

Chapter 6

Corporate Capacity, Liability, and Attribution

Here, basic guidance to the end-of-chapter questions will be provided.

1. Define the following terms:

- **common seal;**
- ***ultra vires*;**
- **objects clause;**
- **agency;**
- **indoor management rule;**
- **strict liability;**
- **vicarious liability;**
- **identification theory.**

| Term | Definition |
|------------------------|---|
| common seal | An embossed stamp, bearing the name of the company, that can be used as the company's 'signature' to enter into contracts and execute documents |
| <i>ultra vires</i> | Where a person or body acts 'beyond one's powers' |
| objects clause | A clause in a company's articles that sets out the purposes for which the company was formed |
| agency | A relationship that arises where one person (the principal) consents to another person (the agent) acting on the principal's behalf. This usually involves the agent effecting a contractual relationship between the principal and one or more third parties |
| indoor management rule | The rule which provides that parties dealing with a company can assume that any internal management rules have been complied with |
| strict liability | A criminal offence or civil wrong that requires no mental element to establish (e.g. no <i>mens rea</i> requirement) |
| vicarious liability | Where a person is liable for the unlawful acts or omissions of another person |
| identification theory | A rule which provides that the mental state or knowledge of certain persons is attributed to the company |

2. State whether each of the following statements is true or false and, if false, explain why:

- **all companies are required to have a common seal;**
- **if a company enters into a contract that is outside of its objects clause, the contract will be void;**
- **actual authority can be express or implied;**
- **section 40 of the CA 2006 provides directors with authority to engage in acts that are outside the scope of their authority;**

- the company can be liable for the acts of its employees and agents;
- where a company is suing a director, the director cannot attribute his own wrongdoing to the company for the purposes of raising a defence.

- **All companies are required to have a common seal:** This statement is false. Companies are no longer required to have a common seal.
- **If a company enters into a contract that is outside of its objects clause, the contract will be void:** This statement is false. Generally, the validity of a contract cannot be called into question on the grounds of a lack of corporate capacity.
- **Actual authority can be express or implied:** This statement is true.
- **Section 40 of the CA 2006 provides directors with authority to engage in acts that are outside the scope of their authority:** This statement is false. Section 40 does not grant any powers to directors – it merely provides that constitutional limitations placed upon the directors’ authority cannot be used to invalidate contracts entered into by those directors.
- **The company can be liable for the acts of its employees and agents:** This statement is true.
- **Where a company is suing a director, the director cannot attribute his own wrongdoing to the company for the purposes of raising a defence:** This statement is generally true.

3. ‘Despite the decision in *Meridian Global Funds Management Asia Ltd v Securities Commission*, the “directing mind and will” test remains of substantial importance.’ Discuss the validity of this quote.

Introduction

- Every essay should begin with a succinct introduction that demonstrates that you understand the essay question. Briefly explain what the essay is about and set out what the essay will discuss and how it will be structured.
- This question requires you to discuss the extent to which the ‘directing mind and will’ test is still a valid means of determining whose actions will be attributed to the company.

Attribution and the ‘directing mind and will’

- Begin by briefly explaining the concept of liability imposed via attribution. Point out that in terms of whose actions could be attributed to the company, the traditional test used was based on identifying who was the company’s ‘directing mind and will.’
- Look at how the concept of the directing mind and will test evolved and the guidance provided by the court (e.g. *Tesco Supermarkets Ltd v Natrass*).

Meridian Global Funds Management

- Set out how the Privy Council in *Meridian Global Funds Management* developed the law relating to corporate attribution by shifting the focus away from the directing mind and will test towards a more purposeful and contextual approach under which the court would examine the relevant rule of law involved and determine the appropriate principle of attribution based on the purpose of the relevant rule. As a result of this approach, attribution could be extended to cover persons below board level, as was seen in the case of *Morris v Bank of India*.
- Look at the scope of the principle in *Meridian Global Funds Management* and discuss whether it has replaced the directing mind and will test. This appears to depend upon whether the case concerns a civil wrong or a criminal offence.
- Where the case concerns a civil wrong, then it appears that the contextual approach devised in *Meridian* is the dominant approach.
- In criminal cases, however, it appears that the directing mind and will test is still the dominant test, but if that test cannot establish the defendant's guilt, the court will adopt the approach in *Meridian* and ask if a particular rule of attribution needs to be devised.
- You may want to discuss whether having different approaches for civil and criminal cases is desirable or not.

Conclusion

- Every essay should end with a conclusion. Briefly summarise the main points/arguments and, if possible, come to a conclusion regarding the essay topic (i.e. which of the opposing views has the stronger arguments).

4. Dragon plc has adopted the model articles for public companies, but added a new art 1A which provides that 'the company shall not enter into any supply contract of over three years in length without the approval of the members.' Dragon is keen to extend a contract with one of its suppliers, Tumble Ltd. At a board meeting, Jane (the CEO of Dragon) stated that it was important that the company does all it can to extend the contract with Tumble, but that the company cannot afford to pay more than what it is currently paying. Steve (a director of Tumble) meets up with Jude (the chair of Dragon) to discuss the contract, although the other directors of Dragon do not know of the meeting, nor do they know that Katie (Dragon's company secretary) arranges for Steve to stay in a five-star hotel. The next day, Jude and Steve agree terms and a five-year extension of the contract is agreed. The extended contract is signed on behalf of Dragon by Jude and Katie.

Jude reports to the other directors of Dragon that a five-year extension of the contract has been agreed, but the other directors are extremely concerned as the price agreed by Jude is double the current price. The directors are also not happy about the prospect of Dragon paying for Steve's hotel stay. Jane seeks your advice regarding whether:

- **Dragon is legally bound to pay for Steve's stay in the five-star hotel, and;**
- **Dragon is bound to the supply contract with Tumble.**

- Where a problem question specifically tells you what issues to discuss, then it is usually wise to adopt a structure based around those two issues.

The contract between Dragon and Tumble

- The first issue to discuss is whether the contract between Dragon and Tumble is binding. The issue here is not one of corporate capacity, but of director's authority. In other words, does Jude have the authority to enter into the contract on Dragon's behalf.
- The first thing to look at here is Jude's authority as an agent. It is likely that Jude does not express actual authority to enter into the contract on Dragon's behalf. This is because the model articles do not confer such power on individual directors, but merely confer managerial power on the directors acting collectively.
- Does Jude have implied actual authority? This would depend on a number of factors. For example, if he had engaged in similar conduct before with the board's acquiescence, then the court might likely conclude that he had implied actual authority (as occurred in *Hely-Hutchinson v Brayhead*). It is likely that Jude's role as chair will not confer upon him implied actual authority, as the chair is the head of the board.
- Does Jude have apparent authority? This is unlikely as one of the requirements for apparent authority to be present is a representation from the principal (i.e. Dragon) that Jude has the authority to engage in the act in question. There is not likely such a representation here.
- If Jude did have the authority to contract on Dragon's behalf, then Tumble could use s 40 of the CA 2006 to hold Dragon to the contract, providing it can be shown that Steve is dealing in good faith (there is nothing to indicate the contrary). There is one possible ambiguity, which is that s 40 refers to the power of the 'directors' to bind the company.

Dragon's liability for the hotel bill

- Katie, Dragon's company secretary, has arranged for Steve to stay in a five-star hotel. The question is whether Dragon is liable to pay this hotel bill. This involves a discussion of the ability of the company secretary to bind the company.
- The company secretary is an agent of the company. The issue therefore is what authority does the company secretary have. It could be the case that the company had bestowed upon Katie actual authority to enter into contracts of this type (although the question does not tell us this).
- If Katie had no actual authority, the issue is whether she had apparent authority. In *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabric Ltd*, the court held that a company secretary had apparent authority to enter into contracts of an administrative nature.
- In *Panorama* itself, the court held that the secretary did not have authority to hire cars. One might, based upon this, assume that Katie would not therefore have the authority to arrange for Steve to stay in the hotel, but there is a notable difference. In *Panorama*, the company secretary used the hire cars for personal purposes, whereas it could be argued that arranging a hotel room for Steve was for company business.