KEY POINTS

- Boards are facing unprecedented challenges as they navigate the pandemic, against a backdrop of mounting legislation, investor pressure and stakeholder expectations favouring corporate responsibility and environmental, social and governance factors.
- Directors must address these challenges while complying with their legal obligations under s 172 of the Companies Act 2006: having regard to stakeholder interests as part of the core duty to promote the success of the company and considering the impact on creditors of the company where relevant.
- In this context, and amidst growing calls for stakeholder capitalism, proper consideration of corporate governance and the articulated purpose of the company, including what "success" means for an organisation, is critical.

Feature

Authors Susy Bullock and Georgina Peters

Directors' duties in the age of COVID-19: where to from here?

This article considers the prominence of environmental, social and governance factors in board decision-making in the COVID-19 context and how these fit with directors' duties under the English Companies Act, amidst rising calls for stakeholder capitalism.[1]

Needless to say, the COVID-19 pandemic has dominated the corporate landscape of 2020. Writing on 18 May, Paul Polman, Chairman of the International Chamber of Commerce and a former CEO of Unilever, said this:[2]

> "This crisis has proven companies with strong ESG credentials are far more resilient. And if anything, the emphasis on the 'S' – social – is even more important than before.
>
> Shareholder primacy was already a tired precept and this pandemic has shown that we need companies to subscribe to a much more powerful article of faith – stakeholder primacy."

The argument may sound dramatic, but it is not a novel one. The philosophical underpinnings of ESG issues were well advanced at the corporate level by the start of 2020, with increasing emphasis on human rights and climate change in more recent years. In this context, it is not surprising that the collective trauma of COVID-19 is already dominating the ongoing discussion on stakeholder capitalism.

For corporates and financial services firms, handling the fallout of this crisis responsibly and seeking to sustain operations, while protecting staff, suppliers and communities, has placed extraordinary pressure – and often conflicting demands – on boards of directors in their decision making. Companies' traditional corporate governance structures and expressed corporate purposes have been put to the test.

There have been expectations from governments, stakeholders and investors that boards will be driven by considerations more akin to the stakeholder capitalism model. This model gives equal respect to all stakeholders of the company, including customers, employees, suppliers and communities: a process described by Klaus Schwab, Founder and Executive Chairman of the World Economic Forum, as "positioning private corporations as trustees of society".[3] It stands in contrast to the traditional (dominant) model of shareholder primacy, which focuses on maximising profit for investors.

In this article, we examine recent ESG developments and consider how, particularly in the COVID-19 era, new pressures faced by company directors will square with the established English law approach to directors' duties.

GOOD CORPORATE GOVERNANCE PRE-COVID-19

Even before the pandemic, questions of appropriate governance structures and corporate purpose had risen up the agenda for multinationals. In 2015, the United Nations set 17 Sustainable Development Goals (SDGs): a sustainability blueprint for global challenges such as climate change, environmental degradation, social justice and inequality, adopted by member states and expressly supported by many corporates. By 2019, the agenda was largely driven by the climate change debate, with significant focus on reducing carbon emissions and adopting measures (by states and private actors) to reach the targets set by member states in the Paris Climate Agreement of 2015.

Against this backdrop, in August 2019 the Business Roundtable (an influential business lobby comprised of the CEOs of America's leading companies) published a new Statement on the Purpose of a Corporation.[4] The 181 CEOs who signed it committed to lead their companies for the benefit of all stakeholders. The Roundtable is US-based, but many of the signatories were CEOs of multinational organisations with UK operations which are subject to English law.

As recently as December 2019, a new "Davos Manifesto"[5] was launched by the World Economic Forum, following which stakeholder capitalism formed a key theme during the Davos sessions in January this year. The Manifesto stated the purpose of a company as being:

> "to engage all its stakeholders in shared and sustained value creation. *In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large*. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to *policies and decisions that strengthen the long-term prosperity of a company*." (emphasis added)

This has been matched, from the European perspective, by a study undertaken by the European Commission into directors' duties and sustainable corporate governance[6] (still ongoing at the time of writing). One stated objective is to analyse how possible reform in corporate law and board duties could contribute to more accountability for sustainable value creation and implementation of the Paris Climate Agreement, as well as the United Nations' SDGs.

INVESTOR FOCUS

Significantly, impetus for these developments has been driven equally by the investor community, placing additional expectations on boards. The United Nations-supported Principles for Responsible Investment (PRI) were launched in 2006, based on the notion that ESG issues should be considered alongside more traditional financial factors. The PRI have gained notable traction over recent years, as asset and investment managers and pension funds doubled down in their scrutiny of good governance and sustainability policy and practice by corporates.

Most vocal in his commentary on this issue is, of course, Larry Fink, CEO of global investment manager Blackrock. In his January 2020 letter to CEOs, he stated that climate change has brought us to "the edge of a fundamental reshaping of finance" and "in the near future … a significant reallocation of capital". BlackRock has committed to "place sustainability at the center of [its] investment approach". While BlackRock cannot divest of companies in its index funds, Fink is clear that they will be "increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them".

EMERGENCE OF NEW SOFT AND HARD LAW IMPACTING DIRECTOR RESPONSIBILITY

Recent years have seen an emergence of industry standards or guidelines which speak to stakeholder interests. In financial services, for example, the "Principles for Responsible Banking"[7] were launched by 130 banks representing more than US$47trn in assets in September 2019.[8] Principle 1 requires business strategy to align with individuals' needs and societal goals (as expressed in the SDGs, Paris Climate Agreement and relevant national frameworks), while Principle 4 states that signatories will proactively and responsibly consult, engage and partner with relevant stakeholders to achieve those goals. Companies typically embrace these kinds of principles publicly and embed them in their policies, as recorded in both financial and corporate social responsibility (CSR) disclosures each year.

Climate change has been a growing focus of regulators: for example the Prudential Regulation Authority is set to examine the resilience of the largest financial firms' business models to climate change risks in an exercise due to commence mid-2021 (deferred due to the pandemic), and the Financial Conduct Authority has various ongoing workstreams in relation to climate change and green finance, including a focus on "challenging firms where we see potential greenwashing ...".[9]

Moves are already afoot to introduce European-wide legislation in 2021 which would mandate due diligence by companies for human rights and environmental impacts, announced by Justice Commissioner Reynders on 29 April 2020. At an event hosted by the EU Parliament's Responsible Business Conduct Working Group,[10] Commissioner Reynders spoke directly of the challenge of managing short-term interests against long-term sustainability, and the important duty of care of directors in this regard. If adopted in the form which appears contemplated, these legal requirements will become embedded in the operations and risk management processes of European companies. The proposal comes at a time when many countries have already implemented (or are close to doing so) laws which require corporate due diligence (or greater transparency) for human rights issues such as child labour.[11]

Director responsibilities are also engaged when meeting corporate disclosure requirements. European member states (including the UK[12]) have implemented the Non-Financial Disclosure Directive (2014/95/EU), containing rules on disclosure of non-financial information such as environmental protection, respect for human rights and anti-bribery and corruption. In addition, in the UK, s 54 of the Modern Slavery Act 2015 includes a requirement for commercial organisations with annual turnover of more than £36m to disclose a board-approved statement each year detailing its steps to tackle slavery and human trafficking throughout its supply chain and business.

RAPID COVID-19 DECISION MAKING

Against this background struck COVID-19. Despite extensive challenges faced by boards in managing their organisations and liquidity during the crisis, numerous companies have made choices which respond to the interests of their stakeholders or communities, as part of their drive towards sustainability and corporate responsibility.

The ability to protect employees' interests was made easier by the introduction of the UK government's Coronavirus Retention Scheme, enabling employers to put employees on furlough, at least in the short-term. When it comes to active employees, Google has announced that homeworking for the majority will be permitted until the end of this year, whilst Facebook gave employees US$1,000 bonuses for their home-working costs.

More widely, examples of corporate responses to COVID-19 are plentiful. In the manufacturing and car industries, for instance, many boards swiftly moved to repurpose their factories to produce PPE or other critical machinery for the NHS. On a global level in the retail sector, companies such as H&M and Inditex have pledged to honour orders which were cancelled post-production to protect their supply chains or have repurposed manufacturing hubs to prepare PPE for health services.

And in financial services, banks across Europe have taken a variety of steps to support government programmes and their own clients, including: suspending mortgage payments, offering significant credit lines for SME and corporate clients, and rolling out bridge loans and relief programmes.[13] Santander has established a €25m fund for medical equipment (funded by a reduction in salaries of senior management), whilst UBS made a US$30m commitment to fund COVID-19 relief efforts globally.[14]

Numerous banks and insurers have also resolved (often at the urging of their regulators) to withhold current dividend payments. Aviva, for example, announced on 8 April that the board had withdrawn its recommendation to pay the 2019 final dividend to ordinary shareholders "in the wake of the unprecedented challenges Covid-19 presents for businesses, households and customers …".

All these moves evidence short-term corporate responsiveness to wider stakeholder interests; but it should be recognised that these decisions have been taken in a crisis situation, their short-term nature perhaps being more easily justifiable on that basis. What remains to be seen is how companies will behave in the long-term, against the COVID-19 backdrop. Will board directors – as the ICC Chairman pithily put it – "subscribe to a much more powerful article of faith – stakeholder primacy"? And even if they have the desire, how is the vision of stakeholder capitalism accommodated within existing English law on directors' duties?

ENGLISH LAW ON DIRECTORS' DUTIES

It is some fourteen years since the general duties which directors owe to a company were codified in Pt 10, Ch 2 of the English Companies Act 2006 (although the substance of those duties were, in part, already well-entrenched at common law or in equity). Section 170(1) makes clear that the duties in ss 171 to 177 are owed by a director to the company. Now well-known, the general duties are:

- to act within powers (s 171);
- to promote the success of the company (s 172);
- to exercise independent judgement (s 173);
- to exercise reasonable care, skill and diligence (s 174);
- to avoid conflicts of interest (s 175);
- not to accept benefits from third parties (s 176);
- to declare an interest in a proposed transaction or arrangement (s 177).

Codification of directors' duties was not intended to be a comprehensive code: as Lord Goldsmith, then Attorney-General, said of the general statement during the Bill's passage through Parliament:

> "The directors may owe a wide range of duties to their companies in addition to the general duties listed. Those are general, basic duties which it is seen as right and important to set out in this way. The statement that these are the general duties does not allow a director to escape any other obligation he has, including obligations under the Insolvency Act 1986."[15]

Of course, the statement is formulated in terms which make clear the duty is owed "to the *company*", reflecting the company's separate legal personality (from the shareholders) – not to individual shareholders nor to the company's creditors.[16] Nevertheless, prior to 2006, for the most part, the company's interests were historically determined by reference primarily to the interests of shareholders (as a general body).

Section 172, however, which contains the duty to promote the company's success, is framed as follows:

> "(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 to (amongst other matters) –
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,[17]
> (c) the need to foster the company's business relationship with suppliers, customers and others,
> (d) the impact of the company's operation on the community and 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 a company.
>
> (2) Where to the extent that *the purposes of a 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.*
>
> (3) The duty imposed by this section *has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interest of the creditors of the company*." (emphasis added)

On one hand, this provision did no more than to codify a director's pre-existing duty to act in the way he considers would be most likely to promote the company's success for the benefit of its members as a general body. How this provision departed significantly, however, was in its express requirement for a director to have regard to identified (but non-exhaustive) considerations, certain of which are directly referable to the interests of wider stakeholders. Those which were identified were said to reflect wider expectations of responsible business behaviour.[18]

LEGISLATIVE BACKGROUND TO s 172

In considering where to from here, it is important to understand why we are where we are. There are two facets to this. First, s 172 saw stakeholder considerations expressly introduced, but as part of a core duty having foundations in a company model deriving from the Victorian era: that a company is a legal person distinct from its members, but (in the case of a company limited by shares) operated for their benefit.[19] Legislative intention was not revolutionary; as Lord Sainsbury remarked, it maintained:

> "… the important principle, established by our predecessors, of enabling shareholders to be the primary regulators of corporate behaviour …"[20]

Second, this essential model was maintained despite the stirrings of stakeholder debate even at that time. During the Act's evolution, a House of Commons committee report on the White Paper on Modernising Company Law[21] recognised the debate reigning between Enlightened Shareholder Value (ESV) and the pluralist approach to defining directors' duties.

In short, the ESV approach maintained that the director's primary duty was to maximise value for shareholders but accepted other relationships as being significant in this and the need for them to be taken into account when judging how to carry out this duty. The interests of employees, customers, suppliers, and local residents, as well as the environmental impact of the company's activities and its good standing in the eyes of the public, were all noted as factors which had to be considered when judging what was in the interests of shareholders.

By contrast, the pluralist approach would require a more fundamental change in the way that directors' duties had been applied at common law, forcing directors to consider the interests of stakeholders in their own right (as opposed to considering the *impact* of their attempts to produce shareholder value, on the wider stakeholders). In other words, shareholders would become merely one of a number of parties whose interests the directors would weigh against each other when making decisions.

This divergence represented a fundamental disagreement about the purpose of company law (although even the pluralists felt the ESV approach represented progress on existing law). ESV advocates, on the one hand, viewed the ultimate objective of generating maximum shareholder value as the best means of achieving overall prosperity and welfare. Pluralists, for their part, advocated using company law as an instrument for forcing companies to serve the wider range of interests – being valuable in their own right, and not as a means of achieving shareholder value.

For example, one model by which to implement pluralism (proposed by the TUC) required representatives of various stakeholder groups to be included in the company's decision-making process, challenging the standard model of a single board comprising executive and non-executive directors. The Corporate Social Responsibility Commission (CORE) supported the introduction of a duty of care, forcing directors into responsibility for the impact of their decisions on other stakeholders.

The Company Law Review Steering Group ultimately rejected the pluralist approach, considering that it would confuse the issue of directors' duties, giving directors little in the way of guidance in decision-making. The Group considered that it also ran the risk of creating a litigious climate for business, where those parties who felt they had not been treated as they would have liked by a company's directors sought recompense through the courts.[22]

The essential thrust, therefore, of the s 172 approach (as ultimately legislated) was not whole-scale, surgical reform of existing company law, but a gentler progression towards ESV. It still views the purpose of company law as being to promote the long-term success of companies, whilst requiring management to have regard to factors such as goodwill that involve interest groups other than shareholders.

SECTION 172: WHAT IS SUCCESS?

There are (at least) three elements to s 172(1). The first is incontrovertible: it makes plain that a director's core duty is to act in the way he considers would promote the company's success (for the benefit of members). The second and third, perhaps less straightforward: what does "success" mean in each case, and by what means or to what extent must directors consider the interests of other stakeholders when fulfilling that core duty.

Taking them in reverse order, the result is that directors *are* obliged to take stakeholders' interests into account and to consider the impact of their decisions on those parties (not only shareholders), but (under the statute) they are not to be considered independently from (nor superior to) what is ultimately judged to promote the company's success in members' interests. In other words (as the law presently stands), shareholder primacy: but with a statutory requirement ("have regard to") to take account of stakeholder interests.

And as to the company's success, evidently the decision as to what will promote this is one for the director's good faith, business judgment. Directors have an unfettered discretion on decision making (subject to the company's constitution and articles), so long as they behave in what they judge to be most likely to promote the company's success.

This test is essentially subjective, embodied in the words "he considers, in good faith".[23] This has been tempered to some extent in *dicta* of certain decisions, holding that the analysis may involve taking account of objective considerations, such as where the challenging party can show there are no reasonable grounds on which the decision could have been made (ie a rationality test),[24] or where there has been a wholesale failure to consider the company's interests.[25]

It forces the shareholder seeking to challenge a decision to demonstrate that the director failed to behave in a manner in which he considered was in the company's interests: in other words, putting the court to the task of assessing the director's state of mind – but subject, where relevant, to any objective considerations demanded by the particular facts, such as irrationality or an obvious absence of good faith.

Further, legislative intention appears to have been that the company's "success" would be informed by the company's express corporate purposes. At least this seems to have been in Lord Goldsmith's mind, when he said:

> "… it is for the directors, by reference to [the objective of the company] – to judge and form a good faith judgment about what is to be regarded as success for the members as a whole … they will need to look at the company's constitution, shareholder decisions and anything else that they consider relevant in helping them to reach that judgment …"[26]

Clearly this permits a director to promote the interests of the stakeholders identified in ss 172(1)(b) to (d) (or any other relevant stakeholders) – so long as the director has, in good faith, concluded that doing so would be regarded as "success" for the company, having regard to its constitution, articles, any resolutions which might have been passed by the shareholders, and "anything else that they consider relevant". Again, Lord Goldsmith articulated the limits to the role of stakeholder interests in this way:

> "We want the director *to give consideration to the factors identified as necessary for the decision that he has to take, and no more than that.* We do not intend a director to be required to do more than good faith and the duty of skill and care would require ..." (emphasis added)[27]

When a director assesses how to achieve corporate success, the weight to be given to those different interests is a matter for his/her good faith judgement, which gives a director a certain amount of protection when facing complaints (or allegations of breach of duty) by aggrieved shareholders or stakeholders. However, what is increasingly becoming clear in the wider corporate debate is the perennial (potential) tension between short-term shareholder gain and long-term value creation. Where those different interests present different (conflicting, even) courses of action, navigating a balance between them will ultimately (on the wording of the statute) point back to the director's interpretation of the company's success (his core duty): as above, informed by the expressed corporate purpose and anything else which is relevant.

As to this, s 172(2) makes expressly clear that success has to be judged by reference to the purposes of a company and recognises that in a particular case those purposes may "consist of or include purposes other than the benefit of its members". Whilst it might traditionally have been thought that for most businesses, shareholders' primary concern will be maximising investment returns, the focus by investors (eg the Principles for Responsible Investment, referred to above) indicates that priorities are now changing (at least at the institutional investor level). This suggests, within the confines of s 172, that renewed focus ought now to be placed on how a company's purposes are articulated and implemented.

DUTIES OWED TO DISTRESSED COMPANIES

In reality, for certain boards, decisions in response to the COVID-19 impact will be made in relation to companies in financial distress. Where the relevant insolvency threshold is met, the distinguishing feature of this scenario is the director's obligation to "consider or act in the interest of the creditors of the company": preserved, or recognised, by s 172(3). The established position now is that when the company is or is likely to become insolvent, directors owe a duty to creditors to act in their interests.[28]

The rationale for the duty is normally regarded as being the prospective interests of creditors in the assets of the company through the operation of the statutory insolvency scheme.[29] In many cases, it will see the debate shift significantly to an analysis of whether decision-making is in the interests of the company's creditors (as opposed to its shareholders).

The question of precisely when this threshold is reached, as well as the content of the duty, was last year considered by the Court of Appeal in *BTI 2014 LLC v Sequana SA*.[30] The court went only so far as to confirm that once a company is presently and actually insolvent, "it is hard to see that creditors' interests could be anything but paramount". The question whether, and when, those interests might "be considered without being decisive" was not answered definitively by the Court of Appeal.[31]

The harder question (post-*Sequana*) might be: to what extent is a director still required – or permitted – to consider the wider stakeholder interests in s 172(1), if the company is likely to become (but is not yet) insolvent, and the director believes that a decision taken which promotes those interests will ultimately enhance the company's long-term prosperity. Once the insolvency threshold is met, it would be challenging (to say the least) for a director to justify taking decisions in aid of stakeholders if the result is to deplete the company's assets, and where it would put at real risk the creditors' prospects of being paid. Or as Norris J has put it, "the acts which a competent director might justifiably undertake in relation to a solvent company may be wholly inappropriate in relation to a company of doubtful solvency where a long-term view is unrealistic".[32]

SECTION 172 IN THE COVID-19 ERA

Whilst it has been recognised that the precise content of the core s 172 duty "may vary from case to case depending on the circumstances of the company and on the type of decisions that the directors are called upon to make",[33] the draftsman is unlikely to have contemplated a global crisis of the scale and nature of COVID-19. Consideration of stakeholder interests (whether those identified under ss 172(1)(b) to (d) or otherwise) have not featured largely in the case law to date (allegations of breach of duty instead tending to focus on the more frequent occurrences of diversion of corporate opportunities, loans to or unprofitable contracts with affiliated companies, and so on).

In practice, the type of decisions now facing company directors are materially impacted by the pandemic (inevitably), with boards operating in unchartered territory. In particular, directors of financially distressed companies may have questions as to the extent of their existing duties, in light of the government's temporary suspension of a director's liability under the wrongful trading provisions in s 214 of the Insolvency Act 1986 (retrospectively from 1 March 2020, and at the time of writing, currently proposed in s 10 of the Corporate Insolvency and Governance Bill, with exclusions for certain types of financial institutions and firms, or entities that are FCA-regulated). This temporary relief is aimed at enabling directors to keep unprofitable businesses in operation without personal liability for depletion of company assets, notwithstanding that they may know (or ought to know) that there is "no reasonable prospect that the company would avoid going into insolvent liquidation".

However, this does not relieve a director of his s 172(3) duties, where, for example, the business is being conducted unprofitably *and* the insolvency threshold under s 214 would be met (no reasonable prospect of avoiding insolvent liquidation).[34] In such a case (as the law stands), a director will likely struggle to justify, for example, the unnecessary acquisition of expensive supplies or entry into a substantial loan as serving the company's best interests (judged by reference to its creditors), if the company is unlikely to have sufficient funds to repay its debts. Moreover, the long-term interests of stakeholders are unlikely to hold much significance at this point in the company's decision-making, at least if they have economic impacts on the company's immediate financial health.

Even for healthier companies, of some interest is the note released by the Government on 7 May entitled *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency.*[35] The guidance is non-statutory, and said to be "for [contractual parties'] collective benefit and for the long-term benefit of the UK economy".

A diverse list of contractual matters is set out (for which responsible behaviour is advocated), ranging from issues concerning compliance with contracts, to those concerning forbearance to contractual counterparties. The options available to parties are considered from both sides: eg "making, and responding to, force majeure, frustration … claims". Responsible and fair behaviour in relation to contracts materially impacted by COVID-19 is said to include:

> "… being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party, the availability of financial resources, the protection of public health and the national interest."

Of course, in reality, the extent to which directors interpret and adopt the guidance (to preserve contractual relations), will still require the appropriate balance to be struck between all the relevant interests, arriving at decisions which best promote the company's success. Having said that, from the director's perspective it seems unjust (to say the least) if the content of a director's duty under s 172 (whether pre-insolvency or not) will not in some way be shaped by these developments.

For example, where a director continues the business unprofitably even though the s 214 threshold has been crossed (so no reasonable prospect of avoiding insolvent liquidation), might (should?) the s 214 relaxation not influence his/her pre-insolvency duty to consider creditors' interests, enabling the director to, for example, expend company funds in aid of its long-term economic survival, even though it might place creditors' immediate chances of being repaid on time at risk? And might (should?) a director be protected from a breach of duty action where he/she has acted in compliance with the government's guidance on responsible contractual behaviour (for example, bringing a premature end to a burdensome contract, even where this risks a counterparty breach of contract claim)?

CONCLUDING REMARKS

What is clearly occurring – both pre-COVID-19 and now – is a changing dialogue (at both board and investor level) as to the meaning of a company's success, and in particular, the philosophy that providing value for shareholders may lead to short-termism, as opposed to the long-term financial health and prosperity of the company (and, in turn, its investors). Long-term consequences are, after all, expressly recognised as a factor to be considered under s 172(1)(a).

Even in the case, though, where this impetus derives from investors, it has been held that shareholder pressure cannot justify cutting across the duties contained in s 172(1). In an administrative law decision of Sales J in *R (on the application of People & Planet) v HM Treasury,*[36] the possibility of a majority shareholder (HM Treasury) exerting influence on the board of directors (of Royal Bank of Scotland) to have regard to environmental and human rights considerations under s 172 was recognised. However, any more interventionist policy (by seeking to impose HMT's specific policy on these matters, contrary to the board's own judgement[37]) was given short shrift as an attempt to press the board beyond the limits of its statutory duties. As English law currently stands, the core duty to promote the company's success will be determinative.

How the company's success is defined is especially prescient in the COVID-19 context. Boards are being seen to make operational or financial decisions which are actively driven by the wider interests of employees, suppliers, or the local community, informed by concerns over sustainability and the long-term future of both the company and the communities which it serves. In cases where there is scope for argument – or direct conflict – between different interests as to what will best promote the company's success, the way in which these questions are resolved will inevitably be tied directly to the factual position of each company, its corporate purposes, the specific interests which it serves, and, of course, its current financial health. The point: that against this background, the ongoing calls for stakeholder capitalism, corporate responsibility and sustainability could not be more timely, nor demand more careful consideration. ■

1 This article first appeared in the June 2020 edition of the South Square Digest, which can be accessed here at https://southsquare.com/articles-publications/south-square-digest-editions

2 https://www.telegraph.co.uk/business/2020/05/18/time-redesign-traditional-capitalism-put-focus-values/

3 https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/

4 https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans

5 Davos Manifesto 2020: *The Universal Purpose of a Company in the Fourth Industrial Revolution.*

6 https://emeia.ey-vx.com/4429/82548/landing-pages/dg-just-sustainable-corporate-governance---survey-for-legal-practitioners.pdf

7 Developed as a partnership between the United Nations Environment Programme Finance Initiative and 30 founding banks and

Biog box
Susy Bullock is a partner at Gibson Dunn specialising in financial services/commercial litigation and business and human rights. She is former Head of EMEA Litigation at UBS. Email: sbullock@gibsondunn.com
Georgina Peters is a barrister at South Square Chambers, specialising in banking and finance litigation, insolvency/restructuring and company law. Georgina is a Contributor to *Company Directors: Duties, Liabilities and Remedies* (OUP, 2017). Email: georginapeters@southsquare.com

launched in September 2019.
8 www.unepfi.org/banking/bankingprinciples/
9 https://www.fca.org.uk/publications/feedback-statements/fs19-6-climate-change-and-green-finance
10 https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/
11 Eg, the *French Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*; the Dutch Child Labour Due Diligence Law (*Wet zorgplicht kinderarbeid*) of 14 May 2019.
12 The Companies, Partnerships and Groups (accounts and Non-Financial Reporting) Regulations 2016 (SI 2016/1245).
13 Steps taken by signatories to the Principles of Responsible Banking are summarised at: https://www.unepfi.org/banking/bankingprinciples/responsible-banking-in-the-covid-19-crisis/
14 https://www.businesswire.com/news/home/20200430005830/en/COVID-19-Crisis-UBS-Americas-Financial-Support-Address
15 Lords Grand Committee, 6 February 2006, col 249.
16 Recognised (at common law) by Dillon LJ in *Multinational Gas and Petrochemical Co Ltd v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, 288 (CA).
17 Which in fact replaced s 309 of the Companies Act 1985.
18 Explanatory Notes to the Companies Act 2006, para 326.
19 It was in 1844 that companies could be incorporated otherwise than by Royal Charter or Special Act; in 1855 that a registered company could assume limited liability; and in decisions of the late 19th century that the separate legal personality of a company began to be recognised, ie *Ashbury Rail Carriage & Iron Co Ltd v Riche* (1874) LR 7 HL 653; *Trevor v Whitworth* (1887) 12 App Cas 409.
20 Hansard, House of Lords, Vol 677, Col 182 (11 January 2006).
21 Trade and Industry Committee, The White Paper on Modernising Company Law, Sixth Report of Session 2002-03.
22 Company Law Review Steering Group, *Modern Company Law: For a Competitive Economy – Developing the Framework*, DTI (March 2000), paras 3.30 to 3.31.
23 As recognised in the pre-s 172 case law: eg *Re Smith and Fawcett Ltd* [1942] Ch 304, 306 (CA) per Lord Greene MR; *Re Regentcrest plc v Cohen* [2001] BCC 494, [120], per Jonathan Parker J; and post-s 172, eg *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), [191] *et seq.*, per Popplewell J.
24 There are currently conflicting positions on this: see *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239, [4598] *et seq.*; however, the rationality test was expressly rejected by the Royal Court of Guernsey in *Carlyle Capital Corporation Ltd v Conway*, 38/2017 (4 September 2017) at [396] to [412] (the judgment as a whole being upheld on appeal: [2019] GCA 014).
25 See, eg dicta of Pennycuick J in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.
26 Hansard, House of Lords, vol 678, cols 255-6 (6 February 2006).
27 Hansard, House of Lords Grand Committee, col 846 (9 May 2006).
28 Pre-2006, under the line of authority deriving from *West Mercia Safetywear Ltd v Dodd* [1988] 4 BCC 30, 33; most recently, the Court of Appeal examined the meaning of the insolvency threshold in *BTI 2014 LLC v Sequana SA* [2019] 2 All ER 784, per David Richards LJ.
29 [2019] 2 All ER 784, [217]. The reason for this is that once the company enters insolvent liquidation or administration, the creditors will look to the company's assets to discharge their debts, whilst shareholders are left to participate in any surplus remaining after (and only if) the creditors' debts have been discharged in full.
30 [2019] 2 All ER 784, [220] to [222]. The specific question of whether there is a pre-insolvency duty to consider creditors' interests, and if so at what point it is triggered, is subject to a pending appeal before the Supreme Court.
31 Which left the question to be decided on the facts of cases which might arise in the future, because it was not an issue which arose on the *Sequana* facts.
32 *Roberts v Frohlich* [2012] BCC 407, [98].
33 *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239, [4395] *et seq.*
34 Neither is a director relieved from his duties arising in connection with s 239 of the Insolvency Act (should the company ultimately enter an insolvency process), precluding a director from giving a preference to one creditor to the ultimate detriment of others (within the meaning of that section).
35 https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency
36 [2009] EWHC 3020 (Admin).
37 Required to act in the interests of all shareholders, not just the majority; made clear by both s 172(1) and s 172(1)(f).

Further Reading:

- Beyond wrongful trading: remaining risks and responsibilities (2020) 6 JIBFL 391.
- Directors' duties and insolvency (2019) 6 JIBFL 407.
- LexisPSL: Banking & Finance: Directors' duties: companies in financial difficulties.