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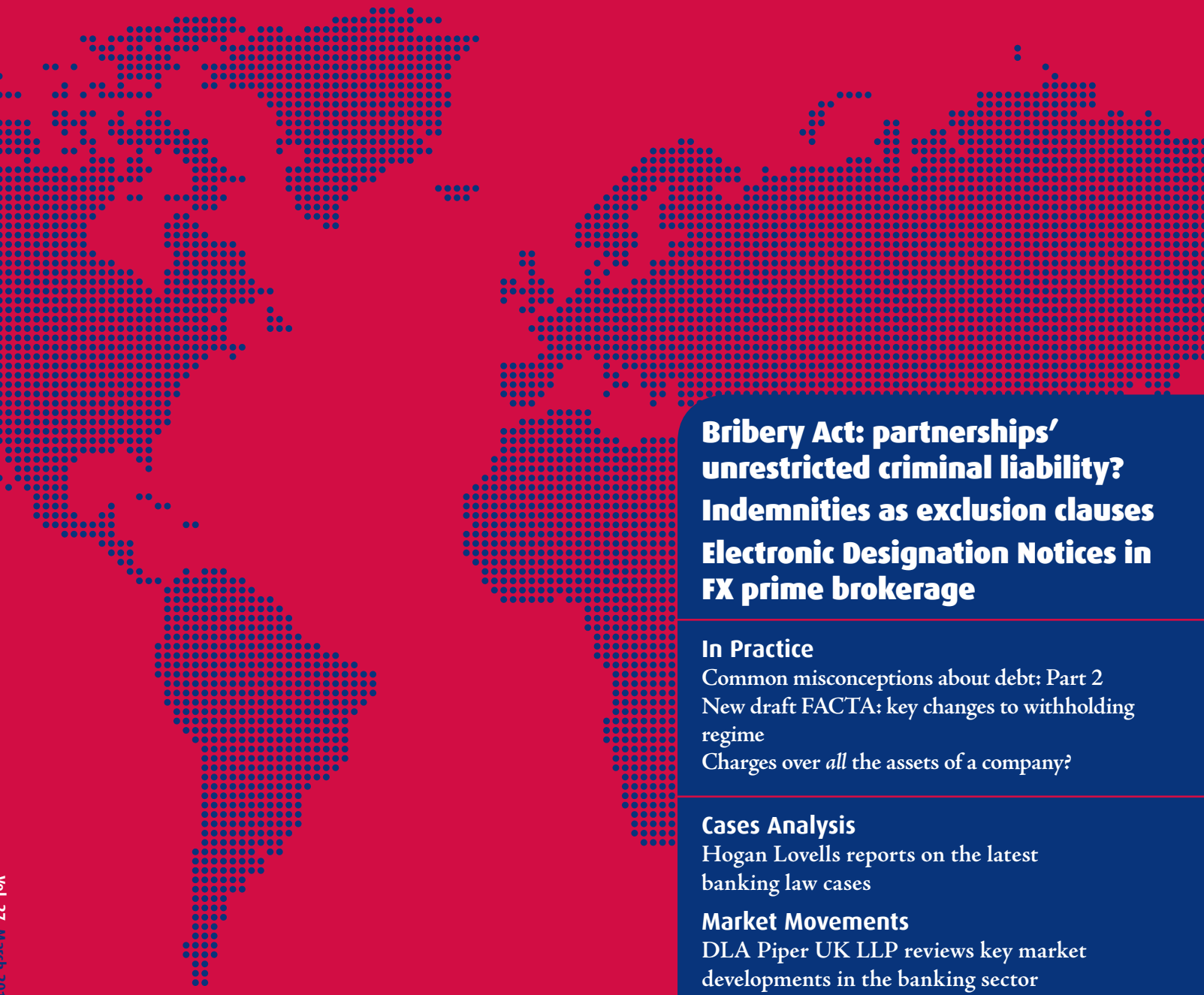

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Spotlight

KEY POINTS

- In English law it is unclear in what circumstances, where a particular state of (guilty) mind is necessary for a criminal offence, the state of mind and wrongdoing of an individual partner in an unincorporated partnership can be attributed to the partnership so as to make it liable for the offence.
- As a result of unclear drafting, the Bribery Act 2010 might seem to provide that if liability for a serious (*mens rea*/guilty mind) offence arises on conviction of the partnership under ss 1, 2 or 6, the liability of individual partners is apparently unrestricted – but if a partnership is liable for the strict liability offence under s 7, the liability of individual partners is restricted to the partnership assets.
- The better view is that it is not Parliament's intention that unincorporated partnerships (or other unincorporated associations) should be liable for offences under ss 1, 2 or 6.

Authors Paul Marshall, Chris Colbridge and Lisa Cawley

Legal uncertainty: the criminal liability of partnerships for bribery under the Bribery Act 2010

The elderly Partnership Act 1890 imposes joint and several liability on an individual partner for penalties incurred by the partnership. This article considers the question of whether unincorporated partnerships are intended by Parliament to be capable of committing bribery offences under ss 1, 2 and 6 of the Bribery Act 2010 with resulting joint and several liability for individual partners. This might seem to be the case. But those offences require a guilty mind or *mens rea*, unlike the offence for commercial organisations under s 7 that imposes strict liability subject to an exculpatory provision. Recent decisions of the Court of Appeal express concern about the potentially unrestricted criminal liability of members of unincorporated associations. We consider that on its proper interpretation Parliament did not intend that ss 1, 2 or 6 of the Bribery Act 2010 should apply to such partnerships.

While much attention has been devoted to the interpretation and effects of s 7 of the Bribery Act 2010 (the Act), little consideration has been given to the question of what entities are potentially liable for the offences of bribery under ss 1, 2 and 6. This may be because the drafting of these sections is, at least on the face of it, straightforward. Section 1 provides that *a person* is guilty of an offence where: (i) they offer, promise or give a financial or other advantage to another person, and *intend* that the advantage should induce the other person to perform a function or activity improperly or to reward a person for such improper performance; (ii) that *person* offers, promises or gives a financial or other advantage to another person, *knowing or believing* that acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

The question arises as to what "a person" means[1] in this context. Is that expression apt to include a partnership made in England, Wales or Northern Ireland[2] where, so far as a partnership is a "person" at all, this arises because of convenience in statutory drafting provided by the Interpretation Act 1978[3] (below). The question is, as Lord Phillips MR observed *in R v W Stevenson & Sons (a Partnership)*[4], one of difficulty[5] and of importance[6]. In the absence of a provision to the contrary, where a partnership is convicted of a criminal offence the individual partners are jointly and severally liable for the penalty imposed (below). Where a particular state of (guilty) mind is necessary for an offence, a partner is thus exposed to liability attributed to the partnership for the wrongdoing of another person over whom he may have no real control (and, of whom, perhaps, scant knowledge). In this respect the prospective liability of partners for a partnership is quite different from that of companies where the senior officers and controllers will not be liable unless individually separately prosecuted. If unincorporated partnerships *are* within ss 1, 2 and 6 of the Act this may present real legal risk against which it may be very difficult for individual partners to protect but whom nevertheless are jointly and severally liable for any penalty[7]. Take for example, an English partnership of 100 partners that conducts its business globally and a junior partner (not involved in the firm's management) bribes a foreign public official while conducting a deal in a high-risk jurisdiction but without the knowledge of the other partners. Can the partnership be prosecuted under ss 1 or 6 of the Act with joint and several liability attaching to *all the partners* for the penalty, simply as a result of an expression used in a Schedule to the Interpretation Act 1978? We think not.

The discussion that follows does not apply to limited liability partnerships under the Limited Liability Partnerships Act 2000. Despite its name, an LLP is a body corporate which enjoys both separate legal personality and unlimited capacity and by definition will not constitute a partnership within the meaning of the Partnership Act 1890[8]. Members of an LLP act as agents of the LLP not of each other and are not, in general, liable for its debts and obligations[9].

It has been observed that "[b]ribes are most often paid to benefit a commercial organisation"[10]. Partnerships constitute a significant proportion of such organisations and, to those dealing with them, for all practical purposes are commonly indistinguishable from corporations[11] (impliedly recognised by their being within the definition of "commercial organisation" under s 7 of the Act). That being so, if, as we suggest, English (ie unincorporated) partnerships are excluded from the serious

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(*mens rea*) offences under ss 1, 2 and 6 of the Act (distinguished from the strict liability offence under s 7) it is very unsatisfactory that this is not made expressly clear in the Act but only emerges from a detailed analysis of other terms of the Act (in particular, s 15(3)) together with recent decisions of the Court of Appeal[12].

In contrast with company legislation, that has been the subject of continuous development and refinement, the default law governing partnerships remains the Partnership Act 1890. (In their Discussion Paper on the *Criminal Liability of Partnerships* the Scottish Law Commission has observed that it cannot be in the interests of the public, of business or of the wider economy, that firms should continue to be governed by such an outdated statute[13].) Nevertheless, despite the continuous refinement of company law, there exists no consensus as to the general jurisprudential nature or purpose of corporate criminal liability beyond strict liability offences[14]. The unresolved difficulty remains as to in what circumstances, and how, the act and state of mind of an individual is to be attributed to an abstract legal person. In summary, there are two views. One is the "identification principle" explained by Lord Reid in *Tesco Supermarkets Ltd v Nattrass*[15], by which the acts and state of mind of the *controllers* of a company are treated *as* the acts and state of mind *of the company*. A different, and arguably somewhat wider and more flexible basis for attribution was given by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v The Securities Commission*[16]. In contrast with what may be seen as inappropriate anthropomorphism under the identification approach, Lord Hoffmann emphasised that the requirement in every case is *to identify the applicable rule of attribution and the policy to which the statute gives effect*. Liability under this approach need not attach only to controllers if the applicable rule and policy indicate otherwise. The *Meridian* approach was expected to cause a sea change but this has not happened[17]. The difficulty in securing a conviction and judicial conservatism under the identification principle is well known[18]. In part in recognition of this, the Law Commission has recently advocated that a context-based more interpretative approach to crimes created by statute should have a greater influence than it does at present[19] – that is to say, an approach more in line with *Meridian*.

THE MEANING OF 'PERSON': S 5 OF THE INTERPRETATION ACT 1978

It is striking that in the Guidance provided by the Ministry of Justice on the Bribery Act the s 7 offence is referred to as being in addition to liability under s 1 and 6 "where the commercial organisation itself commits an offence by virtue of the 'identification' principle"[20]. 'Commercial organisation' here necessarily includes a partnership[21] but the common law identification principle has been worked out in the case law only in the context of corporations, not partnerships. As Lord Phillips MR pointed out in *Stevenson*, different considerations arise in connection with the criminal liability of partnerships because the imposition of criminal liability on a firm carries with it the individual (joint and several) liability of the partners for any penalty imposed[22]. The common law has been resistant to imposition of liability on third parties other than the immediate offenders. The policy and reason for doing otherwise should be capable of being clearly discerned.

A partnership in England and Wales is not a legal entity separate from its partners but, rather, as an unincorporated association, a number of legal persons having mutual rights and duties in accordance with rules which constitute the contract under which they have agreed to be associated[23]. A partnership is a *relationship* (rather than a legal person) that enables transactions to take place under a name (the firm name) of persons who have between themselves agreed to carry on business together with a view to profit and who are made jointly liable on the transactions. However, by ss 10 and 12 of the Partnership Act 1890 partners are made *jointly and severally liable for any penalty incurred by the firm*.

While not being legal persons with independent legal existence, partnerships are commonly made subject to legislation by the common use of "person" to denote persons whether or not incorporated. Section 5 of the Interpretation Act 1978 provides that: "[i]n any Act, *unless the contrary intention appears*, words and expressions listed in Sch 1 to this Act are to be construed according to that Schedule." The Schedule provides: "Person includes a body of persons corporate or unincorporate."

The Court of Appeal in *Stevenson* considered the nature of the criminal liability of a partnership and the effect of this for individual partners. The application, for permission to appeal against the conviction of a partnership, was made after confiscation proceedings followed from conviction of the partnership in a prosecution brought by Defra under the Sea Fishing (Enforcement of Community Control Measures) Order 2000[24]. The offence enabled fishing quotas to be evaded.

In considering the consequence of the meaning of "person" under the Interpretation Act Lord Phillips MR referred to a passage in *Smith and Hogan's Criminal Law*, a leading textbook (the only one that then dealt in any detail with the criminal liability of unincorporated associations) that referred to the prosecution of an unincorporated association. The editor suggested that the court must presumably proceed by analogy with the law relating to corporations and that: "it is inconceivable that the association is liable for the act of any one of its members who has no part in the general management of its affairs[25]". Lord Phillips MR commented that the effect of the Interpretation Acts was not to create a single legal entity that could itself commit an offence, adding: "[t]hose Acts do not, of themselves, produce that result. The effect of those Acts is that where a statute refers to a 'person' 'unless the contrary intention appears' that word should be read as including a partnership. The Acts do not state what the effect is to be of giving the word 'person' such a meaning.[26]" The court recorded that no instance had been cited by counsel where the prosecution had relied solely upon the Interpretation Acts to bring criminal proceedings against a firm in relation to a statute that makes it an offence for "any *person*" to do or to fail to do a specified act[27].

STRICT CRIMINAL LIABILITY OF MEMBERS OF UNINCORPORATED ASSOCIATIONS: *R v L*

That gap in the authorities was filled by the Court of Appeal decision in *R v L(R) and*

F(J)[28]. The appeal arose in connection with a strict liability offence under s 58 of the Criminal Justice Act 2003 and s 854 of the Water Resources Act 1991 which provides: "(1) A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter...to enter any controlled waters." The first defendant was the chairman of a golf club and the second had been treasurer and chairman of the building committee when some 1,500 litres of heating oil escaped from a tank and into a nearby watercourse. The appeal was brought by the Crown against the judge's decision holding that the defendants could not be prosecuted individually but that the club could (and properly should) have been prosecuted. The Crown contended that the Water Resources Act demonstrated a 'contrary intention' for the purposes of the Interpretation Act 1978 because the Water Resources Act did not include any specific provision showing that an unincorporated association was intended by Parliament to be criminally responsible in its own name. The Court of Appeal rejected the argument. The court concluded that statutory provisions adopted for imposing criminal liability on unincorporated associations "vary so greatly that *there is no settled policy which can be discerned from them*, and we find it impossible to draw from them any general proposition that there is a form of enactment which is to be expected if an unincorporated association is to be criminally liable, and of which the absence signals a contrary intention for the purposes of section 5 of the Interpretation Act[29]." Professor Ormerod has commented that the decision has "very serious potential ramifications for the presumably tens of thousands of members of unincorporated bodies that exist in England and Wales", concluding that: "[i]f the decision is correct, it is submitted that the potential criminal liability of members of unincorporated associations deserves parliamentary consideration[30]."

While the court held that the absence of a specific statutory provision did not of itself establish a contrary intention for the purposes of s 5 of the Interpretation Act, Lord Justice Hughes was careful to limit the scope of the decision:

> "30. In that conclusion, we confine ourselves to the particular offence which we are considering. In particular we do not for a moment consider any offence which involves any element of *mens rea*, which would be likely to raise quite different questions because of the personal and individual nature of a guilty mind. In such a case, it may well be that a contrary intention appears. *Attorney-General v Able* [1984] 1 All ER 277, to which we were referred, was a case in which the point which we have had to consider was not in any manner argued, and the Interpretation Act was not mentioned. It is, however, not in the least surprising that Woolf J dealt with it on the assumed basis that "it must be remembered that the [Voluntary Euthanasia] society is an unincorporated body and there can be no question of the society committing the offence", when that offence was of intentionally aiding, abetting, counselling or procuring the suicide of another, thus involving *mens rea* and indeed punishable with up to 14 years' imprisonment. For the same reasons, we say nothing about common law offences."

A different approach and conclusion is thus recognised as possible where serious offences requiring *mens rea* are concerned.

RESTRICTING THE LIABILITY OF PARTNERS FOR PARTNERSHIP OFFENCES: *R v STEVENSON*

In *Stevenson* Lord Phillips MR referred to *Clode v Barnes*[31] that concerned an offence under s 14 of the Trade Descriptions Act 1968. Section 1 made it a strict liability offence for a person, in the course of a trade or business, to apply a false trade description to any goods or to supply or to offer to supply goods to which a false trade description is attached. The offence had been committed by one of two partners. The second partner was not complicit. The court held that both partners had been properly charged for the offence because each defendant was a joint supplier. Lord Phillips MR said:

> "This case involved an offence of strict liability. Had it involved *mens rea* it would not have been open to the court to have convicted the partner who was not complicit. *Would it have been open to the prosecution to prefer the information against the firm and then to seek to recover the fine imposed from the two partners jointly? We do not find it easy to answer this question. It is one thing to hold a limited liability company open to prosecution for an offence that requires mens rea. It is another to hold a partnership open to prosecution if the consequence of a conviction will be to render liable in respect of the penalty persons who had no involvement in the offence*. In the present case three of the partners in the Partnership had retired and played no part in the running of the firm. One lived abroad. *It seems to us that the question of whether or not the context permits one to read 'person' in a criminal statute as including a partnership may depend critically upon whether there is some restriction upon the assets that will properly be available to meet any penalty imposed*[32]."

These latter observations have even more force in the context of an offence requiring *mens rea*. The offence of which the partnership had been convicted[33] in *Stevenson* was strict, the partnership having failed "to submit a sales note which accurately indicated the quantities and price at first sale of each fish species". The Sea Fishing (Enforcement of Community Control Measures) Order 2000 Order included:

> "11 [ ]
>
> (2) Where any offence under article 3 of this Order committed by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership shall be guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (3) Where any offence under article 3 of this Order committed by an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on

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the part of, any officer of the association or any member of its governing body, he as well as the association shall be guilty of the offence and liable to proceed against and punished accordingly."

Paragraph 11(2) of the Order distinguishes the liability imposed upon an individual partner from the strict liability imposed on the partnership, individual liability *only* arising where they were shown to be complicit in the offence through consent or connivance[34] and which require *mens rea* on the part of the individual concerned. Central to the reasoning in *Stevenson* was the Master of the Rolls' observation that, not only does the wording of the Order make it clear (i) that a partnership may be independently liable, but also (ii) that an individual partner would *not* be liable unless the offence had been committed with his consent, connivance or due to his neglect[35]. In dismissing the application the court considered the effect of conviction of the partnership for the individual partners:

"35. Most of the statutes to which we have been referred that make express provision for proceedings against partnerships also expressly provide that fines can only be imposed against partnership assets. We cite, by way of example, section 285 (3) of the Copyright, Design and Patents Act 1988, section 143(4) of the Political Parties, Elections and Referendums Act 2000, section 403 of the Financial Services and Markets Act 2000, section 168C(2) of the Education and Inspections Act 2006 and section 1130(3) of the Companies Act 2006. It is only when we get to a series of Orders relating to fishery protection, culminating with the Order that has given rise to this prosecution that we find an absence of such a provision. We are inclined to think that this absence must be by accident rather than by design.

36. Whether we are correct in that surmise is nothing to the point. We have already observed that the effect of the Order is that proceedings can only be brought against an individual partner if that partner is complicit in the offence committed by the partnership. *We consider that it necessarily follows that, where a partnership alone is indicted, any fine imposed can only be levied against the assets of the partnership. If fines could be levied against the assets of individual partners who were not complicit in the offence committed by the partnership, this would largely negate the legislative scheme under which they cannot be made defendants unless complicit*[36]*. We would add that, if individual partners were at risk of being subject to criminal penalties in respect of offences committed by a partnership, then we consider that justice would demand that the criminal process should contain provisions designed to enable individual partners to challenge the alleged liability of the partnership*[37]*."*

DISCUSSION

A number of arguments support the conclusion that the better view is that *"the contrary intention appears"* in the Bribery Act so as not to include within the meaning of "person" given by the Interpretation Act 1978 unincorporated partnerships.

First, in *Stevenson* the Court of Appeal recognised that the issue of *the criminal liability of a partnership is different from the criminal liability of a company* because it carries with it, by s 12 of the Partnership Act 1890, the individual joint and several liability of the individual partners for the penalty who otherwise may have no involvement in the offence. The court considered that the interpretation of criminal liability of a partnership under a statute may critically depend[38] upon whether or not the liability of partners was limited, and that otherwise there should be a mechanism by which a partner might challenge a conviction of the partnership. If this is the test to be applied, it is not one that is satisfied under the Act so far as ss 1, 2 and 6 are concerned. In contrast, *this is a test that is satisfied in connection with a partnership's criminal liability under s 7*[39].

Second, so far as implying any restriction on individual partner liability is concerned, the court in *Stevenson* was able to interpret the Order as requiring a restriction on individual partner liability as a matter of statutory interpretation. But it did so as a matter of *necessity*[40]. Otherwise the court considered that the separate scheme of individual liability (that is to say, for liability for consenting or conniving), would be "negated". That route is not available under the Bribery Act because there is no separate scheme for individual partner liability for offences other than for the strict liability offence under s 7. If there was a consent and connivance provision for individual partners analogous to s 14 that would support the view that the liability of *other* partners should be interpreted as restricted as a matter of statutory interpretation for precisely the reason as identified by the Court of Appeal in *Stevenson*. But there is no such provision.

Third, in contrast with the position in relation to the offences under ss 1, 2 and 6 (that require a guilty mind to be proved) under the strict liability offence under s 7 (that can *only* be committed by the partnership as a "commercial organisation") the individual liability of partners is limited in *precisely the way* envisaged by Lord Phillips MR in *Stevenson*:

"15 Offences under section 7 by partnerships

(1) Proceedings for an offence under section 7 alleged to have been committed by a partnership must be brought in the name of the partnership (and not in that of any of the partners).

(2) For the purposes of such proceedings—

(a) rules of court relating to the service of documents have effect as if the partnership were a body corporate, and

(b) the following provisions apply as they apply in relation to a body corporate— [ ][41]

(3) A fine imposed on the partnership on its conviction for an offence under section 7 is to be paid out of the partnership assets

[ ]. "

There is no obvious explanation available as to why, had it been Parliament's intention to include unincorporated partnerships under s 1, 2 and 6, there is no restriction analogous to s 15(3). It verges on the bizarre that if partnership liability for a serious (*mens rea*) offence arises on conviction under s 1, 2 or 6, the liability of individual partners is *unrestricted* and governed by the default provisions under s 12 of the Partnership Act 1890, but if a partnership is held liable for a strict liability offence under s 7 the assets available are limited by s 15(3) to those of the partnership. The absence of such a provision under ss 1,2 and 6 strongly supports the view that partnerships do not fall within those provisions.

Fourth, the only basis for concluding that English partnerships (within the class of unincorporated associations) are within ss 1, 2 and 6 of the Act is that the word "person" in those provisions includes unincorporated associations by reason of s 5 of the Interpretation Act 1978. There is no other express reference in the Act to partnerships being liable for offences, for example, under s 1[42]. This may be contrasted with the position in *Stevenson* where the wording of the Order made it clear Parliament intended that the (strict liability) offence might be committed by a partnership itself.

Fifth, s 14 of the Act provides a detailed scheme for consent and connivance offences committed by individuals in connection with offences, including under s 1 of the Act, but *only* where those offences are committed by corporate bodies or Scottish partnerships:

> "14 Offences under sections 1, 2 and 6 by bodies corporate etc.
>
> (1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.
>
> (2) If the offence is proved to have been committed with the consent or connivance of—
>
> (a) a senior officer of the body corporate or Scottish partnership, or
>
> (b) a person purporting to act in such a capacity,
>
> the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly...
>
> [ ]
>
> (4) In this section
>
> [ ]
>
> "senior officer" means—
>
> (a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, and
>
> (b) in relation to a Scottish partnership, a partner in the partnership."

Apart from the odd circularity of this provision so far as companies are concerned[43] (consent and connivance provisions may have more obvious justification in strict liability offences) in the absence of very clear words, it is virtually impossible to conclude that the reason for not including individual partners under s 14 is because Parliament *intended* that all partners were anyway jointly and severally liable for any penalty. Such a view would require explanation, particularly given the restriction on individual partner liability (for the strict liability offence) that is provided under s 15(3). After all, "it is the foundation of the criminal law that a person should be liable only for his personal wrongdoing"[44]. Apart from such an unlikely intention by Parliament, the principle of statutory interpretation under the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is engaged by the first words under s 14. If a partnership is intended to be *capable* of committing the s 1 offence there is no available explanation for the different treatment of senior officers of a corporation, on the one hand, and individual partners in unincorporated partnerships on the other. That point is given additional force by s 14(4)(b).

Sixth, the only counter-argument that appears to be available is that it might appear odd that Parliament should have intended that partnerships be capable of committing the offence under s 7 but not capable of committing the bribery offences under ss 1, 2 and 6. The explanation for this may be the fundamental difference that under the s 7 offence the state of mind (*mens rea*) of a "commercial organisation" is irrelevant because s 7 is a strict liability offence. So far as corporations are concerned, while there is no generally recognised or accepted policy basis for imposing liability on abstract persons for offences where state of mind is an element of the offence, the means by which an individual's state of mind is attributed to a company has been worked out by the courts as explained in the *Tesco Supermarkets* case. That approach might possibly be applied to unincorporated associations, but the rules of attribution are less obviously applicable and, in any event, have not been worked out by the courts. In our view it appears inherently implausible that it was Parliament's intention that it is simply up to judges to decide whose intention is relevant, how such intention is to be attributed to the partnership and how, if at all, the liability of others might be restricted.

MERIDIAN AND LORD HOFFMANN'S RULES OF ATTRIBUTION

The "identification principle" under *Tesco Supermarkets* is rather less obviously applicable to partnerships than it is to corporations. In theory an alternative analysis is nevertheless available by analogy with the approach to attribution of individual acts to companies that Lord Hoffmann explained in the Privy Council decision in *Meridian*[45]. The case concerned the circumstances in which an individual's knowledge can be attributed to a corporation even though the relevant unauthorised acts were carried out behind the company's back. His lordship said:

> "It is worth pausing at this stage to make what may seem an obvious point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of

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attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no *ding an sich*,[46] only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company[47]."

His lordship went on to say: "It is a question of construction in each case as to whether the particular rule requires that knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company." Following illustrations of attribution, and a counter-example of non-attribution, he concluded by saying that: there is no inconsistency (between the examples): "Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule[48]." The analysis is compelling, both as a matter of logic and principle, and there is no reason why the approach should not be applied to the question of attribution of a partner's state of mind to a partnership. If such an approach is adopted, the terms of the policy and the substantive rule require to be identified under which criminal liability is to be imposed on unincorporated partnerships under ss 1, 2 and 6 of the Act. Neither the policy, nor any applicable substantive rule of attribution, beyond s 5 of the Interpretation Act, may be discerned. We suggest that this is a wholly inadequate foundation for criminal liability for a serious offence requiring *mens rea*.

Further, in practice it seems unlikely that judges will be enthusiastic to look for rules of attribution beyond the confines of the statute, where to do so is to enter upon wholly uncharted waters. If "the courts have been reluctant to impose the stigma of a serious criminal conviction on a company in the absence of a very clear steer from Parliament that this was actually intended and have struggled to find such a steer in criminal offences not formulated with the position of companies specifically in mind[49]", as Professor Ferran has observed, even greater reluctance may be expected in relation to unincorporated associations where the sole basis for imposing liability would appear to rest on s 5 of the Interpretation Act 1978.

CONCLUSION

As Lord Phillips MR has said, "[i]t is one thing to hold a limited liability company open to prosecution for an offence that requires *mens rea*. It is another to hold a partnership open to prosecution if the consequence of a conviction will be to render liable in respect of the penalty persons who had no involvement in the offence." The foregoing discussion strongly supports the view that unincorporated partnerships are not intended by Parliament to be persons within ss 1, 2 or 6 of the Act because a "contrary intention" appears for the purposes of the Interpretation Act 1978. Apart from the other considerations, if the critical test in determining Parliament's intention that a partnership be separately liable for an offence is, as the Court of Appeal has suggested, that a restriction on the liability of individual partners be identified, expressly or as a matter of interpretation (and otherwise there be a mechanism by which an individual partner might challenge a conviction), that is a test not satisfied by the Bribery Act.

In practice it may well be (vanishingly) unlikely that prosecutions will be brought against partnerships for *mens rea* offences where s 7 imposes strict liability on the partnership where a person "associated" with it commits an offence under ss 1 or 6 unless "adequate procedures" are shown to have been put in place to prevent such a person from doing so. If a defence would appear to be available under s 7(2), that is to say "adequate procedures" *had* been put in place, it would be virtually perverse for a prosecution to be brought under s 1 and it is difficult to see how the public interest would be served in doing so. But reliance upon prosecutorial discretion, even where this is that of the Director of Public Prosecutions or Serious Fraud Office, is no comfort and the point is irrelevant to the underlying issue of liability as such.

The *apparent* criminal liability of unincorporated partnerships under ss 1, 2 and 6 appears to be the product of unclear drafting rather than the true intention of Parliament. But potential exposure to such a risk cannot be wholly discounted and addressing a risk that is apparent rather than real may carry serious commercial implications in terms of cost and risk-management, which, if the risk is not real, represent wholly unnecessary and avoidable burdens on business[50] Further, a perceived risk, because of the difficulty in evaluating and protecting against liability for the acts of a person over whom there is no control, may affect the decision of a person as to whether to join a partnership at all, which at worst may thus operate as an impediment to trade. Fifty years ago Professor Glanville Williams wrote that the criminal law in relation to strict and vicarious liability was "perhaps the clearest example of the disadvantage of trying to do without a code of criminal law with an agreed statement of fundamental principles of penal policy[51]." Not very much may appear to have changed. It is perhaps unfortunate the Act was introduced before the Law Commission has reported on corporate criminal liability and before any review of the nature of criminal liability of partnerships similar to that undertaken by the Scottish Law Commission[52]. The lack of clarity in the drafting of the Bribery Act perhaps serves merely to highlight the force of the political imperatives[53] that led to its introduction in July 2011 and to underscore the view that the nature of the criminal liability of unincorporated associations merits consideration by Parliament, as Professor Ormerod has suggested[54]. ■

1 The Parliamentary Joint Committee Report on the Draft Bribery Bill includes the statement: "The two offences of bribing (clause 1) and being bribed (cl 2) *apply to individuals* who offer or accept, directly or indirectly, an "advantage" of any kind in connection with the "improper" performance of the recipient's functions", TSO HL Paper No 115-1 HC Paper 430-1 July 2009 para 17 (emphasis supplied).

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2 To be distinguished from a Scottish partnership where "a firm is a legal person distinct from the partners of whom it is composed": Partnership Act 1890 s 4(2).

3 *Bennion on Statutory Interpretation* 5th Ed. p 576.

4 [2008] EWCA Crim 273; [2008] 2 CrAppR 14 CA.

5 Lord Phillips MR at para [29] (below).

6 *c.f.* "As regards criminal proceedings, the existence of a partnership is of little significance..." *Lindley & Banks on Partnership* 18th Ed. 14-02 cited in *Stevenson* at para [24].

7 The Law Commission in its 2008 Report *Reforming Bribery* explained that its recommendations were: "in part shaped by the need to ensure that companies do not find themselves saddled with disproportionate administrative burdens, and exposed to a serious form of criminal liability respecting conduct they were effectively helpless to prevent": [2008] EWLC para 6.55. The concern was expressed in a different context. But *individual* partner liability for an offence of a kind that might be committed by a partnership as a "person" within s 1, unless somehow restricted, is liability for an offence over which an individual partner is foreseeably likely to have little control and accordingly be helpless to prevent.

8 Limited Liability Partnerships Act 2000, ss 1, 2(1)(a) and *Lindley & Banks on Partnership* 18th Ed para 2-37. An LLP will in any event fall within the provisions of ss 1 and 6 as a result both of the Interpretation Act 1978 and the terms of s 14 of the Bribery Act.

9 Limited Liability Partnerships Act 2000, s 6(1) – compare the 1890 Act at s 5 and *Lindley & Banks ibid.* and at note 17 therein. But the creation of the LLP does not affect the need to modernise the law of partnership. Law Commission Consultation Paper 159, Scottish Law Commission Discussion Paper 111 *Partnership Law, A Joint Consultation Paper* para 1.15.

10 Response of the SFO to the Law Commission Consultation paper 185 *Reforming Bribery*.

11 As the Court of Appeal has more than once observed see: *Stevenson* para [23]; *R v L(R) and F(J)* [2009] 1 CrApp R 16, [2008] EWCA Crim 1970 para [14].

12 Though it may be that the oddity is the result of the way in which the s 7 offence was introduced late, as a "bolt-on" following the Woolf Committee Report following the BAE fiasco: *Business Ethics, Global Companies and the Defence Industry*. For the effect on the Bribery Bill see Law Commission [2008] EWLC 313 paras 6.43 ff. There is no reference to partnerships as such (still less, unincorporated associations) in either the *Guidance* provided by the Ministry of Justice or in the *Joint Prosecution Guidance* of the DSFO and DPP.

13 TSO Discussion Paper 150 May 2011. (Recommendations of the 2003 Joint Report by the Law Commissions were shelved by the then DTI (Department of Trade and Industry)).

14 For a detailed discussion see *Corporate Attribution and the Directing Mind and Will*, Eilis Ferran (2011) 127 *Law Quarterly Review* 239.

15 [1972] AC 153, 170 a company "must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting *as the company and his mind which directs his acts is the mind of the company*". (italics supplied).

16 [1995] 2 AC 500.

17 See Eilis Ferran note 14 above. The Court of Appeal, curiously, has even suggested that *Meridian* represents an *affirmation* of the identification principle: Rose LJ in *A-G's* Reference (No 2 of 1999) [2000] QB 796.

18 The Director of Public Prosecutions described it as "almost impossible" to prosecute successfully under this (ie the identification) principle." TSO 2009 HL Paper No 115 para 17.

19 Law Commission, "Criminal Liability in Regulatory Contexts", TSO 2010 Consultation Paper 195.

20 *The Bribery Act 2010 Guidance* p 9 para [14].

21 Bribery Act 2010 s 7(5)(c).

22 *Stevenson* para [28] ff.

23 *Eastbourne Town Radio Cars Association v Customs & Excise* [2001] 2 All ER 597, [32] Lord Hoffmann.

24 SI 2000/51.

25 *Stevenson* para [25] – the statement in *Smith and Hogan* therefore suggesting an approach analogous to the identification principle for companies in *Tesco v Nattrass*.

26 *Stevenson* para [26].

27 *Stevenson* para [26].

28 Note 11 above.

29 *Ibid* para [22] italics supplied.

30 *Smith and Hogan's Criminal Law*, 13th Ed. Oxford, pp 269, 270. David Ormerod is a Law Commissioner for England and Wales.

31 [1974] 1 WLR 544.

32 At para [28] italics supplied.

33 An individual had been separately convicted.

34 For the meaning of consenting and conniving see *R v Chargot Ltd* [2009] 1 WLR 1 [32]-[34], *per* Lord Hope. See also the discussion in the Law Commission Consultation Paper 185 (2007) *Reforming the Law of Bribery* at 9.34.

35 See further below for an analogy for non-strict liability (*mens rea*) offences under the Act.

36 An analysis that the Scottish Law Commission considers to be "not compelling", distinguishing between criminal liability and liability for a fine: Scottish Law Commission Discussion May 2011 TSO Paper 150 para 3.20.

37 Emphasis supplied.

38 *Stevenson* para [28].

39 See for this point 3 [in the main text] below.

40 *Stevenson* paras [12], [30], [35], [36].

41 Procedural rules omitted.

42 *c.f.* the Health Act 2006 at s 77.

43 Because under the "identification principle" the directors and senior officers of a corporate body *are* the company, but s 14 makes the *same* persons potential connivers – in effect conniving with themselves. This is a curious result that, in the context of the draft Bill, Professor Wells described as "cannibalistic". See the discussion in: *Bribery Corporate liability under the draft Bill* (2009) Celia Wells, *Criminal Law Review* 479.

44 Note 30 above p 276.

45 Above note 16.

46 German, "*thing in itself*". An esoteric reference, it seems, to Kant's epistemology *q.v. Critique of Pure Reason* where the *thing in itself* certainly *exists* independently, but unperceived, unlike objects of our senses.

47 *Meridian* p 506H.

48 *Ibid* p 512A.

49 Eilis Ferran note 14 above at p 247.

50 *q.v.* the Law Commission's statement footnote 7.

51 *Criminal Law The General Part*, 2nd Ed. Stevens (1961) p 286.

52 *Report on Criminal Liability of Partnerships* Scottish Law Commission Paper 224 TSO December 2011.

53 See footnote 43 above.

54 Note 30 above. At the end of the passage cited (p 270) David Ormerod suggests that provisions akin to those dealing with the liability of company officers would produce fairer results.