The Jenkins Committee in its Report (Cmnd 1749, 1962, paras 44, 54(b)) considered the law unsatisfactory and anomalous, and recommended that 'a company should be enabled unilaterally to adopt contracts which purport to be made on its behalf or in its name prior to incorporation, and thereby become a party thereto to the same extent as if the contract had been made after incorporation …'. Many Commonwealth countries have enacted provisions which follow the lines of this recommendation, and a similar reform was projected for the UK in the abortive Companies Bill of 1973, but this proposal was not revived when the First EU Directive was implemented; and so the *Natal Land* case is still good law.

6. The traditional doctrine of privity of contract (which states that a contract cannot confer benefits or impose obligations upon someone who is not a party) could be seen as a further **(p. 134)** obstacle to allowing a company to enforce a pre-incorporation contract. The doctrine has now, in part, been abrogated by the Contracts (Rights of Third Parties) Act 1999, following a recommendation of the Law Commission (Law Com No 242, 1996). This Act allows a person who is not a party to a contract to enforce a term, in certain circumstances, provided that that person is sufficiently identified; and s 1(3) expressly states that the person need not be in existence when the contract is entered into. The Law Commission in its report (paras 8.9–8.16) acknowledged that any change made to the privity doctrine might have some impact on pre-incorporation contracts, but took the view that any considered reform of the latter topic should be dealt with separately as a matter of company law. Of course, since the 1999 Act is concerned only with the enforcement of *rights* by a third party, and not with the imposing of obligations, there is no way in which that Act could be invoked in order to make a company a party in the full sense to a pre-incorporation contract. However, there is scope for its application in a more limited sense—that is, where such a contract includes a term which expressly or purportedly confers a benefit on the unformed company. This could extend to the parties agreeing (for a consideration) that the company, when formed, should have the option of entering into a contract on predetermined terms.

7. As already noted, it is very common for those wishing to incorporate a business to acquire a ready-made company for the purpose, possibly changing its name if the existing name is not thought suitable. In *Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] BCLC 507, CA, Mr Craze bought a company named E Ltd 'off the shelf' and later changed its name to DM Ltd. Before the change of name was registered the company, acting through Craze, bought goods from the plaintiff. In an action to make Craze personally liable it was held that s 9(2) of the European Communities Act 1972 [CA 2006 s 51] could not be applied because the company had been formed (albeit under another name) at the time when the contract was made: the issue of an amended certificate of incorporation under CA 1985 s 28(6) [CA 2006 s 80(3)] did not imply that the company had been re-formed or re-incorporated. Again, in *Badgerhill Properties Ltd v Cottrell* [1991] BCLC 805, CA 1985 s 36C was held to be inapplicable where the company was in existence but had been described by an incorrect name. In contrast, in *Cotronic (UK) Ltd v Dezonie* [1991] BCLC 721, CA, a defendant escaped personal liability under CA 1985 s 36C for a different reason. He made a contract in 1986 in the name of W Ltd in ignorance of the fact that W Ltd had been struck off the register under CA 1985 s 652 [CA 2006 s 1000] in 1981 and had ceased to exist. A new company, also named W Ltd, was incorporated in 1989 to continue the business. The court held that he could not be made liable under s 36C because he had purported to make the contract on behalf of the old company and not the new one, which no one had thought about forming in 1986.

➢ Questions

1. Could any or all of the difficulties revealed by the *Natal Land* case have been met by Mrs de Carrey *assigning* her right to the lease to the company after it had been formed?

2. It is possible to create a valid trust for the benefit of an unborn child. Could the problems revealed by the *Natal Land* case have been surmounted by having someone enter into an agreement as trustee, rather than as agent, for the yet to be formed company?

Corporate gifts

Problems of some complexity may arise when a company makes a gift, such as a donation to a charity or a political party, or when it enters into a transaction which, although perhaps not strictly gratuitous, has an altruistic character—such as guaranteeing someone else's bank **(p. 135)** overdraft. Agreements to pay remuneration to a company's staff or officers may also be open to challenge (or, at least, arouse suspicion) on the ground that the sums may not have been genuinely earned; and, *a fortiori*, the payment of bonuses and pensions in recognition of past services may also be called into question as being unauthorised or unmerited.

The cases show that the courts have, over the years, viewed such payments with no great enthusiasm, and sometimes with outright hostility. The reasons for this are varied. Creditors, of course, stand to be prejudiced if corporate assets are given away, but they are given only limited protection by the rules of company law and virtually no direct access to the courts to have these rules enforced while the company is a going concern. Naturally enough, therefore, the courts will be alert to the potential need to intervene indirectly on their behalf (eg in a suit brought by a liquidator) and to seek to upset such transactions, especially in cases where the company has become insolvent not long after the gifts were made.

Perhaps the strongest factor influencing the judges, more especially in the Victorian period, has been the difficulty of reconciling notions of altruism with the capitalist ethos. It seems to have been accepted practically without question until only a decade or two ago that the sole purpose of any company was to make the greatest possible profits for its members. Even today, this approach is by no means dead, and most people would assume that this was at least a company's predominant purpose. A corporate gift which diminishes profits violates this philosophy, unless it can be justified on the ground that it is likely to bring a greater benefit in the longer term.

Nowadays, opinion has changed, and there is greater support for the view that 'responsible' companies ought not to neglect 'wider' interests such as those of their employees, clients and customers, the community, the environment, and so on. However, the 'members' money' attitude can still influence questions such as the propriety of corporate gifts to charity or donations to political parties: why, it is asked, should company directors, or even majority members, decide where this benevolence is to be bestowed, when there are likely to be other members who would choose to do something quite different with their share of the money if it were paid out to them?

Of course, the 'members' money' approach rests on the basic assumption that companies *are* formed with the paramount aim of earning profits, and that the investors contribute their capital on that understanding, and that the members' views on all this should prevail. This may be apt in the vast majority of instances; but we should not forget that the Companies Act does allow the corporate form to be used for all sorts of purposes, and there is nothing to say that business and profits must come first. The corporate form is adopted by many charitable organisations, and could clearly be used by an enterprise that allowed its investors a limited return, after which its excess profits were to go to philanthropy or to some other object. Many co-operatives are registered companies, established to run businesses that make *no* profit. And there is no reason why a 'one man company' should not have as its objects *both* the carrying on of its founder's business *and* the support of his family—especially after his death—and any other objects of his benevolence.

The decision in *Re Horsley & Weight Ltd* **[4.30]** confirms that, even at common law, the making of gratuitous payments can be construed as a corporate object if the company's old style memorandum was framed in sufficiently explicit terms. But prior to this decision, it was the *ultra vires* doctrine which was relied on by the judges to strike down many such transactions. Unhappily, in their zeal to keep corporate generosity within what they saw as proper bounds, they allowed a degree of confusion to creep into their reasoning, failing (for instance) to distinguish between corporate capacity and the directors' authority, in some cases, and between a company's express powers and its implied powers in others.

It was not until the Court of Appeal restated the law in the *Rolled Steel* case **[3.04]** that some logic was restored to the subject. But the result was that the *ultra vires* ground could be invoked only rarely to upset these gratuitous transactions. Now the rule cannot be invoked **(p. 136)** at all. The courts must have recourse instead to the rules on directors' authority and abuse of their powers, to the 'maintenance of capital' rules ('Controls over a company's distribution of capital', pp 512ff), the statutory 'wrongful trading' provision, and perhaps to other newer concepts, in order to counter the misapplication of corporate assets by transactions of this kind.

Note that CA 2006 s 366 now prohibits companies from making political donations or incurring political expenditure unless the transaction or the expenditure is authorised by the members of the company. Certain exemptions are specified, with various conditions and ceiling amounts specified.

Tort liability

There are two routes to finding a company liable in tort. The company may be *primarily* liable for committing the tort, just as any natural person might be, and the usual consequences will follow. To establish such primary liability, unless the liability is strict, it is essential to identify the person (or persons) whose acts will count as the acts of the company (as in the *Meridian Global* case, **[3.01]** and **[3.29]**, using Lord Hoffmann's attribution rules), and then to establish that those acts are sufficient to attract liability in tort.

The second route to fixing a company with liability in tort is to find the company *vicariously liable* for the tort. In this case, it is essential to find some individual who is primarily liable for the tort (and who might be sued personally by the claimant). Once that is done, it is then necessary to explain why the company is vicariously liable for that person's acts or omissions. Employers and principals are typically held to be vicariously liable for the acts of their employees or agents in the conduct of their employment or agency (but not for their acts outside this context, of course, although this is a difficult line to draw—see *Dubai Aluminium Company v Salaam* **[3.21]**). Vicarious liability has been described as 'a loss distribution device based on the grounds of social and economic policy'.[37] Liability attaches to the company not because it is regarded as having committed the tort, but because it has created the risk that the tort would be committed,[38] and so, for example, because of the close connection between the nature of the employment and the particular tort and looking at the matter in the round, it is just and reasonable to hold the employer liable.[39] It follows that the company's capacity to commit the tort is irrelevant.[40] Where vicarious liability is established, the individual and the company are jointly liable to the victim for the tort.[41]

One of the problems in this area is whether the individual who 'acts for the company' and whose acts attract *primary* liability in tort on the company, should also be primarily liable *personally* for the same tort (since the facts will usually, but not always, enable that to be established). If this is always the case, then the corporate form is not quite the insulating device in tort that it is in contract (where an agent acting for the company can fasten liability on the company while avoiding any personal obligations under the contract that is negotiated). For a potential resolution of the issues, see *Williams v Natural Life Health Foods* **[3.22]** and *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* **[3.23]**.

The following cases illustrate the operation of these rules.

(p. 137) ***A company may be primarily liable in tort, even for acts that it is not authorised or permitted to undertake.***

[3.20] Campbell v Paddington Corpn [1911] 1 KB 869 (King's Bench Divisional Court)

The plaintiff occupied premises in Edgware Road of which the balcony and front rooms could be let to persons wishing to view public processions. She had agreed to let a balcony to Mr Albert Ginger to watch the funeral procession of King Edward VII, but had to release him from the contract when the defendant corporation unlawfully erected a stand in the street outside, which blocked the view. In the county court, she was awarded £90 damages. The Corporation's appeal to the Divisional Court was dismissed.

> AVORY J: Three objections are taken to this verdict. First, it is said that the defendants, the mayor, aldermen and councillors of the metropolitan borough of Paddington, being a corporation, are not liable because the borough council had no legal right to do what they did, and therefore the corporation cannot be sued. This stand was erected in pursuance of a formal resolution of the borough council. To say that, because the borough council has no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation. If the view of

the defendants were correct no company could ever be sued if the directors of the company after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd. The first objection therefore fails, and the defendants are liable to be sued …

[The second and third objections are not material.]

LUSH J: … where the wrongful act is done without the express authority of the corporation, an authority from the corporation to do it cannot be implied if the act is outside the statutory powers of the corporation. That principle has no application to a case where the corporation has resolved to do and has, in the only way in which it can do any act, actually done the thing which is unlawful and which causes the damage complained of.

➢ Notes

1. Also see *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456, referred to in *Meridian Global* **[3.29]**.

2. *Campbell*'s case concerns the primary liability of a company in tort. The principle established by the case extends to acts which are unlawful, as well as to acts which, prior to the coming into force of CA 2006 and its predecessors in Companies Act 1989 (CA 1989), would have been beyond a company's capacity under the *ultra vires* doctrine ('Corporate capacity', p 83). The point is that the company's primary liability in tort cannot be limited to those things that the company is authorised to do. The issue, rather, is whether the acts of the company's human agents count as acts of the company (under the *Meridian Global* **[3.29]** test), and then whether those acts constitute a tort. It follows that a company may sometimes be held primarily liable for a tort even when none of its human actors commits the same tort. For example, in *WB Anderson and Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, Rhodes was held liable for negligent misrepresentation. The Rhodes employee who made the representation was not negligent, as he could only have known the true facts (on a buyer's creditworthiness) if either Rhodes' manager or its bookkeeper had told him, but they negligently did not. They, on the other hand, could not be liable for negligent misrepresentation because they had not made any representations. Nevertheless, Rhodes itself was liable for the tort.[42]

(p. 138) ***A company is often, although not invariably, vicariously liable for the torts of its agents and employees even when the acts constituting those torts are unauthorised or even illegal.***

[3.21] Dubai Aluminium Company Ltd v Salaam [2002] UKHL 48, [2003] 2 AC 366 (House of Lords)

The facts appear in Lord Nicholls's opinion. This case concerned the Amhurst partnership 'the firm', not a company, but the general principles remain relevant.

LORD NICHOLLS:

19 Vicarious liability is concerned with the responsibility of the firm [or a company] to other persons for wrongful acts done by a partner [or company agent or employee] while acting in the ordinary course of the partnership [or company] business or with the authority of his co-partners. At first sight this might seem something of a contradiction in terms. Partners do not usually agree with each other to commit wrongful acts. Partners are not normally authorised to engage in wrongful conduct. Indeed, if vicarious liability of a firm for acts done by a partner acting in the ordinary course of the business of the firm were confined to acts authorised in every particular, the reach of vicarious liability would be short indeed. Especially would this be so with dishonesty and other intentional wrongdoing, as distinct from negligence. Similarly restricted would be the vicarious responsibility of employers for wrongful acts done by employees in the course of their employment. Like considerations apply to vicarious liability for employees.

20 Take the present case. The essence of the claim advanced by Dubai Aluminium against Mr Amhurst is that he and Mr Salaam engaged in a criminal conspiracy to defraud Dubai Aluminium. Mr Amhurst drafted the consultancy agreement and other agreements in furtherance of this conspiracy. Needless to say, Mr Amhurst had no authority from his partners to conduct himself in this manner. Nor is there any question of conduct of this nature being part of the ordinary course of the business of the Amhurst firm. Mr Amhurst had authority to draft commercial agreements. He had no authority to draft a commercial agreement for the dishonest purpose of furthering a criminal conspiracy.

21 However, this latter fact does not of itself mean that the firm is exempt from liability for his wrongful conduct. Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

22 This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope.

23 If, then, authority is not the touchstone, what is? Lord Denning MR once said that on this question the cases are baffling: see *Morris v C W Martin & Sons Ltd*[1966] 1 QB 716, 724. Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223–224 and 230. …

(p. 139) 24 In these formulations the phrases 'may fairly and properly be regarded', 'can be said' and 'can fairly be regarded' betoken a value judgment by the court. The conclusion is a conclusion of law, based on primary facts, rather than a simple question of fact.

25 This 'close connection' test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged. It provides no clear assistance on when, to use Professor Fleming's phraseology, an incident is to be regarded as sufficiently work-related, as distinct from personal: see Fleming, *The Law of Torts*, 9th ed (1998), p 427. Again, the well known dictum of Lord Dunedin in *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, 67, draws a distinction between prohibitions which limit the sphere of employment and those which only deal with conduct within the sphere of employment. This leaves open how to recognise the one from the other.

26 This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions. In this field the latter form of assistance is particularly valuable.

27 So I turn to authority, noting that the present appeal concerns dishonest conduct. Historically the courts have been less ready to find vicarious liability in cases of employee dishonesty than in cases of negligence. …

30 I turn, then, to cases such as the present where there is no question of reliance or ‘holding out’, or of the employer having assumed a direct responsibility to the wronged person. Take a case where an employee does an act of a type for which he is employed but, perhaps through a misplaced excess of zeal, he does so dishonestly. He seeks to promote his employer’s interests, in the sphere in which he is employed, but using dishonest means. Not surprisingly, the courts have held that in such a case the employer may be liable to the injured third party just as much as in a case where the employee acted negligently. Whether done negligently or dishonestly the wrongful act comprised a wrongful and unauthorised mode of doing an act authorised by the employer, in the oft repeated language of the ‘Salmond’ formulation: see Salmond, *Law of Torts*, 1st ed (1907), p 83. …

32 The limits of this broad principle should be noted. A distinction is to be drawn between cases … where the employee was engaged, however misguidedly, in furthering his employer’s business, and cases where the employee is engaged solely in pursuing his own interests: on a ‘frolic of his own’, in the language of the time-honoured catch phrase. In the former type of case the employee, while seeking to promote his employer’s interests, does an act of a kind he is authorised to do. Then it may well be appropriate to attribute responsibility for his act to the employer, even though the manner of performance was not authorised or, indeed, was prohibited. The matter stands differently when the employee is engaged only in furthering his own interests, as distinct from those of his employer. … Then the mere fact that the act was of a kind the employee was authorised to do will not, of itself, fasten liability on the employer. In the absence of ‘holding out’ and reliance, there is no reason in principle why it should. Nor would this accord with authority. To attribute vicarious liability to the employer in such a case of dishonesty would be contrary to the familiar line of ‘driver’ cases, where an employer has been held not liable for the negligent driving of an employee who was employed as a driver but at the time of the accident was engaged in driving his employer’s vehicle on a frolic of his own.

➢ Note

It is essential, if the company is to be held vicariously liable for a tort, that someone within the company is found primarily liable for the same tort. Contrast this with the requirements where the company itself is held primarily liable. Then the individuals within the company may or may not also be primarily liable. All depends on the facts. This is the issue in the two cases which follow.

(p. 140) ***Avoiding findings of personal liability in tort against both the company and the person whose acts count as those of the company.***

[3.22] Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830 (House of Lords)

Williams and his partner approached the defendant company with a view to obtaining a franchise from it to run a health food shop in Rugby. They were given a brochure and, later, detailed financial projections for the scheme. Encouraged by these, they entered into a franchise agreement. The project was a failure. The advice they had been given was negligent, and although the company would have been held liable for their loss, it had been dissolved. The plaintiffs therefore sought to have the company’s managing director and principal shareholder, Mistlin, held personally liable. Mistlin’s expertise had been highlighted in the brochure, and he had played a prominent part in producing the projections, but he had played no part in negotiation of the franchise agreement with them. They succeeded at first instance, and by a majority in the Court of Appeal, but this ruling was reversed by the House of Lords.

LORD STEYN: … What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of *Hedley Byrne* [[1964] AC 465, HL], which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself. …

The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification, the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question, the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees. …

… it is important to make clear that a director of a contracting company may only be held liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance. …

Mr Mistlin owned and controlled the company. The company held itself out as having the expertise to provide reliable advice to franchisees. The brochure made clear that this expertise derived from Mr Mistlin's experience in the operation of the Salisbury shop. In my view these circumstances were insufficient to make Mr Mistlin personally liable to the plaintiffs. Stripped to essentials, the reasons of Langley J [the trial judge], the reasons of the majority in the Court of Appeal and the arguments of counsel for the plaintiffs can be considered under two headings. First, it is said that the terms of the brochure, and in particular its description of the role of Mr Mistlin, are **(p. 141)** sufficient to amount to an assumption of responsibility by Mr Mistlin. In his dissenting judgment [in the Court of Appeal] Sir Patrick Russell rightly pointed out that in a small one-man company 'the managing director will almost inevitably be the one possessed of qualities essential to the functioning of the company'. By itself this factor does not convey that the managing director is willing to be personally answerable to the customers of the company. Secondly, great emphasis was placed on the fact that it was made clear to the franchisees that Mr Mistlin's expertise derived from his experience in running the Salisbury shop for his own account. Hirst LJ summarised the point by saying that 'the relevant knowledge and experience was entirely his qua Mr Mistlin, and not his qua director'. The point will simply not bear the weight put on it. Postulate a food expert who over ten years gains experience in advising customers on his own account. Then he incorporates his business as a company and he so advises his customers. Surely, it cannot be right to say that in the new situation his earlier experience on his own account is indicative of an assumption of personal responsibility towards his customers. In the present case there were no personal dealings between Mr Mistlin and the plaintiffs. There were no exchanges or conduct crossing the line which could have conveyed to the plaintiffs that Mr Mistlin was willing to assume personal responsibility to them. Contrary to the submissions of counsel for the plaintiffs, I am also satisfied that there was not even evidence that the plaintiffs believed that Mr Mistlin was undertaking personal responsibility to them. Certainly, there was nothing in the circumstances to show that the plaintiffs could reasonably have looked to Mr Mistlin for indemnification of any loss. For these reasons I would reject the principal argument of counsel for the plaintiffs. …

LORDS GOFF OF CHIEVELEY, HOFFMANN, CLYDE and HUTTON concurred.

[3.23] Standard Chartered Bank v Pakistan National Shipping Corporation (No 2) [2000] 1 Lloyd's Rep 218 (Court of Appeal), overruled in [2002] UKHL 43, [2003] 1 AC 959 (House of Lords)

Mr Mehra, the managing director of Oakprime Ltd, knowingly made a false statement to Standard Chartered Bank (SCB) that enabled Oakprime Ltd to obtain payment under a letter of credit. To do this he persuaded the ship owners, Pakistan National Shipping Corporation (PNSC), to backdate a bill of lading. SCB did not know that the bill was falsely dated. When SCB sought payment from the bank that had issued the letter of credit, it refused because of discrepancies in the documents. SCB sued PNSC, Oakprime Ltd and Mr Mehra for deceit. It was successful against all three at first instance. PNSC and Mr Mehra appealed, and, in the Court of Appeal, Mr Mehra was successful. SCB successfully appealed. The House of Lords considered a number of issues. The only one of interest here is whether Mr Mehra was personally liable in deceit, or whether the deceit was only that of Oakprime Ltd. The judgments of the Court of Appeal are extracted here, even though overruled, as the comparison clarifies the analysis adopted in the House of Lords.

ALDOUS LJ [*Note this analysis is now overruled by the House of Lords*.]:

88 Since *Salomon v Salomon & Co Ltd* **[2.01]**, companies have been recognised as separate legal entities to their shareholders, their directors and their employees. Leaving aside certain cases, not applicable in this case, where it has been held permissible to lift the corporate veil e.g. where the company is a mere facade, directors or employees acting as such will only be liable for tortious acts committed during the course of their employment in three circumstances.

89 First, if a director or an employee himself commits the tort he will be liable. An example is the lorry driver who is involved in an accident in the course of his employment. Although Mr Mehra was the person who was responsible for making the misrepresentations, he did not commit the deceit himself. For reasons I have already stated the representations were made by Oakprime and not by him. Further, SCB relied upon them as representations by Oakprime and not as representations by Mr Mehra.

(p. 142) 90 The second way that a director or an employee will become liable is a branch of the first. A director or an employee may, when carrying out his duties for the company, assume a personal liability. An example where personal liability was assumed was *Fairline Shipping Corporation v Adamson* [1975] QB 180. A different conclusion was reached in *Trevor Ivory Ltd v Anderson* [1997] 2 NZLR 517. What amounts to such an assumption will depend upon the facts of the particular case. Guidance as to how to decide whether such an assumption took place can be obtained from *Williams v Natural Life Ltd* **[3.22]**. … [He then described the facts and cited Lord Steyn, including the passages extracted previously.]

91 In those quoted passages, Lord Steyn had in mind that the cause of action relied on was negligence. However the principles stated are applicable to other torts, in particular to deceit. There must be an assumption of responsibility such as to create a special relationship by the plaintiff with the director or employee himself. Whether that exists is to be judged objectively with the primary focus on things said and done by the director or employee. It is necessary to enquire whether the director conveyed directly or indirectly to the plaintiff that he assumed a personal responsibility towards the plaintiff.

92 In the present case, Mr Mehra, by his actions or statements never led SCB to believe he was assuming personal responsibility for the misrepresentations. SCB believed they were dealing with Oakprime. It follows that Mr Mehra cannot be held liable on this ground.

93 The third ground of liability arises when the director does not carry out the tortious act himself nor does he assume liability for it, but he procures and induces another, the company, to commit the tort.

94 A person who procures and induces another to commit a tort becomes a joint tortfeasor (see *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 and *Molnlycke AB v Procter & Gamble* [1992] RPC 583. There is no reason why a director of a company should be in any different position to a third party and therefore it is possible that a director can be capable of becoming a joint tortfeasor by procuring and inducing the company, for which he works, to carry out a tortious act. However there are good reasons to conclude that the carrying out of duties of a director would never be sufficient to make a director liable. That was the view of the Court of Appeal in *C. Evans v Spritebrand Ltd* [1985] 1 WLR 317. …

98 It was also alleged that Mr Mehra had been guilty of conspiracy. As I understand the allegation, the

unlawful act relied was the deceit practised by Oakprime on SCB. That was an act carried out by Oakprime but not with Mr Mehra who acted in his capacity as employee and director.

99 … I would allow the appeal by Mr Mehra …

EVANS LJ delivered a concurring judgment.

WARD LJ concurred with both.

[The decision of the Court of Appeal was overturned on appeal to the House of Lords.] LORD HOFFMANN:

20 My Lords, I come next to the question of whether Mr Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think that it is unfair. Mr Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr Mehra's representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr Mehra's representation, because otherwise there could have been no representation and no attribution.

21 The Court of Appeal appear to have based their conclusion upon the decision of your Lordships' House in *Williams v Natural Life Health Foods Ltd* **[3.22]**. That was an action for damages for negligent misrepresentation. My noble and learned friend, Lord Steyn, pointed out that in such a case **(p. 143)** liability depended upon an assumption of responsibility by the defendant. As Lord Devlin said in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 530, the basis of liability is analogous to contract. And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the *Hedley Byrne* rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

22 This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying: 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.' Evans LJ [2000] 1 Lloyd's Rep 218, 230 framed the question as being 'whether the director may be held liable for the company's tort'. But Mr Mehra was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the way he did, Evans LJ answered it by saying that the fact that Mr Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud.

23 Both Evans and Aldous LJJ treated the *Williams* case **[3.22]** as being based upon the separate legal personality of a company. Aldous LJ [see earlier] referred to*Salomon v A Salomon & Co Ltd* **[2.01]**. But my noble and learned friend, Lord Steyn, made it clear that the decision had nothing to do with company law. It was an application of the law of principal and agent to the requirement of assumption of responsibility under the *Hedley Byrne* principle. Lord Steyn said it would have made no difference if Mr Williams's principal had been a natural person. So one may test the matter by asking whether, if Mr Mehra had been acting as manager for the owner of the business who lived in the south of France and had made a fraudulent representation within the scope of his employment, he could escape personal liability by saying that it must have been perfectly clear that he was not being fraudulent on his own behalf but exclusively on behalf of his employer.

24 I would therefore allow the appeal against Mr Mehra …

LORDS MUSTILL, SLYNN AND HOBHOUSE concurred.

LORD RODGER delivered a concurring opinion.

➢ Notes

1. In *Barclay Pharmaceutical Ltd, AAH Pharmaceuticals Ltd, AAH Ltd v Waypharm LP and others* [2012] EWHC 306 (Comm), therefore, the court rejected the tortfeasor's argument that the only liability rested on the company and that he, as controller, had no separate personal liability. Citing the *dicta* of Lord Hoffmann and Lord Rodger from this decision, Gloster J held that 'a director making fraudulent misrepresentations on behalf of a company cannot escape personal liability for his fraud' [239] and the controller was found personally liable for the tort of causing loss by unlawful means. Indeed, if necessary, Gloster J 'would also hold the tortfeasor liable for inducing his company's breach of an agreement … because of his direct personal involvement and responsibility for the fraudulent presentations made' [245].

2. In *Holland* **[7.02]**, Mr Holland was a director of the corporate director which, in turn, was the sole director of the composite companies. Clarke LJ, in the Court of Appeal, in his dissenting judgment, drew an analogy with the facts of this case, and argued that Mr Holland should be held liable as *de facto* director of the composite companies because 'he personally procured the payment of the unlawful dividends and is liable to restore them just as the de jure director is' [131].

➢ Questions

1. Explain the basis of the different outcomes for the individuals in *Williams* **[3.22]** and *Standard Chartered* **[3.23]**. Is this explanation also consistent with the rules that apply in respect of contractual liability (see earlier) and criminal liability (see the following section)?

(p. 144) 2. What are the advantages and disadvantages of this series of decisions on tort liability for those dealing with companies (especially small companies) and those involved in managing such companies?

3. Are these decisions defensible on policy grounds? And on doctrinal grounds?

4. Is there now any need for vicarious liability in the context of companies, or is it always possible to find the company primarily liable in tort by applying an appropriate rule of attribution (as described in *Meridian* **[3.29]**)? Put another way, can a company always be found *primarily* liable for fraud, negligent misstatement, negligent driving, and so on, because the acts of a relevant individual count as the acts of the company for the relevant purpose?

Criminal liability

Some crimes have a mental element. To find the company liable for those, it is necessary to attribute the relevant mental element of one person (or corporate organ) within the company to the company itself. This is most usually done by identifying the 'directing mind and will of the company' (Lord Reid in *Tesco Supermarkets Ltd v Nattrass***[3.28]**). This rule, however, suffers from the defect that finding such a personal representative is only likely in very small companies, not in large ones. The rather unfair consequence is that it is much easier to find small companies liable in crime than large ones. Sometimes the problem can be overcome by using Lord Hoffmann's 'attribution rules' to find the person whose mental element *for these purposes* (ie for the purposes of the act constituting *this* crime) is to count as the mental element of the company (*Meridian Global* case **[3.29]**). It is not possible to make the company *vicariously liable* for crimes with a mental element: this would, in effect, be making the company criminally liable for all the criminal intents of anyone associated with the company.

On the other hand, where there is no mental element to the crime (ie so that the commission or omission of the act automatically attracts liability), then vicarious liability is possible. This is the usual rule in relation to offences relating to health and safety or environmental protection, for example. The *Tesco Supermarkets* case **[3.28]** is a case in point.

Alternatively, liability may be imposed if appropriate standards of care are not in place. The Bribery Act 2010 came into force on 1 July 2011, and repealed all existing statutory and common law offences relating to bribery and replaced them with four new offences, including a new 'corporate' offence under s 7 (the failure of commercial organisations to prevent bribery), which will apply where a corporation fails to prevent the payment of bribes by any person (whether an employee, agent or other third party) who is performing services on its behalf. The company's only defence is, pursuant to s 7(2), to show that it has in place 'adequate procedures' to prevent such bribery. In accordance with s 9 of the Act, the Secretary of State for Justice has published *The Bribery Act 2010 Guidance*,[43] which sets out six principles accompanied by case studies to assist companies in understanding the 'adequate procedures' requirement: proportionate procedures, top-level commitment, risk assessment, due diligence, communication and monitoring and review.

Since its inception, the Act has received mixed reception. On one hand, it has been praised as being 'clear and accessible', with the guidance representing a 'useful framework for compliance with the Act'.[44] On the other hand, it has also been described as a 'toothless wonder',[45] containing **(p. 145)** obvious areas of uncertainty within its terms.[46] Given its novelty, it is as yet impossible to assess its effect on companies and its success in combating bribery. A recent report by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery offers useful guidance on progress made by the UK on combating bribery:www.oecd.org/daf/anti-bribery/anti-briberyconvention/48362318.pdf.

Finally, there is the problem of corporate killing. This issue has been given some prominence in the press over the past decade, with a series of public disasters making it clear that it is difficult to find a large company liable for manslaughter, even when the business has been operated with inadequate regard to the health and safety of the public. Again, the problem is that it is often impossible to find one individual with the necessary criminal failings who can be identified with the company, and courts have rejected the use of aggregation to find the company liable by aggregating the failings of a series of individuals that, in total, add up to a corporate failing that might attract criminal liability (as is sometimes done in establishing vicarious liability in tort). See *Attorney General's Reference (No 2 of 1999)* [2000] QB 796[47] and *R v Stanley* (Central Criminal Court, 19 October 1990, on the *Herald of Free Enterprise* disaster).

The Law Commission reported on the problem (*Legislating for the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996)), there was a Home Office consultation paper in 2000 and a draft Bill was published in the White Paper, *Corporate Manslaughter: The Government's Draft Bill for Reform* (Cm 6498, 2005). Eventually, Parliament enacted the Corporate Manslaughter and Corporate Homicide Act 2007. It establishes a new offence of corporate manslaughter that is committed by a company if the way in which its activities are managed or organised by its senior management causes the death of a person *and* amounts to a gross breach of the relevant duty of care the company owed to the person. The company, if guilty, will be subject to a fine and perhaps to other appropriate orders.

Corporate Manslaughter and Corporate Homicide Act 2007 ss 1 and 18

1 The offence

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

- **(a)** causes a person's death, and
- **(b)** amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are—

- **(a)** a corporation;