Singapore Journal of Legal Studies
[2023] 498–506

BOOK REVIEWS

Corporate Attribution in Private Law by Rachel **Leow** [Oxford: Hart Publishing, 2022. XXXIV + 246 pp. Paperback: £41.99]

Given the competitive nature of legal academia today, anyone believing in free market economics would seldom find a PhD thesis or monograph that makes one wonder why it had not hitherto been written. Rachel Leow's book on attribution in private law, based on her Cambridge PhD, falls into that category. Like the proverbial twenty dollar note lying before the economist, you may not pick it up because rationally it cannot be there.

Ever since *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC, NZ), said in *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd* [2006] 3 SLR(R) 12 (HC) at [36]–[39] to be good law in Singapore, many of us fell into the deceptively easy trap of thinking that the area of attribution had fully stabilised. This suggested a universal approach to attributing acts, knowledge and even liability on the part of a company's agents or employees to the corporation. While Lord Hoffmann's speech in that case was a laudable attempt at rationalising the law that had come before, it may have done too much in using a construction/contextual approach that did not provide enough guidance to the solicitor needing to internalise an area of law in order to provide quick advice to a client (as opposed to a barrister with time to prepare for a case). But his speech also had to be seen in context. Lord Hoffmann was responding to what are seen today as metaphysical concepts like the "directing mind and will" (see *Meridian* at 511 and also *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 (CA) at [50] that "the term 'directing mind and will' of the company is but a convenient label for the persons whose knowledge or acts should be attributed to the company for the purpose of applying that legal rule"). These he saw as special rules that lay at the bottom of a hierarchy made up of first primary and then general rules of attribution.

But as in art, the law can go from one extreme of the traditional doctrinal approach to the other post-modern one. The danger with an overly contextual or purposive approach is that it can lead to all against all, one in which litigators thrive and others suffer from the unbounded arguments that they raise, particularly given how divergent corporations are today. Responding to this, Andrew Burrows (now Lord Burrows) says in the Foreword that the core of Dr Leow's thesis is that attribution "depends on the allocation and delegation to particular groups or individuals of the company's powers to act". In her foundational chapters, she reminds us that a corporation has both internal and external relationships. With attribution,

she expressed surprise (at 28) that the external dimension may have dominated its development. But this is likely due to the importance of agency law in the area of corporate contracting. While authority was once focused on what was actually authorized, most of the difficult and important cases since *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA, Eng) have been on apparent authority, which is about how the relationship between company and agent appeared to the third party. Leow, who begins her analysis of corporate contracting in Chapter 3 by looking at this case in some detail, however then brings us back to our roots by examining actual authority closely, including implied actual authority in *Hely Hutchinson v Brayhead* [1968] 1 QB 549 (CA, Eng), which was heard after *Freeman*.

Importantly, Leow also discusses at length the difference between the authorization of subordinate agents and corporate organs like the board of directors and shareholders in general meeting. For the latter, Leow points out that the more external agency approach does not work well. While Peter Watts ("Directors as Agents – Some Aspects of Disputed Territory" in D Busch, L Macgregor & P Watts, eds. *Agency Law in Commercial Practice* (Oxford University Press, 2016) 97) has suggested that the entire board should still be seen as an agent, Leow highlights the issues that arise with this as so much of how the board of directors and shareholders in general meeting do turn on the internal arrangements that are set up within the company. We are tasked with looking at corporate capacity, the constitution, the delegation of powers, and whether the powers were properly exercised (which she describes at 88 as "the most difficult question here") in creating what she terms a "a non-fictional account of attribution" (at 31).

In any case, Leow goes on to examine the subordinate agent and finds that actual authority continues to play a far bigger role even today. Simply because an agent is in breach of duty does not indicate that the agent has no authority. It is only when the agent does not act in good faith nor for proper purposes (which, in the case of the subordinate agent like a director, is the same thing, unlike in the case of the board as a whole – see 77–81) that the contract is void. Otherwise the agent can still make a contract on behalf of the principal, who can avoid it if the bars to rescission have not set in. On her analysis, the rules of attribution do not include the indoor management rule (which since *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30 (PC, Bermuda), noted H Tjio and D Ang, "No Magic to the Indoor Management Rule" [2020] LMCLQ 217, is seen as a manifestation of apparent authority, also excluded), nor deeming rules.

It is likely that the amount of delegation required for the purposes of identification or attribution must transcend that needed in normal agency law: P Davies, S Worthington & C Hare, eds. *Gower: Principles of Modern Company* Law, 11th ed (Sweet & Maxwell, 2021) at [8-048]. In Chapter 4, Leow turns her attention to torts and immediately warns us not to confuse the attribution of acts with vicarious liability, and that it was not clear that the former existed in tort law. She then tells us that vicarious liability prior to 1956 did concern the attribution of acts but then focused just on liability after that. For the attribution of acts, it falls back on her theory of delegation, which she argues has always existed, now autonomously of vicarious liability, which also means that it has not been affected by the latter's move towards a "close connection" test. Perhaps all of this complexity found itself

in a local decision involving whether a company was to be directly liable in tort for the actions of its board of directors, where in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1997] 3 SLR(R) 649 (CA) at [31], the Court of Appeal said that "[i]t naturally followed that the company was liable for its own act since an act of the organ of the company was the act of the company itself. There was no agency or master-servant relationship involved and no issue of vicarious liability". Leow would still see in that case some form of silent attribution of acts based on the constitutional arrangements in the company and the proper delegation of powers.

Chapter 5 deals with attribution in the context of unjust enrichment where Leow cites Stephen Watterson "Agents and Organisations: Attribution Rules in Unjust Enrichment Claims" [2017] RLR 255 who said that, "since the publication of the first edition of *Goff & Jones*, there is virtually no learning on the attribution rules applicable within the law of unjust enrichment". She accepts the challenge and applies her arguments of delegation and proper purposes in archetypal mistaken payments and finds that they hold despite some asking for wider attribution rules here. She then finds this consistent with other payment acts and misrepresentation-induced mistakes.

Chapter 6 departs a bit from the delegation argument when the book confronts the difficult question of attribution of knowledge. Many might have shied away from this, but it is quite clear that acts and knowledge are quite different. In the context of insider trading, for example, sections 226 and 227 of the Securities and Futures Act 2001 (Cap 289, 2020 Rev Ed) deem a corporation or partnership to be in the possession of information that is in the possession of officers or partners of the corporation or partnership respectively. But the corporation or partnership must still have the necessary *mens rea*, and not be shown only to possess the information, before it can be said to contravene the insider trading prohibition in section 219 of the Act. In this context, sections 226 and 227 also provide that a corporation or partnership knows or ought reasonably to know of any matter or thing which its officer or partner knows or ought reasonably to know. However, the equivalent provisions in Malaysia's Capital Markets and Services Act 2007 (No 671 of 2007) (M'sia) ss 190 and 191 are only concerned with the issue of possession and do not expressly attribute knowledge to the corporation or partnership as such. There would need to be fallback onto common law rules of attribution of knowledge, which to Leow argues that the knowledge possessed must be material to the exercise of powers delegated to the power-holder. She analyses this with respect to those forms of liability turning on states of mind as opposed to conduct, such as knowing receipt and dishonest assistance (*cf* M Ziegelaar, "Insider Trading Law in Australia" in G Walker (ed), *Securities Regulation in Australia and New Zealand* (2nd Ed, LBC, 1998) at 568, where it was suggested that, in Australia, there was still a need to discern the knowledge of the directing mind and will of the company or partnership in this context, even though there is specific attribution of knowledge provisions in their legislation.)

Chapter 7 comes under a separate part "Difficult Problems" and is titled "Attribution in Enforcing Duties" (contrast *Gower's* "Attribution Rules When the Company is the Claimant"). It is perhaps here that the context and purpose matters most, *eg* whether the company's responsibility is being apportioned with an agent or with a third party: *Singularis Holdings Ltd (In Official Liquidation) (A Company*

Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd [2019] UKSC 50 at [34], noted R Leow, "Attribution and illegality again" (2020) 136 LQR 181. It may be there is neither a primary nor special attribution rule if what is sought in these situations is just to say that the company itself cannot sue the wrongdoer due to a defence of *ex turpi causa non oritur actio*: *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 (CA) at [70]. See also *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Kaur d/o Sardara Singh, deceased and another* [2020] 1 SLR 115 (CA). However, the book maintains a consistent stand here and argues that her approach in searching for proper delegation and exercise of power means that it should not matter whether we seek to determine the company's duties by attributing its officers' acts or knowledge to it, or where the company is enforcing duties owed to it. It is difficult to disagree with Dr Leow when she points out that it makes little sense "to say that the act or state of mind is both the company's and not the company's at the same time" (at 202).

Chapter 8 deals with the aggregation of the acts and knowledge of different actors in the company and Chapter 9 concludes by examining, for example, how the civil "directing mind and will" theory then spreads to the criminal law where it still remains. She discussed where this and private law may diverge and converge, and also how attribution might work with non-corporate entities, all of which will require more work going forward. We will also need to think about this in the digital world with *eg* decentralised autonomous organizations set to become more commonplace today.

Marc Loth, *Private Law in Context* (Edward Elgar, 2022) warns against the extremes of pure doctrine and at the other extreme just context. He argues (at part 7.10) for a move "Back to Private Law: A Moderate Postmodernism". Leow does precisely that and may be the best example of this "tradition" (when we look back one day) as her delegation/proper use of power approach "explains exactly how context is relevant: the relevant context is the power to act which has been allocated or delegated to the actor doing the act or holding the knowledge" (at 232). In this regard, Dr Leow's excellent monograph is highly recommended for academics, judges, practitioners, and students alike. It provides a unifying principle that ties together different aspects of corporate attribution, a reminder of the dangers of over-reliance on context, and the importance of concepts.

HANS **TJIO**
Professor
Faculty of Law, National University of Singapore

Company Law: A Real Entity Theory BY EVA **MICHELER** [Oxford: Oxford University Press, 2021. xxxv + 282 pp. Hardcover + eBook: S$120.10]

Company law is extremely complex, in part because it is founded upon a substratum of statute, regulatory law, contract, tort law, equity and more. Researchers tend each to focus upon one of the main areas of inquiry, these being corporate governance, securities regulation, and corporate liability. Many basic concepts relevant to the