

Hunting the Snark: Defining Business Judgment

In Lewis Carroll's nonsense poem, in which a crew of ten hunters (one of whom is a barrister) pursue the eponymous highly elusive creature over a period of months, neither they nor we ever catch a glimpse of the Snark (though one of their number disappears in the course of the hunt and is presumed carried off). As we discovered, defining and developing a concept of business judgment turned out to be a little like hunting the Snark.

When we explain that we are investigating business judgment, many people assume that we are referring to the business judgment rule (BJR)-about which much has been written. In contrast, however, the focus of our inquiry-what constitutes a director's business judgment -has been largely overlooked. The leading US practitioner text on the BJR (Block, Barton and Radin,1998) is over 2000 pages long. But only 2 pages are devoted to defining a business judgment, and these indicate that for the BJR to apply there needs to be a business judgment, and that decisions about whether to comply with the law are not business judgments. This is of limited assistance in understanding what exactly a business judgment is.

The first stage of this AHRC funded project has therefore been devoted to examining how the courts use the term business judgment and to developing a conceptual understanding of business judgment. To do this we considered Australian case-law and leading Delaware cases applying the BJR, and case-law in England and Wales.

Unfortunately, not only has there previously been very little consideration of the issue academically, but the case-law generally throws little light on why something has been classified as business judgment. It isn't though the case that every decision a director makes is a business judgment, which would be an unappealing argument in any event-after all why should directors receive immunity from court review simply because they are directors?

Because there is no BJR in England and Wales, the courts do not often use the business judgment. Dr Francis Okanigbuan has conducted an extensive search of Westlaw and Lexis for cases based on directors duty of care; directors disqualification; wrongful trading ; unfair prejudice petition; permission to bring a derivative action; duty to promote the success of the company; cases relating to the duty to consider creditor interests; proper purpose cases. Close to 400 cases have been identified from the search.

We observed that 'business judgment' has been sparingly used (only in 8 cases) to describe the decisions of directors. Terms that are used instead include; commercial judgment, commercial decision, mercantile, and business matters. In other cases, the courts did not use any term but seemed to defer to directors' decisions.

This information has been used to build a picture of what business judgment might be. The preliminary findings have been presented by Professors Loughrey and Keay on a number of occasions ([Project Preliminary Output](#)) The next being at the SLS conference in Dublin in

September 2017. A summary will be provided here in due course. In the meantime the team is continuing to analyse the case-law and to build up a comprehensive database of business judgment cases in England and Wales. The empirical part of the project involving a series of interviews with directors and other key actors is also underway.

We will be posting updates on the project here at regular intervals. If you would like further information contact Joan Loughrey at j.m.loughrey@leeds.ac.uk