Neutral Citation Number: [2018] EWHC 3055 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2018

Before:

LORD JUSTICE DAVIS

(Sitting as a Judge of the High Court)

Between:

THE SERIOUS FRAUD OFFICE	**Applicant**
- and -	
BARCLAYS PLC & ANR	**Respondents**

- -
- -

Sir James Eadie QC, Andrew Onslow QC, Edward Brown QC, Annabel Darlow QC and **Alison Morgan** (instructed by **Rakesh Somaia** on behalf of **the Serious Fraud Office**) for the **Applicant**

Richard Lissack QC, Crispin Aylett QC and **Ben FitzGerald** (instructed by **Wilkie Farr & Gallagher (UK) LLP**) for the **Respondents**

Hearing dates: 22 – 24 and 26 October 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LORD JUSTICE DAVIS

Lord Justice Davis:

Introduction

1. This is an application on the part of the Serious Fraud Office (SFO) for permission to serve a draft indictment: an application to prefer a voluntary bill of indictment, in time-honoured language. It is made as a consequence of Jay J, sitting in the Crown Court at Southwark, dismissing on 21 May 2018 all charges on the then indictment as against Barclays Plc and its wholly owned subsidiary Barclays Bank Plc (whom I will collectively style "Barclays"). The application involves a consideration of whether the (alleged) criminal dishonesty of senior officers within a corporate organisation can be attributed to that corporation so as to render the corporation itself criminally liable.

2. This has been a heavy application. The dismissal hearing below lasted 5 days. It resulted in a reserved judgment extending to 231 paragraphs. The judge was to describe the issues arising as "of fabulous complexity and intricacy". That complexity, and doubtless too the great importance of this case for the parties, is reflected in the fact that the SFO before me was represented by no fewer than 4 QCs and 1 junior and the respondents by 2 QCs and 1 junior. All this is not, and I emphasise should not be, the norm for applications to prefer a voluntary bill. However, this is without question a complex case: and a hearing of such a length in such a context is not unprecedented (see *Serious Fraud Office* v *Evans* [2015] 1 WLR 3526).

3. Following the hearing before me, and having taken some time to reflect, I announced my conclusion that the application would be dismissed. I stated that I would give my written reasons for such decision at a later date. These are those reasons.

4. It is unavoidable that this will be a judgment of some length. Nevertheless, I have no intention of giving a judgment of a detail corresponding to that below or of a length commensurate to the very sophisticated and elaborate arguments presented to me. Consequently, I will not specifically discuss in this judgment every detail or nuance of the arguments addressed to me: albeit I have sought to bear them all in mind. In saying that, I would like to acknowledge the conspicuously thorough and careful arguments presented, in writing and orally, to me and to acknowledge the skill with which they were presented.

The approach

5. The general approach which I take on this application to prefer a voluntary bill of indictment is as follows.

6. My jurisdiction is undoubted. Paragraph 2 (6) of Schedule 3 to the Crime and Disorder Act 1998 provides for the voluntary bill procedure in cases where a Crown Court judge has dismissed charges: such voluntary bill procedure having been statutorily preserved by s. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act 1933. Parliament has not, for whatever reason, seen fit to provide an appeal to the Court of Appeal (Criminal Division) in such cases, notwithstanding the availability of an appeal route in the case of terminating rulings subsequently conferred by the relevant provisions of the Criminal Justice Act 2003.

7. Such applications are the subject of the Criminal Procedure Rules (under which I previously directed an oral hearing) and of the Consolidated Criminal Practice Direction. That at paragraph 10B.4 states as follows:

> "The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it."

8. That it should be an exceptional course to grant leave to prefer a voluntary bill is borne out by a number of authorities cited to me but to which I need not specifically refer here. As stated in *Evans* at paragraph 85, the exceptional course of preferring a voluntary bill, following a successful application in the Crown Court to dismiss, will ordinarily only be permitted by the High Court if:

(i) the Crown Court has made a basic or substantive error of law which is clear or obvious; or

(ii) new evidence has become available to the prosecution which was not available before; or

(iii) there was a serious procedural irregularity.

Nevertheless, I agree with the SFO's submission that exceptionality is not the legal test as such for granting permission: rather, it is descriptive of the position.

9. The authorities also make clear that if the application is based on the assertion that the Crown Court, in dismissing the charges, had wrongly appraised the evidence proposed to be adduced by the prosecution then the bar is raised very high: in effect, if leave to prefer is to be granted in such a context, it will ordinarily require the High Court to conclude that the view of the evidence taken by the Crown Court judge was wholly unreasonable.

10. I direct myself on that basis.

11. Applying that approach, I make clear here and now that I accept the judge's account and evaluation of the evidence as proposed to be adduced by the prosecution. He was taken through it (and the underlying materials) in far more detail than I have been. I have no basis in any event for concluding that his factual summary or factual evaluation – he having stressed that he took the prosecution case at its highest and on the assumption that its factual allegations could be proved at trial – was wrong or unreasonable. To the extent that it was submitted by Sir James Eadie QC (who had not appeared below) on behalf of the SFO that I was in as good a position as the judge to evaluate the evidence I reject that. I am not; and in any case it would be wrong in principle, on an application of this kind, to undertake afresh such a factual evaluation. As also stated by Pitchers J in the case of *Davenport* [2005] EWHC 2823 (QB):

> "… it must, in my judgment, be wrong in principle for the prosecution to be able to get round a decision [to dismiss] they do not like by inviting another judge to take a different view of

> the same material that was before the judge who dismissed the charges."

12. But in any event that is not the real thrust of the SFO's present application. It ultimately does not claim that the judge got the (presumed) facts wrong. What it says is that he made a number of errors of law by reference to the presumed facts and reached the wrong conclusion in consequence.

13. On the basis which I have outlined above, it could then be argued that the SFO's application should fail in limine. How can it possibly be said that any asserted error of law involved is "clear or obvious"? The truth is, it cannot be said. In fact, speaking for myself, I had to read both the judgment and the written arguments more than once just to get a real grip on the issues. But it would in my view be simplistic and wholly wrong, in this particular case, to dismiss the application on such a basis. I do not demur from the correctness of the general proposition that, where a case has been dismissed in the Crown Court and an application for a voluntary bill is then made, any alleged error of law involved must be clear or obvious. But I view that as indeed a *general* proposition, which of itself permits of departure in an appropriate case.

14. In my view this assuredly is such a case: and it would do no service to the parties or anyone else to treat it otherwise. Indeed, as I have indicated, ultimately the key issue here is whether the alleged criminal acts of individual officers of Barclays are to be attributed to Barclays so as to make it too criminally culpable. In such a context, as stated by Lord Reid in *Tesco Ltd.* v *Nattrass* [1972] AC 153 at page 173 D:

> "I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company."

15. Thus, on the footing that the facts as presented by the prosecution are to be taken as true (which must be assumed for present purposes), it then becomes a matter of law as to whether or not Barclays, as a corporate entity, is itself criminally culpable. This is not a matter of evaluation or discretion: it is a matter of law. Consequently, the question is what nowadays would be called a binary one: is or is not, on the assumed facts, Barclays criminally culpable: yes or no? That needs an answer, be the exercise difficult or not.

16. That being so, I do not think that, potentially complex though the case is, I should shy away from engaging in a detailed analysis in reaching my own conclusion: any more than Jay J did not shy away from fully confronting the matter.

17. In assessing the position, I should also explain, for the avoidance of any doubt, that I am not sitting on appeal, as such, from the decision of Jay J. I am a judge of the Court of Appeal. But on this application I sit as a High Court judge. That said, the arguments before me closely track, even if they are not identical to, the arguments before Jay J; and the indictment, in the relevant respects, is in the same form. At all events I could in reality – and as was accepted before me - only give leave to prefer a voluntary bill (if I thought it in the interests of justice to do so) if I formed the view that the conclusion of Jay J was wrong.

Facts

18. So what are the facts which have led to this proposed prosecution of Barclays? I say "facts" – but of course I mean facts as currently alleged by the prosecution and where the individual defendants have fiercely and strongly denied any dishonesty.

19. I will summarise these only relatively briefly. A much fuller account is contained in the judgment of Jay J, to which reference can be made.

20. As will be recalled, in 2008 there was a banking crisis. Barclays was unavoidably caught up in that crisis. It was extremely anxious to avoid being bailed out by the United Kingdom Government (as other United Kingdom banks were being constrained to be) as it did not wish to forfeit or compromise its independence. It therefore urgently cast around for sources of fresh injections of capital in order to bolster its balance sheet.

21. Barclays Plc at that time owned 100% of the voting shares of Barclays Bank Plc. The Chief Executive of Barclays was Mr John Varley (JV). Mr Christopher Lucas (CL) was Group Finance Director. Mr Roger Jenkins (RJ) was Barclays Capital Executive Chairman of Investment Management in the Middle East and North Africa. Relevant also, in particular, to Counts 1 and 2 on the draft indictment are Mr Richard Boath (RB) who was Barclays Capital Head of European Financial Institutions Group and Mr Thomas Kalaris (TK) who was Barclays Wealth Management Chief Executive Officer. Further, in connection with the capital raisings contemplated, a committee called the Board Finance Committee (BFC) had been constituted, in circumstances I will come on to explain.

22. In June 2008, a capital raising (CR1) undertaken by Barclays secured £4.4 billion. A subsequent capital raising (CR2) in November 2008 secured a total of £6.8 billion. I have, mercifully, been spared study of the underlying formal documentation. The details do not matter for present purposes.

23. The prospective investors identified – at a time when investors were difficult to attract because of the state of the banking sector – included (among others) the state of Qatar, in effect through its Sovereign Wealth Fund. In addition, the then Prime Minister of Qatar, Sheikh Hamad, was proposed as a potential investor through a BVI investment company called Challenger Universal Limited. I will, for convenience, call the various entities "the Qatari entities", although I stress that they are legally distinct. RJ had a particularly close business connection with such entities.

24. It was settled practice at the time, and the common expectation of investors, that the subscribing investors known as "Conditional Placees" such as the Qatari entities would as between themselves receive an equal commission, in addition to the like discounted price of the shares agreed for a rights issue. In the case of CR1 such commission was publicly set out in the Prospectus ultimately issued to shareholders and the wider market as 1.5%: the formal Subscription Agreements dated 25 June 2008 also expressly stated that no other commissions were being paid to any of the investors. Further, in the Prospectus it was stated that the aggregate costs and expenses payable by Barclays in respect of the Placing was £107 million. (In the Prospectus, it may be added, it was stated that the Board and Barclays took responsibility for the accuracy of the information contained in it.) That figure was consistent with commission being paid to subscribers of 1.5% of their maximum investment commitment. It was not consistent

with any further sum (by way of commission or otherwise) being paid to any such investors.

25. As the banking crisis worsened, it became evident that CR1 had not solved the balance sheet problem for Barclays: indeed the United Kingdom Government was making a requirement of further capital injections. By this time, willing investors were even harder to locate. Barclays focused again on Qatar. It also focused on certain Abu Dhabi investors. They agreed to participate. The combined investment of the Qatari entities (the same entities as involved in CR1) on this occasion ultimately amounted to some £2.05 billion. The structure of CR2 was particularly complex, involving the use of Reserve Capital Instruments, Mandatorily Convertible Notes and Warrants. Suffice it to say, Subscription Agreements and various Prospectuses were, with other documents, issued on 31 October and 25 November 2008. These contained in the relevant respects broadly the like statements and warranties as contained in the CR1 documentation. The public announcement of Barclays, and as restated in the relevant documentation, was that the Qatari entities would variously receive 2% commission on the Reserve Capital Instruments for which they subscribed and 4% commission on the Mandatorily Convertible Notes for which they subscribed (totalling £62 million) and in addition an Arrangement Fee of £66 million. The stated net proceeds for Barclays were likewise calculated on such a basis.

26. On 8 October 2008 a request for a loan by Barclays of US $2 billion was made by those in Qatar: subsequently raised, on 29 October 2008, to a request for a loan of US $3 billion. The matter was primarily negotiated by JV and RJ, although discussed with a number of others. This loan was ultimately approved by the Group Credit Committee (GCC) on behalf of Barclays Bank Plc. That approval was subject to an express restriction on the use of the funds being lent, it being expressly stipulated that the loan could not be permitted for use to fund the CR2 subscription (because of an appreciation of the unlawful financial assistance provisions of s. 151 of the Companies Act 1985).

27. In the result, the loan was drawn down on 17 November 2008, those in Qatar having been pressing for its release. Payment by the Qatari entities of what was due from them under the various Subscription Agreements relating to CR2 was thereafter made on 24 November 2008. It is the prosecution case that the amount needed to pay the subscription monies corresponded very closely (after applying the relevant exchange rates) to the amount of the prior loan. It is also the prosecution case, on the evidence, that the same bank account in London was used to receive the loan and thereafter to make the subscription payments for CR2. It is the prosecution case that the loan money was used, and was always designed to be used, to fund the subscription payments.

28. So far as CR1 and CR2 are concerned, it is the SFO's case that the true position was very different from that being publicly stated and warranted in the respective Prospectuses and Subscription Agreements: which documents, it is said, dishonestly misrepresented the position. The truth was that much greater sums had been paid to the Qatari entities in return for their agreeing to invest for the purposes of CR1 and CR2 than had been stated in the public documentation. These sums in effect had to be paid as the Qatari entities (doubtless appreciating their strong bargaining position) were insistent. Moreover, by the time of CR2 the Qatari entities were insistent on achieving a "blended price" for the totality of their various investments: of itself connoting a sizeable sum.

29. How this was achieved, it is alleged, was through the use of two agreements called "Advisory Service Agreements" and made with Qatar Holdings LLC. The first (ASA1) was dated 25 June 2008. It was signed by JV on behalf of Barclays Bank Plc. The second was dated 31 October 2008. It was signed by RJ on behalf of Barclays Bank Plc. Both agreements were in letter form. The stated term of ASA1 was 3 years. That of ASA2 was 5 years. ASA1 comprises one page. The stated sum to be paid (of £42 million) for services to be provided is written in manuscript. That sum was to be paid in four instalments. The agreement does not specify the services to be provided in return for the £42 million; it states that Qatar Holding has agreed to provide "various services, as an intermediary, in connection with the development of our business in the Middle East"; and that the "type and scale of the services… will need to be refined by mutual agreement as our relationship develops further". ASA2 is hardly less short. The fee is stated at £280 million. It refers to the "great success of the agreement to date". It then lists, in very broad language under six heads, the nature of some of the services stated to be provided: with again a statement that "these will need to be refined by mutual agreement" during the period of the agreement. The sums payable by Barclays under ASA1 thus were £42 million. The sums payable under ASA2 were £280 million. It is one feature of ASA2 that its contractual period overlaps, for all but four months, with the same contractual period stated in ASA1, albeit ASA2 was to last for an additional 28 months after ASA1 terminated. It is another feature of ASA1 that the four instalments payable under it were to be paid by 1 April 2009: that is, before the end of the contractual period; and all such instalments in fact were invoiced by the Qatari entities on 13 August 2008. The instalments payable under ASA2 were 20 equal instalments of £14 million.

30. It is the case of the SFO that each of ASA1 and ASA2 was a sham or dishonest device designed to funnel money to the Qatari entities as part of their true overall commission for subscribing to CR1 and CR2. The real reason why these Agreements were introduced in this way was because the Qatar entities had been insisting on much higher commission payments for their involvement. Further, if that were accepted as payable as commission for their subscriptions (which, it is alleged, was the reality) then that would not only indicate Barclays' weak position but also, in accordance with settled practice, all other subscribers in the same class should likewise also potentially have to be so paid a corresponding increased commission: and it was desired to avoid that.

31. There is, as the judge found, an amount of material (particularly in the form of contemporaneous emails and recorded telephone conversations) to lend cogent prima facie support to the SFO's case on this - although of course, as is to be understood, it will be subject to the strong denials of the individual defendants. That detail is provided in the latest Prosecution Summary of Evidence and is also fully set out in the judgment of Jay J.

32. Thus, by way of example, with regard to CR1 and ASA1 the documentation indicates that the Qatari entities were holding out for a commission of 3.25% (not the publicly announced 1.5%). It also indicates the desperation within Barclays to secure their involvement. The internal documentation is further wholly consistent with the fee payable under ASA1 of £42 million corresponding, and being intended to correspond (with interest adjustments), with the balance of 1.75% representing the differential between the publicly stated 1.5% and the demanded 3.25%. The documentation is also consistent with acute anxiety as to what was going on on behalf of at least some of those

closely involved on behalf of Barclays. By way of example, in a telephone conversation between RB and TK on 4 June 2008 there is talk of "doing a side deal" and that "it's going to have to be on the side"; and telephone conversations between, for example, RB and RJ on 18 June 2008 are indicative of the "advisory services" being regarded as in truth wholly illusory. RB is also recorded on that day as suggesting a "start again" approach by paying increased commissions to everyone and then "we don't have any of this shit, none of us is going to jail...." A further reference is also made to "I am very surprised that John Varley, given his ethics, is doing this". Elsewhere there is stated the need to discuss the advisory agreement by telephone rather than email. And so on: there is a great deal more to similar effect.

33. As to CR2 and ASA2, the SFO points to the lack of any real discussion at all as to what further advisory services could in truth be or were intended to be meaningfully provided by the Qatari entities or as to why ASA2 was needed at all, given the existence of ASA1 and the alleged lack of any services to date provided thereunder, and also when much of its period in any event overlapped with that of ASA1. By this time, moreover, unlawful financial assistance was very much in people's minds. The in-house legal team was refusing to sign off on the drafting of ASA2; and to the extent that ASA2 was raised with external lawyers, the SFO's case is that they were never told of the lack of any true independent commercial purpose in ASA2 according to its tenor; or of the fact that (as alleged) it was in truth designed to meet the Qatari demands as a price for their involvement - desperately needed - in CR2.

34. It is right to mention that a draft of ASA1 had been placed before the BFC on 19 June 2008 (although no price had been inserted in that draft); and reference was also made in the published Prospectus to there being intended to be an Advisory Services Agreement with the Qatari entities, albeit the terms of such agreement were not there outlined. So far as ASA2 is concerned, that does not appear to have been raised as such with the BFC at all; nor is there any mention of it in the published formal documentation.

35. Thus the case of the SFO is that ASA1 and ASA2 were not independent of but were interdependent with CR1 and CR2 and in reality represented (and were intended to constitute) disguised commissions payable to the Qatari entities: thereby rendering the warranties and statements made in the various Prospectuses and Subscription Agreements false.

36. As to the loan of US $3 billion, the case of the SFO - put shortly - is simply that this was designed and intended to fund the Qatari entities in raising the subscription amounts needed for CR2. It is said that that is shown by the course of events; by the timings; and by various internal recorded conversations and emails.

37. Overall, it is also the SFO's position that the Board and the relevant committees (BFC and GCC) within Barclays were kept in the dark about the true intent behind ASA1 and ASA2 and the loan. A witness statement of the then Chairman, Mr Agius, for example, relied on by the SFO, expresses both shock and great anger at what has emerged as a result of the subsequent investigations. He considers that the Board and the committees were deceived. He says that had they known the truth they never would have authorised ASA1 and ASA2 and never would have permitted signing off on or the issuing of the various Subscription Agreements and Prospectuses for CR1 and CR2.

38. So that then leads to the question of how it is said, by reference to the facts alleged by the prosecution and to the counts as particularised, that criminal culpability or the part of Barclays arises.

Indictment and Statutory Background

39. The draft indictment reads as follows:

"IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

PROPOSED INDICTMENT

THE QUEEN

- v -

BARCLAYS PLC
BARCLAYS BANK PLC
JOHN VARLEY
ROGER JENKINS

BARCLAYS PLC, BARCLAYS BANK PLC, JOHN VARLEY and ROGER JENKINS, are charged as follows:

Count 1

STATEMENT OF OFFENCE

CONSPIRACY TO COMMIT FRAUD BY FALSE REPRESENTATION, contrary to section 1(1) of the Criminal Law Act 1977.

PARTICULARS OF OFFENCE

BARCLAYS PLC, between 1 May 2008 and 31 August 2008, conspired with JOHN VARLEY, ROGER JENKINS, THOMAS KALARIS, RICHARD BOATH and CHRISTOPHER LUCAS, to dishonestly make representations within documents relating to Barclays' capital raising of June 2008, with the intention of making gain for themselves or another, or causing loss to another, or exposing another to a risk of loss, which they knew were untrue or misleading, in breach of section 2 of the Fraud Act 2006, namely:

i. (In the Prospectus dated 25 June 2008) that Qatar Holding was to be paid commission of 1.5% for its subscription in shares;
ii. (In the Prospectus dated 25 June 2008) that the aggregate costs and expenses payable by Barclays plc in connection with the Firm Placing and the Placing and Open Offer was estimated to amount to approximately £107 million; and
iii. (In Subscription Agreements dated 25 June 2008) that Barclays had not agreed to, nor intended to pay, any additional fees, commissions, costs, reimbursements or other amounts to Qatar Holding.

Count 2

STATEMENT OF OFFENCE

CONSPIRACY TO COMMIT FRAUD BY FALSE REPRESENTATION, contrary to section 1(1) of the Criminal Law Act 1977.

PARTICULARS OF OFFENCE

BARCLAYS PLC, between 1 September 2008 and 30 November 2008, conspired with JOHN VARLEY, ROGER JENKINS and CHRISTOPHER LUCAS, to dishonestly make representations within documents relating to Barclays' capital raising of October 2008, with the intention of making gain for themselves or another, or causing loss to another, or exposing another to a risk of loss, which they knew were untrue or misleading, in breach of section 2 of the Fraud Act 2006, namely:

i. (In the MCN Prospectus dated 25 November 2008) that Qatar Holding was to be paid commission of 2% for its subscription in RCIs;
ii. (In the MCN Prospectus dated 25 November 2008) that the net proceeds of the issue of the Notes was expected to amount to approximately £3,875,000,000 after deduction of commissions and concessions and the expenses incurred in connection with the issue of the Notes.
iii. (In the RCI Prospectus dated 25 November 2008) that the net proceeds of the issue of the RCIs was expected to amount to approximately £2,905,000 after deduction of commissions and concessions and the expenses incurred in connection with the issue of the RCIs;
iv. (In Subscription Agreements dated 31 October 2008) that there were no further agreements or arrangements entered into between Qatar Holding and Barclays; and
v. (In Subscription Agreements dated 31 October 2008) that Barclays had not agreed to, nor intended to pay, any additional fees, commissions, costs, reimbursements or other amounts to Qatar Holding.

Count 3

STATEMENT OF OFFENCE

UNLAWFUL FINANCIAL ASSISTANCE, contrary to section 151(1) and (3) of the Companies Act 1985

PARTICULARS OF OFFENCE

BARCLAYS BANK PLC and BARCLAYS PLC, between 1 October 2008 and 30 November 2008, gave financial assistance, in the form of a loan of US$3 billion by Barclays Bank plc and Barclays plc, to the State of Qatar (acting through the Ministry of Economy and Finance) for the purpose, directly or indirectly, of Qatar Holding's acquisition of shares in Barclays plc, before or at the same time as the acquisition of shares took place.

Count 4

STATEMENT OF OFFENCE

BEING AN OFFICER IN DEFAULT OF A COMPANY'S GIVING OF UNLAWFUL FINANCIAL ASSISTANCE, contrary to section 151(1) and (3) of the Companies Act 1985

PARTICULARS OF OFFENCE

JOHN VARLEY and ROGER JENKINS, between 1 October 2008 and 30 November 2008, as officers of Barclays plc, knowingly and wilfully authorised or permitted the giving of unlawful financial assistance, in the form of a loan of US$3 billion, by Barclays plc, or its subsidiary, to the State of Qatar (acting through the Ministry of Economy and Finance)."

40. It thus may be noted that in Counts 1 and 2 there is no count of common law conspiracy to defraud. What is alleged is a statutory conspiracy, under s. 1 (1) of the Criminal Law Act 1977, by reference to fraud by false representation under s. 2 of the Fraud Act 2006. It thus is necessary to set out the terms of s. 2 of the Fraud Act 2006, which constitutes the offence of fraud by false representation:

> "Fraud by false representation
>
> (1) A person is in breach of this section if he —
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.
>
> (2) A representation is false if—
>
> (a) it is untrue or misleading, and
>
> (b) the person making it knows that it is, or might be, untrue or misleading.
>
> (3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—
>
> (a)the person making the representation, or
>
> (b)any other person.
>
> (4) A representation may be express or implied.
>
> (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention)."

41. I note that s. 3 relates to fraud by failing to disclose information and s. 4 relates to fraud by abuse of position. But the SFO has not sought in this case to rely on either such provision. I also note the provisions of s. 12:

> "Liability of company officers for offences by company

> (1) Subsection (2) applies if an offence under this Act is committed by a body corporate.
>
> (2) If the offence is proved to have been committed with the consent or connivance of—
>
> (a) a director, manager, secretary or other similar officer of the body corporate, or
>
> (b) a person who was purporting to act in any such capacity,
>
> he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (3) If the affairs of a body corporate are managed by its members, subsection (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate."

(I add here that that the statutory technique of imposing secondary criminal liability on errant officers or managers of a company is quite frequently deployed in a number of statutory contexts: such as, for example, s. 151 of the Companies Act 1985 itself and, for example, s. 14 of the Bribery Act 2010.)

42. So far as Counts 3 and 4 are concerned, s. 151 of the Companies Act 1985 provides as follows:

> "Financial assistance generally prohibited
>
> (1) Subject to the following provisions of this Chapter, where a person is acquiring or is proposing to acquire shares in a company, it is not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place.
>
> (2) Subject to those provisions, where a person has acquired shares in a company and any liability has been incurred (by that or any other person), for the purpose of that acquisition, it is not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred.
>
> (3) If a company acts in contravention of this section, it is liable to a fine, and every officer of it who is in default is liable to imprisonment or a fine, or both."

43. I should here also note the provisions of s. 153 (1) and (2):

> "Transactions not prohibited by s. 151

> (1) Section 151(1) does not prohibit a company from giving financial assistance for the purpose of an acquisition of shares in it or its holding company if —
>
> (a) the company's principal purpose in giving that assistance is not to give it for the purpose of any such acquisition, or the giving of the assistance for that purpose is but an incidental part of some larger purpose of the company, and
>
> (b) the assistance is given in good faith in the interests of the company.
>
> (2) Section 151(2) does not prohibit a company from giving financial assistance if—
>
> (a) the company's principal purpose in giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of the acquisition of shares in the company or its holding company, or the reduction or discharge of any such liability is but an incidental part of some larger purpose of the company, and
>
> (b) the assistance is given in good faith in the interests of the company."

44. These provisions of the Companies Act 1985 have in fact since been repealed by corresponding (though not identical) provisions in the Companies Act 2006. But those provisions only came into effect after the events in question in the present case.

45. Finally, for present purposes, s. 1 (1) of the Criminal Law Act 1977 provides as follows:

> "(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a)will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b)would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question."

Section 2 (1) provides:

> "2 (1) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence if he is an intended victim of that offence."

Constitutional Position within Barclays

46. It is necessary to say something about the constitution of Barclays and about various meetings and resolutions.

47. Extracts from the Articles of Association of Barclays Plc were drawn to my attention. I was told that those also are reflected in the Articles of Association of Barclays Bank Plc. Thus these articles are included:

> "113. The board may entrust to and confer upon any director any of the powers exercisable by it as such upon such terms and conditions and with such restrictions as it thinks fit…
>
> 114 (a). The board may delegate all or any of its powers, authorities, discretions and functions to any committee or committees on such terms and conditions as it may think fit.
>
> . . . .
>
> 117. The business of the company shall be managed by the board, which may exercise all such powers of the company as are not by the statutes or by these articles required to be exercised in general meeting…"

It was, however, among other things provided in a document entitled "Corporate Governance in Barclays" that changes to the company's capital structures were reserved to the Board.

48. With regard to CR1, on 11 June 2008 the Board of Barclays Plc was informed of the proposed discount on the shares the subject of the proposed placing and also was informed that the commission payable to the subscribers was unchanged at 1.5%. It was common ground that at a previous Board meeting of Barclays Plc the Board had by resolution passed on 28 May 2008 approved commission payable at 1.5% and a discount on the shares to a maximum of 10%: and it approved CR1 proceeding on this basis. It on that occasion had delegated authority "to a Committee of the Board to oversee the placing and offer on behalf of the Board." It was proposed that the BFC be appointed for this purpose. That was to include the (non-executive) Chairman (Mr Agius); the Chief Executive Officer (JV); and at least 2 non-executive directors. It was further resolved by the Board on that occasion that the BFC be "vested with full authority to approve, execute and do or procure to be executed and done all acts it may be necessary or desirable to have executed, approved or done in connection with the Placing and Open Offer..." Non-material matters were left to be approved by any one Director, Company Secretary or Group General Counsel. Also on that occasion the directors of the Board signed a responsibility letter verifying the accuracy of the proposed Prospectus. Subsequently on 17 June 2008 the Board signed a resolution amending the terms of the capital raising to a figure of £5.5 billion.

49. At a BFC meeting on 19 June 2008 it was among other things resolved that the final terms of CR1 be approved and that any one director be authorised (among other things) to sign any necessary documents with regard to the Placing and Open Offer.

50. As to CR2, there had been a number of Board meetings. Thus on 21 October the Board resolved that Barclays "should pay such fees, commissions and expenses in connection with the [Qatari] subscription as may be fair and reasonable in the circumstances." The

Board was informed on 26 October 2008 that significant fees would be paid to the key subscribers: 2% on the Convertible Instruments and 4% on the Loan Notes. (The Board was at no stage told of any proposal to pay the Qatari entities a further £280 million.) At a Board meeting held on 27 October 2008 it was resolved that CR2 could be proceeded with. It was further resolved that the BFC be authorised with regard to CR2 and be authorised to finalise the terms of the transaction.

51. It thus was resolved by the Board, among other things, that the BFC "be vested with full authority to approve, execute and do… all acts it may be necessary or desirable to have approved, executed or done in connection with the Transaction…" On 22 October 2008 the BFC had itself been told that the Qatari entities would be seeking additional fees expected to be £325 million; but it was not told of the additional £280 million which thereafter was to be included in ASA2. On 28 October 2008 the BFC in turn thereafter resolved that authority be given to the Chairman (Mr Agius) and Chief Executive Officer (JV) with regard to finalising the transaction. It in this respect was resolved by the BFC that "the Chairman and Chief Executive, acting jointly (together "the Authorised Persons"), be vested with full authority to approve, execute and do…. all acts they together consider necessary to have approved, executed or done in connection with the Transaction…" Again, "non-material matters" were left for approval by any one Director, Company Secretary or Group General Counsel. On 30 October 2008 Mr Agius and JV then resolved on behalf of Barclays to approve the Subscription Agreements for CR2.

52. With regard to the loan, it was common ground before me that the relevant committee with power to approve the loan of US $3 billion made in November 2008 was the GCC. It was and is not suggested that the Board of Barclays Plc or Barclays Bank Plc had any involvement in, or would have been expected to have any involvement in, approving that loan.

53 Finally on this aspect of the matter, the position apparently was that at the material times the main Board of Barclays Plc comprised the (non-executive) Chairman (Mr Agius); eleven non-executive directors; and five executive directors, of whom JV, as Chief Executive Officer, and CL, as Group Finance Director, were two. JV and CL were also executive directors of Barclays Bank Plc.

54. So far as the BFC was concerned, that ultimately comprised the Chairman, three non-executive directors and JV and CL. It was agreed that at all meetings of the BFC the non-executive directors should be in the majority of those attending; and at all events it seems that CL was recorded simply as being (with others) "in attendance" at the BFC meeting held on 19 June 2008. That particular meeting was attended by the Chairman, two non-executive directors and JV as members of that committee.

55. As for the GCC, neither JV or CL (nor any other of the alleged individual conspirators) was a member of that committee.

The legal authorities

56. I can now turn to the law.

57. The starting point is that it is well-established that a limited liability company is capable in principle, depending on the circumstances, of being party to a conspiracy. Further,

as the terms of the Fraud Act 2006 show (see s. 1 (1) and s. 12), it is clear that a company can be liable for fraud under that Act. Likewise it is self-evident from the terms of s. 151 of the Companies Act 1985 that a company may be criminally liable for unlawful financial assistance.

58. That being so, the question is, on the assumed facts, whether the alleged dishonest acts taken in conjunction with the alleged dishonest state of mind of the relevant individuals – in particular for present purposes JV, CL and RJ - can be attributed to Barclays so as to make it criminally liable. Put another way, are their (assumed) dishonest acts and intentions, for the purposes of these particular transactions, to be treated as the dishonest acts and intentions of Barclays itself?

59. The authorities in this field are legion: and many of them were cited to me. However, I am only going to refer to a selection of them.

60. Since a limited company has a separate legal status whose activities and intentions can only derive from its human officers and agents it was at one time thought that a limited company could have no criminal liability at all for a common law crime involving mens rea such as conspiracy. But that view of things has long been exploded: see, for example, *R* v *ICR Haulage Ltd*. [1944] KB 551.

61. It is common in this context to start with the speech of Viscount Haldane in the case of *Lennard's Carrying Company Ltd.* v *Asiatic Petroleum Co. Ltd.* [1915] AC 705 (a case on s. 502 of the Merchant Shipping Act 1894) and his introduction of the notion of a person who is "the directing mind and will of the corporation". But I take as my starting point the House of Lords decision in *Tesco* v *Nattrass* (cited above), which was a case involving the criminal law in a regulatory context: in that case, alleged infringement of the Trade Description Act 1968 and the defence available under s. 24 of that Act.

62. In that case, Tesco (a limited company) was charged with an offence under the 1968 Act. It raised a defence, as permitted by the statute, that the offence was "due to an act or default of another person": namely the manager of the relevant store. It was convicted. The House of Lords quashed the company's conviction, holding that the manager was indeed "another person" for the purposes of the statutory defence. Thus it was held that the manager could not, for those purposes, be identified with the company.

63. In his speech Lord Reid rather deprecated the notion that there should be vicarious responsibility on the part of the employer company for an infringement of the statute committed without the consent or connivance of the employer. In that case, as it was held, the board of the company had remained in control of the manager and of the store: consequently his acts and omissions were not, for the purposes of s. 24, to be regarded as the acts and omissions of the company itself: and the company itself was blameless.

64. In the course of his speech Lord Reid said this at p. 171F-H:

> "Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company.

> Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. *Lennard's* case [1915] A.C. 705 was one of them."

His ultimate conclusion in that case was expressed in this way:

> "But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself."

65. In the course of his speech, Viscount Dilhorne, after referring to certain authorities, said this at p. 187 G-H:

> "These passages, I think, clearly indicate that one has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organisation. In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as "another person" within the meaning of sections 23 and 24 (1) (a)."

And at p. 193 A-B Lord Pearson stated:

> "In the case of a company, the ego is located in several persons, for example, those mentioned in section 20 of the Act or other persons in a similar position of direction or general management. A company may have an alter ego, if those persons who are or have its ego delegate to some other person the control and management, with full discretionary powers, of some section of the company's business. In the case of a company, it may be difficult, and in most cases for practical purposes unnecessary, to draw the distinction between its ego and its alter ego, but theoretically there is that distinction."

In his speech, Lord Diplock, at p. 199H-200A, placed particular emphasis on the constitution of the company for ascertaining which individuals are to be treated in law as the company for the purposes of the acts done in the course of its business. He had previously stated this at p. 199 C-D:

> "To constitute a criminal offence, a physical act done by any person must generally be done by him in some reprehensible state of mind. Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent: because it does not ascribe to him his agent's state of mind. Qui peccat per alium peccat per se is not a maxim of criminal law."

66. As I will come on to explain, *Tesco* v *Nattrass* still, subject to some qualification, is to be taken as providing the relevant test for attributing criminal culpability to a corporation. It therefore is to be noted at this stage that significant emphasis is placed in that case on the requirement that the postulated individual(s) should, to be the directing mind and will, have "full discretion to act independently of instructions" of the Board with regard to the relevant function and should not be responsible to the Board or others for the manner in which he discharges his duties.

67. That decision has been criticized in some quarters. It is said that it involves too narrow an approach and is capable of deflecting Parliament's intention in various statutory provisions, particularly regulatory offences. It is also said that such an approach would tend to render large companies with widely devolved management less exposed to criminal prosecution than small companies. I can see some force in those points. But as against that, the decision in *Tesco* v *Nattrass* (read with *Lennard's*) can be said to give rise to a degree of certainty in the required approach. Moreover, it is to be borne in mind that the policy considerations which have driven the doctrine of vicarious liability in the law of tort simply do not apply in the same way in criminal law. This is in part because tort is focused on issues of *liability* (and the redress, ordinarily financial, involved). But, as Lord Diplock points out, the focus of the criminal law is different. For, other than in strict liability cases, the focus is on *culpability*.

68. The next potentially relevant authority to which I would refer is the decision of the Court of Appeal (Criminal Division) in *R* v *Andrews-Weatherfoil Ltd*. [1972] 1 WLR 188. In the course of his judgment, Eveleigh J (giving the judgment of the court) said this at p. 124 C-D

> "It is not every "responsible agent" or "high executive" or "manager of the housing department" or "agent acting on behalf of a company" who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities."

That no doubt is a useful general description: but it is not to be taken as a definitive statement of the applicable law (indeed it would not reflect *Tesco* v *Nattrass* if it did). Certainly, and as the SFO in argument accepted before me, it is not enough simply to ask what the particular individual's "status" within a company is (although that "status" is undoubtedly very relevant). The focus also has to be on the particular authority bestowed by the company and which that individual has with regard to performance of the function in question said to give rise to criminal culpability.

69. The next case to which I will refer is *El Ajou* v *Dollar Land Holdings Plc* [1994] 2 All ER 685: a civil case. It is a case on which the SFO places considerable reliance.

70. The ultimate issue in that case, put shortly, was whether the defendant company (DLH) was constituted a constructive trustee of large sums received and disbursed by it on the grounds of knowledge that such money represented the proceeds of a fraud. The board of DLH had no such knowledge, although the individual (F) concerned in the receipt and disbursement of the money on its behalf did. F was the non-executive chairman of DLH who played no active part in its general management. It was successfully contended on appeal that F had nevertheless been the directing mind and will of DLH with regard to the receipt and disbursement of the money in question: and so his knowledge was to be attributed to DLH.

71. In my view, *El Ajou* provides only limited assistance to the SFO. First, it was a civil case. Second, it had its own particular facts. But where it potentially does assist the SFO is in the court's refusal to consider itself bound by the formal constitution of DLH. It sufficed that, as found, the entire de facto control of the particular transactions in question, even though there was no board resolution passed to that effect, lay with F: see at p. 697 C-E (per Nourse LJ); p. 700 c-d (per Rose LJ); p. 706 d-h (per Hoffmann LJ). Thus it can fairly be said that the court concentrated on the actuality: not on the (lack of) formality in sanctioning F's conduct. Even so, it is plain from the judgment that, on the facts, the court considered that DLH had in fact permitted F to take entire responsibility for the transaction, without supervision by the board, and had adopted it by performing the relevant funding agreement.

72. That then leads to the decision of the Privy Council in *Meridian Global Funds Management (Asia) Ltd.* v *Securities Commission* [1995] 2 AC 500 and the much discussed opinion of Lord Hoffmann.

73. In *Meridian* two senior employees of a company, not board members, undertook in the name of the company a covert share – building programme in a target company. This was not known to the board. However, the individuals had wide authorised powers of investment; and it is to be noted that they had general authority to make the investment which they in fact made and that there was no unlawfulness in that. But it was a legal consequence of that investment that they were also required to give notice of the beneficial entitlement in the shares acquired to the relevant regulatory body in New Zealand. This was because under the relevant New Zealand statutory provisions there was a requirement for notification of the purchase at a certain level of shares of which the acquiring company knew. Failure to comply was liable to result in a fine. Such notification was (deliberately) not given by the two employees. The company's defence was that it did not know of the acquisition and that the knowledge of its two employees should not be attributed to it for that purpose. The defence failed in the New Zealand courts.

74. An appeal by the company to the Privy Council also failed. In the course of delivering his opinion Lord Hoffmann said this at p 507 D-F:

> "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, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an 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."

75. Lord Hoffmann went on to conclude that, for the purposes of the legislation (properly construed) in question, the omission to register and the knowledge of the two individuals who had acquired the shares on behalf of Meridian and who had, as he said, "authority to do the deal" were to be attributed to the company: "otherwise, the policy of the Act would be defeated" (p. 511 D-F). He further reiterated that "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 it will be appropriate; sometimes it will not be (p. 511G-512B).

76. That decision, if adopted in the English courts (as it since has been), perhaps had the potential for leading to the prospect of a looser, or wider, approach for the purposes of attribution of liability to a company than provided in *Tesco* v *Nattrass*. But three points should be noted here:

(1) Lord Hoffmann at no stage purported to say – even if it were open to him to do so, which it was not – that *Tesco* v *Nattrass* was wrongly decided as a matter of English law. On the contrary, he applied its principles even if, to an extent, restating them.

(2) It is also striking that Lord Hoffmann was careful to disclaim a proposition that his judgment would necessarily impact on the position relating to other cases such as, for example, corporate manslaughter.

(3) The "special rule" of attribution comes into play when insistence or the primary rule would defeat the parliamentary intention.

77. There have subsequently been cases, in the civil law, where the approach outlined by Lord Hoffmann in M*eridian* has been applied, and a special rule of attribution fashioned, having regard to the circumstances of the case and the context and purpose of the statutory provisions in question: see, for example, the VAT case of *McNicholas Construction Ltd. v HM Commissioners of Customs and Excise* [2000] WL 742054 (Dyson J) and the fraudulent trading case under s. 213 of the 1nsolvency 1986 of *Bank of India* v *Morris* [2005] BCC 739. It is to be noted that in the latter case the relevant individual (S) had been given "blanket permission" ultimately to decide to proceed with the banking transactions in question on terms negotiated by him; and the board of his employing company had been content to leave both the conduct and the completion of the negotiations in the hands of S (paragraphs 125 to 129 of the judgment of Mummery LJ). To anticipate, it is the case of Barclays that that cannot be said to be the position here.

78. I was also referred to the (civil) case of *Odyssey Re (London) Ltd.* v *OIC Run Off Ltd.* [2000] WL 19127 (13 March 2000). That was a remarkable case on its facts and litigation history. Put shortly, the question was whether the (as found) perjured evidence of a witness given at trial, which had been instrumental in OIC succeeding at that trial, should be attributed to OIC so that it could not retain the benefit of its dishonestly obtained judgment. The Court of Appeal (by a majority) decided that the perjury was to be so attributed.

79. The SFO places some reliance on that decision. First, it says, it illustrates that the dishonest conduct and state of mind of an individual can be attributed to a company even where the company has self-evidently not authorised such conduct. Second, it says, it illustrates that such attribution may be made where the individual is seeking not to further his own interests but to further the interests of the company in question.

80. In my view, however, that case is of relatively limited assistance. It was a civil case and also did not involve any rule of substantive statutory law. Moreover, it is striking that Buxton LJ (who dissented) did so, in essence, on the footing that perjury is a crime and "it is not an acceptable outcome for a company to be characterised as a principal offender in perjury in civil proceedings when that outcome could not be achieved in criminal proceedings" (at pp. 107-111 of the report). It may be thought, on one view, that his general approach represented an orthodox application of the principles of *Tesco*

v *Nattrass*. It is, at all events, noticeable for present purposes that Brooke LJ (in the majority) acknowledged that the outcome could have been different in a criminal context and that his approach involved, in a civil context, "striking out for the open sea" (p. 76). Likewise the decision of Nourse LJ was in in its fundamentals predicated on the *civil* law rule that a party cannot retain the benefit of a judgment fraudulently obtained.

81. It at all events seems to me that it is plain that, whatever the more expansive approach to corporate attribution the civil courts may (possibly) be prepared to embark upon in a given case, such an approach has, in the aftermath of *Meridian*, been eschewed by the criminal courts.

82. This is borne out by the reasoning and approach of the Court of Appeal (Criminal Division), in a judgment delivered by Rose LJ, in the case of *AG Refence (No 2 of 1999)* [2000] QB 786. That reaffirmed the "identification principle", so called, in criminal common law cases; and refused to rely on civil negligence rules to extend the principles of manslaughter to corporations in circumstances departing from the identification principle set out in *Tesco* v *Nattrass. Tesco* v *Nattrass* thus was re-affirmed in that context. (The decision of course antedated the Corporate Manslaughter and Corporate Homicide Act 2007.) That is also borne out by the reasoning and approach of the Court of Appeal (Criminal Division), in a judgment delivered by Moses LJ, in *R* v *St Regis Paper Co. Ltd*. [2012] 1 Cr App R. 14. That, too, reaffirmed that Lord Hoffmann's opinion in *Meridian* was not to be taken as an abandonment of existing principles and that the rules for attributing to a company liability for a criminal offence involving mens rea still stood. That case also – again, as I see it, uncontroversially – stated that the lesson of *Meridian* was the importance to be attached to construing the statute creating the statutory offence in order to determine the rules of attribution applicable to that offence (paragraph 20). It was, I observe, a striking outcome to that case – a case involving what may be styled essentially regulatory offences – that it was held that (aside from the strict liability elements of the offending) there was to be no special attribution to the company of the acts and state of mind of the manager entrusted with performance of the relevant environmental duties. That case, at all events, again illustrates that in a criminal context the courts have refrained from giving an expansive application to *Meridian.*

83. The matter is put beyond doubt, in the criminal sphere, by the decision of the Court of Appeal (Criminal Division) – in a constitution of the court which had also included a Lord Justice with specialist company law expertise – in the case of *R v A Ltd.* [2017] 1 Cr App R.1. That in substance affirmed the approach taken in *St Regis Paper Co Ltd*. (cited above). At paragraph 27 of the judgment of the court delivered by Sir Brian Leveson P this was said:

> "This principle [the identification principle] was analysed and restated in its application to offences requiring proof of mens rea by the Court in *R* v *St Regis Paper Co Ltd* [2011] EWCA Crim 2527; [2012] 1 Cr App R 14. Save in those cases where consideration of the legislation creating the offences in question leads to a different and perhaps broader approach, as discussed in *Meridian Global Funds Management Asia Ltd* v *The Securities Commission* [1995] 2 AC 500, the test for the determining those individuals whose actions and state of mind

> are to be attributed to a corporate body remains that established in *Tesco Supermarkets Ltd* v *Nattrass*, to which we have already referred."

84. In my view, that is to be taken as an accurate summary of the legal position in the context of a criminal case not involving strict liability; and in any event I am bound by it. I also add that such a statement is consistent with the reasoning of the Supreme Court in the (civil) case of *Bilta (UK) Ltd.* v *Nazir (No 2)* [2016] AC1: a case on the defence of illegality in the aftermath of the controversial decision in *Stone & Rolls Ltd*. v *Moore Stephens* [2001] AC 1391. As Lord Mance (at paragraph 41) said in that case, after citing Lord Hoffmann in *Meridian* with approval:

> "The key question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act, knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company."

85. As Lord Sumption thereafter pointed out in paragraph 67 of his judgment in that case, Lord Hoffmann in *Meridian* had in effect followed Lord Reid in *Tesco* v *Nattrass* in stating that the attribution of the state of mind of an agent to a corporate principal

> "may also be appropriate not only in cases where the agent is the directing mind and will of the company for all purposes but also where such agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind and will for other purposes."

86. A considerable number of other authorities were cited to me which I have not thought it necessary specifically to discuss. But they variously stand as authority for (among other things) the following propositions:

(1) It is, depending on the circumstances, possible - both in a civil context and also in some criminal contexts, by reference to the wording and policy of the particular statute – for civil liability or criminal culpability to attach to a corporation even if it has not specifically authorised, and even may specifically have prohibited, the conduct in question: see, for example, the interesting discussion of the Canadian Supreme Court in *Canadian Dredge & Dock Co. Ltd*. v *The Queen* [1985] 1 SCR 626; *re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456.

(2) Whilst the courts will be slow to attribute criminal culpability to a company where the acts of the individual(s) in question have operated to defraud the company or otherwise make it a victim, criminal culpability may still, depending on the circumstances and context and on the wording of the statutory offence in question, be capable of attaching to the company by virtue of that conduct of individual(s) representing its directing mind and will: *Canadian Dredge* (cited above); *Belmont Finance Corporation Ltd*. v *Williams Furniture Ltd*. [1979] Ch 250. The fact that such individual(s) will have had no authority to commit an unlawful act is not of itself necessarily an answer for the company.

(3) There is no general principle that the knowledge and approval of one director is necessarily and for all purposes to be regarded as the knowledge and approval of the board of directors (and thereby of the company): see, for example, *Ross River Ltd.* v *Cambridge City Football Club Ltd.* [2007] EWHC 2115 (Ch) per Briggs J. In this regard Briggs J – in my opinion, correctly – distinguished and explained the very broad statements made by Moore-Bick LJ in paragraph 98 of his judgment in the civil case of *Jafari-Fini* v *Skillglass Ltd.* [2007] EWCA Civ 261.

(4) Companies may (in accordance with their constitution) as much delegate their powers and responsibilities to a committee of individuals as to one individual. The identification principle of corporate criminal responsibility can then apply to the collective acts, with the requisite knowledge, of such a committee: see the Scottish case of *Transco Plc* v *HM Advocate* [2004] SLT 41 at paragraph 62 (per Lord Hamilton).

87. I would also like to acknowledge the insight which I gained from the very interesting, even–handed and thought provoking article by Professor Eilis Ferran entitled: "Corporate Attribution and the Directing Mind and Will" (2011) LQR 239.

The Judgment of Jay J

88. I turn to the judgment of Jay J. It is a conspicuously thorough and careful judgment: setting out the evidence in detail, marshalling the legal authorities and engaging in an erudite and closely reasoned analysis of the application of the legal principles to the evidence.

89. There can at all events be, and is, no complaint that the judge adopted a mistaken initial general approach. He acknowledged the overall complexity of the case. He in terms directed himself that he must take the prosecution case at its highest and must assume as true what was being factually alleged by the prosecution as set out in its Case Statement and Summary of Evidence.

90. As to his detailed evaluation of that evidence (from which, as I have said, I have no proper basis for departing) the following represented some of his conclusions:

(1) The negotiations for CR1 with the Qatari entities were led by JV and RJ, who had authority to conduct such negotiations.

(2) At no stage did the Board of Barclays as a board know that the negotiations, or CR1 itself, would in effect provide the Qatari entities with their required 3.25% commission. Nor did the members of the BFC (other than JV).

(3) The individual alleged conspirators planned that ASA1 would be "disassociated" from the subscription and planned that the stated consideration for ASA1 would not be revealed to the BFC or Board.

(4) Individual executive directors or senior executives had general authority to bind Barclays on individual transactions up to an amount not exceeding £150 million. But no such individual had authority to bind Barclays to an agreement providing for non-existent services to camouflage additional commission for the capital fund-raising exercises.

(5) As to CR2, JV and RJ had "considerable autonomy" over the manner in which negotiations were conducted.

(6) No draft of ASA2 was ever provided to the BFC or Board.

(7) Mr Agius (the Chairman) had no involvement at any stage in ASA2. To the extent moreover that joint authority of Mr Agius and JV was required under the BFC resolution of 28 October 2008, in that ASA2 was (on the prosecution case) in truth part and parcel of CR2, it was not obtained.

(8) The GCC knew nothing of, and was not told of, the alleged true motivation for the US $ 3 billion loan.

(9) None of JV, RJ or CL had authority to commit Barclays to the capital raisings or to agree a secret commission amounting to an additional fee for the Qatari entities.

(10) The real purpose behind ASA1, ASA2 and the loan was concealed from the Board and relevant committees, who were deceived.

(11) The BFC and GCC were not mere rubber stamps or ciphers.

91. The judge's overall conclusion – and I summarise drastically – was that JV, RJ and CL (or any combination of them) could not, on the evidence, be said to be the directing mind and will for the purpose of concluding the capital raisings and making of the loan: the "transactions in point" as he called them. The relevant responsibility and authority in this respect ultimately remained with the Board or BFC or GCC as the case may be, whatever autonomy the individuals may have been accorded in the antecedent negotiations. The Judge said this at paragraph 170 of his judgment:

> "This issue cannot be finessed, circumvented or ignored by asserting the JV, RJ and CL had authority to negotiate and to "do the deal", and that they were given considerable autonomy as to how to "bag" Qatar. That assertion is factually correct, but it is not arguable that "doing the deal" in the sense in which Lord Hoffmann and others have used that expression means "completing the negotiation". If that were the case, the negotiation was as much concluded in relation to CR1 as a whole as it was to ASA1; these are fused and inseparable transactions. However, it is not the case. On any view, including the SFO's, the deal was not concluded by the coterie in relation to CR1"

He said that the same considerations and analysis applied to CR2 and the loan. He concluded that "none of Lord Hoffmann's general rules of attribution operate to fix Barclays with the acts or omissions of the individuals involved"; and that no special rule of attribution could be fashioned to affix Barclays with criminal culpability, either. Overall, the judge's assessment was that JV, RJ and CL "were deceiving the decision-makers in relation to the transaction in point and before the relevant decision was taken" (paragraph 189).

92. I should add that, after the judge's dismissal of the charges against Barclays, the individual defendants applied to have the charges dismissed as against them also. The

SFO opposed that application. Following a further hearing, the judge rejected that application. Thus as matters stand there will be a criminal trial of those defendants on Counts 1 and 2. However, it was agreed that, by reason of the dismissal of Count 3 against Barclays and of the provisions of s. 151 (3) of the Companies Act 1985, Count 4 also would have to be dismissed against JV and RJ. That explains why both are included in the draft indictment before me.

93. I should also add that proceedings have not been pursued against CL because of the state of his health.

Submissions of counsel

94. On behalf of the SFO, Sir James strongly attacked the judge's reasoning and conclusion.

95. In the course of his argument, he submitted that the evidence was that the individuals were ostensibly seeking to benefit Barclays (by securing the desperately needed capital injections, while evading paying a comparable commission to other subscribers). This was not alleged to be a case of them trying to defraud Barclays for their own personal gain. He went on to state that the SFO's case was not primarily based on a "special rule of attribution" being appropriate here (although he did not wholly abandon that as an alternative argument). Rather, he said, JV, CL and RJ were indeed on the alleged facts the directing mind and will of Barclays for these deals: CR1, CR2 and the loan.

96. In this regard he stressed the very senior status of these individuals (whilst accepting that that was not of itself determinative). It was moreover plain that they had autonomy – with the sanction of the relevant committees – over the negotiations with the Qatari entities. He said that the judge unrealistically distinguished between control over the negotiations (the "anterior conduct") and control over agreeing and concluding the final "transactions in point" (CR1, CR2 and the loan). He said that the judge adopted far too schematic an approach by reference to *Meridian*; and ultimately, he complained, drew a conclusion which focused excessively on the de jure (or "primary rules of attribution") position without having any sufficient regard to the realities of the matter, to the de facto position. He further complained that the judge placed excessive reliance on the individuals having no actual authority to negotiate or agree ASA1 or ASA2 as disguised commission or the loan by way of financial assistance: whereas, he said, it is well established that liability may be attributed to a company even where it has not authorised the unlawful conduct in question. He in fact bluntly said that Barclays' lack of knowledge and authorisation was irrelevant. The point was, he said, that control of the transactions in question in truth rested, and had been permitted to rest, with JV, CL and RJ: who thereby had authority to "do the deal."

97. For his part, Mr Lissack QC placed emphasis at the outset on the exceptional nature of the exercise of this jurisdiction. He also placed emphasis (as had the judge) on the matters as actually pleaded and particularised in Counts 1 and 2 of the indictment. Those counts did not, for instance, charge the individuals and Barclays solely with regard to ASA1 and ASA2 – instead, the conduct particularised was expressly linked to the false representations allegedly made in the relevant Prospectuses and Subscription Agreements. But, he submitted, it cannot be said that JV, CL and JR were the directing mind and will with regard to the finalised transactions representing CR1 and CR2: rather, the BFC (if not the Board) was. Likewise, he said, with the loan: the GCC was the authorised body.

98. Meaning no disrespect to the very full and careful argument of Barclays (both written and oral), what its case really came down to was that the judge was right and for the right reasons.

Statutory context

99. I would make some initial observations.

100. First, it is essential at the outset to bear in mind that principles of vicarious liability that can come into play in civil cases do not apply in that way in a criminal context such as this (as emphasised by, among other others, Lord Diplock in *Tesco* v *Nattrass).* Sir James explicitly (and rightly) disclaimed any reliance on principles of vicarious liability in this case. As Lord Sumption said in *Bilta* (at paragraph 90):

> "Vicarious liability does not involve any attribution of wrongdoing to the principal. It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else."

101. Second, *Tesco* v *Nattrass* (which continues to be binding) has, as I have said, been criticised for having the consequence that larger companies may be more readily absolved from criminal responsibility whilst smaller companies may not. That may be so: but it does not necessarily represent the whole story. It is just because some companies are very large that it becomes a practical necessity to devolve and delegate various functions, operations and decision-making processes. A board of a large international corporation cannot possibly be expected to know, or concern itself with, all of that corporation's day-to-day transactions and operations. So devolution and delegation, as a matter of corporate governance, thus becomes a practical necessity in order to improve decision-making and the discharge of responsibilities. It therefore would be quite wrong to presume that such devolved structures are put in place as a device to avoid corporate responsibility, criminal or otherwise. Certainly in the present criminal proceedings there has been no allegation that Barclays' general corporate governance structures and procedures were inadequate or deficient.

102. Third, the question, as I see it, can usefully be asked, in any given case, as to *why* the corporation in question is to be the subject of criminal prosecution: at all events where the conduct in question is not of what I might call the regulatory kind. So I asked the SFO that question here. In the present case, as I gather, Barclays is currently the subject of a regulatory investigation (albeit stayed, pending the criminal proceedings). It has also, I gather, been served with civil proceedings for financial redress by aggrieved parties claiming to have suffered loss as a result of what has occurred. Yet further, the individuals within Barclays itself said to have been responsible for what has happened are, as I have recorded, the subject of ongoing criminal prosecution. So why prosecute Barclays itself (the more so perhaps when, if there were a conviction, the resultant, presumably heavy, fine would in practice be borne by the innocent shareholders)? The answer I was given was that it was to promote deterrence and good corporate governance.

103. This, however, leads to another consideration. It is always open to Parliament to draft statutory offences with the position of corporations in mind. For example, some statutes may impose strict liability: as, for instance in Health and Safety legislation or various

regulatory offences. Another statutory technique is to provide for the existence of a criminal offence in specified circumstances but to make available a statutory defence, often with the burden of proof on the company (as in *Tesco* v *Nattrass*). A variant of that statutory technique is to impose general criminal responsibility on a corporation for the specified criminal offence but with a defence available to a corporation that it had adequate preventative procedures in place: as in s. 7 of the Bribery Act 2010. I will have to come on to say something more about this for the purposes of Count 3 and s. 151 of the Companies Act 1985. But for the purposes of Counts 1 and 2 and for the substantive offence of fraud, at all events, the required mens rea remains that of dishonesty.

104. That then leads on to a consideration of the policy behind and context of the statutory offences in point here. So far as the Fraud Act 2006 is concerned, it is difficult to discern any particular policy behind the statute aside from that applicable to analogous common law offences: viz, that it is in the public interest that persons dishonestly conducting themselves in such a way should be liable to criminal sanctions (and including, where a corporation is involved, its responsible officers or managers: s. 12).

105. The position for offences under s. 151 of the Companies Act 1985 is, as I see it, potentially rather different. The policy behind the statutory provisions (and their predecessors and successors) is clear enough: it is to guard against a covert reduction of the capital of a company to the detriment of its creditors and share-holders. As has been stated, the object of such provisions is to protect the company itself and guard against the misuse of its assets: see *Wallersteiner* v *Moir* [1974] 1 WLR 991 at p. 1014H (per Lord Denning MR).

106. That being so, on one view it is perhaps a conceptual oddity that the company itself can be liable for breach of the section. But that unquestionably is the effect of the statute. It is also to be noted, in fact, that the statutory provisions (unlike the Fraud Act 2006) do not stipulate a requirement of a dishonest state of mind. Indeed there are a number of cases where the directors of such a company have been held (civilly) liable by reference to the statutory provisions for breach of fiduciary duty even though they acted in good faith or on legal advice or where they had no actual motivation to provide financial assistance at all: see, for example, *Brady* v *Brady* [1989] AC 755; *Chaston* v *SWP Group Plc* [2003] 1 BCLC 675.

107. However, I need not dwell on that further in this particular case. The SFO commendably has not shilly-shallied on this aspect. For the purposes of Counts 3 and 4, it has made clear that it alleges that JV and RJ not only were the directing mind and will with regard to the loan of US $ 3 billion but also that here too they were dishonest in this regard, knowing full well that the loan was to be unlawfully applied in the funding of the CR2 subscription and deliberately not telling the GCC of that.

Disposal

108. I have to say that, applying to the assumed facts what I take to be now settled principles in the context of the criminal law, I think that on analysis the proper outcome in law for this application to prefer a voluntary bill ultimately has become clear enough. That is that this application should be refused: as I have already announced. It seems to me that the judge reached the right conclusion on the dismissal application; and nothing in

the arguments presented to me justifies any different conclusion on this present application to prefer a voluntary bill.

109. Although the arguments before me reached the highest level of detail, sophistication and analysis, I think that I can express the reasons for my conclusion in relatively simple terms.

110. The starting–point is that, on the constitution of Barclays, there is no way (and as the SFO accepts) that JV, CL and RJ were its "directing mind and will" for *all* purposes; nor had there been any delegation to them of all Barclay's functions. That is plain. The case is quite different from *Lennard's* in this respect.

111. Accordingly the principal question, put shortly, becomes whether they (or any of them) were the directing mind and will of Barclays for the purpose of performing the particular function in question, if their alleged dishonesty is to be attributed to Barclays for criminal law purposes.

112. It was much emphasised on behalf of the SFO by reference to Counts 1 and 2 that a criminal conspiracy does not need to come to fulfilment: the focus of the criminal law is on the combination, with the necessary dishonest intent, not on the outcome. I entirely accept that (as is indeed elementary): see, for example, the statements of Brett LJ in *R v Aspinall* (1876) 2 QBD 48 at pages 58-59:

> "Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some further time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless, the crime is complete; it was completed when they agreed…
>
> An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy."

113. In the present case however, on the SFO's allegations, the actual intended fraud *was* achieved: the Prospectuses and Subscription Agreements for CR1 and CR2 were published containing the (alleged) false representations and the monies were subscribed. So why, then, was the matter not charged against Barclays as a substantive offence: with the errant officers then being sought to be made liable under s. 12 (2) of the Fraud Act 2006? That is even more striking when it is seen that Count 3 is charged as the substantive offence of unlawful financial assistance, with secondary criminal liability for JV and RJ then arising, and is *not* charged as a conspiracy.

114. I confess initially to having had some concerns that Counts 1 and 2 perhaps had been charged as a conspiracy in order to avoid drawing over much attention to the actual issuing of the various Prospectuses and Subscription Agreements: in respect of which (it might be said) JV, CL and RJ were *not*, on any view, the directing mind and will. Indeed, I think that distinction is reflected by the emphasis given by Jay J to what he

called the "anterior conduct" – viz, the negotiations - over which JV, CL and RJ did have autonomy, as compared to the completed transactions.

115. However, Mr Brown QC assured me – and of course I accept – that was not the intention. Indeed, he frankly stated that the matter could, on the SFO's case, have been charged as a substantive offence of fraud against Barclays. He further, and consistently with that, confirmed that it was the SFO's case that JV, CL and RJ were as much the directing mind and will for the completion of CR1 and CR2 as for the preceding negotiations. All, it was said, was to be viewed realistically in the round as one transaction, one package: and that was reflected in the drafting of the indictment.

116. Put like that, that certainly accords with the way the matter has been pleaded and particularised in the indictment: the allegations thus are not simply in respect of ASA1 and ASA2, taken as agreements on their own: the allegations are (as pleaded) linked to the accuracy and truthfulness of the Prospectuses and Subscription Agreement as issued to investors and the public. Mr Lissack was, in my view, entirely justified in the circumstances in focusing on the way in which the counts are particularised (and which the SFO has not, before Jay J or me, applied to amend).

117. In my judgment, however, that then confirms the correctness of the essential reasoning of Jay J.

118. By virtue of what, it may be asked, did JV, CL or RJ have authority not only to negotiate but also to complete and conclude and issue the Subscription Agreements and Prospectuses for CR1 and CR2 as to be finalised, signed and issued? The short answer is: they had no authority. They were not, in the words of Lord Hoffmann, authorised "to do the deal." The relevant powers in that regard had been reserved, if not to the main Board then to the BFC (or perhaps, for CR2, JV and the Chairman jointly). It was they who were the ultimate decision makers. The above-mentioned resolutions demonstrate that. It is also to be noted that there was no evidence that JV, CL and RJ had assumed or been entrusted with control of all the many other aspects of CR1 and CR2 (it being recalled that the Qatari entities were by no means the only subscribers and that there were very many other facets of the fund-raising requiring to be finalised). Furthermore, given the structures specifically adopted, the (uncommunicated) knowledge of JV, as Chief Executive Officer, or CL, as Group Finance Director, cannot for these purposes be imputed to the Board or BFC as a whole.

119. On that basis, derived from the prosecution's own case, those individuals did not with regard to these transactions have "full discretion" to act independently and they were "responsible to another person [viz the BFC] for the manner in which they discharged their duties" (reflecting the words of Lord Reid and Lord Pearson in *Tesco* v *Nattrass*). It follows that, by reference to the pleaded particulars on the indictment, they could not be regarded as the directing mind and will for the purpose of performing the functions in question. That in essence, in my view, is the long and the short of it.

120. Sir James protested that that was and is far too narrow an approach. He relied on cases such as *El Ajou* for the proposition that one has to have regard to the realities, to the de facto control. He said that the approach of the judge had in effect focused solely on the "primary rules of attribution" without the necessary wider approach needed to assess who in reality was the directing mind and will.

121. But this case, as I have already indicated, is very different from *El Ajou.* In *El Ajou,* F not only had entire control over the negotiations he also had entire control over the completion of the relevant agreement and payments and yet further, and critically, had been permitted (albeit without a formal resolution) by the board of DLH to exercise such entire control. That being so, it could not assist DLH that it had not known of or authorised the dishonesty of F. It could not assist it because it had delegated entire control of the entirety of the transaction so as to make F the company's directing mind and will. That, however, simply is not the case here. Here, neither the main Board nor, the BFC had conferred such entire control on JV, CL and RJ. To the contrary, they had *retained* ultimate authority for the finalising and approval of CR1 and CR2 to the Board or BFC (or also, in the case of CR2, to the joint authority of the Chairman and JV). Likewise the case of *Bank of India* v *Morris* is to be distinguished: because there too S had been given complete authority and control to permit, negotiate and conclude the transactions in question. Thus in the circumstances of the present case the argument of the SFO that it is irrelevant that neither the Board nor the BFC knew of or authorised the alleged unlawful transactions itself becomes irrelevant. It becomes irrelevant because the alleged individual conspirators were not the directing mind and will of Barclays for the purposes of performing the functions in question.

122. It simply is not acceptable, in my opinion, for the SFO to regard the various resolutions of the Board and of the BFC as, in effect, mere pieces of paper. They are not: they reflect the level of delegation sanctioned by the appropriate organs of the company. Broad appeals to "the realities" and to the "de facto" position cannot overcome that in this case. This is not a matter of form over substance. Rather, in this case, the form *is* the substance. That the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question; and that is not the case here. Moreover, powerfully though Sir James advanced his arguments on the asserted "de facto" position those arguments in any event also seem to me to collide with the factual evaluation of Jay J: an evaluation from which it is not open to me to depart and from which I am not prepared to depart.

123. That this is the correct conclusion, in the circumstances of this particular case, seems to me also to be confirmed by some other considerations.

124. First, Sir James necessarily had to accept that, on his argument, Barclays was in precisely the same position in terms of criminal culpability as it would have been if all the members of the BFC and the Chairman had indeed known and approved of the true underlying purpose (as alleged) behind ASA1 and ASA2. That is unattractive.

125. Second, Sir James also had to concede that had the BFC intervened, perhaps after scrutinising or enquiring about ASA1 and ASA2 more closely, and refused to allow CR1 and CR2 to proceed then still, on his argument, Barclays would have been criminally culpable for the alleged antecedent conspiracy. But such a conclusion is not merely unattractive: it is surely extraordinary. Indeed, the very fact that the BFC could have prevented CR1 and CR2 proceeding to conclusion (as it is acknowledged it could) is of itself revealing as to the true limits of the delegation to JV, CL and RJ and revealing as to the retained powers of the BFC. The BFC, on such a scenario, would not have been intervening so as to terminate the delegated authority of JV, CL and RJ – rather, it would have been acting in the exercise of its own retained and vested powers.

126. Third, and reflecting the foregoing, it was a concomitant of Sir James' arguments that the BFC was not simply deceived by JV, CL and RJ: it was, in effect, to be regarded as its "innocent agent" for achieving the object of the conspiracy. But that too is extraordinary. The judge had in terms found that the BFC was not a rubber stamp. The BFC was not, either de jure or de facto, acting as agent of or at the behest of JV, CL and RJ in approving CR1 or CR2. To the contrary: those individuals had been negotiating, with delegated authority, at the behest of the BFC; and as to CR2 it also cannot sensibly be said that the Chairman was the "innocent agent" of JV, either.

127. Fourth, if Barclays was a criminal co-conspirator with deemed dishonest intent would it have any redress against those individual officers who, as it were, got it into the conspiracy? When this question was put to Sir James he said that it would. Barclays, he said, could seek in any civil proceedings contribution and indemnity from the individual officers; it could also, at least in theory, commence a private prosecution in fraud against those officers. This is a difficult area (see the *Belmont* and *Bilta* cases). But one can see an argument that Barclays would be entirely precluded from recovery on the ground that it was, ex hypothesi, a *criminal* co-conspirator which had obtained the benefit of the unlawful agreement. Moreover if, as Sir James argued, Barclays could get redress from the individual officers that would tend to support the point that Barclays had not simply been a beneficiary of the conspiracy but had in truth been a victim of deception.

128. The same considerations and approach must apply to the loan of US $3 billion. The directing mind and will for the actual transaction ("to do the deal") was the GCC, notwithstanding that JV and RJ had undertaken, and had been permitted to undertake, the prior negotiations. Indeed, it here too seems to me to be remarkable that Barclays could be adjudged criminally culpable for unlawful financial assistance, in (I stress) circumstances where dishonesty is alleged, when the organ of the company empowered and authorised to approve the loan (the GCC) had specifically *prohibited* its use to fund CR2: and no one has suggested that that was a "nod and wink" prohibition.

129. For these reasons (which, I think, also reflect the substance of the altogether more detailed reasoning of Jay J) and applying the principles of *Tesco* v *Nattrass* and the notions of primary and general rules of attribution articulated in *Meridian* to the assumed facts, I conclude that the alleged conduct and dishonest state of mind of the individual conspirators cannot properly be attributed to Barclays so as to make Barclays itself criminally culpable.

130. Sir James rather deprecated labelling (a view I sympathise with). He also submitted that *Meridian* should not be viewed as providing a rigidly schematic taxonomy. But to the extent that he also, as an alternative argument, shortly submitted that in any event a special rule of attribution could apply in this case I, no less shortly, would also, and in agreement with the judge, reject that.

131. There is nothing in the policy or scheme of the Fraud Act 2006 to justify such a special rule in the circumstances of a case such as this. Certainly the SFO in argument advanced nothing. There is perhaps potentially more room to manoeuvre in the case of s. 151 of the Companies Act 1985, as I have indicated, given the underlying statutory purpose and given the lack of an express requirement of a dishonest state of mind set out in the section. But be that as it may, it cannot avail the SFO in this case. It cannot avail the SFO because the SFO attributes dishonesty to JV and RJ, and thence

Barclays, in this regard also. Given that, for the reasons given above, they were not the directing mind or will, here too their (alleged) dishonesty cannot fairly be attributed to Barclays. Nor, in the circumstances, can Barclays, on the assumed facts, be said itself to have provided financial assistance "for the purposes of" the acquisition of the relevant financial instruments. In such circumstances, it would in my judgment be contrary to the interests of justice, in this particular case, to permit Counts 3 and 4 to proceed: the more so when Counts 1 and 2 cannot stand.

Other points

132. Sir James also raised what he described as a "quasi in terrorem" argument. He suggested that if the case remained dismissed as against Barclays then it "might be" that there might be no case against the individual defendants either.

133. I refuse to be terrorised. The fact is that the individual defendants themselves applied to dismiss in the aftermath of the successful application to dismiss by Barclays; and the judge rejected that application. It is not for me to second-guess that decision of the judge. In any event, there is, as the judge found, cogent prima facie evidence of dishonesty on the part of the individuals. Whether it turns out at trial to correspond to the dishonesty which the SFO has chosen to plead and particularise in the current indictment again is not a matter for me, sitting as a judge dealing with an application to prefer a voluntary bill of indictment.

134. I also have - not least because of the SFO's complaints that the judge adopted far too narrow and technical approach - endeavoured to adopt a "stand back and consider" approach as to this conclusion. That is not because such cases can be decided on a broad application of "justice and fairness" – that approach would be a subjective approach as uncertain as it would be unprincipled. But to the extent that it may be used a residual check, then all I can say is that I do not, for myself, think that such a conclusion is unjust or offends a sense of the merits in the circumstances of this particular case. It is essential for this purpose to put to one side the familiar vicarious liability doctrines of the civil law. It is no use saying – and in fairness to the SFO I repeat that it never has said - that Barclays is criminally liable simply because the alleged conduct was undertaken by some of its senior officers and employees. If anything, as I see it, injustice could be said to lie in Barclays being rendered criminally liable, in circumstances of an alleged mens rea of dishonest intent, when underlying key elements with regard to CR1 and CR2 (that is, the covert use of ASA1 and ASA2) were unknown to and unauthorised by the Board, the Chairman and the relevant committee entrusted with approving CR1 and CR2; and when, with regard to the loan of US $3 billion, the relevant authorised committee not only had not known of but had positively prohibited its use to assist in the acquisition of the relevant financial instruments.

135. It may be that some would prefer a wider approach than that articulated in *Tesco* v *Nattrass*. But *Tesco* v *Nattrass* still represents the law; and, at all events in the criminal law, subsequent decisions in the Court of Appeal (Criminal Division) have declined to adopt a more expansive approach in the aftermath of *Meridian*. In the present case, I rather gained the impression that the SFO considers that in experiencing the dismissal of the indictment it may have been the victim of a combination of pernickety pleading points, of legal sophistry on the part of Barclays and of narrow-minded judicial intellectualism: thereby allowing form to triumph over substance. If that is its view,

then it may be that nothing will displace it. But, as will be gathered, it is not my own view.

136. As I have mentioned, it seems that there are civil proceedings extant against Barclays. I know barely anything about them. All I would say is that the position in tort and/or contract by no means necessarily corresponds with the position of attribution of liability in the criminal law; and at all events nothing I have said in this judgment has been intended or designed to have a bearing on those civil proceedings. But those civil proceedings will at least take place in the knowledge that there are no extant criminal proceedings against Barclays.

Conclusion

137. For these reasons I have dismissed the application to prefer a voluntary bill of indictment. The parties should endeavour to agree any consequential matters.

138. I also wish to reiterate that the arguments have taken place on assumed facts (which have not been proved and which may never be proved), taking the SFO's case at its highest; and that the individual defendants vehemently deny dishonesty.

NOTE: Reporting restrictions on this judgment were lifted on 28 February 2020.