CHANCERY BAR ASSOCIATION ANNUAL LECTURE

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Given by

The Rt Hon The Lord Neuberger of Abbotsbury

THE CONSPIRATORS, THE TAX MAN, THE BILL OF RIGHTS AND A BIT ABOUT THE LOVERS

1. When she asked me to give this talk, Carolyn Walton realised that she would get her way if she asked me so far ahead that it was hard to justify saying no. As the day got nearer, the inevitable question came up: what was I going to talk about? Characteristically, I batted that question back to the committee. The most popular subject was *Stack v Dowden* [2007] 2 AC 432, a House of Lords decision about cohabitation and co-ownership, where I dissented. It was very tempting, but I feared appearing either indecisive and feeble by admitting my error, or defiant and shrill by sticking with my view. Neither indecision and feebleness nor defiance and shrillness are very attractive qualities, least of all in a Judge. It occurred to me that a recent case we had heard, *Total Network SL v Her Majesty's Revenue and Customs* would provide a good basis for a talk, even though it was about VAT of all unpromising subjects. So I said I would talk about *Total* with a little bit on *Stack.*

2. Well, the best laid schemes o' mice an' men gang oft a-gley, and, whether mouse or man, this particular judge's scheme went particularly a-gley - both as to only touching on *Stack* and as to discussing about *Total*. This was entirely because of the failed attempt by mercenaries to bring down the Government of Equatorial Guinea in 2004. You may recall that it initially hit the headlines because of Mark Thatcher's alleged involvement. More recently, it returned to the front pages because of Simon Mann's extradition from Zimbabwe to Equatorial Guinea.

3. What on earth, I hear you ask, has this got to do with cohabitation or VAT? Well the failed coup resulted in a case, *Mbasogo v Logo Ltd*, in which the President of Equatorial Guinea sought damages for the attempt to bring down his government. The case went to the House of Lords, and they decided to have a committee of nine to hear it. As they pick from the top, and I am the baby Law Lord, I was not wanted on the journey. So, rather than skulking around, I made a nuisance of myself in the Court of Appeal, where we heard an appeal involving *Stack*. As a result, I rather repented of my decision only to touch on the topic. So I decided to use that decision, *Laskar v Laskar* (Times Law Reports 4 March 2008), as an excuse for sounding off a little more than I had intended on *Stack*. And, in case you are wondering, I will be defiant and shrill rather than indecisive and feeble.

4. *Mbasogo* then went on to give me problems in connection with *Total*. One of the points in *Total* also came up in *Mbasogo*, so the decision in *Total* had to be delayed in case the court in *Mbosogo* had different thoughts on the point. This means that the judgment in *Total* is not to be given until this Wednesday. So my discussion of *Total* now has to be rather more tentative, and that of *Stack* rather fuller, than I had anticipated.

5. I also had some concern as to whether it was appropriate for me to talk about *Stack*, but this was allayed last week when Lady Hale spoke about *YL v Birmingham City Council* to a Parliamentary Select Committee. *YL* was a case where I was in the majority and she was in the minority. So it was to that extent a mirror image of *Stack*, except that she had Lord Bingham (no less) on her side in *YL*, and I was in solitary splendour in *Stack*.

6. As to *Total*, one should make the best of a bad job, and what I shall do is this. After discussing *Stack* in rather more detail than I had intended, I shall explain the facts and issues in *Total* as even-handedly and briefly as I can. You will then have to decide which way you expect the House of Lords to decide the three points it raised. Audience participation and transparency are all the rage, so, at the end of this talk, I am going to get you to register your vote on one of the two pieces of paper on your seats. The fact that you will have to vote means that you cannot snooze through this talk and earn your CPD points: you will actually have to listen to me, in case I ask you why you voted the way you did.

7. Before I turn to *Stack*, I should mention a final irony in this pathetic little tale of woe. In *Mbasogo*, there were three days of argument before nine law lords (or rather eight law lords and one law lady – perhaps the Supreme Court has some advantages after all: after October next year I could simply say "nine justices"). Anyway, after those three days, the appeal was aborted *sine die* because the Equatorial Guinea government refused Simon Mann access to his legal team. So the reason for my talking about *Stack* more than intended, and the reason for the talk on *Total* being converted into ask the audience, was something of a damp squib.

8. And so to *Stack*. Mr Stack and Miss Dowden, who were not married, had been living together for about fifteen years and had four children when they purchased a house in joint names with no agreement as to how the beneficial interest was to be held. Miss Dowden contributed 65% of the purchase price, and Mr Stack the remaining 35%. After about nine years, the relationship ended and Mr Stack was excluded from the house. He subsequently applied for an order for sale, and the primary issue was the beneficial ownership of the house.

9. All five of us agreed that it was 65-35 in favour of Miss Dowden, but the majority (led by Baroness Hale) got there by a different route from the minority (me). I applied presumption of resulting trust, as there was nothing to displace it, so the parties' shares were assessed by reference to their respective contributions. I thought this represented the application of a well established principle. I also thought it would be clear simple and cheap to apply in most other cases, and that if it was unsatisfactory, Parliament was better placed to change the law than the judges.

10. The majority thought Parliament was unlikely to intervene, and, at least in this sort of case, the resulting trust presumption was inappropriate. They thought the presumption which should apply is that equity follows the law. Lady Hale said that "at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved" (para 58). Rebutting the presumption of a beneficial joint tenancy, she said, was "not a task lightly to be embarked on" (para 68), as it would only be in a "very unusual" case where the presumption would not apply. She went on,

however, to hold that the facts in *Stack* were "very unusual" (para 92) and justified departing from the presumption.

11. It is fair to say that, in the past 20 years or so, there had been cases which suggested such a departure at least in cohabitation cases. Anyway it is legitimate for the House of Lords to change the law where appropriate, and, while I disagree, there is undoubtedly a case for introducing a presumption of equality between cohabiting joint owners. Particularly in *Stack*, where the parties had been together for nearly twenty years and had four children, when they bought the house as a family home. Many people would regard them as married in all but name, and the House of Lords in *White v White* [2001] 1 AC 596 at 605 has of course laid down "the yardstick of equality" in post-matrimonial property disputes.

12. Having said that, I have four concerns about the majority view on this aspect of *Stack*, two of which were reinforced when considering the arguments in *Laskar*.

13. The first concern is about the confident and strong assumption that unmarried parties should be taken to have intended a joint tenancy in equity. Are we really to assume that unmarried cohabitants intend the law of survivorship to apply? I suspect that one reason why many cohabiting couples do not marry is that they wish to keep their assets separate, and their rights to alienate and bequeath/devise their assets, relatively unencumbered.

14. The second problem is the identification of the types of case where this presumption of equality applies. Lady Hale referred to it applying "at least in the domestic consumer context" (para 58). The "at least" may pose a problem in itself. But, ignoring that, does the presumption only apply where the parties are cohabiting (as Lord Hope and Lord Walker may well have thought – paras 2 and 14)? Or does it extend to cases where they are related (as Judge Behrens held, in my view rightly, in *Adekunle v Ritchie* 4th March 2008)? And what if co-owners are simply friends sharing a home and hoping for a capital gain? What, too, if the property is purchased partly mainly or wholly as an investment? In *Laskar*, Tuckey and Rimer LJJ and I thought it would not apply where a mother and daughter purchased a house, which the mother was renting, primarily to let out rooms, i.e. as an investment, although the mother initially continued to live there for a time.

15. My third problem with *Stack* arises from the circumstances which were held sufficient to justify departing from the presumption of equality. There appeared to be two factors which together persuaded the majority that the presumption was rebutted (see paras 87 to 91and para 11). The first was that one of the parties had "contributed far more to the acquisition" than the other. The difference was not, in fact, that great – not even 2 to 1. More importantly, it is scarcely a convincing reason. If the parties had contributed equally, there would be no issue as to beneficial shares. The issue only arises where the contributions are unequal. If the presumption of equality is to be rebutted because the contributions are significantly different, it is a pretty useless presumption: the only time you need it, it isn't there.

16. The second factor was that Mr Stack and Miss Dowden kept their assets separate from each other (save for the house itself and an associated endowment policy) and each paid for different aspects of the household expenses. I find it hard to believe it is a particularly unusual state of affairs in the present day even as between married couples. Further, if anything, it can be said to suggest that the parties intended the house to be shared equally because they did not keep their respective investments in the house in separate names, and they thereby departed from the norm.

17. Are these facts telling enough to live up to discharging the "considerable burden" said by Lord Walker (para 14) to face a party seeking to rebut the presumption? Lady Hale said (at para 92) that these two factors, on their own, did indeed render *Stack* "a very unusual case" and justified a departure from the principle of equality However, I suspected at the time that this would mean that almost every case would be "very unusual", and that most cases would end up with a *de facto* resulting trust apportionment. As far as I can see, this has indeed turned out to be the case. Judge Behrens decided *Adekunle* on that basis, again rightly in my view, albeit on what many would regard as not very exceptionable facts. It was also the alternative ground for our conclusion in *Laskar*, again on what many might think were not particularly unusual facts. Indeed, neither counsel in *Laskar* knew of a case subsequent to *Stack* where the court had not thought the facts exceptional enough to justify a departure from equality.

18. My fourth concern is that, despite the justified concern expressed by Lady Hale about the desirability of avoiding long and costly disputes between co-owners who have fallen out (para 68), the approach in *Stack* risks encouraging just such disputes. The court must, she said, "search … for the result which the parties must, in the light of their conduct, be taken to have intended", an exercise which involves "undertaking a survey of the whole course of dealing between the parties" (para 61). That may well be an invitation to an expensive and time consuming exercise at all stages - disclosure, witness statements and court hearing.

19. I hope that a fifth concern I have is misconceived. I wonder whether the analysis in *Stack* may be based on the heretical doctrine of imputed intention. In the field of contract, agreement or intention can be either expressed or it can be inferred. It cannot be imputed – i.e. one cannot ascribe to the parties an agreement or intention based on what they might well have agreed if they had thought about things, or on what reasonable people in their position may well have agreed. The House of Lords had specifically rejected imputed agreement or intention in two famous cases some forty years ago, *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886. However, as I have mentioned, at para 61, Lady Hale talked about what the parties must "*be taken to have intended"*. Those words may simply mean that the courts are being invited to infer, rather than impute, intention, in which case you may infer that I am demonstrating mild paranoia about the majority decision.

20. There is another aspect of the decision in *Stack*. Having excluded Mr Stack from the house, Miss Dowden paid him £900 a month towards the cost of alternative accommodation, initially pursuant to a consent order, and thereafter voluntarily. Then she stopped paying, and in his application for an order for sale, Mr Stack asked for resumption of the monthly payments. The Judge made that order, but the Court of Appeal reversed this. The majority of the House (me dissenting again) upheld the Court of Appeal's decision.

21. I remain mystified as to the reasons why the majority thought ordering at least some payment was inappropriate. The house was bought as a home for both parties and was 35% beneficially owned by Mr Stack, who had been excluded against his will, simply because the relationship had ended, and Miss Dowden

enjoyed exclusive occupation albeit with the four children. The three points relied on to justify no payment appear to me to be weak. First, the fact that Mr Stack agreed to vacate is scarcely a reason for not ordering payment. Not only does it seem to me to be irrelevant: it appears to reward intransigence and to penalise reasonableness. Secondly, the fact that both parties were responsible for housing the children takes matters no further; through his 35% interest in the house, Mr Stack was housing the children as he always had. Nor did the third fact, namely that the house was to be sold soon; first, it may not have been sold fast, and, secondly, so what if it had been?

22. There is another criticism which can be made of the House's analysis of Mr Stack's claim for payment. Lady Hale said (para 94), and I agreed (para 150), that sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) had "replaced the old doctrines of equitable accounting". As Sir Gavin Lightman has pointed out, there may be two problems with this. First, TOLATA appears to apply only to future payments, whereas equitable accounting, of course, covers the past as well as future payments. Secondly, on a fair reading of TOLATA, the statutory provisions are not so much a replacement of, as a gloss on, the equitable doctrine, in the sense of adding or emphasising factors to be taken into account when carrying out an equitable account.

23. Having criticised myself as well as my colleagues on this final aspect of the decision in *Stack*, I now move on promptly to *Total.*

24. As I already mentioned, *Total* was a case about VAT, which is a very unpromising starting point. However, although I must explain the background by briefly summarising aspects of the Value Added Tax Act 1994 and explaining a particular type of VAT fraud, the issues thrown up are much more general in nature and have nothing to do with the technicalities of VAT. First, there is a constitutional point on the executive's tax-raising powers under the Bill of Rights 1688. Secondly, there is the increasingly germane question of the extent to which a statutory code leaves room for a claim in tort. Finally, there is a fundamental issue as to the nature of the tort of unlawful means conspiracy, one of the economic torts.

25. Now we have the boring VAT part. As you will probably know, if only from your own experience as barristers, when it comes to VAT there is output tax and input tax. Output tax generally has to be charged by a trader on any goods or services he sells, and he then has to account for it to the Commissioners. Input tax is the mirror image, paid by a purchaser of goods; when he is a trader, he either credits the input tax against his liability for output tax, or, if the input tax exceeds the output tax he collects, he can recover the balance from the Commissioners. Where the purchaser is in a different EU member state, the transaction is zero-rated, so no output tax is payable on the sale.

26. The Act which governs the VAT regime is the 1994 Act. It has many provisions, but a tour, if only a whistle stop tour, is necessary.

27. As one would expect, the 1994 Act identifies the parties who are primarily liable for paying output tax, and when it is due. It also requires traders to make regular returns. VAT is stated in schedule 11 to be "recoverable as a debt due from the Crown", by the Commissioners, who, under the Taxes Management Act, have the duty of "collecting, accounting for, and otherwise managing, the revenues of customs and excise".

28. The 1994 Act has a longer reach than the recovery of output tax from the primary taxpayer. Examples include section 59, which provides for a default surcharge if a trader fails to make a return, or to pay tax, on time. Also, section 60 says that a person "does any act" "for the purpose of evading VAT" (which includes wrongly claiming an input tax credit) and "his conduct involves dishonesty", is liable for a penalty equal to the VAT sought to be evaded. Where the person is a company, section 61 extends potential liability for such a penalty to its directors. Other sections provide for penalties – e.g. sections 63 and 64, which apply where a person substantially or persistently understates his liability for VAT, but they do not apply where a section 60 penalty has been imposed or the person concerned has been convicted. Section 72 imposes criminal liability on any person "knowingly concerned in … the fraudulent evasion of VAT by him or any other person" (which includes falsely claiming a credit). The penalty can be up to three times the VAT evaded. Section 73 enables the Commissioners to assess a person who

made inaccurate VAT returns or who wrongly received a VAT credit.

29. Section 77 contains statutory time limits for the Commissioners making claims and assessments. The period is normally either two or three years (depending on the issue), but it is 20 years where a section 60 penalty for dishonest evasion is involved. Part V of the 1994 Act requires appeals from assessments and claims by The Commissioners to be made to VAT tribunals and enables procedures and time limits to be laid down in that connection. So much for the Statute. Section 70 entitles a tribunal to mitigate a penalty but not on the ground that the matter for which it is being levied resulted "in no significant loss of VAT".

30. Now I must explain the nature of a carousel fraud. For that purpose, you may get help from the little diagram on the second piece of paper on your seats. It shows how the fraud works.

31. Alfonso, a trader in Spain, sells goods to Bertie in the UK; the transaction is zero-rated and no tax is payable. Bertie sells on the goods to another UK trader, Charlie, and therefore charges Charlie VAT. Charlie sells the goods back to Alfonso in Spain; that transaction is zero-rated, so no VAT is payable. Bertie, having received VAT should pay it as output tax to the Commissioners; but he doesn't pay and disappears. Charlie, having paid VAT but not charged it, claims an input tax credit, which the Commissioners pay. So the Commissioners are out of pocket, having paid Charlie input tax without receiving the effectively corresponding output tax from Bertie. By the same token, Alfonso Bertie and Charlie, who, surprise surprise, are all closely connected, have made an equivalent illicit profit.

32. The Commissioners' pleaded case in *Total* was based on the allegation of such a carousel fraud, albeit that it was a little more sophisticated, involving six transactions, rather than the three in my paradigm example, no doubt to put the Commissioners off the scent. In that carousel fraud, Total, the defendant against whom the Commissioners' claim was brought, was my Alfonso. In other words, Total was the Spanish party with whom the goods started and finished It never claimed a credit for input tax or was liable for output tax. Indeed, Total was not liable to The Commissioners for any money under any provision of the 1994 Act at all, save perhaps section 72 (which renders being "concerned in … the

fraudulent evasion of VAT" a criminal offence). However, on these assumed facts, Total was guilty of the common law offence of cheating the revenue, as well as an offence under section 72.

33. Unlike the other five parties involved in the carousel, Total had a UK bank account with money in it. So, having frozen that account, the Commissioners brought proceedings against Total. As Total was not civilly liable under the 1994 Act, the Commissioners' claim was ultimately based on the tort of unlawful means conspiracy. The allegation was that Total had conspired with at least some of the other parties to the carousel to defraud the Commissioners of VAT, either of the input tax which was paid out to Charlie, or of the output tax which was not paid by Bertie. This led to a preliminary issue, namely, whether, on the assumption that there was a carousel fraud and that Total was a participant, the claim could succeed. The Judge, Mr Justice Hodge, said yes. The Court of Appeal, consisting of Lords Justices Ward, Chadwick and Gage, said no – see [2007] EWCA Civ 39. Total appealed to the House of Lords - and you will have to be in suspense for another 40 hours or so.

34. Total advanced three reasons why the Commissioners' claim was bad in law. The first was that the claim infringed article 4 of the Bill of Rights 1688. This states "That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament …. is illegal". Secondly, Total said that the 1994 Act constituted a complete code which identified and prescribed the Commissioners' rights and obligations in relation to VAT, and that there was no room for a claim in tort for lost VAT. The third argument was that, even if a tortious claim could be brought, the claim based on unlawful means conspiracy must fail as the only unlawfulness relied on was criminal, not civil, and that would not do. Let me now examine these three points a little further.

35. First, then, the argument based on article 4 of the Bill of Rights. You will recall that the article prohibits the Crown from "levying money" without "grant of Parliament". The point made by Total was that Parliament authorised the raising of VAT and other payments in the 1994 Act, but that that Act did not include the right to recover sums such as those claimed from Total. The point was said by Total to be reinforced by the wide ambit of the 1994 Act, which is not limited by a long chalk to payment of output tax and claims for input tax. As I have mentioned, it extends to other

payments, namely assessments surcharges penalties, sometimes payable by others than the taxpayer.

36. The Court of Appeal rejected this argument, saying that the Commissioners were basing their claim on what they called "a well recognised tort", and that such a common law claim (if it was otherwise permissible) was not prohibited by article 4. In other words, there was no "levying" of money by raising a claim in tort. Chadwick LJ also robustly suggested that a "scheming international fraudster" should not be able to escape liability "by piously claiming the benefit of the Bill of Rights".

37. Was the Court of Appeal right on this first point? The fact that the Commissioners were claiming in tort does not alter the fact that they were seeking to recover compensation for tax they had lost, which might be said really to be seeking the equivalent of the tax, and therefore to be "levying money". Certainly, there was no legislative basis, i.e. no "grant of Parliament", for such a claim. Further, the notion that the Bill of Rights can only be relied on by good guys (admittedly a separate point) can be said to be a bit quaint. What do you think? Now is the time to answer the first question on your voting paper.

38. The second point raised by Total was that the 1994 Act constituted a complete code for the recovery of VAT and any default or wrong in connection therewith. As a result, said Total, there was no room for a claim in tort for lost output tax or wrongly credited input tax. This issue seems to turn on the proper construction of the 1994 Act – see the *Deutsche Morgan Grenfell* case [2006] 1 AC 558 at para 135 of the speech of Lord Walker. To some extent, however, your conclusion on this argument may depend on your view of two competing philosophies. The first, supported by Total, is that it is no function of the common law to permit the executive to mount claims which fill gaps in statutes. Especially a taxing statute, and particularly one which includes civil and criminal sanctions, some extending to third parties, for non-compliance and evasion. Also, can a claim for lost tax, which only arises in statute, sound in tort? *Clerk & Lindsell* suggest at para 1-39 that "the primary function of the law of tort remains to protect private rights and private interests". The alternative approach, adopted by The Commissioners, is that, in the absence of an express statutory provision, there no good reason to deprive the revenue of money of which it is wrongfully deprived. Why

should The Commissioners not have the same rights as any other person who is wrongly deprived of cash?

39. Total's case on this point was reinforced by other features of the 1994 Act. Thus, penalties under section 60 must be taken into account against claims under the Act, but that would not appear to be capable of applying to common law claims. Limitation periods under the 1994 Act are different from those applicable to any common law claims. Contested claims by the Commissioners under the 1994 Act have to go to VAT tribunals, whereas common law claims would be dealt with by the courts. Claims under the 1994 Act are subject to some special mitigation rules which could not apply to common law claims. These disconnects seem particularly startling given that a claim under the 1994 Act for some joint enterprises or carousel frauds could be brought against some conspirators (e.g. Bertie and Charlie) but not against others (e.g. Alfonso). Finally, Total appears to be caught by section 72, albeit a criminal provision: is it appropriate for the courts to step in and add to Parliament's delineation of its liabilities

40. The Court of Appeal did not have to deal with Total's case on this second point. But was it a good point? The Commissioners say no. The revenue regularly seeks freezing orders against taxpayers, and in a winding up it appears that they can proceed against a receiver for misfeasance (*Inland Revenue Commissioners v Goldblatt* [1972] Ch 498), albeit that is in connection with the recovery of tax which Statute says is due. The Commissioners could bring proceedings for money stolen from their bank account, albeit that is not recovery of tax. More compellingly, perhaps, the Commissioners contend that they should not be barred from pursuing a remedy in tort against a particular person unless such a remedy is (a) expressly prohibited by the statute in question, (b) clearly duplicative or (c) positively inconsistent with the statutory scheme. No such problem, they say, arises here. The 1994 Act does not expressly bar claims in tort. Further, a claim in tort against Total does not duplicate or run counter to any claim which could be raised under the 1994 Act. It is true that there are some oddities, but they can be taken into account when assessing damages.

41. So, does Total have a good point when it says that the statutory scheme embodied in the 1994 Act precludes the Commissioners

maintaining a claim in tort against it? Time to vote in answer to the second question. …..

42. Now I turn to the third of the three issues thrown up by Total. The claim against them was in unlawful means conspiracy, one of the so-called economic torts. There is no doubt that, with one arguable exception, the ingredients of the tort were present on the Commissioners' pleaded case. There was an arrangement between the parties to the carousel whereby at least one of them would use unlawful means to deprive the Commissioners of money, and, as a result, the Commissioners have suffered loss. The issue between the parties is whether a "mere" crime will do as unlawful means for this purpose, as the Commissioners contended, or whether, as Total argued, the unlawful means had to be civilly actionable. If Total was right on the point, the claim against it would fail as the unlawfulness alleged was the common law crime of cheating the revenue (and the additional offence under section 72 of the 1994 Act).

43. The case law on the topic of unlawful means conspiracy over the past 120 years is long and complex, and there are dicta which go both ways. It would be impossible to do them justice this evening. Perhaps the strongest card in Total's hand in the House of Lords was the recent decision of the House in *OBG Ltd v Allan* [2007] 2 WLR 920. In that case, it was held, in relation to the tort of causing loss by unlawful means, that the unlawful means had to be civilly actionable, and that a purely criminal act would not do. At para 57, Lord Hoffmann said that "it is not for the courts to create a cause of action out of a regulatory or criminal statute which Parliament did not intend to be actionable in private law". At any rate on the face of it, it would appear that this principle should apply equally where the claim is brought in unlawful means conspiracy. Further, the same rules should apply to all the economic torts on grounds of consistency logic and predictability.

44. However, there are arguments the other way. The tort in *Total* involves the parties conspiring to harm the claimant by unlawful means; it would perhaps be surprising to the man on the Clapham omnibus, or indeed the woman on the Docklands Light Railway, if a crime was not unlawful means. Although that can be said to apply equally to the *OBG* tort of causing injury by unlawful means, it can fairly be said that that tort is really concerned with the defendant causing harm to the claimant by committing a

wrong against a third party. Also, in para 61 of *OBG*, Lord Hoffmann suggested that what he called "two party intimidation" raised "altogether different issues" from those raised by "three party" cases such as causing loss by unlawful means. Also, conspiracy, which is involved in *Total* but not in *OBG,* can raise special issues. As Bowen LJ said in the *Mogul Steamship* case in the Court of Appeal (1889) 23 QBD 598 at 616, "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt." So, too, it may be said an act which would not found a civil claim if committed by one person may found a civil claim in conspiracy if embarked on by a combination of people.

45. Nonetheless, the bare principle that the court should not create a tort out of a crime has obvious force. Maybe, an exception can be made where the purpose of the offence is to protect the would-be claimant, as here where cheating the revenue and section 72 of the 1994 Act are both offences specifically for the benefit of the claimant, the Commissioners. However, it may be said that even that refinement does not fully meet the argument that the courts shouldn't turn a crime into a tort.

46. The Court of Appeal found for Total on this issue, as they felt they were bound by an earlier decision, *Powell v Boladz* [1998] Lloyds Med Rep 118, but don't worry about that decision. What do you think: should Total escape liability because there was no independent tort, and "merely" a crime? Vote now.

47. So, subject to any questions you have or points you may wish to make, that is it. You can hand in your voting slips as you go out, and, on Wednesday, after the House of Lords has given its decision in *Total*, the Chancery Bar Association will email members with the vote of this meeting and the decision of their Lordships. Those of you who have read James Surowieki's recent book, "The Wisdom of Crowds", may think that, even though the conclusions of their Lordships will be the law, the conclusions of this meeting are more likely to be right because of the sheer weight of numbers. But that is a topic for statisticians and psychologists, not for lawyers. This lawyer, at any rate, has said quite enough. Thank you very much.