



Split (legal) personalities?

Corporate agents beware: **Dr Mike Wilkinson** dissects the mistaken belief that individuals running a company are shielded from personal liability for company wrongdoing

IN BRIEF

► Those running a company often claim—wrongly—that they cannot be sued personally for their role in any wrongdoing and that any third party dealing with the company can only sue the company itself for the harm they have suffered.

► While those running a company cannot be sued on a company's contract, nor expected to give up property belonging to the company (unless the corporate veil is lifted), after the Supreme Court decision in *Sevilleja v Marex Financial Ltd* there is now no reason in principle why such persons cannot be sued for any wrongdoing they have committed or commissioned as a joint tortfeasor.

Persons dealing with a company often suffer losses at the hands of those running a company. They may wish to sue such persons individually, rather than suing the company itself—especially when the company is insolvent. All too often when such situations arise, misunderstandings abound, and third parties are deterred from bringing personal claims in the mistaken belief that the company's separate legal personality shields the corporate agents from liability. Something of a myth prevails that third parties can only sue the company itself.

It is perhaps unsurprising that this area is so rife with confusion. Until as recently as *Sevilleja v Marex Financial Ltd* [2020] UKSC 31, [2021] 1 All ER (Comm) 97, the rule against reflective losses was an impediment to bringing such personal claims. According

to that rule, a third party could not sue those controlling a company for any losses which reflected the losses suffered also by the company as a result of the same or similar wrongdoing. They were instead expected to go after the company, and if necessary, try to control its insolvency. Thankfully this rule has now been overturned by the Supreme Court, at least as far as third-party creditors are concerned. However, the confusion engendered by the operation of that rule may take a lot longer to dispel.

No escaping liability

However, it is only in a contractual context that a director can breach a company's contract free from incurring any personal liability. The basis for their immunity from suit lies in the privity of contract and agency law, and not because of the company's separate legal personality. An agent is never liable on their principal's contract, as they are simply not party to it. That same principle does not give a director immunity from personal liability for harm they cause to third parties while running a company. Agency law will not allow an agent to avoid responsibility by merely blaming their principal. As Lord Hoffmann put it in *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43 (at para [21]):

'No one can escape liability for his fraud by saying "I wish to make it clear that

I am committing this fraud on behalf of someone else and I am not to be personally liable".'

Similarly, a company's separate legal personality does not absolve a corporate agent of liability for the torts they bring about—even where liability for such torts might be attributed to the company. Whether the corporate agent will be liable for their own wrongdoing is a question of the extent of their involvement and participation in the tort; in other words, whether liability on the cause of action can be made out.

Personal liability can arise in two situations: where the corporate agent themselves commits all of the elements of the tort; or where they commission it in such way as to become joint tortfeasor with the company. An agent will be a joint tortfeasor with their company where two or more persons participate in some 'joint enterprise' or share some 'common design' to commit or commission a tort (see *Barclay-Watt and others v Alpha Panareti Public Ltd and another* [2022] EWCA Civ 1169, [2022] All ER (D) 70 (Aug) and *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486, [1999] All ER (D) 164), or where they instigate the commission of the tort by instructing, soliciting or inciting another or others to commit it (see *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441).

In either case—whether the director has committed the tort themselves or commissioned others to commit it so as to be jointly liable—they will have exceeded their authority as a mere corporate agent. As such, they cannot claim to have been authorised in law to commit the tort for another party.

Causes of action

Establishing liability on either basis will always be fact-sensitive, and there is no simple formula for determining whether the requisite level of assistance or combination in some common design has taken place.

The nature of the cause of action and the extent to which the conduct was within the sphere of the company's business appear to be relevant (see *Barclay-Watt and others v Alpha Panareti Public Ltd and another* [2022] EWCA Civ 1169, [2022] All ER (D) 70 (Aug)). It is clear from a review of the authorities that the courts are willing to uphold personal liability on all sorts of causes of action, including:

- ▶ **Procuring a breach of contract:** a director can be personally liable for procuring a breach of their company's contract where they exceed their authority by acting in bad faith towards their company, as was the case in *Antuzis and others v DJ Houghton Catching Services Ltd and others* [2019] EWHC 843 (QB), [2019] All ER (D) 78 (Apr), where it was considered that directors who exploited their employees exposed the company to reputational harm and claims, and were thus not acting in good faith towards their company.
- ▶ **Negligence causing pure economic losses:** directors can be liable on an action for negligence causing pure economic losses once they have voluntarily assumed responsibility to protect the claimant from suffering such losses which may arise, as suggested in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at p638C-E, where:

'(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment'.

- ▶ **Injury to property or person:** situations involving a foreseeable risk of harm in circumstances of close proximity will often give rise to a duty of care being owed, and the fact that such duty can be attributed also to a company does not

necessarily negate the directors from also being liable, as held by Viscount Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

- ▶ **Passing off and copyright infringement:** a director will be liable where they 'procured or commissioned' copyright infringement by others in their company, and they cannot escape liability by arranging for the company they control to commit the breach (see *Evans (C) & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415).
- ▶ **Deceit:** a director that knowingly makes a false representation intending an outside third party to rely on it will be personally liable on an action for deceit where that outside third party acts in reliance on it and suffers losses. In this context, a false representation can include a statement about a company's creditworthiness which induces a customer to enter into a transaction when the director knows the company cannot meet its obligations as was the case in *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201, [2007] All ER (D) 293 (Nov).
- ▶ **Conspiracy:** a director can be liable for conspiring to cause losses to a third party, including planning to fold a company or strip it of assets, as held in *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250. Such liability can also be attributed to the company at least in civil law so that the corporate personality can be the corporate agent's co-conspirator (at least notionally) in the collusion for the purposes of establishing conspiracy of the director (see *Yukong Lines Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82).
- ▶ **Unlawful means tort:** a director can be personally liable to an outside third party for using unlawful means towards their own company to cause economic losses not to the company (or not just to the company) but to that outsider, as was the case in *Sevilleja v Marex Financial Ltd*.
- ▶ **Dishonest assistance:** a director of a company that assists or procures his company to act deliberately in breach of trust or a fiduciary duty, knowing of that breach, can be held liable for dishonestly assisting a breach of trust or fiduciary duty, and they will be liable to pay equitable compensation, akin to damages, for all losses flowing from the breach of trust or fiduciary duty, including in cases where the company is insolvent (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378).
- ▶ **Knowing receipt:** a director may be required to account as a constructive trustee if they let their company be used for fraud that they have notice of by way

of actual or constructive knowledge, including by turning a blind eye (see *Shell International Trading & Shipping Company Ltd v Evgeny Tikhonov* [2010] EWHC 1770 (QB)).

Personal liability on the statute book

In addition to those common law and equitable causes of action, corporate agents can often also be held personally liable to third parties under statute. The Insolvency Act 1986 for example provides scope for personal liability: under s 423 to 425 where directors enter into transactions at an undervalue to defraud creditors; or under s 217 in phoenix situations where a new company carries on in the name of an old, liquidated company without permission.

There are many other Acts of Parliament which also make provision for those running a company to incur personal liability both civilly and criminally, including for example in areas as diverse as environmental protection, data protection, competition law, housing and tax.

The courts also have power to make orders imposing personal liability on those running companies in legal proceedings, and often do so to require a party other than a claimant to pay security for a defendant's costs or to pay the costs of proceedings, or where those controlling a company have committed a contempt of court.

Accordingly, those faced with clients contemplating suing corporate agents rather than (or as well as) the company should not be deterred from seeking to set up a cause of action against them personally where the action is not based purely on the company's contract. The fact that personal liability may exist, however, does not make the task of proving the commission of the relevant wrongdoing any easier. Often decisions will be made in small companies without any formal minutes being produced. In the absence of real evidence establishing who was involved in bringing about a tort, practitioners may thus find it hard formulating and advancing their claims. They will therefore want to consider also the array of disclosure levers at their disposal, including through resort to pre-action correspondence, pre-action disclosure applications, or even subject access data requests.

NLJ

Dr Mike Wilkinson is a business & property law barrister practising at 18 St John Street in Manchester & author of *The Limits of Separate Legal Personality: When Those Running a Company Can Be Held Personally Liable for Losses Caused to Third Parties Outside of the Company*, Law Brief Publishing (2022). NLJ readers qualify for a £25 discount which is available (until the end of 2022) using the code 82E43C7 at bit.ly/3C9Pdgr.