HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 19

on appeal from: [2007] EWCA Civ 39

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Total Network SL (a company incorporated in Spain) (Original Respondents and Cross-appellants) v Her Majesty's Revenue and Customs (suing as Commissioners of Customs and Excise) (Original Appellants and Cross-respondents)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The issue in this case is whether the Commissioners can maintain a civil claim for damages under the tort of unlawful means conspiracy against a participant in a missing trader intra-community, or carousel, fraud. Two questions need to be considered. The first is whether it is open to the Commissioners to maintain a cause of action in damages at common law as a means of recovering VAT from a person who has not been made accountable or otherwise liable for that tax by Parliament. The second is whether, if so, it is an essential requirement of the tort of unlawful means conspiracy that the conduct which is said to amount to the unlawful means should give rise to a separate action in tort against at least one of the conspirators.

2. On the second issue the Court of Appeal considered itself bound by prior Court of Appeal authority to hold that the unlawful means had to be independently actionable: [2007] EWCA Civ 39, paras 78-79. Its decision to strike out the Commissioner's claim for this reason is the subject of the appeal to this House by the Commissioners. The Court of Appeal decided the first issue in favour of the Commissioners: paras 31-32. Total Network SA ("Total") has cross-appealed on the first issue.

The facts

3. Total is a company incorporated in Spain which has a bank account in the United Kingdom. The Commissioners claim that Total is liable to them in damages at common law for conspiracy in sums equivalent to amounts of VAT which the Commissioners say they have lost as a result of thirteen carousel frauds which were participated in by Total. There are alleged to have been thirteen such conspiracies over five months from May to October 2002.

4. In its simplest form a carousel fraud begins with the sale of taxable goods by a trader registered for VAT in one member state, A, to a VAT-registered trader in another member state, B. Under article 28c(A)(a) of European Council Directive 77/388/EEC of 17 May 1977 (OJ L 145, 13 June 1977) on the harmonisation of the laws of the member states relating to turnover taxes (the Sixth Directive), the supply of goods to a trader in another member state is exempted from VAT. In the words of section 30 of the Value Added Tax Act 1994 ("VATA 1994"), it is zero-rated. B then sells the goods to another VAT-registered trader, C, in its own member state, charging and receiving VAT on the consideration. It fails to account for that VAT to the taxing authorities and disappears. It becomes a missing trader. But before doing so it provides a tax invoice to C, which claims and receives the VAT that it has paid to B as input tax. C, the middleman or broker, then sells the goods to a registered trader in another member state. In the simplest form, this is A. This sale is zero-rated, so there is no output tax to set off against the input tax which C has received. B's disappearance has resulted in a profit to the conspirators which is equivalent to the amount of the input tax received by C. It is the circularity of the transaction that gives rise to the description of the fraud as a carousel.

5. The fraud is the product of a dishonest application of the system of value added tax. C has a claim for input tax arising from its transaction with the missing trader, B, which it is entitled to recover under article 17(2)(d) of the Sixth Directive. Its sale to A is zero-rated in its own member state. So it is not required to account to the taxing authorities for any output tax on that sale. The result of the fraud is that the missing trader, B, has received the VAT from C. But it has not accounted for that VAT as output tax to the taxing authorities. They must nevertheless pay the VAT, or give credit for it, to C when it is claimed as input tax. The goods are no more than a token to give the transaction the semblance of reality. A has no genuine business motive in buying back what it has sold. Typically the goods are high volume articles such as computer chips or mobile telephones.

6. As the Court of Appeal observed in para 3 of its judgment, this type of fraud is not confined to the United Kingdom. It is common in other countries within the EU. It has been described as a sophisticated attack on the VAT system. It was estimated to have cost in excess of £1bn in the year 2004/2005 to the United Kingdom by way of lost revenue. The Commissioners refer in their written case to estimates that show that this figure was exceeded substantially in the succeeding financial years. There is no doubt that this is a pernicious stratagem, and that member states are justified in making use of every means at their disposal within the scope of the Sixth Directive to eradicate it.

7. It is sufficient for the purposes of this case to summarise the details of the first of the thirteen conspiracies alleged in the Statement of Claim. It has been treated as representative of all of them. On or about 15 October 2002 Total sold 3,780 Nokia mobile phones to Redlaw Ltd, a company incorporated in England and Wales, for £1,672,224.75. On the same day Redlaw sold the mobile phones to Lockparts Ltd for £1,423,170 plus £249,054.75 as VAT, amounting in total to £1,672,224.75. On the same day Lockparts sold them to GAK Ltd, for £1,428,840 plus £250,047 as VAT, amounting in total to £1,678,887. Both Redlaw and Lockparts thereafter ceased to trade and did not pay the VAT due on these transactions. On the same day GAK sold the mobile telephones to The Accessory People plc, for £1,436,400 plus £251,370 as VAT, amounting in total to £1,687,770. On the same day The Accessory People sold them to Alldech Ltd, the broker, for £1,447,740 plus £253,345.50 as VAT, amounting in total to £1,701,094.50. In due course GAK and The Accessory People paid VAT on the transactions which they had entered into. Finally, on the same day Alldech sold the mobile telephones to Total for £1,508,220. That sale, being a sale out of the United Kingdom, was zero-rated. Alldech claimed and was paid a refund of input tax from the Commissioners which included the sum of £253,345.50 of VAT which it had paid to The Accessory People.

8. Reduced to its essentials, the position is that Redlaw, the first missing trader, was liable to pay VAT of £249,054.75 on its taxable supply which it failed to pay to the Commissioners. The intermediaries in the chain, other than Lockparts, did properly account for and pay VAT on the supplies. Alldech, the broker, did actually pay VAT of £253,345.50 on the supply it received from The Accessory People. Alldech then claimed and received a VAT credit for £253,345 in respect of the zero-rated supply out of the United Kingdom to Total. If Redlaw, the first missing trader, had paid the VAT due from it of £249,054.75 the result would have been that substantially all the VAT due on these

transactions would have been paid or accounted for. The difference between the amounts paid and due at each end of the chain is accounted for by the fact that VAT of £992.25 due by Lockparts, the second missing trader, was not paid to the Commissioners.

9. The total number of mobile phones involved in the thirteen conspiracies was 30,704. They were sold by Total to the various missing traders for a total of £12,299,117.40 and re-purchased by Total from the various brokers for a total of £11,663,423. The total amount of VAT due but unpaid on the sales by the missing traders is £1,921,331.12. The total amount of the VAT refund claimed by the brokers and allowed by the Commissioners is £1,958,714.95. That is the sum claimed in this action.

10. The cause of action relied on by the Commissioners is the tort known as unlawful means conspiracy. The unlawful means on which they rely in their re-re-amended Particulars of Claim are (a) the commission by Redlaw and/or Alldech of the common law offence of cheating the revenue and (b) the making by Alldech of a fraudulent misrepresentation that the transactions had a genuine economic purpose and that VAT was chargeable and/or recoverable on them by the submission to the Commissioners of a VAT return in the relevant form claiming that it was entitled to a VAT credit. The claim relating to four of the alleged conspiracies was issued on 2 July 2003. On the same day Fulford J granted a freezing injunction against Total, the amount of which was increased on several subsequent occasions as other alleged conspiracies were added to the claim. On 10 January 2005 Hodge J held that the Commissioners had a cause of action in conspiracy where the unlawful means alleged was the common law offence of cheating the public revenue. On 31 January 2007 the Court of Appeal allowed Total's appeal against that order. The Commissioners were granted permission to appeal to this House and Total were granted permission to cross-appeal. The freezing injunction was continued pending the determination of the appeal and the cross-appeal.

The statutory scheme

11. Value added tax is a creature of statute. More precisely, it is the product of a series of EC Directives, of which the Sixth Directive was the most recent. (The Sixth Directive was repealed and replaced by Council Directive 2006/112/EC of 28 November 2006. But it was still in force at the time when the transactions that gave rise to this case were

entered into). They provided for the harmonisation of this form of sales tax throughout all the member states of the EU: see Part I of the Finance Act 1972, which brought the then Directives into force in the UK following its accession to the EEC. It is a Community tax. There is no common law to which reference can be made. So it is important, to set the issues into their proper context, to identify the provisions of the statute that apply to the transactions that were involved in the alleged fraud. They are to be found in the Value Added Tax Act 1994, as amended. It is important also to identify the extent of the remedial steps that are available under the Act to the Commissioners. There are, as Mr Flint QC for Total explained, three aspects of the statutory scheme that need to be considered. These are (a) the application of VATA 1994 to transactions of the type complained of in this action; (b) whether VATA 1994 creates an exclusive regime for the enforcement of liabilities arising out of the failure to account for or pay VAT; and (c) the nature of the duties and rights of the Commissioners.

12. Section 1(1) VATA 1994 provides that VAT shall be charged, in accordance with the provisions of the Act, on the supply of goods or services in the United Kingdom and on the acquisition in the United Kingdom from another member State of any goods. Section 1(2) provides that VAT on the supply of goods or services is a liability of the person making the supply and that, subject to provisions about accounting and payment, it becomes due at the time of the supply. That section must be read with sections 4(1) and 10(1) which make it clear that VAT is charged on the events referred to in section 1 only when the person who makes the supply or acquisition is a taxable person. Section 3(1) provides that a person is a taxable person while he is, or is required to be, registered under the Act. Total is not, and does not require to be, registered as it is a Spanish company carrying on business outside the United Kingdom. On the other hand Redlaw, the first missing trader, was registered under the Act, as was the broker, Alldech.

13. Section 7 VATA 1994 deals with the place of supply. It applies for determining whether, for the purposes of the Act, goods or services are supplied in the United Kingdom. Section 13 deals with the place of acquisition. It applies for determining whether, for the purposes of the Act, goods acquired from another member State are acquired in the United Kingdom. Section 25(1) provides that a taxable person shall account for and pay VAT in respect of supplies made by him and in respect of the acquisition by him of goods from another member State. This is to be done by reference to prescribed accounting periods. Section 25(2) provides that he is entitled at the end of each accounting period to credit for so much of his input tax as is allowable under section 26 and

then to deduct that amount from any output tax that is due from him. So Redlaw was liable under section 25(1) VATA 1994 to pay the output tax due on the supplies of the mobile telephones that it made in the United Kingdom, and Alldech was entitled under the same subsection to recover the VAT that it paid on their supply to it as input tax allowable under section 26.

14. Part IV VATA 1994, which is headed "Administration, Collection and Enforcement", is introduced by section 58, which provides that Schedule 11 shall have effect with respect to the administration, collection and enforcement of VAT. Para 1(1) of Schedule 11, as originally enacted, provided that VAT was to be under the care and management of the Commissioners. Para 5(1) provides that VAT due from any person shall be recoverable as a debt due to the Crown. These provisions must now be read together with the Commissioners for Revenue and Customs Act 2005, which provides for the appointment of the Commissioners to exercise the functions previously vested in the Commissioners of Customs and Excise and for the transfer to them of the ancillary powers that were conferred on the former Commissioners by the Customs and Excise Management Act 1979.

15. Various provisions are included within Part IV to enable the Commissioners to collect and to enforce the payment of VAT. Section 60 enables a civil penalty to be recovered in cases of dishonest evasion of VAT or the making of false input tax or repayment claims. Section 61 extends liability to a civil penalty to the director or managing officer where the person liable under section 60 is a body corporate. Section 72 makes it an offence for a person to be knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or by any other person. This provision supplements other common law offences with which the offender may be charged, including conspiracy to cheat the revenue. All persons knowingly concerned in the fraudulent evasion who are subject to the criminal jurisdiction of the relevant part of the United Kingdom are within its reach. Section 73 enables the Commissioners to assess the amount of VAT due where there has been a failure for whatever reason to make any returns required by the Act. The making of assessments under this provision is subject to the time limits set out in section 73(6). They may not be made after the later of two years after the end of the prescribed accounting period or one year after the evidence of the facts came to the knowledge of the Commissioners. Section 76 enables the Commissioners to assess amounts due by way of penalty, interest or surcharge. Section 77 prescribes a long-stop time limit, normally six years in the section as originally enacted and now three as substituted by section 47(10) of the Finance Act 1997, on the

making of assessments, including assessments for penalties, interest or surcharge, under section 76.

16. Two further provisions, added to VATA 1994 by amendment to address the problem of intra-community fraud, are also relevant to an understanding of the scheme of VATA 1994. First, section 77A was added by section 18(1) and (4) of the Finance Act 2003 with effect from 10 April 2003. It enables the Commissioners, where a taxable supply of goods to which the section applies has been made to a taxable person, and at the time of supply that person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply would go unpaid, to serve a notice on the taxable person making him jointly and severally liable with the person who is liable to the Commissioners for that amount. Section 77A(1) provides that the section applies to telephones and equipment made or adapted for use in connection with telephones, computers and equipment made or adapted for use in connection with computers and various other equipment of a similar nature which it specifies.

17. Secondly, section 55A was added by section 19(1) of the Finance Act 2006, together with section 26AB which provides for the adjustment of accounts to give effect to it. It introduced a system known as reverse charge accounting which had been permitted by a derogation from article 21(1)(a) of the Sixth Directive that had been requested by the UK government under article 27(1) to combat missing trader intra-community fraud. Its core is to be found in section 55A(3) by which the purchaser rather than the seller is liable to account for and pay the VAT on the supply. It applies to goods of a description specified in an order made by the Treasury. In June 2007 reverse charge accounting was implemented in respect of mobile phones and computer chips.

18. Neither of these additional measures to combat fraud has the effect of enabling the Commissioners to obtain a statutory remedy against persons in another member state whom it believes to have been involved in intra-community fraud who are not registered for VAT in the UK. No provision for this is made in the Sixth Directive. There is no statutory remedy against Total. Redlaw and Alldech on the other hand are within the reach of the statute. Redlaw's failure to pay was a breach of section 25(1) VATA 1994. Alldech can be assessed under section 73(2) for an amount as being VAT due from it to the Commissioners which is equivalent to the amount of the VAT that it recovered as input tax, on the ground that the Commissioners would have been entitled to withhold payment of the VAT if the purpose of the transaction had been disclosed to them.

19. Mention should also be made of the provision which VATA 1994 makes for appeals. Section 82(1) provides that a reference to a tribunal is a reference to a tribunal constituted in accordance with Schedule 12. Section 83 provides that an appeal shall lie to a tribunal with respect to the various matters listed in that section which, as amended, include the amount of any input tax that may be credited to any person, any liability to a penalty or a surcharge under sections 59 to 69, any assessment made under section 73 and any liability arising by virtue of section 77A.

20. Overall the impression that is conveyed by VATA 1994 as amended is of a comprehensive scheme for the administration, collection and enforcement of VAT by the Commissioners under the powers that are given to them by the statute. This is consistent with the propositions which I set out in para 11: VAT is a creature of statute, the limits of which are set by the Sixth Directive which requires member states to comply strictly with the harmonised rules that it lays down. It is designed to apply throughout the EU. So there is no common law to which reference can be made to fill any gaps in the scheme as to the persons from whom the Commissioners may collect amounts due to it as VAT. This is the background to the first issue, which is whether the Commissioners can maintain a cause of action in damages at common law as a means of recovering VAT that ought not to have been paid or credited from a person who has not been made accountable or otherwise liable for that tax by Parliament.

The first issue: the exclusive regime issue

21. Total submits that it is a fundamental constitutional principle that no money shall be levied for or to the use of the Crown except by grant of Parliament, and that this in substance is what the Commissioners are seeking to do in this case without Parliamentary authority. Although their claim is presented as one for the award of damages, what they are really seeking to do is to recover by indirect means sums due as tax. Their action was ultra vires of the statute, from which alone they derive their powers. It was also contrary to article 4 of the Bill of Rights 1688, which declares:

> "That levying money for or to the use of the Crown, by pretence of prerogative, without Grant of Parliament for longer time, or in other manner than the same is or shall be granted, is illegal."

The Commissioners had no power under VATA 1994 to raise an assessment on Total for the tax that had been not been paid on the transactions. Nor was there any power under the Act to commence civil proceedings by action to recover unpaid tax from Total as a debt, as Total was not a taxable person. The absence of any such power was to be contrasted with the powers to recover unpaid tax that were now available to the Commissioners in terms of sections 55A and 77A of the Act, as amended.

22. The Court of Appeal did not, of course, question the fundamental constitutional principle. Ample support for it is to be found in the authorities. In *Gosling v Veley* (1850) 12 QB 328, 407, Wilde CJ said:

> "The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."

In *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 the Food Controller under the Defence of the Realm Acts sought to impose a charge as a condition of the grant of a licence to purchase milk in certain areas for which no authority had been given by Parliament. It was held that he had no power to do so. Atkin LJ referred at p 886 to the Bill of Rights and to what he described as the elaborate custom of Parliament by which money for the service of the Crown is only granted at the request of the Crown made by a responsible Minister and assented to by the House of Commons. He went on to draw this conclusion:

> "In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge."

In the House of Lords, where the decision was affirmed, Lord Buckmaster said that the imposition could only be properly described as a tax, which could not be levied except by direct statutory means: (1922) 38 TLR 781.

23. Having recognised the principle, the Court of Appeal said in para 31 of its judgment that the crucial issue was to determine the nature of the claim in conspiracy:

> "Assuming for the purpose of this argument that a claim in conspiracy does lie, then this is a claim for damages for a perfectly proper, well-recognised tort, the tort of conspiring together to defraud the claimant. That the measure of damages suffered by such a claimant may be measured by reference to the amount by which the Exchequer's income is depleted does not in our view alter the essential character of the claim as one for damages, not as a levy of money for the use of the Crown without grant of Parliament."

Having distinguished the nature of the claim in the *Wilts United Dairies* case, the court summed up its conclusion with these words:

> "Properly characterised this claim by the Commissioners is not a direct claim for VAT. It is a claim brought on a wholly different basis. It is a claim against conspirators to recover loss occasioned by fraud. It would make a mockery of the law to suggest that a fraudster can escape with impunity by piously claiming the benefit of the Bill of Rights designed for the innocent down-trodden citizen, not the scheming international fraudster."

24. The Court of Appeal took a different view, at a later stage in its judgment, of the possibility that the Commissioners might have an independent actionable claim of damages at common law against Alldech: paras 83-85. The Commissioners had a statutory method for clawing back tax wrongly paid or credited to a trader under sections 73(2) and 77 VATA 1994. So the common law claim would be met by the defence that the only remedy was one provided by the statute. In that respect the statutory provisions could be said to provide a comprehensive regime for collecting tax which had been wrongly paid or credited. The Commissioners have issued an assessment under section 73(2) against Alldech to recover the amount of VAT with which they were wrongly credited.

25. At first sight the argument that Total is entitled to invoke the Bill of Rights to avoid liability for its part in the alleged conspiracy seems to fly in the face of common sense. But, as Mr Flint pointed out, the protection of the Bill of Rights is available to everyone. Fraudsters and cheats are as much entitled to be protected against the levying of taxes without the authority of Parliament as anyone else. At the heart of his argument however there lie more fundamental questions about the nature of the Commissioners' claim and their interest, if any, to seek to recover tax wrongly paid or credited as damages against a person upon whom no liability to pay that amount can be imposed under the statute.

26. The claim that is made in this case is presented as a claim for damages. As presented it is, as the Court of Appeal said, a claim for the loss caused by a perfectly proper, well recognised tort. I agree with my noble and learned friend Lord Neuberger of Abbotsbury (para 172) that such a claim is simply not within the territory of article 4 of the Bill of Rights. But I do not think that the claim in this case is truly of that character. The function of an action of damages is to provide a remedy for interests that are recognised by the law as entitled to protection. Obvious examples are protection against injury to the person, to reputation and to privacy. Economic interests are entitled to protection too, such as a person's business or his property. As Hazel Carty, *An Analysis of the Economic Torts* (2001), p 3, puts it, the economic torts are to be seen as protecting against the infliction of economic harm. Tony Weir, *A Casebook on Tort* (10th ed, 2004), p 17, makes the same point. Compensation, he says, is the principal function of tort law. The very concept of compensation entails the notion or harm or damage, since only harm or damage can be compensated.

27. It is not difficult to think of situations where the Commissioners could properly bring a claim of damages for loss sustained with regard to some interest that falls within the law's protection, such as damage to their buildings or their equipment. In *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641 the Revenue's claim for loss resulting from its being deprived of the services of a taxing officer due to a vehicle accident was dismissed. But this was because an action for that kind of loss did not lie where its relationship was with an established civil servant. In this case it is said that an action lies for loss sustained as a result of an unlawful means conspiracy. But can the amount sued for be said to be a loss sustained by the Commissioners for which they can sue in damages?

28. The Commissioners' duties and responsibilities are set out comprehensively in the statute. Para 1(1) of Schedule 11 VATA 1994, as originally enacted, stated that VAT was to be under the care and management of the Commissioners. Section 1(1) VATA 1994 states that references in the Act to VAT are references to value added tax charged in accordance with the provisions of the Act. Para 5(1) of Schedule 11 states that VAT due from any person shall be recoverable as a debt due to the Crown. The Commissioners are not authorised by the statute to carry on a business for profit. They have no commercial interests that need to be protected by the tort of conspiracy: see *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 189B-C per Lord Diplock. Their only function is to gather in and account to the Crown for VAT charged in accordance with the provisions of the Act. My noble and learned friend Lord Walker of Gestingthorpe, very properly, draws attention to the fact that the point that the Commissioners have no commercial interests needing to be protected by the tort of conspiracy was not raised by Mr Flint in his written and oral submissions (para 40). But in my respectful opinion it follows inevitably from his analysis of the statute.

29. The sum that is claimed as damages in this action is the amount of the VAT that the Commissioners say was wrongly paid to Alldech in response to its claim for a refund or credit of input tax. It is the same amount as is recoverable as a debt due to the Crown from Alldech by means of an assessment made under section 73(2). It is not recoverable from Total under VATA 1994 because the statute makes no provision for the recovery of VAT from someone who is not a taxable person within the meaning of section 3. There is, it may be said, a gap in the statute. But this does not mean that the Commissioners have suffered a loss for which they can sue in damages. All that can be said is that payment was made to Alldech which ought not to have been made. It is an amount that can be recovered as a debt due to the Crown from Alldech. It does not change its character as a debt due to the Crown because, when it is sought to be recovered from someone else, it is described as damages. It is an inescapable fact that the sums claimed as damages will become VAT for the purposes of the statute if and when they are paid to the Commissioners because they have no power under the statute to deal with those sums in any other way. But the Commissioners have no power to recover such a debt from strangers to the Act such as Total. In form the claim is one for damages, outside the scope of article 4 of the Bill of Rights. But in substance it is a claim for the recovery of VAT from a person who is under no liability to pay that tax under the statute. No provision for this is made in the Sixth Directive. Total do not need to invoke the protection of article 4. The

issue is resolved by the terms of the statute. The statutory code precludes the claim.

30. As the Court of Appeal noted when it was considering, and then rejecting, the possibility of an independent actionable claim in damages at common law against Alldech, the statutory provisions can properly be said to provide a comprehensive regime for collecting VAT which has been wrongly paid or credited to a taxable person. Various aspects of that regime sit uneasily with the idea that there is an independent common law remedy. For example, time limits are built into the provisions for the making of assessments under section 73(2) VATA 1994 that are different from those that apply to a common law remedy: see section 77. And exclusive jurisdiction for the determination of all appeals arising from the Commissioners' exercise of their powers under the Act is given by section 82 to a tribunal constituted under Schedule 12. As Lord Nicholls of Birkenhead said in *Autologic plc v Inland Revenue Commissioners* [2006] 1 AC 118, para 13, the taxpayer must use the remedies provided by the tax legislation. It would seem odd for the court to have the exclusive jurisdiction to determine disputes about the amount of VAT claimed as damages from a non-taxable person such as Total, when a tribunal has exclusive jurisdiction to determine disputes as to exactly the same amount of VAT at the instance of a taxpayer who, under the tort on which the Commissioners rely, is jointly and several liable.

31. These additional points reinforce the fundamental point that the regime for the administration and collection of VAT which is set out in VATA 1994 is indeed comprehensive and does not admit the use by the Commissioners of means for collecting VAT which are not provided for by the statute. The steps which Parliament has taken to address the problem of carousel fraud by conferring additional statutory powers on the Commissioners, authorised where necessary by a derogation from the Sixth Directive, are entirely consistent with this view. The taking of these powers would not have been necessary if common law remedies were available. The fact that Parliament has followed this route is, of course, due to its long tradition of insisting that power to raise money for the public revenue may be exercised only with statutory authority. In my opinion the Commissioners' attempt to resort to the common law for this purpose, which is without precedent, is contrary to principle.

32. I do not think, with the greatest of respect, that it is an answer to say, as Lord Walker does, that the Commissioners regularly seek and obtain remedies against defaulting taxpayers which are not conferred on

them expressly by statute or that the courts must be astute to deal with progressive techniques of tax avoidance when they are construing the taxing statutes. These points do not meet the fundamental objection that the purpose of this action is to recover VAT from a person who is not, for any of the purposes of VATA 1994, a taxpayer. Nor is it met by the example of cash representing collected taxes which was stolen from a vehicle belonging to the Commissioners while in transit. I agree that the Commissioners would have a civil remedy to reclaim the money if it could be traced to the robbers' bank account. But it would be recovered as a debt due by them to the Commissioners, not from a third party as damages. If the claim is properly to be seen as one for damages, the amount due would need to be assessed, as my noble and learned friend Lord Scott of Foscote points out. But the fact that techniques are available for the assessment of damages does not answer the question whether the Commissioners are in a position to make such a claim.

33. For these reasons I consider that the Court of Appeal was wrong to hold that this ground of appeal was wholly devoid of merit. I would hold, in agreement with Lord Neuberger, that the Commissioners' claim is precluded by the statute and ought to have been struck out on this ground.

The second issue: unlawful means conspiracy

34. The Court of Appeal said in para 67 of its judgment that it could see no reason, on the assumed facts of this case, why the Commissioners ought not to be able to rely on the tort of conspiracy by unlawful means. If it had been open to it to do so, it would have held that the allegation of conspiracy to cheat the Commissioners, provided there was an intention, albeit not a predominant intention, to injure them, was sufficient. But it felt itself prevented from doing so by the decision of the Court of Appeal in *Powell v Boladz* [1998] Lloyd's Rep Med 116 in which Stuart-Smith LJ said, in a judgment with which the two other members of the court agreed, that the unlawful act relied upon must be actionable at the suit of the plaintiff and that it was not sufficient that it amounted to a crime or a breach of contract with a third party.

35. The authorities relied upon by Stuart-Smith LJ in support of that proposition were *Clerk & Lindsell on Torts*, 17th ed, para 23-80, *Marrinan v Vibart* [1963] 1 QB 234 and 528, *Hargreaves v Bretherton* [1959] 1 QB 45 and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 per Lord Diplock at p 186 and following. The discussion of the

topic in *Clerk & Lindsell*, as can be seen from the 19th ed (2006), pp 1615-1620, is wide-ranging and does not come down firmly on either one side or the other. Mr Flint accepted in the Court of Appeal and in your Lordships' House that neither *Marrinan v Vibart* nor *Hargreaves v Bretherton* supports the proposition for which they were cited. So the question is whether support for it is to be found in Lord Diplock's speech in *Lonrho v Shell* and, if it can be found there, how what Lord Diplock said in that case stands up to examination in the light of the speech of Lord Bridge of Harwich in *Lonrho plc v Fayed* [1992] 1 AC 448.

36. The background to Lord Diplock's speech in *Lonrho v Shell* is to be found in the way the issue was dealt with in the Court of Appeal: The Times, 7 March 1981, [1981] Com LR 74. The judge, Parker J, had held that there was no claim in conspiracy because the acts, if done, were not done with intent to harm the plaintiff and were not in themselves actionable. Lord Denning MR made it clear at the outset of his discussion that the important point was that the agreement, if any, to which Shell was a party was not made with any intent to injure the pipeline companies. The point of law was whether the agreement to do an unlawful act was actionable by anyone who suffers damage even though there was no intention to injure him. He pointed out that the problem only arises where the unlawful act is one which does not itself give rise to a cause of action but it is sought to make it actionable by reason of an agreement by two or more to do it. His answer to it was that the tort was a conspiracy to injure. That intention may not be the predominant motive. It might be mixed with others. But it was sufficient if the conspiracy was aimed or directed at the plaintiff, it could reasonably be foreseen that it might injure him and it did in fact do so. Eveleigh LJ's judgment was to the same effect. Fox LJ said:

> "I agree with the judge, that where persons combine to do an unlawful act with the intention of injuring another person there is every reason why that person should have a cause of action if he suffers damage. The position is otherwise if, there being no cause of action in respect of the act if done by an individual, there was no intent by the combiners to injure the complainant. To give such a cause of action gives undue weight to the mere fact of the combination. An intention to injure is, it seems to me, a necessary element in the tort."

37. In the House of Lords counsel for the appellants made it clear in his speech that his cause of action based on conspiracy assumed that no breach of contract, no private rights arising out of breach of the sanctions orders and no allegations of intent to injure. All that was alleged was actual knowledge that the acts done could cause damage to Lonrho: [1982] AC 173, 180C-D. Having held that there was no independent cause of action against any of the alleged conspirators, Lord Diplock proceeded at p 188C nevertheless to consider the conspiracy claim. In the discussion which followed he said that the civil tort of conspiracy to injure the plaintiff's commercial interests, where that was the predominant purpose of the agreement and of the acts done in execution of it, was too well established to be discarded: p 189 B-C. Turning to actions for damages for conspiracy where the damage-causing acts, although neither done for the purpose of injuring the plaintiff nor actionable at his suit if they had been done by one person only, he said that the House had an unfettered choice whether to confine the civil action of conspiracy to a narrow field or to extend it beyond the narrow limits which were all that common sense and the application of the legal logic of the decided cases required: p 189F. He concluded these remarks with this passage at p 189G:

> "My Lords, my choice is unhesitatingly the same as that of Parker J and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff."

38. I agree with the Court of Appeal, para 57, that the real point decided in that case was that to establish the tort the plaintiff had to prove that the defendant's purpose in the conspiracy was to injure the plaintiff. It is difficult to find in what Lord Diplock said a clear and unequivocal statement that where there is such an intention, and the plaintiff suffers the intended damage, the unlawful acts that were used by the conspirators to bring this about must themselves be actionable. When account is taken of the absence of any indication of disapproval of the judgments in the Court of Appeal, which were to the contrary, the argument that Lord Diplock intended to confine the unlawful means conspiracy to cases where the unlawful acts were themselves actionable becomes even more tenuous. But the previous cases to which he had referred were concerned with lawful means conspiracy, where there is no liability unless the predominant motive of the conspirators was to injure the plaintiff. This gave rise to doubt in subsequent cases as to

whether a predominant motive to injure the plaintiff was also an essential element in unlawful means conspiracy.

39. In *Lonrho plc v Fayed* [1992] 1 AC 448, Lord Bridge of Harwich quoted Lord Diplock's speech in *Lonrho v Shell* without disapproval. At p 463F he said that the tort of conspiracy where no unlawful means were used is regarded as an anomaly, for the reasons that had been explained by Lord Diplock. But at p 464D-E he observed that there were many cases where dicta had indicated that the predominant purpose requirement did not apply where the means used to effect the conspirators' purpose were unlawful. At pp 465G-466A he said:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."

No mention is made in this passage of a requirement that the unlawful means must be independently actionable.

40. A clear indication in these speeches that the unlawful means need not be independently actionable is not easily found. Statements to that effect can be seen in the judgments of the Court of Appeal in *Lonrho v Shell*, and the assumptions to which counsel for the appellants referred in his speech in the House of Lords are a further pointer to the conclusion that ought to be drawn. The Court of Appeal concluded in this case that an allegation of conspiracy to cheat was sufficient, provided there was an intention to injure the claimant, albeit not a predominant intention: para 67. I respectfully agree. But I think that it has to be acknowledged that textual analysis of this kind is an incomplete answer to the problem. The question then is whether the general principles on which the tort is based support the proposition that the unlawful means must be independently actionable.

41. When *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 was in the Court of Session Lord Justice Clerk Aitchison said (1940 SC 141, 155-156):

> "When the end of a combination is not a crime or a tort in the accepted sense, and the means are not in the accepted sense criminal or tortious – cases which give rise to no difficulty – the question always is – What is the real purpose of the combination? If it is to injure, without reference to anyone's lawful gain, or the enjoyment of one's rights, or the furtherance of one's legitimate interests, then what is done may become a wrongful act and be actionable. If, on the other hand, the real purpose of the combination is to further the lawful interests of the parties to it- these not necessarily being identical interests – no wrong is committed even when the means, employed not being in themselves illegal, are calculated, and even intended, to injure the persons against whom they are directed."

He did not understand there to be any real dispute about the law, which was to be found in the cases from *Allen v Flood* [1898] AC 1 to *Sorrell v Smith* [1925] AC 700. The question was whether a purpose to injure was the real root of the acts that grew from it: *Sorrell v Smith*, per Lord Dunedin at p 717. If that was its purpose, he saw no reason to distinguish between means that were criminal and means that were tortious. As Lord Wright put it in the House of Lords, it is in the fact of the conspiracy that the unlawfulness resides: [1942] AC 435, p 462. That is the essence of the lawful means conspiracy. It is for the claimant to show that to harm his economic interests was the predominant purpose of the conspiracy. The situation that was contemplated in that case was one where the combination had more than one purpose, which Viscount Simon LC described at p 445 as "the quagmire of mixed motives". In a case of that kind the issue has to be resolved by ascertaining the predominant intention. If the predominant intention of the combination is to injure, what is done is actionable even though the means used were lawful. Harm caused by a conspiracy where the means used were unlawful would seem no less in need of a remedy.

42. The means that are alleged in this case are the commission by Redlaw and/or Alldech of the common law offence of cheating the revenue and the making by Alldech of a fraudulent misrepresentation: see para 10. The second alternative can be ignored for the purposes of the argument. The conduct alleged was tortious, but on the evidence it may be the weaker alternative. So the Commissioners wish to have their

argument tested on the first alternative. Their primary contention is that where the conspirators agree to engage in conduct against the claimant which amounts to a criminal offence, and the carrying out of that conduct results in loss or damage to the claimant, the conduct will supply the unlawful means for the purposes of an unlawful act conspiracy although it is not itself actionable. They do not offer to prove that harm to their economic interests was the predominant purpose of the conspiracy. But the case does not appear to be one of mixed motives where predominant purpose is a necessary ingredient. Their case is more straightforward. It is that the criminal offence was directed at the Commissioners for the purpose of persuading them to give Alldech a VAT credit to which it was not entitled. The unlawful means chosen by the conspirators were intended to secure that result which could not have been secured by either of them acting alone.

43. In *OBG Ltd v Allan* [2007] 2 WLR 920, para 56 Lord Hoffmann said that the courts should be cautious in extending the tort of causing loss by unlawful means beyond the description given by Lord Watson in *Allen v Flood* [1898] AC 1, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535, which was designed only to enforce standards of civilised behaviour in economic competition between traders or between employers and labour. I entirely appreciate the point that he makes that caution is needed where the unlawful act is directed against a third party at whose instance it is not actionable because he suffers no loss. There the claimant's cause of action is, as Hazel Carty, *An Analysis of the Economic Torts* (2001), p 274 puts it, parasitic on the unlawful means used by the defendant against another party. As to that situation I would prefer to reserve my opinion. But in this case there was no third party. The means used by the conspirators were directed at the claimants themselves. This is a case where the claimants were persuaded by the unlawful means to act to their own detriment which, in para 61 of *OBG*, Lord Hoffmann said raises altogether different issues. One has to ask why, in this situation, the law should not provide a remedy.

44. The situation that is contemplated is that of loss caused by an unlawful act directed at the claimants themselves. The conspirators cannot, on the Commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the Commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not accept that the Commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in *Crofter Hand Woven*

Harris Tweed Co v Veitch [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. As Professor Joe Thomson put it in *An island legacy – The delict of conspiracy*, Comparative and Historical Essays in Scots Law, ed Carey Miller and Meyers (1992), p 148, the rationale of the tort is conspiracy to injure. These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.

45. I would hold that the decision of the Court of Appeal in *Powell v Boladz* [1998] Lloyd's Rep Med 116 was erroneous and that it should be overruled. I would also hold, in agreement with all your Lordships' that criminal conduct at common law or by statute can constitute unlawful means in unlawful means conspiracy. Had it been open to the Commissioners to maintain a civil claim of damages the tort of unlawful means would have been available to them, even though the unlawful means relied upon were not in themselves actionable

Conclusion

46. For these reasons I would allow the appeal by the Commissioners. But I would also allow the cross-appeal by Total. For reasons that are different from those given by the Court of Appeal, I would affirm that part of the Court of Appeal's order by which the Commissioners' claim was struck out.

LORD SCOTT OF FOSCOTE

My Lords,

47. I have had the great advantage of reading in advance the opinions prepared by all my noble and learned friends. The relevant facts are fully set out in the opinion of Lord Hope of Craighead and I gratefully adopt his exposition. The close, and to my mind completely convincing,

analysis of the legal principles applicable to the two issues that arise on this appeal (see para.1 of Lord Hope's opinion) contained in the opinion of Lord Walker of Gestingthorpe probably say all that needs to be said. In view, however, of the importance of the two issues I propose to express in my own words why I have reached the same conclusions.

48. It is important to keep in mind that the two issues arise from a preliminary issue directed to be tried by a Consent Order made on 9 July 2004. The preliminary issue asked this question:

> "Does the Claimant [i.e. the Commissioners] have, as a matter of law, a cause of action in conspiracy against the Defendant [i.e. Total] as pleaded in the Consolidated and Amended Particulars of Claim?"

The question directs attention to the facts as pleaded by the Commissioners. These facts must, for the purposes of the preliminary issue, be assumed to be true. Whether they will, or which of them will, be proved to be true, only time will tell.

49. There are some aspects of the pleaded facts that I wish to emphasise for they bear upon each of the two issues that arise. Paragraph 6 of the Agreed Statement of Facts and Issues, signed by leading and junior counsel for both parties, described the litigation, of which this appeal is the latest, but almost certainly not the last, stage as arising out of "a series of carousel, or missing trader intra-community, frauds". An alternative, and equally apt, description of each carousel, as pleaded by the Commissioners in this case, would be "charade". "Charade" is the name given to a game played frequently at birthday and Christmas parties but has also the colloquial meaning of an "absurd pretence" (see The Concise Oxford Dictionary 9th Ed.). The description of a "carousel fraud" taken from the decision of the VAT Tribunal in *Bond v Commissioners of Customs & Excise*, quoted by Ward LJ in paragraph 2 of his judgment in the present case, refers to the fraud as consisting of a series of sales of taxable goods, of which sales the initial one is zero rated, under the next one the initial buyer sells the goods and receives VAT from its buyer but then disappears without accounting to the Revenue for the VAT it has received, and the third sale made by the buyer from the "missing trader", is a zero rated sale of the goods back to the original vendor. This seller, who has paid VAT to the "missing trader", then claims back from the Revenue as input tax the amount of the VAT paid to the missing trader. The invoices are all in order so the

Revenue accepts the claim for repayment of the input tax but because the "missing trader" has not accounted to the Revenue for the VAT it had apparently received, the Revenue is out-of-pocket by the amount it has had to pay to the vendor under the third sale. This description of a "carousel fraud" assumes valid sales of goods at each step.

50. A charade, however, a pretence and in the present case a fraudulent pretence, is something else. Diplock LJ (as he then was) in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 described as a "sham"

> "…acts done or documents executed by the parties to the 'sham' which are intended to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create."

A "sale", at its simplest, is the exchange of property for money and it is, I suggest, plain that a contract of sale of goods requires, if the contract is to justify that description, an intention that there should be the payment of a price in exchange for the transfer of property in the goods (see s.2(1) and (3), Sale of Goods Act 1979). Consider these requirements against the facts of the "First Conspiracy" set out in paragraph 5 of the Commissioners' Consolidated Particulars of Claim and taken to be typical of each of the other twelve pleaded conspiracies.

51. Paragraph 5 pleads that Total

> "... carried out and otherwise participated in a series of transactions in a chain of supply that had no economic purpose other than to cheat and/or defraud [the Commissioners] of revenue …".

The transactions, as pleaded, related to 3,780 Nokia mobile telephones and consisted of the following events, all taking place on 15 October 2002.

(1) Total sold the telephones to Redlaw Ltd for £1,672,224 under a zero rated transaction.

(2) On the same day Redlaw sold the telephones to Lockparts Ltd for £1,423,170 plus VAT of £249,054, a total of £1,672,224. If this is taken to be a genuine sale it would have been a sale at an immediate loss of £249,054, the amount of the VAT for which Redlaw was accountable to the Revenue. But it was plainly never intended that Redlaw should pay £249,054 to the Revenue and Redlaw did not do so. Redlaw simply disappeared and became the "missing trader".

(3) On the same day Lockparts sold the telephones to GAK Ltd for £1,428,840 plus VAT of £250,047, a total of £1,678,887. The VAT payable by Lockparts on its purchase from Redlaw was £249,054. Lockparts was therefore accountable to the Revenue for the balance, £993. But Lockparts, too, became a "disappeared" trader and the £993 remains unaccounted for. Leaving aside the £993 VAT balance, Lockparts made an instant paper profit of £6,550 odd on its transaction with GAK.

(4) On the same day GAK, pursuant to written instructions given on that day by Lockparts, paid £1,672,224 into Total's UK bank account, thereby purporting to discharge the sum owing by Redlaw to Total and owing to Redlaw by Lockparts. That left £6,663 still owing by GAK to Lockparts.

(5) On the same day GAK sold the telephones to The Accessory People for £1,436,400 plus VAT of £251,370, a total of £1,687,770. GAK had paid, or purported to have paid, £250,047 VAT on its transaction with Lockparts and so was accountable, and did account, to the Revenue for the balance, £1323. GAK had made an instant paper profit of over £6200 on its transaction with Lockparts.

(6) On the same day The Accessory People sold the telephones to Alldech Ltd for £1,447,740 plus VAT of £253,345. The Accessory People were liable to pay £251,370 VAT under their transaction with GAK and so were liable to account, and did account, to the Revenue for the balance, £1975. The Accessory People had made an instant paper profit of over £9375.

(7) Finally, on the same busy day, Alldech sold the telephones back to Total for £1,508,220 under a zero rated transaction. So Total made an instant paper profit of £164,004 (i.e. £1,672,224 less £1,508,220).

Alldech later claimed, and obtained, from the Commissioners the repayment as input tax of the £253,345 VAT that it had paid to The Accessory People. Alldech had made, therefore, an instant profit of £60,480. This profit, and Total's £164,004 profit, The Accessory People's profit of £9375, GAK's profit of £6200 odd and Lockpart's profit of £6,660 odd (if the £6,663 was ever paid by GAK to Lockparts) were funded by the £253,345 input tax repayment made by the Commissioners to Alldech (less, of course, the £1323 and £1975 for which GAK and The Accessory People accounted to the Revenue).

52. What are your Lordships to make of these transactions that had "no economic purpose other than to cheat and/or defraud [the Commissioners] of revenue" and, as pleaded in paragraph 4 of the Consolidated Particulars of Claim, were entered into "…with intent to cheat [the Commissioners] of revenue and/or to defraud the Revenue …"? The telephones, if they existed, did not physically move from the place or custody in which they were in the morning of 15 October 2002, when the carousel began, to anywhere else or anyone else's custody by midnight. At best, if they existed, they started and ended with Total. If it is to be said that property in these telephones, if they existed, left Total, passed down the chain of companies and ended back with Total, at what point during 15 October 2002 did this process begin? We know that no money was ever paid to or by Redlaw and it does not appear that any authority was ever given by Redlaw for the payment made by GAK to Total. But these questions are, perhaps, pointless for it seems clear that the telephones, as objects of an intended sale, were irrelevant. The passing of property in the telephones was not the purpose of the transactions. The purpose was the creation of book entries enabling a claim for repayment of input tax to be made.

53. Article 2 of the First Council Directive, 67/227/EEC of 11 April 1967 says that

> "… The principle of the common system of value added tax involves the application to goods and services of a general tax *on consumption* …" (emphasis added)

and article 2(1) of the Sixth Directive says that

> "… a supply of goods and services effected for consideration by a taxable person acting as such is subject to VAT".

Article 4(1) of the Sixth Directive defines "taxable person" as

> "… any person who independently carries out in any place any economic activity …"

and “economic activities” are defined in article 4(2) as comprising

> “… all activities of producers, traders and persons supplying services …”

On what basis could it be suggested that the carousel of 15 October 2002, on the basis of the facts as pleaded, involved the participants in trading in goods or supplying services? The several transactions were plainly orchestrated and pre-ordained. None of the participants wanted mobile telephones. All that they wanted was to obtain a money profit at no risk and without doing anything that could remotely be described as trading or supplying goods in a commercial transaction.

54. On the Commissioners’ pleaded case Alldech was a fraudulent conspirator, not an innocent trader caught up in somebody else’s fraudulent scheme. The pleaded case does not allege that GAK or The Accessory People were conspirators. It is difficult to believe that they did not know or suspect the fraudulent purpose of a scheme under which they were to sign up to buy goods they had never seen and immediately to sell on the goods for an enhanced price. And if they did not know of the fraudulent purpose it is difficult to believe that their lack of knowledge was not attributable to a decision not to enquire, a convenient adoption of a Nelsonian blind eye. Be that as it may, Alldech, on the pleaded case, was a participating conspirator with knowledge of all the pleaded features of the conspiracy and neither expected nor intended to become the owner of mobile telephones. That was not the purpose of the carousel. In my opinion, there was, on 15 October 2002 when the several transactions were entered into, no supply or intention to supply mobile telephones, no change of the property rights in any mobile telephones and no transaction that could claim the description of a contract of sale or a contract for the supply of telephones. This was a fraudulent scheme designed to extract by deception money from the Revenue. If the pleaded facts had been known to the Revenue at the time that Alldech’s input tax repayment claim was made, the Revenue would not have paid and would not have been liable to pay.

55. The ECJ’s judgment in *Optigen Ltd v Customs & Excise* [2006] Ch.218 is no authority to the contrary. The ECJ emphasise in their judgment that the terms “supply of goods” and “taxable person acting as such” in the Sixth Directive require an objective assessment to be made

(see para.44 of the judgment). In paragraph 46 of the judgment the ECJ said this:

> "An obligation on the tax authorities to take account, in order to determine whether a given transaction constituted a supply by a taxable person acting as such and an economic activity, of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain … of which that taxable person had no knowledge and no means of knowledge, would a fortiori be contrary to [the objectives of the Sixth Directive]."

And in paragraph 51 the ECJ repeated that whether a supply of goods had been made by a taxable person acting as such was to be objectively ascertained

> "… regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, *of which that taxable person had no knowledge and no means of knowledge*" (emphasis added).

It follows from this that if a trader becomes innocently involved in a fraudulent and/or sham chain of supply, the innocent trader does not necessarily cease to be a person liable to pay output VAT and eligible to claim input VAT. If objectively assessed without regard to the fraud, there would appear to have been a supply of goods by or to the innocent trader, the innocent trader does not by reason of the fraud fall outside the VAT loop. None of this, in my opinion, assists Total in the present case. Alldech was not an innocent trader. GAK and The Accessory People may have been. If Alldech was not an innocent trader but a conspirator in the fraud there is no need to disregard the intentions of the conspirators, the fraudsters, in assessing the true nature of the transactions into which they entered. In my opinion, on the facts as pleaded, neither Total when it entered into its transaction with Redlaw, nor Alldech when it entered into its transaction with The Accessory People, nor Total and Alldech when they entered into the final transaction with one another, were intending to buy or sell, as the case

may be, mobile telephones. They were intending to produce pieces of paper invoices, in order to pretend to the Revenue that genuine commercial transactions had taken place and thereby to deceive the Commissioners into paying-up on a spurious input tax repayment claim. The issue is whether in these circumstances the Commissioners have a civil action in tort to recover from Total, as damages for the tort, the loss suffered by the Commissioners by the success of the fraudulent scheme.

The tort of conspiracy

56. The pleaded tort is a conspiracy to cheat and/or defraud the Commissioners by unlawful means. The issue is whether this tort requires that the unlawful means relied on include some civil wrong actionable by the claimant against at least one of the conspirators. On this issue I can add nothing of value to the conclusion and reasoning of my noble and learned friends. The Court of Appeal felt bound to follow the earlier Court of Appeal decision in *Powell v Boladz* [1998] Lloyd's Rep. Med.116 in which Stuart-Smith LJ, with whose judgment the other two members of the Court agreed, had said at 126 that

> "… the unlawful act relied on must be actionable at the suit of the plaintiff. It is not sufficient that it amounts to a crime or breach of contract with a third party".

My Lords, in agreement with my noble and learned friends and for the reasons they have given I too would hold that criminal conduct can constitute unlawful means for the purposes of a tortious conspiracy to injure by unlawful means (see para.95 of Lord Walker's opinion). It must, in my opinion, be kept in mind that the whole of this branch of the law of tort is the result of a step by step development by judges of the action on the case. We were taught at Law School that the action on the case was the means whereby our judicial forbears allowed tortious remedies in damages where harm had been caused in circumstances where the conduct of the authors of the harm had been sufficiently reprehensible to require the conclusion that they ought to be held responsible for the harm. The law whereby harm caused by negligence can be remedied by an action in tort for damages results from a development of the action on the case. The law enabling an action for tortious damages to be brought where two or more persons have joined together with the predominant intention of injuring another person and have successfully carried out their intention is another, and for present purposes highly relevant, example of a judicial development of the

action on the case. This is the so-called "lawful means" conspiracy which is tortious notwithstanding that the means employed to cause the harm are themselves neither criminal nor tortious. The essential ingredient of this type of action is the combination of people all intent on causing harm to the victim, not on the type of means employed for doing so. As it was put by Viscount Simon in *Crofter Hand Woven Harris Tweed Co.Ltd v Veitch* [1942] AC 435 at 445

> "If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."

Where, however, unlawful means are employed by the conspirators to achieve their object and their object involves causing harm to the victim, the intent to cause that harm does not have to be the predominant purpose of the conspiracy. This difference between the torts of lawful means conspiracy and unlawful means conspiracy is sometimes described as anomalous. In my opinion it is not. The difference reflects and demonstrates the essential flexibility of the action on the case. It is not all conduct foreseeably likely to cause, and that does cause, economic harm to another that is tortious. Nor should it be. The circumstances must be such as to make the conduct sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages for having done so. Bearing that in mind, the proposition that a combination of two or more people to carry out a scheme that is criminal in its nature and is intended to cause economic harm to some person does not, when carried out with that result, constitute a tort actionable by that person is, in my opinion, unacceptable. Such a proposition is not only inconsistent with the jurisprudence of tortious conspiracy, as Lord Walker has demonstrated and explained, but is inconsistent also with the historic role of the action on the case.

57. In my opinion, any coherent law of tortious liability for conspiracy must hold Total liable in tort if the facts of the conspiracies pleaded in this case can be proved.

The second issue

58. The second issue is whether the Commissioners can bring a private law action to recover the loss they have been caused by the fraudulent conspiracy. It is said that the damages claim is, in substance, a claim to recover the tax that Redlaw has failed to pay. The action constitutes, it is said, an attempt to make Total liable to pay the tax, an attempt that is barred by article 4 of the Bill of Rights (see para.21 of Lord Hope's opinion). It is said, alternatively, that the statutory VAT scheme establishes exclusive remedies for the recovery of tax or for dealing with false input tax repayment claims and that these remedies cannot be supplemented by a tortious action for damages. Lord Hope, in paragraph 15 of his opinion, has listed the various statutory remedies available under the statutory VAT scheme.

59. My Lords, there is, in my opinion, nothing whatever in the Bill of Rights point. It is true that Total are not taxable under the statutory VAT scheme in respect of any of the pleaded transactions, but the claim against Total is not a claim for tax. It is a claim for damages, for loss, caused by the fraudulent conspiracy. The Consolidated Particulars of Claim claim from Total damages (for the first conspiracy) of "not less than £253,345.50". That was the sum paid by the Revenue to Alldech in response to Alldech's claim for repayment of the VAT Alldech had paid as input tax to The Accessory People. It was not the amount of the VAT in respect of which Redlaw, the missing trader, should have accounted to the Revenue. The claim for a sum in damages not less than the sum paid by the Revenue to Alldech is, however, capable of leading to a misunderstanding. The sum recoverable by the Commissioners as damages may well be less than £253,345. A tortious damages claim must bring into account benefits, as well as losses, that have accrued to the victim from the wrongful conduct. So the Commissioners must give credit for the £1323 and £1975 for which GAK and The Accessory People accounted to the Revenue and must give credit, also, for the value of any statutory right of the Commissioners under the VAT scheme to recover the £253,345 from Alldech (see s.73(2) of the Value Added Tax Act 1994). But this would all be part of the assessment of the quantum of damages recoverable by the Commissioners from Total if the Commissioners succeed in establishing the tort. It is not the levying of tax.

60. As for the point that the statutory VAT scheme prescribes exclusive remedies for the Commissioners, I can, for my part, see no reason why the statutory scheme should be thought to provide protection against tort claims for those who by fraudulent schemes succeed in extracting money from the Commissioners. If the Commissioners have a statutory remedy against Alldech to recover the £235,345 and if Alldech

are good for the money, then the economic damage caused by the conspiracy will, presumably, be nil. But if Alldech is not good for the money, or if there is no statutory remedy available in a case such as this, I can see no reason why the Commissioners, the victims of a fraudulent conspiracy, should be barred from recovering damages against the principal conspirator, Total. An intention that that should be so cannot, in my opinion, be attributed to the legislature in enacting the VAT scheme.

Conclusion

61. In agreement, therefore, with all my noble and learned friends on the tort of conspiracy point and with Lord Walker and Lord Mance on all other points, I would allow the Commissioners' appeal, dismiss Total's cross-appeal, restore paragraph 1 of the order of Hodge J made on 10 January 2005, and set aside paragraph 1 of the order of the Court of Appeal made on 31 January 2007.

LORD WALKER OF GESTINGTHORPE

My Lords,

The two issues

62. This appeal on a preliminary point of law raises two issues, each of which is important. The first is whether the appellants, the Commissioners of HM Revenue and Customs ("the Commissioners") are entitled to resort to a private law remedy—an action for damages for the tort of conspiracy—in order to recoup value added tax (VAT), which would otherwise be irrecoverable. The second issue is whether (on the facts which the House is required to assume for the purposes of the preliminary issue) the requirements of the common law tort of conspiracy can be established.

63. Although they are distinct the two issues touch at a single point. That is whether (if, contrary to the Commissioners' primary case, a claimant alleging an "unlawful means" conspiracy must establish that the unlawful means consisted of or included the commission of a civil

wrong actionable at the suit of the claimant) the Commissioners would have been able to bring a private law claim for fraudulent misrepresentation against a company called Alldech Limited ("Alldech"), which was (on the assumed facts) a participant in a fraudulent conspiracy with the respondent Total Network SL ("Total").

64. I have set out the two issues in what seems to be their logical order. But the Commissioners' appeal (on the second issue) was opened before Total's cross-appeal (on the first issue) and I will follow the same course. I gratefully adopt the exposition of the facts and the legislation set out in the opinion of my noble and learned friend Lord Hope of Craighead.

The tort of conspiracy: background

65. The essential dispute between the parties, on the Commissioners' appeal, is whether the Court of Appeal was right in holding that, in order to establish the tort of "unlawful means" conspiracy, the claimant must show that the unlawful means constituted or included a civil wrong which had been committed by at least one of the conspirators, and was actionable at the suit of the claimant himself. The Court of Appeal made clear that it would not have reached that conclusion had it not felt bound to follow the decision of the Court of Appeal in *Powell v Boladz* [1998] Lloyd's Rep Med 116.

66. That decision referred (on the material point) to only three authorities, only one being a decision of this House, that is *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173 ("*Lonrho v Shell*"). It might therefore appear to be a short point. But your Lordships have had the advantage of full argument and full citation of authority. Mr Flint QC for Total (echoing Lord Diplock in *Lonrho v Shell* at p189) urged the House not to extend the scope of an already anomalous tort. Against that Mr Martin QC for the Commissioners argued that on Total's case the tort would be reduced to no more than a barren iteration of joint tortfeasance. In these circumstances it is necessary, I think, to go back to some of what Lord Diplock (in *Lonrho v Shell* at p188) called the tort's "chequered history" between the first-instance decision of Lord Coleridge CJ in *Mogul Steamship Co. Ltd v McGregor, Gow & Co.* (1888) 21 QBD 544 ("*Mogul*") and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 ("*Crofter*"). The decision of this House in *Crofter* can, I think, be seen as the final emergence of the tort of conspiracy in its modern form. But it is necessary to go back further to

see why the tort is generally regarded as anomalous, and why the notion of "predominant purpose" or "real and predominant purpose" was defined in *Crofter* (especially in the speeches of Viscount Simon LC and Lord Wright at pp 445-447 and pp 477-478 respectively) as a necessary ingredient of an "unlawful object" (or "lawful means") conspiracy.

67. In looking at the older cases I have the advantage of traversing some of the same ground as has recently been covered by Lord Hoffmann in his opinion in *OBG Ltd v Allan* and associated appeals [2007] 2 WLR 920 ("*OBG*"), paras 6 to 21 and paras 45 to 64. In the latter group of paragraphs Lord Hoffmann concluded (with the concurrence of the majority) that a wrong actionable in private law is a necessary ingredient of the tort of intentionally causing harm by unlawful means (which I shall for brevity call "the intentional harm tort"). That may be thought to add a further layer of anomaly to the tort of conspiracy, if the Commissioners are right on the first issue. That there is an anomaly, or at least something calling for explanation, was recognised as long ago as 1889, when Bowen LJ said in *Mogul* in the Court of Appeal (1889) 23 QBD 598, 616:

> "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt."

He proceeded to state what he saw as sound reasons for the distinction, but some other distinguished judges have been more sceptical.

68. In *Mogul* the plaintiffs complained that the defendants (an association of shipowners) had conspired to obtain a monopoly of the China tea trade, mainly by offering a discount on the freight charged to those who confined their shipments to the defendants' vessels. The claim failed at first instance before Lord Coleridge CJ sitting without a jury (1888) 21 QBD 544, before the Court of Appeal (Bowen and Fry LJJ, Lord Esher MR dissenting) (1889) 23 QBD 598 and in this House [1892] AC 25. The distinction between the two varieties of the tort was seen in terms of combination for an unlawful object, or combination to cause harm by unlawful means. The real difficulty (exemplified in the difference of opinion in the Court of Appeal) was in identifying what was unlawful, either as an object or as a means to an end, in the *laissez-faire* Victorian world of trade competition.

69. Lord Coleridge CJ described the two categories of the tort 21 QBD 544, 550:

> "And in this case it is clear that if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants and a person injured by their misdemeanour has an action in respect of his injury."

He was almost but not quite persuaded (pp 553-554) that there was a "wrongful and malicious combination to ruin a man in his trade". He concluded that:

> "I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice."

Here Lord Coleridge CJ was identifying the problem of mixed motives – the trader who wants to damage his competitor's business because that will make his own business more profitable – which runs through the development of the law of economic torts, including conspiracy. This point was recently made by Lord Hoffmann (in the context of causing loss by unlawful means) in *OBG* [2007] 2 WLR 920 paras 134-135, quoting Lord Sumner in *Sorrell v Smith* [1925] AC 700, 742:

> 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss.'

70. In the Court of Appeal in *Mogul* Lord Esher MR stated nine rules (23 QBD 598, 609-610). The first seven enunciated a doctrine of "fair trade competition" which, had they prevailed, would have set the development of the law on a very different course. They applied to all traders, whether or not they were acting in concert, and Lord Esher MR treated the defendants' combination as a sort of *a fortiori* footnote (at p.710). But the views of Bowen and Fry LJJ (which were approved unanimously by this House) insisted in much-quoted passages (at pp

614-618 and pp 626-628) that trade competition, however fierce, was not unlawful unless it involved fraud, misrepresentation, intimidation or molestation; that the defendants did not intend to injure their competitors further than was necessarily involved in the activity of competition; and that a combination of traders to engage in such activity did not amount to an unlawful conspiracy, although the doctrine of restraint of trade might make it unenforceable.

71. *Allen v Flood* [1898] AC 1, the case about the demarcation dispute between the ironworkers and the woodworkers at a shipyard in Millwall, was regarded at the time as a case of the highest importance, and its importance is still recognised over a century later. It was first argued over four days before an appellate committee of seven, and then again over six days before a committee of nine (three Lords of Appeal in Ordinary and six other peers who held or had held high judicial office). On the second occasion eight judges attended to give the House the benefit of their opinions (the last time that ever occurred). The judges divided 6-2 in favour of the plaintiffs (the respondents in the appeal) but the House divided 6-3 in favour of Allen (one of the three original defendants, but by then the only appellant). The Lord Chancellor, Lord Halsbury, presided but was in the minority. The case is of enormous interest as a matter of legal and social history (see RFV Heuston, Legal Prosopography (1986) 102 LQR 90). But as regards conspiracy it is of limited importance since although conspiracy was an issue on the pleadings, at first instance (Kennedy J with a jury) the judge ruled that there was no evidence of conspiracy (or of intimidation, coercion or breach of contract). Allen, the London representative of the Boilermakers' Society, had simply been summoned to the shipyard, and (acting on his own initiative) told the management what would happen if Flood and Taylor (woodworkers who were known to have done ironwork at another yard) were not discharged (as they could be without a breach of contract, since they were employed by the day). The absence of a conspiracy was most strongly emphasised by Lord Macnaghten [1898] AC1, 153:

> "the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of 'boycotting,' and other forms of oppressive combination, seem to me to depend on considerations which are, I think, in the present case conspicuously absent."

72. To my mind the main significance of *Allen v Flood* to the present appeal is in explaining the delicacy with which, about four years later, the House approached *Quinn v Leathem* [1901] AC 495. The Earl of Halsbury LC was again presiding, and the committee included several law lords who had sat in *Allen v Flood*. (Heuston's article does not advert to the curious fact that when this House gave judgment on 5 August 1901, there were according to the Law Reports six speeches, given by the Earl of Halsbury LC, Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson and Lord Lindley. Lord Davey is recorded as having read the speeches of Lord Shand, Lord Robertson and Lord Lindley but not as having given any speech of his own. Mr G R Dymond of the House of Lords Library has kindly checked that the Lords' Journals confirm what is in the Law Reports.)

73. Quinn was treasurer of a Belfast butchers' association. Leathem, who traded as a butcher, employed some non-union men, although when the union made difficulties he asked for them to be admitted to the union, and offered to pay their dues. The union put pressure on Munce, a wholesale customer of Leathem, to stop buying his meat. It also called out Dickie, one of Leathem's employees. The jury found for Leathem, holding that there had been a malicious conspiracy between Quinn and other officers of the union. The Irish Court of Appeal affirmed this. So, unanimously, did this House. The House's anxiety to explain why *Allen v Flood* was not in point makes it quite difficult to discern what *Quinn v Leathem* did decide. But it can, at any rate with hindsight, be recognised as a case of "unlawful object" (or "lawful means") conspiracy, since (on the facts found) the union did not have the justification of advancing its own interests, and was acting primarily for the purpose of punishing and injuring Leathem (see especially the speeches of Lord Macnaghten at p 511 and Lord Shand at p 515; Lord Lindley, however, at p 538 seems to have regarded it as a case of unlawful means). In *Sorrell v Smith* [1925] AC 700 most of the House saw *Quinn v Leathem* as a case of unlawful object, not unlawful means (see especially Viscount Cave LC at p 712, Lord Dunedin at pp 719 and 724, Lord Sumner at p 735 and Lord Buckmaster at p 744).

74. In *Crofter* [1942] AC 435 the House, building on *Sorrell v Smith*, finally established the basic principles of the modern tort. There is a key passage in the speech of Viscount Simon LC at p 445:

> "The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding

> that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and even if we avoid the word 'motive', there may be more than a single 'purpose' or 'object.' It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."

75. Another very important passage is in the speech of Lord Wright, at p 462, and it has been the subject of a good deal of discussion before your Lordships:

> "The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides. It is a different matter if the conspiracy is to do acts in themselves wrongful, such as to deceive or defraud, to commit violence, or to conduct a strike or lock-out by means of conduct prohibited by the Conspiracy and Protection of Property Act, 1875, or which contravenes the Trade Disputes and Trade Unions Act 1927."

76. My Lords, I would draw attention to three general features of the authorities down to, and including, *Crofter*. First, the debate is overwhelmingly about intention (or purpose, or object) culminating in the approval of "real and predominant purpose" (Viscount Simon LC in *Crofter* at p 446) as the essential ingredient of the "unlawful object" variety of the tort. Second, there is little or no discussion of whether unlawful means can include conduct which is a criminal offence but cannot found a civil cause of action. Most of the examples of unlawful means given in the speeches and judgments are expressed in general,

fairly non-technical terms (fraud, misrepresentation, molestation, intimidation, obstruction). Lord Wright, in the passage just quoted from his speech in *Crofter*, includes some statutory offences, but he does not seem to have regarded it as a point calling for reasoned discussion. Third, there are frequent references (again, the quotation from Lord Wright in *Crofter* is an example) to the anomaly that the conduct of two or more persons may be actionable whereas the same conduct on the part of a single person would not be.

77. This third point calls for a little more discussion. In *Mogul*, Bowen LJ (23 QBD 598, 616) gave two reasons for it:

> "The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights."

The first reason is not very satisfactory, since (as has very often been pointed out, for instance by Lord Sumner in *Sorrell v Smith* at p 741 and Lord Diplock in *Lonrho v Shell* at p189) it all depends on the particular facts. The second reason seems to me more principled, focusing as it does on the fact that the claimant's damage is caused by two or more persons acting in concert to carry out an unlawful plan. That is, I think, what was behind an observation of Lord Dunedin in *Sorrell v Smith* at p 725:

> "Now the moment that that is recognised, ie, that the essence of conspiracy on which civil action is founded is a criminal conspiracy, though of course unless actual damage has followed no civil action will lie, the moment that fact is recognised, you at once bring in the spirit of the criminal law, where motive or intention—the *mens rea*—is everything."

That identifies what sets conspiracy apart from other torts, and emphasises the first point made above—the intense focus, in the tort of conspiracy, on intention. It is also worth noting that in some factual situations (such as that in the present appeal) the fraud disclosed by the

assumed facts could not have been carried out otherwise than by a number of persons acting in concert.

78. I suspect that the judges at the end of the 19th century also had a third reason, largely unarticulated but appearing in Lord Macnaghten's dictum about boycotts in *Allen v Flood*. That was the deep suspicion which the governing class had, in Georgian and Victorian England, of collective action in the political and economic spheres, as potential threats to the constitution and the framework of society. It is a theme from the Gordon Riots in 1780 to the Land League in Ireland a century later (see *R v Parnell* (1881) 14 Cox CC 508), with the conventions called by the corresponding societies in the 1790s, the Peterloo Massacre in 1819, the Tolpuddle Martyrs in 1834 and the Chartist Movement (1838-1848) and the rise of the trade unions in between.

The tort of conspiracy: the modern cases

79. The litigation in *Lonrho v Shell* [1982] AC 173 arose from sanctions imposed against Southern Rhodesia, after UDI, under the Southern Rhodesia Act 1965. Lonrho's claim was that Shell and its co-defendant BP had breached the sanctions and caused loss to Lonrho and its Portuguese co-owner of a pipeline from Beira in Mozambique to a refinery in what was then Southern Rhodesia. The matter came before the court as issues of law arising on assumed facts in the course of an arbitration. The relevant issue was numbered 5(b):

> "Whether the claimants have a cause of action for damage alleged to have been caused by such breaches [of the sanctions orders] by virtue only of the allegation that there was an agreement to effect them."

That is a rather bald way of putting the issue: the essential point was whether it was fatal that there was no pleading of an intention to injure Lonrho and its co-plaintiff, as Lord Diplock explained at p188:

> "Question 5(b), to which I now turn, concerns conspiracy as a civil tort. Your Lordships are invited to answer it on the assumption that the purpose of Shell and BP in entering into the agreement to do the various things that it must be assumed they did in contravention of the sanctions

> Order, was to forward their own commercial interests; *not* to injure those of Lonrho. So the question of law to be determined is whether an intent by the defendants to injure the plaintiff is an essential element in the civil wrong of conspiracy, even where the acts agreed to be done by the conspirators amount to criminal offences under a penal statute."

80. So the question was clearly understood as being one of intention, and the reference to "criminal offences under a penal statute" (introduced as it was by the words "even where") does not suggest that the criminal element was seen as a potential flaw in Lonrho's case. Lord Diplock then briefly discussed the classic authorities on the tort of conspiracy; I have already mentioned some of his observations. He stated (at p189) that none of the authorities

> "was directed to a case where the damage-causing acts although neither done for the purpose of injuring the plaintiff nor actionable at his suit if they had been done by one person alone, were nevertheless a contravention of some penal law."

He concluded that the House had an unfettered choice, and his unhesitating choice (agreeing with the courts below in their conclusion if not in their reasoning) was not to extend the scope of the tort, and to answer question 5(b) in the negative. The other members of the House agreed.

81. My Lords, the reasoning in Lord Diplock's speech seems to me to be very compressed, especially in the passage from which I have just quoted. I am very conscious of the danger of trying to expound speeches and judgments (even of the most eminent judges) as if they were Acts of Parliament. It is a danger of which Slade LJ (delivering the judgment of the Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391—"*Metall*") was conscious. Nevertheless he did subject the speech of Lord Diplock to "detailed textual analysis" (as Lord Bridge of Harwich put it in *Lonrho plc v Fayed* [1992] 1 AC 448, 468—"*Lonrho v Fayed*"). In analysing *Lonrho v Shell*, Slade LJ also quoted from and paid close attention to the reasoning of the arbitrators, Parker J and the Court of Appeal, although it is far from clear that Lord Diplock (whose speech on this issue runs to no more

than one and a half pages) had the reasoning in the lower courts at the forefront of his mind.

82. In *Lonrho v Fayed* this House unanimously disapproved of the views which the Court of Appeal in *Metall* had expressed about the effect of Lord Diplock's speech in *Lonrho v Shell.* In doing so the House also clarified the law, which had fallen into some confusion as a result of *Lonrho v Shell* as interpreted in *Metall*. In those circumstances it is unnecessary and inappropriate, I suggest, for your Lordships to revisit the exegesis of Lord Diplock's speech. It is sufficient to repeat that it was concerned solely with the issue of intention, and that Lord Diplock uncharacteristically failed to make a clear distinction between the requirement of predominant purpose under one variety of the tort of conspiracy and the lower requirement of intentional injury needed for the other variety.

83. Clarity was restored by the speech of Lord Bridge in *Lonrho v Fayed* [1992] 1 AC 448, with which the rest of the House agreed. (Lord Templeman also stated, with the agreement of the majority, that the ambits and ingredients of the torts of conspiracy and unlawful interference might require further analysis and reconsideration.) The key passage in the speech of Lord Bridge is at p464, after a citation of Lord Diplock's reference to injury to the plaintiff being the predominant purpose of the conspiracy:

> "But this reasoning has no relevance to the second type of conspiracy which employs unlawful means. Of this type Lord Devlin said in his speech in *Rookes v Barnard* [1964] AC 1129, 1204, . . . 'In the latter type . . . the element of conspiracy is usually only of secondary importance since the unlawful means are actionable by themselves.'
>
> It is no doubt for the reason mentioned by Lord Devlin that there is no direct authority, unless it be *Rookes v Barnard* itself, establishing the negative proposition that the tort of conspiracy to injure by unlawful means may be established without proof that the intention to injure the plaintiff was the predominant purpose of the conspirators. But in the many cases where plaintiffs have asserted a conspiracy to injure, but have been unable to prove that any unlawful means were used, judgments in the Court of Appeal and speeches in your Lordships' House emphasising the requirement of a predominant purpose to

> injure have repeatedly included dicta indicating that this requirement does not apply where the means used to effect the conspirator's purpose are unlawful."

84. Lord Bridge then gave some examples, including a passage from the speech of Lord Wright in *Crofter*, of which I have already quoted part. He also quoted from the judgments below in *Lonrho v Shell* before coming to *Metall*. Of that case he said (at p468):

> "My Lords, I am quite unable to accept that Lord Diplock or the other members of the Appellate Committee concurring with him, of whom I was one, intended the decision in *Lonrho v Shell* [1982] AC 173 to effect, *sub silentio*, such a significant change in the law as it had been previously understood. The House, as is clear from the parties' printed cases, which we have been shown, had never been invited to take such a step. Moreover, to do so would have been directly contrary to the view of Lord Denning MR expressed in the judgment which the House was affirming and inconsistent with the dicta in what Lord Diplock described, at p188, as 'Viscount Simon LC's now classic speech in [*Crofter*].' I would overrule the *Metall* case in this respect."

85. I now come to *Powell v Boladz* [1998] Lloyd's Med Rep 116, which the Court of Appeal saw as compelling it to require civil actionability as an ingredient of unlawful means. It was a very unusual conspiracy claim, alleging falsification of hospital records. I need not go further into the complicated facts. Stuart-Smith LJ (with whom Morritt and Schiemann LJJ agreed) saw three answers to the claim for conspiracy. The second (at p126) is in point:

> "Secondly the unlawful act relied upon must be actionable at the suit of the plaintiff. It is not sufficient that it amounts to a crime or breach of contract with a third party. (See *Clerk & Lindsell on Torts*, 17th ed. Para 23-80, *Marrinan v Vibart* [1963] 1 QB 234 & 528, *Hargreaves v Bretherton* [1959] 1 QB 45, *Lonrho v Shell* [1982] AC 173 per Lord Diplock at p186 etc). For this reason this form of unlawful act conspiracy adds little to the remedies available to a plaintiff."

86. Mr Martin QC (for the Commissioners) described this passage as plainly wrong. Mr Flint QC (for Total) showed little enthusiasm for its reasoning. But to say that the reasoning in *Powell v Boladz* is unsound is only the first step towards identifying the correct principle. That question has been considered in a number of recent cases, which (to say the least) do not speak with one voice. The judgment of the Court of Appeal in this case, holding itself bound by *Powell v Boladz*, was handed down on 31 January 2007. That judgment referred to the unreported decision of Davis J in *Mbasogo v Logo Ltd* [2005] EWHC 2034 (QB) ("Mbasogo") but not to the fact that that case had by then gone to the Court of Appeal (Sir Anthony Clarke MR, Dyson and Moses LJJ) [2006] EWCA Civ 1370; [2007] 2 WLR 1062 which gave its reserved judgment on 23 October 2006. That division of the Court of Appeal declined to go far into the law on unlawful means conspiracy (since it held the claim unjusticiable on wider grounds) but the Court did (at para 104) express doubt as to whether it was bound by *Powell v Boladz*.

87. Davis J's judgment in *Mbasogo* contains an admirable discussion of the "unlawful means" issue, with mention of all the recent cases. Because the judgment is unreported I will give a brief summary. Davis J pointed out that in an interlocutory appeal in *Associated British Ports v Transport & General Workers' Union* [1989] 1 WLR 939, Stuart-Smith LJ had (in agreement with Butler-Sloss LJ but contrary to the view of Neill LJ) taken the view, for the purposes of the intentional harm tort (p 966):

> "that at the very least it is strongly arguable that where the unlawful relied upon in this tort is a breach of statute, it is not necessary that it should be one that is actionable in tort at the suit of the plaintiff."

That case was not referred to in *Powell v Boladz* (decided on 1 July 1997), nor in *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 LLR 19, decided by the Court of Appeal (Stuart-Smith, Hobhouse and Thorpe LJJ) on 23 July 1997. At p 32 Stuart-Smith LJ recorded (using the same language and referring to the same authorities) counsel's concession that the unlawful act must be actionable at the suit of the plaintiff. That statement of the law was followed by Toulson J in *Yukong Line Ltd of Korea v Rendsburg Investments Corp. of Liberia* [1998] 1 WLR 294, 311-314. Toulson J's reasoning was based, it seems to me, on an over-elaborate textual analysis of Lord Diplock's speech in *Lonrho v Shell*, without regard to

the authoritative explanation given by Lord Bridge in *Lonrho v Fayed*. I would make the same respectful criticism of the judgment of Laddie J in *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493 (especially paras 30-34).

88. In *Surzur Overseas Ltd v Koros* [1999] 2 LLR 611, the Court of Appeal refused to strike out a claim alleging an unlawful means conspiracy by deception of the Court (leading it to lift an order preventing the sale of three ships). Waller LJ (with whom Hirst and Aldous LJJ agreed) stated at p 617:

> "This aspect was not debated in any detail before Mr Justice Longmore at all and was raised very much at the last moment in argument [before] us. It would clearly be wrong to reach any final conclusion. What is clear, in my view, is that it is eminently arguable that in an unlawful means conspiracy the unlawful means do not have to be actionable at the suit of the plaintiff."

Crime as unlawful means

89. My Lords, faced with this confusion in the recent case-law, the House must, I suggest, go back to the general principles to be derived from the older cases in which the economic torts have been developed. It is however necessary to bear in mind that their development has been a long and difficult process, and may not yet be complete, as Lord Templeman observed (with the concurrence of the majority) in *Lonrho v Fayed* [1992] 1 AC 448, 471. A particular difficulty is that it has been generally assumed, throughout the 20th-century cases, that "unlawful means" should have the same meaning in the intentional harm tort and in the tort of conspiracy. A good deal of legal reasoning in the speeches and judgments (as to the ingredients of one or other of these torts) has been based on the assumption that the meaning must be the same in both. That assumption is however challenged, if the Commissioners are correct, by the speech of Lord Hoffmann in *OBG* (with which the majority concurred). I shall have to come back to that difficulty.

90. In searching for general principle I start with a very simple, even naïve point. The man in the street, if asked what an unlawful act was, would probably answer 'a crime.' He might give as an example theft, obtaining money by false pretences, or assault occasioning actual bodily

harm. He might or might not know that each of these was also a civil wrong (or tort) but it is unlikely that civil liability would be in the forefront of his mind.

91. The reaction of a lawyer would be more informed but it would not, I suggest, be essentially different. In its ordinary legal meaning "unlawful" certainly covers crimes and torts (especially intentional torts). Beyond that its scope may sometimes extend to breach of contract, breach of fiduciary duty, and perhaps even matters which merely make a contract unenforceable, but the word's appropriateness becomes increasingly debatable and dependent on the legal context. In the very important criminal case of *R v Clarence* (1888) 22 QBD 23 (in which a question of law on sections 20 and 47 of the Offences against the Person Act 1861 was argued before a court of 13 judges, several of whom later gave their opinions to the House in *Allen v Flood*) Stephen J (at p 40) expressed the view that:

> "The word 'unlawfully' must here be construed to mean 'unlawfully' in the wide general sense in which the word is used with reference to acts which if done by conspirators are indictable, though not if they are done by individuals. This general sense may, I think, be said to be 'immoral and mischievous to the public'. I do not agree with the doctrine that the word 'unlawfully' is used here in this wide sense. The use of the word in relation to conspiracy appears to me to be exceptional."

What was exceptional about it was its extension *downwards* in the scale of blameworthy conduct. The unlawfulness of criminal conduct was at the top end of the scale, and too obvious to call for mention.

92. The enquiry how far *downwards* to go seems to me to be a feature common to all the leading cases in which the tort of unlawful means conspiracy has been developed. Until Lord Diplock's speech in *Lonrho v Shell* there was never a clear issue as to whether the alleged unlawful means must be actionable (as a separate tort) at the suit of the plaintiff. Lord Diplock himself acknowledged this [1982] AC 173, 189. His attention may have been drawn to the point by his earlier disapproval (at p187) of some wide observations made by Lord Denning MR in an interlocutory appeal in *Ex parte Island Records Ltd* [1978] Ch 122.

93. In the long period during which this issue did not arise for decision there is, unsurprisingly, little discussion of it in the authorities. They concentrate on the issue of intention (which was also at the heart of question 5(b) in *Lonrho v Shell*). But all the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it). I do not want to multiply citations but I would instance Lord Watson in *Allen v Flood* at p96 (emphasising "illegal means *directed against* that third party"); Viscount Cave LC in *Sorrell v Smith* at p 714 ("means which are in themselves unlawful, such as violence or the threat of violence or fraud"); Lord Wright in *Crofter* at p 462 (quoted in para 75 above, and instancing some statutory offences); Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1209 ("in some of the dicta [on conspiracies] the language suggests that the means must be criminal or tortious and in others that breach of contract would do; but in no case was the point in issue;" in the earlier much-discussed sentence at p 1204 I would not give much weight to the position that the word "usually" occupies in the sentence); and Lord Denning MR and Russell LJ in *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, 783, 785 (though that decision is questionable: see (1968) 84 LQR 310).

94. From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy "merging" into some other tort, but I need not go far into those: *Surzur Overseas Ltd v Koros* [1999] 2 LLR 611; *Kuwait Oil Tanker Co. SAK v Al Bader* [2000] 2 All ER (Comm) 271).

95. In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG* at para 159 called "instrumentality") of intentionally inflicting harm. In *Lonrho v Shell* the sanctions order against Southern Rhodesia was part of the story, but it was not the instrument for the intentional infliction of harm. With great respect to

Lord Hoffmann (in *OBG* at para 57) it is in my view what Shell and BP did not intend, rather than what Parliament did not intend, that is most relevant to that decision.

96. Having said that I would accept that the sort of considerations relevant to determining whether a breach of statutory duty is actionable in a civil suit (*Cutler v Wandsworth Stadium Ltd* [1949] AC 398) may well overlap, or even occasionally coincide with, the issue of unlawful means in the tort of conspiracy. But the range of possible breaches of statutory duty, and the range of possible conspiracies, are both so wide and varied that it would be unwise to attempt to lay down any general rule. What is important, to my mind, is that in the phrase "unlawful means" each word has an important part to play. It is not enough that there is an element of unlawfulness somewhere in the story.

OBG revisited

97. I must now come back to *OBG* [2007] 2 WLR 920. It was a case about an invalid appointment of receivers in which the appellants sought to widen the scope of the tort of conversion. It was heard with *Douglas v Hello! Ltd*, which raised issues about breach of confidence, and *Mainstream Properties Ltd v Young*, a case which might have been run as a claim for dishonest assistance in breach of fiduciary duty. Despite these disparate issues the appeals were heard together because they all raised issues as to the intentional harm tort. In a passage of his opinion with which the majority concurred (paras 45-60) Lord Hoffmann observed in relation to the intentional harm tort (para 49):

> "In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss."

Lord Nicholls of Birkenhead took a different view (paras 149-163).

98. Lord Hoffmann stated at para 56:

> "Your Lordships were not referred to any authority in which the tort of causing loss by unlawful means has been extended beyond the description given by Lord Watson in *Allen v Flood* [1898] AC1, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535. Nor do I think it should be."

He added at para 57 (on which I have already commented):

> "Likewise, as it seems to me, in a case like [*Lonrho v Shell*], it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law."

And at para 60:

> "I do not think that the width of the concept of 'unlawful means' can be counteracted by insisting upon a highly specific intention, which 'targets' the plaintiff. That, as it seems to me, places too much of a strain on the concept of intention."

99. These passages (on which Mr Flint relied in his printed case and his oral submissions) prompted me to mention, near the beginning of this opinion, the risk of a new layer of anomaly being added to the tort of conspiracy (that is, that "unlawful means" would have a meaning for the purposes of a conspiracy claim different from its meaning for the purposes of a claim based on the intentional harm tort). But as Lord Hoffmann develops his reasoning in paras 51-58 of his opinion it becomes apparent that he is concerned, not only with the legal quality of the unlawful means (tort or crime?) but also with their effect in interfering with a third party's freedom of economic action. Cases like *RCA Corporation v Pollard* [1983] Ch 135 and *Isaac Oren v Red Box Toy Factory* [1999] FSR 785, show that a trader may suffer economic loss as the result of a civil wrong by a bootlegger actionable by the proprietor (or sometimes, an exclusive licensee) of intellectual property rights, without the trader having a remedy. The breach of the intellectual property rights is a statutory tort, but it is actionable only by those with a sufficient title to them. As I understand his opinion, Lord Hoffmann was concerned to limit the intentional harm tort to cases where the claimant has been "intentionally struck at through others" (in the words of Lord

Lindley in *Quinn v Leathem* [1901] AC 495, 535, quoted by Lord Hoffmann at para 46). He made clear (para 61) that "two party intimidation" raises quite different issues. This point is developed in para 43 of the opinion of my noble and learned friend Lord Hope of Craighead, and in para 124 of the opinion of my noble and learned friend Lord Mance, and I respectfully agree with their observations.

100. The intentional harm tort and the "unlawful means" variety of conspiracy share the ingredients of the intentional infliction of harm on the claimant. But that variety of conspiracy is not simply the intentional harm tort committed by joint tortfeasors. The gist of the intentional harm tort (apart from exceptional "two party" cases) is striking at the claimant through a third party, and doing so by interfering with his freedom of economic activity. The gist of conspiracy is damage intentionally inflicted by persons who combine for that purpose (Viscount Simon LC in *Crofter* at p 444) and the claimant need not be a trader who is injured in his trade, though that is the most common case. In my opinion your Lordships are driven to the conclusion that, as the economic torts have developed, "unlawful means" has a wider meaning in the tort of conspiracy than it has in the intentional harm tort.

101. Some scholars have classified the tort of unlawful means conspiracy as a form of secondary liability (notably Hazel Carty, An Analysis of the Economic Torts (2001) p 22, agreeing with Philip Sales, The Tort of Conspiracy and Civil Secondary Liability [1990] CLJ 491). They would not apply this classification to a conspiracy to injure by lawful means. If an unlawful means conspiracy is indeed a form of secondary liability for a civil wrong then the need for the unlawful means to be actionable as a civil wrong would be self-evident.

102. However the premise is in my opinion mistaken. The best judicial support for it seems to be some comments by Palles CB in *Kearney v Lloyd* (1889) 26 LR Ir 268, but in *Crofter* [1942] AC 435, 461-462 Lord Wright said that later cases have decisively held the contrary (this passage immediately precedes the passage which I have set out in para 75 above). Sales' article was written (like other scholarly comments such as John Eekelaar, The Conspiracy Tangle (1990) 106 LQR 223) in the uneasy period after this House's decision in *Lonrho v Shell* and the Court of Appeal's decision in *Metall* and before the House's decision in *Lonrho v Fayed*. A later well-regarded article by Sales and Stilitz, Intentional Infliction of Harm by Unlawful Means (1999) 115 LQR 411 repeated (at p435) the proposition:

> "It is now clear that conspiracy to injure another by unlawful means is a distinct form of liability, under which the conspirators are made jointly liable for acts committed by one or more of them, which are acts which would be independently actionable by P if committed by only one person. Unlawful means conspiracy is thus an example of secondary liability, and is quite distinct from the intentional harm tort (for which the unlawful means involved do not have to be actionable independently of the tort itself)."

103. The last part of this passage has been shown to be incorrect by the decision of this House in *OBG* (see the speech of Lord Hoffmann at paras 59-61). In my opinion the first part of the passage is also unsustainable. The authors cite in support of it *Lonrho v Shell; Lonrho v Fayed; Rookes v Barnard; Marrinan v Vibart;* and *Powell v Boladz.* I need not repeat why those authorities do not in my opinion support it, beyond noting the passage relied on in the speech of Lord Bridge in *Lonrho v Fayed* [1992] 1 AC 448, 466G:

> "As the judgments in both courts below and the speech of Lord Diplock make clear, the fact dictating a negative answer to the second question was the absence of any intention to injure Lonrho. Parker J said:
>
> > 'The claimants accept that there is no case in which an undirected crime, not itself a civil wrong, committed without intent to injure, has been held, or, I think, even alleged to be actionable on the mere ground that it was committed pursuant to agreement.'"

The whole context of *Lonrho v Shell* shows that the emphasis in this passage (and the other passages quoted) was on the absence of an intention to injure, and not on the need for an independently actionable wrong.

104. In short, and with great respect to those who take a different view, any suggestion that the unlawful means conspiracy is a form of secondary liability, and must therefore have an actionable wrong as an essential ingredient, seems to me to be a circular argument which assumes what it sets out to prove.

Is a private law action open to the Commissioners?

105. All the foregoing discussion is academic if, as my noble and learned friend Lord Hope of Craighead would hold, a private law action for damages for conspiracy is not open to the Commissioners. Lord Hope founds his conclusion, as I understand it, not so much on the Bill of Rights 1688 as on the comprehensive and exhaustive nature of the statutory code for the administration and collection of VAT contained in the Value Added Tax Act 1994. My noble and learned friend also considers that the Commissioners have no commercial interests needing to be protected by the tort of conspiracy. This last point was not, so far as I can see, raised by Mr Flint in his written and oral submissions.

106. I respectfully differ from Lord Hope on this part of the case. The Commissioners' statutory powers are not derived solely from the Value Added Tax Act 1994. They are also derived from the Commissioners for Revenue and Customs Act 2005, which lays down the Commissioners' statutory functions in connection with VAT (section 5(1)(b) and (2)(b)). The Commissioners have ancillary powers (section 9) and specific power to conduct civil proceedings (section 25).

107. The Commissioners regularly present bankruptcy petitions and winding-up petitions against defaulting taxpayers of all sorts. In a winding up they can if necessary proceed against a receiver for misfeasance (*Inland Revenue Commissioners v Goldblatt* [1972] Ch 498). They do so in order to recover tax (not to "levy" it). So far as I can see they have no express statutory power to seek these remedies, but it has never been doubted that they are available. Similarly (though your Lordships heard no argument on the point from either side) there does not appear to be any specific statutory power for the Commissioners to obtain a freezing order. But it was only by obtaining a freezing order in private law proceedings that the Commissioners were able to prevent the conspirators from removing their ill-gotten gains out of the jurisdiction. But for a freezing order, there would have been a severe loss to the Commissioners and to the general body of taxpayers.

108. The Commissioners' action in this case has been described in Total's written and oral submissions as unprecedented. That may be so. The first-ever application for a freezing order (originally called a *Mareva* injuction) was unprecedented, but it has proved very efficacious in strengthening civil remedies against fraud. In the well-known case of

Ramsay v Inland Revenue Commissioners [1982] AC 300, 326, Lord Wilberforce said:

> "While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both."

Lord Wilberforce said that in relation to artificial (but not unlawful) tax avoidance which was then costing the Exchequer millions of pounds a year. Your Lordships are now concerned with illegal, fraudulent tax evasion which is costing the Exchequer more than a billion pounds a year. Indeed it is worse than evasion: it is the fraudulent extraction of money from the Exchequer.

109. The Commissioners do not now handle large sums of cash, since there are safer means for the transfer of money. But if an official vehicle carrying cash belonging to the Commissioners (cash representing collected taxes) were hijacked and the cash stolen, it seems to me that the Commissioners would undoubtedly have a civil remedy available to reclaim it, if the robbers were apprehended and the proceeds of the robbery traced to a bank account. In my opinion the present case is essentially the same.

110. For these reasons I disagree with the conclusion of the Court of Appeal on what it called the third issue (paras 80-87 of its judgment). I would therefore, if necessary, have upheld the Commissioners' fallback position (para 63 above). I would allow the Commissioners' appeal and dismiss Total's cross-appeal.

LORD MANCE

My Lords,

111. I have had the benefit of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. I

gratefully adopt the summary of the facts in paragraphs 3 to 10 of Lord Hope's and paragraphs 49 and 51 of Lord Scott's opinions. The questions to which they give rise are (a) whether the pursuit of any claim by the Commissioners against Total Network SL in conspiracy is precluded by (i) the Bill of Rights and/or (ii) the statutory scheme of the Value Added Tax Act 1994 ("the VAT Act 1994") and (b) whether, if it is not, it can as pleaded exist in law.

112. I will start with issue (b). All of your Lordships are of the view on issue (b) that the Commissioners' pleaded claim can as pleaded exist in law. The Commissioners put their claim in two alternative ways, as Lord Neuberger explains in paragraphs 142 and 164-167 of his opinion. I agree with him that both are arguable under the domestic and European legal principles that he examines. But I would put this on a narrow basis.

113. One way in which the Commissioners put their case focuses on the non-payment of VAT by Redlaw (£249,054.75) and, to a much lesser extent, Lockparts (£993); the other on the VAT credit which was claimed by, and in respect of which the Commissioners were induced to pay £253,345.50 to, Alldech. The Commissioners allege a conspiracy to cause them loss by unlawful means, consisting of the commission of the common law offence of cheating the public revenue either in respect of the VAT which the Commissioners should have received from Redlaw and Lockparts or out of the VAT credit they were induced to pay to Alldech. It is not, for present purposes, disputed that there is a good case for saying that Total, Redlaw, Lockparts and Alldech were together guilty of this common law offence of cheating the revenue. There is nothing in the scheme of the VAT Act 1994, or in the various civil and criminal remedies for which it provides, to prevent prosecution for the common law offence such as was pursued under the predecessor legislation in *R v. Mavji* [1987] 2 AER 758.

114. Total's primary response is that the commission of a crime alone is insufficient to constitute "unlawful means" for the purposes of grounding a tortious cause of action for conspiracy. Total submits that for this purpose "unlawful means" would have to consist in conduct that was itself actionable by the Commissioners in tort (or possibly breach of contract). In the case of the payment made to Alldech, the Commissioners do allege that the cheating was accompanied by positive deceit, itself actionable by them in tort against Alldech. In response to this, Total submits, and the Court of Appeal held, that the statutory scheme of the VAT Act 1994 precludes any independent actionable remedy in tort against Alldech.

115. The House is not concerned with an alleged conspiracy committed with the predominant intention of injuring the Commissioners. In the Court of Appeal, counsel for the Commissioners declined on instructions, for reasons which he explained to the Court, to seek to amend to plead that the conspirators' predominant purpose was to injure the Commissioners. The House is concerned with the other branch of conspiracy depending upon an intention (although not a predominant intention) to injure by unlawful means. The existence of unlawful means is therefore critical to the Commissioners' case.

116. In agreement with the reasoning of Lord Walker and Lord Neuberger, I consider that the history and jurisprudence relating to this type of conspiracy point clearly to the conclusion that at least some criminal acts, not amounting to torts, may suffice to ground the tort. Lord Wright's speech in *Crofter Hand Woven Harris Tweed Co. Ltd v. Veitch* [1942] AC 435, cited by Lord Walker, contains particularly clear support for the view that this type of conspiracy is not to be regarded as a purely secondary form of liability, limited (apart from the possibility that the wrongful means might consist of breach of contract) to duplicating liability that the conspirators would anyway have as joint tortfeasors. The decision in *Lonhro Ltd v. Shell Petroleum Co Ltd (No. 2)* [1982] AC 173 proceeded, as explained in *Lonhro plc v. Fayed* [1992] 1 AC 448, on the basis that a purely criminal act, consisting of Shell's alleged breach of the United Kingdom's sanctions Orders making it a criminal offence to supply oil to Rhodesia, could constitute relevant unlawful means for the purposes of the tort of conspiracy by unlawful means. The conclusion that no tort had been committed derived from the absence – admitted by counsel for Lonhro plc (p.180B-C) – of any allegation of any intention at all to injure Lonhro plc. (It was also the fact that the sanctions Orders were "not passed for the protection of any particular section of the public and [gave] rise to no special duty to [Lonhro]": see the concession at p.179B-C.)

117. In *Lonhro plc v. Fayed* at pages 467A to 468H Lord Bridge Harwich, giving the leading speech with which all other members of the House agreed, quoted extensively from the judgment of Lord Denning MR in the Court of Appeal as well as from Lord Diplock's speech in the House of Lords in *Lonhro Ltd v. Shell Petroleum Co Ltd (No. 2)* to show that what was fatal in the latter case had been the absence of any intent at all to injure; and on that basis he concluded that conspiracy by unlawful means, where there was an intention to injure the claimant, even if this was not the defendant's predominant intention, continued to exist as an English law tort. It is also worth noting that in *Lonhro plc v. Fayed* the unlawful means alleged consisted in misleading the board of

directors of the House of Fraser and the Secretary of State, in other words of torts committed at most against third parties. Yet the House accepted that the claim for conspiracy by unlawful means was arguable.

118. Liability in conspiracy has been described as an anomaly. But it is again to be noted that in *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 QB 391, the Court of Appeal at p.460C-D thought that to interpret *Lonhro Ltd v. Shell Petroleum Co Ltd (No. 2)* as preventing a plaintiff from relying on a damage-causing act which was merely a breach of the criminal law but gave no right of action in tort would be to treat the House as having intended to introduce a new anomaly. It would mean that "a cause of action in conspiracy would exist where it was least needed (i.e. where the acts done pursuant to the agreement were torts, which would in themselves provide a cause of action) but not where it was most needed….". The Court of Appeal's understanding of *Lonhro Ltd v. Shell Petroleum Co Ltd (No. 2)* in another respect (that on which its decision was overruled by *Lonhro plc v. Fayed*) does not detract from this observation.

119. Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in *OBG Ltd. v. Allan* [2007] UKHL 21; [2007] 2 WLR 920, para. 266) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And - as in relation to the tort of causing loss by unlawful means inflicted on a third party - there is a legitimate objection to making liability "depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant": per Lord Hoffmann in *OBG Ltd. v. Allan* at para. 59.

120. But the same concern does not apply where, as here, the offence exists in its very nature to protect the Revenue; where its commission is necessarily, directly and intentionally targeted at and injurious to the Revenue; and where its intended result is the wrongful non-payment of VAT by Redlaw and Lockparts of statutorily recoverable VAT or the payment to Alldech of a VAT credit not properly due under the VAT Act 1994. Like others of your Lordships, I think that there would be an evident lacuna if the law did not respond to this situation by recognising a civil liability.

121. It may be asked why the liability should only exist through the medium of a claim for unlawful means conspiracy, and not on the basis of the cheating alone. There is force in the point. It was not argued on this appeal that mere cheating of the Revenue would (without either conspiracy or the commission of another recognised tort such as deceit) give rise to liability in tort. But I would reserve my opinion about that. The assumption in the case-law recognising the common law offence of cheating the public revenue appears to have been that cheating would as between subject and subject be actionable (though actionable only) by civil action: see e.g. *Rex v. Bainbridge* (1783) 22 St. Tr. 1, 155 per Lord Mansfield CJ, cited in *R v. Hudson* [1956] 2 QB 252, 260, per Lord Goddard CJ (and 253, in counsel's argument). I note the observations of Sales and Stilitz in *Intentional Infliction of Harm by Unlawful Means* (1999) 115 LQR 411, at pp.420-425 as well as by Lord Hoffmann and Lord Nicholls of Birkenhead in *OBG Ltd v. Allan* at paras. 61 and 161 about the possibility of civil liability in the case of deliberate infliction of harm in "two-party" situations. In practical terms, however, the possibility of the point now arising in relation to cheating the public revenue must be negligible, having regard to the statutory scheme of civil liability arising under the VAT and other taxing statutes. The statutory scheme would in a two-party situation be likely to supersede any tortious liability: see further below.

122. Assuming that cheating the public revenue is not, even apart from the statutory scheme of the VAT and other taxing statutes, itself tortious in the absence of some other recognised tort such as deceit, the fact of conspiracy in my opinion offers a sufficient justification for recognising tortious responsibility in the present context, as it does in cases of predominant purpose to injury. The present appeal illustrates the extent to which cheating the revenue is a crime likely to be facilitated by a combination of conspirators. A devious individual or entity might – possibly - achieve the same result by himself or itself, but would be a great deal less likely to try or succeed.

123. Heavy reliance was placed by Total on *OBG Ltd. v. Allan* [2007] UKHL 21. In that case, the House considered and distinguished the accessory or secondary liability which exists under the principle in *Lumley v. Gye* (1853) 2 E & B 216, where C induces B to break B's contract with A, and the primary liability which exists under the tort of causing loss to a person (A) by unlawful means where C commits acts (including the threat to do acts) against B which are actionable by B or would be if B had suffered loss and which affect B's freedom to deal with A (see paras. 49, 51, 129 and 136, per Lord Hoffmann). The majority of the House in *OBG* held the actionability (or potential

actionability) of C's acts against B to be a pre-requisite to A having a claim in tort against C for causing loss by unlawful means. The submission made to the House on this appeal is that the House should adopt the same view of unlawful means in the context of the tort of conspiracy to injure. The submission has on its face attraction, as I have myself said in *Grupo Torras SA v Al-Sabah* [1999] CLC 1,469, 1,649 (though in support of an analysis according to which actionability at the suit of the plaintiff was *not* necessary). But another view has been suggested at the highest level (*Rookes v Barnard* [1964] AC 1129, 1210-1211 per Lord Devlin), and, on reflection, there can be danger in what Lord Goff of Chieveley called "the temptation of elegance" (*Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, 186B-C). The two torts are different in their nature, and the interests of justice may require their development on somewhat different bases.

124. Lord Hope (in para. 43) and Lord Neuberger (in para. 223) note that Lord Hoffmann at para. 61 in *OBG*, in "defining the tort of causing loss by unlawful means as a tort which requires interference with the actions of a third party in relation to the plaintiff", made clear that "a case of 'two party intimidation' raises altogether different issues". In relation to the three-party tort of causing loss by unlawful means, Lord Hoffmann's criticism of the Court of Appeal's reasoning in *OBG* was that it first expanded the concept of "unlawful means", and then sought to counteract the width of the concept "by insisting upon a highly specific intention, which 'targets' the plaintiff"; this, he considered, "places too much strain on the concept of intention" (paras.60 and 135). That problem does not to my mind arise with anything like the same force in the present context. I accept that conspiracy can be categorised as a three- rather than two-party tort, in that liability depends on at least two persons joining together to injure another: see also Hazel Carty in *An Analysis of the Economic Torts* at e.g. pp.271 and 278. Nevertheless, there is in my view a distinction between the infliction of harm through the intermediary of a third party (as in the case of the tort of causing harm by unlawful means under consideration in *OBG Ltd. v. Allan*) and the present situation where two wrongdoers join and act together to inflict injury directly upon another person or body; and to do so, moreover, by committing an offence integrally related to the Revenue and recognised specifically to protect it from such injury. This in turn assists to delimit the liability for conspiracy by unlawful means which the House is recognising by its present decision.

125. So far as the Commissioners' claim relates of the VAT credit paid to Alldech, I would only add that the Commissioners ought on any view to succeed on issue (b). It matters not if the Commissioners' only

remedy to recover the VAT credit as against Alldech (as opposed to other conspirators responsible for the deceit) is under s.73(2) of the VAT Act 1994. The wrongful extraction of the money from the Commissioners by deceit involved unlawful means and a sufficiently actionable wrong to justify a civil claim in conspiracy.

126. I would therefore answer affirmatively issue (b) identified in paragraph 112 above. This brings me to the issue on which my opinion proves critical to the outcome of this appeal. It is a curious feature that the appeal was in terms brought only on part (i) of issue (a), that is the Bill of Rights point. Part (ii), the inconsistent statutory scheme point, was taken below, but not in either the cross-notice of appeal or the statement of issues. Total's case only mentions the statutory scheme as a background factor to its submissions on issue (b) and to the Bill of Rights. Even during oral argument before the House, Mr Charles Flint QC for Total did no more than say that issue (a) could also be put on a pure "ultra vires/statutory" basis, but that article 4 of the Bill of Rights was how they had formulated it. However, as all aspects of issue (a) involve pure questions of law and raise questions of general importance, I agree that they need deciding.

127. Lord Hope and Lord Neuberger have helpfully analysed the detailed provisions of the VAT Act 1994. The Act was of course passed in the context of the Sixth VAT Directive 77/388, but it has not been suggested by counsel that the Directive contains anything presently material. I agree with Lord Scott (para. 59) and Lord Neuberger (paras. 168-172) in rejecting Total's submission that the Commissioners' claim infringes article 4 of the Bill of Rights (issue (a) part (i)). For the reasons they give the Commissioners' claim is a damages claim for being wrongfully cheated of monies or revenue with the management or collection of which the Commissioners were entrusted, rather than a claim to levy money for or to the use of the Crown within the meaning of article 4. The Commissioners are claiming damages against a conspirator (Total) whose wrongdoing either prevented the recovery of tax which was due under Parliamentary authority (from Redlaw and Lockparts) or led to the Commissioners mistakenly paying (to Alldech) a VAT credit which was not due and which is in law recoverable under Parliamentary authority (from Alldech). In short, although the claim is against Total, it is a claim aimed at the recovery of damages to uphold, not to extend, the tax system. Such a claim is in my view outside the language and mischief of article 4. Article 4 aims to prevent the levying of taxation for which there is no Parliamentary authority, not the recovery of compensation for wrongdoing causing the loss of monies belonging or due to the Commissioners.

128. The statutory scheme point (issue (a) part (ii)) is, self-evidently in view of the division in the House, more difficult. Lord Neuberger identifies and examines various aspects of the point: the Commissioners' functions, the remedial rights given to them and the procedural and other stipulations relating to such rights. Some of his reasoning in relation to the Commissioners' functions echoes Mr Flint's reference to vires. But for my part, I do not find vires a problem. First, no question of vires in a strict sense has ever been raised. The most that was argued below or touched on in the House is the suggestion that the statutory scheme excludes the ordinary common law rights that the Commissioners would otherwise have in respect of Total's alleged conduct. Second, the Commissioners had, in the language which applied until 2005, "the care and management" of VAT (sched. 11, para. 1(1) to the 1994 Act). They were charged with "the duty of collecting and accounting for, and otherwise managing, the revenues of customs and excise" (s. 6(2) of the Customs and Excise Management Act 1979). If, as their alternative case involves, their loss consists in paying out in respect of a false claim to a VAT credit, that involves loss of money under their direct management. Lord Neuberger accepts (at para. 184) that the Commissioners could bring tortious claims for theft of monies in their possession. Wrongful abstraction of monies as a result of a successful deceit or conspiracy seems no different in principle. And if, as their primary case involves, the Commissioners' loss is their inability, as a result of the conspiracy, to recover VAT due from the missing traders, the recovery of such loss seems to me also to fall within the scope of their competence. I see no reason why it should be outside the Commissioners' competence, if the statutory scheme otherwise permits, to take common law action in respect of a successful conspiracy which abstracts monies en route to the Commissioners or which prevents the Commissioners from recovering from others what is due from such others to the Commissioners. It is in my view neither wrong nor artificial to describe the Commissioners as having suffered loss or as seeking compensation, in whichever way their case is put; and I see no incongruity in their and the public's interests being in this respect protected by a common law action for conspiracy. Again, the claim is not for the VAT due or for repayment of the VAT credit, it is for damages in respect of loss suffered by the Commissioners due to a successful conspiracy to manipulate the VAT system.

129. The decision in *Inland Revenue Commissioners v. Goldblatt* [1972] Ch 498 is in my opinion of interest, even though, and to some degree because it was taken for granted that the Commissioners were entitled to pursue private law remedies to recoup loss which they had suffered through the receivers' and/or debenture holder's failure to pay tax out of monies available for the purpose. Goff J accepted that the

Commissioners could bring both a misfeasance claim for breach by a receiver and/or debenture holder of the statutory duty to pay the revenue preferentially (pp.505B-C, 506E and 506G-507C), and claim in equity on the footing of constructive trusteeship (pp.507G-508A). Goff J based his decision on each of these grounds, and the existence of the latter as well as the former appears to me to strengthen, rather than weaken, the significance of the case. A claim for breach of a statutory duty specifically designed to protect preferential creditors such as the Commissioners might be argued to fall into a different category to the Commissioners' present claim to invoke the common law tort of conspiracy. Nonetheless, a claim on this basis enables the Commissioners to recover compensation for wrongdoing causing a loss of tax due to them. In that respect, it mirrors the Commissioners' present claim. A claim in equity on the footing of constructive trust cannot on any view be distinguished as belonging to some special category associated with breach of statutory duty.

130. The critical question, in my view, is whether the statutory scheme supersedes and displaces the common law rights and remedies which the Commissioners would otherwise have: see *Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558, per Lord Walker at para. 135. For this to be the case, it seems to me that the statute must positively be shown to be inconsistent with the continuation of the ordinary common law remedy otherwise available, and further that this must be shown to be the case as against the particular defendant. In support of the passage cited above, Lord Walker referred to two cases where an exclusive scheme would have been "set at nought" or "defeated" if a common law claim had been permitted. In *Marcic v. Thames Water Utilities Ltd.* [2003] UKHL 66; [2004] 2 AC 42, the statutory scheme for ensuring that water undertakers performed their statutory duties appropriately would have been set at nought if a common law claim for damages in nuisance had been possible; and in *Autologic Holdings plc v. Inland Revenue Commissioners* [2004] UKHL 54; [2006] 1 AC 118, the majority in this House held that, at least where the time limit for use of the statutory scheme had not expired, a taxpayer's only way of challenging a taxing provision as contrary to European law was by making use of the statutory tribunal scheme, as opposed to judicial review. In contrast, in *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70, also cited by Lord Walker, there had been no lawful assessment, it was not therefore possible to seek a remedy through the statutory scheme (which "where applicable, overlaid and replaced the common law principles") and so a common law claim for restitution could lie: per Lord Goff of Chieveley at pp.168G-170D, esp. at p.169H-170B. The case of *Johnson v. Unisys Ltd.* [2003] 1 AC 518 falls in my

opinion into the same category. The claimant was contending for a common law remedy covering the same ground as the statutory right available to him under the Employment Rights Act 1996 through the Employment Tribunal system, and it was held that it would have been contrary to Parliament's intention to recognise such a remedy: per Lord Nicholls of Birkenhead at para. 2 and Lord Hoffmann at paras 58-59.

131. As against any taxable person, including in the present case Redlaw, Lockparts and Alldech, the legislation provides direct remedies for the recovery of any VAT due as well as of any sums paid as a VAT credit which ought not to have been so paid: cf para. 5 of sched. 11 to the VAT Act 1994 and s.73(2). In each case, as I read the statute, the Commissioners could only pursue the person concerned in respect of VAT due from or a VAT credit paid to him, her or it.

132. S.77A, introduced only with effect from 10th April 2003 by the Finance Act 2003 and so not applicable at the times relevant to this appeal, contains a major extension, by creating potentially joint and several liability for unpaid VAT on the part of any taxable person who, at the time a supply was made to such person, "knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid" (s.77A(2)). The permissibility and validity of that extension under article 21(3) of the Sixth Directive were upheld by the European Court of Justice in *Commissioners of Customs and Excise v. Federation of Technological Industries* Case C-384/04; [2006] 3 CMLR 11. But, even s.77A would not have created a liability for VAT on the part of Total, which was not a taxable person. The possibility that article 21(3) might have permitted the United Kingdom to go further than it did in s.77A, by imposing liability for VAT on an otherwise non-taxable overseas company such as Total, was not raised or explored before the House. It may be the case that this would not be possible. But, assuming for the moment that it would, it did not happen. Nothing in the language of article 21(3) of the Sixth Directive seems to me (or was suggested by Mr Flint QC before the House) to exclude, or preclude the pursuit by the Commissioners of, any ordinary civil remedy that would otherwise be available to them against a third party for tortiously causing the Commissioners a loss of VAT or a loss by way of payment of a VAT credit.

133. In the light of the statutory scheme, I would accept as correct the Court of Appeal's answer to the third question before it, namely that the Commissioners cannot pursue an independent actionable remedy

(outside the statute) against Alldech. But the issue on the present appeal is whether the Commissioners can pursue such a remedy against Total. It was not, as I understand it, suggested, nor would it in my view be correct to suggest, that the Commissioners' inability in law to pursue anything but a statutory remedies against Alldech (or any other of the United Kingdom companies in the chain) means that they cannot still pursue Total for the conspiracy to which it is alleged that all were in fact party.

134. No statutory remedy to recover VAT or repayment of a VAT credit from Total has been identified as available to the Commissioners in this respect. Total happens to be a company in the chain of suppliers and purchasers involved in the present alleged "carousel" fraud, and it is its overseas status and the fact that it is not a taxable person that takes it outside the statutory scheme. But the claim for conspiracy does not depend upon its membership of the chain of suppliers and purchasers or its overseas status. It is quite possible to conceive of other conspirators here or abroad, including financial and legal advisers, involved in the conception, preparation and implementation of a carousel fraud, who would themselves have no liability under the statutory scheme for VAT or its repayment (except perhaps criminal liability under e.g. s.72, which I address below).

135. It is, I think, on the statutory scheme of liability for VAT and the repayment of VAT paid that attention should primarily be focused when considering whether a separate common law claim for being cheated by a conspiracy out of VAT can be pursued. A penalty is a sanction, and differs in nature from compensation for loss. But, when one does look at the penalty provisions which the VAT Act 1994 also contains, they also do not apply to Total. S.60 in particular is, as I read it, concerned with evasion of VAT by the person liable to the VAT or claiming a credit or refund. S.61 provides a minor qualification to this, by allowing a penalty to be imposed on a director or managing officer of a body corporate liable to a penalty under s.60. Neither the liability for VAT which the VAT Act 1994 imposes on taxable and some other persons, nor the potential liability to a penalty or criminal offences which it also imposes on certain persons, including some who are not themselves taxable persons under the Act, seem to me reasons for treating the Act as excluding or precluding the exercise of ordinary civil remedies against non-taxable persons like Total against whom the Act provides no parallel statutory remedy.

136. S.72 of the VAT Act 1994 creates a criminal offence of considerable width, which may lead to a court ordering a penalty of up to three times the VAT evaded and/or imprisonment. In so far as the evasion of VAT - which Total in combination with other companies is alleged to have been concerned in or to have taken steps with a view to - took place in England, it is arguable, and I am ready for present purposes to assume, that the principle of territoriality of criminal legislation would not preclude the application of s.72 to Total. But s.72 is capable of co-existing with the common law offence of cheating the revenue (cf *R v. Mavji* cited in para. 113 above), and I see nothing in the existence of either of these criminal offences to exclude or preclude the use of ordinary civil law remedies, if otherwise available. The practicalities, the ease of pursuit, the aims and results and the enforcement of civil and criminal proceedings all differ radically. There are under the VAT Act 1994 provisions whereby a conviction under s.72 or for cheating the revenue will preclude the assessment of a penalty under s.60 or s.63 (see s.60(6) and s.63(11)(a)), and the assessment of a penalty under s.60 will preclude the assessment of a penalty under s.63 (see s.63(11)(b)). But I see no inconsistency or even incongruity in it being possible, despite the conviction of one conspirator under s.72, to pursue a common law remedy in tort against another conspirator. I do not think that the conspirator who has been convicted can be regarded as having escaped liability. The likelihood is, if anything, that s/he will suffer a considerably heavier penalty, including it may well be a financial penalty in excess of any loss that the Revenue could claim to have suffered in civil proceedings.

137. It is of course the case that, if a common law claim against Total is possible, it will be pursued through the courts, and the statutory rules, procedures and mechanisms relating to such matters as limitation, appeals against assessments and mitigation of penalties will not apply. But, as I have already noted, the Commissioners might have a claim for conspiracy against persons such as financial and legal advisers, against whom the statutory scheme could not afford any right to recover the VAT or VAT repayment in issue. If such persons have by a successful conspiracy caused the Commissioners to pay out a false VAT credit to other conspirators, is it to be said that the statute precludes any civil claim against them? Further, it is of the essence of any such civil claim that it is brought to recoup any loss that the Commissioners may ultimately suffer after all statutory remedies reasonably available have been exhausted. The Commissioners have to mitigate their loss by taking reasonable steps in that regard. A court assessing damages will have to take into account the Commissioners' statutory rights and, so far as they have not been exhausted and enforced, make an assessment as to their value. That is a different exercise from any which a tax tribunal

will have to undertake. Parallel, though different, exercises of this nature have not infrequently to take place in various legal contexts, where all connected proceedings cannot be combined, and I do not see their possibility as any indication that the statutory scheme should be treated as precluding the Commissioners' claiming damages for conspiracy at common law.

138. The possibility under s.70(1) of a tax tribunal reducing a penalty imposed under the statute (though not by reference to any of the matters specified in s.70(4)) appears to me irrelevant. As I have already said, the sanction of a penalty is conceptually distinct from the compensation afforded by a common law claim for damages. There is no call or basis in the case of a common law claim for reducing whatever the court may find to be the properly recoverable loss suffered by a claimant.

139. For these reasons, I would, in common with Lords Scott and Walker, answer issue (a)(ii) in the Commissioners' favour, by holding that there is nothing in the statutory scheme to preclude the Commissioners' pursuit of a common law claim for conspiracy against Total. It follows that I would allow the Commissioners' appeal on issue (b) and hold that the Commissioners' common law conspiracy claim based on unlawful means can as pleaded exist in law, while I would dismiss Total's cross-appeal on issue (a) and hold that the pursuit of such a claim is not precluded by either the Bill of Rights or the statutory scheme of the Value Added Tax Act 1994.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

Introductory

140. The Commissioners' pleaded case raises a claim for damages against Total based on the tort of conspiracy. The core allegation is that Total was party to a so-called carousel fraud, which resulted in the Commissioners not recovering VAT which they should have recovered, or paying an alleged VAT credit which they should not have paid. The preliminary issue to be determined is whether the Commissioners "have,

as a matter of law, a cause of action" against Total "as pleaded in [their] Consolidated and Amended Particulars of Claim".

141. The preliminary issue proceeds on the assumption that the Commissioners will make out the factual allegations which they have pleaded. These allegations have been very clearly set out and explained by my noble and learned friends, Lord Hope of Craighead, and Lord Scott of Foscote, in paras 3 to 10 and paras 49 and 51 of their respective opinions, which I have had the privilege of seeing in draft.

142. The Commissioners put their case on conspiracy on two bases. The first involves accepting the carousel transactions, as summarised by Lord Hope in para 7 and by Lord Scott in para 51, as effective for VAT purposes, on the ground that each transaction constituted an economic activity within the meaning of article 4(2) of the Sixth Directive (77/388/EEC). On this basis, the loss suffered by the Commissioners is the output tax that ought to have been paid by Redlaw, but was not. The second basis involves treating the carousel transactions as deceitful shams falling outside the ambit of article 4(2) of the Sixth Directive. On this basis, the Commissioners' loss arises from the credit claimed by and accorded to Alldech in respect of input tax, which was paid by the Commissioners.

143. As a result of the arguments which have been advanced before your Lordships, it seems to me that the issues which need to be resolved are as follows:

a. Whether, even if otherwise justified, the Commissioners' claim based on conspiracy must fail because:
    i. The claim falls foul of Article 4 of the Bill of Rights 1688 ("the Bill of Rights issue");
    ii. The Value Added Tax Act 1994 constitutes a regime which excludes the claim ("the complete code issue");
b. Whether the claim cannot in any event be made out on the Commissioners' pleaded case ("the conspiracy tort issue").

144. I set out the issues in this way, because it appears to me that the Bill of Rights issue and the complete code issue are to some extent connected. The conspiracy tort issue involves a rather different argument, which, if successful, may have the same effect. Before considering those three issues, which raise points of difficulty and

significance, it is convenient briefly (a) to summarise the relevant provisions of the Value Added Tax Act 1994 ("the 1994 Act"), as they play such a crucial part in the arguments on the first two issues, and (b) to consider the viability of the Commissioners' two ways of putting their case in the light of the Sixth Directive, which is, of course, the overarching legislative code relating to VAT. All references to sections and schedules hereafter are to those of the 1994 Act unless the contrary is stated.

The Value Added Tax Act 1994

145. Part I of the 1994 Act is concerned with the "Charge to Tax" and it identifies the items upon which tax is chargeable, the persons who are chargeable, and when they are chargeable. Section 24(1) defines "input tax" as VAT on the supply to a taxpayer of goods or services or on the acquisition by him of goods from another member state. Section 24(2) defines "output tax" as VAT on the supply by a taxpayer of goods and services or on the acquisition by him of goods from another member state. Section 25(1) effectively requires a taxable person to account for and pay output tax by reference to "accounting periods", in accordance with regulations. Sections 25(2) and 26 entitle a taxable person to credit for input tax, again in accordance with regulations. Those regulations enable a taxpayer whose input tax exceeds his output tax to recover the difference from the Commissioners.

146. Part II of the 1994 Act, which deals with "Reliefs, Exemptions and Repayments", and Part III, which is concerned with "Application of [the 1994 Act] in Particular Cases", are not relevant for the purposes of this appeal.

147. Part IV of the 1994 Act is entitled "Administration, Collection and Enforcement" and is of significance in the present context. Section 58 provides that schedule 11 shall have effect "with respect to the administration, collection and enforcement of VAT". The functions of the Commissioners are defined in para 1 of schedule 11. Until 2005, this provided that VAT should be "under the care and management of the Commissioners". This was amplified by section 6(2) of the Customs and Excise Management 1979 ("the 1979 Act") which charged the Commissioners with "the duty of collecting and accounting for, and otherwise managing, the revenues of customs and excise". (In 2005, section 6 of the 1979 Act was repealed by the Commissioners for Revenue and Customs Act 2005 ("the 2005 Act"), and para 1 of

schedule 11 was amended so that it states that the Commissioners are "responsible for the collection and management of VAT".)

148. Paras 2 to 4 of schedule 11 concern procedures for accounting for and paying VAT. They include obligations to register for VAT and to make periodic returns, and to pay VAT, by certain dates. Para 5(1) provides that "VAT due from any person shall be recoverable as a debt due to the Crown", and it has further provisions dealing with the recovery of VAT. Paras 6 to 13 are concerned with taxpayers' duties to keep records and the like, and the Commissioner's powers to inspect etc.

149. Section 59(1) makes provision for a default surcharge where a taxable person fails to make a return on time or to pay tax on time. The amount is specified in subsections (4) to (6) and is calculated by reference to the amount of the outstanding VAT. By subsection (7), no surcharge is payable if the person concerned satisfies the Commissioners "or, on appeal, a tribunal" either that the return or VAT was despatched in time or that he had "a reasonable excuse". By subsection (9), any penalty under section 69 for the same default is to be credited against any section 59 liability.

150. Section 60 (1) provides:

> "In any case where-
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> > he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct".

Section 60(2) gives an extended meaning to "evading VAT", so that it includes "obtaining…a VAT credit…in circumstances where the person concerned is not entitled to that sum", and section 60(3)(a) states that a "VAT credit" extends to an amount "falsely claimed by way of credit for input tax". Section 60(6) excludes the application of section 60(1) where "by reason of conduct falling within subsection (1) above, a person is convicted of an offence".

151. (It has not been suggested that section 60(1) can be relied on by the Commissioners against a person, such as Total, who was not liable for the VAT evaded or sought to be evaded. As a matter of language, there may be an argument for saying that section 60(1) is capable of bearing such a meaning, although, apart from anything else, the way in which subsection (2) is worded may well call the argument into question. In any event, for present purposes, one must proceed on the common assumption of the parties, which I am inclined to think is right, namely that the section cannot be relied on by the Commissioners against Total.)

152. Section 61 states that, where Section 60 applies and the person concerned is a company, its directors can, in some circumstances, be liable for the penalty. Section 62 provides for a penalty where a person gives an invalid certificate in relation to zero rating, Section 63(1) provides for a penalty (in addition to the VAT recoverable) where a person's VAT return contains a "mis-declaration" – i.e. it understates his liability for VAT or overstates his entitlement to a VAT credit in a single accounting period, in excess of an amount specified in succeeding subsections. Section 63(10) provides that such a penalty can be avoided if "there is a reasonable excuse" for the mis-declaration. Section 63 is disapplied by subsection (11) where the person concerned is penalised under section 60, or convicted, in respect of the mis-declaration.

153. Section 64(1) provides for a penalty, specified in subsection (3) for "repeated mis-declarations", and, like section 63, it is disapplied where the mis-declarations have been the subject of a section 60 penalty or a criminal conviction – see section 64(6). Section 65 to 69 also provide for specified penalties for various other defaults, including (in sections 65 and 66) failure to comply with rules relating to EC sales statements, (in section 67) failure to register for VAT or to comply with the rules relating to invoices, and (in section 69) failure to comply with various other regulatory provisions in the 1994 Act. They include exoneration provisions if the person concerned satisfies "the Commissioners or, on appeal, a tribunal that there is a reasonable excuse" for the default, and disapplication provisions if a penalty has been exacted under other sections (e.g. section 60) or there has been a criminal conviction (see for instance subsections (8) and (9) of section 69).

154. Section 70 entitles the Commissioners or, on appeal, the VAT Tribunal, to mitigate any penalty levied under sections 60, 63, 64 or 67. However the grounds set out in section 70(4) are specifically excluded from being taken into account. Those grounds include (a) "the

insufficiency of…funds available", (b) "in the case in question or in that case taken with any other cases…no significant loss of VAT", and (c) the person liable for the penalty "has acted in good faith".

155. Section 72 (1) is in these terms:

> "If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by him or any other person, he shall be liable-
>
> (a) on summary conviction, to a penalty of the statutory maximum or of three times the amount of the VAT, whichever is greater, or to imprisonment for a term not exceeding 6 months or to both; or
>
> (b) on conviction on indictment, to a penalty of any amount or to imprisonment for a term not exceeding 7 years or to both."

Section 72 (2) gives a wide meaning to "evasion of VAT", and it includes, in para (a), "the obtaining of ... the payment of a VAT credit", and the reference to VAT credit is extended by subpara (i) to an "amount (if any) falsely claimed by way of credit for input tax". Subsections (8) and (10) of section 72 create further offences, in connection with the production of false documents, and dealings with goods and services upon which VAT was evaded; conviction of such offences can give rise to substantial fines as well as imprisonment.

156. Section 73(1) empowers the Commissioners to make assessments for VAT where a person makes no or "incomplete or inaccurate" returns or fails to maintain satisfactory records. Section 73(2) enables the Commissioners to assess a person who transpires to have wrongly received a refund of VAT or a VAT credit. Section 73(6) imposes a time limit of two years (or, if later, one year after sufficient facts come to the attention of the Commissioners) for such assessments. Section 73(7B), added in 1996, enables the Commissioners to assess a person who removed goods, on which VAT had not been paid, from certain types of warehouse. Section 74 entitles the Commissioners to interest on sums recovered under section 73, and it is normally subject to a three-year maximum.

157. Section 75(1) enables the Commissioners to assess "a person who…was not a taxable person" for VAT in cases involving the import of certain classes of goods from other member states. Subsection (2) imposes similar time limits to those in section 73(6). Section 76 enables the Commissioners to make assessments of amounts due, where a person is liable for a surcharge under section 59, for a penalty under sections 60 to 69, or for interest under section 74.

158. Section 77 provides for certain time limits within which the Commissioners have to bring claims and make assessments. The period in question is normally three years (although it is sometimes two years) in relation to assessments under sections 73 and 76, but, where the assessment is based on section 60(1), or is made in circumstances where section 67 applies, the period is twenty years. Section 80 enables overpayments of VAT to be recovered from the Commissioners by a taxpayer, albeit usually subject to a limitation period of six years.

159. Section 77A was introduced by the Finance Act 2003, and was therefore not in force when the events in this case occurred. It applies where, at the time of a taxable supply of telecommunication goods, the taxable person to whom the supply was made "knew or had reasonable grounds to suspect" that VAT would go unpaid on that supply "or on any previous or subsequent supply of those goods". It enables the Commissioners to recover such unpaid VAT from that person notwithstanding the fact that he would not otherwise be liable. The section appears to have been specifically designed to ensure that, in the case of a carousel fraud, the Commissioners could recover any VAT not just from the person who would normally be liable, but from many of the other parties involved in transactions in the carousel. However, as my noble and learned friend Lord Mance points out, it would appear that the new section would not catch a party such as Total.

160. Part V of the 1994 Act is concerned with "Appeals". Section 82 incorporates Schedule 12, which establishes and sets out the procedures of VAT Tribunals. Under para 9, the Lord Chancellor is empowered to make rules including provisions "(a) for limiting the time within which appeals may be brought" and for other purposes. Section 83 sets out a list of over thirty different types of matter on which an appeal lies to such a tribunal. They include in paragraph (n) "any liability to a penalty or surcharge by virtue of any of sections 59 to 69A" and any assessments or penalties under sections 73, 75, 76 or 77.

The Commissioners' case and the Sixth Directive

161. As I have mentioned, the Commissioners have pleaded and argued their case on two alternative bases, which I have summarised in para [142] above. On the first basis, the Commissioners allege no tort other than the conspiracy involving Total, Redlaw, and Alldech (and, quite possibly, some or all of the other parties to the carousel transactions). The second basis additionally involves an allegation of deceit, most specifically on the part of Alldech when it claimed the VAT credit from the Commissioners. The way the Commissioners put this point is that, by claiming a VAT credit from the Commissioners, Alldech deceitfully, if impliedly, represented that the transactions to which it was party had a genuine economic purpose.

162. In their written cases, the parties did not give much consideration to the viability of these two ways of putting the Commissioners' case in the light of the provisions of the Sixth Directive. And they gave even less consideration to that aspect in their oral submissions. In view of the difficulties thrown up by the three points on which the preliminary issue was treated as focussing, and the time available for the hearing, this is scarcely surprising, and is not meant as a criticism. However, it does seem to me that this aspect requires some discussion, albeit of a limited nature, given that domestic courts should not proceed on a basis which conflicts with the provisions of the Sixth Directive.

163. In this connection, it is necessary to consider the decision of the European Court of Justice in *Optigen Ltd v Customs and Excise Commissioners* [2006] Ch 218. The effect of that decision was that the fact that a transaction was a step in a carousel fraud did not prevent an innocent party to the transaction contending that it constituted a supply and a genuine economic activity, so that it was within the ambit of the Sixth Directive and subject to the VAT regime.

164. In the light of the remarks of the ECJ in paras 46 and 51 (quoted by Lord Scott in para 55 of his opinion), it seems to me that the reasoning and conclusion in *Optigen* may very well only apply to traders in a carousel fraud who are innocent of any involvement in the fraud, as was assumed in relation to the traders in that case. Further, it may be difficult to reconcile the suggestion that the reasoning in *Optigen* applies to parties to the fraud with the conclusion reached by the ECJ in a case decided a month later, *Halifax plc v Customs and Excise Commissioners* [2006] Ch 387. If, as was held in that latter case, the steps in an honest

but “abusive” scheme designed to avoid VAT should be “redefined” in relation to the parties to the scheme so that VAT is not avoided, it is not easy to see why each step in a dishonest and “abusive” scheme designed to evade VAT should be treated, in effect, as genuine and effective in relation to the parties to the dishonesty.

165. In my opinion, it is therefore well arguable that each of the two ways in which the Commissioners seek to put their case against Total is consistent with the Sixth Directive. So far as the first basis is concerned, the assumption that the transactions constituting the carousel fraud in the present case are similarly effective for VAT purposes, even in relation to a party to the fraud, such as Total, may well be right (and, indeed, it appears to have been assumed by the legislature when enacting section 77A). However, that conclusion does not necessarily follow from *Optigen*, as already explained. Even if the transactions could be treated as a sham, which is the assumption made by the second basis, it seems to me that, at least as a matter of domestic law, it is open to a victim of the sham transaction to treat the transaction as genuine if he wishes to do so. The parties to a sham transaction must, I would have thought, be estopped from raising the argument that it was a sham, at the very least where, as here, the person seeking to treat the transaction as genuine has suffered loss in the belief that it was genuine. Nonetheless, it may conceivably be the case that such an estoppel argument could not be relied on under the Sixth Directive as interpreted by the ECJ.

166. As to the second basis, it appears to me likely, at least in the absence of compelling authority to the contrary, that, if a transaction in a carousel fraud involves a party to the fraud, it should be possible to allege against him that the transaction is a sham not merely for domestic law purposes but for VAT purposes as well. A carousel transaction is not so much one of a pre-ordained set of transactions: it is, in reality, not a transaction at all. It is merely a chimera which is used as an excuse or a front to justify the creation of one of several purported invoices, which are brought into existence by the parties to the fraud to obtain money dishonestly from the Commissioners. However, whether that argument is correct in the light of the Sixth Directive is not entirely clear, in the light of the reasoning in *Optigen* (and see especially the reasoning of the Advocate-General at para 28 of his opinion).

167. For the reasons I have given, at least on the basis of the arguments that have been put before your Lordships’ House, I would not regard it as clear that both the ways in which the Commissioners put their case would withstand scrutiny under Community law. However, it may very

well be that they both would withstand such scrutiny, and, as at present advised, I think that at least one of them must do so. I do not regard it as necessary to consider the question further, at least at this stage. Your Lordships are only concerned with a preliminary point, which throws up the three issues identified above, and, in view of the analysis just undertaken, I am prepared to proceed for that purpose on the basis that each of the two ways in which the Commissioners put their case is strongly arguable as a matter of Community law.

The Bill of Rights issue: is the claim barred by the Bill of Rights?

168. Article 4 of the Bill of Rights 1688 renders "illegal", "levying money for or to the use of the Crown", if it is "by pretence of prerogative, without grant of Parliament". It appears to me that, in order to decide whether this provision bars the present claim, it is necessary to identify the proper characterisation of the Commissioners' claim. In particular, is their claim for damages in tort, or for recovery of tax, or indeed should it be characterised in some other way? In my judgment, the claim is not for recovery of tax, but for damages in tort. It is quite clear that the Commissioners' case is pleaded, and has been argued throughout, solely in tort, as explained by Lord Hope in paragraphs 7 to 10 of his opinion. The Commissioners accept that Total is not liable for any VAT (whether by way of payment or repayment of tax or penalty) under the 1994 Act, insofar as it was in force at the time relevant for the purpose of these proceedings: hence the complete code issue. Indeed, they go further, and accept that, in order to succeed, they have to establish that a claim in common law is made out: hence the conspiracy tort issue.

169. Further, as my noble and learned friend Lord Scott has explained in para 59 of his opinion, the amount which the Commissioners would recover in these proceedings by way of damages would not necessarily be the same as the amount of tax out of which the Commissioners were cheated. The amount of output tax which should have been paid by Redlaw or, on the Commissioners' alternative case, the amount that they wrongly paid to Alldech is not necessarily the same as their recoverable damages in tort. Unlike any tax so payable, the award of damages in tort would, of course, have to give credit for any VAT which had been paid to the Commissioners in the context of the totality of the transactions involved in the carousel fraud: such VAT would not have been paid if there had been no such fraud.

170. Once one concludes that the claim which the Commissioners make is for damages in tort, it seems to me, in agreement with the Court of Appeal, that the basis of Total's case on the Bill of Rights issue falls away. While the claim for damages may be assailable on one of the other two grounds which have been raised on this appeal, I am of the view that a genuine claim for damages in tort does not fall within either the spirit or the literal meaning of the words of Article 4 of the Bill of Rights. Seeking damages under a claim which is made pursuant to a properly established common law ground does not fall within the expression 'levying money' within the meaning of the Article, which, in my view, is directed to claims which would have no other legal basis than the fact that they are made by or on behalf of the Crown. That point is, I think, made clear by the words "by pretence of prerogative" in the Article. Looking at the realities of the early twenty-first century, as opposed to those of the late seventeenth century, the effect of the Article is that the executive cannot impose or claim a tax or other imposition without the authority of the legislature.

171. If the Crown has suffered a wrong which, in common law, would give it the right to claim damages, Article 4 of the Bill of Rights would not serve to prevent the Crown from raising a claim. If the Crown were to sue in debt for a sum due under an agreement or for damages for breach of an agreement, there would similarly be no 'levying [of] money', and no "pretence [or invocation] of prerogative", because the juridical basis for the Crown's claim would be an established legal right in contract, such as that enjoyed by any other individual or entity. So, too, if money were stolen from the Crown, it could maintain a claim for recovery or damages: again, there would be no "levying" or reliance on the prerogative: the claim would be based on an established legal right in tort.

172. I should add that, if Article 4 of the Bill of Rights had otherwise applied, I would have unhesitatingly agreed with Lord Hope and disagreed with the Court of Appeal on the issue of whether it would have been open to Total to invoke the Article. Far from it being "a mockery of the law" for Total "as a fraudster" to invoke the Article, as the Court of Appeal suggested, it seems to me that such a statutorily enshrined unqualified fundamental right, intended to curb the powers of the Crown (and the executive), exists for the benefit of everyone. Indeed, it is when the unmeritorious seek to rely on such a right that it truly comes into its own and is properly put to the test. Outlawry, which is what the reasoning of the Court of Appeal appears to me to involve, may have existed in the past, but the concept has long ceased to be

recognised by the law. As it is, however, it seems to me that this case is simply not within the territory of Article 4 of the Bill of Rights.

The complete code issue: Does the 1994 Act preclude the claim?

173. That, then, leads to the question whether a common law claim, such as that sought to be raised by the Commissioners in the present case, is precluded by the 1994 Act, and in particular its provisions relating to the functions of the Commissioners, the recovery of VAT and other sums, and procedures and the like.

174. The issue is not dissimilar from that in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, to which your Lordships were referred and in which my noble and learned friend Lord Walker of Gestingthorpe said this at para 135:

> "When Parliament enacts a special regime providing special rights and remedies, that regime may (but does not always) supersede and displace common law rights and remedies (or more general statutory rights and remedies). Whether it has that effect is a question of statutory construction…."

(A comparable point in relation to equitable rights was made by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 724G to 725C). In other words, one is seeking to discern from the terms of the legislation concerned whether the legislature intended a common law claim to be displaced by the Statute, as in *Deutsche* or to exist outside the Statute, as in this case.

175. It is convenient initially to consider this issue separately in relation to the two alternative bases upon which the Commissioners put their case. The first is that each of the transactions in the carousel should be taken as genuine for VAT purposes, so that the payment by the Commissioners to Alldech was a proper credit of input tax. On that basis, the Commissioners contend that the conspiracy deprived them of the receipt of output tax due from Redlaw. The alternative basis is that the whole set of alleged transactions was a fraud and a deceit on the Commissioners, in which case the conspiracy resulted in Alldech being wrongly credited with, and paid, input tax by the Commissioners.

The claim based on unpaid output tax: general

176. Does the 1994 Act constitute a "complete code" which excludes the Commissioners from raising claims for damages based on unlawful means conspiracy (which would otherwise be well-founded) in respect of any tax which should have been, but was not, paid to them? The reasoning of Lord Walker, Lord Scott, and Lord Mance (whose draft opinions I have had the benefit of seeing) as to why the Commissioners are entitled to maintain a common law claim in tort is powerful, and has resulted in even greater diffidence than I had already felt about reaching a conclusion to the contrary effect.

177. Nonetheless, in agreement with Lord Hope, I am of the view that the statutory scheme of the 1994 Act precludes the Commissioners from pursuing a common law claim for non-payment of VAT which they should have recovered. In other words I consider that not only the Commissioners' right to recover VAT, but also their right to recover compensation for not recovering, or for wrongly being induced to pay, VAT, are exclusively governed by the 1994 Act, and that it is thus not open to them to raise claims outside that Act to recover damages for loss of tax which they should have recovered or which they should not have paid. Three aspects of the 1994 Act are relevant in this connection: the functions of the Commissioners, the remedial rights given to the Commissioners, and the procedural and similar stipulations relating to such rights.

The claim based on unpaid output tax: the Commissioners' functions

178. The contents of para 1 of schedule 11 changed in 2005, and, although it makes no difference to my conclusion, the relevant provisions are, in my view, those in force when the tax was lost and when these proceedings were issued. The fact that VAT was to be "under the care and management of the Commissioners" does not, as a matter of ordinary language, appear to me to carry with it a right to pursue a common law claim for damages, based on the contention that tax has been wrongly not paid to them or which has been wrongly paid by them, against someone who is not liable for VAT or any other sum under the 1994 Act. Nor can it be fairly claimed, in my opinion, that the pursuit of such a claim is within the ambit of the duty in the 1979 Act to "collect", "account for" or "manage" the customs and excise revenues. In these proceedings, the Commissioners are claiming neither VAT nor a penalty or similar sum under the 1994 Act, as is emphasised by their

successful rebuttal of Total's argument based on Article 4 of the Bill of Rights.

179. The Commissioners, an arm of the executive, appear to have suffered no loss if VAT which ought to have been paid or recovered is not paid or recovered: they have merely collected less tax then the 1994 Act intended. In this connection, para 1-39 of *Clerk and Lindsell on Torts* (19th Edition) starts with the proposition that: "the primary function of the law of tort remains to protect private rights and private interests". The exceptions that it then considers constitute breaches of public rights, which can give rise to claims by private persons who suffer particular damage. I consider that this reinforces the view that an action which results in non-payment of tax due under a statute should not amount to a tort actionable at the suit of the Commissioners.

180. In another leading textbook, *McGregor on Damages* (17th Edition), it is stated at para 1-021 that "the object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered". At least on the face of it, it is difficult to say that the Commissioners have suffered loss or damage simply because tax which they ought to have been entitled to collect is not capable of collection or because they have paid tax they ought not to have paid. The answer to that point might lie in para 5(1) of schedule 11, which specifically empowers the Commissioners to recover VAT payable under the 1994 Act as a debt due to the Crown. However, that appears to me to be directed to identifying how the tax is to be juridically characterised for the purpose of legal proceedings. Indeed, the paragraph gives some indirect support for the conclusion that there is no room for a tortious claim such as that raised in the present case. If the Commissioners were entitled to maintain a claim in tort arising out of non-payment of VAT, their right to claim VAT due under the 1994 Act as a debt would be *a fortiori*, and there would be no need for such a right to be expressly conferred. I would add that para 5(1) cannot have been inserted to defeat any argument based on Article 4 of the Bill of Rights, as the right to "levy" VAT is clear from other provisions of the 1994 Act, especially elsewhere in schedule 11.

181. Mention has been made of sections 5, 9, and 25 of the 2005 Act. They did not come into force until 2005, and I therefore do not think that they could be relied on in this case, where the alleged tort occurred in 2002 and the proceedings were started in 2003. In any event, they would not cause me to change my view. Section 5 of the 2005 Act takes matters no further. Section 9 of the 2005 Act gives the Commissioners

power to do things which are "necessary or expedient" for, or "incidental or conducive to", the exercise of their functions. These are general words, which are all contingent on their existing functions (i.e. the recovery of VAT and other sums statutorily levied on persons statutorily designated as liable), and cannot, to my mind, possibly extend the nature of the Commissioners' powers to enable them to bring a common law claim against someone not liable for tax or other payment under the 1994 Act. Section 25 of the 2005 Act is only concerned with rights of audience.

182. It is true, as Lord Walker has pointed out, that the Commissioners seek freezing orders and present winding-up petitions against defaulting taxpayers. However, it seems to me that such applications or petitions can fairly and properly be said to fall within the ambit of their statutory function of "collect[ing]" VAT as a "debt", and are now plainly within the powers given to the Commissioners by section 9 of the 2005 Act. I cannot agree that the fact they bring such proceedings with a view to recovering what is undoubtedly VAT (or other sums due under the 1994 Act), from someone who is undoubtedly liable under the terms of the 1994 Act, assists the Commissioners' argument that they can bring proceedings for damages in tort against someone who is not a taxable person or otherwise liable under the 1994 Act.

183. The successful claim for misfeasance by the Commissioners, as preferential creditors, against the receiver, and the debenture holder to whom he had wrongly paid out money, in *Inland Revenue Commissioners v Goldblatt* [1972] Ch 498 appears at first sight to present greater difficulties. However (although Goff J said at 509B that counsel for the defendants "took every point that could possibly be taken") the contention that the IRC had no power to bring the claim for misfeasance was not run – see at 501C to 502D. In any event, even if the point had been taken, the claim would, I think, still have succeeded, on the basis that the money paid by the receiver to the debenture holder was impressed with a trust for the payment of the tax –see at 507G to 508A.

184. It is also true that the Commissioners could bring claims in tort in some circumstances; for instance, if cash belonging to them was stolen from a vehicle. However, that would be a claim for money which was their property in their possession, albeit money representing what had been paid as tax. Such a claim would be covered by the passage quoted above from *Clerk & Lindsell*, as it would be a private law claim, albeit by a public body. Such examples do not, to my mind, assist on the issue whether the statutory scheme under the 1994 Act permits extra-statutory

common law claims by the Commissioners to recover damages for not having recovered tax which should have been paid to them.

The claim based on unpaid output tax: statutory claims and remedies

185. The second relevant group of provisions in the 1994 Act are sections 59 to 69, 72 and 73, which, when taken together, have a long and broad reach. It is important in the present context to note that those provisions extend (a) to many more payments than of the simple VAT which is described in sections 24 to 26, and (b) to persons other than the primarily taxable person under those three sections.

186. Thus, the 1994 Act deals with recovery of other payments (such as surcharges, penalties and assessments) effectively compensating for failure to pay VAT or to comply with other statutory requirements, where the non-payment, or non-compliance, has occurred through dishonesty, recklessness negligence or mistake. It is hard to believe that a common law right to claim for such failures should co-exist with those statutory rights. The legislation also often extends the Commissioners' rights of recovery of such sums from the person responsible for paying the tax to others who are involved with the failure. Examples where others are rendered liable include sections 61, 72, 73(7B) and 75; many aspects of sections 65 to 69 also appear to me to be capable of extending to those who are not taxable persons. Again, it seems to me unlikely that the legislature envisaged common law claims being brought against such persons in addition to claims under the 1994 Act.

187. Further, a section 60(1) claim is excluded by section 60(6) where there has been a conviction, and many of the succeeding sections are expressly disapplied where section 60 has been successfully invoked or where there has been a criminal conviction. It cannot have been intended that the Commissioners could get round such exclusions, in cases where there had been criminal convictions, by bringing common law claims based on the defaults covered by those sections.

188. An answer to these points might be that common law claims can only be brought where the statute does not provide a remedy. I am unimpressed with that argument for two reasons. First, and more generally, it strikes me as unconvincing and unattractive that the common law should be invoked to "fill in the gaps" in a taxing statute in favour of the Crown, by providing remedies for non-compliance, where

the statute has many provisions which clearly provide such remedies. Secondly, and more particularly, it seems unlikely that it can have been intended that the principal wrongdoer, if convicted (e.g. under section 72, or of cheating the Revenue), can escape liability, whereas a person jointly liable with him, who has similarly been convicted, should not. It also seems unlikely that the principal wrongdoer could only be liable under section 60, while his fellow wrongdoers could only be liable in tort.

The claim based on unpaid output tax: procedure and mitigation

189. The third strand of relevant statutory provisions are those relating to assessment, appeal, interest, limitation, and mitigation. If common law, as well as statutory, claims could be brought, these provisions serve to emphasise the curious differences which would arise between the two types of case. In my judgment, the differences become positively capricious once one considers a case of conspirators or other joint wrongdoers, some of whom are within the ambit of the statutory code and others of whom are not.

190. The assessment provisions in sections 75 and 76, which enable the Commissioners to determine the surcharges, penalties and interest for which a person is statutorily liable under the preceding sections, would not apply in relation to common law damages, which would have to be assessed by the court. Nor would the procedural provisions of those sections apply to common law claims brought by the Commissioners. This would be particularly odd if one conspirator was liable statutorily (e.g. Redlaw under section 60) and the co-conspirators (e.g. Total) were liable at common law.

191. The statutory appeal provisions in schedule 12 to the 1994 Act are designed to provide an exclusive set of routes and procedures whereby any liability determined by the Commissioners, whether to VAT or to any statutory surcharges, penalties or assessments, can be challenged. It would seem somewhat surprising if claims such as the present, which, while they do not strictly constitute claims for payment of VAT, nonetheless involve very similar considerations, should be subject to different procedures in different tribunals, namely the Civil Procedure Rules in the High Court or the County Court. Again, this would be particularly odd in a case such as this, where section 60 appears to apply to Redlaw, but not to Total.

192. If common law claims could be brought, the interest provisions in section 74 would mean that different rates of interest could apply to claims under the 1994 Act and common law claims, and, indeed, that the interest might run for different periods. Once again, this would appear particularly odd where the Act applied only to the person who failed to pay the tax, but not to his co-conspirators.

193. As for the time limits, sections 73(6) and 75(2) contain two year time limits, and, more generally, section 77 contains two or three year time limits and twenty year time limits. Thus, penalties, surcharges and assessments under the 1994 Act are subject sometimes to shorter, and sometimes to longer, time limits than would apply to any claims brought in tort, which would be governed by the Limitation Act 1980. Most claims under the 1994 Act are subject to a three or two year limitation period, which would represent an eccentric mismatch with the six year limitation period which would normally apply under the 1980 Act. If the Commissioners had an unrestricted right to sue in tort, then they would often be able to avoid the shorter limitation period in section 77. If the Commissioners could only rely on tort to "fill the gaps" in the 1994 Act, then it would be equally unsatisfactory. There would, in a case such as this, be different time limits for claims against joint wrongdoers, with the principle wrongdoer being liable under the 1994 Act, and therefore often benefiting from a shorter limitation period than could avail his co-conspirators.

194. In relation to some claims under the 1994 Act, including those under section 60, the limitation period is twenty years, which is again different from that in tort. In many cases it would be longer than the period under the 1980 Act, but bearing in mind the fraud and concealment provisions in section 32 of the 1980 Act, that would not always be the case. In any event, there would still be a curious mismatch between the limitation period appropriate for the principal wrongdoer under section 60, and that applicable to his collaborators if they are liable in tort. Accordingly, these procedural provisions also suggest to me that no claim such as that sought to be raised here could have been intended by the legislature.

195. A claim based on tort for loss of VAT on a transaction would, as Lord Scott points out, have to give credit for any VAT paid on another transaction which was part of the same scheme; yet that would not be true of a claim based on section 60 – see section 70(4)(b). Further, although this may be less significant in practice, good faith would be a defence to a claim in tort involving dishonesty, but it would not operate

as a defence to a section 60 claim – see section 70(4)(c). Even if common law claims are limited to "filling gaps", it seems unlikely that the legislature could have intended that quantum in statutory claims should be subject to different mitigation from that in common law claims, especially as common law claims will normally be against co-conspirators of the person who is statutorily liable.

The claim based on wrongly credited and paid input tax

196. As already explained, the alternative basis of the claim involves treating the whole carousel, and each purported transaction within it, as a fraud and a deceit on the Commissioners. If each transaction can be treated as bogus, then the Commissioners' claim fastens not on the output tax which should have been paid by Redlaw to the Commissioners, but on the payment by the Commissioners to Alldech in respect of purported input tax which should not have been paid. On that basis, the Commissioners' case is that, as a result of a deception (to which Total was a party), they were dishonestly deprived of money.

197. The question is whether this way of putting the Commissioners' claim is also defeated on the "complete code issue". At least on the face of it, on this basis, the Commissioners would appear to have a strong argument to the effect that, while, at the time the money was paid to Alldech, they may have believed it to have been a payment in respect of input tax, it was not, and therefore the whole transaction was outside the ambit of the 1994 Act, and could properly be the subject of a common law claim. In other words, the Commissioners would argue that this was a straightforward case of claimants being defrauded of money by a deceitful statement, and the fact that they were led to believe by the deceit that the money was paid in the context of the VAT regime does not mean that that regime governs the claim.

198. Attractive though that submission (and indeed its consequences) may be, it does not appear to me to tie in with the wide way in which the provisions of the 1994 Act, and sections 60 and 72 in particular, are drafted. Sections 60(2)(b) and 60(3)(a) extend the concept of "evading VAT" in section 60(1) to "obtaining…a VAT credit" where "the person concerned is not entitled to that sum" so that it plainly applies to a case where a non-existent VAT credit is falsely claimed. Section 72(2)(a), especially subpara (i), contain similar provisions for the purpose of extending the ambit of section 72(1). It appears to me, therefore that the legislature has decided to extend the statutory regime in explicit terms to

cases where money is wrongly claimed and paid out as a VAT credit, which would apply here in relation to the claim made by Alldech.

199. Further, as already mentioned, in view of its wide words, section 72(1) would extend to all the other parties involved in the fraud, including (in the present case) Total; indeed, in view of section 61, section 60 has a longer reach than merely to the taxable person. It is also worth mentioning that sections 63 and 64 apply to cases where a person "overstates his entitlement to a VAT credit". Although not quite as specific as the provisions of sections 60 and 72, these provisions also seem to me to embrace a case such as this, where a VAT credit has been wrongly claimed.

200. In these circumstances, it appears to me that the same principles and conclusions apply in relation to the second way in which the Commissioners put their case as in relation to the first.

Conclusion on the effect of the 1994 Act on the claim

201. If a common law claim, whether based on unpaid tax or on a payment of an unjustified claim for a tax credit, could be maintained, it would either sometimes overlap with statutory remedy or be limited to cases where there was no statutory remedy. It would plainly be unsatisfactory and inappropriate to have concurrent claims under the statute and in tort. It would also, as I have just been discussing, risk rendering the limitation, procedural and mitigation provisions in the 1994 Act nugatory. The notion of the common law filling in the holes in a taxing statute, particularly one containing many remedial rights in favour of the Commissioners, often not only against the primarily taxable person, appears wrong in principle, as I have already indicated; indeed, it is getting very close to Article 4 of the Bill of Rights territory. Further, it would lead to many and significant substantive and procedural inconsistencies, and indeed duplication of process, in claims against co-conspirators, where one or more of the conspirators are liable under the statute and others are not.

202. For these reasons, I am of the view that a claim in tort such as that raised by the Commissioners in these proceedings is precluded as a matter of law. It is tempting to hold that an exception should be made in the case of those who dishonestly evade paying VAT or make dishonest claims, and of those who assist in their dishonesty. However, simply to

invoke the doctrine that "fraud unravels everything" would seem to me to involve palm tree justice. In other words, one would be relying on a general sense of morality or indignation, without regard to principle or the rule of law. Such a course would be inconsistent with principle, especially in the context of a taxing statute, and would effectively represent *carte blanche* for any tribunal to do what it likes.

203. A more principled approach might appear to involve holding Total liable on the basis that it was seeking to invoke the 1994 Act "as an engine of fraud". This doctrine has, so far as I am aware, only been applied to section 4 of the Statute of Frauds 1677 (re-enacted in a partial and amended form in section 40 of the Law of Property Act 1925, which has now been replaced by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989). The basis of the doctrine and the consequent development of the law of part performance was explained by Lord Selborne LC in *Maddison v. Alderson* (1883) 8 App. Cas. 467 at 474 to 480.

204. The present case can be said to be in some ways a stronger candidate for the application of the doctrine than the normal case where part performance is invoked. Total has not merely been fraudulent in the equitable sense, but has been guilty of conspiracy to deceive and to cheat the Revenue. Nonetheless, it seems to me that the doctrine is inapplicable here, as its invocation would involve the Commissioners pulling themselves up by their own bootstraps: the only reason they have a claim at all is because of the existence of the 1994 Act, so they can scarcely complain if the person against whom they are claiming relies on that Act.

205. The conclusion that the Commissioners cannot claim common law damages from a party to a dishonest "scam" which deprived the public purse of substantial sums might appear surprising and unsatisfactory. However, although Article 4 of the Bill of Rights does not come directly into play in this case, I consider that there is a policy argument for rejecting the existence of such a claim which as mentioned is similar to the policy behind Article 4. If the Government wishes to raise tax, or to recover compensation for not having received tax which it ought to have received, it is for the legislature to give the executive, presumably the Commissioners, the appropriate powers and duties; it is not for the courts to permit the executive to rely on the common law to fill in gaps in the legislation.

206. According to Lord Nicholls of Birkenhead, "the taxpayer must use the remedies provided by the tax legislation" - see *Autologic plc v Inland Revenue Commissioners* [2006] 1 AC 118 at para 13. Although that statement was made in a case where the legislation concerned contained a remedy, it has some resonance here. It does appear appropriate, as a matter of principle, and consistent with the spirit of Article 4, that the Commissioners should be limited to their statutory remedies. The law relating to direct and indirect tax is comprehensively reviewed annually by the legislature through a Finance Bill which is presented by the Chancellor of the Exchequer, no doubt after consultation with the Commissioners. Other changes in revenue law can be introduced relatively easily during the year (particularly during the passage of a Finance Bill), and this presumably sometimes happens at the instigation of the Commissioners. Such reviews and changes are often retrospective, in the sense of taking effect from the date they are publicly announced.

207. In the present connection, I am unpersuaded that the Commissioners can gain any assistance from the way the court has treated "artificial transactions" for the purposes of taxing statutes in cases since *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300. I appreciate that there have been dicta (e.g. per Lord Wilberforce in that very case at p 326) which appear to suggest that the court in such cases was almost acting as a quasi-legislator, filling in gaps in the legislation. However, the rationale of such cases has been conclusively explained in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 as involving the normal principles of a purposive approach to interpretation and giving effect to the statutory language (see at para 7 per Lord Nicholls, and at paras 33 to 64 per Lord Hoffmann).

208. In his opinion, Lord Mance, also relying on the *Deutsche Morgan Grenfell* case, suggests that, in order for Total to succeed, the 1994 Act must positively be shown to be inconsistent with the existence of a common law claim such as the Commissioners seek to bring. I have already identified the points which seem to me to support such a conclusion in this case. However, I should also mention the reasoning of your Lordships' House in *Johnson v Unisys Ltd* [2003] 1 AC 518, to which my attention has been drawn by Lord Mance. In that case, it was held to be inappropriate to develop the common law in relation to employee dismissal because (per Lord Nicholls at para 2):

> "[A] common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law".

Lord Hoffmann (after full consideration of the legislation) and Lord Millett said much the same at paras 43 to 66 and para 80 respectively.

209. Many of the factors relating to statutory rights and remedies which persuaded the House that there should be no common law claim in *Johnson* are applicable here. It is true that the Commissioners' claim would not involve extending the common law, as in *Johnson*. However, unlike in *Johnson*, the claim here is not based on a relationship recognised by the common law, but on obligations created by the very statute which contains the rights and remedies. In those circumstances, I do derive some support for my conclusion from *Johnson*.

210. In reaching my conclusion, I do not rely directly on the existence of section 77A of the 1994 Act, which now enables the Commissioners to visit liability for VAT on any party to a transaction who "knew or had reasonable grounds to suspect" that it was part of a carousel fraud. However, its relatively recent enactment illustrates both the principle and the practicality of the legislature dealing with carousel fraud by claiming the unpaid VAT from a party such as Total. Perhaps of greater support is what the Advocate-General said in para 42 of his Opinion in *Optigen* in answer to the UK Government's concern about combating carousel fraud. He accepted the desirability of "member states…taking appropriate measures against carousel fraud", and went on to point out that "article 21 of the Sixth Directive gives member states the opportunity to introduce joint and several fiscal liability", so that a person can be made responsible for the VAT due from a "co-contractor, if he knew or should have known of his co-contractor's fraudulent activities". Another point arises from section 77A. Parliament has now legislated to ensure that certain parties involved in a carousel fraud, in addition to the primary taxpayer, should be liable for the VAT the

Commissioners have lost as a result of the fraud, but this new legislation does not extend to a party such as Total. In those circumstances, it would seem wrong for the common law to intervene and hold Total nonetheless effectively liable to the Commissioners for that VAT. The alternative possibility, namely that the enactment of section 77A would now exonerate Total from common law liability would appear to run counter to the notion that the common law can "fill the holes" in the statutory scheme.

211. Article 21.3 of the Sixth Directive provides that, where there is a taxable supply, "Member States may provide that someone other than the person liable for payment of the tax shall be held jointly and severally liable for payment of the tax". (This only came into effect in October 2000, but the predecessor article contained similar provisions in at the end of article 21.1(a) and 21.1(b)). The 1994 Act was intended to give effect to the Sixth Directive. The fact that the Directive clearly permits the legislature to extend liability for payment of VAT to persons not primarily liable for payment reinforces the conclusion that, as it did not do so in relation to cases such as this, it is not for the courts to do so. All the more so where the legislature has taken advantage of that right in the 1994 Act in relation to other types of case.

212. For these reasons, and for those given by Lord Hope (which I believe are much the same), I am of the view that the Commissioners' claim in these proceedings, whether based on the contention that they were wrongly deprived of output tax or on the contention that they were wrongly induced to credit and pay input tax, is effectively precluded by the 1994 Act. This conclusion renders it unnecessary to resolve the third issue, but I shall nonetheless consider it, not least because I understand that the majority of your Lordships consider that the Commissioners' claim is not barred by the 1994 Act.

If a claim in tort is permissible, is it made out on the pleadings?

213. The Commissioners' case, as advanced both in writing and orally, against Total relies on the tort of unlawful means conspiracy. It is common ground that that tort involves an arrangement between two or more parties, whereby they effectively agree that at least one of them will use "unlawful means" against the claimant, and, although damage to the claimant need not be the predominant intention of any of the parties, the claimant must have suffered loss or damage as a result. It is

also common ground that all those ingredients are present in the pleaded case against Total.

214. The reason the Court of Appeal, albeit with regret, held that the Commissioners had not made out the claim in the present case was that there was an additional requirement of the tort which was not present. That requirement was that the unlawful means relied on must be independently actionable by the claimant against at least one of the parties to the alleged conspiracy. The question for your Lordships is whether that is correct.

215. This issue appears to me only to arise in relation to the first basis upon which the Commissioners put their case. That claim alleges a conspiracy which involves no independent cause of action on the part of any of the alleged conspirators; what is relied on is that the conspiracy involved criminal means, namely cheating the Revenue. However, the second basis upon which the case is put seems to me to avoid the problem identified by the Court of Appeal. That is because, as already mentioned, the Commissioners contend that the conspiracy involved means which included an independently actionable tort, namely deceit on the part of Alldech. However, in case it transpires that this second basis is not maintainable and the first basis is otherwise maintainable, the Court of Appeal's reason for holding the tort was not made out needs to be addressed.

216. Unlawful means conspiracy is one of the so-called economic torts, which include procuring a breach of contract, unlawful interference, causing loss by unlawful means, intimidation, and conspiracy to injure (or lawful means conspiracy). These torts present problems even if they are considered individually (and yet more problems arise if they are treated as a genus). This is as true of unlawful means conspiracy as of any of the other economic torts. The issue in the present case is what constitutes "unlawful means" in unlawful means conspiracy, and in particular whether, at least in a case such as the present, a criminal act is enough, or whether it must involve an act by at least one of the conspirators which is actionable at the suit of the claimant.

217. This issue had not been expressly addressed by any court before it was specifically discussed and decided by the Court of Appeal in *Powell v Boladz* [1998] 1 Lloyd's Rep Med 116. The reasoning of Stuart-Smith LJ (who gave the only reasoned judgment) is not only brief but, with respect, unsatisfactory. He cited three cases to justify the proposition

that the unlawful means in the tort of unlawful conspiracy must be a civil wrong committed by at least one of the conspirators, actionable at the suit of the claimant; however, none of those cases in fact provides such support. In their opinions, Lord Walker and Lord Mance have authoritatively and fully considered the decisions which touched on this issue, before *Powell*, and I agree with their analyses.

218. Not only has the issue not been addressed in your Lordships' House, but it has really only been considered in any detail at first instance, most fully and impressively by Davis J in *Mbasogo v Logo Ltd* [2005] EWHC 2034 (QB) at paras 51 to 89. As Davis J said at para 69, referring to *Lonrho Limited v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 and *Lonrho Plc v Fayed* [1992] 1 AC 488, "there are statements in the various speeches in the cases on this topic in the House of Lords which are capable of being read either way", but they do not really grapple with the issue (because it was not relevant to the conclusion in either appeal).

219. Accordingly, it appears to me that your Lordships' House is free to decide the issue as it sees fit. However, we should plainly resolve the issue on a principled basis, in so far as that is possible in this very tricky area.

220. At para 57 of his opinion in *OBG v Allan* [2007] 2 WLR 920, Lord Hoffmann (expressing the majority view in this House) said that the fact that the means involve a crime, without also involving a civilly actionable wrong, was insufficient to establish a claim for loss caused by unlawful means. Given the obvious desirability of consistency and coherence as between the economic torts, it can fairly be said that the same rule should apply to a claim in unlawful means conspiracy. Further, the point made by Lord Hoffmann at para 57 of *OBG*, that "it is not for the courts to create a cause of action out of a…criminal statute which Parliament did not intend to be actionable in private law" can fairly be said to be as applicable to unlawful means conspiracy as to causing loss by unlawful means.

221. On the other hand, it appears that the law of tort takes a particularly censorious view where conspiracy is involved. Thus, a claim based on conspiracy to injure can be established even where no unlawful means, let alone any other actionable tort, is involved. That tort is therefore frequently described as anomalous; yet its existence is very well established. Its centrally important feature is that the conspiracy

must have as its primary purpose injury to the claimant. In my judgment, given the existence of that tort, it would be anomalous if an unlawful means conspiracy could not found a cause of action where, as here, the means "merely" involved a crime, where the loss to the claimant was the obvious and inevitable, indeed in many ways the intended, result of the sole purpose of the conspiracy, and where the crime involved, cheating the revenue, has as its purpose the protection of the victim of the conspiracy. The difference between intending to make a profit at the claimant's expense and intending to cause injury to the claimant is pretty fine and, in economic terms, artificial: that point emerges most clearly from the discussion in paras 130 to 134 in Lord Hoffmann's opinion in *OBG*.

222. I do not think that the conclusion, at least on the facts of ~~in~~ this case, that the "mere" crime of cheating the Revenue can constitute unlawfulness for unlawful means conspiracy can be said to involve illegitimately creating a tort out of a crime, as mentioned in para 57 of *OBG*. First, there is the narrow point that the crime (or at least the crime primarily relied on in the Commissioners' argument) in the present case is a common law one, and therefore there is no question of disregarding the legislature's intention, which only arises where the tort is statutory. Secondly, there is the more general and telling point that the tort in this case involves the element of conspiracy, which is, of course, lacking in the tort considered in *OBG*. The importance of the ingredient of conspiracy has been examined and explained by Lord Walker and Lord Mance in their speeches, and is, as already mentioned, underlined in the field of economic torts by the anomalous tort of conspiracy to injure (or lawful means conspiracy). Thirdly, as already mentioned, the crime in the present case exists for the protection of the victim.

223. Further, in para 61 of his speech in *OBG*, Lord Hoffmann made it clear that his "discussion of unlawful means" was limited to cases involving "interference with the actions of a third party in relation to the plaintiff", and did not necessarily apply to "a case of 'two party intimidation'", which, he said, "raises altogether different issues". In this case, as Lord Hope and Lord Mance have explained, the tort is of a "two party" nature, in that the conspiracy could be said to have been directed against the Commissioners. After all, it was directly intended (albeit for the purpose of enriching the conspirators) to deprive the Commissioners of money to which they were entitled, and, if successful, it was inevitably and foreseeably going to do so, and no tort, harm or crime as against any party other than the Commissioners was involved. As Lord Hoffmann implicitly recognised, it may therefore not be inappropriate to hold that the Commissioners have a cause of action in

such circumstances, even though they might not have had a claim if they had suffered loss (particularly if it was as an incidental result) as a result of a crime directed at a third party.

224. Thus the notion that the Commissioners have a claim here is not, in my view inconsistent with the reasoning of the majority in *OBG*¸upon which Total relies. In any event, the notion of a single consistent approach as to what constitutes unlawfulness in relation to all the economic torts can be said to be inconsistent with what *Clerk & Lindsell* refer to as the "ramshackle" nature of the economic torts (at para 25-001) and with the statement in Stevens on *Torts and Rights* (2007) at p 297 that the economic torts "have no inherent unity" and that it is "a mistake to group these 'torts' together". I would in any event, at least in a case such as this, where injury to the claimant is the direct, inevitable and foreseeable result of the conspiracy succeeding, and where the crime can be said to exist for the protection of the victim, I would find it far less offensive to hold that unlawfulness can extend to a "mere" crime in unlawful means conspiracy, when it cannot do so in causing loss by unlawful means, than to hold that a "mere" crime cannot in any circumstances constitute unlawfulness in unlawful means conspiracy, when there is a tort of conspiracy to injure by means which are neither tortious nor criminal.

225. In this connection, I should record my agreement with Lord Walker and Lord Mance that, for the reasons they give, the tort of unlawful means conspiracy is not a form of secondary liability. Furthermore, although it involves an element of pulling oneself up by one's own bootstraps, it is hard to see what role the tort of unlawful means conspiracy, whose existence is accepted by Total, could have if it did not apply in a case such as this. This is well illustrated by Stevens's suggestion, at p 249, that there is no need for the tort of unlawful means conspiracy. This is on the basis that there are three well-established tortious principles which, between them, effectively "catch" almost all who would be caught by a claim in unlawful means conspiracy. First, there is the tort of causing loss by unlawful means, the tort considered in *OBG*. Secondly, there is the tort of conspiracy to injure, where injury to the claimant has to be the principle purpose of the conspiracy. Thirdly, there is the well-established principle that, where two or more parties join together in some way with a view to assisting or enabling one or more of them to commit a tort, all are liable for the tort as joint tortfeasors.

226. On this basis, Stevens suggests that there is really no role for an additional tort of conspiring to injure by unlawful means. However, if a criminal act is sufficient unlawful means, at least in some circumstances (which Stevens challenges), the present case is an example of a claim which can (at least on the basis that the case has been argued by both parties) only succeed in unlawful means conspiracy. Conspiracy to injure cannot be relied on as injury to the Commissioners was not, it is apparently accepted by the Commissioners, the primary aim of the carousel fraud. Total could not be a joint tortfeasor if there is no claim in unlawful means conspiracy, because unlawful means conspiracy is the only tort relied on. There can be no claim in causing loss by unlawful means, as if the means involve a crime which is not civilly actionable, it does not count as unlawful means for that purpose (see *OBG* at para 57).

227. Accordingly, in my view, on the basis of the arguments before your Lordships, a claim in unlawful means conspiracy could have been maintained on the Commissioners' first basis of claim, as well as on the second basis, were it not precluded by the 1994 Act representing a "complete code". That is because, at least where the conspiracy has loss or damage to the claimant as the direct, foreseeable and inevitable consequence of its success, the fact that the means "only" involve a crime, at least where that is other than incidentally, appears to me to give rise to sufficient unlawfulness to establish a claim in unlawful means conspiracy.

228. However, it seems to me that, although this argument was abandoned by the Commissioners, it may be that the better route to this conclusion is that this is a case of conspiracy to injure, and that, as Stevens suggests, there is no need for the tort of unlawful means conspiracy. I referred earlier to the point that the reasoning in paras 130 to 134 of *OBG* supports the view that, in this case, there is little, if any, difference between the conspirators' intention to make money and their intention to deprive the Commissioners of money: each is the obverse of the other. On that basis, it may well be that it could be said that the predominant purpose of Total and the other conspirators was indeed to inflict loss on the Commissioners just as much as it was to profit the conspirators, and hence the claim in tort is made out in conspiracy to injure.

229. That analysis would not, I am inclined to think, significantly extend the ambit of the tort of conspiracy to injure. A defence often available to a claim based on that tort is that the conspirators inflicted the loss for "the lawful protection…of any lawful interest…(no illegal

means being employed)" or that "the object is the[ir] legitimate benefit" (see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, per Viscount Simon LC at 445 and Lord Wright at 469 respectively). Such a defence would not, as I see it, be open to the conspirators here: they used "illegal means" and the benefit they sought, and indeed obtained, was plainly not "legitimate".

230. However, because the claim based on conspiracy to injure was not argued, indeed was abandoned, by the Commissioners, and because Total accepts that there is such a tort as unlawful means conspiracy, I think it is more appropriate to rest my decision on the basis of that latter tort, and leave open for another case any argument along the lines discussed in the preceding two paragraphs.

Conclusion

231. For these reasons, I would allow both the Commissioners' appeal and Total's cross-appeal, and consequently would uphold the order of the Court of Appeal dismissing the Commissioners' claim.