

Separation Rule for the Director and the Company: Malaysian Law Position

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ABSTRACT

Directors' misconduct relating to their duties and liabilities to companies in Malaysia is subject to public enforcement by the Companies Commission of Malaysia (CCM). Despite frequent complaints about such misconduct, CCM statistics reveal fewer convictions against directors for these offences. The legal framework categorises directors' liabilities into direct, accessorial, and deemed liabilities. This study delineates the scope and conditions under which directors are held accountable within this framework. Using a comparative approach, the article examines Australia's enforcement strategies as a valuable benchmark. The study demonstrates that directors' liability fosters legal openness by ensuring that culpable parties are held accountable, provided that enforcement mechanisms are appropriate, equitable, and balanced to prevent unjustly attributing blame to directors. The study also identifies key constraints in Malaysia's enforcement regime, particularly the lack of civil penalties, and opines that introducing such penalties could enhance accountability. Based on doctrinal analysis, the study employs primary sources from statutes and judicial rulings, complemented by secondary materials including academic journals, books, and online databases. This paper aims to provide a significant resource for directors, practitioners, educators, and students, while offering valuable insights for policymakers to consider future reforms to directors' liability laws.

Keywords: Directors' Liabilities, Accessorial Liability, Direct Liability, Deemed Liability, Civil Penalty

INTRODUCTION

Although the law recognises a company and its directors as distinct legal entities, a company can only operate through the actions of its directors. Nevertheless, directors are not personally liable for the company's activities (Hamid, 2013; Mohd Sulaiman & Othman, 2018), due to the doctrine of limited liability established in *Salomon v. A. Salomon & Co. Ltd* [1897] AC 22 (Hamid, 2013). Accordingly, liability rests with the company itself. However, directors may incur criminal or civil liability independent of the company when they have engaged in forbidden conduct or are held accountable due to their engagement in business management.

While the concept of a separate legal entity benefits investors by minimising their exposure, it also has the potential to insulate individual company officers from criminal liability, which is considered socially damaging (Australian Law Reform Commission, 2002). Consequently, in certain situations, individual liability serves as a crucial complement to corporate liability, ensuring that individuals are suitably reprimanded and that sanctions for corporate misconduct remain in effect (Australian Law Reform Commission, 2002).

In Malaysia, the responsibilities of the directors in Malaysia emanate from multiple sources, including common law and equity principles, the Companies Act 2016, company constitutions or agreements, and other statutes such as the Malaysian Anti-Corruption Commission Act 2009 (MACC Act), the Anti-Money Laundering, Anti-

Terrorism Financing and Proceeds of Unlawful Activities Act 2001, the Penal Code, and the Capital Markets and Services Act 2007 (CMSA).

Based on the annual report of Companies Commission of Malaysia (CCM), which regulate matters relating to corporations, companies and businesses in Malaysia, fraud and serious offences involving the duties and liabilities of directors and corporate misconduct were listed in the top three complaints received by the CCM from 2017 until 2022, and cases involving breach of directors' fiduciary duties were the second most investigated offence in 2023 (Companies Commission of Malaysia (CCM), 2020, 2021, 2022, 2023, 2024).

The total number of convictions meted out by the Court against the directors subject to CCM's enforcement is as per Table 1 below:

Table 1: The total number of convictions meted out by the Court against the directors from 2017 to 2023:

Convictions	2017	2018	2019	2020	2021	2022	2023
Directors	522	87	8	3	8	3	3

Source: CCM Annual Reports for 2017, 2018, 2019, 2020, 2021, 2022, 2023

Thus, even though the duties and liabilities of directors were the subject of the most complaints received by CCM from 2017 to 2022, and cases involving breach of directors' fiduciary duties, were the second most investigated offence in 2023, convictions were not constant, as they were high in 2017 but decreased in 2018 and continued to decline thereafter in 2019 and 2020 and then rose to eight in 2021 and then decreased to three in 2022 and 2023.

Given that the three mechanisms for establishing director liabilities are direct, accessory, and deemed liabilities, the study examines these types of liabilities to clarify the extent of directors' liability within the legal framework and the means of holding directors accountable. The study delineates the obstacles to the existing enforcement regime within Malaysia's legal framework, which emphasises criminal prosecution, and evaluates potential improvements by contrasting it with Australia's legal framework, which incorporates both criminal prosecution and civil penalties.

LITERATURE REVIEW

Various commentators have analysed and provided insights into the literature concerning the personal liability of directors for corporate fault.

A company enjoys a separate legal entity (Pollman, 2021). Directors, collectively the board of directors, manage the affairs of a corporation (Pollman, 2021). Since a corporation is legally distinct from its directors, both may be held individually accountable for the same activity taken on behalf of the company (Noonan & Watson, 2008). The director should also assume personal accountability when at fault (Xue & Li, 2024). Hence, the three methods of establishing liability of directors are direct liability, accessory liability, and deemed liability (Australian Law Reform Commission, 2002).

A direct liability, also known as concurrent liability or the participation theory (Gerding, 2008), describes circumstances where both an individual and a corporation are separately liable as principals in relation to the same violation (Carr & Cunningham, 2019), whether civil or criminal (Allens & Linklaters, 2019). Carr & Cunningham stated that legislative provisions enforce direct liability; therefore, direct accountability is contingent on the statute that gave rise to the corporate violation (Carr & Cunningham, 2019). Allens & Linklaters added that direct liability may be enforced on a director alone or in conjunction with the imposition of an obligation on a company (or any other natural person) (Allens & Linklaters, 2019). Gerding clarified that directors may be held accountable for corporate statutory violations in which they were involved, provided that the statute in question includes individuals in the definition of "persons" who may be held accountable (Gerding,

2008). However, Allens & Linklaters cautioned that direct liability is a relatively burdensome form of director liability, because, while it requires director culpability, it does not require a prior showing that a director's company or an officer, employee or third-party representative of their company committed a primary offence (Allens & Linklaters, 2019). Hence, where there is a clear legislative statement that individuals are liable in addition to corporate bodies and where those individuals have participated in the prohibited conduct, they will be directly liable for offences or contraventions (Australian Law Reform Commission, 2002).

On the other hand, accessory liability is an indirect liability (Australian Law Reform Commission, 2002). A director or manager may be personally liable because they are an accessory to the criminal misconduct of the corporation. Austin et al stated "accessorial liability" is imposed on a director by virtue of his involvement in blameworthy conduct by a company or another natural person (Austin et al., 2018). Freeburn and Ramsay asserted that accessorial liability requires some personal fault, that the person aided, abetted, counselled or procured the commission of the offence by the corporation (Freeburn & Ramsay, 2021). Thus, an accessory is not the perpetrator of the crime, but rather aids others in committing it (Solaiman & Langsted, 2017). Allens & Linklaters opined that accessorial liability can be perceived as a less onerous form of liability than direct liability, as it requires a prior showing that a director's company, or an officer, employee or third-party representative of their company committed a primary offence, as well as a showing of director culpability (Allens & Linklaters, 2019). The common law concept of accessorial liability has been integrated into various federal statutes (Australian Law Reform Commission, 2002).

Meanwhile, deemed liability or managerial liability provisions (Australian Law Reform Commission, 2002) typically provide that if a company contravenes a provision, every director of the company is deemed to have contravened the provision, unless they can prove that the company's contravention occurred without their knowledge or fault (Robert P Austin and Ian M Ramsay, 2018). The individual is considered liable as a principal for an offence or contravention due to their role and status in managing the body corporate (Australian Law Reform Commission, 2002). Deemed liability is analogous to strict liability, where the mental element of an offence is not required to be proven by the prosecution (Personal Liability of Directors: Regulatory Overkill?, n.d.). Penalties for individuals can have a significant deterrent effect (Australian Law Reform Commission, 2002). Nevertheless, there are concerns about deemed liabilities. Deemed liability issues include determining the seniority of officers responsible for a corporation's actions, reversing the onus of proof, determining the role of fault, establishing liability thresholds, and determining if there should be a penalty differential between corporations and individuals (Australian Law Reform Commission, 2002).

Past literature provides the strengths and weaknesses of the personal liability of directors. Regarding strengths, personal liability can promote transparency in management procedures, leading to improved accountability and performance (Hawke, 2000). Therefore, human agents who engage in prohibited conduct will be subject to the legal consequences of their actions and cannot exploit or conceal themselves behind the corporate framework (Fisse & Braithwaite, 1986). Furthermore, fines against corporations may not deter criminal behaviour, especially if the amount imposed is small or unenforceable. Alternative penalties, such as imprisonment for company directors or public denunciation, are more effective (Chesterman, 1993).

However, critics argue that personal liability can undermine separate legal entity status benefits and hinder corporate investment (Australian Law Reform Commission, 2002; Hawke, 2000). Further, smaller companies may be impacted as the shareholders are also, at the same time, the directors, the creditors or the employees (Australian Law Reform Commission, 2002). In addition, if directors face excessive liability, it could discourage experienced and well-qualified individuals from taking up directorships, depriving companies of valuable resources (Herzberg & Anderson, n.d.; Naaraayanan & Nielsen, 2021). Naaraayanan and Nielsen found in their research that personal liability laws in India discouraged individuals from accepting company director positions (Naaraayanan & Nielsen, 2021).

Abe Herzberg and Helen Anderson (Herzberg & Anderson, 2012) stressed that a balance is needed where sufficient justification for imposing liability on directors civilly or criminally, where they have committed wrongs or failed to behave, should be provided. Welsh and Anderson argue that "the best way to ensure that companies comply with regulations is to impose liability on the directors and managers personally as well as on the company." They further argue that civil penalties against corporate officers should be considered where the

regulation aims to ensure compliance (Michelle Welsh and Helen Anderson, 2005).

Literature highlights the challenges of prosecuting directors or controllers of companies. As the primary regulator for companies, CCM has rarely brought enforcement actions against directors for breaches of directors' duties, more so when the directors are nominees of those at the top of political power and their associates (V. Chen, 2019; Salim, 2022). Enforcement action also tends to require heavy resources, which regulators may lack. These may be some of the reasons why none of the directors of 1Malaysia Development Berhad, as well as SRC International Sdn Bhd (SRC), have been charged for any breach of directors' duties or other breaches of corporate law (V. Chen et al., 2025; Salim, 2022).

The Malaysian regulator can only pursue criminal charges for breaches of directors' duties (V. Chen et al., 2025). It is challenging to prove criminal violations, and authorities often lack the authority to take civil or administrative action against directors who breach their duties (V. Chen et al., 2025). Proving breaches beyond a reasonable doubt is difficult since the necessary evidence is frequently under the directors' control (V. J. H. Chen, 2017). Moreover, Holder stressed that individual punishment has been difficult, partly due to evidential issues; putting together who did what within a complicated and complex organisation is no easy task (Holder, 1999).

In Australia, the Australian Securities and Investments Commission (ASIC), which has the authority to initiate proceedings against directors for breach of duties (A. R. Keay, 2013; A. Keay & Welsh, 2015), has the authority to initiate civil penalty actions against directors (V. Chen et al., 2025; A. Keay & Welsh, 2015). Chen emphasised that Australian academics have drawn attention to the challenges in obtaining convictions for violating directors' duties and other corporate offences (V. J. H. Chen, 2017). As a result, the civil penalties were introduced to the Australian regulatory framework, which are based on the lower standard of proof on the balance of probabilities (V. Chen et al., 2025; V. J. H. Chen, 2017).

The literature indicates that directors cannot evade liability stemming from their misconduct; the extent of liability varies across three categories: accessory, direct, or deemed liability. Nonetheless, the literature also highlights the difficulty of enforcing criminal liability for directors in Malaysia. Against this backdrop, the paper examines the three categories of liabilities that govern directors in Malaysia and the possibility of supplementing criminal liability with civil penalties as an alternative mechanism to enhance the enforcement of directors' duties.

RESEARCH METHODOLOGY

Research Design

This study adopts a descriptive research design to clarify the three mechanisms of directors' liability within the existing legal framework. The design focuses on identifying and highlighting the distinctive features of each type of liability, as reflected in both primary and secondary legal sources, as well as examining the challenges in fulfilling the relevant legal requirements.

Research Approach

The study employs a doctrinal legal research approach, which systematically examines legal principles and rules. Primary legal sources such as statutes, case law, regulations, and established legal doctrines are analysed to establish the authoritative framework governing directors' liability. In addition, secondary sources—including textbooks, journal articles, law reports, news articles, and reputable online resources—are reviewed to provide scholarly interpretations, commentary, and contextual insights that supplement the primary materials.

Research Analysis

The analysis applies coding and thematic techniques to organise and interpret the data obtained from the legal materials. Recurring concepts and patterns relating to directors' liability are identified through coding. These are then developed into themes that provide a structured understanding of the liabilities examined. The analysis also incorporates a comparative method, particularly in evaluating Australia's practice of combining civil penalties

with criminal prosecution. This comparative dimension provides insights into potential reforms, suggesting that Malaysia could consider adopting similar measures to strengthen its legal framework on directors' liability.

FINDINGS AND DISCUSSIONS

Directors under the Companies Act 2016

Directors are part of the company's governance structure, and they make decisions for the company together with the general meeting of members (Mohd Sulaiman & Othman, 2018). The board of directors manages the company's business (Mohd Sulaiman & Othman, 2018).

Under Section 2 of the Companies Act 2016, a director includes “any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act and an alternate or substitute director”. In addition, a chief executive officer, chief operating officer, chief financial controller or any other person primarily responsible for a company's operations or financial management is also a director (Section 2 of the Companies Act 2016). In the case of *Public Prosecutor v Dato’ Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808, although the accused was not formally appointed as a director of SRC, the evidence showed that he was in essence and substance a director as a “director” as defined under Section 402A Penal Code or a shadow director since: he acted in a manner the SRC directors were accustomed to act (this made him a Section 402A director). The SRC directors were accustomed to acting according to the accused's instructions and directions, making him a shadow director.

The common law general fiduciary obligation of directors continues to exist alongside the statutory duties of directors. The directors, as fiduciaries, must exercise powers given to them in good faith in the company's best interest as stated in Section 213 of the Companies Act 2016. Directors are appointed to manage the affairs of the company, and they owe fiduciary duties to the company, and not to the creditors, present or future, or to individual shareholders (*Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258; [1983] 2 All ER 563). They must also exercise reasonable care, skill and diligence with the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities and any additional knowledge, skill and experience which he has (Section 213(2) Companies Act 2016, *Tengku Dato’ Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Berhad* [2018] 1 AMR 517 (Federal Court)). Under common law, the duties can be categorised as fiduciary duty of loyalty comprising the duty to act in good faith in the best interests of the company, the duty to exercise powers for a proper purpose, the duty to retain discretion, and the duty to avoid conflicts of interest, as well as the duty of care, skill and diligence (Mohd Sulaiman & Othman, 2018).

Direct liability

Where there is a distinct legislative statement that explicitly states that individuals are liable in addition to corporate bodies, and where those individuals have engaged in the prohibited conduct, they will be held directly accountable for offences or contraventions (Australian Law Reform Commission, 2002). Direct liability may be imposed on a director either independently or in conjunction with the imposition of liability on a company (or any other natural person) (Australian Law Reform Commission, 2002). The liabilities can be in the form of a return of profits made by the director to the company, or criminal or regulatory enforcement.

The Companies Act 2016 imposes direct liability for breaches of directors' general duties to the company. The duties include the duty to act in good faith and in the best interests of the company. In *Bester Malaysia Sdn Bhd v Tan Tee Kung & Ors* [2025] MLJU 2441, the plaintiff sued the defendant, who was the plaintiff's director and chief executive officer (CEO), for breach of trust, breach of fiduciary duties and/or negligence in relation to two business deals that the plaintiff undertook in which it lost RM3,472,504.40. The fiduciary duties of directors applicable to Tan are codified in Sections 213 to 215 of the Companies Act 2016. Section 213(3) of the Companies Act 2016 provides that a director who contravenes the section commits an offence and, on conviction, is liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both. The breach of duty is based on the test whether an intelligent and honest man in the position of the

director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company (Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch 62 at 74).

The Court held that the defendant did not exercise independent judgment as the sole director and CEO of the plaintiff. Accordingly, Tan did not make a business judgment deemed under Section 214 of the Companies Act 2016 to meet the standard of reasonable care, skill and diligence because he was not informed about the subject matter of the business judgment to the extent a director would reasonably believe to be appropriate under the circumstances. The defendant was ordered to pay the plaintiff damages suffered by the plaintiff, which was assessed at RM2,822,504.40, as well as the interest and costs of the action.

Making false reports to the Registrar of Companies under Section 593 of the Companies Act 2016 also carries direct liability for any person. A company director was charged with the offence under Section 593(a) of the Companies Act 2016, for allowing the company secretary to provide false statements regarding the appointment of directors and company secretaries to the Registrar of Companies (Bernama, 2025). Section 593 of the Companies Act 2016 provides imprisonment for up to 10 years or a maximum fine of RM3 million or both upon conviction.

In addition, a director is also liable if a solvency statement is made without having reasonable grounds for the opinion expressed in the statement, wherein, upon conviction, liable to imprisonment for a maximum of five years and a fine for a maximum of RM500,000 or to both (Section 114 Companies Act 2016).

Further, it is an offence to both the corporation and the officer of the corporation under Section 591 of the Companies Act 2016 to make or authorise the making of a statement that a person knows is false or misleading. Upon conviction, that person may be imprisoned for a term not exceeding ten years or a fine not exceeding RM3 million or to both.

It can be seen that although direct liability does not require a company to attribute responsibility to a specific individual, it serves as a means of holding individuals accountable for civil and criminal misconduct. The directors face harsh consequences, including fines and imprisonment, even if their mistakes were unintentional or due to complex company situations. Direct liability usually requires proof that the director acted improperly, such as breaching duties of care or honesty. It can be hard to decide precisely when a director's personal actions cross the line into liability. Sometimes directors face strict penalties even if their mistakes were unintentional or due to complex company situations.

Accessorial liability

Accessorial liability is not explicitly stated in the Companies Act 2016, but can be seen in judicial decisions that refer to common law and statutes. Accessorial liability requires knowledge and intent to participate in or assist the wrongful act. Ignorance is a defence. "Accessorial liability" is also known as "knowing receipt" (Breen, 2015) or "knowing assistance" (Ridge, 2013).

The High Court in SRC International Sdn Bhd & Anor v Dato' Sri Mohd Najib bin Hj Abd Razak [2022] 10 MLJ 95 referred to Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378, where the Privy Council quoted Barnes v Addy (1874) LR 9 Ch App 244, 251–252 in analysing the tort of knowing receipt and fraud. The High Court thus stated that "knowing receipt" concerns the liability of a person as a recipient of trust property or its traceable proceeds. Nevertheless, "knowing assistance" is the liability of an accessory to a trustee's breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in that it only arises where there has been a breach of trust.

In the Privy Council decision of Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378, the elements of the claim for "knowing assistance" are sufficiently set out (PharmMalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel & Ors [2004] MLJU 764). The Court applied the principle of accessorial liability to the facts of the case. It held that the company director was found to have dishonestly aided in the breaches of trust

committed by the corporate trustee he controlled, making him personally liable to Royal Brunei Airlines (Ridge, 2013).

In Royal Brunei Airlines Sdn Bhd's case, the airline seeks a remedy against the defendant, the managing director and shareholder of a travel agent company that the plaintiff airline appointed as its agent in a specific region for

the sale of passenger and cargo transportation. Per the agreement, the company was required to retain the airline's funds from the transaction in trust until the company accounted for them to the airline. The company deposited the funds into its current bank account rather than a separate account with the defendant's knowledge and assistance. Subsequently, the company utilised the funds for business purposes, constituting a breach of trust. The company did not pay the airline amounts due within the timeframe specified in the agreement. The airline terminated the agreement and, as a result of its insolvency, initiated legal proceedings against the defendant to recoup the funds owed to the company. The judge determined that the defendant paid the airline the specified sum as a constructive trustee. The Court of Appeal of Brunei Darussalam reversed the decision on appeal, determining that the defendant could not be held to such a high level of liability because the company had not been proven to have engaged in fraud or dishonesty concerning the funds held in trust for the airline. The airline submitted an appeal to the Privy Council. The Privy Council affirmed the appeal, asserting that a third party who dishonestly assisted a trustee in committing a breach of trust or procured him to do so would be liable to the beneficiary for the loss resulting from the breach of trust, regardless of whether the trustee was dishonest or fraudulent and regardless of whether the third party had received any trust property.

Further, the Privy Council held that in accessory liability, honesty was to be judged objectively and acting dishonestly, or with a lack of probity, was synonymous. It meant that not acting as an honest person would act in the circumstances and could be equated with conscious impropriety, which is distinct from inadvertent or negligent conduct or carelessness. However, a third party might be acting dishonestly if they recklessly disregard the rights of others. In addition, the third party's conduct had to be assessed based on his actual knowledge at the time, not what a reasonable person would have known or appreciated, and regard could be had to his personal attributes, including experience and intelligence and the reason for his acting in that way. In the case, since the defendant had caused or permitted the company to commit a breach of trust by using in the conduct of its business money held in trust for the airline when he knew that the company was not authorised to do so by the terms of the trust, the defendant had acted dishonestly, and was, therefore, liable to the airline for the amount owed to it by the company (*PharmMalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel & Ors* [2004] MLJU 764).

In *SRC International Sdn Bhd & Anor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2022] 10 MLJ 95, the plaintiff relied on the accessory limb. The issue arose from the expression "a dishonest and fraudulent design on the part of the trustees". The High Court referred to *Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors* and another case [2020] MLJU 2197; [2020] 1 LNS 1975 which referred to the Singapore Court of Appeal's case of *Caltong (Australia) Pty Ltd* (formerly known as *Tong Tien See Holding (Australia) Pty Ltd*) and another v *Tiong Tien See Construction Pte Ltd* (in liquidation) and another appeal [2002] 3 SLR 241. In the latter, the Court of Appeal summarised the elements which must be proved to establish dishonest assistance in *Royal Brunei Airlines Sdn Bhd's* case, which are (1) that there has been a disposal of his assets in breach of trust or fiduciary duty; (2) in which the defendant has assisted or which she/he has procured; (3) the defendant has acted dishonestly; and (4) resulting loss to the claimant. The disposal of assets in breach of trust or fiduciary duty under (1) above is, however, not a necessary element in "knowing assistance", unlike in "knowing receipt".

Thus, to make a defendant personally liable for dishonest assistance in a breach of trust or other fiduciary duty, it is necessary to establish (1) a breach of trust or fiduciary duty; (2) assistance by the defendant in the breach; (3) a causal link between and a gain to the defendant, depending on the remedy which is sought; and (4) a dishonest state of mind on the part of the assistant. The High Court stated, among others, that based on the above, there was a good arguable case for the above alleged wrongs against the defendant (*SRC International Sdn Bhd & Anor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2022] 10 MLJ 95).

Hence, knowledge of the fundamental facts that lead to a violation is required for accessorial liability (*ASIC v ActiveSuper Pty Ltd* (in liq), 2015) and also active participation in the acts or omissions that constitute the violation (*ASIC v SensaSlim Australia Pty Ltd* (in liq) (No 5), 2014).

Under Malaysian statutes, accessory liability is usually linked with criminal liability for directors for offences such as corruption or fraud. Abetment relates to accessory liability (Australian Law Reform Commission, 2002). Sections 107 to 117 of the Penal Code deal with abetment. In *Public Prosecutor v Datuk Haji Harun Bin Haji Idris & Ors* [1977] 1 MLJ 180; [1977] 1 LNS 92, the Court discussed what is meant by abetment as follows: "Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of an offence (*Ragunath Das v Emperor* (1920) 21 Cr LJ 213). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference, deduced from certain criminal acts of the accused in pursuance of an apparent criminal purpose in common between them (*Emperor v Abdul Hamid* (1945) 46 Cr LR 342). Abetment by aiding takes place when a person, by the commission of an act, intends to facilitate and does facilitate the commission of an offence (*Faguna Kanta Nath v State of Assam*, AIR 1959 SC 673. Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offence, the abettor is guilty of abetment by aiding (*National Coal Board v Gamble* [1959] 1 QB 11."

The law on abetment is stated in *Mohd Arif bin Ab Rahman & Anor v Public Prosecutor* [2021] MLJU 659 involved instigation of any person to do that thing, commanding any person to do that thing, engaging with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and to the doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing.

Thus, accessory liability demands proof that the director knew about and intentionally participated in the wrongdoing, which can be challenging to establish. Ignorance or being "wilfully blind" can exempt directors from liability. Further, liability under the MACC Act or the Penal Code demands high standards of proof beyond a reasonable doubt, which may be challenging to meet in complex corporate conspiracies or frauds.

Deemed liability

Directors are subject to several offences based on deemed liability or derivative liability. Deemed liability is also referred to as a secondary or "derivative" form of liability, as the person responsible for a crime is considered sufficiently liable because they have encouraged, allowed, or assisted in committing the offence (McGrath, 2021). The individual's contribution to the commission of the primary offence is derived from proof that the company committed it (Mcgrath, 2021). Therefore, it is necessary first to determine the company's liability and inability to use defences before examining the director's individual liability (Anderson & Welsh, n.d.). Deemed liability is distinct from accessory liability in that it does not require evidence of knowledge of or involvement in the contravention; in most cases, mere participation in the administration of the body corporate will suffice (Australian Law Reform Commission, 2002). Deemed liability results in the reverse onus of proof provision by rebuttable presumption.

In Malaysia, in criminal proceedings, the derivative or deemed liability provision in Section 122(1) of the Securities Industry Act 1983 (Act 280) (SIA) (since repealed by the CMSA) was held by the Federal Court to be valid and constitutional in *Public Prosecutor v Gan Boon Aun* [2017] 3MLJ 12, as Article 5 of the Federal Constitution did not prohibit presumptions and reverse onus clauses. The Federal Court analysed Section 122(1) SIA. Section 122(1) SIA states as follows:

"(1) Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."

According to the Federal Court, there were two components in Section 122(1) of the SIA. Firstly, there was a presumption that an offence against the SIA or any regulation made under the SIA committed by a body

corporate is committed by any person who, at the time of the commission of the offence, was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity. Secondly, a reverse onus clause, which imposed on that person the onus to prove that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances. Here, although this is a "deeming clause", the law provides that it is rebuttable and this is seen from the phrase "unless he proves that the offence was committed without his consent or connivance and that he exercised all due diligence to prevent the commission of the offence" (*Extreme Design & Associates Sdn Bhd v Ministry Of Domestic Trade And Consumer Affairs (Kluang Branch)* [2021] 9 MLJ 360). The "deeming clause" is the application of the doctrine of lifting the veil or "piercing the veil" that had shielded the "real players" behind the curtains.

In this case, the Federal Court emphasised that the frequent justifications for reversing the onus of proof include necessity and the law's legitimate purpose in the public interest. Although interfering with the burden of proof can violate the presumption of innocence, the interests of the community as a whole must also be preserved. There was a presumption and reverse onus clause in Section 122(1) of the SIA, but the presumption's substance and effect were reasonable and not greater than necessary.

The Federal Court's decision has significant implications, as 32 other provisions in different statutes are similar to the mentioned provision (Securities Commission Malaysia, 2017). Among others, a reverse onus clause, where an enactment provides that a particular fact is presumed or deemed to exist "unless the contrary is proved", also exists in the MACC Act, Customs Act 1967, Police Act 1967, Arms Act 1960, and Dangerous Drugs Act 1952. It is an exception to the general rule that an accused bears no onus of proof. The oft-given justification for interference with the onus of proof is necessity and the legitimate aim of the legislation in the public interest, except that interference with the onus of proof could run afoul of the presumption of innocence.

In Malaysia, a corporate liability provision in Section 17A of the MACC Act was established on June 1, 2020, to address and curtail the problem of corruption by business entities and their associated persons. The provision holds business entities and, in addition, their officers in managerial positions, who are deemed liable if anyone associated with them offers a bribe to a third party for the benefit of the business entities. Section 17A(3) of the MACC Act delineates concurrent personal criminal liability in corruption cases for individuals associated with a corporation, including directors, controllers, officers, partners, or anyone managing a commercial entity. Section 17A(3) MACC Act has the deemed liability component, which automatically deems the directors and officers of the company/organisation with criminal liability. By creating the deemed personal criminal liability of senior personnel for corruption by a company that is committed by an associated person, Section 17A MACC Act has both broadened the scope of liability and reversed the onus of proof onto directors/officers by requiring such individuals to prove the absence of consent and connivance. Hence, to rebut the presumption, the director must prove on a balance of probabilities that the offence was committed without his or her consent or connivance, and that he had exercised the necessary due diligence in the circumstances.

Therefore, despite the contradiction with the separate entity principle in company law, implementing deemed liability is an effective method for assigning responsibility to individuals for corporate offences and violations. It is argued that individuals who have neglected their duties of supervision and management should be held accountable when businesses engage in criminal activities. Complications may occur when a company has many directors and multiple hierarchical tiers. It may be challenging to identify the specific director who is liable.

Civil penalties in Australia

In Australia, the enforcement of directors' duties is underpinned by a comprehensive civil penalty regime administered by ASIC. Where there is suspicion of a civil breach, ASIC is empowered to initiate civil penalty proceedings against directors (Keay & Welsh, 2015). In addition, the affected company itself may enforce such penalties pursuant to Section 1317 of the Corporations Act 2001 (Tawiah, 2021).

The Corporations Act 2001 outlines a range of civil penalties that ASIC may seek in cases of breach of directors' duties. These include disqualification orders, which prevent individuals from managing corporations for a

specified period, thereby safeguarding the integrity of corporate governance. Pecuniary penalty orders may also be imposed once a court has declared that a director has breached their statutory duties. Further, directors in breach may be subjected to compensation orders, which require payment to the company where the breach has caused financial loss. When directors have gained an improper advantage or avoided a detriment, courts may impose relinquishment orders, directing payment to the Commonwealth of Australia equivalent to the benefit obtained or avoided (Tawiah, 2021).

Taken together, this civil penalty framework illustrates Australia's balanced approach to corporate governance: it provides ASIC with robust enforcement tools while ensuring that remedies are available to the state and the affected company. This system demonstrates a hybrid enforcement model that combines deterrence, accountability, and restitution in addressing breaches of directors' duties.

Although Tawiah (Tawiah, 2021) highlighted that the civil punishment regime in Australia is flawed due to ASIC's limited financial resources, which hinder its ability to address all instances of corporate misconduct, and the Court's classification of civil penalties as quasi-criminal offences has created challenges for ASIC in terms of evidence and procedures, in effect, civil penalties provides an alternative enforcement mechanism when criminal prosecution cannot be continued.

In light of this, Chen et al observed that it is intriguing to note that the Australian data indicate a higher number of criminal prosecutions than civil penalty applications during the data period they examined from 2011 to 2020 (V. Chen et al., 2025). The variation, according to Chen et al, can be attributed to a variety of factors, such as the following: civil penalty applications have proven to be more challenging to administer than anticipated initially; the legislation mandates that ASIC consult with the Commonwealth Director of Public Prosecutions (CDPP) office regarding the potential for a criminal prosecution before initiating civil penalty proceedings; and the policy of both ASIC and the CDPP is to prosecute criminally rather than pursue civil penalty action in cases where there is evidence of criminal behaviour (V. Chen et al., 2025).

In this respect, ASIC's enforcement actions against directors and officers from 2021 to 2023 highlighted 42 successful criminal outcomes and 22 civil outcomes (Ramsay & Webster, 2024). However, the civil outcomes are still significant as they relate to the ability of the enforcers to take action against directors for their breach of duties when criminal prosecution is not possible.

CONCLUSION

The discussion above highlights that when directors are involved in wrongdoing, they are not exempt from liability. The separate legal entity concept will not be applicable. The liability of a director will depend on the level of his participation, namely direct, accessorial and deemed liability, respectively.

The implementation of duties upon directors aims to shape and regulate their conduct and behaviour, and guide them in carrying out their managerial responsibilities following legal standards.

Attributing responsibility to the company's directors is warranted when they are liable; otherwise, the liability will unfairly fall on the business entity itself. Nonetheless, the accountability must pertain to the director's conduct. It must be commensurate. The law is transparent, since the irresponsible are held accountable; yet, it must always be equitable, just, and appropriate to prevent arbitrary blame on the director.

However, breaches of directors' duties persist despite a legal framework comprising criminal enforcement by the regulator with direct liability, accessorial liability, and deemed liability. Challenges exist in the application of the law, particularly in demonstrating a director's breach of duty, establishing knowledge of wrongdoing, which allows directors to evade liability through claims of ignorance, and identifying the specific director accountable.

Thus, although legislative responses have evolved to keep pace with technological advances, the practicality and efficiency of legal mechanisms remain questionable. Laws, although strengthened over time, have not proven entirely effective in preventing wrongful action among directors. Personal liability for directors via direct liability, accessorial liability, and deemed liability remains an ongoing challenge.

The study indicates that Australia has made significant progress in addressing enforcement issues by implementing civil penalties for directors' breaches of duties. Malaysia has established public enforcement laws that regulate directors' duties, characterised by their criminal nature. Criminal sanctions are necessary when all conditions are met. Criminal sanctions are challenging to achieve, primarily due to the requirement of proving

the offence beyond a reasonable doubt. Given the low conviction rates, the study identified a need to improve the enforcement mechanisms concerning directors' duties. This may necessitate targeted reforms to better align misconduct with operational outcomes. Future reforms may involve implementing civil penalties, similar to those utilised in Australia. Civil mechanisms represent a viable alternative, as breaches of directors' duties are subject to civil penalties and criminal liabilities.

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