CHAPTER - VI
JUDICIAL INTERPRETATION OF THE LAW ON
CORPORATE CRIMINAL LIABILITY

In the previous chapters the discussion was relating to the concept of corporations and their crimes; the evolution of law on the subject of corporate crimes was noted, the institutions which have the responsibility of administering the law was discussed, and the cases which had arisen about corporate criminal liability were discussed. Yet another important aspect that calls for an investigation is the question how the Courts have dealt with the controversies that came before them about the issue of corporate criminality.

In this chapter an analysis is given of the important cases decided by the English and the Indian courts on the interpretation of the rule of corporate liability. Since the concept of corporate personality and the law in India on this subject has been borrowed English law, the cases decided by the English courts have been examined to note the approach adopted by the courts in and outside India on the subject of corporate crimes.

The discussion presented herein can bring out the principles followed by the courts in applying the law to specific situations and the result that has arisen from this approach as developing the law through the process of interpretation. The methodology adopted is to discuss the opinion of the courts on specific issues of company law.

Section I  English Cases on Judicial Interpretation of the Rule on Corporate Liability

1. The issue of Corporate Personality

Salomon v. Salomon & Co Ltd. is a landmark UK company law case on the issue of corporate personality. The effect of the Lords' unanimous ruling was to uphold firmly the doctrine of corporate personality, as set out in the Companies Act 1862, so that creditors of an insolvent company could not sue the company's shareholders to pay up outstanding debts. The facts of the case were:

Mr Aron Salomon made leather boots and shoes in a large Whitechapel High Street establishment. He ran his business for 30 years and "he might fairly have counted upon retiring with at least £10,000 in his pocket." His sons wanted to become business partners, so he turned

(1897) AC 22.
the business into a limited company. His wife and five eldest children became subscribers and two eldest sons also directors. Mr Salomon took 20,001 of the company's 20,006 shares. The price fixed by the contract for the sale of the business to the company was £39,000. According to the court, this was "extravagant" and not "anything that can be called a business like or reasonable estimate of value." Transfer of the business took place on June 1, 1892. The purchase money the company paid to Mr Salomon for the business was £20,000. The company also gave Mr Salomon £10,000 in debentures (i.e., Salomon gave the company a £10,000 loan, secured by a charge over the assets of the company). The balance paid went to extinguish the business's debts (£1,000 of which was cash to Salomon).

Soon after Mr Salomon incorporated his business a decline in boot sales, exacerbated by a series of strikes (organised by the National Union of Boot and Shoe Operatives) led the government, Salomon's main customer, to split its contracts among more firms. The government wanted to diversify its supply base to avoid the risk of its few suppliers being crippled by strikes. His warehouse was full of unsold stock. He and his wife lent the company money. He cancelled his debentures. But the company needed more money, and they sought £5,000 from a Mr Edmund Broderip. He assigned Broderip his debenture, the loan with 10% interest and secured by a floating charge. But Salomon's business still failed, and he could not keep up with the interest payments. In October 1893, Mr Broderip sued to enforce his security. The company was put into liquidation. Broderip was repaid his £5,000, and then the debenture was reassigned to Salomon, who retained the floating charge over the company.

The company's liquidator met Broderip's claim with a counter claim, joining Salomon as a defendant, that the debentures were invalid for being issued as fraud. The liquidator claimed all the money back that was transferred when the company was started: rescission of the agreement for the business transfer itself, cancellation of the debentures and repayment of the balance of the purchase money.

The High Court in its judgment said, at first instance, the case entitled Broderip v Salomon 2 Vaughan Williams J said Mr Broderip's claim was valid. It was undisputed that the 200 shares were fully paid up. He said the company had a right of indemnity against Mr Salomon. He said the signatories of the memorandum were mere dummies; the company was just Mr Salomon

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2 [1893] B 4793
in another form, an alias, his agent. Therefore it was entitled to indemnity from the principal. The liquidator amended the counter claim, and an award was made for indemnity.

The Court of Appeal confirmed Vaughan Williams J's decision against Mr Salomon, though on the grounds that Mr. Salomon had abused the privileges of incorporation and limited liability, which Parliament had intended only to confer on "independent bona fide shareholders, who had a mind and will of their own and were not mere puppets". Lindley LJ (an expert on partnership law) held that the company was a trustee for Mr Salomon, and as such was Lopes LJ and Kay LJ variously described the company as a myth and a fiction and said that the incorporation of the business by Mr Salomon had been a mere scheme to enable him to carry on as before but with limited liability.

The House of Lords unanimously overturned this decision, rejecting the arguments from agency and fraud. They held that there was nothing in the Act about whether the subscribers (i.e., the shareholders) should be independent of the majority shareholder. The company was duly constituted in law and it was not the function of judges to read into the statute limitations they themselves considered expedient. Lord Halsbury LC stated that the statute "enacts nothing as to the extent or degree of interest which may be held by each of the seven [shareholders] or as to the proportion of interest or influence possessed by one or the majority over the others.

2. The Issue of Corporate Liability for Crimes The issue of Actus Reus and Mens Rea as elements of crime

An element of a crime means one of a set of facts that must all be proved to convict a person accused of an offence. In the systems of criminal justice based on Common Law a crime is said to consist of two elements, namely, the Actus Reus and Mens Rea.

Actus Reus is sometimes called the external element or the objective element of a crime. Actus Reus is a Latin term for the 'guilty act', which when proved beyond a reasonable doubt in combination with Mens Rea 'guilty mind' produces criminal liability. Such a system of criminal liability is followed in the countries which follow the Common Law, such as, England, Canada, Australia, India, Pakistan, South Africa, Ghana, Wales and United States of America.

Mens rea is a Latin term for the words "guilty mind". In criminal law, it is viewed as one of the necessary elements of crimes. The standard common law test of criminal liability is usually expressed in the Latin phrase; actus non facit reum nisi mens sit rea, which means "the
act is not culpable unless the mind is guilty”. Thus, in jurisdictions with due process, there must be an actus reus, or "guilty act," accompanied by some level of mens rea to constitute the crime with which the defendant is charged. As a general rule, criminal liability does not attach to a person who acted with the absence of mental fault. The exception is strict liability crimes.

In civil law, it is usually not necessary to prove a subjective mental element to establish liability for breach of contract or tort, for example. However, if a tort is intentionally committed or a contract is intentionally breached, such intent may increase the scope of liability as well as the measure of damages payable to the plaintiff.

Therefore, mens rea refers to the mental element of the offence that accompanies the actus reus. In some jurisdictions, the terms mens rea and actus reus have been replaced by alternative terminology. In Australia, for example, the elements of the federal offences are now designated as "fault elements" or "mental elements" (mens rea) and "physical elements" or "external elements" (actus reus). This terminology was adopted to replace the obscurity of the Latin terms with simple and accurate phrasing.

Under the traditional common law, the guilt or innocence of a person depended upon the question whether he had committed the crime (actus reus), and whether he intended to commit the crime (mens rea). In other words, in the traditional common law approach, the definition includes:

1. actus reus: unlawful killing of a human being;
2. mens rea: malice aforethought.

In keeping with this notion of Menes Rea the definition of crime depended upon the culpability and the intention to commit the wrong.

However, many modern penal codes have created levels of mens rea called modes of culpability, which depend on the surrounding elements of the crime: the conduct, the circumstances, and the result, or what the Model Penal Code calls CAR (conduct, attendant circumstances, result). The definition of a crime is thus constructed using only these elements rather than the colorful language of mens rea. Thus, the traditional common law definitions and the modern definitions approach the question of criminal liability from different angles.

In the modern approach, the attendant circumstances tend to replace the traditional mens rea, indicating the level of culpability as well as other circumstances. For example, the crime of
theft of government property would include as an attendant circumstance that the property belong to the government.

The levels of mens rea and the distinction between them vary between jurisdictions. Although common law originated from England, the common law of each jurisdiction with regard to culpability varies as precedents and statutes vary.

In order to have an accurate insight into the matter it is necessary to know how the Legislature has approached the question of Mens Rea and how the Courts have interpreted the rule regarding Mens Rea as a necessary element of crime. An enquiry of such a nature becomes wider in scope in view of the fact that the content of crime today is determined by different kinds of laws and the nature of crime also is of innumerable categories.

The subject of mens rea in the context of crimes has been the subject matter of many decisions in England as well as in our country. Like the system followed in our country English Law also follows the principle of ‘Nulum Pena Sine Lege, Nullum Crimen Sine Lege’ (No punishment without a law and no crime without a law) crimes today mostly are statutory crimes.

In order therefore to know the nature and scope of Mens Rea and the definition of crime one has to look to the definition as laid down by the legislature and then the interpretation given by the courts to the legal provisions. Since it is not possible to present the statutory definitions of several crimes in an article of a limited scope like this the discussion is confined to the opinion of the text book writers and the judicial decisions only.

In his learned treatise on Law of Crimes Russell says, there is a presumption that in any statutory crime the common law mental element, mens rea, is an essential ingredient.\(^3\) On the question how to rebut this presumption, the learned author points out that the policy of the courts is unpredictable.

In Halsbury's Laws of England it is stated that statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, willfulness. Or recklessness. On the other hand, it may be silent as to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute.\(^4\)

This passage also indicates that the absence of any specific mention of a state of mind as an

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\(^{4}\) 3\(^{rd}\) Edition, vol.10, para 508
ingredient of an offence in a statute is not decisive of the question whether mens rea is an ingredient of the offence or not: it depends upon the object and the terms of the statute.

It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences however it depends on the effect of the statute… There is a presumption that mens rea is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the works of the statute creating the offence or by the subject matter with which it deals."

The leading English case on the subject is Sherras v. De Rutzen. Section 16(2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor to a police constable while on duty. It was held that the section did not apply where a licensed victualler bona fide believed that the police officer was off duty. Wright J., observed "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

The learned Lord then quoted with approval the view expressed by the Lord Chief Justice in Brend v. Wood (1): "It is...... of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind".

Lord Wright J said “… unless the statute clearly or by fair implication rules out mens rea, a man should not be convicted unless be has a guilty mind. In other words, absolute liability is not to be presumed, but ought to be established. For the purpose of finding out if the presumption is displaced, reference has to be made to the language of the enactment, the object and subject-matter of the statute and the nature and character of the act sought to be punished.

In the case of Director of Public Prosecutions v. Kent and Sussex Contractors Ltd. It was held that a limited company could be convicted of offences under the Defence (General) Regulations, 1939. In that case, officials of that company had made use of a document which was

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5 (1895)1 QB 918
6 1944 1 KB 146
false in material particulars and statements, which the Manager knew to be false in material particulars, were made. In this case Viscount Caldecote C.J. made the following observations:

“...He has not disputed the abstract proposition that a company can have knowledge and can form an intention to do an act. A company cannot be found guilty of certain criminal offences, such as treason or other offences for which it is provided that death or imprisonment is the only punishment, but there are a number of criminal offences of which a company can be convicted...... Under the Defence (General) Regulations, 1939, it is common for offences to be created in which certain ingredients are required to be found and the present case seems to me to fall within that category..... the real point which we have to decide, which is, I repeat, whether a company is capable of an act of will or of a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement... The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company by the only people who could act or speak or think for it had done both these things, and I can see nothing in any of the authorities to which we have been referred which requires us to say that a company is incapable of being found guilty of the offences with which the respondent company was charged.”

In this judgment in that same case Macnaghten J. made the following observations: "It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate .... If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, according to the authorities that my Lord has cited, his knowledge and intention must be imputed to the company.”

The matter had come up for consideration before the King's Bench Division again in Rex v. I. C. R. Haulage, Ltd. In that case, a company was being prosecuted for a common law conspiracy to defraud. It was conceded by the counsel for the company that a limited company

7 1944-1 KB 551
can be indicted for some criminal offences and it was conceded by the counsel for the Crown that there were some criminal offences for which a limited company cannot be indicted. As Stable J. remarked therein: "The controversy centred round the question where and on what principle the line must be drawn and on which side of the line an indictment such as the present one falls. Counsel for the company contended that the true principle was that an indictment against a limited company for any offence involving as an essential ingredient "means rea" in the restricted sense of a dishonest or criminal mind, must be bad for the reason that a company not being a natural person, cannot have a mind honest or otherwise, and that, consequently, though in certain circumstances it is civilly liable for the fraud of its officers, agents or servants, it is immune from criminal process. Counsel for the Crown contended that a limited company, like any other entity recognized by the law, can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity".

Upon those rival contentions, Stable J. made the following observations on page 554: "The offences for which a limited company cannot be indicted are, it was argued, exceptions to the general rule arising from the limitations which must inevitably attach to an artificial entity, such as a company. Included in these exceptions are the cases in which, from its very nature, the offence cannot be committed by a corporation, as for example, perjury, an offence which cannot be vicariously committed, or bigamy, an offence which a limited company, not being a natural person cannot commit vicariously or otherwise. A further exception, but for a different reason, comprises offences of which murder is an example, where the only punishment the court can impose is corporal the basis on which this exception rests being that the court will not stultify itself by embarking on a trial in which, if a verdict of guilty is returned, no effective order by way of sentence can be made. In our judgment these contentions of the Crown are substantially sound, and the existence of these exceptions, and it may be that there are others, is by no means inconsistent with the general rule".

Stable J. then went on to consider several authorities which were cited at the bar. After quoting the views of Lord Caldecote C. J. and Lord Macnaghten the final decision was given in the following words at page 559:
".... With both the decision in that case and the reasoning on which it rests, we agree."

In our judgment, both on principle and in accordance with the balance of authority, the present indictment was properly laid against the company, and the learned commissioner rightly refused to quash. We are not deciding that in every case where an agent of a limited company acting in its business commits a crime the company is automatically to be held criminally responsible. Our decision only goes to the invalidity of the indictment on the face of it, an objection which is taken before any evidence is led and irrespective of the facts of the particular case. Where in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and other relevant facts and circumstances of the case. It was because we were satisfied on the hearing of this appeal that the facts proved were amply sufficient to justify a finding that the acts of the managing director were the acts of the company, and the fraud of that person was the fraud of the company, that we upheld the conviction against the company, and, indeed, on the appeal to this court no argument was advanced that the facts proved would not warrant a conviction of the company assuming that the conviction of the managing director was upheld and that the indictment was good in law."

In this connection, the remarks in Halsbury's Laws of England in paragraph 521 on page 281 and 282 of Tenth Volume, Third Edition (Simonds Edition) 1955 were referred to in the Court of the Extra Additional Sessions Judge, but he does not seem to have considered them. Those remarks are as follows:

"A corporation aggregate cannot be guilty of any offences (such as bigamy or perjury) which by their very nature can only be committed by natural persons; nor can a corporation aggregate be found guilty of a crime where the only punishment is death or imprisonment.

Apart from these exceptions, a corporation may be guilty both of statutory and of common law offences, even though the latter involve mens rea: and in the construction of any enactments relating to an offence punishable on indictment or on summary
conviction, the expression "person" includes a body corporate unless the contrary intention appears. A corporation can only commit crime by or through its agents, some of whom must themselves be responsible for the crime. It is a question of fact in each particular case whether the criminal act of its agent is the act of the corporation, and whether the agent's state of mind, intention, knowledge or belief can be imputed to the corporation. It depends on the nature of the charge, the position of the officer or agent relative to the corporation and the other relevant facts and circumstances of the case”.

Similar views on this point are expressed in Russell on Crime\(^8\),

A perusal of the decision in 1944-1 KB 551 would show how the law on the point has been undergoing a change in England. Section 2 of the Interpretation Act, 1889 was in the following terms:

"In the construction of every enactment relating to an offence, punishable on indictment, the expression person shall, unless a contrary intention appears, include a body corporate."

Despite that provision which made bodies corporate, like any other person or individual, liable for an indictment, corporations were ordinarily not indicted for any serious offences or offences involving mens rea. Corporations were prosecuted only in cases involving breaches of bye-laws or rules or entailing minor sentences of fines. Later on, they were indicted under statutes which made corporations vicariously liable for the acts committed by their agents or directors. That was when corporation were far and few between. The society, however, was developing and the ideas of corporate activities were taking root. In order to cope up with the changing circumstances new laws permitting the formation of corporations of different kinds were passed. Knowing that the law will not pursue a corporate body for the criminal acts of its servants or directors, unscrupulous persons began to prey upon individuals in the society, in a manner which was not intended by the legislations that had given birth to such corporate bodies. That necessitated a change in the outlook towards corporate bodies, so far as their criminal liability was concerned. Russell in his learned Treatise on Crime\(^9\) has lucidly analysed the reason for the change in our attitude towards corporate bodies in the following Words:

\(^8\) Eleventh Edition, Volume I, 1958
"It would seem that the common law rule affords a good guide as to the intention of a statute. The modern tendency of the courts however has been towards widening the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature of every day affairs, and the point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons exposed to the action of the many powerful associations which surround them. At common law, corporations are now indictable for nuisance and breaches of public duty, whether existing by the common law or created by statute, and whether the breach of duty is by misfeasance of non-feasance. Corporations are often indicted for non-repair or illegal obstruction of highways, and it would seem that a corporation aggregate is indictable for defamatory libel".

Thereafter the author has mentioned recent decisions which have widened the scope of criminal proceedings against the corporate bodies culminating in the earlier decision of the court.

In our country also, corporate bodies were initially indictable for minor breaches of rules or byelaws or for offences involving petty fines only. In recent times, the ideas of corporate activities have taken root and several legislations permitting the formation of corporate bodies have been passed. Numerous corporate bodies have come into existence. These corporate bodies include various public and private limited companies also. These corporate bodies necessarily act through the human agency of their directors or officers and authorised agents. They reap all the advantages flowing from the acts of their directors, servants or authorized agents and there seems to be no reason to exempt them from liability for crimes committed by their agents or servants while purporting to act for or on behalf of the corporate bodies. The ordinary citizen is now very much exposed to the activities of persons acting, in the name of corporate bodies, to his detriment. Even in our country, now in the words of Russell quoted above,

"The point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons exposed to the action of the many powerful
associations which surround them”.

3. **The issue of the Liability of Multinational Corporations:**

**Thor Chemicals Holdings Ltd/Desmond Cowley**

During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive (HSE) due to elevated levels of mercury in the blood and urine of the workers. In about 1986, the company terminated mercury-based processes in Margate and shifted its Margate mercury operations (including key personnel and plant) to Cato Ridge, Natal, South Africa. At that factory, precisely the same deficiencies which had been identified by the HSE, were replicated. In addition, the South African operation relied extensively on casual untrained labour. Workers with high levels of mercury were laid off and replaced by new casual labourers who queued at the factory gate for work each day. This (“recycling of workers”), rather than a proper health and safety system, appears to have been how Thor attempted to control mercury exposures of its workforce.

In February 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry and a criminal prosecution in the local (Pietermaritzburg) Magistrates’ Court led to the equivalent of a £3,000 fines!

Compensation claims against the parent company and its Chairman, Desmond Cowley, were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent Holdings was liable because of its negligent design, transfer, set-up, operation, and supervision and monitoring of an intrinsically hazardous process. Thus the claim was based on negligent acts and omissions (failure to take steps to protect the South African workers against the foreseeable risk of mercury poisoning).

Thor applied to stay the action on forum grounds. The application was dismissed by Deputy High Court Judge Mr James Stewart QC, the judge, noting the connections of the claim with England and holding that English law would probably be applied to the case. The defendant’s appeal was struck out by the Court of Appeal on the grounds that Thor had acceded to the jurisdiction, inter alia, by serving a Defence_. In 1997, Thor settled the claim for £1.3 million.
A further 21 claims are now in progress. In July 1998 Thor’s attempt to stay this further action on forum grounds was rejected by Garland J. Leave to appeal was refused by the Court of Appeal.

**RTZ**

A claim for compensation was brought in England by Edward Connelly, a laryngeal cancer victim employed at RTZ’s Rossing uranium mine in Namibia. Various allegations including the following were made:-

Key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. For example in order to meet contractual deadlines for the supply of uranium internationally by RTZ companies, directors of their English companies were directly responsible on the ground, for substantially increasing the output of uranium – and the consequent dust levels – without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure.

In March 1995, RTZ succeeded, initially, in persuading the Court that Namibia was the “natural forum” for the case. Thereafter, the argument was limited to the relevance of Mr Connelly’s inability, to obtain funding to bring a claim in Namibia (whereas funding was available here, in the form of legal aid or lawyers willing to act on a “no win, no fee” basis).

The case went to the Court of Appeal twice before reaching the House of Lords. On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an “available forum”, S31 of the 1988 Legal Aid Act precluded the Court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia, but had Legal Aid to litigate in England. The plaintiff applied to lift the stay on the grounds that the funding of his English action had switched to “no win, no fee” conditional fee agreements (the UK variant of contingency fees) having been made lawful in August 1995). His application was rejected at first instance in October 1995. However, in May 1996 the Court of Appeal, referring specifically to Article 6 ECHR and Article 14 ICCPR, allowed the appeal. Bingham MR stated:

“But faced with a stark choice between one jurisdictions, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment and interests of justice tend to
weigh, and weigh strongly in favour of that forum in which the Plaintiff could assert his rights”.

The Lords held, by a 4-1 majority, that Mr Connelly’s inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgment, Lord Goff stated:

“The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available”

A further claim was subsequently brought by the widow of another (oesophageal) cancer victim employed at Rossing, Peter Carlson. Mr Carlson worked at Rossing during the same period and for a substantial period in the same areas of the mine, as Mr Connelly. Almost immediately after the House of Lords reversed the stay, RTZ applied to strike out the Connelly claim (including on limitation grounds) and to stay the Carlson action on the ground of forum non conveniens.

In December 1998 the court struck out Mr Connelly’s claim on limitation grounds but dismissed RTZ’s application to stay the Carlson action on the grounds that Mr Carlson’s widow could not obtain funding to achieve substantial justice in Namibia.

Cape plc

The asbestos mined in South Africa has caused a chain of injuries world-wide – asbestos miners and millers, people involved in transportation of asbestos, stevedores loading/unloading ships, ship workers, workers at factories in South Africa, the UK and the US as well as people living in the vicinity of these operations. Whereas victims in the US and the UK can and have been compensated, victims in South Africa have not been.

Cape plc, formerly “The Cape Asbestos Company Limited”, was involved in mining blue and brown asbestos in the Northern Cape and Northern Provinces respectively from 1890 until 1979. Until 1948 the operations in the North Western Cape were carried out directly by the
parent company but for the remainder of the period, through wholly-owned subsidiaries.

The Prieska mill (N Cape) was situated in the middle of the town, close to the school. In and around Prieska, the focus of the blue asbestos mining and milling operations, the incidence of asbestos-related disease (including many victims whose exposure was purely environmental) was very high, with whole families being affected by the tragedy.

In 1962, the Chief Medical Officer of Cape based in London visited South Africa and reported:

“At Prieska the conditions around and about the mill are not good. The crusher is out of doors – it was obvious that quite a cloud of dust was being produced and blown away by a fairly strong wind towards the town”.

At Cape’s Penge mine (named after Penge in Kent) in the Northern Province, the conditions were just as bad with asbestos dust levels during the 1970s being many times higher than the UK limit during the corresponding period. A government health inspector, Dr Gerritt Schepers observed:

“Exposures were crude and unchecked. I found young children completely included within large shipping bags, trampling down fluffy amosite asbestos, which all day long came cascading down over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate of asbestos exposure. X-ray revealed several to have asbestosis with cor pulmonale before the age of 12”.

In February 1997, compensation claims were commenced in the English High Court on behalf of three Penge workers who had also lived near the mine and two Prieska residents who had lived in the vicinity of the mine (Lubbe & Others –v- Cape plc). The former suffered from asbestosis and the latter from mesothelioma, an asbestos-related cancer of the lining of the lung.

The claims were based principally on the negligent control of the company’s world-wide asbestos business from England and failure to take measures to reduce asbestos exposures to a safe level. Claims were also lodged on behalf of four Italian workers, employed at Cape’s Turin manufacturing operation, purportedly run by another wholly-owned subsidiary, Capamianto_. By
virtue of Article 2, Brussels Convention, the Italian Claimants could not be prevented from suing in England where Cape Plc is domiciled.

Cape applied to stay the South African claims on forum grounds. In January 1998, following an eight day hearing spread over six months, their application was granted, but on appeal in July 1998, the Court of Appeal reversed this decision. The Court paid particular heed to the fact that “the alleged breaches of … duty of care … took place in England rather than South Africa”, and the fact that since the company no longer had any connection with South Africa (and hence the South African courts only acquired jurisdiction by virtue of Cape’s offer to submit to the jurisdiction, there being no equivalent of RSC Order 11 in South Africa), to grant a stay would effectively be allowing Cape to “forum shop in reverse”. The court also indicated that on the basis of the pleaded case there were good arguments in favour of the application of English or South African law but that, prima facie, the “duty” owed by an English Company should be determined by English law.

Following an oral hearing in December 1998, the House of Lords dismissed Cape’s petition. In January 1999 two further actions comprising almost 2000 claims were commenced in England against Cape plc by South African claimants exposed to asbestos in the same geographical regions of South Africa.

Cape applied to stay the 2000 claims on forum grounds contending that the emergence of the group was a sufficiently material change to warrant a different conclusion from that of the Court of Appeal in the first 5 cases. Cape also sought a stay of the first 5 cases on the grounds that the Court of Appeal had been misled as to the true nature of the case.

At first instance, the Judge Buckley J granted a stay of all the actions including the 5 Lubbe claims holding that SA was a “clearly and distinctly more appropriate forum” for the group action. He also held, apparently contrary to the Court of Appeal – in the 5 cases - that by reason of Cape’s offer to submit to the SA jurisdiction, the SA courts were “available” as required by Spiliada. He also dismissed the Claimants’ argument that because the Defendant had not identified a single alternative forum – it being common ground that the Claimants would have to initiate their claims in 2 or 3 different jurisdictions in South Africa – there was no jurisdiction to stay.

SA is divided into 9 separate provincial jurisdictions, each of which exercises jurisdiction over a Claimant if; the cause of action arose in the jurisdiction and, the Defendant is based, or
has assets in the jurisdiction, or the Defendant submits to that jurisdiction. However, in the case of the Northern Cape Provincial Division, mere submission will not suffice. There, money will also have to be lodged in a bank account and “attached” by the Claimants in order for the N Cape Court to have jurisdiction. However, Buckley J concluded that once he had decided to stay the action, the manner of its progress in South Africa was a matter for the SA Courts.

Buckley J said he was also “comforted” by decisions of the US Courts in which public policy considerations had influenced the decision of the courts to stay proceedings in favour of the alternative forum. The specific reference to the Bhopal case was perhaps surprising given that it is widely known that the settlement of these cases in India was approved by the Indian Courts on the grounds of expediency and did not result in compensation being paid to more than a small number of Claimants and even then in paltry amounts.

**Meridian Global Funds Management Asia Ltd v Securities Commission**

In 1990 a group of people in New Zealand, Malaysia and Hong Kong tried to gain control of a cash-rich publicly listed New Zealand company, Euro-National Corporation Ltd. ("ENC"), and use its assets for their own purposes. The predators included a New Zealand businessman called David Lee Sian Mun, two Hong Kong investment managers called Norman Koo Hai Ching ("Koo") and Norman Ng Wo Sui ("Ng"), who were employed by the appellants Meridian Global Funds Management Asia Limited ("Meridian"), and members of a Malaysian sharebroking firm called Hwang & Yusoff Securities Sdn Bhd ("Hwang & Yusoff"). Their scheme required the purchase, through apparently respectable New Zealand merchant bankers, of a 49% controlling holding in ENC for NZ$18.2 million. The intention was to fund this purchase out of ENC's own assets, but bridging finance was needed to fill the gap between buying the shares and gaining control of the company's money. This was provided by Koo and Ng out of funds managed by Meridian. Meridian is a substantial Hong Kong investment management company, a subsidiary of National Mutual Life Association of Australasia Limited. Koo was its Chief Investment Officer, Ng a senior portfolio manager. Their Lordships do not know exactly how they were to receive their share of the spoils. But they funded the scheme by improperly using their authority to buy and sell Asian shares. They contracted on behalf of Meridian, through Hwang & Yusoff, to buy a parcel of shares in Malaysian and Indonesian companies from ENC for $21 million and at the same time to resell the same shares to ENC for a slightly greater
price. Payment for the purchase was made to Hwang & Yusoff on 30th October and payment for the resale was to be made by ENC on 19th November. ENC did not own the shares in question and the persons who purported to sell on its behalf had at that stage no authority to do so, but Meridian paid the money and on 9th November Hwang & Yusoff used $18.2 million to buy the shares in ENC. But the scheme to pay Meridian back out of ENC's money on 19th November was frustrated by the independent directors of ENC, who imposed conditions on the use of the company's funds with which the predators could not comply. Unable to get their hands on the company's money, they had to unwind the scheme as best they could. It is unnecessary to go into the details of how the participants tried to extricate themselves except to notice two matters. First, that on 10th December 1990 Koo, on behalf of Meridian, agreed to release its rights under the original funding arrangements and accept instead a payment and undertakings from Hwang & Yusoff. Secondly, that the net result was that the funds under Meridian's management suffered a loss, which the Australian parent company had to make good to the beneficial owners of the funds when the affair was discovered some six or seven months later.

Stockmarket regulators have found that one way to help boards and investors to resist such raids is to require immediate disclosure to the target company and the stock exchange of the identity of anyone acquiring a substantial interest of any kind in the company's shares. This enables the board and the investors to know who is behind the respectable nominees. Part II of the New Zealand Securities Amendment Act 1988 was intended, among other things, to introduce such transparency into dealings in publicly quoted securities. The relevant duties of disclosure are contained in section 20(3) and (4):-

"(3) Every person who, after the commencement of this section, becomes a substantial security holder in a public issuer shall give notice that the person is a substantial security holder in the public issuer to -

(a) The public issuer; and
(b) Any stock exchange on which the securities of the public issuer are listed.

(4) Every notice under subsection (3) of this section shall -

(a) Be in the prescribed form; and
(b) Contain the prescribed information; and
(c) Be accompanied by, or have annexed, such documents, certificates, and statements as may be prescribed; and
(d) Be given in the prescribed manner; and
(e) Be given as soon as the person knows, or ought to know, that the person is a substantial security holder in the public issuer."

A "public issuer" means a company listed on the New Zealand Stock Exchange and "substantial security holder" means a person who has a "relevant interest" in 5 percent or more of the voting securities in the public issuer. The definition of "relevant interest" in section 5 is both complicated and comprehensive, but there is no need to examine its terms because, although the matter was disputed in the courts below, the appellants have accepted before their Lordships' Board that the effect of the transaction was to give Meridian a relevant interest in the 49% holding in ENC between 9th November 1990, when its money was used to buy it, and 10th December 1990 when the scheme was unwound. It gave no notice under section 20(3).

Section 30 of the Act provides that where there are "reasonable grounds to suspect" that a substantial security holder has not complied with, among other provisions, section 20, the Court may, on the application of the Securities Commission, make one or more of a number of orders mentioned in section 32. These range from ordering the substantial security holder to comply with the Act to forfeiting the shares in which he has an interest. After holding its own inquiry in March 1991, the Commission applied for orders against various participants in the scheme. Meridian was not among the original defendants but was joined a few days before the trial began.

Heron J. held that Meridian knew on 9th November that it was a "substantial security holder" in ENC for the purposes of section 20(4)(e). He arrived at this conclusion by attributing to Meridian the knowledge of Koo and Ng, who undoubtedly knew all the relevant facts. He did not go into the juridical basis for this attribution in any detail. It seemed obvious to him that if Koo and Ng had authority to enter into the transaction, their knowledge that they had done so should be attributed to Meridian. It had therefore been in breach of its duty to give notice under section 20(3). In view of the fact that its relevant interest had ceased on 10th December 1990 the judge made no order against Meridian except that it should pay $50,000 towards the Commission's costs and $15,000 towards the costs of a minority shareholder in ENC. The finding that Meridian was in breach was incorporated in a declaration made by the judge at the request of Meridian so that it could have an order against which to appeal. The Court of Appeal affirmed the decision of Heron J. on somewhat different grounds. It decided that Koo's
knowledge should be attributed to Meridian because he was the "directing mind and will" of the company. The Court of Appeal received some evidence about how Meridian functioned. The members of the board lived partly in Hong Kong and partly in Australia and met only once a year, for the formal business before the annual general meeting. Other matters which required a board resolution were circulated by post. Koo used to be managing director but was replaced by Mr. Armour on 1st August 1990. Although Koo thereafter in theory reported to Mr. Armour, in the matter of buying and selling securities he went on in the same way as before. The ENC purchases and sales were openly recorded in the books but Koo did not specifically report them to Mr. Armour, who only found out about them after Koo had left. Nor did Koo report anything else and there was no evidence that Mr. Armour or the other members of the board tried to supervise what he was doing. By leave of the Court of Appeal, Meridian now appeals to their Lordships' Board. It says that its only directing mind and will was that of its board, or possibly of Mr. Armour, but not Koo, whom the Court of Appeal correctly described as "under Mr. Armour" in the corporate hierarchy. ….

The House of Lords held that the precautions taken by the board were sufficient for the purposes of section 24(1) to count as precautions taken by the company and that the manager's negligence was not attributable to the company. It did so by examining the purpose of section 24(1) in providing a defence to what would otherwise have been an absolute offence: it was intended to give effect to "a policy of consumer protection which does have a rational and moral justification" (per Lord Diplock at pages 194-5). This led to the conclusion that the acts and defaults of the manager were not intended to be attributed to the company. As Lord Diplock said at page 203:-

"It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer's duty to exercise all due diligence; it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and upon whom he could reasonably rely to carry them out, would be to render the defence of
due diligence nugatory and so thwart the clear intention of Parliament in providing it."

Once it is appreciated that the question is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be as straightforward as it did to Heron J. The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under section 20(3). The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.

It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the "directing mind and will" of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in *Ready Mixed Concrete* and this case, it will be appropriate. Likewise in a case in which a company was required to make a return or revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see *Moore v. I. Bresler Ltd.* [1944] 2 All E.R. 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no
inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.”

In Tesco Supermarkets Ltd. v. Nattrass\textsuperscript{10} determined the question whether the fault of an employee of a company may be attributed to the company and the company held liable for the fault of its employee. This was an appeal case determined in the House of Lords in 1972 which discusses extensively matters pertaining to Corporate Liability and Consumer Protection, and has been a supporting case law example for decisions which stem from the statutory provisions outlined within the Trade Descriptions Act 1968.

In brief, Tesco Supermarkets’ advertised that Radiant washing powder was on sale at a discounted price. All the packs at this displayed price had been sold, and a shop assistant had repacked the shelves with washing powder at the regular inflated price, however the advertising still remained in the store reflecting the discounted price.

Mr Clement was the store manager at the time and had marked and signed off his daily ‘checklist’ sheet that the shelves had been re-stocked with the sale priced goods, however only to discover later that the shelves were re-stocked with the washing powder that was individually marked at the inflated price and that an employee had sold a customer a packet of washing powder at the inflated price. Mr. Coane was this customer who undertook legal proceedings to prosecute Tesco Supermarkets Ltd.

This matter was initially heard before the Magistrates Court, where the appellant, Tesco Supermarkets (Tesco), was found guilty under section 11(2) of the Trade Descriptions Act 1968 for making false and misleading statements in regards to the price of the washing powder. Tesco sought to rely on the defence clause of Section 24(1) of the Trade Descriptions Act 1968.

Although the Court held that Tesco satisfied Section 24(1)(b) of the Trade Descriptions Act 1968 as they had an acceptable workplace procedure implemented to prevent the offence from occurring (the checklist), Mr. Clement was found to be the ‘same person’ as the company.

On appeal of this decision before the Divisional Court, the determining judges held that the...

Tesco Supermarkets v. Nattrass is a leading decision of the \textit{House of Lords} on the "directing mind" theory of \textit{corporate liability}.

\textsuperscript{10} (1972) AC 153.
This is a leading case on the *Trade Descriptions Act 1968* (s.24(1)), where Tesco relied upon the defence of the ‘act or omission of another person’ i.e. their store manager, to show that they had taken all reasonable precautions and all due diligence.

*Tesco* was offering a discount on washing powder which was advertised on posters displayed in stores. Once they ran out of the lower priced product the stores began to replace it with the regularly priced stock. The manager failed to take the signs down and a customer was charged at the higher price. Tesco was charged under the *Trade Descriptions Act 1968* for falsely advertising the price of washing powder. In its defence Tesco argued that the company had taken all reasonable precautions and all due diligence, and that the conduct of the manager could not attach liability to the corporation.

The House of Lords accepted the defence and found that the manager was not a part of the "directing mind" of the corporation and therefore his conduct was not attributable to the corporation. The corporation had done all it could to enforce the rules regarding advertising.

Lord Reid held that, in order for liability to attach to the actions of a person, it must be the case that "The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."

In the House of Lords Tesco were successful with their defence showing that,

- a store manager was classed as ‘another person’, and,
- a system of delegating responsibility to that person was performance of due diligence, not avoidance of it

The store manager was not the directing mind and will of the company - the company had done all it could to avoid committing an offence and the offence was the fault of another person (an employee). The company was acquitted.

*Section II – Indian Cases on Judicial Interpretation of The rule on Corporate Liability*
In India, there has been a long-drawn controversy in legal circles as to whether a Company being a juristic or artificial person and incapable of being sent to prison may still be prosecuted and punished for an offence where imprisonment is a mandatory part of the sentence.

Such a Judicial controversy arises in the situations when the statute prescribes mandatory imprisonment as punishment for an offence. Penal law basically aims at punishing persons found guilty of commission of offence. In the statutes defining crimes, the prohibition is frequently directed against the person who commits a prohibited act. The term ‘person’ as defined in Section 11 of the Penal Code and Section 2 of the General Clauses Act includes clearly within its fold a Company which is a juristic person. Further, various enactments like the Prevention of Food Adulteration Act, 1955, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Income Tax Act, 1961 and the Cable Television Networks (Registration) Act, 1955 provide for penal liability of a company in relation to the offences prescribed in the Act.

The various problems which have come before the Courts pertain to the interpretation of the law on Penal Liability of the Companies.

The Privy Council in Lim Chin Aik v. The Queen\textsuperscript{11} reviewed the entire law on the question in an illuminating judgment and approached the question, from a correct perspective. By s. 6 of the Immigration Ordinance, 1952, of the State of Singapore, "It shall not be lawful for any person other than a citizen of Singapore to enter the colony from the Federation or having entered the colony from the Federation to remain in the colony if such person has been prohibited by order made under s. 9 of this Ordinance from entering the colony" and s. 9, in the case of an order directed to a single individual, contained no provision for publishing the order or for otherwise bringing it to the attention of the person named. The Minister made an order prohibiting the appellant from entering the colony and forwarded it to the Immigration Officer. There was no, evidence that the order had in fact come to the notice or attention of the appellant. He was prosecuted for contravening. 6(2) of the Ordinance. Lord Evershed, speaking for the Board, reaffirmed the formulations cited from the judgment of Wright J., and accepted by Lord du Parcq in Srinivas Mull Bairaliya's case.

\textsuperscript{11} (1853) "AC 160, 174, 175
In State v. Sheo Prasad\textsuperscript{12} the Court held that a master was not liable for his servant’s act in carrying oilseeds in contravention of the order made under the Essential, Supplies (Temporary Powers) Act, 1946, on the ground that he had not the guilty mind. In the same manner a Division Bench of the Calcutta High Court in C. T. Prim v. The State accepted as settled law that unless a statute clearly or by necessary implication rules out mens rea as a constituent part of the crime, no one should be found guilty of, an offence under the criminal law unless he has got a guilty mind.

A division Bench of the Bombay High Court in Emperor v. Isak Solomon Macmull in the context of the Motor Spirit Rationing Order 1941, made under the Essential Supplies (Temporary Powers’ Act, 1946, held that a master is not vicariously liable, in the absence of mens rea, for an offence committed by his servant for selling petrol in the absence of requisite coupons and at a rate in excess of the controlled rate.

In State of Maharashtra v. Hans Mayers George\textsuperscript{13}, the respondent, a German smuggler, had left Zurich by plane on 27\textsuperscript{th} November 1962 with 34 kilos of gold concealed on his person to be delivered in Manila. The plane arrived in Bombay on the 28\textsuperscript{th} but the respondent did not come out of the plane. The Customs Authorities examined the manifest of the aircraft to see if any gold was consigned by any passenger, and not finding any entry they entered the plane, searched the respondent, recovered the gold and charged him with an offence under Section 8 (1) and 23 (1-A) of the Foreign Exchange Regulation Act (7 of 1947, read with a notification dated 8\textsuperscript{th} November 1962 of the Reserve Bank of India which was published in the Gazette of India on 24\textsuperscript{th} November. The question was whether the respondent who was passing through India by flight can be prosecuted for bringing gold in contravention of a notification of the Reserve Bank of India when he was in transit. The accused pleaded his innocence on the ground that he had no intention of violating the law which was in force in India at that time; in other words; mens rea was pleaded as a element of the crime and since it was missing he could not be prosecuted and punished for bring gold with him.

\textsuperscript{12} AIR 1956 All. 610

\textsuperscript{13} 1965 AIR 722
The respondent was convicted by the Magistrate but acquitted by the High Court on appeal. In the appeal by the State to the Supreme Court, the respondent sought to support the judgment of the High Court by contending that (i) Mens Rea was an essential ingredient of the offence charged and as it was not disputed by the prosecution that the respondent was not aware of the notification of the Reserve Bank, he could not be found guilty, (ii) the notification being merely subordinate or delegated legislation could be deemed to be in force only when it was brought to the notice of the persons affected by it, and (iii) the second proviso in the notification requiring the disclosure in the manifest was not applicable to gold carried on the person of a passenger.

The majority judgment of Justice Rjagopala Ayyangar and Justice Mudholkar allowed the appeal of the State of Maharashtra stating that On the language of s. 8(1) read with s. 24(1) of the Act, which throws on the accused the burden of proving that he had the requisite permission to bring gold into India, there was no scope for the invocation of the rule that besides the mere act of voluntarily bringing gold into India any further mental condition or mens rea is postulated as necessary to constitute an offence referred to in s. 23(1-A). Further, the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition were to be read into the sections qualifying the plain words of the enactment, that the accused should be proved to have knowledge that he was contravening the law before he could be held to have contravened the provision.

The minority judgment of Justice Subba Rao however dissented from the aforesaid ruling. Justice Subba Rao said, “I regret my inability to agree.” The minority judgment was to the effect that the respondent should not be held guilty of contravening the provisions of s. 8 of the Act read with the notification issued by the Reserve Bank, as it was not proved he had knowingly brought gold into India in contravention of the terms of the notification.

In the case of State of Maharashtra v. Syndicate Transport it was held that the company cannot be prosecuted for offences which necessarily entail consequences of a corporal punishment or imprisonment and prosecuting a company for such offences would only result in the court stultifying itself by embarking on a trial in which the verdict of guilty is returned and no effective order by way of sentence can be made. A similar view was taken by the Calcutta High Court in Kusum Products Limited v. S. K. Sinha, ITO, Central Circle, X Calcutta, where it was stated that “… a company being a juristic person cannot possibly be sent to prison and it is
not open to the court to impose a sentence of fine or award any other punishment if the court finds the company guilty and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.

In A. K. Khosla v. T. S. Venkatesan\(^\text{14}\) two corporations were charged with having committed fraud under the Indian Penal Code. The Magistrate issued process against the corporations. In the Calcutta High Court, the counsel for the defendants argued, inter alia, that the corporations, as juristic persons, could not be prosecuted for offences under the Indian Penal Code for which mens rea is an essential ingredient. The court agreed. The Court pointed out that there were two prerequisites for the prosecution of corporate bodies, the first being that of mens rea and the other being the ability to impose the mandatory sentence of imprisonment. Each of these prerequisites rendered the prosecution of the defendant corporation futile: a corporate body could not be said to have the necessary mens rea, nor can it be sentenced to imprisonment as it has no physical body.

In Kalpanath Rai v. State a company accused and arraigned under the Terrorists and Disruptive Activities Prevention Act (TADA) was alleged to have harboured terrorists. In a bench trial, the trial court convicted the company of the offence punishable under Section 3 (4) of the TADA. On appeal, the Supreme Court referred to the definition of the word ‘harbour’ as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the mens rea element had been excluded from the offence under Section 3 (4) of TADA.

The Supreme Court referred to its earlier decision in State of Maharashtra v. Mayer Hans George and Nathulal v. State of Madhya Pradesh\(^\text{15}\) and observed that there was a plethora of decisions by Indian courts which had settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offence, the same must be treated as an essential ingredient of the act in order for the act to be punishable with imprisonment and/or fine.

In Zee Tele films Ltd. v. Sahara India Co. Corporation Ltd.\(^\text{16}\) The court dismissed a complaint filed against Zee under Section 500 of the Indian Penal Code. The complaint alleged that Zee had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that mens rea was one of the essential elements of the offence of criminal defamation.

\(^{14}\) (1992) Cr. L. J. 1448
\(^{15}\) AIR 1966 SC 43
\(^{16}\) (2001) 3 Recent Criminal Reports, 292
and that a company could not have the requisite mens rea. In another case, Motorola Inc. v. Union of India\textsuperscript{17} the Bombay High Court quashed a proceeding against a corporation for alleged cheating, as it came to the conclusion that it was impossible for a corporation to form the requisite mens rea, which was the essential ingredient of the offence. Thus the corporation could not be prosecuted under section 420 of the Indian Penal Code.

In The Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.\textsuperscript{18}, it was held by a majority decision of the court a company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where the punishment provided is imprisonment and fine, the court cannot impose only a fine. The majority was of the view that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty.

B.N. Srikrishna J. Further said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. The Court was of the view that the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:

“In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an

\textsuperscript{17} (2004) 1 Comp. L. J.
\textsuperscript{18} AIR 2004 SC 86
association of individuals, it shall be competent to the court to sentence such offender to fine only.”

The Court decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.

In Velliappa Textiles\(^\text{19}\) a private company was prosecuted for violation of certain sections under the Income Tax Act. Sections 276 C and 277 of the Income Tax Act provided for a sentence of imprisonment and a fine in the event of violation. The Supreme Court held that the respondent company could not be prosecuted for offences under certain sections of the Income Tax Act because each of these sections required the imposition of a mandatory term of imprisonment coupled with a fine.

In J. K. Industries Ltd. V. Chief Inspector of Factories and Boilers\(^\text{20}\) the Supreme Court observed that ‘absolute offences’ are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty. Absolute offences face the ‘strict liability’ regime where the fact that a situation existed or an event occurred is sufficient to constitute the offence. Labour and industry legislation, food adulteration and pollution laws are an illustration of this situation.

In Standard Chartered Bank and Others v. Directorate of Enforcement\(^\text{21}\), the Standard Chartered Bank was prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 (FERA). Ultimately, the `Supreme Court held that the corporation could be prosecuted and punished, with fines regardless of the mandatory punishment of imprisonment.

\(^{19}\) (2004) 1 Comp. LJ 21
\(^{20}\) (1996) 6 SCC 665
\(^{21}\) AIR 2005 SC 2622
required under the respective statute.

The Court initially pointed out that, under the view expressed in Velliappa Textiles, the Bank could be prosecuted and punished for an offence involving rupee one lakh, or less as the court had an option to impose a sentence of imprisonment or fine. However, in the case of an offence involving an amount exceeding rupees one lakh, where the court is not given discretion to impose imprisonment or fine, that is, imprisonment is mandatory, the Bank could not be prosecuted. The Court also referred to the recommendations made by the Law Commission which had noticed the legal conundrum arising out of the aforementioned situation. The Law Commission recommended the following provision to be inserted in the Penal Code:

- In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only;
- In every case in which the offence is punishable with imprisonment and any other punishment not being fine and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.
- In this section ‘corporation’ means an incorporated company or other body corporate and includes a firm and other association of individuals.

Such were the problems which had come before the Courts with regard to the application of the statutory provisions on liability of companies. Going by the above viewpoint and with the growing trend of corporate criminality, the Courts in India have finally recognized that a corporation can have a guilty mind but still they have been reluctant to punish them since the criminal law in India does not allow this action.