RE: BILTA (UK) LTD (IN LIQUIDATION) & OTHERS VS NAZIR & OTHERS [2015]
UKSC 23

Introduction
The recent Supreme Court decision in Bilton (UK) Ltd (in liquidation) and others v Nazir and others has provided office holders with greater (but not final) clarity on the operation of the ‘illegality defence’.

Many readers will be familiar with the concept of the illegality defence, otherwise referred to by the maxim ‘ex turpi causa non est actum actio’. It is a rule of law which provides that a claimant cannot rely on its own wrongdoing to found a claim against another party.

The principle is a common sense one, and has a long history. Indeed, Lord Sumption in Bilton, considering the history of the rule, cited a case dating to 1765 concerning two highwaymen who had fallen out over sharing their spoils, leading one to sue the other for an account of profits arising from their “partnership” (a claim which the Court held to be “scandalous and impertinent”). In this historical context, it is clear to see why the reliance by an individual on his own wrongdoing to claim against another individual’s wrongdoing was prevented as a legal defence.

The area is, however, a complex one, and has been subject to some uncertainty ever since the House of Lords decision in Stone & Rolls v Moore Stephens in 2009.

The Supreme Court judgment in Bilton has brought some welcome clarity to the issues – while also highlighting the likelihood of a further examination by the Supreme Court of the whole basis of the illegality defence as soon as the opportunity arises.

The Facts
Bilton’s business involved trading in carbon credits. It was placed into compulsory liquidation, following a provisional liquidation, in 2009, by which point it is alleged to have owed HMRC over £38m in unpaid VAT.

The liquidators of Bilton brought proceedings against Bilton’s two former directors, Messrs Nazir and Chopra (the latter of whom was also Bilton’s sole shareholder), as well as Jetivia SA, a Swiss company with which Bilton’s trading had been conducted, and Jetivia’s chief executive Mr Brunschweiler. The claims, which were brought in the name of the company itself, alleged that the four defendants “were parties to an unlawful means conspiracy to injure Bilton by a fraudulent scheme, which involved Messrs Chopra and Nazir breaching their fiduciary duties as directors, and Jetivia and Mr Brunschweiler (the Appellants) dishonestly assisting them in doing so”.

Specifically, the claims alleged that the Appellants had conspired to engage in ‘carousel fraud’ via a series of linked trades which was intended to leave Bilton with a large liability to HMRC which it would inevitably be unable to meet.

The Appeal
The Appellants’ response to the liquidators’ claims against them was to make an interim application to strike out the claims. It is worth noting that the proceedings are still at an interim stage and that the courts have not yet begun to consider the substantive case. The Appellants contended that the actions and knowledge of Bilton’s directors should be “attributed” to Bilton itself. This would, in effect, have rendered Bilton, as the corporate entity, a party to its directors’ own wrongdoing, and thereby prevented it from using that wrongdoing to found a claim against the directors and the Appellants who had assisted them.

Attribution
Attribution involves deeming one party to have had knowledge of or to have been responsible...
for the actions of another party. It is a necessary element of the illegality defence where the proceedings are being brought by a company, because companies can only act through their officers. The wrongdoing of those officers must therefore first be attributed to the company, in order to raise the illegality defence against that company.

The Supreme Court was unanimous in deciding that where a company is itself the victim of wrongdoing by its officers or shareholders, the knowledge or actions of those persons cannot be attributed to the company. As the company therefore cannot be deemed to be responsible for the wrongdoing, the illegality defence does not arise.

This is clearly a sensible outcome. The various judges arrived at it by somewhat different routes; in particular, Lord Neuberger, with three other judges, felt that the Court’s role in deciding on questions of attribution was to decide whether attribution ought to apply, in light of the nature and factual context of the claim in question. Lord Sumption, by contrast, felt that the illegality defence constituted a fixed rule of law with limited scope for judicial discretion, but one which included a rule preventing attribution in these specific circumstances. All judges acknowledged that their differing analyses led to the same conclusion.

Therefore, where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing or knowledge of the director cannot be attributed to the company as a defence to the claim brought against the directors by the company’s liquidator in the name of the company.

While most observers will no doubt feel this outcome is intuitive, its importance lies in going some way towards resolving the uncertainties in the law created by *Stone & Rolls*. It that case, the liquidators of a “one man band” company set up to perpetrate a prolonged course of fraudulent dealing sued the company’s auditors for negligence in failing to spot the fraud. The claim was dismissed, before the alleged negligence was even discussed, on the basis of *ex turpi causa*. The rationale being that the company was deemed to have had knowledge of and been responsible for the actions of its sole director.

The House of Lords judgment in that case is notoriously unclear. The judgment was reached by a majority of three of the five judges, each of whom gave different reasons for their conclusion. The Law Commission’s verdict, cited in the *Bills* judgment, was that “it is difficult to anticipate what precedent, if any, Stone & Rolls will set regarding the illegality defence”. In the years since then, it has caused some confusion regarding the scope of the illegality defence and its correct application in different circumstances.

**Fraudulent trading**

Apart from raising the attribution point, as discussed above, the Appellants also argued that the fraudulent trading claims against them (pursuant to section 213 IA 1986) against them could not be brought as such claims could only be brought against defendants resident in the UK. Jetho was a Swiss company and its director was a Swiss national living in France when the transactions were carried out.

The Court was also unanimous in dismissing the appeal in relation to the application of s213 IA 1986 in these circumstances. It was firmly of the view that it had jurisdiction to determine the issues in the case. Lord Sumption dismissed as “misconceived” the argument raised by the Appellants that s213 IA 1986 was not intended to have extraterritorial effect. The Court decided that s213 IA 1986 has extraterritorial effect, given the context of the winding up of a company registered in the UK trading in a globalised economy. The Court approved the approach of the Court of Appeal in *Re Paramount Airways Limited* [1992] where it was held that the court had jurisdiction under s238 IA 1986 against a foreign resident abroad.

**Comment**

The *Bills* judgment has now clarified the application of the illegality defence as it applies to claims by insolvent companies against former directors and those who dishonestly assist them. This brings welcome certainty to liquidators in pursuing this very common situation.

The *Bills* decision does not remove all uncertainty in this area; it leaves open, for example, precisely how the Courts should apply the *ex turpi causa* principle to the *Stone & Rolls* scenario itself, where a company which has suffered a loss as a result of wrongdoing by its directors or shareholders (or by some of them) wishes to bring claims against third parties who are innocent of the wrongdoing but may, for example, have been negligent in failing to spot it. The seven judges all considered that a more comprehensive review of the whole basis and application of the illegality defence is needed, but they were of the view that this case, which turned solely on the more discrete issue of attribution, was not the forum for that analysis.

In saying that, they made clear that the House of Lords judgment in *Stone & Rolls* will not be the starting point for that wider review. Lord Neuberger considered, quoting Lord Denning, that the case should be put “on one side . . . marked ‘not to be looked at again’”. The court was agreed that it should be confined to its facts and not applied to other cases.

In considering claims against innocent but negligent third parties arising from a company fraud, office holders are therefore now free from the confusion created by *Stone & Rolls*, and can draw some useful pointers from the various judgments in *Bills*. They will, however, have to wait a little while longer for a full reconsideration of the relevant law.

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