LJ at para.48). The court was not invited to consider whether the company might be both, depending on the context. As a result Rimer LJ at para.73 accepted MS's submission and held that, as between S & R and the banks, S's dishonesty was to be attributed to the company so it was liable for the frauds. S & R was not the target or victim of the agent's dishonesty but the fraudster and it made no difference that the frauds resulted in the company incurring liabilities. He succinctly rejected S & R's 'the very thing' argument' on the ground that it was simply not supported by *Reeve*, which had been about causation, and did not trump the public policy behind *ex turpi causa* [at para.110].

Mummery LJ agreed with Rimer LJ that the appeal should be allowed and described S & R's claim as 'astounding'. Adopting the victim/villain analogy he said that to suggest that the corporate creature used by S as the vehicle for the fraud was the victim turned the world upside down [at para.114]. The knowledge of the fraudulent mastermind and the knowledge of his creature company were identical in targeting the victim bankssoS&Rwasapartytothefraudandnotthe victim. However, he also held that, in any event, MSowednoadutyofcaretoS&R,'afraudster in the total grip of another fraudster'. At para.119 he concluded that it was contrary to all common sense to uphold a claim that would confer benefits on the corporate vehicle which was used to commit the fraud and was not the victim of it, and the 'fraudulent driver of the fraudulent vehicle' (another interesting anthropomorphism). At the risk of spoiling the plot, the absence of a duty of care would ultimately be what the Supreme Court in *Bilta* found to be the restricted *ratio* of *Stone & Rolls*.

Stone & Rolls in the House of Lords

S & R's appeal was dismissed by Lords Phillips, Walker and Brown with Lords Scott and Mance dissenting ([2009] 1 AC 1391). Although about attribution and *ex turpi causa* in the courts below, the real issue which divided the Law Lords was the scope of MS's duty of care. Lord Phillips at para.80 accepted MS's submission that it was difficult to see how the law could rationally hold an auditor liable when the entire shareholding body and the entire management was embodied in a single individual who knew everything because he had done everything; any breach of duty would not have caused any loss. In his view the answer was found, not in principles of attribution, but in the extreme facts of the case where all whose interests formed the subject of any duty of care owed by MS to S & R, namely its sole will and mind and shareholder S, were party to the illegal conduct which formed the basis of the claim so that *ex turpi causa* provided a defence [at para.18].

Although the issue was whether *ex turpi causa* barred the claim that MS was in breach of duty, he could not isolate the issue of the scope of MS's duty. Lord Phillips expressed sympathy with Mummery LJ's finding that MS owed no duty to S & R. Even if a duty was owed, it only extended to the exercise of reasonable care in the provision of information to the directors and not to taking reasonable care to ensure that the company was not used as a vehicle for fraud which duty was owed for the benefit of those that the company might defraud [at para.86].

Lord Brown introduced his short speech [at para.195] by outlining a scenario where a solicitor in private practice defrauded HMRC by under declaring fees and hid the fraud from his accountant. *Ex turpi causa* prevented the solicitor from suing his accountant for failing to detect the fraud. If the solicitor, having incorporated his practice, committed the same fraud, Lord Brown thought it would be odd that the accountant could be sued by the company; the company itself had been fraudulent and *ex turpi causa* barred the claim. S & R was a one man company, without innocent directors or shareholders. The adverse interest rule (the breach of duty exception) was an exception to the ordinary rule of attribution, itself a general principle of agency, that ordinarily one imputes to the company (the principal) the knowledge of the director (the agent), where the director is committing fraud or even defrauding the company. It was absurd to describe S as an agent of S & R when he was its embodiment. He found Lord Walker's concept of the 'sole actor' exception to the adverse interest exception puzzling — why was it necessary to except from the exception cases which logically could not fall into the exception at all [at para.199]. He confined his decision to the 'one man company or sole actor basis', that S & R was in no better position than S to resist the *ex turpi causa* defence [at para.201]. He noted, however, that confining the *ex turpi causa* defence to one man company frauds meant that where there were innocent shareholders then a claim against the auditors might well lie [at para.203]. However, following the subsequent analysis in *Bilta*, the precondition for such liability would be that a duty of care was owed, in other words, the fact that the claim was not caught by the illegality defence would not of itself make it relevant.

Lord Brown also considered at para.202 that the consequence of Lord Mance's opinion would be to impose liability on MS in an indeterminate amount for an indeterminate time to an indeterminate class of claimants, in other words, whoever was defrauded by the company in the period during which the fraud should have been detected, which ran against *Caparo* principles (*Caparo Industries plc v Dickman* [1990] 2 AC 605).

Lord Walker also approached the issue on the basis that if S had carried out the frauds as an individual neither he nor his trustee in bankruptcy would have had a claim against MS because of the illegality defence. He did not consider that S & R, which had as a matter of law carried out the fraud (along with S as the allegation was a conspiracy), should be in a better position. He disagreed with Lord Scott's opinion that S & R was a victim because to do so treated the company as having no mind at all and he agreed with Langley J that that was unrealistic.

Lord Walker noted that the *Belmont* rule was referred to in the US as the 'adverse interest' exception to the usual rule of imputation and at para.168 he described the sole actor principle as an exception to the adverse interest rule which was itself an exception to the usual rules of imputation. He applied the 'sole actor' exception to a claim by a company in liquidation against its auditors where the company was a one man company; on the assumption that the auditors owed the company a duty of care, and the only human embodiment of the company already knew about the fraudulent activities, there was realistically no protection which the auditors could give. The application of the 'sole actor' exception meant that the company could not claim to be a 'secondary' victim because it had no innocent participators who would be prejudiced by the illegality defence barring the company's claim [at para.173]. He set out the proposition that 'one or more individuals who for fraudulent purposes run a one man company could not obtain an advantage by claiming that the company was not a fraudster but a secondary victim' [at para.174]. He agreed with Rimer LJ on 'the very thing' issue that a principle of causation could not trump *ex turpi causa* [at para.183].

At para.145 Lord Walker said that the fraud exception, a general principle of agency, applied both to a company's liabilities to others and its

claims against others. However, in *Moulin Global Eyecare Trading Ltd v Inland Revenue Comr* (2014) 17 HKCFAR 218, sitting in the Hong Kong Court of Final Appeal, he accepted that this was wrong and at para.80 said that it applied to prevent the illegality defence barring a claim by a company against its own agents. In *Moulin* at para.106 he also said that the fraud exception applied even if under the primary rules of attribution the board had approved the wrongdoing under the company seal. Lord Sumption JSC in *Bilta* agreed [at para.86].

Dissenting, Lord Scott said the 'issue — an easy one to state but, at any rate for me, a difficult one to decide — was whether S & R's claims as pleaded must inevitably founder on the *ex turpi causa* rule' [at para.96] and asked rhetorically why *ex turpi causa*, a rule based on public policy, should bar an action against auditors based on breach of duty? He considered that S & R was the victim of S's fraud since the latter was not (on the pleadings) the absolute beneficial owner and derived his powers of control from a power of attorney which he had abused to turn S & R into a corporate automaton. Lord Scott accepted that, for the purposes of an action against the company by an innocent third party with no notice of any illegality, the state of mind of a 'sole actor' should be attributed to the company but not where the action was by the company against the 'sole actor' director for breach of duty. He considered that, as MS as auditors were officers of the company, they should not be in any better position than S in respect of attribution. He described Lords Phillips, Walker and Brown as in effect lifting the veil of incorporation to attribute S's dishonesty to S & R which could not be justified in principle or on authority. The fact that S & R was insolvent was critical — *ex turpi causa* should not prevent an action by the liquidator for the benefit of creditors when there was no possibility of S benefitting from any damages recovered [at para.121]. For him the 'wielding of a rule of public policy where public policy is not engaged constitutes...bad jurisprudence' [at para.122].

Lord Mance, with whom Lord Scott agreed, considered at para.206 that the effect of the majority decision was to relieve from all responsibility auditors negligently failing in their duty to report on 'one man' companies operated by individuals to carry out Ponzi schemes, a 'questionable policy' when the risk of these schemes happening was well known.

MS could not attribute to S & R the knowledge of S to invoke *ex turpi causa*. What would have happened had MS performed its duty 'is simply a matter of causation' [at para.275]. He considered that both senior management and auditors owed complementary and enforceable duties to the company to protect shareholders' interests; S's fraud could not be attributed to S & R to prevent S & R complaining of MS's breach of duty.

He held that there was no suggestion that the *Belmont* rule depended on there being some innocent constituency within the company to whom knowledge could have been communicated [at para.229]. He also considered that there was no difficulty characterising the 'whole scheme as one of fraud on the company' [at para.231]. He disagreed with Lord Phillips that S & R 'started life with nothing, never legitimately acquired anything and cannot realistically be said to have suffered any loss' since it wrongly assumed that a deficit rendering a company insolvent was not a loss [at para.232]. It made no difference whether the company was incorporated to carry out the fraud; in his view, once incorporated it was entitled to be respected as a separate legal entity and not be treated as the puppet of the directing mind and will. Directors who knew the company to be insolvent owed a duty to the company to have regard to the interests of creditors. However the fraud was categorised, it could not be attributed to the company itself to relieve the auditors from their duty; the interests and activities of S & R and its directing mind had to be distinguished precisely because it was among MS's functions as auditor to ensure the former a degree of protection against the latter [at para.245]. He said that the majority conclusion overlooked the critical fact that S & R was insolvent rather than solvent at each audit date and concluded that MS could not invoke the illegality defence by reference to S's knowledge if MS ought to have detected that S & R was subject to a continuing scheme of fraud in which it was insolvent and being rendered increasingly so [at para.271]. He held that auditors, who should in the performance of their contractual duties have detected top management fraud and reported it to the appropriate authorities, owed an enforceable duty to the company to do so [at para.277].

Stone & Rolls analysed

The division between the majority and the minority was clear but the real problem lay in the lack of unanimity in the majority decisions. The Law Commission in its report on

The Illegality Defence (Law Com No.320) at para.3.32 said that it was difficult to anticipate what precedent, if any, the House of Lords' decision in *Stone & Rolls* would 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' [at para.3.32]. The Law Commission concluded that the majority judges confined their reasoning to cases of fraud committed by "one man companies", in which the beneficial owners were all implicit in the fraud.

Patten LJ in *Bilta* said that the majority speeches in the House of Lords disclosed 'a variety of different approaches to the principles to be applied' [at para.54] and should be confined 'to the claim and the facts in that case'. Lord Neuberger JSC in *Bilta* thought that it was very hard to derive much in the way of reliable principle from *Stone v Rolls*; 'so far as it is to be treated as strictly binding authority, the decision is best treated as a case which solely decided that the Court of Appeal had been right to strike out the claim because the illegality defence succeed' [at para.24]. He said that the time had come to put *Stone & Rolls* on one side in a pile and marked 'not to be looked at again' [at para.30]. Lords Toulson and Hodge JJSC concluded that *Stone & Rolls* had no majority *ratio decidendi* and stood as authority only for the point that, on the facts, no claim lay against the auditors [at para.154]. Lord Mance JSC re-emphasised his own view that the central issue in the case ought to have been the scope of the auditor's duty and the classes of innocent parties whose interests the contract of audit was designed to protect rather than *ex turpi causa*. Lord Sumption JSC's views are noted in more detail below.

Jetivia doggedly advanced the submission before all the courts in *Bilta* that the *ratio* to be distilled from the majority decisions in *Stone & Rolls* supported their argument that Bilta was a 'one man company' to which the fraud of its directors was to be attributed so that it was the villain rather than the victim in circumstances where the action was raised against directors rather than auditors. As will be seen, the High Court and Court of Appeal distinguished *Stone & Rolls* without suggesting that it had no *ratio decidendi* but the seven justice Supreme Court was less reluctant to identify its shortcomings.

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In the second part of this article, the author will consider Bilta (UK) Ltd (in liquidation) v Nazir (No 2) [2015] 2 WLR 1168 in the High Court, the Court of Appeal and the Supreme Court.