

*Centre for Business Law and Practice
School of Law
University of Leeds*

BUSINESS LAW & PRACTICE REVIEW

2007 – 2008

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1. ABOUT THE CENTRE, THE UNIVERSITY AND THE CITY OF LEEDS

The Centre

The Centre for Business Law and Practice is located in the School of Law at the University of Leeds (which is part of the Faculty of Social Sciences, Education and Law) and its aim is to promote the study of all areas of Business Law and Practice, understood as the legal rules which regulate any form of business activity. It seeks to promote all forms of research, including doctrinal, theoretical (including socio-legal) and empirical research and to develop contacts with other parts of the academic world, as well as the worlds of business and legal practice in order to enhance mutual understanding and awareness. The results of its work are disseminated as widely as possible by publishing monographs, articles, reports and pamphlets as well as by holding seminars and conferences with both in-house and outside speakers.

Staff members have acted as consultants to law firms, accounting bodies and international bodies such as the International Monetary Fund. Research has been undertaken in many areas of business law including banking and financial services, business confidentiality, corporate (general core company law as well as corporate governance and corporate finance), credit and security, contract, consumer, employment, financial institutions, foreign investment, insolvency, intellectual property, international trade, and corporate and economic crime (including money laundering and the financing of terrorism).

One of the primary functions of the Centre is to oversee the research undertaken at postgraduate level and to manage postgraduate taught several programmes in International and European Business Law. In addition, the Centre offers several undergraduate business law modules to law and non-law students.

The University

The University of Leeds is among the United Kingdom's top universities, located close to the centre of one of the most progressive, cosmopolitan and student-friendly cities in the United Kingdom. One of the largest single site universities, Leeds is a hugely popular choice for students. With over 30,000 students living in the city, it regularly tops the national polls as a favourite destination for students.

Established in 1904, the University is a member of the Russell Group, which was formed by nineteen of the country's most prestigious universities. With a world class reputation for quality in research and teaching, a degree from the University of Leeds, both undergraduate and postgraduate, is highly regarded by employers and universities worldwide.

The University has over many years invested heavily in its infrastructure to provide students with first-class learning, development, support and leisure facilities, including modern well-equipped lecture theatres and seminar rooms, an internationally acclaimed University library, an enterprising careers service, a wide range of sporting amenities and one of the biggest and most active Students' Unions in the country.

The University is one of the main centres for postgraduate teaching in the country, with around 5,000 postgraduate students drawn from all over the UK and another 100 countries world-wide. As a University of Leeds postgraduate research student, you will have access to outstanding facilities including our major academic research library and excellent computing facilities.

The City

Only a short walk from the bustling shops, boutiques, art galleries, cinemas, bars, restaurants and cafes of the city centre, the University campus is a vibrant place in which to live and study. Leeds is one of the fastest growing cities in the United Kingdom. With its continued prosperity in law, finance, business and media, the city offers great employment potential. This is complemented by an exciting mix of culture, commerce and style, making Leeds the primary social hub of the North of England. Rich in history with a growing economy and cosmopolitan atmosphere, Leeds remains an affordable student-friendly city and the centre of a region of great cultural diversity.

Leeds is a '24 hour city' that is famous for the diversity and popularity of its nightlife. The city prides itself on the vitality of its 'independent' bar scene, whilst its nightclubs offer a sophisticated and relaxed clubbing experience with a wide range of music and ambiences to suit all tastes. It is home to a wide variety of theatre, music, film and music venues including the legendary University Refectory. The annual Leeds Film Festival is also one of the leading cinema events in the country.

2. INTRODUCTION BY CENTRE DIRECTOR

This report covers the activities of the Centre for Business Law and Practice (“the Centre”) during the period from 1st October 2007 to 30th September 2008. The Centre has been gradually expanding the scope of its activities, and this has been very much in evidence during the past year. The Centre is now in a position to develop strongly as a result of the increased number of academics who are members and we look to the future with considerable confidence. In particular the Centre has continued to develop its research profile particularly in those areas where it already has considerable expertise:

- Corporate law - with special emphasis on corporate governance, corporate finance and corporate insolvency law.
- International financial law – banking and financial services and anti-money laundering.
- Credit and security law
- Contract law – including consumer law.

The past year has been another very productive year for the Centre in terms of activity of staff, research, research outcomes and growth of its postgraduate taught programmes and the number of students being enrolled in them, as well as the increase in the number of postgraduate research students. The publications of members of the Centre once again manifest the completion of some very high quality and relevant research work which spans diverse parts of business law. The number of postgraduate students recruited, for both doctoral research and taught Masters programmes, indicates the popularity and strength of the Centre’s programmes and is testimony to the standing of the Centre’s staff. One of our major aims is to further develop the postgraduate research culture within the Centre and the Law School and we are pleased to report that in this respect the Centre is growing in accordance with our plans and the number of full-time postgraduate research students has continued to increase. For the 2008-09 academic year two new programmes will be added to the menu available at postgraduate level in the Centre.

In accordance with the aim of the Centre to broaden its activities, within its remit, the Centre has organised, for several years now, a number of early evening seminars at which high-profile experts from outside the University come and present papers on business law and business law related topics. During 2007/08 we were privileged to have the following speakers :

- Professor David Milman, University of Lancaster, “Litigating Domestic Disputes within Companies,
- Professor Joanna Gray, University of Newcastle-upon-Tyne, “Risk, Regulation and BCCI,”
- Professor Blanaid Clarke, University College Dublin, “The Takeovers Directive and the Target Board,”
- Dr Sandra Frisby, Baker & McKenzie Associate Professor in Company and Commercial Law, University of Nottingham, “Pre-pack Administrations”

- Dr. Dalvinder Singh, Associate Professor in Law, University of Warwick,
“International Financial Sector Reform and Compliance”

These presentations were well supported by our undergraduate and postgraduate students as well as practitioners from Leeds and elsewhere. We intend to continue to run these types of seminars again this year and into the foreseeable future. Plans have been put in place for the Centre to invite a number of internationally renowned speakers during the academic year 2008/2009.

The talks are designed to appeal to the legal profession, business professionals (including bankers and directors), academics and students, both undergraduate and postgraduate. The seminars attract large audiences and we were pleased at the response from the legal community in West Yorkshire and beyond. They were also popular with our own postgraduate and undergraduate students, whose learning experience was enriched by being able to hear, and ask questions of, internationally acclaimed speakers on the relevant matters addressed.

The Centre has enjoyed links with the Leeds University Business School, including the sharing of Academic Fellowships and discussions on research objectives, and is developing links with the Institute for Applied Ethics in the University and the School of Economic Law at the Free University of Brussels. The Centre has also been in dialogue with legal practitioners in Leeds in order to improve links between the Centre and practice and to establish how the Centre might serve the interests of those in the legal profession who practice in the business law field. There have been some discussions concerning the possibility of law firms sponsoring certain research projects.

I have just returned to acting as Director of the Centre (I acted as Director from 2002 until 2005). From 2005 to 2008, Andrew Campbell ably fulfilled the role. During the past year he enjoyed the support of Joan Loughrey as Deputy Director and other colleagues and members of the Centre.

Full details of the Centre's activities can be found at www.law.leeds.ac.uk/leedslaw

**Professor Andrew Keay
Director of the Centre for Business Law and Practice**

November 2008

3. RESEARCH DEGREES AND TEACHING PROGRAMMES

A. Research Postgraduates

The Centre for Business Law and Practice has been expanding the number of students enrolled for research degrees, and we have a diverse range of students engaging in research in a number of areas, including corporate law, banking and finance, insolvency, and trade law. Each postgraduate student receives high quality supervision from two academics who are trained and experienced supervisors as well as being experts in the particular field of research. In addition students are provided with formal research methods training.

All research students are encouraged to take an active part in the activities of the Centre and this includes attending seminars and conferences. The Centre's research postgraduates are located in the Law Graduate Centre, which has excellent facilities. Each student is provided with access to desk space, lockable storage space, a good quality computer cluster with printing facilities and a very convivial and collegial environment (including a social room) in which to undertake their work. Additional facilities are provided at the University's central Graduate Centre, which also runs helpful training courses. The Law Graduate Centre is only a short walk from the University's main research library, which contains a well-stocked collection of relevant books, journals, materials and sources.

The Centre for Business Law and Practice welcomes applications from students wishing to pursue research into any aspect of business and commercial law. The Centre has particular expertise in the following areas: contract law; corporate law – especially corporate governance, the role and duties of company directors, corporate insolvency law, corporate rescue, corporate finance; all aspects of insolvency law; insider dealing; banking and financial services law; economic crime including anti money-laundering and terrorist financing; Islamic banking law; credit; law relating to security; intellectual property; international economic law; consumer law including consumer credit; employment law; environmental law.

All relevant proposals within the broad remit of business law will be considered and even if the proposed research topic is not listed above it may be worth contacting the Director to discuss whether research supervision would be available.

The degree schemes on offer by research and thesis only are as follows:

- Master of Laws (LL.M) – one year full-time or two years part-time
- Master of Philosophy (M.Phil) – two years full-time or four years part-time
- Doctor of Philosophy (Ph.D) – three years full-time or five years part-time
- Integrated Ph.D – four years full-time (not available part-time). This new degree combines taught classes and the traditional research thesis, with an exit award of LLM Legal Research the students complete the first two years.

The entrance requirements for all schemes are that applicants must normally possess an upper second class honours degree or equivalent. Applicants with professional qualifications or substantial professional experience are also encouraged to apply. In addition, MPhil and Ph.D applicants are usually required to hold a Masters level qualification.

Informal enquiries from applicants are welcome. Please contact the Director of the Centre, Andrew Keay at a.r.keay@leeds.ac.uk

B. Taught Postgraduate Programmes

During the academic year 2007 – 2008 the Centre offered a range of taught postgraduate programmes in international business law.

The two programmes for law graduates only are:

- 1) LLM European and International Business Law
- 2) LLM International Business Law
- 3) LLM in Insolvency Law

Students on the LLM programmes will all have a Bachelors degree in law (commonly an LLB or equivalent) and will take this course in order to develop specialist knowledge in the various aspects of business law.

The two programmes for non-law graduates only are:

- 4) MA European and International Business Law
- 5) MA International Business Law.

Traditionally those attracted to the two MA versions of the programmes tend to have a business, economics or Master of Business Administration (MBA) background. The factor they have in common is that they do not have a background in law. Such students are usually looking to acquire a significant degree of knowledge about business law without having the intention to practice law in any country.

In all the programmes, the modules are taught by seminars, and there are two 11 week semesters in each academic year. Assessments are by written work.

The numbers of people applying for entry into the LL.M and M.A. programmes has been increasing significantly over the past couple of years, as have the number of students actually registered. A high proportion of the students enrolled are from outside the United Kingdom and one of the strengths of our programmes is that students come to study at Leeds from a wide range of countries.

The LL.M. programmes involve the completion of taught modules totalling 120 credits that are taken in Semesters 1 and 2. Some modules are compulsory (this varies between programmes) and the others are optional modules chosen from a long list of available subjects. The final stage of the programme is a dissertation (worth 60

credits) being completed in the Summer, following Semester 2. The programme consists of 180 credits in total.

The compulsory modules consist of modules which are believed to form a critical base for the study of business law, nationally and internationally. Students have a broad choice when it comes to the optional modules, and this reflects the breadth of expertise in the Centre.

The dissertation, constituting 60 credits, is compulsory and forms a major part of the programmes, and reflects one of the aims of the programme, namely to foster research capabilities. The dissertation requirement permits students to engage in some detailed research of a particular issue that warrants investigation. Research for, and the writing of, the dissertation is undertaken in conjunction with a supervisor, who is a member of the law staff. The members of the law staff have a wide range of research interests and are able to supervise a broad spectrum of topics in different areas of the law.

The overall objective of this programme is to provide students with a firm grounding in many of the basic principles and rules regulating business activity in the UK Europe and around the world. The programme also aims to enable students to develop the following: analytical legal skills, ability to work independently, writing skills, and ability to undertake research.

As part of the Centre's objective to continually keep programmes under review we introduced a new LLM programme in Insolvency Law which commenced in September 2006. We believe that there should be significant demand in Leeds, which is a major commercial centre, for a programme such as this. We also designed two further programmes which have just commenced. These are LLM programmes in Banking and Finance and in International Corporate Law, and with little publicity they have recruited very well. The Centre is fortunate to have staff with international reputations for expertise in these areas and this is a particular strength which we wish to utilise. Our market research indicates that there is significant demand in these areas both from students in the United Kingdom and from overseas but at present there are few places which are able to offer such programmes.

C. Undergraduate Teaching

While the Centre does not directly run any undergraduate programmes, it makes a very important contribution to teaching of the Bachelor of Laws (LLB) degree, in particular. The Centre has developed modules that are taught to both law and non-law undergraduates. These modules have been very popular with students, and have attracted good enrolments. The modules that are taught in the Bachelor of Laws programme (although students from other programmes with the necessary prerequisites can enrol for them) are Business Law, Company Law, Banking and Financial Services Law, Intellectual Property Law, Employment Law, and Corporate Finance and Insolvency. Members of the Centre also either act as leaders, or contribute to the teaching, of the following modules : Law of Contract, International Law, Equity and Trusts, Constitutional Law and Jurisprudence. Offerings to non-law students include Introduction to Company Law and Introduction to Obligations.

4. GENERAL CENTRE ACTIVITY AND NEWS

There have been some notable achievements by members of the Centre in the past year, and not always reflected in a published piece, that are worthy of mention. What follows is a selection of some of the activities of the Centre and its members and it is not intended to be exhaustive.

In November 2007 **Andrew Campbell (Andy)** was invited to address the IMF at its headquarters in Washington, DC on the problems being experienced in the UK banking market. Since then he has regularly provided advice to the IMF and other organisations on aspects of the global financial crisis. The law and regulation of international banking and finance is already an area of increasing academic interest and over the next few years it is likely to prove to be a very exciting time to be at the forefront of global initiatives. Andy was invited to be a Fellow of the International Institute of Banking and Financial Services at the Leeds University Business School in 2008 and was elected a Fellow of the Chartered Institute of Bankers in Scotland in 2007. In addition to this he has been invited to participate as a member of the Academic Advisory Panel of the International Association of Deposit Insurers, which is based at the Bank for International Settlements in Basel, Switzerland. Andy formally took over responsibility for the development, promotion and coordination of Enterprise and Knowledge Transfer (EKT) activities within the Law School, after doing this in an unofficial capacity.

Roger Halson continues as Head of School with all of its significant demands. He became a Trustee of the Hamlyn Trust which sponsors and publishes perhaps the most prestigious series of annual lectures in Law. The first was given by Lord Denning in 1949. Roger visited East China Normal University and East China University of Politics and Law in Shanghai to conclude memoranda of understanding to facilitate postgraduate students from the latter studying for mainly business law postgraduate degrees in Leeds, as well as promoting staff visits and exploring possible research collaborations. Roger has also become a Visiting Fellow of Gray's Inn.

Andrew Keay designed the new LLM programme in International Corporate Law and a new module in Advanced Corporate Law for the LLM programmes. He obtained funding from the British Academy to enable him to undertake research in relation to the ultimate objective of the public corporation. This research investigates the existing theories pertaining to the corporate objective, the shareholder value (shareholder primacy) and stakeholder theories, and seeks to formulate a new model, the entity maximisation and sustainability model. This research will be ongoing and the intention is to develop a full-blown model to assist in the underpinning of corporate governance mechanisms. Andrew was appointed by the Open University and the College of Law to act as the external assessor of their joint new course on Company Law and Practice. He continued to act both as a member of the Panel of Academic Advisers of the Commonwealth Scholarship Commission and as a member of the Peer Review College of the Arts and Humanities Research Council. Andrew was also an external examiner at the Universities of Sheffield and Hull. His work has been cited in the past year by the High Court of England and Wales in *Re Cheyne Finance plc* ([2007] EWHC 2402 (Ch) at para 38), and *Re OMP Leisure Ltd* ([2008] BCC 67 at 68), the Hong Kong Court of Final Appeal in *Nam Tai Electronics Inc v*

PriceWaterhouse Coopers ([2008] HKCFA FACV No. 1 at [68]), the New Zealand Court of Appeal in *Dunphy and Shephard v Sleepyhead Manufacturing Co Ltd* ([2007] NZCA 241 at para 22), the Full Court of the Federal Court of Australia in *Capital Finance Australia Ltd v Tolcher* ([2007] FCFAC 185), the High Court of Australia in *Capital Finance Australia Limited & Anor v Tolcher & Anor* ([2008] HCATrans 281), New South Wales Court of Appeal in *Deputy Commissioner of Taxation v Dick* ([2007] NSWCA 190 at para 87), the New South Wales Supreme Court in *Re Mendarma Pty Ltd (No2)* ([2007] NSWSC 99 at para 26); the Federal Court of Australia in *J P Morgan Portfolio Services Limited v Deloitte Touche Tohmatsu* ([2008] FCA 433 at para 7) and *Hightoke Pty Ltd v Hayes Knight GTO Pty Ltd* ([2007] FCA 13 at para 59), and the Hong Kong Court of First Instance in *Re Orient Power Holdings Ltd* ([2007] HKCFI HCCW 191/2007 at [26]).

Gerard McCormack commenced as Professor of International Business Law at the beginning of this report period and he has been a most welcome addition to the staff in all aspects. He has been involved in a project, “UNCITRAL and the Harmonisation of Secured Credit Law” that is funded by the British Academy. The research project addresses international harmonisation efforts in the sphere of secured credit law and in particular it asks whether the most comprehensive international standard – the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions – is suitable for adoption at the national level. This area is highly important and contentious in that an efficient secured transactions law is seen to increase the availability and lower the cost of credit, thereby contributing to international development. The research hypothesis however, is that American law and American lawyers have shaped the content of the Legislative Guide to an undue extent; so much so that it is not suitable for direct and immediate translation into the laws of other countries. This specific project is intended to form the preliminary to a larger project examining the role of globalisation and international finance capital in shaping harmonisation endeavours in the secured credit field.

The current project will address a number of specific questions:

1. Why is there pressure for greater international convergence, and is “spontaneous” convergence a viable possibility?
2. What is the relative importance of the different actors and how does their work interact? Why, for instance, is the European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions much less prescriptive in tone and American in content than the UNCITRAL Legislative Guide?
3. Why has UNCITRAL assumed such a leading role in this field and why has it gone for the approach of maximum harmonisation? UNCITRAL has stressed the importance of secured credit and its intimate association with international trade. A degree of caution is appropriate however, for different States may wish to experiment with different degrees of freedom when it comes to sanctioning the creation and enforcement of security. The case for national autonomy is particularly strong in the area of consumer oriented transactions. But even in the commercial context, different States may have different views on the extent to which secured creditors should prevail over unsecured creditors and whether particular types of creditor e.g. trade creditors should prevail over other creditors e.g. finance creditors.
4. Why, on its face, is there such a large American imprint on the UNCITRAL Legislative Guide? For example, the Legislative Guide validates “all-assets security”

i.e. security over the entire business operations of an enterprise. This reflects an approach found in Article 9 of the American Uniform Commercial Code and, like Article 9, the Guide rejects the idea of carving out a proportion of the value of such security for the benefit of unsecured creditors. Similarly the Guide embodies a general principle of publicizing the existence of security through filing or registration although registrationless regimes of personal property security prevail in many economically significant jurisdictions like Germany. Moreover the Guide goes for US style “notice filing” rather than UK “transaction filing”. The notice on the register is a bare bones statement merely alerting one to the possible existence of a security interest. Further inquiries from the parties are necessary to ascertain the exact state of affairs. Although notice filing permits filing in advance of a transaction and a single filing to cover multiple transactions, having so little information on the register hardly seems justifiable in the modern information age.

In addition, mirroring the US approach, but at variance with the position in most jurisdictions worldwide, the Guide extends registration requirements to “quasi-security” i.e. functionally equivalent legal devices such as reservation of title clauses in sale of goods contracts.

5. How significant has been the influence of American lobby groups such as the Commercial Finance Association (CFA) on the Legislative Guide given their participation in the drafting work?

6. How successful is the Legislative Guide likely to be in influencing other initiatives such as the European Common Frame of Reference (CFR) and the Eurohypothec, or is its American orientation likely to limit its usefulness?

Gerard was the guest editor of a special issue of the *Singapore Academy of Law Journal* on Insolvency Law, and was a member of the scientific advisory committee for Europa Law Publishing. He continued as an adviser to the government of the Hong Kong SAR on the reform of aspects of their Company Law as part of a consultancy project headed up by Dr Maisie Ooi of the National University of Singapore. Gerard presented papers at conferences in Wuhan China May 2008 and Shanghai China September 2008 on the modernisation and harmonisation of secured credit and insolvency law and gave papers on this subject at Shanghai International Studies University and East China University of Politics and Law.

Suya Subedi has continued as the Crown representative on the Governing Board of the School of Oriental and African Studies, University of London, and as a member of the Peer Review College of the Arts and Humanities Research Council. During the Report year he became a member of the Governing Board of the National Trust for Nature Conservation of Nepal.

5. PUBLICATIONS

(a) Books

- Keay, A.** and Walton, P., *Insolvency Law : Corporate and Personal* 2nd edition, (Jordan Publishing, Bristol, 2008)
- Subedi, S.**, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, Oxford, 2008).

(b) Chapters in Books and Other Contributions to Books

Campbell, A., ‘Bank Insolvency and the Problem of Non-Performing Loans’ in P. Omar (ed), *International Insolvency Law* in *International Insolvency Law*, (Aldershot, Ashgate, 2008) at 212 – 235.

Campbell, A., ‘Market Stability and the Financial System’ and ‘Negotiable Instruments’ in Cane, P., and Conaghan, J. (eds) *New Oxford Companion to Law*, (Oxford, Oxford University Press, 2008), 761p and 829 – 830pp.

Cardwell, M., and Bodiguel, L., “La coexistence des cultures GM et non GM: approche comparative entre l’Union Européenne, le Royaume-Uni et la France”, in Parent, G. (ed.), *Production et Consommation Durables: de la Gouvernance au Consommateur Citoyen* (Éditions Yvon Blais, Québec, Canada, 2008), at pp.325-366

Keay, A., “A Comparative Analysis of the Administration Regimes in Australia and the United Kingdom,” in P. Omar (ed), *International Insolvency Law: Themes and Perspectives*, (Aldershot, Ashgate, 2008), 105-133.

Keay, A., “Winding up” in Cane, P., and Conaghan, J. (eds) *New Oxford Companion to Law*, (Oxford, Oxford University Press, 2008) at 1248.

Keay, A., “Liquidator” in Cane, P., and Conaghan, J. (eds) *New Oxford Companion to Law*, (Oxford, Oxford University Press, 2008) at 738.

Keay, A., “Distribution of assets” in Cane, P., and Conaghan, J. (eds) *New Oxford Companion to Law*, (Oxford, Oxford University Press, 2008) at 335-336.

McCormack, G., “The CFR and Credit Securities – A Suitable Case for Treatment?” in A Vacquer (ed). *European Private Law Beyond the Common Frame of Reference* (Amsterdam, Europa Law Publishing, 2008) at pp. 99-129.

McCormack, G., “Reform” in Paul Ali (ed). *Secured Finance Transactions: Key Assets and Emerging Markets* (London, Globe Law and Business, 2007) at pp. 41-56.

McCormack, G., “The UNCITRAL Legislative Guide on Secured Transactions – Functionalism and Form” in B Foex, L Thevenoz and S Bazinas (eds(*Reforming Secured Transactions* (Geneva, Schulthess, 2007) at pp. 43-62.

(c) Journal Articles

Caldwell, M., “Rural development in the European Community: charting a new course?”, (2008) 13 *Drake Journal of Agricultural Law* 21-61

Campbell, A. ‘Insolvent Banks and the Financial Sector Safety Net – Lessons from the Northern Rock Crisis’ in [2008] *Singapore Academy of Law Journal*, 316 – 342 pp.

Campbell, A., ‘Bank Insolvency and the Problem of Non-Performing loans’ in [2007] *Journal of Banking Regulation*, 25 – 45 pp.

Pearce, D. and **Halson, R.** “Damages for Breach of Contract: Compensation, Restitution and Vindication” (2008) 28 *Oxford Journal of Legal Studies* 73-98.

Halson, R. “Time Charters, Damages and Remoteness” [2008] *Lloyd’s Maritime and Commercial Law Quarterly* 119

Keay, A., and Loughrey, J., “Something Old, Something New, Something Borrowed : An Analysis of the New Derivative Action Under the Companies Act 2006” (2008) 124 *Law Quarterly Review* 469-500.

Keay, A. “Incomplete Contracts, Contingent Fiduciaries and a Director’s Duty to Creditors” (2008) 32 *Melbourne University Law Review* 141-170 (Co-author - Dr Hao Zhang).

Cerioni, L. and **Keay, A.** “Corporate Governance and the Corporate Objective in the European Community: Proposing a Re-Definition in Light of EC Law” (2008) 19 *European Business Law Review* pp. 405-445

Keay, A. “The Duty of Directors to Exercise Independent Judgment” (2008) 29 *Company Lawyer* 290-296.

Loughrey, J., **Keay, A.** and Cerioni, L., “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance” (2008) 8 *Journal of Corporate Law Studies* 79-111.

Keay, A. “Can Derivative Proceedings be Commenced When a Company is in Liquidation?” (2008) 21 *Insolvency Intelligence* 49-55.

Keay, A. “Tackling the Issue of the Corporate Objective : An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach” (2007) 29 *Sydney Law Review* 577-612.

Keay, A., "Company Directors Behaving Poorly : Disciplinary Options for Shareholders" [2007] *Journal of Business Law* 656-682.

Keay, A., and **Loughrey, J.**, "Something Old, Something New, Something Borrowed : An Analysis of the New Derivative Action Under the Companies Act 2006" (2008) 124 *Law Quarterly Review* 469-500.

Loughrey, J., Keay, A. and Cerioni, L., "Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance" (2008) 8 *Journal of Corporate Law Studies* 79-111.

Loughrey, J., 'Can You Keep a Secret? Children, Human Rights, and the Law of Medical Confidentiality' (2008) *Child and Family Law Quarterly* 312-334.

McCormack, G., "Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model" (2008) 20 *Singapore Academy of Law Journal* 396-437.

McCormack, G., "Super-priority New Financing and Corporate Rescue" [2007] *Journal of Business Law* 701 732.

McCormack, G., "Control and Corporate Rescue – An Anglo-American Evaluation" (2007) 36 *International and Comparative Law Quarterly* 515-552.

Pearce, D. and Halson, R. "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28 *Oxford Journal of Legal Studies* 73-98.

6. CONFERENCE PRESENTATIONS AND PUBLIC LECTURES

Brown, S., 'The Unfair Credit Relationship Test- an escape for the vulnerable credit consumer?' Socio-Legal Scholars Association annual conference, 19th March 2008, University of Manchester.

Caldwell, M 'Rural development in the European Community: charting a new course?', International Workshop: The Role of Law in Promoting Sustainable Farming and Rural Development, Drake University, Des Moines, Iowa, USA, October 2007

Caldwell, M and Bodiguel, L., 'La coexistence des cultures GM et non GM: approche comparative entre l'Union Européenne, le Royaume-Uni et la France', Colloque International: Production et Consommation Durables: de la Gouvernance au Consommateur Citoyen, Université Laval, Québec, Canada, September 2008

Caldwell, M and Bodiguel, L., 'GMOs: public perceptions and coexistence', McGill University, Montréal, Canada, September 2008

Campbell, A. Presented several papers on bank insolvency and associated topics at a seminar on 'Designing Effective Legal Frameworks for Problem Banks and Resolving Banking Crises', International Monetary Fund, Singapore Regional Training Institute, Singapore, August 2008

Campbell, A. 'Alternative Mechanics of Intervention', Conference on the Proposed New Regime for Resolution of Banking Problems, Cass Business School, City University, April, 2008.

Campbell, A. 'Bank Insolvency Law: Getting the Balance Right', Conference on the 'International Monetary Fund and Financial Crises: the Role of Institutional and Governance Reform', Judge Business School, University of Cambridge, April, 2008.

Campbell, A. Presented several papers on bank insolvency issues at a seminar on Central Banking and Financial Sector Regulation', Joint Vienna Institute, Vienna, March 2008.

Campbell, A. 'Deposit Insurance Reform and the Need for a Special Bank Insolvency Regime', London Financial Regulation Seminar ' The Regulatory Response to the Financial Crisis – Northern Rock', Financial Markets Group Research Centre, London School of Economics and Centre for Commercial Law Studies, Queen Mary, University of London, January 2008.

Campbell, A. 'The Banking Crisis: the Northern Rock Story', paper presented to the Faculty of Law, George Washington University, Washington, D.C., November, 2007.

Campbell, A. 'The United Kingdom Banking Crisis 2007', paper presented at the International Monetary Fund, Washington, D.C., November, 2007.

Campbell, A. 'Threats Facing Islamic Banks', Cambridge International Symposium on Economic Crime, Jesus College, University of Cambridge, September, 2007.

Keay, A., "Promoting the Success of the Company and Enlightened Shareholder Value" a paper presented at the Lancashire Law School, University of Central Lancashire on 7 March 2008.

Loughrey, J., 'The Gate-keeping and Whistle-Blowing Roles of UK Corporate Lawyers', Faculty Seminar, University of Louisville, Kentucky, April 2008.

McCormack, G., "Convergence, Path Dependency and a European Civil Code - the case of credit securities" at the WG Hart Workshop, University of London, June 2008.

Subedi, S., 'The Challenge of Reconciling Competing Interests in the International Law of Foreign Investment', a plenary speech delivered at the Inaugural Malaysian International Law Symposium organised to launch the Malaysian Society of International Law and the Malaysian Chapter of the Asian Society of International Law, in Kuala Lumpur, Malaysia, on 8 August 2008.

Subedi, S., 'Development Dimensions of WIPO and the Flexibilities provided in the TRIPs Agreement', presented at a Seminar on 'Development Dimensions of the Doha

'Development Agenda' organised by the Islamic Development Bank and the Tunisian Agency for Technical Co-operation, in Tunis, Republic of Tunisia, on 22 July 2008.

Subedi, S., 'Financing for Development in International Economic Law', presented at the Inaugural Conference of the Society of International Economic Law (SIEL) held at the Graduate Institute of International and Development Studies, Geneva, Switzerland, on 17 July 2008.

Subedi, S., 'Legal Constitutionalism and the Restoration of Democracy in Nepal', presented at the Annual International Conference of The Hague Academic Coalition on 'The Dynamics of Constitutionalism in the Age of Globalisation' under the theme 'From Peace to Justice' at the Peace Palace, The Hague, the Netherlands, 16 May 2008.

Subedi, S., 'Current Global Food Crisis and the Liberalisation of Trade in Agriculture under the WTO System', presented at a conference organised by the Centre for International Governance, University of Leeds, 9 May, 2008.

Subedi, S., 'Constitutional Response to the Post-Election Political Stalemate in Nepal', presented at a conference organised by the Peace and Conflict Management Committee of Nepal, 3rd May, 2008, Kathmandu, Nepal.

7. EDITORIAL WORK

Many members of the Centre are actively involved as members of editorial boards and editorial activity includes:

Caldwell, M., Consultant Editor, 'Agricultural Production and Marketing', *Halsbury's Laws of England: Volume 1* (Fifth Edition, Butterworths LexisNexis, London, 2008)

Campbell, A., He continued to serve on the editorial boards of the *Journal of Financial Crime*, the *Journal of Money Laundering Control*, the *Journal of Banking Regulation* and the *Journal of Financial Regulation and Compliance*.

Campbell, A. 'Editorial: Reflections on Northern Rock' in *Amicus Curiae: the Journal of the Society of Advanced Legal Studies* 2008, 1 – 2 pp.

Campbell, A. 'Editorial: The Run on the Rock and its Consequences' in *Journal of Banking Regulation* 2008, 1- 2 pp.

Keay, A., Commonwealth editor of *Gore-Browne on Companies* (Jordan Publishing, Bristol).

Keay, A. , Member of Editorial Boards of *International Insolvency Review* (Wiley) and *Insolvency Law Journal* (Law Book Co.), and Advisory Editorial Boards to

Insolvency Intelligence (Sweet and Maxwell) and *QUT Journal of Law and Justice* (Queensland University of Technology).

McMullen J., General Editor, *Employment Practitioner Series*, Oxford University Press.

Subedi, S., General Editor, *Asian Yearbook of International Law* (Martinus Nijhoff/Brill, the Hague, the Netherlands).

Subedi, S., Consulting Editor, *Peace and Conflict Studies* (George Mason University, USA).

Subedi, S., a member of the Advisory Board of *Human Rights and International Legal Discourse*, (Intersentia, Antwerp/Oxford).

8. WORKING PAPERS

*The following represents work in progress, and is not completed; some references need to be finalised. Please contact the author before citing or quoting from it. The author can be contacted at a.r.keay@leeds.ac.uk

Enforcing Adherence to Achieving the Ultimate Objective of the Company

Andrew Keay*

I Introduction

A company's constitution will often state the aims for which it has been established. For instance, it might state that the company is to carry on the business of a building contractor or a retailer of clothing. However, what the constitution will not express is how that is to be achieved by management and what is the ultimate end of the company's operations. This causes one to ask what is to be the ultimate objective of a company? The response might be (from commercial companies, as opposed to not-for-profit companies) that the end is to make profits. But that is rather glib. It says nothing about how the profits are to be made and how they are to be used, and what the company is to aim for. Often the issue had been framed in the following terms : for whose benefit is the management to conduct the company's business? There have been two primary answers to that question as far as public companies are concerned. The first comes from the shareholder primacy theory that holds that the company's business is to be managed in such a way as to benefit the shareholders, and that the

* Professor of Corporate and Commercial Law and Director of the Centre for Business Law and Practice, School of Law, University of Leeds. Some of the early research for this article was made possible by a Large Research Grant from the British Academy for which I am most thankful.

objective of the company is to maximise shareholder interests. The second answer is given by the stakeholder theory, which maintains that the company's business is to be managed for the benefit of all of the stakeholders of the company, including the shareholders. The shareholder primacy and stakeholder theories have dominated corporate law for the past 25 years, with both having their roots much further in the past.

Recently, a new normative model has been proposed to address the issue of what is to be a company's ultimate objective. This is the entity maximisation and sustainability model (EMS).¹ The model has only been sketched out, but there remain a number of issues which need to be considered in relation to the model. High on the list, and acknowledged in the work proposing the model,² is how is compliance with the model to be enforced? What if the directors fail to manage the company in line with the tenets of the model which lay down what a company's objective should be? How can their action be contested? In the words of Morey McDaniel, 'a right without a remedy is worthless,'³ so there must be some enforcement mechanism for the model to be of any practical use. There must be enforceable standards that ensure that the directors discharge their stewardship of the company's affairs and assets properly and in accord with the objective of a company. This is merely consistent with the fact that any system must have safeguards built into it.⁴ Providing for some process which permits the contesting of what the directors have done operates as a legitimating mechanism.⁵ It is critical that those who have invested in the company, and this includes shareholders, creditors, employees and others, have an avenue available to them to take some form of action if they have legitimate concerns in relation to how the company is being managed. The mechanism should be such that it will encourage a board of directors to be diligent and mindful of the way that they exercise their powers and duties. The mechanism utilised must be effective and something which can be embraced without inordinate costs in terms of finance and time.⁶ Moreover, any mechanism should not be easily or frequently employed as it could be costly and precipitate loss of business opportunities and prejudice the company's reputation.⁷

The issue of enforcement has been something that has been a problem for many areas of company law for a significant number of years (and continues to be so) and it has plagued the stakeholder theory ever since its popularisation in the early 1980s. If the directors fail to take into account a particular stakeholder's interests, what can that stakeholder do? Absent the shareholders, who are entitled to seek permission to continue a derivative claim,⁸ the answer, as far as the law goes, appears to be : very little.

¹ A. Keay, "Ascertaining the Corporate Objective : An Entity Maximisation and Sustainability Model" (2008) 71 MLR 663.

² Ibid at 698

³ M. McDaniel, "Bondholders and Stockholders" (1988) 13 *Journal of Corporation Law* 205 at 309.

⁴ Company Law Review, *Modern Company Law for a Competitive Economy* : "The Strategic Framework" 1999, London, DTI, at para 5.1.30.

⁵ S. Bottomley, *The Constitutional Corporation* (Ashgate, Aldershot, 2007) at 144.

⁶ Ibid at 148.

⁷ Ibid at 146.

⁸ Even the shareholders may have problems in taking action. See, A. Keay, "Company Directors Behaving Poorly : Disciplinary Options for Shareholders" [2007] JBL 656.

The article explores, from a normative perspective, the avenues in which the EMS could be enforced, and then argues for one particular mechanism. It is emphasised that the article is dealing with non-contractual enforcement options. Obviously, some of those to whom this article refers as “investors” (the term used in the formulation of the EMS model) and who are variously known as stakeholders, constituencies or contributors, and who have contracts with the company, will often be able to take action for breach of the contract; but this action is based on a breach of the specific contract entered into, and might have little to do with the objective of a company. The article is set out in the following manner. Part II rehearses the essential elements and effects of EMS. The next Part considers what has been said in relation to the enforcement of the shareholder primacy and stakeholder theories. Part IV, the principal part of the article, identifies and examines various alternative ways of enforcing the model and then argues for the use of one. This is followed by some concluding remarks.

II The Entity Maximisation and Sustainability Model

The model was devised because the two dominant theories for dealing with the issue of what is the ultimate objective of public companies, the shareholder primacy and stakeholder theories have found to be wanting. The shareholder primacy theory has been regarded, *inter alia*, as unfair, and, also it is not clear what it actually involves. The stakeholder theory has been perceived as being, *inter alia*, imprecise and/ or unworkable.

The entity maximisation and sustainability model focuses on the company as an entity or enterprise, that is, the company is an institution in its own right.⁹ As a consequence all directorial obligations are owed to the company as an entity.

Essentially, the model :

“involves the fostering of entity wealth, which will involve directors endeavouring to increase the overall long-run market value of the company. This will entail enhancing the value to the company as a whole, taking into account the investment made by various people and groups. An entity maximisation approach entails the directors making decisions that will maximise the general wealth of the company. In other words, directors should do that which value maximises the corporate entity, so that the net present value to the company as a whole is enhanced...”¹⁰

Maximisation of the company’s wealth, unlike with shareholder primacy, is not always measured by how much profit has been made by the company in a given period. At the same time as maximising wealth directors have to ensure that the company survives, namely it does not fall into an insolvent position from which it

⁹ A. Keay, “Ascertaining the Corporate Objective : An Entity Maximisation and Sustainability Model” (2008) 71 MLR 663 at 679. For a discussion of the entity concept, see *ibid* at 679-685.

¹⁰ *Ibid* at 685

cannot escape, but is able to stay afloat and pursue the development of the company's position.¹¹

So, the model has two elements to it, namely the maximising of entity wealth and contemporaneously ensuring the entity's financial sustainability.

At the moment UK law arguably provides for a variation of shareholder primacy. This is found in s.172 of the Companies Act 2006. The variation is known as enlightened shareholder value.¹² To implement EMS little needs to be done from a legislative perspective. Under s.170(1) of the Companies Act 2006, the duties of directors are owed to the company. In this context the words "the company" has been variously interpreted as meaning the entity¹³ or the company's present and future shareholders,¹⁴ or even both.¹⁵ So, the provision could certainly be interpreted as meaning the company as a whole, namely the entire corporate enterprise. The problem for any change at the moment comes in the form of s.172(1) as it provides, *inter alia*, that the directors are to act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole, and in doing so have regard to certain matters. This subsection could be amended to remove all of the words following "the success of the company." Importantly this would see the omission of the words, "for the benefit of the members as a whole," and the list of stakeholders who are set out in the subsection. This action would provide for a focus on the company as an entity.¹⁶

The directors will owe a fiduciary duty to the company as an entity, and, therefore, their duty is to act to promote its best interests. Undoubtedly, there is room for directors to act opportunistically or to shirk, but this is also the case with companies operating under shareholder primacy (and stakeholder theory). Shareholder primacy prides itself as providing the best answers to the agency problem, namely how do you control and monitor the directors who are regarded as the agents of the shareholders? Nevertheless, there are spectacular examples, such as Enron and WorldCom in the United States, Maxwell Communications in the UK and HIH Insurance and One.Tel in Australia, of the failure to monitor and rein in directors in the context of the practice of shareholder primacy. Clearly, managers have, under shareholder primacy, plenty of scope for self-serving activity.¹⁷

¹¹ Ibid at 691

¹² See A. Keay, "Enlightened shareholder value, the reform of the duties of company directors and the corporate objective" [2006] *Lloyds Maritime and Commercial Law Quarterly* 335.

¹³ For example, see *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627; *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363; *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453; *Brunninghausen v Glavanics* [1999] NSWCA 199; (1999) 17 ACLC 1247; *Peoples' Department Stores v Wise* [2004] SCC 68; (2004) 244 DLR (4th) 564.

¹⁴ For example, see *Parke v Daily News Ltd* [1962] Ch 927; *Brady v Brady* (1987) 3 BCC 535. Also, see *Greenhalgh v Arderne Cinemas* [1951] Ch 286 in a different context.

¹⁵ *Darvall v North Sydney Brick and Tile Co Ltd* (1987) 12 ACLR 537 at 554; (1988) 6 ACLC 154 at 176.

¹⁶ Professor Gregory Crespi advocates such an approach for the US : "Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance" (2002-03) 16 *Creighton Law Review* 623 at 633.

¹⁷ T. Donaldson and L. Preston, "The Stakeholder Theory for the Corporation : Concepts, Evidence, Implications" (1995) 20 *Academy Management Review* 65 at 87.

The issue is what if the directors act opportunistically to benefit themselves, or they shirk their duties or act in some other way that causes them to fail to fulfil the requirements of EMS? What could be done to enforce the directors' obligations? Before dealing with that issue it is interesting to see what has happened with relation to the shareholder primacy and stakeholder theories as they are of longer standing than EMS.

III Enforcement Under Other Theories

Under the shareholder primacy approach the directors have a duty to act in the best interests of the company and this is taken, effectively, to mean the shareholders.¹⁸ This duty involves focusing on maximising shareholder interests. If directors fail to do so, they are in breach. Shareholders have been given the right, for many years at common law, to bring derivative actions against directors where they have breached their duties. Some have even said that this right is provided because the shareholders are perceived as the owners of the company.¹⁹ The most frequently argued reason for granting shareholders the right to take action is that they are the residual claimants to the income generated by the company.²⁰ Arguably, one of the strengths of this approach is that the shareholders have rights which might allow them to remedy in some way the wrongs perpetrated by the directors in not adhering to the objective of the company. Derivative actions, which are provided for under corporate law in many common law jurisdictions, permit shareholders to take action against directors who have breached their duties. Most common law jurisdictions that allow for derivative actions have now codified this right, the United Kingdom doing so recently in the Companies Act 2006.²¹ The aim behind the UK's decision is the simplification and modernisation of the law in order to improve its accessibility.²² Whether or not there will be an increase in derivative claims under this legislation is moot. The legislation was only put in force from 1 October 2007 and we have few cases that have been reported.²³ Australia, which has similar legislation, and introduced in 2000, has not seen an upsurge in litigation,²⁴ and it has been suggested that the same situation is

¹⁸ The literature discussing the theory is extensive. For some of the leading works on the principle, see J. Macey, 'An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties' (1991) 21 *Stetson Law Review* 23; S. Bainbridge, 'In Defense of the Shareholder Maximization Norm : A Reply to Professor Green' (1993) 50 *Washington and Lee Law Review* 1423; B. Black and R. Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 Harv L R 1911; D. G. Smith, 'The Shareholder Primacy Norm' (1998) 23 *Journal of Corporate Law* 277.

¹⁹ L. Mitchell, 'The Fairness Rights of Bondholders' (1990) 65 NYULR 1165 at 1192-1193; M. Stokes, "Company Law and Legal Theory" in S. Wheeler (ed), *The Law of the Business Enterprise* (Oxford, OUP, 1994) at 94.

²⁰ S. Deakin and G. Slinger, "Hostile Takeovers, Corporate Law, and the Theory of the Firm" (1997) 24 *Journal of Law and Society* 124 at 126; A. Licht, 'The Maximands of Corporate Governance : A Theory of Values and Cognitive Style' (2004) 29 Del J Corp L 649 at 652. This seems to be what was being said in *Brady v Brady* (1988) 3 BCC 535.

²¹ See Part 11.

²² Law Commission, *Shareholder Remedies: Report on a Reference under section 3(1)(e) of the Law Commissions Act 1965* (Law Com. No. 246, Cm. 3769) (London: Stationery Office, 1997) at p. 7. There have been some adjustments to the original recommendations-in England and Wales, for example, the Law Commission's recommendation that a member be required to give 28 days notice to the company before initiating proceedings was not adopted: *ibid* at 91.

²³ An example of a case is *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch).

²⁴ See, I. M. Ramsay and B. Saunders, "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action" (2006) 6 JCLS 397 at 417.

likely to occur in the UK.²⁵ While arguably shareholders might be able to mount derivative claims more easily, they still have to get over a significant hurdle, namely persuading a court to give them permission to take action in a derivative claim.²⁶

Theoretically, where there is a failure to maximise shareholder interests, shareholders might be able to mount an action under provisions similar to s.994 of the Companies Act 2006, on the basis that the affairs of the company have been conducted in a way that is oppressive or unfairly prejudicial to them. Such actions have been rare where public companies are concerned. While there is nothing in the legislation which prevents a member in a public company bringing proceedings under s.994, and they are possible, given the decision of the Court of Appeal decision in *Clark v Cutland*,²⁷ clearly it has been used overwhelmingly in relation to private companies where a member can establish that he or she had, when joining the company, certain legitimate expectations that have not been fulfilled. The reason why disenchanted shareholders of public companies have not invoked s.994 is probably primarily due to the fact that they favour selling their shares rather than resorting to what is potentially costly litigation. In any event, with public companies, where people tend to become involved without being given any expectations by directors or managers, a claim under the precursor of s.994 has not generally been successful.²⁸

Besides the aforementioned legal actions, shareholders are able, provided that they can secure sufficient support, to have directors removed from office,²⁹ or they are entitled to refrain from supporting them at re-election time. There are significant practical hurdles that shareholders have to face in order to see these options to a successful end.³⁰

Another process that is often said to protect shareholders where shareholder primacy applies, is the market for corporate control. This is said to deter managers from failing to maximise shareholder wealth because if a company is run down, and operating below its potential, its share price will be depressed, and corporate raiders might see an opportunity to acquire the company at a good price and then run it efficiently to produce a profit. In such circumstances the shareholders will usually benefit because either they will sell their shares to the raider at a much better price compared with the listed price or the price that is generally available, or they remain in the company after the takeover while the company's performance improves. The managers though will lose their jobs as the raider will replace them with its own

²⁵ A. Keay and J. Loughrey, "Something Old, Something New, Something Borrowed : An Analysis of the New Derivative Action Under the Companies Act 2006" (2008) 124 LQR 469 at 499-500.

²⁶ For a discussion of the process and issues relating to it, see A. Reisberg, *Derivative Actions and Corporate Governance*, (OUP, Oxford, 2007); R. Hollington, *Shareholders' Rights*, 5th ed (Sweet and Maxwell, London, 2007) Chapter 6; V. Joffe et al, *Minority Shareholders : Law, Practice and Procedure* (Oxford, OUP, 2008), Chapter 1; A. Keay and J. Loughrey, "Something Old, Something New, Something Borrowed : An Analysis of the New Derivative Action Under the Companies Act 2006" (2008) 124 LQR 469.

²⁷ [2003] EWCA Civ 810; [2004] 1 W.L.R. 783.

²⁸ See *Re Astec (BSR) plc* [1998] 2 B.C.L.C. 556 at 589. For a case where a petition in relation to a public company failed, see *Re Blue Arrow plc* [1987] B.C.L.C. 585.

²⁹ Companies Act 2006, s.168. For a discussion of the avenues shareholders might take, see, A. Keay, "Company Directors Behaving Poorly : Disciplinary Options for Shareholders" [2007] JBL 656.

³⁰ For a discussion, see A. Keay, "Company Directors Behaving Poorly : Disciplinary Options for Shareholders" [2007] JBL 656.

nominees. But there has been theoretical argument³¹ and some empirical research³² that denies the efficacious nature of the takeover in this regard. The use of the market for corporate control has also been questioned as an adequate device for disciplining directors.³³

In shareholder primacy the ones who enforce the duties of the directors, if the board does not take action, are the shareholders. There have been a number of commentators who have argued for greater powers for shareholders in the United States, but even in the UK where shareholders are regarded as having more powers to control directors,³⁴ they are not, practically, well endowed with powerful weapons.

Whilst it might be said that one of the strengths of shareholder primacy is the fact that it is a theory that can be enforced by the shareholders, even though there are problems in doing so, undoubtedly one of the main drawbacks with stakeholder theory is that there are significant problems in enforcing it. Stakeholder theory involves the demand on directors that they manage the company's business for the betterment of the interests of all those who can be counted as stakeholders in the company.³⁵ The problem of enforcing adherence to this theory has been identified as a problem ever since the time of the debates entered into between Professors Adolph Berle and E Merrick Dodd in the 1930s. Berle indicated³⁶ that he, like Dodd, favoured an approach closer to what we know as stakeholder theory today, but he confessed that he could not see it being workable. His inevitable conclusion from his thinking was that you cannot abandon an emphasis on:

“the view that business corporations exist for the sole purpose of making profits for their shareholders’ until such time as [you] are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”³⁷

Berle saw shareholder primacy as a second-best solution so as to mitigate the amount of opportunism which managers engaged in, but it was more practicable than

³¹ M. Lipton and S. Rosenblum, “A New System of Corporate Governance : The Quinquennial Election of Directors” (1991) 58 U. Chi. L. Rev. 187 at 188; Richard Booth, “Stockholders, Stakeholders and Bagholders (or How Investor Diversification Affects Fiduciary Duty)” (1998) 53 *The Business Lawyer* 429 at 440. For a more recent view, see L. Bebchuk, “The Myth of the Shareholder Franchise” (2007) 93 *Virginia Law Review* 675.

³² J. Franks and C. Mayer, “Hostile takeovers in the UK and the correction of managerial failure” (1996) 40 *Journal of Financial Economics* 163.

³³ See I. Anabtawi, “Some Skepticism About Increasing Shareholder Power” (2006) 53 U.C.L.A. L. Rev. 561 at 568.

³⁴ Certainly this is the perception of some esteemed American commentators. For example, see L. Bebchuk, “The Case for Increasing Shareholder Power” (2005) 118 Harv. L. R. 833.

³⁵ The literature discussing the theory is extensive. For some leading works, see R. Edward Freeman, *Strategic Management : a stakeholder approach* (Boston, Pitman/Ballinger, 1984); R. Karmel, ‘Implications of the Stakeholder Model’ (1993) 61 *George Washington Law Review* 1156; T. Donaldson and L. Preston, “The Stakeholder Theory for the corporation : Concepts, Evidence, Implications” (1995) 20 *Academy Management Review* 65; R. Mitchell, ‘Toward a Theory of Stakeholder Identification and Salience : Defining the Principle of Who and What Really Counts’ (1997) 22 *Academy Management Review* 853; A. Campbell, ‘Stakeholders : The Case in Favour’ (1997) 30 *Long Range Planning* 446; J. Dean, *Directing Public Companies*, (Cavendish, 2001).

³⁶ A. A. Berle Jr, “For Whom Corporate Managers are Trustees : A Note” (1932) 45 Harv L R 1365.

³⁷ Ibid at 1367.

stakeholder theory. Dodd conceded that it was necessary to introduce strong legal measures in order to provide for the regulating of the actions of management.³⁸ The disagreement between the two scholars was as to how the duty could be enforced.³⁹ Much later Professor Oliver Hart asserted that there could be no enforcement of the stakeholder theory because the idea of requiring a director to take into account the interests of all constituencies is “essentially vacuous”⁴⁰ as directors would be able to justify any decision on the basis that it benefited some person or group.⁴¹ Of concern was that the directors might be able to act opportunistically and then to hide behind an assertion that they acted in order to benefit a particular stakeholding group. Far more recently the Company Law Review Steering Group in its review of UK company law said that there is little sense in requiring a duty to be owed to a group that is unable to enforce it.⁴²

The cynic might say that as many who hold to stakeholder theory tend to espouse the professionalism of directors and that they should be trusted, there is no need for any enforcement mechanism. Under the stewardship theory, embraced by many favouring stakeholder theory or something akin to it, there is a focus on directors’ need for achievement, responsibility, recognition, altruism and respect for authority, and as a result they can be seen not as opportunistic, but as good stewards who will act in the best interests of the stakeholders.

Dr Janice Dean has said that if stakeholding is to be implemented in practice then there has to be a power to protect stakeholder expectations and to compensate a stakeholder whose interests have been disregarded.⁴³ First of all, it is never going to be easy to assess if the interests of some stakeholders have been prejudiced, and then secondly, it may well be difficult to quantify the extent of the loss. Professor Gregory Crespi has attempted to explain how a court might go about determining whether a stakeholder had been injured by the decision-making of the directors, and, if so, to what extent.⁴⁴ But, with respect, the process with which a court would be faced, if the learned commentator’s explanation were applied, is extremely complex. Crespi seemed to acknowledge this problem later in his article where he states that any obligation on a director in relation to stakeholder interests would have to be an aspirational norm rather than a legal directive.⁴⁵ This obviously does not provide that which Dean assets is needed. The problem with dealing with this issue is manifested by the fact that the Company Law Review Steering Group recorded that few who responded to their request for replies on various topics, and who argued for a stakeholder approach, sought to give stakeholders the right to be heard by a court if they felt that their interests were not being taken into account by the directors.⁴⁶

³⁸ “The Modern Corporation and Private Property” (1933) 81 U Pa L R 182 at 785.

³⁹ A. Licht, ‘The Maximands of Corporate Governance : A Theory of Values and Cognitive Style’ (2004) 29 Del J Corp L 649 at 652.

⁴⁰ “An Economist’s View of Fiduciary Duty” (1993) 43 U Toronto L J 299 at 303.

⁴¹ Ibid

⁴² Company Law Review, *Modern Company Law for a Competitive Economy : “The Strategic Framework”* 1999, London, DTI, note 31, p40.

⁴³ *Directing Public Companies* (Cavendish Publishing, London, 2001) at 169, 176

⁴⁴ “Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance” (2002-03) 16 *Creighton Law Review* 623 at 637-639.

⁴⁵ Ibid at 641.

⁴⁶ Company Law Review, *Modern Company Law for a Competitive Economy*, : Developing the Framework, 2000, London, DTI, at para 2.12.

Wai Leung,⁴⁷ adopting the arguments of Professor Larry Mitchell in addressing the enforcement of US constituency statutes,⁴⁸ has advocated permitting stakeholders who have been injured because of the way the directors have run the company, to bring proceedings against the directors. On this argument, the stakeholder would need to establish that he or she was injured and that the injury sustained was to a legitimate expectation which he or she had as a stakeholder in the company. This is similar to the requirement for relief that exists under s.994 of the UK's Companies Act 2006.⁴⁹ The concept of legitimate expectations⁵⁰ in essence is a contract-based idea, the object of which is to fill in the gaps in a contractual relationship. It involves asking what reasonable parties would have wanted to have included in their contract had they thought about the issue.⁵¹ The argument might be put that as stakeholders make firm specific investments in the company then they have certain high expectations of how the company will be managed. Nevertheless, this does not help with the enforcement issue.

It has been suggested, adroitly, it is respectfully submitted, that to provide non-shareholder stakeholders with a legally enforceable right in the governance of companies will require a fundamental change in the organisation of corporate affairs.⁵²

There are several ways that may be used to prevent or limit directors from shirking or acting opportunistically. There is a mixture of contractual, regulatory, market and fiduciary constraints on the actions which directors can take. For instance, managers remain subject to the financial markets, the market for control and the product markets⁵³ and these provide, according to some, highly objective and demanding

⁴⁷ W. Leung, "The Inadequacy of Shareholder Primacy : A Proposed Corporate Regime that Recognizes Non-Shareholder Interests" (1997) 30 *Columbia Journal of Law and Social Problems* 589 at 627-628

⁴⁸ "A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes (1992) 70 *Texas Law Review* 579 at 635-636. These statutes permit (or in one case, require) directors in their decision-making to take into account the interests of constituencies besides shareholders. An example is Arizona Revised Statute Ann, s 10-1202(A) (1987). For further discussion of them, see, for example, S. Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties' (1991) 21 *Stetson Law Review* 163; J. Hanks Jr, 'Playing With Fire: Nonshareholder Constituency Statutes in the 1990s' (1991) 21 *Stetson Law Review* 97; Committee on Corporate Laws, 'Other Constituencies Statutes: Potential for Confusion' (1990) *Business Lawyer* 2253; E. Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statutes' (1993) 61 *George Washington Law Review* 14; E. Adams and J. Matheson, 'A Statutory Model for Corporate Constituency Concerns' (2000) 49 *Emory Law Journal* 1085; J. Springer, 'Corporate Constituency Statutes: Hollow Hopes and False Fears' (1999) *Annual Survey of American Law* 85; K., 'Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes' (2003) 45 *Arizona Law Review* 823.

⁴⁹ See *O'Neill v Phillips* [1999] 2 BCLC 1; [1999] BCC 600 (HL).

⁵⁰ It is a concept that is regularly considered in cases brought under s.459 of the Companies Act 1985 (now replaced by s.994 of the Companies Act 2006) and claiming that a company's affairs have been conducted in an unfairly prejudicial way. For example, see *O'Neill v Phillips* [1999] 2 BCLC 1; [1999] BCC 600 (HL).

⁵¹ Lawrence Mitchell, 'The Fairness Rights of Bondholders' (1990) 65 *New York University Law Review* 1165, 1225.

⁵² A. Schall, L. Miles and S. Goulding, "Promoting an Inclusive Approach on the Part of Directors : The UK and German Positions" (2006) 6 *JCLS* 299 at 300.

⁵³ See, for example, E. Fama, , 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288; E. Fama and M. Jensen, 'Separation of Ownership and Control'

guidelines.⁵⁴ But these constraints do not give any investors in the company a straightforward route which they can pursue to rein in directors. For example, as noted earlier, no one but a shareholder is able to commence proceedings if the directors breach their duties and the company decides not to take action against them.

IV Enforcement Options in EMS

This part of the article considers the options which are available, or potentially available, to ensure that the EMS model is enforced. What we are considering is whether any action, and in particular, any kind of legal action can be introduced to ensure that directors show appropriate regard for the maximisation of entity wealth together with making sure that the entity is sustained financially. As it is under UK law, as we have seen, at the moment the only investors who have any significant structural protection within the company are the shareholders, and it is arguable whether that is particularly effective.⁵⁵

The following discussion does not encompass any contractual options available to investors. Such options are usually considered in relation to creditors and, on some occasions, employees. It also should be noted that it might be argued that there should not be any dedicated enforcement mechanism as investors can rely on contract and, in addition, the market to ensure that they are protected. But with EMS we are not looking at investors taking action to protect their own positions directly, as with the stakeholder theory, but to enforce any failure of the directors to comply with the objective of the company.

A. Exit

Most investors can decide to exit from their relationship with the company. For instance, shareholders can sell their shares, employees can resign and suppliers can decline to supply the company any longer. This option might, however, be of little, or no, use. In fact it might be totally impracticable for an investor to leave.

Shareholders might not be able to get the price for their shares that they believe they are worth, and they believe that they cannot afford to sustain the loss. It is often inconvenient and even disruptive for employees (and their families) if they decide to leave their posts, especially if they have either to leave the area in which they live or commute long distances to take up new employment. Some suppliers either might have built their businesses around the company or cannot replace the company's custom readily. Other investors, such as lenders, are not able, absent breaches of restrictive covenants in the loan agreement, to exit the relationship in the short term as they are contractually bound. Clearly, the local community is not able to exit the relationship, although it might withdraw support in some way.

B. Voice

(1983) 26 *Journal of Law and Economics* 301; Jensen and Meckling, 'Theory of the Firm : Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

⁵⁴ A. Campbell, "Stakeholders : The Case in Favour" (1997) 30 *Long Range Planning* 446 at 448.

⁵⁵ See A. Keay, "Company Directors Behaving Poorly : Disciplinary Options for Shareholders" [2007] JBL 656.

Exit might be regarded as an extreme measure, so what else is available that is less extreme? One would expect that any investor or group of investors who were disgruntled with the manner in which the directors were acting, could approach the board with their concerns in the hope that the board would change its proposed action(s) or at least enter some form of dialogue and negotiation. There are numerous examples of shareholders doing this in recent years,⁵⁶ particularly as shareholder activism has developed and become far more common. Influential creditors, such as banks which have lent large sums, may well be able to go to the board and register concern, but most investors will either not have enough information to do anything, because of information asymmetry, or will not be able to get “the ears” of the directors.

C. Pressure

It is very possible that the overtures of most investors to directors, if made, will go unheeded. If that is the case, what else might investors seek to do? One possible extra-legal action that an investor might take is to exert some form of pressure on the board. This could take a variety of forms. Pressure could be exerted with one of two aims in view. First, an investor might act in order to convince the directors that they should be doing something differently in order to enhance the company’s wealth. But, alternatively, an investor could seek to persuade the board to act in such a way as to benefit him or her. This latter approach could lead to more investors engaging in rent-seeking activities as they compete with one another in order to gain greater advantages.⁵⁷ Pressure by investors on the board to benefit them must be resisted by a board or else it is likely to be highly deleterious for the company, and certainly it would not enhance entity wealth. Leaving aside this issue, what avenues are there available to investors?

Under any model of the corporate objective there is the possibility of an economic enforcement mechanism that is able to be undertaken by several investors and others.⁵⁸ First, investors might threaten to exit, engendering concern in the board that this threat, if put into action, might lead to a reduction in the company’s share price. Such a threat might be seen as a bluff. Second, there might well be available to some investors different forms of political pressure that can be brought to bear on directors. There are a range of political pressure mechanisms that can be used, such as the formation of coalitions, public relations campaigns, referring matters to regulatory agencies etc. Some investors may be willing to take action which will see their concerns about the company become public and, therefore, possibly be detrimental to the company’s reputation. This might be prejudicial to the investor, but it might be reasoned that this damage will only be short term, and could be fruitful in the long term.

Shareholders have what might be regarded as the ultimate pressure tactic, and which was dealt with earlier, that is, threatening to use their power to remove one or more

⁵⁶ Ibid.

⁵⁷ D. Millon, ‘New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law’ (2000) 86 Va L Rev 1001 at 1004.

⁵⁸ See, N. Gunningham, R. Kagan and D. Thornton, ‘Social License and Environmental Protection : Why Businesses Go Beyond Compliance’ (2004) 29 *Law and Social Inquiry* 307.

directors.⁵⁹ They also may threaten to exercise their voting rights to not elect a director. Whether these avenues have any strength will depend on a number of factors, including the level of shareholding held by the shareholder, and the shareholder's power to influence.

The ultimate pressure tactic for employees is to withdraw their labour, that is, strike. The amount of strikes has reduced in the UK over the past decade compared with previous years and this might be due to diminished unionisation.⁶⁰ Unless large portions of a company's workforce are members of a union it is unlikely that this option is of great benefit. Alternatively, employees could threaten to resign.

There might be other means (besides court action), such as pressure on the board so as to encourage the board to take a different course of action or approach. One method is to place pressure on directors as Robert Monks did in relation to the American retailer, Sears. He did this by the use of public opinion. Monks inserted full-page advertisements in the *Wall Street Journal* exposing the identities of the directors of the company and described them as "non-performing assets." The subsequent embarrassment for the directors led to the changes Monks sought.⁶¹ The drawback with this type of approach is that it might attract very bad publicity from which it might take the company a long period to recover, even if the sought-after reforms are introduced. Pressure was successful in 2005 in relation to Asset Management Investment Company plc, a specialist investor in the asset management industry. Its board was accused of overseeing disastrous performance and under substantial pressure it went quietly.⁶² Besides possible effects on the company's reputation, the danger of instituting a publicity campaign against a board is that it could deter future investment and/or affect the company's place in the marketplace, both of which would prejudice the entity and, indirectly, all investors, so any action has to be measured.

Consumers can seek to engineer a boycott of the company's products, action which might place pressure on other investors to take action to persuade or force the board to change its actions, as a boycott could affect them. Of course, a boycott might not be an option where the company is either the only producer of the goods or is the cheapest producer.

Communities that are affected by companies might take political action in order to try and enforce adherence to EMS, as this action is something which Professor Jonathon Macey has argued is adequate.⁶³ The action that might be taken could include demonstrations, particularly at the gates of factories or retail outlets of the company,

⁵⁹ See Companies Act 2006, s.168.

⁶⁰ D. Bradley, "Be prepared to act fast when industrial action strikes" Personnel Today and accessible at > <http://www.personneltoday.com/articles/2007/09/10/42221/be-ready-to-act-fast-when-industrial-action-strikes.html> < (last accessed, 22 May 2009). See the Department of Business Enterprise and Regulatory Reform statistics > <http://stats.berr.gov.uk/UKSA/tu/tum2008.pdf> < (last visited, 22 May 2009).

⁶¹ R. Monks and N. Minnow, *Watching the Watchers : Corporate governance for the Twenty-first Century*, (Blackwell Publishing, Malden, Mass, 1995) and referred to in L. Zingales, "In Search of New Foundations" (2000) 55 *Journal of Finance* 1623 at 1627-1628.

⁶² P. Hosking, "Amic board makes quiet exit" *The Times*, 9 June 2005.

⁶³ "An Economic Analysis of the Various Rationales for Making Shareholder the Exclusive Beneficiaries of Corporate Fiduciary Duties" (1991) 21 *Stetson Law Review* 23 at 42-43.

as these tend to cause the most publicity. Less direct action is to lobby local councillors, Members of Parliament and even government ministers to have such officials influence boards of directors.

Suppliers could exert pressure through a refusal to supply necessary supplies to a company, although of course this might lead the company going elsewhere for those supplies (if it could), and many suppliers would rather not take the risk of alienating the company's directors, especially if the company was a major customer.

Lenders could decline to continue existing credit arrangements, save where they are constrained by contractual terms, or indicate that any request for new credit facilities will be refused.

Many of the aforementioned options cannot work across all companies and not even across all investors in a particular company. It is limited in efficacy to those situations where the investor is offering something unique to the company, or all, or a significant number of, investors are disgruntled and they agree to engage in economic action. For, unless these circumstances exist, it is probable that the company can go elsewhere to obtain its investment.

As adverted to above, the problem with extra-legal pressure is that an investor can endeavour, by taking such action, to obtain a benefit for himself or herself, whereas EMS is seeking to enhance company wealth. With pressure there is the danger that it might in fact lead to directors being forced to take action which fails to achieve EMS.

D. Board Representation

One mechanism that has been suggested for enforcement, in the context of stakeholder theory,⁶⁴ is to install representatives on the board from various investor groups, and indeed this does happen in some companies. In fact representation on the supervisory board of German companies is necessary under that country's co-determination law. Could this be used for enforcing adherence to EMS? There are at least three obvious drawbacks with this action. First, each investor is, naturally, going to be concerned to act to its benefit, and often options that are available to a board will not favour all investors. It has been asserted that no stakeholder would hurt the company just so that a larger piece of the pie could be secured.⁶⁵ But, with respect, that does not necessarily ring true. Some stakeholders might see the opportunity of taking benefits in the short term, just as shareholders are often alleged to want to do. Second, it is possible that it might encourage factions to develop in the board that could lead to difficulty in decision-making at board level. Third, any restructuring of corporate governance to permit stakeholders to have some control is unlikely to be attractive to many. The Company Law Review Steering Group, when considering the review of British company law at end of the last century, stated in one of its reports that : "Proposals to alter board composition to require wider representation as a mandatory requirement would represent a very radical change to British corporate

⁶⁴ See, Kent Greenfield, "Reclaiming Corporate Law in a New Gilded Age" (2008) 2 *Harvard Law and Policy Review* 1 at 24.

⁶⁵ Ibid at 28.

culture and would be unlikely to command wide support.”⁶⁶ It has been suggested that placing stakeholders on boards would be frowned on by present and potential shareholders.⁶⁷ Even if one had board representation that does not mean that there would, necessarily, be adherence to the objective provided for in the model, and so one still needs an enforcement mechanism in case the board fails to act appropriately. Therefore, one is back to the beginning to find a method to permit the contesting of the action.

It has often been asserted that having independent directors present on the board is theoretically the best way of ensuring compliance with a company’s objective. In the context of the Anglo-American company it is acknowledged that these directors are usually regarded as protecting the interests of the shareholders. However, there is an argument that they are on the board to protect the overall interests of the company and to assist in coming to the best decisions for the company.

E. Administration/Liquidation

A mechanism that is available to creditors to enforce adherence to EMS is to threaten to, or apply to, put the company in liquidation or administration. This would concern the directors as they would lose their positions, for an independent insolvency practitioner would take control of the company’s affairs, and actions might be brought against them by the liquidator or administrator for breach of duty. While this might seem attractive, the board will know that although an application to have the company wound up or placed in administration would be annoying, if their company is clearly solvent then an application would not succeed as a creditor seeking liquidation or administration will usually have to demonstrate that the company is unable to pay its debts and that might well not be the case.⁶⁸ Also, an application for administration or winding up could be potentially damaging as far as the reputation of the company is concerned,⁶⁹ and this might not be the best outcome for a creditor ultimately.

A problem with administration is that it cannot be sought by any other investor. Furthermore, apart from shareholders who are able to be categorised as contributories,⁷⁰ other investors cannot present a liquidation petition.

The Secretary of State for Business Enterprise and Regulatory Reform is empowered to present a petition for winding up, pursuant to s.124A of the Insolvency Act 1986, where it is in the public interest.⁷¹ Could such a power be invoked by the Secretary of State where a company’s board has acted in a way that is not consistent with the

⁶⁶ Company Law Review, *Modern Company Law for a Competitive Economy* : “The Strategic Framework” 1999, London, DTI, at para 5.1.32. The same could be applied to the culture that exists in companies in places such as the US, Australia, and Canada, as well as in companies in many countries.

⁶⁷ L. Ribstein, ‘Accountability and Responsibility in Corporate Governance’ (2006) 81 Notre Dame L Rev 1431 at 1440.

⁶⁸ See Insolvency Act 1986, s.122(1)(f) and Schedule B1, para 11(a).

⁶⁹ The reason why companies are able to apply for an injunction to prevent a petition to wind up being advertised (as is required by the Insolvency Rules 1986) is that the advertising could damage the company’s reputation : *Re a Company (No. 007923 of 1994)* [1995] B.C.C. 634 at 639.

⁷⁰ Section 124 of the Insolvency Act 1986 prescribes who may petition for winding up. Subsection (1) permits contributories to do so, but no other investor.

⁷¹ See A. Keay, “Public Interest Petitions” (1999) 20 Co. Law. 296; V. Finch, "Public interest liquidation : PIL or Placebo?" [2002] Insolv. L. 157.

objective of a company? It might be argued that the public interest here means a very wide-ranging interest. It is suggested that in the context of s.124A “in the public interest” means something that is in the interest of society as a whole, as opposed to specific sectors of the community or certain people, such as investors, who are interested in the company which is the subject of the petition. This seems to be in line with two judicial comments. First, in *In re Rubin, Rosen and Associated Ltd*,⁷² Megarry J referred, in the context of the public interest, to the Secretary of State acting in the interests of the public at large, and the public at large is a similar idea to society as a whole. Second, Nicholls LJ in *Re Walter L Jacob Ltd*⁷³ said that the public interest requires that individuals and companies who are involved in dealing in securities with the public, should be ready to assume minimum standards of commercial behaviour and those who do not do so should be stopped from engaging in such activities.⁷⁴ In referring to the public interest his Lordship was obviously adverting to society as a whole, for it is the concern of society that business affairs are conducted in a commercially moral way. In addition to the above, most s.124A petitions have been presented where the Secretary of State is concerned about the public being misled and/or companies that have acted unscrupulously. It is highly unlikely that the Secretary of State would want to get involved in taking action against a solvent company that has not committed any wrongdoing with broad consequences.

F. Government Intervention

The Company Law Review Steering Group indicated in its review of UK company law that supporters of the pluralist view wanted either a power for the Secretary of State to intervene in a company or some form of consultative system.⁷⁵ The problem with the Secretary of State having the former power is that intervention could be very arbitrary, and it could always be politically motivated. It could be heavily influenced by political reasons rather than reasons of justice and fairness. Allied to this is the fact that the government might well have insufficient resources to act in relation to a number of companies. Furthermore, what does the Secretary of State do when he or she intervenes? We have seen that, certainly in more recent times, UK governments of either of the two main political parties prefer generally not to intervene in business affairs.⁷⁶ Any government intervention would be unpalatable to many who would see such a mechanism as favouring the idea that companies carry out a public function, whereas they would say that companies are involved in private functions only.

G. Class Action

Provision might be made for injunctive relief to be available to any investors who can demonstrate a *prima facie* case that the proposed actions of the directors would involve a failure to adhere to seeking to fulfil the objective of the company. In equity obtaining an injunction is onerous. But the need for the establishing of a *prima facie* case is necessary for two reasons. First, this would eliminate the more trivial claims

⁷² [1975] 1 WLR 122 at 129.

⁷³ (1989) 5 BCC 244.

⁷⁴ *Ibid* at 256.

⁷⁵ Company Law Review, *Modern Company Law for a Competitive Economy*, : Developing the Framework, 2000, London, DTI at para 2.12.

⁷⁶ there has been partial nationalisation of the banks recently, but that was regarded by many as judicious use of government power, and designed to deal with a very unusual situation.

and ensure that there is not a multiplicity of proceedings. Second, if one is going to allow interference in the management of companies, then there has to be a good basis for doing so. But on what basis could an injunction be granted? Could it be said that the investor who takes action can argue that he or she has an interest in protecting the company's interests?

There are undoubtedly practical issues that would have to be resolved if a class action is to be permitted. What does one do with investors who want to free-ride, namely those who decline to contribute to the initiation of the class action, but want to share in any benefits that might flow from stopping the directors' proposed action? Does one penalise them in some way? Arguably, there are insurmountable obstacles to such action.

Leaving aside the difficult practical issues just discussed, it is likely that if injunctive relief was all that was available, it would not help investors very much as often they would not learn of what the directors propose to do before they actually put the action into effect, and once the action has been implemented the seeking of an injunction would, for the most part, be otiose.

H. Oppression/Unfair Prejudice Remedy

Several common law jurisdictions, including the UK, have had an “oppression remedy”,⁷⁷ for some time. Before the enactment of the unfair prejudice section, s.459 in 1980, the UK had s.210 of the Companies Act 1948 which simply provided that a remedy could be granted by the court if the affairs of a company are being conducted in a manner oppressive to some part of the membership. Australia still has an oppression remedy that was based on the aforementioned UK provision.⁷⁸ The Australian provision effectively provides that if the company's affairs are being conducted in a manner that is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity relief might be given by a court. The former and present UK provisions, like the present Australian provision, were limited to granting a right to members to bring action. Usually, as with the unfair prejudice ground that is now found in s.994 of the Companies Act 2006,⁷⁹ the provision tended to be used to take action against the directors and/or controlling shareholder in quasi-partnerships in a variety of situations, but often where the complainant had been removed from a management role in the company.

Canada has developed perhaps the most broad oppression provision, namely s. 241 of the Canada Business Corporations Act 1985, as far as the persons who qualify as applicants for relief are concerned. Section 241(2), like the Australian provision, provides that an applicant may succeed if he or she establishes conduct that amounts to unfair prejudice as well as that which constitutes oppression. Section 241(2)(c) (and provincial statutes based on this provision) states that the court is able to give a remedy if the directors' powers have been exercised ‘in a manner that is oppressive or

⁷⁷ “Oppression” in this context has been said to involve “burdensome, harsh and wrongful” conduct : *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 at 342 (HL).

⁷⁸ Corporations Act 2001, s.232.

⁷⁹ The Australian provision also provides that if conduct that is unfairly prejudicial is established the courts are permitted to grant relief.

unfairly prejudicial to or unfairly disregards the interests of any security holder,⁸⁰ creditor, director or officer.⁸¹ The Part in the Canada Business Corporations Act that houses s.241 does allow a potentially broad range of people who can bring proceedings. Section 238 provides that applications may be made by a wider range of people including members, secured creditors⁸² and directors. Importantly, in subsection (d) it also includes “any other person who, in the discretion of a court, is a proper person.” Who is a proper person is squarely within the discretion of the court.⁸³ Most actions have been sought to be initiated by creditors. The courts have restricted who can take action. For example, it has been said that for a creditor to be able to proceed, it must be demonstrated that the creditor has a legitimate interest in the manner in which the company is being run or has a direct financial interest in how directors are managing the company’s affairs.⁸⁴ One example of the use of the provision is *Prime Computer of Canada Ltd v Jeffrey*⁸⁵ where a director had increased his salary substantially at a time when he was aware that his company was in financial straits. On the application of a creditor the court ordered the director to repay the increase in salary on the basis that the director’s action was unfairly prejudicial to the creditor, as the funds used to increase the director’s salary were largely, in effect, those of the creditor.

The courts in Canada have given a broad construction to oppression and unfair prejudice. The Ontario Court of Appeal in *Brant Investments Ltd v Keep-Rite Inc*⁸⁶ said that as ‘the statutory scheme of [s 241] is so broadly formulated, the evidence necessary to establish a breach of fiduciary duty would be subsumed in the broader range of evidence which would be appropriately adduced on an application under the [oppression] section.’⁸⁷ As one would expect, the courts have developed some guidelines. For instance, the courts will have reference to the history and nature of the company, the relationship between the company and the applicant creditor as well as general commercial practice (*First Edmonton Place Ltd v 315888 Alberta Ltd* (1988) 60 Alta LR (2d) 122 at 146).⁸⁸ It was indicated in the Ontario Court of Appeal in *Pente Investment Management Ltd. v. Schneider Corp.*⁸⁹ that the remedy was

⁸⁰ According to s.2 of the Canada Business Corporations Act 1985 this means a person who holds a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation.

⁸¹ See D. Thomson, ‘Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress’ (2000) 58 *University of Toronto Faculty of Law Review* 31.

⁸² Interpreted very broadly by the Ontario Superior Court of Justice in *Fedel v Tan* 2008 CanLII 46697.

⁸³ Section 241(3) gives courts an unfettered discretion as to what order they think appropriate, although some examples of orders are set out, in a similar manner to s 996 of the UK’s Companies Act 2006.

⁸⁴ *Hordo; Jacobs Farms Ltd v Jacobs* [1992] OJ No 813 at 12-14, and referred to by J. Sarra, ‘Taking the Corporation Past the “Plimsoll Line” – Director and Officer Liability When the Corporations Founders’ (2001) 10 *International Insolvency Review* 229 at 240.

⁸⁵ (1991) 6 OR (3d) 733.

⁸⁶ (1991) 3 OR (3d) 289 at 303.

⁸⁷ Quoted by D. Thomson, ‘Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress’ (2000) 58 *University of Toronto Faculty of Law Review* 31 at 48.

⁸⁸ Nevertheless, one learned commentator has criticised the vagueness of the legislation (J. Ziegel, ‘Creditors as Corporate Stakeholders : The Quiet Revolution – An Anglo-Canadian Perspective’ (1993) 43 *University of Toronto Law Journal* 511 at 531).

⁸⁹ [1998 CanLII 5121](#); (1998), 42 O.R. (3d) 177 (Ont. C.A.) at 201. Also, see *C.I. Covington Fund Inc v White* 2000 CanLII 22676; (2000), 10 C.P.R. (4th) 49; (2000), 22 C.B.R. (4th) 183; (2000), 10 B.L.R. (3d) 173 at [21] (Ontario Supreme Court).

available to protect the expectations of the stakeholders, thus while most cases have dealt with applications by creditors, the provision clearly envisages applications by others with interests in the company.

Could such a provision be used to enforce EMS? A possible objection to this approach might be that it will precipitate a proliferation of litigation, as well as the abuse of proceedings in order to disrupt the management of a company. Yet, this is not the Canadian experience. Its legislation has not, interestingly, precipitated a large number of claims.⁹⁰

At first blush the oppression remedy is attractive. Dean appears to think that the UK's counterpart to the Canadian provision, namely s.994 of the Companies Act 2006, action, which provides for possible relief where there is unfair prejudice, is the most promising for stakeholders.⁹¹ She argues that a personal right action, such as that provided by the unfair prejudice remedy is best as it provides benefits for those who have been deprived of some advantage by the company.⁹² However, it is submitted that it is not appropriate for enforcement of EMS. Section s.994, limited to actions by members, requires the applicant to establish that the company's affairs have been conducted in a manner that is unfairly prejudicial to the interests of members (including the applicant for relief), but even if "investors" were substituted for members it would still not be appropriate, as EMS is all about preventing damage to the entity or compensating it for any action that has damaged it, and yet the oppression/unfair prejudice remedy tends to personalise the effects of the board's wrongful action. The concern that I have with giving a broader range of people the opportunity to bring an oppression and/or an unfair prejudice action is that such an action is focused on personal rights. That is, the applicant for relief is complaining that he or she has been oppressed or unfairly prejudiced by the action of which he or she complains, and while an action can lead to any relief deemed fit and proper by the courts, it is generally regarded as providing for a personal remedy, with the most frequent relief being an order that the petitioner's shares be purchased. There is certainly room for such proceedings for shareholders, particularly in close companies as they are often unfairly locked in to a company and cannot exit if they so desire, or certainly not as easily as shareholders of large companies, but what we are seeking to construct is a mechanism that facilitates an investor to enforce the obligation of directors to adhere to EMS. Thus, an investor is bringing proceedings because the entity's interest has been, or will be, prejudiced in some way.

I. Derivative Claims

1. Introduction

In many common law jurisdictions there is provision made in companies legislation for the bringing of derivative actions. Such actions permit a shareholder to commence

⁹⁰ J. Ziegel, 'Creditors as Corporate Stakeholders : The Quiet Revolution – An Anglo-Canadian Perspective' (1993) 43 *University of Toronto Law Journal* 511 at 527; D. Thomson, 'Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress' (2000) 58 *University of Toronto Faculty of Law Review* 31 at 47.

⁹¹ *Directing Public Companies* (Cavendish Publishing, London, 2001) at 177. The defence that would be available is that the directors had properly examined all the relevant options with appropriate reference to stakeholder interests.

⁹² *Ibid* at 167.

proceedings on behalf of their company against persons who have damaged the company, and in circumstances where the company cannot, or refuses to, initiate proceedings itself. This is because the board, which is usually granted by the articles of association the power to manage the business of the company,⁹³ including bringing and defending litigation, has decided not to take action against someone who has harmed the company. Most often this is because the claim involves misconduct on the part of one or more directors, or even the whole board. While provision for the bringing of such actions used to be permitted only by case law, the legislatures in many countries have enacted statutory derivative action schemes. The UK was one of the latest to do so, and quite recently.⁹⁴

The need for a derivative action follows from the decision in *Foss v Harbottle*⁹⁵ where it was held that if a company is wronged, it, and it alone, must bring proceedings to seek relief. At common law the courts developed several exceptions to the rule in this case because they felt that the rule could produce unfairness. The reason for enacting a statutory scheme for derivative actions⁹⁶ is the simplification and modernisation of the law in order to improve its accessibility.⁹⁷ Also, the existence of any statutory scheme is to ensure that the company receives an appropriate remedy for actions that have prejudiced its interests, and to deter the directors from acting improperly.⁹⁸

As indicated above, while an oppression/unfair prejudice action is an action focused on personal rights, namely, the applicant for relief is complaining that he or she has been oppressed or unfairly prejudiced by the action of the company, the derivative action is a mechanism for “corporate-regarding behaviour,”⁹⁹ that is the emphasis is on corporate concerns, and is, therefore, far more appropriate for EMS. It is “oriented towards collective outcomes,”¹⁰⁰ rather than purely personal benefits.

The problem with utilising this process in the UK is that only members are permitted to initiate derivative proceedings. Yet it has been said that there is a “dissonance between the corporation’s gains and losses and those of the shareholders,”¹⁰¹ and so it seems most appropriate when one is ensuring compliance with EMS, as the benefit of the entity is the critical issue. The problem with leaving the derivative action only to the shareholders is that they will be happy enough if the directors’ decisions have

⁹³ For example, see art. 70 of Table A (Companies (Tables A-F) Regulations 1985 (SI 1985/805).

⁹⁴ Also, see Canada (Canada Business Corporations Act 1985, s.239), Australia (Corporations Act 2001, Part 2F1A, Singapore (Companies Act, s.216A), New Zealand (Companies Act 1993, s.165), Hong Kong (Companies Ordinance, s.168BC).

⁹⁵ (1843) 2 Hare 461; 67 E.R. 189.

⁹⁶ For a discussion of which, see A. Keay and J. Loughrey, “Something Old, Something New, Something Borrowed : An Analysis of the New Derivative Action Under the Companies Act 2006” (2008) LQR 469.

⁹⁷ Law Commission, *Shareholder Remedies: Report on a Reference under section 3(1)(e) of the Law Commissions Act 1965* (Law Com. No. 246, Cm. 3769) (London: Stationery Office, 1997) at p. 7. There have been some adjustments to the original recommendations-in England and Wales, for example, the Law Commission’s recommendation that a member be required to give 28 days notice to the company before initiating proceedings was not adopted: *ibid* at 91.

⁹⁸ See, J. Coffee and D. Schwartz, “The Survival of the Derivative Suit : An Explanation and a Proposal for Legislative Reform” (1981) 81 Colum L R 261 at 302-309.

⁹⁹ S. Bottomley, *The Constitutional Corporation* (Ashgate, Aldershot, 2007) at 166.

¹⁰⁰ *Ibid* at 167.

¹⁰¹ *Ibid* at 158.

been such as to benefit them – this might not of course maximise entity wealth and achieve EMS. It makes sense to limit derivative actions to shareholders if a shareholder value approach is implemented, but if an EMS approach is taken it makes sense to give that right to any investor,¹⁰² for it is unlikely shareholders would seek to invoke the derivative action process where directors fail to adhere to EMS unless they could see that the action was likely to harm them in the short term or even in the long term because such action takes times and might lead to them being responsible for costs if they are not successful. In articulating their Team Production approach to corporate law, Professors Margaret Blair and Lynn Stout argue that the shareholders in bringing derivative actions act as proxies for all those with claims on the company.¹⁰³ But, while such an action is designed to recover for the company, it might be argued that shareholders do not take proceedings save where they are convinced that they will benefit from the action, at least indirectly. It is probable that whether or not shareholders would be prepared to institute derivative proceedings will very much depend on what the directors have done. Some actions that the directors take, in contravention of EMS, might well lead shareholders to reasoning that the action taken would end up indirectly affecting the shareholders, so they will consider proceeding. But other actions will not adversely affect shareholders, or even might benefit them, and in either case no shareholder is gong to take proceedings.

As Dr Janice Dean has asserted in relation to derivative claims that : “there seems to be no a priori reason why others [besides shareholders] should not enjoy similar access to the courts to protect the company from harm, under a regime of judicial supervision similar to that envisaged to “manage” shareholder actions.”¹⁰⁴ Implicit in the EMS model is a recognition that all investors should be entitled to take action to safeguard the wealth of the company entity, in which they have a potential distinct interest, albeit one that is not vested or able to be calculated. As a consequence there needs to be an enforcement mechanism that is more encompassing. Also, it is often recognised that shareholders frequently do not know what is going on in a company; they are poor monitors. Broadening the range of those who can bring proceedings increases the chances of a company’s interests being protected, because another investor might well be aware of something that the shareholders and others are not. For example, employees may be more conversant with the activities of directors, and may, therefore, be far better monitors. This is perhaps demonstrated to some degree by the fact that we see, not infrequently, employees acting as “whistleblowers,” namely disclosing some improper or inappropriate practice of managers.

2. What is needed?

While the UK restricts those who can initiate derivative actions to shareholders,¹⁰⁵ many other jurisdictions permit a greater range of possible applicants. For instance, s.236 of the Australian Corporations Act 2001 is broader, for besides members it

¹⁰² One commentator accepts the need for it in relation to creditors : Rutherford B. Campbell Jr, ‘Corporate Fiduciary Principles for the Post-Contractarian Era’ (1996) 23 *Florida State University Law Review* 561 at 606.

¹⁰³ M. Blair and L. Stout, ‘A Team Production Theory of Corporate Law’ (1999) 85 *Va L R* 247 at 293. Professor David Millon doubts this (‘New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law’ (2000) 86 *Va L Rev* 1001 at 1013.

¹⁰⁴ *Directing Public Companies* (Cavendish Publishing, London, 2001) at 155.

¹⁰⁵ Hong Kong in Companies Ordinance, s.168BC also limits actions to shareholders.

allows former members and officers of the company to bring proceedings.¹⁰⁶ Interestingly, the Company and Securities Law Review Committee, a body that reviewed company law and considered changes to corporate legislation in Australia, favoured giving a derivative action to creditors as well as shareholders,¹⁰⁷ but this view did not gain the imprimatur of Parliament and, hence, did not find its way into legislation. Importantly though, in the general scheme of things, Australian creditors arguably could secure relief under s.1324 of the Corporations Act, which enables anyone affected, or who could be affected, by a contravention, or proposed contravention, of the Act to seek injunctive relief. Such relief is not available in the UK.

It would be necessary to provide a broad category of persons who could apply, because the range of people who can be regarded as investors for the purpose of EMS is wide. But, it is probably impossible to include all persons within the purview of the concept of investor. If standing to bring proceedings were limited, then there would be no one who would apply where a decision of the board damaged the company entity but fostered the interests of the subset of investors who did have the right to bring an application to challenge directorial action through the derivative claim process.¹⁰⁸ It is suggested that the legislation should provide that an application could be made by “anyone who appears to the court to be interested in the company.” This is reminiscent of the category of persons who were able to apply under s.651 of the Companies Act 1985 for an order declaring the dissolution of a company to be void. Courts could be granted a discretion as to whether any applicant legitimately fell within the category. The permission procedure which is provided for in the Companies Act 2006 before derivative proceedings can be pursued, and the accompanying criteria for determining whether the proceedings can go ahead could remain. This would ensure that the floodgates would not be opened as far as applications are concerned.

This suggestion is not unprecedented for there are two jurisdictions where derivative proceedings are able to be instigated by, potentially, a very broad range of persons. First, s.238(d) of the Canada Business Corporations Act 1985 includes amongst those who may make applications, “any other person who, in the discretion of a court, is a proper person to make an application.” In a similar vein, s.216A(1)(c) of the Singaporean Companies Act provides that the range of persons who can apply for a derivative action includes “any other person who, in the discretion of the Court, is a proper person.”

It is envisaged that if the proposal to widen the range of people who could take derivative action, the courts would be granted broad discretion when it came to giving permission to the pursuit of such actions (as they are granted under the Companies Act 2006 under the present regime) and then making final orders in the derivative action if permission were granted to continue it. Where a case initiated by an investor establishes that action had been taken by the board that did not maximise and sustain

¹⁰⁶ New Zealand also permits directors to apply : Companies Act 1993, s.165.

¹⁰⁷ *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action*, Report No 12, 1990.

¹⁰⁸ Gregory Crespi, “Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance” (2002-03) 16 *Creighton Law Review* 623 at 634.

the entity, then the courts might make an order that would remedy what the directors had done. For instance, an order reinstating employees who had been made redundant, or an order voiding of a decision to declare a dividend.¹⁰⁹

For the most part it is likely in practice that the party who decides to make a derivative claim and institutes proceedings, because he or she would be motivated sufficiently, would be one who has felt that the directors' actions have prejudiced, or is likely to prejudice his or her position. Of course, the prospective applicant would have to make out a case that the directorial action offends the notion of entity maximisation and sustainability, and not that his or her position is damaged, even though it might be clear that the directors' actions have prejudiced the applicant's position. This latter requirement would have the advantage of ensuring that applicants would not only be focused on their own interests, but also the interests of the company, and they would have to be able to demonstrate, as with the present derivative scheme, that the company's interests have been damaged. This does produce a possible proof problem. How might an investor obtain the necessary evidence that is needed to establish the fact that the company's interests are prejudiced? But this is the same problem that faces shareholders under the present system and no one has suggested that this makes the derivative claim otiose. A further advantage of introducing this process for a broader class of investor is that there would be more potential applicants for permission to take derivative action if directors breach their duties to the company. It is possible that some investors, such as creditors, suppliers and some employees will have either, or both, more resources and information than most shareholders.

Under the present law a court must refuse permission to continue a derivative action if directors have had their actions ratified by a general meeting of members. Under what is proposed here, that provision would need to be omitted as the shareholders could stymie an application by another investor for permission. As it is at the moment where only members can bring derivative claims one can see why ratification by the members might qualify as an event that should block derivative proceedings. But under the proposal made here, failure to omit the provision concerning ratification could effectively mean directors would be able to run the company for shareholders and the latter could ratify the breach of duty as they might well be quite content with what the directors have done. So, the present UK provisions would have to be amended, not only to broaden the right of those who are eligible to bring proceedings, but also to omit any reference to ratification in s.263(2)(c) as not to favour shareholders compared with other investors. This should not be a problem. It is notable that neither the Australian legislation¹¹⁰ nor the Canadian legislation¹¹¹ include the fact, or possibility, of ratification as an element that should be considered by courts in determining whether to give permission for someone to be able to continue a derivative action.

The advantage of the proposal here is that it does not revolutionise the law that has only recently been introduced, for derivative actions are only permitted now when the company has been subject to damage. All that the proposed action does is to extend

¹⁰⁹ This latter instance would only be fair and effective if an injunction stopping payment could be secured before the shareholders were actually paid out.

¹¹⁰ Corporations Act 2001, s.237.

¹¹¹ Canada Business Corporations Act 1985, s.239.

the range of possible applicants for permission to take forward a derivative action and to permit derivative actions where the directors have not only done something that has harmed the company, but what they have done or intend to do would fail to ensure the company's maximisation and sustainability. It could be argued that the use of the derivative action in the circumstances envisaged here seems to be consistent with the rationale for such an action. Professor Bert Prunty stated that this kind of action "was born and nurtured as a corrective for managerial abuse in economic units which by their nature deprived some participants of an effective voice in their administration."¹¹²

3. Criticisms and Retorts

What are the arguments against the use of such a process? First, those who do not take action might be regarded as free-riding on those who can and do take action. But free-riding takes place all of the time. For instance, some creditors free-ride on the monitoring of bigger and more powerful creditors,¹¹³ such as banks, and shareholders will often leave the monitoring of directors' actions to institutional investors.

Second, one of the reasons given for the rule in *Foss v Harbottle* was to limit the number of actions that could be commenced. Is there a danger that allowing a potentially wide group of investors to bring proceedings could lead to an avalanche of litigation? This was even a concern when the introduction of the present statutory scheme was proposed.¹¹⁴ But, with respect, this is unlikely; the concern over a deluge of claims is often over-emphasised. Certainly the floodgates do not appear to have opened as far as litigation is concerned in either Canada or Singapore. It would appear that leave has been used in Canada¹¹⁵ successfully, in that it has prevented an avalanche of litigation.¹¹⁶ The Australian experience is that there has not been a marked increase in litigation since the advent of the statutory derivative action. It was one reason why the Law Commission for England and Wales recommended that court permission had to be obtained in relation to a proposed derivative action,¹¹⁷ and the Companies Act 2006 implemented the recommendation. Indeed in Canada, it is the oppression provision which has spawned a significant amount of litigation, with few applications made for relief under derivative proceedings except where shareholders are the applicants. Also, as indicated above, there would be no intention to omit the permission/leave process that is found in the UK legislation, as that process is present in the legislative schemes of all jurisdictions discussed in this article. This process should enable the filtering out of unmeritorious or vexatious claims.¹¹⁸ Whilst there

¹¹² 'The Shareholders' Derivative Suit : Notes on its Derivation' (1957) 32 NYULR 980 at 982.

¹¹³ "Free-riding" occurs where economic actors "are able to enjoy their share of the benefits from some costly activity...without shouldering their share (or any) of the costs of the activity" : J. Macey, *Corporate Governance* (Princeton, Princeton University Press, 2008) at 131. See, Saul Levmore "Monitors and Freeriders in Commercial and Corporate Settings" (1982) 92 Yale LJ 49.

¹¹⁴ J. Loughrey, A. Keay and L. Cerioni "Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance" (2008) 8 *Journal of Corporate Law Studies* 79 at 87.

¹¹⁵ Canada Business Corporations Act 1985, s.239(1).

¹¹⁶ See, I. M. Ramsay and B. Saunders, "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action" (2006) 6 JCLS 397.

¹¹⁷ *Shareholders Remedies*, Report No 246, 1997, at para 6.69.

¹¹⁸ It has been suggested that in the context of implementing stakeholder theory relief might be limited to injunctions (W. Leung, "The Inadequacy of Shareholder Primacy : A Proposed Corporate Regime that Recognizes Non-Shareholder Interests" (1997) 30 *Columbia Journal of Law and Social Problems* 589 at 625), but this would not be necessary with a permission process in effect.

may well be some increase in litigation it is unlikely that it would involve a significant increase. If we restrict ourselves to the reported cases, there is certainly few cases since 1 October 2007 that have involved a request for permission to bring derivative action.¹¹⁹ As far as non-shareholders are concerned, in Canada, as with the oppression remedy, it is creditors who have sought to utilise the broad derivative process. The courts have not encouraged proceedings and they have required creditors to establish that they have either a direct financial interest in the affairs of the company or a particular legitimate interest in the way that the company is being managed.¹²⁰ Also, the courts have required creditors to demonstrate that they are in a position that is analogous to minority shareholders who have no legal right to influence the things that they regard as abuses of management.¹²¹ The Canadian cases seems to indicate that if an applicant can establish that he or she is bringing action to address conduct that harms the corporation's interests then the courts will grant leave to take the derivative proceedings.¹²²

One other possible concern in this regard is that the board could be held to ransom by an investor, who might threaten litigation unless the directors agreed to take some form of action, and this action might not be conducive to fostering EMS. But with respect to this, and generally when it comes to considering whether derivative claims will be pursued, we must take into account the fact that an investor has the onus of instructing lawyers and obtaining evidence, and there is always the possibility of a costs order being made against him or her if an application is unsuccessful at either the permission stage or when the matter is finally decided, if permission were obtained. Furthermore, as with the present system it will be necessary to persuade a judge that the claim by the investor/applicant is warranted and it fulfils the criteria set out in s.263.

One possible way of ensuring that derivative proceedings do not get out of hand, or investors being minded to use the proceedings to "feather their own nest," would be to enable other investors to appear at the preliminary hearing. Investors who are concerned that the applicant under the derivative process is seeking to benefit his or her own interests or that there is really no harm done to the company, might seek to argue that leave not be given to enable the proceedings to proceed. This process is permitted with winding-up petitions presented by creditors in England, and courts are entitled to take into account the views of other creditors. The reason is that winding up is regarded as a collective regime, and the petitioner is not only acting for himself or herself but for all creditors. Likewise an investor who seeks leave to continue derivative action would be seen as acting collectively on behalf of all investors. One thing that an investor might be concerned about, and which might motivate his or her opposition to an application for permission is that the company might well end up being responsible for most, if not all, of the legal costs of any action, and that will not only affect the company, but also investors indirectly.

¹¹⁹ An example of a case is *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch).

¹²⁰ *Re Daon Development Corp* (1984) 54 BCLR 235 at 243; *Jacobs Farms Ltd v Jacobs* [1992] OJ No 813 at 6-7 and referred to by J. Sarra, 'Taking the Corporation Past the "Plimsoll Line" – Director and Officer Liability When the Corporations Founders' (2001) 10 *International Insolvency Review* 229 at 244.

¹²¹ *Daon Development Development Corp* (1984) 54 BCLR 235 at 243.

¹²² *Re Daon Development Corp* (1984) 54 BCLR 235.

A third objection might be that the process proposed is too uncertain, as what is proposed is leaving open the class of investors who could apply for permission to continue derivative proceedings. But, gradually a jurisprudence would develop to provide more certainty. Also, the main players (employees, creditors, suppliers, the community etc) are going to be likely to be covered by such the formula proposed. It would be impossible to provide an exhaustive list of those who could or should be entitled to bring proceedings.

Fourth, it might be argued that investors would not bother taking action if they are not going to get any direct benefit. Judge Frank Easterbrook and Professor Daniel Fischel have observed that : “A dominating characteristic of the derivative action is the lack of any link between stake and reward – not only the judge’s part but on the plaintiff’s.”¹²³ But shareholders do institute proceedings now when they do not receive any direct benefit. Also, it is likely that the investors who will take action are those who are likely to be prejudiced in some way as a result of what the directors have done or propose to do. The difficulty might be that investors cannot always see how an action will affect the entity and less likely to see how it will affect them. In addition, there is always the possibility that they might be rather reluctant to take action as they might feel that other investors are free-riding on what they are doing.

4. The Use of a Company Litigation Committee

Before applying to the courts for review of what the directors have done, is it feasible and/or appropriate to require the complaint of the investor to go before a litigation committee¹²⁴ that is comprised of independent members of the board? This is an option used in the United States in relation to shareholders’ derivative claims. The obvious benefits of this process are to keep down costs and to “nip in the bud” a dispute before it becomes too serious and which could, conceivably, prejudice the company’s public reputation. But there are undoubtedly problems with this approach. The directors who are members of the committee would have to be independent in that they could not have been involved in taking the action against which the investor complains, or else, obviously, one would have to question how open-minded they would be at a hearing. It might be very difficult in many companies to have truly independent directors. Those selected to act have an inherent conflict of interest in having to pass judgment on one or more of their colleagues.¹²⁵ The directors would have to be non-executives as it is likely that if executives were to have to determine allegations against other executives they would tend to side with the executives as a matter of course, and especially if their promotion or benefits depended on those about whose actions the investor is complaining.¹²⁶ One would expect many investor complaints in the context of EMS to be brought against the board for its collective decisions. In today’s commercial climate all directors are expected to be actively involved in overseeing all facets of the company’s business and they cannot avoid

¹²³ *Economic Structure of Corporate Law* (1991) at 101.

¹²⁴ The concept of such committees is based on litigation committees in the US. See G. Dent, “The Power of Directors to Terminate Shareholder Litigation : The Death of the Derivative Suit” (1980) 75 Nw U L R 96.

¹²⁵ *Ibid* at 114.

¹²⁶ *Ibid* at 111

liability by relying on being passive.¹²⁷ So, it is likely that all, or nearly all, of the directors would be involved in the decision subject to complaint.

Where the action of the investor is aimed at one, two or a small number of directors it will be easier to convene a meeting of independent directors, but in such a situation the independent directors will realise that they would have to work in the future with the directors who took the action that is under attack, unless these latter directors were removed, and then they might feel uncomfortable about acceding to the investor's request. It is not unusual for non-executive directors to be familiar with those directors who are subject to the complaint, having, in the course of working together, forged a friendship with them. In any event it is quite possible that those who select the directors to be members of the litigation committee will seek to select persons who are more likely not to "cause waves." If the ones whose action is impugned are more junior executives the independent directors might feel that if they were to find against the former the junior executives might take the view that there is no loyalty within the board and they might well be less loyal or effective in the future.¹²⁸

5. Court Review

Perhaps one of the primary arguments against the proposal propounded here is to assert that courts should not be employed to review actions of directors. The argument effectively casts aspersions on either the competence or appropriateness of a court making the kind of decisions that are envisaged by derivative litigation initiated by a wide range of investors. It might be said that it involves companies getting involved in the management of companies, and this is something that courts have steadfastly refused to do for many years. One American bankruptcy court has said that short of cases of obvious abuse in cases involving Chapter 11 of the Bankruptcy Reform Act 1978, business judgments should be made in the boardroom and not in the courts.¹²⁹

If a derivative action in the form suggested above were available, and permitted to proceed, then the courts would have to determine whether or not the directors had failed to adhere to EMS. The bottom line is that the courts would have to assess the actions of the directors and possibly the effect of those decisions. Many have had severe misgivings about judges sitting in judgment on what directors have done in making business decisions. David Wishart has asserted that : "Judges simply do not have or would not be seen to have the expertise to determine the limits of acceptable business decisions points."¹³⁰ Professors Margaret Blair and Lynn Stout have said that :

¹²⁷ For instance, see *Re Park House Properties Ltd* [1999] 2 BCLC 530; *Re Kaytech International plc* [1999] BCC 390; *Cohen v Selby*[2000] BCC 275; *Lexi Holdings plc (In Administration) v Luqman* [2007] EWHC 2265 (Ch).

¹²⁸ G. Dent, "The Power of Directors to Terminate Shareholder Litigation : The Death of the Derivative Suit" (1980) 75 Nw U L R 96 at 111.

¹²⁹ *In re Simasko Production Co* 47 Bankr 444 at 449 (Col) (1985)

¹³⁰ "Models and Theories of Directors' Duties to Creditors" (1991) 14 *New Zealand Universities Law Review* 323 at 340. In a similar vein, see M. Whincop, "Overcoming Corporate Law : Instrumentalism, Pragmatism and the Separate Legal Entity Concept" (1997) 15 *Company & Securities Law Journal* 411 at 426; D. Oesterle, 'Corporate Directors' Personal Liability for 'Insolvent Trading in Australia, 'Reckless Trading' in New Zealand and 'Wrongful Trading' in England : A Recipe for Timid Directors, Hamstrung Controlling Shareholders and Skittish Lenders' in I M Ramsay (ed),

“once we leave behind the narrow objective of maximising share value, it is impossible for an outsider like a court to design an algorithm to measure whether a board is maximizing returns to the corporate team, and dangerous to invite courts to try.”¹³¹

But if that is the case how do you enforce any breaches? The theory of the firm which Blair and Stout advocate, namely the Team Production approach, places great responsibility on, and trust in, the directors (known as “mediating hierarchs”¹³²) but surely the learned commentators do not envisage the absence of some form of review process. As the Company Law Review Steering Group said in 1999, any system must have safeguards built into it¹³³ and court review is the ultimate safeguard.

Admittedly, the judges themselves have, from time to time, expressed misgivings, or even fear, in making decisions about how directors have acted in any given business situation.¹³⁴ Undoubtedly one can point to many old cases where courts have taken such a view. Even in the mid-1980s while Street CJ of the New South Wales Court of Appeal in *Kinsela v Russell Kinsela Pty Ltd*¹³⁵ in dealing with the issue of directors’ duties to take into account the interests of creditors, accepted that courts have traditionally and properly been cautious about entering boardrooms when deciding the commercial justification of executive actions.¹³⁶ But his Honour approved¹³⁷ of the opinion of Cooke J of the New Zealand Court of Appeal in *Nicholson v Permakraft (NZ) Ltd*¹³⁸ who said that, *inter alia*, creditors’ interests were to be considered “if a contemplated payment or other course of action would jeopardise its solvency,”¹³⁹ and this requires, as a matter of necessity, an examination of the decision of a board, by a court.

It is arguable that in even more recent times there are indications that many judges no longer see the boardroom as sacrosanct and have not resiled from assessing decisions of management, and there are examples of courts in the past 20 years demonstrating a readiness to review the way in which companies operate and the merits of decisions

Company Directors’ Liability for Insolvent Trading (Melbourne, Centre for Corporate Law and Securities Regulation and CCH Australia, 2000)..

¹³¹ M. Blair and L. Stout, ‘Specific Investments and Corporate Law’ (2006) 7 *European Business Organization Law Review* 473.

¹³² M. Blair and L. Stout, ‘A Team Production Theory of Corporate Law’ (1999) 85 Va L R 247 at, for example, 281.

¹³³ Company Law Review, *Modern Company Law for a Competitive Economy : “The Strategic Framework”* 1999, London, DTI, at para 5.1.30

¹³⁴ See L.S. Sealy, *Company Law and Commercial Reality* (London, Sweet and Maxwell, 1984) at 53-54. Professor Gregory Crespi (“Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance” (2002-03) 16 *Creighton Law Review* 623 at 640) expresses the view that the courts would show the same degree of deference to board decisions as they do now if duties were owed to the company, but the learned commentator was referring to the duty of care and in the US there is always difficulty in challenging directors’ decisions as breach of the duty of care because of the existence of the business judgment rule.

¹³⁵ (1986) 4 ACLC 215.

¹³⁶ Ibid at 223.

¹³⁷ Ibid.

¹³⁸ (1985) 3 ACLC 453.

¹³⁹ Ibid at 457.

which have been made at a managerial level.¹⁴⁰ This is most patent in cases involving claims for directors' breach of duty of care,¹⁴¹ breach of duty to take into account the interests of creditors against directors¹⁴² and applications to disqualify directors under the Company Directors' Disqualification Act 1986.¹⁴³ The courts have clearly conceded that there is a potential danger that they might see everything that was done many years before a matter comes to trial with hindsight, but the fact that they have adverted to this danger, and warned that it must be avoided, is at least a positive step and is likely to mean that courts will not unfairly rely on second-guessing what directors did, and allow hindsight to influence them in the final outcome of a case.¹⁴⁴ In fact it seems that courts take great care to ensure that their assessment of the conduct of the directors is not coloured by hindsight. This is demonstrated clearly by the comments in *Re Sherborne Associates Ltd*,¹⁴⁵ a wrongful trading case, where the judge warned that it is dangerous to assume that "what has in fact happened was always bound to happen and was apparent."¹⁴⁶ Likewise in *Facia Footwear Ltd*, Sir Richard Scott V-C said that "the benefit of hindsight was not available to the directors at the time," implying that he was not going to rely on it. The same approach is evident in the director disqualification case, *Secretary of State for Trade and Industry v Gill*,¹⁴⁷ a case that was concerned with the past activities of a director. Blackburn J made it clear that hindsight should not be employed when dealing with a consideration of the finely balanced judgments of directors.

In the famous, but rather old, US case of *Dodge v Ford Motor Co*,¹⁴⁸ the court opined that "judges are not business experts."¹⁴⁹ But do they have to be? In the Companies Court all judges will have had some significant commercial experience, and, most importantly, the parties can present expert evidence to the court to assist the judge. The judges can hear evidence and decide what is in the interests of the company even if they cannot readily quantify those interests.¹⁵⁰ Importantly, it must not be forgotten

¹⁴⁰ For example, *Re D'Jan of London* [1993] BCC 646; *AWA Ltd v Daniels* (1992) 10 ACLC 933 and on appeal *Daniels v Anderson* (1995) 13 ACLC 614; *Re Barings plc* [1998] BCC 583; *Re Westmid Services Ltd* [1998] 2 BCLC 646; [1998] BCC 836; *Re Barings plc (No5)* [1999] 1 BCLC 433; *Re HIH Insurance Ltd (in prov liq)*; *ASIC v Adler* [2002] NSWSC 171; (2002) 41 ACSR 72; (2002) 20 ACLC 576; *Re One.Tel Ltd (in liq)*; *ASIC v Rich* [2003] NSWSC 85; (2003) 44 ACSR 682; *ASIC v Vines* (2003) 48 ACSR 322; *Re AG (Manchester) Ltd* [2008] EWHC 64 (Ch); [2008] 1 BCLC 321; *Lexi Holdings Ltd (in administration) v Luqman* [2008] EWHC 1639 (Ch).

¹⁴¹ For instance, see most of the cases in preceding note.

¹⁴² For instance, see *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453; *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 ACLC 215; 10 ACLR 395; *Liquidator of West Mercia Safetywear v Dodd* (1988) 4 BCC 30; *Facia Footwear Ltd (in administration) v Hinchliffe* [1998] 1 BCLC 218; *Re Pantone 485 Ltd* [2002] 1 BCLC 266; *Gwyer v London Wharf (Limehouse) Ltd* ([2003] 2 BCLC 153; [2002] EWHC 2748; *Peoples' Department Stores v Wise* [2004] SCC 68; (2004) 244 DLR (4th) 564; *Re MDA Investment Management Ltd* [2004] BPIR 75; [2003] EWHC 227 (Ch); *Re Cityspan Ltd* [2007] EWHC 751 (Ch); [2007] 2 BCLC 522.

¹⁴³ For instance, see *Re Barings plc* [1998] BCC 583; *Re Westmid Services Ltd* [1998] 2 BCLC 646; [1998] BCC 836; *Re Barings plc (No5)* [1999] 1 BCLC 433; *Secretary of State for Trade and Industry v Swan* [2005] EWHC 603 (Ch); *Secretary of State v Thornbury* [2007] EWHC 3202 (Ch); [2008] 1 BCLC 139.

¹⁴⁴ *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at 475.

¹⁴⁵ [1995] BCC 40.

¹⁴⁶ *Ibid* at 54.

¹⁴⁷ [2004] EWHC 933.

¹⁴⁸ 204 Mich 459; 170 NW 668.

¹⁴⁹ 170 NW 668 at 684.

¹⁵⁰ Steven Wallman, "The Proper Interpretation of Corporate Constituency Statutes and Formulation of Directors' Duties" (1991) 21 *Stetson Law Review* at 163 at 191.

that judges in the Companies Court have regularly assessed the conduct of directors in relation to actions for, by way of example, wrongful trading¹⁵¹ and breaches of directors' duties,¹⁵² some of which cases have been difficult to resolve and/or involving complicated facts and issues. Parliament has, arguably, in the Companies Act 2006 demonstrated recognition that courts can engage ably in assessing the actions of directors. The courts will have to assess, for instance, whether directors have acted in such a way as to promote the success of their company under s.172(1). Parliament seems to be content to bestow on the courts the responsibility of assessing decisions made by administrators in relation to actions taken in administrations under Schedule B1 of the Insolvency Act 1986. This responsibility includes evaluating business decisions that administrators have to make.

It is submitted that, hitherto, courts, when reviewing what has occurred to companies, often some years before the hearing of an action, have demonstrated a good deal of understanding of the positions in which directors found themselves at the relevant time. It has already been noted that judges have warned about second guessing the judgments of directors.¹⁵³ Decisions like *Nicholson v Permakraft (NZ) Ltd*,¹⁵⁴ *Re Welfab Engineers Ltd*¹⁵⁵ *Linton v Telnet Pty Ltd*¹⁵⁶ and *Brady v Brady*¹⁵⁷ manifest the fact that courts are capable of weighing up business decisions. In *Facia Footwear Ltd (in administration) v Hinchliffe*,¹⁵⁸ Sir Richard Scott V-C acknowledged that in continuing trading the directors were taking a risk, but his Lordship went on to say, with, it is respectfully suggested, an understanding of business practice, that "the boundary between an acceptable risk that an entrepreneur may properly take and an unacceptable risk...is not always, perhaps not usually, clear cut."¹⁵⁹

Furthermore, the courts have been judging the actions of different kinds of fiduciaries for many years and, it is submitted, they are now more adept at doing so than ever before. It is contended that British courts have increasingly become more competent at assessing the actions of directors.

Where a claim is that the directors have been involved in some form of self-dealing or have allegedly breached their duty of care, the courts could approach the matter as they presently do. Where the allegation is that the directors have failed to maximise

¹⁵¹ For example, see *Re Brian D. Pierson (Contractors) Ltd* [1999] BCC 26; [2001] BCLC 275; *Re Continental Assurance Ltd* [2001] BPIR 733; *The Liquidator of Marini Ltd v Dickensen* [2003] EWHC 334 (Ch); [2004] BCC 172.

¹⁵² For example, *AWA Ltd v Daniels* (1992) 10 ACLC 933; *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] BCC 145; *Criterion Properties plc v Stratford UK Properties LLC* [2002] EWHC 496 (Ch); [2002] 2 BCLC 151; *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2002] 2 BCLC 201; *Re HIH Insurance Ltd (in prov liq); ASIC v Adler* [2002] NSWSC 171; (2002) 41 ACSR 72; (2002) 20 ACLC 576; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch); [2003] 2 BCLC 523; *Shepherds Investments Ltd v Walters* [2006] EWHC 836; *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237; [2008] 1 BCLC 508

¹⁵³ Law Commission, *Company Directors : Regulating Conflicts of Interests and Formulating a Statement of Duties* (Law Commission Consultation Paper No 153, 1998), at para 15.30.

¹⁵⁴ (1985) 3 ACLC 453

¹⁵⁵ [1990] BCC 600.

¹⁵⁶ (1999) 30 ACSR 465.

¹⁵⁷ (1988) 3 BCC 535.

¹⁵⁸ [1998] 1 BCLC 218.

¹⁵⁹ Ibid at 228.

entity wealth, then the courts will have to consider whether the actions of the directors did in fact do that. Undoubtedly there are likely to be some significant measurement issues that have to be considered in determining whether the directors did maximise entity wealth in the circumstances in which they found themselves.¹⁶⁰ If EMS was only focused on financial wealth at a given time then it would be preferable if the judges could do a comparison of the total aggregate value of the corporate entity before the directors took the action that is impugned and the total aggregate value after they had taken the action, to ascertain the effect of what they had done. But entity maximisation does not just mean a focus on profit maximisation, for it encompasses such things as augmenting reputation, which have a longer term impact on the financial standing of the company. Any assessment cannot be purely objective. A court cannot simply look at the share value of the company before and after the impugned action. EMS is far more subtle than that. A court would have to consider how the action has impacted on the company overall, and this might involve examining a number of factors. What the court does consider will, to a large extent, depend on what is presented to it by the party claiming under the derivative claim. It is obviously the responsibility of the claimant to introduce cogent and convincing evidence that demonstrates that the directors have fallen short of the necessary standard. The judicial review of the directors' actions is to prevent a serious abuse of power.¹⁶¹ The courts will be required to determine whether the applicant or the directors' view of what is best for the company will prevail.¹⁶²

There has to be an avenue for review of what directors have done; they cannot be immune for scrutiny of their actions. Just as we provide for the review of the decisions of public servants and other public office-holders, administrators, liquidators and others, so there must be provision for the review of what directors do.

In sum, while judges will, it is acknowledged, often have to wrestle with difficult questions flowing from differing views of what constitutes right action in the circumstances in which companies operated,¹⁶³ they are able to make a fair assessment of the actions of directors on the evidence that is presented to them, and are now more than ever probably better able and better equipped to take practical and commercial decisions.¹⁶⁴ Sheldon Leader has said in relation to consideration of what interests should be considered by directors : "management need not always have the last word on the matter either. It must be open to the outside influence of a court of law."¹⁶⁵

V. Conclusion

¹⁶⁰ See, "Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance" (2002-03) 16 *Creighton Law Review* 623 at 636. The learned commentator does not seek to ascertain whether the company entity has been maximised, but is more concerned with the value of any action to each stakeholder.

¹⁶¹ G. Frug, "The Ideology of Bureaucracy in American Law" (1983-84) 97 *Harvard L R* 1276 at 1334.

¹⁶² Ibid at 1344.

¹⁶³ W. Allen, "Ambiguity in Corporation Law" (1997) 22 *Del J Corp L* 894 at 899.

¹⁶⁴ A point accepted as far back as 1982 by the Insolvency Law Review Committee, *Insolvency Law and Practice* (generally referred to as 'the Cork Report') Cmnd 858, HMSO, 1982 at para 1800.

¹⁶⁵ "Private Property and Corporate Governance. Part I : Defining the Interests" in F. MacMillan Patfield, *Perspectives on Company Law : 1*, (Kluwer, London, 1995) at 113.

This article has sought to ascertain what enforcement measure could be utilised in relation to the entity maximisation and sustainability model that has been posited earlier. The article has considered various options, but it has been argued that the derivative scheme presently found in the Part 11 of the Companies Act 2006 can be modified to provide for the most appropriate enforcement process. To ensure that all investors might have standing the process must be open to more than just shareholders, which is the present state of affairs. It is such that the availability of a derivative action requires investors to consider the wider interests of the corporate entity.

It has been noted in the article that the stakeholder theorists have had significant problems in determining how that theory could be implemented. While devising an enforcement process is far from easy, it is, arguably, significantly easier with relation to EMS compared with the stakeholder theory, because there is no need to determine whether a stakeholder/investor has suffered prejudice. It will only be necessary to establish that the affairs of the company have not been carried out in such a way as to maximise and sustain it.

APPENDIX 1

Constitution of the Centre for Business Law and Practice

1. Objectives

The objectives of the Centre are the promotion of research and teaching in all aspects of business law and practice, including but not limited to the interaction between legal rules and business practice. These objectives may, where appropriate, be pursued through links with other constituent parts of Leeds University or departments or centres within other Higher Education Institutions, as well as through links with businesses and professions in Leeds and elsewhere.

2. Membership

2.1 Any member of the academic or research staff of the Department of Law or the Leeds University Business School may be a member of the Centre.

2.2. Other individuals, whether members of the University or not, may be appointed to membership of the Centre by the University Council on the nomination of the Executive Committee.

2.3 Institutions or firms may become associate members of the Centre if they fulfil the conditions established in by-laws made from time to time by the Executive Committee of the Centre.

3. Administration

3.1 The Centre shall be administered by a Director and an Executive Committee.

3.2 The Director shall be appointed by the University Council on the nomination of the Head of the Department of Law after consultation with the members of the Centre. S/he shall hold office normally for a period of three years and shall be eligible for immediate re-appointment.

3.3 The Director shall be responsible to the Executive Committee for the running of the Centre and the representation of its interests. The Director shall have regard to the views and recommendations of the Executive Committee and the Advisory Committee. The Director may be assisted by a Deputy Director or Directors appointed by the Executive Committee normally for a period of three years. Any Deputy Director so appointed shall be a member ex officio of the Executive Committee.

3.4 The Executive Committee shall consist of the Director and any Deputy Director together with the Head of the Department of Law, two representatives of the Leeds University Business School and up to three nominated members of whom not more than two may be members of the teaching staff of the Department of Law. The Executive Committee shall have power to co-opt up to two additional members. Nominated and co-opted members shall be appointed normally for two years and shall be eligible for immediate re-appointment.

3.5 The Executive Committee shall meet as often as necessary to carry on the work of the Centre, but in any event at least twice a year, the Director acting as convenor. Any

member of the Executive Committee shall have the right to require the holding of a meeting of the Committee.

3.6. Minutes of the meetings of the Executive Committee shall be presented to the following Staff Meeting of the Department of Law.

3.7 There shall be an advisory Committee appointed by the Executive Committee which shall formulate advice and recommendations concerning any aspect of the administration or activities of the Centre. The Advisory Committee shall consist of:

- (a) all members of the Executive Committee;
- (b) up to three members of the teaching staff of the University of Leeds in departments other than Law, being individuals 'those activities or interests have relevance to the objectives and work of the Centre';
- (c) up to fifteen persons from outside the University of Leeds with experience in the fields of activity covered by the objectives and work of the Centre.

3.8 The Executive Committee may also nominate up to ten persons to act as Advisers to the Centre. Advisers shall be persons who agree to offer advice on the work of the Centre at the invitation of the Executive Committee

3.9 The Advisory Committee shall meet once a year with the Director acting as convenor. Special Meetings may be held at the request of the Executive Committee.

4. Amendment to the Constitution

This constitution may be amended by the University Council (or any committee acting with authority delegated by the Council) on the recommendation of the Department of Law and the Executive Committee of the Centre.

APPENDIX 2

OFFICERS OF THE CENTRE

Director :

Professor Andrew Keay (appointed 1st August 2008)

Deputy Director :

Joan Loughrey (appointed 1st August 2007)

Executive Committee:

Sarah Brown

Andrew Campbell

Judith Dahlgreen

Professor Roger Halson

Oliver Gerstenberg

Juliet Pearce

Paul Lewis (Leeds University Business School)

Joan Loughrey

Professor Surya Subedi