CONCEPTUAL CONFUSION

Organs, Agents and Identity in the English Courts

This article aims to address some of the more conceptual questions about companies sitting behind two recent cases. Lord Scott in the House of Lords described *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 as difficult but the facts in *Stone & Rolls* and the subsequent Court of Appeal case *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 could hardly be simpler. It is argued that the apparent complexities (and the occasional counter-intuitive outcomes) expose a fundamental misconception about the structure of companies brought about by the unwillingness in UK company law to acknowledge the place of the board in the company. The application of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 is also discussed.

Susan **WATSON**
LLB (Hons) (University of Auckland), MJur (University of Auckland);
Deputy Director of the New Zealand Corporate Governance Centre;
Professor, University of Auckland.

I. Introduction

1 *Stone & Rolls Ltd v Moore Stephens*[1] ("*Stone & Rolls*") involved a claim by a fraudulent one-man company against its auditors for negligence for failing to detect its fraud. In one of the shorter judgments of the eight from the Court of Appeal and House of Lords, Mummery LJ asked:

> Does common sense matter? Yes. It is contrary to all common sense to uphold a claim that would confer direct or indirect benefits on the corporate vehicle, which was used to commit the fraud and was not the victim of it, and the fraudulent driver of the fraudulent vehicle.[2]

Mummery LJ described the claim as "astounding".[3]

1 [2009] 1 AC 1391 (CA) and (HL).
2 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [119] (CA). Rimer LJ also used the words "common sense" several times (at [38] and [54]).
3 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [113] (CA).

2 Common sense and the law are sometimes uneasy bedfellows. Indeed, the use of the phrase "common sense" in a judgment brings to mind one of the many memorable "old darlings" created by John Mortimer in his Rumpole stories, Mr Justice "Ollie" Oliphant, the practical red judge from the North who equated common sense with his view on the correct outcome in a case and whose "affectations of Northern bluntness and 'common sense' drove Rumpole to distraction".[4]

3 Lord Phillips was mindful of criticism of the use of the phrase common sense, beginning his speech in the House of Lords by saying that "[m]y initial reaction to S & R's claim was that, as a matter of common sense it could not succeed",[5] setting out reasons why common sense led him in that direction before continuing:[6]

> In a lecture to the Chancery Bar Association entitled 'Common Sense and causing Loss' given on 15 June 1999 Lord Hoffmann commented adversely on the practice of those judges who justify their decisions by reference to 'common sense'. He suggested that this was far too often an unsatisfactory alternative to the identification of the relevant principles. The differences of opinion between the members of the Committee underline the need to identify the relevant principles that apply in this case.

4 In fact Lord Hoffmann's criticism of the resort to common sense by judges to justify their decisions was more trenchant than that. In the speech referred to by Lord Phillips he said: "This phrase is often used challengingly, even rather aggressively, implying an accusation of lack of practicality, unworldliness, fussiness and pedantry against anyone who asks for further explanation."[7] This use of the phrase common sense was, the South African-born Lord Hoffmann commented, "in the best tradition of British anti-intellectualism".[8]

5 The judges in the House of Lords clearly took Lord Hoffmann's criticism to heart, identifying, in five opinions and almost 100 pages of speeches, the relevant principles. Common sense dictates that the claim would in fact be struck out and that is what happened (but only by a bare majority.) In this article, it is argued that the principles set out and used to reach that finding were misguided and those principles laid the

4 *Rumpole of the Bailey* <http://en.wikipedia.org/wiki/Rumpole_of_the_Bailey> (accessed 2 June 2011).
5 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [5] (HL).
6 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [5] (HL).
7 Lecture to the Chancery Bar Association by The Rt Hon The Lord Hoffmann (15 June 1999) at p 1 <http://www.chba.org.uk/library/?a=49940> (accessed 26 May 2011).
8 Lecture to the Chancery Bar Association by The Rt Hon The Lord Hoffmann (15 June 1999) at p 1 <http://www.chba.org.uk/library/?a=49940> (accessed 26 May 2011).

ground work for the outcome of *Safeway Stores Ltd v Twigger*[9] ("*Safeway*") in the English Court of Appeal. In *Safeway*, a company was convicted of competition law breaches due to the actions of some of its employees and directors. The company was unsuccessful in an action against those directors and employees on the basis that the wrongdoing employees and directors were identified as the mind of the company and therefore exempt from liability. It is an outcome that some might say is lacking in common sense.

6 This article does not provide a detailed analysis of *Stone & Rolls* and *Safeway* but rather aims to address some of the more conceptual questions about companies sitting behind the two cases. Lord Scott in the House of Lords described *Stone & Rolls* as difficult.[10] The facts in *Stone & Rolls* and *Safeway* could hardly be simpler. Why do the UK courts struggle with these cases? It may be that the apparent complexities expose a fundamental misconception about the structure of companies. In this article, it is argued that in both cases the rules of attribution as set down by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission*[11] ("*Meridian*") were misunderstood and misapplied.

7 The first misapplication was brought about by the unwillingness in UK company law to acknowledge the place of the board in the company.[12] The rules of attribution as applied necessarily mean that the board collectively and the shareholders collectively sit at the core of the company. When directors are acting collectively as part of the board, they are not the agents of the company. Their knowledge as part of the board is attributed to the company by the primary rules of attribution. Absent statutory provisions that override company law principles, or

9 [2010] EWCA Civ 1472.

10 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [88] (HL). For a more detailed analysis of the cases see E Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239; P Watts, "Illegality and Agency Law: Authorising Illegal Action" [2011] JBL 213; D Halpern, "*Stone & Rolls Ltd v Moore Stephens*: An Unnecessary Tangle" (2010) 73 MLR 487.

11 [1995] 2 AC 500.

12 Recognition of the board of directors and the shareholders acting through the meeting as components of the company is sometimes described as the organic theory. Some commentators consider that it was introduced in UK company law in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705. A difficulty with the organic theory is that the analogy necessarily implies that the two components are fixed and unchanging. It may be better to consider the company internally as comprising two components: residual claimants, usually the shareholders but when the company is insolvent the creditors, and the board, usually comprised of the appointed directors but also including those who occupy the position of director (*de facto* directors) and those who control the board (shadow directors, as seen in *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 (CA) and (HL)). Exploring the conception of the company further is beyond the scope of this article.

breach of duty, the board of directors collectively should therefore be immune from liability when they act in that role. But when accepting that the members of a board that acts collectively are, as a general principle, immune from liability, it is crucial to accept also that individuals who are directors are likely to have many different legal relationships with a company that in a temporal sense occur concurrently or sequentially. An example is *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)*,[13] where a director of a one-man company incurred liability for deceit when the House of Lords determined that when he committed the wrong he acted as an agent of the company. It was a reversal of the Court of Appeal where, counter intuitively, it was decided that the deceitful director was identified as the mind of the company and could not therefore be made personally liable.[14] There are some similarities to the outcome in *Safeway* in the Court of Appeal.

8 The second misapplication was of the special rules of attribution. For the purposes of a rule, usually statutory, the special rules of attribution can override the principles of company law, meaning that the company can be primarily liable for the knowledge and actions of a corporate agent. Crucially though, and unlike, the doctrine of identification, the primary liability brought about by the special rules of attribution is only for the purposes of that statutory rule; it does not change the underlying structure of the company.

9 Cases with facts such as those outlined above reach the highest level of courts in the UK but do not seem to trouble the US courts to the same extent. The first section of this article explores the differences between UK and US corporate law that might explain why the US enjoys this absence of concern. The second section briefly outlines the development of modern UK company law. The next section looks at examples of the way in which the courts in the past have viewed the structure of companies and the legal relationship of directors to companies. The following section sets out the place of *Meridian* and the final section contains a brief discussion of *Stone & Rolls* and *Safeway* in light of the preceding discussion.

II. North American law

10 The interesting and multi-faceted story of the origins of the modern UK company is briefly outlined in the next section. The history of the US corporation is, by contrast, much more straight-forward. The modern US corporation is a direct descendant of the corporations –

13 [2003] 1 AC 959 (HL).

14 *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2001] QB 167.

governmental and municipal, rather than business – that American colonists brought with them to America in the 17th and 18th centuries.[15] As the Supreme Court in *Bank of the United States v Deveaux*[16] put it: "As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid in ascertaining its character." Companies are acknowledged in North America to be direct descendants of the chartered corporation, a legal form that was widely adopted by the colonists[17] and a form where the powers of the board were allocated to the board by the charter with the sanction of the Crown or the State. The central role of the board was always characteristic of corporations' law. As pointed out by Professor Bainbridge:[18]

> [I]t is instructive to note the corporation, unlike partnerships, for example, did not evolve from enterprises in which the owners of the residual claim managed the business. Instead, as a legal construct, the modern corporation evolved out of such antecedent forms as municipal and ecclesiastical corporations. The board of directors as an institution thus predates the rise of shareholder capitalism. When the earliest industrial corporations began, moreover, they typically were large enterprises requiring centralized management.

11 Boards or their equivalent, such as town councils in municipal corporations, were one of the key components of all early corporations. A requirement for an elected board was in the first US incorporation statutes.[19] The idea of a shareholder democracy with an elected governing body was strong in US corporate law from the beginning but has been eroded in more recent years by the agency theory. The standard clause in almost all US corporation statutes requires that a corporation be managed by or under the direction of its board of directors.[20]

12 The standard clause, until 1974, just stated that the company shall be managed by the board of directors. It was in the Model Business Corporation Act, in what Robert Clark described as a "display of the

---

15 F C B Gower, "Some Contrasts Between British and American Corporation Law" (1955–1956) 69 Harv L Rev 1369 at 1370.

16 (1809) 9 US (5 Cranch) 61at 88.

17 According to John Stuart Mill, in the New England states of the period, "the soil is covered with chartered companies for almost every conceivable purpose". J S Mill, *Principles of Political Economy* (Ashley ed) (Longmans, 1909) Bk V, ch IX at pp 797–909, paras 5, 6, and 7, in Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) at p 134.

18 S Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Northwest U L Rev 547 at 598.

19 F A Gevurtz, "The Historical and Political Origins of the Corporate Board of Directors" (2004) 33 Hofstra Law Review 89.

20 See J R Macey, *Macey on Corporations Laws* (Aspen Publishers) at para 16.01, n 1 for a comprehensive list of the States that have such a clause in their statutes. Missouri is the exception.

super-caution that is the hallmark of practising corporate lawyers", that the words "under the direction" were added to the words "managed by a board of directors".[21] This change was due to publicity about the fact that it was really senior executives who actually "managed" the corporation. It was also a consequence of the change in the meaning of the word "manage". That word had been used in corporations' statutes and charters since the 16th century.[22] Up until the beginning of the 20th century, the term "to manage" had a meaning similar to "to direct and supervise".[23] It was in the 20th century, with the emergence of management science, that the word "manage" took on the meaning that we now understand it to have. Thus, it was never the role of boards of directors to "manage" a corporation in the modern sense of the word; the words direct and supervise convey much more the flavour of the role.[24]

13 *Manson v Curtis*, a decision of the Court of Appeals of New York, contains an important and much cited discussion of the nature of a board that derives its powers from a statute:[25]

> In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. *Hoyt v Thompson's Executor*, 19 NY 207, 216.

14 US corporations, therefore, have always had boards given statutory authority to direct the affairs of the company. It has always been accepted that boards are central to US corporations. Individuals who are directors, acting collectively as part of the board, are treated in a

21 R C Clark, *Corporate Law* (Aspen Publishers, 1986) at p 106.

22 For example, "To order, manage and direct the affairs and business of the said corporation …" (The Charter of the Corporation of the Amicable Society for a Perpetual Assurance-Office, 1710), "to manage affairs and servants & c…" (Royal Fishery of England, 29 Car II (1678)).

23 *Oxford English Dictionary* <http://www.oed.com> (accessed 2 June 2011).

24 The role of the board in "management" is also discussed in P L Davies, *Gower and Davies Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at p 367: "[I]t is perhaps surprising that the model article for public companies refers to 'management' quite generally, since it is clear that, in a large company, the totality of its management is something beyond the grasp of even the most talented set of directors." But understanding management as akin to direction or supervision addresses this issue.

25 *Manson v Curtis* 119 NE 559 at 562 (1918).

different way when acting in that role. The business judgment rule provides that decisions made by the board of directors that are based on reasonable information and are reasonably rational do not lead to liability by the directors, even if they subsequently turn out to have been poor decisions. A related principle, the business judgment doctrine, holds that such decisions bind the corporation.

15 Courts were traditionally reluctant to second-guess the decisions of directors of corporations[26] but the origins of the business judgment rule in North American law can be traced to *Percy v Millaudon*[27] in 1829. In *Hodges v New England Screw Co*[28] in 1853, the Rhode Island Supreme Court said that the "Board of Directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake". The significance for our purposes is that the business judgment rule applies to directors when acting as part of the board of directors. Directors are protected from liability if they comply with their duties.

16 There is another related difference between the understanding of the corporation in the US and the company in the UK. In US law, directors, at least when acting as part of the board, are not regarded as legal agents of the shareholders. The Introduction to the Restatement of the Law (Third) Agency says that "the defining characteristics of 'true agency' are not present in the relationship between a corporation's shareholders and its directors".

17 The US understanding of the legal relationship between the directors on the board and the shareholders as not based on agency can be contrasted with the UK understanding. Unlike almost all US states and most jurisdictions, directors are not granted the power to direct the company by means of the statute. Instead that power is given by the articles of association. Much significance is attached to this difference by UK company scholars. The leading text Gower and Davies' *Principles of Modern Company Law*[29] states that:

---

26 *Charitable Corp v Sutton* (1742) 2 Atk 400.

27 *Percy v Millaudon* 8 Mart (NS) 68 (La, 1829).

28 *Hodges v New England Screw Co* 3 RI 9 at 18 (1853).

29 P L Davies, *Gower and Davies' Principles of Modern Company Law* (London, Sweet & Maxwell, 8th Ed, 2008) at p 366. See also R R Pennington, *Pennington's Company Law* (Butterworths, 8th Ed, 2001) at p 696 ("[u]nlike American law and the laws of most European countries, English law does not regard certain functions and powers as managerial or executive and therefore as inherently exercisable by the board and inalienable by it") and B R Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press, 2008) at p 30 ("UK company law, in contrast, has never dictated who will have managerial authority in a company or the method by which managers are selected. This has instead been

(*cont'd on the next page*)

> It is … a point of some theoretical (even ideological) importance: the directors' authority is derived from the shareholders through a process of delegation via the articles and not from a separate and free-standing grant of authority from the State. This helps to underline the shareholder-centred nature of British company law.

Perhaps consequently, the orthodox view in the UK is that directors, either individually or collectively as part of the board, are in a relationship akin to agency with the shareholders. It is a core argument of this article that boards in UK companies are not different to boards in US companies and that it is the failure in the UK to distinguish between directors acting as part of the board and directors acting as agents of the company that is the source of the difficulties in the recent cases. The next section of this article looks back to determine the source of the apparent divergence in UK company law.

III. The development of UK company law prior to the incorporation statutes

18 In *O'Neill v Phillips*,[30] Lord Hoffmann said that company law developed seamlessly from partnership law. But some key components and principles of modern company law are drawn from other sources. The uneasy juxtaposition of those principles and components drawn from partnership, trust and agency law on one side and corporations' law on the other side may have led to the failure in UK company law to recognise the non-agency based relationship that directors have with companies when they act as part of the board. Throughout the 19th century, clearly competing conceptions of companies existed but it is not generally well understood the extent to which modern company law is truly a hybrid of several bodies of legal principle. The associative partnership foundations of modern company law are accepted.[31] But many of the characteristics of early corporations are key characteristics of modern companies.[32] Some of the company law cases which form the foundation of modern company law were in fact corporations' law cases.[33]

---

left to the internal governance rules of companies, most typically the articles of association, the contents of which the shareholders determine").

30 [1999] 1 WLR 1092 at 1099A.

31 See generally P L Davies, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 6th Ed, 1997) and also earlier editions of *Gower*. Sadly the history was omitted from the seventh and eighth editions of *Gower*. See also C A Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester: University Press, 1950); A B DuBois, *The English Business Company After the Bubble Act 1720–1800* (New York: The Commonwealth Fund, 1938).

32 W Blackstone, *Commentaries on the Laws of England with Practical Notes by Joseph Chitty* (London, 18th Ed, 1826) at pp 475–478.

33 See, *eg*, *Foss v Harbottle* (1843) 2 Hare 461.

19 The corporate form has existed for a considerable period of time in the corporation and had a body of law and principle surrounding it, famously summarised by Coke in 1612 in the *Case of Sutton's Hospital*.[34] Corporations were "instituted through a concession by the King to some of his subjects" rather than the corporation being a "contractually, voluntarily-devised aggregate person".[35] The "new idea" that arose in England at about the time of the Elizabethan privateering ventures was using the corporate form for the private gain of the members as a whole.[36]

20 An understanding of the nature of the office of director in a joint stock company was also developing. In 1742 in *Charitable Corp v Sutton*,[37] Lord Hardwicke stated that the employment of a director was:

> … of a mixed nature. It partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government; and for this reason none of the directors of the great companies, the *Bank, South-sea &c*, are required to qualify themselves by taking the sacrament. Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation.

21 Directorship of a joint stock company was thus partially in the nature of a public office as it arose from the charter of the Crown. The idea of directorship as a form of office that is occupied forms a thread in corporations' law. Wade observed that:[38]

> Offices were long considered to be a form of property and wrongful possession of any office may be compared with wrongful possession of land; just as a wrongful occupier of land may validly exercise an owner's powers … against all but the true owner, merely on the strength of the fact of possession, so the wrongful occupier of an office may validly exercise its powers as against members of the public merely on the strength of his authority *de facto*.

---

34 *Case of Sutton's Hospital* (1612) 10 Coke Rep 22b.

35 R Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720–1844* (Cambridge University Press, 2000) at p 18.

36 C A Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) at p 55.

37 *Charitable Corp v Sutton* (1742) 2 Atk 400 concerned a joint stock company incorporated by charter. Non-attendance upon their employment, non-observance of by-laws and delegating all of their powers made directors "guilty in the second degree by conniving at the affair and not making use of the proper power invested in them by the charter to prevent the consequences of the wrongdoing" (at 404). The court went on to say that "by accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence" (at 406).

38 W Wade, *Administrative Law* (Oxford University Press, 10th Ed, 2009) at p 337.

22 The development of common law principles of joint stock company law was diverted in the early part of the 18th century by the passage of the Bubble Act in 1720: it prohibited the formation of new joint stock companies. Incorporation could legally be achieved only by charters granted by the Crown or by private Acts of Parliament, both of which became difficult to obtain.[39] The development of company law did not cease because of the passage of the Bubble Act, with legal ingenuity leading to the devising of an unincorporated form: the deed of settlement joint stock companies. These companies came within the bounds of the equitable jurisdiction, being linked to the two equitable forms of group association, the partnership and the trust. Despite the prohibition of the Bubble Act, companies were created "without troubling King or Parliament, though perhaps we said we were doing nothing of the kind".[40]

23 In the deed of settlement, mutual covenants were signed between the shareholders as partners and the trustees selected by them. The trustees covenanted to observe all the terms of the deed and to apply the funds settled on them for the specified purposes.[41] The office of director was a separate office from the office of trustee, with the first directors appointed in the deed of settlement and granted their powers in the deed. A typical deed of settlement made it clear that the board of directors had responsibility for the "entire management and superintendence over the affairs and concerns of the company" with the obligation to act in conformity with the laws and regulations in the deed of settlement.[42] Adam Smith described joint stock companies as "always managed by a court of directors".[43] Unlike a corporation though, because their powers were not derived from the statute or royal charter but from the unregistered deed, the employment of directors was not of a mixed nature as described in *Charitable Corp v Sutton*. The court of directors of an unincorporated deed of settlement company were just the agents of the shareholders.

24 Despite Lord Eldon in *Kinder v Taylor*[44] in 1825 stating that acting as a corporation without being one was illegal at common law,

39 A B DuBois, *The English Business Company After the Bubble Act 1720–1800* (New York: The Commonwealth Fund, 1938) at p 15.
40 F W Maitland, *Collected Papers III* in C A Cooke, *Corporation, Trust and Company: An essay in Legal History* (Manchester University Press, 1950) at p 283.
41 C A Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Manchester University Press, 1950) at p 88.
42 The excerpt is from a clause in the deed of settlement for the London-Ale Brewing Company found in the appendix to J Collyer, *A Practical Treatise on the Law of Partnership: with an Appendix of Forms* (London: S Sweet, 1832) at p 731.
43 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (5th Ed, 1789) vol 3 at p 123.
44 (1825) 3 LJ Ch 68.

the unincorporated form flourished. But as Professor Farrar points out, "[t]he deed of settlement company was built on a foundation of trust and partnership and was at best an inchoate corporation".[45] At the time of the introduction of the general statutes permitting incorporation by registration in the middle of the 19th century (the Joint Stock Companies Act of 1844 and 1856 and the Companies Act 1862), many judges and scholars considered that the purpose of incorporation by registration was to allow the creation of a sort of corporation. For example, in *Oakes v Turquand and Harding*, Lord Cranworth explained:[46]

> The course of legislation was to rear up the company into a separate persona, with certain powers and privileges, but without conferring on it in an unqualified manner all the attributes of a perfect corporation. The companies were said to be incorporated, but they were only incorporated to certain effects – they were quasi corporations.

25 Not everyone agreed. Instead of viewing joint stock companies as a type of corporation or a quasi corporation, Lindley's influential treatise on partnership saw company law only as a branch of the existing partnership law. A consequence of considering companies as a variant on partnerships and legally similar to the unincorporated deed of settlement companies was that Lindley regarded directors of registered companies solely as agents of the shareholders, in much the same way as partners are each other's agents.[47] In all the editions of his 19th century treatise, Lord Lindley persisted with the view that directors were co-agents.[48]

---

45 J Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd Ed, 2008) at p 9.

46 (1867) LR 2 HL 325 at 374.

47 See N Lindley, *Supplement to a Treatise on the Law of Partnership Including its Application to Joint-Stock and Other Companies* (5th Ed, 1863) at p 205.

48 In *A Treatise on the Law of Partnership Including its Application to the Law of Company* first published in 1860 in a section entitled "General Principles of Agency", Lindley described directors as agents and said that the management of the affairs of a company can be distinguished from a partnership because the management of a joint-stock company is "delegated by its members to a few chosen individuals" (p 198). Later, he stated that it by no means follows that each director is an agent of the company because if a "person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two or one of them" (p 250). In the later editions of the treatise (1867, 1873, and 1878) and in the fifth edition where the text was renamed as *A Treatise on the Law of Companies Considered as a Branch of the Law of Partnership*, Lindley continued to regard directors as agents even though it is suggested, at least for companies incorporated pursuant to the 1862 Act, this was no longer the predominant judicial view. Without departing from that fundamental view, later editions of Lindley do, however, qualify the position. In the 1873 third edition, Lindley said that as directors are agents, they "*prima facie* cannot delegate their authority to one or more of their own number but that companies that are governed by Table A of the Companies Act 1862 can delegate" (p 257). In the fifth edition of 1889, Lindley said that "it must not be supposed that the majority of a duly convened and duly constituted board of directors cannot act

(*cont'd on the next page*)

26 It is indisputable that the main reason for the differences between US and UK company law is the legacy of the unincorporated joint stock companies created by deed of settlement. But it is also indisputable that many characteristics of modern companies, such as perpetual succession, the ability to sue and be sued in the corporate name, to do acts as a natural person may, to have a common seal that binds the corporation and the rules around meetings come from corporations' law. And it is suggested that another legacy of corporations' law that has not been properly acknowledged by the UK courts and scholars in more recent years is a board of directors where the directors, individually and collectively, are not the agents of the shareholders.

27 The next section of the article sets out some significant developments and cases in UK company law in the late 19th and early 20th centuries where a conception of directors based solely on agency did not prevail.

IV. Developments in UK company law subsequent to the incorporation statutes

28 When the principles of modern UK company law were being crystallised in the latter part of the 19th century and early 20th century, it was open to the courts to follow the law that had developed around deed of settlement unincorporated companies and determine that the directors as part of the board were agents or co-agents of the shareholders.[49] This necessarily would have meant that shareholders would have the power to override the articles of association and, as

for the whole board and bind the company" (p 156). In all the treatises including the final sixth edition written with his son Walter, Lindley maintained that the shareholders cannot exercise control over the management of the affairs of the company except at duly convened meetings. The reason for this though is said to be that "the directors of a company are the servants not of the individual shareholders but of the company" (p 308). It is clear through all the various editions of Lindley that he continued to regard the directors collectively as the agents of the shareholders delegated power by the shareholders. It is salutary to note that the treatise did not continue past 1902 and thus did not confront cases such as *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 at 46. It is also salutary to note that Lindley LJ acting in his judicial capacity was one of the judges on the Court of Appeal whose judgments were overturned by the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22. The House of Lords specifically discussed the judgment of Lindley LJ, ignoring the other judgments, before it overturned the Court of Appeal.

49 M Stokes, "Company Law and Legal Theory" in *Legal Theory and Common Law* (Twining ed) (Oxford: Blackwell, 1986) at p 163; P L Davies, *Gower & Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 7th Ed) at p 300; H A J Ford, R P Austin & I M Ramsay, *Ford's Principles of Corporations Law* (Australia: Lexis Nexis Butterworths, 14th Ed, 2005) at para 7.100.

principal, revoke and take back management power allocated to their agents, the directors, in the articles. That is what happened in *Isle of Wight Railway Co v Tahourdin*,[50] the case most often cited in discussions about 19th century conceptions of the legal relationship of directors to the company.[51] But *Tahourdin* can be confined to its special facts. *Tahourdin* involved a company registered under the Companies Clauses Consolidation Act 1845. The 1845 Act was not a general incorporation statute but rather provided a set of standard clauses for statutory corporations. Section 90 of the 1845 Act provided that the powers of directors would be subject to the control and regulation of the general meeting.[52] No equivalent provision existed in the Companies Act 1862. Thus *Tahourdin* is not strong authority for the proposition that in general the 19th century courts viewed directors as agents of the shareholders in general meeting for companies incorporated by registration.

29 The significance of *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*,[53] lies in the fact that, on the first occasion the question came before the English Court of Appeal, the court stated unequivocally that once the power had been delegated to the directors, the shareholders could not take it back again. *Cuninghame* was distinguished in *Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd*[54] as turning on the contents of the particular articles of association of the company. However, the House of Lords in 1909 in *Quin & Axtens Ltd v Salmon*[55] unequivocally stated that the bargain between the shareholders set out in the articles of association of the appellant company meant that "the directors should manage the business; and the company, therefore, are not to manage the business unless there is provision to that effect". The Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd*[56] also adopted this approach, stating that "directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed the majority of shareholders cannot control them in the exercise of these powers while

50 *Isle of Wight Railway Co v Tahourdin* (1884) 25 Ch D 320.

51 See, *eg*, P L Davies, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 8th Ed, 2008) at p 369.

52 *Isle of Wight Railway Co v Tahourdin* (1884) 25 Ch D 320 was followed in one case, *Barron v Potter* [1914] 1 Ch 895. The articles of association had given to the board of directors the power to appoint additional directors. When, due to differences between the directors, no directors' meeting could be held, the court held that the company retained the power to appoint additional directors in general meeting. The notable fact in *Barron* is that the power allocated to the board was not a management power but a power to appoint directors, a power that ordinarily resides with the shareholders. The decision can be distinguished on that basis.

53 [1906] 2 Ch 34 (CA).

54 [1909] 1 Ch 267.

55 [1909] AC 442 at 443 (HL).

56 [1974] AC 821 at 837 (PC).

they remain in office". These cases are not consistent with courts of the late 19th and early 20th centuries always considering the directors to be the agents or co-agents of the shareholders.

A. Indoor management rule

30 The conceptual difficulties created by considering directors to be agents for all purposes can be illustrated by a discussion of the treatment by the courts of the indoor management rule. The common law indoor management rule means that third parties dealing with the company are not bound to ensure that all internal regulations of the company relating to exercise and delegation of authority have been complied with. Two prevailing versions of the common law rule exist, based, it is suggested, on two different 19th century cases and the two different conceptualisations of the company and the legal relationship of the board to the company.

31 In *Royal British Bank v Turquand*[57] ("*Turquand*"), a bond issued without a required internal resolution was deemed valid. It was established that third parties were not expected to take their inquiries beyond the public documents at the Companies Registry. They could assume internal company requirements had been complied with. The case could be viewed as setting out a rule about the apparent authority of agents. Indeed, many commentators view the indoor management rule as an aspect of the law relating to apparent authority – it was explained in that way by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*[58] ("*Freeman & Lockyer*"). However, although the indoor management rule is sometimes called the rule in *Turquand*'s case, the rule was expanded and conceptualised differently by the House of Lords in *Mahony v East Holyford Mining Co*[59] ("*Mahony*") which involved a company registered under the Companies Act 1862.

32 In *Mahony*, Lord Hatherley considered that people who deal with the company externally "are not to be affected by any irregularities which may take place in the internal management of the company". Despite the facts being essentially the same, the reasoning used in

57 *Royal British Bank v Turquand* (1856) 6 E & B 327, 119 ER 886. See the discussion on which this section is based in C Noonan & S Watson, "Directorship Through the Lens of *De facto* Directors" [2008] *Journal of Business Law* 587.

58 [1964] 2 QB 480 (CA).

59 (1874–1875) 7 HL 869 (HL). *Mahony v East Holyford Mining Co* is generally remembered as the case that affirmed the rule in *Turquand*'s case. Lord Hatherley coined the term "indoor management rule" in *Mahony*. See, *eg*, E Ferran, *Company Law and Corporate Finance* (Oxford: Oxford University Press, 1999) at p 468. See also J Birds, A J Boyle, I MacNeil, G McCormack, C Twigg-Flesner & C Villiers, *Boyle and Birds' Company Law* (Bristol: Jordan Publishing, 7th Ed, 2009) at p 180.

Mahony was quite different to the reasoning used in *Turquand*.[60] *Turquand* was one of the raft of cases brought about by the failure of the Royal British Bank in 1856. The "deed of settlement" company had been registered under the Joint Stock Banking Act 1844. Under that Act, shareholders had unlimited liability[61] and the deed of settlement was described as a deed of partnership.[62] Directors would have been considered to be the agents of the shareholders. By contrast, the East Holyford Mining Co Ltd was incorporated under a general incorporation statute, the Companies Act 1862. The difference in conceptualisation by judges of the role of directors in a company incorporated under the 1862 Act is demonstrated in the speeches in *Mahony*. Most of the members of the House of Lords, unlike the judge in *Turquand*, did not describe the directors as the agents of the shareholders. The issue in *Mahony* was not considered to be whether the shareholders had collectively given the putative directors apparent or ostensible authority. Instead, to the House of Lords the issue was whether a form authorising the signatories to the cheques of the company was invalid because the authorising signatory directors had not been duly appointed. Lord Hatherley considered that people dealing with a company are "entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed".[63] Lord Hatherley allowed the bank dealing with the company to rely on the cheque authorisations, not because the shareholders had given the *de facto* directors apparent authority to sign the cheque authorisations, but because those dealing with the company should not to be affected by internal irregularities.[64]

33 Mahony was discussed by Diplock LJ in *Freeman & Lockyer*. He described the board as having actual authority but considered that allowing an individual to act in the management or conduct of the company's business to be a form of representation creating an apparent

60 *Royal British Bank v Turquand* (1855) 5 E & B 248, affd *Royal British Bank v Turquand* (1856) 6 E & B 327, 119 ER 886. In light of *Turquand*, it is not surprising that many commentators view the indoor management rule as no more than an application of the law of agency. See, eg, D Prentice, "The Rule in *Turquand*'s Case" (1991) 107 LQR 14; *Palmer's Company Law* (London: Sweet & Maxwell, 25th Ed, 1992) at para 3.312; P L Davies, *Gower and Davies' Principles of Company Law* (London: Sweet & Maxwell, 8th Ed, 2008) at paras 7.17–7.20.

61 Joint Stock Banking Act 1844 (UK) s 7.

62 Joint Stock Banking Act 1844 (UK) s 4.

63 *Mahony v East Holyford Mining Co* (1874–1875) 7 HL 869 at 894 (HL).

64 See also R R Pennington, *Pennington's Company Law* (London: Butterworths, 8th Ed, 2001) at pp 131–133, where it is observed that the indoor management rule "does not depend on estoppel, as do the rules relating to the apparent authority of a company's agents to act in its name".

authority.[65] Diplock LJ went to some length to differentiate Mahony from other cases involving directors acting as corporate agents on the basis that in Mahony it was not the conduct of the board of directors that was relied on to create the apparent authority of the corporate agents. Instead, it was:[66]

> … the conduct of those who, under the constitution of the company, were entitled to appoint them which was relied upon as a representation that certain persons were directors and secretary. Since the appointers had 'actual' authority to appoint these officers, they had 'actual' authority to make representations as to who the officers were.

34 In Diplock LJ's reading of *Mahony*, a form of apparent authority was created in the directors and therefore reliance by the third party became important. But in *Mahony*, although the judges differed in their approaches, there was no discussion about any representations, express or by conduct, made to any third party by the shareholders as the group entitled to appoint the directors. The discussion instead centred on how the shareholders consented, assented or acquiesced to the *de facto* directors occupying the position or office of director. Crucially, the liability-creating fact for the company in Mahony was not representations made by the shareholders as appointers but rather occupation of office by the *de facto* directors. Notwithstanding Diplock LJ's analysis, in *Mahony* the bank never inquired whether the directors had been appointed and did not rely on the appearance that they had been.[67]

35 In summary, therefore, two common law indoor management rules exist. The narrower agency-based form preferred by Diplock LJ in *Freeman & Lockyer* is the same as the principle of apparent authority in agency law. If a company holds out an individual as a director, then the company is estopped from denying the validity of the acts of that individual. That estoppel applies not only to acts carried out by the director as part of the board but acts carried out by the individual director as an agent of the company. There is no differentiation between the two different sorts of acts. The narrower indoor management rule does not treat as special the acts of directors as part of the board. The

65 R R Pennington, *Pennington's Company Law* (London: Butterworths, 8th Ed, 2001) at p 505.

66 R R Pennington, *Pennington's Company Law* (London: Butterworths, 8th Ed, 2001) at p 507. Furthermore, "[i]n *Mahony*'s case, if the persons in question were not persons who would normally be supposed to have such authority by someone who did not in fact know the constitution of the company, it may well be that the contractor would not succeed in proving condition (3), namely, that he relied upon the representations made by those persons, unless he proved that he did in fact know the constitution of the company".

67 R R Pennington, *Pennington's Company Law* (London: Butterworths, 8th Ed, 2001) at p 132.

broader indoor management rule outlined by Lord Hatherley in *Mahony* holds that all the internal acts of directors as part of the board will bind the company whether or not representations of authority are made to third parties and whether or not third parties rely on that authority. This form of the indoor management rule extends only to acts of the board and acts of directors when acting as part of the board. The broader indoor management rule fits a conceptualisation of the company where individual directors are not always corporate agents and are not corporate agents when they act collectively as part of the board. The broader indoor management rule does not require individuals to be held out as directors for their acts as part of the board to bind the company in legal relationships with third parties.[68]

36 A difficulty with the narrower apparent authority-based view of the indoor management rule arises because of the failure to distinguish between acts of the board and acts of individual directors. Particularly problematic are situations where the third party dealing with the company knows of an irregularity, but does not acquire that knowledge as a third party dealing with the company. This knowledge might arise because the third party also occupies a position in the company[69] and may even be the individual responsible for the irregularity.[70] If it is considered, for example, that a person who has not been duly appointed as a director but who has been held out as a director has apparent authority, then it is difficult for the company to deny that apparent authority, even to third parties who know otherwise through knowledge acquired acting in a different capacity in the company.[71] The courts have consistently held that the presumption of regularity cannot be relied on by those who have notice of the irregularity or who have been put on inquiry.[72] But even those who accept the apparent authority-based view of the indoor management rule acknowledge that such a holding would be difficult "if the Rule in *Turquand*'s case were an absolute or

68 For a discussion of the competing policy considerations underpinning the indoor management rule, see the discussion of Mason CJ in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

69 *Smith v Henniker-Major* [2003] 1 WLR 1386 (HL); *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156.

70 *Morris v Kanssen* [1946] AC 459 (HL).

71 This is what happened in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (CA). See also *Cromwell Corp Ltd v Sofrana Immobilier (NZ) Ltd* (1992) 6 NZCLC 67,997 (CA).

72 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *cf Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (CA). In *Broadlands Finance Ltd v Gisbourne Aero Club Inc* [1975] 2 NZLR 496 (relating to an incorporated society where the doctrine of constructive notice did not apply), the Court of Appeal held that a person dealing with a corporation is put on inquiry if a document is executed in a manner which is not consonant with the normal method prescribed in the public documents.

unqualified rule of law, applicable in all circumstances".[73] The broader indoor management rule does not give authority to individual directors; no qualification of its application is therefore needed.[74] If a third party has any sort of knowledge of an irregularity acquired in any capacity, there is no colour of right; the indoor management rule cannot be relied upon to validate a transaction.

B. The common seal

37 Difficulties with the failure to distinguish directors having a relationship with the company not based on agency when they act as part of the board have also emerged since the abolition of the requirement to affix the common seal.[75] Previously, companies often affixed their common seal, an inked stamp with the name of the company, when entering into formal transactions with third parties. Directors signed their names next to the common seal. Case law demonstrates[76] that the courts regarded the affixing of the common seal, usually accompanied by the requisite number of signatures of directors of the company, as *prima facie* evidence that the company had entered into the transaction in question and was bound by that transaction.[77] In *Northside Developments Pty Ltd v Registrar-General*,[78] Mason CJ in the High Court of Australia commented:

> The affixing of the seal to an instrument makes the instrument that of the company itself; the affixing of the seal is in that sense a corporate act, having effect similar to a signature by an individual, as I noted earlier. Thus, it may be said that a contract executed under the common seal evidences the assent of the corporation itself and such a

73 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA). The irreconciliability of the cases where the indoor management rule has been applied has been commented on by a number of judges. See, *eg*, Dawson J in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 192: "[t]he rule in *Royal British Bank v Turquand* has been applied in a number of cases, not all of which are entirely reconcilable"; and Wright J in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 at 56: "I am relieved from any examination of the exact definition of this very respectable but perhaps somewhat ambiguous rule of law …".

74 It seems that the indoor management rule may be derived from the *de facto* officer doctrine where the validity of actions depended on a *de facto* officer having colour of right. In *R v Lisle* (1738) And 163, 95 BR 345, the court, setting out the principles surrounding the validity of the acts of officers *de facto*, stated that "the act of an officer *de facto*, when it is for his own benefit, is void, because he shall not take advantage of his own want of title, which he must be conusant of; but when it is for the benefit of strangers, who are to be presumed ignorant of such defect of title, it is good".

75 Companies Act 2006 (c 46) (UK) s 45(1).

76 *Newbourne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45 (CA).

77 D J Goddard, "Execution of Documents by Companies" in *Dimensions in Business Finance Law* (J Prebble ed) (Wellington: Butterworths, 1992) at p 5.

78 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 160. See also *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636.

> contract is to be distinguished from one made by a director or officer on behalf of the company, that being a contract made by an agent on behalf of the company as principal.

38 Dawson J saw things differently. He considered that, even in the affixing of the seal, the body corporate was acting through agents. He attributed the alternative view, that the affixing of the seal was a corporate act, to the organic theory of company law. That theory, Dawson J considered, was articulated by Lord Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[79] ("Lennard").

39 Dawson J considered that the organic theory was useful in criminal cases where the liability of a company depended upon a mental element, the identification principle (which is discussed in the section below.) In Dawson J's view, the organic theory merely extended the scope of an agent's capacity to bind the company and that first the agent must have authority. But an understanding of the organic theory, at least based on its German origins, does more than that. In German law, the board of directors, board of managers and general assembly of shareholders ("*Aktiengesellschaft*") are considered to be integrated parts of the enterprise. "This idea leads necessarily to the exclusion of the rules of agency as far as 'organ-acts' are concerned."[80] Writing about the German board, Eckhert says:[81]

> According to the German conception, each act which is done on behalf of the Aktiengesellschaft by one of the corporate bodies is automatically the act of the juristic person. No legal construction such as agency is necessary to impute those acts and their implications to the corporate enterprise; the so-called 'organe' (organs) of the Aktiengesellschaft are looked upon as integrated parts of the corporation organism itself.

40 Organic theory is consistent with early corporations' law in that in organic theory the directors who comprise the board and the shareholders in general meeting have a special relationship with the company when acting in these roles. Board-centred corporate governance developed in continental Europe on a roughly parallel track to its development in the UK.[82] Hanseatic merchants, associations of

79 [1915] AC 705. For a discussion contrasting German and US corporate law see D Eckert, "Shareholder and Management: A Comparative View on Some Corporate Problems in the United States and Germany" (1960) 46 Iowa LR 12.

80 D Eckert, "Shareholder and Management: A Comparative View on Some Corporate Problems in the United States and Germany" (1960) 46 Iowa LR 12 at 18.

81 D Eckert, "Shareholder and Management: A Comparative View on Some Corporate Problems in the United States and Germany" (1960) 46 Iowa LR 12 at n 5.

82 F A Gevurtz, "The Historical and Political Origins of the Corporate Board of Directors" (2004) 33 Hofstra Law Review 89 at 126–127.

travelling merchants, were of all nationalities but there were important German hanse in the 14th and 15th centuries. These had a governance structure of aldermen and a council broadly parallel to a board.[83] In the body of law surrounding early corporate forms, the council or the court of directors or equivalent had a different legal relationship with the corporation than a relationship based solely on agency; like the US, German company law has remained consistent with those early principles.

41 Although the organic theory helps separate out and explain the acts of the board and the shareholders collectively as acts of the company, considering the affixing of the seal as an act of the company predates *Lennard* and the introduction of organic theory into UK company law. It has its origins in corporations' law. As Mason CJ said in *Northside Developments Pty Ltd v Registrar-General*[84] ("*Northside*"), "use of agency principles [to explain the enforceability of documents executed under seal] overlooks the significance of the company seal and the reliance which may ordinarily be placed upon it".

42 The abolition of the common seal was therefore significant. A transaction entered into with the affixing of the common seal was *prima facie* legally different to a transaction entered into by directors acting on behalf of the company as corporate agents. A body of developed case law relating to an aspect of the indoor management rule allowed that a duly executed document which had the seal affixed in the manner set out in the constitution of the company would *prima facie* bind the company. Issues about the authority of directors would not arise as the directors would not be acting as corporate agents when the seal was affixed, but rather as part of the decision-making body of the company, the board.

C. Summary

43 In summary, therefore, the amalgamation of corporations' law principles and partnership and agency law principles into the principles that comprise modern UK company law largely took place in the courts in the late 19th and early 20th centuries. Unlike US corporate law, where it has been settled from the beginning that the board and the directors who comprise the board are not the agents of the shareholders and despite seminal cases such as *Salomon v Salomon & Co Ltd*,[85] *Mahony* and *Automatic Self-Cleansing v Cunninghame* that seemed to indicate that it was corporations' law principles that had mostly prevailed, the

---

83 F A Gevurtz, "The Historical and Political Origins of the Corporate Board of Directors" (2004) 33 Hofstra Law Review 89 at 127–128.

84 (1990) 170 CLR 146 at 164.

85 [1897] AC 22 (HL).

precise legal relationship between boards of directors and shareholders is generally considered to be agency-based in the UK. This idea that directors are always agents has persisted despite the introduction of the organic theory of the company into UK company law by Lord Haldane LC.

44 This author has argued elsewhere that the fact that directors in the UK derive their powers from the constitution rather than the statute is probably an anomalous historical accident and that too much significance is attached to the fact that directors in the UK appear to derive their powers from shareholders rather than the statute. The articles of association are in any event given statutory sanction and are legally different from pre-incorporation statute deeds of settlement used prior to the enactment of the general incorporation statutes.[86] This article suggests that the apparent complexities of the recent company law cases that have reached the higher courts in the UK may be brought about by a failure to recognise the special relationship of the board to the company. The next section of the article discusses *Meridian* and then moves to an analysis of the difficult cases in light of that alternative conception.

V. The place of *Meridian*

45 In a recent article in the Law Quarterly Review, Eilis Ferran suggested that the "impact of *Meridian* may be more muted than some commentary has suggested".[87] Despite commentary being generally favourable towards *Meridian*, and the predicted demise of the directing mind and will test, the courts have continued to apply that test, either instead of, or in conjunction with, the rules of attribution.[88] It is suggested that the idea that, just because directors, individually or collectively, may often act as agents of the company, this does not mean that the directors must be regarded as agents for all purposes, is evident in Lord Hoffmann's opinion in *Meridian*. For that reason, the rules of attribution, at least interpreted and applied in this way, provide a principled basis for determining the difficult cases that is superior to the directing mind and will test.

46 In *Meridian*, Lord Hoffmann set out the rules of attribution which help determine when actions can be attributed to the company for the purposes of determining the liability of the company.

86 See S Watson, "The Significance of the Source of the Powers of Boards of Directors in UK Company Law" [2011] *Journal of Business Law* 597.

87 E Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) LQR 239 at 240.

88 E Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) LQR 239 at 245.

47 Lord Hoffmann said:[89]

> The company's primary rules of attribution will generally be found in its constitution … and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated … but implied by company law, such as 'the unanimous decision of all the shareholders in a solvent company … shall be the decision of the company': see *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.

48 When determining the criminal liability of corporations, the primary rules of attribution will allow the courts to ascribe the knowledge – the "guilty mind" of the directors on the board – to a company. Application of the primary rules of attribution is the most straight-forward means to impose criminal liability on a company. Indeed, as was noted by Estey J in *Canadian Dredge and Dock Co Ltd v The Queen*,[90] the terminology "primary representative" is well established, perhaps being derived from a 1929 Cambridge Law Journal article by C R N Winn where it was said:[91]

> [T]he conspiring minds are in fact the minds of the directors, or other primary representatives. It is submitted that no mere conspiracy of inferior agents could affect the corporation with criminal guilt. If the guilty intention in the minds of the primary representatives is attributed to the corporation in this case where, more than anywhere, it is the vital element of the offence, it seems that it will always be proper to attribute to a corporation the guilty state of mind of its primary representatives when they do criminal acts on its behalf in the exercise of its powers.

49 Lord Hoffmann observed that the company's primary rules of attribution, which are generally found in the company's constitution and deal with rules relating to the internal management of the company, "are obviously not enough to enable a company to go out into the world and do business".[92] It is the general rules of attribution, which include the rules of agency and vicarious liability and which are equally available to natural persons, that are essential if the individuals,

89 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 at 11, 2 AC 500 at 506 (PC).

90 [1985] 1 SCR 662.

91 C R N Winn, "The Criminal Responsibility of Corporations" (1929) 3 CLJ 398 at 423. A form of attribution theory seems also to have been set out by Sir John Salmond in *Jurisprudence* (London: Sweet & Maxwell, 7th Ed, 1924) at p 329.

92 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506 (PC).

including directors, are to engage in business with the outside world on behalf of the company.

50 The key point is that the primary rules of attribution are concerned with the fundamental organisation and core functions of the company. These include not only rules relating to the allocation of decision-making power in a company but also, it is suggested, rules relating to decision-making by the board where the decisions cannot be viewed as having been taken on behalf of the company. These are often decisions that will affect the other internal "organ" of the company, the shareholders. Examples are the decisions of the board to authorise a dividend or liquidate the company. The primary rules of attribution will rarely involve actions. As Lord Hoffmann continues, it is once decisions of the board are acted on, by those acting as agents of the company, that the general rules of attribution, including the principles of agency, come into play.

51 It could be argued that the primary rules of attribution are examples of the board acting as agents of the company. That would be a similar argument to the arguments used by Dawson J in *Northside* and Diplock LJ in *Freeman & Lockyer*. But if the primary rules of attribution were just examples of directors acting as agents of the company, Lord Hoffmann's classification would have no meaning. The first two categories of the rules of attribution would be examples of general rules of attribution arising out of agency or as a result of vicarious liability. Also, it could be equally asserted that shareholders who take part in decision-making as part of the shareholders' meeting are agents of the company; clearly a nonsense. It is suggested that acceptance of the principles set out in *Meridian* necessarily requires an acceptance that directors are not always agents and are not agents when they act as part of the board.

52 As well as the primary rules and general rules of attribution, Lord Hoffmann crafted the special rules of attribution to provide a more nuanced approach to the issue of corporate criminal liability than the directing mind and will test. *Meridian* was heard by the Privy Council on appeal from the New Zealand Court of Appeal. Mr Koo and Mr Ng were chief investment officer and senior portfolio manager respectively of Meridian. The court was asked to decide if Meridian had breached its securities law obligations.

53 The New Zealand Court of Appeal followed *Tesco Supermarkets Ltd v Nattrass*,[93] using identification principles to determine that Koo was Meridian's "directing mind and will". The doctrine of identification

93 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL).

had developed in the common law through the 20th century.[94] In *Lennard*, Lord Haldane considered that:[95]

> … for a company to be criminally liable, the fault must rest with an individual who is not (or who is not just) an agent or employee of the company. The individual must be the directing mind or will, the very ego and centre of personality of the company. Such individuals are likely to be close to the centre of decision making within the company.

54 The identification doctrine was not completely developed until the mid-1940s when *Lennard* was used as support by the courts in developing a doctrine of corporate criminal responsibility for offences requiring a guilty state of mind.[96] The doctrine extended *mens rea* for corporations beyond the board.

55 In *Tesco Supermarkets Ltd v Nattrass*, Lord Reid stressed that this type of liability was *not* the same as vicarious liability or principal/agent liability. There, the liability of the company is derived from the liability of the agent or employee. The doctrine of identification meant that the mind of the controlling individual was deemed to be the mind of the company. Describing the person identified with the company as its alter ego was misleading: "The person who speaks and acts as the company is not alter. He is identified with the company."[97]

56 It may not be possible to establish guilty intentions in the minds of the primary representatives of the company, the board, in circumstances where policy considerations would seem to indicate that liability should be imposed on the company. The doctrine of identification evolved to permit liability to be imposed on companies in such circumstances but the discussion by Lord Hoffmann in *Meridian*, where he outlines the special rules of attribution, appears to allow for the basis of liability to be driven more by the policy of the statutory rule in question rather than the position or status of the individual in the company. It thus does not alter the underlying conception of the structure of the company.

57 In many ways Lord Hoffmann's advice is a synthesis of the earlier discussions of identification theory with the distinguishing characteristic that Lord Hoffmann avoided the anthropomorphic terminology found in some of the earlier judgments. Lord Hoffmann set out the principles that might apply when the primary and general rules of attribution would not provide an answer, describing these as the

94 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.
95 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713–714.
96 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146; *R v ICR Haulage Co Ltd* [1944] KB 551; *Moore v I Bresler Ltd* [1944] 2 All ER 515.
97 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 171 (HL).

special rules of attribution. The need for the special rules of attribution would arise when a rule of law excluded attribution on the general principles of vicarious liability and agency. One instance of this need would be the rules of criminal law that usually require an "act or state of mind on the part of the person 'himself', as opposed to his servants or agents".[98] At the same time, insistence on the primary rules of attribution would defeat the intention of the rule of law.[99]

58 Examples of the limitations inherent in such insistence are the health and safety, and competition laws. It would defeat the purpose of such legislation if it were enough for those at board level to show that systems had been put in place to prevent breaches, even though breaches had in fact taken place. As Lord Hoffmann put it:[100]

> In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act *etc* of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy. [emphasis in original]

59 It had been recognised, at least to some extent, prior to *Meridian* that the knowledge, acts and states of mind of individuals other than those appointed as directors could be attributed to the company by use of the doctrine of identification. However, prior to *Meridian*, it seems that the issue of whether a corporation would be criminally liable was essentially determined by the position of the individual within the corporate structure. Sometimes identification principles extended liability for corporations beyond the board and other primary representatives,[101] but usually only as far as individual directors and managerial level employees. Once it was determined that these individuals were to be identified as the mind of the company, it then seemed to follow that they would be immune from liability. The structure of the company was thus determined by the identity of the wrongdoers.

98 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 at 12, 2 AC 500 at 507 (PC).
99 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 at 12, 2 AC 500 at 507 (PC).
100 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 at 12, 2 AC 500 at 507 (PC).
101 C R N Winn, "The Criminal Responsibility of Corporations" (1929) 3 CLJ 398 at 423.

60 Writing extra judicially, Lord Hoffmann described the difficulty with the concept of identification ("an unnecessary fifth wheel") as follows:[102]

> It is based upon a spurious metaphysic and it is conceptually obscure in being unable to give a convincing explanation of why a company should be able to have an alter ego for the purposes of one kind of offence who would not be its alter ego for the purposes of a different kind of offence. Far better, as it seems to me, to recognise that one is concerned not with identification but with attribution. What matters is whether, in terms of the relevant rule, the act in question is attributable to the company. That depends upon the content of the rule, which is a matter for express legislation or judicial implication. Parliament or the courts are free to devise whatever rules of attribution seem best calculated to give effect to the purpose of imposing liability upon a company. There is nothing in the inherent nature of a company which makes it necessary to say that the actor in some additional sense be capable of being 'identified' with the company.

61 Clearly after *Meridian* and the formulation by Lord Hoffmann of the principles for fashioning special rules of attribution, the status of an individual in the company may not necessarily be determinative of whether the acts or knowledge of that individual will be attributed by the courts to the company. Instead, when applying the special rules of attribution, the inquiry will start with an examination of the legislation or rule to determine for the purposes of that legislation or rule whose acts, knowledge or state of mind will be attributed to the company. The special rules of attribution can thus be viewed not as principles of company law but instead a mechanism of statutory interpretation which allows the application of certain legislation to companies. The primary and general rules of attribution are principles of company law based on a structure of a company comprising two "organs"; those occupying the positions of directors on the board and the residual claimants, in a solvent company the shareholders collectively. The special rules of attribution, the application of which will vary depending on the courts' interpretation of a particular statute or rule, are thus not company-law based.

62 In summary, therefore, the argument is that the rules of attribution can be explained using a conception of the company that resembles the US conception. Acts and knowledge of the board and the shareholders acting collectively are attributed to the company using the primary rules of attribution that are not based on agency. The general rules of attribution are concerned with the acts and knowledge of agents

102 Leonard Hoffmann, "Foreword" in *Corporate Criminal Liability* (A Pinto & M Evans) (London: Sweet & Maxwell, 2003) at p xv.

and employees of the company (including directors when they act externally as corporate agents). The acts and knowledge are attributed to the company using agency principles such as the imputation of knowledge (in agency) and vicarious liability (for acts of agents and employees). It is a form of secondary liability. For those situations where a statutory or legal rule requires that the knowledge of the company be "primary", the special rules of attribution allow the courts to override the primary and general rules of attribution (derived from company law) to determine *for the purposes of the rule* whose acts or knowledge should be attributed to the company. The special rules of attribution do not change the underlying structure of the company.

VI. Analysis of "difficult" cases

A. Stone & Rolls

63 In *Stone & Rolls*, the House of Lords had to decide whether to strike out a claim by a company for an action in negligence against its auditors for failing to detect and report its fraud. The company in question was in effect a one-man company which had been used by the wrongdoer, Stojevic, to defraud banks. Normally plaintiffs will be precluded by their own guilt from succeeding in actions of this type, but the liquidators argued that the illegal acts of Stojevic should not be attributed to the company because of the rule derived from the case *Re Hampshire Land Co*[103] that the knowledge of an agent should not be attributed to a principal where the knowledge relates to the agent's own breach of duty to the principal.

64 The purpose of this article is not to set out in detail the arguments used by the judges to reach the conclusion that the company could not be successful. What is fascinating is that the House of Lords took almost 100 pages of law report to do this, with one judge commenting on how difficult the case was[104] and with the strike out succeeding only by a bare majority. It is respectfully suggested that the case is not difficult at all if the conception of the company set out in this article is applied. Put simply, when he masterminded and perpetuated the fraud through the company, Stojevic was acting as the board of the company rather than its agent. His actions and knowledge should thus have been attributed to the company by the primary rules of attribution. As beneficial shareholder and shadow director, Stojevic controlled the company to the extent that he procured the wrong and he also carried out the frauds as the agent of the company. But the crucial liability-causing relationship he had with the company was as its board (as

103 *In re Hampshire Land Co* [1896] 2 Ch 743.
104 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [88] (HL).

shadow director holding a power of attorney) and, acting in that capacity, his decisions, actions and knowledge were the decisions, knowledge and actions of the company.

65 The basis of the strike out was *ex turpi causa*. "*Ex turpi causa* is a principle that prevents a claimant from using the court to obtain benefits from his own illegal conduct."[105] The *ex turpi causa* principle applies when the wrongdoing is personal, or primary, not when it is vicarious.[106] *Ex turpi causa*[107] prohibits the action being successful and that is the beginning and end of the matter as far as company law is concerned.[108] The director does not need to be viewed as an agent and once the agency issues are avoided the complexities introduced by the agency case In *Re Hampshire Land Co* fall away.[109]

66 The auditors argued that Stojevic was the directing mind of the company and, although most of the judges referred to the rules of attribution set out in *Meridian*, most of the judges in the Court of Appeal and the House of Lords in fact based their discussion on Stojevic in his capacity as directing mind of the company.[110] Thus, even though the majority were able to conclude that Stojevic was the mind of the company and that the company was primarily liable, they did not solely use attribution reasoning to reach that conclusion. The role of the board as the mechanism by which the company incurs primary liability was not analysed.

67 In summary, the basis on which the majority of the House of Lords was able, therefore, to strike out the action by the company using the *ex turpi causa* policy principle was that they decided that the company was liable through the primary rules of attribution for the actions and knowledge of its agent Stojevic. A different outcome would have defied common sense. But the basis on which that finding was made set a dangerous precedent. Rather than using the rules of attribution to conclude that the company was primarily liable through the knowledge of its board, Stojevic, the majority concluded that

---

105 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [20] (HL).

106 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [28] (HL), *per* Lord Phillips.

107 A plaintiff cannot benefit from his own wrong.

108 Wider issues about whether the auditors owed a duty of care to the creditors and the conclusion, following *Caparo Industries plc v Dickman* [1990] 2 AC 605, that they did not may point to flaws in the law surrounding auditors' liability but are not relevant to the company law issue.

109 Lord Walker describes the principle from *In re Hampshire Land Co* [1896] 2 Ch 743 as a general principle of agency (*Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [138] (HL)).

110 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391: in the Court of Appeal, *per* Rimer LJ at [24] ("[t]he attribution to it of its dishonest directing mind and will"), and [30] onwards; in the House of Lords, *per* Lord Phillips at [49] onwards; *per* Lord Walker at [134]; Lord Brown at [197]; and Lord Mance at [224].

Stojevic was the directing mind of the company and that the company was therefore primarily liable. Lord Hoffmann's fifth wheel, the spurious metaphysic, became the basis for the opinions. Whilst the use of directing mind and will reasoning added to the complexity but made no difference to the outcome in *Stone & Rolls*, its use in *Safeway* by the Court of Appeal led to the wrong outcome; one which defies common sense.

B. Safeway

68 In *Safeway*, a company, due to the actions of its directors and employees, was convicted of competition law breaches.[111] The company then sued those directors and employees. The Court of Appeal held that the company could not recover from the directors and employees. The basis of the finding was *ex turpi causa*. The court considered that the liability-causing undertaking was personal. Disagreeing with the lower court judge, Lord Justice Longmore said that it was not true that the word personal was used in a different sense to when it is said "that a corporation who cannot be vicariously liable is 'personally' liable".[112]

69 Part of the difficulty was brought about by the counsel for the company arguing, applying the rules of attribution, that the company "could only be personally at fault if the infringement was committed or authorized by the Board of Directors acting as such or by the shareholders in general meeting *unless* there was some special rule of attribution applicable in the circumstances of the case" [emphasis added]. The Court of Appeal correctly concluded that it was not necessary to show that the defendants were the directing mind and will of the company, but simply that the company had breached the Act. And the company acknowledged that it had breached the Act. Although it was not stated, the Court of Appeal clearly considered that the company incurred liability by means of the special rules of attribution. Following the concession by counsel for the company that the company would be personally liable if it was made liable by means of a special rule of attribution and following *Stone & Rolls*, the Court of Appeal concluded that it necessarily followed that the wrongdoers as the mind of the company could not be personally liable.

70 That concession by counsel and that conclusion by the Court of Appeal were not a necessary consequence of the company having incurred liability through the special rules of attribution. The special rules of attribution override company law principles to allow companies to be made liable for the purposes of a particular statutory rule or

111 *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472.
112 *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 at [26].

principle. Thus, *for the purposes of the Competition Act 1988 but for that purpose only*, the acts and state of knowledge of certain directors and employees were taken to be the acts and knowledge of the company. That means, *for the purposes of the Competition Act 1988 but for that purpose only*, the statutory provisions overrode the corporate law principles of primary and general attribution. The special rules of attribution did not need to override company law principles or change the underlying structure of the company when the Court of Appeal was considering the separate issue of whether the wrongdoing directors and employees had breached their duties to the company. The company law principle is, it is suggested, that the directors acting as part of the board of directors as the "mind of the company" will not be liable for acts of the company.[113] In *Safeway*, even though some directors were involved in the wrongdoing, their wrongdoing was not as part of the board. When the directors and employees committed the wrong they were acting as agents of the company. The directors who were involved in the wrongdoing would not escape liability because their wrongdoing was not in their role as part of the board, but as corporate agents. The problem for the Court of Appeal and the logic leading them to a counter-intuitive outcome was the concession by counsel and the precedent set by *Stone & Rolls*, where identification reasoning was used. The identification doctrine as applied leads to an outcome that those individuals whose knowledge is deemed to be the knowledge of the company when determining the *mens rea* of a company, are the mind of the company and are therefore immune from liability. To the judges in *Safeway* it followed that the liability was the liability of the company rather than those who were the mind of the company.

VII. Consequences of applying *Meridian* reasoning

A. Liability of the board

71 In *Safeway*, Lord Justice Longmore concluded:[114]

> If indeed, it were the law that the ex turpi maxim could only be used against a company, if the act was specifically authorized by the whole Board of Directors (or the shareholders in general meeting) there would be little scope for the maxim to be used at all in a corporate context.

72 In cases such as *Safeway* is there any mechanism whereby the members of the board might incur liability? In the US, where the role of the board is recognised, these cases are dealt with by the courts

113 The exception may be when the directors on the board have breached their duties: see the discussion in the section below.

114 *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 at [26].

determining whether the board has put in place the systems to monitor compliance. In the leading case *In re Caremark International Inc* Derivative Litigation,[115] it was alleged that the directors were liable because they should have known that certain officers and employees were violating the anti-referral payments law. The court reviewed the duty of care and the protection offered by the business judgment rule. For director liability standards, the court distinguished between two possible scenarios. The first was where a board decision results in a loss because the decision is ill-advised or negligent. That decision is analysed under the business judgment rule, focusing on the process used to reach the decision. The second possible scenario is "an unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss".[116] This would be a sustained or systemic failure of the board to exercise oversight and "will establish the lack of good faith that is a necessary condition to liability".[117] In *Stone v Ritter*,[118] the Delaware Supreme Court approved the *Caremark* standard for directors:

> *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. [emphasis in original]

73 For example, in the recent *Citigroup* litigation, the plaintiff shareholders alleged that the defendant members of the board were liable to the company for breach of fiduciary duty for failing to oversee and manage Citigroup's exposure to the problems in the subprime markets. The plaintiffs were unsuccessful on the facts.[119]

74 Thus, if *Safeway* had been decided in the US, it would have been open to counsel to argue that the members of the board had not put systems in place to ensure compliance and that therefore the members of the board could incur liability.

115 698 A 2d 959 (Del Ch, 1996).
116 *In re Caremark International Inc* Derivative Litigation 698 A 2d 959 at 967 (Del Ch, 1996).
117 *In re Caremark International Inc* Derivative Litigation 698 A 2d 959 at 971 (Del Ch, 1996).
118 911 A 2d 362 at 370 (Del Supr, 2006).
119 *In re Citigroup Inc* Shareholder Derivative Litigation 964 A 2d 106 (Del Ch, 2009).

B. Company villain or victim?

75 In *Stone & Rolls*, the judges spent some time discussing whether the company was the villain or the victim of the fraud. This determination depends on whether an internal or external perspective is taken. To those external to the company, the company was a villain, just as a country controlled by a dictator that wages war is a villain. But internally, in companies controlled by wrongdoers, there may be victims; those who comprise the other "organ", innocent shareholders or, perhaps, subsequent residual claimants such as creditors. Part of the issue in *Stone & Rolls* was determining whether the auditors as company officers and gatekeepers were internal or external to the company. Making this determination and therefore determining in respect of the litigation whether the company was villain or victim was made more difficult, it is suggested, by a failure to delineate the role and existence of the board. Internally, the board was the *locus* of the villainy and the residual claimants were the victims in the same way that innocent citizens of a country controlled by a dictator are victims. Lord Phillips concluded that it was arguable that the scope of the duty undertaken by auditors should extend to protecting the interests of creditors but to hold so would involve departing from or extending *Caparo Industries plc v Dickman*.[120] Lord Scott, one of the two dissenting judges, saw things differently:[121]

> Let it be supposed the managing director is also a shareholder and that he and the auditors are together sued for negligent breach of duty. I know of no authority that would bar the action on ex turpi grounds. The action, assuming it succeeded against both defendants, could be expected, via contribution proceedings, to leave the delinquent managing director with no benefit from any damages recovered from the auditors. And why, if that were so, should public policy require the auditors to be relieved of liability for their breach of duty?

76 The difference in perspective between the two judges is brought about, it is suggested, by a difference in perception about what the structure of a company is. Lord Scott seems to see the company as the residual claimants, normally the shareholders, except when, as here, the company is insolvent. Then the residual claimants are the creditors. It is a view of the company where the auditors are internal to the company. Lord Phillips sees the company as comprising shareholders and board: it is the external view of the company.

120 [1990] 2 AC 605.
121 *Stone & Rolls Ltd v Moore Stephens* [2009] 1 AC 1391 at [120] (HL).

VIII. Conclusion

77 Extra-judicially, Lord Hoffmann has been critical of the use of the term common sense by judges, describing it as typical of British anti-intellectualism. But that does not mean that Lord Hoffmann considered that judges should not use their common sense at all; merely that judges should set out the principles that underpin that common sense. If an outcome of a case defies common sense, that may be an indication that the principles underpinning the case are in some way flawed. The outcome of *Safeway* defies common sense. It should go without saying that it sets a dangerous precedent for wrongdoing directors and employees who might now, with impunity, point to the company and argue that they were the mind of the company and therefore immune personally from liability.

78 This article argues that at the root of the difficulty is a failure to understand the internal structure of the company, as comprising a board made up of directors who are not, when part of the board, agents of the company. That is the US understanding of the company. The different UK conception is brought about by the historical anomaly of the unincorporated joint stock company. The lingering understanding of directors as always agents and a failure to acknowledge an internal and external dimension of the company is a conceptual flaw in UK company law.