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Injunctive relief: But let's agree not to have it?

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CASES

Injunctive Relief: But Let's Agree Not To Have It?

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The ability of parties contractually to limit their right to seek injunctive relief has not often been judicially discussed. An interesting case from Singapore now appears to suggest that this is much more than a theoretical possibility. Some arguments can, however, be made to demonstrate that this is perhaps not the vista of opportunity over which some contract draughtsmen might rejoice, and care should be taken to ascertain the boundaries of the law, as explained in this note.

The recent decision in *CKR Contract Services Pte Ltd* v *Asplenium Land Pte Ltd*[1] (*Asplenium*) saw a rather uncommon issue being raised before the Court of Appeal of Singapore. Can a party contractually limit its right to seek injunctive relief, in this case to restrain the counterparty from calling on a performance bond on the basis that the call was made unconscionably? The court's reply was yes, but deeper questions remain unanswered. In particular, the result raises a number of general issues which have important conceptual and practical implications.

It should be noted at the outset that the law of Singapore on performance bonds differs from English law in one significant respect. Both would allow a party to restrain another from calling on a performance bond on the ground that the call was made fraudulently, but only Singapore law additionally permits a restraining order to be made in cases where the call was made *unconscionably*. The 'unconscionability exception' (as it became known) was judicially introduced in Singapore to counter the increasing prevalence of abusive calls by bond beneficiaries, as described in an early case:

> *We are concerned with abusive calls on the bonds.* It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is *prima facie* evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. *It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court's intervention except on the ground of fraud.*[2]

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1 *CKR Contract Services Pte Ltd* v *Asplenium Land Pte Ltd* [2015] SGCA 24; [2015] 3 SLR 1041.
2 *GHL Pte Ltd* v *Unitrack Building Construction Pte Ltd* [1999] SGCA 60; [1999] 3 SLR(R) 44 at [24] (emphasis added).

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The Singapore Court of Appeal has since confirmed on multiple occasions that the unconscionability exception is a separate ground from fraud, and includes conduct such as unfairness and abuse which are broader than conduct that would constitute fraud. A finding of unconscionability is therefore a conclusion applied to conduct which is found to be so lacking in *bona fides* that an injunction restraining the beneficiary's substantive rights is warranted.[3]

Returning to the facts of the *Asplenium* case, the building contractor there had, pursuant to a contract with a property developer, requested its bank to furnish an on-demand performance bond in favour of the developer as security for the performance and observance of the contractor's obligations under the contract. Crucially, however, clause 3.5.8 of the contract provided that the contractor was not, except in the case of fraud, entitled to restrain the developer from calling on the bond 'on any ground including the ground of unconscionability'. Disagreements arose during the construction project and the developer called on the bond for the full secured amount. The contractor pursuant to an *ex parte* application promptly obtained an interim injunction restraining payment under the bond. At the subsequent *inter partes* hearing, however, the first instance judge, Edmund Leow JC, dismissed the contractor's application for an injunction (in reliance on the unconscionability exception) to restrain the developer from calling on the bond.[4]

In his ruling the first instance judge held that clause 3.5.8 was unenforceable, for three reasons: first, it was an attempt to oust the court's jurisdiction on the significant ground of unconscionability and represented a severe incursion into the court's freedom to grant injunctive relief;[5] secondly, the power to grant injunctions emanated from the court's equitable jurisdiction and this could not be circumscribed or curtailed by contract;[6] and thirdly, the unconscionability exception was based on policy considerations which could not be lightly brushed aside by agreement.[7] However, the judge went on to find that the threshold had *not* been met for the unconscionability exception to apply, and he therefore declined to grant the injunction sought.[8]

The important question on appeal was whether the judge had been right to hold that clause 3.5.8 was unenforceable. The Court of Appeal reversed the judge on this point, reasoning as follows: first, clause 3.5.8, by restricting the right (except in a fraud situation) to restrain the beneficiary from calling on the bond, was only seeking to limit the right to an equitable remedy in a particular situation; this was more in the nature of an exclusion or exception clause than an ouster of jurisdiction clause. The parties had moreover voluntarily agreed to the provision. Looked at in this light, neither party had been denied access to the court. That was not to say that there were no safeguards; such a clause could at least potentially be subject to judicial scrutiny pursuant to the

3 *BS Mount Sophia Pte Ltd* v *Join-Aim Pte Ltd* [2012] SGCA 28; [2012] 3 SLR 352 at [23] and [45].
4 *CKR Contract Services Pte Ltd* v *Asplenium Land Pte Ltd* [2014] SGHC 266; [2015] 1 SLR 987 (*Asplenium (HC)*).
5 *ibid* at [19] and [20].
6 *ibid* at [21].
7 *ibid* at [22]-[25].
8 *ibid* at [27]-[34].

Singapore equivalent of the Unfair Contract Terms Act 1977 (UCTA).[9] The second strand of the court's reasoning was that on the facts the developer could have asked for a cash deposit instead of a performance bond as security, and there was therefore no pressing reason in principle or policy why clause 3.5.8 should be considered as being contrary to public policy for purporting to oust the court's jurisdiction.[10] The court did not elaborate further, but the thinking could perhaps have been that since the parties could have eschewed the courts altogether, had cash security been transacted, there was in commercially realistic terms no compelling justification to read clause 3.5.8 as an ouster of jurisdiction provision. Finally, in concluding that the policy considerations underlying the unconscionability exception could not be displaced summarily by agreement, the first instance judge had incorrectly conflated the policy motivations for developing the unconscionability exception with the general public policy of invalidating contracts seeking to oust a court's jurisdiction.[11]

It is not intended here to debate the theoretical correctness of the unconscionability exception or whether that is a legitimate response to changing circumstances in a mature but nimble-footed jurisdiction. The remaining discussion thus proceeds on the footing that the unconscionability exception is a warranted addition; and, as will be seen, this does not materially detract from the generality of the discussion that follows. The first issue is whether a provision like clause 3.5.8, in disentitling a person from specified equitable remedies on a recognised ground of relief, can properly be analogised to an exclusion or exception clause (hereafter referred to simply as an exemption clause, for brevity). The second is to ascertain the limits to contractual autonomy in navigating around a ground of equitable relief that was created precisely to regulate the conduct of commercial parties.

The resolution of the first issue evidently relies in part on a preliminary question of framing. In the context of performance bonds, taking away a party's right to apply for an injunction on the ground of unconscionability may appear (as it did to the appeal court in *Asplenium*) to be no different in concept from a disclaimer sometimes found in commercial contracts that a party will not be liable for loss caused through its negligence. Both, it could be argued, belong to the category of provisions depriving a party of a particular remedy that might otherwise be available on the facts. It is thought however that there exists a perceptible difference depending on whether it is a legal or equitable remedy that is being excluded. The difference is *not* that an equitable remedy (unlike a legal one) involves an exercise of judicial discretion which can never be denied to the court; such a rationalisation is flawed because it is in truth no more than a mere by-product of the traditional primacy of common law remedies over the equitable remedies, and in any case it is tolerably clear that the common law remedies involve a significant degree of facultative decision-making as well (for example, in respect of questions of causation, the measure of damages awarded) etc. Rather, the nature of the relief sought to be denied

9 *Asplenium* n 1 above at [21], [22], [24] and [36].
10 *ibid* at [31].
11 *ibid* at [40] and [41].

is crucial because of the dichotomy of primary and secondary obligations that exists in the law. Leaving aside the prerogative writs, a fundamental difference between legal and equitable remedies is that the latter may issue to compel a party's contractual performance.[12] The tool of choice here is, of course, the injunction.

A recent and informative discussion may be found in *AB* v *CD*.[13] It had been argued there that a limitation clause excluding recovery of certain heads of losses and capping damages at a predetermined amount reflected the commercial agreement of the parties, and the limiting effect of this clause thus had to be considered when the court, in deciding whether to grant an injunction, addressed its mind to the question whether damages would be an adequate remedy. The Court of Appeal dismissed the argument. Underhill LJ, with whom Laws and Ryder LJJ agreed, viewed the limitation clause as only affecting the parties' *secondary* obligation to pay damages in the event of a breach. It could not affect the *primary* obligation of the parties to perform the contract, in the sense that an agreement to restrict the recoverability of damages in the event of a breach could not be treated as an agreement to excuse performance of that primary obligation.[14] Seen in this light, the court, when deciding whether to order an injunction to enforce compliance with the primary obligations under the contract, was not to consider the effect of such a limitation clause.

The reasoning in *AB* v *CD* appears, with respect, to be sound in principle. It gives the proper understanding to injunctive relief as being

> a remedy available to the court to give effect to commercial expectations where it is in the interests of justice that agreed obligations should continue to be binding on the parties, whether that be for an interim period or the term of the contract.[15]

What is particularly interesting is Ryder LJ's further statement that the court's remedies were, on the facts there, available in support of a contractual right *and were not excluded by the terms of the contract*.[16] This seems to open the possibility for an argument that the terms of the contract *could* exclude a party's right to apply for injunctive relief; and *Asplenium*, as we have seen, accepts that argument.[17] The normative justification for this almost invariably reduces to the freedom of parties to contract, that they may, subject to the limits of the law, contractually amend the content and performance of their primary obligations.[18] But even on this view it cannot be said that clauses limiting the availability of equitable relief to compel contractual performance are sufficiently analogous to those that limit purely legal remedies, such that the usual interpretative rules applicable

12 See generally S. Rowan, *Remedies for Breach of Contract – A Comparative Analysis of the Protection of Performance* (Oxford: OUP, 2012) ch 1.
13 *AB* v *CD* [2014] EWCA Civ 229; [2015] 1 WLR 77.
14 *ibid* at [27].
15 *ibid* at [32].
16 *ibid* at [32].
17 See also *Tercon Contractors Ltd* v *British Columbia* 2010 SCC 4; [2010] 1 SCR 69 at [132] and [133].
18 See, for example, D. Neo, 'Banking Law' (2014) 15 *Singapore Academy of Law Annual Review of Singapore Cases* 73, para 5.42.

to the latter may be utilised in respect of the former.[19] Rather, the analysis of clauses limiting specific equitable relief should in fact be *stricter* because it is harder to contemplate that parties would have foregone the right to compel the performance of their contract (this naturally excepts certain categories of agreement for which specific performance and perpetual injunctive relief are not traditionally ordered). The facts of *Asplenium* illustrate this necessity for a more rigorous approach. The contractor there was unable to restrain the developer from calling on the bond due to the presence of clause 3.5.8, and despite the court's insistence that there were safeguards in place to regulate the use of such clauses, it is unclear whether these as stated are any salve to a general and (perhaps) increasingly persistent phenomenon. By its own terms UCTA is not always applicable to the contract at hand, and the evaluative questions that are traditionally asked when construing exemption clauses for legal remedies simply do not address the different and vastly more fundamental query whether the parties objectively intended to allow deviations from the primary performance of the contract to go unpenalised without recourse to any injunctive remedies. As *Bean on Injunctions* recognises:

> It is comparatively unusual for the defendant to be able to say that damages are the only available remedy in the case and that the court does not even have a discretion to grant an injunction.[20]

The right to expect contractual performance is generally allied to a right to seek equitable relief to compel such performance. Excluding or limiting this concomitant right should properly necessitate a heightened level of inquiry, where the court's assessment is based on the relevant material before it and even the conduct of the parties, where that is admissible in evidence, with appropriate sentiment to be derived from Megarry V-C's *dictum* that the courts must beware of allowing a restriction of the range of remedies which it is proper to grant to destroy or unduly impair the rights of the parties.[21]

This brings us to the second issue, which is whether there are any limits to contractual autonomy in navigating around a ground of equitable relief created precisely to regulate the conduct of commercial parties. The way this inquiry has been presented may faintly resemble a catch-22, but it is essentially the problem the court faced in *Asplenium*. Its resolution has broader implications not just in terms of the immediate ability of parties to affect the availability of equitable injunctive relief, but also in introducing an overlap to the traditionally held view that liability for certain types of conduct (such as fraud and dishonesty) may not be limited or excluded on public policy grounds.

The result in *Asplenium*, it will be remembered, was that unconscionability as a ground for restraining calls on a performance bond could be excluded contractually by the parties. The appeal court did not see any policy considerations against such a result and, in fact, thought that the first instance judge

19 cf P. G. Turner, 'Inadequacy in Equity of Common Law Relief: The Relevance of Contractual Terms' (2014) 73(3) *Cambridge Law Journal* 493, 496.
20 D. Bean, I. Parry and A. Burns, *Injunctions* (London: Sweet & Maxwell, 11th ed, 2012) para 2-09.
21 *Thomas Marshall (Exports) Ltd* v *Guinle* [1979] Ch 227, 243.

had confused the policy motivations for developing the unconscionability exception with the general public policy of invalidating contracts seeking to oust a court's jurisdiction.[22] With respect, however, this seems to have recast the concerns of the first instance judge. Leow JC's stated view is that the important policy considerations underpinning the unconscionability exception cannot be lightly brushed aside by an agreement made by the parties.[23] He appears only to be saying here that the parties cannot easily avoid the unconscionability exception or its underlying policy; and he does not, in fairness, suggest definitively in any way that he finds the policy motivations of the unconscionability exception to be coterminous with the general public policy concerns over jurisdiction-ousting contracts. If this correctly reads the first instance judge's words then, respectfully, he was right to have drawn attention to this quandary.

It is true that the unconscionability exception was created in Singapore after much deliberation and thought—this representing a conscious deviation from English law on the subject—and it has, for all practical purposes, been understood by many lawyers in Singapore to exist on the same plane as the fraud exception. This is no doubt due to the understanding there (as in England) that there are extremely limited grounds on which to restrain a beneficiary from calling on or receiving payment under a performance bond. One has only to read the recent decisions in *Simon Carves Ltd* v *Ensus UK Ltd*[24] (*Ensus*) and *Doosan Babcock Ltd* v *Comercializadora de Equipos y Materiales Mabe Limitada*[25] (*Doosan Babcock*) to realise how inordinately difficult it was to accept that a second exception existed in English law, in addition to the fraud ground. It might therefore have been thought that any exception, once recognised and given legitimacy by the law, would not easily permit of derogation. The true policy at work here is that of ensuring that parties do not contract themselves out of the law.[26]

It may be asked what makes this different from those cases in which the law does allow for the limitation of liability which would otherwise be imposed; that extends, as we know, not just to legal liability (such as for consequential losses, loss of profits, or loss caused through negligence etc) but even liability in equity as well (for instance, trustees may legitimately disclaim liability, including for gross negligence, save for wilful default).[27] Moreover, an argument may now possibly be mounted, based on certain statements in the *Ensus* and *Doosan Babcock* cases cited earlier, that the ambit of action in restraining a call may be contractually defined in such a way as to disallow a party from relying on the unconscionability exception. It is, however, thought that the contractual estoppel doctrine espoused in *Peekay Intermark Ltd* v *Australia and*

22 n 11 above.
23 *Asplenium (HC)* n 4 above at [22] and [25].
24 *Simon Carves Ltd* v *Ensus UK Ltd* [2011] EWHC 657 (TCC); [2011] BLR 340.
25 *Doosan Babcock Ltd* v *Comercializadora de Equipos y Materiales Mabe Limitada* [2013] EWHC 3201 (TCC).
26 To quote Branson J in *Warner Brothers Pictures, Inc* v *Nelson* [1937] 1 KB 209, 221.
27 See, for example, *Spread Trustee Company Ltd* v *Hutcheson* [2011] UKPC 13; [2012] 2 AC 194.

New Zealand Banking Group Ltd[28] cannot convincingly be relied on here as the policy considerations surrounding exemption clauses warrant their own distinct analysis.

The response to this is threefold. As mentioned earlier, a limitation on liability (liability here meaning the secondary obligations that result from the breach of a primary obligation) cannot fully be compared to a limitation of an equitable remedy, simply because they address different aspects of the contract. The former generally rises to act only upon the secondary obligations of the parties, while the latter is a direct impingement on the rights of the parties to affect the method of performing and discharging their present (and future) primary obligations. This can be easily appreciated: the fact that I may not be able to claim for loss caused by your negligent behaviour does not mean that I have necessarily and voluntarily withdrawn from the other remedies available (such as declaratory or injunctive relief). If a comparison is insisted upon then the better parallel is as between a provision touching on the election of remedies and a clause seeking to limit the right to seek specific equitable relief. Clearly, then, it is conceptually possible to neutralise *completely* (and without leaving any other viable remedy) the right to ask for damages or any injunctive remedies, but that would be something so out of line with ordinary commercial expectations that it would take extremely cogent evidence to demonstrate that the parties intended for this to be the position. The following words of Moore-Bick LJ were said in a slightly different context but they are capable of general application:

> The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.[29]

This leads to the second point, which is that if the parties do wish to effectively strip the availability of a crucial equitable remedy from their relationship, the court has to be concerned to ensure generally that there remain other viable avenues of recourse to compel the performance of the primary obligations.[30] This safeguarding aspect is not addressed only by the application of legislation (eg, UCTA) and the usual attendant rules relating to the interpretation of exemption clauses, but requires further a commercially sensible analysis of the contract to understand what the parties intended when they provided for the discharge (or breach) of a primary obligation to have certain consequences or non-consequences, taking into account the ordinary meaning of the words

28 *Peekay Intermark Ltd* v *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.

29 *Stocznia Gdynia SA* v *Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27 at [23].

30 In some ways this is the obverse inquiry to that posed in S. Rowan, 'For the Recognition of Remedial Terms Agreed Inter Partes' (2010) 126 LQR 448, where the author argues that contracting parties should be permitted to agree upfront in their contract on their entitlement to equitable relief (such as specific performance or mandatory injunctions) even if this would oust the court's exercise of discretion in awarding the remedy, so as to further the protection of the performance interest in their contract. See also Rowan, n 12 above, ch 5.

used, relevant evidence aliunde and, importantly, the furtherance of the fundamental policy of ensuring that parties should perform, and should ordinarily be entitled to compel performance of, their agreements. It is emphasised again that this policing role does not, under the present analysis, conflict in principle with a (exemption) clause which prescribes capped or liquidated damages in the event of a breach or which is extremely comprehensive in scope such as to affect virtually all the secondary obligations that arise; such a clause would not in itself assist in understanding the proper scope of the equitable remedies which should, considering all the circumstances, be available to compel performance.[31]

The third note of response specifically addresses the propriety of any potential restriction on the right to injunctive relief in a performance bonds context, such as clause 3.5.8 found in *Asplenium*. It is arguable, given the nature and usage of performance bonds, that there is a *numerus clausus* of exceptions on which to restrain calls and payment thereunder. The significance of the *Asplenium* decision, as far as Singapore law is concerned, is in allowing parties to deduct at will one of these very few exceptions, leaving fraud as the only generally recognised ground available for use. This appears to be a one-way street in that only the unconscionability ground (but not the fraud ground) may be derogated from; and, to be sure, nothing in *Asplenium* suggests that the elimination of the *fraud* exception is even a remote possibility.[32] But this is also why the actual decision in that case to validate clause 3.5.8 is questionable. In allowing for the exclusion of the unconscionability exception there has been an implicit hierarchical decision to place this below the fraud exception. That, granted, is a policy decision, but arguably a more balanced analysis of the relevant policy considerations would have resulted in favour of equality. Indirect authority may be drawn from *Regus (UK) Ltd* v *Epcot Solutions Ltd*,[33] where the Court of Appeal confirmed that exemption clauses would not naturally be construed as purporting to exclude liability for fraud or wilful damage, going on to find in that case that a clause which excluded liability 'in any circumstances' was not effective to exclude liability for fraud or malice.[34] In my view the unconscionability exception, in attacking the problem of abusive calls and targeting conduct which is unfair and lacking in *bona fides*, falls within this sphere of general immunity from contractual manipulation. From this it follows that the same immunity should normally apply to the second, distinct, exception recognised by Akenhead J in *Ensus*; the exception being that if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, that party can potentially be restrained on this ground from making such a demand.[35] Therefore if a particular contract should so provide, then, notwithstanding that another clause may at the

31 See also *Cavendish Square Holding BV* v *Talal El Makdessi* [2015] UKSC 67 at [298]. *Elsley* v *JG Collins Insurance Agencies Ltd* [1978] 2 SCR 916.

32 cf D. Neo, 'Banking Law' (2014) 15 *Singapore Academy of Law Annual Review of Singapore Cases* 73, para 5.43.

33 *Regus (UK) Ltd* v *Epcot Solutions Ltd* [2008] EWCA Civ 361; [2009] 1 All ER (Comm) 586.

34 *ibid* at [34] and [35].

35 *Ensus* n 24 above at [33].

same time limit the availability of injunctive relief to the case of fraud, the expectation that contracting parties will not act in bad faith (or, conversely, that they will act in good faith) means that it should still be very hard to justify the denial of an injunction if the beneficiary was not entitled to call on the bond in the first place. This would be to give true meaning to the aphorism that people expect and are entitled to nothing less than honest dealing in their relationships.

Attribution and the Illegality Defence

Ernest Lim*

In *Jetivia SA* v *Bilta (UK) Ltd (in liquidation)* all seven judges of the Supreme Court affirmed the decision of the Court of Appeal by holding that the illegality defence could not be raised against the claim made by the company because the wrongdoing of the directors and shareholder cannot be attributed to the company. Although all the judges unanimously agreed on the outcome of the case, their reasoning concerning the approach to attribution and the different circumstances under which attribution should or should not take place differed. Further, the Supreme Court was divided on the issue of the correct approach to the illegality defence.

INTRODUCTION

The decision of the Supreme Court in *Jetivia SA* v *Bilta (UK) Ltd (in liquidation)*[1] (*Bilta*) is significant and interesting for two reasons. First, it authoritatively resolves the issue of whether the wrongful acts or state of mind of the directors (or the sole director and shareholder) are attributable to the company where the latter sues the former for breach of duty and their co-conspirators for dishonest assistance. In so doing, the Supreme Court clarified the general approach that should be taken towards analysing the difficult subject of attribution, and it provided clear and forceful clarification of what the controversial decision in *Stone & Rolls Ltd (in liquidation)* v *Moore Stephen (a firm)*[2] (*Stone & Rolls*) is authority for. Second, the judges were divided on the issue concerning the correct approach to the illegality defence. Lords Toulson and Hodge said that the application of the illegality defence requires the evaluation and balancing of competing public policies but Lord Sumption rejected this. Lord Neuberger (with whom Lords Clarke and Carnwath agreed) did not take a position. Depending on the approach that is adopted, the judges said that

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1 [2015] UKSC 23; [2015] 2 WLR 1168; see W. Day, 'Attributing Illegalities' (2015) 74 CLJ 409.
2 [2009] 1 AC 1391.

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the House of Lords decision in *Tinsley* v *Milligan*[3] (*Tinsley*) may have to be reconsidered.[4]

FACTS AND DECISION OF THE SUPREME COURT

The liquidator of the company, Bilta, sued its directors and co-conspirators for breach of duty and dishonest assistance in connection with a carousel fraud on the Revenue which involved Bilta purchasing 'carbon credits' in the EU from one conspirator and therefore not subject to VAT, which was followed by their resale (which was subject to VAT) at a loss to other companies, with the proceeds of the sale remitted to other companies controlled by the defendants. The point of this fraudulent scheme was to cause Bilta to be insolvent so that it could not pay the VAT to the Revenue. The defendants argued that the company's claim should be dismissed on the basis of the illegality defence (ie, no court will give effect to a claim founded on an illegal or immoral act) because the fraud of its directors should be attributed to the company. They also alleged that because section 213 of the Insolvency Act 1986 has no extraterritorial effect, the claim under that section should be dismissed.

The Court of Appeal ruled in favor of the claimant.[5] Patten LJ held that that the fraud of the directing mind and will should not be attributed to company to defeat its claim against the directors or co-conspirators for breach of duties and the tort of conspiracy. To make such an attribution would violate the principle of separate legal personality, and more importantly, would be contrary to sections 172(3) and 178 of the Companies Act 2006 and the Insolvency Act. He also said that on a proper construction of section 213 of Insolvency Act, it had extraterritorial effect. The defendants appealed to the Supreme Court.

All seven judges of the Supreme Court upheld the decision of the Court of Appeal, on both the attribution and extraterritorial issues. Lord Neuberger (with whom Lords Clarke and Carnwath agreed) held that

> Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings.[6]

Lords Sumption, Toulson and Hodge differed in their reasoning, although they arrived at the same result as Lords Neuberger and Mance. Lord Sumption

3 [1994] 1 AC 340.
4 *Bilta* n 1 above at [17] and [174].
5 [2013] EWCA Civ 968; [2013] 3 WLR 1167; see E. Lim, 'Attribution in Company Law' (2014) 77 MLR 794.
6 *Bilta* n 1 above at [7].

decided the case on the basis of attribution.[7] Lords Toulson and Hodge decided this case primarily on the basis that to apply the illegality defence would undermine the protection that the law accords to the creditors of a company that is in or near insolvency by requiring directors to take into account their interests.[8] They said that in any event, the rules of attribution would achieve the same result. Moreover, although Lord Sumption and Lords Toulson and Hodge differed in their understanding of *Stone & Rolls*,[9] Lord Neuberger[10] as well as Lords Toulson and Hodge[11] said that *Stone & Rolls* is authority for a very narrow point: the illegality defence succeeded and the claim against the auditors failed. Lord Neuberger even stated that 'the time has come in my view for us to hold that the decision in *Stone & Rolls* should, as Lord Denning MR graphically put it in relation to another case in *In Re King* [1963]; Ch 459, 483, be "put on one side and marked 'not to be looked at again'".'.[12]

Despite these important differences in their reasoning, the most interesting one concerns the correct approach to the illegality defence. While Lords Toulson and Hodge said that the application of the illegality defence has to be sensitive to context and considerations of competing public policies,[13] Lord Sumption rejected such a flexible, discretionary approach.[14] Lord Neuberger acknowledged that both approaches are supportable but did not make a determination on this issue.[15] This note argues in favour of the flexible approach.

ATTRIBUTION

On the issue of attribution, the Supreme Court's decision is important in three respects. The first is that it is clear authority for the proposition that where a company (acting through its liquidator) sues its directors for breach of duties for the losses caused to it by the directors, their wrongful acts or state of mind cannot be attributed to the company, even if the directors are the only directors and shareholders of the company (ie, a 'one-man' company). This is because it would be absurd and unjust, and it would defeat the purpose underlying section 172(3) of the Companies Act 2006 (the Act), if the miscreant directors can escape liability simply by attributing their wrongdoing to the company.

Secondly, the Court set out the correct approach to answering the question of whether and when the acts or state of mind of the directors (or their third party co-conspirators) or agents should be attributed to the company. Lord Neuberger and Lord Mance held that it depends on the nature and the factual context of the claim in question, thereby endorsing Lord Hoffmann's dictum in *Meridian*: 'Whose act (or knowledge, or state of mind) was for this purpose

7 *ibid* at [86].
8 *ibid* at [125]-[130].
9 The other difference lies in the judges' interpretation of *Safeway Stores* v *Twigger* [2010] EWCA Civ 1472.
10 *Bilta* n 1 above at [24].
11 *ibid* at [154].
12 *ibid* at [30].
13 *ibid* at [170]-[174].
14 *ibid* at [60]-[63], [98]-[100].
15 *ibid* at [15]-[17].

intended to count as the act etc. of the company?'[16] This contextual, purposive approach is different from that articulated by Lord Sumption, with which Lord Mance[17] disagreed and which was endorsed by none of the other judges Lord Sumption analysed this case as one involving the rules of attribution–one of which is that the acts or state of mind of the directing mind and will shall be attributed to the company–'derived from the law of agency',[18] which apply '*regardless* of the nature of the claim or the parties involved',[19] but which can be negatived by the exception of the breach of duty by the agents.[20] The problem with analysing it as one of prima facie attribution, which is then negatived under a breach of duty exception, is that it implies that the rules of attribution should *automatically* apply (unless the exception applies), ie, it wrongly assumes that the principal is to be treated for all intents as *always* having the same knowledge as his agents.[21] Such knowledge cannot be attributed to the principal unless the purpose of such attribution, which can only be discerned from the nature and context of the claim, is first articulated; thus, where the agent has defrauded the principal, the exception is unnecessary to allow the principal to succeed in its claim given that the agent's knowledge will not be attributed to the principal in the first place.[22] Indeed, '[t]he rules of attribution do not exist in a state of nature, such that some reason [such as breach of duty] has to be found to disapply them'.[23] Nevertheless, an advantage arising from Lord Sumption's approach is that it provides more certainty than the contextual approach endorsed by the majority.

Although it is clear from the Court's holding that the contextual, purposive approach to attribution is the correct one to follow, the precise basis on which attribution should or should not apply in the different contexts is not clear. This is because while Lord Neuberger explicitly endorsed the result reached by Lord Sumption as well as Lords Toulson and Hodge on the attribution issue, he did not examine their reasoning in detail; nor did he express a clear view as to whose reasoning is to be preferred with respect to claims made by a company against its delinquent directors and third party co-conspirators. While the directors' wrongful act or state of mind will not be attributed to the company in order to bar a company's claim against them and the third party co-conspirators, the judges are not in accord as to the reasons. Lords Toulson and Hodge analysed it principally from a statutory policy standpoint: allowing the illegality defence to succeed and attributing the fraud of the directors to the company would negate and contradict the protection afforded to the creditors of a company which is insolvent or approaching insolvency through

16 *Meridian Global Funds Management Asia Ltd* v *Securities Commission* [1995] 2 AC 500, 507.
17 *Bilta* n 1 above at [37].
18 *ibid* at [86].
19 *ibid* (emphasis added).
20 *ibid*.
21 P. Watts and F. Reynolds (ed), *Bowstead & Reynolds on Agency* (London: Sweet & Maxwell, 20th ed, 2014) at [8-213] endorsed by Lord Mance at [44] and Lords Toulson and Hodge at [191].
22 *ibid*.
23 P. Watts and F. Reynolds (ed), *Bowstead & Reynolds on Agency* (London: Sweet & Maxwell, 19th ed, 2010) at [8-213], endorsed by Lord Mance at [44] and Lords Toulson and Hodge at [191]. NB, these paragraphs of the judgment referred to both 2010 and 2014 editions of this text.

the statutory requirement (sections 172(3) and 180(5) of the Act) that directors must take into account the creditors' interests in such a company.[24]

Lord Sumption took a different view. He said that just as directors cannot raise the illegality defence by attributing their wrongdoing to the company when they are being sued for breaching the duties that they owed to the company, so must be the case for their co-conspirators who are under an ancillary liability for participating in the wrongdoing of the fraudulent directors.[25] He rejected Lords Toulson and Hodge's policy based reasoning because first, the application of the illegality defence does not permit the weighing or evaluation of public policies.[26] Secondly, he disagreed that there are countervailing public policies underlying sections 172(3) and 180(5), which require the illegality defence to be disapplied so that liability can be imposed on directors.[27] Finally, he found that this case was about attribution.[28]

Lord Sumption's first reason does not seem well-supported by authorities. This is because none of the authorities[29] cited by him addressed, let alone decided, the question of whether the illegality defence should apply if doing so would undermine or defeat the operation of another rule of law, particular a statutory provision. This question, according to Lords Toulson and Hodge, is the central issue in *Bilta*.

It might be said that because Lords Toulson and Hodge analysed the adverse effect of the application of the illegality defence on the creditors, their reasoning is inconsistent with *Apotex*. There, Lord Sumption said that the illegality defence does not permit the court 'to make a value judgment about the seriousness of the illegality and the impact on the parties of allowing the defence'.[30] A closer analysis of Lords Toulson and Hodge's reasoning, however, shows that it is not contrary to *Apotex*. This is because their discussion of the adverse consequences on the claimant is a result of their analysis of the contravention of the common law and statutory rule protecting creditors' interests, should the illegality defence be allowed to succeed. The consequences on the claimant are merely collateral to the central and determinative issue of whether allowing the illegality defence to succeed would undermine the policy and purpose of the statutory provisions.

Equally important, it would be remarkable if a rule of law derived from the common law, such as the illegality defence, is to be mechanically applied if doing so would frustrate the operation of a statute. After all, proper consideration has to be given to the principle of parliamentary sovereignty (ie, an Act overrides, or directly or indirectly modifies, inconsistent provisions of pre-existing statutory or common law);[31] the principle that courts should avoid reaching an outcome

24 *Bilta* n 1 above at [207], [126]-[131], [166]-[167].
25 *ibid* at [90].
26 *ibid* at [99]-[102].
27 *ibid* at [104].
28 *ibid* at [105].
29 *Tinsley* v *Milligan* n 3 above; *Les Laboratoires Servier* v *Apotex Inc* [2014] UKSC 55; [2014] 3 WLR 1257 (*Apotex*).
30 *Apotex ibid* at [19].
31 O. Jones (ed), *Bennion on Statutory Interpretation* (London: LexisNexis, 6th ed, 2013) 167-168, 171.

that allows the common law to defeat the operation of a statutory provision thereby depriving the claimant of civil remedies intended by parliament, such as the case in *Bilta*; and the principle that courts should avoid arriving at a decision that involves accepting an anomalous legal rule or doctrine.[32] Unsurprisingly, Lord Neuberger concluded that 'a claim against directors under section 172(3) cannot be defeated by the directors invoking the defence of *ex turpi causa*'.[33]

On Lord Sumption's second reason, he disagreed that the policies underlying section 172(3) require directors to be subject to liability despite the illegality defence; this is in part because the company is permitted under sections 180(4) and (5) to authorise directors' breaches of duty which would otherwise be unlawful, thereby exempting them from any liability.[34] But the authorisation is expressly permitted by the statute. Thus, unless there are express statutory provisions exempting directors from liability or waiving the duties of directors, sections 172(3) and 180(5), which require directors to consider or act in the creditors' interests, should not be defeated by the application of the illegality defence, a common law rule.

The above analysis concerns claims made by a company against the delinquent directors and/or its third party co-conspirators. In the context of a third party who is not a conspirator to the wrongdoing committed by the company's directors or agents, the Court could have provided clearer guidance on the circumstances under which the acts or knowledge of the delinquent company's directors or agents should be attributed to the company in order to bar the company's claim against that third party. Lords Toulson and Hodge said that it 'depends on the nature of the claim'[35] but without laying down any general principle. It is suggested that where a third party has breached a duty that it owes to the company, the acts or state of mind of the delinquent directors are not attributable to the company to bar its claim against the third party. Otherwise, third parties can simply breach the duties that they owe to the company and yet are insulated from liability. But the difficulty arises if it is a 'one-man' company suing a third party.

This brings us to the third and final important aspect of *Bilta*, which is the Court's interpretation of the significance of *Stone & Rolls*. There, the sole director and sole beneficial shareholder defrauded certain banks. The company's liquidator alleged that the auditors breached their duty by failing to detect the fraud. The auditors accepted that they were in breach of their duty and conceded that but for their breach, the fraud would have been detected earlier. The liquidator sought to recover from the auditors the losses caused by the extension of the period of fraud. The auditors raised the illegality defence and succeeded. Given the intractable difficulty in extracting any ratio from that case and in the light of trenchant academic criticisms, Lord Neuberger clarified that it is authority only for this point and nothing more: 'on the facts of the particular case, the illegality defence succeeded and that the claim should be

32 *ibid*, 890.
33 *Bilta* n 1 above at [20].
34 *ibid* at [104].
35 *ibid* at [207].

struck out'.[36] Nonetheless, Lords Neuberger[37] and Mance[38] agreed with two of the propositions that Lord Sumption[39] derived from *Stone & Rolls*. The first is that the illegality defence cannot apply to bar the company's claim against a third party in connection with the fraud perpetrated on it by its directing mind and will where there are innocent shareholders or directors. The second proposition is that where a 'one-man' company sues a third party, the latter could raise the illegality defence in certain circumstances (such as those in *Stone & Rolls*) where it was not involved in the dishonesty and there are no innocent shareholders or directors.

On the first proposition, it is submitted that even where there are no innocent shareholders or directors, a third party should still be precluded from raising the illegality defence to bar a 'one-man' company's claim against the latter for breach of duty *if*: (i) in a tortious action, the nature and extent of losses sustained by the company is within the scope of the third party's duty; and (ii) the sole director and shareholder does not profit from the damages that are recoverable from the third party (through mechanisms such as contribution proceedings).[40] It is crucial to determine the scope of a third party's duty because, for example, a critical issue in *Stone & Rolls*[41] is whether the scope of duty in tort of the third party in that case (auditors) extends to the protection of the interests of creditors of an insolvent company (which the majority answered in the negative, but Lord Mance dissented). It is important to ensure that the wrongdoer (ie, a delinquent director/shareholder) does not profit from his wrongdoing because that is a key rationale underlying the illegality defence. Further, a third party should not be able to raise the illegality defence against a claim made by a 'one-man' company because the law draws a distinction between the interest and state of mind of the company and that of the sole director and shareholder who has defrauded the company: *a sole shareholder* or the whole body of shareholders cannot 'validly consent to their own appropriation of the company's assets for purposes *which are not the company's*'.[42]

On the second proposition, Lord Neuberger clarified that the court should not 'purport definitively to confirm'[43] that *Stone & Rolls* has the effect of barring a company's claim against auditors where the company was insolvent or near insolvent at the relevant audit date. However, with respect, this is

36 *ibid* at [24].
37 *ibid* at [26].
38 *ibid* at [50].
39 *ibid* at [80]. The other proposition that Lord Sumption derived from *Stone & Rolls* was rejected by Lords Neuberger (at [29]) and Mance (at [50]), ie, the illegality defence is only available where the company is directly, as opposed to vicariously, responsible for the illegality.
40 E. Lim, n 5 above, 804-805. However, where the sole director and shareholder of a company has defrauded a solvent company, Lord Mance (in *Stone & Rolls* at [256]) stated that the auditor can rely on the illegality defence in order to bar the claim by the one-man company against it because the auditor cannot be said to have breached its duty in failing to draw the attention of the owner to his own fraud, as the sole shareholder cannot allege that he does not know of, or is misled by, the fraud.
41 *ibid per* Lord Phillips at [67]-[68]. See also *Bilta* n 1 above at [135] and [152] *per* Lords Toulson and Hodge.
42 *Prest* v *Petrodel Resources Ltd* [2013] 2 AC 415 at [41] *per* Lord Sumption (emphasis added). See also *Stone & Rolls* n 2 above at [230] *per* Lord Mance.
43 *Bilta* n 1 above at [28].

unsatisfactory. It has been astutely observed that '[u]ltimately, what divided the judges in *Stone & Rolls* was determining the classes of innocent parties whose interests the contract of audit is designed to protect'.[44] And given that the majority (particularly Lords Phillips and Walker) held that the protection of creditors' interests is outside the scope of the auditors' duty, the Supreme Court in *Bilta* could have said that either *Stone & Rolls* was wrongly decided (and therefore the second proposition would not apply to an insolvent or near-insolvent company), or because it was correctly decided, the second proposition would, as a matter of logic, apply. To say that 'we ought not shut the point out'[45] without providing further guidance is, with respect, unsatisfactory.

Despite the Court providing helpful clarification on the issue of attribution, the majority[46] did not articulate what the correct approach to the illegality defence is, although Lords Sumption, Toulson and Hodge did. Nevertheless, the judges recognised that it is vital to make a determination of the correct approach in future cases. The next section of this note will only briefly evaluate these approaches given space constraints and because it is not the determinative issue in *Bilta*.

ILLEGALITY DEFENCE

For ease of exposition, the current approaches to the illegality defence can be, broadly speaking, divided into the strict and flexible approaches. The clearest authority in support of the strict approach can be found in *Tinsley* v *Milligan*, which was affirmed in *Apotex*,[47] as well as in Lord Sumption's dicta in *Bilta*. The flexible approach is exemplified in *Hounga* v *Allen*[48] (*Hounga*) which was endorsed by Lords Toulson and Hodge in *Bilta*.[49]

Under the strict approach, the application of the illegality defence 'allows no room for the exercise of any discretion by the court in favour of one party or the other'[50] and 'is indiscriminate and so can lead to unfair consequences between the parties to litigation',[51] thereby 'capable of producing injustice'.[52] Lord Sumption observed that it is 'bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits . . . '[53] He said that the court is required to apply the illegality defence (which is based on a rule of law) in every case to which it applies.[54] Crucially, he emphasised that '[i]t is not a discretionary power on which the court is merely entitled to act, nor is it dependent upon a judicial value judgment about the

44 P. Watts, 'Audit contracts and turpitude' (2010) 126 LQR 14.
45 *Bilta* n 1 above at [28] *per* Lord Neuberger.
46 *ibid per* Lords Neuberger (with whom Lords Clarke and Carnwath agreed) and Mance.
47 n 29 above.
48 [2014] UKSC 47; [2014] 1 WLR 2889.
49 n 1 above at [171]-[174].
50 *Tinsley* n 3 above at 355 (Lord Goff dissenting).
51 *ibid*.
52 *ibid* at 364.
53 *Apotex* n 29 above at [13].
54 *Bilta* n 1 above at [62].

balance of the equities in each case'.[55] Thus, under the strict approach, the 'effect of the illegality is not substantive but procedural'.[56]

Under the flexible approach, Lord Wilson (with whom Baroness Hale and Lord Kerr agreed) held in *Hounga* that it is necessary to examine the policy underlying the illegality defence, stating that

> [t]he defence of illegality rests upon the foundation of public policy ... 'Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification': *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which application of the defence would run counter?'[57]

The need to examine the underlying policies was also underscored by Lord Hughes (with whom Lord Carnwath agreed) in *Hounga*,[58] Lord Toulson in *Apotex*[59] and both him and Lord Hodge in *Bilta*.[60] The clear implication is that if the illegality defence is not justified by its underlying policies, it should fail, which is the case in *Hounga*.

Critique

The majority's approach to the illegality defence in *Hounga*, endorsed by Lords Toulson and Hodge in *Bilta* and in a recent Court of Appeal decision,[61] is neither contrary to *Tinsley* nor *Apotex*. In the latter case, Lord Sumption held that the illegality defence is not based 'on the perceived balance of merits between the parties to any particular dispute'.[62] He said that the illegality defence did not permit the court 'to make a value judgment about the seriousness of the illegality and the impact on the parties of allowing the defence'.[63] However, the majority's reasoning in *Hounga* does not fall foul of that.[64] The court there did not reject the application of the illegality defence on the basis that the defendant should not receive an unjustified windfall; nor did it say that the illegality defence should fail because it would be unfair or unjust to the claimant to deny her the remedy that she sought when compared to the nature or extent of her turpitude or that of the defendant.[65]

55 *ibid*.
56 *Tinsley* n 3 above at 374 *per* Lord Browne-Wilkinson.
57 *Hounga* n 48 above at [42].
58 *ibid* at [55].
59 *Apotex* n 29 above at [57].
60 *Bilta* n 1 above at [171]-[174].
61 *R (on the application of Best)* v *Chief Land Registrar* [2015] EWCA Civ 17 (*Best*) at [51] *per* Sales LJ (with whom McCombe LJ agreed); cf Arden LJ.
62 *Apotex* n 29 above at [13].
63 *ibid* at [19].
64 cf J. C. Fisher, 'The *ex turpi causa* principle in *Hounga* and *Servier*' (2015) 78 MLR 854, 860-861.
65 Although there are obiter remarks, in *Hounga* n 48 above, at [39], which might be read as suggesting otherwise, they have to be interpreted in the context of Lord Wilson's remarks concerning the inextricably linked test.

On the contrary, given that the illegality defence is a rule based on public policies, a careful analysis of the majority's judgment in *Hounga* shows that the court was only examining the policies underlying the rule, and determining whether they would be applicable to the facts of the case. Neither *Tinsley* nor *Apotex* precludes the court from evaluating the policies underlying the illegality defence and weighing them against a competing policy underlying another applicable rule. Both cases only objected to the court weighing the adverse consequences to the parties as a result of granting or refusing relief. But that was not what the majority in *Hounga* did. Lord Wilson did not weigh the 'equities' of the case by conducting a cost-benefit analysis of the effect of applying the illegality defence on the claimant and defendant. Thus, the majority's approach in *Hounga*, ie, the flexible approach, does not entail judging 'the significance of the illegality or the consequences for the parties of barring the claim'.[66]

Moreover, although it is stated in *Tinsley* that the application of the illegality defence is 'indiscriminate',[67] it is with reference to the effects the application would have on the parties, particularly the claimant. It does not bar the court from evaluating the policies underlying the rule, only the consequences for the parties as a result of applying the rule, ie, *Hounga* is not incompatible with *Tinsley*. After all, the Supreme Court in *Hounga* did examine and endorse the reasoning of *Tinsley* which rejected the public conscience test and found no consistency between that and the flexible approach. Lords Toulson and Hodge are correct to say that *Tinsley* 'did not preclude this court from adopting the approach in *Hounga* . . . '[68] and '[n]o member of the court in *Les Laboratoires Servier* suggested that the court's approach in *Hounga v Allen* had been wrong'.[69] Tellingly, the Court of Appeal in a recent case held that *Hounga* 'confirmed the position arrived at in *Tinsley*'[70] and stated that 'the approach of the Supreme Court in *Les Laboratoires Servier* is compatible with its approach in *Hounga*, and in particular with the approach set out by Lord Wilson . . . ',[71] statements which were not disapproved of by any of the judges in *Bilta*. Finally, Lord Sumption in *Bilta* did not object to the reasoning or outcome in *Hounga*.[72] Thus, contrary to Lord Neuberger's obiter remarks,[73] it is unnecessary to depart from *Tinsley* in order to support the flexible approach in *Hounga*.[74]

However, it might be said that even if the evaluation of public policies should not be precluded where the application of the illegality defence would violate or undermine the public policy underlying another rule of law, particularly a statutory obligation or convention obligation as in the case of *Bilta* and *Hounga*,

66 *Apotex* n 29 above at [18] *per* Lord Sumption.
67 *Tinsley* n 3 above at 364D-E *per* Lord Goff.
68 *Bilta* n 1 above at [173].
69 *ibid*.
70 *Best* n 61 above at [52] *per* Sales LJ with whom McCombe LJ agreed. However, see Arden LJ's reservations at [111]-[112].
71 *ibid* at [61] *per* Sales LJ.
72 But he was sceptical, at [102], that the flexible approach applied by the majority in *Hounga* has any broader significance beyond the facts of the case.
73 *Bilta* n 1 above at [17].
74 In any event, the power to depart from precedents should be exercised very sparingly: *Jones* v *Secretary of State for Social Services* [1972] AC 944 *per* Lord Reid.

it does not follow that courts have or ought to have a general discretion to conduct such a balancing exercise where there is no conflicting or countervailing public policy. Otherwise, such a discretionary balancing exercise does not sit well with *Tinsley* which seems to require the illegality defence to be automatically applied, at least insofar as the application does not contravene or undermine public policies underlying a rule of law derived from statute or convention.

Further, it might be said that a broad interpretation of the significance of *Tinsley* and *Apotex* is as follows: the courts are prohibited from undertaking any kind of discretionary weighing exercise even if it is the sort of structured discretion recommended by the Law Commission, and regardless of whether it pertains to the underlying polices of the illegality defence (which, it has been argued, is permitted at the very least where its application would undermine a competing or conflicting policy underlying another rule of law as in the case in *Hounga* and *Bilta*) or the consequences for the parties (which *Tinsley* prohibited). As Lord Sumption remarked, '[t]he fact that the illegality defence is based on policy does not entitle a court to reassess the value or relevance of that policy on a case-by-case basis'.[75]

But Lord Sumption's obiter remark, endorsed by none of the other judges in *Bilta*, went further than the holdings in *Tinsley* and *Apotex*. Neither of the two cases raised or discussed the issue at stake in *Hounga*: whether the illegality defence should apply to the case if its underlying policies are not furthered and if permitting the defence will lead to the violation of another rule. In other words, whether the rule of law in question (ie, the illegality defence) should apply when it conflicts with another rule of law (which was a Convention obligation in *Hounga* and a statutory provision in *Bilta*.) Neither *Tinsley* nor *Apotex* addressed, let alone precluded, the evaluation of policies underlying two conflicting rules of law in order to determine which rule should prevail.

Further and no less important, just as *Tinsley* is binding authority, so is *Hounga*. The flexible approach adopted by the majority in *Hounga* formed the basis of its *ratio*. The question then is whether the flexible approach in *Hounga* has or should have any application to future cases. The Supreme Court did not confine the application of the flexible approach to the facts of *Hounga*. And there are no principled justifications for doing so. On the contrary, the illegality defence should not be mechanically applied where doing so would contravene another rule of law, particularly a statutory provision or convention obligation, without regard for the purpose and policy of the statute and convention and the policies underlying the illegality defence. It is submitted that unless and until the Supreme Court refuses to follow *Hounga*, a fair and reasonable interpretation of *Hounga* is that where the application of the illegality defence would violate or undermine another rule of law, it is authority for the point that courts could and should evaluate competing public policies. This is how the majority of the Court of Appeal in *Best* understood *Hounga*,[76] with whom Lords Toulson and Hodge in *Bilta* agreed.[77] Moreover, while Lord Sumption said in *Bilta* that he

75 *Bilta* n 1 above at [99].
76 *Best* n 61 above at [51]-[55].
77 n 1 above at [173].

was sympathetic to Arden LJ's analysis in *Best* which did not apply the flexible approach in *Hounga*, neither of them was purporting to depart from *Hounga* without saying so. Tellingly, Lord Sumption did not criticise the reasoning or decision of the majority in *Best*.

CONCLUSION

The Supreme Court in *Bilta* is to be commended for laying down clear rules on the issue of whether the state of mind or acts of the directors or agents are attributable to the company or principal in connection with a claim made by the latter against the former (as well as their co-conspirators), as well as for setting out the correct approach to the general issue of corporate attribution. But where a company (particularly a one-man company) sues a third party (particularly an auditor) for breach of duty, it is regrettable that the Court did not provide clearer guidance on whether the intent or acts of its directors (or sole director and shareholder) are attributable to the company in order to bar its claim against the third party.

On the issue of the correct approach to the illegality defence, the flexible approach exemplified by the majority's reasoning in *Hounga* and endorsed by Lords Toulson and Hodge in *Bilta* is not contrary to *Tinsley*. Further, the strict approach is 'indiscriminate'[78] and 'will often produce disproportionately harsh consequences'.[79] Moreover, the highest courts in various common law jurisdictions have adopted a flexible approach,[80] which decisions the Court would 'undoubtedly wish to examine'[81] in the future, and which 'merit reading'.[82] Accordingly, there is arguably more to be said for the flexible approach, if clear and principled criteria are formulated as to the circumstances under which the policies underlying the illegality defence should give way to opposing public policies. In the interest of certainty and predictability, the Supreme Court has to lay down clear and workable guidelines as to when and how competing policies should be balanced. The Court should not avoid this difficult but vital task by relying on the notion of 'much seems to depend upon the circumstances of the particular case',[83] which although defensible, is 'the traditional refuge of the judge who is unable to articulate a principle and wishes to retain maximum flexibility'.[84]

78 *Tinsley* n 3 above, 355 *per* Lord Goff.
79 *Apotex* n 29 above at [18] *per* Lord Sumption.
80 See, for example, *Nelson* v *Nelson* (1995) 184 CLR 538 (HC Aust); *Ting Siew May* v *Boon Lay Choo* [2014] 3 SLR 609 (Court of Appeal of Singapore). See also New Zealand's Illegal Contracts Act 1970; *Catley* v *Herbert* [1988] 1 NZLR 606; cf *NZI Bank Ltd* v *Euro-National Corporation Ltd* [1992] 3 NZLR 528.
81 *Bilta* n 1 above at [174] *per* Lords Toulson and Hodge.
82 *ibid*.
83 See, for example, *Woolwich Building Society* v *Inland Revenue Commissioners* [1993] AC 70, 173 *per* Lord Goff.
84 Lord Dyson, 'Where the Common Law Fears to Tread. Annual Lecture for ALBA 2012' (2013) 34(1) *Statute Law Review* 1, 2.

No (,) More Bolam Please: *Montgomery* v *Lanarkshire Health Board*

Clark Hobson*

Montgomery v *Lanarkshire Health Board* concerned a negligent non-disclosure of certain risks involved in natural birth. The Supreme Court departed from *Sidaway* v *Bethlem Royal Hospital*, which formerly governed negligent risk disclosure. A new test was adopted: risks that are material must be disclosed, the materiality of a risk to be decided by reference to a reasonable person in the patient's position, or where the medical professional should be reasonably aware a particular patient is likely to attach significance to that risk. The Court emphasised risk disclosure practices must focus on what the patient wants to know. Yet the Court's portrayal of this change as a development of *Sidaway* is questionable. The decision is problematic in its engagement with precedent, the new test's future implications and statements regarding therapeutic privilege. Despite rejecting *Bolam* v *Friern Hospital Management Committee's* relevance to risk disclosure, this case is likely to remain relevant.

INTRODUCTION

The value of autonomy is often seen as 'by far the most significant value to have influenced the evolution of contemporary medical law'.[1] This value is most invoked as the ethical lens that the legal practices relating to risk disclosure (at times alternatively termed, if slightly incorrectly, informed consent[2]) are seen through. In *Montgomery* v *Lanarkshire Health Board*[3] (*Montgomery*), the Supreme Court considered a claim brought by Nadine Montgomery. She sought damages on behalf of her son, Sam Montgomery, for the severe injuries he sustained as a result of complications during labour and delivery. It was held that Mrs Montgomery's consultant obstetrician and gynaecologist, Dr Dina McLellan, was negligent in failing to disclose the risk of shoulder dystocia that may have arisen from natural delivery, and failing to discuss, as a direct result of these risks, the alternative possibility of delivering the baby by caesarean section.

This was the first opportunity in thirty years, since the House of Lords decision in *Sidaway* v *Bethlem Royal Hospital*[4] (*Sidaway*), that the Supreme

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1 J. K. Mason and G. T. Laurie, *Mason and McCall Smith's Law and Medical Ethics* (Oxford: OUP, 9th ed, 2013) 8.

2 Though Lady Hale did state in *Montgomery* n 3 below at [107], that the case provided the opportunity to confirm the confident statement that the need for informed consent was firmly part of English and Scottish law, see further T. K Feng, 'Failure of Medical Advice: Trespass or Negligence' (1987) 7 LS 149. See, alternatively, J. Miola, 'On the Materiality of Risk: Paper Tigers and Panaceas' (2009) 17 Med LR 76.

3 *Montgomery (Appellant)* v *Lanarkshire Health Board (Respondent) (Scotland)* [2015] UKSC 11.

4 *Sidaway* v *Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

(2016) 79(3) MLR 468–503

Court has had to rule directly on the legal standards regulating information provision and risk disclosure. In *Sidaway*, it was held that whether a medical professional negligently failed to disclose a risk relating to medical treatment was to be decided according to the test set out in *Bolam* v *Friern Hospital Management Committee*[5] (*Bolam*), otherwise known as the *Bolam* test. *Bolam* is authority for the proposition that a medical professional will not be guilty of negligence if they have acted in accordance with a practice accepted as proper by a responsible body of medical practitioners. This is sometimes known as the 'professional-practice' test.[6]

Though the House of Lords has, since *Sidaway*, discussed the appropriate standard of risk disclosure in relation to medical treatments in *Chester* v *Afshar*[7] (*Chester*), *Chester* did not require a ruling on such standards, as it was primarily concerned with causation. The Supreme Court in *Montgomery* was invited to depart from *Sidaway*, and reconsider the duty of a medical professional to disclose certain material risks when advising about treatment. It duly did, with Mrs Montgomery succeeding in her claim.

Montgomery is highly significant for numerous reasons. Not only does the decision impact upon the scope of the medical professional's duty to disclose to avoid negligent practice, but it comes amid claims that '[t]he common law no longer sees the professions as somehow sacred or fragile assets of society, which merit special protection'.[8] Linked to this is a pervasive concern throughout the leading joint judgment given by Lord Kerr and Lord Reed,[9] and the short 'footnote' concurring judgment from Lady Hale,[10] with what has been called the concept of 'jurisdiction'; the demarcation by the Court of a territory to which it alone exclusively possesses the appropriate power to make determinations on matters that arise.[11] This is done by addressing the underlying nature of the issues surrounding risk disclosure. As a result, the Court repeatedly emphasises one broad message: risk disclosure should change to focus on what the patient wants to know rather than what the medical professional may wish to provide.

This note will discuss how the Court reaches and portrays this message. Whilst the approach in reaching this decision is commendable, it is not to be welcomed uncritically. A large part of the cutting edge of *Montgomery* comes from the Court trying to present its decision as a development of *Sidaway*, when in reality *Montgomery* signifies an important departure from that case. The Court could have been more explicit that this was a departure from *Sidaway*, given the substance of the new test, rather than trying to reinterpret

5 [1957] 1 WLR 582.
6 In Scotland, the equivalent of the *Bolam* test is that test laid down by Lord President Clyde in *Hunter* v *Hanley* 1955 SC 200.
7 [2004] UKHL 41. See Lord Hope at [48]-[59], and Lord Steyn at [15]-[19].
8 Lord Justice Jackson, 'The Professions: Power, Privilege and Legal Liability' (Professional Negligence Bar Association Peter Taylor Memorial Lecture) 10 at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/pnbalecture-_2_.pdf (last accessed 25 June 2015).
9 With whom Lord Neuberger, Lord Clarke, Lord Wilson, Lord Hodge, and Lady Hale (at [117]), agreed.
10 n 3 above at [107]-[117]; [117].
11 See further K. Veitch, *The Jurisdiction of Medical Law* (Hampshire: Ashgate, 2007).

the judgments in *Sidaway* in a manner most consistent with the message above. Second, the Court does assert that autonomy is the dominant value underlying risk disclosure (as opposed to beneficence). However, the Court also accepts that in certain circumstances information as to risks can be justifiably withheld from the patient by the medical professional. Coupled with trying to present the case as a development from *Sidaway,* this invoking of the 'therapeutic privilege' potentially allows for a more orthodox interpretation of *Sidaway* to be restored, depending on how wide the circumstances are in which information can be justifiably withheld. This is despite the Court confirming emphatically that there was 'no reason to perpetuate the application of the *Bolam* test in this context any longer'.[12] Finally, given that the purported irrelevance of *Bolam* can be questioned, this means that the interpretation of the judgment of Lord Bridge in *Sidaway* becomes particularly important. It is here that the downplaying of elements of his Lordship's judgment is in tension with one interpretation as to the real reading of that judgment. This interpretation is one which the Court might have assigned weight to, given its repeated emphasis precisely on *Montgomery* as a *development* from the decision in *Sidaway.*

FACTS

Nadine Montgomery graduated with a BSc in molecular biology at Glasgow University, and then went on to work as a hospital specialist for a pharmaceutical company; this portrays Mrs Montgomery, as was noted in the Outer House of the Court of Session, as 'a clearly highly intelligent person'.[13] Additionally, both her mother and sister were general practitioners, meaning Mrs Montgomery was able to avail herself of further independent professional support if needed. Mrs Montgomery was also diabetic. Pregnant women who are diabetic are likely to have larger than average babies. Mrs Montgomery was informed of this during the course of her pregnancy. There is also greater risk of foetal abnormalities and stillbirth in later stages of pregnancy, as well as mechanical problems when giving birth. One of the reasons for potential mechanical problems is that there can be a particular concentration of weight on the baby's shoulders. This can lead to shoulder dystocia, whereby the baby's shoulders become stuck above the pelvis. For all these reasons, Mrs Montgomery was regarded as a high risk pregnancy requiring intensive monitoring.

Shoulder dystocia has been described as being 'likely to engender an atmosphere of crisis in the delivery room',[14] as well as 'probably the most frightening obstetric emergency that medical staff can encounter'.[15] As well as presenting risks to the mother, the manoeuvres required to free the baby can cause a brachial plexus injury (whereby the nerve roots connecting the baby's arm to the spinal cord can become damaged). Further, the umbilical cord can become trapped against the mother's pelvis, and consequently may become occluded.

12 n 3 above at [86].
13 *Nadine Montgomery* v *Lanarkshire Health Board* [2010] CSOH 104 at [246].
14 *Jones* v *North West Strategic Health Authority* [2010] EWHC 178 (QB) at [51].
15 *ibid*.

Occlusion of the umbilical cord can cause prolonged acute hypoxia, which in turn can lead to cerebral palsy or death.

During Mrs Montgomery's labour, shoulder dystocia did occur. There was a 12-minute delay between delivering Sam Montgomery's head, and the rest of his body. Due to the manoeuvres used to resolve the shoulder dystocia, Sam Montgomery suffered a brachial plexus injury that resulted in a permanent disability: Erb's palsy of the upper limb.[16] Occlusion of the umbilical cord also occurred. Later he sustained a 12-minute period of acute hypoxia. He was diagnosed with cerebral palsy affecting all four limbs. Though the injuries did occur as a result of the manoeuvres performed, it was held in the Outer House and the Inner House of the Court of Session that Dr McLellan was not negligent in the management of Mrs Montgomery's labour.[17] Indeed, this was not appealed in the Supreme Court. Instead, it was invited to reconsider the duty of a medical professional to a patient with regards to advice about treatment, given the risk of shoulder dystocia itself and the crisis which can result from its occurrence.[18]

The principal evidence given by Dr McLellan (which was not materially in dispute) was that the risk of the occurrence of shoulder dystocia was 9–10 per cent with diabetic mothers. The risk of a brachial plexus injury following shoulder dystocia was put at about 0.2 per cent, with the risk of cerebral palsy or death put at less than 0.1 per cent.[19] Mrs Montgomery was not told about the risk of shoulder dystocia. Whilst Dr McLellan did accept the risk of the occurrence of shoulder dystocia was high, it was argued that it was not her practice to discuss these risks. This was precisely because of very small risk of adverse consequences and the overwhelming likelihood that, if shoulder dystocia was mentioned, many women would opt for a caesarean section. Dr McLellan believed it was not 'in the maternal interests for women to have caesarean sections'.[20] Whilst it was accepted that Mrs Montgomery had expressed *concern* about the size of the foetus, and had done so at least more than once,[21] it was in dispute whether she had specifically questioned Dr McLellan about the relevant risks of vaginal delivery.[22]

The case therefore presents, with its intricacies, a paradigmatic instance of the risk disclosure scenario. There was a failure to disclose certain risks, leading the appellant reluctantly to deliver vaginally, when she had repeatedly emphasised concerns about her ability to do so, given her small stature and the size of her baby.[23] Mrs Montgomery's negligence claim was rejected in

16 n 13 above at [3].
17 *ibid* at [198]; [205]-[206]; *NM* v *Lanarkshire Health Board* [2013] CSIH 3 at [64]-[66]. See further, R. Heywood, 'Negligent Antenatal Disclosure and Management of Labour' (2011) 19 Med LR 140.
18 n 3 above at [4].
19 n 13 above at [229] See further at [171], [177]; n 17 above at [11]. Finally, see also the reliance in both the leading judgment and Lady Hale's judgment on the Royal College of Obstetricians and Gynaecologists, Guideline No 42 on *Shoulder Dystocia* (ethical guidance, 2005), n 3 above at [9]; [112].
20 n 3 above at [13]. See further n 13 above at [19]; n 17 above at [46]-[47].
21 n 3 above at [17]; n 13 above at [19].
22 n 13 above at [238]; [260]; n 17 above at [14]-[15]; [35]-[38].
23 n 3 above at [17]; [94].

both the Outer House and the Inner House, *Sidaway* being influential in the lower courts' views on more recent developments in the law relating to risk disclosure. The Supreme Court did not consider it necessary to engage in a detailed discussion of causation and *Chester*, given that the majority found Mrs Montgomery definitely would have had a caesarean section if informed of the risks of the occurrence of shoulder dystocia.[24]

THE NEW TEST FOR RISK DISCLOSURE

As noted in the introduction, the majority of judges in *Sidaway* held that the test governing the negligent non-disclosure of risks relating to medical treatment was one based upon professional practice; that is, based upon *Bolam*.[25] Yet, if their Lordships' reasoning in *Montgomery* is provisionally set aside, and the majority test in *Sidaway* is compared with the new standard for a medical professional's legal duty of risk disclosure (as set out in paragraph 87 of Lord Kerr and Lord Reed's judgment in *Montgomery*), the two tests initially appear very different in nature. The new standard is one whereby the medical professional is

> under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.[26]

This test stands in contrast to *Sidaway,* and replicates that put forward by the Australian High Court in *Rogers* v *Whitaker*[27] (*Rogers*). There are two limbs to this duty of disclosure. The first limb explicitly reiterates the objective, reasonable patient test. However, the second limb introduces a *particular* patient approach to the law. In order for this limb to be activated though, the medical professional must be reasonably aware, through the patient making their particular circumstances known to the medical professional, that that patient would attach particular significance to that particular risk.

The difference between these two tests can be seen in the arguments for them, and the values that constitute them. It is recognised by the Supreme Court that the rationale behind the professional-practice test is that expert matters can only be judged by experts alike.[28] It has also been asserted, more consequentially, that the rationale for the professional-practice test is one whereby 'if excessive liability is imposed upon the professions, indemnity insurance premiums will escalate and the costs of that insurance will all be passed on

24 See n 3 above at [103]-[105].
25 n 4 above, 893 *per* Lord Diplock, 900 *per* Lord Bridge, 903-904 *per* Lord Templeman.
26 n 3 above at [87].
27 [1993] 4 *Medical Law Reports* 79.
28 n 3 above at [83].

to clients/consumers'.[29] In contrast, the argument for the duty of disclosure in *Montgomery* is primarily based upon the principle of respecting a person's autonomy and choices in light of their character-values and convictions.

Applying the new test to the present case, Lord Kerr and Lord Reed concluded that 'there can be no doubt that it was incumbent on Dr McLellan to advise Mrs Montgomery of the risk of shoulder dystocia'.[30] Lady Hale was to 'entirely agree'[31] with this conclusion and judgment. Much like *Jones* v *North West Strategic Health Authority*[32] (*Jones*), it was necessary to focus on not just the risk of the potential adverse consequences, but the risk of the *occurrence* of shoulder dystocia. *Jones* was, factually, a very similar case concerning the negligent non-disclosure of shoulder dystocia, and the non-disclosure of the alternative of a caesarean section.[33] Indeed, the Court's reasons echo (without explicitly referring to) Nicol J's approach in *Jones*,[34] highlighting shoulder dystocia is 'a major obstetric emergency requiring procedures that may be traumatic for the mother, and involving significant risks to her health'.[35] Likewise, and in contrast with the approach in the lower courts,[36] Mrs Montgomery is seen as the graduate-level educated professional with experience in the health sector, who has repeatedly expressed concerns regarding her ability to deliver vaginally.

SIDAWAY: DEVELOPMENT OR DEPARTURE?

As noted above, the two tests initially appear to be different in nature. Yet, when Lord Kerr and Lord Reed initially discuss *Sidaway* in detail (after discussing the approaches of the Outer House and the Inner House[37]), there is a noticeable concern to promote the overarching message that change in the law relating to risk disclosure is not a substantial departure from established principles. This leads to two related problems. First, this is in tension with the more explicitly critical aspects of the judgment, whereby the Court asserts its jurisdiction, and addresses the underlying ethical rationale behind the practices of risk disclosure. Second, in trying to frame *Montgomery* as a development of *Sidaway,* their Lordships seem to (re)interpret the judgments in *Sidaway* in a manner designed to show that the development from *Sidaway* to *Montgomery* is smooth, despite the substance of the judgments in *Sidaway* arguably demonstrating this is not the case.

It has previously been noted that '[f]rom a legal perspective [*Sidaway*] is a mess',[38] in that there are three separate positions taken regarding to what degree

29 Jackson, n 8 above, 12.
30 n 3 above at [94].
31 *ibid* at [117].
32 n 14 above.
33 *ibid* at [3].
34 *ibid* at [50]. This was contrary to the approach of the Outer House in declining to follow *Jones*; n 14 above at [28].
35 n 3 above at [94].
36 n 13 above at [248]; n 17 above at [37].
37 n 3 above at [29]-[39].
38 J. Miola and S. Fovargue, 'How Much Information is Enough?' (2010) 5 *Clinical Ethics* 13, 14.

the professional-practice test (*Bolam*) should govern the risk disclosure scenario. As noted in the Inner House,

> although differing to some extent in the expression of their reasons, Lord Diplock, Lord Bridge (with whom Lord Keith agreed) and Lord Templeman all concluded that, in advising of the risks of an adverse outcome, essentially the same test of liability applied as was applicable in the other aspects of medical practice.[39]

This reference to the same test of liability applicable in other aspects of medical practice is the professional-practice test, ie, *Bolam*. Further, in contrast to Lord Diplock, it is possible to interpret Lord Bridge and Lord Templeman as holding that whilst the risk disclosure scenario was to be governed *primarily* by the professional-practice test, there were circumstances in which the Court could conclude, contrary to established professional practice, that a medical professional 'ought to draw the attention of a patient to a danger which may be special in kind or in magnitude or special to the patient'.[40] This interpretation of Lord Bridge's judgment will be contrasted later with an alternative reading that *fully* promotes *Bolam*. However, reinterpreting each judgment with the purpose of smoothing over the transition from *Montgomery* to *Sidaway* not only adds to what is already a complex decision, but also means that at times Lord Kerr and Lord Reed may overstate their point that this smooth transition is underpinned both in terms of precedent and legal doctrine.

Lord Kerr and Lord Reed state that in *Sidaway,* the question of whether the test in *Bolam* should be applied in relation to risk disclosure 'was approached in different ways, *but with a measure of overlap*'.[41] The overlap in the House of Lords' reasoning in *Sidaway*, according to Lord Kerr and Lord Reed, is 'the doctor's duty of care [follows] from the patient's right to decide whether to undergo the treatment recommended'.[42] Whilst first quickly dismissing Lord Diplock's judgment in *Sidaway,*[43] more substantial (and questionable) is their Lordship's discussion of the judgments of Lord Templeman and, as discussed later, Lord Bridge. These are compared with the judgment of Lord Scarman, the most ethically robust judgement in *Sidaway,* explicitly recognising and implementing the principle of respect for autonomy. The Supreme Court notes in light of Lord Scarman's approach, medical evidence is needed only to establish the probability and magnitude of the relevant harms should they occur. The question of whether there has been a breach of duty, however, is ultimately *not* a medical question.[44] The Supreme Court is also clear that the practices of risk disclosure are inherently ethical rather than relying on technical medical skill. Lord Kerr and Lord Reed analyse the limits of the professional-practice test to the duty of risk disclosure. It is first noted that:

39 n 17 above at [21].
40 n 4 above, 903. See also n 5 above, 900 *per* Lord Bridge.
41 n 3 above at [41] (emphasis added).
42 *ibid* at [56].
43 *ibid* at [42].
44 *ibid* at [48].

> The doctor's advisory role cannot be regarded *solely as an exercise of medical skill* without leaving out of account the *patient's entitlement to decide on the risks to her health* which she is willing to run ... Responsibility for determining the nature and extent of a person's rights *rests with the courts, not the medical professions*.[45]

It is then recognised that the rationale behind the professional-practice test (expert matters can only be judged by experts alike) cannot be used to justify different practices of disclosure. According to the Supreme Court, different practices of disclosure and the making of value judgments 'are attributable not to divergent schools of thought in medical science, but merely to divergent attitudes among doctors as to the degree of respect owed to their patients'.[46] Likewise, Lady Hale is equally robust in highlighting the ethical nature of the giving of advice about risks, with specific reference to giving birth either vaginally, or by caesarean section.[47]

However, in one respect, the judgment of Lord Kerr and Lord Reed goes even further than that of Lord Scarman. In *Sidaway,* Lord Scarman notes that 'the two critically important medical factors are the degree of probability of the risk materialising and the *seriousness* of possible injury if it does'.[48] The emphasised part of the quotation again appears to demonstrate that Lord Scarman is concerned with the adverse *consequences* should the risk materialise, rather than the *occurrence* of the risk itself. In tension with this and the Outer House[49] and Inner House,[50] the relevant factor for the Supreme Court in determining whether the non-disclosure of risks by Dr McLellan was negligent was the occurrence of the shoulder dystocia itself. This is important because it appears that the principles underpinning even the judgment most supportive of the decision in *Montgomery* have had to be extended. Whilst this might still be classed as a development of *Sidaway,* the fact that Lord Scarman is in the minority in *Sidaway* (holding that *Bolam* should not govern the risk-disclosure scenario[51]) demonstrates the Supreme Court's decision is an even further departure from those judgments in *Sidaway* that advocate the professional-practice test.

More questionable is Lord Kerr and Lord Reed's reframing of Lord Templeman's judgment, holding that his Lordship 'implicitly rejected the *Bolam* test',[52] and that Lord Scarman's reasoning was 'in substance the same as Lord Templeman's: the doctor's duty of care followed from the patient's right to decide whether to undergo the treatment recommended'.[53] Lord Templeman's judgment in *Sidaway* at times asserts quite a paternalistic stance. While he did believe that patients were allowed to reject 'advice for reasons which are rational, irrational or for no reason',[54] to state that at the heart of his judgment is the

45 *ibid* at [83] (emphasis added). See also this discussion, in the context of Lord Bridge's caveat in *Sidaway,* at *ibid* [61].
46 *ibid* at [84].
47 *ibid* at [115].
48 n 4 above, 889.
49 n 13 above at [233].
50 n 17 above at [23].
51 n 4 above, 882, 885, 888-889.
52 n 3 above at [55].
53 *ibid* at [56].
54 n 4 above, 904.

patient's right to judge whether to undergo the treatment recommended again involves the Court embarking on revision with hindsight. Lord Templeman is explicit in stating:

> I do not subscribe to the theory that the patient is entitled to know everything . . . An obligation to give a patient all the information available to the doctor would often be inconsistent with the doctors contractual obligation to have regard to the patient's best interests.[55]

The promotion of autonomy, in light of this argument, rings hollow. How is the patient able to exercise a right to judge whether to undergo treatment, if the medical professional is to gauge how much information to tell the patient on the basis of her medical experience and training?[56] Therefore, this reinterpretation again shifts the basic presumption of his Lordship's judgment, this time from a judgment grounded primarily in (if anything) the value of beneficence to one grounded primarily in the value of autonomy.

Indeed, that Lord Kerr and Lord Reed also argue that Lord Bridge's judgment in *Sidaway* 'might be thought to arrive at a position not too distant from that of Lord Scarman',[57] reached by focussing on the 'caveat' given to Lord Bridge's holding that the degree of disclosure necessary was to be governed by *Bolam*, further substantiates the conclusion of the Court. That conclusion is that there is room for development in the law relating to risk disclosure without fundamental change, as *Sidaway* does not give that much priority to *Bolam*. Whether this is strictly speaking true does not seem too concerning for the majority of the Supreme Court.[58] Given the Supreme Court is entitled to overrule *Sidaway*, it is surprising that they seek to reinterpret the case at all. One reason for this might be because the Outer House[59] and Inner House[60] do engage in quite lengthy defences of *Sidaway*. It might be that this 'smoothing over' is one way of dealing with these defences. Direct concern with the Court of Sessions' decisions takes up 12 paragraphs of Lord Kerr's and Lord Reed's

55 *ibid*.
56 J. Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford: Hart 2007) 61.
57 n 4 above at [53].
58 There has also been a plethora of comment regarding whether Lord Woolf MR in *Pearce* v *United Bristol NHS Healthcare Trust* [1999] PIQR 53, 59 (*Pearce*) had already introduced the reasonable patient test (in England and Wales). For representative arguments that *Pearce* does introduce the reasonable patient test, See M. Brazier and J. Miola, 'Bye Bye *Bolam*: A Medical Litigation Revolution?' (2000) 8 Med LR 85, 110. See also R. Heywood, 'Subjectivity in Risk Disclosure: Considering the Position of the Particular Patient' (2009) 25 (1) PN 3, 4. See also Heywood, n 17 above, 146. Finally, see K. Mason and D. Brodie, '*Bolam, Bolam*—Wherefore Art Thou *Bolam*?' (2005) 9 Edin LR 298, 301. For arguments that *Pearce* simply refines *Sidaway* and does not introduce a reasonable patient standard into the law, see A. Maclean, 'The Doctrine of Informed Consent: Does it Exist and Has it Crossed the Atlantic?' (2004) 24 LS 386, 407-410. See also A. Maclean, 'From *Sidaway* to *Pearce* and Beyond: Is the Legal Regulation of Consent any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) Med LR 108, 117-121. Again, this extensive debate appears to be of little concern to their Lordships, who attempt to deal with subsequent case law post-*Sidaway* in a mere six paragraphs. See n 3 above at [63]-[69].
59 n 13 above at [230]-[235].
60 n 17 above at [17]-[30].

judgment.[61] Even so, this smoothing over does not chime with the substance of the decisions in *Sidaway*.

All this shows just how important is the portrayal of the message that change is needed in the law of risk disclosure. The majority of the Supreme Court is willing to emphasise those principles and values embedded in previous case law that support the proposition that a medical professional must disclose (at least) those risks that a reasonable patient in those circumstances would find significant. It is questionable whether the level of emphasis given to the value of autonomy is consistent with a close reading of *Sidaway*.

BOLAM'S POTENTIAL RELEVANCE (1): THE THERAPEUTIC PRIVILEGE

Sidaway is also used by Lord Kerr and Lord Reed to demonstrate substantively *why* change is necessary in relation to risk disclosure. Here the Court continues to assert its jurisdiction, as well as to substantiate the argument that autonomy is the dominant value underpinning risk disclosure practices. It is first noted that '[t]he significance attached in *Sidaway* to a patient's failure to question the doctor is however profoundly unsatisfactory'. There is an appropriate focus on the possibility of the doctor-patient relationship being unilateral in nature, due to 'social and psychological realities of the relationship between a patient and her doctor'. Not only was the question raised of how those patients lacking information about risks they face could question a medical professional, more pertinent to Mrs Montgomery's case, it was argued that 'this approach leads to the drawing of excessively fine distinctions between questioning, on the one hand, and expressions of concern falling short of questioning, on the other'.[62] Indeed, it was argued in the Outer House that there was no substantive difference between Mrs Montgomery's repeated raising of concerns regarding vaginal delivery and asking specifically about these risks.[63] Lord Reed and Lord Kerr also analyse the medical and social settings in which the practices of risk disclosure have developed to give expression to the increasing importance of respecting a person's autonomy. Despite being easily able to find the promotion of autonomy in *Sidaway* earlier, they note

> [s]ince *Sidaway,* it has become increasingly clear that the paradigm of the doctor-patient relationship implicit in those speeches in that case has ceased to reflect the reality and complexity of the way in which health services are provided.[64]

Lady Hale takes a similar approach, relying on various sources of discourse to substantiate her discussion of pregnancy, risks to the mother and child, and the role of the medical professional in offering pregnant women

61 n 3 above at [26]-[38].
62 *ibid* at [58].
63 n 13 above at [151]-[152].
64 n 3 above at [75].

'evidence-based information to support and enable them to make informed decisions'.[65]

This reasoning is to be welcomed. If respect for autonomy is seen as a positive obligation to buttress the understanding of others and place the patient in a position (in terms of information, emotions, situation etc) where they can act according to their character-values and convictions, then the distinction between specific questions and the raising of concerns is one without a difference. This translates into there being different standards of a medical professional's duty of disclosure, unsupported by principle. Here then is the active willingness of the Court to distance itself (substantively) from *Sidaway.*

But despite this promotion of autonomy, this does not mean that the value of beneficence loses all significance in *Montgomery*. Indeed this is the first point where, despite Lady Hale noting *Bolam* has become 'quite inapposite'[66] within risk disclosure practices, there may still be scope for *Bolam* to have an influence in this area of the law.

This is due to their Lordships immediately qualifying the standard by stating that a medical professional is 'entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health';[67] in other words, there is the availability of the 'therapeutic privilege'. Concerns have been raised about this defence that in principle grants medical professionals the ability to withhold information based upon professional practice.[68] Not only does the Court state the disclosure of risks must be *reasonably considered* seriously detrimental to the patient's health, appearing to imply a fairly wide formulation of the therapeutic privilege, what is also worrying in this context is that it was considered 'unnecessary for the purposes of this case to consider in detail the scope of those exceptions',[69] other than sounding a general warning that the therapeutic privilege should not be abused, and that it is a limited exception.[70]

The therapeutic privilege is not unknown in English case law. In *Pearce* v *United Bristol Healthcare NHS Trust*,[71] Lord Woolf appeared to acknowledge the existence of the therapeutic privilege, noting that

> the doctor, in determining what to tell a patient, has to take into account all the relevant considerations, which include the ability of the patient to comprehend what he has to say to him or her and the state of the patient at that particular time, both from the physical point of view and an emotional point of view.[72]

65 *ibid* at [116]. See also *ibid* at [109]-[112].
66 *ibid* at [115].
67 *ibid* at [88].
68 M. Brazier, 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) Legal Stud 169, 188.
69 n 3 above at [88].
70 *ibid* at [91].
71 n 58 above.
72 *ibid,* 59.

Likewise, as Hodkinson acknowledges,[73] an analogous reference to the therapeutic privilege has been made in relation to withholding information from parents about their deceased child's post-mortem in *AB and Others* v *Leeds Teaching Hospital NHS Trust and Another.*[74] Whilst in that case the blanket practice in question of not disclosing details of post-mortem procedures was negligent, one main reason why this was negligent was that the practice 'had not been carried out on a case-by-case-basis'.[75] Lord Steyn was also to note in *Chester* that 'there may be wholly exceptional cases where objectively in the best interests of the patient the surgeon may be excused from giving a warning'.[76] Most significantly is the widest formulation (and that most similar to *Montgomery*) of Lord Scarman in *Sidaway,* where he states that it is 'plainly right that a doctor may avoid liability for a failure to warn of a material risk if he can show that he reasonably believed the communication ... would be detrimental ... to the health of his patient'.[77]

Whilst this might not quite collapse the differences between Lord Scarman's approach and that of his fellow Lordship's in *Sidaway* (given his rejection of *Bolam*) in speaking about how a *reasonable* belief on behalf of the medical professional that providing information as to risks would be detrimental to the patient's health, this still appears to leave quite a large space for the professional-practice test to operate in. Though the Supreme Court talks about the reasonable belief of serious harm, two problems arise. The first is not just that this formulation is vague, but that the Supreme Court fails to recognise that it needs to be more specific, precisely because it has separated out the therapeutic privilege from the new test for risk disclosure. Under the professional-practice test for risk disclosure itself, there is an allowance for the justified withholding of information, as this is still based upon clinical judgment. That is, a separate exception is not needed.[78] Second, the importance of *Montgomery* as a development from *Sidaway* once again becomes pertinent. One argument that might be made is that because of the emphasis on the continuum of development from *Sidaway*, especially from Lord Scarman's judgment, and the similarities of the formulations of the therapeutic privilege, *Montgomery* has not done anything to narrow the range of circumstances in which the therapeutic privilege, and thus the professional-patient test, may apply. Whilst the notion of 'significant harms' might be thought to be one limitation, this is a vague notion itself.[79]

This vague discussion is compounded by the slightly disingenuous approach the majority takes to replicating both the new test for risk disclosure and the scope of the therapeutic privilege in *Rogers.* Further guidance could have been given as to how the therapeutic privilege will operate in practice by engaging in more detail with *Rogers* itself, rather than stating that 'it is unnecessary to discuss

73 K. Hodkinson, 'The Kneed to Know—Therapeutic Privilege: A Way Forward' (2013) 21 *Health Care Analysis* 105.
74 [2004] 3 FCR 325.
75 *ibid,* 327 *per* Gage J.
76 n 7 above at [18].
77 n 4 above, 888. See also *ibid*, 904 *per* Lord Templeman.
78 Hodkinson, n 73 above, 115.
79 *ibid,* 117.

[comparative law] in detail'.[80] This is further compounded by the fact that the formulation of the therapeutic privilege in the joint judgment in *Rogers* refers to the justified withholding of information when disclosure of that risk will 'harm an unusually nervous, disturbed or volatile patient'.[81] This formulation appears narrower than that discussed in *Montgomery*, and in turn appears to be more considerate of the principle that a patient's autonomy should be respected.

Thus, the Supreme Court is committed in principle to abandoning *Bolam* in relation to risk disclosure, as is consistent with its message. Given the explicit highlighting of the therapeutic privilege, it is likely that the professional-practice test will still be available in principle. How often and widely this is used remains to be seen. Yet, in stating that respect for autonomy underpins the new reasonable patient test in *Montgomery*, and separating this out from the therapeutic privilege, the importance of placing clear limits on this privilege becomes vital. Again, the Supreme Court creates an issue for itself (the continued relevance of *Bolam*) that it does not resolve with any real clarity.

BOLAM'S POTENTIAL RELEVANCE (2): LORD BRIDGE IN *SIDAWAY*

It has been shown above that through the therapeutic privilege, the professional-practice test/*Bolam* may still have a role to play in the law governing risk disclosure. However, it is arguable that in portraying *Montgomery* as a development from *Sidaway*, this inadvertently *should* have allowed *Bolam* to be considered relevant in another way. This stems from Lord Kerr and Lord Reed's interpretation of Lord Bridge's judgment in *Sidaway*, one which is in tension with an alternative interpretation which might have been assigned greater weight, precisely because Lord Kerr and Lord Reed are so concerned to portray *Montgomery* as developing the law.

As noted above, Lord Kerr and Lord Reed conclude that Lord Bridge's judgment is not too far from Lord Scarman's in *Sidaway*, by focussing on Lord Bridge's 'caveat' to *Bolam*; in certain circumstances the courts could find that disclosing certain risks was so necessary to the patient making an informed choice, that no reasonable medical professional, 'recognising and respecting his patients right of decision', would fail to disclose that risk. Lord Bridge further notes that the 'kind of case' in mind is a procedure 'involving a substantial risk of grave adverse consequences'[82] (again, as opposed to the *occurrence* of that risk for the Supreme Court). This passage, when read appropriately, 'narrowed the gap between his position and that of Lord Scarman'.[83] The appropriate way to read that passage, according to the Supreme Court, is to not focus excessively on the notion of 'grave adverse consequences'. His Lordship was 'merely giving an example' of the 10 per cent risk of stroke to 'illustrate' the important point to concentrate on; there may be circumstances where disclosure is a must, where

80 n 4 above at [70].
81 n 27 above, 83. For a further comparative analysis as to the scope of the therapeutic privilege in international jurisdictions, see Hodkinson, n 73 above, 114.
82 n 4 above, 900.
83 n 3 above at [52].

'no reasonably prudent medical man would fail to make it'. This standard of the reasonably prudent medical professional is *any* professional who recognises and respects his patient's right of decision.[84]

Here, we begin to see a downplaying of certain important elements of Lord Bridge's 'caveat'; the highlighting of the 10 per cent risk of a stroke is now merely an 'illustration' of a general proposition. But perhaps a more appropriate reading, given that Lord Bridge goes on to state that 'no reasonably prudent medical man'[85] would fail to disclose the 10 per cent risk of stroke, is one whereby the example illustrates that the breach of *Bolam* is self-evident. This has been argued by Jonathan Montgomery to be 'an appeal to the doctrine of *res ipsa loquitur*'[86] (the evidence of breach being obvious to the judge). If this is correct, then it can be concluded that the example illustrates a principle of responsible *professional* judgment; likewise there is less room in using *Bolam* for the judiciary to also assert its jurisdiction and set standards.[87] All the while, the continuity professed between *Sidaway* and *Montgomery* presents an unnecessary, and potentially ill-founded, attempt to argue for the irrelevance of *Bolam*, when the relevance of *Bolam* can be substantiated in Lord Bridge's 'caveat', a caveat the Supreme Court relies upon.

Further, Lord Kerr and Lord Reed are also explicit later in stating that previous cases (including both lower court decisions) have been wrong to take the particular example given as of central importance, 'rather than ... the principle which the example was intended to illustrate'.[88] But if risk perception *does* differ from individual to individual,[89] then a quantified example cannot illustrate a particular patient principle. It can illustrate a reasonable patient principle (provided reasonable patients think that the risk of grave adverse harm is relevant to their decisions); it could also illustrate a principle of professional judgment, and again *Bolam* may become relevant. Still, at this point, Lord Kerr and Lord Reed's interpretation of Lord Bridge's judgment does not do the work they think it does. This all stems from the initial, constraining commitment, to show *Montgomery* as developing the law. Additionally, it is arguable, given the extent to which their Lordships focus on a 'merely illustrative' example, that the example was intended to be used, and subsequently was used, as a representative way of illustrating when the principle that it is necessary to disclose would be engaged. As such, it may have taken on a more important symbolism than Lord Kerr and Lord Reed give credit for, especially since there is a concern to display continuity with *Sidaway*.[90] Again though, all these problems appear to be of the Court's own making. Lord Bridge's 'caveat'

84 *ibid* at [53].
85 n 4 above, 900.
86 J. Montgomery, 'Medicine, Accountability, and Professionalism' (1989) 16 JL & Soc 319, 323 (emphasis in original).
87 *ibid*.
88 n 3 above at [62].
89 T. L. Beauchamp and J. F. Childress, *Principles of Biomedical Ethics* (Oxford: OUP, 7th ed, 2013) 235-236. See also R. Heywood, A. Macaskill and K. Williams, 'Informed Consent in Hospital Practice: Health Professionals' Perspectives and Legal Reflections' (2010) 18 Med LR 15. See, finally, Lord Kerr and Lord Reed's support of this proposition, n 3 above at [46].
90 This is substantiated (as noted) by the decisions of the lower courts; see n 14 above at [233]; n 18 above at [29]. See also *Pearce* n 58 above, 59 *per* Lord Woolf.

would have been less relevant if the Supreme Court had been more overt about *Montgomery* being a departure from *Sidaway,* rather than trying to emphasise continuity with that case.

What clinches the point for their Lordships that Lord Bridge's position is not too far from Lord Scarman's is the reading of the entirety of his 'caveat' (now referred to as a 'passage').[91] In doing so, Lord Kerr and Lord Reed take Lord Bridge to endorse the approach that the *primary* 'question for the judge is whether disclosure of a risk was so obviously necessary to an informed choice on the part of the patient that no doctor who recognised and respected his patient's right of decision and was exercising reasonable care would fail to make it'.[92] This is a further, arguably more deceptive sleight of hand by their Lordships. Whilst it has also been argued that Lord Bridge and Lord Templeman are closer to the objective, reasonable patient test than previously considered,[93] it is generally accepted and explicitly recognised by the Court that Lord Bridge rejected the 'North American doctrine of informed consent',[94] and that the question of breach was 'to be decided primarily on the basis of expert medical evidence, applying the *Bolam* test'.[95] To therefore readily imply that the vital question the judges must ask themselves is one which focuses upon the disclosure being necessary for an informed choice on the part of the patient overlooks the basic presumption Lord Bridge's approach is grounded on (professional-practice) and seeks to re-ground his approach in an entirely different one (the needs of the patient). Given medical professionals are much more heavily favoured by the former basic presumption than the latter (all other things being equal), this shows the importance of change to the Court.

Overall therefore, if the change in the law is this important to the Supreme Court, it bears returning to the point that has already been made many times: it would have been far clearer (and easier) for the Court to explicitly note that *Montgomery* signifies a large departure from *Sidaway.* Indeed, in trying to demonstrate the continuity with *Sidaway*, it invites further criticisms of the Court's approach in relying on Lord Bridge's judgment, one that, arguably, shows the continuing importance and relevance of *Bolam*.

CONCLUSIONS

It is unfortunate that more focus could not be given to Lady Hale's judgment. It is hoped that this judgment will at least play a part specifically in discussions about a medical professional's legal and ethical duty to disclose risks in pregnancy and childbirth. The judgment itself does seem to have a very specific purpose, with a focus on caesarean section being a low-risk, routine alternative for mothers,[96] and an attendant refocus on the risks to, and giving

91 n 3 above at [53].
92 *ibid* at [53].
93 See Miola, n 2 above, 103.
94 n 3 above at [51].
95 n 4 above, 900.
96 n 3 above at [110]; [113].

decision-making back to the pregnant woman.[97] Nonetheless, it is arguable that Lady Hale's approach involves an over-simplification of the National Institute for Health and Clinical Excellence (NICE) guidelines. This guideline is over 276 pages long, including an 'algorithm' to determine whom to offer a caesarean section to, whom not to, taking into account maternal requests, planning the place of birth, pregnancy and childbirth after a previous caesarean section, procedural and surgical aspects of a caesarean section, and post-caesarean section care, the latter two headings being yet further sub-divided.[98]

Ultimately, the decision in *Montgomery* is sensitive to the extent that the value of autonomy constitutes the legal and ethical practices of risk disclosure. This necessitates the move away from *Bolam,* and its endorsement in *Sidaway*, despite the Court's reliance on the judgments in *Sidaway* (especially Lord Bridge's) which do give prominence to the professional-practice test. In substance, there is the largely legitimate creation of a space by which the Court now has the primary authority to pronounce on matters relating to risk disclosure. In articulating the reasonable patient test coupled with a further *conditional* particular patient standard, *Montgomery* has at least symbolically gone further than ever before in protecting patient autonomy. Yet it appears that there is much still to be articulated about the relationship of the therapeutic privilege to the standard of disclosure set out by *Montgomery*. Future decisions could do worse than look abroad for further guidance as to how these two elements fit together, bearing in mind that the privilege here has been formulated in a narrow manner. Whilst 'the full majesty of the *Bolam test*' no longer continues to hold sway,[99] it is not quite time to say bye-bye *Bolam* for good.

97 *ibid* at [111]; [114]-[115].
98 NICE Clinical Guideline 132, *Caesarean section* (2011) 1, 3-7. Thanks to the anonymous reviewer who suggested this implication of Lady Hale's judgment.
99 Jackson, n 8 above, 12.