

Directors' Liability
in the light of *Lifestyle Equities*
(pre-Supreme Court)

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H|C

Directors' liability - the balancing exercise

A balance between 2 principles:

- A company is a legal entity in its own right, distinct from its officers and shareholders (Salomon v Salomon [1897] AC 22 and
- All people should be held liable for their tortious acts.

“A very difficult question of policy”

Directors' liability - the questions

1. What is the alleged tort?
2. Who did the tortious act?
3. Did the director personally do the tortious act?
4. If not, was the director a joint tortfeasor with whoever did the tortious act?

MCA Records Inc. v Charly Records Ltd

[2001] EWCA Civ 1441

FACTS

- Charly Records Ltd infringes copyright by copying sound recordings in which MCA owns copyright
- Mr Young was a de facto director, exercising ultimate control of Charly Records on behalf of a holding company. He was not involved in all decision-making but made the strategy and policy decisions.
- No evidence that Young himself had done the copying or that he directly instructed staff to do the copying.
- However, Mr Young had caused Charly Records to be set up in a way which meant that in trading it would carry out such acts of copying.
- Mr Young found to be a joint tortfeasor.

MCA Records Inc. v Charly Records Ltd

Test for joint tortfeasorship

- Where 2 or more persons act in concert pursuant to a common design or combine to secure the doing of a tortious act – e.g. where a person procures or induces another to do such an act (see [32], [35], [51] and [53]).
- “Elusive” question of fact in each case (see [47]-[48]).
- Director is not a joint tortfeasor with the company simply by reason of being a director – must be shown to have acted in concert under a common design.
- No joint tortfeasorship if director has merely carried out constitutional role in governance of the company – “that is to say, by voting at board meetings”.
- “If all a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor would be rare indeed” (see [49], [50]).

Lifestyle Equities CV v Ahmed

[2021] EWCA 675

FACTS

- Company infringes trade marks containing words Beverly Hills Polo Club and devices featuring horse riding polo players.
- Company a family-owned SME, but not a “one man band”.
- Mr Ahmed – MD, chose what brands to put on goods, factories to make them, agreed prices (etc.). Dealt with complaints. Actively involved.
- Ms Ahmed, very hands on in managing and running a brand of the business – deciding what goods to stock and sell
- Both liable despite acting bona fide and not knowing acts would infringe.

Lifestyle Equities CV v Ahmed

Test for joint tortfeasorship

- Two stage test for joint tortfeasorship (see [34]):
 - Is there was a case of joint tortfeasorship (applying *Fish & Fish v Sea Shepherd* [2015] AC 1229); and
 - if so, whether the fact that the person is a director provided him/her with a defence – on the basis that they were merely exercising constitutional control over the company.
- Exercising constitutional control may be slightly wider than simply voting at board meetings. May apply where a company's constitution delegates authority to officers (see [46]-[48] citing *Ottercroft v Scandia Care* [2016] EWCA Civ 867).
- Exception excusing directors from liability as joint tortfeasors is “intended to be a narrow one” (see 37] and [49]).

Barclay-Watt v Alpha Panareti Public Ltd

[2022] EWCA Civ 1169

- Company marketing properties in Cyprus through agents.
- Company liable for negligently failing to ensure that its agents warned investors of foreign currency risks.
- Need to balance limited liability with need to ensure people were answerable for tortious acts (at [53]).
- Accessory liability ought to be kept within reasonable bounds – should be possible to trade via limited liability company without exposing individuals to personal liability (at [77])
- Liability of a director “*may differ according to the nature of the tort in question*” (at [66]). Distinction between *Barclay-Watt* (tort requires assumption of responsibility) and IP cases (strict liability).
- In *Barclay-Watt*, director had been fully involved in the marketing plan and was the driving force of the company but had not dealt directly with or assumed any responsibility to the clients and there was no common design not to warn of the currency risks.
- Director not liable (to find otherwise would drive coach and horses through concept of limited liability).
- Not clear that Court supported the two-stage test from *Lifestyle Equities* (see [83])

Conclusion

- Joint tortfeasorship - it depends on the facts!
- Is there really a two-stage test? Does it matter?
- If director satisfies the common design test, then likely to be found to be a joint tortfeasor.
- Impact of constitutional role “defence” likely to be limited – where a director who does no more than implement a decision made by the board.
- Watch out for ruling of the Supreme Court in the *Lifestyle Equities* appeal.

Thank you.