Accessory Liability and Section 213 Insolvency Act 1986

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Accessory Liability and Section 213 Insolvency Act 1986

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Abstract

This article challenges the judicial interpretation of s.213 Insolvency Act 1986, which has created a species of accessory liability of striking width and imprecision. It argues that s.213 was never intended to apply to outsiders transacting with the company, and that the two key concepts of "carrying on business" and being "knowingly party" have been misinterpreted.

Introduction

Section 101(1) Companies Act 1947,[1] addressing the unprepossessing subject of "miscellaneous amendments affecting civil and criminal liability", introduced the words "any person" into the fraudulent trading liability for directors created by s.75 Companies Act 1928. That small addition has created a species of accessory liability[2] of striking width and imprecision. On the favoured interpretation, the "principal wrongdoer(s)" under s.213 are those engaged in the carrying on of the company's business for one of the identified fraudulent purposes, and the accessories are the third parties whose transactions with the company assisted that dishonest purpose, and who acted with the relevant mental state.[3]

This species of statutory accessory liability does not accord with the origins and intended effect of s.213, and the interpretation of the section requires a fundamental reappraisal. The concept of "carrying on of the business" with intent to defraud has been interpreted so as to embrace any individual *transaction* entered into with a fraudulent intent, rather than a *business* carried on with a fraudulent purpose. The expression of "knowingly parties to the carrying on of the business" has been expanded to cover anyone dealing with the company, rather than those with management or control of the business.

After outlining the extraordinary width of s.213 accessory liability, the article considers the legislative origins of the concept of fraudulent trading, and of the "any person" language which has been the hook for the subsequent development of this statutory accessory liability. The article identifies the way in which the key concepts of "carrying on of the business" and "knowingly party" have been

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[1] 10 &11 Geo. VI c. 47.

[2] The phrase "accessory liability" is used to mean a liability where "the accessory's liability is derivative or parasitic of a principal [wrongdoing] and its harm content (K. Smith, "The Law Commission Consultation Paper on Complicity" [1984] Crim. L.R. 239, 244, substituting the word "wrongdoing" for the word "offence").

[3] Using the terminology in Paul S. Davies, *Accessory Liability* (Oxford: Oxford University Press, 2015), p.1. Davies does not consider accessory liability under s.213 Insolvency Act 1986.

misinterpreted. Finally, the article considers the merits of adopting the tortious test of joint liability as the touchstone for any accessory liability under s.213.

The current scope of s.213

Section 213 may well be the ultimate statutory encapsulation of the legal maxim that "fraud unravels all". In the litigation that has followed the financial crisis of 2008, it has become an increasingly popular weapon in the armoury of corporate liquidators. A third party can be liable for being "knowingly part[y] to carrying on of the business" even though it played no managerial role in the business in question.[4] The requirement that "any business of the company has been carried on with intent to defraud" can be satisfied by a single transaction (and the third party can be "party to [that] carrying on" by being the counterparty to that single transaction.[5] The section applies to parties who were not present and did not have assets in the jurisdiction at the time of the events giving rise to liability,[6] and in respect of companies incorporated outside England.[7] It might not even be necessary for the company to be liquidated in England, if proceedings are brought here by the liquidator of a foreign company under Cross-Border Regulations 2006 art.21(g)[8].

A claim under s.213 may only become available because the company has moved its centre of main interests from elsewhere in the EU to the UK to liquidate it here,[9] many years after the acts said to give rise to the third party's liability took place. The third party can be liable whether or not it would have accessory liability under the law governing its transaction with the company,[10] because the section creates "a new liability and a new right not previously known to the law".[11] A new limitation period for the bringing of such claims accrues on the winding-up of the company even if this occurs many years after the events in which the third party was involved.[12] The discretion conferred on the court when the predicates of the section are satisfied is of extraordinary width: to order "such contribution(s) to the company's assets as the court thinks proper", with considerations of causation, remoteness and scope of duty operating, if at all, as factors informing the exercise of an open-textured discretion rather than as rules of law.[13] In one case, only considerations of "proportionality" appear to have stood between a bank, one of whose employees had engaged in transactions with another bank to manipulate

[4] *Re Bank of Credit and Commerce International SA* [2002] B.C.C. 407 Ch D.

[5] *Re Gerald Cooper Chemicals Ltd* [1978] Ch. 262 Ch D.

[6] *Bilta UK (in liquidation) v Nazir (No.2)* [2016] A.C. 1 SC at [10], [53], [106]-[111] and [213]-[214].

[7] *Stocznia Gdanska SA v Latreefers Inc* [2000] EWCA Civ 36 at [38].

[8] SI 2006/1030: if art.21(g) extends to the power under s.213 as well as "procedural" rights to obtain information, etc.; cf. *Rubin v Eurofinance SA* [2013] 1 A.C. 236 SC at [143], where Lord Collins observed that art.21 was "concerned with procedural matters"; and Morgan J in *Re Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), [2014] Bus. L.R. 1041 at [111].

[9] Regulation 1346/2000 on insolvency proceedings [2000] OJ L160/1 art.4(2)(m) (Insolvency Regulation 2000); and Regulation 2015/848 [2015] OJ L141/19 art.7(m) (Recast Insolvency Regulation 2015).

[10] Subject, where the Insolvency Regulation 2000/Recast Insolvency Regulation 2015 apply, to arts13/16, where the third party can prove that the act is "subject to the law of a Member State other than that of the State of the opening of proceedings" and that "that law of that Member State does not allow any means of challenging that act in the relevant case".

[11] *Re Maney and Sons Deluxe Service Station Ltd* [1969] N.Z.L.R. 116 at 128.

[12] *Re Overnight Ltd* [2009] EWHC 601 (Ch), [2009] Bus. L.R. 1141 at [36]; and *Re Maney & Sons De Luxe Service Station* [1969] N.Z.L.R. 116.

[13] *Morphitis v Bernasconi* [2003] B.C.C. 540 CA (Civ Div) at [53]-[55]; *Re Overnight Ltd* [2009] EWHC 601 (Ch), [2009] Bus. L.R. 1141 at [31]; and cf. the approach under Insolvency Act s.214 (wrongful trading) in *Re Continental Assurance Co of London Plc* [2001] B.P.I.R. 733 Ch D at [377]-[380].

the latter's balance sheet, and liability for the entire deficiency in what was at that point the largest corporate insolvency in English history.[14] How did this come about?

The legislative origins of s.213

The origins of fraudulent trading

We owe the concept of fraudulent trading—both as a civil liability to contribute to the assets of an insolvent company and as a criminal offence—to the recommendations of the Company Law Amendment Committee of 1925–26 chaired by Sir Wilfred Greene. One of the abusive practices raised with the Committee was a party in control of a private company, with a floating charge over its assets, "filling his security" once he realised the company was on the verge of liquidation, by ordering a large quantity of goods he knew the company could not pay for, simply to improve his security.[15] The Committee recommended that such conduct should be made a criminal offence, and that directors who engaged in it should be subject to potentially unlimited liability for the company's debts. The result was the Companies Act 1928 s.75,[16] soon Companies Act 1929 s.275,which provided that,

> "if in the course of winding up a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose",

the court could,

> "declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct".

It also made such conduct by a director a criminal offence.

The edition of Buckley which immediately followed the Act described the section as appearing "to give rise to considerable difficulties" and the new criminal offence as "somewhat vaguely defined".[17] Evidence given to the next Company Law Amendment Committee some 18 years later suggested that the section had been little used.[18]

The origins of "accessory liability" under s.213

That next Company Law Amendment Committee was convened in 1943, chaired by Sir Lionel Cohen.[19] It heard evidence about the dangers of "long firm fraud",

[14] *Morris v Bank of India* [2004] B.C.C. 404 Ch D at [127].
[15] *Report of the Company Law Amendment Committee* (1925) (Cmd 2657), paras 61–62.
[16] 18 & 19 Geo. V c. 45.
[17] Buckley, *The Law and Practice under the Companies Acts*, 11th edn (London: Stevens & Sons Ltd, 1930), p.565.
[18] *Minutes of Evidence Taken Before the Company Law Amendment Committee* (HMSO, 1943–44) (Cohen Committee Evidence) Day 4, 29 October 1943, pp.57–58 (Q.1048).
[19] Cohen Committee Evidence (1943–44); *Report of the Committee on Company Law Amendment* (1945), Cmd 6659 (Cohen Committee Report).

when a company was established or taken over, with the intent of building up a good credit record through small transactions, and, then ordering large quantities of goods without intending to pay for them. One witness suggested:

> "Oftener than not the people who are directors are merely dupes. They will probably know quite a deal of what has gone on but the brains behind the fraud belong to the people who do not appear on the surface. [20]"

That set Sir Lionel Cohen thinking, and the following month he raised the issue with two representatives of the Institute of Chartered Accountant of England Wales, Sir Harold Howitt[21] and Mr T.B. Robson:

> "One of the difficulties that has occurred in giving effect to … Section [275], particularly with private companies, is that generally the gentleman who has engineered the fraud has taken care not to be a director. Do you think that it would be useful if that Section were made applicable not merely to directors but to any other party who was knowingly party to carrying out the fraud? [22]"

Sir Lionel asked another witness if it would be desirable to say that that s.275 "should apply not only to a director but to any other person who was knowingly party to the fraudulent trading".[23] He explained that what he,

> "was trying to get at was the person in the small private company who was behind the scenes, and who, without it being possible to prove that he was a director or that the directors had obeyed his orders, was a party to the fraud".

The Committee's report recommended an amendment to s.275 in laconic terms, so it would apply "not only to directors but also to other persons who were knowingly parties to the frauds".[24]

Subsequent amendments

The amendment was effected by s.101(1) Companies Act 1947, soon s.332 Companies Act 1948. Where the 1929 Act had provided for civil or criminal liability for "any of the directors, whether past or present of the company, who were knowingly parties to the carrying on of the business in manner aforesaid", the 1948 Act made provision for the liabilities of "*any persons* who were knowingly parties to the carrying on of the business in manner aforesaid". The class of acts which engaged criminal liability did not change—it remained a pre-condition of criminal and civil liability that the person was "knowingly [party] to the carrying on of the business … with intent to defraud creditors". The words "without limitation of liability" remained, suggesting that the purpose of the section remained that of withdrawing the privilege of corporate personality from those operating

[20] Cohen Committee Evidence, Day 11 (28 January 1944), pp.307–310 (Q5558).
[21] Whose escape from German lines in the Great War was immortalised by his friend John Buchan in the novel *Mr Standfast* (London: Hodder and Stoughton, 1919).
[22] Cohen Committee Evidence, Day 13 (25 February 1944), p.384 (QQ6877–6878).
[23] Cohen Committee Evidence, Day 18 (12 May 1944), p.523 (QQ9279–9280).
[24] Cohen Committee Report (1945), Cmd 6659, para.149.

behind it. The amendment passed without comment in the new editions of the company law textbooks which followed the 1948 Act.[25]

In the Companies Act 1985, the criminal and civil aspects of s.332 were divided into separate sections. Section 458 contained the criminal offence, in essentially the same terms as its predecessor. The civil remedy appeared in s.630, which provided that if, in the course of winding up a company, it appeared that "any business of the company has been carried on with intent to defraud creditors of the company", the court could,

> "if it thinks proper to do so, declare that any persons who were knowingly parties to the carrying on of the business in the manner above mentioned are to be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct".

The criminal offence is now found in Companies Act 2006 s.993, and the civil liability in Insolvency Act 1986 s.213(2). This last section did not include the "without any limitation of liability" wording which had appeared in the English legislation to date, but instead tracked the wording which appeared in the new wrongful trading provision, created by s.214, which applied only to directors.

Similar fraudulent trading provisions were enacted in a number of common law jurisdictions, incorporating "any persons" provisions either on enactment or through subsequent amendment. This was the case in Australia, [26] New Zealand,[27] South Africa[28] and Ireland,[29] although further reforms have led the law in those jurisdictions increasingly to diverge from its UK origins.

"Carrying on of the business"

There is a clear distinction between the situation where the very carrying on of a business is a fraud, and a fraud perpetrated in the course of carrying on a legitimate business. In the former case, the perpetration of the fraud *is* the business of the company (a "fraudulent business"), whereas in the latter (a "fraudulent transaction"), the fraud occurs in a transaction which is incidental to the carrying on of the business. It is suggested that s.213 is inherently concerned with the former state of affairs, and not the latter. Where directors have ordered goods, not to sell them but to "fill" their security in advance of imminent insolvency, or a "long firm" fraud is being perpetrated, this is clearly a fraudulent business. This is equally true of companies engaging in any of the various forms of carousel fraud,[30] and any case in which the company continues to incur credit which the directors know cannot and will not be repaid. By contrast, fraudulent statements made to induce third parties to transact with a company, or to dissuade them from taking a particular

[25] See e.g. Buckley, *The Law and Practice under the Companies Acts*, 12th edn (London: Stevens & Sons Ltd, 1949), pp.672–674; Sir Francis Gore-Browne, *Handbook on the Formation, Management and Winding-up of Joint Stock Companies*, 41st edn (London: Jordan and Sons, 1952), pp.707–708.

[26] See Andrew Keay and Michael Murray, "Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia" (2005) 14 *International Insolvency Review* 27.

[27] Companies Act 1955 (New Zealand) s.320.

[28] See generally R.C. Williams, "Liability for reckless trading by companies: the South African experience" (1984) 35 I.C.L.Q. 684.

[29] See Irene Lynch-Fannon and Gerard Murphy, *Corporate Insolvency and Rescue*, 2nd edn (Haywards Heath: Bloomsbury Professional, 2012), Ch.10.

[30] *Re Overnight Ltd (In Liq.) (No.2)* [2010] EWHC 613 (Ch); [2010] B.C.C. 796.

course of conduct, are fraudulent transactions. However, the distinction has proved elusive in the case law, which increasingly elided the two concepts.

The early case law

The first reported case on the then s.275, *Re William C. Leitch Brothers Ltd*,[31] was a "debenture-filling case". The company had become insolvent, and a director ordered goods "greatly in excess of what was required for the company's business and what had generally been ordered for the company over a like period". Those goods became subject to the director's debenture over the company's assets. Maugham J held that where a company,

> "continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud",

and that in this case, the respondent was carrying on trading "in order … to safeguard his own position".[32]

Maugham J refused to find that the requirements for liability under s.275 were made out in *Re Patrick and Lyon Ltd*,[33] where the company had carried on trading for the six-month period necessary to ensure that debentures issued in the directors' favour could not be set aside under Companies Act 1929 s.266.[34] This was because,

> "the business of the company … was carried on in order to clear up the position by getting in debts and by effecting sales of stock and not with a view to securing by purchases on credit assets available as a security for debentures".[35]

While the reasoning is abbreviated, it can be fairly be read as an inquiry into whether this was a fraudulent business, which it was not shown to be.

Fraudulent business or fraudulent transaction?

One of the few English cases which has addressed and applied the distinction between a fraudulent business and a fraudulent transaction is *Re Murray-Watson Ltd*,*Re Murray-Watson Ltd Unreported* (6 April 1977). in which Oliver J noted that the then s.332,

> "is aimed at the carrying on of a business … and not at the execution of individual transactions in the course of carrying on that business. I do not think that the words 'carried on' can be treated as synonymous with 'carried out', nor can I read the words 'any business' as synonymous with 'any transaction or dealing'. The director of a company dealing in second-hand motor cars who wilfully misrepresents the age and capabilities of a vehicle is, no doubt, a fraudulent rascal but I do not think that he can be said to be

[31] *Re William C. Leitch Brothers Ltd* [1932] 2 Ch. 71 Ch D.
[32] *Leitch Brothers Ltd* [1932] 2 Ch. 71 at 77.
[33] *Re Patrick and Lyon Ltd* [1933] Ch. 786 Ch D.
[34] Which provided that a floating charge could be set aside if the company went into liquidation within six months of its creation.
[35] *Patrick and Lyon Ltd* [1933] Ch. 786 at 792.

> carrying on the company's business for a fraudulent purpose, although no doubt he carries out a particular business transaction in a fraudulent manner".

Re Murray-Watson was cited by Templeman J in *Re Gerald Cooper Chemicals Ltd (In Liquidation)*,[36] one of a number of cases which has sought to explore the limits of s.332 in the less-than-ideal context of a strike-out application. One of the issues was whether a single transaction was *capable* of amounting to "carrying on … any business of the company" with intent to defraud, and the answer was yes. The pleading alleged that the company's director had entered into a forward sale of dye with the applicant intending to use the money received to pay the respondent, and knowing that if the money was so used, the company would never be able to manufacture dye.[37] If the facts were as alleged, Templeman J. had little difficulty in concluding that the requirement would be met:

> "If a mail order company advertises goods and solicits deposits with no intention of supplying the goods or of returning the money, and, if one hundred customers in response to the advertisement pay over £100,000, the business of the company is plainly being carried on with intent to defraud creditors. If the company, as in the present case, solicits and obtains an advance of £100,000 from one customer, the position is no different."[38]

The reasoning is compelling.[39] On the pleaded facts, the company had incapacitated itself from ever manufacturing dye, and had entered into the contract to manufacture dye for the applicant merely to obtain cash to advantage another creditor without any intention of fulfilling the order. The position was no different from the "filling the debenture" case at which the concept of fraudulent trading was originally aimed, save that one large order which the insolvent company did not intend to fulfil was placed, rather than a number of smaller orders, and the intended beneficiary was an external creditor rather than the directors themselves.[40]

In carousel fraud, the requirement of "carrying on of the business" with the requisite fraudulent intent is easily met. In *Re Overnight Ltd (In Liq.) (No.2)*[41] as Roth J noted, the only transactions in which the company engaged were necessarily loss-making if VAT was accounted for, and the raison d'être of the business was to generate cash by defrauding HMRC. By contrast, Harman J in *Re Todd (Swanscombe) Ltd*[42] failed correctly to apply the fraudulent business/fraudulent transaction distinction. *Todd* concerned a scrap metal dealership which dealt with its major client in cash, to avoid paying VAT on those sales. The evasion of VAT was clearly fraudulent, but the purpose of carrying on the business itself was not to defraud the HMRC, or even necessarily to leave the company without the assets

[36] *Re Gerald Cooper Chemicals Ltd (In Liquidation)* [1978] Ch. 262.
[37] *Re Gerald Cooper* [1978] Ch. 262 at 266.
[38] *Re Gerald Cooper* [1978] Ch. 262 at 268.
[39] For the reasons which follow, it is suggested that there is no inconsistency on this issue between this decision and Oliver J's decision in *Re Murray-Watson Ltd* (cf. Oliver J's comment in *Re Sarflax Ltd* [1979] Ch. 592 Ch D at 598 that some of his comments in *Re Murray-Watson Ltd* may "require some qualification" in the light of the decision in *Re Gerald Cooper* [1978] Ch. 262).
[40] The position where a debt is *created* which cannot be discharged in order to pay the proceeds of another creditor is to be distinguished from a decision to use *existing assets* of an insolvent company to pay one creditor in preference to another, which does not constitute fraudulent trading: *Rossleigh Ltd v Carlaw* 1986 S.L.T. 204 Court of Session (Inner House, Second Division); and *Re Sarflax* 1979] Ch. 592 at 599.
[41] *Re Overnight Ltd (No.2)* [2010] EWHC 613 (Ch); [2010] B.C.C. 796 at [11].
[42] *Re Todd (Swanscombe) Ltd* [1990] B.C.C. 125 Ch D.

necessary to meet any claim by HMRC for VAT, but to profit from the sale of scrap metal. The suggestion that all companies engaged in the "cash economy" are companies carrying on business with intent to defraud would give s.213 a very wide remit. The decision may be justifiable on the basis that the company's continued existence (and to that extent its "business model") was premised on its not being able to meet (and not meeting) the tax liabilities which its continuing operation necessary incurred. A company which trades, knowingly generating liabilities which cannot be fulfilled, can be said to be carrying on business with intent to defraud creditors.

The position in other jurisdictions

The "fraudulent business"/"fraudulent trading" distinction has caused similar difficulties in other common law jurisdictions. In *Flavel v Semmens*,[43] an argument that incidental fraud did not constitute fraudulent trading succeeded at first instance in the Supreme Court of South Australia, but was rejected by a majority on appeal.[44] O'Loughlin J accepted that if "the fraudulent acts were merely incidental to the dominant activity" then the business might not be carried on for a fraudulent purpose but the position might be different if the fraudulent acts "were not merely incidental to but an integral part of the business".[45] In New Zealand, the Court of Appeal split on the issue of whether a single transaction could constitute "carrying on business" in *Re Nimbus Trawling Co Ltd*.[46] President Cook held, obiter, that "the provision covers any dealing or transaction of the company performed, carried out or conducted with the intention of defrauding creditors",[47]and Somers J held it applied to "a particular piece of business".[48] Richardson J, dissenting, held that "business is not synonymous with any transaction of the company".[49]

In South Africa, academic commentary originally resisted the suggestion that a single transaction could establish fraudulent trading,[50] but in *Gordon NO and Rennie NO v Standard Merchant Bank Ltd*,[51] De Kock and Baker JJ held that the words applied to an isolated transaction, and that "if a transaction is part of the business of the company … it matters not … that it is done once or as part of a series of acts".[52] In Ireland, it has been held that not only can a single transaction constitute carrying on business, but so can "constituent parts of a transaction".[53]

[43] *Flavel v Semmens* (1987) S.A.S.R. 354.
[44] *Flavel v Semmens* (1987) S.A.S.R. 354 at 358.
[45] *Flavel v Semmens* (1987) S.A.S.R. 354 at 358–359.
[46] *Re Nimbus Trawling Co Ltd* [1986] 2 N.Z.L.R. 308.
[47] *Re Nimbus Trawling* [1986] 2 N.Z.L.R. 308 at 311.
[48] *Re Nimbus Trawling* [1986] 2 N.Z.L.R. 308 at 317.
[49] *Re Nimbus Trawling* [1986] 2 N.Z.L.R. 308 at 314.
[50] The Hon. Mr Justice Henochsberg, *The Companies Act*, 3rd edn (Durban: Butterworths, 1985), p.741, which received some support from Milne J in *S v Harper* 1981 (2) S.A. 538 (D) at 632. The point had been left open in *Fisheries Development Corp of SA Ltd v A.W.J. Jorgensen 1980* 1980 (4) S.A. 156.
[51] *Gordon NO and Rennie NO v Standard Merchant Bank Ltd [1984] (2) S.A. 519 (C)* (1984) 3 All S.A. 174(C) at 178–179.
[52] *Gordon NO and Rennie NO v Standard Merchant Bank* (1984) 3 All S.A. 174(C) at 183.
[53] *Re Hunting Lodges Ltd (in liquidation) 1 June 1984* [1985] I.L.R.M. 75.

The Morphitis v Bernasconi case

The extent to which the "fraudulent business"/"fraudulent transaction" distinction has been elided can be seen in *Morphitis v Bernasconi*.[54] The first instance judge held that the "carrying on business" requirement was met where the directors had caused the company's solicitors to send a letter seeking an extensions of time to pay rent when they knew the company would not be able to pay that rent and had no intention of doing so. Their purpose was to prevent the company going into liquidation within 12 months of the date when they had resigned and set up another company with a similar name, to avoid the prohibition created by s.216 Insolvency Act 1986. The judge found that the letter was sent with an intention to mislead,[55] and, relying on in *Re Gerald Cooper Chemicals*,[56] that this was enough for s.213 liability.

In what it is hoped marks a return to more orthodox analysis, the Court of Appeal overturned the decision. Chadwick LJ held:

> "If (which I doubt) Templeman J. intended to suggest that, whenever a fraud on a creditor is perpetrated in the course of carrying on business, it must necessarily follow that the business is being carried on with intent to defraud creditors, I think he went too far … Parliament did not provide that the powers under those sections might be exercisable whenever it appeared to the court that 'any creditor of the company has been defrauded in the course of the carrying on the business of the company'. And, to my mind, there are good reasons why it did not enact the sections in those terms."[57]

The court noted the absence of any evidence that the landlords had in fact been misled by the letter, or that the landlords had been defrauded in the relevant period (in that their prospects of recovering on the debt had been prejudiced).[58] However, even if the landlords had in fact been prejudiced, this should not have changed the outcome. When a business under financial stress tells pressing creditors that the cheque is "in the post", this might constitute the tort of deceit—an implicit representation of intention to pay when there is none is a classic fraudulent representation[59]—but it is difficult to see how it constitutes *carrying on business* with intent to defraud creditors.

Conclusion on "the carrying on of the business"

The distinction between carrying on business for a fraudulent purpose (including that of defrauding creditors) and an incidentally fraudulent transaction in the course of business carried on for a legitimate purpose is easier to state than to apply. The concepts are sufficiently protean to allow considerable judicial flexibility in their application where an imperative to provide a s.213 remedy is perceived. And yet, unless some attempt is made to recognise and enforce such a distinction, the concept

[54] *Morphitis v Bernasconi* [2001] 2 B.C.L.C. 1 Ch D; *Morphitis v Bernasconi* [2003] EWCA Civ 289, [2003] Ch. 552.
[55] *Morphitis v Bernasconi* [2001] 2 B.C.L.C. 1 at [131].
[56] *Re Gerald Cooper Chemicals* [1978] Ch. 262 Ch D.
[57] *Morphitis v Bernasconi* [2003] EWCA Civ 289; [2003] Ch. 552 at [46].
[58] *Morphitis v Bernasconi* [2003] EWCA Civ 289; [2003] Ch. 552 at [49].
[59] *R. v Rai (Thomas)* [2000] 1 Cr. App. Rep. 242 CA (Crim Div).

of fraudulent trading under s.213 becomes impossibly wide, providing a delocalised liability for any kind of fraud, very far removed from the policy objectives which led to the introduction of the section in the first place. When a specific transaction undertaken by a company involves the assumption of obligations to a third party which it is known the company cannot and will never be able to meet, this will generally involve not simply an incidental fraud. *Any* ongoing business in such a state of affairs is likely to be fraudulent. However, s.213 extends not merely to business carried on "with intent to defraud creditors of the company" but also "intent to defraud … creditors of any other person" or "for any fraudulent purpose". Unless the concept of "carrying on business" means something more than "entering into a transaction", any transaction entered into by a company involving fraud will fall within s.213, subsuming virtually the entirety of the criminal law of fraud within s.458 Companies Act 1985, and providing a parallel fraud regime for all civil deceit claims at the suit of a company in liquidation.

"Knowingly parties to the carrying on of the business"

The case of Re Maidstone Builders Ltd

Re Maidstone Buildings Ltd[60] is one of the few cases in which the limits of the concept of being party to the "carrying on of the business" have been explored, albeit in terms which are not wholly satisfactory. The case involved allegations of fraudulent trading against two directors of a company, and its secretary, an accountant who worked for the company's auditors. As he was not a director, the claim against the secretary was on the "any persons" ground, and an issue arose as to whether he had been party to the "carrying on of the business with intent to defraud". The secretary sought to strike out the liquidators' application under s.332 Companies Act 1948. The pleaded case alleged that debts had been incurred and goods ordered on credit "without any reasonable prospect of being to pay for the said goods or to satisfy its other debtors". The secretary's defence was that he was not "concerned with the management of the company" and that, while he advised the company, he was "not party to carrying on the business of the company". The hearing proceeded on the basis that the liquidator's case was correct, and that the secretary knew that the company was insolvent and knew that there was no reasonable basis for it ever to be able to pay its debts.[61] The issue was whether it could be said that the secretary had been party to "carrying on of the business" by reason of his having taken no steps at board meetings or otherwise to prevent the company ordering goods on credit or incurring debts in these circumstances.

Pennycuick VC held that this could not amount to being party to the carrying on of the company's business. Construing the words "parties to" as meaning "'participates in', 'takes part in' or 'concurs in'", he held that this involved "some positive steps of some nature", and that,

[60] *Re Maidstone Buildings Ltd* [1971] 1 W.L.R. 1085 Ch D at 1088.
[61] *Maidstone Buildings* [1971] 1 W.L.R. 1085 at 1091.

> "in order to bring a person within the section, you must show that he is taking some positive steps in the carrying on of the company's business in a fraudulent manner".[62]

It is suggested that the distinction being drawn here is not simply one between act and omission, as some have suggested, but between those who carry on the company's business and those who do not. The claim failed because "a secretary … is not concerned in the management in the company [or] … in carrying on the business of the company". Pennycuick VC rejected the suggestion that "the expression 'party to' covers everyone who has notice that the business of the company is being carried on fraudulently", stating that "this would lead to impossible results".[63]

The case of In re Gerald Cooper Chemicals Ltd

The suggestion that some role in the management of the business is necessary to engage liability under s.213 was rejected in *Re Gerald Cooper Chemicals Ltd (In Liquidation)*.[64] The issue was whether a creditor of the company who was repaid a debt with money obtained by the carrying on of the business with intent to defraud creditors was "knowingly party" to that state of affairs. The creditor argued that,

> "there is no direct allegation in the pleading that the respondents were at any time involved in the carrying on of the business of the company".

The applicant ran two arguments. The first (which was clearly wrong) was that s.332 did not create a substantive claim, but was a "machinery section" providing a mechanism by which otherwise actionable frauds discovered in the course of the liquidation could be dealt with. The second was directed to the "carrying on of the business" issue. The applicant laid emphasis not simply on the respondent's knowing receipt of funds with knowledge that they had been procured by conducting business with intent to defraud, but the allegation that the respondent had pressurised the company to obtain funds in that very way,[65] an allegation which might have amounted to a form of carrying on of the company's business.

Templeman J rejected part of the second argument, holding that,

> "a lender who presses for payment is not party to a fraud merely because he knows that no money will be available to pay him if the debtor remains honest".[66]

However, he held:

> "In my judgment a creditor is party to the carrying on of a business with intent to defraud creditors if he accepts money which he knows full well has in fact been procured by carrying on the business with intent to defraud creditors for the very purpose of making the payment."

[62] *Maidstone Buildings* [1971] 1 W.L.R. 1085 at 1092.
[63] For a similar decision in New Zealand see *Thompson v Innes* (1985) 2 N.Z.C.L.C. 99,463 at 99,470.
[64] *Re Gerald Cooper Chemicals Ltd (In Liquidation)* [1978] 1 Ch. 262 Ch D.
[65] *Cooper Chemicals* [1978] 1 Ch. 262 at 264.
[66] *Cooper Chemicals* [1978] 1 Ch. 262 at 268.

This took the receipt-based liability which it was common ground the pleaded facts disclosed, and treated it as synonymous with the statutory requirement of carrying on the business of the company with intent to defraud. However, it is difficult to see why the respondent was any more a party to the "carrying on of the business" of the company than the secretary in *Re Maidstone*, and if anything, less so. The respondent's liability for "carrying on of the business with intent to defraud" crystallised as a result of an act taking place after the creditor was defrauded, namely the receipt of the proceeds. The "outsider" liability in *Re Cooper Chemicals* was essentially restorative, but once outsider liability is brought within s.213, the terms of the section provide no basis for limiting the extent of that liability to restitution rather than compensation.[67]

Cooper Chemicals was the first case which distinguished between the conduct required by those managing the company for s.213 liability to arise, and the conduct required on the part of outsiders vis-à-vis the company to render them liable under the same section alongside the managers. It was this distinction which effectively turned s.213 into a section providing for principal and accessory liability. That approach is also seen in *Re Augustus Barnett & Son Ltd*,[68] another case in which an application under the then s.332 was subject to a strike-out application. The respondent to the s.332 application was the parent of the insolvent company. Hoffmann J noted that "it is not alleged … that [the parent] carried on any business of the company".[69] He held that the section required,

> "a finding that someone has done an act which can be described as carrying on some business of the company and that in doing so he had an intent to defraud",

(i.e. in accessory liability terms, the "principal offence"), and that:

> "Once this condition has been satisfied, the court may impose personal liability on any persons who were knowingly 'party to' the carrying on of the business in manner aforesaid."[70]

That formulation distinguishes between those who actually carry on the business with intent to defraud (primary actors), and those who are "knowingly party" to the carrying on of business with that intent (accessories). Later, Hoffmann J expressly adopted this legal terminology, identifying the issue before him as whether,

> "sec. 332 can form the basis for imposing liability on a parent company otherwise than as accessory to fraudulent trading by the persons who actually carried on the business of the subsidiary".[71]

[67] cf. the comment of the Irish Supreme Court in *O'Keeffe v Ferris* [1997] 3 I.R. 463 at 469 on Companies Act 1963 s.297, and the significance of *Cooper Chemicals* in that context, which might suggest such a distinction:

> "A person cannot be made amenable under the section unless he has actively participated in the management of the company … A third party who knowingly participates in an act of fraudulent trading … may be compelled personally to restore the money so applied by means of an order under the section."

[68] *Re Augustus Barnett & Son Ltd* (1986) 2 B.C.C. 98904.

[69] *Augustus Barnett & Son* (1986) 2 B.C.C. 98904 at 98907.

[70] *Augustus Barnett & Son* (1986) 2 B.C.C. 98904at 98907.

[71] *Augustus Barnett & Son* (1986) 2 B.C.C. 98904 at 98908. For a more recent statement by Lord Hoffmann to similar effect in the Court of Final Appeal (Hong Kong), see *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 B.C.L.C. 324 at 330.

The influence of accessory liability in equity

The influence of the equitable concept of accessory liability on the judicial approach to s.213 is seen in other cases. *Re Bank of Credit and Commerce International SA, Banque Arabe Internationale d'Investissement SA v Morris*,[72] Neuberger J. was guided in his construction of s.213 by the view that there was no,

> "good reason for preventing a liquidator from pursuing a person who actively and dishonestly assisted and/or benefited from the company in adopting a dishonest course of conduct".

In *Morris v State Bank of India*[73] Patten J referred to "a conscious decision to participate in transactions which are known to be fraudulent", and in a later decision in *Morris v Bank of India*[74] Patten J stated that,

> "the purpose of section 213 is to enable the liquidator to recover compensation from those who knowingly assisted the fraudulent conduct of the company's business".

There are considerable difficulties with this principal/accessory analysis. The words "knowingly parties" are clearly intended to capture the company's directors who conduct business with the relevant intent, and the use of the single phrase to identify those who are to be made liable under the section would suggest that all those liable to compensate are liable on the same basis and for the same conduct. The words appeared in s.275 Companies Act 1928, when the section only applied to directors. There appears to be a halo effect here, with judges attracted by an analytical framework for s.213 which mirrors the familiar distinction between fiduciaries who breach their duties and those who knowingly assist them in doing so.[75] There are undoubtedly cases in which the overlay of existing common law and equitable concepts on broad statutory discretions to guide their exercise is a useful exercise—for example the use of concepts of causation, scope of duty and loss to provide some rigidity to the broad discretion under s.213 to award compensation. However, when determining who is liable under s.213 and for what, rather than for how much, the approach is unhelpful. Section 213 applies to those who are parties *to the carrying on* of the business, not to those simply counterparties to aspects of that business, and the reference to knowing assistance tends to obscure this fact.

Is management or control required to be knowingly party to the carrying on of the business?

The legislative history of the "any person" provision in s.213 suggests that it was aimed at those exercising some form of management or control over the business being carried on, whatever their formal role. However, an application for a preliminary issue to determine whether there was such a limitation was rejected by Neuberger J in *Re Bank of Credit and Commerce International SA, Banque*

[72] *Re Bank of Credit and Commerce International SA* [2002] B.C.L.C. 407 at 412.
[73] *Morris v State Bank of India* [2003] B.C.C. 735 Ch D at 741.
[74] *Morris v Bank of India* [2004] B.C.C. 404 Ch D at [121].
[75] cf. Andrew Burrows, "The relationship of common law and statute in the law of obligations" (2012) 128 L.Q.R. 232, 242–243.

Arabe Internationale d'Investissement v Morris.[76] He held that "it was not arguable" that activities did not fall within s.213 "merely because [the respondent] was not performing a managerial or controlling function".

It is respectfully suggested that the issue was more capable of argument than Neuberger J recognised. The judge suggested that the language "parties to the carrying on" was "not limited to the person who actually directs or manages the business concerned" but was "a more natural reference to people who are not employed by the company at all but who are third parties to the company".[77] However, when those words were introduced in s.75 Companies Act 1928, they were concerned, and concerned solely, with those who directed and managed the company's business from the inside, namely its directors. The judge also relied on the contrast between the "any person" language in s.213, and the application of s.212 to any person "who has been concerned, or has taken part, in the promotion, formation or management of the company".[78]Section 212 provides a short-hand mechanism for enforcing the private law duties already owed by the persons identified in it to the company rather than creating a new basis for relief. It is, as has been noted, "purely procedural".[79] It therefore has very limited parallels with s.213. It also has very different origins, going back to s.165 Companies Act 1862. Sections 212 and 213 have lived essentially separate statutory lives, making the suggestion that the meaning of one is informed by the language of the other unpersuasive. Finally, the key phrase in s.213 is that of being party to "carrying on of the business". Nothing in s.212 sheds any light on the meaning of that phrase. The fact that s.214 is restricted to directors is of equally limited assistance.

Neuberger J referred to the contents of para.149 of the Cohen Committee Report as something which supported his conclusions,[80] but not (unsurprisingly) the evidence showing how this recommendation had come to be formulated. He also referred to the decisions in *Re Gerard Cooper Chemicals*[81] and *Re August Barnett & Son Ltd*,[82] which undoubtedly support, to varying degrees, the conclusion he reached but which, for the reasons set out above, should not conclude the issue. Among the authorities cited were decisions on the criminal offence created by Companies Act 1986 s.485. The judge was not assisted by those cases, which he said were "not directed to the sort of point raised in the present case".[83] However, it is suggested that the cases are of real assistance. In *R. v Grantham* the judge directed the jury that one of the matters of which they had to be sure if they were to convict the appellant (formally a consultant to the company) of fraudulent trading was that he had "taken an active part in carrying on the business".[84] Lord Chief Justice Lane stated that it was open to the jury to find that,

> *"whoever was running this business* was intending to deceive or was actually deceiving Jacob into believing he would be paid in 28 days or shortly

[76] *Re Bank of Credit and Commerce International SA, Banque Arabe Internationale d'Investissement v Morris* [2002] 2 B.C.C. 407.
[77] *Re Bank of Credit and Commerce International* [2002] 2 B.C.C. 407 at 411.
[78] *Re Bank of Credit and Commerce International* [2002] 2 B.C.C. 407 at 412.
[79] *Re DKG Contractors Ltd* [1990] B.C.C. 903 Ch D at 905; *Re B Johnson & Co (Builders) Ltd* [1955] Ch. 634 CA at 647.
[80] *Re Bank of Credit and Commerce International* [2002] 2 B.C.C. 407 at 413.
[81] *Cooper Chemicals* [1978] Ch. 262.
[82] *Re August Barnett & Son Ltd* (1986) 2 B.C.C. 98904.
[83] *Re Bank of Credit and Commerce International* [2002] 2 B.C.C. 407 at 414.
[84] *R. v Grantham* [1984] Q.B. 675 CA (Crim Div) at 681.

> thereafter, when they knew perfectly well there was no hope of that coming about".[85]

In *R. v Miles*,[86] the appellant contended that s.458 "requires the 'person who was knowingly a party to the carrying on of the business' to have some executive or managerial responsibility", and that he "was a mere salesman acting on the orders of others" and so could not be convicted. The Crown's submissions were that:

> "Once 'any person' was substituted for 'director', the position was reached where an offence could be committed by anyone whatever their position within the company and, indeed, that the offence would not be confined even to persons within the company itself. During the course of argument, the Crown conceded that there could be many instances where persons within a company could not be said to be 'party to the carrying on of the business of the company'."

These submissions addressed the very argument later raised before Neuberger J: for the appellant that "some controlling or managerial function is required to bring a defendant within section 458" and for the Crown that,

> "the introduction of the words 'any person' must be taken to show an intention to cast the net very wide: had it been otherwise some expression such as `concerned in the management of the company' would have been used".

The Court of Appeal adopted the former view, holding that the section was,

> "designed to include those who exercise a controlling or managerial function, or who, in Lord Lane's phrase, are 'running the business'".[87]

A salesman like Miles who is not a manager and who sells shares he knows are worthless can be charged with offences under the Theft Act or with conspiracy but not the s.458 offence. An earlier direction to a jury in a criminal case was that the offence was committed by someone who "took a deliberate part in the calculated carrying on of the business at the expense of the creditors",[88] referring to a "director or person concerned in the management" of the company. When what became s.9 of the Fraud Act 2006 (extending the offence of fraudulent trading to an unincorporated business) was introduced in both the House of Commons and House of Lords, the Home Office Explanatory Notes identified as one of the four guiding principles of the corporation offence which it was intended would continue to apply to the new offence that "it can be committed only by persons who exercise some kind of controlling or managerial function within the company".[89] Neuberger J held that *Miles* was concerned with an employee who sells shares under direction, and that,

> "just as an employee of the company who was merely carrying out orders does not fall within s.213(2) whereas somebody who orchestrates, organises

[85] *R. v Grantham* [1984] Q.B. 675 at 684.
[86] *R. v Miles* [1992] Crim. L.R. 657 CA (Crim Div); Transcript 2 April 1992.
[87] A reference to *R. v Grantham* [1984] Q.B. 675 at 681.
[88] *R. v Ploster Plywood Ltd* (1956) cited in [1984] J.B.L. 357, 358.
[89] Home Office, Fraud Bill, Explanatory Notes (2006), para.30, *https://www.publications.parliament.uk/pa/cm200506/cmbills/166/en/06166x--.htm* [Accessed 21 March 2018].

> or can seize of the business does … so a company … which carries on (so far as it is concerned) a bona fide business with the company, does not fall within s.213(2), but a company which is involved in, and assists and benefits from, the offending business … and does so, knowingly and therefore, dishonestly, does fall or at last can fall within s.213(2)".[90]

There are a number of difficulties with this passage. First, an employee who "sells shares he knows are worthless" is clearly dishonest, whether acting under direction (as to which there is no reference in *Miles*) or not. It was for that reason that the Court of Appeal in *Miles* stated that Miles could have been charged with an offence under the Theft Act or with conspiracy. The reason why that (*ex hypothesi*) dishonest individual did not commit the s.458 offence was because he was not engaged in the "carrying on of the business", something which required the exercise of a managerial function. Secondly, Neuberger J's reasoning makes a false comparison. In the first part, he contrasts someone who exercises managing responsibility with someone who does not, and in the second, someone with a dishonest state of mind and someone without one. The first part of this judicial equation is concerned, in criminal terms with actus reus and the second with mens rea.

Other difficulties with an accessory liability approach to s.213

In England, it has been held that s.213 provides a basis for imposing liability not only on "outsiders" who are natural persons, but also on the employers of those individuals. In *Morris v Bank of India*,[91] it was conceded that liability under s.213 could attach to an employer, and the court held that "the policy of the Act" required the attribution of the conduct of an individual involved in the relevant transactions to his employer. In reaching these conclusions, the English decisions relied on the separation of the civil and criminal aspects of fraudulent trading effected by the Companies Act 1985, although there is nothing to suggest that this was intended to achieve the result that the same language had a different scope in the different sections.[92] The Court of Appeal in *Morris* stated that attribution would depend on matters such as,

> "the agent's importance or seniority in the hierarchy of the company … His significance and freedom to act in the context of the particular transaction … the degree to which the board is informed, and the extent to which it can be said that it was, in the broadest sense, put on inquiry".[93]

The Court of Appeal also raised the possibility that the principle of vicarious liability might apply, rendering an employer vicariously liable under s.213 for the acts of its employee.[94] This is not the approach adopted in South Africa, where the criminal and civil aspects of fraudulent trading still derive from the same statutory provision. While the South African courts have recognised the possibility of

[90] *Re Bank of Credit and Commerce International* [2002] 2 B.C.C. 407 at 414.
[91] *Morris v Bank of India* [2004] B.C.C. 404 at [121], Patten J; [2005] EWCA Civ 693, [2005] B.C.C. 739 at [108], [111].
[92] *Morris v Bank of India* [2004] B.C.C. 404 at [121], Patten J; [2005] EWCA Civ 693, [2005] B.C.C. 739 at [107].
[93] *Morris v Bank of India* [2005] EWCA Civ 693; [2005] B.C.C. 739 at [130].
[94] *Morris v Bank of India* [2005] EWCA Civ. 693; [2005] B.C.C. 739 at [113].

corporate liability for fraudulent trading on an alter ego basis,[95] they have held that fraudulent trading provisions can only be invoked against those identified in the statute, and "not against persons who may be vicariously liable at common law for the conduct of persons against whom it may be invoked".[96] Where the individual alleged to have carried on the fraudulent trading is a director or officer of the company appointed at the behest of a major shareholder for the purposes of representing its interests, the allegation that the appointing entity can have vicarious liability for fraudulent trading has also been rejected in South Africa on the basis that the director is not a servant or agent of those who procured his or her election to the board, but rather owes the company an obligation to exercise an independent judgment and to act in its best interests. As the matter was put by Margo J, "directors performing their duties as such are not the instruments of any outside person".[97]

If s.213 extends to "outsiders", this approach produces a curious imbalance in its operation between "insiders" and "outsiders". Conduct by directors appointed to the company by particular shareholders would not render the shareholders whose interests they represent liable under s.213, whether vicariously or under a rule of attribution, because the directors are necessarily acting on behalf of the company rather than the appointing shareholder. However, there would be no such inhibition when it came to an "outsider" who was party to a fraudulent transaction with the company. Further, on the basis of the English authorities, we have reached a position in which a non-managing employee of the company carrying on business fraudulently cannot be made subject to a s.213 order,[98] but a non-managing employee of another company transacting with that company can be, for which his employer can then be held vicariously liable.[99] If the answer is that only a *managing* employee of the counterparty can be liable, then the result is just as curious. It would mean that a controlling or managerial role is required for s.213 liability on the part of an "outsider", as it is on the part of an "insider", but not one in the business being carried on fraudulently.

The suggestion that s.213 imposes a species of accessory liability on outsiders transacting with the company raises a number of issues as to how the recovery under s.213 interrelates with the cause of action which the company already has against the outsider based on some form of accessory liability at law or in equity. What happens, for example, if the liability arising independently of s.213 involves a different measure of relief, or is time-barred, or has been the subject of some form of settlement? If the proceedings on the company's cause of action have already been determined, it might be possible to take account of the outcome when fashioning the discretionary relief under s.213. If the s.213 proceedings have been brought first, the answer might be to seek some form of undertaking from the liquidator as a condition of granting relief which would control or preclude the subsequent pursuit of the company's cause of action. However, the very fact that these problems arise at all might suggest that s.213 was never intended to apply

[95] e.g. *Anderson v Dickson* [1985] 1 All S.A. 132 (N) at 148–149 per Booysen J.

[96] *Ensor NO v Syfret's Trust and Executor Company (Natal) Ltd* 1976 (3) S.A. 762 (D), Hefer J; *Anderson v Dickson* [1985] 1 All S.A. 132 (N); *Fisheries Development Corp of SA Ltd v Jorgensen* [1980] 4 All S.A. 525 (W) 536 (Margo J).

[97] *Fisheries Development Corp of SA v Jorgensen* [1980] 4 All S.A. 525 (W) at 531, 537 (Margo J).

[98] *R. v Miles* [1992] Crim L.R. 657; Transcript 2 April 1992.

[99] *Morris v Bank of India* [2005] EWCA Civ 693; [2005] B.C.C. 739 at [113].

in these circumstances. This is a point well made by Patrick Ussher, who observes in respect of the equivalent Irish section:

> "Section 297 should not be used to effect duplicate liability. One does not duplicate liability by imposing a liability for fraudulent trading in respect of an act which was lawful vis-à-vis the company but nonetheless fraudulent with regard to its creditors."[100]

Conclusion on "knowingly parties"

Dixon CJ, in the High Court of Australia, noted in *Hardie v Hanson*[101] that the purpose of s.213 as originally drafted,

> "surely must have been to enable the Court to remove the protection of the no liability system before liquidation in the case of directors who have been parties to carrying on any part of the business of the company before liquidation with intent to defraud creditors of rights, privileges or advantages they would obtain or enjoy whether in the winding-up or otherwise … Now, however, in England the word `persons' has been substituted for 'directors', a step which doubtless makes such an explanation of the provision much less cogent, if any longer tenable, in the country of its origin".

This is one of a several comments identifying fraudulent trading as, in effect, a "veil-piercing" provision which removes the privileges of corporate personality from those who abuse them.[102] A veil-piercing provision is fundamentally different from a provision imposing accessory liability on outsiders dealing with the company for the benefit of its creditors, but the original rationale for s.213 identified in *Hardie v Hanson* could still act as an organising principle if the provision was confined to those with management or control of the company's business, whether directors or not. As Ussher notes, applying the fraudulent trading provisions so that "any person who in effect controls the company" was liable for its debts during the period of fraudulent trading,

> "is philosophically justifiable by viewing incorporation as a privilege given on condition that it is not abused by its recipients … A corporation's controllers are the recipients of this privilege".[103]

By contrast, third parties dealing with the company are not, and their lability should depend on conventional private law principles.

Applying the common law joint tortfeasors test

If s.213 cannot be confined in its application to those managing or controlling the company, its application should be limited to conduct undertaken by the outsider for the purposes of the company's business rather than his own. This would be

[100] Patrick Ussher, "Fraudulent Trading" (1984) 6 *Dublin University Law Journal* 58, 63.
[101] *Hardie v Hanson* (1960) 105 C.L.R. 451 at 459.
[102] For other examples see Bisson J in *Thompson v Innes* (1985) 2 N.Z.C.L.C. 99,463 at 99,470; *Re Klimtworth Homes Pty Ltd* [1977] 2 N.S.W.L.R. 904 at 908; R.C. Williams, "Fraudulent Trading" (1986) 4 *Companies and Securities Law Journal* 14 ("the most important statutory incursion into the principle of the separate personality of the company").
[103] Ussher, "Fraudulent Trading" (1984) 6 *Dublin University Law Journal* 58, 65.

consistent with the suggestion in the South African cases that an outsider who fraudulently seeks to procure credit for the company in liquidation can be liable for fraudulent trading,[104] and would mean that those managing the company and the outsiders would be liable for fraudulently carrying on the *same* business. This approach would be consistent with the requirement for accessory liability in tort, where the parties must "act in concert with one another pursuant to a common design".[105] As Hobhouse LJ noted in *Credit Lyonnais Bank Nederland NV v ECGD*[106]:

> "Mere assistance, even knowing assistance, does not suffice to make the 'secondary' party jointly liable as a joint tortfeasor with the primary party. What he does must go further. He must have conspired with the primary party or procured or induced his commission of the tort (my first category); or he must have joined in the common design pursuant to which the tort was committed (my third category)."[107]

By contrast, for knowing assistance in equity, there is no requirement for a shared purpose between principal and accessory. In *Agip Africa Ltd v Jackson*,[108] Millett J stated that for knowing assistance, it was "not necessary that [the accessory] should have been aware of the precise nature of the fraud or even of the identity of its victim".[109] In the s.213 context, Patten J held in *Morris v Bank of India*[110] that the accessory "did not have to know every detail of the fraud or the precise mechanics of how it would be carried out", provided they knew the company was engaged in "a fraud of some kind".[111] In Ireland, Carroll J held in *Re Hunting Lodges (In Liquidation)*[112] that "if each of the participants acts for a fraudulent purpose … it is not necessary that there should be a common agreed fraudulent intent".

In *Fish & Fish v Sea Shepherd UK*,[113] Lord Sumption JSC argued that the different tests for accessory liability at law and in equity reflect the fact that "knowing assistance is a species of fraud, and knowledge is relevant only to establish dishonesty", whereas considerations of joint liability at law reflect,

> "a pragmatic concern to limit the propensity of the law of tort to interfere with a person's right to do things which are in themselves entirely lawful".

[104] *Fisheries Development Corp v Jorgensen* 1980 (4) S.A. 156 (W) at 167 per Margo J; *Anderson v Dickson NNO* [1985]1 All S.A. 132 (N) at 140 per Booysen J.

[105] *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] A.C. 1013 HL at 1056–1057; *Fish & Fish Ltd v Sea Shepherd U.K. Ltd* [2015] UKSC 10, [2015] A.C. 1229 at [21], per Lord Toulson JSC, although for a suggestion this requirement is being diluted see Davies, *Accessory Liability* (2015), p.191.

[106] *Credit Lyonnais Bank Nederland NV v ECGD* [1998] 1 Lloyd's Rep. 19 at 46.

[107] Although the lack of assistance-based liability at common law has been criticised by Paul Davies, "Accessory liability for assisting torts" (2011) 70 C.L.J. 353.

[108] *Agip Africa Ltd v Jackson* [1990] Ch. 265 Ch D at 295.

[109] Views endorsed by the Court of Appeal in *Abou-Rahman v Abacha* [2006] EWCA Civ 1492, [2007] 1 All E.R. (Comm) 827 at [38]-[39]; and Lord Hoffmann in the Privy Council in *Barlow Clowes Ltd v Eurotrust Ltd* [2005] UKPC 37, [2006] 1 W.L.R. 1476 at [2]; and cf. the views to the contrary of Mance J in *Grupo Torras SA v Al Sabah (No.5)* [1999] C.L.C. 1469 C Comm. Ct. at 1665–1668, and Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2006] F.S.R. 17 at [1500]-[1501].

[110] *Morris v Bank of India* [2004] B.C.C. 404 at [13].

[111] *Morris v Bank of India* [2004] B.C.C. 404 at [108].

[112] *1 June 1984:* [1985] I.L.R.M. 75.

[113] *Fish & Fish v Sea Shepherd UK* [2015] UKSC 10; [2015] A.C. 1229 at [39].

While this analysis would support the adoption of the equitable approach to accessory liability for fraudulent trading, it runs into the difficulty that s.213 does not contemplate a principal-accessory divide at all, and uses the same language to describe the conduct necessary to trigger liability, whether for insiders or outsiders. The common law test for accessory liability provides an answer to this dilemma, because, as Peter Gibson LJ noted in *Sabaf SpA v Meneghetti SA*[114]:

> "The underlying concept for joint tortfeasance must be that the joint tortfeasor has been so involved in the commission of the tort as to make himself liable for the tort. Unless he has made the infringing act his own, he has not himself committed the tort. That notion seems to us what underlies all the decisions to which we were referred. If there is a common design or concerted action or otherwise a combination to secure the doing of the infringing acts, then each of the combiners has made the act his own and will be liable."[115]

Conclusion

In *Hardie v Hanson*,[116] Menzies J described the Australian equivalent of s.213 as "full of difficulties". The intervening 60 years have done little to lessen those difficulties, and the extension of s.213 to "outsiders" as a species of accessory liability has merely served to enhance them. Given the increasing prevalence of cross-border fraud, it is probably unrealistic to expect the judiciary to row back from an interpretation of s.213 which has produced a provision of such protean scope. No doubt it can be said that most of the difficulties raised in the course of this article can be accommodated within the exercise of the broad-textured discretions available in determining whether s.213 should be invoked against those outside the jurisdiction, and what, if any, relief should be ordered. However, the structural requirements for establishing private law rights and remedies, and the rules which identify the system of national law which determines what those requirements are, are not simply legacies of a more formal legal age, but serve important goals of certainty, consistency[117] and the protection of settled affairs. The coherence and distinctness of different legal categories is a legitimate objective of a system of law. The existence of a parallel, broad-textured and delocalised regime alongside the rights created by private law, but only for a certain class of claimants, cuts across a number of those goals, and should not be beyond re-appraisal.

[114] *Sabaf SpA v Meneghetti SA* [2003] R.P.C. 264 CA (Civ Div) at [59]. See also *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch); [2010] E.C.C. 13 at [108] (Kitchen J).

[115] Although note Beatson LJ's comment on this test in *Fish & Fish v Sea Shepherd* [2013] EWCA Civ 544; [2013] 1 W.L.R. 3700 at [56].

[116] *Hardie v Hanson* (1960) 105 C.L.R. 451 at 465.

[117] cf. *Gray v Thames Trains Ltd* [2009] 1 A.C. 1339 HL at [77], [92], [95] and [99].