



Corporate Liability in the UK and Singapore: Should Prosecution be Directed at the Corporation or Humans?

Natalie Alfred

Leicester Student Law Review
Autumn 2017

Liability is very easily established by the courts because it is usually clear what the crime is and who has committed it. However, in the case of corporations it is not always so straight forward. Though separate legal personality allows a corporation to be party to a dispute, criminal or civil, instances of humans taking part in criminal activity for a corporation make it difficult to justify the prosecution of the corporation rather than the individual. This is highly dependent on the type of criminal conduct that has taken place.

Comparing UK and Singapore Law, this article will identify the distinction between corporate crimes and other criminal activity. This is essential in determining the mechanisms available to the courts in deciding how a corporation can be prosecuted. Different types of crimes that a corporation may be liable for are also explored within this context, highlighting the problems that arise when a corporation rather than an individual is prosecuted. Furthermore, it mentions the role corporate culture plays in establishing when it is in fact best to prosecute a corporation for a crime with case examples from both jurisdictions. Finally, it briefly outlines the criminal context in which an individual should be prosecuted.

This paper will explore corporate liability in Singapore and the UK, whether the company or certain individuals in the company should be found liable for certain crimes rather than others and the reason for the different views. The crimes discussed will range from economic and environmental crimes, to murder and manslaughter. This discussion will be supported by academic theories and cases.

What is a corporation?

A corporation is deemed to be separate from a company. It is the artificial existence of the company as a 'person' separate from its members. It only exists in law in order to be party to disputes that concern the company, making it detached from its member at such point. In *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd*,¹ Lord Viscount Haldane LC defines a corporation as an 'an abstraction. It has no mind of its own any more than it has a body of its own'.² Though the corporation is artificial, the rights and liabilities given to it by law and in a dispute are those committed by humans in the course of their working in the company. From this definition, we can determine that the corporation can be convicted of criminal offences

which are known to be performed by humans.

Separate legal personality and the corporate veil

A company has a corporate personality. The concept of a company's separate legal personality was established in the English case of *Salomon v A Salomon & Co Ltd* and is fundamental in the structure of Company Law.³ This introduced what is known as the corporate veil, whose artificial existence is there to emphasise that the company's affairs are to be kept separate from that of its managers, directors, shareholders and employees. This allows the members of the company to have limited liability in relation to transactions made by the company, so that any debts incurred belong to the company alone, not the shareholders. In other words, it is an independent 'person' and its existence is detached from its members. The courts try very hard not to tear or lift this veil and find the members liable for wrongdoing, but this could prove unfair in certain cases when it comes to criminal liability. It could prove dangerous to simply punish a company rather than an individual. On the other hand, it could be unfair to punish a whole company when a clear individual(s) can be found liable. This question ultimately

¹ [1915] AC 705.

² *ibid* 713.

³ [1896] UKHL 1.

hinges on how we are meant to identify a culprit if there is one within the company, and the difficulty in this balancing exercise will become clear.

What are corporate crimes?

Whilst crimes are acts or omissions committed by individuals or groups of individuals that break the written and common law of the land, corporate crimes are the same except they have to be committed by persons in the course of their working for a corporation. However, this does not mean that simply because one works in a company the company is liable for all crimes they commit like theft or murder. Rather, corporate crimes have to be crimes committed for the company. The crimes usually have to benefit the company itself, in some ways for it to be deemed a corporate crime. Alternatively, corporate crimes can be when an individual uses a company to benefit themselves. Such corporate crimes include money laundering, financial fraud, corruption and more. In the case of criminal activity, rather than civil disputes, the liability of a corporation can be difficult to prove.

How can corporations be prosecuted for corporate crimes?

There are mechanisms in place that allows a way by which corporations can be prosecuted. These are outlined below.

Vicarious liability

This is best used for strict liability offences or in cases of negligence, where a company is held liable for the acts of its employees in the course of their duties as decided in the *National Rivers Authority v Alfred McAlpine Homes*.⁴ These offences do not require mens rea and thus tend to be regulatory offences; most popularly pollution. For example, in the English case of *Alphacell v Woodward*, the pipes being blocked and causing overflow meant that the company was liable under vicarious liability, regardless of the fact that they were unaware of the blockage and had not been negligent.⁵

Lord Salmon gave the leading judgement looking at the intention of the statute and emphasising that if these companies were not liable, a lot of wrongdoing would go unpunished.⁶ As long as the actus reus of the offence was committed, there was no need to show mens rea. Therefore in the UK, though the presumption is that every offence requires mens rea, the courts have to take a purposive approach and look at the purpose of the statute to determine if it is one of strict liability as Parliament intended. Additionally, holding the corporation liable in cases such as mentioned is serving the greater good, as it stops a floodgate of cases, where companies are able to argue that they had no knowledge of the fault in their equipment or in this case, pipes and getting away with

crimes. Corporations being liable for offences such as this can serve as a warning and deterrent for other companies to make regular checks in the course of their daily activities.

In the case of *Empress Car Company Ltd v National Rivers Authority*, the court also held the corporation liable for the act of polluting a river though the real culprit was a hooligan.⁷ Hence, it is clear that perhaps the courts hold corporations to a higher standard and that they are expected to take extra care in ensuring something unfavorable does not occur. This is probably due to the fact that it is a company, which arguably can afford to take that extra care as opposed to an ordinary individual.

The reasons as to why they should be prosecuted are largely based on public policy as well as the nature of the crime itself.

Identification doctrine

In order to expand on my arguments in relation to various crimes, I will be focusing on the different common law doctrines that can be used in finding a company liable for a criminal offence.

The identification doctrine is also known as the directing mind theory. It focuses on 'the actions of the directing mind of the corporation and merges individual and corporate persons in order to assign criminal liability to the latter'.⁸ This is similar to vicarious liability, as it is the action of an individual(s) in the company that is being attributed to the corporation as a whole. However, it is restricted and narrower, as it is concerned with the actions of those in decision-making positions in the company, for example a director or a manager.

This directing mind and will was discussed in *Tesco Supermarkets Ltd v Natrass* and was held to be 'normally the board of directors, the managing director and perhaps other superior officers of the company carry out the functions of management and speak and act as the company'.⁹ Indeed, this restricts the circumstance in which a corporation would be found liable. Given this theory is followed, a corporation is not found liable for every wrong action of any employee in the company, but only those of higher ranks. While this means that the corporation is only legitimately liable for the actions of those directing it, as they should know better and act in the interests of the company (e.g. the directors' duties under the Companies Acts of England and Singapore), the lower ranked employees are left to fend for themselves when they commit a wrong.

In *Meridian Global Funds Management Asia Ltd v Securities Commission*, the managing director became a substantial security holder and failed to give notice of this to the company and the stock exchange.¹⁰ It was a question of whether his decision not to do so could be attributed to the company, which would lead to liability. Lord Hoffman held that the rules of attribution can be found in a company's constitution and if this is not

⁴ [1994] Env.L.R. 198.

⁵ [1972] AC 824.

⁶ *ibid* 848.

⁷ [1998] 2 WLR 350.

⁸ Canada Department of Justice, *Corporate Criminal Liability- Discussion Paper* (March 2002) <<http://www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/dp-dt/iss-ques.html>> accessed 17 November 2016.

⁹ [1972] AC 153; *ibid* 171.

¹⁰ [1995] 2 AC 500.

sufficient, then the general rules on attribution should apply, namely agency rules. In deciding whether the act of an individual is viewed as an act of the company, these rules are taken into account and looked at contextually. In addition, the legislation is examined to determine if the rule is meant to apply to companies or individuals- For example, through looking at the punishment imposed for it. Lord Hoffman stated that 'it is a question of construction in each case as to whether the particular rule requires that the knowledge... should be attributed to the company'.¹¹

The case of *El Ajou v Dollar Land Holdings PLC* radicalised the original theory from *Tesco*,¹² suggesting that the directing mind and will of the corporation could be anyone in the company and not necessarily those of top ranks or positions. It was held that the relevant test was to identify the person with control in relation to the act or omission being questioned. Simply looking at the company's articles or constitution to determine the will and directing mind of the company is restricting and not the best approach to take in corporate criminal liability. Lord Hoffman suggested that a 'pragmatic' approach be taken.¹³

Although the identification doctrine makes corporate criminal liability easier to identify, it can be a little unfair, as the wrong may have been committed due to a lack of sufficient staff training, which is arguably due to the fault of senior managers of a corporation. On the other hand, is it fair to hold a corporation liable for every little wrongdoing of an employee, which is usually unintentional? The answer to this question is largely discretionary and can only be based on the facts of the case. If the consequence of the mistake is grave, then perhaps it is fair that the company is held liable for the crime.

In the Piper Alpha disaster in July 1988, where an oil rig explosion killed 167 people, the corporation was not held liable for the disaster, as they could not identify the controlling mind of the corporation. This could clearly be seen as an unjust outcome, due to the number of people that died as a result of the lack of sufficient health and safety measures. Due to the lack of convictions of corporations for disasters, the UK eventually introduced the Corporate Manslaughter and Corporate Homicide Act 2007.

The reasons as to why these tragedies occur lead us on to the concept of corporate culture.

Corporate culture

It could be argued that the systematic failure in corporate structures lead to the crime. Though it was an individual that may have failed in their job or omitted an action, it is more so down to the issue that there was not enough oversight in place to make sure that such failures would not occur. In other words, there were not enough checks and balances in place to make sure that it did not happen.

This argument supports the reason why the identification theory may not be the best way to prosecute the corporation. It is only a part way solution, taking into account how complex corporations are and how they operate.

Organisations may not tell individuals what to do, but informal structures can still cause actions to fall behind standards. For example, the sinking of the Herald of Free Enterprises Ferry, otherwise known as *R v P&O European Ferries (Dover) Ltd* was as a result of three employees failing to close the ship's bow doors, causing the death of nearly 200 passengers.¹⁴ This led Sheen J to state in a judicial inquiry that 'from the top to bottom the body corporate was infected with the disease of sloppiness', highlighting the careless and corrupt corporate culture that existed and how it could lead to such disasters.¹⁵ In cases such as this it is considered fair and reasonable for the company to be held liable. Perhaps this is due to the circumstances and consequences of their actions which are considered to be extremely grave. Rather than simply punishing the individuals who were negligent in their duty, the corporation should also suffer for their lack of satisfactory training which led to a terrible outcome.

The corporate culture is built by individuals and it builds itself and adapts to the pressure imposed on it. It is an important requirement in preventing liability from being extended to the company as a whole. However, the problem with this concept is how the jury decides whether the architect of the company has built it in a way that means that there will be issues down the line.

Manslaughter

In the UK, corporate liability for this crime is governed by the Corporate Manslaughter and Corporate Homicide Act 2007. This act states that 'an organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.¹⁶ Furthermore, section 1(3) makes it clear that the company will only ever be liable for the offence of manslaughter where 'its activities are managed or organised by its senior management and this is a substantial element in the breach referred to in subsection (1)'. Therefore, in the case of corporate liability for homicide involving a company, it appears that the corporation will only be held liable where the homicide was caused by a senior management failure rather than an act by a low ranked employee.

However, the difficulty with this is determining how high in the hierarchy of the company the failing management must be in order for the corporation to be found liable.

¹¹ ibid 511.

¹² [1994] BCC 143; *Tesco Supermarkets Ltd v Natrass* (n 9).

¹³ *El Ajou v Dollar Land Holdings* (n 12) 151.

¹⁴ [1991] 93 Cr App R 72.

¹⁵ Department of Transport, *Formal Investigation Report: Herald of Free Enterprise* (September 1987)

<https://assets.publishing.service.gov.uk/media/54c1704ce5274a15b6000025/FormalInvestigation_HeraldofFreeEnterprise-MSA1894.pdf> accessed 19 November 2016, 14.

¹⁶ Corporate Manslaughter and Corporate Homicide Act 2007 s1(1).

Punishment

Due to the corporation's lack of a physical body, hands or feelings, the question on how to punish a corporation arises. Regarding criminal acts, if prosecuted, they cannot be handed a prison sentence like an individual could. Therefore, fines are a way that corporate criminal liability could be achieved. The aim of fines is deterrence. This raises the question as to whether corporations are really being deterred by such fines. This is dependent on the size of the company. If big and successful companies are given fines for their wrongdoing, it may not impact them substantially as granting it to a smaller company that made a smaller profit. This principle also applies when an individual from a company is fined; bigger companies could easily pay it off on their behalf, so their personal assets are not affected. In such cases the deterrence aim is not achieved. However, it may affect their reputation as a corporation for a period of time.

In Singapore, the common law has recognised the ineffectiveness of the punishments that may be imposed on a company. In *Auston International Group Ltd v PP*, the High Court held that the principle of deterrence was not relevant as a sentencing principle for corporations.¹⁷ The court cautioned in *Lim Kopi Pte Ltd v PP*, against imposing a prohibitive fine as it may result in bankruptcy and passing the burden to innocent parties such as employees, creditors and shareholders.¹⁸

Singapore provisions

In Singapore, there is no specific legislation on corporate liability, but there are indications through a number of statutes of who is most likely to be prosecuted.

Under section 11 of the Penal Code 2008, the word 'person' includes any company or association or body of persons, whether incorporated or not. This definition is also included in the Interpretation Act 1997. This meaning is only assigned to legislation as long as 'there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided'.¹⁹

In Singapore, corporations can be liable for the conduct of employees acting within the scope of their employment under vicarious liability. This is possible when the employer delegates statutory duties and in law the acts that are done are those of the employer.

Another approach to corporate criminal liability that Singapore has taken, is personal liability as opposed to vicarious liability. This is the identification or alter ego approach when the acts of the key employee are considered to be the acts of the company. The question, as mentioned earlier, is whether the employee has the directing mind or is the embodiment of the company. This occurred in *Ong Boon Kheng v PP*, where the Subordinate court found an officer of the company liable for the company's offences under the Securities and Futures Act 2006.²⁰

The Securities and Futures Act 2006 explores the concepts of consent and connivance. Section 331, in

particular, states that 'where an offence under this act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of an officer of the body corporate, the officer as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.' This raises questions as to when an officer is said to have given consent to the corporation to commit a wrongdoing. This can only be possible if the officer of the corporation had knowledge of this wrongdoing; otherwise, consent or connivance would not be a question to be determined. This is much easier when it is the officer himself committing the corporate wrongdoing, but when being done by someone else in the company, the only way the officer may have given consent or connivance is through willful blindness or acquiescence. In such a case it would be fair to prosecute the officer and the corporation rather than choosing one to prosecute.

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 2000 section 59, provides that an officer of the corporate body himself or the corporation can be prosecuted for any crime committed under the legislation. This provision allows the prosecution discretion on whom to choose to be liable for a criminal act; they are also free to prosecute both. This emphasises that there is perhaps no need to choose between an individual(s) in the company and the corporation itself.

Aggregation theory

This is a theory that is practiced in Australia and the United States to find corporate criminal liability. This is the combining of the faults of all (individual acts and omissions) and not one individual alone. This approach seems more sensible than the identification doctrine as it takes into account the fact that when criminal activity occurs in a corporation, it is not usually due to just the decision of one individual. If it was, we would only be focused on prosecuting individuals and there would not be a demand for more corporate criminal liability for corporate crimes. By attributing all the actions of various actors down the line leading to the commission of the offence, we do not limit liability to just one person and we are most likely to draw attention to a problem in the corporate structure to be focused on and fixed.

When should individuals be found liable for a corporate crime?

Shell companies

Holding individuals liable for corporate crime is only easily possible when it involves a shell company. This is a company that is set up by an individual solely for criminal purposes such as money laundering. In such cases, it is sensible to only hold the individual actor liable for the corporate crime because technically, the company does

¹⁷ *Auston International Group Ltd v PP* [2008] 1 SLR 882.

¹⁸ *Lim Kopi Pte Ltd v PP* [2010] 2 SLR 413.

¹⁹ Interpretation Act 1997, s 2(1).

²⁰ [2008] SGDC 3.

not exist and does not carry out a legitimate business. The director or the person who set up the company is the likely person to be prosecuted in these cases. This occurred in the Singaporean case of *Abdul Ghani v PP* where a director of several companies registered in Singapore was engaged in money laundering.²¹ He was sentenced to 2 years in jail along with high fines and prosecution fees. Though the defence argued that he was merely negligent, the person who set up the companies in the first place and whose accounts the monies were being transferred to could not be found, so the defendant was the probable culprit especially when such a large amount of money was involved. Perhaps there is a point where ignorance or negligence can no longer be pleaded as a defence in corporate crimes.

As reiterated earlier, in Singapore it is possible to choose who to prosecute and even to prosecute both the individual and the corporation. However, from the cases given from various jurisdictions, it is clear that the corporation will most likely be the one prosecuted for most corporate crimes. Perhaps the main exception is where the individual simply used the corporate body for their own individual gain rather than for the gain of the company.

Conclusion

Prosecuting a company can have its advantages and disadvantages. The main problems with such an approach is the fact that people could lose their jobs as a result of the company perhaps becoming insolvent or suffering a collapse in business and consumers as well as the fact that it greatly goes against the premise on which limited liability is built.

For example, the Department of Justice decided not to prosecute HSBC for laundering funds from Mexican drug trafficking and processing transactions on behalf of Iran, Libya, Sudan and Burma. The Department of Justice officials were concerned that the charges against the bank 'would have serious adverse consequences on the financial system'.²² The United Kingdom's Financial Services Authority was also involved in the U.S case influencing the decision not to prosecute the corporation for their crimes for the sake of the economy. This case reiterates a disadvantage in prosecuting big corporations, especially banks. Perhaps it may be more favorable to prosecute those in the corporation that gave consent for these crimes or should have known of them. The decision to prosecute a company has to be looked at from all perspectives; the impact on other actors should always be taken into account.

However, limited liability was introduced for a reason. It means that a company's assets should all that is on the line in a lawsuit not that of the individual's. In other words, disputes that involve the company will solely be dealt with by the company and not the individual members. This surely extends to criminal liability in cases where it is unclear who the main or sole culprit is, which

the case in many situations is. Limited liability encourages business men and women to incorporate companies without it affecting their finances and without incurring personal liability at all if anything goes wrong. Therefore, seeking to prosecute individuals within a company for crimes may discourage this culture and policy.

Overall, the decision to either prosecute a corporation or an individual and deciding which is better or more effective should be based on the facts and evidence of the individual case.

Bibliography

Primary Sources

Table of Cases

Abdul Ghani v PP [2016] SGDC 161

Alphacell v Woodward [1972] AC 824.

Auston International Group Ltd v PP [2008] 1 SLR 882

El Ajou v Dollar Land Holdings PLC [1994] BCC 143.

Empress Car Company Ltd v National Rivers Authority [1998] 2 WLR 350.

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705

Lim Kopi Pte Ltd v PP [2010] 2 SLR 413

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500

National Rivers Authority v Alfred McAlpine Homes [1994] Env.L.R. 198

Ong Boon Kheng v PP [2008] SGDC 3

Salomon v A Salomon & Co Ltd [1896] UKHL 1.

Tesco Supermarkets Ltd v Nattrass [1972] AC 153

R v P&O European Ferries (Dover) Ltd [1991] 93 Cr.App.R.72

Table of Legislation

Corporate Manslaughter and Corporate Homicide Act 2007

Interpretation Act 1997

Secondary Sources

Internet Sources

Canada Department of Justice, Corporate Criminal Liability: Discussion Paper (March 2002)
<<http://www.justice.gc.ca/eng/rp-pr/other-autre/jhr-jdp/dp-dt/iss-ques.html>> accessed 17 November 2016.

Department of Transport, Formal Investigation Report: Herald of Free Enterprise (September 1987)
<<https://assets.publishing.service.gov.uk/media/54c170>>

²¹ [2016] SGDC 161.

²² Kevin McCoy, *USA Today*, Report: DOJ overruled recommendation to prosecute HSBC (11 July 2016) <<http://www.usatoday.com/story/money/2016/07/11/report-doj-overruled-recommendation-prosecute-hsbc/86942600/>> accessed 23 November 2016.

4ce5274a15b6000025/FormalInvestigation_HeraldofFre
eEnterprise-MSA1894.pdf> accessed 19 November 2016.

Kevin McCoy, USA Today, Report: DOJ overruled
recommendation to prosecute HSBC (11 July 2016)
<[http://www.usatoday.com/story/money/2016/07/11/
report-doj-overruled-recommendation-prosecute-
hsbc/86942600/](http://www.usatoday.com/story/money/2016/07/11/report-doj-overruled-recommendation-prosecute-hsbc/86942600/)> accessed 23 November 2016.