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ACCESSORY LIABILITY FOR INTELLECTUAL PROPERTY INFRINGEMENTS AND DIRECTORS: SOME SIGNIFICANT SHIFTS

The focus of this article is on accessory liability for infringement of intellectual property ("IP") rights. In this little area of the law, the legal developments have also not been uniform and coherent. Like civil law in general, there is compartmentalisation within IP law into copyright, trade marks, patents and designs, to name but a few. This article will not only revisit how accessory liability has been determined in the other spheres of IP (particularly trade marks, patents and designs) but also consider how that liability was recently reformulated by the UK Supreme Court in *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297.

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I. Introduction

1 We may begin our exploration of the concept of accessory liability by first recognising that, broadly speaking, an accessory is a person who assists another person to commit a wrongful act. Such a person is not necessarily a passive amanuensis but may well be an active participant, if not an agitator. In criminal law, he is the person who abets a criminal act by instigating, conspiring or intentionally aiding the doing of that act by another person and would be liable to be punished with a fine or imprisonment or both for the abetment. This is stated in the Penal Code 1871[1] (the "Code"). The types and boundaries of the offence of abetment are clearly set out and explained in the Code, and they relate to a wide variety of crimes, such as murder, bribery, theft, robbery and causing grievous hurt. It is explained in the Code that, to constitute the offence of abetment, it is not necessary that the act abetted should be committed or that "the effect requisite to constitute the offence should be caused".[2] Also, it is not necessary to the commission of the offence of abetment by conspiracy that the abettor should "concert the offence with the person who commits it" as it is sufficient if he engages

1 2020 Rev Ed. See, *eg*, s 107.
2 Penal Code 1871 (2020 Rev Ed) s 108, Explanation 2.

in the conspiracy in pursuance of which the offence is committed.[3] The abetment must however be intentional.[4] All this is clear from the Code.

2 There is no such clarity in civil law, as the Code has no counterpart in that area of the law. Although an accessory can be liable for assisting another person to breach his obligations and duty (salutary examples being inducing breach of contract[5] and dishonest assistance in breach of trust[6]), the nature and extent to which the accessory may be liable for the assistance are neither codified nor set out and explained in any statute. Given this, eminent tort scholars have called for the adoption of criminal law principles (such as those concerning "assistance liability"[7]) for establishing the liability of an accessory in civil law, stating that there is little justification for the failure to align both laws. For instance, Prof Atiyah wrote:[8]

> Just as in the criminal law relating to misdemeanours any person who 'aids or abets' the commission of an offence is guilty as a secondary party, so it is clear that in the law of torts anyone who assists the commission of a tort is liable as a secondary party.

3 This view did not gain traction at the highest levels. In *CBS Songs Ltd v Amstrad Consumer Electronics plc*[9] ("*CBS Songs*"), Lord Templeman said "it is a mistake to compare crime and tort" in relation to the liability of an accessory. In another case, Lord Scott opined that "the function of the civil law of tort is different" from that of the criminal law and that "the plea for consistency between the criminal law and the civil law lacks cogency for the ends to be served by the two systems are very different".[10]

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3 Penal Code 1871 (2020 Rev Ed) s 108, Explanation 5.

4 Penal Code 1871 (2020 Rev Ed) s 107(*c*).

5 See *OBG Ltd v Allan* [2008] 1 AC 1.

6 See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.

7 "Assistance liability" refers to the type of liability where an accessory has assisted the primary wrongdoer but there is no common design between them. This is synonymous with "abetting" and "aiding" in criminal law: see, *eg*, David John Cooper, *Secondary Liability for Civil Wrongs* (1995) at p 4 (unpublished doctoral thesis, archived at <https://www.repository.cam.ac.uk/items/367f49e2-8e26-4b65-b3d0-04356776decf>).

8 P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 295. See also John G Fleming, *The Law of Torts* (LBC Information Services, 9th Ed, 1998) at p 289.

9 [1988] AC 1013 at 1059.

10 *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 at [17]–[18]. The reasons for the difference include the ability to impose different degrees of criminal culpability on the abettor, unlike civil law which has no such leeway as it makes the accessory fully liable for all the claimant's loss. In a similar vein, in *New Line Production Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660, which involved s 201B(4) of the then-Copyright Act (Cap 63, 1999 Rev Ed) (now s 500 of the Copyright Act 2021 (2020 Rev Ed)) which stipulated that

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4 Consequently, the legal developments for establishing civil liability of an accessory have been left to judges filling in the gaps by applying common law and equitable principles to the factual circumstances of the cases at hand. These developments led the law to become "fragmented" and "untidy", exacerbated by the tendency to compartmentalise the law into discrete subjects, such as contract, trusts, tort and intellectual property ("IP").[11] Another academic commentator astutely observed that "the law is in a state of considerable uncertainty and confusion, in danger of becoming a quagmire of conflicting propositions and rationales".[12]

5 Yet, the need for coherence and clarity across the different areas of civil law is obvious and imperative. Accessory liability[13] protects the moral and economic rights of holders of legal rights (including IP rights) by casting the net of protection beyond the primary wrongdoers. It also deters violation of the rights by conferring collective responsibility on persons who combine to bring about the violation.[14] The liability is also of immense practical importance as it provides the holders with further or alternative means of redress against an accessory who, for instance, is the only party worth suing,[15] has deep pockets, is the only party within the court's jurisdiction or is a necessary or proper party to be joined in the action for the purpose of the court having jurisdiction to entertain the action against the primary wrongdoer[16] and where the action against

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where a copyright offence is committed by a company, its director, manager, secretary and other officer would also be guilty if he consented or connived in the offence, Tay Yong Kwang J said (at [103]) that the courts should not be too hasty to inject civil liability into criminal offences. He preferred to approach the issue of personal liability of directors from the civil law principle of separate legal personality. There is a similar provision concerning consent or connivance of a director in s 107(4) of the Trade Marks Act 1998 (2020 Rev Ed).

11 See R Arnold & P S Davies, "Accessory Liability for Intellectual Property Infringement: A Case of Authorisation" (2017) LQR 442 at 442 and Lee Pey Woan, "Accessory Liability in Tort and Equity" (2015) 27 SAcLJ 853 at 853–854.

12 Joachim Dietrich, "The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions" (2010) 34 *Melbourne University Law Review* 106 at 106, citing *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025 at [55], *per* Finkelstein J.

13 The term "accessory liability" is used interchangeably with "joint tortfeasance" and "joint liability": see, *eg*, *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229. At [38], Lord Sumption said that "[l]iability as a joint tortfeasor is more commonly an accessory liability".

14 Joachim Dietrich, "Using Tort Law Accessory Liability to Protect Intellectual Property Rights" (2016) 23 *Torts Law Journal* 275 at 275.

15 Such as in *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 (which we shall shortly review extensively) where the directors are the parties worth suing.

16 This occurred in *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229.

the accessory represents the most cost-effective and efficient method of vindicating the holder's rights.[17]

6 The focus of this article is on accessory liability for infringement of IP rights. In that little area of the law, the legal developments have also not been uniform and coherent. Like the civil law in general, there is compartmentalisation within IP law into copyright, trade marks, patents, designs and others. An example of the lack of uniformity and coherence is that, whereas accessory liability in copyright law is based on the concept of "authorisation", the liability in the other areas of IP is premised on quite different concepts, namely, "procurement" and "participating in a common design".[18] Each of these concepts is itself mired in a "quagmire of conflicting propositions and rationales". For instance, there are conflicting views concerning the meaning of "authorisation" of copyright infringement. One school of thought adopts the dictionary meaning of the word, which is "to give formal approval to; to sanction, approve, countenance",[19] and this meaning is considered to be wider than the alternative meaning: "to grant or purport to grant to a third person the right to do an act".[20] This conflict and its ramifications were subject to excellent treatment by Saw Cheng Lim and Warren Chik in their article "Revisiting Authorisation Liability in Copyright Law",[21] in which they advocated for the wider meaning of the word, for its ability to meet the increasing technological incursions into the sphere of copyright protection.

17 See, *eg*, *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1 where Kitchin LJ agreed (at [160]–[163]) that it was economically more efficient to require the internet service providers, website hosts and other such accessories to take action to prevent infringement occurring using their services than it was to require right holders to sue the infringers.

18 See also R Arnold & P S Davies, "Accessory Liability for Intellectual Property Infringement: A Case of Authorisation" (2017) LQR 442 at 442.

19 This dictionary meaning was first adopted by Tomlin J in *Evans v E Hulton and Co Ltd* [1923–28] MacG Cop Cas 51 at 59–60 and approved by Bankes LJ in the UK Court of Appeal in *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 491. It was embraced by the High Court of Australia in *Adelaide Corporation v Australasian Performing Right Association Ltd* [1928] HCA 10 and *University of New South Wales v Moorhouse* [1976] RPC 151.

20 The alternative meaning was put forward by Atkins LJ in *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 499 and found favour with Lawton LJ in *Amstrad Consumer Electronics PLC v The British Phonographic Industry Ltd* [1986] FSR 159 at 207 and Lord Templeman in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1054. It was endorsed by the Singapore Court of Appeal in *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 and *RecordTV Pte Ltd v Mediacorp TV Singapore* [2011] 1 SLR 830.

21 (2012) 24 SAcLJ 698. This article will therefore not tread where others have gone.

7 This article will not only revisit how accessory liability has been determined in the other spheres of IP (particularly trade marks, patents and designs) but also consider how that liability was recently reformulated (to put it mildly) by the UK Supreme Court in the case of *Lifestyle Equities CV v Ahmed*[22] ("*Lifestyle Equities*") in these spheres as well as in the domain of directors' accessory liability. Part II unfolds with a general discussion on the two types of accessory liability (namely, procurement by inducement, incitement or persuasion and participation in a common design), followed by a specific excursion to the divergent perspectives on the relationship between these types. One perspective is that the two overlap and are intertwined, with the corollary that procurement is a subset or species of participation. This contrasts with the view that they are separate and different paths to accessory liability, with the complication that procurement may lead to common design. The UK Supreme Court in *Lifestyle Equities* seems to have settled the issue, with Lord Leggatt (who delivered the judgment of the court with whom the other judges (namely, Lord Lloyd-Jones, Lord Stephens, Lord Richards and Lord Kitchin) concurred) describing the choice between the two types as a "false dichotomy". This article will then give thought to the practical advantage of his Lordship's eventual choice. That is the easy part.

8 Part III concerns the role of strict liability in IP infringements. The importance of strict liability in IP has escaped intense scrutiny by the courts and academic commentators, for good reason. Although left unsaid in the statutes, it has been the understanding that knowledge of infringement and intention to infringe are irrelevant for establishing not only infringement but also accessory liability. There is high authority in support of this understanding such that it has become embedded in the jurisprudence. However, the understanding has now been held to be wrong by the Supreme Court as it opined that there must be knowledge of the essential facts of the infringement for finding accessory liability. It is submitted that there is no principled or policy support for the opinion. The practical difficulties of applying this "knowledge of the essential facts" approach are also highlighted, and they affect not only the general tort law on accessory liability[23] but also directors' accessory liability under company law. This conveniently leads on to Part IV where the "very difficult question of policy" of balancing two well-established principles is considered. The first principle is that directors are not liable for their company's wrongful acts merely because they are directors and the other is that everyone is answerable for his tortious acts. These two principles are particularly difficult to reconcile in the context of IP

22 [2024] 2 WLR 1297.

23 It bears reiteration that the term "accessory liability" is used interchangeably with "joint tortfeasance" and "joint liability": see n 13 above.

infringements where strict liability is imposed. The balancing acts by the Anglo-Commonwealth courts resulted in three tests regarding the nature and extent of the director's participation or involvement in the company's acts which would render him jointly liable: (a) the "make the tort his own" test; (b) the "direct or procure" test; and (c) the "assumption of responsibility" test.[24] The weight of authority is in favour of the "direct or procure" test that has two carve-outs which are also closely considered.

9 There is a slight digression in Part IV on whether the *Said v Butt* principle should extend to tortious acts. The Supreme Court did not agree that there is any "very difficult question of policy" involved, nor is there any need for a balancing exercise. It largely jettisoned the law and jurisprudence on directors' accessory liability which had been developed and built up during the past four decades and instead put in place the "knowledge of the essential facts" test that is the subject of review in Part III. That test also contains the requirement of good faith, which means that, in practice, the outcome of any inquiry into accessory liability may often be subjective, unpredictable and/or uncertain. A brief conclusion follows in Part V.

II. Types of accessory liability

10 Under the Copyright Act 2021[25] ("CA"), copyright in relation to a work (such as a literary work) or a subject-matter (such as a film) is the right of the copyright owner to exclude others from doing an act in relation to the work or subject-matter, or *authorising the doing of that act*, without the authorisation of the copyright owner.[26] The CA stipulates that this exclusive right is infringed by any person who does in Singapore, or *authorises the doing in Singapore of*, any act comprised in the copyright.[27] There are thus two separate and distinct rights involved, infringement of each would give rise to a distinct tort and a separate cause of action.[28]

24 For reasons explained later, it is not necessary to consider the "assumption of responsibility" test in this article.

25 2020 Rev Ed.

26 Copyright Act 2021 (2020 Rev Ed) s 108(1)(*a*).

27 Copyright Act 2021 (2020 Rev Ed) s 146(1)(*a*).

28 See, *eg*, *WEA International Inc v Hanimex Corp Ltd* [1987] FCA 379 at [31], citing *Ash v Hutchinson and Co (Publishers) Ltd* (1936) 1 Ch 489; *Australasian Performing Right Association Ltd v Jain* [1990] FCR 53 at 57; and *Composers and Authors Society of Singapore Ltd v Fox Networks Group Singapore Pte Ltd* [2022] 3 SLR 1099 at [27]. Both causes of action must be pleaded if it is intended to make the infringer and the authoriser liable: *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 at [39]–[40].

11 There are no equivalent provisions in the Trade Marks Act 1998[29] ("TMA"), the Patents Act 1994[30] ("PA") and the Registered Design Act 2000[31] ("RDA") incorporating the authorisation or similar concept, which means that an accessory cannot be statutorily liable for infringement of a registered trade mark, patent and registered design respectively. For instance, infringement of a registered trade mark is committed by any of the methods specified in s 27(4) of the TMA (*eg*, importing goods under the infringing sign and offering the goods for sale) and no other, and these methods do not include authorisation or similar acts to make an accessory liable. However, this has not stopped common law tort principles from being adopted to make an accessory liable.[32]

12 The catalyst for the adoption is that infringement of a registered trade mark (as well as a patent and registered design) is regarded as a tort. As such, the principle that a person may be jointly liable with another person for a tort has been applied to infringement of each of these statutory IP rights. This principle has a long provenance, stemming from the following passage by Erle J in *Lumley v Gye*:[33]

> … the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong … he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.

13 The principle subsequently evolved such that it is now well established that a person is jointly liable for a tort committed by another person if he either:[34]

> (a) procured by inducement, incitement or persuasion the other person to commit the tort; and/or
>
> (b) participated in a common design with the other person to commit the tort.

29 2020 Rev Ed.
30 2020 Rev Ed.
31 2020 Rev Ed.
32 The adoption of the principles has been described by Mustill LJ in *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 at 603 as "a bold step, since it applies a common law [principle] to the interpretation of a statute".
33 (1853) 2 El & Bl 216 at 232.
34 See, *eg*, *The Koursk* [1924] P 140; *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1998] 1 AC 1013; and *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229.

However, mere assistance (even knowing assistance) or facilitation does not suffice to make the person liable as an accessory or joint tortfeasor.[35]

14 A number of English judges had given close consideration to the relationship between these two types of accessory liability.[36] They provided a rich fund of divergent perspectives on the relationship. For instance:

(a) In *CBS Songs*, Lord Templeman elided procuring an infringement with participating in a common design by regarding procurement as a subset of common design.[37]

(b) In *Unilever plc v Gillette (UK) Ltd*,[38] Mustill LJ proffered the tentative view that there are two distinct routes to joint tortfeasance.

(c) In *SABAF SpA v Meneghetti SpA*,[39] Lord Hoffmann implied that only common design matters.

(d) In *Fish & Fish Ltd v Sea Shepherd UK*[40] ("*Sea Shepherd*"), Lord Toulson characterised liability based on procurement as "a different category" from liability based on participation in a common design[41] whereas Lord Sumption suggested that both depend on a common intent and "inducing or procuring a tort necessarily involves common intent if the tort is then committed".[42]

15 Thus, there was much confusion as to whether procurement and participation in a common design are distinct concepts to be deployed separately for finding accessory liability or whether procurement is a subset or species of common design and the elements of both concepts must be proven to establish the liability. Recently, this conundrum seems to have been resolved. In *Lifestyle Equities*, Lord Leggatt categorically asserted that presenting a choice between regarding procurement as a distinct tort or as a form of participation in a common design is a "false dichotomy". According to him, the "better view" is that procuring an infringement and participation in a common design are "two *separate*

35 See, *eg*, *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1998] 1 AC 1013 at 1057–1058, *per* Lord Templeman and *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Dept* [1998] 1 Lloyd's Rep 19 at 46, *per* Hobhouse LJ.

36 Coincidentally, these cases involved infringement of intellectual property rights.

37 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1058.

38 [1989] RPC 583 at 608.

39 [2005] RPC 10 at [39].

40 [2015] AC 1229.

41 *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at [19]–[20].

42 *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at [19]–[41].

principles of accessory liability" [emphasis added] on which a person may be held liable jointly with the infringer for damage caused by the infringing act.[43] It is not entirely clear why the choice was considered by the learned judge to be a "false dichotomy" and why he chose the "better view". He did not expound on the choice beyond citing with approval Mustill LJ's tentative view that procurement and participation are distinct as well as rejecting Lord Sumption's suggestion that both depend on a common intent.[44]

16 Nevertheless, Lord Leggatt's opinion does yield some clarity to a perplexing area of the law. A person may now be held liable as an accessory if he procures a tort (*eg*, an infringement of IP rights) by, *eg*, issuing instructions on which the primary wrongdoer acts, without having to also show that he acted in concert with the wrongdoer for a common end. Alternatively, he can be held liable if he had assisted in the commission of the tort pursuant to a common design with the primary wrongdoer. In the latter regard, a relatively minor assistance is sufficient provided that it is not *de minimis* or trivial.[45] Consequently, claimants now have a choice as to which type of accessory liability to adopt and only need to establish the elements of the chosen type without having to establish all the elements of both types as was previously the case.

III. Strict liability

17 We move now to more difficult aspects of the court's decision.[46] Liability for infringement of a registered trade mark, patent (in relation to an inventive product[47]) and registered design under the TMA, PA and RDA respectively arises if the infringer does any of the acts specified in these statutes without the consent of the proprietor. The liability is strict in that there is *no need* to prove knowledge of infringement and intention to infringe by the infringer. For instance, s 27(2) of the TMA states that a person infringes a registered trade mark if he uses, without the consent of the trade mark proprietor, a sign which is identical or similar to the trade mark in relation to identical or similar goods or services and there exists a likelihood of confusion on the part of the public as a result of the use.[48]

43 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [120].
44 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [121]–[122].
45 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [122].
46 The aspect of the case which is not considered in this article is account of profits.
47 In relation to an inventive process, a person infringes the patent if he uses the process or offers it for use in Singapore when he knows, or it is obvious to a reasonable person in the circumstances, that its use without the consent of the proprietor would be an infringement of the patent: s 66(1)(*b*) of the Patents Act 1994 (2020 Rev Ed).
48 By way of an exception, s 27(5) of the Trade Marks Act 1998 (2020 Rev Ed) provides that a person who applies a sign to any material used or intended to be used for
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18 Similarly, s 66(1) of the PA indicates that a person infringes a patent for an invention if he, among others, makes, uses or disposes of a product protected by the patent or obtained directly by means of a patented process.

19 As for designs, it is an infringement for a person to, among others, make in Singapore or sell or offer for sale in Singapore any article in respect of which the design is registered and to which that design or "a design not substantially different from that design", has been applied.[49]

20 Thus, infringement does not depend on what the person knows or intends but upon what he does. Also, innocence and acting in good faith and without any improper motive on the part of the infringer affords no defence. In *Gillette UK Ltd v Edenwest Ltd*,[50] Blackburne J said that "it is well settled law … that innocence on the part of the infringer is no defence to a claim to damages". This was cited with approval in *Calvin Klein, Inc v HS International Pte Ltd*[51] where Chan Seng Onn J held that innocence "due to a lack of knowledge or awareness that the goods offered for sale … infringed the [claimants'] trade marks" was not a defence.

21 It would seem logical that if there is no requirement to prove the infringer's knowledge of infringement of IP to establish his liability, there should also be no requirement to prove the accessory's knowledge of infringement to establish his liability as such – that is, accessory liability should also be one of strict liability. Logic aside, the absence of the requirement in the above IP statutes is understandable. This is because the absence – and the imposition of strict liability – in both situations would serve as a valuable policy lever to achieve a desirable social objective: respect for IP rights by the infringer and his accessory. Having to prove knowledge on the part of the infringer and accessory would not help to promote that objective.

22 In practical terms, if the requirement were a prerequisite for accessory liability, it would mean that the accessory is treated more kindly than the infringer as the accessory can escape liability, leaving the infringer to face the music for the infringement. This would not only offend common sense but would also seem harsh, especially in

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labelling or packaging goods or uses a sign on any commercial document (such as an invoice and business letter) is deemed not to use the sign if, at the time of such application or use, the person *does not know nor have reason to believe* that the proprietor or a licensee of the registered trade mark did not consent to such application or use of the sign.

49 Registered Design Act 2000 (2020 Rev Ed) s 30(1)(*a*)(i).

50 [1994] RPC 279 at 290.

51 [2016] 5 SLR 1183 at [110].

employer-employee and master-servant situations where the infringer is a subordinate (*eg*, an employee) of the accessory who instigated and procured the infringement and was primarily responsible for the infringement.

23 Thus, the case for accessory liability to be also strict is compelling.

24 There is support at the highest level for the case. In *Vestergaard Frandsen A/S v Bestnet Europe Ltd*,[52] Lord Neuberger said (albeit *obiter*) that patent infringement is a wrong of strict liability which requires no knowledge or intention on the part of the alleged infringer and that "it is *entirely logical* that [an accessory] who, while wholly innocent of the existence, contents or effect of the patent, is nonetheless secondarily liable if she assists the primary infringer in her patent-infringing acts"[53] [emphasis added].

25 In *Sea Shepherd*, the UK Supreme Court unanimously affirmed that there is no requirement for a tort of strict liability that the accessory should have an improper motive or should know or have reason to believe that the activity is or may be an infringement. For instance, Lord Neuberger said that:[54]

> … it is unnecessary for a claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed. … It is not enough for a claimant to show merely that the activity, which the defendant assisted and was the subject of the common design, was carried out tortiously if it could also perfectly well be carried out without committing any tort. However, *the claimant need not go so far as to show that the defendant knew that a specific act harming a specific defendant was intended*. [emphasis added]

26 Although he dissented on the facts, Lord Sumption made the same point when he referred to the defendant being liable if he assisted

52 [2013] 1 WLR 1556.

53 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556 at [37]. The case concerns trade secrets. Unauthorised disclosure or use of trade secrets is not a wrong of strict liability, which means that the alleged infringer must be found to have knowledge of the unauthorised disclosure or misuse or intention to carry out such disclosure or misuse. Thus, Lord Neuberger went on in the above passage to state that the approach in patent infringement cannot apply in a trade secrets case which requires the alleged infringer to have knowledge in order to make him liable. Accordingly, the defendant employee who was involved in developing a new product using the claimant's trade secrets was not found liable before she had no knowledge that the claimant's trade secrets were misused.

54 *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at [60].

in the commission of a tort pursuant to a common design to do an act which is *"or turns out to be"* [emphasis added] tortious.[55]

27 In *Lifestyle Equities*, the UK Court of Appeal placed reliance on the test for accessory liability affirmed in *Sea Shepherd* and said that it was not necessary for the directors to have known, actually or constructively, that the acts were infringements.[56] It thus upheld the trial judge's finding that the directors were jointly liable as accessories in infringing the claimant's marks. However, the Supreme Court disagreed and said that the Court of Appeal placed more weight on the *obiter dicta* in *Sea Shepherd* than they could reasonably bear.[57]

A. Supreme Court's decision in Lifestyle Equities

28 In the case, the proprietor of various trade marks featuring an image of a mounted polo player and the words "BEVERLY HILLS POLO CLUB" sued the defendant companies for infringing its trade marks by manufacturing and selling clothing, footwear and headgear under the sign "SANTA MONICA POLO CLUB". It also sued the directors of two of the companies personally, claiming that they were jointly and severally liable with the companies for the infringements. The directors were siblings. The brother was the managing director of the companies and he was the one who managed the IP portfolio for the companies, instructed their design director to oversee designing a logo for the "SANTA MONICA POLO CLUB" sign and selected the factories to make the goods that were found to infringe. The sister was the head of sales of a division of the companies and had a very hands-on role of managing the day-to-day running of the division. The division had a showroom which stocked the infringing goods. It was her decision to display the goods and she sold them to customers. Both of them did not dispute that, as a matter of causation, their conduct in giving instructions to manufacture, sell and offer to sell the goods bearing the offending sign induced the company to infringe the proprietor's trade marks.[58] But they disputed that they knew or should reasonably have known that the manufacture, sale and offer for sale were infringements of the proprietor's marks.

29 The trial judge found that the parties' marks were sufficiently similar so as to give rise to a likelihood of confusion on the part of the public. He also held that the directors were jointly liable with the companies on the ground that they had both procured the infringements

55 *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229 at [37].
56 *Lifestyle Equities CV v Ahmed* [2021] Bus LR 1020 at [25] and [30].
57 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [129].
58 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [29].

of the proprietor's trade marks and participated in the infringements pursuant to a common design.[59] The judge made no finding as regards whether the directors knew or ought to have known that there was a likelihood of confusion or infringement. This was because, on his view of the law as affirmed in *Sea Shepherd*, the absence of such knowledge did not affect their liability. As mentioned, the Court of Appeal upheld his decision.

30 The Supreme Court however did not agree. Lord Leggatt (with whom the other Law Lords agreed) opined that there is no logical reason that just because strict liability applies to the primary wrongdoer, it should also apply to an accessory.[60] In respect of trade mark infringement, there is "no necessary connection between the two".[61] He said that applying the same standard of knowledge or mental element to the infringer and the accessory would be logical if procuring to commit a tort or participating in a common design to do so were itself a tort. But that is not so with the accessory's liability because his liability is secondary to the infringer's liability and arises from the infringer's tortious act. Lord Leggatt categorically opined that accessory liability for tortious wrongs in general and IP infringements in particular requires a mental state on the part of the accessory.[62]

31 With respect, Lord Leggatt did not fully explain why the fact that the accessory's liability is secondary to the infringer's liability should be an impediment to applying strict liability to the former. He instead supported his opinion by contrasting the law on copyright which provides for authorisation to be a restricted act with trade mark law which does not have such a provision.[63] However, it is precisely because authorisation is not stipulated in trade mark and other IP laws that it can be assumed that the legislative intent was for accessory liability to be governed by ordinary principles of tort liability. As mentioned, one of the principles is that knowledge of infringement and any other mental element are not required for accessory liability.

32 As regards what kind of knowledge or mental element is required, Lord Leggatt reviewed a number of authorities[64] and concluded that, in

59 *Lifestyle Equities CV v Santa Monica Polo Club* [2018] FSR 15 at [106].
60 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [90].
61 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [95].
62 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [92]–[94].
63 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [92]–[95]. The law is the same in the Copyright Act 2001 (2020 Rev Ed) and Trade Marks Act 1998 (2020 Rev Ed).
64 The authorities reviewed include *Lumley v Gye* (1853) 2 El & Bl 216; *OBG Ltd v Allan* [2007] 2 WLR 920; *Quinn v Leathem* [1901] AC 495; and *CBS Songs v Amstrad Consumer Electronics plc* [1988] AC 1013.

respect of accessory liability based on procurement, "[w]hat is required is that the defendant acted in a way that was intended to cause another party (the primary wrongdoer) to do an act which the defendant knew was a wrongful act (turning a blind eye being sufficient for this purpose)".[65]

33 How would the defendant know that the act is a wrongful act? What sort of knowledge must he have? According to Lord Leggatt, it is knowledge of "*the essential facts which make the act of the primary wrongdoer an actionable wrong together with an intention to procure the doing of that act*"[66] [emphasis added]. He said that there is considerable support for this "knowledge of the essential facts" approach:[67]

> Considerations of principle, authority and analogy with principles of accessory liability in other areas of private law all support the conclusion that *knowledge of the essential features of the tort is necessary to justify imposing joint liability on someone who has not actually committed the tort*. [emphasis added]

34 With respect, none of the authorities cited by the learned judge support that conclusion. Instead, they indicate that the knowledge and intention relate to procurement or inducement, not essential facts. For instance, in *CBS Songs*, Lord Templeman said that a defendant who procures a breach of copyright is liable jointly and severally with the infringer if "he *intends and procures* and shares a common design *that infringement shall take place*"[68] [emphasis added].

35 Lord Leggatt interpreted "intends and procures … that infringement shall take place" to mean that "the defendant must know the facts which make that act a breach of copyright".[69] It is respectfully suggested that this interpretation is not apparent from Lord Templeman's passage, as well as from the authorities referred to by him.[70]

36 Turning to the facts, the Supreme Court noted that no case was advanced before the trial judge, nor did he make any finding, that the

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65 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [102]–[107]. He indicated (at [134]) that this conclusion is just as applicable to accessory liability based on participation pursuant to a common design.

66 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [133].

67 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [137].

68 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1058.

69 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [108].

70 The authorities referred to by the learned judge include *Allen v Flood* [1898] AC 1, where Lord Watson said at 107:

> He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured.

The wilfulness or intention relates to inducement. There is no reference to knowledge of the facts that make the act unlawful.

directors had knowledge of, or turned a blind eye to, the essential facts which made the acts of the companies in using the "SANTA MONICA POLO CLUB" signs wrongful. Although he found that the signs were sufficiently similar to the proprietor's trade marks such as to give rise to a likelihood of confusion, he did not find that the directors knew, or should have appreciated, that there was a likelihood of confusion.[71] Thus, the court held that the trial judge's findings did not at all satisfy the above-mentioned "knowledge of the essential facts" test. It may be said that due to the way in which the case was conducted at the trial, the court's decision to allow the directors' appeal cannot be faulted. However, there was a missed opportunity for the court to specify the essential facts or features which would have made the acts of the companies amount to trade mark infringements and which the directors must have had knowledge of in order to impose accessory liability upon them.

37 In the field of trade marks in Singapore and England, the essential elements to establish trade mark infringement are: (a) the use of the sign complained of in the course of trade;[72] (b) the sign is similar to the claimant's registered trade mark; (c) the sign is used in relation to goods or services that are identical with or similar to those for which the trade mark is registered; and (d) there exists a likelihood of confusion on the part of the public as a result of the similarities.[73] It is submitted that these four elements would be the essential facts or features which an accessory must have knowledge of in order to inflict accessory liability on him.

38 In the natural order of human affairs, when a person procured an infringement or assisted the infringer to commit an infringement pursuant to a common design (that is to say, he is an accessory), he would inevitably know of the use of the sign complained of – thus, his knowledge of the essential fact or feature (a) can easily be proven. But knowledge of such use is different from knowledge of the essential fact that the use is indeed an infringement in law. Must the accessory also know that the use would amount to an infringing act in law? Would he still be liable if he has no such knowledge or genuinely believes that the similarities are not close enough but the use "turns out" to be an infringement in law? These questions also relate to the other three elements. Establishing each of these elements does not merely depend on the defendant's factual assessments regarding the similarities and likelihood of confusion but requires the application of legal principles which will override the

71 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [139].

72 "Use" is defined in s 27(4) of the Trade Marks Act 1998 (2020 Rev Ed) to include such acts as applying the sign complained of on goods, importing or exporting the goods under the sign and offering the goods for sale.

73 Section 27(2) of the Trade Marks Act 1998 (2020 Rev Ed) (equivalent to s 10(2) of the English Trade Marks Act 1994 (c 26)).

assessment.[74] This is unlike trespass (cited by Lord Leggatt) in which the essential facts are: (a) entry upon another person's property; and (b) the entry is without the permission of that other person. There is little wriggle room for the trespasser and his accessory to deny knowledge of these facts or acts and that it is legally wrong to enter another person's property without permission.

39 To be clear, Lord Leggatt did say that it is not knowledge of the law which must be established (as ignorance of the law is no excuse) but rather knowledge of the essential facts which make the act unlawful.[75] This is what he said: "Only if all the features of the act done which make it, for example, an infringement of a patent or copyright or trade mark are known to a defendant whose conduct has procured the infringement, will the defendant be jointly liable with the actual infringer."[76]

40 However, this is no answer to the above-mentioned conundrum. If, for example, a person knows of the essential features of trade mark infringement (such as similarities of marks and of goods or services) and assesses that the similarities are not close enough such as to give rise to a likelihood of confusion but his assessment is later found to be wrong by a court through the application of legal principles, would he still be jointly liable for the infringement and for making a wrong judgment call? This intriguing but difficult question does not arise under the existing strict liability approach.

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74 In Singapore, the legal principles include adopting the "step-by-step" approach whereby the three requirements of similarity of marks, similarity of goods or services and likelihood of confusion arising from the two similarities are assessed systematically and individually before the final requirement (likelihood of confusion) is assessed in the round: *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide, Inc* [2014] 1 SLR 911 ("*Staywell*") at [15]. Determining the similarity of marks is based on their visual, aural and conceptual aspects, with the qualification that not all these aspects must be established for a finding of similarity. The relative importance of each aspect varies with the circumstances and a trade-off between the three aspects can be made: *Hai Tong Co (Pte) Ltd v Ventree Singapore Pte Ltd* [2013] 2 SLR 941 ("*Hai Tong*") at [40(a)]. Also, the determination is to be based on a "mark for mark" comparison of the marks, without taking into account "any external added matter or circumstances": *Hai Tong* at [40(b)] and *Staywell* at [88]. This means that the court will not have regard to how the marks as well as the goods in question are in fact used in trade. Also, factors which are *not intrinsic* to the nature of the goods but are susceptible to changes that can be made by a trader from time to time, such as "pricing differentials, packaging and other superficial marketing choices which could possibly be made by the trader" are not relevant for determining a likelihood of confusion: *Staywell* at [20].

75 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [108].

76 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [1391.

41 In respect of patented products, it is likely to be more difficult to establish accessory liability based on "knowledge of the essential facts" approach. This is because patent infringement is contingent not only on the types of factual acts that constitute the infringement (*eg*, making, importing or using an infringing product and using or importing a product obtained directly by means of an inventive process[77]) but also on whether the act complained of falls within the scope of the patent monopoly. These twin requirements constitute the essential facts for establishing patent infringement.

42 Determining the scope of a patent monopoly is a notoriously difficult exercise. It is the subject of several court cases in Singapore and England. The starting point for the determination is s 113(1) of the PA which provides that an invention for a patent shall be "taken to be that specified in a claim of the specification of the application or patent (as the case may be) as interpreted by the description and any drawings contained in that specification". There is no shortage of rules governing how patent claims are to be interpreted. The more important ones are that the claims are to be interpreted purposively rather than literally and, in interpreting a claim, the court dons the mantle of a person skilled in the art – that is, someone in the field of technology relevant to the invention in question and who possesses, amongst other characteristics, common general knowledge in the art concerned.[78] In practice, questions of validity of a patent and patent infringement are often fraught with considerable uncertainty requiring long and expensive trials to resolve. It is unrealistic to expect laypersons to know whether or not the impugned acts fall within the scope of the patent monopoly.

43 It will be recalled that at para 22 above, it is suggested that if there were a requirement to prove knowledge of infringement on the part of an accessory to establish his liability while strict liability continues to apply to the infringer, it would not only offend common sense but would also be harsh in situations where the infringer is a subordinate of the accessory. Lord Leggatt was not deterred by such an outcome. Using the hypothetical situation of an employee who commits trespass as a result of obeying the instructions of a director, when neither of them knows that the act of the employee would amount to a trespass,[79] he opined that he did not regard it as unjust that the director, who has committed no

77 These are set out at s 66(1) of the Patents Act 1994 (2020 Rev Ed).

78 See, *eg*, *Ila Technologies Ltd v Six Element Technologies Ltd* [2023] 1 SLR 987 at [63] and [79].

79 This is likely to be due to turning a blind eye. As mentioned earlier, it is difficult for a trespasser and his accessory to argue that they did not know that they have entered upon another person's property without permission and that it is not legally wrong to do so.

trespass himself and was unaware that his order would have that result, should "escape scot free" and that while it would be unjust to leave the employee to bear the loss, "that injustice is not removed by inflicting liability on another innocent individual [*ie*, the director] as well. That merely compounds the injustice."[80]

44 To him, the solution to the injustice to the innocent employee lies in his entitlement to an indemnity from the employer, under an implied term of his employment contract.[81] With respect, this solution would provide scant solace to the employee and is susceptible to criticism. It would leave the employee vulnerable and expose him to the tender mercies of the director and employer. Also, Lord Leggatt's opinion concerning compounding the injustice is debatable; one could argue with some force that inflicting liability on the employer is not unjust. This is because it is he who procured, induced or incited the innocent employee to commit the trespass and he should bear some moral and legal responsibility for such an act. He is not an "innocent individual". Moreover, the injured victim is likely to view him as not "innocent" but as more culpable than the employee.

45 The Supreme Court's substitution of the "knowledge of the essential facts" approach for strict liability is also likely in practice to increase the burden on IP proprietors to establish infringement against accessories. This is especially so in cases where there are plausible arguments by both parties on issues such as those concerning similarities of marks, likelihood of confusion and whether the impugned product falls within the scope of a patent claim. After all, as Lord Leggatt acknowledged, there is often room for argument and honest difference of opinion on whether competing marks and/or goods or services are similar and whether the similarities would give rise to a likelihood of confusion.[82] The same may be said about whether an offending design is "not substantially different from" the registered design and whether an impugned product falls within the scope of a patent monopoly. The court's decision puts a greater onus on the IP proprietors to demonstrate why infringement is clear and should have been obvious to an accessory and why the accessory cannot in good faith deny the infringement.

80 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [90].

81 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [91].

82 See *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [138]. He said this after he noted (at [138]) that the offending "SANTA MONICA POLO CLUB" sign was "different in various ways from" the proprietor's mark "BEVERLEY HILLS POLO CLUB", and that the case before him was not one of those "simple" cases where a company offers for sale counterfeit goods, and it may be obvious that a director who arranged for the manufacture and sale of the goods, must have known the facts which made the company's acts infringements of the claimant's trade mark.

They would have to think very hard about whether to include or add an accessory in an infringement action. This can be challenging, unless the case against the accessory is clear-cut such as it involves a counterfeit trade mark[83] or an ex-employee marketing a product which is an obvious copy of his former employer's patented product or if the industry is small with few players and highly specialised.[84]

46 The UK Supreme Court's substitution of strict liability also has the effect of jettisoning much of the law on accessory liability of directors. To that we now turn.

IV. Directors' accessory liability for company's wrongful acts

47 Much has been written about the issue of liability of directors for the wrongful acts of their company. The issue has been described as a "perplexed" one[85] which has "persistently vexed the common law".[86] This is due in large part to divergent decisions in Anglo-Commonwealth jurisdictions that applied different tests for the nature and extent of the director's participation or involvement in the company's acts which would render him jointly liable. The divergence stems from having to balance two well-established principles.

48 The first principle is that directors are not jointly liable with their company for its tortious acts (including IP infringements) merely because they are directors and carrying out their duties as such.[87] This gives proper recognition to the well-established principle, going back to *Salomon v A Salomon & Co Ltd*,[88] that individuals are entitled to limit their liability by incorporating a company, which is a distinct legal entity, to carry on their business. The rationale for this separate legal entity principle is that if directors are made liable too easily, many commercial decisions will be fraught with the danger of personal liability being imposed on the directors who might then become overly cautious in making management decisions, so as to avoid becoming vulnerable to legal suits. This will in turn be disadvantageous to the company commercially. It is thus in the

83 A "counterfeit trade mark" is defined in s 3(6) of the Trade Marks Act 1998 (2020 Rev Ed).

84 See, *eg, Towa Corp v ASM Technology Pte Ltd* [2017] 3 SLR 771.

85 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [34].

86 *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980 at [115].

87 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476 and *Wah Tat Bank Ltd v Chang Cheng Kum* [1975] AC 507 at 514. See also *Evans v Spritebrand Ltd* [1985] 1 WLR 317 at 323 where Slade LJ said that "[t]he mere fact that a person is a director of a limited liability company does not by itself render him liable for torts committed by the company during the period of his directorship …".

88 [1897] AC 22.

interests of the company that directors should enjoy the benefit of the limited liability afforded by incorporation.[89]

49 On the other hand, there is the principle that everyone should answer for his tortious acts. In particular, a director should not be able to use his company as a shelter or vehicle for such acts. In *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc*[90] ("*Mentmore*"), Le Dain J, who delivered the judgment of the Federal Court of Appeal of Canada, said that the balancing of these two principles involved a "very difficult question of policy".[91]

*A. The "*Mentmore*" test*

50 Cases abound in Anglo-Commonwealth jurisdictions as to how the balance between the two principles is to be struck.[92] Many of them involved IP infringements. The courts in these cases formulated and adopted various tests for the nature and extent of the participation or involvement which would render a director liable as an accessory in the company's wrongful acts. In *Mentmore* itself, Le Dain J postulated that what is required is "that degree and kind of personal involvement by which the director or officer makes the tortious act his own"[93] and that a director would make a tortious act his own if he is engaged in "the deliberate, wilful and knowing pursuit of a course of conduct that is likely to constitute infringement or which reflected an indifference to the risk of it".[94] He was careful to stress that, despite the use of the words "deliberate" and "knowing", it is not necessary to prove that the director knew the relevant acts were infringing acts.[95] His suggestions were widely accepted by the courts in Canada.[96]

89 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [34].
90 (1978) 89 DLR (3d) 195.
91 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 202.
92 A number of the cases were reviewed in Helen Anderson, "Directors' Liabilities for Corporate Faults and Defaults – An International Comparison" (2009) 18 *Pacific Rim Law and Policy Journal* 1 at 34–43.
93 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 203, hereafter referred to as the "*Mentmore* test".
94 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 204–205.
95 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 204.
96 See, *eg*, *Scotia McLeod v Peoples Jewellers* (1995) 129 DLR (4th) 711 and *ADGA Systems International Ltd v Valcom Ltd* (1999) 168 DLR (4th) 351 (OAC) (Can) (Ont).

51 The *Mentmore* test found favour with the majority of the Full Court of the Federal Court of Appeal of Australia in *Keller v LED Technologies Pty*.[97] The case involved infringements of registered designs for lenses used in combination with rear lights of motor vehicles. Keller was the director in the infringing companies who was involved in the day-to-day management of the companies, including the manufacture and sale of the infringing products. The other director (Armstrong) was the chairman of the boards of directors of both companies and attended board meetings as well as sales and marketing meetings. A trial judge had ruled the two directors to be personally liable as joint tortfeasors with their companies in infringing the designs.

52 The majority of the Full Court (Emmett and Jessup JJ) reversed the ruling as they held that the two directors did not make the infringing acts their own. Emmett J gave his take on the *Mentmore* test by stating that "[w]here a person is acting in the capacity of a director, the person will not be liable for the act of the company unless it can be shown that, in so acting, the director was doing something more than acting as a director."[98]

53 The minority judge (Besanko J) said that the *Mentmore* test lacked precision[99] and he appeared to prefer the "direct or procure" test (discussed below) which, to him, was "reasonably clear".[100] At any rate, he found Keller to be liable under either test. As for Armstrong, although he had a greater degree of involvement than the usual involvement of a director of a large company, he did not have such a close personal

97 (2010) 268 ALR 613. Prior to this case, the weight of authority in Australia appeared to be in favour of the "direct or procure" test (discussed at para 57 *ff*): see Stefan Lo, "Dis-Attribution Fallacy and Directors' Tort Liabilities (2016) 30 *Australian Journal of Corporate Law* 215 at 224. It was adopted by a number of appellate judges, such as Thomas J of the Supreme Court of Queensland in *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FLR 101 at 127; Burchett J in the Federal Court of Appeal of Australia in *Martin Engineering Co v Nicaro Holdings Pty Ltd* (1991) 100 ALR 358; by Lindgren J in the Federal Court of Appeal of Australia in *Microsoft Corporation v Auschina Polaris Pty Ltd* (1996) 71 FCR 231 at 245–246 who said that the test was "more satisfactory" than the "make the tort his own test" test. In other cases, however, the judges noted the existence of the two competing tests and decided the cases before them without the need to resolve the uncertainty: see, *eg*, *King v Milpurrurru* (1996) 66 FCR 474; *Allen Manufacturing Co Pty Ltd v McCallum & Co Pty Ltd* [2001] FCA 1838; and *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380.

98 *Keller v LED Technologies Pty* (2010) 268 ALR 613 at [83], *per* Emmett J.

99 *Keller v LED Technologies Pty* (2010) 268 ALR 613 at [287].

100 *Keller v LED Technologies Pty* (2010) 268 ALR 613 at [286].

involvement in the infringing acts such that it was proper to conclude that he directed or procured them.[101]

54 In England, the *Mentmore* test received the unqualified approval of Nourse J in *White Horse Distillers Ltd v Gregson Associates Ltd*[102] who described it as "an entirely rational basis for personal liability".[103] He interpreted the test as follows:[104]

> Before a director can be held personally liable for a tort committed by his company he must not only commit or direct the tortious act or conduct but he must do so deliberately or recklessly and so as to make it his own, as distinct from the act or conduct of the company.

55 However, a year later, in *C Evans & Sons Ltd v Spritebrand Ltd*,[105] the UK Court of Appeal was less than enthusiastic about the interpretation. It advised caution concerning the test, noting that Le Dain J had himself rightly stated that the nature and extent of participation in the tortious act which will render a director personally liable is an "elusive question" and "a question of fact to be decided on the circumstances of each case".[106] This put paid to any further acceptance of the *Mentmore* test in English law.

56 Apart from the *Mentmore* test, what is the legal position if the accessory's participation or involvement is indirect or more specific, as compared to making "the tortious act his own" – in particular, if he directs or procures the company to commit the infringing act?

B. The "direct or procure" test

57 The starting point is *Lumley v Gye*,[107] in which the defendant was sued for unlawful interference with a contract between an opera singer and a theatre manager. He was a rival manager and had enticed

101 *Keller v LED Technologies Pty* (2010) 268 ALR 613 at [297]. It is not necessary to consider another test, called the "assumption of responsibility" test, in this article. This is because the test is confined to cases concerning the director's duty of care and tortious acts such as negligent misstatements and deceit: see, *eg*, *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517; *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830; *Standard Chartered Bank v Pakistan International Shipping Corp (No 2)* [2003] 1 AC 959 and *Customs and Excise Commissioners v Barclay Bank plc* [2007] 1 AC 181. Besides, the test has not been deployed in any intellectual property cases.

102 [1984] RPC 61.

103 *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61 at [91].

104 *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61 at [91].

105 [1985] 1 WLR 317.

106 *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 at 330.

107 (1853) 2 El & Bl 216.

the singer to breach the contract. In finding against the defendant, Erle J stated that:[108]

> … the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong … he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.

58 This passage has been authoritatively interpreted to mean that the liability is not confined to interference with contracts only. For instance, in *Quinn v Leathem*,[109] Lord Macnaghten said that the decision in *Lumley v Gye* was based upon "the ground that a violation of legal right committed knowingly is a cause of action"[110] and Lord Lindley said that the decision "cannot be confined to inducements to break contracts of service" and "reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him".[111]

59 Subsequent cases took the cue and held a director to be liable as an accessory if he directs, authorises or procures his company to commit a *tortious* act. In the field of IP, the seminal case is the copyright case of *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd*[112] where Atkin LJ stated that "[i]f the directors themselves directed or procured the commission of the [tortious] act, they would be liable in whatever sense they did so, whether expressly or impliedly".[113]

60 This statement exercised a deep influence in Commonwealth jurisdictions. Specifically, the "direct or procure" test has been applied in relation to tortious acts in Australia (as mentioned earlier[114]), Hong Kong[115] and New Zealand.[116] In Singapore, the test was adopted in *Gabriel Peter & Partners v Wee Chong Jin*[117] in which a law firm sought to make the directors of a company liable for allegedly authorising, directing and procuring the company to pass a board resolution which contained an alleged libel against the firm. Yong Pung How CJ, who delivered the judgment of the Court of Appeal said that "a director can, in certain circumstances, be liable for a tort committed by the company

108 *Lumley v Gye* (1853) 2 El & Bl 216 at 232.
109 [1901] AC 495.
110 *Quinn v Leathem* [1901] AC 495 at 510.
111 *Quinn v Leathem* [1901] AC 495 at 535.
112 [1924] 1 KB 1.
113 *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at 15.
114 See n 99 above.
115 See, *eg*, *Kabushiki Kaisha Yakult Honsha v Yakudo Group Holdings Ltd* [2004] 1 HKC 630 and *Tai Shing Diary Ltd v Maersk Hong Kong Ltd* [2007] 2 HKC 23.
116 See, *eg*, *Lucas v Peterson Portable Sawing Systems Ltd* (2003) 57 IPR 305.
117 [1997] 3 SLR(R) 649.

if he directed or procured the commission thereof".[118] The test was also applied in *TV Media Pte Ltd v De Cruz Andrea Heidi*[119] where a director was found liable for authorising his company to import slimming tablets containing undeclared substances. The Court of Appeal expanded the scope of the test, stating that it was not confined to a situation where the wrong could be isolated as a positive, clear, deliberate act but might apply equally to a negligent course of omissions.[120] The court found that the director was clearly the controlling mind and spirit of the company and that he had authorised, directed and/or procured the company's acts.[121]

61 In England, the "direct or procure" test was adopted at the highest level without judicial exploration in *CBS Songs*. Lord Templeman said that a defendant who procures a breach of copyright is liable jointly and severally with the infringer if "he intends and procures and shares a common design that infringement shall take place".[122]

C. Said v Butt *principle*

62 At the same time, there was a parallel development which *exempts* a director from accessory liability for his company's breach of contract which he had directed, authorised or procured. This was the case of *Said v Butt*,[123] in which the plaintiff was refused permission to enter a theatre to view a play. The refusal was made at the direction of the defendant, the managing director of the theatre company. The plaintiff sued the defendant for wrongfully and maliciously procuring the company to breach the contract, arising from the sale of a ticket to him to view the play.

63 The suit failed because the plaintiff could not establish the existence of a contract between him and the company and accordingly could not prove that the defendant had caused any breach of a contract. Nonetheless, McCardie J went on to consider what would have been the position had there been a contract. He did this because there is an established principle that knowingly inducing a breach of contract is a tort, and this gives rise to the question: would the defendant be liable for the tort? He answered this question in the negative because, in his view,

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118 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [35].
119 [2004] 3 SLR(R) 543.
120 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [128].
121 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [145].
122 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1058. He added that a defendant may procure an infringement by inducement, incitement or persuasion. See also *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507, where the Privy Council applied the test in relation to the tort of conversion.
123 [1920] 3 KB 497.

a servant's acts are, in law, those of his employer and it is the employer himself, acting by the servant as his agent, who breaches the contract. He opined that "if a servant acting *bona fide* within the scope of his authority procures or causes a breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the [third party]".[124] McCardie J was at pains to stress that this statement was confined to liability for directing, authorising or procuring a breach of contractual relations:[125]

> Nothing that I have said today is I hope inconsistent with the rule that a director or servant who actually takes part in or actually authorises such torts as assault, trespass to property, nuisance or the like may be liable in damages as a joint participant in one of such recognised heads of tortious wrong …

64 In fact, the statement did cause an anomaly as there is now a distinction between an exemption for directors from accessory liability in respect of their company's breach of contract as compared to the existence of accessory liability for its tortious acts. Despite this, the principle embodied in McCardie J's opinion (the *Said v Butt* principle) has received universal approval in the common law world, although its precise scope (particularly concerning the director's *bona fide*) has been subject to some debate. It has been accepted in England,[126] Australia[127] and Canada.[128] In Singapore, it was adopted in *Chong Hong Kuan Ivan v Levy Maurice*,[129] *Nagase Singapore Pte Ltd v Ching Kai Huat*[130] and *M+W Singapore Pte Ltd v Leow Tet Sin*.[131] More recently, the principle was closely considered by our Court of Appeal in *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[132] ("*PT Sandipala*"). After reviewing the authorities from the countries mentioned above, the court observed that the scope of the *Said v Butt* principle should be more clearly demarcated and defined

124 *Said v Butt* [1920] 3 KB 497 at 506.
125 *Said v Butt* [1920] 3 KB 497 at [506].
126 See, *eg*, *Scammell G & Nephew Ltd v Hurley* [1929] 1 KB 419 at 443 and 449; *D C Thomson & Co Ltd v Deakin* [1952] Ch 646 at 680–681; and *Ridgeway Maritime Inc v Beulah Wings Ltd* [1991] 2 Lloyd's Rep 611 at 624–625.
127 See, *eg*, *O'Brien v Dawson* (1942) 66 CLR 18; *Rutherford v Poole* [1952] VLR 130 at [143]; and *Root Quality Pty Ltd v Root Control Technologies Pty Ltd* [2000] FCA 980 at [125]–[134].
128 See, *eg*, *Imperial Oil Ltd v C & G Holdings Ltd* (1989) 62 DLR (4th) 261 and *ADGA Systems International Ltd v Valcom Ltd* (1999) 168 DLR (4th) 351 (OAC) (Can) (Ont).
129 [2004] 4 SLR(R) 801.
130 [2008] 1 SLR(R) 80.
131 [2015] 2 SLR 271.
132 [2018] 1 SLR 818.

to provide certainty for directors in the performance of their duties. It suggested that:[133]

> … the *Said v Butt* principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company.

65 The Court of Appeal also queried if it is legitimate to permit immunity for directors in relation to their company's breach of contract but not for its tortious acts – *ie*, whether the distinction should be maintained. It suggested two possible responses. The first, which would explain the exemption, is that, having agreed to enter into a contract with the company, the victim is taken to have accepted that remedies from any breach of the contract should be sought from the company, not from anybody else (including a director who may have directed, authorised or procured the breach).[134] The second possible response is to reconsider the director's personal liability by extending the *Said v Butt* principle to other torts and to grant exemption to a director only if "he has acted properly in the discharge of his duty to the company".[135] In the event, the court did not express a concluded view as the issue was not directly material to the appeal before it, but said that "there are compelling arguments in support for both views".[136]

66 The second possible response was relied upon by the defendant directors in *Lifestyle Equities* to ward off accessory liability. This presented an opportunity for the Supreme Court to review this whole area of law which, it acknowledged, is not "completely coherent".[137] After reviewing

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133 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [62].

134 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [76]. In *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 328 at [63], Einstein J succinctly said that "[w]here the dealings are contractual it is elementary that the outsider's rights are against the company, not the director who has represented it".

135 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [78], citing Tan Cheng Han SC, "Tortious Acts and Directors" (2011) 23 SAcLJ 816 at para 26.

136 *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd* [2018] 1 SLR 818 at [79]. A third possible response has been provided by Cathy JA in the Ontario Court of Appeal who said in *ADGA Systems International Ltd v Valcom Ltd* (1999) 168 DLR (4th) 351 at 357, that the *Said v Butt* principle "also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assured basis that the company's best interest is to pay damages for failure to perform".

137 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [63].

the authorities, the court opined that the *Said v Butt* principle is "sound", based on the first possible response suggested by the Singapore Court of Appeal in *PT Sandipala*.[138] It also said that it is a general norm or social understanding that if an agent (*eg*, a director) causes the principal to break a contract, only the principal will incur liability to the other contracting party and not the agent and that it would be contrary to that norm or understanding if the other contracting party were able to recover damages against the agent. If the other party wishes to claim from the agent, it must bargain for it, otherwise it would be given a "free ride".[139] The court postulated that, beyond contractual arrangements, the *Said v Butt* principle could also be extended to liability in tort that arises out of a voluntary arrangement "equivalent to contract" which involves an assumption of responsibility and creates a "special relationship" with the director himself.[140] Such a relationship would exist if, for instance, there is a duty of care. In the event, the court did not decide on the extension as the liability in the case was not based on contract or any voluntary arrangement between the parties.

67 Thus, the anomalous distinction persists and the law remains not "completely coherent". This is not necessarily a bad thing as a matter of principle and policy. This is because while the victim of a breach of contract can bargain for directors to be sued in the event of the breach, the victim of a tortious act has no such leeway. Imposing accessory liability on directors at the suit of the victim of a tortious act would not only protect him but would also achieve the wider policy objectives of preventing excessive risk-taking and irresponsible behaviour by directors, and ensuring accountability and corporate responsibility by both the company and the directors.

D. Four propositions

68 The *Mentmore* and "direct or procure" tests were subject to close review in *MCA Records v Charly*[141] ("*MCA Records*") which concerned infringement of the claimant's copyright in sound recordings committed by a company. The only issue on appeal was whether an individual, Mr Young, was personally liable with the company for the infringement. Although he did not hold office as a director of the company, the trial judge described him as the "*de facto* or shadow director" who was part of the corporate governance of the company and found that he exercised

138 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [54].
139 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [55].
140 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [58]–[62]. See also *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 at 835.
141 [2001] EWCA Civ 1441.

the ultimate influence over it. After considering the facts, he held that Mr Young must be taken at least to have impliedly directed or procured the tortious acts of infringement by the company.

69 Mr Young appealed to the UK Court of Appeal. He claimed that the law gave no clear guidance as to the circumstances in which a director's involvement in the acts of the company should give rise to personal liability. The court framed the issue as follows: Even if Mr Young had been a director, actual or "shadow", of the defendant company or has enjoyed ultimate influence over it enabling him to authorise, procure and direct the acts of the company, is it still necessary for the evidence to establish that he was personally involved, to a substantial extent, in the acts?[142]

70 After a comprehensive review of the authorities on accessory liability (such as *Mentmore*, *CBS Songs* and *Evans v Spritebrand*), Chadwick LJ, whose judgment Tuckey and Simon Brown LJJ agreed, put forward four "propositions" concerning the interplay between the general tort principles of accessory liability and company law principles on director's accessory liability:[143]

> (1) "A director will not be treated as liable with the company as a joint tortfeasor *if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings*" [emphasis added]. He explained that this "is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person" and said that he would accept that "if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed" [emphasis added].
>
> (2) "There is no reason why a person who happens to be a director … should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director." The circumstances would include his participation or involvement in ways which go *beyond* the exercise of constitutional control.
>
> (3) "The question whether the individual is liable with the company as a joint tortfeasor, at least in the IP field, is to be

142 *MCA Records v Charly* [2001] EWCA Civ 1441 at [27].
143 *MCA Records v Charly* [2001] EWCA Civ 1441 at [49]–[52].

> determined under principles identified in *CBS Songs* – *ie*, liability as an accessory or a joint tortfeasor may arise where the director "intends and procures and shares a common design that the infringement takes place".
>
> (4) "Whether or not there is a separate tort of procuring an infringement of a statutory right, actionable at common law, an individual who does 'intend, procure and share a common design' that the infringement should take place may be liable as a joint tortfeasor."[144]

71 In upholding the trial judge's finding, Chadwick LJ agreed that the evidence did establish that Mr Young induced the company to copy the sound recordings and issue copies to the public and that he and the company joined together in a concerted action to ensure that those acts were done.[145] What he did was beyond the exercise of constitutional control of the company.

72 Chadwick LJ's propositions have been adopted by the UK courts.[146] The following observations may, with respect, be made concerning the propositions.

73 First, propositions (1) and (2) indicate an assimilation of the general tort principles governing accessory liability with company law principles which determine when a director can be held liable as an accessory for the company's infringing acts. The two sets of principles have been operating alongside each other without any perceived doctrinal difficulty. How they operate may be illustrated as follows. A person may be held liable under the general tort principles irrespective of his status as a director. But if he is a director, would have a defence only if his involvement in the company's wrongful acts was due to his carrying out his constitutional role in the governance of the company. The converse is also true; if his conduct does not make him liable as an accessory under the general tort principles, the fact that he is a director in and of itself cannot make him liable when he would not be otherwise.[147]

144 It is suggested that the fourth proposition takes the matter no further than the third, other than to affirm that a person who intends, procures and shares a common design with the infringer that the infringement should take place may also be liable.

145 *MCA Records v Charly* [2001] EWCA Civ 1441 at [54]–[62].

146 See, *eg*, *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch) at [402]; and *British Sky Broadcasting Group plc v Sky Home Services Ltd* [2006] EWHC 3165 (Ch) at [86].

147 See the UK Court of Appeal judgment in *Lifestyle Equities CV v Ahmed* [2021] Bus LR 1020 at [34] and [36].

74 Secondly, it would appear that the propositions only apply to the "direct or procure" test (see propositions (3) and (4)). This would leave out the *Mentmore* test. As a matter of principle and policy, this may not be undesirable because, under that test, there is a greater degree of participation or involvement on the part of the director in the company's wrongful acts than simply directing or procuring the acts, as manifested by "a deliberate, wilful and knowing pursuit of a course of conduct that is likely to constitute infringement or which reflected an indifference to the risk of it".[148] In such circumstances, the director is not deserving of protection even if he was discharging his constitutional role. His liability is therefore to be governed by the general tort principles of accessory liability.[149]

75 Thirdly, Chadwick LJ's signal contribution is to carve out a safe harbour for directors who "carry out their constitutional role in the governance of the company … by voting at board meetings". This "constitutional role" exception seems fair and just. However, the consequences of sailing beyond the harbour are unclear. What other acts of the director would be excepted? In *MCA Records*, the exception did not apply as Mr Young (the "*de facto* or shadow director") was found to have induced the infringing company to copy the sound recordings and to issue copies to the public even though he may be considered to be a member of the board of the company and thus had a constitutional role in the governance of the company. It is suggested that the exception cannot in principle also apply where the director or the entire board directs or procures an infringing act knowing full well that the act is infringing or wrongful even though the direction or procurement may relate to the governance of the company. This suggestion is actually supported by Lord Buckmaster who said in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd*[150] that directors would be personally liable for the company's tortious acts if "they were acts expressly directed by them" or if "a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done".[151]

76 It can thus be seen that, for over four decades since *Mentmore*, the courts in England and other Commonwealth countries have been grappling with the "very difficult question of policy" arising from the tension between the "separate legal entity" principle and the principle that

148 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195 at 204–205.

149 See also Stefan Lo, "Liability of Directors as Joint tortfeasors" [2009] *Journal of Business Law* 109 at 133–135 in relation to the "assumption of responsibility" test.

150 [1921] 2 AC 465.

151 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476.

a director should be answerable for his tortious acts as well as the "elusive question" regarding the nature and extent of the director's involvement or participation which would render him liable. They responded to the quandaries and concerns generated by these questions by devising and deploying various tests and propositions, with carve-outs in the form of the *Said v Butt* principle and the "constitutional role" exception. The tests and propositions provided a fairly clear (if not resoundingly acceptable) response. It would now appear that the quandaries and concerns were overblown and overwrought, if not needless.

77 In *Lifestyle Equities*, the UK Supreme Court preferred the principle that everyone is answerable for his tortious acts over the long-established principle that directors are not jointly liable with their company for the company's tortious acts, merely because they are directors. It considered that the fact that a company is a separate legal entity does not justify treating a director as free from personal liability for such acts. Rather, the opposite is true.[152] Lord Leggatt categorically asserted that he did not accept that "there is any general principle of English law – whether of company law, the law of agency or the law of tort – which exempts a director, acting in that capacity, from ordinary principles of tort liability".[153] He disagreed that the liability of directors for his company's torts involves the difficult question of policy and balancing the two principles. It was clear to him that neither the "separate legal entity" principle nor its associated principle of limited liability "justifies allowing directors to escape personal liability for their tortious acts".[154] The various tests devised to address the requisite nature and extent of the director's involvement for accessory liability to arise were, to him, "amorphous" and devoid of any clear criteria.[155] These tests approach the director's liability from the "wrong way round" as they start from the presumption that directors are immune from liability in the first place. According to him, the onus should instead be on the proponents of the presumption of immunity to identify a principled basis for the immunity. "I do not think there is one", Lord Leggatt declared.[156] He discerned the underlying sentiment of the courts over the past four decades to be this: "it is unjust to hold a director personally liable for acts done in the ordinary course of performing the director's role which cause the company to commit a tort, if the director has not acted wilfully or knowingly".[157] His Lordship further asserted that it would indeed be unjust that: "anyone whose act causes another person to commit a tort should be held jointly

152 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [37].
153 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [33].
154 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [82].
155 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [82].
156 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [83].
157 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [85].

liable for the tort as an accessory if the individual was *acting in good faith and without knowledge of facts* which made the acts of the other person tortious"[158] [emphasis added].

78 Upon this broad assertion, he then delved deeply into the subject of accessory liability for IP infringements and came up with the "knowledge of the essential facts" approach. That approach, as discussed at Part III above, is freighted with conceptual and practical difficulties. In addition, there is the requirement of good faith in the approach, meaning that if an accessory (such as a director) knew (or deliberately turned a blind eye to) the essential facts which indicate infringement of an IP right (as Mr Young did in procuring the copying and marketing of sound recordings in clear breach of copyright in *MCA Records*), there would be a finding of lack of good faith and accessory liability attached to the director.[159] It is suggested that the additional requirement introduces subjectivity and unpredictability, compounding the difficulties in the "knowledge of the essential facts" approach. As mentioned earlier, one of the difficulties is that there is often room for honest opinion as to whether an act amounts to IP infringement in law. Further, whether there is good faith often spawns knotty questions of fact that are to be decided based on the circumstances of the case at hand. Like its antithesis ("bad faith"), the term itself ("good faith") is an etymological chameleon, having nuanced differences in meaning depending on the context in which it is used.

V. Conclusion

79 It should be evident by now that the preference of the author is for keeping the *status quo* for accessory liability. In addition to ensuring fairness, strict liability for accessory liability can serve as a valuable policy lever for promoting respect for IP rights. Unlike the CA, the other IP statutes (namely, the TMA, PA and RDA) do not provide for authorisation (as well as procurement and participation pursuant to a common design) to be infringing acts and are silent on whether the mental element or intention to infringe is required for accessory liability. The silence has salience, as it suggests that liability for such acts is to be governed by the general principles of tort law. One of the principles that prevailed at the dates of the respective statutes is that the mental element or intention to infringe is not required for accessory liability. Lord Leggatt's statement that there is no necessity to mirror the two liabilities in terms of the mental element and intention is not based on any compelling policy imperative. His "knowledge of the essential

158 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [85].
159 *Lifestyle Equities CV v Ahmed* [2024] 2 WLR 1297 at [85].

facts" approach (with its requirement of good faith) is fraught with the difficulties that are highlighted above, exacerbating the present "state of considerable uncertainty and confusion". Besides, it is likely to work unfairly to the owners and directors of small, and even medium, sized companies as their close involvement or participation in the management of their company's activities (*eg*, manufacturing, marketing and selling activities) could itself make them personally liable for infringement by their company.

80 As for directors' accessory liability, the existing order, built up over four decades, should not have been upended. Company law principles have co-existed with the general tort principles on accessory liability without any doctrinal difficulty and without causing any incoherence and disturbance in the law. The difficult task of balancing the two conflicting well-established principles will always remain difficult. Room should be given to judges to decide on where the chips fall based on the facts of the case before them. Instead, the Supreme Court has categorically embraced the principle that everyone (including a director) is answerable for his tortious acts. In doing so, it eliminated the "constitutional role" exception. The court's choice may indeed have the adverse effect of diminishing the efficacy of the limited liability principle and causing directors to be overly cautious in making management decisions.

81 In the premises, it is to be hoped that the Singapore courts will follow their own path as regards accessory liability for IP infringement and directors, in line with developing an autochthonous legal system in Singapore.[160]

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160 In a speech delivered at the Singapore Academy of Law Second Annual Lecture on 12 September 1995, the then-Chief Justice (Yong Pung How CJ) said:

> There has been a realization over these years that Singapore has to develop its own responses to its own legal problems; Singapore has to develop a legal system that is autochthonous, that grows out of its own soil.
>
> But autochthony does mean that we have to be willing to part ways with England, whenever necessary. To some extent we have already done so, particularly in several aspects of procedure, in legislation and case law. We must continue to evolve our own rules of procedure, suited to our urban, multiracial, multilinguistic, Asian society. Our approaches to the law must reflect our own Asian values, such as consensus and respect for authority and the group. We must be willing to adopt new technologies which will assist in the effectiveness of our legal system; we cannot be Luddites, forever fearful of the new.