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ABSTRACT

It is difficult to advance the ESG agenda using company law, especially in common law legal systems. Cases show that directors' duties require directors to prioritise the 'interests of the company', which is equated with 'shareholders' interests as a whole', whether under the traditional common law or, for the UK, under the codified section 172 of the Companies Act 2006. In addition, when determining if directors have acted in the interests of the company, judges typically decline to examine the merits of a business decision, focusing instead on the decision-making process. What this means is that even if directors must take ESG considerations into account, courts have held that the duty to act in the company's best interests does not impose a positive duty for directors to adopt aggressive ESG focused strategies. We argue that this has always been and should continue to be the correct judicial approach.

1. Introduction

The acronym ESG (environmental, social and governance) was first coined and subsequently became popular following the publication of the UN Global Compact report[1] in 2004. In a nutshell, the term embodies a 20-year-old movement that encourages companies to move away from a purely profit-making mindset and to integrate environmental, social and governance concerns into their business models. Beginning with a call to business leaders to promote principles for a sustainable global economy, it has now developed into a trillion-dollar industry with money flowing into the voluminous ESG related investment funds and products; to consulting companies hired to guide companies in their ESG strategies and disclosure requirements and to regulators in various jurisdictions designing and implementing ESG related policies.[2] However, as the term was first formed without a precise definition and scope, there remains much confusion and misinformation, both in practice[3] and in academic research,[4] about its meaning and effect. This problem is accentuated by the fact that there are inherent tensions amongst the various components of ESG that can lead to 'sustainability arbitrage'[5] or conflicts that are not easily reconcilable. This may explain

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[1]United Nations, 'Who Cares Wins: Connecting Financial Markets to a Changing World' (2004) Financial Sector Initiative. See https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf

[2] The origin and meaning of the term has been explored in great detail in Elizabeth Pollman, 'The Making and Meaning of ESG', (2022) ECGI – Law Working Paper No 659/2022, available at SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857> accessed 2 August 2023.

[3] For instance, ESG rating standards differ vastly across rating agencies: Aaron K Chatterji, Rodolphe Durand, David I Levine and Samuel Touboul, 'Do Ratings of Firms Converge? Implications for Managers, Investors and Strategy Researchers' (2016) 37 Strategic Management Journal 1597; Robert G Eccles and Judith C Stroehle, 'Exploring Social Origins in the Construction of ESG Measures' (July 12, 2018), available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212685> accessed 2 August 2023.

[4] Martin Lipton, Wachtell, Lipton, Rosen & Katz, 'ESG, 'Stakeholder Governance, and the Duty of the Corporation' (*Harvard Law School Forum on Corporate Governance*, 18 September 2022) <https://corpgov.law.harvard.edu/2022/09/18/esg-stakeholder-governance-and-the-duty-of-the-corporation/> accessed 2 August 2023.

[5] Alperen A Gözlügöl, 'The Clash of 'E' and 'S' of ESG: Just Transition on the Path to Net Zero and the Implications for Sustainable Corporate Governance and Finance' (2022) SAFE Working Paper No 325, available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962238>.

why despite the many financial economics-based papers written on the topic, social scientists are still unable to resolve the inconsistencies in the hypotheses and results relating to ESG.[6]

For company law scholars, the debate on ESG generally centers around two big themes. One theme explores how the purpose of the company can be broadened to include ESG elements.[7] The other examines the role played by directors in the big picture of ESG.[8] On this, the French parliament was the first to amend its company law to impose ESG obligations on companies in 2017 and 2019.[9] The French amendments are said to have inspired the proposed EU Directive on Corporate Sustainability Due Diligence Directive ('CSDDD').[10] The CSDDD, when adopted and implemented by the EU Member States, will have wide-ranging impact on companies and directors for both EU-

[6] Corporate finance and economics scholars generally look at the ESG scores based on the disclosures made by the companies and how the performance of the various branches of ESG are affected by the markets in which the companies operate, the characteristics of the companies, ownership patterns etc. For a comprehensive analysis of the corporate finance literature in this area, see Stuart L Gillan, Andrew Koch, and Laura T Starks, 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance' (2021) 66 Journal of Corporate Finance 101889.
[7] See, in particular, the series of debate between Paul Davies and Colin Mayer on corporate purpose: Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (OUP 2018); Paul Davies, 'Shareholder Voice and Corporate Purpose: The Purposelessness of Mandatory Corporate Purpose Statements' in Luca Enriques and Giovanni Strampelli (eds), *Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices* (CUP, 2023) (forthcoming); Colin Mayer, 'The Purpose of Corporate Purpose Statement: A Response to 'Shareholder Voice and Corporate Purpose: The Purposelessness of Mandatory Corporate Purpose Statements' by Paul Davies' (2023) ECGI Law Working Paper No 694/2023, available at SSRN < https://ssrn.com/abstract=4397435> accessed 2 August 2023.
[8] For example, see Stephen Turner, 'Corporate Law, directors' duties and ESG interventions: Analysing pathways towards positive corporate impacts relating to ESG issues' (2020) 4 JBL 245; Jonathan A McGowan, 'The Trouble with Tibble: Environmental, Social, and Governance (ESG) and Fiduciary Duty' (*The University of Chicago Business Law Review Online Edition*, 2022) <https://businesslawreview.uchicago.edu/online-archive/trouble-tibble-environmental-social-and-governance-esg-and-fiduciary-duty>.
[9] The first legislation, introduced in 2017, imposes an extensive 'duty of vigilance' on large French corporations to implement a proactive plan to prevent serious injury to, inter alia, human rights, health and safety of people and to the environment, which might result from the activities of the company, its groups of companies, suppliers and subcontractors throughout the world. A second piece of legislation, introduced in 2019, known as 'PACTE law', applies to all French registered companies to take ESG impact into considerations when carrying out their activities, see Alain Pietrancosta, 'Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives' (2022) ECGI Law Working Paper No 639/2022, available at SSRN <https://ssrn.com/abstract=4083398>.
[10] ibid 15.

based companies and non-EU-based companies,[11] as it, inter alia, imposes a general duty of care on directors on ESG issues.

The scope of the CSDDD and the controversies surrounding it has been discussed elsewhere[12] and will not be covered in our paper. Instead, our paper will re-examine the scope of a director's duty under the common law legal systems, especially in light of the recent UK cases of *BTI 2014 LLC v Sequana*[13] and *ClientEarth v Shell Plc*[14] and the Singapore case of *Tiong Sze Yin Serene v HC Surgical Specialists Ltd*.[15] These cases are unique as the plaintiffs involved attempted to take actions against the concerned directors for failing to consider what essentially were non-shareholders' interests in their decision-making. The key to understanding these cases lies in understanding what constitutes the 'interests of the company' and how these interests are advanced or enforced by the courts.

We make three key points. Firstly, we observe that the law continues to refer primarily to the interests of a company's shareholders when defining the company's interests. While stakeholder interests are not entirely irrelevant, and should be taken into account, the interests of the company remain paramount, and it is these interests that the directors are duty-bound to protect.

Secondly, where a judge reviews the decisions of a company's directors to determine whether the directors have acted in the best interests of the company, they generally focus on the decision-making process taken by the directors, instead of examining these decisions on their merits. The key exception to this rule is when the judges have determined that the directors have been acting in bad faith. Barring this low threshold, the question is one of whether the directors have taken the relevant

[11] For non-EU-based companies, the CSDDD will apply if the company's global net turnover generated from within the EU exceeds certain threshold stipulated.
[12] For example, see Pietrancosta (n 9); Mak Chantal, 'Corporate sustainability due diligence: More than ticking the boxes?' (2022) Maastricht Journal of European and Comparative Law, vol 29(3), 301; Alessio M Pacces, 'Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis' in Rik Mellenbergh, *Ondernemingsrecht* (forthcoming).
[13] [2023] 2 All ER 303, [2022] 3 WLR 709 (UKSC) ('*Sequana*').
[14] [2023] EWHC 1137 (Ch).
[15] [2021] 3 SLR 1269 (SGHC).

factors that influence the company's interests (such as relevant stakeholder interests) into account, and not whether they have accorded these factors the appropriate weight, nor whether they have adopted the best course of action to protect these interests.

Finally, we argue that this judicial approach we have described is justifiable and unlikely to change as it is consistent with the general attitude taken by common law judges when examining an exercise of discretion. A key parallel is the traditional approach in the common law towards judicial review of administrative actions by the government. Policy concerns and institutional limitations have resulted in judges refraining from examining the merits of these decisions, adopting a procedural review instead. We think these reasons remain relevant in the corporate law context and argue that requiring directors to assume appropriate decision-making practices is a useful tool in ensuring that they act appropriately. Furthermore, this approach is internally consistent with the regulatory scheme set out within company law which bestows broad executive discretion on directors to make corporate decisions.

We conclude with a few observations on how our discussion on company law contextualises the proper understanding of ESG regulation, and how it can help to advance corporate governance standards. Our understanding of ESG codes should be read in line with the broad scope of directorial discretion and how the courts protect the interests of the company not through a merit-based review of corporate decisions but by advocating for good decision-making procedures. We propose that the best understanding of these codes is to see them as modifications to the decision-making process. We characterise the wide variety of strategies that are applied in existing ESG codes and explain how they can be seen as attempts to nudge and incentivize directors to consider these non-shareholder interests in their pursuit to act in the best interests of the company. On this note, we urge ESG activists to continue to persist in their efforts with shareholder engagement to put forth their causes as this engages most clearly and directly with how the law understands a company's interests. On the other hand, litigation should always be the last resort as common law courts are unlikely to make orders dealing specifically with detailed aspects of corporate strategy.

2. Defining the Interests of the Company

To clarify our position in this paper, we are not denying that directors have duties of compliance and disclosure under specific pieces of legislation and regulation relating to ESG. There are various ESG-related legislation and regulations that impose specific duties which directors are legally obliged to comply with. For instance, the UK Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 when read with the UK Companies Act[16] now requires UK publicly traded companies with more than 500 employees or private companies with more than £500 million turnover to make mandatory climate-related financial disclosures. Similarly in Singapore, it is mandatory for listed companies to produce annual sustainability reports. This would include a board statement outlining the company's sustainability practices.[17] Non-compliance with these requirements can lead to criminal sanctions (in the UK[18]) or delisting (in Singapore). While we acknowledge the existence of these duties, they are outside the framework of company law. Instead, our focus is on the extent to which company law in common law jurisdictions requires directors to take positive action to advance ESG interests. We will first look at how the common law defines 'interests of the company' and how this has been changed under section 172 of the UK Companies Act 2006 ('CA 2006').

A. The Traditional Common Law View: Shareholder Primacy

Under common law, directors, by virtue of their position in the company, have two kinds of duties, namely, fiduciary duties and duties of care and skill. At the core is the fundamental duty of the

[16] UK Companies Act 2006, s 414C, s 414CA and s 414CB.
[17] Singapore Exchange (SGX) Mainboard Listing Rule 711A. See also SGX, Sustainability Reporting <https://www.sgx.com/sustainable-finance/sustainability-reporting>.
[18] UK Companies Act 2006, s 414D(3).

director, as a fiduciary, to act in the best interests of his principal, the company. The rest of the duties are merely applications of this duty.[19] This duty is well-established and can be traced to various authoritative English cases such as *Aberdeen Railway Co v Blaikie Brothers*[20] and *Scottish Co-operative Wholesale Society Ltd v Meyer*.[21]

In *Aberdeen Railway Co v Blaikie Brothers,* Lord Cranworth LC referred to the duty to act in the company's best interests while explaining why a director is precluded from dealing on behalf of the company with himself or with a firm in which he is partner:[22]

> The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so **to act as best to promote the interests of the corporation whose affairs they are conducting.** Such an agent has duties to discharge of a fiduciary character towards his principal. (emphasis ours)

Broadly, this duty requires the directors to act bona fide in what they consider to be in the 'interests of the company'.[23] This is the current legal status for countries which adhere to the common law director's duties, including Singapore.[24] The key concept to understanding this duty is defining the 'interests of the company'. Case law shows that a directors' duty is owed to 'the company as a whole' which refers not to the company as a commercial entity, but the corporators or the shareholders as a general body.[25] Ultimately, the interests of a company, as an artificial person, cannot be distinguished from the interests of the persons who are interested in it.[26] This concept was referred to by several judges of the UK Supreme Court[27] in the recent case of *BTI 2014 LLC* v *Sequana* ('*Sequana*')[28] as

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[19] Andrew Keay, *Directors' Duties* (3rd Ed, 2016) (London: LexisNexis) 136 [6.3].
[20] [1843-60] All ER Rep 249.
[21] [1959] AC 324.
[22] *Aberdeen Railway Co* (n 20) 252.
[23] *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 at 543, [1942] Ch 304, 306.
[24] In Singapore, director's duty to act bona fide in the interests of the company is incorporated under section 157(1) Companies Act 1967, which has been said to 'mirror a director's general fiduciary duty at common law', per Yong Pang How CJ in *Cheam Tat Pang v PP* [1996]1 SLR(R) 161 at para 19.
[25] Lord Evershed in *Greenhalgh v Arderne Cinemas Ltd* [1951] 1 Ch 286, 291.
[26] *Brady v Brady* [1988] BCLC 20 CA, 40 (Nourse LJ).
[27] Lord Reed P, Lord Hodge DP and Lady Arden.
[28] *Sequana* (n 13).

the traditional common law approach of 'shareholder primacy'.[29] This is the first time the term 'shareholder primacy' has been acknowledged by an English court outside of academic writings.[30] As Lord Reed described, this means that 'while the duty is owed to the company, the shareholders are the intended beneficiaries of that duty'.[31] Shareholder primacy is best understood by considering who is entitled to control the company and to the company's profits.[32] Firstly, with respect to the control and governance of the company, shareholders have the legal right to appoint those who will manage the business of the company, i.e. the directors. Secondly, the shareholders are legally entitled to the residual equity of the company which represent the company's profits.[33] The directors are therefore to run the company with the ultimate goal of generating maximum value to shareholders.[34]

It has been said that inherent in the shareholder primacy principle is that other interests, such as those of creditors or other stakeholders, will necessarily diminish the interests of shareholders.[35] Under the traditional common law shareholder primacy view, the primary duty of the directors is to act in what they considered to be in the best interests of the company with no obligation to consider the interests of other stakeholders.[36] Shareholders 'collectively embodying the interests of the company', [37] means that their interests are considered to be fully aligned with those of the company. That said, shareholder primacy or maximisation shareholders' value is not the same as profit maximisation. As Chao Hick Tin JA of the Singapore Court of Appeal said in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)*[38]

[29] [2023] 2 All ER 303 [65], [225], [243], [265], [332], [372]-[379], [386], [471].
[30] It is generally accepted that the idea that 'shareholders are the corporation's true owners' came from Adolf Berle and Garinder Means in their 1932 book *The Modern Corporation and Private Property* (Transaction Publisher, 1932) 380.
[31] *Sequana* (n 13) [65].
[32] ibid [332].
[33] ibid [374].
[34] ibid [380].
[35] ibid [376] and [386(g)].
[36] ibid [386(c)].
[37] Singapore Court of Appeal in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 [30]. Singapore still applies the traditional common law duties of director under s 157 of the Singapore Companies Act 1967, see *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR 424 (SGHC) [80].
[38] [2014] 3 SLR 329 [40].

> The 'interests of the company' is not just profit maximisation. Neither is it profit maximisation by any means. It is as much in the interests of the company (comprising its shareholders) to have its directors act within their powers and for proper purposes, to obtain full disclosure from its directors, and not to be deceived by its directors.

Therefore, directors are expected to follow the law and not carry out activities that would harm the company, even if the company's financial interests may be furthered in the short term. For instance, paying bribes for the purpose of securing business for the company, cannot be said to be in the interests of the company as it would subject the latter to criminal liability.[39] Similarly, under the common law, directors are entitled, but not obliged, to take into account the interests of group entities,[40] employees,[41] creditors[42] and stakeholders when making decisions on behalf of the company if so doing will further shareholders' interests. As explained by Bowen LJ, '[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.'[43] How does this analysis apply to ESG-related interests? The implication of our discussion thus far is that directors are entitled but *not obliged* to consider these interests, save that they should do so where ESG-related laws and regulations impose legal obligations on the company, and a failure to comply with these laws and regulations would injure the company.

B. Enlightened Shareholder Value and the Success of the Company

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[39] Facts in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 (SGCA).

[40] *Charterbridge Corpn. v Lloyds Bank* [1970] 2 Ch 46; *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064.

[41] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

[42] The consideration of creditor's interest comes in when the company is in a financially parlour situation or on the verge of insolvency: *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] 1 SLR 271 (SGCA). See also *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 (CA).

[43] *Hutton* (n 41).

In the UK, director's duties under the company law were codified with the enactment of CA 2006. Several previous attempts to codify directors' duties had failed,[44] and it was only in 2001 that the Company Law Review Steering Group ('CLRSG') recommended that, inter alia, an exhaustive statement of directors' duties should be written into a statute.[45] The director' duties under English law are now contained in sections 170 to 177 of CA 2006. As clearly stated in s 170(1), all duties stated in ss 171 to 177 are owed by a director of a company to the company. Of particular note is the duty to act in the company's best interests, which is stated in s 172.

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> > (a) the likely consequences of any decision in the long term,
> >
> > (b) the interests of the company's employees,
> >
> > (c) the need to foster the company's business relationships with suppliers, customers and others,
> >
> > (d) the impact of the company's operations on the community and the environment,
> >
> > (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.

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[44] The Greene Committee formed in 1925, *Report of the Company Law Amendment Committee* (Cmnd 2657, 1925-26) and the Jenkins Committee formed in 1959, *Report of the Company Law Committee* (Cmnd 1749) (presented June 1962) reviewed whether to include the duties in statutory form but both concluded that it was impossible to define directors' duties statutorily.

[45] Department of Trade and Industry, Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report*.

> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

This section has been said to be the 'most wide-ranging duty of the general duties in the Act, and clearly the most difficult to interpret'.[46] At first glance, the language used in s 172 may appear to suggest that a new duty for directors has been created and that it is completely different from the common law duty to act bona fide in the best interests of the company because of its direct reference to stakeholder interests. However, subsequent cases that have discussed the content of this duty have shown otherwise.[47]

The scope of s 172 was expounded in detail by the UK Supreme Court in *Sequana*. In this case, the court was called upon to determine whether the directors owe a duty directly to the company's creditors prior to insolvency. The material facts were that the directors of AWA caused it to distribute a large dividend to its parent company and sole shareholder, Sequana SA in 2009. AWA was solvent at that time, although it had long-term contingent liabilities[48] of an uncertain amount which, coupled with uncertainty surrounding the value of some of its assets, meant that there was a real but improbable risk that it might become insolvent in the uncertain future. Ten years later, AWA entered into insolvent liquidation. AWA assigned its rights to its creditors who sued AWA's directors, claiming that the dividend had been paid in breach of duty as the directors had failed to take into account the interests of AWA's creditors when deciding to pay the dividend.

In order to succeed, the plaintiffs had to prove that AWA's directors owed a duty to act in the interests of its creditors when making corporate decisions. This meant that the plaintiffs had to convince the court that there was either a separate free-standing duty owed by the directors to the creditors directly or that the proper conceptualization of the company's interests under s 172 CA

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[46] Andrew Keay, *Directors' Duties* (3rd Ed, 2016) (London: LexisNexis) 128 [6.2].
[47] *Re West Coast Capital (LIOS) Ltd* [2008] CSOH 72.
[48] This was relating to the environmental liabilities from the extensive pollution of the Lower Fox River.

2006 would also include the interests of its creditors, even when the company was solvent. If either of these arguments succeed, the court could then hold that AWA's directors had breached their duties when authorizing the payment of the dividend.[49]

The application was dismissed by all the courts. The Supreme Court held that there is no duty directly owed by the directors to the creditors under common law or as part of the directors' duties to the company in CA 2006.[50] Under s 172, a director's duty to promote the success of the company or the 'success duty'[51] is owed to the company alone. The interests of the company generally align with those of its shareholders, and the relevance of the creditors' interests in determining the interest of the company depends on the financial status of the company. As a general rule, it is up to the directors to determine, in the exercise of their commercial judgement, how they would like to prioritise the interests of the shareholders, as well as any other stakeholders.[52] Where the company is insolvent or bordering on insolvency, the economic interests of the company's shareholders decrease since they stand to receive nothing in the event that the company is liquidated. This causes the shareholders' interests to be outweighed by those of the company's creditors and the interests of the creditors become paramount only in this exceptional circumstance.[53] Since AWA was solvent at the material time, its directors did not have to consider the interests of its creditors and they had not breached their duties in causing the dividend to be paid.

In particular, Lady Arden, who was a member of the CLRSG, spent some time explaining the legislative history and considerations underpinning s 172[54] The CLRSG had considered two approaches when deciding the appropriate model for director's duties. The first approach was to formalize the common law position, i.e. a company should be run on the basis where the directors can consider the interests of other stakeholders but the ultimate goal is to generate maximum value

[49] *Sequana* [261]-[277].
[50] ibid [11], [95], [205], [406], [426], [446].
[51] As Lady Arden calls it, see ibid [252].
[52] ibid at [176]-[177] and [293]-[304].
[53] ibid [81]-[90], [176]-[199] and [297]-[311].
[54] ibid [371]-[386].

for shareholders. The second approach was the more radical approach or the 'pluralistic' model where the company should 'serve a wider range or interests, not subordinate to a means of achieving shareholder value… but as valid in their own right'.[55] This would mean that the 'interests of the company' would be defined by stakeholders' interests, such as those of employees, suppliers, consumers and the community, in addition to shareholders' interests. In the end, the UK government expressly rejected the 'pluralistic' model and accepted the first approach. S 172 in its present form was drafted on this basis.[56]

S 172 requires the directors 'to promote the success of the company'. Lady Arden calls this the 'success duty'.[57] Keeping in mind that the 'pluralistic model' has been rejected, the statutory statement of duty preserves the status quo of shareholders primacy as a starting point. At the same time, it expressly acknowledges that there are other factors beyond the financial interests of the shareholders which ought to be considered by the directors while promoting the success of the company. [58]As a result, the modern approach under s 172 is a slight modification of shareholder primacy in what has been described as 'enlightened shareholder value' (ESV). As Lady Arden elucidated,[59]

[55] ibid [265].
[56] ibid.
[57] ibid [252].
[58] ibid [65]-[66]. As Lord Reed explained,

> First, the primary duty imposed on directors by s 172(1) is expressed in terms of promoting 'the success of the company for the benefit of its members as a whole'. Accordingly, the duty is no longer expressed by reference to the interests of the company, and the previous problem of identifying the interests of an artificial person is side-stepped. Since the duty under s 172(1) is focused on promoting the success of the company 'for the benefit of its members as a whole', it is clear that, although the duty is owed to the company, the shareholders are the intended beneficiaries of that duty. To that extent, the common law approach of shareholder primacy is carried forward into the 2006 Act. In carrying out their primary duty under s 172(1), the directors are also under a secondary obligation to have regard 'amongst other matters' to the considerations listed in paras (a) to (f). This reflects a recognition that the promotion of the company's success requires that consideration be given to such matters as the interests of its employees and the need to foster its business relationships with suppliers and customers.

[59] ibid [386].

> [T]he primary duty of directors should be to act in what the directors consider to be the appropriate way to promote the success of the company for the benefit of its members coupled with an obligation as part of that duty to consider the interests of other persons who contributed to the company's success.

This is not a novel idea.[60] As alluded to earlier, under the common law, the directors can consider the interests of stakeholders in corporate decision making. The key nuance introduced by s 172 is an express recognition that the directors should regard stakeholder interests as being of relevance when seeking to promote the success of the company for the ultimate benefit of its shareholders. However, the obligation with respect to stakeholder interests remains a duty to consider and does *not* extend into a duty to act. In addition, s 172(1) only presents a restricted shortlist of stakeholders interests that are of relevance. Finally, as alluded to earlier, the interests these stakeholders remain secondary to that of the shareholders, and shareholder interests remain the key touchstone when defining the interests of the company. Therefore, while the concept of ESV in s 172 exhorts directors to consider stakeholder interests instead of blindly pursuing profits, the core requirement for directors to protect the interests of shareholders remains the same.

3. Advancing the interests of the Company

The factor that we have not covered in the discussion thus far is that the law only requires directors to act in what they consider, on a bona fide or good faith basis, to be in the interests of the company. Ultimately, whether a decision is in the interests of the company would be determined by the circumstances of the case.[61] However, the key point to note here is that it is for the directors alone to decide, in good faith, how to best advance the interests of the company. This is echoed in the position taken by the courts in reviewing corporate decision. In general, courts do not apply deep scrutiny when they examine directorial decisions, preferring instead to defer to the discretion of the

[60] ibid [66] (Lord Reed P).
[61] *Ho Kang Peng* (n 39) [15].

directors. As Lord Greene MR describes it, the law only requires directors to act '*bona fide* in what they consider – not what a court may consider – is in the best interests of the company'.[62] The approach is the same whether under common law or under s 172 CA 2006.[63] Therefore, the general analytical approach courts apply when reviewing allegations of breach of duty in relation to failing to act in the interests of the company is procedural in nature. Courts will focus on the process applied by the directors, looking at whether they had identified and considered relevant factors in their decision making process, reflecting a deference of the court to the discretion of the directors where it comes to corporate decision making and defining the interests of the company. This general approach can be observed in other areas of law where it comes to the judicial review of an exercise of discretion and is also reflective of the general statutory scheme found in company law.

A. The Review of Corporate Decisions by Judges

The approach generally adopted by the courts in reviewing corporate decisions is perhaps best encapsulated in Lord Wilberforce's speech in *Howard Smith Ltd v Ampol Petroleum Ltd*, stating:

> [I]t would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if *bona fide* arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.[64]

This statement of principle encapsulates the judicial approach towards determining whether decisions made by directors can be impugned for not being in the interests of the company. If it can be shown that the directors subjectively believed that their decision was in the company's best interests, the

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[62] *Re Smith* (n 23) 306.
[63] *Sequana* [226].
[64] [1974] AC 821 (PC) 832.

court will generally not examine it closely on its merits. Therefore, when a chemical manufacturer conferred power on its directors to make donations to universities for scientific research and education, the court accepted the board's argument that this would benefit the company as such donations would encourage the education and training of a pool of experts from which the company could draw on in the future of its own purposes.[65] Notably, this was despite the lack of a clear, immediate and direct benefit to the company. The court held that the interest of the company did not require that the education and training should necessarily be confined to scientific work of the nature of that in which the company was solely interested, as long as the directors exercised the discretion vested in them 'bona fide in the interests of the company'.[66] The focus therefore is on whether the directors have acted in good faith, which means that the court's attention is not on the merits of the decision, but on the process by which the directors made their decision.

Given that company law has identified the board of directors as being the corporate organ that is primarily in charge of managing the business of the company,[67] it would also make sense for courts to withhold from interfering excessively in dictating how a company should be run. An activist judiciary that dictates the substance of appropriate corporate policy would be problematic since it runs the risk of turning company law into a textbook as to how companies should be run. This in turn has serious implications as the principle of *stare decisis* could have the effect of entrenching such rules,[68] carving corporate policy into stone which can have serious knock-on impacts.[69] The key point that has been emphasized by the courts is that judges are not businessmen and it is impossible to conclusively determine what is the best corporate strategy.[70] After all, running a company is not an exact science and reasonable stakeholders can disagree on the direction the company should take,

[65] *Evans v Brunner, Mond & Co Ltd* [1921] 1 Ch 359.
[66] ibid 364.
[67]UK Companies Act 2006, s 174; Singapore Companies Act 1967, s 157A.
[68] See the high standards for departing from a prior decision of a superior court articulated in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA).
[69] See, for example, the discussion on the introduction of the *Fairchild* exception and subsequent developments in Patrick Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (2020) 84 *Rabels Zeitschrift* 211.
[70] *ClientEarth* (n 14) [47].

as well as the most appropriate strategy that should be adopted. Similarly, the wide discretion of the directors should also be left undisturbed so that they can amend or even reverse their policies if they determine that the current approach is not feasible and to adapt to changing circumstances without having to worry about constantly being tied up in litigation simply because a group of stakeholders disagree. The procedural approach described would be consistent with the basic principles of corporate decision making which is based on majority rules and delegation of authority to directors.

We believe the recent cases of *ClientEarth v Shell Plc*[71] ('*ClientEarth*') and *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [72] ('*HC Surgical'*) are helpful illustrations that remind us of the court's approach. Both cases were prima facie applications under the relevant statutory derivative action provisions. *ClientEarth* was an application under s 260(1) CA 2006 decided by UK High Court while *HC Surgical* was an equivalent application under s 261A(3) Singapore Companies Act 1967 decided by the Singapore High Court.

In *ClientEarth,* the District Court of the Hague in the Netherlands issued a judgement against Shell Plc ('Shell', then known as 'Royal Dutch Shell Plc') in 2021 and ruled that Shell's carbon emissions were in breach of Dutch law and ordered it to reduce its carbon emissions by 45% by 2030.[73] Subsequently, ClientEarth, a UK registered non-profit environmental law organization, bought 27 shares in Shell and sought to enforce the Dutch judgement in the English courts through a derivative action. Its primary argument was that Shell's directors were in breach of their statutory duties to promote the success of the company[74] and to exercise due care, skill and diligence.[75] It argued that these statutory duties gave rise to six other specific duties that generally require Shell's directors to consider and accord appropriate weight to climate risk, and adopt strategies which are reasonably likely to meet its emission targets and comply with the Dutch order.[76] It was therefore

[71] ibid.
[72] *HC Surgical* (n 15).
[73] *Milieudefensie v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339.
[74] UK Companies Act 2006, s 172.
[75] UK Companies Act 2006, s 174.
[76] *ClientEarth* (n 14) [16].

alleged that Shell's directors were in breach of these duties as the strategy they had put in place to manage climate change risks were inadequate.[77]

In *HC Surgical*, HC Surgical Specialists Ltd ('HC Surgical'), a listed company in Singapore, had entered into an agreement with a certain Dr Ong to purchase shares in the latter's company through which Dr Ong operated his surgical business (the 'Transaction'). Through a romantic relationship with a close friend of Dr Ong, the plaintiff discovered that Dr Ong had been involved in inappropriate relationships with his female patients. She reported this to the Singapore Medical Council[78] and Dr Ong was, at the material time, under investigation for improper conduct. The plaintiff sought to inform HC Surgical's board about Dr Ong's indiscretions and purchased the minimum lot of 100 shares of HC Surgical in an effort to attend its annual general meeting. When she eventually conveyed these facts to HC Surgical, she was told that HC Surgical's management was aware of the matter. Nevertheless, HC Surgical proceeded with the Transaction. In response, the plaintiff brought the derivative action, accusing HC Surgical's CEO of having breached his duties by adopting a 'lackadaisical approach' to her complaints.[79] She argued that HC Surgical's directors would have found that the Transaction was too risky and aborted it if they had properly investigated and considered her complaints.

In both cases, the aim of the respective courts was to determine whether the matters pleaded were sufficient to support a *prima facie* case of breach of duties, failing which the derivative action would not be allowed to proceed as it would not be in the interests of the company.[80] Despite taking the respective applicant's cases at face value, the court found that there was no *prima facie* case of a

[77] ibid [27].
[78] The Singapore Medical Council is the Singapore authority regulating the conduct of medical practitioners and has the power to suspend or revoke the license of a medical practitioner. The plaintiff's allegations were found to be true and Dr Ong was eventually suspended: see *Ong Kian Peng Julian v Singapore Medical Council* [2022] SGHC 302.
[79] *HC Surgical* (n 15) [40].
[80] For *ClientEarth*, UK Companies Act 2006, s 261 and see also *ClientEarth,* [4]-[12]. For *HC Surgical*, Singapore Companies Act 1967, s 216A. See also, *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 (CA) [53]-[56].

breach. As the discussion below will show, the focus of the court's analysis in both cases was on the process behind the directors' decision making, as opposed to a review of their merits.

In *ClientEarth*, the applicant's case was that Shell faced material and foreseeable risk as a result of climate change,[81] and that the manner in which its directors were addressing these risks was so inadequate that it was a breach of duty.[82] In examining the scope of the duties owed by Shell's directors, the court first noted that they had broad discretion to determine how to best promote the interests of the company[83] and, as far as the separate duty of care was concerned, it was sufficient that the decision taken was within the range of decisions reasonably available to a director in the same position.[84] The court declined to accept any notion that company law gave any specific direction to the directors as to how they should run the company. Accordingly, the six specific duties proposed by the applicant as to how the directors should manage climate risk were rejected.[85] Turning then to whether there had been a breach of duty, the court pointed out that criticisms of the board's decisions alone did not mean that there was a breach of duty. Instead, the proper principle was that 'the law respects the autonomy of the decision making of the [directors] on commercial issues and their judgements as to how best to achieve results which are in the best interests of their members as a whole'.[86] On the facts, the directors had put in place policies, demonstrating that they had actually considered the climate risks faced by Shell and the court would not intervene in the absence of evidence that no other reasonable director would have made the same decisions.[87]

In *HC Surgical*, the applicant's case was that the directors of HC Surgical had failed to appropriately consider and deal with the risks associated with getting into business with Dr Ong, who was at the material time under investigation for engaging in improper conduct with his patients. The

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[81] *ClientEarth* (n 14) [29]-[33].
[82] ibid [35]-[45].
[83] ibid [18]-[19]. The court uses the language of promoting the success of the company, which mirrors the language used in the UK Companies Act 2006 but there is no substantial difference for present purposes.
[84] *ClientEarth* (n 14) [20].
[85] ibid [16]-[25].
[86] ibid [47].
[87] ibid [48].

main part of the court's decision on this point was primarily premised on the fact that the directors of HC Surgical were aware of the allegations against Dr Ong, had discussed its implications, and had decided that there were sufficient safeguards put in place to protect HC Surgical's interests even if the allegations were proven to be true.[88] Applying an approach similar to the restraint seen in *ClientEarth*, the court in *HC Surgical* concluded that there was no evidence of breach of duty, and stated that it would not interfere if the decisions were made in good faith.[89]

The common thread in the approach used by both courts was that in the absence of an egregious breach, judges should generally defer to the exercise of discretion by directors. In other words, the test of whether a director has acted in the interests of the company is primarily subjective, and it would be sufficient if the directors had merely considered the interests of the company.[90] From that perspective, the development of English law through the introduction of the ESV concept and a list of relevant factors in section 172 of the CA 2006 might have created a slightly stricter duty by opening the door to potential directors' liability if they fail to consider any of the factors which have been listed.[91] However, even if there might be a slight development requiring directors to consider the interests of stakeholders, section 172 of the CA 2006 nevertheless requires stakeholder interests to be made subject to those of shareholders.[92]

There remains a minimum objective standard, which is based on whether an intelligent and honest man in the position of a directors could have reasonably believed that the transactions were for the benefit of the company.[93] This objective standard could also be understood as the court disbelieving the directors' claims that they subjectively believed that the decision was in the interests

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[88] *HC Surgical* (n 15) [51]-[59].
[89] ibid [60]-[61].
[90] Hans Tjio, Lee Pey Woan & Pearlie Koh, *Corporate Law* (Singapore: Academy Publishing) [09.043]; Tan Cheng Han, SC (gen. ed.), *Walter Woon on Company Law*, 3 rev ed, (Singapore: Sweet & Maxwell) [8.34] and [8.35]. See also *Hellard v Carvahlo* [2013] EWHC 2876.
[91] Paul Davies, Sarah Worthington and Christopher Hare, *Gower: Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2021) [10-032].
[92] As discussed in part 2.B above.
[93] *Charterbridge Corp v Lloyds Bank* [1970] Ch 62. This proposition was also applied by Singapore's Court of Appeal in *Intraco* (n 40).

of the company, potentially suggesting that the directors had acted in bad faith.[94] Regardless of whether this is conceptualized as an objective or subjective test, the implication on the manner directorial discretion is scrutinized is the same: any scrutiny of the merits of the decision is carried out on a low threshold basis which would only filter out irrational decisions. In sum, courts usually appear to display general deference to decision making by directors, restricting their review to the steps taken to arrive at their decision.[95] As a result, the analysis of whether there has been a breach of duty is mainly procedural in manner. The question that follows then is whether this level of scrutiny is appropriate and effective in ensuring that directors act in the interests of the company.

Procedural requirements can, at least in theory, act as a strong nudge in the context of the exercise of directorial discretion.[96] In a 2019 speech to the Anglo-Australasian Law Society, Lord Philip Sales of the UK Supreme Court noted that there has been an increased reliance on procedural rules in both the UK and Australia in regulating the conduct of directors. He then suggested that additional procedural requirements, such as disclosure and reporting duties, could be used to prompt directors to carefully consider specific factors, such as environmental considerations, when making decisions. Having thought about these factors, it may then become more likely for directors to make more environmentally conscious decisions. Notably, this process occurs without interfering excessively with the broad discretion conferred upon directors in company law.[97]

[94] Hans Tjio, Lee Pey Woan & Pearlie Koh, *Corporate Law* (Singapore: Academy Publishing, 2015) at paragraph 09.043; Tan Cheng Han, SC (gen. ed.), *Walter Woon on Company Law*, (3 rev edn, Singapore: Sweet & Maxwell, 2009) [8.36].

[95] Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, (3rd edn, Oxford: Oxford University Press, 2017) 69-71. See also, Stephen Bainbridge, 'The Business Judgement Rule as Abstention Doctrine' (2004) 57 Vanderbilt Law Review 83.

[96] This reflects the theory in behavioral economics known as 'nudge theory' explaining how the structure of decision-making processes can influence the final result. See Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Connecticut: Yale University Press, 2016) and Cass Sunstein, 'The Storrs Lectures: Behavioral Economics and Paternalism' (2011-2012) 122 Yale Law Journal 1826 (forthcoming) available at SSRN < https://ssrn.com/abstract=2182619> accessed 2 August 2023.

[97] Speech by Lord Philip Sales, Directors' duties and climate change: Keeping pace with environmental challenges (Anglo-Australasian Law Society on 27 August 2019).

The American case of *Caremark*[98] illustrates the potential of scrutinizing decision-making procedures. Essentially, this case creates a specific duty for directors to put in place sufficient systems to monitor compliance risks to prevent breaches of law. In a review of subsequent cases based on this precedent, Professor Jennifer Arlen suggests that the principles in *Caremark* have been expanded, creating an obligation to monitor and investigate potential misconduct that is relevant to the company's financial health, even if the relevant misconduct is not directly in breach of the law.[99] This is a further example of how procedural requirements can help ensure that relevant matters (in this case, relevant types of risk) are within the consideration of the directors when they make decisions. In theory, requiring the presence of an adequate monitoring system will help to ensure that directors will come across information about the risks that the company faces, thereby enabling them to deal with such risks appropriately.[100] In fact, other commentators have suggested using the *Caremark* duty as a basis for requiring boards in the US to implement effective monitoring systems with respect to ESG factors, arguing that this will shape the thinking and decisions of the boards in favour of ESG goals.[101]

Nevertheless, the duty focuses only on requiring directors to ensure that information about risk is obtained. It does not prescribe the systems that the board has to put in place, nor the level of oversight they have to exercise, much less how they should respond to any risks identified.[102] In addition, any evaluation of the directors' response will under Delaware Law be subject to the standard of gross negligence.[103] In short, the law obliges directors generally to monitor business risks, but

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[98] 698 A.2d 959 (Del. Ch. 1996).

[99] Jennifer Arlen, 'Evolution of Director Oversight Duties and Liability under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest' (February 2023) ECGI Working Paper Series in Law, Working Paper No 680/2023 available at SSRN < https://ssrn.com/abstract=4202830> accessed 2 August 2023.

[100] John Armour, Jeffrey Gordon, Geeyoung Min, 'Taking Compliance Seriously' (2020) 37 Yale Journal on Regulation 1.

[101] Leo Strine Jr, Kirby Smith & Reilly Steel, 'Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient and Effective Caremark Strategy' (July 30, 2020), Iowa Law Review, Vol. 106, pp. 1885-1922 (2021), U of Penn, Inst for Law & Econ Research Paper No. 20-45, available at SSRN <https://ssrn.com/abstract=3664021>.

[102] Arlen (n 100) 14-15.

[103] *Smith v Van Gorkom* 488 A.2d 858 (Del. 1985); ibid 15-17.

leaves it to directorial discretion to determine the exact mechanism of what systems they put in place and how they respond to identified risks. As directors are only required to consider the relevant risks, it remains within their discretion to discount it subsequently in their decision making. By only requiring directors to consider relevant risks, the law still recognizes and preserves the discretion of the directors to define and act in the best interests of the company, ensuring that the nudging effect of requiring directors to identify and monitor relevant risks is not just strong but also appropriate.

B. A Consistent Approach to the Judicial Review of Discretion

The approach of applying a mainly subjective test and refraining from reviewing a decision on its merits is consistent with how courts review the exercise of discretion in other areas of law. For example, the courts have described similarities between the approach used when reviewing the exercise of discretion in administrative law and when reviewing the exercise of directorial discretion.[104] In administrative law, judicial review is generally limited to a review of the decision-making process as opposed to a review of the merits of the decision[105] and the traditional grounds on which administrative discretion are reviewed are those summarized by Lord Diplock in the *Council of Civil Service Unions v Minister for the Civil Service*[106] or the *GCHQ Case*, comprising illegality, irrationality and procedural impropriety.[107] In the context of illegality, the consideration is whether the discretion has been exercised in good faith and within the scope of the decision maker's power.[108] Accordingly, a decision maker is expected to apply their mind to the matter at hand and not be distracted by irrelevant factors.[109] Where it comes to irrationality, the test is whether the decision was

[104] *Equitable Life Assurance Society v Hyman* [2002] 2 All ER 331 (CA) [17]-[20].
[105] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 401; *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (SGHC) [93].
[106] *GCHQ* (n 106).
[107] ibid 410-411.
[108] *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 (SGCA) [80].
[109] *Padfield v Minister of Agriculture, Fisheries and* Food [1968] AC 997 (HL); *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL). In Singapore, see *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 (SGHC).

'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[110] While this might involve some examination of the merits of the decision, it is only in the most outrageous cases where this standard will be triggered.[111] Lastly, procedural impropriety is concerned with whether the fundamental rules of natural justice (such as the right to a fair hearing) and other procedural rules have been complied with.[112]

Two key similarities can be observed between the court's approach to administrative review and the review of directors' decisions. Firstly, the courts generally focus on the decision-making procedure instead of the merits of the decision. Secondly, where the courts carry out any form of substantive review, they apply a low threshold standard and will not fault a decision merely because it is possible to reasonably disagree with it. This is again consistent with the fact that the law has given broad discretion to the authorities (in administrative law) and to directors (in company law). The similarities do not extend only to administrative law and there are other areas of law where judges practice a generally deferential approach when reviewing decisions. In the context of medical negligence, the test of whether a doctor has met the standard of care depends not on the opinion of the judges but instead on whether the doctor's actions could be accepted as being proper by other doctors,[113] subject only to a minimal threshold of there being some logical basis for such an opinion.[114]

The deferential approach by judges can be attributed to institutional constraints as well as concerns about the potential impact that stricter scrutiny may have on society as a whole.[115] Notably,

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[110] *GCHQ* (n 106) 410, describing the principle laid down in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).
[111] *Tan Seet Eng* (n 109) [80].
[112] *GCHQ* (n 106) 411; *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA).
[113] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (HC).
[114] *Bolitho v City and Hackney Health Authority* [1988] AC 232 (HL).
[115] Patrick Hodge, 'Judicial Law-making in a Changing Constitution' (2015) 26 Stellenbosch L Rev 471 471-485 at 479-481 and Patrick Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (n 70). See also, Tom Bingham, *The Rule of Law* (London: Penguin Publishing, 2011), ch 2.

the court in *ClientEarth* referred to the fact that managing a business, particularly one the size of Shell, requires directors to consider and balance competing consideration, describing this as a task that 'the court is ill-equipped to interfere'.[116] This ties in with the idea that the company is a vehicle that facilitates commercial risk-taking and adopting a strict level of review might cause directors to act defensively instead of furthering the company's interests in good faith.[117] In the context of administrative law, Lord Diplock in the *GCHQ* case refers to the exercise of executive discretion in balancing policy considerations as a matter that 'judges by their upbringing and experience are ill-qualified to perform'.[118] Finally, in the context of medical negligence, there is a recognition that the lack of medical training limits the extent to which judge can review the merits of a medical decision, especially in the absence of consensus within the medical community. Much like in the case of directorial discretion, judges are also concerned that an interventionist review may encourage defensive practices.[119] The point therefore remains, judicial review of an exercise of discretion tends to be deferential in nature, leading judges to focus on the decision-making procedure as opposed to the actual merits of the decision. As the brief survey of the general approach across various areas of law shows, this is a consistent approach and reflects the unique skill set that decision-makers have but are not found within the institutional capabilities of the judiciary. This also feeds into policy concerns that the imposition of legal liability may unduly limit the exercise of discretion by specially-skilled decision-makers. To summarize the proposition in broad terms, the role of the judiciary is to ensure that the requirements of the law are complied with, not to develop new policy nor decide which corporate strategy is optimal for promoting the interests of the company.

C. An Internally Consistent Approach to Company Law

[116] *ClientEarth* (n 14) [48].
[117] See, for example, *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 (SGHC) [17].
[118] *GCHQ* (n 106) 411.
[119] *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 (SGCA) [79]-[83].

Finally, the judicial approach we have described is also consistent with the general regulatory structure commonly found in company law statutes. It is common and uncontroversial that directors are given broad directorial discretion to manage the business of the company.[120] Where it comes to the actual decision-making process, company law statutes generally remain silent, leaving the process of board meetings to be decided internally and, at the very most, are to be decided by the company and detailed within the company's constitution or articles of association. Even then, the exact procedure applicable to board meetings may be drafted in a very flexible manner, leaving it entirely to the discretion of the directors to regulate how they would like to meet.[121]

By contrast, the rights of shareholders are significantly limited. For instance, shareholders have limited rights to the company's business records[122] and they typically only receive annual accounts and report, and not details of specific transactions.[123] Further, their influence in the management of the company is generally limited to summoning and voting at general meetings.[124] This creates a statutory regulatory framework where the primary decision-making power lies with the directors. Therefore, it would be inconsistent if judges were to carry out reviews of the merits of corporate decision. Doing so would cause the judiciary to take the form of a secondary board.[125] Further, it effectively gives shareholders an indirect right of management by way of derivative action suits, which directly contradicts the broad managerial power that company law grants directors.[126]

That is not to say that shareholders and other stakeholders do not have any means to influence the running of the company. After all, the managerial discretion of the directors is not unlimited; they are obliged to act in the interests of the company and it would behove them to be in tune with the

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[120] Singapore Companies Act 1967, s 157A. In the UK, this concept remains in the common law: see *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA), although the default Article 3 of The Companies (Model Articles) Regulation 2008 expressly provides for this unless this is altered by the company, see section 20 of the CA 2006.
[121] See, for example, Article 83 in the First Schedule of the Singapore Companies (Model Constitutions) Regulations 2015.
[122] *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] 5 SLR 226 (SGHC).
[123]Singapore Companies Act 1967, s 203; UK Companies Act 2006, s 423.
[124] Part 5, Division 3, Singapore Companies Act 1967; Part 13, Chapter 3, UK Companies Act 2006.
[125] *Howard Smith v Ampol* [1974] AC 821 (PC) 832.
[126] Singapore Companies Act 1967, s 216A; UK Companies Act 2006, s 261.

factors that define these interests. We have seen that directors have the broad discretion to take stakeholder interests into account on their own accord.[127] In addition to this, there are levers that shareholders can tug on to influence the directors. The key mechanism for this is the shareholder meeting and, in contrast to the relatively laissez-faire approach taken in company law statutes to regulating board meetings, various shareholder rights are enshrined in statute. A shareholder has a right to receive notice of and attend shareholder meetings,[128] which is an avenue provided by law for them to express their thoughts on the management of the company to the directors. Where relevant, they may also use this forum to seek information about the company's performance and strategies, or even apply pressure on directors by question managerial decisions.[129] In the event the directors refuse to cause the company to call a shareholder meeting, shareholders have rights to requisition and summon meetings unilaterally.[130] Should the shareholders find that the directors are unresponsive to their demands, they may act to remove the existing directors and appoint new directors that better aligned with their interests.[131] In very specific situations, the law may even allowed shareholders to directly intervene in the management of the company via shareholder resolutions, although only to a very limited extent.[132] Finally, shareholders have the right to dispose of their shares, which can place pressure on directors by subjecting them to the threat of replacement through the market for corporate control.[133] Assuming that the interests of the company are mainly those of its shareholders,[134] it would logically follow that the shareholders should have these mechanisms by which they can cause the directors to listen to and consider their views.

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[127] See discussion in Part 2 of this paper.
[128] Singapore Companies Act 1967, s 180; UK Companies Act 2006, s 310.
[129] See, for example, Sam Meredith, '"Go to hell, Shell": Climate protesters try to storm stage at oil giant's annual shareholders meeting' (CNBC, 23 May 2023) <https://www.cnbc.com/2023/05/23/oil-giant-shell-braces-for-shareholder-revolt-over-climate-plans.html>.
[130] Singapore Companies Act 1967, s 176-177; UK Companies Act 2006, s 303-306.
[131] Singapore Companies Act 1967, s 149B and 152; UK Companies Act 2006, s 168.
[132] *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 (SGHC). See also Paul Davies, Gower (n 92) [11-006]-[11-010].
[133] See David Kershaw, *Principles of Takeover Regulation* (Oxford: Oxford University Press, 2016) Ch 1.
[134] As discussed in part 2 of this paper.

While shareholders may face issues such as coordination costs,[135] this is merely a reflection of an inherent problem with corporate decision-making and reflects the diverse interests that form the interests of the shareholders as a whole, as well as that of the company. The point remains that shareholders have legal rights to address the company and its directors and influence their decisions. These rights do not enable shareholders to force directors to decide in a specific direction and can therefore be regarded as more akin to being procedural in nature. Nevertheless, these rights should not be viewed lightly as they can be powerful nudges that help guide the exercise of directorial discretion.[136]

A final point to note in our discussion of the regulatory scheme found in company law statutes is that the position of stakeholders stands in stark contrast as they do not have legal rights to attend and vote at shareholders meetings or otherwise legally compel directors to engage with them. Instead, it is left to them to approach the directors in their private capacity.[137] This reinforces our earlier discussion of the law prioritizing the interests of the shareholders over that of other parties when defining the interests of the company.[138]

4. Conclusion and Implications on Activism

ESG activists, in particular, environmental advocates, often argue that the presence of gaps in domestic regulation addressing environmental and social concerns mean that judges and the courts should help in shaping the response to ESG and climate change issues. Therefore, the argument follows, litigation can and should be used as a tool to reduce carbon emissions by developing

[135] Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn Oxford: Oxford University Press, 2017) ch 3.
[136] As discussed in part 3.A of this paper.
[137] That is not to say that directors have free rein to ignore these stakeholders. The prudent director would likely recognize that there is inherent value with such engagements, especially where the cooperation of key stakeholders would be essential to the success of the company, and that doing so would be in line with his duty to act in the company's best interests.
[138] As discussed in part 2 of this paper.

company law to oblige directors to make environmentally conscious decisions.[139] However, this perspective is not universal. As discussed previously, this may be beyond the institutional expertise of the courts, leading to concerns about negative knock-on effects.[140] Similarly, other commentators have suggested that developing the law for this purpose would be inconsistent with the constitutional role of the courts.[141] Even where a legal duty can be established, the courts may find themselves pressed to design the appropriate remedy.[142]

Turning back specifically to company law and directors' duties, we believe that the duty to act in the best interests of the company is not the appropriate base to launch litigation to force companies to adopt more environmentally-conscious business practices. In most of the common law world, the core of this duty remains to protect the interests of the company which are closely tied with the interests of its shareholders. While the interests of stakeholders are not completely irrelevant, they remain ancillary and directors are only obliged to consider these interests, and not to act to advance or protect them,[143] as it is difficult for the directors to serve many masters.[144]

We propose that the duty to act in the best interests of the company is a more powerful tool outside the courtroom. Instead, its potential is best demonstrated at the shareholders' meeting. This

[139] See, for example, Cinnamon Piñon Carlarne, 'The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis' in Benoit Mayer and Alexander Zahar, eds, *Debating Climate Law* (Cambridge: Cambridge University Press, 2021) 111 and Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law 55.

[140] Patrick Hodge, 'Judicial Law-making in a Changing Constitution' (n 116) 479-481 and Patrick Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (n 70).

[141] See, for example, Guy Dwyer, 'Climate Litigation: A Red Herring among Climate Mitigation Tools' in Benoit Mayer & Alexander Zahar, eds, *Debating Climate Law* (Cambridge: Cambridge University Press, 2021) 111. See also the Singapore Court of Appeal's comments on its constitutional role in *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347 [1]-[12].

[142] *ClimateEarth* (n 13) [56]-[58]. See also the Australian case of *Sharma v Minister for the Environment* [2021] FCA 560 where the court found that the government owed a duty of care to prevent climate harm but declined to order an injunction against the government approving a coal mine proposal.

[143] It has been argued that other avenues such as the directors' duty to act for proper purposes or the public enforcement of securities law may be more appropriate to enforce stakeholders' interests. See Hans Tjio, 'Sustainable Directors' Duties and Reasonable Shareholders' NUS Law Working Paper 2023/016 (May 2023), forthcoming in European Business Organisation Law Review; Ernest Lim & Umakanth Varottil, 'Climate Risk: Enforcement of Corporate and Securities Law in Common Law Asia' (2022) 22(1) Journal of Corporate Law Studies 391.

[144] *Sequana* (n 13) [244], [250] and [266].

is because the duty to act in the best interests of the company is closely linked to the interests of the shareholders, and the meeting is the avenue by which company law ensures that shareholders have access to the directors and can engage with, question or even replace them. It is through this process that the duty to act in the best interests of the company can be used to shape corporate strategy. Activists who wish to rely on this to promote change will find more success if they are able persuade shareholders to become aligned with their views and collectively express these views to the directors. We conclude with two specific observations that follow from the discussion thus far.

A. A Note on Derivative Actions

Any attempt to use the directors' duty to act in the best interests of the company to influence corporate decision-making will begin with a derivative action. This follows from the basic proposition that directors' duties are owed to the company only and a suit for a breach of duty can only be brought in the company's name. The law creates an exception for shareholders to bring an action on the company's behalf after seeking permission from the court to do so through a derivative action.[145] As derivative actions can only be brought by shareholders, activists may purchase shares for the purpose of bringing the derivative action. Doing so, however, may cause the court to question the activist shareholders' intentions and whether pursuing the proposed lawsuit would be in the interests of the company. This is illustrated in both *ClientEarth* and *HC Surgical*.

In *ClientEarth,* the activist group that brought the suit only held 27 shares in Shell. Furthermore, it could only demonstrate that it had support from other shareholders holding 0.17% of Shell's total share capital.[146] That the group was attempting to bring a complex, expensive claim on behalf of the whole of Shell despite only having a very small shareholding led the court to question

[145] *Foss v Harbottle* (1843) 2 Hare 461, 1843) 67 ER 189 (Ch). This is also provided for in statute: Singapore Companies Act 1967, s 216A; UK Companies Act 2006, s 261.
[146] *ClientEarth* (n 14) [65] and [69].

whether the case was being brought for an ulterior motive instead of genuinely promoting the interests of the company, and therefore not one brought in good faith.[147] The lack of support from other shareholders also suggested that the case was not in the best interests of the company. In fact, the shareholders had voted strongly in favor of the existing business strategy at Shell's latest general meeting.[148] As a result, the application for a derivative action failed.

Similar questions arose in *HC Surgical* as under Singapore law, a derivative action that is brought for a collateral purpose will fail for a lack of good faith.[149] The court regarded the applicant as having 'simply persisted in ignoring [the directors' explanations]' and had a collateral aim of punishing the party that the company was transacting with by preventing the deal from going through.[150] The court also noted that the applicant had only very recently bought the shares, and the primary purpose for purchasing them was to gain access to the company's general meeting so that she could raise the matter there. The application had to fail as she was not the 'genuinely aggrieved shareholder' that the law was seeking to protect by allowing derivative actions.[151]

The analysis above reinforces our conclusion that company law, and more specifically the duty to act in the best interests of the company, is focused primarily on the interests of shareholders. It is also in line with our suggestion that attempts to redefine corporate value to include environmental, social and other causes should be taken outside of the courtroom. Instead, more mileage may be gained by ESG activists if shareholders can be persuaded to embrace the causes and to raise these issues at the shareholders' meeting.

B. The Relevance of ESG Codes and Rules

[147] ibid [61]-[65].
[148] ibid [67]-[71].
[149] *HC Surgical* (n 15) [68]-[70] citing *Ang Thiam Swee* (n 81) (SGCA) [30]-[31].
[150] ibid [71]-[76].
[151] ibid [77].

Our next observation pertains to how ESG codes and other similar rules apply in the context of the duty to act in best interests. Although most of them operate as soft laws which may not have legal binding force nor sanctions for non-compliance, they are important as they set the tone for the whole ESG ecosystem. In addition, keeping in line with the general principle that directors should exercise their discretion to decide the interests of the company, we suggest the role of ESG codes and rules in shaping and reforming corporate decision making is similarly soft in nature. Instead of dictating the strategies that directors should adopt, ESG codes and rules should guide directors' decision making, ensure that they take into consideration ESG factors that are relevant to their exercise of decision making discretion. In the event that directors fail to do so, ESG codes and rules help to ensure that they can be taken to account by shareholders at the general meeting. We will focus our discussion on corporate governance codes as other ESG codes remain in their infancy.

Key common tools used by ESG codes and related rules include the following:

- requiring diversity on the company's board, such as by appointing independent directors ('Board Composition Strategy')[152]
- requiring the directors to disclose their strategy when handling social and environmental matters ('Disclosure Strategy');[153] and
- requiring the board to engage with shareholders and stakeholders, be it at the shareholder meeting or other more informal avenues ('Engagement Strategy'). [154]

[152] UK Corporate Governance Code 2018, Principles D and G. Provision 11 also requires half the board to be independent; SG Code of Corporate Governance 2016, Principle 2.
[153] UK Companies Act 2006, s 414A-D; SGX Listing Rule 711A. In addition, SGX has recently commenced consultations on further refinements to bring the disclosure obligations found in the SGX Listing Rules in line with international standards. See Sustainability Reporting Advisory Committee, *Turning Climate Ambition into Action in Singapore - Recommendations by the Sustainability Reporting Advisory Committee* (Consultation Paper, July 2023).
[154] UK Corporate Governance Code 2018, Principles D. Provisions 3 and 5 requires directors to engage with shareholders outside formal general meetings and disclose how they have considered the interests of stakeholders; SG Code of Corporate Governance 2016, Principles 11 and 12. Provision 11.3 specifically requires directors to attend general meetings and Provision 12.1 requires directors to disclose how they have sought to solicit and understand the views of shareholders.

As described above, these rules focus on ensuring that directors continue to consider diverse points of views, and in particular ESG-related considerations. The Board Composition Strategy introduces outside voices to the board meeting who may also bring along specific expertise to help design the appropriate response. This is reinforced by the Disclosure Strategy as directors will have to go through the process of considering the matter and designing their response before they will be able to provide any meaningful disclosure. Finally, the Engagement Strategy ensures that the board is able to canvass the views of the shareholders and sometimes those of the stakeholders to fine-tune their response. Furthermore, in the event that the shareholders deem the board's strategy to be inadequate, the Engagement Strategy also ensures that the shareholders will have an avenue to voice their views to the board.

The strategies described above fall in line with the statutory scheme found in companies law legislation. As described earlier, the general scheme is for the directors to have broad discretion to determine how best to advance the interests of the company while shareholders, on the other hand, have a legally protected right to engage with these directors and take them to task if they fail to do promote their interests.[155] The strategies provide finer details to the broad statutory scheme. All three strategies described keep ESG-related matters and other issues that are of importance to the shareholders at the forefront of the directors' minds. The Disclosure Strategy ensures that shareholders are given the required information for them to properly evaluate the strategies the directors wished to put in place. Finally, the Engagement Strategy ensures that the shareholders can meaningfully exercise their rights at the shareholder meeting, up to and including replacing the directors if they feel that the directors are not acting in a manner that reflects their interests.

A key point to note is that the ESG codes and the strategies we have identified remain procedural in nature. They focus on shaping how the directors come to their conclusions and do not prescribe that they need to make specific decisions to act in the interests of the company. The deference to directorial discretion is a reflection of the diverse differing interests that companies can

[155] As discussed in part 3.C of this paper.

have and potential strategies that directors can consider, negating the possibility of an effective one-size-fits-all solution. Therefore, this is how ESG codes and strategies should be understood, not as a tool to direct directors to implement specific strategies but a nudge that compels directors to consider the matter, so that they can design the appropriate strategy that fits the needs and circumstances of the company they manage.