*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

study of company law remain contested. Debate rumbles on about matters such as separate legal personality, the boundaries of the company, corporate purpose, limited liability, veil-piercing, and so on. This review focuses upon the question of how the company is to be viewed in theoretical terms. "Theoretical" means, in this context, abstracting from less significant details and concentrating upon the company's most important elements and functions, and upon the way that it operates in the commercial world.

There has long been debate about matters of corporate ontology. In the United States, the prevailing view of the company is a contractualist one. This treats the internal legal view of the company as of little import, the company being seen as either a nexus *of* contracts or a nexus *for* contracts (Michael C Jensen & William H Meckling, "The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J Financial Economics 305 and Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (1991) respectively). Each contract-like relationship between different classes of participant involves "agency problems", which the law must attempt to ameliorate. Frequently, the focus is upon relations between shareholders and directors. Employing directors to manage the company gives rise to "agency costs" of misappropriation and shirking. Because shareholders have the residual claims in the company (being paid out last in the event of insolvency), their interests are viewed as primary. This gives rise to the idea of "shareholder primacy". Both ideas of "agency costs" and "shareholder primacy" have held enormous sway in thinking through matters of corporate law and regulation. In other words, our views of what the company *is* are of great practical importance.

A recent challenger theory downplays the idea that shareholders are primary and looks to the greater array of interests involved in the life of the company. According to Blair and Stout's "stakeholder" view (Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va L Rev 247; taking much inspiration from Raghuram G Rajan & Luigi Zingales, "Power in the Theory of the Firm" (1998) 113 QJ Economics 387), which does not dispute the company's contractual foundations, the company brings together many potentially competing interests, indicative of an important "investment" by each. The job of the directors is to allocate resources, coordinate activity, and reconcile competing interests. In the latter respect, the board of directors is viewed as a "mediating hierarch". The criticism of this view is that it leaves mysterious the inner structures of the company, which divide labour according to function and coordinate work and production (Olivier Weinstein, "The current state of the economic theory of the firm" in Yuri Biondi, Arnaldo Canziani & Thierry Kirat, eds, *The Firm as an Entity: Implications for economics, accounting and the law* (2007) 21 at 38). Beyond this work, however, Stout has considered viewing the company as a system which brings together various factors that are deployed for corporate purposes. According to this perspective, the company operates in a certain business environment from which it receives feedback, alerting the company to the need for internal change in order to survive and flourish (Tamara Belinfanti & Lynn A Stout, "Contested Visions: The Value of Systems Theory for Corporate Law" (2018) 166 U Pa L Rev 579. See also Christian A Witting, "Corporate Liability: A Systems Perspective" in Martin Petrin & Christian A Witting, eds, *Research Handbook on Corporate Liability* (2023) 42)).

Although the work reviewed in these pages is Eva Micheler's *Company Law: A Real Entity View*, this volume must be placed in the context of the fevered activity that has taken place over recent years in consideration of questions about the nature of the company and cognate issues. Collectively, the work that has been undertaken is extremely valuable because it brings together different perspectives and methodologies in the elusive quest for understanding. The recent book-length scholarship encompasses the following:

- *The Making of the Modern Company* (2022). In this book, Susan Watson takes a *historical approach* and traces how views of the company have changed from the time of the Romans. Watson herself believes that the entity (or real entity) view of the company is the correct one. However, she offers a very bare-bones, stripped-down mental model of the company. This model does not involve a hierarchy, positions and policies. It boils down to the Corporate Fund (at p 233): "the entity … exists in the abstract, separate from natural persons with the entity comprised of forms of value" (at p 234). The fund is separated from shareholders by double-entry bookkeeping (at pp 70, 261) and, because it is a permanent fund, "faciliate[s] long-term focus" (at p 70). Although the company begins its life as an abstraction, a *persona ficta*, it becomes a real entity as it begins operating in the world (at pp 227, 261).
- In *The Form of the Firm: A Normative Political Theory of the Corporation* (2018), Singer wishes to distinguish markets from corporations (at p 34) and to uncover the *socio-political dimensions* of corporations (at pp 14–16), which he sees as more than simple economic relationships and as the basis of a "real entity" view (at pp 172, 176). Singer sees corporations as "meso-level institutions", which wield considerable social power because of their productivity and efficiency (at pp 3, 82, 118). The nub of Singer's argument is this: "What distinguishes the corporation as an entity in its own right are the kinds of relationships – both normative and procedural – that enable a type of cooperation that would not be possible by individuals acting merely as individuals." These "relationships become institutionalized and codified such that they stand apart from and outlast the individuals who cooperate within it" (at p 175). The relationships in question are governed by norms and expectations which alter preferences towards cooperation, thus creating important efficiencies (at pp 118–119, 133).
- In *Corporate Personhood* (2019), Susanna Kim Ripken considers the *evolution of corporate theory*, looking at several conceptions before identifying frequently-cited characteristics of personhood. She recognises the organisational "depth" of larger corporations, which feature hierarchy, decision-making procedures, formalisation of roles and activities, and actions informed by purpose (at pp 94–95). From this it is possible to "accept that the corporation is a real and functional organizational system" (at p 96). The corporation takes its place as an "intermediate institution" (a view similar to Singer's), acting as a "buffer" between individuals and the state (at p 120). Kim Ripken examines wider questions of culture, image and branding. But she prefers not to take fixed positions on controversial issues. The main argument is about the need for openness and pluralism in considering theories of the corporation. As she states, "[t]here are many faces of the corporate person, and each is visible

when viewed through the appropriate lens" (at p 12). Indeed, "law retains efficacy and legitimacy precisely because it does not emphatically state that the corporation is *X*" (at p 56).

- In *Business Persons: A Legal Theory of the Firm* (2013), Eric Orts examines the nature of the "firm" through various legal *conceptualisations and concepts*. He insists that many fundamental questions about the existence and nature of firms must be examined from a legal perspective because law "provides the social rules by which they are both (a) governed and organized internally and (b) treated externally with respect to questions of responsibility and liability for their actions" (at p xi). As to (a), firms are constituted by reference to statute and are recognised to exist by courts (at p 28). Orts argues for an "institutionalist theory" of the firm, which recognises that they are "socially established entities that are both authorized and recognized by governments and organized and managed by individual participants" (at p 14). Similar to Watson, he takes the view that firms become "socially real" once they are up and running. Again, this is to adopt the entity view. But Orts places more emphasis than Watson upon the fact that firms orientate themselves "in accordance with a specific set of internal and external legal rules, principles, and understandings" (at p 30).

This brief survey indicates that, taken from a number of perspectives (historical, political, and legal), writers who have considered the nature of the company in recent times have affirmed a "real entity" view. Although Kim Ripken (taking a theoretical approach) is less adamant, she too proves to be receptive to the entity view.

Micheler's work takes a not-totally-unfamiliar route in concluding that the company is a real entity. The question becomes what else she brings to the table. The answer lies in her going one step further than Singer and Watson, in particular, by explaining the operation of many important aspects of company *law* by reference to the real entity view of the company. Micheler undertakes this task in an impressive fashion. Her ability to explain how current company laws and doctrines *make most sense* by reference to this understanding is almost wholly convincing and represents a major advance in our thinking (which, as one sees from the copious footnotes in Micheler's work, is built upon ground previously prepared by our intellectual forebears). As the reviewer will point out, however, one important question is left hanging.

Let us consider how Micheler proceeds with her general argument by breaking it down, then, into (a) recognition of entity and (b) explanation of laws by reference to this approach. As to (a), Micheler asserts that the way in which company law has developed means that it has "outgrow[n] the nexus of contract model" (at p vii). In part, this is because the nexus of contracts model fails to recognise sufficiently the extent of mandatory rule-making by legislatures, regulators and courts (at p vii). This is reflected, for example, in the plain fact that the Companies Act 2006 (c 46) (UK) "does not provide for a legal relationship between the directors and the shareholders or any other constituency" (at p viii). Instead, the directors' duties are owed to the company itself (at pp 126, 237). And shareholders, far from being free-to-roam principals, are "subject to constraints", for example, when it is necessary to protect creditor interests (at p 9). Perhaps even more important than these points, there is the fact of separate legal personality (SLP), which is often at the heart of court understandings of the company (at p 10) (such as in *Prest v Petrodel Resources*

*Ltd* [2013] 2 AC 415). As Micheler rightly concludes, it is not possible to explain SLP "through a nexus of contract or agency framework" (at p 46).

Micheler says that "[t]hrough the provision of separate legal personality the law acknowledges a social reality" (at p 37). This seems correct, although there is an interesting question as between Micheler's and Watson's views about which comes first – the social reality or the legal clothing of the company. Micheler implies that company law provides a legal form for persons to adopt – rather than that the company becomes real only when it starts operating in the world. Perhaps both are right – it all depends upon the way things unfold – upon whether the social grouping exists prior to incorporation or the company starts life as a shelf-company. We see, then, that both writers have something important to say about this issue, but that it is valuable to reflect upon the wider scholarship in the area.

Micheler stands on even surer ground when she discusses the social reality of the company and our collective experiences of it (that is, our understanding gained through observation – stressed, for example, in systems thinking (Donella H Meadows, *Thinking in Systems: A Primer* (2008)). She notes that "our experience of companies" is that they are "actors" (at p viii). They act autonomously with their own decision-making procedures, routines and habits (at pp viii, 1, 21). Company law *facilitates* recognition in law and in the commercial world of decisions made and actions taken (at p 20). The autonomy of companies is evidenced, moreover, by the fact that they shape the decisions and actions of participants within them (at pp 1, 22, 28). Micheler concludes with the observation that companies are real "not in a tangible way but rather in their consequences" (at p 28). What this means is that companies cannot be directly observed in the social world, but their consequences can be. But this is not to deny that, from the internal, legal perspective, companies are indeed very real (at pp 29–30). Veil-piercing doctrine apart, companies are "formal subjects of the law" (at p 30) and cannot be ignored or denied by the law (at pp 54, 64). "Corporate law … allows a social reality to become formally integrated into the legal system" (at p 30). That is a good way of putting it.

Micheler draws out the reality of the company in various ways in what I am calling part (b) of the book. For example, she notes the existence of the indoor management rule, by which external parties are not required to test whether the internal procedures of the company have been followed in the making of appointments to corporate offices (at p 79). This is to say that, so far as outsiders generally are concerned, they need not inquire into the "relational web [that] exists inside of the company" (at p 79). For these outsiders, the company is all entity and zero nexus-of-contracts. As another example, Micheler says of the company's liability in tort that "[i]f companies were fictional entities which aggregate contributions we would not trouble with their liability in tort. We would be satisfied with the personal liability of the person acting" (at p 82). This is correct. Indeed, there is a growing consensus on the need for "two level" recognition-cum-liability rules with respect to companies (Tracy Isaacs, *Moral Responsibility in Collective Contexts* (2011)).

Micheler notes that lawmakers and regulators have become increasingly interested in the inner workings of the company – recognising (so it seems) that the way in which to ensure that companies and their participants behave in acceptable ways is by influencing their internal decision-making procedures, routines and cultures. We see this in various corporate law decision-making rules (at p 105), the

provisions of the *Corporate Governance Code* (at pp 110, 149), and in new-fangled failure-to-prevent offences (at p 93ff). This is an argument that Watson would find hard to make because she boils the company down to the Corporate Fund. Micheler seems to have the better of the argument, presenting a fuller picture of the company as social reality recognised and regulated by the law and by quasi-legal instruments.

This is enough to give the reader a flavor of *Company Law: A Real Entity Theory* without spoiling it. There is more to be discovered within its pages. In this reviewer's viewpoint, the result is an extremely important (and excellent) work of scholarship that gets just about everything that it discusses right.

But this is not to say that everything is now straightforward. Indeed, there is one comparative gap in the coverage that is explained, perhaps, by the fact that Micheler concentrates on the analysis of major company law rules by reference to her version of real entity theory. These rules concern directors first and foremost. The gap, then, relates to the place of senior and middle management in the company. Micheler has 13 index entries on "managers" and "senior managers". There is no reference to "middle managers". This is a significant gap that infects much company law literature when we compare the modest discussion of managers with, for example, a text such as Richard Daft, *Management*, 14th ed (2022). While lawyers tend to focus "obsessively" on the board (says Mariana Pargendler, "The Corporate Governance Obsession" (2016) 42 J Corp L 359), those who write about the everyday operation of companies might not even have a single index entry on the board or on directors. Daft has no such entry. Neither does David Buchanan & Andrezej Huczynski, *Organizational Behaviour*, 10th ed (2019). As far as the reviewer is concerned, this is both a mystery about current company law scholarship and a chapter about the company as a real (sociological) entity that is still to be written. This is because the managers run the company day-to-day. Most of the time, the directors are nowhere to be seen.

Christian A. **Witting**
Professor
Faculty of Law, National University of Singapore