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Sustainable Directors' Duties and Reasonable Shareholders

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Sustainable Directors' Duties and Reasonable Shareholders*

Abstract

This paper will examine the sustainability of directors' duties from two perspectives, namely that the duties are stable in their own right and cover enough ground so that they can help achieve sustainable goals. First, we will examine how directors' duties to act in a company's best interest operates well when shareholder interests are aligned. That duty when breached can be ratified by shareholders given the traditional understanding that they are the company. This may in turn have been associated with the growing acceptance of shareholder primacy over the past 40 years seen most recently in the UK Supreme Court decision in *BTI v Sequana* (2022). The court there, however, also discussed the limitations of shareholder ratification, and its interaction with the rules protecting creditors, particularly capital maintenance. Those rules have, however, been weakened and private law has had to step in to address the mischief those rules were aimed at.

Where the substantive content of directors' duties is concerned, the focus everywhere is on how to make directors take account of external constraints such as environmental, social and governance (ESG) concerns and corporate purposes that may contradict enhancing shareholder value (as well as existing shareholder protection) as an established paradigm of company law. We will analyse the difficulties even in accommodating the interests of other internal constituents like creditors (some who may have been externalized). This paper will build on earlier suggestions that the proper purpose rule has a part to play in balancing the interests of corporate constituents both *inter* and *intra se* and even to consider the position of future shareholders. The test of what is in the best interest of the company may not provide enough balance in this regard and should take account the interest of the reasonable shareholder to capture the gist of what we want with ESG.

Shareholder Primacy

There was a time when the company was seen as a strong separate entity with an inviolable 'trust fund'.¹ Capital was locked-in but it has now been coded² in such a way that it is now more for shareholders to extract rather than for the corporate growth. Many company directors

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¹ *Wood v Dummer* 30 Fed Cas 435 (no 17944) (CC DMe1824), discussed by Manning (1981) at 28.

² Pistor (2019).

and management today focus on that right side of the balance sheet and not their underlying business. Some firms behave more like funds than the business that they are in. Perhaps the worst example was the decline of ICI from a leading chemical and pharmaceutical company to one which sold off that core business and focused on its short-term share price to the ultimate detriment of the shareholders.³

What sets the financialized corporation apart from its industrial-age predecessor is that the financial gains from these operations are not reinvested in the firm's productive facilities, but rather are distributed to shareholders through dividend payouts and share buybacks (Lazonick and O'Sullivan, 2000). It is for these reasons, that Blackburn has dubbed the financialized firm 'the disposable corporation' (2006, p. 42).⁴

Much of this has been driven by relaxed capital maintenance rules but such increased autonomy has meant a reallocation of risks without participants in a business venture fully realizing its implications. Governments have been somewhat complicit as they strived to create growth after the GFC particularly with small and medium-sized enterprises. Lawyers have helped to code things like digital assets and derivatives which have been accepted as property much quicker than shares and debts were in the past.⁵

While some of the cleverest arguments have been arrogated in favour of it, there is a cognitive dissonance when this rush to paper wealth amidst shareholder primacy in the past 40 years or so (the Dow Jones Index has risen more than thirty times since 1982 whilst US GDP is only about 7 times higher, and the rate of return on capital is greater than income growth⁶) is said to be perfectly consonant with sustainability goals. We may have overly focused on the agency costs problem between management and shareholders, and kept on trying to enhance minority shareholder protection, and to keep aligning directors' duties and incentives with shareholder interests, when that was no longer the problem. It was understandable in the 1970s as the labour

³ Kay (2012).

⁴ van der Zwan (2014) at 108-129.

⁵ Pistor (2019). In fact, shares were more slowly reified as property compared to debts. In *Colonial Bank v Whinney*, the House of Lords (11 App Cas. 426) reversed the Court of Appeal (30 Ch D 261) and found that the share was a thing in action. The Judicature Act 1873 (36 & 37 Vict c 66) s 25(6) referred to 'all debts and other legal choses in action' and the House of Lords thought that shares were akin to debt securities which are more proprietary in nature: UK Jurisdiction Taskforce, *Legal statement on cryptoassets and smart contracts* (November 2019) at para 68.

⁶ Piketty (2014). See now LoPucki (2023).

share of national income peaked in 1975. Compare the first statement from 1973 World Economic Forum Davos Manifesto calling for more unqualified shareholder return with the second from the WEF's new statement at their 2020 50th Annual Meeting:

2. The management has to serve its investors by providing a return on its investments, higher than the return on government bonds. This higher return is necessary to integrate a risk premium into capital costs. The management is the *shareholders' trustee*. (emphasis added)....

v. A company provides its shareholders with a return on investment that takes into account the incurred entrepreneurial risks and the need for continuous innovation and sustained investments. It responsibly manages near-term, medium-term and long-term value creation in pursuit of sustainable shareholders returns that *do not sacrifice the future for the present*. (emphasis added)

These are aspirational and to counter the then existing position. As with the famous headline of Friedman in 1970 that the 'Social Responsibility of Business Is to Increase Its Profits',⁷ the WEF recognised that labour was overly strong at that time. In contrast, their 2020 statement acknowledges that things have swung too much in favour of immediate shareholder-as-owner primacy.⁸ The article below will try to put the two statements together to say that directors owe a duty to their company to maintain the balance between the present and future by focusing on the reasonable shareholder. This will be discussed in the context of the important recent UK Supreme Court decision in *BTI 2014 LLC v Sequana SA*.

Since 1987 we have witnessed one financial crisis leading to an economic one every 10 years or so as leverage benefits shareholders, or a certain generation of them. But that financial crisis had small real economic effects. The warning signs of over-financialisation perhaps was first with the Asian Financial Crisis that began in 1997 in Thailand. We then saw the toll wrought by the Global Financial Crisis (GFC) in 2008. The advent of digital assets then put more pressure on shareholder returns. Covid-19 has made it worse with the removal of wrongful trading rules⁹ on top of the guilt governments felt after the GFC in bailing out the banks, who

⁷ Friedman (1970). Cheffins (2020) has argued that this statement did not lead to modern shareholder primacy which was caused by the hostile takeover wave of the 1980s.

⁸ See also EY (2020), which is an action plan to counter corporate and shareholder short-termism.

⁹ See the suspension of wrongful trading in various jurisdictions due to Covid-19 discussed by van Zwieten and Licht (2020). Davies (2020) at 236 said that 'continued trading in the vicinity of insolvency might be absolutely the right decision'. See now the UK Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension

are also now protected by bail-in rules. Non-adjusting creditors are the ones that have been left behind.

Shareholder primacy was the right strategy in a world with plentiful resources and new ‘general purpose technologies’¹⁰ or ‘disruptive technologies’¹¹. But the world has changed. Some shareholders may want to take on too much risk¹² and we are in the wrong part of the real, as opposed to financial, innovation cycle for that. Management, especially those in financial institutions, ended up working against their own constituents, starting with customers, creditors, employees, and now possibly the environment.

Directors’ Duties to the Company

While there are many facets to sustainability, this paper will explore how we can use private law, in particular, directors’ fiduciary duties, to bring us back to the middle, one where directors focus on maintaining the company’s existence as well as its place within the broader community. Their duty is to the company, and consequently it is difficult to make directors liable in negligence through some form of assumption of responsibility to third parties or outside causes¹³. The main duty, as in most places, is the one that requires directors to act in what they in good faith believe to be in the interests of the company. In fact, this is broken into separate requirements to be met before a statutory derivative action under s 216A Singapore Companies Act 1967 can be brought by a company against a director (as it is in the UK under s 263(3) Companies Act 2006, with the latter replaced by the duty to promote the success of the company under s 172(1)). Good faith has to be seen on the part of the shareholder seeking derivative standing, and the court must also believe that the action will *prima facie* be in the interest of the company. The latter comes from a notional directors’ viewpoint given that a derivative action is one in which the directors do not want to bring but some shareholders do¹⁴. While the company’s best interest can be measured here in terms of how the shareholders *as a whole* will benefit from the bringing of a derivative action as disputes should be aired (which

of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, effective 26 November 2020.

¹⁰ Gordon (2012).

¹¹ Giem, A, ‘Be afraid, be very afraid, of the tech crisis’ Financial Times, February 5 2013.

¹² Blair (2012).

¹³ *William v Natural Life Health Foods Ltd* [1998] UKHL 17.

¹⁴ The best interest of the company here to be seen from the ‘prudent director’ viewpoint (*Zavahir v Shankleman* [2016] EWHC 2772) or that of some directors (*Iesini v Westrip Ltd* [2009] EWHC 2526). Even a *prima facie* case could not be made out in *Clientearth v Shell Plc* [2023] EWHC 1137 (Ch).

should ideally be the view of shareholders independent of the wrongdoing director per *Smith v Croft (No 2)*¹⁵), we will see that it is harder to visualise what even unconflicted and independent shareholders would want when it comes to taking a decision which may not benefit the company but which is meant to comply with an external ESG requirement imposed on that company. There is no reason to assume that shareholders share the same interests when it comes to these relationships the corporate entity has with the outside world the same way they did in the past when fairness was only a concern with a company's internal constitutional balance, as in the case of a rights issue.

With rights issues, it was said in *The Wellness Group v OSIM*¹⁶, by Chua LM JC that:

In my judgment, a rights issue would be unfair within the meaning of s 216 if (a) there is no commercial reason to raise capital through a rights issue, or (b) the dominant purpose of the rights issue is to dilute non-subscribing shareholders.

While the judge rightly did not comment on whether the dominant purpose test should be the causative one suggested for the proper purpose rule applicable to directors by the Supreme Court in *Eclairs v JKK Oil*¹⁷, as not all the judges there agreed with it¹⁸, the judgment is significant in its linkage of shareholder oppression (based in Singapore on a text of 'commercial unfairness' that requires a buyout of the oppressed minority) and some of the language that would have been used in a director improper purpose case. A rights issue is one of the situations in which what directors do for the company in fundraising also impacts on shareholders and the balance of control between them. In the US, Fried¹⁹ suggests also that rights issues should be subject to a 'substantive fairness' test due to the risk of expropriation. The suggestion below is that we will need further development in this regard where directors' duties are concerned in order to create a mechanism in which sustainability goals and corporate purposes translate to something that directors have to take into account. The test of whether directors have acted in the best interests of the company finds it difficult to accommodate this as shareholders have different interests when it comes not just to a rights issue but with matters concerning ESG. While the European Commission has lamented the 'lack of a clear definition

¹⁵ [1988] Ch 114.

¹⁶ [2016] SGHC 64 at [183]. The decision was upheld by the Court of Appeal on 31 October 2016.

¹⁷ [2015] UKSC 71.

¹⁸ See, especially, Lord Mance, *ibid* [52]-[53]; Tjio [2016] at 183-4.

¹⁹ Fried (2021).

of “company interest” in company law frameworks²⁰, it may be that the problem is that that interest has to change with the context.

Shareholder Ratification and Capital Maintenance

When it comes to a narrow and less multifaceted decision where directors are only expected to act in the company’s best interest and not to be conflicted themselves, shareholder approval or ratification can waive or cure any breach. Here, shareholder primacy is rightly the starting point and a recent Singapore decision has held, somewhat against previous authority, that approval for a director to enter into a conflicted transaction has still to be given by the shareholders in general meeting, and not by the board²¹. This is the general principle although because there is no absolute bar to a conflicted transaction, it should be possible to modify it by permitting board approval (via provisions to such effect in the corporate constitution) without there being a breach since director decision-making is the starting point²². With ratification, which is an even more serious act by the company that extinguishes any possible action against a wrongdoing director, however, it is right, that only shareholders can approve any breach as they are in effect the company at that time. There are no duties on them when it comes to how they vote unless it is to alter the articles of association. Even s 239(4) of the UK Companies Act 2006, which requires independent shareholder ratification, is only concerned with ruling out shareholders linked to the director from the vote, and not broader concerns with other constituencies. But it does signify that there are at the least intra-shareholder conflicts in ratification.

In an important recent decision, however, the UK Supreme Court in *BTI 2014 LLC v Sequana NA*²³ (*Sequana*) examined the nature and limits of shareholder ratification of breaches of directors’ duties in the shadow of other constituencies, such as creditors. Counsel argued that shareholders, being the corporators, would not be able to ratify a breach of directors’ duties only when it amounts to an actual fraud on creditors. This, therefore, negated any possible duty on directors to take account of creditor interests when they seek to promote the success of the

²⁰ EY (2020) at 3.2.1.

²¹ *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind* [2018] SGHC 14

²² *Dayco Products v Ong Cheng Aik* [2004] SGHC 192 at [14]. Shareholder primacy does not mean shareholder decision making.

²³ [2022] UKSC 25.

company as creditors are expected to protect themselves contractually.²⁴ The majority rejected this argument and held that there was a limit to ratification when the company was insolvent or near enough to it that a special duty²⁵ on directors to take account creditor interests arose (which conversely meant that it was not enough for there to be a ‘real risk of insolvency’²⁶ to trigger this *West Mercia* duty as the two were inter-related). In an important dissent on the law but not the outcome of the case, Lady Arden thought that ratification was not based on the *West Mercia* rule creating a special duty to take account of creditor interests when a company is near insolvency but on the doctrine of capital maintenance, which also appears to be the position in Singapore²⁷. She pointed out that s 239(7) UK Companies Act 2006 recognises that some breaches of duty remain unratifiable by shareholders, even if independent, or if done unanimously. Put differently, it did not matter what the quality of shareholder ratification²⁸ was in these cases of unlawful capital return as Lady Arden said that shareholder primacy did not mean that the shareholders owned the company from a proprietary angle. She said that:

It is inherent in shareholder primacy that other interests such as those of creditors will necessarily diminish the interests of shareholders. They are only ever residual claimants.²⁹

Lynn Stout has pointed out that from another view, it could be said that it is in fact the debt holders that are residual claimants on a company’s cash flow who have given a call option to the shareholders.³⁰ While the rest of the Supreme Court also disavowed any proprietary interest of shareholders and creditors in the company’s assets, it was amenable to seeing the financial interests of these constituents, and some form of co-sharing of economic interests by shareholders and creditors may not be inaccurate.³¹ But much of this is buttressed by capital maintenance rules which were needed to ‘accelerate the point at which failing corporations must file for insolvency’³². It did so by providing checkpoints at which the company’s position had to be examined by the board (solvency statement) or shareholders (resolution) before it

²⁴ *Ibid*, [26], Lord Reed.

²⁵ Based on the case of *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250.

²⁶ This argument failed at first instance, the Court of Appeal and the Supreme Court.

²⁷ *Sequana* at [312]; *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2012] SGCA 62.

²⁸ *Cf Payne* (1999) prefers the approach that asks whether the ratification was by the correct decision maker in the best interest of the company.

²⁹ *Sequana* at [376].

³⁰ Stout (2001) at 1192.

³¹ *Armour & Whincop* (2007) at Part C (this could be sequential or joint).

³² *Allen and Kraakman* (2016) at 4.2.3.

could carry on certain transactions. It has, however, now been pushed back for more 40 years now in many parts of the world, which have followed the lead of US company law from around the early 20th century.³³

Lady Arden previously revived another capital maintenance rule, one which prohibits a company from giving financial assistance to a purchaser of its shares, when she was in the English Court of Appeal in *Chaston v SWP Group Plc.*³⁴ Her ladyship reversed what appeared a trend towards reducing the relevant test to whether the transaction was in the commercial interest of the company. Her decision made it clear that unless the regulators further amended the financial assistance rules, they continued to require directors acting properly to follow them. This suggests clearly that these rules on capital are not just about what directors believe to be the best interest of the company. There is something more, even if the rules themselves have today been statutorily weakened.

*Ford's Principles of Corporations Law*³⁵ has also observed that the financial assistance prohibition is a manifestation of the general rule that a company's resources should be used for proper corporate purposes, as well as for the company's benefit, and not to assist in the purchase of its shares. This doctrine helps mediate situations in which it is necessary to see through the corporate entity to the various constituents behind it where there may be conflicting interests between them, and where recourse to the company's best interest can be a refuge for those seeking to take unfair advantage of its entity status. We will try to articulate an argument that it can serve as a proxy for sustainability. First, we will have to look more closely at *Sequana* which will confirm that solely relying on the traditional best interest duty may not work when the conflict of interest is not at the board level but a different conflict inheres in the constituencies interested in the outcome of the decision, there between shareholders and creditors, but this could include employees of the company. There are also situations when it comes to the environment when it is then difficult to say what is in the best interests of the company because even shareholder interests are not aligned.

³³ Manning (1981) at 129 that stock purchases were important in allowing closely held corporations to repurchase the shares of deceased members (in order to pay death duties) to assist the other shareholders who could not afford to do so.

³⁴ [2003] 1 BCLC 675 where, according to Arden LJ at [38], 'it is clear...that the test is one of commercial substance and reality'.

³⁵ Austin and Ramsay (2018) at 24.670.

Balancing success of the company for shareholders and creditor protection: *BTI v Sequana*

Despite the UK relaxing capital maintenance rules from around 1980, s 423 of the Insolvency Act 1986, which despite where it is located, is not dependent on bankruptcy, continues to set aside undervalued transactions made with the purpose of prejudicing persons with claims against the transferor. This was observed by Lord Neuberger in *Prest v Petrodel*³⁶ as a ‘specified and limited’ application of the principle that ‘fraud unravels everything’. US fraudulent conveyance cases in practice see a necessary purpose to defraud creditors only if it leaves the company ‘insolvent or with unreasonably small capital’³⁷ as that then puts assets beyond the reach of creditors.³⁸ Intent may otherwise be hard to prove as this is rarely “susceptible to direct case”.³⁹ But that is not the case in the UK where in *BTI v Sequana* the judges continued to apply it without the need to prove insolvency⁴⁰, and it may even be to protect *future* creditors.⁴¹

In *Sequana*, section 423 was used to set aside a lawful dividend paid by a company from distributable reserves to its holding company Sequana whilst having one material contingent liability. That was some ten years before the company, which was set up to meet the liability, became insolvent. However, the estimate of that liability which involved costs arising from the clean-up of a polluted river was too low and so the dividend payment was challenged as a conveyance intended to defraud creditors, including here BAT, which was to be indemnified for the clean-up costs. The dividend was ultimately set aside by the court on the basis that it was given for no consideration (clearly a transaction at an undervalue) to Sequana to set off against debts owed by it to the company and to put those assets out of the reach of the company’s creditors. Unfortunately, Sequana was also bankrupt and so the appeals which

³⁶ *Prest v Petrodel Resources Limited* [2013] UKSC 34 at [83].

³⁷ Kahan, M (2003) at 147.

³⁸ Section 548(a)(1), US Bankruptcy Code; *Whyte ex rel. SemGroup Litig. Trust v. Ritchie SG Holdings, LLC*, 526 B.R. 556 (D. Del. 2014)

³⁹ This is illustrated in *re Kaiser*, 722 F.2d 1574 (2d Cir. 1983)

⁴⁰ In *Sequana* at [61], Lord Reed seemed to see s 423 as insolvency rule but none of the other judges did *cf* *Armour* (2003) 3.1 stating that in practice it is difficult to show that the creditors have been prejudiced without showing the debtor’s insolvency.

⁴¹ *Midland Bank v Wyatt* (1882) 18 Ch D 588 where the father transferred assets to children without intending to benefit them to protect the family business from long term commercial risk ie future creditors, discussed by *Armour* at 3.45. For an Irish perspective, see *Doherty v Quigley* [2015] IECA 297. Defrauding creditors has to be a purpose and not the sole or dominant purpose of the transaction: *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176.

ultimately reached the Supreme Court, which heard the case in May 2021 but only rendered its judgment in October 2022, focussed on whether the directors of the company, which had assigned its claims to BTI and been sold by Sequana, had breached their duties to the company.

This was held not to be so at every level as directors' duties, while owed to the company (to promote its success for the benefit of its members as a whole) under section 172(1), did not shift its focus to creditors under subsection (3) as insolvency was not likely, which meant 'probable'⁴² or 'imminent'⁴³, when the dividend was paid. This was the view of the majority in the Supreme Court. Lady Arden, however, disagreed that this 'creditor duty' came about only through s 172(3) but that s 172(1) itself required directors when considering the company's success to also consider creditor interests alongside those specifically mentioned, which included employees and the environment. However, she agreed that the need to consider creditors had not arisen in this case and, along with the majority, also rejected a lesser 'real risk of insolvency' test the appellant asked for.

To Lady Arden a company is polycentric⁴⁴ as are its best interests, which Lord Reed⁴⁵ also agreed have been modified today. But although s 172(1) specifically mentions other constituencies to be considered by directors, such as employees (subsection (b)) and the environment (subsection (d)) and even fairness between shareholders (subsection (f)), it does appear that those interests come to the fore only in egregious circumstances. It seems to remain the case that the s 172(1) duty to promote the success of the company finds it difficult to balance differing interests when it is a going concern even if Lady Arden saw a strong form of enlightened shareholder value in s 172(1). In any case the majority thought that s 172(3) was needed to recognise and further develop the 'creditor duty'.⁴⁶ As Lord Reed said, creditors were expected to protect themselves contractually (although some are non-adjusting). Still, we must recognise that there is a shareholder/bondholder conflict in that the residual claimants will have an incentive to shift value to themselves from those ranking about them.⁴⁷ Usually this takes the form of risky decision-making that may reduce the expected return of an investment but

⁴² *BTI 2014 LLC v Sequana* [2019] EWCA Civ 112 per Richards LJ at [220].

⁴³ *Sequana* per Lord Reed at [86], Lord Briggs at [186], Lord Hodge at [243].

⁴⁴ *Sequana* at [303].

⁴⁵ *Sequana* at [12].

⁴⁶ Lady Arden in *Sequana* at [344] thought that s 172(3) does not recognise an existing duty but exhorts courts to develop one.

⁴⁷ Jensen & Meckling (1976).

increases its volatility so that there is at least a chance of a payoff to the shareholders. Shareholders are willing to take the riskiest course of action when a company is not doing well given that their claims to the few remaining assets rank last.⁴⁸

While recognising just duties to creditors does not bring us to an insoluble conflict, the reference, in particular, to *potential creditors*⁴⁹ in the context of fraudulent conveyances can dilute the focus of directors' duties. There is a strong argument that it is not the function of directors' duties to encourage companies to adopt socially desirable behaviours, which should be within the purview of upstream regulations, such as those protecting employees or the environment.⁵⁰ Easterbrook and D Fischel, for example, pointed out that '(a) manager told to serve two masters...has been freed of both and is answerable to neither.'⁵¹ Milton Friedman has also argued that '(i)f businessmen do have a social responsibility other than making profits for stockholders, how are they to know what it is?'⁵² The latter point was first made in 1970 when we have seen that the power of labour unions was at its apex, and non-shareholder interests were prioritised by 'bureaucratic'⁵³ managers. The pendulum then swung too much in favour of shareholders, and so it may be that to stave off the regulation that even Friedman advocated to control externalities, shareholders and businesses are claiming that they are socially responsible.⁵⁴ Bainbridge has suggested this as a plausible reason for the 2019 change in the US Business Roundtable⁵⁵ 'Statement on the Purpose of the Corporation' signed by 181 CEOs to embrace corporate purposes although he believes that it is more greenwashing that is

⁴⁸ This is one of the three agency problems identified by as being the focus of corporate law across various jurisdictions by Kraakman et al (2004).

⁴⁹ This was also said to be the case by Lord Templeman in *Winkworth v Edward Baron* [1986] 1 WLR 1512 at 1516, a decision criticised by Sealy (1988). See also Cunningham A (2021) at 12-104 discussing Irish fraudulent conveyance laws that are restricted to land transfers. In 2022, Ireland also adopted a statutory duty to consider the interests of creditors near insolvency: s 224A of Ireland's Companies Act 2014.

⁵⁰ Cf McConvill and Joy (2003) who believe that directors' duties to the environment are a logical extension of such upstream regulations.

⁵¹ Easterbrook and Fischel (1991) at 38.

⁵² Friedman (1982) at 133.

⁵³ Jensen and Murphy (1990) still saw this in management even though things had improved since the 1970s.

⁵⁴ Rhee (2023) argues that the case of *Dodge v Ford Motors Co* (1919) 204 Mich. 459 (where Ford was made to declare dividends to its shareholders in 1919) was not influential until neoliberalism came to the fore in the 80s. That is consistent with the point made above that compares the 1973 WEF Davos statement (made when unions and purposes were strong) with the modern 2020 50th Anniversary one (in light of shareholder primacy). This must mean that companies have managed to evolve even given existing directors duties which is consistent with the 'reasonable shareholder' story below. Compare Bainbridge (2023) analysis of *Ford* and how he sees that Business Roundtable has only recently changed its statement from shareholder to stakeholder capitalism. The story could lie somewhere in between as we have seen that capital maintenance rules in the US were weakened from the 1900s: Manning (1981).

⁵⁵ Bainbridge (2023) at 9.4 alongside other non-altruistic reasons.

at play⁵⁶, which seems to be more a US fund phenomenon⁵⁷. But it does show that the existing best interest duty has difficulties accommodating different goals amongst its constituents given the focus on shareholder value maximisation, which Bainbridge still advocates.⁵⁸

Managing Different Interests within a Class

The position is more subtle if conflicting interests are within the same constituency, particularly between shareholders. We know that in schemes of arrangement involving solvent or insolvent restructuring, differing interests are today not sufficient to require the formation of separate classes of shareholders and/or creditors to vote to approve the scheme. They must have different rights, and even then courts have sometimes favoured informed voting over separate class voting. To stave off challenges, any restructuring should also be done in such a way that the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might *reasonably* approve.⁵⁹ In small quasi-partnerships, we have also seen that shareholder disputes are resolved through oppression actions involving majority shareholders buying out minorities whose “legitimate expectations”⁶⁰ have been breached. But greater formal protection was thought unnecessary in listed companies as the minority can sell out, with the focus there on disclosure of information on secondary markets. There should be no need for minorities to stay in a listed firm and ask for changes. But that is precisely what we are now witnessing in the ESG space. Some shareholders of Shell, led by Clientearth who bought a small holding in the company (27 shares) for this reason, for example, tried to bring a derivative action to sue Shell’s board to get it to adopt a more environmentally friendly strategy when the majority of shareholders already approved the existing strategy at

⁵⁶ Bainbridge (2023) at 9.7.

⁵⁷ Gibson et al (2022).

⁵⁸ Bainbridge (2023) may reflect the extant US position more than the rest of the world where the WEF statements in 1973 and 2020 show the earlier stakeholder position and the more recent shareholder primacy one. Flannigan (2022) also argues that unlike, in the Commonwealth, US academics saw directors to be more accountable to shareholders from the 1930s without clear judicial support for this.

⁵⁹ *Re National Bank* [1966] 1 WLR 819 at 829A-E, *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123. In the US liquidation and restructuring plans must be such that it would allow the hypothetical, reasonable and average investor enough information to make an informed judgment of the plan: Cox & Hazen (2003) at 1282. See also *Re Dee Valley Group plc* [2017] EWHC 184 (Ch) – share splitting to block scheme of arrangement (by making it harder to get the majority in number) failed as not voting for benefit of class. In Singapore, the court will only let through a scheme restructuring that has a reasonable prospect of working: *Re Aquaverse Pte Ltd* [2023] SGHC 29.

⁶⁰ Which themselves only arise though informal agreement: *O’Neill v Phillips* [1999] UKHL 24, recently again followed by the New Court of Appeal in *Birchfield v Birchfield Holdings Limited* [2021] NZCA 428 that the unfairness is about “exclusion without a reasonable offer”.

the AGM. Previous actions have only been against the company itself, largely for negligence, some of which have succeeded in requiring changes in corporate behaviour⁶¹. The action failed on the threshold grounds that it may not have been brought in good faith nor was it prima facie to promote the success of the company.⁶²

The issue with the recent Shell litigation is that it is about the future as the company is doing well given high share and oil prices, and many shareholders have different views of how things should be. There is also no present loss at such. Consequently, Clientearth admits that this is really the first test case in respect of directors' duties and external ESG requirements. But there were indications from *Sequana* that it will not be easy to argue that the directors have failed to act in a way to promote the success of the company (*ie* the merits of the case as opposed to satisfying the threshold for commencing a derivative action, which in any case failed with Shell as on the face of it Clientearth could not show that Shell's directors had acted unreasonably). In *Sequana*, s 423 expressly prohibited the payment of the dividend, which caused the company loss as it was unrecoverable. Yet, Lord Briggs, with whom Lord Kitchin agreed, said:⁶³

It is, in passing, an irony of the present case that the May dividend has been found to have offended section 423 but no claim that it involved for that reason alone a breach of duty by the respondent directors has ever been pursued.

Instead, we have seen that an argument had to be framed that creditors' interests had come into the picture only because the company was near insolvency. This failed as the company became insolvent only 10 years later. Any projected insolvency is hard to show due the interaction of the balance sheet and cash flow tests which still exist in many jurisdictions. On the 'balance sheet' test, the English Court of Appeal held in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*⁶⁴ that a company could not be said to be insolvent simply because its

⁶¹ Eg *Milieudéfensie et al v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5337 where Shell was ordered to reduce its emissions by 45% by 2030: see Mayer (2022). See also Broccardo, Hart, and Zingales (2022) arguing for voice over exit.

⁶² *Clientearth v Shell Plc* [2023] EWHC 1137 (Ch), [64] and [20] respectively. An additional argument that Shell had a duty to comply with the Dutch order failed, [20]-[24], but the proper purpose argument discussed below was not raised.

⁶³ *Sequana* at [182]. Armour (2003b) thinks that directors could be liable for negligence, at 7.59-60 (although he also says that there may be a breach of terms of the constitution).

⁶⁴ *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2011] 1 WLR 2524 (CA). Cf P Walton, "Inability to pay debts"—beyond the point of no return? [2013] JBL 212, pointing out that the meaning in s 123 went beyond winding up and affected other ancillary areas.

liabilities appeared to exceed its assets, partly due to the difficulties of taking contingent and prospective liabilities into account. In this case, a trustee of longer dated notes was asked to declare a contractual event of default that mirrored the tests of insolvency in section 123 of the Insolvency Act 1986. The insolvency provisions were meant to identify companies that could not pay its debts, and this would be so only if there was an incurable deficiency in its assets, where a ‘point of no return’ had been reached.⁶⁵ The Supreme Court rejected the need for the last point, but thought that the ‘cash flow’ test worked for the reasonably near future only.⁶⁶ A ‘balance sheet’ test was more sensible when looking forward but the Court thought that this was an imprecise test, which the party asserting it had to prove. On the facts, given that the final redemption of the notes was only in 2045, the Court felt it had to proceed with caution. Eurosail could pay its debts presently and the Court could not be sure that it would eventually be unable to do so until a time closer to 2045.

Future shareholders

This shows that, even with discounted cash-flow valuations, things that are too far into the future, including environmental issues, find it difficult to be covered by the duty to promote the success of the company. But can the interests of future shareholders not be considered? In the UK at least, s 172(1)(f) UK Companies Act 2006 would then require the directors to have regard to the ‘need to act fairly as between the members of the company’. If this includes future members, it would require directors to ensure the company’s long-term viability⁶⁷ and may counteract the short-termism that may seep into their thinking.⁶⁸ At the same time, it addresses the problem that the best interest duty does not adequately deal with differing interests amongst its various constituencies as it focuses on just one, albeit now including future shareholders.

There are Commonwealth cases such as *Provident Corp v International Leasing Corp Ltd*,⁶⁹ in which the courts seemed to have recognised that directors owe duties to both present and future

⁶⁵ *BNY Corporate Trustee* [2013] UKSC 28 at [52] (Lord Neuberger MR), and [114] (Toulson LJ), referring to *Goode* (2011) at para 4-06.

⁶⁶ *Ibid* at [37], [42] (Lord Walker).

⁶⁷ This can also indirectly accommodate environmental concerns: J McConvill and M Joy (2003) at 130, who in fact propose a new statutory duty for directors to ensure that the “corporation interacts with the environment in a sustainable manner”.

⁶⁸ It is not always clear that this means: *Roe* (2022). Compare *EY* (2020) at 3.1.1.1 (Indicators to assess short-termism).

⁶⁹ [1969] 1 NSW 424.

shareholders. *Ford's Corporations Law*,⁷⁰ however explain that decision on the same basis that interests of employees are taken account of, *ie* that directors may have regard to future interests when making their decisions to act in the company's interest but there is no separate duty to speak of.⁷¹ It is no different from the balancing between shareholders and creditors that we still have to struggle with when we look at the best interest duty where it comes out in favour still of shareholder primacy. As Bainbridge notes:

Merely allowing directors to consider stakeholder interests thus guarantees nothing, because management can – and likely will – exercise its discretion to favour shareholders in true zero-sum settings. After all, the idea that the same managers who have driven private sector unionism virtually to the point of extinction will suddenly become workers' protectors is risible, at best.⁷²

Put differently, future shareholders are just another stakeholder. Directors' duties are still concentrated on present shareholders and so it needs to be crafted accordingly. In *Sequana*, Lord Briggs discerned the general need for some director impartiality as⁷³:

There is nothing inconsistent with the fiduciary nature of the directors' duty that it calls for a balancing of potentially competing interests. Much of the development of fiduciary duty arose in connection with family settlements, where trustees charged with investment powers faced the constant challenge of balancing the interests of life tenants and remaindermen, the former being interested in maximising income, and the latter in preserving and enhancing capital.

⁷⁰ Austin and Ramsay (2018) at 8.095.

⁷¹ See Schwarcz, S Temporal Perspectives: Resolving the Conflict Between Current and Futures Investors" (2005) 89 University of Minnesota Law Review) at 1067, dismissing claims of duties to future shareholders made in JD Heydon, "Directors' Duties and Company's Interests" in PD Finn ed, *Equity and Commercial Relationships* (1987) 120 at 123, and the Report of EM Holland QC, *The Savoy Hotel Limited and the Berkeley Hotel Company Limited: Investigation under Section 165(b) of the Companies Act 1948* (London, 1954). To the same effect are US cases like *A P Smith Manufacturing Co v Barlow* (1953) 98 A 2d 581: see Bainbridge (2023) at 2.5. At Chapter 3 he points out the syllogistic mistake some managers make which is that while you can take these other interests into account, you cannot then say that you only take these interests into account, which was the mistake made by Henry Ford in *Dodge v Ford*.

⁷² Bainbridge (2023) at 18.

⁷³ *Sequana* at [177]. In Singapore, it was said that fiduciaries needed to have "even-handedness": *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at 124 (CA). In the UK it is buttressed by the need to consider fairness to shareholders under s 172(1)(f) Companies Act 2006.

Lord Reed also thought that the content of the success promoting duty here is to have a fair balance between shareholders and creditors.⁷⁴ It is not unlike a trustee's duty of impartiality to balance the interests of those beneficiaries that are interested in income generated by the assets of the trust and those interested in the final distribution of those assets.⁷⁵ But it would appear in any event that the duty of impartiality still focuses mainly on existing beneficiaries, although there is some flexibility, particularly in the case of family trusts, to consider the claims of future beneficiaries that are as yet unborn.⁷⁶ But directors are not trustees, and we have seen that shareholder primacy has some path dependence attached to it⁷⁷. It needs to be modified so that directors are more comfortable adopting these balancing exercises when they make decisions which divide their shareholders, who although more to the middle than the general public given the large number of institutional investors⁷⁸, will have its share of those on the left and right of the political spectrum. Is impartiality better captured by a duty to exercise powers for proper purposes?

Proper Purposes

In *Eclairs*, in what Lord Sumption saw as a 'formidable dissent' in the Court of Appeal,⁷⁹ Briggs LJ saw a difference between the best interest duty and proper purposes, which the majority (reversed by the Supreme Court) did not in finding that the board had acted properly in suspending the votes of two shareholders that it suspected wanted to take over the company that failed to disclose that they may have been acting in concert:

I consider it important that the court should uphold the proper purpose principle in relation to the exercise of fiduciary powers by directors, all the more so where the power is capable of affecting, or interfering with, the constitutional balance between shareholders and directors, and between particular groups of shareholders.⁸⁰

⁷⁴ *Sequana* at [81].

⁷⁵ *Howe v Earl of Dartmouth* [1802] 7 Ves Jun 137, 32 ER 56.

⁷⁶ Hayton (2001) at 103. This is the case even if there are no beneficiaries to hold the trustees to account for the time being: Duckworth (2001) at 16.

⁷⁷ EY (2020) at vi.

⁷⁸ Bolton *et al* (2020).

⁷⁹ *Eclairs*, *supra* n 17, [29].

⁸⁰ [2014] EWCA Civ 640, [122].

While Rachel Leow has said that for subordinate agents like directors, the best interest of the company encompasses the duty to act for proper purposes⁸¹, it will be argued that we should allow the two to develop more independently, as is the case with organs of the company, or the entity itself.⁸² For one, many Commonwealth companies' legislation have them as separate duties, see eg UK Companies Act s 171 and 172. It may be that a breach of the proper purpose duty should not be ratifiable, particularly if it is linked to capital maintenance although it is thought presently that it can be as with breaches of the best interest duty. We have seen that in *Sequana*, it was thought that the latter was unratifiable by shareholders if the company was insolvent (majority) or if it was an unlawful capital return (*Lady Arden*). That may have been because they crossed the line into the improper use of power.

Maintaining a fair balance could be the additional understanding that illuminates s 171(b) which states that directors have to 'only exercise powers for the purposes for which they are conferred.' Boadle has pointed out that the proper purpose rule is flexible and different for trustees, directors and shareholders⁸³ and so it is still not fully stable. However, there is enough there to accommodate external codes given that it is about constitutionality (expressed in s 171(a)⁸⁴ - directors to "act in accordance with the company's constitution"), fairness and faithfulness to powers that are given to the power-holder. And enforcing the duty is less about obtaining damages but seeing the power exercised properly. Thus, in *Eclairs*, for example, an action was successfully brought by the shareholders to enjoin the company from suspending their votes in a general meeting as the board had done so not to compel disclosure as the relevant power was intended to but to improperly prevent a hostile takeover.⁸⁵ That is really what Clientearth wants of the Shell directors. It is more in the nature of a class action against the company by a group of similarly interested shareholders rather than a corporate claim by

⁸¹ Leow (2022) at 72-81. In *Sequana*, Lord Hodge thought that s 171(b) had to be read in light of s 172(1) of the UK Companies Act 2006.

⁸² Cf Murray and Langford (2021) that they may be the same for incorporated charities.

⁸³ Boadle (2016) at 541 states that "what is improper for a director exercising a fiduciary power is very different from what is improper for a shareholder exercising a non-fiduciary power".

⁸⁴ While there are suggestions that purposes be put into the corporate constitution: Langford (2020), Davies (2023) has pointed out that it will end up as with previously wide objects clauses used to circumvent the ultra vires rule or the failure of French voluntary codes. This is illustrated in recent amendments to Article 1835 of the French Civil Code which merely 'allows' rather than mandate a corporation to specify its 'raison d'être' in its articles of association. Bainbridge (2023) at 4.8 says of the 30 odd US states that have adopted constituency statutes that they are permissive and not mandatory.

⁸⁵ The other thing to note was that the shareholders could bring the actions personally and not derivatively through the company.

the company against its directors, and was seen as inappropriate and not brought in good faith.⁸⁶ What also helps is that the duty on directors to act properly is arguably directly owed to shareholders⁸⁷ when the decision is not with respect to the company's external relations but one involving the internal structure of the company and constitutional balance of power, such as its legal capital. We need to extend this to some of a company's external activities.

Schwarcz, who brings a US perspective to the issue of temporal conflicts caused by mandatory corporate disclosure, however, sees the proper purpose rule in company law as balancing the interests between present investors, and not one between such investors and potential bidders or future shareholders as had been pointed out to him by some Commonwealth academics.⁸⁸ It is therefore unlikely that the proper purpose rule in its present form or the focus on the interests of long-term investors, can be seen, by themselves, to directly involve or resolve a temporal conflict. But it does recognise that there are different interests within the constituency of shareholders that fall within the conception of a company that directors have to bear in mind in making their decisions even if shareholder primacy remains the goal. In contrast, company law has traditionally assumed that shareholders have similar interests, compared to the adverse interests of trust beneficiaries.⁸⁹ What will be argued for below is a further understanding to the proper purpose rule to focus on the interests of reasonable shareholders, particularly given the present disclosure rules applicable to listed entities which, while they contain elements preserving fairness between existing shareholders (particularly insiders versus outsiders), are equally intended to protect future shareholders indirectly through a 'reasonable investor' test. This creates a variation of the single owner test of sorts and reduces any conflict.⁹⁰

Reasonable shareholders

Hu has highlighted the intergenerational problems involved in the context of US periodic disclosure:⁹¹

⁸⁶ *Clientearth v Shell Plc* [2023] EWHC 1137 (Ch), [64]. In a sense, this and securities class action litigation are in each other's places: Booth (2009).

⁸⁷ See Birds et al (2019) at 568. *Sequana* at [234] suggests that a breach of proper purposes can be ratified by shareholders, which is consistent with cases like *Bamford v Bamford* [1968] 3 WLR 317 (UKCA).

⁸⁸ Schwarcz (2005) at 1067, brings a US perspective to the Commonwealth cases like *Howard Smith v Ampol Petroleum* (1974) AC 821, *Teck Corp v Millar* (1972) 33 DLR (3d) 288; *Hogg v Cramphorn Ltd* (1967) Ch 254.

⁸⁹ Sitkoff (2004) at 650-2.

⁹⁰ Farnsworth (2007) Ch 4.

⁹¹ Hu (1991) at 1300, points out that the problem really exists because of the fact that financial innovation and trading turnover has dramatically increased over the previous generation (at 1302-3).

The timing and nature of such disclosures could help those who are shareholders at one point in time and hurt those who are shareholders at another. To the extent that securities laws allow some discretion in the timing of disclosures, managers have a basic fiduciary problem in terms of which “generation” of shareholders to favour.

Here, present and future shareholders clearly have different interests in that the former (who would have otherwise sold) prefers the disclosure of positive information that results in increases in the share price, and the latter (who would otherwise have bought) is very much dependent on the prompt disclosure of negative news. Existing shareholders may not even care that the company performs poorly, or that disclosure of such performance is made, so long as the trading price goes up, and stays that way until they sell their shares.⁹² It is partly for such reasons that Hu has argued against the strong form conception of ‘maximising shareholder value’⁹³. The law deals with this by requiring continuous disclosure to reach a ‘reasonable investor’ standard. So, for example, Australia’s s 674 of the Corporations Act 2001 states that the listed entity must disclose confidential information required of it by an exchange’s listing rules if ‘a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value of ED securities of the entity’. In Singapore s 203 of the Securities and Futures Act 2001 states that a listed entity must disclose what the listing rules require and those rules go on to state at rule 203 that the entity can only not do so, ‘where a reasonable person would not expect the information to be disclosed’. The reasonable investor standard helps disclosure committees on boards decide what to say into the market and is both a requirement and a form of protection as they try to balance what different shareholders may want said at various times. In Singapore, the courts have held that the materiality threshold for s 203 is based on price-sensitivity, and this is a more difficult test to satisfy than the trade-

⁹² Although they may care that insiders could have sold before the inevitable and eventual disclosure of the negative information – discrimination of existing shareholders to that extent can, however, be controlled by the existing proper purpose rule.

⁹³ Hu (1991) at 1284. But he believes also that neither the focus on the entity itself, or the recognition of ‘blissful shareholder wealth maximisation’ (which focuses on long-term shareholders) solves the conflict between present and future shareholders (at 1287-88).

sensitivity test for insider trading.⁹⁴ The US SEC has published a statement that they should focus on the reasonable investor when assessing materiality of financial disclosures.⁹⁵

While the reasonable investor standard in prospectus disclosure is not about balancing the interests of shareholders as their interests are aligned in an IPO, we have seen that standard itself evolve over time. In *Exeter Group Limited v ASC*⁹⁶ there was found to be insufficient disclosure for there to be a public offering in Australia, a country which Singapore modelled its ‘reasonable investor’ prospectus disclosure standard on from 1999. It was not enough for there to be full disclosure regarding the absence of any detailed plans on the part of the management of an investment fund which sought to raise funds from the public (in AUD2000 tranches) as to the types of companies it would invest in. There was nothing misleading in, or omitted from, the prospectus. Despite this, the Australian Securities Commission refused registration on the basis that a higher, not lower, standard of disclosure applied where a prospectus was targeted at small or retail investors.⁹⁷ Today, however, Special Acquisition Purpose Vehicles (SPACs) are structured in precisely that way, as funds raising money from public investors in order to invest in target companies that have not yet been identified (but will be within 2 to 3 years)⁹⁸. Industry norms, relevance and reliability guide the courts in determining what that reasonable investor expects to be disclosed, and this changes over time.⁹⁹

While this was not about directors’ duties but shareholder obligations in the context of alteration of articles, there might be something instructive in how things played out there. A test which only said that shareholders had to vote in what they considered was the best interest

⁹⁴ *Madhavan Peter v PP* [2012] 4 SLR 613 (Chief Justice Chan). But Booth (2013) has argued that information that would cause a reasonable investor to trade would also be information that would convince a sufficient number of investors to do so and this would naturally have an effect on the market price.

⁹⁵ SEC Statement, *Assessing Materiality: Focusing on the Reasonable Investor when Evaluating Errors* 9 March 2022.

⁹⁶ [1998] 16 ACLC 1,382. It is unlikely that the common law imposed a duty to disclose; although some cases supported the position that if anything is said it cannot be misleading: *New Brunswick and Canada Railway and Land Co v Mugeridge* (1860) 1 DR & SM 363. There were also judicial statements that refer to the duty of ‘utmost candour and honesty’ on the part of promoters who invite members of the public to invest in a company: *Central Railway of Venezuela v Kisch* (1867) LR 2 HL 99 at 113 *per* Lord Chelmsford. This could be seen as the “Golden Rule” that did not create a firm foothold: see Anon (1932) R v Kylsant: A new golden rule for prospectuses. Harvard LR 45(6):1078-1083.

⁹⁷The court rejected the argument that disclosure only had to satisfy the more sophisticated investors and that retail investors could rely on them. See also Lin (2015) arguing that the problems in financial regulation has been to only see a particular kind of reasonable investor but again that focuses more on the actual rather than hypothetical.

⁹⁸ Varottil (2023), Wan (2023).

⁹⁹ *Pancontinental Mining v Goldfields Ltd* (1995) 16 ACSR 463 (profit forecasts).

of the company was always insufficient in cases where the constitutional balance of the company was affected by the vote (as opposed to the company's external relations). In *Gambotto v WCP Limited*¹⁰⁰, the Australian High Court decided on a proper purpose test where the vote resulted in some form of expropriation of membership rights. While that case has not been followed, not even in Australia, it may have led courts to re-examine that best interest test more generally (at least outside expropriation which may involve property rights and not just different interests). In *Citco Banking v Prusser*, the Pricy Council said that the shareholders had to vote to alter the corporate constitution in a way that the 'reasonable shareholder' would see was for the company's benefit¹⁰¹. It stated that:

provided there are grounds on which reasonable men could come to the same decision, it does not matter whether the Court would or would not come to the same decision or a different decision.

And we saw earlier that non-insolvent restructurings had to be approved by shareholders in a way that an honest and intelligent person might reasonably do so.¹⁰² Where directors are concerned, their duties to balance different shareholder interests directs them to ask what the reasonable shareholder would want.

There is the advantage of keeping the focus of directors' duty to an identifiable constituency, *viz* shareholders, but recognising that the law already requires the interests of future constituents to be borne in mind by using a reasonable shareholder standard. While this stretches our current conception of the company, and the proper purpose rule, it does close the loop on directors' duties, where the best interest duty or one to promote the success to the company is too bound to stronger notions of shareholder-as-owner primacy without seeing the different interests that shareholders have in some situations. Just as the existing proper purpose rule surfaces in share issues and takeovers, where the internal balance of power is affected, an extended one that incorporates the interests of reasonable shareholders could be recognised in

¹⁰⁰ (1995) 182 CLR 432. Austin and Ramsay (2018) at 11.070; discussing the limits on the application of *Gambotto* at [11.110]. *Cf Re Southern Cross Airlines Holdings Ltd* [2000] 2 Qd R 216

¹⁰¹ *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13 (holding also that the burden of proof rested on the person seeking to challenge the validity of an amendment). See now *Arbuthnott v Bonnyman* [2015] EWCA Civ 536 at [90]-[97].

¹⁰² See also *Re Dee Valley Group plc* [2017] EWHC 184 (Ch) – share splitting to block scheme of arrangement (by making it harder to get the majority in number) failed as not voting for benefit of class.

situations of disclosure and perhaps ESG requirements. Indeed, many ESG issues are today dealt with by continuous disclosure rather than harder sanctions.

If this evolves with directors' duties, then reasonable directors have to do what they believe reasonable shareholders want when they act in the company's best interest, which can accommodate external constraints. This may be more realistic than expecting actual shareholders themselves to change, which is the main thrust of many of the corporate purpose arguments today.¹⁰³ Ernest Lim has said that the best interest duty has worked well in Singapore as Temasek, the state investment fund, is concerned with long-term sustainability. He contrasts the position in HK, where that duty on directors has not worked as well due to the proliferation of long/short hedge funds. Activist hedge funds can improve internal corporate governance although they may force a company to drop external ESG requirements if it damages profits¹⁰⁴. A further argument Lim makes is that institutional shareholders should then be fiduciaries, as should controlling shareholders¹⁰⁵, who may also oppose any ESG requirements.¹⁰⁶ Expecting shareholders to change their goals, as Paul L Davies also advocates¹⁰⁷, may not be realistic in the short term without that further step. Evidently that is the aspiration and we should continue to pressure them with Stewardship Codes and the like. And it may be that promoting ESG will eventually be consonant with share performance. But the jury is still out on that,¹⁰⁸ and in the meantime directors need to be able to act without too many masters, and to be judged accordingly.

There are leading advocates for sustainability like Davies who believe that existing director duties suffice and the judges in *Sequana* thought that there was enough too in the various provisions of the UK Companies Act 2006 to deal with constituency conflicts. Certainly, where the UK is concerned, the s 172(1) duty to promote the success of the company has to have regard to fairness between the shareholders. This may be true but as we saw with how private law developed with shareholder duties when voting to alter the corporate constitution, it could do with a nudge from the proper purpose rule as that then led to a focus on the reasonable shareholder. The allows us to accept that shareholders have differing interests but start pushing

¹⁰³ Eg Lim (2020). Davies (2023) also suggests that shareholders need to change their goals.

¹⁰⁴ Bainbridge (2023) at 10.8.

¹⁰⁵ Lim (2019).

¹⁰⁶ Gözlügöl (2021).

¹⁰⁷ Davies (2023)

¹⁰⁸ Bainbridge (2023) Chapter 8.

company directors, as Clientearth hopes, towards adopting sustainable strategies by requiring them to do what a reasonable shareholder of the company would expect. With disclosure, however, we have seen that reasonableness is both a standard and a constraint, and it may be that Shell directors at the moment are acting properly. Reasonableness works both ways. But a reasonable shareholder in an ESG fund would certainly expect it, as an investor company¹⁰⁹, to do more than what investee companies are generally required to since there is clearly less path dependence in switching out of its current assets.¹¹⁰ They in turn can pressure an investee company like Shell, as some ESG funds who are with Clientearth are, but the law must provide a way for directors to balance this against the interests of other shareholders. Companies and shareholders and not monoliths and the danger with an overly strong entity approach (as with shareholder primacy at the other extreme¹¹¹) is that we do not see their diversity. There are conflicts given the type of company involved, the interests of the shareholder, and the decision that is under consideration.¹¹² And corporate purposes work better where there is less competition.¹¹³

Conclusion

Traditional directors' duties of care¹¹⁴ and loyalty have been around for a long time and they have struggled to cope with external requirements¹¹⁵ imposed on a company (which may well be liable in negligence for non-compliance with ESG requirements) given that those duties are owed by directors to the company (providing them some shield from third parties) and by

¹⁰⁹ Which is likely to be part of the "complex, opaque chains of intermediation that characterise the western banking system" (The Guardian, 24 August 2022).

¹¹⁰ Gadinis and Miazad (2000) at 1451-52 estimated that by 2018 ESG funds controlled about 25% of total assets under management worldwide. BlackRock with its ESG funds today started out as a hedge fund in 1984 which shows the multiverse nature of investors.

¹¹¹ Hill (2020) states that it should be balanced between the public and private dimensions.

¹¹² This is even more so for benefit corporations where Bainbridge (2023) at 6.2 says that "the widespread availability of PBCs as an alternative to the traditional business corporation could alleviate growing pressure on the latter to pursue ESG".

¹¹³ Roe M (2021).

¹¹⁴ In *Sequana*, Lord Hodge at [243] disagreed with Lady Arden that the duty of care in s 174 would stop a company from taking a risky decision when doing badly as it would benefit present and future shareholders and even creditors, although losses would only be borne by the latter. Such actions would still be consistent with s 172(1) without the special duty in subsection (3). Lord Reed at [74] observed that the duty of care, unlike in the US, it is not a fiduciary duty. See also EY (2020) at 5.7.1 'If EU were not to act, current enforcement levels of directors' duty of care in Member States can be expected to remain low, in line with existing trend'.

¹¹⁵ EY (2020) at 5.1 'Director's duties and company's interest are interpreted narrowly and tend to favour the short-term maximisation of shareholder value'.

extension the undifferentiated shareholders as a whole (when those external requirements are viewed differently by them). In the US, the duty of good faith has ebbed and flowed, although it has helped with oversight liability and may require ESG compliance as not doing so is seen as disloyalty on the part of directors.¹¹⁶ However, Andrew Gold goes on to ask “if the Delaware courts haven’t stretched fiduciary loyalty concepts to the breaking point, even in corporate contexts where charters are a component of the parties’ relation.”

Hill and Conaglen argue that only US has a more stringent ‘entire fairness’¹¹⁷ approach towards the duty of loyalty but as we saw with s 172(1)(f) UK Companies Act 2006, ESG issues are less about fairness between shareholders and their rights but balancing their different interests. While there is an argument that we should identify and provide the quality investor with more votes¹¹⁸, as the EU considered with long-term shareholders¹¹⁹, that is an approach that requires the identification of actual shareholders in that category. The test proposed here which has drawn from the experience in restructuring, disclosure and alternation of articles is that courts can ask if directors have acted properly and in the best interest of the hypothetical reasonable shareholder, who is the best embodiment of the company when shareholders as a class have too many varied interests within. That requires impartiality and is linked to industry norms. The company can then be the intergenerational machine envisaged by Lynn Stout¹²⁰ and one that itself can evolve with the times.

References

- Allen, W T and Kraakman R (2016) *Commentaries and Cases on the Law of Business Organization*. 5th ed, Aspen
- Armour J (2003a) *Transactions Defrauding Creditors in Vulnerable Transactions in Corporate Insolvency*. In: J Armour & H Bennett (eds) Oxford: Hart Publishing 95-122
- Armour J (2003b) *Avoidance of Transactions as ‘Fraud on Creditors’ at Common Law in Corporate Insolvency*. In: J Armour & H Bennett (eds) Oxford: Hart Publishing 281-330.
- Armour J and Whincop M J (2007) *The Proprietary Foundations of Corporate Law*. Oxford Journal of Legal Studies 27:429-465
- Austin R P and Ramsay IM (2018) *Ford’s Principles of Corporations Law*. 17th ed, Australia: LexisNexis Butterworths

¹¹⁶ Gold (2020) at 72 asks if this has not distorted the meaning of disloyalty.

¹¹⁷ Hill and Conaglen (2018) at 308.

¹¹⁸ Cunningham L (2021).

¹¹⁹ But the Shareholder Rights Directive (Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies) was not amended in this regard by Directive 2017/828.

¹²⁰ Stout (2015).

- Bainbridge S (2023) *The Profit Motive Defending Shareholders Value Maximization*. Cambridge University Press
- Birds J, Varney M R, Leiser M, Solinas M, Attenborough D, Zhang Z (2019) *Boyle & Birds' Company Law*. 10th ed, LexisNexis
- Blair MM (2012) *Corporate Law and the Team Production Problem*. Vanderbilt Law and Economics Research Paper No. 12-12; Vanderbilt Public Law Research Paper No. 12-14. <http://ssrn.com/abstract=2037240> Accessed 20 February 2023
- Boadle R (2016) *Improper purposes in company law*. LMCLQ 529-543
- Bolton P, Li T, Ravina E, Rosenthal H (2020) *Investor Ideology* Journal of Financial Economics. 137(2): 320-352
- Booth R A (2009) *The Future of Securities Litigation*. Journal of Business and Technology Law 4:129-165
- Booth RA (2013) *The Two Faces of Materiality*. Delaware Journal of Corporate Law 38(2):517570.
- Broccardo E, Hart, O and Zingales L (2022), *Exit v Voice*, Journal of Political Economy. 130(12): 3101-3145
- Cheffins, BR (2020) *Stop Blaming Milton Friedman!* University of Cambridge Faculty of Law Research Paper No. 9/2020, European Corporate Governance Institute - Law Working Paper No. 523/2020, <https://ssrn.com/abstract=3552950> Accessed 20 February 2023
- Cox J & Hazen T (2003) *Corporations Including Unincorporated Forms of Business*. 2nd ed, Aspen
- Cunningham A (2021) *Civil Litigation of Commercial Fraud*. Clarus Press
- Cunningham L A (2021) *Ask the Smart Money: Shareholder Votes by a 'Majority of the Quality Shareholders'*. UC Davis Law Review 55:1019-1090
- Davies PL (2020) *An Introduction to Company Law*. Oxford: Clarendon 3rd ed
- Davies PL (2023) *Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements*. In: Luca Enriques & Giovanni Strampelli (eds) *Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices*. Cambridge University Press (forthcoming) <https://ssrn.com/abstract=4285770>. Accessed 21 February 2023
- Duckworth A (2001) *Trust Law in the New Millenium: Part II – Perspective*. Trusts and Trustees 11-20
- Easterbrook, F and Fischel, D (1991) *The Economic Structure of Corporate Law*. Harvard University Press
- Ernest & Young (2000) *European Commission Study on directors' duties and sustainable corporate governance*. Final Report. July. <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> Accessed 21 February 2023
- Farnsworth W (2007) *The Legal Analyst A Toolkit for Thinking about the Law*. The University of Chicago Press
- Flannigan R (2022), *The Academic Contribution to the Shaping of American Director Fiduciary Duty*, Canadian Business Law Journal 66:58-93.
- Fried JM (2021) *Rights Offers and Delaware Law*. (June 17). European Corporate Governance Institute - Law Working Paper No. 596/2021, <https://ssrn.com/abstract=3869188>. Accessed 20 February 2023

- Friedman M (1970) A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits. New York Times September 13
- Friedman, M (1982) Capitalism and Freedom. University of Chicago Press
- Goode RM (2011) Principles of Corporate Insolvency Law. 4th ed, London: Sweet & Maxwell
- Gozlugol AA (2021) Controlling Shareholders: Missing Link in the Sustainability Debate? Oxford Business Law Blog, 16 July, <https://www.law.ox.ac.uk/business-law-blog/blog/2021/07/controllingshareholders-missing-link-sustainability-debate> Accessed 21 February 2023
- Gadinis S and Miazad A (2020) Corporate Law and Social Risk. Vanderbilt Law Review 73(5):1401-1477
- Gibson R, Glossner S, Krueger, P, Matos, P and Steffen, T (2022) Do Responsible Investors Invest Responsibly? Review of Finance 26:6 1389–1432
- Gold A S (2020) The Internal Limits on Fiduciary Loyalty. The American Journal of Jurisprudence 65(1):65–82
- Gordon, R (2012), Is US Economic Growth Over? Faltering Innovation Confronts the Six Headwinds NBER Working Paper No 18313 (August 2012) <https://www.nber.org/papers/w18315> Accessed 20 February 2023
- Hayton DJ (2001) Developing the Obligation Characteristic of the Trust. LQR 117: 96-108
- Hill J (2020) Corporations, Directors' Duties and the Public/Private Divide". In: Arthur Laby and Jacob Russell (eds) Firm Governance: The Anatomy of Fiduciary Obligations in Business. Cambridge University Press 285-300
- Hill J and Conaglen M (2018) Directors' duties and legal safe harbours: a comparative analysis. In: Gordon D S and Gold A S (eds) Research handbook of fiduciary law. Edward Elgar 305-330
- Hu HTC (1991) New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare. Texas Law Rev 68:1273-1318
- Jensen M and Meckling W (1976) Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. 3 Journal of Financial Economics 3:305-360
- Jensen M and Murphy K (1990) CEO Incentives: It's Not How Much You Pay, But How. Harvard Business Review 68(3): 138–153
- Kahan, M (2003) Legal Capital Rules and the Structure of Corporate Law: Some Observations on the Differences Between European and US Approaches. In: Hopt and Wymeersch (eds) Capital Markets and Company Law, OUP, Oxford 145-150
- Kraakman, R, Davies PL, Hansmann H, Hertig G, Hopt K, Kanda H and Rock E (2004) The Anatomy of Corporate Law. OUP, Oxford
- Kay J (2012), Kay Review of UK Equity Markets and Long-Term Decision Making, Final Report. <http://www.bis.gov.uk/assets/biscore/business-law/docs/k/12-917-kay-review-of-equity-markets-final-report.pdf> Accessed 20 February 2023
- Langford R T (2020) Purpose-Based Governance: A New Paradigm. University of New South Wales Law Journal 43(3):954-976
- Leow R (2022) Corporate Attribution in Private Law. Hart Publishing
- Lim E (2019) A Case for Shareholders' Fiduciary Duties in Common Law Asia. Cambridge University Press
- Lim E (2020) Sustainability and Corporate Mechanisms in Asia. Cambridge University Press
- Lin, T C W (2015) Reasonable Investors. BUL Rev 95:461-518

- LoPucki, L M (2023) The End of Shareholder Wealth Maximization. UC Davis Law Review, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=4277872>
- Manning, B (1981), A Concise Textbook on Legal Capital. 2nd ed Foundation Press
- Mayer, Benoit (2022), Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change. In: Engert, Enriques, Ringe, Varottil and Wetzer (eds), Business Law and the Transition to a New Zero Economy, Beck, Hart, Nomos, 79-83
- McConvill, J and Joy, M (2003) The Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on an Uncharted Road. MULR 27:116-138
- Murray I and Langford R T (2021) The Best Interests Duty and Corporate Charities — The Pursuit of Purpose. Journal of Equity 15:92-125
- Payne, J (1999) A Re-examination of Ratification. Cambridge Law Journal 604-626
- Piketty, T (2014) Capital in the Twenty-First Century. Harvard University Press
- Pistor, K (2019), The Code of Capital How the Law Creates Wealth and Inequality, Princeton
- Rhee R (2023) The Neoliberal Corporate Purpose of Dodge v. Ford and Shareholder Primacy: A Historical Context 1919-2019. Stanford Journal of Law, Business, and Finance, Vol. 28 (forthcoming)
- Roe M (2021) Corporate Purpose and Corporate Competition. European Corporate Governance Institute - Law Working Paper No. 601/2021. <https://ssrn.com/abstract=3817788>. Accessed 21 February 2023
- Roe M J (2022) What is Stock Market Short-Termism? (August 16). European Corporate Governance Institute - Law Working Paper No. 658/2022, <https://ssrn.com/abstract=4194910>. Accessed 21 February 2023
- Sealy, L (1988) Directors' Duties-An Unnecessary Gloss. Cambridge Law Journal 47:175-177
- Schwarcz S (2005) Temporal Perspectives: Resolving the Conflict Between Current and Futures Investors. University of Minnesota Law Review 89:1044-1091
- Sitkoff R (2004) An Agency Costs Theory of Trust Law. Cornell Law Review 89:621-684
- Stout L A (2001) Bad and not-so-bad arguments for shareholder primacy. S Cal L Rev 75:1189-1209
- Stout L A (2015) The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form. Seattle University Law Review 38:685-724
- Tjio, H [2016] The Proper Purpose Rule. LMCLQ 176-185
- van der Zwan Natascha (2014), Making sense of financialization. Socio-Economic Review, 12(1): 99-129
- van Zwieten K and Licht A (2020) The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog. (11 April). Oxford Legal Studies Research Paper No. 15/2020 <https://ssrn.com/abstract=3573419> Accessed 20 February 2023
- Varottil U (2023) Special purpose acquisition companies: A discordant tale of two Asian financial centres. Capital Markets Law Journal (forthcoming). <https://academic.oup.com/cmlj/advance-article/doi/10.1093/cmlj/kmad003/7049583?searchresult=1> Accessed 22 February 2023
- Wan, W (2023) SPAC Regulation in Singapore and Hong Kong: Designing a Regulatory Framework for New SPAC Markets. Singapore Journal of Legal Studies (forthcoming)