Indictment No: T2017 7247-7251 & T2018 0055

IN THE CROWN COURT AT SOUTHWARK

Southwark Crown Court
1 English Grounds
London SE1 2 HU

21st May 2018

Before:

MR JUSTICE JAY

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Between:

THE QUEEN

- and –

BARCLAYS PLC and BARCLAYS BANK PLC

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Edward Brown QC, Andrew Onslow QC, Alison Morgan and Philip Stott (instructed by **Serious Fraud Office**) for the **Crown**
Richard Lissack QC, Crispin Aylett QC and Ben Fitzgerald (instructed by **Willkie Farr & Gallagher (UK) LLP**) for **Barclays PLC and Barclays Bank PLC**

Hearing dates: 23rd – 27th April 2018

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RULING

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. Barclays PLC ("Barclays") and Barclays Bank PLC ("Barclays Bank"), collectively "the companies", have applied to dismiss all the charges brought against them by the Serious Fraud Office ("the SFO") on Counts 1, 2 and 3 of the joinder Indictment preferred on 16th February 2018.

2. In outline: by Counts 1 and 2 of the Indictment, Barclays is charged with separate conspiracies to commit fraud by false representation contrary to section 1 of the Criminal Law Act 1977 ("the CLA 1977"); and by Count 3 Barclays and Barclays Bank are charged with giving unlawful financial assistance contrary to section 151(1) and (3) of the Companies Act 1985. It is immediately apparent that these are allegations of the utmost seriousness.

3. A number of human defendants have also been charged but I do not have to consider their position at this stage, save to the extent that their alleged criminality bears on the position of the companies.

4. The SFO has, I was informed, been investigating these matters since 2012. The factual background is complex and in the context of a contested trial would require careful exposition to the jury. The trial itself is currently listed to begin in January 2019 with a time estimate of 12-16 weeks.

5. At first blush this dismissal application appears remarkably ambitious. The complexity of the case, the scale and depth of the SFO's investigation, and the overriding principle that the facts must for these purposes be assumed against the companies, suggest that it should not be possible to distil out of this morass of material legal points of sufficient precision and clarity, unencumbered by evidential doubt and the possibility of adverse inferences being drawn, to permit of appropriate judicial resolution in advance of the trial itself; still less points which, if this application were to succeed, the SFO must have analysed incorrectly.

6. Despite my initial scepticism, I have reached the firm conclusion that all these charges should be dismissed. Notwithstanding the evidential complexity, an adequate simplified narrative can be expounded, assuming all the facts in the SFO's favour. In my judgment a correct application of the legal principles governing corporate liability in a criminal context lead inevitably to the conclusion that these charges cannot be maintained.

Overview

7. What follows is almost entirely derived from the SFO's Case Statement as amended on 2nd March 2018.

8. The allegations in this case concern the activities of Barclays, Barclays Bank and a number of its senior directors and executives in relation to capital raisings in June

2008 ("CR1") and October 2008 ("CR2"). CR1 raised a total of £4.4B and CR2 a total of £6.8B.

9. Barclays is the parent company of Barclays Bank owning 100% of the ordinary voting rights. The main *dramatis personae* are Mr John Varley (at the material time, Barclays Group Chief Executive and a director of Barclays), Mr Chris Lucas (Barclays Group Finance Director), Mr Roger Jenkins (Barclays Capital Executive Chairman of Investment Management in the Middle East and North Africa), Richard Boath (Barclays Capital Head of European Financial Institutions Group) and Mr Tom Kalaris (Barclays Wealth Management Chief Executive Officer). Henceforth, I shall refer to the human defendants by their initials. JV, RJ, TK and RB are alleged to be parties to the conspiracy forming the subject-matter of Count 1. JV and RJ are the alleged human conspirators in relation to Count 2, and they are also said to be the directing mind and will of the companies for the purposes of Count 3. The SFO say that, but for his deteriorating health, CL would have been indicted as a party to the Count 1 and 2 conspiracies. On my understanding of the SFO's case, JV, RJ and CL should be identified as Barclays for the purposes of both Counts 1 and 2; the SFO does not suggest that TK and RB may also be so identified. CL's role in relation to CR2 is not clear, although nothing turns on that for the purposes of this application.

10. A number of investors participated in CR1 and CR2 but for present purposes the focus is on the State of Qatar acting by or through the following entities: Qatar Investment Authority ("QIA"), Qatar Holding LLC ("QH") and Challenger Universal Limited ("Challenger"), a BVI investment vehicle. In terms of the human *dramatis personae*, the focus has been on Sheikh Hamad bin Jassim Jaber Al-Thani ("Sheikh Hamad"), former Prime Minister of Qatar concerned in all three of the entities I have mentioned, and Dr Hussain Ali Al-Abdulla ("Dr Hussain"), described as Sheikh Hamad's right-hand man and concerned in QH and QIA.

11. The context of CR1 and CR2 was the crisis in the UK banking sector. Barclays, and other banks, were under pressure to raise further capital. As part of CR1 Qatar (through QIA, QH and Sheikh Hamad, through Challenger) invested approximately £1.9B, after clawback and before commissions. Following the collapse of Lehman Brothers on 15th September 2008, the crisis became so acute that Barclays' future as an independent bank was in jeopardy. The evidence demonstrates that Barclays did not want to have to seek a "bail-out" from the UK Government, the availability of which was announced on 8th October. On 13th October Barclays announced that it would raise capital outside these arrangements. In short, Barclays was prompted to look again to Qatar, and to substantial Abu Dhabi investors, among the few potential investors with the resources and inclination to avail it.

12. In November 2008 the same Qatari entities as before invested approximately £2.05B. The SFO alleges that concurrently with CR2 Barclays Bank lent $3B to Qatar, closely matching the amount of the investment (the $ to £ exchange rate at the time was approximately 1.5). The SFO alleges that the evidence demonstrates that, contrary to promises made by Qatar, this money was used to fund the investments in Barclays as part of CR2. In providing this unlawful financial assistance, it is said that Barclays Bank acted for and on behalf of the holding company, Barclays. (I note in passing that the companies prefer to characterise the SFO's case as being based on a joint enterprise between them, but in my view nothing turns on that at this stage.)

13. As is standard practice in capital raisings of this nature, Barclays agreed to pay fees or commissions in return for the commitments to invest. All investors would expect to be paid such commissions at the same rate and, to the extent applicable, to be given the same discount from the price of the shares they were acquiring. Set percentage commissions were offered to the investors in question, and the agreement to pay them recorded in Subscription Agreements. These stated that Barclays were not paying any other such commissions. In relation to CR1, a set discounted share price was agreed.

14. As Barclays knew would be required, and as in fact happened, the proposed content and terms of the capital raisings were presented to Barclays' shareholders and to the wider market by way of prospectuses. Under EU and UK law, as the relevant human defendants well knew, these would have to be accurate and could not withhold material information. The Prospectuses for both CR1 and CR2 recorded the commissions payable in respect of each share issue, in each case as agreed in the Subscription Agreements, the agreed discount (in CR1), and the estimated costs of the capital raisings.

15. The subscription fees payable to Qatar under the Subscription Agreements were approximately £34.5M for CR1 and £62M for CR2. Put simply, these fees in relation to CR1 were based on 1.5% of Qatar's maximum potential investment. The position was somewhat more complex in relation to CR2, and I will address this later.

16. It is the SFO's case, which must be assumed to be true for present purposes, that in addition to these disclosed amounts, at the same time Barclays agreed to pay Qatar undisclosed sums totalling £322M under two Advisory Service Agreements ("ASAs") dated, respectively, 25th June and 31st October 2008. By the ASAs QH, acting as an intermediary, was to provide "advisory services" in return for fees payable by Barclays - £42M under ASA1 and £280M under ASA2. The SFO's case is that these advisory services were a fiction, and that the fees were in substance and reality hidden commissions referable to the capital raisings, additional to the subscription fees declared in the Subscription Agreements.

17. Reducing the case to its simplest, says the SFO, the correctness of the foregoing proposition is demonstrated by two central features of each of ASA1 and ASA2 and the way in which they came into being:

    (1) as to ASA1, Qatar sought and Barclays agreed a total fee for subscribing of 3.25% of the maximum potential investment (this was the figure reached after negotiations between the Qatari "principals" and those representing Barclays, in particular JV and RJ). The £42M commission as finalised was a rounded calculation based on 1.75% of the maximum potential investment plus LIBOR interest. Thus, the true fee of 3.25% represented the published fee of 1.5% and the hidden fee of 1.75%.

    (2) as to ASA2, £280M was the amount required by Qatar to give both QH and Challenger a "blended entry price" for their investments over both CR1 and CR2, and thus a discount.

18. The SFO contends that Barclays' motives in devising the ASAs was clear: to avoid disclosure of the additional commissions paid to Qatar, which would have meant that other investors would be entitled to the same higher subscription fee, and to secure the deal on the only terms which were available. Paying the other investors the same

higher fee would, apart obviously from being more expensive, have generated a perception of financial weakness in the bank as a whole.

19. The conduct alleged in relation to Counts 1 and 2 focuses as matter of *form* on false representations made in the Prospectuses and Subscription Agreements: the effect of these documents was that the world at large was being informed that the relevant commissions were based on 1.5% of the maximum potential investment and that there were no other commissions to be paid. As a matter of *substance*, however, the focus is on the nature, features and attributes of the ASAs wherein the "essential criminality" is said to reside or inhere. On the other hand, the SFO does not allege that relevant false representations for the purposes of section 2 of the Fraud Act 2006 were made in the ASAs, otherwise these would have been indicted. The SFO chooses to concentrate on the representations made to the market at large.

20. The suggested nexus between form and substance is advanced in paragraph 18(x)-(xii) of the Prosecution Case Statement in the following manner:

> "(x) It follows that the existence of an agreement to make such false representations, and to conceal material information, can be properly inferred between those knowingly involved in the planning and use of each ASA.
>
> (xi) Conspiracy to commit fraud by false representation is therefore alleged against the persons who can be shown to have entered into agreements to conceal the true nature of the fees payable to the Qataris, thereby necessarily intending that dishonest false representations should be made in the Prospectuses, and that material information should be dishonestly withheld, with the intention of making a gain for Barclays.
>
> (xii) The liability of the corporate defendant is founded on the criminality of those directing minds that can be shown to have entered into the conspiracies (JV, CL and RJ)."

21. Partway through the hearing, the SFO reformulated this slightly, as follows:

> "By devising and bringing the ASAs into effect, they were responsible for creating the "untrue and misleading" nature of the representations that were made as a consequence.
>
> …
>
> Assuming that it can be demonstrated that JV, RJ and CL all entered into such agreements, the issue that must be considered is whether the agreements included an intention that the offence of fraud by false representation should be committed by one or more of the conspirators. [emphasis supplied by the SFO]
>
> …

> The agreement was that the conspirators would make representations that were "false". That is to say, they were responsible for making the statements that were made in the Prospectus[es], which they knew to be "untrue and misleading". The Prosecution submits that it is irrelevant that the Prospectus itself, and linked documents, were formally published by the Board. The information contained in them was only false because of the actions of the conspirators. It follows that the conspirators were responsible for making the false representations."

22. On the final day of the hearing, Mr Andrew Onslow QC proffered a further formulation, or series of formulations, which are better addressed below. After the hearing further written submissions were received, some at my invitation, others unsolicited.

23. As to Count 3, which concerns the provision of unlawful financial assistance in the acquisition of Barclays' shares in contravention of section 151 of the Companies Act 1985, the SFO's case has been distilled by it to the following propositions, the factual accuracy of which must be taken as a given for this exercise:

(1) the contemporaneous evidence demonstrates that a loan of $3B made to Qatar by Barclays Bank was used to fund the CR2 investments and that the senior executives responsible for negotiating CR2 and the loan (JV and RJ) knew it was being used for that purpose.

(2) the evidence demonstrates that the loan and the investments took place at precisely the same time, corresponded very closely in amount, and were negotiated and finalised at the same time by the same individuals for both Barclays and Qatar.

(3) key negotiations on both CR2 and the loan, involving JV and RJ, took place in the same telephone call on the evening of 29th October 2008, with the amount of the loan being increased at that point to match the amount of the investments.

(4) in the days following the announcement of CR2, RJ – necessarily with JV's knowledge and support – pressed hard for completion of the loan.

(5) the securities issued to Qatar entailed the proposed acquisition of Barclays' shares within the meaning of section 151.

24. The SFO contends that it follows that Barclays Bank, acting for and on behalf of Barclays, gave unlawful financial assistance, with JV and RJ acting as directing minds for the purposes of binding the company.

Corporate Structure and Governance

25. Mr Richard Lissack QC for the companies guided me through the key documentation bearing on the corporate structure and governance of Barclays in particular, his intention being to demonstrate that the directing mind and will of the company was

the Board, in relation to the subject-matter of Counts 1 and 2, and the Group Credit Committee ("the GCC"), in relation to the subject-matter of Count 3.

26. I do not understand any issue to arise as to the correct analysis of this documentation. The headline submission of Mr Edward Brown QC for the SFO is that the formal "constitutional" documentation provides an incomplete and legally insufficient characterisation of the actions and arrangements at issue, ignoring as it does the commercial realities and the *de facto* position. He conceded that the Board and the GCC were not parties to any relevant criminality and he did not contend that liability attaches to the company or companies because of their actions.

27. It is worthwhile to provide at least an outline of the key documents in this case because on any view they provide the framework or starting-point for the legal analysis of attribution and directing mind and will which lie at the forefront of the debate between the parties. At Mr Lissack's invitation, I have also read the witness statements of Mr Lawrence Dickinson and Mr Marcus Agius, respectively Barclays' company secretary and Chairman at the material time, and prosecution witnesses.

28. Under Barclays' Memorandum of Association, Part G, the management of the business of the company is vested in the Board, and (by Article 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". By Article 113, the Board may entrust to and confer upon any director any of the powers exercisable by it. By Article 114, "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 see fit".

29. Mr Lissack showed me the names and brief *cvs* of the members of the Board at the material times. I have noted the preponderance of NEDs and the obvious calibre of the individual members. Mr Lissack's purpose was to show that the Board is unlikely to have been guilty of, to use his epithets, "abrogation" or "indolence". In my view this was a jury point. Whether the Board abrogated its responsibilities turns at this juncture on an objective analysis of what the Board did or did not do, rather than a fact-specific examination of the quality of its decision-makers.

30. Under Appendix 1 of "Corporate Governance in Barclays", December 2007 version, certain powers and functions were reserved to the Board. These included "changes relating to the company's capital structure and its status as a PLC". A similar reservation was contained in "Barclays Group, Board Committees, Powers and Responsibilities", December 2007 version, as well as a reservation covering "approval of all shareholder circulars, prospectuses and listing particulars". Plainly, the capital raisings fell within these categories of reservation.

31. Mr Lissack referred me to other similar documentation (see, for example, the June 2008 document entitled "Matters Reserved to the Board") but in my view this takes matters no further.

32. According to paragraph 70 of the witness statement of Mr Lawrence Dickinson, Board decisions could technically be reached by majority voting, although in practice there would be a discussion in which the directors would express their views and then a

collective decision made. There were 17 Board members at the material time, and it may not be an accident that this is an odd number.

33. I have considered the relationship between Articles 113 and 114 of the Memorandum and Articles of Association and Appendix 1 of "Corporate Governance in Barclays". The former, read in isolation, suggests that the Board has power to delegate *any* function to a director or a committee (as a matter of language, this might include just one individual), whereas Appendix 1 places express constraints upon the ability to delegate. For example, there is no power in the Board to delegate relevant functions in relation to the capital raisings, save – as expressly provided for – "[the] approval of announcements". Mr Brown did not submit that Articles 113 and 114 somehow override Appendix 1, and I think that he was right not to do so. In any event, there is no evidence that the Board did delegate its functions relating to the changes in the capital structure of Barclays or the approval of circulars, prospectuses or listing particulars to any of JV, CL or RJ. The negotiation of the terms of the capital raisings is anterior to and distinct from the making of the relevant changes and approvals. This is a point to which I will need to revert.

34. Mr Lissack also drew my attention to the Terms of Reference of the Board Finance Committee ("the BFC"). In particular, "the purpose of the Committee is to authorise and implement certain Transactions (as defined below) to which the Group is a party, subject to the relevant authority being delegated to the Committee by the Boards as set out in these Terms of Reference". Mr Lissack has pointed out that decisions of the BFC could be taken by majority vote but in my view nothing turns on this.

35. Barclays' corporate governance structures and processes in relation to the making of loans were set out in its manual entitled, "Global Financial Risk Management, Credit Risk Policies and Procedures", October 2008 version. Given that the loan in question was to a Sovereign client in the sum of approximately £2B, the entity within Barclays responsible for approving it was the GCC and not the Capital Credit Committee. The GCC's functions could not be delegated to others and there is no evidence that they were – noting always the distinction between the negotiation of the relevant transaction and its approval.

36. In essence, the way in which the procedures were designed to work is that the "product sponsor" and the "relationship sponsor/responsible executive" should prepare a document containing the business case for the loan, highlighting the commercial and legal risks as appropriate; and the GCC, as an independent decision-maker composed of a Chairman plus one Barclays Capital Voting Member and one Credit Risk Voting Member (taken from a list of names in each category) should deliberate on the merits of the application having received the benefit of a brief oral presentation (see paragraph 5.4 of the document). Approval of the loan requires the unanimous agreement of the Voting Members. JV and RJ were not Voting Members of the GCC nor were they the product sponsor or the relationship sponsor. I have not been told the process by which these last individuals would have been briefed, or the terms of any instructions or information, if any, given by JV and RJ down the executive chain to the sponsors. There is no evidence that the Board was involved in or told about the loan, and the witness statements of Mr Dickinson and Mr Agius state that there was no reason why they should have been.

The Essential Facts

37. I preface this section of my Ruling by reiterating that I am assuming for present purposes the best version of the facts that can realistically be advanced by the SFO on all the available evidence. These are not the facts that the companies or the human defendants accept as true or as likely to be proved.

38. An additional prefatory observation is required. Mr Lissack's submissions were almost wholly devoted to an examination of the decision-making processes within the matrix of Barclays' formal, constitutional structures; he had next to nothing to say about the discussions and negotiations which were taking place at a high-level between Barclays' senior executives, and two of its directors, and their Qatari counterparts. His submission was that the story amounted to a good read but was legally irrelevant. Mr Brown, on the other hand, had next to nothing to say about Barclays' formal decision-making and focused instead on Mr Lissack's good read. His submission, in effect, was that the executives were left "to do the deal", and that is legally sufficient under the doctrine of directing mind and will. Thus, I was presented with two parallel narratives which were in danger of occupying parallel universes, with no apparent intersections between the two.

39. I am amalgamating the two factual narratives set out in different SFO documents which I fully understand were prepared for different purposes. The Prosecution Case Statement tells the tale and sets out what the SFO characterises as "the essential criminality" in a clear and apparently convincing matter. Its primary purpose is not to demonstrate that the directing mind and will of Barclays amounted to or constituted the human defendants named in the Indictment. On the other hand, this is the primary purpose of the Prosecution Response Document dated 9th April 2018.

40. In the circumstances where the ambit of the dispute is not the facts in themselves but the legal inferences to be drawn from them, it seems to me that I can be relatively brief. I am also able to exclude a lot of material which serves merely to reinforce the respective perspectives of the SFO and the companies.

ASA1 and CR1

41. At a personal level, the key point of contact between Barclays and Qatar was RJ, who had a close personal relationship with Sheikh Hamad. The documents show that in the context of the overtures, discussions and negotiations that arose, the "principals" acting for or as Barclays and Qatar respectively were RJ, JV and to a lesser extent CL for the former, and Sheikh Hamad and Dr Hussain for the latter.

42. In May 2008 the negotiations were proceeding on the basis of an investment by Qatar of £1-2B, through the acquisition of share capital at a discounted price, and a commission in the range of 1-2%, which was the norm in the market at this level of commitment. Strictly speaking, Qatar was to be a "conditional placee", which meant that its maximum commitment would be a certain figure.

43. These negotiations were being conducted by JV and RJ. For obvious reasons, neither the Board nor a committee of the Board would be directly involved in the negotiations

themselves. This would not be standard practice and it was not what happened in this case. Mr Lissack did not suggest that JV and RJ did not have authority to conduct these negotiations, and in my judgment they clearly did. Conducting negotiations would include "doing the deal" if that phraseology is used from the perspective of business persons operating in the real world and, perhaps even in the 21st Century, on the basis of what some like to call a handshake and "gentleman's agreement". I would prefer the more legally accurately phraseology of "subject to contract". In this regard, I have not been shown any heads of agreement or letters of intent.

44. On 16th May 2008 the BFC considered the terms of the emerging CR1. JV and CL were present. This Committee was made aware of the maximum commission and discount to market price (2% and 10% respectively) and on my understanding, although nothing much turns on this, gave its approval for negotiations to continue on that basis.

45. On 28th May 2008 there was a key Board meeting. Before then there was some suggestion (see paragraph 55 of the Prosecution Case Statement) that Qatar was looking for a commission of 2.5%, but that was not communicated to the Board. The latter was provided with a document which sought approval to paying commissions of 1.5% of the conditional placings and a maximum discount to the share price of 10% for the conditional placees. The Board gave approval to CR1 on this basis, and delegated to the BFC authority "to approve, execute and do or procure to be executed and done all acts it may be necessary or desirable to have approved, executed or done in connection with the Placing and Open Offer".

46. On 28th May the directors, including JV and CL, signed responsibility letters in the standard form which vouched the accuracy of the Prospectus, which was then of course only in draft. JV and CL therefore took continuing responsibility for the information contained in the document and for it being "in accordance with the facts". This continuing responsibility was on the premise that the Prospectus would be "in the form in which it is approved for issue by resolution of the Board … or a duly authorised committee".

47. According to his witness statement, the expectation of Mr Agius was that if the shape of the deal changed in some material way the BFC, which he also chaired, would refer the matter to the main Board for determination. This, he says, would include Qatar's demand for a commission of 3.75%.

48. At a meeting which took place at Claridge's Hotel on 3rd June, attended by RJ, RB and TK, and Dr Hussain, the latter said that he "needed" a fee of 3.75% in the context of a "strategic relationship" with Barclays. Thereafter, internal discussions took place within Barclays to see whether, and if so how, this requirement might be accommodated.

49. All the discussions took place within the coterie of individuals the SFO has identified and were led, both internally and in subsequent negotiations with Qatar, by RJ and JV (technically, the latter was the senior man). The notion was soon hatched that the mechanism for an additional fee would need to be some sort of "side deal". According to TK, this would have to be negotiated directly between RJ and Dr Hussain. On 5th June JV told Mr Agius that Qatar, codenamed "Quail", was "bagged at 2bn of the conditional". Mr Brown sought to make something of this terminology, but in my

judgment no deal was concluded. Putting aside the colourful metaphor, not merely was any arrangement "subject to contract", Qatar had not agreed the mechanism for the payment of their fee, even assuming that it had been agreed in principle at 3.25%. I suspect that the amount was agreed shortly thereafter but nothing can turn on that for present purposes.

50. The email trail demonstrates that it was on or about 11th June that the coterie had alighted on the idea that the side deal would need to be couched in terms of an advisory relationship "disassociated" from the subscription owing to the warranty in the draft subscription agreement that there were no other fees, and it was also understood that the mechanics would need to be "sorted" on the basis of a conversation "principal to principal". It was further understood within the coterie that, whereas the fact of the side deal might have to be disclosed within the Prospectus, the consideration for these "advisory services" would not be. Yet further, it was understood (see, for example, the telephone call RJ/RB on 17th June) that if disclosure had to be given to the Board it would not be on a transparent basis.

51. On 11th June the Board was updated on a revised proposal that the discount for the conditional placings would be 9% and the commission was unchanged at 1.5%. On 17th June the Board signed a written resolution amending the terms of the capital raising to £5.5B. On 19th June the BFC, one of whose members was JV (CL attended but did not play an active role), approved the final terms of CR1 and the accompanying documentation, considering and noting ASA1 on the premise that Qatar would be providing advisory services to Barclays on the basis of "certain agreed fees in respect of value received under these arrangements".

52. Mr Lissack took me through one version of the minutes of this BFC meeting. The minutes run to some 18 pages and reflect the complexity of the capital raising in terms of its various constituent elements. Each director present (including JV) confirmed "that all statements made and opinions expressed in the Public Documents [including the Prospectus] were true and accurate in all material respects and that none of them is misleading and that there are no other facts, the omission of which would make any statement made or opinion expressed in the Public Documents misleading". The BFC also resolved that "the entry by [Barclays] into [ASA1] is approved". On my understanding of the minutes, the BFC did not specify who was authorised to sign it, and the copy made available to the BFC did not include the level of fee.

53. It is unclear why the BFC needed to approve the entry by Barclays into ASA1, and Mr Dickinson gives no explanation. Mr Brown made no submissions about this, observing instead that there is no suggestion that the *detail* of ASA1 was dependent on BFC approval. I take Mr Brown's point to be that as matter of practical reality ASA1 was negotiated by JV, RJ and CL, and that *de facto* responsibility for it was theirs. As for the *de iure* position, on the basis that this was an agreement for advisory services which fell outside the parameters of the capital raising, an individual director or senior executive in RJ's position had authority to bind Barclays Bank, subject to the amount involved being less than £150M. This threshold was not an issue in relation to ASA1 although it was to become one in relation to ASA2. On the other hand, no director or executive had authority to bind Barclays Bank to an agreement which related to the provision of non-existent advisory services the consideration for which was a camouflage for an additional commission for participation in CR1. From

the perspective of the BFC, save for one of its members, it was approving ASA1 on the basis of what it purported to be, not what it was.

54. The witness statement of Mr Dickinson raises a number of evidential issues not all of which I can resolve at this point. There are three versions of the BFC's minutes. The SFO accepts that the BFC meeting started at 9am and finished at either 9:50 or 9:55 am. Mr Dickinson's witness statement states that following the conclusion of the BFC meeting there commenced a full Board meeting of Barclays Bank at which ASA1 was approved, amongst other documents. These approvals mirrored the BFC's approvals given on 19th June. Paragraph 175 of Mr Dickinson's witness statement says:

> "Normally we would be specific about the level of fees to be paid under agreements requiring Board approval. I do not know why the fees were not specified. These particular Minutes were drawn up by the external lawyers so I do not think I would have queried the absence of a specific figure. I would not be best qualified to comment on whether such an absence was normal in this sort of transaction."

55. On 25th June 2008 three documents or sets of documents were signed or published, each being dependent on the others, viz.:

(1) the Prospectus disclosed the discount as 9.3% and the commission (to all the subscribers, including of course Qatar) as 1.5%. The Prospectus also stated that the aggregate costs and expenses payable by Barclays in connection with CR1 was approximately £107M. Barclays accepted responsibility for the information contained in this document which was signed on its behalf by a number of directors including JV and CL.

(2) the Subscription Agreements, signed on behalf of Barclays by CL, or in one instance JV (on the basis that they were "authorised signatories" pursuant to one of the BFC resolutions), warranted that the fees to other participants were as set out in the Prospectus, and that there were no additional fees or commissions. Qatar signed its Subscription Agreement on the same day.

(3) ASA1 was signed for and on behalf of Barclays Bank by JV.

56. Thereafter, but only on this foregoing basis, Qatar participated in CR1 as a conditional placee pursuant to its obligations under the Subscription Agreement. The precise detail matters not for these purposes, although the SFO contends that subsequent events throw further light, if it be needed, on the true intentions of the parties.

57. According to paragraph 28 of Mr Agius' witness statement:

> "I think it right to say that my initial reaction on reading these documents … and some later documents … was one of disbelief, profound shock and great anger since they suggest that a group of executives conspired to deceive the Board, Barclays shareholders, and the wider world by withholding from them the fact that one major new shareholder was being paid a much higher effective commission rate for participating in this, and

> then the subsequent fund-raising, exercise, than was paid to other financiers. Specifically, in relation to the June capital raising, the executives did not have authority to approve fees of 3.5% [sic] since this would involve a material departure from what had been understood by the Board to be the level of fees that were payable."

58. The SFO's submission based on all the available evidence (I have given only the highlights) is as follows:

> "All of the above evidence demonstrates that "authority to deal" plainly rested with RJ, JV and CL. As indicated in the full Case Statement, they are alleged to have been key participants in the conspiracy. It is clear that they acted with authority and autonomy in negotiating the terms of the deal with the Qataris. This was as envisaged by the BFC which did not oversee the practicalities and details of the negotiations." [paragraph 148 of the Prosecution Response document]

59. Barclays, on the other hand, submits as follows:

> "This witness evidence confirms that genuine authority was never delegated to any of the individuals asserted by the SFO to have represented the directing mind and will of Barclays, and that neither the Board nor the BFC constituted a rubber-stamp for their decisions." [paragraph 76 of Barclays' Note]

60. If the correct focus is on the negotiation, it is clear that responsibility (using this noun loosely) resided with RJ, JV and maybe CL both in relation to ASA1 and certain key facets of CR1, including the 1.5% fee and the discount to the share price. If the correct focus is on BFC approval, on the basis that the reserved functions of the Board had been delegated to it to deal with the matters which remained in issue, it is clear that responsibility rested with the BFC.

61. It will be obvious by now that the SFO's case as to the falsity of the 1.5% fee in the Prospectus and the Subscription Agreements depends on the co-existence of ASA1 and the proposition that the fee for "advisory services" is a sham, being a disguise for an additional commission for participating in CR1. It is this very point which provides the springboard for the parties' respective cases: whereas the SFO says that the essential criminality brought about by activity directed or willed by the human defendants inheres in ASA1, its inextricable link with CR1 means that Barclays may be inculpated, Barclays says that this self-same inextricable link draws the legal focus onto CR1 where the directing mind and will of Barclays was reserved to the Board, and to the BFC to which relevant functions had been delegated, and never left those entities.

ASA2, CR2 and the Loan

62. CR2 was of considerably greater complexity than CR1 but the SFO's fundamental point is the same: that the fee for "advisory services" in the sum of £280M in ASA2 did not reflect the true position. For present purposes, I must proceed on the basis that there is sufficient evidence to support the propositions (1) the £280M sum was a disguised additional commission for Qatar's participation in CR2 (the amount being calculated as a "blended entry price"), and (2) RJ and JV "were the sole representatives of Barclays, driving the negotiations" or were acting "as principals". As was its case in relation to CR1, the SFO's focus is on the commercial reality and the *de facto* position. There can be no dispute, as far as I interpret the documentation, that RJ and JV were given considerable autonomy over the manner in which the negotiations were conducted.

63. The negotiations started on or about 3rd October 2008 and over the course of the following four weeks or so entailed high-level meetings in London and Doha between RJ/JV and Sheikh Hamad/Dr Hussain. There are numerous references in email traffic and transcripts of telephone conversations that RJ, JV and those acting under them regarded "the deal" as being the finalisation of the key terms of CR2, ASA2 and, in due course, the loan. It is also clear that these elements were seen as a "package trade" and mutually interdependent.

64. A number of Board meetings took place in October during the course of which the evolution of CR2 was considered. For example, on 13th October it was noted that Qatar had increased its potential commitment to £1.5B. On the following day a slightly lower figure was given to the BFC. By 21st October the basis of Qatar's proposed participation had become clearer, although it was not finalised. The Board resolved that "the Company should pay such fees, commissions and expenses in connection with the Quail Subscription as may be fair and reasonable in the circumstances". On 22nd October the BFC was informed that "Quail and partners would be seeking significant fees for the underwriting, currently expected to be £325M" (the £280M was not included within this figure). On 26th October the Board was updated and it noted that "significant fees would be paid to the strategic investors: 2% on the RCIs and 4% on the MCLs". This predicated parity of treatment as between all the investors, and did not take into account any fees payable under ASA2.

65. The key meeting of the Board was on Monday 27th October. Sixteen members were present, including JV and CL. The Board approved the transaction in principle, resolving that its proposed terms "are fair and reasonable", although there were important matters of detail which remained outstanding. In approving the transaction on this basis the Board was aware of the fee structure which I have already summarised. The Board was made expressly aware that Qatar would be paid a commitment fee but its amount was unspecified and no draft ASA was made available. It resolved that "[t]he Company should pay such other fees, commissions and expenses in connection with the Transaction as may be fair and reasonable in the circumstances". The Board resolved that the BFC "be vested with authority to approve, execute and do or procure to be executed and done all acts it may be necessary to have approved, executed or done in connection with the Transaction". This included authority to "finalise the terms of the Transaction and to amend, revise, vary and extend the terms of the Transaction which the BFC considers necessary or desirable".

66. On 28th October the BFC was convened. JV and CL were present. The BFC resolved that "the Chairman [Mr Agius] and the Chief Executive [JV], acting jointly (together with Authorised Persons) be vested with full authority to approve, execute and do or procure to be executed and done all acts they consider necessary or desirable to have approved, executed or done in connection with the Transaction". In other words, the authority vested in the BFC by the Board was now being vested in two individuals. On the SFO's case nothing turns on this.

67. On 30th October 2008 Mr Agius and JV resolved on behalf of Barclays as follows:

> "We refer to the minutes of [Barclays] and [the BFC].
>
> We also refer to the attached schedule setting out the details of the subscription by the [investors] for the RCIs, Warrants and MCNs … and the draft agreements setting out the terms and conditions on which [they] would subscribe ("the Subscription Agreements"), each provided for us to review.
>
> We, being the Authorised Persons … after full and careful consideration, HEREBY RESOLVE that:
>
> 1. the Subscription Agreements be approved in the form provided to us …"

68. Meanwhile, and "on the ground", negotiations were proceeding at a frantic pace. On 22nd October Qatar made clear that they wanted a "blended entry price". On 24th October Leading Counsel's opinion was sought on the principle of a new ASA, described as a "co-operation agreement", which the SFO contends was the mechanism for securing Qatar's stipulation. Leading Counsel advised that this arrangement would "not be problematic for the purposes of unlawful financial assistance or commissions", on the basis that it was on "normal commercial arms' length terms". I infer that Leading Counsel was not shown any draft agreement. On the same day RJ was offering Sheikh Hamad a fee of £250M but the latter was holding out for more.

69. Matters came to a head on 29th October. It is not entirely clear when Qatar's requirement for a loan hove into view, although it was I think alluded to on 16th October in the context of a "package deal"; and on 21st October Barclays' lawyers were commenting that Qatar would not have $1B available within time.

70. Over the course of 29th and 30th October, it is reasonable at this stage to infer that JV and RJ agreed with Sheikh Hamad that CR2 should proceed on the basis of a total investment, comprising various instruments, of approximately £2.05B, a loan of $3B and additional fees of £280M which were wrapped up in the form of ASA2 which came onto the table very late in the day.

71. The Subscription Agreements were signed (by CL and not by JV) and were exchanged on 31st October, and the Warrants Prospectus (containing the same warranty by Barclays as applied to CR1) was issued on 25th November. The formal documentation did not disclose either the existence or terms of ASA2. From the perspective of these documents, Qatar's fees were calculated on the basis of the algorithm put before the Board on 27th October, and approved by it as "fair and reasonable" (the final amount

changed because Qatar invested more). However, if ASA2 should be regarded as containing an additional fee, which for present purposes it must, it follows that the Subscription Agreements misrepresented the position (in warranting that there were no additional fees), as did the relevant Prospectuses in stating that Qatar was to be paid commission of 2% for their subscription in RCIs.

72. ASA2 was signed for and on behalf of Barclays Bank by RJ and not by JV. He did not involve Mr Agius at any stage. According to paragraph 84 of the latter's witness statement:

> "The resolution [of 28th October] gave JV and me the authority to agree fees for the Qataris so long as they were fair and reasonable in the circumstances. There was no requirement to report back to the Finance Committee or the Main Board any decisions regarding fees as long as they were fair and reasonable in the circumstances. As to that, we would have made a judgment. But the delegation was to us acting jointly and so JV couldn't have taken any substantive decision without my agreement. I discovered subsequently that [ASA2] had been entered into involving payments of £280M. I deal with this in more detail in paragraph 92 below. If that agreement was a disguised means of paying extra fees, then such fees were not fair and reasonable and I would not have sanctioned them without reference back to the [BFC] or the whole Board."

Paragraph 92 of Mr Agius' witness statement takes the matter no further. As I have said, JV did not sign ASA2 but Mr Agius' assumption seems to be that he took the "substantive decision" in conjunction with RJ.

73. I note what Mr Agius says, but I would simplify the position yet further. If ASA2 was simply an agreement for advisory services outwith the scope of the transaction, the BFC resolution of 28th October would not apply to it and, subject to the point that RJ's authority was limited to £150M, he could have signed this document without reference to Mr Agius. If, in line with the SFO's case, ASA2 was part and parcel of the transaction, it clearly fell within the ambit of the relevant BFC resolution and joint authority was required. It was not obtained.

74. It is convenient at this stage to move onto the loan in the context of Count 3. There is clearly a sufficient case on the evidence that RJ and JV knew that the loan would be deployed by Qatar for the purpose of QH's acquisition of shares in Barclays, and that the loan was used for that purpose.

75. In support of his submission that the directing mind and will of the companies for the purpose of Count 3 was the GCC, Mr Lissack took me through relevant documentation. Mr Brown's approach, as before, was not to consider this but to examine instead the *de facto* position.

76. The "presenting officer" for the proposed $3B loan was Adrian Hogg and the "responsible executive" was Fergus McDonald. RJ and JV were not involved in this stage of the decision-making, and as I have said were not members of the GCC. A pack prepared for the purposes of a meeting of the GCC on 30th October focused on

whether the Emirate of Qatar was a credit risk. However, one of the key discussion points was "need for compliance approval due to forthcoming capital injection in Barclays".

77. On 30th October the GCC sanctioned the proposed unsecured loan facility but only on the basis of "a restriction on the use of funds as an undertaking in the Loan documentation". This was because:

> "As the Government of Qatar is considering providing Barclays with additional capital concerns were expressed relating to compliance issues of providing the proposed loan at such a time. In this respect it was noted that the loan would not permit proceeds to be used to fund the purchase of Barclays shares or any instrument convertible into Barclays shares. Compliance advised that the restriction on the use of funds should be an undertaking which if breached would be an event of default."

78. On 14th November Clifford Chance advised that:

> "… if this is a business opportunity that would be extended to this client irrespective on [sic] any other activity (i.e. Qatar involvement in the capital raising), then it is not the intention of either Barclays Capital or Qatar to indulge in activity that contravenes financial assistance legislation. The two activities are completely separate.
>
> To support this we are working with Qatar's counsel and the client to design a specific purpose clause that clarifies this point. That clause contains the statements that the funds:
>
> (a) will not be used to purchase Barclays' equities …
>
> (b) will not be spent in a way that results in any loan being classed as unlawful financial assistance."

79. In an internal document dated 14th November analysing the business case for the loan, the following appears:

> "[RJ] was appointed as Head of Investment Banking and Investment Management Middle East with specific responsibility as Barclays Capital representative for sovereign wealth funds. Qatar has been identified as a key client. As part of this he has continued to have dialogue with the Prime Minister of Qatar on a daily basis.
>
> …
>
> We are aware that other banks are being shown similar sized bilateral opportunities to support Qatar Inc. Against that competitive backdrop the decision has been taken to support Qatar with this relationship defining deal which would be

> available to Qatar on these terms notwithstanding any investment activity that Qatar may be undertaking in Barclays.
>
> We have discussed with senior officials within the Qatari government the concerns that might be raised around the potential for financial assistance. These officials assure us that the bilateral loan funding would not be used to finance the acquisition of Barclays' equity securities …"

80. The loan was made on 17th November containing, I infer, the specific purpose clause previously mentioned. I have seen no evidence that between 30th October and 17th November anyone asked RJ whether he could throw any light on the issues which were troubling other individuals within Barclays and the lawyers.

81. Finally, I note in passing the terms of a letter the SFO wrote to Qatar's lawyers on 13th May 2013:

> "I can confirm that based on the information the SFO has obtained to date there is no suggestion that your client, its officers and employees have done anything improper in their dealings with Barclays in June and October 2008, and are not the subject of any investigation by the SFO."

The logic of the SFO's case must be that the impropriety of Barclays extends to Qatar. Mr Lissack submitted that the SFO has "blinked" on this issue; but, if it has, this is not a factor which can avail his clients at this stage.

The Offences Indicted

82. Annexed to this Ruling is the joinder Indictment preferred on 16th February 2018. The Indictment mandates an examination of the provisions of section 2 of the Fraud Act 2006, section 151 of the Companies Act 1985 (now repealed) and section 1 of the Criminal Law Act 1977.

83. Section 2 of the Fraud Act 2006 provides:

> "**2. 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)."

84. Section 151 of the Companies Act 1985 provided so far as it is material, at the material time:

> "**151 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.
>
> ...
>
> (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."

85. Section 1 of the CLA 1977 provides, so far as is material:

> "**1 The offence of conspiracy.**
>
> (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."

The Test to be Applied on an Application to Dismiss

86. There is no real dispute between the parties about the relevant test.

87. By paragraph 2(1) of Schedule 3 to the Crime and Disorder Act 1998, a person who is sent for trial may apply to the Crown Court for the charge or charges in the case to be dismissed. By paragraph 2(2), the judge must dismiss a charge, and take necessary consequential action in relation to the Indictment, "if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted".

88. The leading authority on this provision is R (oao IRC) v Crown Court at Kingston [2001] 4 All ER 721, a decision of the Divisional Court on antecedent legislation to like effect. I do not detect any difference between the test to be applied at this stage and at the close of the Crown's case, subject to the obvious point that in practical terms at the later stage the court will have a surer idea of what the evidence comprises. The court must consider the whole of the evidence; and, to the extent that the Crown's case depends on inferences, determine whether a jury properly directed could draw the appropriate adverse inference of guilt against the defendant. This does not mean that in a case involving multiple possible inferences the court should assume that the jury would draw every possible inference against the defendant: a sensible, holistic assessment is required, looking at the evidence in the round.

89. When directing myself under Galbraith in a case involving circumstantial evidence and/or inferences, my ruling usually takes on board two authorities of the Court of Appeal, Criminal Division. First, at paragraph 36 of R v Goddard [2012] EWCA Crim 1756 (Aikens LJ presiding) the CACD said this:

> "We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in Galbraith. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether **a** reasonable jury, not **all** reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that **a** reasonable jury could be entitled to do so

> (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

Secondly, in R v Masih [2015] EWCA Crim 477 (Pitchford LJ presiding) the CACD identified the correct question as follows:

> "Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?"

90. In my view, Aikens LJ's formulation is more elaborate, and possibly more analytical, than Pitchford LJ's but in practical terms the upshot is identical. Furthermore, to the extent that the companies' application engages me in a process which entails *not* drawing any particular adverse inference on the available evidence, I would decline that invitation.

Two Procedural Issues

91. At the commencement of the proceedings, there was some discussion at the Bar as to whether I should convert these dismissal proceedings into a preparatory hearing on a provisional basis, for the purpose of ensuring that Barclays would have a right of appeal in the event that I refused its application. The thinking was that I could carve out discrete points of law in the preparatory hearing which would then trigger appeal rights. This proposal seemed to me to be sensible but wrong in principle. Mr Brown opposed the submissions advanced by Mr Crispin Aylett QC on behalf of Barclays, and the issue was held in abeyance. As matters proceeded, the dynamics of the case were beginning to shift and I raised with Mr Brown the point that, if the dismissal application succeeded, these criminal proceedings would end at that juncture and no preparatory hearing could be ordered. The issue was not definitively resolved at that point because it did not need to be.

92. As Fulford LJ pointed out in R v Evans [2015] EWHC 3803 (QB), there is no appeal right and the SFO's only avenue is to apply to the High Court for a Voluntary Bill of Indictment to be preferred. In a written note dated 3rd May 2018 Mr Brown has made clear that the correct course must be for it to apply for a Voluntary Bill of Indictment in the event that this dismissal application succeeds.

93. The second procedural issue which arose during the course of the hearing is that on the fifth and last day Mr Brown applied for a relatively short adjournment, until Tuesday 8th May, to enable the SFO to reflect further on the case, and on the terms of the Indictment, in the light of the manner in which the legal argument had unfolded. The basis of Mr Brown's application was that I had raised points which had not been advanced by Mr Lissack.

94. I refused Mr Brown's application, and I should now set out my reasons in slightly more detail.

95. First of all, the SFO has had since 2012 to consider this case and to formulate the Indictment in the light of the available evidence. It is incumbent on the SFO to

anticipate all the points of law which might reasonably be taken against it. Secondly, I do not consider that it is entirely fair to say that I have run with new points. One of the companies' two foundational arguments on Counts 1 and 2 has been, since 2015, that there is a mismatch between the "essential criminality" alleged by the SFO in relation to the ASAs and the conduct that the SFO was minded to indict (and, indeed, did indict in 2017). It is true that this submission does not feature in Mr Lissack's skeleton argument, but it had been ventilated before and in all these circumstances I could not conclude that the SFO had been ambushed. The only point which came from me, and was not specifically foreshadowed, was that the *actus reus* of the substantive offence of fraud by misrepresentation had not been committed by any of the conspirators: anything done in relation to the Prospectuses and the Subscription Agreements was done by the Board or the BFC. In my view, this is a slightly different mode of advancing the submission on mismatch; and, in any event, it is a pretty obvious point. I suspect that Mr Lissack was diffident in advancing it explicitly through fear that it would expose a weakness in the SFO's case against the human defendants, and engender uncovenanted judicial trepidation. His timorousness had evaporated by the time he made his Reply. My third reason for refusing the SFO's adjournment application was that I did not consider at the time that the Indictment was capable of being amended to meet the companies' arguments.

The Rival Contentions

96. As might have been expected in a case of this importance, the parties have inundated me with copious, sophisticated and well-honed written submissions. The oral arguments have been transcribed, and are available for scrutiny should the need arise. On analysis, it seems to me that the parties' contentions, although apparently numerous, were often variations on a theme and might have been significantly reduced without doing injustice to their persuasiveness. In the circumstances, a detailed recitation of the parties' submissions is not required; an outline will suffice.

97. Another aspect of both parties' submissions was that there was an element of circularity underpinning their respective cases, more so in relation to the SFO than Barclays'.

98. Mr Lissack identified what he submitted were three fundamental flaws in the SFO's case. The first was that it was not permissible to fashion a special rule of attribution out of section 2 of the Fraud Act 2006, which is a provision of wide and general scope. He submitted that the SFO cannot avoid this exercise, despite protestations to the contrary, because the primary rules of attribution fixed the directing mind and will of Barclays in entities which were not composed of the human defendants who were the participants in the alleged conspiracy, and authority was not delegated to them either expressly or by necessary implication. The second suggested flaw is that the SFO has indicted the wrong activity: namely, the *making* of false representations and the *giving* of financial assistance, whereas its case has been explicitly put forward on the basis that the human defendants' essential criminality inheres in the *negotiation* of these transactions. It is in this regard that the mismatch arises. The third flaw is that it is said that the SFO has ignored its own evidence, in particular the evidence of Messrs Agius and Dickson, which demonstrates that a fraud was practised by the human defendants on the Board, the BFC and the GCC. The saliency of this point, argues Mr

Lissack, is that the human defendants acted outside the scope of their authority and by misleading the relevant decision-makers "subverted the regime of corporate governance". These bodies were designed to have genuine authority, they believed they had such authority, they sought to exercise it and they did exercise it.

99. Acknowledging that the SFO has characterised the companies' case as amounting to the narrowest possible iteration of the primary rules of attribution, Mr Lissack met this as follows:

> "I make this perfectly plain: if, regardless of such formal structures, the truth in any given company is that status, authority and control lay with the individual, not with the structured body, then of course the company can be guilty, obviously. But then the search is for some species of delegation or abrogation or indolence, or de facto abandonment, anything that would pass status, authority and control to a given individual."

Mr Lissack further submitted that there is no evidence that status, authority and control was or became divested of "the structured body". His basic point on the evidence was that, although it may be accepted that the human defendants had considerable autonomy over the manner in which the negotiations were conducted, this is a separate matter from decision-making capable of binding the company.

100. Towards the end of the first day of the hearing, I asked Mr Lissack whether his submissions would be the same if the SFO's focus shifted onto what I was calling "the anterior conduct": in other words, the negotiations, or as Mr Lissack was to call it, the "positioning". By using the epithet "anterior", I was not intending to suggest that the negotiations had necessarily to be regarded as legally prior to and separate from the conduct that the SFO had indicted: I was accepting, at least *arguendo*, that there might be a distinction to be drawn, and I was examining where Mr Lissack's submissions led him if there were such a distinction. It seems to me that the answer Mr Lissack gave to my question advanced the essential core of his case:

> "So the hypothesis is imagine that the prosecution rather than indicting as they have the making of the conspiracy to make false representations in the prospectus and the subscription agreements, instead had charged whatever they fancy, that attached to the entering into the advisory services agreements, supposing that is the hypothesis. The amending of the Indictment in that way, my Lord, would not affect our submissions, nor affect their merit. This is because any fraud charge based upon the ASAs would have to be predicated upon their status as contrivances to pay disguised fees to the Qataris, i.e. that the ASAs were in fact terms of the capital raisings. It is only if they were terms of the capital raisings that any other investor might have been entitled to the same treatment, or, as alleged here, that lies were told to the other investors in the associated documentation to prevent them finding out the truth and demanding the same. Our argument would remain that whatever degree of authority the individuals had to negotiate or even to agree separate commercial arrangements that were not part and

> parcel of the capital raising, they never had authority to act as the company to determine the key terms of the capital raising. In the present case it is, if I may say so, convenient and correct to characterise the agreement of the ASAs as anterior to the allegedly false representations because it exposes in stark terms the area where the individuals can be shown to have had some authority, i.e. negotiation of commercial agreements, and an area, disclosure of the key terms of the capital raising, where they did not. The point is in fact no different however a fraud might be framed. That's because the board never ceded authority over the key terms of the capital raisings to the individuals either formally or informally."

101. Mr Lissack advanced detailed submissions on the authorities, academic literature, consultation papers and on the evidence which it will be convenient to address, to the extent necessary, under the next section of this Ruling.

102. Mr Brown submitted that this is a "true identification case", involving a simple application of the principle of directing mind and will "unencumbered by consideration of primary and constitutional rules". What he meant by that, I believe, is that the human defendants were very senior executives of Barclays (JV was CEO and a director; CL was also a director) who clearly had the status and authority to "do the deal", which is what they did. In relation to Counts 1 and 2, the conspirators retained ownership of the ASAs wherein lay the "essential criminality" that the SFO had indicted.

103. Mr Brown emphasised that the conspiracy was the agreement to bring about the making of false representations, and that the offence was completed when the agreement was made, not when acts in furtherance of it were taken. That submission was obviously right: these acts may be evidence of the conspiracy but they are not the completed offence. I pressed Mr Brown as to how the offence should be envisaged in the light of the terms of section 1 of the CLA 1977, which requires the identification of a substantive offence (here, of fraud by false representation) committed by one or more of the parties to the conspiracy. At various stages Mr Brown advanced a number of submissions designed to assuage my concern. These were: the ASAs were an essential part of the conspiracy; Barclays have adopted "a silo-based approach that focuses solely on the outcome of the conspiracy"; the Prospectus and the Subscription Agreement were falsified by the co-existence of the ASAs (this is my wording, but it does not differ materially from Mr Brown's); once the conspiracy was hatched and put into effect, it was a certainty that the Prospectus would lie (seeking to address the wording of section 1(1)(a) and "will necessarily amount"); the conspirators specifically intended that the representations would be made; the Board etc. were innocent parties to a joint enterprise; by signing director's letters (in the case of JV and CL) and signing off the Subscription Agreements for CR1 (in the case of JV), individuals with the requisite *mens rea* at board level were instrumental in bringing out the falsehoods; and, finally, the formulations I have previously summarised under paragraph 21 above.

104. During the course of oral argument, Mr Brown invited me to consider the following hypothesis:

> "Let's for the moment put aside the directing mind and will point if we can but dealing with the individuals because of course then you get to the directing mind. Let's assume that JV, RJ and CL had set out to commit the conspiracy alleged, and had intended that the prospectuses should contain false representations because the ASAs were known by them to be mechanisms, which would be used to pay commission fees. Let's also assume though that the board found that out and stopped what was happening. And so that the false representation was not in fact made in the prospectus. That of course would not mean that [they] would not be guilty of the offence of conspiracy to commit fraud by false representations. They would have entered the agreement with that intention, the intention that such false representations would be made. It doesn't matter, we submit, whether or not that intention comes to fruition. What's being said is that because the actual prospectuses could only be brought into effect by the board, [they] couldn't be responsible for the lie within them. But they plainly were responsible for the provision of the content in relation to the lies, in relation to the ASAs, knowing that the content was false."

105. About 15 minutes later the following exchange appears on the transcript:

> "MR JUSTICE JAY: Go back to your hypothetical example of the board finding this out and therefore stopping it, but the conspiracy by the individuals, as it were, as a completed offence because that was their intention. Would the Crown be able to say even in that hypothetical example that the company who by its acts has frustrated the carrying out of the fraud is nonetheless liable for the thwarted conspiracy?
>
> MR BROWN: Yes, we do.
>
> MR JUSTICE JAY: Even in that example?
>
> MR BROWN: Yes.
>
> MR JUSTICE JAY: So the company acts heroically and someone in the board, a non-executive director, reads the paper with phenomenal attention and says, "Aha, there is a problem here", the company ends up responsible because the company you say has allowed the directors the degree of autonomy to negotiate?
>
> MR BROWN: Yes, and the actors, the human actors, are acting as the company when they enter into the conspiracy, when they carry out the acts in furtherance of the conspiracy. It matters if it's a conspiracy to defraud for example the company, but if it's not, there's nothing wrong, we submit, with the company being properly liable as a result of their acts acting as the company.

> MR JUSTICE JAY: Even though the very safeguards, which are there to ensure that these frauds don't come to fruition, have in fact operated successfully. The company is still criminally liable?
>
> MR BROWN: It's still blameworthy and criminally liable to use a test in Smith and Hogan, because the directing mind and will for the purposes of the actions complained of were Varley, Jenkins and Lucas. As we will demonstrate."

106. Mr Brown made detailed submissions on the evidence, concentrating as I have said on the negotiation of CR1 and CR2, ASA1 and ASA2, and the loan. In relation to "doing the deal" the human defendants were not acting under the direction of the Board, the BFC and the GCC: they had the status and authority to act in the name of the companies. The focus should be on the *de facto* position, and it is both artificial and wrong to create a hard, notional line between the negotiation and the formal aspects of the transactions: the former led seamlessly into the latter. In any event, submitted Mr Brown, the conspirators did bind the company to a legal commitment in relation to the ASAs.

107. Mr Brown submitted that the fact that the human defendants were misleading the Board, the BFC and the GCC was not an answer to the SFO's case. There are several examples in the authorities of individuals acting in contravention of express instructions of the Board, or effectively duping the Board, but a relevant liability being established. Furthermore, this is not a case of fraud being directed *at* the company: see In re Hampshire Land [1896] 2 Ch 743.

108. Mr Brown too made detailed submissions on the authorities. His analysis was that the true identification principle, as he put it, requires only that the company is identified with any individual with sufficient "status and authority", or "authority to deal", and that depends on a fact-sensitive examination "of what actually and practically occurred within the company". By implication, Mr Brown submitted that this was an examination which was inapt to be resolved in a dismissal application of this sort.

109. On the final day of the hearing Mr Andrew Onslow QC advanced a further group of submissions on behalf of the SFO, one of which it would be fair to say was presaged by Mr Brown. His contention was that the human defendants were co-conspirators with Barclays, and once the company possessed the relevant criminal intent it could not be lost or shed. This submission was advanced in a number of slightly different ways and had not been clearly set out in the SFO's written arguments. Mr Onslow added to the mix that JV's knowledge could be imputed to Barclays because he participated in the formal decision-making.

110. At the time these submissions were being advanced, it was not entirely clear to me where they were leading; and, in particular, whether Mr Onslow was advancing additional submissions in harmony with Mr Brown or a different submission altogether. It was primarily for this reason that I sent two emails to the parties posing a number of questions. I am grateful for the written responses, not least because I now believe that I have properly understood Mr Onslow's arguments.

111. In short, the final resting place of the SFO's case is as follows:

(1) in negotiating with Qatar, JV, RJ and CL were acting as the directing mind and will of Barclays.

(2) the actions and knowledge of JV, RJ and CL, in agreeing between themselves and with others as to the course to be adopted by Barclays and in their dealings with Qatar, are to be imputed to Barclays.

(3) the "making" of a false representation for the purposes of the Fraud Act 2006 should not be narrowly construed "so as to be confined to the act of final and formal (and potentially perfunctory) approval by the Board of the making of the representations", because the representations cannot be divorced from the actions of these individuals in negotiating and making the ASAs; and such a narrow interpretation would frustrate the statutory purpose.

(4) the conspirators did intend that relevant acts or omissions (I think that there is a typographical error in the SFO's final written submission) would be committed by one or more of the conspirators, because Barclays itself was a conspirator. Once the company is fixed with criminal intent, it could not then shed it. In bringing into effect the capital raisings, including the making of false representations, the company was thereby a conspirator bringing into effect the outcome of the conspiracy.

(5) the conspirators included two directors acting at Board level and one or more of them signed key documents, including the Prospectuses and the Subscription Agreement.

(6) the SFO's case is not based on JV's involvement in Board and BFC decisions *qua* member of those bodies, although such involvement is highly relevant evidentially. If one director is fixed with guilty knowledge, that is sufficient for the purpose of inculpating the company: "what matters is that one or more natural persons, capable of representing and being identified with the company, are a knowing party to the process".

112. The only observation that I would make at this stage is that item (6) does appear to me to raise a further or alternative argument. Items (1)–(4) are a development or reformulation of earlier arguments. Item (5) acquired greater prominence as the arguments evolved. It looks back to items (1)-(4) and forward to item (6). Whether or not items (5) and (6) in particular were clearly displayed in the SFO's main skeleton argument does not, I think, matter.

Analysis and Conclusions

Introduction

113. As often happens in complex cases of this sort, the parties' respective characterisations of their opponent's submissions, which were not always accurate, occupied much time and expended more heat than light, with the risk that I was deflected from the task at hand. Aside from this knocking down of straw men, there was also a tendency, if I may say so more in the SFO's camp than Barclays', to seek

to persuade me of propositions that were not in issue and about which I received little or nothing by way of submission from the opposing party. For example, there is more than a sufficiency of evidence showing that "the deal" being negotiated by the human defendants in relation to both CR1 and CR2 contained dishonest elements, inasmuch as ASA1 and ASA2 misrepresented the nature of the services that Qatar was providing. These services were not "advisory services" but Qatar's participation in the capital raising themselves, for which they were being paid a hidden commission. Mr Brown was also pushing at a wide-open door when he drew my attention to the mass of documentation showing that JV and RJ in particular were the commercial negotiators representing Barclays, were given considerable autonomy in that regard, and if "the deal" is accurately and fairly to be described as the shaking of hands, or an oral utterance expressing assent and confirmation, that "deal was done" by the individuals the SFO seek to inculpate.

114. Moreover, I also agree with Mr Brown that often the problem in these cases is the evidential one of identifying whose conduct as a matter of fact might be attributed to the company. In the absence of such an individual, there can be no attribution: see Attorney General's Reference (No. 2 of 1999) [2000] QB 796 at 815B-F. This problem does not arise in the present case.

115. It is tempting to begin with the point which I raised during oral argument, namely that Counts 1 and 2 seek to extend the concept of conspiracy beyond its permissible bounds. For a number of reasons, I am resisting that temptation, not least because it must be preferable to begin with a consideration of the principal arguments that were advanced by the parties.

116. With that in mind, I begin with the authorities.

The Authorities

117. I do not believe that it would be helpful or desirable for me to examine, review and analyse all of the various authorities which were brought to my attention. That exercise was undertaken by Counsel but it often seemed to me to be at too high a level of generality. In any event, I cannot improve on the exposition and analysis undertaken by Professor Eilis Ferran in her paper, Corporate Attribution and Directing Mind and Will, 2011, LQR 239. Her commentary on the current state of the law repays consideration, and I will be reverting to one aspect of this in due course.

118. The right course, in my view, is for me to seek to draw out and distil the key principles relevant to this case from the leading authorities in this area, and then concentrate on the clutch of company law cases which are or may be the most promising from the perspective of the SFO.

119. In the *locus classicus* of Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd [1915] AC 705, Viscount Haldane LC's quest was for the individual or entity:

> "… who is really the directing mind and will of the corporation,
> the very ego and centre of the personality of the corporation.

> That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company … whatever is known about Mr Lennard's position, this is known for certain, Mr Lennard took the active part in the management of this ship …" [at 713]

As Lord Hoffmann would come to explain in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500, the celebrated reference to "directing mind and will" in terms of the "very ego and centre of the personality of the corporation" has been misunderstood. It is neither a metaphysic nor a test, although it will often be the best description of the person designated by the appropriate rule of attribution [511B/C]. Thus, the correct starting-point is not the invocation of some generalised notion of the status, seniority and "authority" of the individual or entity in question, but rather an examination of which rule, if any, may apply to the facts in the particular statutory context.

120. In Viscount Haldane's view, Mr Lennard's formal status within the company on the limited evidence available was unclear. What was clear was that he took an active part in the management of the ship, and that this must have been with the concurrence of the company. It is also not clear from Viscount Haldane's reasoning whether he was basing his decision *sub silentio* on one of Lord Hoffmann's general rules of attribution, viz. delegation, or on one of his special rules – derived from a purposive interpretation or construction of the relevant substantive rule. The passage I have set out suggests implied delegation, being an inference from such evidence that there was or that the company had chosen to place before the court; another passage at the bottom of page 713 of the Law Report suggests that the matter pivots, or also turns, on the true construction of section 502 of the Merchant Shipping Act 1894 (and is, therefore, a special rule). Lord Dunedin's analysis was clearly based on implied delegation ("I can quite conceive that a company may by entrusting its business to one director be as truly represented by that one director, as in ordinary cases it is represented by the whole board"). Lord Sumption's analysis in Jetivia SA v Bilta (UK) Ltd (in Liquidation) [2016] AC 1 was that the directing organ of the company implicitly delegated the entire conduct of the business to Mr Lennard (at paragraph 67). This seems to me to be the most helpful.

121. The application of a general rule, or a special rule, leads to the same outcome on the facts of Lennard's case. I would agree with Mr Brown that it has never been the law, or at least it has not been the law since 1915, that the application of primary rules of attribution are dispositive of the directing mind and will question. That said, it was not Mr Lissack's submission that they are.

122. In Tesco Supermarkets Ltd v Nattrass [1972] AC 153 the issue was whether a store manager could be regarded as the company for the purposes of a statutory defence in the context of an offence of strict liability. If the manager were the delegate of the board, as the Divisional Court held, his omission could be attributed to the company. The House of Lords allowed the appeal with all five members giving slightly different reasons in their speeches for doing so. However, I think that it is reasonably clear from the reasons of at least three of the Appellate Committee that the manager could not on

the facts be regarded as a delegate of the board in the light of the applicable test. In particular:

> "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 was one of them." (per Lord Reid at 174F-G, and see also 174H-175A)
>
> "… the question … is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of some action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company" (per Lord Diplock at 199H-200A)
>
> "these passages [from Lennard's case and Denning LJ in HL Bolton (Engineering) Co Ltd v TJ Graham &Sons Ltd [1957] 1 QB 159, 172)], I think, clearly indicate that one has in relation to a company to determine who is or 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" (per Viscount Dilhorne at 187G).

123. Mr Lissack relied on Lord Reid and Lord Diplock in support of the proposition that the limits of implied delegation must be carefully analysed: it is a question of examining whether what happened was within the scope of the person's delegation so that he can be regarded as acting as the company. In my view Mr Lissack's submission is well-founded in the context of Lord Hoffmann's general rules of attribution. It is true that Viscount Dilhorne appears to have gone slightly further, agreeing with Denning LJ's now infamous anthropomorphic approach. However, Viscount Dilhorne also drew his principle from Viscount Haldane, and I have already addressed how the latter's speech should be approached.

124. Lord Diplock, at 203C-F, also based his conclusion on the proposition that if the manager was the delegate of the company this would "render the defence of due diligence nugatory and so thwart the clear intention of Parliament". Lord Hoffmann alighted on this in Meridian as being an example of the application of a special rule of attribution, derived from a purposive construction of the statute, which in these particular circumstances served to limit the strict liability of the company by giving greater resilience to the due diligence defence. However, only Lord Diplock in the

Appellate Committee based himself on this additional ground, although it was the principal submission made by counsel for Tesco in the House of Lords.

125. Before leaving Tesco v Nattrass, I should mention the observations of Lord Reid that, once the facts have been ascertained, it is a question of law whether the person under scrutiny is to be regarded as the company: see 1170G and 1173D. This is an indication that the question I am asked to determine is fit for disposal on a dismissal application, subject always to the qualification that it is possible to assume all necessary facts without doing an injustice to the SFO.

126. In R v Andrews-Weatherfoil Ltd [1972] 1 WLR 118, the Court of Appeal allowed the company's appeal owing to deficiencies in the summing-up. Eveleigh J, giving the judgment of the court, provided the following gloss on Tesco v Nattrass on which Mr Brown heavily relied:

> "It is not every "responsible agent" or "high executive" or "manager" of the housing department or "agent acting on behalf of the 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 set down by the authorities." [at 124C-D]

Although favoured by Nourse LJ in El Ajou v Dollar Land Holdings PLC [1994] 2 All ER 685, 696A-B, this formulation is in danger of expressing the principle too broadly. Assuming that the primary rules of attribution do not apply, the general rule of implied delegation requires more than a merits-based consideration of whether the person concerned is in a sufficiently responsible position. This problem is avoided if Eveleigh J's reference to "authority" is taken to embody the concept of implied delegation. Given that he was seeking to summarise the effect of Tesco v Nattrass, this is an entirely reasonable approach. Alternatively, Eveleigh J's passage should be understood as being descriptive, to use a cognate of Lord Hoffmann's terminology (see Meridian, at 511C), rather than providing a designation of the nature and limits of the principle.

127. Unsurprisingly, both Counsel spent time on Lord Hoffmann's Opinion for the Privy Council in Meridian, a case which strictly speaking is not binding authority. It has acquired almost legendary status. When I said during the course of oral argument that this was Lord Hoffmann's "unified field theory", I was not intending any disrespect – quite the contrary. However, it is necessary to be precise as to the principles that should properly be drawn from this case. In my judgment, these are the following:

128. First, although Meridian was not a criminal case in the strict sense, it was quasi-criminal with penal consequences: see section 32 of the Securities Amendment Act 1988. There is no reason, in my view, why Meridian should not be regarded as at least applicable in principle to criminal statutes. A separate and often more difficult

question arises as to whether a purposive construction of the statute at issue permits the operation of a special rule on the facts of any particular case.

129. Secondly, Meridian is clear authority for the proposition that a company's directing mind and will may be found in different persons for different purposes of the company: see 507F. Mr Lissack drew my attention to at least four other cases where the same point was made. I mention Nourse LJ in El Ajou (at 699E) and Lord Sumption in Bilta (at paragraph 67). Nourse LJ added that "it is necessary to identify the natural person or persons having management and control in relation to the act or omission in point" (at 696A/B).

130. Thirdly, I consider that there is a hierarchy of norms. Meridian requires a sequenced or layered approach: first, the primary rules; secondly, the general rules; and, finally, a consideration of any special rule. Lord Hoffmann explains that the primary and general rules are "usually sufficient" to determine the rights and obligations of the company (at 507B). They were insufficient on the facts of Meridian because Mr Koo was dealing for a corrupt purpose, knew that he was required to give immediate notice of the acquisition of the security, and did not do so because he did not want his employer to find out (at 511F-G). Although the company delegated to Mr Koo authority to acquire interests on its behalf, he exceeded the scope of that authority. Had the position been otherwise, there would have been no need for the fashioning of a special rule of attribution.

131. Fourthly, I would not equate "special" with "exceptional", or conclude that because we are by now at the third tier of norms the court is exercising some sort of residual function. The rule is "special" only because it is geared or tailored to the terms, policies and purposes of the particular statute under consideration, which falls to be construed on standard principles (at 507F). At one stage during oral argument, I suggested incorrectly that a special rule could arise only by necessary implication. That was placing the onus too high. It is simply a matter of construing the statute with a view to identifying its purpose: see, for example, Padfield v MAFF [1968] AC 997 in a public law context.

132. Fifthly, the statute under consideration had a very specific purpose. The *ratio* of Meridian appears at 511C-F:

> "Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would

> not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under section 20(3)"

The prevention of fraud may have been one of the statutory objectives, but the provision is narrowly directed. On the facts of Meridian, the directors left Mr Koo to get on with it, and there was no evidence that they tried to supervise what he was doing (at 505G-H). The outcome of the case could well have been the same even had they been more attentive, but – always assuming that the board was intent on acting honestly – a violation of the provision would have been less likely. Another key feature of the facts, and one strongly emphasised by Mr Lissack, was that Mr Koo had authority to do the deal in the sense that his actions, without more, bound the company as a matter of law.

133. Finally, I note Lord Hoffmann's concluding observation that "it was therefore not necessary … to inquire into whether Koo could have been described in some more general sense as the "directing mind and will" of the company" (at 511G). Mr Brown's submission, as I understood it, was that in some more general sense this was exactly the case in relation to JV, RJ and CL in the context of the transaction in issue. My reading of Lord Hoffmann's speech, taken as a whole, is that Mr Koo could only have been so described if, in reality, the entire conduct of the business of the company was delegated to him. I do not think that the evidence went that far.

134. It is convenient at this stage to consider subsequent authority in a criminal context in which Meridian has been considered.

135. In Attorney-General's Reference (No. 2 of 1999) there was no room for the "fashioning of an additional special rule of attribution geared to the purpose of the statute" (at 816B) because the offence under consideration was gross negligence manslaughter contrary to the common law. Rose LJ added:

> "Indeed … Meridian … proceeded on the basis that the primary "directing mind and will" rule still applies although it is not determinative in all cases.
>
> …
>
> … the identification principle remains the only basis in common law for corporate gross negligence manslaughter." [at 816B and E/F]

Mr Lissack placed some reliance on this passage. I consider that it is neutral, not least because the instant case is about a statutory provision. I would interpret Rose LJ's "the primary "directing mind and will" rule" and "the identification principle" as encompassing both Lord Hoffmann's primary and general rules of attribution, consonant with the speeches of Lords Reid and Diplock in Tesco v Nattrass.

136. In McNicholas Construction Co Ltd v HMRC (unreported, 16th June 2000), Dyson J in a quasi-criminal context applied Meridian to sections 60(1) and 77(4) of the VAT Act 1994, for this reason:

> "49. The policy of those provisions is to discourage the dishonest evasion of VAT and to give the Commissioners an extended period in which to make assessments where VAT has been lost as a result of the dishonest evasion of VAT. That policy would be frustrated if the acts and knowledge of all those employees who have a part to play in the making and receiving of supplies were not to be attributed to the company for [these] purposes. If the only persons whose acts and knowledge may be attributed to a company are those who are responsible for running the affairs of the company as a whole, and those involved in its VAT activities, then the policy to which I have referred would be seriously undermined … it would encourage those prepared to engage in fraud to turn a blind eye to fraud to set up separate VAT departments for that purpose. Moreover, it would discriminate against small companies that do not have separate accounts departments insulated from what happens on site or in contracts.
>
> 49. I would hold, therefore, that the acts and knowledge of all those employees of a company who have a part to play in the making and receiving of supplies, as well as those involved in its VAT arrangements, are to be attributed to the employing company for the [relevant] purposes."

The key provision under consideration was section 60(1) which provides that a person who "does any act or takes any action" for the purpose of evading VAT shall be liable to a penalty. The employees of the company with the requisite knowledge did not merely "do the deals" in Mr Brown's loose sense but played an active role in the fraud by paying monies into a bank account and making withdrawals, and raising or causing to be raised VAT invoices in the names of alleged sub-contractors. Thus, there were legally relevant acts or actions which fixed the company with liability under the section.

137. In R v St Regis Paper Co Ltd [2012] 1 Cr App R 14, the Court of Appeal, Criminal Division applied a Meridian-based approach to a regulatory provision with a specific purpose, namely regulation 32(1)(g) of the Pollution and Control (England and Wales) Regulations 2000. Moses LJ, giving the judgment of the court, concluded that a special rule of attribution could not be fashioned in the particular circumstances of this case. His judgment has been heavily criticised as regards the outcome, but the methodology cannot be in issue. This case shows that Meridian has been applied in a criminal context at Court of Appeal level. The provision under consideration has a narrow and specific purpose in the field of environmental protection.

138. In R v A Ltd, X and Y [2016] EWCA Crim 1469, where directing mind was not in issue on the facts, Sir Brian Leveson P, giving the judgment of the Court of Appeal, Criminal Division, said this:

> "Save in those cases where consideration of the legislation creating the offence in question leads to a different and perhaps broader approach, as discussed in Meridian, the test for determining those individuals whose actions and state of mind are to be attributed to the corporate body remains that established in Tesco v Nattrass." [at paragraph 27]

Mr Lissack placed some weight on this passage but I do not think that it helps him. If Meridian does not apply, the test is indeed that set out in Tesco v Nattrass. The Court of Appeal was recognising in terms that a proper construction of the statute may lead to a different and perhaps broader approach: I would add, depending on the policy, purposes and objects of that statute.

139. Mr Brown was unable to show me a criminal case where a Meridian-based approach has broadened the ambit of attribution in a statutory context as general and wide-ranging as the Fraud Act 2006. Instead, he relied on a number of company law cases decided in the context of civil liability. I will now address these, as well as the cases on which Mr Lissack relied.

140. In El Ajou, the claims were brought in equity in relation to a complex fraud involving companies and individuals in Geneva, Panama and Gibraltar. By the time the case reached the Court of Appeal, the issue was whether DLH's receipt of monies which represented the proceeds of fraud could be regarded as knowing receipt for the purposes of the law of constructive trust. It could only be so regarded if the knowledge of a particular individual could be attributed to DLH. The Court of Appeal (Nourse, Rose and Hoffmann LJJ) held that it could, because Mr Ferdman had *de facto* management and control of the transactions. He made the arrangements for the receipt and payment of tainted monies, and signed a funding agreement which led to DLH being in receipt of such monies. Consequently, he fell to be regarded as the directing mind and will of DLH for this purpose.

141. With respect to the SFO, I think that the concept of *de facto* management and control has been misunderstood. The focus must be, as it was in El Ajou, on specific acts and omissions perpetrated by the individual said to embody the company, and these in my judgment must have intrinsic legal consequences. Mr Ferdman was not merely conducting negotiations: he was responsible for carrying out or effectuating the relevant transactions, and there was no evidence that the board of DLH took any responsibility in relation to them (see Nourse LJ at 697E). Furthermore, as Rose LJ pointed out, Mr Ferdman signed the funding agreement without needing the authority of a board resolution to do so (at 700C).

142. Hoffmann LJ is now regarded as having given the leading judgment in El Ajou. I read the following passage as being central to this conclusion:

> "But so far as the constitution of DLH was concerned, he committed the company to the transaction as an autonomous act which the company adopted by performing the agreement. I would therefore hold … that this was sufficient to justify Mr F being treated, in relation to the Yulara transaction, as the company's directing mind and will." [706G]

Mr Ferdman's actions committed the company; at no stage thereafter did the company disassociate itself from those actions.

143. I do not read Hoffmann LJ's judgment as laying the ground for the special rule of attribution in Meridian. In my view, his analysis was directed to the limits of what was to become, in terms of its nomenclature, his general rule of attribution. Specifically:

> "The last sentence about Mr Lennard's position shows that the position as reflected in the articles may have to be supplemented by looking at the actual exercise of the company's powers. A person held out by the company as having plenary authority or in whose exercise of such authority the company acquiesces, may be treated as its directing mind [705F]
>
> …
>
> But English law shares the view of German law that whether a person is an organ or not depends upon the extent of the powers which in law he has express or implied authority to exercise on behalf of the company [705J]"

These passages have nothing to do with any special rule. As Lord Sumption points out, Mr Lennard did have "plenary authority" in relation to the affairs of the company; no question of any scope or limit on that authority arose.

144. The final point to be made about El Ajou is that Nourse LJ considered that there was no divergence of approach in the criminal and civil jurisdictions as regards the application of the directing mind and will doctrine. Two later cases indicate otherwise.

145. In Odyssey Re (London) Ltd and another v OIC Run-Off Ltd [2000] (Court of Appeal, unreported, 13th March 2000), one of the issues was whether an individual's perjury could be attributed to the company. The three members of the Court of Appeal approached this question in different ways. For Nourse LJ, Meridian laid down a principle of general application (page 10 of the Transcript), and he drew no express distinction between civil and criminal proceedings. For Brooke LJ, the instant case was a civil case and it was unnecessary for the court to regard itself as bound by narrow principles applicable to a criminal context (page 73). He drew an explicit distinction between criminal and civil law, and held that Meridian could apply to the latter, even though the context was not statutory. For Buxton LJ, who dissented, the allegation of perjury raised an issue which engaged principles of criminal law although these were as a matter of form civil proceedings. His analysis was that Meridian could not apply in a criminal context at all, still less one where there was no statute to be construed.

146. Odyssey Re can have no bearing, one way or the other, on whether Meridian applies in a criminal context where a matter of statutory construction arises. Mr Lissack could not and did not rely on Buxton LJ's dissenting judgment. I consider that the criminal law cases that I have already touched on demonstrate that Meridian, by which I mean the process by which a special rule of attribution may be fashioned, is capable of

applying to a criminal statute; the issue is always, can it apply in this particular context, and if so how?

147. In Bank of India v Christopher Morris [2005] EWCA Civ 693, the issue was whether the activities of Mr Samant could be attributed to the Bank of India for the purposes of the fraudulent trading provisions of section 213 of the Insolvency Act 1986. Strictly speaking, therefore, these were civil proceedings, and the Court of Appeal was not required to consider what the hypothetical position would have been under section 458 of the Companies Act 1985, although at paragraph 107 of his judgment Mummery LJ said in terms that the separation of the provisions regarding civil and criminal liability made it easier to isolate and focus on the relevant policy.

148. The facts of the case were complex but in simplified terms amounted to this. Mr Samant contacted Mr Mewawalla of BCCI to ask him whether BCCI would deposit monies at the bank in order, on my understanding, to improve the appearance of its books. BCCI was prepared to deposit funds on what may only be described as unusual terms, involving mirror or circular transactions. There were six transactions in all. Patten J at first instance held that Mr Samant had knowledge of the fraud in relation to the second to fifth transactions, and that this knowledge could be attributed to the company. The sixth transaction could not be attributed in this way, because by that stage Mr Samant had left.

149. The precise facts as found by Patten J were critical to the outcome. These are summarised in the judgment of Mummery LJ at paragraph 30. In short:

(1) a resolution of the Board was required in relation to each transaction;

(2) such a resolution was obtained before the transaction proceeded and on the basis of incomplete facts: the borrower was not identified.

(3) in short, the Board gave "blanket permission" to Mr Samant to proceed on the basis of a borrower identified by BCCI.

(4) matters such as the investigation of the borrower's purpose and the completion of the documentation necessary for the transaction to go ahead were left to Mr Samant, who was therefore given "an obvious and necessary discretion whether to go ahead".

(5) it follows that Mr Samant had "authority to deal". Not merely did the Board cede responsibility to him, it was Mr Samant's actions which bound the company as a matter of law.

150. Three passages in the judgment of Mummery LJ are worthy of express citation:

> "The application of section 213 requires a special rule of attribution in order to make its self evident policy effective. The policy is to make those who have been parties to fraudulent trading liable to compensate the creditors of the fraudulent company. In order to make it effective in a case such as this it is necessary to attribute the knowledge of Mr. Samant to BoI. It is not a case, as Mr. Moss characterised it, of making BoI liable for

the negligence or ineptitude of the BoI board; or of making members of the board personally liable for the fraud when there was no personal dishonesty or real moral blame on their part. They are not liable, nor (save for Mr. Shukla and Mr. Vaghul) was it sought to make them liable. It is a matter of making BoI itself liable by attributing to it the knowledge of the individual in BoI who had the relevant contact and dealings with the CTD of BCCI. Having regard to all the circumstances in which the transactions were entered into, Mr. Samant's knowledge was more relevant than that of any member of the board or of anyone else in BoI." [120]

"Mr. Samant was a senior manager. The board of BoI relied on his judgment in relation to the transactions. He was given a "blanket permission" to deal with BCCI by negotiating the terms of the transactions with borrowers nominated by BCCI, to make recommendations to the board and to give effect to advance approval of Head Office to enter into the transactions. He was allowed by the board to supervise the relevant transactions with BCCI and ultimately to decide to proceed with them on terms negotiated by him. To use Lord Hoffmann's words in *Meridian,* Mr. Samant was the person in BoI who had "authority to deal" with BCCI. He was in substance the relevant decision maker for BoI in respect of the relevant transactions which made BoI a party to the fraudulent trading of BCCI. As Mr. Samant had a large measure of responsibility within BoI for the transactions with BCCI, the policy of section 213, justice and good sense combine to justify the treatment of Mr. Samant's knowledge as the corporate knowledge of BoI so as to make it responsible for contributing to the assets of BCCI in the winding up." [126]

"… it therefore must to some extent depend on the facts of each particular case whether an agent's knowledge should be attributed to the company for the purposes of section 213, where the circumstances are such that there would be no attribution on the application of the primary rules. We are of the view that it must typically depend on factors such as these. The agent's importance or seniority in the hierarchy of the company: the more senior he is, the easier it is to attribute. His significance and freedom to act in the context of the particular transaction: the more it is "his" transaction, and the more he is effectively left to get on with it by the board, the easier it is to attribute. The degree to which the board is informed, and the extent to which it can be said that it was, in the broadest sense, put on inquiry: the greater the grounds for suspicion or even concern or questioning, the easier it is to attribute, if questions were not raised or answers were too easily accepted by the board." [130]

151. Thus, Mummery LJ fashioned a special rule of attribution, applying Meridian, to the particular context of section 213 of the Insolvency Act 1986: whether the business of the company has been carried on with the requisite fraudulent intention. In terms of the activity in question, this entails a broader consideration than section 2 of the Fraud Act 2006. In any case, and in my view, critically, Mr Samant performed the business of the company by carrying out or effectuating the transactions in question: he negotiated them; he made the key decision as to whether the bank should proceed; he was then responsible for the relevant documentation, which was no doubt finalised under his direction. This is what Mummery LJ meant by "doing the deal".

152. Mr Brown placed heavy reliance on paragraph 130 of Mummery LJ's judgment. He submitted that there is a theme which runs through the jurisprudence, in particular Denning LJ in Bolton (HL) Engineering) Co Ltd, Eveleigh J in Andrews-Weatherfoil Ltd and now this case. I have already addressed these earlier authorities, but as for paragraph 130 of Mummery LJ's judgment in my opinion all that he was saying, in line with the views of others (see, for example, paragraph 69 of Lord Sumption's judgment in Bilta) is that questions of fact and degree are capable of arising, depending on the context. If the candidate for being "the company" for this purpose carries out or effectuates the transaction, consideration will have to be given to his importance and seniority etc. because these matters would be bound to throw light on whether *he* was responsible for the transaction rather than being subordinate to someone else. But paragraph 130 is not authority for the proposition that these considerations can convert someone who did not bind or commit the company to the transaction into its directing mind and will.

153. In MAN Nutzfahrzeuge AG v Freightliner Ltd [2005] EWHC 2347 (Comm), a decision of Moore-Bick LJ sitting at first instance, the facts were that owing to the dishonest manipulations of the accounts of ERF by its financial controller, Mr Ellis, various warranties and representations by another company, Western Star, in a share purchase agreement were rendered false. The issue was whether Mr Ellis' dishonesty could be attributed to Western Star on the basis that he counted as that company for the purpose of making the representations and warranties relating to ERF's finances.

154. The primary basis for Moore-Bick LJ's decision was that all the warranties and representations were made in a single or entire agreement, namely the share purchase agreement, in respect of which the directing mind and will of Western Star could only be the board of directors because they authorised the making of the agreement and one director signed it. None of the directors was aware of what Mr Ellis had been doing (paragraph 158).

155. Additionally, Mr Ellis was neither an employee nor a director of Western Star, and was not involved in the decision to commit Western Star to the share purchase agreement. It followed that he simply could not be regarded as the directing mind and will of the company (paragraph 159).

156. Apart from the ratio of Moore-Bick LJ's decision, which it is more convenient to consider in context of the later case of Jafari-Fini, Mr Onslow invited me to look more widely at what an extremely experienced company and commercial law judge said about Meridian and the general principles which flowed from it. Taking his steer, I have been content to do so.

157. I draw the following points from MAN Nutzfahrzeuge:

(1) in Moore-Bick LJ's view, there were three sorts of case, and here the third category applied. In situations where Meridian is being applied to attribute the acts and omissions of natural person(s) to a company, "these rules do not involve so much the attribution of one person's state of mind to another as the identification of the natural person or persons who are to be regarded as representing the juridical person for the purposes of the substantive rule in question" (paragraph 154).

(2) fraudulent misrepresentation requires a conjunction of a false statement and a dishonest state of mind. Accordingly, in the case of a company, the first step is to consider whether the person making the representation is authorised to speak on its behalf; the second step is to enquire into the state of mind of that person. However, "if that person was unaware that the statement was false, it may be necessary to enquire into the state of mind of other persons who directed him to make it or who allowed it to be made" (paragraph 156).

(3) "the proposition that Mr Ellis is to be regarded as Western Star for the purposes of the representations in the share purchase agreement relating to ERF's finances ultimately rests on the fact that he spoke about those matters on behalf of Western Star in the course of the negotiations. However, that is not enough to support the conclusion that he is to be regarded as the person whose state of mind counts as that of Western Star for the purposes of the negotiations, even if they could be viewed separately from the rest of the agreement. One cannot get away from the fact that the representations derive their existence from the contract itself and nothing else, or from the fact that Mr Ellis took no part in deciding whether Western Star should sign up to them" (paragraph 160).

158. As for the first point, Moore-Bick LJ was seeking to distinguish attribution cases from vicarious liability and agency cases (El Ajou also addressed difficult questions of the law of agency, but these are irrelevant here). As for the second point, there must be a conjunction between *actus reus* and *mens rea* (Smith & Hogan make exactly that point in the context of fraudulent representation at paragraph 10.1.1 of the 14th edition). If that person is the directing mind and will of the company according to the primary and general rules of attribution, there is no difficulty. The final sentence of paragraph 156 of Moore-Bick LJ's judgment (see paragraph 157(2) above) has caused me some difficulty. Ultimately, I consider that what Moore-Bick LJ was saying, at least in the context of the civil law of deceit, was that *if* the directing mind of the company was someone else, it *may* be necessary to enquire into the state of mind of the person who directed the maker of the representation or allowed it to be made. On the facts of MAN Nutzfahrzeuge no such enquiry was necessary because Mr Ellis could not on any view be the directing mind and will of the company.

159. The third point is not entirely straightforward. The focus here is on the person who made statements during the course of the negotiations. My reading of paragraph 160 of Moore-Bick LJ's judgment is that, even if Mr Ellis could be regarded as the directing mind and will of Western Star in that context, they were not relevant acts and omissions for the purposes of attribution. This was because the representations derived their existence from the contract itself and nothing else, and Mr Ellis took no part in deciding whether Western Star should sign up to them.

160. Although the final sentence of paragraph 156 of Moore-Bick LJ's judgment was not part of the *ratio* of his decision, my first impression was that it lends some support to the SFO's case. My concluded view, however, is that it does not: this paragraph does not provide a test for determining directing mind and will; it presupposes that the individual concerned occupies that status, and suggests what the consequences might be in relation to the actions of an innocent party. Paragraph 160, equally not part of the *ratio*, is more in the nature of a Curate's Egg. The SFO is entitled to submit on the basis of this paragraph that an individual could be regarded as the directing mind and will of a company for the purposes of negotiations. However, the context of this paragraph is important, and I will come to that at paragraph 216 below.

161. Finally, on MAN Netzfahreuge, I should return to the first part of the *ratio* of Moore-Bick LJ's judgment, namely that none of the board members knew what Mr Ellis had been doing. By implication, the outcome would have been different had at least one of them knew. Moore-Bick LJ returned to this theme in Mohammed Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261:

> "97. In the context of an obligation which arises under a contract the task of identifying the natural persons whose knowledge or state of mind is to be attributed to the company for the purpose of that obligation can easily be identified as one of construing the contract. It is therefore necessary to ask who among PAL's directors, employees and agents did the parties intend should be regarded as the company for the purposes of acquiring information that must be disclosed under clause 21.8.2. In other words, whose knowledge is to be treated as the knowledge of PAL for these purposes?
>
> 98. In the present case it is unnecessary to consider the position of anyone other than Mr. Webster. The obligation to disclose information "which comes to the attention of the Borrower" must, I think, extend to information held by the board of directors as a whole since the board represents the company at the highest level. The question in the present case is whether information which comes to the attention of one director, but which he has not shared with the rest of the board, is to be treated as information in the possession of the company. In *MAN v Freightliner* I expressed the view that where the board of directors is properly to be regarded as the directing mind and will of the company in relation to a particular transaction the knowledge of each is to be attributed to the company. That case, however, was concerned with the liability of the company for a false statement made in a written contract which the board as a whole had resolved that the company should enter into. The present case differs inasmuch as it is concerned with the acquisition by the company of information, but there are nonetheless certain similarities arising from the fact that the members of the board can generally be regarded as collectively representing the company. **In general, therefore, I think that information relevant to the company's affairs that comes into**

> **the possession of one director, however that may occur, can properly be regarded as information in the possession of the company itself.** In my view that presumption informs the present contract and points to the conclusion that information in the possession of Mr. Webster relating to the bribe is to be regarded as information in the possession of PAL itself. That remains the case even if Mr. Jafari-Fini can properly be regarded as representing the company in relation to other aspects of the transaction, as to which it is unnecessary to express any view." [my emphasis]

The obligation under clause 21.8.2 was to "make full disclosure to the lender in writing as soon as practicable of all information which comes to the attention of the borrower and which is material to the decision". Moore-Bick LJ's holding was that information which came to the attention of one director fell to be regarded as information in possession of the full board. Although the Court of Appeal was divided on the facts of Jafari-Fini, it was not on this issue.

162. This holding lends some support to the SFO's case, at least in the context of the argument I summarised under paragraph 111(6) above. There are, however, other relevant authorities.

163. In Ross River v Cambridge City Football Club [2007] EWHC 2115 (Ch) Briggs J, tacitly drawing on the principle Hoffmann LJ restated in El Ajou that "English law has never taken the view that the knowledge of a director *ipso facto* imputed to the company" (at 705H), held in relation to a bribe that disclosure to one director did not constitute disclosure to the board (at 705H). In Howmet Ltd v Economy Devices Ltd [2016] EWCA Civ 847, the Court of Appeal held that that the collective or shared knowledge of three managers, said to represent the directing mind and will of the company under Meridian, was sufficient to bind the company. Howmet was not a case of disparate knowledge.

164. The only criminal case that was drawn to my attention was the decision of the High Court of Justiciary (the Scottish appellate court in criminal cases) in Transco Ltd v HM Lord Advocate [2004] SLT 41. The High Court applied Tesco v Nattrass and not Meridian. This case is authority for the proposition that the prosecution cannot aggregate various states of mind but must identify at least one (uncontroversial before me) and that the company may delegate responsibility to a committee. When it does so the "collective delegate group" is capable of being the company's directing mind and will. Lord Hamilton added:

> "Interesting questions might no doubt arise if there were a division of opinion amongst those who participated in a critical collective decision or if the knowledge with which that decision was taken was not co-extensive among those participating in it. But in principle a collective decision taken by a collective group with the requisite knowledge is, in my view, as attributable to the company as a decision by an individual." [paragraph 62].

165. Thus, save for Jafari-Fini which was a civil case, there is no authority which directly answers the point I have to decide: namely, whether the private knowledge of JV fixes Barclays.

Application of the Principles to these Facts

166. In my judgment, one must never lose sight of what the SFO's case is. There are two essential steps. Step 1 is that the conspirators acted as Barclays in negotiating the capital raisings and in agreeing the ASAs. Step 2 is that the ASAs brought about the falsity of the representations made in the public documents. Without step 2 the SFO would be alleging a different case: namely, that the conspirators acting as Barclays made false representations in the ASAs. References to where the essential criminality may inhere serve to engender imprecision and possible confusion. Setting out these two essential steps introduces a salutary discipline and ensures that the premises underlying each step, in particular step 2, may be identified. The analysis which follows keeps strictly to the SFO's case – a combination of steps 1 and 2 - until I indicate otherwise.

167. A consideration of the primary rules of attribution leads inevitably to the conclusion that JV, RJ and CL were not the directing mind and will of Barclays. The constitutional position is as clear as it is narrow: the directing mind and will of Barclays was the Board, subject to express delegation by the Board to a relevant committee. The committees in question were the BFC and the GCC. The BFC delegated the formal approval of the key documentation to Mr Agius and JV, on the basis that the overall parameters had been set by the Board. It follows that the SFO must proceed, as I think it accepts, to the second stage.

168. It remains unclear to me whether the SFO is relying on a species of implied delegation, and in the circumstances this issue must be addressed. Plainly, this was not a situation where the entire business of Barclays was delegated to one individual (cf. Lennard's case) or even to a coterie. The contention must be that there was an implied delegation for a particular purpose in connection with a particular transaction or series of connected transactions.

169. I think that it is clear on the evidence that JV, RJ and CL were authorised to conduct negotiations with Qatar in relation to the latter's participation in the capital raisings, and that these negotiations included the level of the commitment, the discount to the share price and the commission. There were parameters within which the coterie could operate, subject to further instructions from the board, but for present purposes that does not matter. Save in relation to the ASAs, those parameters were not violated. In my judgment, it is clear that JV, RJ and CL did not have authority either to commit Barclays to the capital raisings or to agree a secret commission which amounted to an additional fee for Qatar's agreement to participate. This would be so even if JV, RJ and CL had authority to commit Barclays to an agreement for advisory services without board approval, and did so. Although the approval of the BFC and the Board of Barclays Bank was obtained for ASA1, it was not for ASA2 and for present purposes I see no reason to distinguish between them. In any event, these men were not authorised to bind Barclays to an agreement which described advisory services but was in reality for something else.

170. This issue cannot be finessed, circumvented or ignored by asserting that 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.

171. In the context of implied delegation, it simply does not make sense to say that JV, RJ and CL were the directing mind and will of Barclays. The focus must be on the transaction in point, namely the capital raisings seen as a whole. This transaction cannot be notionally partitioned or sub-divided. In any case, the BFC approved and authorised Barclays' commitment in relation to CR1, and following this Barclays made the relevant representations set out in Count 1 of the Indictment. This factor – my step 2 - creates the so-called mismatch or "disconnect", the various ramifications of which I address later. The same considerations apply to CR2 although the circumstances are more complex.

172. The same analysis applies in relation to Count 3, because RJ and JV could not bind Barclays in relation to the making of a loan, and the SFO does not suggest that they could. They had authority to carrying out negotiations but Barclays vested the decision in the GCC.

173. It follows that the only conclusion on the evidence, taking the SFO's case at its reasonable pinnacle, is that none of Lord Hoffmann's general rules of attribution operate to fix Barclays with the acts or omissions of the individual conspirators (Counts 1 and 2) and named persons (Count 3). The quest, from the SFO's perspective, must therefore be for the fashioning of a special rule of attribution out of the policies, objects and purposes of the Fraud Act 2006. Although conspiracy is alleged, the correct focus is not on the CLA 1977. An equivalent quest applies to section 151 of the Companies Act 1985.

174. I frame the search in these terms because I do not accept that the law has a "true identification" principle or that the common-sense approach evident in Eveleigh J's formulation is correct. There is no "true identification" principle, just the hierarchy of norms, derived from Meridian, which I have mentioned many times now. Seniority, status and authority are terms of description and not of exegesis or prescription. As a matter of evidence, it would be unlikely if the application of the primary or general rules of attribution could achieve an outcome which ascribes to a relatively lowly employee the potentially invidious status of being the directing mind and will of the company. Furthermore, if I am wrong and insofar as any "true identification principle" does exist as a coherent concept, Rose LJ's formulation of it was extremely narrow, and inadequate for the SFO's purposes.

175. The hunt for a special rule of attribution presupposes that primary and general rules have not fixed the company with criminal liability. Thus, it presupposes that adherence to the formal constitutional structures may lead to an unjust result, in terms of the statutory purpose, and that there has not been an implied delegation.

176. Mr Lissack submitted that it would take exorbitant judicial creativity to fashion a special rule of attribution out of a provision as wide-ranging and general as the Fraud Act 2006. It has not been done before. Indeed, the circumstances in which the courts have applied Meridian to the criminal law are few and far between, and are confined to situations where the statutory purpose is readily definable, narrow and specific. Environmental protection and VAT spring obviously to mind.

177. Academic commentators such as Professor Ferran have suggested that courts have "struggled" to find a Parliamentary steer in relation to general criminal offences not formulated with the position of companies specifically in mind, and that "judicial caution in this sphere may also reflect the importance that is attached to preserving the certainty and predictability of the criminal law". Professor Celia Wells, in her paper in the Criminal Law Review (2014, page 849), Corporate Criminal Liability: a Ten Year Review, points out that "there are some fundamental issues still to be addressed in the criminal liability of corporations" before "we can begin to develop a sound, principled approach to corporate responsibility". Paragraph 20 of CPS/SFO Guidance observes that "certain regulatory offences may require a more purposive interpretation in addition to the primary rules of attribution", referencing Meridian. Section 2 of the Fraud Act 2006 is not a regulatory offence. Footnote 28 to the MoJ's "call for evidence", Corporate Liability for Economic Crime, opines that the application of Meridian "to modern economic crime offences such as fraud and false accounting is untested, and there remains uncertainty over the way it would be applied by the courts to such offences, which are drafted in order to effect as wide and general application as possible".

178. None of this material is particularly propitious from the perspective of the SFO. I am being asked to travel into novel, uncharted terrain. However, that in itself should not hold me back if a correct identification of the policies, purposes and objects of the Fraud Act 2006 leads me in that direction.

179. I consider that it is clear that the Fraud Act 2006 applies to companies, and Mr Lissack did not contend otherwise. The clear purpose of the Act is to prevent or deter fraud, and one of the stated mechanisms of fraud is the offence of making fraudulent misrepresentations. Mr Brown submitted that adherence to the formal structures of the company would inevitably mean that larger companies would find it easier to avoid liability under section 2. In my view, he is right about that, but the point only travels a certain distance and, if I may say so, has been somewhat tendentiously expressed. Corporate governance does not exist to avoid or escape criminal liability. Formal structures, provided that they are transparent within the company, are not intrinsically objectionable. On the contrary, they have an obvious protective function in the context of governance, regulation and the criminal law. In any event, the SFO has to show that adherence to formal structures and to the principles of implied delegation would thwart the statutory purpose.

180. If the issue falls to be addressed in general terms, one of the difficulties that I have in fashioning out of section 2 of the Fraud Act 2006 a special rule of attribution is that, once that rule is fashioned, it may be capable of applying to diverse factual scenarios across where the merits are different. Let me give just a handful of examples:

(1) A large company retains a close, iron grip on an executive who is negotiating an important deal. The executive nonetheless agrees with his counterpart in a covert

meeting that he should receive a secret commission. In order to secure the deal, the executive places a document before the board which falsely describes the commission as something else. The board asks questions but the executive lies to the board. The deal is done after proper inquiry and with board approval, with misrepresentations being made by the board as to the purpose of the document. Third parties suffer loss. (I have framed this hypothetical in this way in order to avoid any difficulties arising in relation to section 1 of the CLA 1977.)

(2) A board gives blanket permission to an executive to negotiate a major deal, subject to financial limits and to an injunction that secret commissions must not be paid, suspecting that in the situation which obtains such commissions might be paid. The deal is negotiated, then placed before the board for decision, but no real consideration is given to the matter and a "rubber-stamping" takes place. False representations are made by the board as a result of the executive's actions. These would not have been made had the board been diligent.

(3) Exactly the facts of this case, although the board intervenes to prevent the attainment of the objects of the conspiracy (i.e. the example discussed under paragraphs 104 and 105 above).

181. At first blush, it does not seem acceptable that criminal liability should attach as a matter of justice and principle in relation to my first example. It is plain to me that it should not attach in relation to my third example. There is some merit in the proposition that it should attach in relation to my second example, although some of Mr Lissack's objections would still apply.

182. A variant of my second example would bring the company closer to a state of affairs where criminal liability might reasonably attach in view of the policies and objects of the Fraud Act 2006: namely, that advance authority is given, the deal is done, finalised and signed without board approval, and the company then performs the agreement or adopts it with "blind-eye" knowledge. On this counter-factual the executive "doing the deal" would be committing the company to the transaction and making the false representation for the purposes of section 2. It is far removed from the present facts.

183. I have come to the conclusion that it is unnecessary, undesirable and supererogatory for me to decide whether there can be *no* circumstances in which the Fraud Act 2006 permits of the derivation of a special rule of attribution. Mr Lissack's submission, put as it was in those terms, compels me to address the issue at too high a level of abstraction. In my judgment, I should focus on the particular circumstances of this case and examine in that context whether an accurate identification of the statutory purpose leads to the implication of a special rule operating outside the envelope of primary rules of attribution and implied delegation. This is consonant with the approach undertaken by Lord Hoffmann in Meridian.

184. As I have said, the need for a special rule arises, on the SFO's analysis, because the statutory purpose would be thwarted if Barclays could shelter behind the argument that other rules of attribution cannot operate to fix them with criminal liability. It is said that the policy of the Fraud Act 2006 is met by holding that JV, RJ and CL were the directing mind and will of Barclays for the purpose of the negotiations, which were in commercial reality "the deal", and that their actions in relation to the ASAs, which were effectively agreed by them either without BFC approval or the need for

it, brought about the misrepresentations which have been indicted. Given the *locus* of the essential criminality which has been identified, a special rule is required to inculpate Barclays.

185. Mr Lissack's answer to this submission was, essentially, that the Board and the BFC retained control of the capital raisings, that if the ASAs are false this is only because they contain hidden commissions for the purpose of the capital raisings, and that the SFO has indicted the wrong conduct. Furthermore, he submitted that justice, fairness and principle do not require the derivation of a special rule.

186. In my view, Mr Lissack's submissions are well-founded, although I would formulate the answer slightly differently. The group of submissions I have summarised in the first sentence of the preceding paragraph are all sound and unanswerable reasons why implied delegation cannot bring home the conspiracy Counts. These reasons overlap with the policy reasons militating against the implication of a special rule, but they cannot provide a complete answer – otherwise there would be an inherent circularity. In my judgment, it is necessary to identify a wider range of considerations bearing on the issue whether the policies and objects of the Fraud Act 2006 would be thwarted by the court refraining from applying a special rule.

187. Adopting that approach, I have come to the clear conclusion that the furtherance of the statutory purpose – the prevention and deterrence of fraud in companies, including large companies – does not require the fixing of Barclays with criminal liability in the circumstances of this case, and that a special rule of attribution should not be fashioned. The following considerations, taken cumulatively, have led me to that conclusion.

188. First, the offence under section 2 of the Fraud Act 2006 requires a conjunction of *actus reus* and *mens rea*. It is not simply a question of attributing the knowledge of the individual to the company. Relevant acts and omissions, accompanied by *mens rea* when they were carried out, have to be attributed to the company.

189. Secondly, the involvement of JV, RJ and CL was, as I have said, limited to the negotiation of the capital raisings. On the assumed facts, they committed Barclays to the ASAs on a false basis, concealing from the relevant decision-makers within the BFC that the fee for alleged advisory services was in fact a secret commission connected to the capital raisings. Both in fact and in law, the ASAs had no autonomous life outside the capital raisings. These individuals acted outwith their authority and deceived the BFC. The deception here was of a different nature and character from that which occurred in Meridian, In re Supply of Ready Mixed Concrete (No. 2) [1995] 1 AC 456 and Bank of India: JV, RJ and CL were deceiving the decision-makers in relation to the nature of the transaction in point and before the relevant decision was taken.

190. Thirdly, the SFO's case focuses on the negotiations over which JV, RJ and CL had considerable autonomy. The SFO's searchlight must shine in this direction owing to the second reason I have just given. "Doing the deal" in the sense of "concluding the negotiations" carried with it no direct legal consequences: in principle, the "deal" could still unravel, and Board or BFC approval to the capital raisings was an essential precondition to the creation of a binding commitment. In reality this was also the case in relation to the ASAs because, unless BFC approval for the capital raisings was

forthcoming, Qatar would have walked away. Logic, principle and policy do not require the carving out of a special rule to inculpate Barclays on account of this type of activity. The only situations in which a special rule has been fashioned in the field of criminal law are cases where the individuals in question have bound the company by their autonomous actions or have taken legally relevant steps as part and parcel of the transactions over which they had control (e.g. McNicholas).

191. Fourthly, the SFO does not suggest that the Board or the BFC acted in dereliction of duty, save to the extent that the negotiations were "ceded" to JV, RJ and CL. I have just addressed this qualification. The SFO cannot make that suggestion on the evidence because the package as presented to the BFC was within the parameters that the Board had agreed as regards discount and commission, in terms of the outward appearances JV, RJ and CL had not strayed outside their authority, and the only basis on which it is said that they did is that they lied about the real consideration for the ASAs. The position is more complex evidentially as regards CR2 but the bottom line remains the same: however thorough the decision-makers were, and there is far more evidence of such thoroughness in relation to CR1, they were deceived by the ASAs. I have not overlooked the SFO's contention that without a special rule of attribution the law's adherence to "potentially perfunctory" formal steps might lead to thwarting the statutory purpose, but with respect to the SFO there is no sound basis for saying that a special rule is needed to address action which *might* be indolent or desultory. It has not been expressly alleged that the formal decision-makers were perfunctory in this case, and I have made the point that the concealed fraud relating to the ASAs was the real vice of what occurred. Further, I do not consider that there is sufficient evidence to support the proposition that the BFC should have been suspicious (it seems that the lawyers were suspicious), and have raised questions with the lead negotiators; but even if there was, that in my view could not be enough to fix Barclays with criminal liability, in line with the purposes of a statute which is directed to the prevention of fraud by companies. Such suspicions could not logically bear on the issue of whether the lead negotiators were the directing mind and will of Barclays, unless that is there was other evidence of dereliction of duty by the Board.

192. Fifthly, I have already pointed out that the logic of the SFO's case must be that Barclays would be criminally liable even had the Board or the BFC somehow seen through the ASAs and prevented the fraud. That cannot be right. On this theory, Barclays could be guilty on account of the actions of the conspirators before any representations were made and any loss caused. More importantly, it would attach despite the perfect operation of Barclays' system of corporate governance. The policy of the Fraud Act 2006 does not lead to such a conclusion; it points in the opposite direction.

193. Sixthly, it needs to be restated that a special rule arises only if the statutory purpose would otherwise be thwarted. An examination of the facts of Meridian and McNicholas shows how it would have been. The SFO has failed to persuade me that this criterion has been satisfied. "Thwarted" does not mean "make the SFO's task more difficult" or something along the lines of, "criminal liability ought to attach in these circumstances". It is, of course, much easier to hold that a statutory purpose has been thwarted if that purpose is narrow and specific. A significant part of the difficulty arises because the SFO is invoking Meridian where the statutory context is so broad and general.

194. Seventhly, the SFO's invocation of the *de facto* position or the commercial reality leads their analysis down legally impossible avenues on the particular facts of this case. Here, I am referring to basic principles of contract and company law. The origin of the difficulty lies in the SFO's incorrect equation of the "deal" in the instant case with the "deal" in Meridian. Mr Koo created legally binding commitments on behalf of the company. Here, taking the SFO's case at its highest, the conspirators' acts in relation to the ASAs caused or brought about the falsity of the public documents. However, that proposition must be broken down as follows:

(1) the Prospectus and the Subscription Agreements were rendered false on account of the co-existence of the ASAs.

(2) for these purposes, the SFO has not chosen to say that the ASAs contained relevant false representations under section 2 of the Fraud Act 2006. The ASAs were not public documents. The fact that the Indictment does not map the "essential criminality" is a telling point against the SFO. The falsehoods in the ASAs may have been capable of being indicted in their own right (see, for example, R v Darroux [2018] EWCA Crim 1009), but a recast Indictment would serve to highlight the interiority of the fraud and the consideration that the human defendants would be acting *against* the structures Barclays had imposed for its own protection. There is no need for a special rule of attribution in such circumstances.

(3) however the argument is advanced (see paragraph 103 above), the correct analysis is that JV, RJ and CL *procured* the relevant falsehoods by committing Barclays to the ASAs. The SFO accepts, and it is in any event the law, that a statutory conspiracy requires the existence of a course of conduct that will be done by one or more of the parties to the agreement, and that an agreement to procure the commission of an offence is insufficient: see Blackstone's Criminal Practice, 2018, paragraph A5.52, and R v Hollinshead [1985] 1 All ER 850[1].

(4) the director's responsibilities' letters (signed by JV and CL), the Prospectuses (signed, amongst others, by JV and CL), and the Subscription Agreements (signed by JV and CL) can make no difference to this outcome. These were as much causative as were the ASAs in the bringing about of the capital raisings, but that cannot be determinative of the central question. If, *arguendo*, the directing mind and will of Barclays was *not* the human defendants, the latter do not become the directing mind and will of the company because they signed these documents. The letters were signed by the individuals *qua* directors and the Subscription Agreements under the aegis of the Board/BFC. Barclays accepted responsibility for the accuracy of the Prospectuses, but the guilty mind of the directors could only be attributed to the company if the individuals constituted its directing mind and will at the material time: the mere fact that they signed the documents is insufficient. Given that the purpose of the director's responsibilities letters was to afford additional protection to the company, it is anomalous that this should be deployed as an additional ground for fixing Barclays with criminal responsibility. In view of the SFO's late emphasis on this point, I will need to return to it.

[1] This case was appealed by the Crown to the House of Lords, but their Lordships declined to rule on this point ([1985] 1 AC 975, at 998C-E. The decision of the Court of Appeal remains binding authority.

195. Eighthly, I must address the issue of whether the criminal law and civil law part company in terms of the proper application of Meridian. On one level this is an artificial exercise because there is no exact civil analogue to section 2 of the Fraud Act 2006. The tort of deceit is broadly comparable, but it arises at common law. Subject to that, the correct analysis is that the approach in Meridian is constant across the jurisdictions because the quest is always for the relevant statutory purpose. In the words of Lord Hoffmann:

> "This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy" [at 507F]

In my judgment, policy and purposive considerations will often lead to different outcomes in these different domains; and, to the extent necessary, I would hold that they do so in the circumstances of this case. This divergence results because the purpose of the criminal law in cases requiring *mens rea* is to deter reprehensible conduct and to punish such conduct after it has happened. The policy of the criminal law also requires clarity, predictability and certainty. Our civil law, particularly our company and commercial law, recognises these last three policy *desiderata*, but axiomatically it exists for a different reason. In particular, the question in a civil case is usually this: should the company be liable to an innocent third party in connection with the actions of its servants or agents? Regulatory statutes are sometimes clearly criminal or clearly civil, but there is often a grey area between the two.

196. Late in the day, the SFO – led I suspect by Mr Onslow on these matters – arrayed a number of submissions which were designed to lead me away from the foregoing conclusions.

197. The first group of submissions amounted to the following: that the human defendants' conspiracy determined the course to be taken by Barclays, and that their guilty knowledge did not become spent, thereby inhering in or attaching to the actions of the company. The submission was advanced in a number of ways, but in my judgment it may be reduced to one of two propositions. Either the human defendants brought about, i.e. procured, the making of the false representations by Barclays, or the conspiracy perpetrated by the human defendants carried over into the formal actions of the company and/or constituted misrepresentations made by it, thereby constituting Barclays a co-conspirator in its own right. I have already addressed the first formulation. As for the second, the argument is ingenious but in my view it is incorrect. The *mens rea* of the human defendants in relation to the negotiation and making of the ASAs did not suddenly dissipate, but it is simply not right to say that it can be attributed to the actions of Barclays if, in relation to the formal decisions, these were effectuated by others – who, I would add, were the directing mind and will of the company unless a special rule of attribution applies. The SFO's argument seems to me to amount to an elision between my first and second steps, because the relevant knowledge somehow crosses the notional bridge between the two. It also tends to circularity. Barclays could only be a conspirator in relation to these formal decisions via the actions and accompanying *mens rea* of specified individuals.

198. The second group of submissions latched onto the position of JV and, possibly, CL – and amounted to a development of the submission I identified under paragraph 111(6) above.

199. I confess that I remain puzzled as to exactly how this submission is intended to work. If JV's involvement in Board and BFC decisions is only highly relevant *evidentially*, it would seem that Mr Onslow's submission fails to take forward his earlier arguments. If, on the other hand, JV was "a knowing party to the process", whatever that means precisely, I can see that Mr Onslow's submission may be raising a further and additional point which seeks to cross the bridge between steps 1 and 2. *Ex hypothesi*, JV would be involved in the "process" which amounted to the making of the false representations for the purposes of section 2 of the Fraud Act 2006.

200. Mr Onslow relied on Moore-Bick LJ's two decisions in support of the proposition that the guilty knowledge of one director is sufficient to fix the company, even if that knowledge was not shared with his colleagues.

201. In MAN Nutzfahreuge and Jafari-Fini Moore-Bick LJ made clear that there were separate rules applicable to the concepts of agency and to directing mind and will. This is apparent from a consideration of El Ajou because the Court of Appeal addressed agency principles under a separate rubric. I did not receive sufficient depth of submission on this aspect of the matter – both parties were really focusing on Moore-Bick LJ's third sort of case rather than his second – and I therefore say nothing more about it. Moore-Bick LJ makes that clear at paragraph 154 of his judgment in MAN Nutzfahrzeuge (see paragraph 157(1) above). The SFO's submission must be that, some way or another, JV's involvement in the decisions of the Board and the BFC fixed Barclays with his guilty knowledge.

202. I fully appreciate that the SFO has no interest for these purposes in the decision-making at Board and BFC level, and says in terms that these entities are irrelevant. However, the formal bodies are a vortex for the SFO which cannot be avoided. The "process" referred to by Mr Onslow is the making of the false representations in the public documents. I have already rejected all the submissions which are predicated on the "process" being the making of the ASAs. It follows that consideration must be given to the question whether JV's involvement in the decisions of the Board and the BFC, which bodies were acting as the directing mind and will of Barclays in connection with the publication of these documents, fixes Barclays with criminal liability. I simply cannot accept the reasoning which says that these entities can, as it were, be bypassed, and that there is a direct link to Barclays through JV. This reasoning, if it has any validity, is predicated on the instant case falling within Moore-Bick LJ's second category, which it does not. The fallacy of this reasoning is further demonstrated by Mr Lissack's submission that, if JV had not been on the Board or BFC at all (and he was not on the GCC in the context of Count 3), his guilty knowledge would on the logic of this limb of the SFO's case still be imputed to Barclays. This would be in circumstances where the entirety of the Board would be uncontaminated by any guilty knowledge.

203. It is not clear whether the SFO is really inviting me to address the question I consider arises, namely whether JV's involvement in the decisions of the Board and the BFC, which bodies were acting as the directing mind and will of Barclays in connection with the publication of these documents, fixes Barclays with criminal liability. As I

have said, the issue is framed by the SFO in a different way and seeks – impermissibly in my view – to circumvent the key point. However, out of an abundance of caution I believe that I should address my formulation. Mr Lissack's written and oral arguments have addressed it comprehensively, and there is no injustice to Barclays in my doing so.

204. The most compelling way in which the SFO's case could be advanced, as I hinted at in my emails to the parties, is that Moore-Bick LJ's approach, if applicable to the criminal law, may be seen as support for the proposition that the knowledge of one director is sufficient to fix the whole board. If correct, that could solve at least one of the conceptual obstacles in this case, because the Board of Barclays and/or the BFC (and/or the duumvirate who approved the relevant documents for CR2) would be making false representations with accompanying *mens rea*. I should make clear that in relation to CR2 the SFO did not advance a positive case as to which entity approved these documents, and I say nothing more about that.

205. In my judgment, however, JV's knowledge, which was withheld from his colleagues at all material times, does not amount in law to a contribution to the collective will of the decision-makers.

206. Moore-Bick LJ in Jafari-Fini used Meridian to construe a contractual provision which was directly concerned with the issue of *knowledge*. There were sound and obvious commercial reasons why the knowledge of one individual should suffice for the purpose of binding the company to a contract with a third party. There is no equivalent contractual provision in the present case; the only substantive rule (per Lord Hoffmann) is the principle that decisions of the Board and/or the BFC require a majority. Even so, Moore-Bick LJ also sought to draw on a more general principle (see the passage I have emphasised in paragraph 98 of his judgment) which clearly does avail the SFO in this regard. This indicates that the general rule is that the knowledge of just one director suffices.

207. Moore-Bick LJ's more general principle is not derived from Meridian; it is a general principle of company law. I am not aware of other authorities which have applied such a general principle, and in Ross Rivers Ltd Briggs J explained that Moore-Bick LJ's general principle could not apply if the statutory context and purpose pointed otherwise: see paragraphs 211-213.

208. I see some of the force of the SFO's submission that proof of fraud would become more difficult if it had to be established that all board or committee members had the relevant guilty knowledge, or even a majority. Furthermore, the BFC comprised a relatively small number of individuals.

209. However, the issue is whether the knowledge of just one individual counts in connection with the correct legal test. Whether framed in terms of Meridian or otherwise, the question is whether the policy of the criminal law is thwarted unless the knowledge of one individual should be treated as sufficient. In my judgment, the answer to that question is to be found in a consideration of the collective will of the relevant decision-maker and of whether JV represents it. The assumed facts must be that JV misled these entities and said nothing about the true purpose of the ASAs. JV's colleagues had no means of knowing the truth unless JV shared it with them.

210. In such circumstances, does section 2 of the Fraud Act 2006 lead to the conclusion that JV's knowledge is sufficient to inculpate Barclays through the collective will of the decision-makers? That is a point of law which does not require further factual assessment. There is no binding authority. The present case is far removed from the factual circumstances of any previous case where wrongdoing has been attributed in this way. The policy reasons which weighed on Moore-Bick LJ in a commercial context are inapplicable to the policy of the criminal law. I would hold that by whatever route section 2 of the Fraud Act 2006 cannot be construed or applied to fix Barclays with criminal responsibility via the knowledge of a sole member of the Board or the BFC. This is for the reason that, because he has suppressed it, such knowledge cannot be regarded the directing mind and will of the company. If the knowledge were shared, the position would be entirely different: the Board and/or the BFC proceeds in its peril, and Barclays would take the consequences.

211. My conclusion is consistent with, if not supported by, the reasoning of Briggs J in Ross Rivers Ltd, Jackson LJ in Howmet and the High Court of Justiciary in Transco. It is not supported by Moore-Bick LJ in Jafari-Fini, but I have ventured to explain why legal policy varies across criminal and civil law.

212. In any event, even if this conclusion were incorrect, this limb or extension of the SFO's case could not avail it in relation to the Indictment as pleaded. Mr Onslow rightly accepts that the conspiracy charges hinge on the activities of JV, RJ and CL in negotiating and making the ASAs. In his final written argument Mr Lissack advanced a number of submissions about this which are obviously right.

213. On 17th May 2018 Mr Brown filed another Prosecution Note which drew my attention to the role of JV and CL in connection with the Prospectuses and the Subscription Agreements. I had not overlooked these matters. I believe that I have already addressed them sufficiently under paragraph 194(4) above but in the circumstances of the SFO's evident concern I must return to this issue. I put to one side the position of the individual directors and any offences they may have committed. The focus must continue to be on the position of Barclays. The fact that JV and/or CL signed these documents, were authorised to do so, and bound Barclays contractually would not fix the latter with criminal responsibility unless JV and CL were the directing mind and will of the company when they did so. The two possible pathways to their being the directing mind and will of Barclays (viz. (1) making the ASAs and (2) involvement in decision-making at Board/BFC level) have already been fully considered. JV and CL did not represent the collective will of Barclays in connection with this second pathway, and the position is not altered by their signature of these documents. As I have already said, these documents were signed under the aegis of the Board/BFC.

214. The position of the human defendants under Counts 1 and 2 remains to be considered. This raises a logically prior and free-standing issue. As I have already indicated, this was a point which I raised at an early stage in the proceedings. On further reflection, I have eventually decided that it would not be fair to the SFO for me to reach a concluded view about this, particularly in the light of the submissions filed after the hearing concluded. Mr Lissack's case was not explicitly advanced on the basis that Barclays' position was logically and necessarily parasitic on that of the human defendants. Only Mr William Boyce QC for RB has thus far taken the point, and it remains open for others to do so if so advised.

215. I have not yet explicitly addressed Mr Lissack's submission that the SFO has indicted the wrong conduct. My reason for deferring consideration of this issue is that I do not think that form should be elevated over substance. If the matter were only a pleading point, it could and should be addressed. My conclusion is that it cannot.

216. In my judgment, it has remained necessary to focus on who was the directing mind and will of Barclays in connection with the transaction in point. Those transactions were CR1 and CR2 respectively. On my understanding of their submissions, neither party is really saying that this transaction can be notionally sliced such that X was the directing mind and will at one time and Y at another, and in my view it cannot. On a fair reading of his judgment in MAN Nutzfahrzeuge (see paragraph 160 in particular), Moore-Bick LJ was not holding that it could: the negotiations fell to be considered in the context of the transaction as a whole. It follows either that JV, RJ and CL were the directing mind and will of Barclays at all material times, or they never were.

217. Having considered all the SFO's arguments as developed by Mr Brown and Mr Onslow, I would hold that the statutory purpose of section 2 of the Fraud Act 2006 does not require the fashioning of a special rule of attribution in the particular circumstances of this case. In short, in the absence of such a special rule, Barclays cannot be treated as making any false representations under this section.

Count 3

218. It is not arguable that JV and RJ were the implied delegates of Barclays for the purpose of giving financial assistance, and I do not understand the SFO to be suggesting that they were.

219. Section 151 of the Companies Act 1985 is devoted to companies and its statutory purpose is clear: to prevent distortions of the market, and potential losses to investors, consequent on circular or mirror transactions. Mr Lissack submitted that Meridian cannot apply as a matter of principle to this provision, because its statutory purpose is not sufficiently lapidary, but I cannot agree: it obviously can. If strict adherence to primary and general rules of attribution would lead to the result that someone who was the directing mind and will of the company in relation to the transaction in point could not be regarded as the company for the purposes of section 151, the statutory purpose would not be furthered but thwarted.

220. It is not difficult to imagine situations in which a Meridian approach could lead to corporate liability under section 151. The facts of Meridian itself could be varied slightly so that the relevant transaction was not the acquisition of a security but the giving of a loan. If Mr Koo or his notional equivalent "did the deal" in that way, section 151 would apply to inculpate the company.

221. So, the point at issue between the parties on this provision is both narrow and succinct: were RJ and JV the directing mind and will of Barclays for the purpose of the relevant transaction, which was the giving of financial assistance to Qatar?

222. I must return to what I believe is a constant error of approach underlying the SFO's analysis. The GCC was the relevant decision-maker in relation to this transaction, not

just as an arid or technical matter of form, but in substance. It is unnecessary for me to decide what the position would have been had there been a sufficient case on the evidence that the GCC acted as some sort of cipher or rubber-stamp, but I am entirely satisfied that there is not. The GCC was aware of the very issue that concerns the SFO; Barclays took legal advice upon it; and a stipulation was contained in the loan agreement to the effect that Qatar would not deploy the monies to assist the company financially.

223. It is not the SFO's case that GCC approval was perfunctory. It is unnecessary for me to go any further. I would, however, make this brief observation: had the GCC invited comment from RJ as to the purpose of the loan, the inference cannot be that he would have told it the truth.

224. In these circumstances, the GCC retained dominion and control over the transaction (being the giving of the loan), and the "deal" was not "done" by JV and RJ. The antecedent negotiation was not "the transaction in point"; it was not a transaction at all. The transaction which constituted the loan, and which amounted to the giving of financial assistance on the SFO's evaluation of the evidence, was performed by the GCC acting as Barclays at the relevant time. The knowledge of RJ and JV cannot be attributed to Barclays, because there is no concordance of *actus reus* and *mens rea*, and there are no sound policy reasons why it should. The contention that a special rule is required because without it the statutory purpose could be thwarted by *potentially* perfunctory approval seems to me to highlight the obvious flaw in the SFO's case. On this argument, criminal responsibility would flow even if the formal approval were perfectly rigorous.

225. In short, there is no need for a special rule in these circumstances. The GCC retained control of a transaction whose integrity has been undermined by a private understanding between JV/RJ and Qatar.

226. The answer to Lord Hoffmann's question – for these purposes, whose act was intended to count as the act of the company? – is: the GCC's.

227. I would hold that the statutory purpose of section 151 of the Companies Act 1985 does not require the fashioning of a special rule of attribution in the circumstances of this case.

Conclusion

228. The issues arising in connection with Barclays' application to dismiss have been of fabulous complexity and intricacy, and I am indebted to Counsel for their assistance.

229. The application of the companies succeeds and the charges specified in Counts 1, 2 and 3 on this Indictment must be dismissed insofar as these relate to them. The precise form of my Order may require further submissions.

230. To be fair to the human defendants and to Qatar, I cannot reaffirm too strongly that this Ruling has proceeded on the basis of assumed facts. Any reader dipping into it may think that I have been damming of their conduct. No findings have been made on

the evidence, and if there were to be a trial such findings would be for the jury. The procedure initiated by Barclays has required me to work on the basis of a hypothesis which assumes that the SFO's "case theory" is right.

231. My Ruling has obvious implications for the human defendants which they and the SFO will need to consider.

ANNEX

BARCLAYS PLC, BARCLAYS BANK PLC, JOHN VARLEY, ROGER JENKINS, THOMAS KALARIS and RICHARD BOATH 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, JOHN VARLEY, ROGER JENKINS, THOMAS KALARIS and RICHARD BOATH, between 1 May 2008 and 31 August 2008, conspired together, and with others, 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, JOHN VARLEY and ROGER JENKINS, between 1 September 2008 and 30 November 2008, conspired together, and with others, 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).