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Civil Conspiracy in the Corporate Context

Pey-Woan Lee*

Abstract

This article examines the issues that arise when the tort of conspiracy by unlawful means is used, as an alternative to veil-piercing, either to extend a company's liability to its controllers, or to enable a controller's creditors to reach the assets of company under his or her control. It observes that the tort of conspiracy is a particularly potent mechanism for these purposes because of its potentially broad reach. A liberal application of conspiracy liability to companies and their insiders would therefore undermine the company's separate legal status as well as the benefits of incorporation. For that reason, the application of the tort, and of private law principles in general, is not free from the policy debates that inform veil-piercing cases. A keen appreciation of how these policies are engaged is therefore necessary for the proper delineation of the tort in the corporate context.

1. Introduction

The term 'economic torts'[1] is commonly understood to encompass a group of intentional torts comprising inducing breach of contract, conspiracy, intimidation and causing loss by unlawful means. It seems now settled, however, that the term has no significance beyond indicating that these torts are frequently (but not exclusively) used to protect financial interests against deliberate interferences.[2] There is therefore

* Associate Professor of Law, Singapore Management University. An earlier draft of this paper was presented at the conference entitled 'Protecting Business and Economic Interests: Contemporary Issues in Tort Law' jointly organised by the Centre for Cross-Border Commercial Law in Asia, Singapore Management University (School of Law), Bond University (Faculty of Law) and the Singapore Academy of Law and held in Singapore on 18 – 19 August 2016. I am grateful to the speakers and participants at the conference for their comments. I would also like to thank Professor Joachim Dietrich and the anonymous reviewer for their helpful suggestions for improvement. The usual caveat applies.

[1] The term 'economic torts' was likely popularised by J D Heydon with the publication of *Economic Torts*, Sweet & Maxwell, London, 1973.

[2] This follows from the rejection by the majority Law Lords in *OBG v Allen* [2008] 1 AC 1 of the suggestion that these torts are specific instances of a 'genus' unlawful means tort. Attempts at rationalising the torts under unifying principles have been made by various authors: Heydon, above n 1; and T Weir, *Economic Torts*, Oxford University Press, Oxford, 1997.

no inherent unity among them[3] and the use of this term should not mislead one to assume that there exist particular qualities innate and common to these torts.[4] That said, there may be practical reasons why it remains convenient to consider them together. One such reason is that these torts are *functionally* similar in that they may be used, in one way or another, to reach beyond the immediate perpetrator of a particular injury, and attach liability to those whose involvement is either indirect or insufficiently causative of the claimant's injury.

This 'liability-extending'[5] function of the economic torts is particularly useful in disputes involving corporate defendants, as a means of circumventing the company's veil of incorporation to reach directors, shareholders or related companies who might in one way or another have been involved in a company's alleged wrongdoing. Indeed, the use of tort principles for this purpose appears now to have gained prominence in view of the UK Supreme Court's recent decision in *Prest v Petrodel*,[6] which has severely restricted, perhaps even eviscerated,[7] the traditional veil-piercing doctrine. In this case, Lord Sumption re-interpreted many traditional instances of veil-piercing as cases explainable by other, more conventional, private law principles. Although the precise analytical framework laid down by his Lordship is *obiter*[8] and controversial,[9] what seems clear (at least in England) is that veil-piercing is now a remedy of last-resort which should only be invoked if no other legal principle would

[3] R Stevens, *Torts and Rights*, OUP, Oxford, 2007, p 279.
[4] Such assumptions have been castigated as 'tendencies to mono-mania that must be resisted': N McBride & R Bagshaw, *Tort Law*, 5th ed, Harlow, England, p 675.
[5] This denotes both the extension of liability to wider range of defendants as well as the creation of new forms of liability.
[6] [2013] 3 WLR 1.
[7] See B Hannigan, 'Wedded to Saloman: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company' (2013) 50 *Irish Jurist* 11; PW Lee, 'The Enigma of Veil-Piercing' (2015) 26 *ICCLR* 28.
[8] The appellant had argued that various properties held by two offshore companies controlled by the respondent were property to which the latter was 'entitled' and which ought to have been transferred to her subsequent to their divorce. The House unaimously allowed the appeal on the ground that the companies held the properties on resulting trust for the respondent but rejected arguments founded on veil-piercing.
[9] Lord Sumption's analysis found support only in Lord Neuberger's speech ([2013] 3 WLR 1 at [60] – [61]. Lords Mance, Clarke, Wilson and Baroness Hale indicated ([2013] 3 WLR 1 at [92], [100] and [103]) that Lord Sumption's formuation of the veil-piercing doctrine might be too narrow while Lord Walker doubted ([2013] 3 WLR 1 at [106]) if the doctrine existed at all. Commentators, too, are divided, as to the correctness and usefulness of Lord Sumption's analysis. Compare, eg, H Tjio, "Lifting the Veil on Piercing the Veil" [2014] *LMCLQ* 19; R Grantham, "The Corporate Veil – An Ingenious Device" (2013) 32 *U Queensland LJ* 311; Hannigan, above n 7; R Matthews, 'Clarification of the Doctrine of Piercing the Corporate Veil' (2013) 28 *JIBLR* 516; Lee, above n 7; Z X Tan, 'The New Era of Corporate Veil-Piercing' (2016) 28 *SAcLJ* 209.

furnish a remedy.[10] Consequently, the jurisdiction is likely to '[wither] into obselescence'[11] as the focus shifts to greater use of private law principles to achieve results similar to veil-piercing. For some,[12] this is a welcome development because the use of private law principles does not, unlike the veil-piercing doctrine, undermine the *Saloman*[13] principle. Such a view assumes that once the company's separate status remains intact, the policy considerations that previously bedevilled the courts in the context of veil-piercing would be irrelevant.[14]

This article examines the issues that arise when conspiracy by unlawful means is used to extend liability in the same way that veil-piercing is often invoked for, that is, either to stretch a company's liability to its controllers, or to enable a controller's creditors to reach the assets of company under his or her control. Civil conspiracy is chosen as the subject of study because it holds considerable potential for such liability extensions. As a company may be understood as a statutorily-endorsed combination of capital, persons and resources, the broad application of conspiracy liability for intra-corporate acts effectively limits the legitimacy of such combinations. Precisely where the line is to be drawn between lawful and unlawful combinations raises legal and policy issues that cannot be adequately answered by looking only to private law principles. These issues will be examined chiefly by reference to English law but authorities from other leading Commonwealth jurisdictions will also be considered where relevant.

By way of background, this article will briefly state the elements of civil conspiracy and its rationale. It then proceeds to consider the specific issues that arise when each element of the tort is applied to companies. It observes that the tort's potency as a liability-extending mechanism far exceeds that of the veil-piercing doctrine (which has traditionally been applied only sparingly by reason of its murky rationale). Several reasons explain why that might be so. First, the tort of conspiracy is

[10] *Prest v Petrodel* [2013] 3 WLR 1 at [35].
[11] B Hannigan, *Company Law*, OUP, Oxford, 2016 at [3-37].
[12]See eg W Day, 'Skirting Around the Issue: the Corporate Veil after *Prest v Petrodel*' [2014] *LMCLQ* 269 at 270, who argues once the analysis is shifted to private law principles, '[the involvement of the company is immaterial to the legal analysis'. See also C Witting and J Rankin, 'Tortious Liability of Corporate Groups: From Control to Coordination' (2014) 22 *Tort L Rev* 91 at 91 – 92 and 102.
[13] *Saloman v A Saloman & Co Ltd* [1897] AC 22 (HL).
[14] F Rose, 'Raising the Corporate Sail' [2013] *LMCLQ* 566 at 585 – 591.

conceived to regulate the conduct of individual jural persons, of which the company is one. As such, a company may, in theory, conspire with its directors as well as related companies. Veil-piercing, by contrast, is conceptually questionable because it seeks to negate the jural status of the company. Second, there is currently some uncertainty as to the tort's elements and rationale. In particular, there is some risk that 'unlawful means' may encompass a broad range of unlawful acts (includting statutory wrongs) and thereby extend the tort to a wide spectrum of circumstances. Third, the authorities suggest that courts' impulse is to use the tort of conspiracy as a means of arresting the abuse of corporate vehicles. Where companies have been used to perpetrate or facilitate fraudulent schemes, the courts will resist arguments that may emaciate the tort.

However, this article also argues that the tort has to be reined in by a number of policy concerns peculiar to companies. Foremost among such policies is the need to avoid a broad regime of liability that would unduly undermine the benefits of incorporation and deter enterprise. In addition, an unbridled application of the tort may also unjustifiably subvert fundamental principles established in the realm of contracts and insolvency regulation. Significantly, these are the same policy concerns that underpinned the courts' reluctance to disregard the company's separate legal status utilising traditional veil-piercing jurisprudence. That leads to the important observation that whilst the tort of conspiracy may appear more doctinally palatable (in that it affirms rather than negates the company's separate legal status), its application is ultimately not free from the policy debates that used to inform veil-piercing cases. A keen appreciation of how these policies are engaged is therefore necessary for the proper delineation of the tort in the corporate context.

2. Civil Conspiracy – Elements, Rationale & Uncertainties

The tort of conspiracy is commonly analysed as comprising two varieties, namely conspiracy by lawful means and unlawful means. Both forms of the tort require proof of agreement, intention to injure and resulting damage. In addition, lawful means conspiracy requires proof of 'improper motive' – which in practice is often equated

with a *predominant* intention to injure. Unlawful means conspiracy, on the other hand, is actionable only upon proof of use of a sufficient form of illegality.

In practice, the application of these elements is attended by a measure of difficulty. In particular, there is uncertainty as how 'intention' and 'unlawful means' are to be determined for purposes of establishing the unlawful means conspiracy. In *OBG v Allen*[15] ('*OBG*'), Lord Hoffmann had explicated the concept of 'intention' to mean that the defendant must have intended the claimant's breach or loss either as an end in itself or a means to an end. Although *OBG* did not concern liability for conspiracy, the Court of Appeal applied this definition in *Meretz Investments NV v ACP Ltd*[16] to unlawful means conspiracy. In the yet later case of *Total Network SL v HM Revenue & Customs*[17] ('*Total*'), which concerned unlawful means conspiracy, the House of Lords did not expressly disagree with *OBG*'s formulation of intention. However, the Law Lords also variously referred to the notions of 'directed at'[18] and 'targeted at'.[19] It is unclear if the ends and means test that was propounded in *OBG* is in fact different from the more traditional formulation of 'aimed or targeted at'. One commentator is of the view that the *OBG* test is broader as it suggests that the claimant's harm need only be *a* means of achieving the defendant's desired end but need not be an inevitable result of their combination.[20] In *Wagner v Gill*,[21] the New Zealand Court of Appeal noted this 'confused and confusing' state of authorities and indicated a preference 'to retain the requirement that the conduct must be directed at the claimant'.[22] The court considered this to be the more satisfactory test because the distinction between 'means' and 'consequence' may in practice be too fine and hence 'difficult to apply in any meaningful way'.[23] In England, however, lower courts have generally applied the *OBG*

[15] [2008] 1 AC 1 at [42] and [134]; Lord Nicholls was of the same view at [164].
[16] [2008] Ch 244 at [146].
[17] [2008] 1 AC 1174.
[18] Ibid at [120], per Lord Hope.
[19] Ibid at [120], per Lord Mance.
[20] See H Carty, *An Analysis of the Economic Torts*, 2nd ed, OUP, Oxford, 2010, at p 126. *Cf*, C Witting, 'Intra-Corporate Conspiracy: An Intriguing Prospect' (2013) 72 *CLJ* 178, who suggests (at 187 – 188) that *Total* should not be seen as having altered the traditional meaning of intention, which requires the unlawful means to be aimed or directed at the claimant.
[21] [2015] 3 NZLR 157.
[22] [2014] NZCA 336 at [104] and [106].
[23] Ibid at [105]. But the correctness of this criticism may be doubted, for the concept of 'means' connotes causality but 'consequence' does not. So what has to be proved under the *OBG* test is that the defendant knew or intended the claimant's injury *as an effective means* for achieving its ultimate end, and it follows that the mere knowledge that injury would ensue should not suffice.

test without reference to *Total*.[24] Although this suggests that the *OBG* formulation is now the prevailing test, ambiguity nevertheless remains until the issue is fully considered by appellate courts.

The other area of contention concerns what would count as 'unlawful means'. In *Total*, the House of Lords was unequivocal that 'unlawful means' for purposes of a two-party conspiracy were not confined to civil wrongs actionable by the claimant. A common law crime would suffice even if it were not otherwise actionable by the claimant as a tort. However, their Lordships furnished scant guidance as to how far beyond traditional crimes the tort would extend. Cases subsequent to *Total* have generally eschewed the suggestion that *any* form of illegality would suffice.[25] At the minimum, the breach has to be either a civil or a criminal wrong. But would *any* statutory crime suffice? In *Digicel (St Lucia) Ltd v Cable & Wireless Plc*,[26] Morgan J was inclined to the view that *all* crimes (including all non-actionable statutory offences) are unlawful acts for purposes of unlawful means conspiracy. But such an approach would significantly broaden the tort, and is not in any event supported by their Lordships' *dicta* in *Total*.[27] Yet if the true position were that only *some* crimes would suffice, it is far from clear how the relevant crimes are to be identified.

The perplexities just described reflect, in large part, the tort's inadequate conceptual foundation. The anomaly of lawful means conspiracy is too well recognised. It assumes that a combination has the magical power to transform a lawful act into an unlawful one though it is not clear why that is necessarily so.[28] Until the House of Lords' decision

[24] See *Baldwin v Berryland Books* [2010] EWCA Civ 1440 at [48]; *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at [174]; *Thames Valley Housing Assoc Ltd v Elegant (Guernsey) Ltd* [2011] EWHC 1288 (Ch) at [104]; *WH Newson Holding Ltd v IMI plc* [2012] EWHC 3680 (Ch) at [35] (the court's finding was reversed on appeal but no criticism was made of the test itself: see *WH Newson Holding Ltd v IMI plc* [2014] Bus LR 156 at [37] – [44]); and *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) Annex I at para 83.

[25] *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at [187], [196], [418] and Annex I at [62]; *Anthony McGill v The Sports and Entertainment Media Group* [2014] EWHC 3000 (QB) at [172].

[26] [2010] EWHC 774 (Ch.) at [410] and at [53] – [54] of Annex I.

[27] Lord Walker did not seem to have an 'all-crimes' approach in mind as he ruled out the possibility of an absolute rule that applies to all circumstances, while Lord Mance expressly cautioned that only some but not all crimes would suffice and Lord Scott alluded to a discretionary approach by stressing that the conduct must be 'sufficiently reprehensible': see *Total Network SL v HM Revenue & Customs* [2008] 1 AC 1174 at [56], [96], [119].

[28] The most cited passage is that of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 189.

in *Total*, it was generally assumed that this anomaly was confined to the lawful means tort and hence tolerated by reason of its relative rarity. In *Total*, however, the House of Lords extended this anomaly to unlawful means conspiracy when it explicated both varieties as a single tort.[29] The result is that for both varieties of the tort, 'it is in the fact of conspiracy that the unlawfulness resides.'[30] As we have seen, this enables the court in *Total* to extend 'unlawful means' to non-actionable common law crimes but has also introduced chaos given the lack of clarity on how 'unlawfulness' should be delimited. Unsurprisingly, this outcome has been criticised for making the tort 'even more anomalous'.[31] Nevertheless, the consequential expansion of the tort to encompass non-actionable unlawful acts has been endorsed in other Commonwealth jurisdictions.[32]

For some, *Total* is a regrettable development signalling an 'interventionist' tendency that would likely enlarge the tort's capacity as a 'gap-filling' mechanism.[33] Others, however, have interpreted *Total* to be of very limited application as it would only be in very rare circumstances where a common law crime would not also be actionable as a tort, and the civil actionability of statutory offences should in any event be governed by Parliamentary intention.[34] Nevertheless, until such time when there is further elucidation of its scope, it seems clear that the tort as it is currently shaped leaves considerable room for judicial lawmaking. What is more, if a liberal approach were adopted of its application to intra-corporate (between a company and its controllers and agents) and intra-group (between companies of the same group) activites, its liabtility-extending effects can only be exacerbated.[35]

3. Two Conceptual Pitfalls

[29] *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 at [41], [44], [56] and [221]. See also *Kuwait oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [107] – [108].
[30] *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 at [41] (per Lord Hope, citing Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 462).
[31] M Matthews, J Morgan & C O'Cinneide, *Hepple and Matthews' Tort: Cases and Materials*, OUP, Oxford, 6th ed, 2009 at 889.
[32] See, eg, *Wagner v Gill* [2015] 3 NZLR 157 at [71] (New Zealand) and *Beckkett Pte Ltd v Deutsche Bank AG* [2009] 3 SLR (R) 452 at [120] and *EFT Holding, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [91] (Singapore).
[33] H Carty, 'The Tort of Conspiracy as a Can of Worms' in S Pitel, J Neyers and E Chamberlain, *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013)
[34] L Hoffmann, 'The Rise and Fall of the Economic Torts' in S Degeling, J Edelman and J Goudkamp, *Torts in Commercial Law* (Thomson Reuters, 2011) at 115 – 116.
[35] A point noted by Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch), Annex I at para 61.

Before embarking on the anlaysis of corporate conspiracies proper, it is helpful to identify two conceptual pitfalls that should be avoided. The first is the fact that a company is a 'separate legal person' does not, in and of itself, prescribe any particular legal consequence.[36] As a statutory construct, a company's rights, powers and privileges are conferred by legislation. The ambit and effects of such legislation are determined not by particular logical attributes of 'legal personality' but the policy considerations that underpin the legislation.[37] In the context of civil conspiracy, the proposition that a company is a separate legal person who *could* be liable for conspiring with others (including its own controllers) is essentially a *conclusion* that such liability ought in some circumstances to arise, but it is not by itself a formula that elucidates what those circumstances are.[38]

A second analytical pitfall to avoid is the assumption that there are particular corporate law constructs that dictate how liability is to be shared by or allocated to a company and its agents. A prime example is the identification 'doctrine', which presupposes that a company's conduct and/or state of mind can always be located in a person or persons who can properly be said to be its alter ego or 'directing mind and will'. A corollary of this principle further assumes that once a particular act or mental state is attributed to a company on this basis, it will necessarily be 'dis-attributed' to the alter ego so that the company and the alter ego cannot be liable for the same wrong.[39] Both principles are founded on an 'organic approach' to attribution, which assumes the individual actor to be the 'very embodiment of the company itself'.[40] On this view, 'identification' confers immnunity on the alter ego from liability and renders a 'conspiracy' between a company and its alter ego a conceptual impossibility. But we now know that the dis-attribution principle is fallacious. A

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[36] As Smith pointedly observed (B Smith, 'Legal Personality' (1928) 37 *Yale L J* 283 at 298):

> It is not part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes. … is to make … corporate personality … a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits.

[37] N James, 'Separate Legal Personality: Legal Reality and Metaphor' (1993) 5 *Bond L Rev* 217 at 220.

[38] PW Lee, 'The Company and its Directors as Co-conspirators' (2009) 21 *SAcLJ* 409 at [22].

[39] See eg, R Grantham and C Rickett, 'Directors' Tortious Liability: Contract, Tort or Company Law?' (1999) 62 *MLR* 133; S Watson, 'Conceptual Confusion: Organs, Agents and Identity in the English Courts' (2011) 23 *SAcLJ* 762.

[40] R Grantham and C Rickett, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Company and Securities Law Journal* 168 at 170.

corporate agent who is 'identified' with the company for some purposes may remain personally liable for those torts that he or she commits in the course of employment.[41] Dis-attribution is a 'heresy' founded on the specious idea that the company and its alter ego somehow constitute a metaphysical union entailing specific logical consequences.[42] That no such union resides in the idea of 'identification' is now confirmed by the UK Supreme Court in *Bilta (UK) Ltd v Nazir (No 2)* ('*Bilta*').[43] Specifically, there is no requirement that a company must be identified with its 'directing mind and will' for *all* purposes. Rather, the 'directing mind and will' of the company is better understood as:[44]

> the product of a process of attribution in which the court seeks to identify the purpose of the statutory or common law rule or contractual provision which might require attribution in order to give effect to that purpose.

By laying to quietus the 'organic approach' to attribution, this clarification also removes a significant conceptual impediment to the establishment of a conspiracy between and company and its alter ego. As there is no *a priori* assumption that the company is always merged with its alter ego as one legal entity, a company *could* in principle be liable for conspiring with its alter ego provided there are sufficient policy reasons to justify such liability.

4. Corporate Conspiracies – Specific Issues

A company may incur liability for civil conspiracy either vicariously or as a primary tortfeasor. A company is vicariously liable if two or more of its employees combine to form a tortious conspiracy in the course of their employment. In the alternative, a company may itself unlawfully conspire with any other legal or natural person,

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[41] *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 & 4)* [2003] 1 AC 959.
[42] N Cambell and J Armour, 'Demystifying the Civil Liability of Corporate Agents' (2003) 62 *CLJ* 290 at 296. See also S Lo, 'Dis-Attribution Fallacy and Directors' Tort Liabilities' (2016) 30 *Aust Jnl of Corp Law* 215.
[43] [2015] 2 WLR 1168.
[44] Ibid at [202] (per Lords Toulson and Hodge). This approach was favoured also by Lord Mance (at [37] – [44]) and Lords Neuberger, Clarke and Carnworth (at [9]). Lord Sumption, on the other hand, adhered to the idea that the state of mind of a company's 'directing mind and will' is attributable to the company for *all* purposes subject to relevant exceptions (at [68] – [69]).

including its agents, controllers and related companies.[45] Our discussion here is primarily concerned with this latter scenario where the company is liable as a primary tortfeasor.

A conspiracy alleged between a company and its insiders (that is, directors and controllers) is often viewed with particular scepticism because, as noted, a finding of conspiracy in such circumstance has the effect of unravelling a combination (that is, the company) that is statutorily authorised in the first place. In broad terms, a company is a legitimate combination of capital, expertise and resources. Modern corporate statutes generally impose no restriction on the ends that such combinations may pursue.[46] Allowing claimants to sue a company for unlawfully combining with insiders, however, undermines such autonomy by extending the company's liability to unlawful acts in respect of which the company was not the primary perpetrator. At the same time, inroads are made to the limited liability principle as the tort enables the claimant to reach those standing behind the corporate veil, or to allow the controller's creditors to access the company's assets. Obviously, therefore, the wider the conspiracy tort, the more severe would be the potential encroachment on these company law policies.

With these considerations in mind, the discussion below will examine the specific issues that arise when the tort is applied to intra-corporate and intra-group activities. It will utilise unlawful means conspiracy as the paradigm because it is this branch of the tort that has been pleaded with much greater success in practice.[47]

(a) Agreement

The agreement or combination is, of course, the gist of the tort. As a legal entity with its own decision-making organs, the company is well capable of forming such

[45] *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch), Annex I at [77].
[46] See eg, s 31(1) of the Companies Act 2006 (UK); s 124 Corporations Act 2001 (Australia) and s 23(1) Companies Act (Cap 50, 2006 ed) (Singapore).
[47] A search of UK cases on Westlaw database for the period between 2011 to 2015 (both years included) reveals only one case in which conspiracy to injure was said to be established: see *Apax Global Payment & Technologies v Morina* [2011] EWHC 2983 at [42]. But this case is arguably not a 'true' instance of lawful means conspiracy as elements of unlawfulness (such as fraud and breach of fiduciary duties) were also established.

agreements or combinations with other natural or legal persons. When applied to combinations between companies and their directors, however, this requirement has given rise to two difficulties. The first is conceptual: can a company 'conspire' with its sole director or alter ego? The second is evidential: what type of conduct or circumstance would constitute 'agreement' on the part of (a) the company and (b) the director?

Taking these issue areas in the order set out above, the first is founded on the objection that in a case involving a one-man company, there can be no true meeting of 'two independent minds'. For purposes of criminal law, it has been held that such a conspiracy is impossible as a matter of English law.[48] That is understandable given the risk of double jeopardy – to hold otherwise may result in a director being punished twice over for the same offence. But it is arguable that different considerations apply in the civil context, where the remedy sought is primarily that of compensation. Indeed, a growing body of authorities[49] now accepts that a sole director can conspire with the company he or she controls for purposes of establishing tortious liability.

In *Barclay Pharmaceuticals Limited v Waypharm LP* ('*Barclay*'),[50] the claimant, Barclay, was an importer and wholesaler which had for some time purchased pharmaceatical products from Wayharm, a limited partnership effectively owned and managed by one Mekni. Mekni also owned and controlled Best Financial Services Corporation Barclay ('BFSC'), which appeared to have been used largely to perform treasury functions within the group of companies owned by Mekni. The claimant brought a suit alleging, *inter alia*, that Mekni, Waypharm and BFSC had conspired to defraud it of substantial sums by presenting false invoices under a letter of credit in respect of goods that were either not delivered or substantially less than what was represented. In defence, Mekni argued that he could not be liable for conspiring with Waypharm and BFSC as that would be tantamount to conspiring with himself. Citing

[48] *R v McDonnell* (1966) 50 Cr App R 5.
[49] For UK, see *Barclay Pharmaceuticals Limited v Waypharm LP* [2012] EWHC 306; *Concept Oil Services Limited v EN-GIN Group LLP* [2013] EWHC 1897 (Comm); for New Zealand, *Wagner v Gill* [2015] 3 NZLR 157; and for Singapore, *Nagase Singapore Pte Ltd v Chng Kai Huat* [2007] 3 SLR 265; *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318; and *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258.
[50] [2012] EWHC 306.

Taylor v Smith in support,[51] Gloster J rejected this argument and held that both Waypharm and BFSC were parties to the conspiracy. In coming to this conclusion, her honour took note of the fact that BSFC had no corporate purpose except to 'front' Mekni's dealings and act as a money box that disperses the latter's ill-gotten gains to other companies that he owned.[52] This was therefore 'a clear case where the corporate machinery of the various companies was being used, or, more accurately, abused, by Mr Mekni as controller to damage the claimant [Barclay].'[53] This suggests that the question whether a company could conspire with its sole controller is not one of metaphysics but of policy: the law's conception of the parties as distinct persons in this context is ultimately a legal device for ensuring that those who perpetrate wrongs cannot evade liability through the use of corporate vehicles.

Cases such as *Barclay* suggest that there is some impetus for developing the tort of conspiracy broadly to strengthen the law's grip on unlawful combinations. However, the tort's actual reach is also determined by the content that makes up the element. It is necessary, therefore, to understand the circumstances or conduct that would suffice as evidence of a company's 'agreement'. It is well established that the agreement or combination need not be explicit but may be tacit or inferred from the parties' acts.[54] Such inferences, however, are not to be lightly drawn as conspiracy, like fraud, is a serious claim for which particularly cogent evidence is required. If a company had approved of an agreement through one of its decision-making organs (*ie*, the board or shareholders' meeting), that would be undisputed evidence of its agreement to participate in the conspiracy.[55] More often, however, a company's 'agreement' is inferred from its role in the alleged conspiracy and the gravity of the illegal means or object. This means that even though the requirement of 'agreement' is conceptually distinct from the elements of intention and unlawful means, in reality it is often derived from an assessment of the latter.[56] In general, the more reprehensible the unlawful acts, the more likely it is that the company would be taken to have 'agreed'

[51] [1991] IR 142.
[52] *Barclay Pharmaceuticals Limited v Waypharm LP* [2012] EWHC 306 at [224].
[53] *Barclay Pharmaceuticals Limited v Waypharm LP* [2012] EWHC 306 at [226].
[54] *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [111].
[55] This occurred, for *eg*, in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 (although the company was ultimately not held to be a party to the conspiracy since it was the victim of the conspiracy and the guilty knowledge of the directors could not therefore be imputed to it).
[56] *The 'Dolphina'* [2012] 1 SLR 992 at [263].

to the conspiracy provided it can also be imputed with knowledge of the illegality. Thus, in a case such as *Barclay*, where the conduct complained of involves fraud, the fact of 'agreement' would quite readily be inferred: Gloster J was prepared to infer BSFC's agreement from the fact of Mekni's control and BSFC's role as a laundering agent of the group's ill-gotten gains.[57] Likewise, in *The Dolphina*,[58] a company ('Universal') alleged to have been a party to a conspiracy had three directors but only one of them ('Kwan') was active in running its business. In those circumstances, the Singapore High Court was prepared to impute Kwan's guilty knowledge to Universal, and to infer its 'agreement' from its failure to take steps to prevent a fraudulent course of conduct. That the element of 'agreement' may be proved by inference thus provides a measure of malleability that can be exploited to expand the tort's ambit.

In cases where a conspiracy is alleged between a company and directors who are not its controllers, a further difficulty arises as to what conduct on the part of the director would suffice as evidence of 'agreement'. Obviously, a wide conception of such conduct may over-expand directors' liability and unduly dampen entrepreneurial risk-taking. This may be why some authorities suggest that a director cannot be taken to have conspired with the company or other directors merely by discharging his or her constitutional functions. Thus, in *Posluns v Toronto Stock Exchange*, a decision of the Ontario High Court, it was said that:[59]

> the directors of a corporation do not make an 'agreement' in the conspiracy sense by voting the same way. They individually make the same decision. In the popular sense they are 'in agreement', but in the sense in which the law of conspiracy uses 'agree' they were not. Each simply expressed an individual opinion and the majority opinion prevailed. A contrary view would bring extraordinary consequences. One of its implications would be that each time the majority of a Board of Directors voted to have the corporation pursue a course of action which ultimately turned out to be illegal, those who were in favour of having the corporation act as it did would be conspirators by reason solely of having so voted.

In England, a similar reasoning has been adopted in the context of joint tortfeasance.

[57] [2012] EWHC 306 at [223].
[58] [2012] 1 SLR 992.
[59] (1964) 46 DLR (2d) 210 (Ont HC) at [328] (per Gale J).

The relevant test here is whether a director could be said to have 'authorised, directed or procured' the company's tort.[60] In *MCA Records Inc v Charly Records Ltd I* ('*Charly Records'*), Chadwick LJ stated that: [61]

> a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company – that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person.

The correctness of this approach has, however, been doubted as it is not apparent why directors should acquire immunity merely because they had authorised an unlawful act as a board. Some commentators contend that this 'constitutional exception' should be discarded as it is no more than a vestige of the 'dis-attribution fallacy' – the mistaken assumption that directors are immune from personal liability once their acts are identified as those of the company's.[62]

In this writer's view, however, the 'constitutional exception' is founded on something more than a misapprehension of the effects of identification. In both the contexts of joint tortfeasance and civil conspiracy, the exception reflects the court's attempt at mediating competing *policies*.[63] On the one hand, there is the truism that each person should bear responsibility for his or her own wrongdoing. On the other, there is real concern that a broad regime of personal liability would inhibit enterprise. This is particularly so if a company operates in a highly regulated environment cluttered with strict-liability offences. Requiring directors to have done 'something more' than merely discharge their constitutional functions is an attempt at striking an appropriate balance between these conflicting concerns. Although this exception is not without difficulty, it serves to emphasise the threshold principle that a director is not liable for

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[60] It has, however, been argued that this form of liability is more accurately analysed as accessorial liability rather than joint tortfeasance: see see J Dietrich & P Ridge, *Accessories in Private Law*, CUP, Cambridge, 2015 at 386.

[61] [2003] 1 BCLC 93. This approach has been applied in *Koninklijke Philips Electronics NV v Princo Digital Disc GmbH* [2004] 2 BCLC 50 and *Società Esplosivi Industriali Spa v Ordnance Technologies (UK) Ltd* [2008] 2 BCLC 428.

[62] S Lo, 'Dis-Attribution Fallacy and Directors' Tort Liabilities' (2016) 30 *Aust J of Corp Law* 215 at 222; N Foster, 'Personal Civil Liability of Company Officers for Company Workplace Torts' (2008) 16 *TLJ* 20 at 41.

[63] See *Mentmore Manufacturing Co Inc v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3rd) 195 at [23].

a company's wrongdoing simply by reason of the office he or she holds, nor that *any* participation in a constitutional capacity equals 'authorisation, direction or procurement'.[64] Transposed to the context of conspiracy, such an approach may suggest that mere acquiescence in a board resolution would not suffice[65] but active participation in the design of an unlawful scheme (whether carried out in the course of or outside board meetings) could constitute an 'agreement' in the conspiracy sense.

Of course, as the experience in relation to joint tortfeasance has shown, exactly what has to be proved beyond the fact of acquiescence admits of no easy answer.[66] In *Keller v LED Technologies Pty Ltd* ('*Keller*'),[67] a majority of the Federal Court of Australia held that a director would only be jointly liable for the company's tort if he or she had authorised or procured the tort in a capacity other than that of a director.[68] For Jessup J, this meant that 'the context must be such that the director is effectively standing apart from the company and directing or prucuring it as a separate entity' so that there is 'a sense in which the director is using the company as the instrument of his or her own wrong'.[69] On this view, a director who does no more than discharge in good faith his or her duties to the company would not ordinarily incur liability for the

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[64] That this is likely what Chadwick LJ had in mind in *Charly Records* is supported by the fact that his Honour derived ([2003] 1 BCLC 93 at [49]) the principle from a statement made by Aldous LJ in *Williams v Natural Life Health Foods Ltd* [1998] 1 BCLC 689 at [17], which was in turn based on Slade LJ's statement in *C Evans Ltd v Spritebrand Ltd* 1 WLR at 329 that:

> The authorities … clearly show that a director of a company is not automatically to be identified with his company for the purpose of the law of tort, however small the company may be and however powerful his control over its affairs. Commercial enterprise and adventure is not to be discouraged by subjecting a director to such onerous potential liabilities. In every case where it is sought to make him liable for his company's torts, it is necessary to examine with care what part he played personally in regard to the act or acts complained of.

[65] A person is not a party to a conspiracy unless he or she has also taken steps to further the common design: see *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] Lloyd's Law Rep 19 at 35. See also *Grupo Torreas SA v Al-Sabah* [1999] CLC 1469 where Mance J observed (at 107) that 'weak and incompetent acquiescence is one thing, participation in conspiracy another.'

[66] In England, the position since *Charly Records* appears to require some personal involvement on the part of the director, but such an approach may favour directors of large companies over those of smaller companies, since the former are better able to distance themselves from the implementation of particular policies. In Canada, the position appears to be that a director is personally liable for a company's tort if he 'makes the wrong his own': *Mentmore Manufacturing Co Inc v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3rd) 195, but this test has been criticised as 'indeterminate and possibly circular' in so far as there is a lack of clarity as to what it entails: see J Farrar, 'The Personal Liability of Directors for Corporate Torts' (1997) 9 *Bond L Rev* 102 at 108. Another approach suggested by Dietrich & Ridge is that a director should only incur liability for directing or procuring a wrongdoing if he or she *knew* of the relevant illegality: see J Dietrich & P Ridge, *Accessories in Private Law*, CUP, Cambridge, 2015 at 392, 394 and 400.

[67] (2010) 185 FCR 449.

[68] Ibid at [83] and [404].

[69] Ibid at [404].

company's torts.[70] This limited immunity is therefore largely justified on policy grounds – that those who serve the company ought not to be exposed to greater liability (at the suit of third parties) than the proprietors themselves.[71] Joint tortfeasance on the 'direct or procure' basis is conceptually distinct from that of liability for conspiracy but the same policy concern underpins the latter context. A case can therefore be made for extending the same approach to conspiracies, so that directors acting in good faith in the company's interests would not normally be regarded as 'combining' with the company. Such an approach would represent a refinement of and improvement over the 'constitutional exception' as liability is predicated not on the form but on the substantive capacity of the director's participation.

More pertinently, the foregoing discussion demonstrates that the use of conspiracy as a means of extending liability in the corporate context is not free from the policy concerns that have traditionally plagued the veil-piercing doctrine. In both contexts, it is necessary to consider the extent to which a company's separate legal status is undermined by visiting liability on those who serve merely as its 'arms and legs'. The attempt in *Keller* to confine tortious liability to situations where directors have used the company 'as instrument of his or her own wrong' is redolent of the 'alter ego ' arguments commonly invoked to pierce the corporate veil.

(b) *Intention*

A party to an unlawful conspiracy is only liable if he or she has intended to cause loss to the claimant. For a corporate conspirator, this culpable state of mind is necessarily located in that of a natural person. Traditionally, it was assumed there are two routes by which such mental state may be attributed to a company. The first is to utilise agency principles. In general, a principal may be imputed with the knowledge that its agents acquire while acting within the scope of his or her authority.[72] This would mean, in the context of unlawful combinations, that a company will be affixed with

[70] Ibid at [406].
[71] Ibid at [403].
[72] P Watts & F M B Reynolds (eds), *Bowstead and Reynolds on Agency*, Sweet & Maxwell, 20th Ed, 2014 at para 8-207.

the intention of the agent purportedly conspiring on its behalf.

That a company may be affixed with the mental state of an agent acting illegally presupposes that the company has the capacity to authorise its agents to commit unlawful acts. In a recent work, Professor Peter Watts argued that such capacity is implicit in modern corporation statutes that confer on companies the *vires* to do anything that an individual can do.[73] Since an individual can commit unlawful acts, it follows that a company is similarly empowered and may authorise others to do the same. On this view, the company would be attributed the mental state of the agent authorised to effect those acts (including illegal acts) constituting the alleged conspiracy. But while a company may (through its board) authorise anyone, including junior officers, to commit unlawful acts, express authorisation of illegality is likely to be rare. More usually, it would be the board itself, and perhaps the managing director, would have the implied authority to act illegally.[74] That may, in turn, suggest that the relevant *mens rea* would more often than not be located in the board or senior officers. However, it is unclear if 'authority' would for this purpose encompass ostensible authority. If it does, the company's potential liability would obviously enlarge.[75]

A second mode of attribution is that of 'identification'. In *Meridian Global Funds Management Asia Ltd v Securities Commission*,[76] Lord Hoffmann expounded this principle as a special rule of attribution to be employed when the context precludes attribution based on agency or various liability by requiring the company *itself* to have committed an act or bear a particular mental state.[77] The rule is fashioned by interpreting the substantive rule in question, taking into account its language and policy, and asking: "[whose] act (or knowledge, or state of mind) was *for this purpose* intended to count as the act *etc* of the company?"[78] So stated, 'identification' is

[73] P Watts, 'Directors as Agents – Some Aspects of Disputed Territory' in D Busch, L Macgregor & P Watts, *Agency Law in Commercial Practice*, OUP, Oxford, 2016, p 111.
[74] Watts, above n 73, p 111.
[75] Difficult questions may also arise as to whether an agent could represent his or her own authority: *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194.
[76] [1995] 2 AC 500.
[77] [1995] 2 AC 500 at 507.
[78] [1995] 2 AC 500 at 507.

analytically distinct from agency rules.[79] The former focuses on the context and purpose of the rule for which attribution is sought, while the latter relies on the concept of 'authority' to identify the relevent 'directing mind'.

Between the two, 'identification' appears to be the more generous rule. In *El Ajou v Dollar Land Holdings plc*,[80] a case concerned with dishonest receipt of trust monies, the English Court of Appeal held that the guilty knowledge of one F, a director of a company, DLH, could not be attributed to the company under agency rules because F did not acquire such knowledge in the course of his directorship with DHL. However, the court then held that the same knowledge could be attributed to DLH on the ground that F was its 'directing mind and will'. For this purpose, it did not matter that F was in fact a non-executive and nominee director with no general management power. What mattered was that it was F who executed the transactions involving the fraudulent proceeds and thus had 'de facto management and control over the transactions'.[81] In *The Dolphina*,[82] it was similarly held that knowledge acquired by a director outside his directorship could not be attributed to the company on agency rules but was attributable on the basis of identification for purposes of deciding if the company had unlawfully conspired with others. The director in this case was one of three directors on the company's board, but he could nevertheless be regarded as the company's 'directing mind and will' as he was the only director actively and routinely involved in the company's business.[83] These cases reflect a pragmatic approach to questions of attribution. The company's 'directing mind and will' could be different persons for different purposes.[84] Where a company has in fact engaged in an illegal transaction, the courts would be prepared to attribute the guilty knowledge of the

[79] The relationship between agency and the special rule of attribution was not discussed by the Law Lords in *Bilta*, but their Lordships appeared to have reasoned on the assumption that they are distinct rules: see *eg*, *Bilta (UK) Ltd v Nazir (No 2)* [2015] 2 WLR 1168 at [40] and [187] – [190]. Watts, however, has argued that directors *always* act as agents even when they act collectively as a board and hence the distinction between agency and special rule of attribution may be more apparent than real: see generally, Watts, above n 73.

[80] [1994] 2 All ER 685. But the rejection of agency principles in this case has been criticised: see P Watts, 'The Company's Alter Ego – An Imposter in Private Law' (2000) 116 *LQR* 525 at 529.

[81] [1994] 2 All ER 685 at 697.

[82] [2012] 1 SLR 992.

[83] [2012] 1 SLR 992 at [254] – [255]. In a similar vein, information possessed by only one director that is not shared with other directors, however acquired, may be presumed to be information possessed by the company: see *Mohammed Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261; affirmed by the Privy Council in *Lebon v Aqua Salt Co Ltd* [2009] BCC 425.

[84] [1994] 2 All ER 685 at 699.

person who is in the position to commit the company to that transaction.[85]

(c) *Unlawful means*

We have already seen that precisely what would count as 'unlawful means' for purposes of the conspiracy tort is currently unsettled.[86] Interestingly, applications in the corporate context suggest that the scope of 'unlawful means'may also be constrained by *policy* concerns specific to that context.

A well-established example of such restriction is the rule in *Said v Butt*,[87] which provides that a servant who in good faith procured or authorised his or her master's breach of contract is not liable for inducing breach of contract. Subsequent cases extended the rule to exempt agents from liability for *conspiring* to breach the principlal's contracts.[88] Although its rationale was stated in *Said v Butt* to lie in the identity of the servant with the master,[89] this rule is better understood as a corollary of the contractual privity rule. Having contracted with a specific principal, a third party cannot (by gaining a right of action against the agent) be placed 'in a better position than if he had dealt with a party who did not employ agents.'[90] So while a breach of contract may, in general, be a sufficient form of illegality for purposes of the conpiracy tort, it is not a basis for civil action where the alleged conspiracy is that between a principal (company) and its agents (directors) acting in good faith.

In the more recent case of *Wagner v Gill*,[91] the New Zealand Court of Appeal also made explicit use of policy considerations to determine if a director's breach of fiduciary obligation is a sufficient form of 'unlawful means'. In this case, the claimant (Wagner) was owed a sum of money by DPL, which debt was guaranteed by BAP. Both DPL and BAP were companies controlled by the defendant, Gill. The claimant

[85] But such an approach would not be as broad as that suggested by Witting, that the company should be presumed to have the intention of its co-conspirator once actions have been taken which are consistent with that intention: see Witting, above n 20, at 199.
[86] See text to above nn 25 - 27.
[87] [1920] 2 KB 497.
[88] *G Scammell, Ltd v Hurley* (1928) 1 KB 419; *O'Brien v Dawson* (1942) 66 CLR 18.
[89] 'He [the servant] is not a stranger. He is the alter ego of his master. His acts are in the law the acts of his employer.': *Said v Butt* [1920] 2 KB 497 at 505, per McCardie J.
[90] Watts and Reynolds, above n 72, at [9-121].
[91] [2015] 3 NZLR 157.

succeeded in obtaining an arbitral award against DPL for the unpaid sums, but both DPL and BAP went into receivership before the award could be enforced. It subsequently transpired that Gill had transferred a profitable contract from BAP to BMAC (another Gill entity) prior to BAP's receivership. The claimant then brought proceedings against Gill and the entities he controlled, alleging that they had conspired to strip BAP of its assets so as to defeat the claims of creditors.

At trial, it was established that Gill had breached his fiduciary duty to BAP by transferring the contract out of BAP at a time when it was financially distressed, and he had done so to protect his personal interests. The question thus arose as to whether this fiduciary breach qualified as a form of 'unlawful means' for purposes of the claimant's suit. The Court of Appeal accepted that a breach of fiduciary duty may, *in principle*, constitute a form of unlawful means but noted that whether it does so may depend on whether it is a two-party or three-party conspiracy.[92] In this case, the claimant had in fact alleged a three-party conspiracy. This was because the fiduciary duty that was breached was owed not to the claimant but to BAP, and so the claimant's real complaint was that she had been injured through the intermediary of BAP.[93] Although the court hinted at the possibility that a breach fidciary duty owed to a third party might not count as 'unlawful means',[94] it ultimately expressed no concluded view on that.[95] Instead, it disposed of the issue largely on policy grounds.

Underlining the centrality of policy considerations in this context, the Court of Appeal observed,[96]

> An overriding theme, however, in the economic tort cases is that the encroachment of the common law into the regulation of economic competition must for obvious reasons be subject to some limits. *In cases such as this one the drawing of those limits ultimately depends not on close textual analysis of the authorities but largely on policy considerations, having regard to the underlying purpose of the tort*.

[92] [2015] 3 NZLR 157 at [80].
[93] Ibid at [55].
[94] Ibid at [77].
[95] Ibid at [80].
[96] Ibid at [79] (emphasis added).

Turning to the facts, the court identified three policy considerations why a director's breach of fiduciary duty by moving assets out of a company does not constitute an unlawful means for purposes of a conspiracy claim by a creditor. First, a creditor in the shoes of the claimant could have secured her interests by obtaining a personal guarantee from Gill at the outset. In the court's view, this availability of self-help is an important factor in delimiting tort liability.[97] Second, the statutory context (*ie*, the Companies Act 1993) is unambiguous that director's duties are owed only to the company but not to creditors. Extending liability in tort may therefore run counter to parliamentary intention as reflected by the statute.[98] Third, s 301 of the Companies Act 1993 allows a creditor of a company in liquidation to seek compensation from directors who might have misapplied the company's assets. The claimant is not therefore without remedy and there is no gap in the law which the tort of conspiracy has to fill.[99]

In *Quay Kay Tee v Ong & Co Pte Ltd*,[100] the Singapore Court of Appeal likewise held that a creditor could not succeed in a claim for conspiracy to injure by fraudulent preference since the remedies and effects of such preferences are already regulated by statutory legislation. These cases thus suggest the statutory context of a claim may operate as a real constraint on the width of 'unlawful means'. The tort should not be used as a backdoor for circumventing important policies underpinning relevant statutory schemes.

(d) *Intra-group Conspiracies*

Possibly the greatest scope for circumventing the separate entity principle through unlawful means conspiracy is in the context of corporate groups. Once it is accepted that a company is a juristic person capable of tortiously 'conspiring' with another, there is, in principle, no reason why it cannot be liable for conpiring with a company

[97] Ibid at [82].
[98] Ibid at [84]. This consideration raises a related but distinct company law principle that would have been relevant in English law, which is that the claimant's claim is essentially one for reflective loss and hence would in any event have been barred: *Johnson v Gore Wood & Co* [2001] 2 WLR 72.
[99] [2015] 3 NZLR 157 at [85]. But cf C Witting and J Rankin, above n 12 at 102 (arguing that conspiracy by unlawful means is an appropriate means of extending liability beyond insolvent companies).
[100] [1996] 3 SLR(R) 637.

within the same corporate group.[101] In theory, therefore, a parent company may conspire with its subsidiary and two subsidiaries may conspire with each other. The extent to which such liability would erode the benefits of incorporation (including both affirmative and defensive asset partitioning[102]) will depend on what facts are held to satisfy the elements of the tort. The mere fact that a parent company has voting control is unlikely to suffice as an act of agreement or combination. But what if the parent also appoints nominees to the board of the subsidiary? Would the acts and knowledge of the nominees then be imputed to the parent company? It is arguable that so long as the nominee directors act in good faith in discharge of their duties to the subsidiary, their conduct and states of mind are not attributable to the parent company.[103] If, however, the nominees had acted pursuant to a group policy promoted or endorsed by the parent, it may be possible to argue that the nominees had acted not merely as agents of the subsidiary but also as agents of the parent company. To attribute the conduct and states of mind of the nominees to the parent company in such circumstance may therefore be justified.[104]

In reality, holding companies do, of course, routinely formulate group policies for adoption by their subsidiaries. To the extent that such management practice could form the basis of a conspiracy that exposes the parent to liabilities of its subsidiaries, it would significantly erode the efficacy of the group structure as an asset protection device. It may be that further constraints on liability will need to be evolved to avoid such effects. One possibility is to insist on a higher standard of culpability – that the parent company in formulating the policy must have done so with the intention of causing injury to those affected by the unlawful act. It would not suffice if the

[101] *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) Annex I at paras 61 and 77. See also K Brickley, 'Conspiracy, Group Danger and the Corporate Defendant' (1983) 52 *Cincinnati L Rev* 431 at 440 – 442.

[102] Affirmative asset partitioning is the shielding of the company's assets from the creditors of the shareholders while defensive asset partitioning is the protection of shareholders' assets from the company's creditors (ie, limited liability): see H Hansmaan and R Kraakmann, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387

[103] This may explain Morgan J's observation in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) Annex I at [77] that 'it would normally not be sufficient proof of such a combination merely to show that the parent knew or suspected that an unlawful act was being committed and did nothing to stop it.'

[104] And would further be consistent with the holding in *Chandler v Cape plc* [2012] 1 WLR 3111 that a parent company that controls specific areas of a subsidiary's operations by formulating policies and practices for adoption by the latter owes a duty of care to those dealing with the subsidiary.

nominee directors had such intention at the time of implementing the policy as a management organ of the subsidiary.

5. Conclusion

Veil-piercing has always been a troubling doctrine because its reasoning lies in the denial of a company's status as a separate legal person. Such denial contradicts the very *raison d'être* of the company. Private law principles, on the other hand, avoid this contradiction by imposing liability on the asumption that the company *is* a distinct legal person. As our discussion has attempted to show, however, this does not necessarily free the application of private law principles from the policy debates that used to inform veil-piercing cases. A liberal application of conspiracy liability to intra-corporate as well as intra-group activities would undermine the company's separate legal status as well as the benefits of incorporation. So while private law principles may often provide a more rational basis for evaluating liability-extending claims, it is important to bear in mind that even here, fundamental company law policies have to be closely assessed.