In Exploring the Enlightened Shareholder Value Principle: Has There Been Any Change in The Way a Company Conduct Its Business?

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1. Introduction

"*For whose benefit and at whose expense should directors operate the firm*."[1] A historical debate that still stands today with the same tension it did one century ago.[2] Alongside theoretical academia, different jurisdictions still in dispute on whom should receive the attention of a firm; shareholders or other stakeholder constituencies, including employees, creditors and customers.

Corporations are the primary vein of any country's economy. The profound influence they carry on peoples' life, place them in a sensitive position that requires continual evaluation. Nonetheless, this continuance evaluation has been largely surrounding the discussion of the actual objective of companies. Although a company is an entity whose "*defining characteristic is the attainment of a specific goal or purpose*,"[3] there is no actual agreement on what that goal or purpose should be. For centuries academics have been asking: Should directors merely care about maximising shareholder profit or should they strive to give proper consideration to stakeholders.[4] Whilst the matter has been discussed '*ad nauseam*,'[5] it is not any close for settlement.[6] In conjunction with other disciplines, the objective of a corporation lies at the heart of Corporate Governance; which constitutes a set of control mechanisms aims, among other things, to facilitate directors' responsibilities.

Corporate bodies in the English legal system have historically adopted the shareholder primacy approach aimed at maximising shareholder profit.[7] However, the intellectual revolt against scandals and recession in the 1990s, most notably *Enron*, led to a public wave advocating for the adoption of an economic theory which simply requires more from such corporate bodies.[8] This brought the stakeholder theory to the national agenda, yet not to implementation. In fact, it was recommended that the application of the stakeholder theory is neither workable nor desirable in the UK.[9]

Following a series of consultations and reports, the UK jurisprudence also opposed readopting the traditional shareholder theory and instead they implemented the enlightened shareholder value

principle [hereinafter 'ESV']. A theory that presents a 'third way' in combining elements of both the shareholder and stakeholder approaches.[10] Although still requires shareholder profit maximisation, it imposes a need to consider stakeholders interest. On such, it was implanted through firstly introducing an *'inclusive'* statement of directors' duties that would reflect the need to consider various stakeholders interest as a means to achieve the primary goal of shareholder value,[11] and secondly by demanding companies to produce an annual report indicating several information related to stakeholders' constituencies, in order to assist shareholders to become '*enlightened*.'[12]

Adopting the ESV has been advocated with modernity, effectiveness, and progress.[13] Although ESV does not oblige directors to act solely on the basis of stakeholders' interest, however, it "*endorses a multi-stakeholder decision-making rule and makes management at least indirectly accountable to stakeholders*."[14] A move that entrenches corporate social responsibility [hereafter 'CSR'] metrics, hence, increase building the confidence and trust with stakeholders and ultimately with the community to ensure a stabilised market.[15]

On that note, this dissertation aims to assess the incorporated concept of ESV from both a director and a shareholder perspective. In particular, this dissertation aims to question whether the incorporation of ESV has changed the way companies conducting their business. It will start with evaluating the two dominant Corporate Governance theories; shareholder primacy theory and stakeholder theory. Thereafter, the second chapter will look at the extent of which the new law has changed the long-standing shareholder primacy approach. This will involve assessing both, duty to consider stakeholders and duty to disclose stakeholder related information. After concluding the ineffectiveness of ESV to impose proper consideration of stakeholders upon directors, chapter three will examine whether shareholders can salvage the situation in accepting the invitation to become enlightened and support stakeholder interests. Finally, last chapter will propose potential solutions to overcome the difficulties inherited from effectively considering the stakeholders interest. The dissertation concludes by arguing that ESV has left stakeholder interest between non-obligated directors and careless shareholders. Legally, the ESV merely represent an artificial and a token gesture that is heavily based on the codifications of the previous law. Nonetheless, the application of ESV might still be preserved under public expectations and public pressure.

2.The Unresolved Debate

2.1. Introduction

Historically, there have been two competing theories as to whom benefit a company should run for; the shareholder primacy theory and the stakeholder or pluralist theory.[16] The first solely seeks to promote the interest of shareholders, hence, aims to accumulate their wealth. In contrast, the latter considers an altruistic view through focusing on whom is affected by a company's actions and emphasises sustainability and inclusion. [17]

The debate over the nature and purpose of the corporation has roots back to the time of the Wall Street Crash on the late 1920's.[18] On one hand, there was Professor Berle who was with the belief that directors should exercise their power "*only for the ratable benefit of all the shareholders as their interests appears.*"[19] On the other hand, Professor Dodd was on the side of stakeholder theory,

varying the opinion that companies are economic institutions "*which has a social service as well as a profit-making function*."[20] Over the course of the past century, this famous debate has been traced and retraced in a pendulum swing between these two fundamental positions. Until our current day, this debate still stands with the same tension as it did at that time.[21] Academics have been divided into showing the rival benefits of one system over the other.[22] The debate is visible through noticing the inconsistent application of Corporate Governance in various countries. Anglo-American countries fall under the shareholder category, whereas Continental Europe and Asian countries follow the stakeholder model.

For deeper understanding of this debate, this chapter will concentrate on evaluating both of the shareholder primacy theory and the stakeholder theory. It will be noted that neither one of these systems offers an ideal example. The flaws of the first model amount as the benefits of the seconds and *vice versa*.

2.2. Shareholder Primacy Theory

The UK Corporate Governance is predominantly established upon the shareholder primacy model.[23] Since the privatisation of state-owned corporations and the adoption a '*laissez-faire*' approach,[24] shareholders were left with the need to monitor and discipline underperforming management.[25] Empowering shareholders and entrenching shareholder profit maximisation had left the presumption that shareholders are the owners of the company and the company should be ran solely for their benefit.[26]

Indeed, legally speaking, they are not the actual legal owners, yet calling them owners is seen as a '*common*' understanding because of the legal rights they hold in the company.[27] Under the Companies Act 2006, owning '*share capital*' is not the same as owning the company itself.[28] The assets of the company are distinct from the profit which may be made using them. This has been the orthodox understanding since 1837, where it was held that company shares are personal entitlement to profit and not a claim to the company assets.[29] In other words, a share is an item of property distinct from the property of the corporation.[30] Furthermore, it is well understood that a company possess a separate legal personality the moment it become incorporated.[31] As a result, it can only be managed but not owned by others. This was stressed by Lord Halsbury, who stated that *'[i]t seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself.'*[32]

However, shareholders can be seen as owners because of their legal power to exercise considerable control over the company.[33] They do not only possess a strong financial influence over their agents, the directors of the company,[34] but they also have a considerable position to monitor the corporation behaviour. The law requires shareholders' consent in most of the major changes in the company life. It is required when the company seeks to change its status from public to private and vice versa;[35] for an allotment of shares, disapplication of pre-emption rights, reduction of share capital, repurchase of shares or giving financial assistance;[36] for defensive measures taken once takeover is imminent;[37] in respect of the articles of association;[38] for a range of transactions between directors and the company;[39] in regard to loans, quasi-loans and credit transactions;[40] also consent is required in respect of political donations.[41] Alongside all of the above approval requirements, shareholders further are connected by their contribution to capital. In addition and above all, the shareholder primacy has been further strengthened by the apparent common law support. Since the renowned judicial authority of *Hutton v West Cork Railway Co*,[42] the court explicitly established that promoting the interest of other stakeholders is only legitimate when it would ultimately advance the

interest of shareholders. A decision that favours stakeholders over the shareholders will be seen invalid.[43] All of these factors have made calling them 'owners', a common practice.[44]

The merit of shareholder theory comes with its ability to generate best environment for the creation of wealth.[45] The objective of profit maximisation creates the basis for economic growth. In spite that this theory considers the only '*social responsibility of business is to increase its profits*,'[46] it is understood that in maximising shareholder profit, the company would benefits its surroundings. Likewise, the bigger the company becomes, the higher chance to provide more employment and relatively cheaper products.[47] This also carries an external benefit extends to the wider community because of the redistribution of wealth through tax revenues. As a result, shareholder primacy achieves a comprehensive prosperity and welfare while also promoting the interests of the wider society.[48]

The second benefit for shareholder paradigm is that it allows corporations to be accountable to their owners.[49] Unlike stakeholder theory which leaves directors with no accountability for a particular group of persons, shareholder model is explicit that directors are accountable to shareholders.[50] Under the stakeholder theory, directors are required to address infinite consideration. Besides a large number of stakeholders affected by the company, a stakeholder might also be affected in different capacities. For instance, an employee might also be worried about environmental impact.[51] Balancing different interests is practically unrealistic and may confer a wide discretion that could lead to an abuse. The shareholder theory alleviates this issue with one single objective which is maximisation profit for shareholders and being accountable only in front of them.[52]

Although the sole objectivity is seen as an advantage in the accountability perspective, it is commonly used in support of counter-arguments against the promotion of shareholder interests.[53] The single objectivity means that managers are willing to sacrifice other stakeholders in order to achieve wealth maximisation for the shareholder. Claiming that shareholder model will ultimately benefit other stakeholders is disputed.[54] Without implementing a mechanism to force corporations to absorb externalities or to share gains among all stakeholders, there is no inevitable gain on the part of workers or society even when the company is making lots of money. [55] This has been noted within *Shell* practice which adhered to shareholder primacy, when the company axed 5,000 jobs to boost the dollar value of its dividend by 5%.[56] An example which represents how a company has every incentive to externalise any cost into those whose interests are not included in the firm's financial calculus. [57] While shareholder primacy has the benefit of holding directors into account, stakeholders are normally left without proper mechanisms to protect their interest. According to the Hampel Committee on Corporate Governance "*directors as a board are responsible for relations with stakeholders; but they are accountable to the shareholders*."[58] Hence, in empowering shareholders and entrenching profit maximisation as the objective of the firm, these provisions potentially militate against stakeholder protection.[59]

2.3. Stakeholder Theory

The second dominant theory of Corporate Governance in the world is the stakeholder theory which is also known as the pluralist theory. [60] The importance of this theory significantly started to raise after the *Enron*, *Tyco*, and *WorldCom* scandals.[61] This theory hinges on the idea that directors are compelled to run the company for the benefit of all potential stakeholders.[62] As a way to obtain shared benefits,[63] stakeholder theory does not only focus on the benefit of its investors, but also its lenders, customers, employees, suppliers, and the community.[64] This implies a demolish of the greedy profit maximisation and replace it with wider generous outlook that cares about others.

The definition of a stakeholder is very wide and includes "*any group or individual who can affect or is affected by the achievement of the organisation's objectives*."[65] At this juncture, this theory does not regard shareholders as the sole residual risk owners. Instead, it does appreciate that other constituencies such as employees, creditors and suppliers bear a significant risk from company actions. Whilst shareholders may lose their investment, employees may lose their lifeline and possibly their future where the failure of the company affects their pensions.[66]

The application of the stakeholder theory has gained much greater provenance outside the Anglo-American markets. Most notably in two of the largest modern economies in the world, Germany, and Japan. Germany implements a codetermination system where stakeholders have a representation in a supervisory board.[67] Whereas, Japan incorporates stakeholder paradigm in the directors' board structure. There, the board of directors includes representatives of key stakeholders, including employees, creditors, and suppliers.[68] The effectiveness of these two systems is not well clear. For instance, whilst Japan is heavily criticised on its weak protection mechanisms concerning minority shareholders, according to a comparison study between leading corporations in Japan and the US, it was concluded that Japanese firms "*outperform their more conventional US counterparts by both operational and financial metrics*."[69] Therefore, despite having some issues with protecting minority shareholder, the system reflects an advanced system which does not only represent diverse interests, but also able to achieve outstanding financial results.

In advocating for the stakeholder theory, most of the arguments used are based on the flaws of the shareholder primacy theory.[70] In particular, pluralist theory tackles the short-termism that is inherent in shareholder theory and which were seen as main causes for the collapse of high-profile companies.[71] Stakeholder theory addresses this issue through its departure from a solely objective of profit maximisation to a wider ambition considering the wide community. Likewise, it embraces wider objectives including equitable employment routines, long-term environmental and social benefits, and sustainable growth.[72] Of course, this is not carried through abandoning shareholder interests, instead, it is basically given equal weight to stakeholder interest.

The second importance of the stakeholder theory comes from the fact that it represents an updated modern theory. Shareholder theory presents an out of date theory which was developed in the 19th century and as a result, it has been argued it reflects the views of an "*outdated, over-abstracted, over-static and far removed from the modern business environment and social reality*".[73] Nowadays, the public place great expectation for corporate behaviour, not only locally but also internationally in regard to their business abroad. Increasingly it has been argued "*that free enterprise cannot be justified because it is good for business. It can be justified only because it is good for society.*"[74] These factors led to the development of CSR which requires employing a more altruistic approach to the running of a company to curb unethical misbehaviour and recognise their social responsibilities. In the eyes of many, the pluralist theory is able to deliver these expectations and enhance their existence.[75]

The major defect of stakeholder theory is that it provides wide discretion without directed accountability. The wide meaning of stakeholders is keeping an open door for the inclusion of more and more stakeholder constituency. Along with all the previous groups, both of the environment and the Government are becoming evoked as stakeholder constituency.[76] Somewhat skeptically, Lord Pattern notes that *"[t]he very word stakeholders can very soon mutate into the whole population of the country."*[77] Thereby, if the company will be accountable for everyone of these groups, instead of a single constituency, the value of directors' accountability would be diminished.[78] The high

subjectivity in balancing all these interests will probably lead to highly immune directors.

In addition, stakeholder theory application while been implemented in some countries, still it carries some doubts in regards to its effectiveness.[79] Despite Germany being one of the leading financial countries in the world, it has been observed that the German model of codetermination lacks a persuasive evidence that it changes corporate decision making.[80] This has also been noticed by the practice of some German companies whom are shying away from the stakeholder-oriented position. For example, one of the largest engineering companies in Europe, *Siemens*, present an example of a company that has abandoned stakeholder theory for a more shareholder-oriented model.[81] Remarkably, more companies are complaining that the national inclusive measures are burdensome and hindering change.[82]

2.4. Conclusion

It is clear that each one of these theories has its own benefits and flaws. Although shareholder primacy approach has shown great success in Anglo-American countries' economies,[83] the continuance crisis they generated has abolished the community trust in their approach.[84] Indeed, adopting the stakeholder approach is not the optimal answer. Similarly to the shareholder model, adopting the pluralist theory whilst encouraging, it still carries a high degree of confusion combined with wide direction and minimal accountability. All in all, the unresolved dispute will probably carry without the possibility of providing a definite answer on choosing one over another.

3. UK Claimed Neutral Position

3.1. Introduction

The original English Legal System is primarily based on the shareholder value model.[85] This position was modified through the enactment of the latest Companies Act 2006. The fact that both of the dominant theories are carried with noticeable flaws in their function; compelled the UK government to take a neutral position implementing the ESV.[86] The ESV is a theoretical precedent that has been relatively developed by the economist, Professor Michael Jensen.[87]

It represents a middle ground theory aimed to eliminate the flaws of the above two competing theories.[88] It requires a wider consideration for other stakeholder factors to minimize blind profit maximisation.[89] At the same time, it recognises the priority of shareholder interest to avoid the possibility that directors would not be held into account through wide discretion and numerous stakeholders to satisfy.[90] By this, it enshrines a new system which recognises '*long-term sustainable success*,'[91] and eliminate the "*undue focus on the short term and narrow interest of members at the expense of what in a broader and longer term sense the best interest of the enterprise*."[92]

The expansion of the traditional scope of shareholder primacy paradigm amounted as the most '*contentious*' provisions of the Companies Act 2006.[93] This is because it has been viewed as a radical change in the UK company law regime.[94] A new era in the company legislation.[95] As Hodge perceived it "*captures a cultural change in which companies conduct their business*."[96] For the first time in the UK legal system, directors are statutorily required to take into account non-shareholder groups' interest.[97] Section 172 requires directors to promote the success of the company for the benefit of the members as a whole, whilst having regard to a no-exhaustive list of factors.[98] Including the long-

term interests of the company, employees, customers, suppliers, the community and the environment.[99]

Such an inclusive approach reflects the interconnected connection between company behaviour and the surrounding stakeholders which will ultimately build sensible relation with stakeholders.[100] In addition to this inclusive duty, the Act also demands companies to produce an annual report indicating some information related to stakeholders' constituencies, in order to assist shareholders to become '*enlightened*.'[101] Through these two mechanisms, ESV represents the practical reality of modern commercial practice that reflects the incorporation of CSR.[102] The explicit requirement to consider stakeholder interest 'amongst other things', overlap with the definition of CSR. As it represent a requirement to pursue advancing the interest of the groups' effected by company actions.[103]

The duty to promote the success of the company under section 172 was seen as an "*entirely new concept*."[104] However, the reality is the duty to act in the best interests of the company is a long standing fiduciary duty a director owes to the company.[105] Furthermore, ESV principle seems to confirm an old common law precedent. The old case of *Hutton v West Cork Railway*,[106] clearly established that directors were allowed to take into consideration various stakeholder interests, as long as, this would achieve a return for shareholders in the future. However, Gower and Davies pointed that section 172 represent a move from this *'permission'* to an *'obligation'* to consider stakeholders.[107] In fact, the inclusion of various stakeholders' interest in section 172 will enhance directors' legitimacy in considering their interests, and make CSR possible and enforceable.[108]

Upon that note, this Chapter will be dedicated to evaluate the effect brought by ESV to the directors' behaviour. In particular, it will evaluate both, duty to consider stakeholders and duty to disclose stakeholder related information. It will be noticed that the expectation of enhancing stakeholder consideration was met with disappointment. The predominance shareholder value is still strongly preserved under the ESV approach.

3.2. Strong Traditions

Previously, directors' duties were in a fragmented state, incorporated in statute law, case law, codes, and regulations.[109] Sections 171-172 of the Companies Act 2006 came into existence to eliminate the considerable duplications and overlapping in the field, with an aim to codify and simplify the law.

Nonetheless, the statutory duties do not provide an exhaustive list. Section 170(4) clearly stipulate that "*duties shall be interpreted and applied in the same way as common law rules*." Despite the enactment of the duties, the continuity of common law application should still stand. Not only that, but also the development of common law and equitable principles may further continue to develop outside the legislation.[110]

This means that the strong stands of common law and equitable principles regarding promoting the success of the company, which were developed before the incorporation of ESV, would still stands while interpreting section 172. It is correctly anticipated that under a heavy influence of existing precedent in support of shareholder primacy paradigm, stakeholder consideration under section 172 will be strictly constrained by the courts' interpretation.[111] Thus, for ESV to be complete, there should have been not only an enlightening of director duties but also an *'enlightened judiciary.'*[112]

Otherwise, all the common law developed restrictions will still apply and hinder an actual implementation of the ESV.

3.3. Judicial Reluctance

There is a noticeable judicial reluctance in regard to the enforcement of considering stakeholders' interest. It has been long established that English courts are notoriously averse to interfering with decisions in companies. They would neither impose their views in formulating decisions in the best interest of the company,[113] nor would hold a director liable simply because their decision caused injury to the company.[114]

Second, there is a firm reliance on a subjective test to assess directors' behaviour. It can be noticed that section 172 stipulates different wordings for addressing shareholders and stakeholders. It addresses these two groups respectively by '*act in the way*' *and* '*have regard to*.' Cerioni argued that the words '*have regard to*' stakeholders' interest does not indicate a ticking box criteria, but rather it means '*give proper consideration to*.'[115] Therefore, in conjunction with the subjective nature of section 172 which require acting in '*good faith*', directors are under a positive duty to take into account the factors listed including stakeholders interest. A discharge from this duty can only happen after proper consideration and not a simple reference to a vague '*box ticking*' exercise.[116] Kershaw confirm this understanding and notes that "*determining what the director thinks will promote the success of the company for the benefits of the members is an objective, not a subjective requirement*."[117] In their opinion, section 172 cannot be solely analysed as being subjective, while acting in good faith is subjective by nature, having regard to various factors and stakeholders in section 172(1)(a) to (f) is an objective test.

On the contrary, Keay correctly observed that the expression '*have regard to*' indicates that the stakeholders' interest consideration is solely at directors' discretion which exercised only for the paramount interest of shareholders.[118] Simply put, section 172 indicates no objective assessment. It provides no practical criteria nor a procedural requirement to assess the requirement of directors to '*have regard to*' stakeholders interest. There is also no prioritisation given between these various constituencies.[119] The main obligation seems to be the need to act in '*good faith*.' This practice guarantee that business decisions, tactics, strategies are solely for directors to take, not subject to the court inquisitorial.[120] As the guidance of implementing section 172 stated, "*what will promote success [of the company], and what constitutes such success, is one for the directors' good faith judgment*."[121] This appears to mean that in breach of section 172, an unequivocal reference to a subjective test based only on the good faith of the director will be held.[122]

This comprehensive observation was later confirmed by the court. As in the case of *Iesini v Westrip Holdings*,[123] it was held that court "*would not second guess a decision made by the company*."[124] Weighing of considerations as to whether an action for a breach of section 172 is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case. Similarly, in *LNOC Ltd v Watford AFC Ltd*,[125] Judge Mackie plainly expressed that "*the obligation [under section 172] is to act in a way that the director (not the Court) honestly believes to be in the company's best interests*."[126] The test only becomes objective when there is no actual consideration of the best interests of the company.[127]

Such an approach seems to follow the previous common law precedent which was also based on a subjective test, placing the issue on "*the director's state of mind*."[128] A practice which motivates directors to take commercial risk without placing much worry on various considerations.[129] Although

any business decision is certainly interconnected with various other factors and often require expert opinion to understand, Kershaw views the judge's attitude toward business judgment as a pull back from "*an actual assessment of these business considerations into the comfort zone of the law*."[130]

The issue that stands with this practice is that directors might obtain "*unfettered discretion*."[131] This could facilitate directors to escape the new requirement of considering stakeholders.[132] Directors would have to decide themselves the proper extent of considering stakeholders.[133] Once a director proves that they made a decision in good faith it makes their position '*virtually unassailable*.'[134] Furthermore, in acknowledging that shareholders are now statutorily entitled to derivative proceedings,[135] directors might be more lenient with a technical breach that involves excluding the consideration of stakeholder interest, in the contrary, they would follow a rigorous approach to achieve profit maximisation.[136] As a result, directors would probably give more weight to a party that carries a judiciary power, not to stakeholders who have no legal enforceable remedies.

The ultimate objective of this duty is to promote the '*success*' of the company. While success depends on the type of the firm itself, normally and as noted by the Parliamentary debate, success would be defined in terms of long-term increase in shareholder value reflecting the economic success of the company.[137] Therefore, they clearly prioritised the shareholder profit maximisation over the considering other factors. This means that stakeholder consideration is required only insofar as this contributes to the overall corporate goal of promoting the success of the company for the benefit of shareholders.[138] To illustrate, even if a director decides to have a negative impact on the environment in contrary to section 172(1)(e), s/he will not be in breach of section 172 as long as the decision carried no damage to the success of the company.[139]

3.4. A Right Without A Remedy

One of the major flaws carried by section 172 relates to its enforceability. Besides having a challenging task to prove the existence of a breach, only shareholders are allowed to bring an action against directors. Those constituents mentioned in section 172(1) have no locus standi before the courts to bring an action for breach of the provision.[140] The Companies Act 2006 provides no remedy for stakeholders in case directors failed to consider their interest.[141] Instead, stakeholders can avail themselves of the protections founded under different acts, including the Insolvency Act 1986, Environmental Protection Act 1990 or tort law. The legal system seems to place the stakeholders in a position where they cannot have an expectation that the corporate management to have them in contemplation in running the company.[142]

Under Companies Act 2006, an action for a breach of a duty can only be brought by either the company itself or a shareholder.[143] Requiring shareholders to bear the time and the cost to bring an action in the interest of other constituencies is often impractical.[144] Thus, in having a right without '*teeth*' as far as non-shareholders are concerned,[145] seriously hinder any potential effectiveness of '*enlightened approach*.'[146] In fact, providing a right without a proper remedy is '*worthless*.'[147] This has actually been proven by a government review in 2010 in regards to the Companies Act 2006.[148] It was discovered that the majority of companies' director were actually aware of section 172, yet were not necessarily putting it into practice.[149] The reason for ignoring this duty could be related to various points, nonetheless, the fact that the duty has no actual remedy is certainly one of the main factors for ignoring the duty.

3.5. Limited Support

The initial thought to implement ESV approach was to adopt two main mechanisms.[150] First, directly through an 'inclusive' duty that requires the consideration of various stakeholders' interest.[151] Second, indirectly by Operating and Financial Review [hereinafter 'OFR'], a body that would compel listed firms to disclose a range of 'qualitative' and 'forward-looking' information.[152] As it is difficult to see how a shareholder can be 'enlightened' merely by the broadening of factors that a director is required to take into account.[153]

Besides providing a help in assessing directors' performance under section 172, disclosure is a vital means of enhancing directors' accountability and improving company transparency.[154] As it may provide the basis for any actions against directors, hence, a key mechanism for reinforcing ESV principle.[155] At the same time, the provision counted as a great movement towards CSR and a reward of the culmination of a decade-long process of prestigious commissions examining Corporate Governance in the UK.[156]

Controversially, only a few months after introducing the new requirement of OFR, the measure was withdrawn as a piece of unnecessary *'red tape.'*[157] Claiming that it could present an unnecessary burden for directors and companies.[158] This move was seen both as a backward step and disappointment in the corporate sector commitment to ESV.[159]

As an alternative, section 417 of the Companies Act 2006 was incorporated. This section requires directors to publish '*Business Review*' report, a small version factors relating to stakeholders' groups and corporate policies.[160] In comparison, the initial OFR required much more comprehensive information, including information about company employees', company contractors and other social and environmental issues. Whilst the Business Review requires information related to non-financial key performance related to the environment, employees and the community,[161] it only requires information to the extent necessary for an understanding of the business.[162] Unfortunately, the information that was supposed to '*enlighten*' will not be legally required.[163] Furthermore, the OFR standards were based on a sophisticated criteria published by the Accounting Standards Board, whereas Business Review provision lacks such support and gives directors wide discretion on what and how much information to include.[164] It is therefore clear that the abolishment of section OFR is considered as a regressive movement away from enhancing ESV.[165] Although section 417 explicitly state the objective of the Business Report is to evaluate directors' compliance with their duty under Section 172, the Corporate Responsibility Coalition (CORE) report examining the performance of FTSE 100 companies' Business Reviews prepared under section 417 in 2010,[166] have found a serious confusion as to what a business review actually was and should actually include.

This criticism has led to a change of the law. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 came into force replacing the duty to produce business review with a need to publish a strategic report.[167] Imposing a punishable duty to publish a similar report to the previous Business Review.[168] The only differences seem to be found with the need to present the report separately,[169] and the need to further report information related to gender diversity and human rights.[170] Although a minor difference from the previous report, but clearly shows an appreciation for the concerns of a broader set of stakeholders. Nevertheless, the Financial Reporting Council Guidance on Strategic Report clearly indicated that "*only information that is material to shareholders should be included in the strategic report*."[171] Therefore, reassuring the primacy of the shareholder position over other stakeholders' considerations. Like section 172, the strategic report can be seen firmly embedded in the goal of prioritising the interest of shareholders.[172] This means that real stakeholder problems might not be included, only what is

relevant to a shareholder whose main concern is usually profit.

It has been argued that a significant number of listed companies produce some form of a detailed OFR, albeit with wide variations in quality and scope.[173] Thus, a withdrawal from the OFR will not make much difference. However, the nature of voluntary disclosure is uneven and may also be informal. Without legal compulsion, firms will not show willingness to disclose information that carries negative consequences. Similarly, a failure to disclosure information will probably occur without being noticed and questioned. As a clear weakness of the strategic report is located in its vagueness on what to include. Directors can make neutral statements due to the discretion obtained from the wide requirements.[174] This can be noticed in a survey conducted by the UK Environment Agency, who surveyed in 2004 FTSE companies on environmental reporting and environmental disclosures. Although 89% of companies mentioned some aspect of their interaction with the environment, most disclosures "*lacked rigour, depth or quantification*."[175] The survey basically found a solid lack of meaningful quantified information which is adequate for shareholders to assess the environmental risks or opportunities facing a company. This concludes that vague reports are just unable to provide sufficient information to 'enlightened' shareholders.

3.6. Conclusion

From this analysis, it can be concluded that the two main mechanisms to incorporate ESV have merely reflected a token gesture away from shareholder primacy paradigm. As correctly submitted by Lynch, the ESV approach is just another '*moniker*' for the previous legal position.[176] Section 172 reaffirm the previous law, however, in a way as to make the law more palatable in modern sensibilities.[177] Likewise, Gower and Davies viewed this section as an improvement on the common law but only a modest one.[178] Mistakenly, Kershaw observed that the new provision 'm*akes changes of form to the existing law*.'[179] However, it is clear from the above that the ESV did '*little more than set out the pre-existing law*'.[180] Neither stakeholders' interest equates to the shareholders' interest, nor is their consideration an absolute obligation.[181] The whole system is still subject to the "*historical magnitude of a corporation as a vehicle for shareholder maximisation*."[182] In a skeptical perspective, section 172 effect is only likely to be educational, as it has no real restrictive effect as long as decisions are taken in good faith by directors.[183] In short, the 'mythical status' of ESV,[184] has simply raised expectations that it cannot deliver.[185] Evidentially, the UK Treasury Select Committee report following of the financial crisis have noted section 172 has failed to encourage directors to consider the '*likely consequences of any decision in the long term*.'[186] In short, it is doubtful to see any different from the previous directors' behaviour. ESV approach seems to have no impact upon directors' business decisions.

It is understood that the situation could have been salvaged through teleological interpretations the courts. However, case law have shown a clear reference for old decisions and minimal willingness to wide up their interpretation. This suggests that the only potential solution to save ESV approach fall under the hands of shareholders. At the end of the day, the compromise was that shareholders are assumed to be enlightened and willing to bring stakeholder consideration on board.[187] Although the OFR is not as similar to the strategic report, the final outcome may well depend on external factors, such as '*information-forcing*' by shareholders.[188] The ultimate aim of information disclosure is not aimed to impress the government but rather the shareholders and ultimately the public.[189] This means that it is up to the investors to pay attention to and make use of the information they will get. Depending on the information, shareholders are assumed to represent the interest of stakeholders. On that note, the dissertation will now move to its second part which will focus on the role of

shareholders in ESV.

4.Shareholders Controversy

4.1. Introduction

Chancellor Allen has observed that the law is "*not simply what it may seem at first, a comprehensive set of rules*" and that "*in order to grasp the dynamic feature of legal rules it is necessary for them to be seen in their historic and social context*."[190] It follows that a consideration of the paradigm of ESV might be incomplete if only been viewed from one perspective. To have a better understanding of the wider picture, it is also important to assess the role of shareholders in ESV.

The English legal system has minimal reliance upon public enforcement. In fact, there is no public body in the UK that includes within its remit the power to enforce breaches of directorial duties.[191] Private enforcement is the dominant power to enforce directors' duties.[192] If a director fails to comply and does not provide informative or adequate explanations for non-compliance, it is a matter for the investors to address.

Equity providers are considered to be the second major player in Corporate Governance after the directors.[193] Thereby, it can be well argued that all the problems alluded above to in regard to sections 172 and 414A can be solved by willing shareholders. If shareholders exercise their power meaningfully and responsibly, they can activate the principle of ESV. They do not only possess enough power to enforce and persuade directors to consider stakeholder interests, but also can bypass any shortage of disclosed information, as they capable to open a dialogue with the companies they are investing in.

Empirical studies have shown that investors monitoring improves corporate financial performance.[194] However, the ultimate question is whether shareholders will accept the invitation to become 'enlightened' and address stakeholder's issues.[195] As to answer this question, this chapter will illustrate the role shareholders can play on implanting ESV model. The focus will be on two aspects: firstly consider the argument that shareholders are both willing and capable to enforce ESV model, secondly, consider the argument that investors are not willing to help as managing a company is not their business as long as they are generating profit.

4.2. Shareholder activism

Shareholders have a general willingness to bring stakeholders interest in board.[196] This is noticed through observing that the vast majority of institutional investors are associated with the concept of CSR and socially responsible investing [hereinafter "SRI"].[197] Equally, they are committed to a sustainable investing behaviour that respects the social, ethical, and environmental criteria. Furthermore, more than half of the leading fund managers in the UK pension industry are members or affiliates of the UK Social Investment Forum;[198] a forum that encourages and supports social investment in stakeholder while also promoting for sustainable economic development.[199] This willingness to address other factors beyond generating profit was also placed in action in few occasions. A number of institutional shareholders have established visible coalitions between

themselves, the government, and NGOs with an aim to address the long-term problems such as climate change and HIV/AIDS.[200] For instance, the Institutional Investors Group on Climate Change engages with its members' portfolio companies to "*address any material risk and opportunities to their businesses associated with climate change and a shift to a lower carbon economy*."[201]

Globally there is also a growing attention to stakeholder issues as a critical element of firm and portfolio risk management. The United Nations Principles for Responsible Investment (PRI) was developed by the joint efforts of 20 leading institutional investors,[202] they voluntarily committed to incorporate stakeholder issues in their investment analysis and decision-making.[203] This commitment has been extensively expanding every year. Today, it covers 1,552 institutional investors, asset managers, and industry service providers worldwide, by this, it represents more than $20 trillion in assets.[204] This implies a remarkable globe commitment to sustainable business management that respects stakeholder interests.

The motivation behind this wide commitment is quite disputed. Clark and Hebb believes that because of the long-term financial risks inherent from stakeholder issues, institutional investors place some care and consideration upon them.[205] However, there is a need to be very cautious in generalising that all investors are materially motivated, at the end of the day, institutional investors are being ran by people who might indeed have some genuine sympathy with factors other than profit. Even if Clark and Hebb were true, shareholders should always advocate for the rights of stakeholders. As according to a study that evaluated more than two thousands empirical researches, it was found that sustainable business that consider CSR will ultimately have a positive impact on the corporate financial performance.[206] Therefore, even if investors only cared about generating profit, stakeholder interest consideration is undoubtedly beneficial to achieve that.

Another factor to can explain the shareholder motivation is linked with market forces which is becoming increasingly focused on stakeholder value.[207] The features of the UK market, which is heavily affected by sophisticated NGO community base, seem to reflect strong pro-stakeholder views.[208] Distinguishably, the UK host many of the world's most influential organisations in all of the human rights, environment and development. Among other, the UK host Greenpeace, CARE International and Christian Aid, Oxfam, and Amnesty International. This has facilitated a positive atmosphere for sustainable business that respects stakeholders.[209] As viewed by Kiarie, the UK is an emerging leader in the CSR revolution, hence, its business reflects wider objectives behind profit.[210]

On that note, shareholders are high likely to help in imposing the ESV model. As a way to impose stakeholder interests and behave as an enlightened shareholder, investors have two possible pathways. First, they can bring the attention of stakeholders indirectly through private consultations, negotiation or threats. Second, they can be more direct and formal by raising a claim against directors who ignore stakeholder interests.

4.2.1. Indirect enforcement

English Company law and regulations contain a number of provisions designed to ensure shareholder involvement. Investors seem to obtain a considerable power in general meetings. As have been alluded above, shareholder approval is required in almost every key decision of the company life. They control substantial loans,[211] certain transactions, and even have more power in

listed companies through various provisions of the Listing Rules, the Combined Code of Corporate Governance, and the Takeover Code. Besides all of that, shareholders can further reward and even expel directors according to their performance.[212]

Together, these rules provide shareholders with great aspects to control the managerial process without the need for litigation. Through exercising voting powers and be involved in direct negotiation with management, shareholders can influence corporate practice. ESV oriented investors can therefore leverage their support for director candidates, executive compensation, or governance measures in a way that rewards directors who are well-aligned with an ESV approach.[213] As an alternative, substantial shareholders or a large coalition of disgruntled shareholders can threaten the board of directors to either follow their wish in a certain issue or they leave the company. A threat to sell their shares can carry a serious determent upon the company leading the directors to obey their will. However, this tool is merely available to large shareholders or shareholder coalitions, as a withdrawal by small shareholders in most cases is invisible to the firm.[214]

Shareholders generally prefer pursuing informal enforcement techniques instead of legal measures. According to a study that examined the extent of institutional shareholder involvement in the *Hermes UK Focus Fund*, pension fund institution,[215] it was discovered in contrary to previous studies that institutional shareholders largely practice an active informal engagement in regards to various issues. It was found that this informal involvement carried a substantial effect on corporate activities and the decision directors going to take. Most importantly, it has been also noticed that there is a practical evidence of gains to shareholder activism which ultimately suggests that well-focused engagements can result in substantial public returns to shareholders.[216] Obviously, a study of only one institution files cannot provide excluding results, yet it can clearly present an example of the effectiveness of private informal enforcement.

The benefit of the private enforcement is not only important to shareholders returns, but also to the wider community including other stakeholders. This has been noticed by Arcot and Bruno report which noticed that amongst FTSE350 companies over the period 1998-2004, there has been an increase of the compliance levels of the Corporate Governance codes, not because of governmental sanctions but rather because of shareholder pressure to encourage directors to comply.[217] This further highlights the power shareholder possess and the effect they can have if they are willing to support a claim. In accepting the existence of these powers, stating that willing shareholders can play an indirect role in saving the enforcement of ESV model through private methods is quite appealing.

4.2.2. Legal enforcement

An advanced mechanism to enforce ESV can be through legal proceedings. If indirect enforcement did not achieve fruitful results, shareholder can seek formal enforcement. This is normally achieved through the choice of two possible claims; a derivative claim or a petition.

A derivative claim is usually brought by a shareholder on behalf of the company against a specific director who allegedly breached his or her duty and harmed the interests of the company.[218] Traditionally, the English law took a restrictive approach.[219] It was only the company who are cable to bring a proceeding against itself. However, this was later evolved through allowing shareholders to bring a claim on behalf of the company. Under the Companies Act 2006, Sections 260(1) has enacted a statutory scheme for derivative actions. The main reason for this enactment

was to bring simplification and modernisation in order to improve its accessibility.[220] In particular, the aim of the statutory regime was *"to make shareholder remedies more affordable and more appropriate in modern conditions."*[221] However, this objective was hardly achieved. To bring a derivative claim the shareholder is required to pass two stages tests. First, shareholder must establish a prima facie case on the merits. [222] This was necessary to obtain a permission of the court to continue a derivative action. A procedure that performs a gatekeeper role in order to exclude frivolous or unmeritorious cases. Second, if permission has been given, the court will order a hearing at which the company will be able to make representations.[223] One of the main benefits of derivative claims is that it is an effective entry to the court as a way to maintain investor confidence. It provides some teeth for to the process of monitoring and deterring directors.[224]

Before the enactment of the companies Act 2006 and in particular over the period from 1990 to 2006, there were only three reported judgments in which a shareholder action was brought in relation to misfeasance by the directors of a listed company.[225] More surprisingly, none of these cases the claimants were successful. It was hoped that the introduction of a statutory derivative action would turn things around for shareholders and at least give them a fair chance to bring wrongdoers to book. Nonetheless, it was correctly predicted that it is "*unlikely that these reforms [in the Companies Act 2006] will lead to a dramatic increase in the incidence of shareholder litigation*."[226] Subsequent years did not show any change in the number of the derivate claims issued.[227] In fact, it has been noticed that since statutory regime came into force on October 2007 until September 2015, there have been only 22 derivative actions instituted and only eight of them were given a permission to leave.[228] This small success rate which amounts to 36%, represent half of other common countries rate. As in comparison with Australia, the success rate for a derivate claim is 61%.[229]

A second enforcing measure lies under the statutory remedy for *'unfair prejudice*.'[230] This provides the court with wide remedial discretion when the affairs of the company where carried unfairly prejudicial to the interest of its members. Traditionally, this ground has merely been used in relation to 'quasi-partnership' companies.[231] Over time, the petition started to be used for other breaches of fiduciary duties by board of directors.[232] To succeed under section 994 the shareholder has to link director actions with unfair prejudice through an objective test from a '*reasonable bystanders*.'[233] However, while s.994 is able to be employed by a shareholder in a public company, it is also rarely achievable.[234]

It is true that ESV oriented shareholders can enforce directors through a legal proceeding to give proper consideration for stakeholders. However, there are various potential reason for the paucity of cases that will be issued by shareholders.[235] First, there is a lack of financial incentives to take the time and incur possible costs that prosecuting derivative actions entails. [236] Even if a shareholder were to win his or her action against directors, the shareholder will not recover all of the legal costs that he or she has had to pay out, as there is likely to be a shortfall in most, if not all, cases.[237] Second, shareholder probably will not receive either direct or indirect benefit from requesting the consideration of stakeholders.[238] In fact, empirical studies have proven that there is a little positive impact on share values following successful legal proceedings.[239] Instead, a claim might cause a reduction in the value of shares followed from a loss of confidence in the directors.[240] Third, the chance that others would enjoy free riding might dissuade shareholder from issuing a claim. While a shareholder is taking all the risks and burden of cost, others might be relaxing and still indirectly share any benefit bestowed. Shareholders who have taken all of the risks get no more

than the same benefits everyone else receives.[241] Fourth, shareholders generally struggle to monitor managers, as the latter can always resist shareholder attempts to hold them accountable.[242] Leaving shareholders with great difficulty in accessing important information that might enable them to have evidence to support an action.[243] All of these reasons implies how the state of affairs is designed to act as an incentive for the parties to settle outside the court. [244]

Most importantly, even if a shareholder decided to bring a claim regardless of all the above deterrence incentives, the chance of succeeding is inconsequential. It must not be forgotten that proving a breach of section 172 is almost impossible. Section 172 requires the consideration of various factors among other things.[245] A subjective decision that required expert judgment. As stated in the case of *Iesini v Westrip Holdings Ltd*,[246] when addressing the issue of whether a hypothetical director acting in accordance with section 172 would continue the claim, Lewison justice said that *"the weighing of all of these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case."*[247] Therefore, holding a director into account seem unrealistic. In addition, questioning the lack of information in the strategic report hardly can qualify for a legal proceeding. The 2016 edition of the Combined Code emphasises that, *"[w]hilst shareholders have every right to challenge companies' explanations if they are unconvincing, they should not be evaluated in a mechanistic way and departures from the Code should not automatically be treated as breaches"*.[248] Thereby, even if the issued report was lacking accuracy, a shareholder cannot automatically turn to legal actions.

It is very conceivable that together all of these reasons and the minimal chance of succeeding leave shareholders with no incentives to legally proclaim the rights of stakeholders and enforce the ESV model.[249] This observation is not only theoretical, but actually, it is well understood by shareholders themselves. When Taylor interviewed a number of institutional investors, he found out that all of them were pessimistic about the successful use of legal proceedings. They clearly indicated that they would only employ legal proceedings rare occasions.[250] Understanding that intervention tends to be reactive rather than proactive, means that intervention will only come after a significant destruction of shareholder value.[251]

The fact that legal proceeding carries a minimal chance of succeeding means it provides neither a threat nor a constraint on directors. [252] For this, investors often view legal enforcement not worthwhile and as an alternative focus their channel into informal enforcement mechanisms. This can provide a convincing explanation for the noticeable shortage of cases. It might imply that there is some settlement bargaining taking place in the shadow of the law.[253] In short, while investors have substantial power both in meeting and through the court, it seems that shareholders who are willing to enforce ESV approach, will most probably seek an informal mechanism informally in behind the scene.

4.3. Careless Shareholders

After understanding that willing shareholders are able to enforce the implantation of ESV in informal private mechanisms, it must be questioned whether they are actually willing to do that.

One of the major shareholders in public companies is institutional shareholders.[254] In 2001, institutional investors collectively account for about seventy per cent of listed UK equities.[255] This significant proportions of shares gave them the leverage to demand directors to address their concerns which might be related to stakeholder issues. However, encouraging their involvement in

the company's affairs have always been challenging.

Since the Hampel Committee' Report in 1998, it was noticed that institutional shareholders are not using their voting power in proportion to their concentration in the market. To tackle this issue, section 2 was incorporated under the Combined Code of Corporate Governance (1998) to encourage an active behaviour of institutional shareholders. Nevertheless, similar issues were later noticed by the Myners Review in 2001.[256] Thereafter, the government decided to encourage their involvement through increasing their powers. This led to the adoption of the Directors Remuneration regulation in 2002, which gave shareholders wider powers to approve director's remuneration report. The main objective behind these reforms was to address failures of Corporate Governance through relying primarily on shareholders to monitor companies.[257] However, the global financial crisis revealed massive widespread failures in the system. The Walker Review in 2009 among other observations has found a significant gap in shareholder involvement. To address this failure the government decided to adopt the Stewardship Code.[258] A great move to define responsibilities for large shareholders. As it includes how shareholders can act responsibly to have a greater, and positive, impact on Corporate Governance.

However, evidence suggests that the Stewardship Code has not been successful in eliciting meaningful shareholder engagement. The Stewardship Code was merely a copy of the Institutional Shareholders' Committee (ISC) code. It represented a 20 year old secondhand code which was simply rebranded and sold to as a new one.[259] This explains the ineffectiveness that has been brought by the code. According to the Trade Union Congress annual study on the voting of fund managers, the Stewardship Code has brought no shift from Institutional shareholders' traditional voting patterns.[260] Quite surprisingly, the Stewardship Code was found enhancing shareholder value rather than enhancing and protecting the value of the company in a long sustainable way.[261] In other words, shareholder empowerment has shown exacerbate market pressures toward single-minded profit generation, instead of implanting ESV and considering wider stakeholder interests.[262]

In addition, It unsuccessfulness was also noticed by the European Commission Green Paper.[263] They correctly noted that ensuring good Corporate Governance through various codes were not sufficiently specific, especially if the codes are giving "*too much scope for interpretation*."[264] For instance, principle 3 of the Stewardship Code state that "*institutional investors should monitor their investee companies*." A statement that reflects a bland and inconsequential meaning. Hence, does little to contribute towards actually achieving closer monitoring by shareholders. As Reisberg put it, "*It is nothing but trivial*."[265] These finding also appears at the Financial Reporting Committee studies, where they noticed that the Stewardship Code has not impacted on the quality of engagement,[266] and there is still be an obvious '*engagement deficit*.'[267]

Clearly, encouraging engagement is not new a practice, though it many reforms have been conducted, there is little evidence to suggest a noticeable difference in shareholder behaviour.[268] One of the spotted reasons for the lack of actual change is the change of the characteristics of the shareholders. Around twenty years ago, the majority of intuitional investors where pension funds and insurance companies. However, this is not the position anymore.[269] Intuitional investors where pension funds are keep declining on the contrary overseas investors holding are increasing, in fact, they now amount to more than 50% of listed shares by value.[270] Understandably, the methods and the incentives to encourage those foreign investors is more challenging. These groups are both geographically remote and less susceptible to domestic political pressure to engage.[271]

In theory, it is believed that because of shareholders interest in deriving as much value as possible from their holdings, they are in the perfect position to be involved in correcting any underperformance management that could impact on their returns. However, this is not at all straightforward in practice. In fact, Institutional investors seem to "*prefer liquidity to activism*."[272] The fact that they are '*profit maximisers*' means that they will not engage in an activity where costs exceed its benefit.[273] The high cost attached to active behaviour and the existence of free rides illuminate shareholders interest to monitor the company.[274] As indicated previously, shareholders are most likely to be active in private informal occasions, and for them to be persuasive and make a different, they require to be either large shareholders or form a shareholder coalitions. This by itself presents a crucial problem for in most large public companies. As in most of the time, the shareholder ownership in large public companies are dispersed. [275] This means that dissatisfied shareholders are required to come together and formulate a coalition before making an actual difference.[276] To establish a coalition they will face significant challenges. This includes mobilising a large number of shareholders,[277] high cost and lengthy process,[278] existence of free riders, and the possibility that their actions could lead to adverse publicity for the company which might precipitate a fall in the share price and a reduction in the value of their investment.[279] Thereby, most shareholders prefer to sell off their shares rather than voice their concerns owing to the time and effort required.[280]

Asking shareholders to be stewardship is seen as a paradox.[281] Shareholders basically lack the central characteristics of stewardship, namely a detachment from share ownership and therefore a detachment from a sectional interest in profit. Besides that, the existence of complex "*characteristics of the modern investment management practice*" seriously hinder their involvement.[282] Drucker summarised the issue through observing that most institutional shareholders "*are not owners, they are investors. They do not want control … It is their job to invest the beneficiaries' money in the most profitable investment. They have no business trying to manage*."[283] Therefore, even when intuitional shareholders pay lip service to stewardship, this behaviour is still against their actual nature. This is noticed when more than 250 asset owners and managers have signed up their support for the Stewardship Code,[284] and the Financial Reporting Council found that there was little engagement beyond that.[285]

In short, it can be noticed that despite all the encouragements and reforms to encourage shareholders involvement, the long-standing careless behaviour still largely stands. Even if institutional investors decided to fulfill their role to monitor their investee companies, it is disputed whether they will enhance the consideration of stakeholder interests. The reality of the high portfolio turnover and the costs of activism, means that the vast majority of institutional investors will remain rationally apathetic and leave the challenge of implanting ESV to the hands of a relatively limited number of institutional activists.[286]

5. Looking Forward

At this stage, it can be understood that neither the directors nor the shareholders are much concerned about the implementation of the ESV model. Directors are still working in the same manner as they used to before the enactment of Companies Act 2006, and despite all the reforms to encourage the shareholders, it is has been observed that all the incentives seem actually to

encourage shareholders not to involve and carry any inconvenience. Although it was noticed that an increased number of shareholders are incorporating objectives beyond profit, their involvement seem to be carried privately without a proper way to identify its actual effectiveness.

Of course, there is no system that can provide a full protection from inadequate decision-making or poor behavior. Likewise, every system requires a continuance update to keep pace with the commercial environment. [287] At this juncture, this research will briefly propose two potential measures at the government could take to bring a better reflection of the ESV model. Although a person could argue that for better stakeholder protection the UK should follow the stakeholder theory such like Germany or Japan. However, the present author believes that this would require a radical change in the current system, hence, could have a negative impact on the economy. Thereby, any change need to be gradual and realistic to minimize any undesirable consequences.

The first suggested solution is to expand the right to bring a derivative claim to stakeholders.[288] As have been alluded above, neither stakeholders have the right to bring a claim nor do the shareholders have enough incentives to enforce stakeholders' rights. In comparison with other countries, the UK seems to provide a very restrictive approach. For instance, in Australia, not only members of the company who can bring a claim, but also former members and officers of the company can.[289] This practice is not unique, actually it is also followed by Canada and Singapore even in a broader scale. Section 238 of the Canada Business Corporations Act 1985, allows a claim to be issued by all members, certain creditors, directors, and '*any other person who, in the discretion of a court, is a proper person to make an application.*' Similar approach is also noticed under section 216A(1)(c) of the Singaporean Companies Act.[290] By expanding the right to bring a claim, the law will provide incentives to the right parties who genuinely care about stakeholders. It will also eliminate the potential lack of information held by shareholders. For instance, employees are normally more conversant with the affairs of the company, hence, could be far better monitors.[291] This is evidential from published news, which often start with an employee acting as '*whistleblower*', and disclosing some improper or inappropriate practice of corporate managers.[292] The chance that this will open a floodgate is minimal. The existence of court permission would still ensure that floodgates would not be opened as far as applications are concerned.

A second potential solution is to facilitate for non-profit organisations to be able to enforce stakeholders' rights. Non-profit organisations have emerged as the most important corporate law enforcement in Korea, Japan, and Taiwan. The aim of these organisations will be through holding a portfolio of shares, they engage by exercising shareholders' rights to combat corporate fraud, mismanagement, and to improve the investor protection climate. In all the countries non-profit organisations have been functioning in, they managed to win significant court victories and settlements against management in a numerous number of cases.[293] This approach could present a lenient enforcing measure compared to the one above which could present an outrageous development from the traditional restricted understanding.

6. Conclusion

A legal person understands that there is a difference between '*law in books*' and '*law in action*'.[294] Law in the books of corporate law seems to advocate for the implantation of ESV paradigm, where

directors consider the stakeholder interest to maximise profit for shareholders. Similarly, it reflects how company discourse deems to make shareholder enlightened. However, through law in action, it has been noticed that the two mechanisms to incorporate ESV have merely reflected a token gesture away from shareholder primacy paradigm. Section 172 impose no absolute requirement to the consideration of the stakeholder interest. A recommendation to consider other stakeholders without any legal enforcement is "*nothing more than common sense*."[295] Likewise, section 414A does not reflect a strict need to reflect upon stakeholder matters. Thereby, stating that there is a noticeable change in business behaviour is an absolute façade.

Placing the need to implement the ESV model on shareholders is heavily disputed. There have has an encouragement to active behaviour ever since the rise of substantial investors. Nonetheless, current law and Corporate Governance observations have been noticing a significant lack of visible involvement. It is true that an increasing number of shareholder are becoming associated with CSR and SRI, however, in observing that the vast majority of their involvement happens behind the scene prevent the paper from making an inclusive conclusion. Yet it is believed that while some shareholders might be actually willing to promote stakeholders right, the overwhelming majority will basically care about nothing beyond profit. This is because it is understood that the previous behaviour of institutional investors which was in association with short-term profit maximisation and aggressive risk-taking were one of the leading causes of global financial crisis.[296] Furthermore, there are numerous hindrances that prevent a shareholder from being concerned and advocate for stakeholders rights. In short and as an answer to the question, it is submitted that the ESV has not changed the way business is conducted, it has rather left the stakeholder interest between non-obligated directors and careless shareholders.

Lastly, the present author thinks that although the law might have shown no actual difference, it has defiantly brought the discussion of stakeholders back to the table. Thus, the law not forcefully but rather indirectly might has raised the public expectation of the companies. Director actions might well achieve what the Parliamentarians hoped from section 172. The application may well not be because of the legal implications of the Companies Act itself, but rather from the reputational hazard if companies disrespect the interest of other stakeholders. It is undoubtable that reputational damage is bad for the business as it would lead customers to switch to other alternatives. The irony is that it is the market forces and commercial pressure, not the legal enactment of ESV which will ensure the implantation of section 172 and the obligation to 'have regard' other stakeholders. At the end, it must be said that this research is merely present a limited analysis and further research is required. In particular to the effect of market pressure to effectively impose the ESV model.

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