> In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

Is this the same test as Lord Reid's? What do you consider that Lord Diplock meant by 'the powers of the company'? Who in the Tesco organisation was 'entrusted' with the exercise of the relevant power, and what was this power?

2. Could the state of mind of the secretary of a company ever be attributed to the company? (See the *Panorama* case **[3.15]**, and consider what might be said of the role in a company's articles.)

3. Does Lord Reid's analysis allow for the possibility that a company could have more than one individual, acting independently, 'speaking and acting as the company' at the same time? Should it?

4. If a corporate body is to be convicted on the basis of a confession, whose confession is necessary?

5. Half of the shares in Black & White Ltd are owned by Black and half by White, and they are its only directors. Can Black, White and the company be indicted for a conspiracy on the basis of acts of Black and White? Can Black and the company be indicted for a conspiracy on the basis of acts of Black at a time when White was away on holiday?

6. It has been held that a person in total control of a one man company is capable of stealing the property of the company (*Re Attorney General's Reference (No 2 of 1982)*[1984] QB 624, CA): see 'What does a company know?', p 156. Is this decision consistent with *R v McDonnell* ? Is this a *de facto* example of the court piercing the corporate veil? Or is it a 'blind spot' within the legal fiction of separate legal personality?

➢ Note

The *policy* of making corporate bodies liable to criminal prosecution in addition to or instead of those officers or agents who are personally at fault has been questioned by writers.[50] If both are proceeded against, and the officers are substantial members, they are doubly punished; if the company only is prosecuted and the wrongdoers have no stake in it, the fine will, in effect, be levied wholly on innocent members or customers, while if it is barely solvent, its creditors will suffer. Commentators have suggested that sanctions other than fines might be imposed, ranging all the way from 'naming and shaming' the company to ordering its dissolution. Note also a recent consultation initiated by the Ministry of Justice for the implementation of Deferred Prosecution Agreements (DPAs) in the UK, a tool which has been extensively used in the United States, and which enables companies to enter into agreements with prosecutors. This mechanism, akin to the tool of 'plea bargaining' as existing in standard criminal cases, **(p. 156)** will bypass prosecution in consideration for a large sum of money being paid in the form of, for instance, financial penalty and reparation to victims.[51]

What does a company know?

The question whether and in what circumstances knowledge should be imputed to a company or other corporate body is one of considerable complexity. Clearly, information which has been given to a corporate organ acting within its sphere of responsibility (eg a document laid before the directors at a board meeting or the members at a general meeting) has been brought home to the company.

This would also be true of information communicated to a person who is the company's 'directing mind and will' if

there is an individual whose relationship to the company can be so described. Thus, in *El Ajou v Dollar Land Holdings Ltd* [1994] 1 BCLC 464, CA, the question was whether DLH had received money with knowledge that it was the proceeds of fraud. The knowledge of its chairman, Ferdman, was attributed to DLH because it was held that for all purposes relevant to the transaction he was its directing mind and will.

In any area of activity where the members or the directors are competent to act by informal unanimous agreement, knowledge of a matter communicated to all those concerned could readily be attributed to the corporate body.

It is where the knowledge is that of one or more individuals only, whether officers, agents or employees of the company, who do not come into one of these categories, that the question becomes more difficult. In *Regina Fur Co Ltd v Bossom* [1957] 2 Lloyd's Rep 466 at 468, Pearson J said:

> The general effect of the authorities is, in my opinion, that in deciding whether in a particular case the knowledge of the agent is to be imputed to the company, or other principal, one should consider, mainly at any rate, (1) the position of the agent in relation to the principal and whether the agent had a wide or narrow sphere of operations, and (2) the position of the agent in relation to the relevant transaction and whether he represented the principal in respect of that transaction.

From this it would follow that information communicated to a company secretary, as the officer charged with general authority in the administrative affairs of the company (see the *Panorama* case **[3.15]**) will almost invariably be deemed to be known to the company.

In *JC Houghton & Co v Nothard, Lowe & Wills* [1927] 1 KB, CA, the court was concerned with the question whether the knowledge of a single director should be imputed to the company. Viscount Sumner in the House of Lords was of the view that:

> where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge which is relevant is that of the directors themselves, since it is their board that deals with the company's rights … What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to action which a fully informed corporation would proceed to take on the strength of it.

Also see *Lebon v Aqua Salt Co Ltd* [2009] UKPC 2, [2009] BCC 425, PC, where the knowledge of a person who was a promoter, director and substantial shareholder was attributed to the company, so as to put the company in bad faith, even though the information had not been communicated to the other directors.

(p. 157) Two exceptions are recognised to this rule relating to the knowledge of an agent.

The first is where the knowledge is received by him in a private capacity, in circumstances where he is under no obligation to communicate it to his principal—in Viscount Sumner's words, not 'in the course of his duty'. In *Re David Payne & Co Ltd* [1904] 2 Ch 608, CA, money was lent by a company which the borrower intended to use for an improper purpose. One of the lending company's directors was aware of this fact, but because he had received the information privately his knowledge was not ascribed to the company.

The second exception is made where the 'agent' is himself a wrongdoer, as was the case in *Houghton*'s case itself. Viscount Sumner went on to say:

> It has long been recognised that it would be contrary to justice and common sense to treat the knowledge of such persons as that of the company, as if one were to assume that they would make a clean breast of their delinquency.

This emerges from the broader '*Hampshire Land* principle', articulated in *Re Hampshire Land Co* **[3.31]**. The reasoning on this point was applied in *Belmont Finance Corpn Ltd v Williams Furniture Ltd* **[10.10]** and in *Heron International Ltd v Grade* **[7.07]**. It was also part of the basis of the decision in *Re Attorney General's Reference (No 2 of 1982)* [1984] QB 624, CA.[52] The question there was whether a person in total control of a one man company could in law steal its property. The court held that where the controller had acted dishonestly in relation to the company, his own knowledge was not to be attributed to the company, and it followed that a jury was not bound to conclude that the company must be taken to have consented to the controller's acts. The question of dishonesty was a separate issue, which should also be put to the jury—that is, the question whether the defendant had established that he had an honest belief, based on the company's 'true' consent, that he was entitled to appropriate the company's funds.

Again, in *R v Roziek* [1996] 1 BCLC 380, the accused had been charged with obtaining property from certain finance companies by deception. If the branch managers with whom he had dealt were aware of the facts, to the extent that they were parties to his dishonesty, it could not be argued that the companies had been deceived as a result of their knowledge: in that event it was necessary to show that some other employees, who had had the authority to issue the cheques in question to the accused, had been deceived. Since the jury had not been directed along these lines, Roziek's convictions were quashed.

Also see *Stone & Rolls Ltd (In Liquidation) v Moore Stephens* **[3.32]**—a difficult but vital case in this area—which suggests that where an individual is identified with a company, the only circumstances in which that individual's knowledge of his or her own wrongdoing should not be attributed to the company is where the company was the target of the wrongdoing. Knowledge may, on the other hand, be attributed where the individual uses the company to perform a wrongful act against another person.

In *El Ajou* it was stressed that the 'directing mind and will' approach and the 'agency' question were separate issues. Indeed, in that case the knowledge of Ferdman was attributed to the company on the first but not the second of these grounds because, *qua* agent, it was not his duty to communicate the information to his principal.

In contrast, in the case next cited, the position was the reverse: the knowledge was deemed to be that of the company on attribution or agency principles without regard to the question whether the particular individual was the company's directing mind and will.

The next case is crucial in this area.

(p. 158) ***Knowledge attribution rules.***

[3.29] Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (Privy Council)

Under the Securities Amendment Act 1988 (NZ), a person who became a 'substantial security holder' in a 'public issuer' (ie a company whose shares were listed for trading on the Stock Exchange) was required to give notice to the authorities 'as soon as the person knows, or ought to know' that he had become such a holder. Two senior investment managers of Meridian, Koo and Ng, acting within their authority but for improper purposes of their own, bought in its name shares in a listed company, ENC, which made Meridian a 'substantial security holder' in ENC. The knowledge of Koo, as the agent primarily involved in the transaction, was attributed to Meridian (so bringing it under an obligation to give the statutory notice) because, on construction of the statutory provision, this was the appropriate test of attribution rather than whether he was the company's directing mind and will.

> The opinion of their Lordships was delivered by LORD HOFFMANN: … The phrase 'directing mind and will' comes of course from the celebrated speech of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* **[3.24]**. But their Lordships think that there has been some misunderstanding of the true principle upon which that case was decided. It may be helpful to start by stating the nature of the problem in a case like this and then come back to *Lennard*' *s* case later.
>
> Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and

to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.

The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as 'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company': see *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* **[7.39]**.

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company **(p. 159)** of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no Ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?

One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, ie if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a 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.

The fact that the rule of attribution is a matter of interpretation or construction of the relevant substantive rule is shown by the contrast between two decisions of the House of Lords, *Tesco Supermarkets Ltd v Nattrass* **[3.28]** and *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*.[53] In the *Tesco* case the question involved the construction of [s 24(1) of] the Trade Descriptions Act 1968.

[His Lordship summarised the facts and issues in that case, and continued:] The House of Lords held that the precautions taken by the board were sufficient for the purposes of section 24(1) to count as precautions taken by the company and that the manager's negligence was not attributable to the company. It did so by examining the purpose of section 24(1) in providing a defence to what would otherwise have been an absolute offence: it was intended to give effect to 'a policy of consumer protection which does have a rational and moral justification'. This led to the conclusion that the acts and defaults of the manager were not intended to be attributed to the company …

On the other hand, in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd*, a restrictive arrangement in breach of an undertaking by a company to the Restrictive Practices Court was made by executives of the company acting within the scope of their employment. The board knew nothing of the arrangement; it had in fact given instructions to the company's employees that they were not to make such arrangements. But the House of Lords held that for the purposes of deciding whether the company was in contempt, the act and state of mind of an employee who entered into an arrangement in the course of his employment should be attributed to the company. This attribution rule was derived from a construction of the undertaking against the background of the Restrictive Trade Practices Act 1976: such undertakings by corporations would be worth little if the company could avoid liability for what its employees had actually done on the ground that the board did not know about it …

(p. 160) Against this background of general principle, their Lordships can return to Viscount Haldane LC. In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd***[3.24]** the substantive provision for which an attribution rule had to be devised was section 502 of the Merchant Shipping Act 1894, which provided a shipowner with a defence to a claim for the loss of cargo put on board his ship if he could show that the casualty happened 'without his actual fault or privity'. The cargo had been destroyed by a fire caused by the unseaworthy condition of the ship's boilers. The language of section 502 excludes vicarious liability; it is clear that in the case of an individual owner, only his own fault or privity can defeat the statutory protection. How is this rule to be applied to a company? Viscount Haldane LC rejected the possibility that it did not apply to companies at all or (which would have come to the same thing) that it required fault or privity attributable under the company's primary rules. Instead, guided by the language and purpose of the section, he looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied. Who in the company was responsible for monitoring the condition of the ship, receiving the reports of the master and ship's agents, authorising repairs etc.? This person was Mr Lennard, whom Viscount Haldane LC described as the 'directing mind and will' of the company. It was therefore his fault or privity which section 502 attributed to the company …

Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be … straightforward. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This could put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do

the deal. It is then obliged to give notice under section 20(3). The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.

It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the 'directing mind and will' of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. 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. Sometimes, as in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see *Moore v I Bresler Ltd*.[54] On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.

(p. 161) ➢ Notes

1. In *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580, HL, the question arose, in construing an insurance policy, whether there had been a theft of certain valuable documents by 'a person present on the premises' of the bank. The crime was attributed to a company, the necessary *mens rea* being found in the intention of its principal executive director. But the only individual who had at any time been physically present on the premises was a junior employee who had been sent to collect the documents. The House of Lords declined to identify this employee with the company so as to hold that it was a 'person present' within the term of the policy.[55]

2. In *Regina v St Regis Paper Co Ltd* [2011] EWCA Crim 2527, the Court of Appeal was required to consider whether an employee's intentional falsification of environmental records could be attributed to the defendant company (the owner and operator of mills which manufactured paper and board from waste paper). The court (Moses LJ, Davies J, Judge Gilbert QC) refused to attribute the employee's actions to the company, since the employee was not the 'directing mind and will' of the company and their lordships were of the view that, as a matter of statutory construction, there was 'no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will' of the defendant company [12].

➢ Questions

1. Can a corporation forget? How (if at all) might this come about?

2. In *Regina v St Regis Paper Co Ltd*, in Note 2, the Court of Appeal noted the company's efforts to encourage accountability and develop best practice in health and safety [18]. Could it be said that the court thought it simply 'unfair' to hold the company liable in these circumstances, so the decision was less a matter of statutory construction, but more an exercise in fact-finding? See the *dicta* of Lord Phillips in *Stone & Rolls Ltd* **[3.32]** at [65].

Application of knowledge attribution rules

Although Lord Hoffmann's approach in *Meridian Global* is compelling, it does not automatically solve all the difficult issues encountered in practice. Indeed, Lord Hoffmann noted this himself, commenting that application of the appropriate attribution rules was entirely context-specific, and pointing out that just because a person is authorised to act on behalf of a company, it does not always follow that his or her knowledge of that act will be attributed to the company.

Deciding whose knowledge is to be attributed to a company as employer.

[3.30] Orr v Milton Keynes Council [2011] EWCA Civ 62 (Court of Appeal)

The facts appear from the judgment of Moore-Bick LJ.

> MOORE-BICK LJ:
>
> 34 The employee, Trevor Orr, is of Jamaican origin. He was employed by Milton Keynes Council as a part-time youth worker until he was summarily dismissed [by Mr Madden] for gross misconduct on 26 May 2006. … However, Mr Madden [Orr's team leader] was not entirely blameless …
>
> 35 The council appointed a senior manager, Mr John Cove, to oversee the disciplinary process. …
>
> **(p. 162)** 36 Mr Cove found that both allegations of misconduct had been established and that each of them was sufficient to constitute a sufficient ground of dismissal. … Mr Orr appealed against that decision, but his appeal failed. He subsequently made a claim for unfair dismissal and unlawful discrimination. The tribunal found that the level of investigation was reasonable in the circumstances and that the conduct of the disciplinary process had been reasonable and fair. It found that on the basis of the evidence before it the council genuinely and reasonably believed that the allegations made against Mr Orr were well-founded. Dismissal fell within the band of reasonable responses and accordingly was not unfair. [That decision is now being appealed.]
>
> 58 … Parliament cannot have assumed that in a large organisation every allegation of misconduct or other grounds of dismissal against any employee would be investigated by the person or body that represents it at the highest level, who would himself then decide whether to exercise the power of dismissal. … The answer to the question 'Whose knowledge or state of mind was *for this purpose* intended to count as the knowledge or state of mind of the employer?' will be 'The person who was deputed to carry out the employer's functions under section 98'.
>
> 59 In the present case that person was Mr Cove. The submission that the knowledge of Mr Madden is to be treated as the knowledge of the council and as such is to be imputed to Mr Cove is in my view unsound. In the first place, it is doubtful whether in circumstances of this kind an employee's knowledge of his own wrongdoing is to be imputed to his employer: see *In re Hampshire Land Co* **[3.31]** in which an officer's knowledge of his own wrongdoing was not attributable to the company. More importantly, however, to impute to Mr Cove knowledge of Mr Madden's behaviour that he could not reasonably have acquired through the appropriate disciplinary procedure in order to enable Mr Orr to treat as unreasonable and therefore unfair a decision that was in all respects reasonable would be to impose on the council as the employer a more onerous duty than that for which s 98 provides.
>
> 60 Sedley LJ suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. To impute to that person knowledge held by others is to reverse the principles of attribution formulated in *Meridian Global Funds Management Asia Ltd* **[3.29]** and to place the whole exercise on an artificial footing. The obligation to carry out a reasonable

investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained. Moreover, the principle cannot logically be restricted to a person in the position of Mr Madden; if sound, it must apply to all employees above a certain level of seniority, though in principle it should apply to any employee who is in possession of information that relates to the organisation's affairs and which it is material for his superiors to know. To impute Mr Madden's knowledge to Mr Cove, therefore, is tantamount to treating Mr Cove as having acquired all the relevant information in the organisation's possession. That is not what section 98(4) or the authorities require.

The next extracts illustrate the difficulties. *Re Hampshire Land Company* **[3.31]** is the easier case. This case stands for the principle that where one person is an officer (not necessarily a director) of two companies, any personal knowledge of the officer is not necessarily the knowledge of both the companies. Knowledge acquired as an officer of one company will only be imputed to the other where a duty is imposed on the officer to communicate that knowledge **(p. 163)** to the other company, and a duty is imposed on the same officer to receive the notice for the other company. Moreover, if the common officer has been guilty of fraud, or even irregularity, the court will not draw the inference that the officer has fulfilled these duties.

That finding makes complete sense, but its application in the context of one man companies is controversial, as is revealed in the *Stone & Rolls* case **[3.32]**, where the House of Lords divided 3:2 on the application of the principle to the facts before them.

Where one person is an officer of two companies, the officer's personal knowledge is not necessarily the knowledge of both companies: relevance of the duties of the common officer and any fraud or irregularity in their exercise.

[3.31] In Re Hampshire Land Company [1896] 2 Ch 743 (Chancery Division)

The directors of a company were empowered to borrow money on its behalf, but not beyond a certain limit without the consent of a general meeting. A general meeting gave the required consent, but the notices summoning the meeting were irregular, in that they did not specify that borrowing beyond the limit was to be authorised by the meeting. The money was borrowed from a society the secretary of which was also the secretary of the company, and he knew of the irregularity. The court held that the knowledge of the secretary could not be imputed to the society, and that the money lent could therefore be proved in the winding up of the company.

VAUGHAN WILLIAMS J: The question really is, whether the shareholders in the building society or the shareholders in the company ought to bear any loss that would result from the resolution authorizing the directors of the company to borrow this money. So far as the shareholders of both the two corporations are concerned, they are innocent people.

It must be taken that in fact a resolution was passed by the shareholders of the company authorizing the borrowing of the £30,000 [but] no notice was given to them that this special business was intended to be proposed to the meeting [and the directors] had no authority in the absence of a properly passed resolution to borrow this money. But in that state of things, the money having been lent by the society and received by the company, the question which I have stated arises. It is not disputed that the authority of *Royal British Bank v. Turquand* [see **[3.16]**] is such that the society had a right to assume in a case like this that all these essentials of internal management had been carried out by the borrowing company, and that it is only in case the law imputes to the society knowledge of these irregularities that the society is not to rank upon the estate of the Hampshire Land Company as a creditor for the amount lent.

The question, therefore, is this: Is it right to impute this knowledge to the society? It is said that it is right,

because Mr. Wills was the common officer of both the society and the company, and was aware of these irregularities; and I think it must be taken that he was aware of them. Then it is said that his knowledge as the officer of the company is equally his knowledge as the officer of the society, and that therefore I ought to impute this knowledge to the society. I do not agree. Both Mr. Bramwell Davis and Mr. Jenkins [counsel] shrank from saying that wherever there is a common officer of two societies, the knowledge of such officer personally is to be imputed to both the societies employing him. In fact it was quite impossible, having regard to … [and various authorities were then cited]. But the moment you have done that you have to ask yourself this: Where is the line to be drawn, or what is the test to be applied in order to say whether or not in each case the knowledge of the common officer is the knowledge of each company employing him? It seems to me that, broadly, … the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice. … It seems to me that that is not at all the case here. … The case is very much more like the one which both Mr. Bramwell **(p. 164)** Davis and Mr. Jenkins had to admit was an exception to the general rule that they sought to lay down, for they admitted that if Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company. …

➢ Notes

1. As indicated earlier (see 'What does a company know?', pp 156ff), subsequent cases demonstrate different understandings of the precise nature and scope of the*Hampshire Land* principle, and doubt has even been expressed as to whether it exists—see *Bowstead & Reynolds on Agency* (18th edn, 2006), paras 8–188 and 8–213; and P Watts, 'Imputed Knowledge in Agency Law—Excising the Fraud Exception' (2001) 117 LQR 300, 319–320.

2. In *Safeway Stores Ltd and others v Twigger and others* **[3.33]**, the company sought to recover from the responsible directors/employees the amount of penalty it paid to the Office of Fair Trading (OFT). The Court of Appeal refused to apply the *Hampshire Land* principle; in the words of Longmore LJ:

> 29 In my judgment, however, this cannot be an answer to the defendants' summary judgment application since the same need for consistency between criminal (or quasi-criminal) liability and civil liability is still required to exist. Once it is appreciated that the claimant companies are (personally and not vicariously) liable to pay the penalties exigible under the 1998 Act those companies cannot invoke the *Hampshire Land* principle to say that they were not 'truly' liable. The principle gives them no defence to the OFT's claim for the penalties; they are personally liable to pay those penalties and it would be inconsistent with that liability for them to be able to recover those penalties in the civil courts from the defendants. The statutory scheme has attributed responsibility to the claimant companies and the*Hampshire Land* exception to the ordinary rule of attribution can have no import on the application of the ex turpi maxim.
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> 30 This is not a decision which requires any resolution of fact but is a pure matter of law.

3. In *The Commissioners for Her Majesty's Revenue and Customs v Greener Solutions Ltd* [2012] UKUT 18 (Upper

Tribunal (Tax and Chancery Chamber)), the court held that: (i) the knowledge of an agent in breach of his duty to the company was not to be attributed to a company where the company was a victim of his fraud; (ii) to determine whether there had been a fraud against the company, the effect of the acts should be considered, not what the position would have been if those acts had proved ineffective; and (iii) the court should not be too ready to imply harm to the company. In this case, the fraud had been aimed at the Revenue rather than the company, so the *Hampshire Land* principle was not engaged and the director's knowledge of the fraud was attributed to the company.

The next case is a difficult one. The opinion of the House of Lords is almost 100 pages long; the House divided 3:2; each of the five Law Lords gave a separate opinion; even the majority seems not completely at one; and, finally, at least one commentator suggests that the right questions were not in any event addressed.[56]

(p. 165) Before reading the extract which follows, some context may be helpful. The issue before the court was deceptively simple. A one man company had perpetrated frauds on a number of banks to the tune of almost £100 million. The company's auditors had not detected the fraud. Neither the company nor the fraudster could meet the company's liabilities to the banks. Assuming the auditors *were* negligent, could the company (through its liquidator) sue the auditors for the losses the company had suffered because the frauds had not been detected? The majority of the House of Lords held that it could *not*.

Their reasons express different subtleties, but, broadly, they accepted that: (i) the company was a wrongdoer (the fraudster's fraud *was* the company's fraud, and the*Hampshire Land* exception did not apply); (ii) as a principle of public policy, a wrongdoer cannot recover in a cause of action based on its own wrongdoing (the *ex turpi causa*principle—see later); and (iii) in the proposed action by the company against its auditors, the 'wrongdoers' *would* recover—because, at least in a one man company, the company was exclusively identified with its shareholders. It was immaterial, as here, that the company is a separate legal person or that the recoveries would only benefit the company's creditors, not its sole fraudulent shareholder. Each aspect of the analysis generated its own problems, many of which are elaborated in the following extract.

The *ex turpi causa* principle warrants a few words so that the context of *Stone & Rolls* is clear. In *Stone & Rolls*, Lord Phillips said that '*ex turpi causa* is a principle that prevents a claimant from using the court to obtain benefits from his own illegal conduct'. As a consequence, courts will not enforce illegal contracts, nor assist claimants to recover benefits from their own wrongdoing. In *Stone & Rolls*, some of the opinions appear to express a wider view of this principle than that advanced in *Tinsley v Milligan*[1994] 1 AC 340, HL. There, so long as the underlying illegality did not have to be pleaded in order for the claimant to advance her claim, she was not barred by the *ex turpi causa* principle. Pursuing this approach, Lord Scott (dissenting) thought that Stone & Rolls *could* advance their claim against the auditors in contract (although not in tort) without raising any fraudulent scheme, so would not be barred by the *ex turpi causa* principle; the illegal scheme would, however, have to be revealed at the causation and damages assessment stage, but he did not pursue its impact there. By contrast, the majority seemed more concerned with whether an action against the auditors would have the *effect* of benefiting the wrongdoers.

Frauds perpetrated by a 'one man company': how knowledge of the frauds is attributed to the company and for what purposes; the company itself is fraudulent—disapplication of the Hampshire Land principle; the principle of ex turpi causa prevents the company suing its auditors in negligence for failure to detect the fraud.

[3.32] Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm) [2009] UKHL 39; [2009] 1 AC 1391 (House of Lords)

Another part of this judgment, dealing with the extent of the liability of auditors, is extracted at **[8.05]**.

S & R's beneficial owner and sole directing mind and will, S, had used S & R as a vehicle for defrauding banks. When the fraud was discovered, the principal victim successfully sued S & R for deceit and was awarded substantial damages. Neither S & R nor S could satisfy the judgment and S & R went into liquidation. Its liquidators brought an action in negligence against S & R's auditors, MS, seeking to recover losses caused to S & R in consequence of the extension of the period of its fraudulent activity caused by MS's breach of duty. MS

accepted, for the purposes of these proceedings, that they were in breach of their duty to exercise reasonable care and skill in carrying out their responsibilities as auditors and that, but for their breach, the fraud perpetrated by S & R would have been discovered earlier. MS submitted, however, **(p. 166)** that the action could not succeed because it was founded on S & R's fraud and was met by the defence of *ex turpi causa*. S & R argued that its liability for S's frauds was vicarious; that by reason of the principle in *Re Hampshire Land Co* **[3.31]** S's fraud could not be attributed to it; and that *ex turpi causa* did not provide a defence where the claimant's illegal conduct was the very thing that the defendant was under a duty to prevent. The House of Lords (Lords Scott and Mance dissenting) found for MS, holding the auditors not liable in the circumstances.

LORD PHILLIPS OF WORTH MATRAVERS:

12 The debate between the parties has largely centred on the nature and effect of the *Hampshire Land* principle. Mr Sumption [counsel for MS] summarised this principle as follows in oral argument: 'There is not to be imputed to a company a fraud *which is being practised against it* even if it is being practised by someone whose acts and state of mind in the ordinary way are attributed to the company.' [Emphasis added.] Mr Sumption submits that this principle does not prevent attribution to S & R of Mr Stojevic's fraud which was directed not against S & R but against the banks.

13 Mr Brindle [counsel for S & R] does not accept that the *Hampshire Land* principle is as narrow as this. He submits that it also applies in respect of fraud on the part of an agent of the company that is directed against a third party in as much as the fraud is likely ultimately to come home to roost with consequent detriment to the company. Thus the company is a secondary victim of the fraud. That is precisely what has happened in this case, for S & R has been held liable [to the banks] for Mr Stojevic's fraud.

14 Mr Sumption has a fallback position that meets this argument. It turns on the fact that Mr Stojevic was, in effect, the sole shareholder in S & R and also solely responsible for S & R's activities. Mr Sumption submits that where there is no human embodiment of the company other than the fraudster, attribution of the fraud to the company is inevitable. …

43 … The important point to note is that *Hampshire Land* **[3.31]** is an exception to the normal rules for the attribution of an agent's *knowledge* to his principal. It is not a rule about the attribution of conduct. *Hampshire Land* applies where an agent has knowledge which his principal does not in fact share but which under normal principles of attribution would be deemed to be the knowledge of the principal. The effect of *Hampshire Land* is that knowledge of the agent will not be attributed to the principal when the knowledge relates to the agent's own breach of duty to his principal. The rationale for *Hampshire Land* has been said to be that it is contrary to common sense and justice to attribute to a principal knowledge of something that his agent would be anxious to conceal from him. …

49 … The purpose for which the question of attribution has to be answered is in order to decide whether the defence of *ex turpi causa* applies. … If the underlying principle of public policy is applied, the question that has to be answered is whether S & R is seeking to obtain compensation for the consequences of its own fraud rather than for the consequences of fraud for which it is only vicariously liable. To answer the question it is necessary to decide whether the fraud of Mr Stojevic falls to be treated as the fraud of S & R itself …

60 … It makes no sense to say that the fraud should not be attributed to the company. The fact that fraud has been attributed to the company is the very thing about which the company is complaining. The company's complaint is that its directing mind and will has infected it with turpitude. If *ex turpi causa* is not to apply in such circumstances, the reason should simply be that the public policy underlying it does not require its application.

61 One can readily reach that conclusion where all the shareholders are innocent. Recovery from the directing mind and will [ie by the company against the defaulting director] does not result in any individual recovering compensation for his own wrong. The position becomes unclear, however, if some of the shareholders were complicit in the directing mind and will's misconduct …

65 Lord Brown and Lord Walker have based their decision on Mr Sumption's fallback position. Lord Walker