CONTEXT AND PURPOSE IN CORPORATE ATTRIBUTION: CAN THE “DIRECTING MIND” BE LAIED TO REST?

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Abstract: The seminal judgment of Lord Hoffmann in Meridian Global Funds Management Asia Ltd v Securities Commission in 1995 did much to clarify the law on corporate attribution. In doing so, the case highlighted the problems of anthropomorphism and in focusing on the “directing mind and will” concept. Notwithstanding Lord Hoffmann’s warnings on the dangers of the imagery employed in that concept, courts continue to rely on the “directing mind and will” concept. However, as forewarned, the continuing use of the idea of the directing mind has led to legal confusion and fallacious reasoning, as demonstrated by recent judicial decisions. This article argues that the directing mind and will concept (together with the identification theory) should be dispensed with entirely in the context of corporate attribution.

Keywords: companies; attribution; directing mind and will; identification theory; alter ego; illegality

I. Introduction

Up until the Privy Council decision in Meridian Global Funds Management Asia Ltd v Securities Commission1 in 1995, the concept of the directing mind and will of a company played a central role in questions of attribution of conduct or states of mind to a company under English common law. Under this doctrine, individuals who may be regarded as the directing mind and will of a company are identified as the company itself, and accordingly the conduct or mental state of such individuals may be attributed to the company on the basis that those individuals and the company are the one and the same. The directing mind doctrine was important in providing the juridical mechanism for imposing direct liability (as opposed to vicarious liability) on a company for civil2 or criminal wrongs.3 In addition, the

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2 Lennard’s Carrying Co v Asiatic Petroleum Co [1915] AC 705.
3 HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624; also see Tesco Supermarkets Ltd v Nattrass [1972] AC 153.
doctrine was also sometimes adopted for determining the company’s mental state or knowledge for other purposes.4

The rules of corporate attribution were re-framed in the seminal judgment of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission*. Lord Hoffmann’s judgment was groundbreaking in at least two respects. First, it provided the doctrinal framework centred on the three categories of rules of attribution (primary, general and special). Second, it moved the analysis away from the anthropomorphism (namely, the attribution of human characteristics to a non-human entity — “companies” in the present context) that underpins the directing mind and will doctrine. As Lord Hoffmann emphasised, any rule that determines what acts or states of mind of individuals may count as the acts or states of mind of a company are simply “rules of attribution”.5 Accordingly, it is unnecessary to characterise a company as having the attributes of a human being, whether for determining the liabilities of a company or for ascertaining the state of mind of a company in other contexts.

The re-formulated approach to corporate attribution in *Meridian Global Funds Management Asia Ltd v Securities Commission* was generally welcomed,6 although some commentators expressed the concern that in-roads into the directing mind theory could lead to confusion.7 Notwithstanding such concerns, *Meridian Global Funds Management Asia Ltd v Securities Commission* is regarded as the leading modern authority on corporate attribution,8 as confirmed recently by the UK Supreme Court9 and by the Court of Final Appeal in Hong Kong.10 The *Meridian Global Funds Management Asia Ltd v Securities Commission* approach has been adopted widely in civil cases,11 but it appears that the directing mind and will doctrine still holds sway in criminal cases where *mens rea* needs to be established12 and also still retains some influence even in the civil sphere.13

The directing mind concept has been criticised in the past for being unduly narrow in limiting the categories of persons whose conduct or mental state may be

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4 *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd* [1916] 2 AC 307, 319 (Lord Atkinson); *JC Houghton and Co v Northard, Lowe and Wills* [1928] AC 1, 18–19 (Viscount Sumner).
5 *Meridian Global Funds Management Asia Ltd v Securities Commission* (n.1), 506–508.
9 *Bilta (UK) Ltd v Nazir (No 2)*[2016] AC 1, [67] (Lord Sumption JSC).
11 Ferran, “Corporate Attribution and the Directing Mind and Will” (n.6) p.249.
13 Ferran, “Corporate Attribution and the Directing Mind and Will” (n.6) p.250.
attributed to a company or otherwise giving rise to uncertainty in terms of which persons can be the directing mind of a company. To some extent, these problems have been ameliorated by using Lord Hoffmann’s categories of attribution rules to supplement the directing mind concept (without necessarily jettisoning the directing mind principles) and by confining the scope of persons who come within the notion of the directing mind and will.

However, there remains a fundamental conceptual problem with the directing mind doctrine in that the anthropomorphism that underlies the doctrine gives rise to false assumptions and flawed analyses which can result in outcomes that are unprincipled or contrary to good policy. Although Lord Hoffmann’s entreaty in Meridian Global Funds Management Asia Ltd v Securities Commission to avoid anthropomorphism has been echoed by others, there is still much reliance on the directing mind concept by both commentators and judges which has given rise to problems in practice. The arguments adopted by defendants in a series of UK cases on illegality and attribution, from Stone & Rolls (Ltd) v Moore Stephens to Bilta (UK) Ltd v Nazir (No 2) (and sometimes accepted by the courts), exemplify the confusion and erroneous reasoning that can arise from adherence to the directing mind and will notion.

It is argued in this article that the directing mind and will doctrine should be laid to rest entirely. Conceptually, there is no need to equate a company with a natural person for the purpose of determining its rights or liabilities, be they of a civil or criminal nature. Questions of attribution can be adequately resolved within Lord Hoffmann’s framework of rules of attribution, with primacy given to context and purpose in the application of those rules. The fundamental role of context and purpose has been rightly emphasised in the recent decisions in Bilta (UK) Ltd (in liq) v Nazir (No 2) v

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16 The application of the common law rules of attribution for criminal liability, even under Meridian Global Funds Management Asia Ltd v Securities Commission, may still be inadequate in dealing with organisational blameworthiness where no specific individuals are fully responsible on their own for commission of the wrong: see Clarkson, “Kicking Corporate Bodies and Damning Their Souls” (n.14); Brent Fisse and John Braithwaite, Corporations, Crime and Accountability (Cambridge: Cambridge University Press, 1993); Celia Wells, Corporations and Criminal Responsibility (Oxford: Oxford University Press, 2nd ed., 2001). Here, statutory extension of criminal liability may be necessary: see, eg, Corporate Manslaughter and Corporate Homicide Act 2007 (UK); Criminal Code Act 1995 (Cth of Aust), pt.2.5.
18 Meridian Global Funds Management Asia Ltd v Securities Commission (n.1), 509.
19 Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (n.10), [67] (Lord Walker NPJ); Grantham, “Corporate Knowledge: Identification or Attribution?” (n.6) p.737; Ferran, “Corporate Attribution and the Directing Mind and Will” (n.6) p.259.
21 Ibid.
in the United Kingdom and *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*\(^\text{24}\) in Hong Kong. It will be argued that the framework of rules of attribution has made redundant the recourse to the imagery of the directing mind and will of a corporate entity and that the continued reliance on the directing mind concept perpetuates muddled thinking and confused reasoning in the law.

This article is structured as follows. Section II argues for the primacy of context and purpose in determining matters of attribution. Section III analyses the problems arising from anthropomorphism and continued use of the directing mind concept and argues that such problems can be avoided by focusing on context and purpose in determining whether conduct or mental states of individuals should be attributed to a company. Following upon the analysis in Section III, it will be argued in Section IV that the time has come to completely abandon the concept of the directing mind. The implications of such abandonment are also analysed in Section IV.

### II. Primacy of Context and Purpose in Attribution

#### A. *Status of Meridian Global Funds Management Asia Ltd v Securities Commission and the concept of attribution*

In the early years following *Meridian Global Funds Management Asia Ltd v Securities Commission*, Hawke observed that judicial attitudes to the directing mind and will concept “have been confused” but the concept was not “dead in the water”.\(^\text{25}\) Ferran observes that speculation of the death of the directing mind and will test was exaggerated, and the concept still continues to exert doctrinal effect in the context of corporate criminal liability.\(^\text{26}\) While recognising the importance of *Meridian Global Funds Management Asia Ltd v Securities Commission*, some corporate law texts still take the directing mind and will doctrine as the starting point on issues relating to direct or primary liability of companies (including direct criminal liability) and to determination of the state of mind of companies.\(^\text{27}\) However, as the authors of *Gore-Brown on Companies* suggest: “it is probably best now to start with the decision in *Meridian*”.\(^\text{28}\)

That *Meridian Global Funds Management Asia Ltd v Securities Commission* is now the leading authority on corporate attribution has been expressly confirmed at the highest appellate level in the United Kingdom, with Lord Sumption JSC stating in *Bilta (UK) Ltd v Nazir (No 2)* that “[t]he leading modern case is *Meridian*”;\(^\text{29}\) and

\(^{24}\) *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (n.10).

\(^{25}\) Hawke, *Corporate Liability* (n.14) p.43.

\(^{26}\) Ferran, “Corporate Attribution and the Directing Mind and Will” (n.6) p.245.


\(^{28}\) *Gore-Browne on Companies* (Bristol: Jordan), Vol 1, para.7A-1 (update 116).

\(^{29}\) *Bilta (UK) Ltd v Nazir (No 2)* (n.9), [67].
theory is beyond the scope of the present article. The important point for present purposes is that rejection of the directing mind or identification theory does not give rise to the concern of inappropriate expansion of corporate criminal liability. The rule of attribution can be preserved in the form outlined above (namely, that only the conduct or mental states of directors or senior officers is to be attributed to the company) without resorting to the identification notion or directing mind concept. Therefore, application of such a primary rule of attribution for offences requiring *mens rea* would not give rise to the perceived problem of expanded corporate criminal liability.

Finally, it is submitted that even mere description of specific individuals as the “directing mind and will” is unhelpful. Although Lord Sumption JSC in *Bilta (UK) Ltd v Nazir (No 2)* considered that the description is useful to distinguish between, for example, direct liability and vicarious liability, use of such a description is unnecessary. One can simply say that pursuant to the relevant primary rule of attribution, the conduct or state of mind is attributed directly to the company rather than through principles of vicarious liability. It might be countered that the different approach advocated here is simply one of semantics and that it is harmless to describe the relevant individuals as the directing mind of the company. However, a continuing problem with use of the “directing mind and will” phrase is that it can still, consciously or unconsciously, affect legal reasoning and confuse the issues at hand, as illustrated in Section III.145

V. Conclusion

Two decades on from the *Meridian Global Funds Management Asia Ltd v Securities Commission*, there remain some (including judges) who still invoke the imagery of the directing mind and will epithet in dealing with corporate attribution. This is so notwithstanding the admonishment by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* to avoid the dangers of anthropomorphism. The problem of the imagery, as detailed in this article, is that it can obscure the real issues at stake and give rise to erroneous reasoning. The picture of the directors and senior officers as the directing mind of the company obscures the fact that the critical question is whether to attribute conduct or states of mind of individuals to a company. Such imagery of the directing mind of a company gives rise to a false assumption of automatic attribution of individuals’ acts and mental states to the company. This has led to litigation over the application of the illegality defence to defeat claims of companies against its directors and others in respect of their wrongdoing. It has also contributed to uncertainty and argument over the so-called fraud exception.

145 See also Ferran, “Corporate Attribution and the Directing Mind and Will” (n.6) p.259.
As both the decisions in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* and *Bilta (UK) Ltd v Nazir (No 2)* have emphasised, application of the rules of attribution always requires consideration of the context and purpose of attribution. Thus, there is never automatic attribution of any person’s conduct or state of mind to a company for all purposes, even in respect of persons who have traditionally been regarded as the directing mind of a company. One should not simply equate the board of directors or others with the company as if they were the embodiment of the company irrespective of the context. If this was properly recognised, then arguments on the basis of an illegality defence to defeat a company’s claims against its wrongdoing directors for breach of duty would never have gotten off the ground, let alone going all the way to the UK Supreme Court. In this type of situation, there should not be any attribution for the purposes of an illegality defence against the company. Non-attribution here is not an exception to any *prima facie* rule of attribution. The context does not require attribution in the first place.

Due to the confusion arising from the directing mind imagery, Lord Walker NPJ is correct in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* to say that it would be better if the concept disappeared entirely. The phrase is unhelpful even as a description. There is no need to refer to persons as the “directing mind and will” of a company even where it is appropriate to apply a rule of attribution that it is only the directors’ or senior officers’ conduct or mental state that is to be attributed to a company for the purpose at hand. Thus, even in cases such as criminal offences involving a mental element or guilty mind, it is possible to discard the notion of identification and of the directing mind. Under this approach, the substance of the attribution rule is the same as under an application of the directing mind concept as a normative rule in the sense that the same outcome is achieved. However, the difference in approach is not merely semantic, as it also involves a subtle change in the conceptual analysis. There is no identification of the individuals with the company as such. It is simply a rule of attribution that the conduct or mental states of directors and senior officers should be attributed directly (rather than vicariously) to the company. It is submitted that such an approach, shorn of anthropomorphism and the imagery of the directing mind, can do much to avoid the confusion and fallacies that arise from continued adherence to the concept of the directing mind and will of a company.