

Attribution and Agency: Back to Basics Again

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I. Introduction

No shortage of literature on corporate attribution and agency exists.¹ Many topics within the broad field can be canvassed, ranging from general accounts of corporate attribution to specific applications in a narrow area. This chapter falls into the latter category.

In 2017, Sarah Worthington tackled three long-standing questions in the law of attribution and agency law in her *Law Quarterly Review* article, ‘Corporate Attribution and Agency: Back to Basics’.² They were:

1. The ‘*Stone & Rolls*’ problem: should acts and states of mind of a person acting for a company be attributed to the company when the company is bringing a claim against another, such that the company’s claim fails for illegality?³
2. Can an agent have actual authority to act contrary to the interests of his principal?⁴
3. The *First Energy* problem: can an agent have apparent authority to communicate approval of a transaction even though he has no authority to approve it himself, so that the principal is bound to the transaction?⁵

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¹ E Ferran, ‘Corporate Attribution and the Directing Mind and Will’ (2011) 127 *LQR* 239; P Watts, ‘Illegality and Agency Law: Authorising Illegal Action’ [2011] *Journal of Business Law* 213; P Watts, ‘Principals’ Tortious Liability for Agents’ Negligent Statements – Is “Authority” Necessary?’ (2012) 128 *LQR* 260; E Lim, ‘A Critique of Corporate Attribution: “Directing Mind and Will” and Corporate Objectives’ (2013) *Journal of Business Law* 333; E Lim, ‘Attribution in Company Law’ (2014) 77 *MLR* 794; J Payne, ‘Corporate Attribution and the Lessons of Meridian’ in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard Hoffmann* (Oxford, Hart Publishing, 2015); S Worthington, ‘Corporate Attribution and Agency: Back to Basics’ (2017) 133 *LQR* 118 (hereinafter ‘Back to Basics’); P Watts, ‘The Acts and State of Knowledge of Agents as Factors in Principals’ Restitutionary Liability’ [2017] *LMCLQ* 386; P Watts, ‘Attribution and Limitation’ (2018) 134 *LQR* 350; E Lim, ‘Attribution’ in W Day and S Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Oxford, Hart Publishing, 2020); R Leow, *Corporate Attribution in Private Law* (Oxford, Hart Publishing 2022).

² Worthington, ‘Back to Basics’ (n 1).

³ Named after *Stone & Rolls v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 1 AC 1391. See Worthington, ‘Back to Basics’ (n 1) 118–31.

⁴ Worthington, ‘Back to Basics’ (n 1) 131–39.

⁵ Named after *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s LR 194 (CA). See Worthington, ‘Back to Basics’ (n 1) 139–42.

The aim of this paper is to critically examine the solutions offered by that article to each of the three problems. It ultimately disagrees with the solutions, but for different reasons than those offered in the current literature.

II. *Stone & Rolls*

Discussed by numerous ultimate appellate courts across the Commonwealth in the last decade, the *Stone & Rolls* problem is undisputedly one of the most significant attribution problems of modern times. Before the problem can be set out, some background context to attribution is necessary. The problem and the solutions in ‘Back to Basics’ and the recent case law are then set out. These solutions rely on the idea that it may be possible to attribute an act for one purpose but not another. They therefore subscribe to a conception of attribution where it is seen as a fictional deeming rule. Drawing on previous writing, I suggest an alternative conception of attribution and show how it sheds light on the *Stone & Rolls* problem and how the latter should be resolved.

A. Corporate Attribution

As Lord Walker NPJ explained in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*:

Attribution means, in this context, the process of legal reasoning by which the conduct or state of mind of one or more natural persons (that is, human beings) is treated as that of a non-natural person (that is, a company) for the purpose of determining the company’s legal liability or rights in civil proceedings (in particular its liability process by which acts and states of mind of human persons are treated as those of a company’s for purposes of establishing its rights and obligations).⁶

The leading decision on attribution is *Meridian Global Funds Management Asia Ltd v Securities Commission*.⁷ Lord Hoffmann ~~said~~explained that:

A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a

⁶ *Moulin Global Eyecare Trading Ltd v CIR* [2014] HKCFA 22, (2014) 17 HKCFAR 218 [61].

⁷ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC).

necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called ‘the rules of attribution’.⁸

Lord Hoffmann then identified three categories of attribution rules: primary rules, general rules and special rules of attribution.⁹ Primary rules of attribution are generally found in the company’s constitution or in general company law.¹⁰ An example includes the rule that ‘for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company’.^{11,12} These are supplemented with general rules of attribution – the rules of agency.¹³ They are ‘general’ rules because they also apply equally to human persons, while the primary rules do not. In some exceptional cases, neither of these two categories provide an answer, but the court may conclude that the substantive rule of law ought to apply to companies.¹⁴ The court must then formulate a special rule of attribution, asking, ‘[w]hose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?’¹⁵ In doing so, the court has to take into account the language of the rule (if it is a statute), its content, and policy.¹⁶

Over time, *Meridian* eventually became closely associated with a highly context-specific approach to attribution. A key reason for this change was the *Stone & Rolls* problem.

B. The *Stone & Rolls* problem

The *Stone & Rolls* problem, so named for the case in which it rose to prominence, occurs at the intersection of attribution and illegality. In *Stone & Rolls Ltd (in liquidation) v Moore Stephens*,¹⁷ a company had been used by its controller, a Mr Stojevic, to perpetuate frauds on banks, inducing them to lend the company funds.¹⁸ Stojevic then perpetuated a fraud on the

⁸ *ibid* 506.

⁹ *ibid* 506–07.

¹⁰ *ibid*.

¹¹ See eg Model Articles for Public Companies, Model Art 20; Model Articles for Private Companies Limited by Shares, Model Art 17, which will apply to limited companies unless the company registers its own articles of association: Companies Act 2006, s 18.

¹² *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (CA), cited at *Meridian* (n 7) 506.

¹³ *Meridian* (n 7) 506–07.

¹⁴ *ibid*.

¹⁵ *ibid* 507.

¹⁶ *ibid*.

¹⁷ *Stone & Rolls* (n 3).

¹⁸ See *Komerční Banka AS v Stone & Rolls Ltd* [2002] EWHC 2263 (Comm), [2003] 1 Lloyd’s Rep 383.

company, dissipating those funds. The company, Stone & Rolls, went into liquidation. Its liquidators sued the company's auditors for breach of duty in negligently failing to detect the fraud perpetrated on the company. In response, the auditors argued that as the company's directing mind and will, Stojevic's acts and states of mind should be attributed to the company. As the company would then be party to illegal conduct, its claim against the auditors would fail under the illegality doctrine.

This argument succeeded by a bare majority before the House of Lords, but each member of the majority gave different reasons for this conclusion. Diverse positions were taken on contested issues. One was whether attribution turned on the company being a 'one-person' company.¹⁹ The scope and purpose of the illegality doctrine was another contested pressure point;²⁰ the scope of the auditors' duties yet another.²¹ The Law Commission eventually regarded *Stone & Rolls* as a decision with 'no majority reasoning':²² distilling a coherent ratio from it was seen as impossible by some.²³ Unsurprisingly, lower courts faced difficulty in applying *Stone & Rolls*. The key question remained: when and why could the acts and states of mind of a misbehaving director, employee or agent be attributed to the company when the company was suing that individual or a third party, whether for illegality or otherwise?²⁴

C. Back to Basics

In *Stone & Rolls*, several members of the House of Lords relied on an exception to attribution in cases of fraud or breach of duty (sometimes called the *Hampshire Land* principle).²⁵ Under it, where the director or agent is acting to defraud the company or in breach of duty to it, his acts and states of mind cannot be attributed to the company.

¹⁹ See eg in favour of attribution, Lord Phillips at [48]–[56], Lord Walker at [168], but against, Lord Scott [117] (relying on the company being a victim of the frauds).

²⁰ Prior to *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, compare eg *Tinsley v Milligan* [1994] 1 AC 340 (HL); *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339; *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.

²¹ In favour of attribution, see eg Lord Phillips [86], but against, contrast Lord Mance [256], [263], [265]–[270].

²² Law Commission, *The Illegality Defence* (Law Com No 320, 2010) para 3.32.

²³ eg Worthington, 'Back to Basics' (n 1) 120.

²⁴ eg *Safeway Stores Ltd & Ors v Twigger* [2010] EWCA Civ 1472, [2011] 1 CLC 80; *Bilta (UK) Ltd (in liquidation) v Nazir (No 2)* [2012] EWHC 2163 (Ch) and [2013] EWCA Civ 968.

²⁵ Named after *Re Hampshire Land Company* [1896] 2 Ch 743 (Ch).

Worthington argued in ‘Back to Basics’ that the key to solving the *Stone & Rolls* problem was to focus on corporate attribution. As she explains:

An individual within the corporate structure may act, or intend or know a wide variety of things, but these will not count as the company’s actions, intentions or knowledge for all purposes. Generalisations are impossible; context is all. And the context which matters is the legal claim in issue, not the parties’ identities, the company’s solvency, or the state of the market.²⁶

Thus, the key question is ‘whose act counts “for this purpose”?’ To this, Worthington explains:

The only context in which ‘the Hampshire Land principle’ finds traction is when *the company sues or is sued by its insiders*. Again, describing the principle as ‘defensive’ does not illuminate. The essential focus is not on the company, but on the corporate insider. Wrongdoing insiders who are sued by, or are suing, their companies cannot escape or limit liability by the ruse of claiming that *their own* acts, intentions, or knowledge, attributed to the company, deliver the result that the company has waived, or shared, or conspired in the insider’s liability. Such assertions seem so contrary to common sense that, whatever our attribution rules, they cannot lead to this end.²⁷

In short:

[T]he rule can be stated very simply: no individual can claim against a company, or resist a claim by a company, if that individual’s claim or defence can be made out only by attributing to the company the individual’s own acts, intentions or knowledge.²⁸

D. The Post-*Stone & Rolls* Case Law

However, post-*Stone & Rolls* case law has not adopted this reasoning. In three important cases, the Supreme Court stressed attribution’s context-specificity, but with a different emphasis. In *Bilta (UK) Ltd (in liquidation) v Nazir*,²⁹ *Singularis Holdings Ltd (in official liquidation) v Daiwa Capital Markets Europe Ltd*³⁰ and *Crown Prosecution Service v Aquila Advisory Ltd*,³¹ the Supreme Court concluded that an act or state of mind could be attributed to the company for one purpose but not for another. Even if that misbehaving director, employee or agent’s acts or states of mind could be attributed to the company to establish its breach of duty or liability, it did not follow that those acts or states of mind could be attributed for other purposes,

²⁶ Worthington, ‘Back to Basics’ (n 1) 124.

²⁷ *ibid* 126.

²⁸ *ibid* 127.

²⁹ *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2015] 2 WLR 1168.

³⁰ *Singularis Holdings Ltd (in official liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] 3 WLR 997.

³¹ *Crown Prosecution Service v Aquila Advisory Ltd* [2021] UKSC 49, [2021] 1 WLR 5666.

such as to defeat the company's claim for illegality. Attribution depended on the context, which might be such that attribution is unavailable.

In *Bilta*, directors used the company, Bilta, to perpetuate VAT frauds, leaving it obliged to account to the tax authorities for millions but with no assets to so account.³² The fraud was discovered; Bilta went into liquidation. Its liquidators sued Bilta's former directors for breach of fiduciary duty. In response, the directors raised the same argument as in *Stone & Rolls*: their wrongful acts or knowledge should be attributed to Bilta, so Bilta's claim would fail for illegality. All five members of the Supreme Court unanimously agreed that Bilta's claim did not fail for illegality, but they took different routes in reaching this outcome. The majority, comprising Lords Neuberger (with whom Lords Clarke and Carnwath agreed), Mance, and Sumption, based their judgment primarily on attribution. They focused on the purpose of the relevant rule. Illustrative is Lord Mance's speech:

As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company?³³

Lord Mance thus concluded that attribution might be available for one purpose, though not another. Where the company was enforcing duties owed by its officers to the company, it was 'self-evidently impossible'³⁴ for the directors' acts and states of mind to be attributed. As Lord Mance explained, 'Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors.'³⁵ Broadly similar conclusions were reached by Lord Neuberger and, to a lesser extent, by Lord Sumption.³⁶ An alternative approach was taken by

³² For details of the type of fraud conducted, see *Bilta (UK) Ltd (in liquidation) v Natwest Markets plc* [2020] EWHC 546 (Ch), [1]–[30].

³³ *Bilta* (n 29) [41].

³⁴ *ibid* [42].

³⁵ *ibid* [42].

³⁶ Lord Sumption initially reached his conclusion on the basis that the breach of duty exception applied, since the duty being enforced existed to protect the company from the directors ([86]–[89]) although he later accepted that '[a]nother way of putting the same point is to treat it as illustrating the broader point made by Lord Hoffmann in *Meridian Global* that the attribution of legal responsibility for the act of an agent depends on the purpose for which attribution is relevant' ([92]).

Lords Toulson and Hodge, who based their decision primarily on illegality, not attribution,³⁷ but they thought attribution would lead to the same result.³⁸

Likewise, attribution was also unavailable in *Singularis*. Singularis's controller, a Saudi Arabian businessman named Al Sanea, instructed Daiwa, a bank and brokerage firm with which Singularis had an account, to make payments to entities controlled by Al Sanea. Daiwa did so; the money was lost. After Singularis went into liquidation, its liquidators sued Daiwa for dishonest assistance and breach of the *Quincecare* duty.³⁹ The latter obliges banks to refrain from executing orders made by its customer where it has reasonable grounds to believe that the order is an attempt to misappropriate the customer's funds.⁴⁰ In response, Daiwa argued that Al Sanea's acts and states of mind should be attributed to Singularis, so that Singularis's claims against Daiwa would fail, whether for illegality or other reasons.

Before the Supreme Court, the key issue was whether Al Sanea's conduct and states of mind were attributable to Singularis in its claims against Daiwa. Lady Hale, delivering the sole judgment of the court, affirmed the context-specific approach in *Bilta*. Thus, 'where the purpose was to attribute responsibility between the company and its agents so as to determine their rights and liabilities to one another, the answer might not be the same as where the purpose was to apportion responsibility between the company and a third party'.⁴¹ In *Singularis* itself, the relevant 'context' of the case was Daiwa's breach of its *Quincecare* duty, the purpose of which was to protect the company against the very kind of misappropriation of its funds that happened in this case.⁴² Thus, attribution was not possible: 'To attribute the fraud of that person to the company would be ... to "denude the duty of any value in cases where it is most needed"'.⁴³

³⁷ *ibid* [130]–[131].

³⁸ *ibid* [206], [209].

³⁹ Named after *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (QB), see also *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA).

⁴⁰ For more recent cases on the scope of the *Quincecare* duty, see *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) (Andrew Burrows QC); *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84; [2018] 1 WLR 2777 and on appeal (n 30); *RBS International v JP SPC 4* [2022] UKPC 18, [2023] AC 461; *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318, [2022] 2 WLR 872; *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2022] EWHC 1447 [145]–[163] (Cockerill J). For criticism of the duty, see P Watts, 'The *Quincecare* Duty: Misconceived and Misdelivered' [2020] *Journal of Business Law* 403.

⁴¹ *Singularis* (n 30) [30].

⁴² *ibid* [35].

⁴³ *ibid* [35].

Most recently, *Bilta* was reaffirmed in *CPS v Aquila Advisory*,⁴⁴ where the directors of a company, VTL, acted in breach of fiduciary duty to make a secret profit. The Supreme Court unanimously refused to attribute the directors' acts and states of mind to VTL for the latter's claim that the profits were held on constructive trust. It affirmed *Bilta*, reiterating that 'the unlawful acts or dishonest state of mind of a director cannot be attributed to the company so as to afford the director an illegality defence to the company's claim against him for breach of fiduciary duty'.⁴⁵ The purpose of the relevant rule – the duty owed by the directors to their company – meant that the company could not be identified with its officers.⁴⁶ Lord Stephens explained that holding otherwise would establish an exception to *Bilta*'s reasoning, which would undermine 'the clarity and simplicity of the law in relation to attribution'.⁴⁷ The 'protective', 'prophylactic way in which the director's fiduciary duties operate' would also be undermined.⁴⁸

This trio of cases focused on the purpose of the cause of action relied on by the company, asking whether to attribute the misbehaving agent or employee's acts to the company under illegality would be inconsistent with that purpose. In all cases it was.

E. Attribution, Inconsistency and Self-contradiction

It is never easy resolving problems at the intersection of multiple issues. Which lever should one pull to solve the puzzle? Both 'Back to Basics' and the Supreme Court chose attribution as the solution.⁴⁹ Fundamental to both is the idea that acts and states of mind may be attributed for some purposes but not another – exactly which purposes fall into which category is still unsettled.

These approaches are easiest to justify if one views attribution as no more than a fictional deeming process, necessitated by the legal fiction of the company itself. The company, an artificial legal person, has been created to achieve various goals, but those goals could not have been achieved unless there were means by which the company could act, hence necessitating

⁴⁴ *Aquila* (n 31).

⁴⁵ *ibid* [81] and see also [79].

⁴⁶ *ibid* [71].

⁴⁷ *ibid* [72].

⁴⁸ *ibid* [75]. See also [74].

⁴⁹ See the majority in *Bilta* (n 29), and *Aquila* (n 31) [79] and [81].

further extensions of that fiction – attribution rules.⁵⁰ As I have explained elsewhere, the difficulty with this approach is that it leaves attribution adrift, lacking justification.⁵¹ As Robert Stevens once memorably described in the context of tort law:

[W]hilst some sort of rules for the attribution of acts are essential, this does not tell us what the detailed content of those rules ought to be. ... What is the correct approach? How many players should a team of footballers contain? Five? Eight? Eleven? Twenty? It is important to know who counts as a member of the team, but there are different ways in which rational rules can be formulated. Whilst some answers may be demonstrably wrong (eg one-a-side, 90-a-side), there may be no single demonstrably right answer.⁵²

If only a deeming rule, it would be perfectly possible in principle to attribute the acts of a stranger to the company, to attribute an employee's acts of getting married to the company, or to attribute the knowledge of a director's tooth-brushing habits to the company. Yet, this does not seem to be how judges, lawyers, and ordinary people think about attribution, which is remarkably consistent across jurisdictions.

Resolving the *Stone & Rolls* problem in this way thus generates other problems. Elsewhere, I have suggested that a better account of attribution focuses on the powers allocated and delegated to persons acting for the company.⁵³ Although companies are legal persons, legal personality in English law does not convey a fixed set of rights, duties and powers.⁵⁴ Companies incorporated by registration under general incorporation statutes will derive their powers either directly from statute or expressly or implicitly from the company's constitution. Through its constitution, the company allocates its powers to different groups or persons, typically dividing them between the board of directors and the shareholders in general meeting. Those bodies in turn can then delegate these powers to others. Where those who are allocated or delegated the company's powers exercise them, the company itself acts.

On this account, attribution is not merely fictional, but has a deeper significance. It identifies the intentional acts of the company done by the company as a 'group agent'⁵⁵ – an actor in its

⁵⁰ Most clearly, see *Meridian* (n 7) 506.

⁵¹ Leow (n 1) ch 2.

⁵² R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 267.

⁵³ Leow (n 1).

⁵⁴ J Armour, 'Companies and Other Associations' in A Burrows (ed), *English Private Law* (Oxford, Oxford University Press, 2013).

⁵⁵ 'Agency' is used here in the sense in the philosophy of action, referring to a being with the capacity for action. On group agency generally, see further C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford, Oxford University Press, 2011). See also PA French, *Collective and Corporate Responsibility* (Columbia, Columbia University Press, 1984); R Tuomela, *Social Ontology: Collective Intentionality and Group Agents* (Oxford, Oxford University Press, 2013).

own right. These acts can truly be said to be those of the company's, as opposed to something being done to it. Consider a simple example involving a human person. The volitional bodily movement of A when he moves his arm, motivated by the aim of grasping an object is, standardly, an intentional act of A: a doing by A. By contrast, where B grasps A's hand and moves it against A's protests, this is not an intentional act: there is no doing *by* A, only a doing *to* A by B. In the latter case A can simply say: this is no act of mine. It is not an act authored by A, only an event that occurred to him.

Some of these same ideas are embedded in the law outside attribution. In tort law, A does no act and thus commits no trespass where A is thrown onto land by B or enters the land 'in an effective state of automatism'.⁵⁶ Automatism in the criminal law is likewise a denial that the *actus reus* has been committed where the alleged offender's arm hits another as a result of reflex or muscular spasm⁵⁷ or stabs another while sleepwalking.⁵⁸ Likewise, in attribution, acts that can be attributed to the company truly belong to it, but acts that cannot be attributed do not.

On this account of attribution, an act either is or is not the company's. The same is true of states of mind. Attribution is binary. It would be inconsistent, even self-contradictory, to say, as the post-*Bilta* case law and 'Back to Basics' do, that an act or state of mind is the company's for one purpose but not another. This is true regardless of how the dividing line is formulated. The better test, as I have suggested elsewhere, is the 'both ways' test used in contributory negligence.⁵⁹ If an act or state of mind is attributable to determine the company's duties or liability for breach, then it should also be attributable in situations in which the company is bringing claims against others. If so, resolving the *Stone & Rolls* problem simply requires applying the general approach to attribution. It poses no special difficulty.

Space precludes extensive discussion of all the problems with orthodox approaches to attribution. A detailed account can be found elsewhere.⁶⁰ It suffices to point out an important practical advantage of adopting the 'both ways' test. It avoids the need to identify when and

⁵⁶ *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2010] EWHC 1852 (TCC) [65], and see generally J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing 2013) 48–49.

⁵⁷ *Bratty v AG for Northern Ireland* [1963] AC 386 (HL) 409.

⁵⁸ *R v Hughes*, reported in *The Times*, 3 May 1978, p 5. See also *Bratty*, *ibid* 409, *R v Carter* [1959] VR 105, *Fain v Commonwealth* (1879) 39 Am Rep 213.

⁵⁹ After the passing of the Law Reform (Contributory Negligence) Act 1945.

⁶⁰ Leow (n 1) ch 7.

why acts and states of mind are, exceptionally, unattributable. Recall the distinction between ‘insiders’ and ‘outsiders’ drawn on in ‘Back to Basics’. Even in the ‘insiders’ cases such as *Bilta* and *Aquila*, in which directors, agents or employees are sued for breach of duty by the company, their acts and states of mind are clearly still attributable to the company for some purposes. For example, in *Bilta*, the objection was that the directors had, in breach of duty, committed Bilta to transactions they knew would make Bilta incur tax liabilities that it would be unable to discharge. At least for purposes of showing that Bilta had (i) suffered loss that was (ii) caused by the breach of duty, it must have been possible to attribute the directors’ acts in committing Bilta to those transactions to Bilta. For some purposes their acts clearly are attributable. The difficulty is then to explain why they are not attributable for other purposes, and here little justification is often found beyond appeals to common sense,⁶¹ references to the company’s separate legal personality being ignored,⁶² or the duty the company is enforcing being ‘emptied of content’⁶³ or ‘denuded’.⁶⁴

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F. The ‘Both Ways’ Test

If the ‘both ways’ test to attribution is adopted, two questions must be asked. First, are the relevant acts or states of mind attributable to the company to determine the company’s breach of duty or liability? If so, under the ‘both ways’ test, it should also be attributable where the company is bringing an action to enforce its rights. Second, even if those acts and states of mind can be attributed, will the company’s claim fail? This turns on the substantive doctrine of private law relied on.

I have advanced a full account of the answer to the first question elsewhere. In this essay, I focus on the second question to show that even if acts and states of mind are attributed to the company, the company’s claim will not necessarily fail.

Let us first consider the simpler cases where the company is suing third parties (‘outsiders’). In some cases, the effect of the doctrine will be such that the claim does not automatically fail. In contributory negligence, the effect of attributing the wrongdoing individuals’ acts to the

⁶¹ Referencing ‘absurdity’, see *HKSAR v Luk Kin Peter Joseph* [2016] HKCFA 81, (2016) HKCFAR 619 (n xx) [41] (Lord Hoffmann NPJ); ‘self-evidently impossible’ in *Bilta* (n 29) [42] (Lord Mance).

⁶² *Bilta* (n 29) [42] (Lord Mance).

⁶³ *Bilta* (n 29) [42] (Lord Mance).

⁶⁴ *Singularis* (n 30) [35] (Lady Hale).

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company is that damages recoverable by the company may be reduced due to the acts of wrongdoing individuals attributed to it,⁶⁵ rather than the claim failing altogether. Indeed, it has been argued that it is impossible for contributory negligence to result in the company's claim failing entirely.⁶⁶ Likewise, even if acts or states of mind were attributed to the company under illegality after *Patel v Mirza*,⁶⁷ the claim may not fail. Whether it does, turns on a range of considerations, including the purpose of the prohibition transgressed, other relevant public policies which might be rendered ineffective or less effective by denying the claim, and proportionality.⁶⁸ Even if Al Sanea's acts and states of mind were attributed to Singularis, the latter's claim against Daiwa would not have failed: it would be contrary to the purpose of the duty being enforced by Singularis.

Other requirements of the doctrine may also not be met. For example, even if the wrongdoing individual's knowledge of the wrongful act being done was attributed to the company, this would not necessarily mean that the company consented to or waived the breach. Knowledge alone does not amount to consent or waiver. Something more is required.

Similar points can be made where the company's claims are against 'insiders'. Even if the wrongdoing directors' acts or states of mind are attributed to the company, the company's claims will not *necessarily* fail for consent, conspiracy and so on.

First, some private law doctrines may not apply where the company is suing its directors or other agents for breach of duty. For instance, some English cases doubt that a company director can conspire with the company.⁶⁹ If so, then conspiracy is simply not relevant at all for these kinds of claims. Contributory negligence too may not always apply. It is probably simply

⁶⁵ *Daniels v Anderson* (1995) 15 ACSR 607, [1995] PNLR 727 (NSWCA); *Barings plc v Coopers & Lybrand* (No 7) [2003] EWHC 1319 (Ch), [2003] ONLR 34, [961]–[964] (decided under the Singaporean Contributory Negligence and Personal Injuries Act (Cap 54, 2002 rev edn), which was materially identical to the 1945 Act). See also *Duke Group v Pilmer* [1998] SASC 6529 where contributory negligence failed because those individuals' conduct could not be attributed to the company.

⁶⁶ J Goudkamp, 'Rethinking Contributory Negligence' in SA Pitel, JW Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Oxford, Hart Publishing, 2013) 344–45.

⁶⁷ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

⁶⁸ *ibid* [120] (Lord Toulson). Reaffirmed in *Stoffel & Co v Grondona* [2020] UKSC 42, [2021] AC 540; *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2021] AC 563.

⁶⁹ The position may be different in other jurisdictions, see eg in Singapore, *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] SGHC 2, [2009] 2 SLR(R) 318; *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] SGHC 169, [2008] 1 SLR(R) 80; *PT Sandipala Arthaputra v ST Microelectronics Asia Pacific Pte Ltd* [2018] SGCA 17, [2018] 1 SLR 818 (conspiracy by unlawful means). See also C Witting, 'Intra-corporate Conspiracy: An Intriguing Prospect' (2013) 72 *CLJ* 178.

unavailable where the directors' acts are intentional.⁷⁰ For example, it is not available as a defence to claims in deceit,⁷¹ intentional torts to the person⁷² and intentional trespass to goods,⁷³ although it ought to be available if the directors' acts were merely negligent.

Even if the doctrine does apply, its requirements may not be met. For instance, even if conspiracy is possible between company and director, something more is required beyond the company being attributed with the director's acts and states of mind. Some combination or agreement between the two seems necessary, as does an intention to injure.⁷⁴ Likewise, attributing a director's knowledge to the company does not itself establish consent.⁷⁵ The same point is also true for waiver.

Even if the problems above are not present, attribution may be much less key to the private law doctrine than assumed. Even if contributory negligence is available, whether the directors' acts are attributed to the company for contributory negligence is essentially irrelevant, because the key question for contributory negligence is not who did what or with what state of mind, but rather the relative blameworthiness between the two. Similarly, the availability of contribution⁷⁶ or indemnities as between company and 'insider' turns on their relative responsibility for the liability incurred to the third party, involving considerations of both blameworthiness and causative potency.⁷⁷ If, as between the individual and the company, the fault lay solely with the individual, then the company can obtain a full indemnity.⁷⁸ If, as between the two, the fault did not lie solely with the individual, then liability might be apportioned differently.⁷⁹ Finally, as contributory negligence shows, even if acts can be attributed, they may not lead to the company's claim failing in its entirety.

This account suggests that the *Stone & Rolls* problem is not always solely a problem about attribution. Not all these questions as to whether the company's claim will fail or be reduced

⁷⁰ See also PS Davies, *Accessory Liability* (Oxford, Hart Publishing, 2015) 264. See eg *Nationwide Building Society v Balmer Redmore* [1999] PNLR 606 (Ch D) 672–77 (Blackburn J).

⁷¹ *Standard Chartered Bank v Pakistan National Shipping* [2002] UKHL 43, [2003] 1 AC 959.

⁷² *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329.

⁷³ Torts (Interference with Goods) Act 1977, s 11(1).

⁷⁴ In both lawful means conspiracy and unlawful means conspiracy, combination or agreement between two or more individuals is necessary. See generally *Total Network SL v HMRC* [2008] UKHL 19, [2008] 2 All ER 413.

⁷⁵ *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services* [1983] Ch 258 (CA).

⁷⁶ Under the Civil Liability (Contribution) Act 1978, s 2(1).

⁷⁷ *Madden v Quirk* [1989] 1 WLR 702 (QB), 707.

⁷⁸ As in *Lister v Romford Ice & Cold Storage Co* [1957] AC 555 (HL).

⁷⁹ eg *Jones v Manchester Corporation* [1952] 2 QB 852 (CA).

can be answered solely by focusing on attribution of the ‘insider’s’ acts and states of mind to the company. Doing so pushes all the problems into the law of attribution when some of them rightly belong elsewhere. Whether attribution is in fact available and the specific doctrine of private law in question both require careful consideration. It is not possible here to give a definitive account of all possibilities, but a longer discussion can be found elsewhere.⁸⁰

III. Actual Authority

This section then turns to another question: when do we attribute acts? One facet of this question appears as an agency law issue: can an agent have actual authority to act contrary to their principal’s interests? The orthodox view today is that an agent cannot: their actual authority only exists to the extent that the agent is acting honestly and in the best interests of the principal. If the agent is acting otherwise, third parties must rely on the agent’s apparent authority to establish that the act is binding on the principal. ‘Back to Basics’ argues against orthodoxy. This section concludes that the orthodoxy should prevail, as the Supreme Court has now accepted,⁸¹ but for different reasons than those commonly given.

A. Orthodoxy

Perhaps surprisingly, today’s orthodoxy is relatively modern. The leading case is *Hopkins v TL Dallas Group*, where Lightman J explained that:

The grant of actual authority to an agent will not normally include authority to act for the agent’s benefit rather than that of his principal and therefore, without agreement, the scope of actual authority will not include this. The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal: *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421.⁸²

In reaching this conclusion, Lightman J followed the 17th edition of *Bowstead & Reynolds*, which emphasised that:

[T]he agent is simply not authorised to act contrary to his principal’s interests: and hence that an act contrary to those interests is outside his actual authority. The transaction is therefore void unless the third party can rely on the doctrine of apparent authority.⁸³

⁸⁰ Leow (n 1) ch 7.

⁸¹ *Philipp v Barclays Bank UK plc* [2023] UKSC 25 [72]-[74].

⁸² *Hopkins v TL Dallas Group* [2004] EWHC 1379 (Ch).

⁸³ *ibid* [88] (Lightman J).

Article 23 of the 17th edition provides that: ‘Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.’⁸⁴ Editions after this have likewise maintained that no agent can have actual authority to act contrary to the principal’s interests unless such authority is expressly conferred.⁸⁵ There is now a considerable body of case law following *Hopkins*.⁸⁶

It is therefore striking to note that the views in the 17th edition of *Bowstead & Reynolds* represented a departure from previous editions. ~~The change between the 16th and 17th editions was probably prompted by the addition of Professor Peter Watts to the *Bowstead & Reynolds* editorial team.~~ Earlier editions instead provided that:

[A]n act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.⁸⁷

This difference in views mirrors a similar equivocation in the case law before 2001. Important cases indicated that an agent could have actual authority even if he was acting other than for the principal’s interests, with two examples being *Hambro v Burnand*⁸⁸ and *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*.⁸⁹ In *Hambro*, Collins MR dealt explicitly with the issue, holding that:

It has been contended for the appellants that, although express authority was given in writing, as in the present case, authorizing an agent to make such a contract as he has made, it is open to the principal to say that, nevertheless, if it appears, on inquiring into the motives which existed in the agent’s mind, that he intended, in making the contract, to misuse for his own ends the opportunity given to him by his authority, and apply it to a purpose, which, if the principal had known of it, he would not have sanctioned, then, because the agent was so influenced by improper motives, the principal is not liable upon the contract made by him. I

⁸⁴ FMB Reynolds, *Bowstead & Reynolds on Agency*, 17th edn (London, Sweet & Maxwell, 2001) para 3-008.

⁸⁵ FMB Reynolds, *Bowstead & Reynolds on Agency*, 18th edn (London, Sweet & Maxwell, 2006) para 3-008; P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency*, 19th edn (London, Sweet & Maxwell, 2010) para 3-007; P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency*, 20th edn (London, Sweet & Maxwell, 2014) para 3-008xx; P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency*, 21st edn (London, Sweet & Maxwell, 2017) paras 3-010 and 3-011; P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency*, 22nd edn (London, Sweet & Maxwell, 2022) paras 3-011 and 3-012.

⁸⁶ *Lexi Holdings (in administration) v Pannone & Partners* [2009] EWHC 2590 (Ch) [75]; *Credit Agricole Corporate and Investment Bank v Ahmad* [2010] EWHC 3968 (QB) [33], [35]; *Re Capitol Films Ltd (in administration)* [2010] EWHC 2240 (Ch) [54]; *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch) [171]; *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168 (Ch) [86]; *Newcastle International Airport Ltd v Eversheds LLP* [2012] EWHC 2648 (Ch) [91].

⁸⁷ Art 74, 16th edn. Citing the equivalent article in the 15th edn, see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Ch).

⁸⁸ *Hambro v Burnand* [1904] 2 KB 10 (CA).

⁸⁹ *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Ch).

should have said myself, apart from authority on the subject, that such a proposition could not hold water.⁹⁰

Likewise, in *Macmillan*, Millett J (as he was then) followed the 15th edition of *Bowstead & Reynolds*, holding that:

I am satisfied that under Delaware law as under English law: ‘an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests:’ see *Bowstead on Agency*, 15th ed (1985), p 279, art 74.⁹¹

Of course, authorities to the contrary existed. One line of cases is typified by *Midland Bank v Reckitt*,⁹² best known today for establishing that powers of attorney are to be strictly construed. A solicitor was authorised by power of attorney to draw cheques on his client’s bank account ‘without restriction’.⁹³ The solicitor had repeatedly fraudulently drawn cheques on the account to pay the debts of his own firm to the same bank. In the House of Lords, Lord Atkin stressed that ‘Lord Terrington had no actual authority to draw these cheques at all or to receive the proceeds. His only actual authority was to draw cheques for the principal’s purposes.’⁹⁴ The agent’s actual authority was limited to acting for the principal’s purposes, even if the words conferring the authority are wide enough to encompass the acts which the agent did.

B. The Argument in ‘Back to Basics’

‘Back to Basics’ argued against the modern orthodoxy. Its central claim is that there is, and should be, a distinction between actual authority’s existence and its abuse.⁹⁵ Its existence appears to turn on the interpretation of the words conferring that authority. If the class of acts done by the agent falls within the words of the authority, the agent has actual authority, even if there is some other flaw with the agent’s acts (eg if the agent is seeking to defraud the principal, acting in breach of fiduciary duty, or negligently). That flaw amounts at best to an abuse of authority.

Worthington raises five arguments for this conclusion. She argues that orthodoxy ‘muddles two quite different contexts’: that between principal and agent and those between principal and

⁹⁰ *Hambro* (n 888888) 19–20.

⁹¹ *Macmillan* (n 898989) 984.

⁹² *Midland Bank v Reckitt* [1933] AC 1 (HL).

⁹³ *ibid* 10.

⁹⁴ *ibid* 14.

⁹⁵ Worthington, ‘Back to Basics’ (n 1) 134–35.

third party (or outsiders).⁹⁶ It also relies on apparent authority in a way that ‘does not make sense’.⁹⁷ If the agent has no actual authority to act other than in the principal’s interests, then the principal can only be bound to the transaction if the agent’s apparent authority to enter it can be proven. However, it is argued, it is impossible to establish the agent’s apparent authority as no one has actual authority to make the necessary representation that the agent has authority to act contrary to the principal’s interests.⁹⁸ Third, the analysis cannot explain equitable cases where the agent enters self-dealing transactions,⁹⁹ makes contracts ~~made~~ for improper purposes¹⁰⁰ or cases where the agent is bribed.^{101,102} In these cases, the transaction is only voidable, although the orthodoxy on actual authority suggests that it should be void. Fourth, the test is difficult to apply.¹⁰³ When is a transaction not in the interests of the company? Does this turn only on what the agent believes, or does it turn on what a reasonable person in the position of the agent would believe? Fifth, it is doubted that the orthodox approach is more protective of the principal, since it leads to the conclusion that the relevant transactions are void, which delivers poorer remedies (by way of constructive trusts) compared to transactions that are only voidable.¹⁰⁴ Worthington argues that treating flaws in the agent’s acts as only abuses, not absences, of the agent’s authority would avoid these difficulties.

C. Against ‘Back to Basics’

⁹⁶ *ibid* 135.

⁹⁷ *ibid* 136.

⁹⁸ *ibid*.

⁹⁹ Citing *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (CA) 589–91; *Guinness plc v Saunders* [1990] 2 AC 663 (HL) 692–93.

¹⁰⁰ Citing *Hogg v Cramphorn* [1967] Ch 254 (Ch); *Bamford v Bamford* [1970] Ch 212 (Ch); *Richard Brady Franks v Price* (1937) 58 CLR 112 (HCA); *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Company NL* (1968) 121 CLR 483 (HCA) 500 (Barwick CJ, McTiernan J and Kitto J); *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666 (NSWCA) 697; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 (HCA).

¹⁰¹ Citing eg *Parker v McKenna* (1874–75) LR 10 Ch App 96 (CA) 118 (Lord Cairns LC), 124–25 (James LJ); *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1874–75) LR 10 Ch App 515 (CA), 528–29; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717 (HL), 742–45 (Goff LJ); *Shipway v Broadwood* [1899] 1 QB 369 (CA); *Logicrose Ltd v Southend United Football Club Ltd (No 2)* [1988] 1 WLR 1256 (Ch) 1260–62 (Millett J); *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 (CA) [39]; *Tigris International NV v China Southern Airlines Co Ltd* [2014] EWCA Civ 1649 [143]; ~~xx~~ [please complete pinpoint reference].

¹⁰² Worthington, ‘Back to Basics’ (n 1) 136–37.

¹⁰³ *ibid* 137.

¹⁰⁴ *ibid* 137.

‘Back to Basics’ provoked a swift response by Professor Watts in the *Journal of Business Law*,¹⁰⁵ which defended the modern orthodoxy and clarified the relevant provision in *Bowstead & Reynolds*. Article 23 previously stated that: ‘Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.’ This formulation was refined to read as follows: ‘authority to act as agent includes only authority to act *for the purpose* of benefiting the principal’. As Watts explained, once refined, the second and fourth of Worthington’s arguments fall away.¹⁰⁶ Three arguments remain. Watts rejects all, for reasons I think are sound.

First, I agree with Watts that the modern orthodoxy does not muddle the principal–agent context from the principal–third-party context.¹⁰⁷ The existence of actual authority is purely an internal matter between principal and agent, but its exercise has external effects.¹⁰⁸ This just is a feature of how actual authority works. By contrast, it is apparent authority which concerns the external agency relationship between principal and third party.¹⁰⁹ Apparent authority today is widely understood as a species of estoppel by representation, established where the principal represents to third parties that the agent has authority.¹¹⁰ Where the third party relies on the representation, the principal is estopped from denying the truth of his statement. As Watts points out, it is ‘Back to Basics’ that blurs the two.¹¹¹

Furthermore, there is no dichotomy between inefficacy and breach of duty: a flaw can make a purported act both ineffective and a breach of duty.¹¹² Trustees exercising dispositive powers may fail to successfully exercise those powers where they act for improper purposes, but their attempt to do so may simultaneously amount to a breach of trust.¹¹³ Fiduciaries entering self-

¹⁰⁵ P Watts, ‘Actual Authority: The Requirement for an Agent Honestly to Believe that an Exercise of Power is in the Principal’s interests’ [2017] *JBL* 269.

¹⁰⁶ *ibid* 273–74.

¹⁰⁷ *ibid* 271–73.

¹⁰⁸ *ibid* 272.

¹⁰⁹ *ibid* 272, citing the well-known case of *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA).

¹¹⁰ *Freeman & Lockyer*, *ibid* 503–04.

¹¹¹ Watts (n [105405405](#)) 272.

¹¹² *ibid* 272.

¹¹³ *eg Re Pauling’s Settlement Trusts* [1964] Ch 303 (CA).

dealing transactions for their principals with themselves may fail to successfully do so,¹¹⁴ but whether they do or not, they are in breach of duty.

Second, on the authorities concerning equitable flaws being inconsistent with the orthodoxy, it has already been noted that the case law before *Hopkins* was hardly unanimous, even at common law. The support of the equitable cases is also doubtful since many of them are arguably consistent with orthodoxy. Arguably, in many, the agent was acting for the principal's interests, although an equitable flaw was also present. It is trite that an agent can contravene the no-conflict rule innocently and without fault.¹¹⁵ An agent might honestly believe that he is acting in the principal's interests although he is acting in conflict of interest or contrary to the no-profit rule.¹¹⁶ The same is true of the requirement to act for proper purposes. *Howard Smith v Ampol Petroleum* illustrates.¹¹⁷ Company directors, honestly believing that they were acting in the company's interests, acted for improper purposes where they issued shares to a third party to dilute the existing shareholdings of potential takeover. The outcome – that the transaction was validly executed but could be set aside – is still consistent with orthodoxy. The agent has actual authority, though he is in breach of duty.

Third, it was suggested that the orthodox approach may not be as protective of principals as commonly suggested because of remedial differences between void and voidable transactions. This does not quite meet the mark either. Leaving aside those remedial differences, the orthodox approach is still more protective of principals. It only reaches the same outcome as the abuse-of-authority approach where the third party to the transaction at least knows of the flaw in the transaction.¹¹⁸ Consider this problem, concerning a fraudulent agent:

A, an agent, has actual authority to contract on behalf of their principal P. A dishonestly enters a contract highly disadvantageous to P with a third party, TP. TP knows that A is acting dishonestly.

¹¹⁴ For what Conaglen refers to as the 'two party rule', which requires that any contract or conveyance involves more than one party: M Conaglen, *Fiduciary Loyalty* (Oxford, Hart Publishing, 2010) 78–79. See eg *Ingram v Inland Revenue Commissioners* [2001] 1 AC 293 (HL) 305 and 310.

¹¹⁵ Famously *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223 (Ch); *Boardman v Phipps* [1967] 2 AC 46 (HL).

¹¹⁶ For well-known examples, see *Keech v Sandford* (n 115+14) (trustees); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL); *Boardman v Phipps* (n 115+14).

¹¹⁷ *Howard Smith v Ampol Petroleum* [1974] AC 821 (PC).

¹¹⁸ See similarly *ibid* 274. For further evidence, see *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 (Ch) 1261 (Millett J).

Orthodoxy presents a simple answer to this problem. A has no actual authority, since he does not intend to act in the interests of P. Nor does A have apparent authority, since TP's knowledge of A's dishonesty means she knows that A has no actual authority, thereby negating any possible reasonable reliance by TP on representations as to A's authority.

By contrast, Worthington's approach seems to generate the wrong answer, one less protective of principals. A has no apparent authority but has actual authority since A does an act that falls within the scope of his authority. A's dishonesty only amounts to an abuse of his authority. Thus, P is bound by the contract unless he sets it aside. This conclusion is less protective of principals than the orthodoxy. It is, I suggest, also intuitively unappealing.

Since this chapter was first written, the orthodoxy has been resoundingly reaffirmed by the Supreme Court. In *Philipp v Barclays Bank UK plc*, Lord Leggatt said:

'The principle is now clearly, and in my opinion correctly, stated in *Bowstead & Reynolds on Agency*, 22nd ed (2021) at article 23 as follows:

"Authority to act as agent includes only authority to act honestly in pursuit of the interests of the principal."¹¹⁹

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D. Justifications

I ~~thus~~ agree with Watts that the orthodoxy should prevail but am less sure about the justification he offers.

For Watts, the agent cannot have actual authority to act otherwise than for the purposes of benefitting the principal because of actual authority's justification: consent. Watts explains:

Principle holds that actual authority turns on a principal's willingness to be bound to what the agent does on the principal's behalf. ... No principal can be taken to have consented (or assented) to an agent deliberately acting against the principal's interests, or even acting recklessly as to the principal's interests. ... *To treat only the express terms of the power, or the type of power and not what the power is being used for, as all that matters, is to detach actual authority from its roots in consent. Actual authority becomes a construct and the resulting liability imposed rather than willed.*¹²⁰

Hints of this explanation had appeared earlier in *Hopkins*, where Lightman J cited the 17th edition of *Bowstead and Reynolds*, explaining that the authority of an agent is

¹¹⁹ (n 81) [72].

¹²⁰ Watts (n ~~105~~~~105~~~~105~~) 267–70 (emphasis added).

actual (express or implied) where it results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself.¹²¹

If actual authority's consensual nature is stressed, then it is a relatively small step to conclude that an agent cannot have actual authority to act other than in the principal's interests because the principal would not have consented to him so acting. This analysis sees actual authority's scope as subject to a carve-out where the agent is not acting in the principal's interests.

This type of consent-based justification appears to have been substantially endorsed by the Supreme Court in *Philipp*, where Lord Leggatt accepted that:

*'In principle, the scope of an agent's authority is a matter of agreement between the agent and the principal. Where that agreement is recorded in writing, the question is one of interpretation of the document. No doubt it would be possible in theory for a principal in appointing an agent to agree that the agent may bind the principal even if and when the agent is acting dishonestly with the aim of defrauding the principal. But it seems inconceivable that any sane person would ever agree, or could reasonably be presumed to have agreed, to confer such authority on an agent. As is generally the case in commerce, parties to an agency relationship naturally deal with each other on an unspoken common assumption that each will act honestly in relation to the other. It goes without saying that authority conferred on an agent does not encompass acting dishonestly to further the agent's own interests in opposition to the interests of the principal.'*¹²²

This type of consensual analysis is persuasive, especially given consent's prevalence in modern agency thinking. It is commonplace for agency lawyers to define agency by reference to the mutual consent of principal and agent.¹²³ However, not all agency relationships are consensual in this way. Perhaps best known is the example of agency of necessity, used in its strict sense to refer to cases where the agent has 'authority to create contractual rights and obligations between [its principal] and a third party that are directly enforceable by each against the other'.¹²⁴ The clearest example of agency of necessity is that which a master of a ship has to act on behalf of the cargo-owners in respect of the cargo, for example to sell it where the ship is damaged and the goods are at risk of deterioration.¹²⁵ As there is no prior agency relationship between the shipmaster and the cargo-owners, it is difficult to explain the master's authority as an extension of his pre-existing, consensually granted authority.¹²⁶

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¹²¹ *Hopkins* (n 828282) [87].

¹²² (n 81) [73].

¹²³ See eg *Bowstead & Reynolds*, 22nd edn (n 858585) para 1-001.

¹²⁴ *China Pacific SA v Food Corp of India (The Winson)* [1982] AC 939 (HL) 958 (Lord Diplock),

¹²⁵ See also *The Winson*, *ibid* (authority of master to enter salvage agreement on behalf of cargo-owners).

¹²⁶ Unlike the shipmaster's authority to sell with or deal with the ship on behalf of the shipowners.

Just as in actual authority, an agent of necessity will only have authority to act for the principal where the agent is acting bona fide in the interests of the principal.¹²⁷ However, the consent-based explanation cannot explain the existence of this parallel rule in cases where the authority is non-consensual. If consent is no longer the justification for the authority, then consent's absence likewise cannot justify the absence of that authority.

Although a more marginal case, the same objection might be made about agency created by statute. For instance, the Mental Capacity Act 2005 confers authority to do acts for the benefit of another person lacking or believed to be lacking capacity in certain circumstances. The person so authorised must reasonably believe that the acts will be in the interests of the incapacitated person.¹²⁸ Again, as this authority is clearly not consensual, this limitation cannot be explained by the absence of consent for acts done other than in the interests of the principal.

A consent-based justification comes very close to the mark, but not quite. If not consent, how then can orthodoxy be justified? In a different context, Lionel Smith explained that 'it is part of the logic of acting for another person that there is only one right way to do it: you must do it in the way that you think is best for that other person'.¹²⁹ Happily, this is also true of the agency relationship. It is part of the logic of acting as agent for another person that one must do it in the principal's interests. Here Watts is entirely right in observing that:

This idea does in practice rest on an implication, since it is not in the nature of human relations for one proposing to employ the services of another to spell out that the purpose of the conferral of powers is that they should be exercised for the benefit of the former. But that purpose goes without saying.¹³⁰

Orthodoxy, I suggest, appears best conceptualised as part of a 'proper purposes' requirement. One must act for another for proper purposes. In this context, for an agent to act for a proper purpose is to act bona fide in what he honestly believes to be the interests of the principal.

¹²⁷ *Prager v Blatspiel, Stamp & Heacock Ltd* [1924] 1 KB 566 (KB) 570; *Tronson v Dent* (1853) 8 Moo PC 419 (PC) 442–52; 14 ER 159, 168–172; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) 75.

¹²⁸ See eg Mental Capacity Act 2005, s 5 (acts in connection with care and treatment) and s 8 (authorising the agent to pledge the incapacitated person's credit and apply money in that person's possession for meeting the expenditure).

¹²⁹ L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 *LQR* 608, 613.

¹³⁰ Watts (n [105105105](#)) 270.

IV. Apparent Authority: *First Energy*

This final section turns to another agency law question, here concerning the familiar chestnut of *First Energy*, a favourite of examiners of undergraduate commercial law courses.¹³¹ ‘Back to Basics’ presented a novel argument here too. ~~It suggested, suggesting~~ that the problem was not with the Court of Appeal’s conclusion that the senior manager had apparent authority, but with the remedial consequences of this conclusion. It is argued here that, though intriguing, this argument does not work. Apparent authority operates as a form of estoppel by representation – a common law estoppel which operates as a rule of evidence. Thus, it has an ‘all or nothing’ character, delivering only a fixed remedy.

A. The *First Energy* Problem

First Energy needed credit facilities. It entered negotiations with the defendant bank for a long-term facility. Pending approval of that facility, the parties entered into an ad hoc financing agreement. The senior manager of the bank’s Manchester branch, Mr Jamison, wrote and signed a letter which was interpreted as an offer of a loan, and hence as indicating approval of the transaction internally. In fact, the transaction had not been approved. The bank later argued that it was not bound. First Energy knew that the manager did not have actual or apparent authority to approve the facility agreement.¹³² Could he nonetheless have apparent authority to communicate that approval had been received, so that the bank was bound to the facility agreement? Despite the somewhat unfavourable state of the authorities, most of which suggested the argument would fail,¹³³ the Court of Appeal held otherwise. The bank was bound.

Steyn LJ started his decision with the sentence: ‘A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected.’¹³⁴ If so, it is not so difficult to see why First Energy succeeded. It had honestly and reasonably relied on the

¹³¹ *First Energy* (n 5).

¹³² *ibid* 535.

¹³³ eg *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd & anor (The Raffaella)* [1985] 2 Lloyd’s Rep 36 (CA) 43 (Browne-Wilkinson LJ); *Armagas Ltd v Mundogas SA* [1986] AC 717 (CA) 730–33 (Goff LJ).

¹³⁴ *First Energy* (n 5) 533. See also 534, and later, Lord Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *LQR* 433.

appearance of Mr Jamison's authority to communicate that approval had been received, even though it had not.

This raises a familiar difficulty. There are two main approaches to apparent authority.¹³⁵ On one, the principal is bound because of something they have done which enables the agent to appear authorised. The other focuses on the third party's good faith and reasonable belief in the agent's authority. Although many systems hint at the latter, nearly all effectively use the former.¹³⁶ As Professor Francis Reynolds points out, it does not seem practical to use the latter, and one typically expects at least something basic that links the principal with what has happened.¹³⁷

Some English cases clearly take the former approach, robustly insisting on a strong link connecting the principal with the agent's acts.¹³⁸ Thus, agents cannot 'self-authorise' because to do so would allow a principal to be bound without any link between the principal and those acts done by the agent pursuant to the 'self-authorisation'.¹³⁹ On the other hand, *First Energy* points more towards the latter [approach](#).

There is no real trouble with the doctrinal analysis that just as an agent can have apparent authority to enter contracts or transfer title to goods, they can also have apparent authority to represent that approval of a transaction had been received.¹⁴⁰ A classic example of such a person is the company secretary.¹⁴¹ The difficulty is that very slender facts seem to generate the polar opposite outcome from the normal case of a self-authorising agent – in one case, the agent says 'I approved the deal', and the principal is not bound; and in the other, the agent says 'I got approval for the deal', and the principal is bound.

B. The Argument in 'Back to Basics'

'Back to Basics' advances a novel argument. As Worthington explains:

¹³⁵ F Reynolds, 'Apparent Authority' (2009) 17 *European Review of Private Law* 975, 976–77.

¹³⁶ *ibid*, 976–77.

¹³⁷ *ibid* 976.

¹³⁸ *eg British Bank of the Middle East v Sun Life Assurance* [1983] 2 Lloyd's Rep 9 (HL).

¹³⁹ *AG for Ceylon v Silva* [1953] AC 461 (PC) 479; *Armagas* (n-~~134~~[133](#)) 749 (Goff LJ); *East Asia Company Ltd v PT Satria Tirtatama Energindo (Bermuda)* [2019] UKPC 30, [2020] 2 All ER 294 [61].

¹⁴⁰ See now *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), [2011] BCC 789 [94]; *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450, [12]–[15]; *East Asia* (n-~~137~~[139](#)) [61].

¹⁴¹ *Lovett*, *ibid* [13].

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The context is typically that a junior employee has incorrectly told a third party that there is a contract between the company and the third party, or that a deal has been done. Legal analysis must then answer the ‘So what?’ question. The slippage is typically to move too quickly from ‘the corporate agent said there is a contract’ to ‘so there should be one’. This is not necessarily the right answer.¹⁴²

She continues to say that, if apparent authority’s requirements are met,

then the court must consider the appropriate remedy; it must assess the losses suffered as a result of reasonable reliance on the representation made. ... What should follow from reliance on that representation? Of course, knowing the precise facts in the case is essential to answering this question properly, but the reliance losses incurred when a bank incorrectly informs a customer that a financing deal has been agreed can often, it seems, be remedied by more limited awards than delivery of the exact deal inaccurately indicated to third parties.¹⁴³

The problem with *First Energy* is thus not seen as the conclusion that there was apparent authority, but with the remedies that followed. The most appropriate remedy may be something other than holding the principal to the truth of whatever the agent had said. This solution has since been approved of in *Stavrinides v Bank of Cyprus Public Company Ltd*,¹⁴⁴ where John Kimbell QC (sitting as a Deputy Judge of the High Court) said that:

It is important to distinguish between representations of transactional authority and conduit authority because the remedy may be very different (assuming reliance can be proved). A person who relies on a representation of a transactional authority will *prima facie* be able to enforce the contract against the principal or claim expectation losses for breach. A person who relies on a representation of conduit authority will generally be limited to claiming reliance losses only. As Prof Worthington points out in her article *Corporate Attribution and Agency: Back to Basics*, (2017) LQR 118 at 140, the ‘authorised’ conveyance of information that an offer has been accepted is not the same as the “authorised” conveyance of a binding offer. I agree.¹⁴⁵

C. Refuting the Argument

Worthington’s argument appears to rests on apparent authority’s nature as a flexible estoppel. But estoppels are varied. Some estoppels, such as proprietary estoppel, permit significant remedial flexibility. Once proprietary estoppel is made out, the court must then award the minimum remedy necessary to satisfy the equity. This may be to award the representee what was represented,¹⁴⁶ or it may be something else.¹⁴⁷

¹⁴² Worthington, ‘Back to Basics’ (n 1) 139.

¹⁴³ *ibid* 142.

¹⁴⁴ *Stavrinides v Bank of Cyprus Public Company Ltd* [2019] EWHC 1328 (Ch).

¹⁴⁵ *ibid* [100] (emphasis removed).

¹⁴⁶ *eg Thorner v Major* [2009] UKHL 1, [2009] 1 WLR 776.

¹⁴⁷ See *eg Jennings v Rice* [2002] EWCA Civ 159, 1 P & CR 100 [50].

If apparent authority is an estoppel at all, it is not of this type.¹⁴⁸ It is an estoppel by representation.¹⁴⁹ Unlike proprietary estoppel, which seems to operate as a cause of action generating new rights,¹⁵⁰ an estoppel by representation is a rule of evidence.¹⁵¹ Where one person makes a representation to another, intending the other to rely on it, and the representee reasonably relies on it to his detriment, the representor will be estopped from adducing evidence contrary to the representation he has made. He is thus barred from denying the truth of the statement against the representee.¹⁵² Estoppel by representation thus operates in an ‘all or nothing’ way. Where A pays B £500 by mistake and represents to B that the money is his to do what he wishes with it, B has a defence to a claim to restitution of the full sum even if he has only spent £50 of it in reliance on the representation.¹⁵³

If apparent authority is an estoppel by representation, as most accept that it is, then it is difficult to see how the most appropriate remedy in *First Energy*-type cases can be anything other than holding the principal to the truth of what the agent has said. Estoppel by representation generates no remedial flexibility. As a rule of evidence, it bars the representor from adducing evidence contrary to the truth of his statement, whatever the content of that statement. If the statement is ‘I approved the deal’, then the agent’s apparent authority to make the statement entitles the third party to hold the principal to the truth of the statement. The same is true if the statement is ‘My superiors authorised the deal’; the principal is likewise bound to the truth of the statement. This is a feature, not a bug.

There is a different possibility which may lead to ‘reliance losses’ being remedied, but this option is in addition to rather than in substitution for the analysis above. The principal may be liable to the third-party representee for misstatements made by the agent in two ways. First, the

¹⁴⁸ For discussion of the difficulties with an estoppel analysis, see *Bowstead & Reynolds*, 22nd edn (n 858585) para 8-027.

¹⁴⁹ *Freeman* (n 109109) 503 (Diplock LJ); *Akai Holdings Ltd v Thanakharn Kasikorn Thai Chamkat (Mahachon)* [2010] HKCFA 64, [2011] 1 HKC 357 [52] (Lord Neuberger NPJ); *East Asia* (n 136139) [41]–[43], [84].

¹⁵⁰ On the difference between the two, see eg *Shortland v Hill* [2018] 1 P & CR 16 (Bristol County Court) [84] (Paul Matthews HHJ).

¹⁵¹ *Low v Bouverie* [1891] 3 Ch 82 (CA) 105 (Bowen LJ); *London Joint Stock Bank Ltd v Macmillan* [1918] AC 777 (HL) 817–18 (Viscount Haldane); *Evans v Bartlam* [1937] AC 473 (HL) 484 (Lord Wright). Contrast attempts to identify a unified notion of estoppel as a substantive doctrine based on unconscionability, eg *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 (CA) 241–42 (Lord Denning MR).

¹⁵² Compare *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 (CA) 611 (Devlin J), where for purposes of s 21(1) of the Sale of Goods Act 1979, apparent authority bound third parties other than the representee.

¹⁵³ *Avon CC v Howlett* [1983] 1 WLR 606 (CA) 620–25 (Slade LJ).

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principal can be held directly liable for authorising the making of the statement by the agent.¹⁵⁴ Certainly, cases where the agent had actual authority to make those statements will count; apparent authority probably will as well.¹⁵⁵ Second, the principal can be held vicariously liable for the tort of its agent. Here the principal is being held liable not for their own wrong, but for the wrong of another – their agent.¹⁵⁶ The agent must thus have committed a tort,¹⁵⁷ and the requirements for vicarious liability – a qualifying relationship¹⁵⁸ and a ‘close connection’ between the acts done and those the agent was employed to do¹⁵⁹ – must be met. In either possibility the principal may be liable for losses caused by reliance on the agent’s misrepresentation to the principal; the precise measure may depend on whether the misrepresentation was fraudulent or negligent. However, even if the principal may be held liable for their agent’s misstatements, that action would be an alternative to the third party seeking to hold the principal to the truth of the statement. There is no good justification why the former should trump the latter.

Worthington's argument might be seen as a call of a different kind, for changing apparent authority's nature as an estoppel by representation into some other kind of estoppel. This new estoppel might offer discretion in fashioning appropriate remedies or might be limited to remedying reliance losses. Either way, it would not operate as a rule of evidence. There is some support for this. In *National Westminster Bank plc v Somer International (UK) Ltd*, the Court of Appeal departed from the orthodox understanding of estoppel by representation by concluding 'there yet remained scope for the operation of equity to alleviate the position on grounds of unfairness or unconscionability ... whatever the appropriate judicial classification

¹⁵⁴ How this type of liability ought to be categorised is controversial. One view might be that the principal commits the tort himself (personally), albeit through the body of another. See eg R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 245–48; R Leow, ‘Understanding Agency: A Proxy Power Definition’ (2019) 78 *CLJ* 99, 108. Another view is that it is a form of accessory or participatory liability, eg Davies (n 70) 191–92.

¹⁵⁵ *eg Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 48 (Dixon CJ). See Leow (n 1) 113–20 (in the context of corporate principals/employers).

¹⁵⁶ eg *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 [15] (Lord Reed).

¹⁵⁷ eg *Axon v Ministry of Defence* [2016] EWHC 787 (QB), [2016] FSR 32 [68], [94] (Nicol J).

¹⁵⁸ See now *Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; *Barclays Bank v Claimants* [2020] UKSC 13, [2020] AC 97.

¹⁵⁹ Generally, see *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] 2 WLR 821. For misrepresentation torts, there is a difficult question of whether the ‘close connection’ test is limited by the existence of actual or apparent authority to make the statement, as suggested in *Armagas* (n 133) 737–40 (Goff LJ), on appeal, 782 (Lord Keith).

of estoppel by representation'.¹⁶⁰ In that case the bank paid approximately US\$76,000 to the defendant Somer, which acted to their detriment by forwarding goods worth approximately £13,000 to their customer in the belief that the latter had paid them. Applying this unconscionability-based exception, the Court of Appeal concluded that Somer could only rely on the defence of estoppel by representation to the extent of their detriment.

Somer's conclusion is difficult to defend if estoppel by representation is a rule of evidence. But it is not so easy to see why apparent authority should develop into something else. One of the key functions of apparent authority is to protect the reasonable reliance of third parties on the appearance of authority which the principal has created. As said in *Morris v Kanssen*, 'the wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order'.¹⁶¹ If remedies for apparent authority were subject to judicial discretion or limited only to remedying reliance losses, the ability of third parties to rely on the appearances of authority would be much more limited. In many apparent authority cases where the third party relies on the agent's authority to approve a transaction, the third party suffers very little detriment, perhaps only losing an opportunity to take some alternative cause of action.¹⁶²

Despite recent judicial support, the argument in 'Back to Basics' is incompatible with the underlying basis for apparent authority. As an estoppel by representation, apparent authority operates as a rule of evidence. There is only one possible result if apparent authority is established: against the third party, the principal is estopped from adducing evidence contrary to the truth of the statement he made. This conclusion does leave the *First Energy* problem intact; its resolution (if one exists) must be left for another day.

V. Conclusion

This chapter critically evaluates the three solutions offered in 'Back to Basics'. For the *Stone & Rolls* problem, it argues that the problem both with 'Back to Basics' and the recent analysis offered by the Supreme Court is that it wrongly identifies a context-specific approach

¹⁶⁰ *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970, [2002] QB 1286 [40] (Potter LJ).

¹⁶¹ *Morris v Kanssen* [1946] AC 459 (HL) 475 (Lord Simonds).

¹⁶² eg *Kelly v Fraser* (n 140140138) [17].

attribution as the solution. The better view is that the resolution of the problem turns on a more careful approach to attribution and the effect of any private law rule in question. The chapter also disagrees with the analysis of the scope of an agent's authority, instead preferring the view that an agent does not have actual authority to act otherwise than for the principal's benefit, but for different ~~views-reasons~~ than those commonly stated. Finally, the innovative solution to the *First Energy* problem ~~also~~ does not quite meet the mark; it is incompatible with the orthodox underlying basis for apparent authority as an estoppel by representation.

Evident in 'Back to Basics' are some familiar themes of Sarah Worthington's work. The solution to the *Stone & Rolls* problem focuses on the need for the law to deliver predictable, commercially sensible outcomes. The discussion of the *First Energy* problem demonstrates a persistent focus on remedial issues,¹⁶³ while analysis of the scope of an agent's actual authority draws on efforts to show how the common law and equity can be coherently integrated into a single system, with different flaws generating different remedies.¹⁶⁴ Its innovative arguments are well worth considering, as this chapter has done.

¹⁶³ eg S Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, Oxford University Press, 1996).

¹⁶⁴ S Worthington, *Equity*, 2nd edn (Oxford, Clarendon Press, 2006).