Article:
Mackie, C orcid.org/0000-0002-8560-2427 (2020) Corporate groups, common officers and the relevance of 'capacity' in questions of knowledge attribution. Journal of Corporate Law Studies, 20 (1). pp. 1-38. ISSN 1473-5970

https://doi.org/10.1080/14735970.2019.1604607

CORPORATE GROUPS, COMMON OFFICERS AND THE RELEVANCE OF 'CAPACITY' IN QUESTIONS OF KNOWLEDGE ATTRIBUTION

Dr Colin Mackie, Lecturer in Business Law, School of Law, University of Leeds,

c.mackie@leeds.ac.uk

Abstract

This article proposes a new approach to determining questions of knowledge attribution in circumstances where a director, manager or secretary of the parent company is appointed to the board of directors of a subsidiary (or sub-subsidiary). These individuals are termed 'common officers' and their deployment within corporate groups is prevalent across the globe. Under the common law of England and Wales, a parent company will not be attributed with knowledge acquired by a common officer whilst they were acting in their capacity as director of the subsidiary unless a relevant exception exists. These are narrow and difficult to establish. This outcome is paradoxical as the organisational theory and sociological literature shows that common directors (and, through analogy, common officers more generally) are often deployed to create channels of communication between the companies to which they are affiliated. The proposed approach, which focuses upon the nature of the knowledge and not its source, treats information concerning the 'affairs' of the parent as capable of attribution to it for the purposes of determining its legal liability.

Keywords: rules of attribution, imputed knowledge, common officers, interlocking directorships, corporate groups, separate legal personality

Introduction

Any proposition about a company must be traceable to a rule.[1] There is, after all, 'no such thing as the company *as such*'.[2] It is a persona ficta, brought into existence by the operation of statutory rules.[3] A rule-driven process of legal reasoning (termed 'attribution'), comprising a blend of judge-made and statutory rules, enables the actions, knowledge and state of mind of one or more human beings to be *treated* as that of the company for the purposes of determining its legal liability (or rights).[4] The courts must construct a primary,[5] general[6] or special[7] rule for attribution to occur for a particular purpose; a company can only be deemed to have acted, known something or possessed a particular state of mind *where a rule so provides*. These rules of attribution connect the rules which *create* the persona ficta of a company with those which *regulate* the behaviour of 'persons' in society. Their efficacious application is critical to ensuring the legal accountability of companies.[8]

This article examines limitations of the rules of attribution as they apply to knowledge. It does so within the setting of corporate groups, specifically in relation to knowledge acquired

---

[1] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413, 506 (PC).

[2] ibid 507 (Lord Hoffman) (emphasis added).

[3] ibid 507; Companies Act 2006, s 7(1): '[a] company is *formed* under this Act by one or more persons (a) subscribing their names to a memorandum of association, and (b) complying with the requirements of this Act as to registration.'

[4] *Moulin Global Eyecare Trading Ltd (In Liquidation) v Commissioner of Inland Revenue* [2014] HKCFA 22, [61].

[5] These will, generally, be found in the company's constitution, typically its articles of association. They may also implied by the decisions of judges on questions of company law: *Meridian* (n 1) 507 (PC).

[6] These include the principles of agency law: ibid.

[7] Special rules will be defaulted to only where the primary and general rules cannot provide a solution: ibid. They arise from interpretation or construction of a substantive rule, such as one contained within a statute, and are fashioned from determination of the question as to *whose* act, knowledge, or state of mind was intended to count as the act, knowledge, or state of mind of the company *for the particular purpose* at hand: ibid. This could be the *directing mind and will* or, in certain circumstances, an authorised agent.

[8] Deborah DeMott, 'When Is a Principal Charged with an Agent's Knowledge' (2003) 13 Duke J Comp & Int'l L 291, 319.

by (human) directors, managers or secretaries of a parent company who are also appointed to the board of a strategically important subsidiary (or sub-subsidiary). For the purposes of this article, they are termed 'common officers'. The presence of common *directors* upon the boards of parent companies and their subsidiaries is widespread both within the United Kingdom[9] and globally.[10] Members of the subsidiary's board may also be drawn from the tier (or tiers) of management below board level; they may be *managers* of the parent, employed formally by

[9] Witting asserts that, '[i]n *many* cases (…), there will be *some* overlap in the identity of parent company and subsidiary company directors.' Christian Witting, *Liability of Corporate Groups and Networks* (CUP 2018) 67 (emphasis added).

[10] In a 2013 survey carried out by the professional services network, Deloitte, 65% of the responding Lead Client Service Partners (LCSPs) reported that for their clients there were common directors on the boards of the subsidiaries and their parent companies. The respondent LCSPs covered fifty-three global companies, each of which had, on average, ninety subsidiaries operating in different parts of the world. Of the thirty seven LCSPs who responded, fifteen were from the Americas, thirteen from Europe, the Middle East and Africa, six from Asia Pacific and three from other geographies. The sectors represented included manufacturing, automotive, chemicals, mining and industrial products. Whilst the data has its limitations – it is restricted to a single service provider – it illustrates the incidence of common directors within multinational enterprises (MNEs): Deloitte, *Governance of Subsidiaries: A Survey of Global Companies* (September 2013) 2 and 9 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/Corporate%20Governance/in-gc-governance-of-subsidiaries-a-survey-of-global-companies-noexp.pdf> accessed 16 November 2018.

it.[11] Directors, managers and secretaries all fall within the definition of 'officer' of a body corporate under the Companies Act 2006.[12]

As a matter of positive law, application of the rules of attribution to officers common to parent companies and their subsidiaries creates a paradox with serious implications for corporate legal accountability. A parent company will not, as a general rule, be attributed with knowledge acquired by a common officer whilst acting in their capacity as director of the subsidiary.[13] They will be deemed to be an agent of two distinct principals (the parent company

[11] '*Typically*, board members of wholly owned subsidiaries are drawn from the holding company's executive and the most senior executives in the group who are responsible for business conducted by that subsidiary': James Dickson and Jen Tan, *Overview — Functioning of Boards* (LexisNexis Australia, undated) (emphasis added) (hereafter '*Functioning of Boards*') <http://lexisweb.lexisnexis.com.au/Practical-Guidance-Topic.aspx?tid=3825> accessed 16 November 2018.

And in an October 2016 report by Deloitte, it was asserted that: '[u]sually, the parent organization nominates the directors to the subsidiary's board who are *often* directors, officers, or *employees* of the parent': Dan Konigsburg and Michael Rossen, *The Board's Agenda: Subsidiary Governance in a Multidimensional Environment* (Deloitte, October 2016) 2 (emphasis added)
<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-on-the-boards-agenda-october.pdf> accessed 16 November 2018.

A 2013 report by Deloitte observed that '[w]here there are no common directors, the headquarters is *represented* on the subsidiary boards.' Deloitte, *Governance of Subsidiaries* (n 10) 9.

[12] CA 2006, s 1173(1): "officer", in relation to a body corporate, includes a director, manager or secretary.

[13] This proposition, which will be caveated, may be inferred from a leading treatise on agency law, Peter Watts and Francis Reynolds, *Bowstead & Reynolds on Agency* (21st edn, Sweet & Maxwell, 2018) [8-211] (emphasis added): 'Knowledge acquired *when not acting for the principal*, whether acquired before or even during the period of appointment, would *not* be imputed. Such an approach has been taken in decisions over many years'. They do, however, emphasise that 'some very important notes and qualifications that need to be made to [this]': ibid, more on which will be said shortly. The editors state elsewhere that 'knowledge held by one *director* relevant to the position of a third party *will generally be imputed to the company*…But this is only a start point, and as usual the question turns on the issue at stake': ibid [8-215] (emphasis added). In the two leading Court of Appeal decisions examined in section 3 which consider knowledge privy to a common officer in the context of *non-contractual* liability, knowledge acquired whilst not acting for the relevant company was, in fact, attributed to it. However, those decisions made clear that attribution depended upon satisfaction of a relevant test. Those tests are strict

and its subsidiary) and as having entered into a relationship of agency with each of them. And under the common law of England and Wales, knowledge acquired 'outside' of the agency relationship will not be attributed to a principal unless a relevant exception exists.[14] *Directing mind and will* theory and certain duty-based approaches to attribution peculiar to common officers provide viable exceptions.[15] However, strict conditions must be satisfied as regards the former. And, for reasons considered in section 3, the latter will be difficult to invoke so as to attribute knowledge to the parent. Thus, it is not so much the case that pertinent knowledge acquired qua director of the subsidiary can never be attributed to the parent company, just that the 'real world' prospect of this occurring may be low.

This outcome does not sit comfortably with the organisational theory and sociological literature on the function of common directors (or 'interlocking directors' or just 'interlocks' as they are referred to there). A theory dominant there, resource dependency theory, posits that interlocks are used by organisations to 'manage' the complexity of their business environment.[16] Interlocks gather and disseminate information which informs the strategic choices facing the organisations with whom they are affiliated.[17] They create an 'information

---

and their conditions can be difficult for a third party to satisfy. And, as we shall see, their spheres of application are narrow. These points support the veracity of the general rule set out in this article, albeit one which is subject to exceptions. It is submitted that those two cases do not create an alternate rule, diametrically opposed to that general rule.

[14] ibid [8-211]; Peter Watts, 'Imputed Knowledge in Agency Law: Knowledge Acquired Outside Mandate' (2005) NZ L Rev 307 (hereafter Watts, 'Imputed Knowledge').

[15] See discussion in Section 3.

[16] Jeffrey Pfeffer and Gerald Salancik, *External Control of Organizations: A Resource Dependence Perspective* (1st edn 1978, Stanford University Press 2003) 161.

[17] See, e.g., Johannes Pennings, *Interlocking Directorates* (Jossey-Bass 1980) 32; Beth Mintz and Michael Schwartz, *The Power Structure of American Business* (University of Chicago Press 1985) 135-6; Pamela Haunschild and Christine Beckman, 'When Do Interlocks Matter?: Alternate Sources of Information and Interlock Influence' (1998) 43 ASQ 4 815, 817.

path' between them.[18] Whilst that literature looked exclusively at the use of interlocks *between* organisations they appear to be used in a similar way *within* organisations.[19] And this has been recognised by the judiciary in England and Wales.[20] Thus, a parent company (A) may deploy one of its officers to the board of a subsidiary (B) to, inter alia, enable A to access information that will be valuable to it. It is, therefore, paradoxical that the strategic choices of the parent may be informed by the information acquired and communicated by the common officer but that it remain immune from harmful effects associated with it unless a certain narrow, hard to establish exception can be shown to apply (hereafter 'the paradox'). An accountability gap arises which must be bridged if responsible practice and good governance within the group is to be encouraged by the law.

The paradox frames a core research question: how should the law of England and Wales deal with a 'bad' fact acquired by an officer common to a parent company (HoldCo Plc) and a subsidiary (SubCo Ltd) in their capacity as director of SubCo Ltd when questions of its attribution to HoldCo Plc arises? A 'bad' fact refers to information relating to malfeasance, neglect or harm (or the prospect of it) caused by the manner in which the subsidiary's affairs are run. Whilst a broad view of malfeasance, neglect and harm ought to be maintained, two case-studies are examined in section 2.3 to illustrate circumstances under which knowledge acquired by the common officer qua director of SubCo Ltd should, as a matter of policy, have implications for Hold Co Plc: (1) 'knowingly permit' offences in environmental law; and (2) a parent company's duty of care to those directly affected by a subsidiary's operations.

Legal scholarship has not, to date, attempted to problematise the difficult conceptual and doctrinal issues associated with knowledge possessed by officers common to parent

[18] Haunschild and Beckman (n 17) 842.

[19] Konigsburg and Rossen (n 11) 2 and 4.

[20] See text accompany fn 62.

companies and their subsidiaries. Watts touched upon the issues posed by common directors whilst addressing the broader question under New Zealand law as to whether knowledge acquired by an agent outside of their mandate for the principal was attributable to the latter, concluding that 'the cases on shared company directors are *not consistently averse* to imputation.'[21] And Watts and Reynolds, as editors of *Bowstead & Reynolds on Agency*, do cover cases concerning common officers in a section titled 'Agents of companies and large organisations' in Article 95 (Knowledge Acquired through Agent).[22] However, neither commentary dealt explicitly with the substantive issues pertaining to non-contractual liability in parent-subsidiary relations. In relation to the laws applicable in the United States, the editors of *Blumberg on Corporate Groups* concluded that the courts have 'readily' held that knowledge acquired as officer of one group company could be attributed to another group company of which they were also officer.[23] But beyond stating that this was 'appropriate' as the common officer was 'clearly under a duty to the corporation to report and use his or her full knowledge of the enterprise in the performance of his or her duties',[24] no further justification was offered. This article fills these gaps, providing normative justifications which can steer a new trajectory for the positive law.

The central claim advanced in this article is that the capacity in which the common officer acquires knowledge of the 'bad' fact should be deemed to be legally *in*significant by the courts where the information concerns the 'affairs' of HoldCo Plc. Such information should be capable of attribution to HoldCo Plc for the purpose of determining its legal liability. The term

[21] Watts, 'Imputed Knowledge' (n 14) 331 (emphasis added).

[22] Watts and Reynolds (n 13) [8-215].

[23] Phillip Blumberg, Kurt Strasser, Nicholas Georgakopoulos and Eric Gouvin, *Blumberg on Corporate Groups*, Vol 1 (2nd edn, New York: Wolters Kluwer 2018) 50.10-50.13.

[24] ibid 50.11 (emphasis added).

'affairs' would be construed broadly, as it is elsewhere in company law,[25] to reflect information concerning goodwill, profit and losses and a company's assets, including its shareholding in a subsidiary; the parent company's 'affairs' could, therefore, encompass those of its subsidiary. The approach, which would function as a general rule of attribution, reflects the reality that common officers are often deployed to create channels of communication between the companies to whom they are affiliated; they are conduits of business information. It encourages 'bad' facts concerning SubCo Ltd's affairs to be reported back to HoldCo Plc so that appropriate steps can be taken to redress the underlying issues with a view to protecting third-parties and the environment.

The wider importance of this article lies in the fact that it challenges contemporary attitudes relating to the (lack of) accountability of parent companies under the positive law for the actions of their subsidiaries. Beyond circumstances under which a parent company may be found to owe a duty of care to its subsidiary's employees[26] or those directly affected by the subsidiary's operations,[27] the literature portrays corporate law doctrine (separate legal personality and limited liability) as preventing third parties affected by the unlawful actions of a subsidiary from bringing claims against the parent.[28] This article advances the alternative

[25] See, e.g., the caselaw relating to the meaning of 'affairs' in the context of the unfair prejudice remedy under s 994 CA 2006. There, the courts have found consistently that in determining whether the 'affairs' of a holding company have been conducted in a manner unfairly prejudicial to its members, the affairs of its subsidiary can count as those of the holding company: see, e.g., *Apex Global Management Limited v FI Call Limited* [2015] EWHC 3269 (Ch).

[26] See, e.g., *Chandler v Cape Plc* [2012] EWCA Civ 525.

[27] See, e.g., *Lungowe v Vedanta Resources plc* [2018] 1 WLR 3575.

[28] See, e.g.: 'Under current law, the parent is largely protected from extended liability claims by rules of separate legal personality and limited liability.': Witting (n 9) 413; 'In the context of corporate groups, the avoidance of responsibility can be achieved by interposing a separate legal entity between the victims and the ultimate controller of the group, be it a parent company or its controlling shareholders.': Peter Muchlinski, 'Limited liability and Multinational Enterprises: a case for reform?' (2010) 34 Camb J Econ 915, 916.

narrative that greater parent accountability can, in fact, be delivered within the *current* architecture of UK company law; corporate law doctrine is not the barrier it is perceived to be. In so doing, it offers a new perspective on how parent companies could be rendered (more) accountable for the actions of their subsidiaries.

The article is structured as follows. Section 2 examines whether the capacity in which knowledge of a 'bad' fact is acquired by a common officer ought to be determinative of whether it can be attributed to HoldCo Plc for the purpose of establishing its legal liability (the *normative* question)? Section 3 evaluates the approaches adopted by the courts in England and Wales to deal with questions of knowledge attribution in common officer cases (the *positive* question)? A new approach to determining questions of knowledge attribution in cases where a parent company and its subsidiary have an officer (or officers) in common is proposed in section 4. Section 5 will draw conclusions. Whilst the positive analysis conducted in this article focuses on the law of England and Wales, much of the normative arguments will be relevant to other common law jurisdictions.

The Normative Question

This section examines whether the capacity in which knowledge of a 'bad' fact is acquired by a common officer ought to determine whether it can be attributed to HoldCo Plc for the purpose of establishing its legal liability. The focus is on two issues. First, uncovering the organisational imperatives driving the utilisation of common officers between parent companies and their subsidiaries. Second, illustrating, through two case-studies, the types of negative externalities which may be created if courts are unwilling to attribute to the parent knowledge acquired by the common officer qua director of SubCo Ltd.[29] It will be argued that, in conjunction, these

[29] Within this context, these are costs created by a company's activities which are transferred to society and, therefore, not reflected in the price charged for its goods or services (e.g. costs attributable to personal injury or pollution) Anthony Ogus,

provide a strong normative justification for courts to treat the capacity in which the common officer acquires knowledge of the 'bad' fact as legally *in*significant where the information concerns the 'affairs' of HoldCo Plc.

Common Officers as Conduits of Information

There is a vast non-legal literature, predominantly in organisational theory and sociology, which seeks to explain interlock formation and their impact on firm performance. This has focused exclusively upon their use *between* organisations, such as between a bank and a manufacturer. It does not consider their role *within* organisations explicitly. However, for the reasons explained below, much can be taken from these sources and applied thoughtfully and sympathetically to the use of common directors (and, through analogy, common officers more generally) *within* organisations, specifically between parent and subsidiary. This connection has not, to date, been made in the literature.

The sociological literature is a particularly fruitful place to start. It helps us understand *why* interlocks form. Mizruchi, a leading scholar in that field, identified the following as explicit and inadvertent reasons for this: to facilitate collusion between market competitors; attempts by organisations to absorb potentially disruptive elements into their decision-making structure (i.e. coopt and monitor sources of environmental uncertainty); to signal to potential investors that the organisation is a legitimate enterprise worthy of support; career advancement of the individual, in part, through prestige and increased social networks; and to solidify social ties

Regulation: Legal Form and Economic Theory (first published 1994, Hart 2004) 35. They are a form of market failure: ibid 21 and 25

among members of the upper class.[30] Information sharing for lawful and unlawful purposes is, therefore, *one* explanation for their creation, albeit a very important one.

Of the reasons presented by Mizruchi, organisational desire to reduce environmental uncertainly has gained the most traction in academic discourse. In organisational theory, a key theory explaining the formation of interlocks posits that they are used by organisations to 'manage' the complexity of their business environment.[31] Pfeffer and Salancik were instrumental in developing a theory of resource dependence in the context of the external control of organisations. They observed that '[t]he need for resources, including financial and physical resources as well as information, obtained from the environment' made corporations 'potentially dependent on the external sources of these resources'.[32] The thrust of their thesis is that as the 'key' to organisational survival is the ability to 'acquire and maintain resources', corporations must 'transact with other elements in their environment to acquire needed resources'.[33] Information is one such resource.[34] One organisation (A) may 'transact' with another organisation (B) upon which it is dependent by appointing an interlock to B's board. And, in this way, the interlock may be used to 'manage' the complexity of A's business environment through enabling it to acquire and maintain information.

Whilst interlocks provide one means through which information may be acquired from the external business environment, Mintz and Schwarz assert that interlocks have a more nuanced role than merely providing a 'broad business scan' and, instead, are an 'information-

[30] Mark Mizruchi, 'What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates' (1996) 22 Annual Review of Sociology 271, 273-280.

[31] Pfeffer and Salancik (n 16) 161.

[32] ibid 18.

[33] ibid 2.

[34] ibid 18.

collection system that forms the basis for *managing corporate discretion*.'[35] It is a *particular* type and character of information that the appointor desires if it is to help inform fully their strategic decision making abilities. An oversupply of information would be detrimental to it. Through drawing upon their expertise and experience the interlock can separate the relevant from the irrelevant; they can function as a filter. Mintz and Schwarz are explicit in their finding as to how the information is used by the organisation: the returning information influences, or at the very least has the ability to, discretionary decision making and so the ability for the appointor to make more informed (and, therefore, presumably better) decisions.

Other authors, building upon resource dependency theory, have developed the idea of interlocks as *conduits* of information. The sociologist, John Scott, viewed interlocking directorships as creating a 'network of communication' between corporations through which 'business information' could flow.[36] This flow can help alleviate the uncertainties facing large corporations.[37] It may do so through providing a stable, steady supply of business critical information for the appointor which will influence the construction of corporate strategy.[38] Interlocking directorships are, thus, a 'stabilizing force' in uncertain market conditions.[39] And for the management theorist, Johannes Pennings, organisations establish 'boundary-spanning positions' (i.e. interlocks) to '*manage* interorganizational interdependence so that the core can operate as if the supply of resources were stable.'[40] Recall that information is crucial, with the interlock providing a 'connection' through which firms can 'communicate' and gather a

[35] Mintz and Schwartz (n 17) 135-6 (emphasis added).

[36] John Scott, *Corporations, Classes, and Capitalism* (Hutchinson 1979) 100 (emphasis added).

[37] ibid 175 (emphasis added).

[38] ibid 100.

[39] ibid 144.

[40] Pennings (n 17) 14 (emphasis added).

'*common body*' of information.[41] For Pennings, the decision by an organisation to establish interlocks is, therefore, 'motivated by a desire to *secure information* and control over the organizational environment.'[42] In addition to enabling one organisation to increase its control over another organisation, he observes that vertical interlocking directorates (which could include common directorships between parent and subsidiary) 'perform an *intelligence* function by *expediting* the dissemination of information among transactionally interdependent organizations.' [43] Thus, not only do interlocks actively collect and import pertinent 'environmental intelligence' for, and to, the organisation but this intelligence can be shared more promptly where interlocks are utilised between dependant organisations. [44]

We can now consider why interlocks form *within* organisations. Whilst the literature dealing within this issue explicitly is embryonic, connections can be made with the literature on the use of nominee directors more broadly. A report by Deloitte, which examined the governance issues associated with subsidiaries, is an important contribution.[45] It found having one or more common *director* on the boards of the parent and subsidiary facilitated ongoing dialogue, helped avoid surprises and improved their ability to work together effectively.[46] Indeed, the use of common directors was recommended where a subsidiary was strategically important to the parent.[47] Strategic importance may derive from a number of different factors but the subsidiary's provision of a steady supply of goods and services to the parent may be crucial. These may be integral to the latter's business and, in turn, its profitability. The point to

[41] ibid 2 (emphasis added).

[42] ibid 32.

[43] ibid 26 (emphasis added).

[44] ibid 165.

[45] Konigsburg and Rossen (n 11).

[46] ibid 2 and 4.

[47] ibid.

take from this is that common directors bridge information gaps between the two companies through the channels of communication they create.

The report made clear that common *directors* engender *bilateral* information flow. Aiding top-down flow (i.e. from parent to subsidiary), placement of the parent's representative on the subsidiary's board ensured that the latter was properly informed of the parent's strategies and activities.[48] And an experienced director interviewed for the report asserted that common directors are normally 'expected' to report up to the parent on issues 'that would be viewed as *significant* and *of interest* to the parent's full board or its committees.'[49] This could encompass both 'good' facts (e.g. useful intelligence which could help steer group strategy) and 'bad' ones. We see reference to this type of expectation in the context of legal literature on nominee directors. Whilst not defined under the Companies Act 2006, the term 'nominee director' is commonly used to describe an individual appointed to a company's board of directors to act as 'guardian' of the appointor's interests.[50] A representative of HoldCo Plc – director, secretary, manager or other employee – appointed to SubCo Ltd's board fits that categorisation. Redmond asserts that a nominee director will 'often be *expected* to report back to his or her appointor as to the state of company affairs.'[51] This may have been the 'primary motive' behind their appointment.[52] Whilst not levelled at common officers, these comments mirror those of the director interviewed for the report.

Whether there is, in fact, an expectation to 'report up' may be determined by the degree to which responsibility for operational decision-making is decentralised with the group. This will be influenced by, inter alia, organisational form. For instance, a *U-form* organisation is

[48] ibid 2.

[49] ibid 5 (emphasis added).

[50] Paul Redmond, 'Nominee Directors' (1987) 10 UNSWLJ 194, 195 and 207.

[51] ibid 213 (emphasis added).

[52] ibid.

characterised by a holding company managing its subsidiaries in a centralised and integrated manner.[53] As most decision-making occurs at the highest level of management, it will only really be appropriate for single-activity companies.[54] Common officers could be expected to have an important reporting function here. *M-form* organisations are, in contrast, characterised by the delegation of operational decision-making from a general office (i.e. the parent company) to semi-autonomous *divisions*.[55] Delegation will occur along functional lines, with different managers being responsible for different divisions of the business, e.g. manufacturing, purchasing and finance.[56] These managers and their divisions will be supervised by top-level executives and directors from the parent company who monitor and coordinate group operations and dictate group strategy.[57] For the reasons considered above, common officers will certainly have a role to play here where lines of authority and communication between different administrative offices and officers and the information and data that flow through them is crucial to the organisation's success.[58]

Where there is a high degree of decentralisation of operational decision-making within a corporate group, a characteristic prevalent in complex organisational structures with a number of managerial levels below the parent company,[59] expectations that common officers 'report up' issues concerning *day-to-day operations* may be muted. It could result in an overload of information. But even within such a setting, the validity of that proposition would weaken

[53] Janet Dine, *Governance of Corporate Groups* (CUP 2000) 63.

[54] Witting (n 9) 34.

[55] Alfred Chandler, *Strategy and Structure: Chapters in the History of the Industrial Enterprise* (MIT Press 1962) 2.

[56] Witting (n 9) 33; Chandler (n 55) 10.

[57] Chandler (n 55) 2; Witting (n 9) 48-49.

[58] Chandler (n 55) 2

[59] Massimo Colombo and Marco Delmastro, 'Delegation of Authority in Business Organizations: An Empirical Test' (2004) 52(1) Journal of Industrial Economics 53, 69.

plants

where there was the prospect of real and tangible harm to third-parties or the environment arising from these operations. The prospect of legal liability alongside reputational damage would render it a *strategic* matter which the parent company would, it is presumed, expect to be reported up. Indeed, it may be the case that a significant capital investment is needed so that a pollution incident may be prevented or the heath of employees safeguarded. This type of decision is likely to be centralised.[60] Thus, the parent company will *have* to be made aware of it if approval of the expenditure is to be granted.

It is submitted that the literature examined in this section permits the following inference to be made: appointment of HoldCo Plc's representative(s) to the board of SubCo Ltd provides HoldCo Plc with, inter alia, a means of acquiring and maintaining information thereby managing proactively any dependence upon SubCo Ltd to which it may be subject. Whilst there is a natural flow of information between parent and subsidiary, the precise scope of which will be influenced by organisational structure, common officers intensify it and are often deployed to do just that. Indeed, the judiciary are beginning to recognise this. For instance, in the decision of the Court of Appeal in *Chandler v Cape Plc*,[61] Arden LJ noted that, '[t]hroughout the relevant period, there were directors of both companies in common which *would have increased* the *flow of information between them*.'[62]

Coupling Benefit with Burden

If it is accepted that *an* (though not always the *only*) organisational imperative driving the deployment of common officers within corporate groups is to gather and disseminate business information then it may be considered unjust and arbitrary to distinguish between their

[60] ibid 77.

[61] [2012] EWCA Civ 525.

[62] ibid [28] (Arden LJ) (emphasis added).

discovery of 'good' and 'bad' facts; the variant quality of the news ought not to matter when the courts determine questions of knowledge attribution. Deeming the capacity in which a 'bad' fact is discovered to be sacrosanct through, for example, prohibiting its attribution to HoldCo Plc or rendering that more difficult through the necessary satisfaction of strict tests would mean that a 'good' fact could flow to HoldCo Plc through a common officer. In contrast, in the eyes of the common law, a 'bad' fact could not. It would be contained and compartmentalised in the mind of the common officer, unable or unlikely to be attributed to HoldCo Plc. This would generate little incentive for the common officer to report negative, risk-related information back to the board of HoldCo Plc if they did happen to stumble upon it.[63] A 'don't ask, don't tell' corporate culture would be fostered, doing little to promote responsible practice and good governance within the group.

Whilst companies with common officers are 'separate entities with separate legal personalities',[64] those individuals create a 'connection' between them.[65] The law can compartmentalise the assets and liabilities of companies comprising a corporate group through recognition of their separate legal personalities and the implications which flow from this.[66] The mind of an officer cannot be compartmentalised in this way.[67] Where they become privy to a 'bad' fact as director of SubCo Ltd then they still know of that very same fact when they act in their capacity as officer of HoldCo Plc. In theory, the law could be as artificial as it liked

[63] Donald Langwoort, 'Agency Law inside the Corporation: Problems of Candor and Knowledge' (2003) 71(4) U Cin L Rev 1187, 1202.

[64] See, e.g., *The Connaught Income Fund, Series 1 (In liquidation) v Hewetts Solicitors (a former firm)* [2016] EWHC 2286 (Ch) [240.3] (Mark Cawson QC).

[65] Dine (n 53) 39

[66] For example, a shareholder has no right to any item of property owned by a company, for they have no legal or equitable interest in them: *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

[67] Restatement (Second) of Agency (American Law Institute 1958) § 276 cmt; Danny Busch, Laura Macgregor and Peter Watts (eds), *Agency Law in Commercial Practice* (OUP 2016) 219.

in deciding the knowledge which could (and could not) be attributed to HoldCo Plc. However, a more pragmatic approach is necessary where there is the potential for harm to be caused to third-parties or the environment, particularly where that harm may be severe and irreversible; prevention is better than cure.[68] As a matter of fundamental principle, there should be a positive response to discovery of a 'bad' fact, a now *known* problem. The rules of attribution should facilitate this, not provide a barrier to hide behind for those with the authority and opportunity to prevent harm from materialising but who choose not to.

DeMott asserts that agency law is, in fact, capable of compartmentalising an agent's mind but the effect would be an 'implausible fiction' as agents may be chosen precisely for their 'prior experiences.'[69] The inference being that whilst the law could compartmentalise, that is perhaps not, firstly, what will happen in reality and, secondly, nor what the principal wishes. As regards the latter, the professional experience possessed by the particular individual can be assumed to be an important, if not the most important, determinant of their selection and subsequent deployment to the board of SubCo Ltd. They may have developed a deep understanding of the parent's business, the risks it faces and its commercial priorities during their time as officer/employee of it. That is the knowledge which they can bring to bear productively for the parent whilst wearing their 'hat' as director of the subsidiary. And their knowledge of the risks facing the subsidiary's business is likely to be precisely the type of information which the parent sought to acquire through the appointment and which will benefit its board when making strategic and operational decisions. Therefore, any attempt by the law to compartmentalise these two categories of knowledge in the mind of the common officer displaces the very purpose of their deployment to the board of SubCo Ltd and the benefits that HoldCo Plc can derive from it.

[68] Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 61.

[69] DeMott (n 8) 305-6.

It is, however, not clear how precisely agency law, or indeed any area of law, could compartmentalise the contents of an individual's mind in any *meaningful* way. Potentially, a contract (e.g. an employment contract) could mandate that certain information be deemed confidential, with sanctions to be imposed for disclosure of it. This type of private ordering could generate very powerful contractual respect for the capacity in which knowledge of 'bad' facts was acquired. Whilst contract law 'minimalists' may posit that contracting parties ought to be free to choose the rules they 'want' free of regulatory interference,[70] the creation of harms to third-parties and the environment are usually irrelevant in contract law.[71] The negative externalities created in the case-studies examined in section 2.3 show that a minimalist perspective may be inappropriate where harm, or the prospect of it, is present in the subsidiary's operations. Or, agency law could specify that knowledge of 'bad' facts acquired outside of the mandate as an officer of HoldCo Plc was incapable of attribution to it. But, that is a very different thing to compartmentalisation *within* the individual's mind. In both of those examples, there is no compartmentalisation of the mind as the knowledge remains; the individual either knows about the malfeasance, negligence or harm (or the threat of it), or they do not. They cannot 'unknow' something merely by changing the 'hat' which they wear when they make a decision and it is improper for the law to deem that to be the case.

In light of this inability to compartmentalise the mind of the common officer it may be considered inequitable to enable business information to be collected and internalised when beneficial to the appointor (i.e. the parent) for the law to prevent its return when questions of legal liability in respect of that information arises. Through appointment of one of its officers to the board of SubCo Ltd, HoldCo Plc intends to extract a particular benefit or benefits. If no apparent benefit flowed from the appointment, one would question the rationale for the

[70] Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP 2013) 87.

[71] ibid 172.

deployment of the common officer. HoldCo Plc could, for instance, have mandated that the minutes of SubCo Ltd's board meetings be forward to it if it merely wished to remain updated on its activities. We have seen that whilst primary benefits include the ability to monitor, to exercise control over another company and to gather and disseminate business information, others included prestige and legitimacy.

HoldCo Plc may also benefit in a variety of ways from the selection and deployment of a specific *individual* to the board of SubCo Ltd. For instance, it may be presumed that HoldCo Plc views that person or persons as possessing *particular* skills (financial, legal or technical) or characteristics (experience, authority, legitimacy or wide social network) which warrant or justify their appointment to a senior position within SubCo Ltd. For instance, where the Chief Financial Officer of HoldCo Plc was appointed to the board of SubCo Ltd, a strategically important subsidiary, this would provide HoldCo Plc's board with oversight in relation to how precisely it was trading. It would also confer ready access to low cost, reliable financial information which could, as Scott observed, inform corporate strategy. The officer's familiarity with the issues most pertinent to HoldCo Plc would, perhaps most importantly, permit *filtration* of the information gathered and enable them to report back the most germane directly to key decision-makers with HoldCo Plc. HoldCo Plc could then draw upon this when managing its own affairs and those of the wider group. Risk could also be flagged and monitored closely. Where the individual communicated knowledge of a 'bad' fact (e.g. suspicious accounting irregularities) to HoldCo Plc then this could, in itself, be seen to bring benefits for it would enable HoldCo Plc to determine how best to respond promptly and decisively so as to reduce or redress the underlying problem.[72] They would, therefore, function as a conduit of 'good' *and* 'bad' facts.

[72] DeMott (n 8) 317.

For Kleinberger, it 'makes no sense' to treat knowledge acquired outside the individual's mandate as agent as incapable of attribution to the principal.[73] The principal intends to 'benefit' from the appointment of a particular agent and expects that agent to communicate to it information which it might reasonably wish to know.[74] His assertion was neither directed at common officers nor parent-subsidiary relations but it is submitted that his point is even stronger in those contexts. HoldCo Plc appoints the *particular* individual(s) to the board of SubCo Ltd precisely because of their unique skillset, prior experience and, as we have seen, often to function as a conduit of pertinent, filtered information from the periphery (i.e. SubCo Ltd) to the centre (i.e. HoldCo Plc) and vice versa. Alongside the benefits accorded to HoldCo Plc through deploying a specific individual to the board of SubCo Ltd, the burden(s) associated with knowledge acquired by them ought to follow.

The Facilitation of Cost Internalisation

Thus far, two central arguments have been advanced. First, common officers facilitate information flow between parent and subsidiary. Second, courts should not discriminate between 'good' and 'bad' facts in deciding whether a parent company can be deemed to know of information acquired by the common officer qua director of the subsidiary. This section develops both of these arguments with the context of two discrete case-studies: (1) statutory 'knowingly permitting' offences in environmental law; and (2) circumstances where a parent company may be deemed to have assumed a duty of care to those directly affected by a subsidiary's operations. There are, of course, a wide array of knowledge-dependant actions and claims to which a parent company could be exposed where it was treated as knowing what the

[73] Daniel Kleinberger, 'Guilty Knowledge' (1996) 22 Wm Mitchell L Rev 953, 973.

[74] ibid 972.

common officer discovered qua director of the subsidiary.[75] These case-studies were selected specifically to provide concrete (and stark) examples of the types of negative externalities which may be transferred to society – and, therefore, the risks to which society is exposed – if the courts are unwilling to attribute to the parent knowledge acquired in that capacity. Thus, the argument advanced in this sub-section is that there are important policy implications which ought to determine whether such an outcome is desirable and appropriate.

Statutory 'Knowingly Permitting' Offences under Environmental Law

Under a wide array of frameworks of environmental law, a defendant may be held liable where they 'cause or *knowingly permit*' some unlawful event to occur.[76] This section will focus upon the 'knowingly permit' strand of the phrase. This is a viable but entirely unexplored means of imposing criminal and/or civil liability upon HoldCo Plc where it could be *treated* as possessed of that knowledge through the application of a rule of attribution, most likely general or special. It would be appropriate where, for instance, an officer common to HoldCo Plc and SubCo Ltd was demonstrably privy to information relating to that unlawful event qua director of SubCo Ltd but HoldCo Plc did nothing to stop or resolve it. The utility of the offence is likely to be greatest where SubCo Ltd was insolvent or in a precarious financial position, unable to bear the costs associated with measures that it could have been required to undertake if *it* had been found liable (e.g. remedying pollution).[77]

[75] For instance, under s 501(1) of the Companies Act 2006, a parent company could be deemed to commit an offence where it *knowingly* made to an auditor a statement that conveyed or purported to convey any information or explanations which the auditor required that was misleading, false or deceptive in a material particular. Or, it could be subject to the equitable claim for 'knowing receipt' of trust property as per the decision of the Court of Appeal in *EI Ajou v Dollar Land Holdings Plc* [1994] BCC 143 which is discussed extensively in section 3.

[76] See text accompany fns 78-80.

[77] See, e.g., EPR 2016, reg 44(1)-(2) (court may order a person guilty of an offence to remedy pollution).

The phrase 'knowingly permit' can be found in some of the most significant offences in environmental law, including Regulation 38(1) of the Environmental Permitting Regulations 2016 (EPRs 2016),[78] s 33(1) of the Environmental Protection Act 1990 (EPA 1990),[79] and Part IIA of the EPA 1990 which deals with contaminated land.[80] Whilst it has formed part of environmental legislation since the 19th century, the phrase 'knowingly permit' has rarely been litigated.[81] There are, however, a handful of cases which permit its scope to be elucidated. For instance, in *Alphacell Ltd v Woodward*,[82] it was held that 'knowingly permitting' involved a '*failure to prevent* the pollution' but this failure must be accompanied by *knowledge* of the pollution or the threat of it.[83] In *Environment Agency v Empress Car Co (Abertillery) Ltd,* Lord Hoffman echoed this assertion, adding the caveat that the omission 'must have *caused*' the pollution.[84] For instance, a defendant may have known that barrels of chemicals stored on premises were leaking into the ground but took no steps to address it; their omission would, therefore, be taken to have caused pollution. They must, however, have had the authority to take preventive measures in order to be found liable. For Lawrence and Lee, Lord Hoffman's

[78] Except under and to the extent authorised by an environmental permit, it is an offence for a person to (a) cause or *knowingly permit* a water discharge activity or groundwater activity or (b) knowingly cause or *knowingly permit* the operation a regulated facility: EPR 2016, reg 38(1).

[79] It is an offence for a person to knowingly cause or *knowingly permit* controlled or extractive waste to be deposited in or on any land unless an environmental permit authorising the deposit is in force and the deposit is in accordance with the permit: EPA 1990, s 33.

[80] Any person, or any of the persons, who caused or *knowingly permitted* the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation: EPA 1990, s 78F(1)-(2).

[81] Maria Lee, ''New' Environmental Liabilities: The Purpose and Scope of the Contaminated Land Regime and the Environmental Liability Directive' (2009) 11(4) ELR 264, 271.

[82] [1972] AC 824, 834.

[83] ibid 849 (Lord Wilberforce) (emphasis added).

[84] *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 28 (Lord Hoffman)

caveat is welcome: 'armed with *authority* to intervene, the person has *omitted* to do so.'[85] Where it was *reasonable* for them to have intervened but they did not, a defendant may be deemed sufficiently blameworthy to attract liability.[86]

Exclusions for 'Class A' persons (e.g. knowing permitters) exist under the contaminated land regime which, if satisfied, absolve them from liability. They relate to activities which are perceived to carry limited (if any) responsibility.[87] An exclusion relevant to this article is 'providing (or withholding) financial assistance to another person' in the form of investing in a company by acquiring shares in it.[88] Whilst owning shares in a company is insufficient *in itself* to attract liability, the exclusion does not apply to holding company-subsidiary relations.[89] This is important as the door remains (deliberately) open to contend that HoldCo Plc could be a 'knowing permitter' in certain circumstances. For instance, it could, following application of a rule of attribution, be deemed to have known that chemicals were leaking from drums on a site belonging to SubCo Ltd *through* the common officer(s). And, in these circumstances, it could be asserted that it was entirely reasonable to expect HoldCo Plc to have taken steps to prevent the pollution; it certainly had the authority to intervene. Where it did not, HoldCo Plc should be liable. This outcome would not necessitate contortion of the phrase 'knowingly permit'. Rather, it is submitted that such a construction is justified by both the statutory guidance and the trajectory of the caselaw.

---

[85] Daniel Lawrence and Robert Lee, 'Permitting Uncertainty: Owners, Occupiers and Responsibility for Remediation' (2003) 66 MLR 261, 267 (emphasis added).

[86] ibid 274.

[87] Department of Environment, Food and Rural Affairs (DEFRA), *Environmental Protection Act 1990: Part 2A, Contaminated Land Statutory Guidance* (April 2012) [7.38] (hereafter DEFRA, *Contaminated Land Statutory Guidance*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/223705/pb13735cont-land-guidance.pdf> accessed 16 November 2018.

[88] ibid [7.39].

[89] ibid.

The 'polluter-pays' principle of environmental law provides a firm normative justification for this position. As a matter of methodological clarity, it is important to state that a clear distinction must be drawn between frameworks of environmental law deriving *solely* from the domestic laws of England and Wales (e.g. part IIA of the EPA 1990) and those deriving from EU institutions (e.g. Reg 38(1) of the EPR 2016). In the latter, the principle is firmly entrenched and guides policy development at the EU institution level very explicitly.[90] It is referred to expressly in various EU Directives.[91] It does not possess equivalent status in purely domestic laws of England or Wales. These do not refer to it explicitly in their text.[92] However, the principle is often referred to in statutory guidance.[93] Thus, whilst it may be seen to have been embedded implicitly within domestic legislation in such instances, its policy rationales are commonly understood and clearly intended to be furthered under relevant domestic statutory regimes.

The jurisprudence of the CJEU offers a particularly sophisticated and illuminating body of caselaw which help us understand the interpretative scope of the principle. According to the CJEU, the obligation to take remedial measures 'is imposed on operators only because of their *contribution* to the creation of pollution or the risk of pollution.'[94] As Advocate General Kokott has asserted, the costs associated with pollution are not be 'imposed on others, in particular the

[90] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art 191(2).

[91] See, e.g., Directive 2004/35/CE on environmental liability regarding the prevention and remedying of environmental damage [2004] OJ L143/5, art 1: the directive is 'based' on the 'polluter-pays' principle.

[92] Colin Mackie and Malcolm Combe, 'Charges on Land for Environmental Liabilities: A Matter Of 'Priority' For Scotland' (forthcoming, 2019) JEL 14, 12 <https://doi.org/10.1093/jel/eqy019> accessed 16 November 2018.

[93] See, e.g., DEFRA, *Contaminated Land Statutory Guidance* (n 87) [8.5]: 'The "polluter pays" principle should be applied with a view that, where possible, the costs of remediating pollution should be borne by the polluter.'

[94] See, e.g., C-379/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo Economico* [2010] ECR I-2007 [67].

public, or simply ignored, but assigned to the person who is *responsible* for the pollution.'[95] In doing so, the principle allocates those costs in a manner which is 'fair',[96] giving the principle an important equitable dimension.[97] As the obligation to bear costs is not necessarily linked to causation but to contribution, there is seen to be 'some flexibility' in the implementation of the principle.[98] A person may be deemed to contribute to pollution if, for instance, they 'failed to take measures to *prevent* (…) an incident.'[99] Thus, where an officer of HoldCo Plc became privy to information concerning a risk of pollution qua director of SubCo Ltd but HoldCo Plc failed to take measures to prevent a subsequent incident, HoldCo Plc could be deemed to have contributed to the pollution and so could be held liable under the relevant framework as a 'knowing permitter'.

The policy objectives which the principle seeks to facilitate support this construction. The principle was conceived to deal with a market failure.[100] When a polluter does not pay for the damage which its activities cause to the environment, it need not reflect these costs in the price charged for its product or service.[101] They can, thus, 'ignore the costs to society in deciding how much to produce and at what price to sell [their] products.'[102] There will, in turn, be greater demand from consumers of its goods or services as they will benefit from market

[95] Case C-254/08 *Futura Immobiliare Srl Hotel Futura v Comune di Casoria* [2009] ECR I-6995, Opinion of AG Kokott, [32] (emphasis added).

[96] ibid.

[97] Mackie and Combe (n 92) 14.

[98] *Futura Immobiliare* (n 95), Opinion of AG Kokott, [50].

[99] Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd* [2008] 3 CMLR 16 [89] (emphasis added).

[100] Case C-126/01 *Ministre de L'économie, Des Finances et de L'industrie v GEMO S*A [2004] 1 CMLR 9, Opinion of AG Jacobs, [66].

[101] Ogus (n 29) 35.

[102] *GEMO* (n 100), Opinion of AG Jacobs, [66].

prices that do not reflect the true social cost of the relevant activity.[103] Consequently, more will be produced than is socially efficient.[104] For this reason, the consumers of polluting goods and services, as distinguished from wider society, may be deemed to benefit from this market failure. The principle attempts to make polluters (i.e. the responsible person(s) under statute) 'internalise' the costs associated with the environmental damage which their activities cause.[105] The goal is for those costs to be reflected in the price charged for its goods or services so as to encourage more efficient, sustainable purchasing patterns by consumers. And, importantly, recognising that they must bear the costs associated with environmental obligations for which they are deemed responsible, the polluter (i.e. HoldCo Plc) would be incentivised to take the measures necessary to prevent the damage occurring *in the first place* or to minimise its impact once aware of the pollution.[106] This gives the principle an important environmental protection perspective.[107] It is, perhaps, the potential of the 'knowingly permit' offence to generate the incentive to *prevent* the creation of pollution which explains its pervasiveness in environmental law. It is used far less frequently in other legal disciplines.

Where knowledge acquire qua director of the subsidiary can be attributed the parent, the statutory construction would harness and channel the direct and indirect benefits of cost internalisation. In contrast, in failing to attribute pertinent knowledge to HoldCo Plc because it was acquired in another 'capacity' not only would the environmental protection incentive dissipate but the costs of environmental damage will, ultimately, need to be borne by society

[103] de Sadeleer (n 68) 21.

[104] Ogus (n 29) 19 and 35; Genevra Richardson, Anthony Ogus and Paul Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press 1982) 4.

[105] GEMO (n 100), Opinion of AG Jacobs, [66].

[106] Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group Srl* ECLI:EU:C:2014:2393, Opinion of AG Kokott, [55].

[107] *Futura Immobiliare* (n 95), Opinion of AG Kokott, [31].

where no other liable party can be found. This outcome would be contrary to the purposive interpretation that has been given to the term 'polluter' and hinder the venerable policy objectives which the principle seeks to achieve.

Parent Company Duty to those Affected by a Subsidiary's Operations

In recent years, tort law in England and Wales has evolved to allow unsatisfied personal injury claimants to 'extend' liability from an insolvent subsidiary company to its parent company in certain carefully defined situations.[108] Following the decision of the Court of Appeal in *Chandler*, responsibility for the health and safety of a subsidiary's *employees* may be imposed on its parent in circumstances where: (1) the business of the parent and subsidiary is the same; (2) the parent has, or ought to have, superior knowledge in relation to the pertinent aspect of health and safety; (3) the subsidiary's system of work is unsafe as the parent company *knew*, or *ought to have known*; and (4) the parent *knew* or *ought to have foreseen* that the subsidiary would rely on its using that superior knowledge for the employees' protection.[109] The group's organisational structure will, ultimately, determine whether these conditions can be satisfied. For instance, their satisfaction may be considered to be more likely under a simple *U*-form structure. They are unlikely to be satisfied where the parent company is a mere non-trading holding company (*H-form*) or where it was a trading company but its business was not an 'integral part' of the operations potentially harmful to third-parties.[110] The latter may be the case in more complex *M*-form structures.

[108] Witting (n 9) 346.

[109] *Chandler* (n 26) [80].

[110] *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635, 865.

The decision of the Court of Appeal in *Lungowe v Vedanta Resources plc* builds upon *Chandler*, adding an extraterritorially perspective to the duty of care.[111] There, the claimants brought civil proceedings against Vedanta Resources Plc (Vedanta), a UK incorporated parent company of Konkola Copper Mines Plc (KCM), its Zambian subsidiary. The claim was unique in that was brought in England but the claimants were all Zambian citizens, resident in Zambia and the claims involved personal injury or environmental damage to land in Zambia. The judgement may be considered ground-breaking for two reasons. First, the court held that the case could proceed before the English courts. Second, not only could a duty be owed by a parent to the employees of a subsidiary but also, in certain circumstances, to parties *directly affected by the subsidiary's operations*.[112] This could, for instance, include communities whose health and economic welfare had been blighted by environmental damage caused by the subsidiary. These parties could be located abroad, exposing UK-based parent companies to actions in negligence in respect of their foreign subsidiaries' affairs. The circumstances giving rise to this duty may arise where the parent has taken *direct responsibility* for devising a material health and safety policy the adequacy of which is the subject of the claim, or where it *controls* the operations which give rise to the claim.[113]

Whilst a parent company could learn of pertinent facts concerning the safety of the subsidiary's affairs and whether the subsidiary relied on it to use its superior knowledge in a variety of ways, we have seen that common officers provide one channel through which it may do so. Indeed, Arden LJ recognised this in *Chandler*.[114] And in *Lungowe*, evidence was adduced that almost all senior positions at the Zambian subsidiary were given to people from Vedanta

[111] [2018] 1 WLR 3575.

[112] ibid 3592.

[113] ibid.

[114] *Chandler* (n 26) [28] (Arden LJ).

Group companies.[115] The deployment of common personnel was prevalent, increasing both the control exercisable by the parent and the number of channels through which relevant information concerning the affairs of the subsidiary could flow towards it. And in earlier cases concerning the prospect of imposing a duty of care to a subsidiary's employees the role placed by common directors was deemed to be central importance. In *Ngcobo v Thor Chemicals Holdings Ltd*, Maurice Kay J held that during the material period the existence of common directors on the boards of the group's holding company and the relevant subsidiary meant that the holding company '*had knowledge* of what passed between the [subsidiary] and the Health and Safety Executive.'[116] And in *Connelly v RTZ Corp Plc*, another decision indicating that a parental duty to a (foreign) subsidiary's employee(s) could exist, that there was a common director between the parent and its subsidiary was relevant evidence. [117] Thus, they may be conduits of information and of liability.

More *Lungowe*-type cases may appear before the courts. Surroca, Tribó and Zahra found that MNEs often respond to pressure from stakeholders in their home country (i.e. where the HQ is based) by exiting fields within which the pressure is strong and moving their 'corporate social *ir*responsibility' (CSiR) to foreign subsidiaries.[118] These are often located in 'pollution havens' where stakeholder pressure is lax.[119] Thus, 'misconduct is not deterred; it is merely *transferred* to selected subsidiaries.'[120] The transfer of CSiR practices was found to be higher where subsidiaries were 'loosely affiliated to an MNE [i.e. minority owned] *but*

[115] Lungowe (n 111) 3593.

[116] (Unreported) 7 November 1995, 24 (emphasis added).

[117] [1999] CLC 533, 542.

[118] Jordi Surroca, Josep Tribó and Shaker Zahra, 'Stakeholder Pressure on MNEs and the Transfer of Socially Irresponsible Practices to Subsidiaries' (2013) 56(2) Academy of Management Journal 549, 563.

[119] ibid 549.

[120] ibid 563 (emphasis added).

controlled by HQ through board interlocks.'[121] The reason for this is that these types of subsidiaries were less likely to cause 'negative legitimacy spillovers' into the MNE's overall legitimacy.[122] And subsidiaries which supplied raw inputs to the HQ (i.e. where their operations are integrated) were more likely to be the targets of these transfers.[123] These 'HQs' are, thereby, exposed to the assumption of a duty of care in respect of parties affected by their subsidiaries' operations.

The findings of section 2.1 are important for they illustrate that common officers not only create a channel through which information concerning the unsafe nature of a (foreign) subsidiary's affairs may flow to the parent company, they provide a 'vehicle' through which control may be exercised.[124] Both factors heighten the risk of the courts finding that there has been a breach of the duty of care by a (UK-based) parent company to a (foreign) subsidiary's stakeholders. It must be recalled that the very reason for the imposition of the duty of is to 'protect' those at risk of injury from those operations and provide a remedy where appropriate standards of conduct have not been met.[125] If doctrine inhibited attribution to the parent of knowledge of, for instance, unsafe systems of work obtained by a common officer qua director of the subsidiary then the ability for victims harmed by those systems to bring a claim against the parent would fall away meaning that negative externalities would transferred to the victims. Moreover, the incentive for the parent to improve safety levels at the subsidiary (or, phrased negatively, the deterrent effect created by the prospect of tortious liability) would be dampened. This would send entirely the wrong message to industry and run counter not only to the goals of tort law but the trajectory of the caselaw emerging in this area.

---

[121] ibid.

[122] ibid.

[123] ibid 564.

[124] Pennings (n 17) 23.

[125] *Thompson* (n 110) 865 (Tomlinson LJ); Witting (n 9) 347.

The Positive Question

This section, doctrinal in its methodology, engages critically with the three broad approaches used by the courts in England and Wales to determine questions of knowledge attribution in common officer cases: the *duty to communicate*; the *duty of inquiry*; and *directing mind and will theory*. It does so to assess their suitability to deal with questions of knowledge attribution where an officer of HoldCo Plc is appointed to the board of SubCo Ltd. It will be seen that *directing mind and will theory* offers the greatest prospect for attributing to HoldCo Plc knowledge of a 'bad' fact acquired by a common officer in their capacity as director of SubCo Ltd. However, the internal conditions which must be satisfied before it can be invoked by a claimant are both difficult to meet and easy for HoldCo Plc to evade.

The analytical methodology adopted in this section follows that recommended by the editors of *Bowstead & Reynolds on Agency*,[126] a leading treatise on agency law.[127] They emphasise the importance of categorising decisions according to the relevant *legal issue* in which knowledge is sought to be imputed[128] and group the case law into three streams: formation and execution of a contract between arms-length legal parties, imposition of tortious or restitutionary liability, and those where the operation of a statutory rule is dependent upon a party's knowledge.[129] As the rationales steering the attribution of knowledge under the first two of these streams differ they consider it '[n]ormally (…) unsatisfactory to borrow case law from

[126] Watts and Reynolds (n 13) [8-209].

[127] The twentieth edition was cited with approval extensively by the Supreme Court in *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2015] UKSC 23, a case concerning the attribution of a director's knowledge to the company.

[128] This article will use the term 'attribution' to describe the process of legal reasoning through which the knowledge of a human being is treated as that of a company. The term 'imputation' is used in the early caselaw in England Wales and some modern academic scholarship. For the purposes of this article, the terms attribution and imputation should be viewed as interchangeable. The term used in the original text will be used when quoting from a judgement or scholarly works.

[129] Watts and Reynolds (n 13) [8-209].

one context for use in another.'[130] They highlight an exception in the context of statutory rules which turn on the state of a party's knowledge, asserting that 'the inference may also be that the legislature intended to borrow the rules used in tortious and restitutionary situations.'[131] Thus, cases from the second stream *can* inform outcomes in the third stream. A similar approach is adopted in this section.

It must be noted from the outset that two important Court of Appeal cases concerning the second category (the imposition of tortious or restitutionary liability), *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*[132] and *EI Ajou v Dollar Land Holdings Plc*[133] relied heavily on decisions in the first category (the formation and execution of contracts) to substantiate their reasoning. Thus, as a matter of contemporary judicial practice, decisions from one stream *have been* borrowed for use in another. This makes clear that whilst the underlying claims may vary, there is a degree of commonality in the way in which the courts approach the issue of capacity when determining attribution outcomes in common officer cases. Therefore, for the purposes of this article there is scholarly value in critiquing those approaches, even where their derivation can be traced to the first stream.

The Duty to Communicate

This approach, which comprises two distinct versions, focuses upon duties owed by individuals who become privy to pertinent information. It may be considered a general rule of attribution. There is no apparent hierarchy between the versions; each is of appellate authority. Under both, the common officer must be subject to a duty qua officer of company A to *communicate* the

[130] ibid.

[131] ibid.

[132] [1980] 1 All ER 393.

[133] [1994] BCC 143, 153.

pertinent information to the board of company B (i.e. the company upon whom the knowledge is sought to be attributed) if attribution to company B is to occur. Under the second version, the common officer must *also* be under a duty qua officer of company B to *receive* the information if it is to be attributed to company B. Both are problematic when applied to officers of a parent company who are appointed to the board of its subsidiary.

The first version may be extrapolated from the ratio in *Belmont.* Its sphere of application is relatively narrow. It is seemingly restricted to circumstances of illegality in a proposed *transaction*, not illegality in the affairs of a company (e.g. SubCo Ltd). In *Belmont*, a parent and its subsidiary shared a director (the chairman) and secretary, both of whom knew that the object of an agreement with a third party was to provide unlawful financial assistance to purchase the shares of the sub-subsidiary (i.e. the subsidiary of the subsidiary); the sub-subsidiary was to purchase a company owned by the third party, the sale proceeds to be used to finance the purchase of the sub-subsidiary's shares.

The Court of Appeal was required to determine whether the parent and subsidiary were liable in conspiracy to infringe companies' legislation (for which knowledge of the plan had to be attributed to both of them) and whether the subsidiary was constructive trustee of the sale proceeds (again, the subsidiary's knowledge of the plan being pertinent). It answered both affirmatively. Buckley LJ, with whom Goff LJ and Waller LJ agreed, held that the knowledge of the common officers was to be attributed to both the parent and subsidiary 'for an officer of a company must *surely* be under a duty, if he is *aware* that a transaction into which his company or a wholly-owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of *that company* of the fact.'[134] Citing *Re Fenwick, Stobart & Co Ltd*[135] and *Re David*

[134] *Belmont* (n 132) 404 (Buckley LJ) (emphasis added).

[135] [1902] 1 Ch 507. This was a case concerning *notice* to a company rather than the attribution of knowledge to it. In *Fenwick*, three companies were concerned in the relevant transaction: Fenwick, Stobart & Co, Deep Sea Fishery Company, and Gardar.

Payne & Co Ltd,[136] Buckley LJ held that '[w]here an officer is under a duty to make such a disclosure to *his* company, *his knowledge is imputed to the company*.'[137] This means that where the duty was deemed to have arisen (i.e. where there was illegality in a proposed transaction) then it was treated *as if* it had been discharged; actual communication, or proof of it, was not required to justify attribution. This eased the evidentiary burden of the claimant dramatically; a claimant merely had to prove that the common officer was aware of the illegality.

Three observations may be made. First, Buckley LJ did not seek to locate the precise source of the duty to communicate. He asserted somewhat tentatively that the officer must 'surely' be under such a duty where there was illegality in a proposed transaction. It was not clear whether this was an independent duty or whether it was a sub-duty within a larger, overarching one. For instance, as regards the latter he could have sought to tie the existence of the duty to the common law duty imposed on a company's agents to 'act as best to promote the interests of the corporation whose affairs they are conducting'.[138] This could have provided an

---

Their head offices were in the same room and the same person acted as secretary for all three companies. Deep Sea held a large number of shares in Gardar. The question for the court was whether knowledge of the common secretary (which he acquired from his role as secretary of Deep Sea) that a bill of exchange would be dishonoured was to be notice of that impending dishonour to Fenwick. The court held not as there was no duty to communicate that knowledge to Fenwick.

[136] [1904] 2 Ch 608. The case concerned a loan and the attempted invalidation of an associated debenture by the liquidator of David Payne & Co Ltd (the 'borrowing company'). Whilst borrowing was permitted under its constitution, its directors sought to utilise the funds for ultra vires purposes. A director of Exploring Land and Minerals Company Ltd (the 'lending company'), who had a personal interest in a scheme involving the borrowing company, knew this. He acquired that knowledge privately before that transaction was entered into. The question for the court was whether the director's knowledge was to be considered the knowledge of the lending company so as to render the debenture invalid. The Court of Appeal held not. The sum borrowed was within the limits of the borrowing permitted by the borrowing company's constitution meaning that there was no duty on the director to have disclosed the information facts to the lending company or a duty on the part of the lending company to have made inquiries.

[137] *Belmont* (n 132) 404 (Buckley LJ) (emphasis added).

[138] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471 (HL) (Lord Cranworth LC).

explanation for the existence of the duty. The argument would run that by informing the company about to enter into the transaction of the illegality this would promote its interests through, presumably, discouraging it from continuing with a sullied deal. Though, as we shall see shortly, the strength of this argument is contestable.

Second, and relatedly, it was not clear from Buckley LJ's reasoning which company, or more accurately which board, the disclosure should be made to where it was, for example, the wholly-owned subsidiary who was about to enter into the illegal transaction; was it the parent, the wholly-owned subsidiary or both? His use of phrase 'his company *or* a wholly-owned subsidiary' alongside his reference to 'that company' suggests that in this hypothetical example the communication was to be made to the board of the company about to enter into the illegal transaction (i.e. the wholly-owned subsidiary). If so, this would seemingly prevent the knowledge from being attributed to the parent; there would be no requirement for the communication to be made to it. This article proceeds upon the basis that where the individual was an officer of a parent company and its wholly-owned subsidiary, communication of the illegality should be made to *both* companies. This is in line with the fact that the disclosure should be made to 'his' company; both would be 'his' companies. It also accords with the outcome in *Belmont* whereby the courts attributed the pertinent knowledge to both the parent company and its wholly-owned subsidiary.

Third, the court made no reference to the capacity in which knowledge of the 'bad' fact was deemed to have been attained. This may have reflected the perception that it would be highly artificial to treat the knowledge of the common officer of the 'bad' fact as originating in their capacity as officer of the sub-subsidiary (i.e. the company which infringed companies' legislation by entering into the transaction). The plan was more likely to have been formulated in secret and then *actioned* in their capacity as officer of the sub-subsidiary. Freeing the inquiry from the need to deal with the capacity in which knowledge was obtained enabled the court to

focus on the *individual(s)* involved and the knowledge *actually* possessed by them. This thread will be picked up again in section 4 where it will form the basis of the new approach proposed in this article.

The second version derives from the obiter statements of Nourse LJ in *EI Ajou* but its origins can be traced to the decision of the High Court in *Re Hampshire Land Co*.[139] Its sphere of application is potentially very wide and could be utilised in circumstances where a third party sought to impose tortious or restitutionary liability on HoldCo Plc or where the operation of a statutory rule was dependent upon the officer's knowledge. In *El Ajou*, a director common to two legally-*unrelated* companies acquired his admitted knowledge of a fraud as a director of one company, SAFI. The key question for the court was whether the common directors' knowledge of the fraud could be attributed to another company, DLH, for the purposes of establishing its liability under the 'knowing receipt' head of constructive trust.

The Court of Appeal held that whilst *directing mind and will theory* justified that finding, agency theory (of which the duty-based approaches form part) did not permit his knowledge to be attributed to the company. This will be returned to in section 3.3. On the agency analysis, whilst Nourse LJ adopted a variation of the *duty to communicate* test, Rose LJ and Hoffmann LJ took a very different approach, discussion of which will take place in the following section. Citing *Hampshire Land* and *Fenwick*, Nourse LJ held that:[140]

---

[139] [1896] 2 Ch 743, 748. In *Hampshire Land*, the question for the court was whether the knowledge of a secretary common to Hampshire Land (the company) and Portsea Island (the society) concerning an irregularity in a notice to call a general meeting was to be notice to the society. This would preclude the society from relying on the rule in *Royal British Bank v Turquand* (i.e. that it had the right to infer that all these essentials of internal management had been fulfilled by the company) which, in turn, would prevent the society from ranking upon the estate of the company as a creditor for a sum that it had loaned to the company. The High Court held not. The officer was under no duty to give notice to the other company of the pertinent information; and he was under no duty, as the officer of the company sought to be affected by notice, to receive such notice.

[140] *EI Ajou* (n 133) 153 (Nourse LJ) (emphasis added).

> It is established on the authorities that the knowledge of a person who acquires it as a director of one company will not be imputed to another company of which he is also a director, unless he owes, not only a duty to the second company to *receive* it, but also a duty to the first to *communicate* it.

This is a certainly reflection of the test first enunciated in *Hampshire Land*.[141] However, whilst in *El Ajou* it was presented as being peculiar to common *directors*, *Hampshire Land* concerned a secretary common to two companies (i.e. a common officer). It would, therefore, be constraining the test too narrowly for it to evolve into one applicable to common director situations only. The test is applicable to common officer situations more broadly.

There was also an important exception to attribution specified in *Hampshire Land* to which Nourse LJ did not refer: it was not possible to infer that either stage of the second version would be fulfilled by a person *guilty* of the irregularity or breach of duty (or fraud).[142] The rationale being that the guilty person would, it was presumed, not wish to land themselves in 'hot water' by letting others hear of their acts or omissions, i.e. there would inevitably be no communication. And so the principal should not suffer because of that. This position, which lays the risk of an agent's breach of duty squarely upon outsiders,[143] has been challenged in the literature. For instance, Worthington contends that as misbehaving agents are often in breach of duty to their principals, if their 'guilty knowledge' could not be attributed to the company then 'the law of corporate attribution would unravel completely.'[144] It is for this reason that she believes that the *Hampshire Land* exception should not protect the company where an outsider

[141] See fn. 139.

[142] [1896] 2 Ch 743, 749-50.

[143] It does so by enabling the principal to escape legal liability for knowledge acquired by the agent when acting contrary to the interests of the principal, leaving the claimant without a remedy against it.

[144] Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133 LQR 118, 126.

brings a claim against it.[145] This makes sense as a matter of policy. It returns the risk to the principal, something which is within the principal's sole power to control through its selection of agents and the culture which it can create for them to report pertinent information. These are factors over which the third party claimant (whether public regulator or private party) has no ability to influence.

In order to gauge the 'real world' ability of the two versions considered in this sub-section to attribute to HoldCo Plc knowledge of a 'bad' fact acquired by a common officer qua director of SubCo Ltd we must locate the existence of the duties underpinning them. Under the common law, appointment by a shareholder of an individual to the office of director imposes no duty on the director to his appointor.[146] Duties may be owed in another capacity (e.g. as an employee) or under some agreement with the appointor but these do not arise from the appointment itself.[147] Section 172 of the Companies Act 2006 (the duty to promote the success of the company), a duty imposed on all *directors*, could be viewed as exhibiting potential to ground the existence of both a duty to communicate and receive pertinent information.[148] SubCo Ltd and HoldCo Plc are separate legal persons; directors common to them will owe distinct duties to both.[149] And a common officer who is merely a manager of HoldCo Plc but a director of SubCo Ltd will owe the duty solely to latter. A common *director* is strictly required to promote the success of both SubCo Ltd and HoldCo Plc independently of each other. In

[145] ibid 127.

[146] *Re Neath Rugby Ltd* [2009] EWCA Civ 291 [32] (Stanley Burnton LJ).

[147] ibid.

[148] It may be seen to comprise a primary and a secondary duty. Broken down into its constituent parts, the primary duty provides that a director must act: (1) in the way he considers; (2) in good faith; (3) would be most likely to promote the success of the company; (4) for the benefit of its members as a whole. In fulfilling their primary duty, directors are subject to a secondary duty to 'have regard' to a specified list of matters in s 172(1)(a)-(f) CA 2006.

[149] CA 2006, s 170(1).

reality, the success of one may be connected intricately to that of the other. SubCo Ltd may be a source of income for, and/or provider of services, goods or raw materials to, HoldCo Plc. If that source is interrupted, it will impact upon HoldCo Plc. HoldCo Plc may need to establish alternative supply lines which may be more expensive and less reliable than those provided by SubCo Ltd. If SubCo Ltd suffers financially, then HoldCo Plc will suffer too. The reverse is also likely to be true.

From this perspective, section 172 CA 2006 may provide a rationale for the existence of a duty for the common director to *receive* information *qua director of HoldCo Plc*. And, in the case of common officers who are not directors of HoldCo Plc but mere employees of it, such as would normally be the case with managers, a common law fiduciary duty of loyalty owed by the employee to their employer is implied under their employment contract: '[t]he employer is entitled to the *single-minded loyalty* of his employee.'[150] This will comprise a duty to act in good faith.[151] Whilst this duty of loyalty is different to the duty owed by a director, as a director, their effects are likely to be similar.

The success of HoldCo Plc could, on one hand, be viewed as being promoted, or the loyalty of an employee demonstrated, through it being made aware of circumstances which could hinder the flow of income, services or resources from SubCo Ltd (i.e. a 'bad fact'). The receipt of a 'bad' fact could be seen to bring benefits to HoldCo Plc for it would enable it to decide 'how to react' so as best to reduce or eliminate the risk.[152] This could be through preventing a claim or action being brought against SubCo Ltd, or mitigating its impact once one was commenced. Its knowledge, experience and resources (human and financial) could be harnessed with a view to *assisting* SubCo Ltd. Where a 'bad' fact was not received, HoldCo

[150] *Attorney-General v Blake Jonathan Cape Ltd* [1998] Ch 439, 454 (Lord Woolf MR).

[151] ibid.

[152] DeMott (n 8) 317.

Plc could not address the underlying issues and SubCo Ltd could be rendered susceptible to litigation or to a prosecution that it might otherwise have avoided. This could harm the success of HoldCo Plc, albeit indirectly. On the other hand, it could be argued that the *non*-receipt of the information would better promote HoldCo Plc's success. It would do so by preventing it from being attributed with the pertinent knowledge, and, consequently, held legally liable for it. This tension is difficult to resolve within the existing structure of UK company law which, in the context of the imposition of liability, traditionally upholds the separate legal personalities of group companies.[153] There may, as a result, be unwillingness on the part of the courts to impose a duty to receive information relating to the affairs of *another* company in respect of which liability may attach. However, as we saw in section 2.3, the negative externalities which may be created by such an approach suggest it may be inappropriate in areas where human health may be harmed or the environment damaged.

A duty for the common officer, *qua director of SubCo Ltd*, to cross-*communicate* information to the board of HoldCo Plc, something necessitated by the approaches of Nourse LJ in *El Ajou*, is challenging to locate. As a preliminary point, it is clear from *Percival v Wright*[154] that a director is under no obligation to disclose to shareholders information concerning incidents that arise in the ordinary course of management.[155] HoldCo Plc is, of course, a shareholder of SubCo Ltd. And a 'bad' fact could be deemed to concern such an incident. Upon this logic, the common officer, in their capacity as director of SubCo Ltd, would be under no duty to disclose/communicate the 'bad' fact to HoldCo Plc.

There is the view that the common officer, qua director of SubCo Ltd, may be deemed to promote the success of *SubCo Ltd* by informing its shareholder, HoldCo Plc, of a 'bad' fact

[153] See, e.g., *Adams v Cape Industries plc* [1990] Ch 433, 544 (CA); Witting (n 9) 100.

[154] [1902] 2 Ch 421.

[155] ibid 426.

which the latter may be able to offer assistance in respect of. Indeed, Boros offers a similar view on the duty of disclosure owed by nominee directors under the pre-Companies Act 2006 common law duty to act in the best interests of the company.[156] Alternatively, it may be argued that *non*-communication would better promote SubCo Ltd's success through insulating its sole shareholder (HoldCo Plc) from liability. Of course, if a knowledge-relevant claim or action brought against HoldCo Plc rendered it insolvent or, at the very least, impacted negatively upon its financial stability, then this may pose serious complications for the continued economic viability of SubCo Ltd. And as Boros contends, the old common law duty to act in the best interests of the company would have *precluded* a director from disclosing information which was 'harmful' to the company.[157] Whilst the harm to SubCo Ltd may be indirect, it would be damaging nonetheless. This means that there is a strong claim that communication of a 'bad' fact to HoldCo Plc would breach the section 172 CA 2006 duty which the common officer owed to SubCo Ltd as one of its directors.

Thus, whilst superficially appealing, both versions of this approach evidence quite significant limitations which mean that they should not be used by the courts to determine attribution outcomes in circumstances where an officer (or officers) of the parent company is appointed to the board of directors of a subsidiary. This is, in large part, due to their inability to locate in concrete terms the precise source and nature of the duties that underpin them. Even where those duties could be located (e.g. in s 172 CA 2006), their applicability may be contested in the context of relations between a parent company and its subsidiary. The courts have also failed to offer any justification as to why the existence of a duty (or duties) owed by an agent to their principal should, *in and of itself*, warrant attribution.

[156] Elizabeth Boros, 'The Duties of Nominee and Multiple directors: Part 1' (1989) 10 Co Law 211, 219.

[157] ibid.

The Duty of Inquiry

This approach, extrapolated from the reasoning of Rose LJ and Hoffmann LJ (as he then was) in *EI Ajou,* focuses principally upon the need for a duty of inquiry to have been owed by *the company* upon whom the pertinent knowledge is sought to be attributed (i.e. HoldCo Plc). It is a general rule of attribution and may be understood in the following terms: where the company upon whom knowledge was sought to be attributed was under a duty to inquire as to the source of funds, an agent privy to knowledge of the source was under a duty to disclose that information to it. The approach has been utilised exclusively in the context of knowledge attribution questions concerning the intended use, or source, of funds (e.g. 'knowing receipt' actions). It, therefore, possesses a somewhat narrow sphere of application.

In *El Ajou*, Rose LJ and Hoffmann LJ believed DLH to be under no duty to inquire. Therefore, the director's knowledge was not attributed to it under principles of agency law. Whilst Rose LJ offered a somewhat cursory consideration of the agency argument,[158] Hoffmann LJ's reasoning is insightful. He believed that the director *did* owe a duty as chairman of the board of DLH to 'inform' it that the money was the proceeds of fraud.[159] There was, thus, a duty to communicate. However, Hoffmann LJ was unwilling to follow counsel's argument that where such a duty existed it should be deemed to have been discharged.[160] Had counsel's argument been accepted, the pertinent information would have been *treated* for the purposes of attribution as having been communicated even if it had not, as per the approach of the Court of Appeal in *Belmont*. For Hoffmann LJ, the existence of a duty to communicate would, from the

[158] He dedicated only 103 words of a 903 word judgement to the issue.

[159] *EI Ajou* (n 133) 157.

[160] ibid.

perspective of third parties attempting to bring a claim against DLH, be ineffectual where there was no duty of inquiry.[161] Thus, the existence (or not) of a duty of inquiry was the central determinant of whether knowledge would be attributed.

The primacy accorded to the duty of inquiry is problematic as a matter of doctrine. As Watts observes in relation to the relevance of such a duty to questions of knowledge attribution '[s]uch a duty is *not* a precondition to the operation of imputation.'[162] He contends that the duty to inquire is a 'separate issue' from whether knowledge possessed by an agent *should*, in fact, be attributed to a principal.[163] Failing to distinguish between the two confuses the attribution of knowledge actually possessed by an agent and the principal's constructive knowledge of it. The latter is not *necessary* for attribution to occur. Thus, it appears that they mistakenly introduced the duty of inquiry as *the* essential precondition necessary for the attribution of knowledge actually possessed by an agent to occur upon the facts. The duty of inquiry approach is, consequently, not viewed as a viable means of attributing the knowledge of an officer common to HoldCo Plc and SubCo Ltd.

The 'Directing Mind and Will' Approach

This *person*-specific approach attributes an agent's knowledge or state of mind to a company where the agent is its directing mind and will 'for the purpose of performing *the particular function in question*.'[164] Its existence appears out of place following the shift from anthropomorphism[165] demanded in *Meridian*. That shift has been received warmly in the academic literature due, in part, to its correction of the 'errors in over-reliance on metaphysical

[161] ibid.

[162] Watts, 'Imputed Knowledge' (n 14) 326 (emphasis added).

[163] ibid.

[164] *Bilta* (n 127) 27 (Lord Sumption) (emphasis added).

[165] This term describes the attribution of human traits, emotions, or intentions to a non-human (i.e. a company).

concepts'.[166] Nevertheless, it is clear from *Meridian* and subsequent authorities at the highest level that the *directing mind and will* approach remains a viable means of attributing the knowledge of a natural person to a legal person.[167] It could do so by functioning as an *aid* to the construction of special rules.[168] Whilst the anthropomorphic core of the theory seems tolerable when its sphere of application is limited to aiding the construction of statutes or other documents,[169] commentators advise against it having a role to play as a general rule as it unnecessarily usurps principles of agency law.[170]

The approach attributes to a company the mind and will (including knowledge) of the individuals who 'manage and control its actions.'[171] Two refinements to this statement were identified in *El Ajou*. First, the management and control exercised by the individual(s) must relate to the act or omission '*in point*'.[172] Thus, determination of the directing mind and will must depend upon the precise act or omission being examined by the court. In the case of very small companies which carry out very simple activities, one individual may dominate day-to-day decision-making in which case they could be treated as the directing mind and will for *all* purposes.[173] However, in larger companies with complex operations, the directing mind and will for one purpose (e.g. finance) may not be the directing mind and will for another purpose (e.g. health and safety). Second, the individual(s) must possess the requisite status and authority

[166] Eilis Ferran, 'Corporate Attribution and the Directing Mind and Will' (2011) 127 LQR 239, 260.

[167] *Bilta* (n 128) 18 and 64.

[168] For instance, a company could, if the factual context of the case was supportive, be deemed to 'knowingly permit' something to happen (e.g. under EPA 1990, s 78F(2)) where the *directing mind and will* of the relevant function did so.

[169] Watts and Reynolds (n 13) [8-215].

[170] See, e.g. Peter Watts, 'Corrupt Company Controllers, their Companies, and their Companies' Creditors - Dealing with Pleas of Ex Turpi Causa' (2014) JBL 161, 162.

[171] *EI Ajou* (n 133) 150-1 (Nourse LJ).

[172] ibid 151.

[173] *Moulin* (n 4) [67].

to make their actions, state of mind or knowledge that of the company.[174] Directors, managers and secretaries (i.e. 'officers') are examples of the types of roles which will typically possess that status and authority.[175] Appropriate status could, in theory, be conferred upon other employees where authority had been delegated to them.[176] Both criteria were satisfied on the facts. The common director's knowledge of the source of the funds was attributed to DLH. Subsequent caselaw has followed *El Ajou*, finding that a company will be taken as having the same knowledge as the directing mind and will.[177]

In deploying the approach in *El* Ajou, the Court of Appeal did not take issue with the fact that the pertinent knowledge was acquired as a director of the 'other' company, i.e. the one upon whom the knowledge was not sought to be attributed. Knowledge was so acquired in *El Ajou*. Nourse LJ was clear on this when he asserted that the director acquired the relevant knowledge 'as a director of SAFI'.[178] This was, in his view, the factor which rendered the attribution of that knowledge to DLH problematic under the agency analysis. This generates illogical and arbitrary outcomes. The legal significance of the 'capacity' in which knowledge was acquired by a common officer will be determined by whether the court is required to interpret a substantive legal rule using a special rule or apply principles of agency law (i.e. apply a general rule). In the former, the concept of 'capacity' may be ignored. In the latter, it takes a central role and must be surmounted through satisfaction of the duty-based approaches considered in section 3.1 or 3.2 if the knowledge of the common officer is to be attributed to

[174] *EI Ajou* (n 133) 151

[175] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 190.

[176] *EI Ajou* (n 133) 171.

[177] *Circular Facilities (London) Ltd v Sevenoaks DC* [2005] Env LR 35, 763 (Newman J).

[178] *EI Ajou* (n 133) 153.

HoldCo Plc. A subsequent decision of the Court of Appeal, *Jafari-Fini v Skillglass Ltd*,[179] affirmed this. No justification was offered in either judgement to support the veracity of this difference in treatment. The arguments proffered in section 2 indicate that this differential treatment should not be sustained.

An important point must be emphasised at this juncture. Recall that the scope of this article is limited to malfeasance, neglect or harm (or the prospect of it) caused by the manner in which the affairs of *SubCo Ltd* are run. This could lead to the (false) conclusion that the theory was inapplicable in questions concerning the *HoldCo Plc's* legal liability; SubCo Ltd's acts or omissions (or more accurately, those of certain natural persons attributed to it by a rule for a particular purpose) could be viewed as 'in point', not HoldCo Plcs. However, in this article it is the *knowledge*-relevant action (e.g. the 'knowingly permitting' some unlawful event or action to occur) which is under scrutiny by the court; it is the acts and omissions in relation to *those* offences which are important, not the acts or omissions of SubCo Ltd itself. The *directing mind and will* approach is perfectly suited to aiding construction of those terms.

There is, however, a drawback with the approach which will limit its general utility. Its own internal conditions (i.e. in relation to the status and authority of the individual within the company and their closeness to the act or omission 'in point') mean that even where a common officer was demonstrably privy to knowledge of a 'bad' fact, where they were not the directing

[179] [2007] EWCA Civ 261. In *Jafari-Fini*, in the context of the construction of a contractual obligation, Moore-Bick LJ held that 'information *relevant to the company's affairs* that comes into the possession of one director, *however that may occur*, *can* properly be regarded as information in the possession of the company itself': [98] (emphasis added). Moore-Bick LJ was very clear that the pertinent information was acquired outside of the individual's capacity as director of the company upon whom the knowledge was sought to be attributed: [92]. The director's knowledge, acquired privately, was attributed to the company under directing mind and will theory; the same knowledge was *not* able to be attributed utilising agency analysis as the requirements of the relevant duty-based approaches could not be satisfied: [95]. Thus, the 'capacity' in which knowledge is acquired mattered in the former but not the latter.

mind and will in respect of the act or omission *in point* then the theory would not enable their knowledge to be attributed to HoldCo Plc. The court could invoke agency principles but, as we have seen, these are unlikely to result in the successful attribution of the pertinent knowledge to HoldCo Plc. This creates incentives for key decision-makers within HoldCo Plc to engage in defensive strategies to ensure that liability under this approach may be evaded. It could do so by delegating authority for 'high-risk' functions to a non-common officer and generating distance between common officers and 'bad' facts. Such strategies could be employed with ease. Thus, the *directing mind and will* approach fails to offer sufficient comfort that it is able to redress the accountability gap outlined in the introduction of this article.

A Way Forward: the *presumed-knowledge* approach

In this section, a new approach (the *presumed-knowledge* approach) is proposed to deal with the issue of 'capacity' when questions of knowledge attribution arise in circumstances where a (human) officer of a parent company is appointed to the board of directors of its subsidiary. It would function as a general rule of attribution. And its sphere of application would be limited to circumstances where the common officer's knowledge was relevant to determination of imposition of tortious or restitutionary liability or where the operation of a statutory rule was dependent upon a party's knowledge.

The new approach focuses on the *nature* of the relevant knowledge, not its source. It would treat knowledge of a 'bad' fact acquired by an officer common to SubCo Ltd and HoldCo Plc qua director of SubCo Ltd as *capable* of attribution to HoldCo Plc where it related to the 'affairs' of HoldCo Plc. The context of the claim or action would determine whether, in fact, the knowledge was *actually* attributed to HoldCo Plc. The term 'affairs' would be construed broadly as it is in other areas of company law,[180] reflecting information concerning goodwill,

[180] See text accompanying fn 25.

profit and losses and assets, including its shareholding in its subsidiary (and, if relevant, a sub-subsidiary).[181] HoldCo Plc's 'affairs' could, therefore, encompass those of SubCo Ltd. This prospect would be attenuated where SubCo Ltd was a strategically important subsidiary of HoldCo Plc, such as would be the case with a *U-form* organisation. It may be more difficult to deem HoldCo Plc's 'affairs' to encompass those of SubCo Ltd in an *M-form* organisation which evidenced a high-degree of decentralised decision-making to its divisions. However, HoldCo Plc would not be immune from attribution. The very fact that HoldCo Plc appointed its officer(s) to the board of SubCo Ltd, in part, to solidify lines of authority and communication between the companies would, it is submitted, provide strong evidence that their affairs were sufficiently connected. HoldCo Plc's 'affairs', much like the organisational structure of the group, need not respect strict legal boundaries.

Framing the definition of 'affairs' in this way recognises that subsidiaries may be conceived of as an investment in which the parent is likely to have placed significant time and resources and whose profitability will ultimately impact upon its own financial success and, often, its ability to operate productively. It neither requires evidence of 'control' by the parent company nor for the operations of the parent and subsidiary to be highly integrated.

The approach formalises the information pathways created by common officers, a core motive for, and outcome of, their deployment; it moves 'bad news' closer to the locus of group decision-making. This is likely to engender a culture of redressing risk within the group; 'bad' facts would neither be confined to the subsidiary from which they came nor would the legal liability attaching to them. Those are risks inherent in the duty-based approaches which the courts in England and Wales have used historically. Under the proposed approach, senior executives within the corporate group would need to respond to 'bad' facts to which they became privy in order to avoid (further) reputational, commercial or legal consequences; don't

[181] *R v Board of Trade, Ex p St Martins Preserving Co Ltd* [1965] 1 QB 603, 613.

ask, don't tell' corporate cultures would be dispelled. Armed with the authority and opportunity to prevent the problem arising in the first place, or to mitigate its impact should it already have materialised, the board of HoldCo Plc would be required to address it.

The approach is perfectly aligned with separate legal personality and limited liability, two core doctrines of UK company law. These are not the barriers to effective regulation that they are often perceived to be by scholars working in the field of parent company accountability.[182] As will now be explained, those doctrines can, in fact, be receptive to the policy objectives underpinning knowledge-relevant claims and actions deriving from a wide array of sources of law internal and external to company law.

When approaching questions of attribution, the need for analytical sensitivity to the principle of separate legal personality has been emphasised by Worthington who asserts that '[t]he very first lesson of corporate attribution is that the *Salomon* principle reigns.'[183] This is amplified in the context of a group for there is more than one legal personality to which due regard must be had. However, we must be clear on the implications of that principle when approaching questions of attribution in common officer cases. Those implications may be categorised according to whether they arise pre- or post-attribution. Pre-attribution, each company incorporated lawfully under companies' legislation is to be treated as a persona ficta with legal personality distinct from its members.[184] The presence of this (first-order) rule means that the company is the legitimate *target* for any subsequent attribution of the knowledge to which the common officer is privy where another (second-order) rule so provides. Post-attribution, application of the first-order rule (i.e. each company gains a persona ficta upon lawful incorporation) means that the company is the proper *holder* of rights to which it is

[182] See fn 28.

[183] Worthington (n 144) 121.

[184] *Salomon v Salomon Ltd* [1897] AC 22, 30.

entitled, liabilities to which it may be subject and knowledge or states of mind attributed to it; the members, qua members, are not the holders.

These implications tell us that when approaching questions of knowledge attribution concerning common officers, having 'due regard' to the principle merely entails accepting that HoldCo Plc cannot bear the *legal consequences* of, or sanction(s) associated with, the common officer's knowledge *just because* it is a member of SubCo Ltd. *Each* possess their own legal personality and so ability to hold rights, incur liabilities and, where attribution is successful, be treated as possessing knowledge. *Each,* under the application of the first-order rule, is a (possible) target for attribution. The principle is simply not impacted where the knowledge of an officer common to HoldCo Plc and SubCo Ltd, acquired qua director of the latter, is attributed to HoldCo Plc.

In utilising the proposed approach, the courts would merely be recognising the implications associated with different agency *relationships* being in play. Where the same individual is an officer of HoldCo Plc and a director of SubCo Ltd then they are party to (at least) two entirely separate agency relationships; one with *each* company. The individual, as *carrier* of and conduit of the 'bad' fact, should be viewed as the proper unit of focus in approaching the questions of attribution as per the approach in *Belmont*. That focus is justified as they take knowledge acquired in one agency relationship (i.e. with SubCo Ltd) into another (i.e. with HoldCo Plc), an action both deliberate and often ultimately beneficial to the latter. The law cannot compartmentalise their mind in any true and meaningful sense. Their decision-making (and, ultimately, that of the parent) is informed by the knowledge that they posses and the information that they gather.[185] With the individual as the proper unit of focus, determination of what *counts* as the agent's knowledge for the purposes of attribution to HoldCo Plc is key. This is the work to be done by the *presumed-knowledge* approach.

[185] Haunschild and Beckman (n 17) 817.

Nor does the proposed approach 'erode' the protection afforded to members (e.g. to HoldCo Plc in its capacity as shareholder of SubCo Ltd) by limited liability. That principle refers to the publicly ordered (statutory) limitation upon the personal liability of members of a company limited by shares to contribute to that company's assets *should it be wound up with unpaid debts and liabilities*. It could, more accurately, be referred to as the doctrine of limited contribution. Section 74(1) of the Insolvency Act 1986 (IA 1986) asserts that 'every present and past member' is 'liable' to contribute to the company's assets if it is wound up. However, under section 74(2)(d) IA 1986, in the case of companies limited by shares (such as SubCo Ltd and HoldCo Plc) 'no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable'. The only way in which limited liability could be relevant in the context of attribution would where a company upon which knowledge *had been attributed* was wound-up (i.e. post-attribution), with its effect being to limit the liability of members to contribute to the assets of the now insolvent company to the extent of sums unpaid on their shares. It has no bearing whatsoever upon either whether knowledge *can* be attributed to a company or upon *which* company it should be attributed.

Finally, it is prudent to deal with the claim that the *presumed-knowledge* approach would incentivise corporate groups to refrain from utilising common officers. Haunschild and Beckman assert that common *directors* (and, presumably, through analogy common *officers* more broadly) are 'low-cost' sources of information as directors are required for all companies and the information that comes from them is an 'inexpensive by-product' of such relationships.[186] Thus, whilst their presence may heighten the prospect of liability in respect of knowledge-relevant claims and offences, the numerous benefits conferred by such individuals are likely to outweigh this concern, particularly where the subsidiary is strategically important

[186] ibid.

to the parent company or the wider corporate group. They provide one very clear mechanism for ensuring the sound governance of subsidiaries within the group.

Conclusion

This article evaluated the normative and positive legal significance of the 'capacity' in which pertinent knowledge was acquired by a representative of a parent company appointed to the board of its subsidiary, a practice found to be prevalent in corporate groups across the globe. It did so to determine how the law of England and Wales should deal with knowledge of malfeasance, neglect or harm (or the prospect of it) caused by the manner in which the affairs of the subsidiary are run (a 'bad' fact), acquired as director of that company, when questions of its attribution to the parent arise.

It was argued that the capacity in which the common officer acquired knowledge of the 'bad' fact should be deemed to be legally *in*significant where the information concerns the 'affairs' of the parent company. Such information could, therefore, be attributed to the parent company for the purpose of determining its legal liability. The term 'affairs' should be construed broadly, as in other areas of company law, to reflect information concerning goodwill, profit and losses and its assets, including shareholdings in a subsidiary. The proposed approach was shown to reflect the reality that common officers are often deployed to create channels of communication between the companies to whom they are affiliated; they are conduits of business information. It encourages 'bad' facts concerning SubCo Ltd's affairs to be reported back to HoldCo Plc so that steps can be taken to address the issue and minimise impacts upon the environment and third-parties, such as employees.

The proposed approach redresses the inequity flowing from the paradox generated by the positive law whereby information may be collected and internalised when beneficial to the parent company only for it to prevent its return when questions of legal liability arise; benefit

and burden ought to be recoupled and the proposed approach facilitates this. It was recommended that the approaches which have been used by courts in England and Wales to determine attribution outcomes in common officer cases should no longer be used in factual contexts concerning parent-subsidiary relations.

The wider importance of this article was seen to lie in the fact that it challenged contemporary attitudes to the (lack of) accountability of parent companies for the actions of their subsidiaries. Beyond circumstances under which a parent company may be found to owe a duty of care to its subsidiary's employees or those directly affected by the subsidiary's operations, the literature has a tendency to view corporate law doctrine (separate legal personality and limited liability) as preventing third parties affected by the unlawful actions of a subsidiary from bringing claims against the parent. This article advanced an alternative narrative: greater parent accountability can, in fact, be delivered within the current architecture of UK company law. Corporate law doctrine is not the barrier it is perceived to be the policy objectives underpinning a wide array of sources of law external to company law. The article, therefore, offered a new perspective on how parent companies could be rendered (more) accountable for the actions of their subsidiaries. However, this will not be achieved if the courts focus upon the *capacity* in which the knowledge was acquired as opposed to the *type* of information which its concerns. The caselaw is confused and confusing. With the approach proposed in this article, the courts have the opportunity to embrace a new means of determining attribution outcomes in common officer cases in a more equitable and principled manner which reflects the organisational imperatives driving their deployment.

Word Count: 14,434 words (excluding footnotes), 18,027 (including footnotes)