The duty to act in the interests of the company: simply a duty to increase shareholder wealth?

Introduction

Since the company has been given the status of a separate legal entity[1] there has been a remarkable change in the role of companies. Companies have gone from small organisations to enormous multinational enterprises. Companies, particularly large public companies, exercise an enormous influence both economically and socially. Their actions affect not only direct stakeholders of the company such as employees, creditors and customers but also governments, communities and the environment.[2] They employ millions of people and exercise significant control over public service sectors such as telecommunications[3] and food production.[4] Despite the significant impact companies have on society, there is no agreement, between academics or law makers as to what their objective or purpose should be. Is the function of companies simply to increase shareholder wealth or do companies have a wider responsibility to benefit stakeholders and society in general? This debate regarding the corporate objective is inextricably linked to the duties of directors. Directors, as managers of the company, are charged with the day to day decision making in a company. The legal requirements placed on directors, and how directors choose to respond to these legal duties, is the primary factor in determining what a company's objective will be.

The discussion on the corporate objective dates back to the 1930's to the well-known debate between Adolf Berle and Merrick Dodd. Berle argued that directors are trustees for the company's shareholders.[5] He stated that all powers granted to the directors of a company are at all times exercisable only for the benefit of shareholders, for whom money is to be made.[6] He believed that because the power to run a company had been delegated from the shareholders to the directors, the latter had the sole responsibility to run the corporation in the interests of those shareholders.[7] Dodd argued that a corporation becomes a distinct legal entity upon incorporation[8] and as such viewed the company as more than just a collection of shareholders and should be obligated to fulfil a social service role.[9] Dodd stated that the law was in favour of treating the company 'as an institution directed by persons who are fiduciaries for the institution rather than for its members'.[10]

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[1] *Solomon v A Solomon & Co Ltd* [1897] AC 22.
[2] Daniel Attenborough, 'Giving Purpose to the Corporate Purpose Debate: An Equitable Maximisation and Viability Principle' (2012) 32(1) *Legal Studies* 4, 4.
[3] Andrew Keay, *The Corporate Objective: Corporations, Globalisation and the Law* (Elgar 2011), 5.
[4] John Parkinson, *Corporate Power and Responsibility* (Oxford University Press 1993) 15.
[5] Adolf Berle, 'Corporate Powers as Powers in Trust' (1930) 44 *Harvard Law Review* 1049.
[6] Ibid, 1049.
[7] John Macintosh, 'The Issues, Effects and Consequences of the Berle-Dodd Debate' (1999) 24 *Accounting, Organizations and Society* 139, 144.
[8] Merrick Dodd, 'For Whom are Managers Trustees?' (1932) 45 *Harvard Law Review* 1145.
[9] Ibid, 1148.
[10] Ibid, 1162, 1163.

Some 85 years on and it is this same debate that is relevant in Ireland after the enactment of the Companies Act 2014. The legislation codifies directors' duties in part 5 and provides that directors shall act in what they consider to be the interests of the company.[11] It is the meaning attributed to this phrase which determines the Irish approach to the corporate objective and where Irish law is located within the Berle-Dodd debate. Under the common law there are two interpretations of the phrase 'the interests of the company.'[12] The first is that the duty requires directors to run the company for the benefit of the shareholders; the interests of the company being equated with the interests of the shareholders.[13]

The second, as envisaged by Dodd, is that the interests of the company means what is best for the company as a separate legal entity.[14] This approach recognises that the interests of the company and the shareholders may well diverge.[15] It would also require directors to consider and take decisions in favour of interests other than shareholders, where such action would benefit the company as a separate entity.[16] Thus allowing directors to take a more stakeholder orientated approach to business. It is at this point where the debate becomes relevant to the impact that companies have on stakeholders and society as a whole. The first interpretation leads to what is known as a shareholder value approach. Shareholder value dictates that the sole focus of a company is to maximise wealth for shareholders. The shareholder value model has long been associated with directors seeking to maximise profits in the short term[17] which in turn is closely linked to corporate collapses[18] and a corporate culture of excessive risk taking from directors.[19] Corporate collapses and excessive risk taking in order to increase short term shareholder wealth can have an extremely negative impact on stakeholders and on wider society. A strict adherence to shareholder value fails to reflect the fact that is impossible for a company to successful in the long term while consistently acting to the detriment wider interests such as its employees, suppliers and creditors.[20] It is submitted that interpreting the duty to act in the interests of the company as meaning a duty to act in the interests of the company as

[11] Companies Act 2014 s 228(1)(a).
[12] Thomas Courtney, *The Law of Companies*, (3rd Edn, Bloomsbury, 2012), 121; Deirdre Ahern, Directors' Duties: Law and Practice (Roundhall, 2009), 152.
[13] *Parke v Daily News Ltd*[1962] Ch 927, 963; *Brady v Brady* [1988] 3 BCC 535, 552; *Heron International Ltd* [1983] BCLC 244, 265; *Gaiman v National Association for Mental Health* [1971] Ch 317, 330; *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 All ER 1120, 1126; *Darvall v North Brick & Tile Co Ltd* (1987) 12 ACLR 537, 554. *G & S Doherty Ltd v Doherty* (19 June 1969, unreported), 42; *Irish Press Plc v Ingersoll Irish Publications Ltd* (15 December 1993, unreported) 77.
[14] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656.
[15] As was recognised in *Re BSB Holdings Ltd* [1996] 1 BCLC 155; *Dawson International Plc v Coats Platon plc* [1989] BCLC 233; *Re Wellifab Engineers* [1990] BCLC 833.
[16] Examples of such an approach can be seen in: *Lonhro v Shell Petroleum* [1980] 1 WLR 637; *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363.
[17]Andrew Keay, *The Corporate Objective: Corporations, Globalisation and the Law* (Elgar, 2011), 53.
[18] Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berret-Koehler, 2012).
[19] William Bratton, 'Enron and the Dark Side of Shareholder Value' (2002) 76 *Tulane Law Review* 1275.
[20] Alexander Schall, Lilian Mines & Simon Goulding., 'Promoting an Inclusive Approach on the part of the Directors: The UK and German Positions' (2006) 6 *Journal of Corporate Law Studies* 299, 306.

a separate legal entity is the superior approach. It removes many of the negatives that result from applying shareholder value. In addition, to simply equate the interests of the company with the interests of the shareholders is a legally flawed approach. As Watson argues, the focus on shareholders and indeed shareholder primacy ideas are based on an outmoded conception of the company.[21] It is one of the fundamental principles of company law that the company is a separate legal entity.[22] Viewing the company as a distinct entity would provide directors with greater scope to consider stakeholder interests. It would also allow directors to take decisions to benefit their stakeholders where such action would benefit the company's long term interests, economic or otherwise. Irish law however, more so than most other jurisdictions embraces the shareholder value model.

This paper will first describe the common law basis for the shareholder value model and briefly consider the arguments in favour and against the model. Secondly it will outline the current status of Irish law in relation to the corporate objective. Thirdly it will argue that equating the best interests of the company with the best interests of the shareholders is a legally flawed approach. Finally, it will argue for a reinterpretation from the Irish courts of what it means to act in the interests of the company.

Shareholder value

Traditionally, common law jurisdictions have favoured Berle's school of thought. Although not uniformly embraced[23], shareholder value has always been perceived to be dominant principle in the traditional judicial approaches of England and Wales and the United States.[24] Shareholder value generally dictates that directors are to manage the assets of the company and take decisions based on the objective of maximising shareholder gain.[25] The model has gained widespread support among academics[26] and the dominance of the principle has led to claims that there is no longer any serious competitor to the view that corporate law should strive for shareholder value.[27]

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[21] Susan Watson, 'How the Company Became an Entity: A New Understanding of Corporate Law' (2015) *Journal of Business Law* 120, 120.
[22] See, Arthur Machen, 'Corporate Personality' (1911) 24 *Harvard Law Review* 253.
[23] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656; *Dawson International Plc v Coats Platon plc* [1989] BCLC 233; *Lonhro v Shell Petroleum* [1980] 1 WLR 637; *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363.
[24] Jingchen Zhao, 'The Curious Case of Shareholder Primacy Norm: Calling for a More Realistic Theory' (2012) 15 *International Trade and Business Law Review* 1, 1.
[25] Daniel Attenborough, How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339, 340.
[26] See, for example: Stephen Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review* 547, 549; Alistair Alcock, 'Corporate Governance: A Defence of Status Quo' (1995) 58(6) *Modern Law Review* 898.
[27] Henry Hansmann and Reinier Kraakman 'The End of History for Corporate Law' (2001) 89 *The Georgetown Law Journal* 439, 439.

One well-known case advocating a shareholder value approach is *Dodge v Ford*.[28] Henry Ford was pursuing a policy of reducing dividends in order to subsidise the sale price of Ford cars. The aim of the policy was to stimulate the market, increase company sales and thereby secure the jobs of the company's employees.[29] The Dodge brothers, as shareholders, argued this approach was at the expense of shareholders and an improper use of power. The court held that such a policy was not proper as it was not in the interests of the company's shareholders and the court stated that 'the business corporation is organised and carried on primarily for the profit of stockholders. The powers of directors are to be employed for that end'.[30] This case demonstrates the strict interpretation of the shareholder value doctrine, a strict interpretation meaning any action which does not directly increase wealth of shareholders' amounts to an improper action by a director. In the *Dodge v Ford* case an argument could easily be made that subsidising prices in order to increase sales and secure the future of the employee's would benefit the company in the long term. A more successful company in the long term would yield greater wealth for shareholders. However the judgment in *Dodge v Ford* demonstrates the short term approach of shareholder value.

The English and Irish common law judgments on this issue have focused on a directors' fiduciary duty to act in the best interests of the company. This duty stems from the cases of *Hutton v West Cork Railway*[31] and Re *Smith and Fawcett.*[32] In *Hutton*, Bowen LJ gave the oft cited statement 'the law does not say that there shall be no cakes and ale, but there are to be no cakes and ale except as such as are required for the benefit of the company'.[33] In *Re Smith and Fawcett*[34] Lord Greene MR speaking in the Court of Appeal observed that 'directors must act, *bona fide*, in what they consider - not what the court considers - is in the best interests of the company.'[35] The duty to act in the best interests of the company has since become a well-established fiduciary duty in common law courts.[36] However despite these cases often being cited a support for shareholder value,[37] the duty to act in the best interests of the company, by itself, does not support shareholder value. It is the courts, by interpreting this duty to mean the interests of the shareholders, which impose a shareholder value approach. In English company law the company's interests are often viewed as synonymous with shareholders'

[28] *Dodge v Ford Motor Company* 170 NW 668 (Mich, 1919).
[29] Ibid 684.
[30] Ibid.
[31] *Hutton v West Cork Railway* (1883) 23 Ch D 654.
[32] *Re Smith and Fawcett Ltd.* [1924] Ch 304.
[33] Ibid, 673.
[34] *Re Smith and Fawcett Ltd.* [1924] Ch 304.
[35] Ibid 306.
[36] See, *Mutual Life Insurance Co v Rank Organisation Ltd* [1985] BCLC 11; *Bamford v Bamford* [1970] Ch 212; *Banfi Ltd v Moran* [2006] IEHC 257*; JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467.
[37] Jeffrey Macintosh, 'Designing an Efficient Fiduciary Law' (1993) 43 *University of Toronto Law Journal* 425, 452.

interests[38] and the best interests of the company have been equated by the courts to mean the best interests of shareholders.[39] The same is true in Ireland.[40]

One of the cases which supports a shareholder value approach is *Greenhalgh v Ardene Cinemas* where Lord Evershed MR stated that, '[t]he phrase, the company as a whole does not mean the company as a commercial entity as distinct from the corporators. It means the corporators as a general body'.[41] Despite it being used in the context of shareholders power to alter the articles, the quote has been cited on many occasions in support of a shareholder value approach to directors' duties.[42] *Parke v Daily News Ltd* also supports a shareholder value approach where Plowman J stated that the benefit of the company meant the benefit of the shareholders as a general body.[43] In the context of a company subject to rival takeover bids *Heron International* found that when it comes to deciding between rival bidders the interests of the company must be the interests of the shareholders.[44] While *Gaiman v National Association for Mental Health* stated that 'it is not very easy to determine what is in the best for the company without paying due regard to the members'.[45] A similar view was taken by Nourse LJ's in *Brady v Brady:*

> The interests of a company, an artificial person, cannot be distinguished from the interests of the person who are interested in it. Who are those persons? Where a company is both going and solvent, first and foremost come the shareholders present and no doubt future as well.[46]

These cases support the view that shareholder value was the common law approach in England and Wales. In addition to the case law, there are other reasons why shareholder value has been the prevailing model. Shareholders have more power over directors when compared to other stakeholder groups. Shareholders have the power to appoint and remove directors and the power to take derivative action against directors. The powers that shareholders' possess can sometimes result in directors feeling pressure to act for shareholder value. While voting rights to remove directors are somewhat illusory in practice,[47] and derivative actions are rare, directors' perception that they are required to manage for shareholder value can be more problematic. The perception from directors that they must pursue shareholder value in the short term can lead to a strict adherence to the principle. A survey

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[38] Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance* 11, 12.
[39] *Parke v Daily News Ltd*[1962] Ch 927; *Brady v Brady* [1988] 3 BCC 535; *Heron International Ltd* [1983] BCLC 244; *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 All ER 1120.
[40] *G & S Doherty Ltd v Doherty* (19 June 1969, unreported), 42; *Irish Press Plc v Ingersoll Irish Publications Ltd* (15 December 1993, unreported), 77; *Re Frederick Inns Ltd.* [1994] 1 ILRM 387, 396.
[41] *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 All ER 1120, 1126.
[42] *Parke v Daily News Ltd*[1962] Ch 927; *Gaiman v National Association for Mental Health* [1971] Ch 317; *Heron International Ltd* [1983] BCLC 244; *Peskin v Anderson* [2000] BCC 1110.
[43] *Parke v Daily News Ltd*[1962] Ch 927, 963.
[44] *Heron International Ltd* [1983] BCLC 244, 265.
[45] *Gaiman v National Association for Mental Health* [1971] Ch 317, 300.
[46] *Brady v Brady* [1988] 3 BCC 535, 552.
[47] Lucian Bebchuck, 'The Case for Increasing Shareholder Power' (2005) 118 *Harvard Law Review* 833.

conducted by the Institute of Directors found that many directors believed that they were legally required to maximise short term shareholder benefits at the expense of the long term interests of the company itself.[48] Further, the perception that directors must increase shareholder wealth in the short term was a primary concern of the Company Law Review Steering Group who led the UK reform.[49] In addition to cases advocating a shareholder value approach, actual pressure or perceived pressure from shareholders increases the likelihood of the implementation of shareholder value.

There are several legal and normative arguments in favour of the shareholder value approach. The first legal argument in favour of such an approach is that the shareholders own the company[50] and as owners, the company should be run for their benefit. However the argument that the shareholders own the company is both legally and economically incorrect[51] and is undermined by the doctrine of separate legal personality. Owning shares, in a legal sense, does not grant shareholders ownership of the company, instead they own a corporate security in the form of stock.[52] Shareholders have no control over the company's assets[53] and have no right to declare a dividend.[54] Even on a winding up, the company's creditors will have a prior claim, ahead of the shareholders, on any assets to the amount of the debt owed. Even advocates of shareholder vale do not maintain that, in a legal sense, the shareholders own a company.[55] The second legal argument is that, as Berle argues, that directors are trustees for shareholders and so should act on their behalf. Again this is a mistaken view. Directors are fiduciaries to the company and owe their duties exclusively to the company, and not to the shareholders.[56] The third legal argument in support of shareholder value is that the shareholders are residual claimants.[57] This is based on the view that the company is merely a nexus of contracts between shareholders and other participants in the company. The non-shareholder interests are protected by the contract with which they enter into, for example, a salary in the case of an employee. The argument states because a shareholder has no such fixed claim through a contract, they are the residual claimants and residual risk bearers and are entitled to have the company operated for their

[48] Institute of Directors, *Good Boardroom Practise: Company Law Review, The Stakeholder Debate* (1999).
[49] CLRSG, *Modern Company Law for a Competitive Economy: The Strategic Framework* (DTI, London,1999) para 5.1.10.
[50] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *NY Times Magazine*, September 13, 1970, 32,33.
[51] Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California law Review* 1189, 1191.
[52] See, *Short v Treasury Commissioners* [1948] AC 534.
[53] *Lee & Co (Dublin) Ltd v Egan (Wholesale) Ltd* (18 October, 1979, unreported) HC; *Pearlberg v O' Brien* [1982] Crim LR 405.
[54] *Re Drogheda Steampacket Co Ltd*. [1903] IR 512; *Bond v Barrow Haematite Steel Co*. [1902] 1 Ch 353.
[55] Stephen Bainbridge, 'In Defence of the Shareholder Wealth Maximisation Norm: A Reply to Professor Green' (1993) 50 *Washington and Lee Law Review* 1427.
[56] *Smith v Cork and Bandon Railway Co* (1870) 5 IR EQ 63; *Percivil v Wright* [1902] 2 Ch 421. *Dawson International plc v Coats Platon plc* [1989] BCLC 233. *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd* [2014] IEHC 93.
[57] See, Jonathon Macey, 'Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective' (1999) 84 *Cornell Law Review* 1266, 1267.

benefit.[58] There are a number of issues with this reasoning. Firstly the only time that shareholders are actually treated as residual claimants is during liquidation. As long as the company is maintained as a going concern they are not legally entitled to any payment, until the directors declare a dividend.[59] So while the company remains as a going concern, it is inaccurate to describe shareholders as the sole residual claimants.[60] It is also incorrect to view shareholders as the sole residual claimants and risk bearers even in liquidation. Liquidation will have negative effects on stakeholders as well as shareholders. For example employees will lose their jobs and if the liquidation is insolvent, creditors will be affected as they will not receive payment to the full amount of the debt owed. The shareholders are often not the only ones mostly affected by corporate decision making[61] and other stakeholders do bear risk in the company. Further, shareholders do not go completely unprotected by contract. Shareholders can alter the articles and memorandum of association and also can negotiate terms of an issue when applying for an allotment or otherwise purchasing shares. To say that the shareholders are unprotected by contract, are the sole risk bearers and sole residual claimants in the company and because of this the company should be run in their interests, is an unpersuasive argument.

While the view that the company should be run for the benefit of all stakeholders and society in general, may be preferable to shareholder value, such a framework is extremely difficult to implement in practice. The argument that the company should be run for the benefit of all stakeholders, known as stakeholder theory, is widely accepted as a model which is impossible to practically implement.[62] The impracticality of stakeholder theory model is one of the most persuasive arguments used in favour of the shareholder value principle.[63] The problem of having to balance the different competing interests makes decision making extremely difficult for directors.[64] As Jensen points out 'it is logically impossible to maximise in more than one dimension at the same time'.[65] As directors are accountable to no one specific group under stakeholder theory, it greatly increases the potential for agency costs with directors acting in their own interests or shirking responsibility.[66] Alternatively, under shareholder value, directors have a clear objective to maximise shareholder wealth, which can be

[58] Frank Easterbroook & Daniel Fischer, *The Economic Structure of Corporate Law* (Harvard University Press, 1991), 36.
[59] *Re Drogheda Steampacket Co Ltd*. [1903] IR 512; *Bond v Barrow Haematite Steel Co*. [1902] 1 Ch 353.
[60] Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California law Review* 1189, 1194.
[61] Luigi Zingales 'In Search of New Foundations' (2000) 55 *Journal of Finance* 1623, 1632.
[62] Andrew Keay, 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71(5) *The Modern Law Review* 663, 677. Elaine Sternberg , 'The Defects of Stakeholder Theory' (1997) 5(1) *Corporate Governance* 3.
[63] Anant Sunderam and Andrew Inkpen, 'Stakeholder Theory and "The Corporate Objective Revisited": A Reply' (2004) 15(3) *Organization Science* 370, 371.
[64] Elaine Sternberg, 'Stakeholder Theory Exposed' (1996) 2 Corporate Governance 4.
[65] Michael Jensen, Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 7 *European Financial Management* 297, 300.
[66] See, Oliver Hart, 'An Economists View of Fiduciary Duty' (1993) 43 *University of Toronto Law Journal* 299.

objectively assessed. Stout argues that directors' being answerable to shareholders and their performance being measurable is likely to increase efficiency of the company by reducing agency costs.[67] The other main normative argument in favour of shareholder value is the view that it is in fact the best way to promote wealth for all constituents in the company.[68] A company will not benefit any stakeholder if it ceases to be an economic success or enters liquidation. However this argument that shareholder value is the best way to benefit all constituents in a company, may be true if stakeholder theory is the proposed alternative, but shareholder value is not the best way to benefit all stakeholders. Rather the theory primarily benefits shareholders.[69] As highlighted by Stout[70], the reality that shareholder value can be damaging to stakeholders and the company as an entity can be nicely illustrated by reference to a hypothetical. Take a company subject to two separate takeover bids. One bid offers a higher price to shareholders but plans to make all employees redundant, shut down production operations, and discontinue the company as a going concern. At a slightly lower price, the second bidder plans to continue production and retain all staff members. From a stakeholder and societal point of view the second bidder would be the preferred option. However, under strict adherence to the shareholder value principle the former bidder must be given priority by the directors despite the consequences to employees, the local community and the company itself. In scenarios such as this, treating the company as a separate legal entity from the shareholders allows directors to take the option which is better for the company and the stakeholders and is one of the reasons to view shareholder value as the inferior model.

The arguments in favour of shareholder value are persuasive when arguing that it is a superior model to stakeholder theory. However they are not so persuasive when the alternative is viewing the company as a separate legal entity. Treating the company as a distinct entity does not have the issue of balancing competing interests and trying to maximise in different directions. One interest prevails above the others - the company's. What is best for the entity is what guides directors' decision making. In relation to reducing agency costs, it is doubtful that shareholders exercise any actual control over directors.[71] Shareholders do have the power to remove directors but it is a somewhat illusory power,[72] particularly in public companies, and it is quite difficult for shareholders to actually remove a director. Many accept that shareholders have limited control over directors and directors

[67] Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California law Review* 1189, 1200.
[68] Anant Sunderam and Andrew Inkpen, 'The Corporate Objective Revisited' (2004) 15(3) *Organization Science* 350, 353.
[69] Daniel Attenborough 'Giving Effect to the Corporate Purpose Debate: An Equitable Maximisation and Viability Principle' (2012) 32(1) *Legal Studies* 4, 11.
[70] Lynn Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 *Southern California law Review* 1189, 1197.
[71] Andrew Keay, *The Corporate Objective: Corporations, Globalisation and the Law* (Elgar 2011), 91.
[72] Lucian Bebchuck, 'The Case for Increasing Shareholder Power' (2005) 118 *Harvard Law Review* 833.

cannot be seen as being accountable to shareholders.[73] As a result directors are not always going to be held to account for agency costs under shareholder value.[74] By treating the company as a separate entity directors have one clear objective, promote the company's interests. Their performance will be objectively measurable and while directors are not directly accountable to any one group, such accountability does not exist under stakeholder theory or shareholder value either.

Despite significant support for shareholder value the principle is not free from critics[75] and there are negatives associated to the application of shareholder value in practice. Strict adherence to the shareholder value principle has long been linked with producing a short term focus which over shadows all else.[76] This short term focus on shareholders can be damaging for stakeholders and harmful to the company as an entity.[77] A series of accounting irregularities in the US and Europe and the collapse of several large companies has led to a reconsideration of the shareholder value doctrine.[78] Blair and Stout argue that this short term shareholder value approach discourages non-shareholder constituents from investing in the company, investments that can be essential to a company's success.[79] The negatives associated with shareholder value have led many jurisdictions attempting to move away from shareholder value, albeit with limited success in the English[80] and EU[81] contexts.

To prevent a strict adherence to shareholder value, jurisdictions generally avail of one of three alternatives. First a legislative requirement can be placed on directors to consider interests others than shareholders, an option selected by the England and Wales and most US States. The second option is to impose a model of a two tiered management structure. This model is constructed of a management board and a supervisory board, the supervisory board being made up of both stakeholder and shareholder representation. This model is in operation in continental European states such as Germany

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[73] See, Andrew Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656; Antoine Riberioux, 'Does Shareholder primacy Lead to a Decline in Managerial Accountability?' (2007) 31 *Cambridge Journal of Economics* 507.

[74] Daniel Attenborough 'Giving Effect to the Corporate Purpose Debate: An Equitable Maximisation and Viability Principle' (2012) 32(1) *Legal Studies* 4, 10.

[75] Wiiliam, Bratton 'Enron and the Dark Side of Shareholder Value' (2002) 76 *Tulane Law Review* 1275. Merrick Dodd, 'For Whom are Managers Trustees?' (1932) 45 *Harvard Law Review*1145*;* Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berret-Koehler, 2012).

[76] Steven Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Directors' Duties' (1991) 21 *Stenson Law Review* 163, 176,177.

[77] Larry Mitchell, *Corporate Irresponsibility: America's Newest Export* (Yale University Press, 2001) 11.

[78] Antoine Riberious, 'Does shareholder Primacy Lead to a Decline in Managerial Accountability?' (2007) 31(4) *Cambridge Law Journal of Economics* 507, 508.

[79] Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247, 305.

[80]See, Elaine Lynch, 'Section 172: A Ground Breaking Reform of Directors' Duties, or the Emperor's new Clothes?' (2010) 33(9) *Company Lawyer* 196.

[81]See, Otto Sandrock and Jean du Plessis, 'The German Corporate Governance Model in the Wake of Company Law Harmonisation in the European Union' (2005) 26(3) *Company Lawyer* 88.

and Holland. The final approach, as applied in Canada,[82] requires the courts to take the view that the company's interests are not to be simply equated with the shareholders' interests and the company should be treated as an entity distinct from its shareholders.

The English model, known as Enlightened Shareholder Value, requires directors to run the company for the benefit of the shareholders but in doing so, they must have regard to a wide range of non-shareholder interests such as employees, the community, the environment and the likely consequences of any decision in the long term.[83] The vast majority of US states, through the adoption of constituency statutes, also require directors to consider non-shareholder interests. The lack of an enforcement mechanism to ensure that directors do, in practice, consider these stakeholder interests is the primary issue with this type of model. The benefits of the model are that it removes the perception that the sole purpose of the company is to be run in the interests of shareholders. It also provides legitimacy to the practise of directors considering non-shareholder interests.[84] For example, should a director be sued for having regard to non-shareholder interests, as was the case in *Dodge v Ford*, a director could claim he was in acting in accordance with Section 172(1) and the principle of Enlightened Shareholder Value.[85] However, as will be discussed below, constituency statutes and Enlightened Shareholder Value are far from satisfactory solutions to the issue of the corporate objective.[86]

In Europe, many jurisdictions, adopt a much more inclusive, non-shareholder orientated approach to the corporate objective. The success of such models prompted action at an EU level. During the 1970s and 80s through the draft fifth directive, the EU attempted to adopt a stakeholder orientated model of corporate governance.[87] The first draft of the Fifth Directive required all public companies to implement a German style model called codetermination.[88] This would have required companies to have a management board and a supervisory board, with the supervisory board made up of up to fifty per cent employee representation.[89] However such an attempt was unsuccessful, primarily due to resistance from the UK[90] and difficulties in applying the model in other countries.[91] A Directive and a

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[82] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461. *BCE Inc v 1976 Debentureholders* [2008] SCR 560.
[83] UK Companies Act s 172(1).
[84] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 *Sydney Law Review* 577, 600.
[85] Company Law Review Steering Group, *Modern Company Law for a Competitive economy: The Strategic Framework* (Department of Trade and Industry, 1999), 41.
[86] See text to note 109.
[87] Concerning the structure of the Public Limited Companies and the Powers and Obligations of their Organs 15 OJ EUR. COMM. (No. C131) 49 (1972).
[88] Ibid, Article 2.
[89] See, Frank Wooldridge, 'The Composition and Functions of German Supervisory Boards' (2011) 32(6) *Company Lawyer* 190.
[90] Jean Du PLessis and Janet Dine, 'The Fate of the Draft Fifth Directive on Company Law: Accommodation instead of Harmonisation' (1997) *Journal of Business Law* 23, 35. Otto Sandrock and Jean du Plessis, 'The

European Council Regulation has now introduced protection for the rights of Member States to choose their own style of management structures[92] and it is now generally accepted that no harmonisation of stakeholder involvement will occur in the EU.[93] Despite the varying degrees of success, what has been demonstrated in the US, the UK, and at EU level is a desire to shift away from a strict adherence to shareholder value. Most jurisdictions accept the fact that for a company to be successful in the long term, interests other than shareholders must be considered by directors. However in an Irish context there seems to be no such desire to move away from shareholder value.

The Irish approach

The Irish common law approach to the corporate objective has been to equate the best interests of the company directly to the shareholders' best interests. This obligates directors to try and maximise wealth for shareholders as it is generally accepted that the main interest of shareholders is obtaining maximum financial return on their investment.[94] Support for shareholder value in the Irish context stems from *G&S Doherty v Doherty* where Henchy J stated that 'directors are in a fiduciary position, and must exercise their power *bona fide* for the benefit of the company as a whole, that is to say, the shareholders as a whole: See *Greenhalgh v Ardene Cinemas Ltd*'[95] Henchy J uses *Greenhalgh* as the evidence to follow such an approach despite it being from a different context. The shareholder value approach was echoed in *Irish Press v Ingersoll* where Barron J stated that 'acting in the interests of the company is no more than acting in the interests of all its shareholders.'[96] In the Case of *Re Frederick Inns Ltd*[97] the Supreme Court of Ireland also followed a shareholder value approach. Blaney J cited with approval from *Kinsela v Russell Kinsela Pty. Ltd*[98] which stated 'In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise'. Although the case dealt with ultra vires payments and the duties of directors to creditors, endorsing the statement would seem to advocate a shareholder value approach. More recently the High Court seems to have endorsed the approach taken in *G&S Doherty*. In *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd*[99] Charelton J cited with approval the decision of *G&S Doherty* v *Doherty* as evidence of the duty to act in the interests of the

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German Corporate Governance Model in the Wake of Company Law Harmonisation in the European Union' (2005) 26(3) *Company Lawyer* 88, 91.

[91] See, Detlev Vagts, 'Reforming the "Modern Corporation": Perspectives from the German' (1966) 80 *Harvard Law Review* 76, 78.

[92] Council Regulation 2157/2001 of October 8 2001 on the statute for a European Company (SE) [2001] OJ L294/1 and the SE employees' Directive [2001] OJ L294/22-23.

[93] H. Hansmann and R. Kraakman 'The End of History for Corporate Law' (2001) 89 *The Georgetown Law Journal* 439, 441.

[94] Deirdre Ahern, *Directors' Duties: Law and Practice* (Roundhall 2009), 158.

[95] *G & S Doherty Ltd v Doherty* (19 June 1969, unreported), 42.

[96] *Irish Press Plc v Ingersoll Irish Publications Ltd* (15 December 1993, unreported), 77.

[97] *Re Frederick Inns Ltd.* [1994] 1 ILRM 387, 396.

[98] *Kinsela v. Russell Kinsela Pty. Ltd. (in liquidation)* [1986] 4 NSWLR 722.

[99] *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd* [2014] IEHC 93.

company making it clear that *G & S Doherty v Doherty* is still being used as persuasive authority on this subject. For the first time, through the Companies Act 2014, Irish law, encodes directors' fiduciary duties.[100] Section 228(1)(a) states that

> A director of a company shall - act in good faith in what the director considers to be the interests of the company

While the legislative duty is new, section 227(5) provides that the legislative fiduciary duties will be interpreted and applied in the same way as the common law rules.[101] As a result, the common law interpretation of this phrase is likely to be carried forward under the new Companies Act thus ensuring the continuing application of the above cases, and the shareholder value principle.

During the Irish reform process the Company Law Review Group (CLRG) did consider alternatives to maintaining the common law approach. The Irish codification of directors' fiduciary duties is similar to the English reform imposed by the UK Companies Act 2006 which also encoded directors' fiduciary duties.[102] However the CLRG were strongly opposed to the corresponding UK reform which introduced Enlightened Shareholder Value. While the implementation of Enlightened Shareholder Value resulted in a requirement to have regard to non-shareholder interests, the CLRG recommended no such expansion of directors' duties. The CLRG stated that they were 'not convinced' by the English statement of directors' duties,[103] and believed it to be susceptible to fossilisation.[104] The CLRG believed that the reform sought to impose 'additional duties' while the Irish reform was aiming for a 'consolidation of duties that have been well established in the Irish courts'.[105] The CLRG also considered, but ultimately refused, the proposals of the draft Fifth Company Law Directive. Instead of considering significant reforms such as proposing an adoption of the German two tiered board model, the CLRG considered granting employees an entrenched right to elect a director on to the existing single tiered board.[106] They declined to recommend such a reform on the basis that employee involvement in a number of different spheres has improved employer-employee relations.[107] The only mention of non-shareholder interests in the Companies Act 2014 is section 224(1) which states,

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[100] The Companies Act 2014 s 228.
[101] ibid s 227 (4).
[102] UK Companies Act 2006 s 170-177.
[103] Company Law Review Group, First Report, (Department of Jobs, Enterprise and Innovation, Dublin, December 2011) available at http://www.clrg.org/1streport/first.asp p239 para 11.3.6.
[104] Ibid.
[105] Ibid.
[106] Ibid p247 para 11.8.14.
[107] Ibid.

> The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.[108]

Section 224(1) re-enacts section 52(1) of the Companies Act 1990. However, despite the strong wording used, the section was generally seen to be of little practical benefit when it comes ensuring directors considered employee interests.[109] The duty is not directly enforceable by employees[110] and section 52(1) was often dealt with by companies in a cursory fashion.[111] The only positive effect from an employee point of view is that it legitimises directors considering employee interests and protects directors from being subject to a derivative action for considering employee interests. However there is nothing to ensure directors do have regard to employee interests as there is no way to enforce the duty. Even if directors completely disregard regard employee interests they will face no penalty. The net effect is that section 224(1), like section 52(1), will be of little practical benefit to employees.

However identical criticisms can be made in relation to Enlightened Shareholder Value. Enlightened Shareholder Value requires a director to promote the success of the company for the 'benefit of its members as a whole, and in doing so have regard to' a list of non-shareholder interests including employees, customers, suppliers, the local community, the environment and the long term interests of the company. The first point to note is the statement that the duty of directors is to promote the success of the company for the benefit of the members i.e. the shareholders. Prior to the 2006 Act, the duty had been to act in the best interests of the company which was often interpreted by the courts to mean the interests of the shareholders but alternative interpretations were also given by the courts. Under the 2006 Act,[112] the duty now contains the explicit legislative requirement to act in the interests of the shareholders. This removes any possibility for the courts to interpret the duty as anything other than a requirement to prioritise the shareholders' interests, even ahead of the interests of the company as a separate entity. As Alcock notes there is no longer any room for a distinction under the UK Companies Act between the interests of the shareholders and those of the company.[113] During the UK reform process, the Company Law Review Steering Group (CLRSG) rejected the idea of omitting this reference to the members as they believed this would provide too much discretion to directors to determine what is in the best interests of the company.[114] The CLRSG disagreed with such an outcome as they believed it would grant directors too much power to set any interest above that of the

[108] The Companies Act 2014 s 224(1).
[109] Thomas Courtney, *The Law of Companies* (3rd Edn, Bloomsbury, 2012), 874; Deirdre Ahern, *Directors' Duties: Law and Practice* (Roundhall, 2009), 178.
[110] The Companies Act 2014 s 224(2).
[111] Deirdre Ahern, *Directors' Duties: Law and Practice* (Roundhall, 2009), 178.
[112] The UK Companies Act 2006 s 172(1)
[113] Alistair Alcock, 'An Accidental Change to Directors'' Duties' (2009) 30 *Company Lawyer* 362, 367.
[114] CLRSG, Modern Company Law for a competitive Economy: Developing the Framework (DTI, London 1999) p34 para 3.52.

shareholders whenever their view of what constituted company success required it.[115] Seemingly, the CLRSG were against any scenario where a non-shareholder interest could be placed above the shareholders' interests and Enlightened Shareholder Value, in its current form, ensures that shareholders' interests take priority over all others.[116] Prioritising the shareholders' interests presumably applies even if giving priority to a stakeholder would benefit the company as a separate legal entity. The requirement to prioritise shareholder interests has led to many questioning how 'enlightened' Enlightened Shareholder Value really is.[117] The framing of company success in terms of the members was intended by the CLRSG to be offset by the requirement to take into account the non-shareholder interests. However this requirement is extremely difficult to actually enforce. Given the now legislative position that the directors must promote the company's success in the overall context of the shareholders' benefit, and the nature of the requirement to consider the non-shareholder interests, Enlightened Shareholder Value is potentially even more shareholder orientated than the common law.

Given this failed attempt to move away from shareholder value in the UK, the Irish Review Group, the CLRG, were correct not to recommend Enlightened Shareholder Value. Applying this model in Ireland would have meant paying lip service to a long list of interests rather than just employees. And while the UK reform Group were unwilling to provide a duty simply to act in the interests of the company, the CLRG did recommend such an approach. The issue is that in the Irish context, the courts have given a legally flawed interpretation of what it means to act in the interests of the company. There is nothing in section 228(1)(a) which requires a shareholder value approach other than the courts' interpretation of this phrase. Not only is equating the interests of the company with the shareholders' interests legally flawed but it is also an inferior approach when it comes to promoting company success. While in many cases the interests of the company and the shareholders will be compatible, in cases where the two interests diverge, the entities interests should prevail. This interpretation would allow directors to consider stakeholder interests, where it would be best for the entity to do so, which offers a movement away from strict adherence to the shareholder value principle and an overall superior solution to the issue of the corporate objective. For this to occur, a reinterpretation of what it means to act in the interests of the company from the Irish courts is necessary.

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[115] Ibid.

[116] Paul Davies, *Gower and Davies: Principles of Modern Company Law* (8th edn, Sweet and Maxwell, 2008), 508.

[117] Shuangge Wen, 'Exploring the Rationale of Enlightened Shareholder Value (ESV) in the Realm of UK Company Law – The Path Dependence Perspective' (2011) 14 *International Trade and Business Law Review* 153; John Birds, 'The Companies Act 2006: Revolution or Evolution?' (2007) 49 *Managerial Law* 13; Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 20 *Sydney Law Review* 577; Elaine Lynch, 'Section 172: A Ground Breaking Reform of Directors' Duties, or the Emperor's new Clothes?' (2010) 33(9) *Company Lawyer* 196.

The correct interpretation of the best interests of the company?

A fundamental principle of company law is that the company is a legal entity which is distinct from its shareholders.[118] This view of the company is more plausible than any other theory of what a company is[119] and explains why shareholders can be members of the company and still bring legal action against the company.[120] The case which laid down this principle of separate legal personality was *Solomon v A Solomon & Co Ltd* where Lord Halsbury LC stated that:

> Once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.[121]

In the same case Lord MacNaughton said that the corporation at law is a different person entirely from the subscribers to the memorandum of the company.[122] Since the judgement in *Soloman* there has been widespread juridical support of this separation between the company and its shareholders.[123] In *Credit Suisse v Allerdale Borough Council* Hobhouse LJ held that 'it is elementary law that shareholders are not to be identified with the corporate entity even if there is only one shareholder'.[124] Similarly Lord Millet in *Johnson v Gore Wood* stated that the company is a legal entity 'separate and distinct from its members.'[125] The Irish courts have also consistently applied the principle laid down in *Solomon*.[126] In *Redfern v O' Mahony* McGovern J stated:

> The legal consequences of incorporating a limited liability company are that the company assumes a separate legal identity as distinct from its owners. This is not a fiction. The rule in *Solomon v Solomon & Co Ltd* [1897] AC 22 is still the law in this jurisdiction. The company and its shareholders are separate legal entities.[127]

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[118] Paddy Ireland, Ian Grigg-Spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' (1987) 14(1) *Journal of Law & Society* 149, 150. Gregory Mark, 'The Personification of the Business Corporation in American Law' (1987) 54 *University of Chicago Law Review* 1441, 1468.
[119] Sanford Schane, 'The Corporation is a Person: the Language of Legal Fiction' (1986) *Tulane Law Review* 563, 594.
[120] Rutherford Campbell Jr, 'Corporate Fiduciary Principles for the Post-Contractarian Era' (1996) 23 *Florida State University law Review* 561, 589.
[121] *Solomon v A Solomon & Co Ltd* [1897] AC 22, 30.
[122] Ibid, 51.
[123] For example see *A L Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775; *Macura v Northern Insurance Co Ltd* [1925] AC 619; *Roberts v Coventry Corporation* [1947] 1 All ER 308; *Wallersteiner v Moir (No 2)* [1975] QB 373.
[124] *Credit Suisse v Allerdale Borough Council* [1997] QB 309, 359.
[125] *Johnson v Gore Wood & Co (A Firm)* [2002] 2 AC 1, 61.
[126] For example see *Re Frederick Inns Ltd* [1991] ILRM 582; *Attorney General v Jameson* [1904] 2 IR 644. *Allied Irish Coal Supplies Ltd. v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519.
[127] *Redfern v O' Mahony and McFeely, Carroll, Tafica Ltd and Aifca Ltd* [2010] IEHC 253, para 87.

Following on from the doctrine that the company is a separate legal person, directors owe their fiduciary duties to the company itself and not to any individual shareholder or group of shareholders.[128] Their fiduciary responsibilities are owed to the company alone. As was held in *Crindle Investments*, 'There can be no doubt that, in general, although the directors of a company occupy a fiduciary position in relation to the company, they do not owe a fiduciary duty, merely by a virtue of their offices, to the individual members.'[129] In *Re A Company* it was stated that 'it is long established and basic law that the directors of a company owe their fiduciary duties to the company and not to the shareholders'.[130] In Ireland, Charelton J in *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd,*[131] in quoting with approval Ussher's *Company law in Ireland*, stated that, 'It is [also] well established that the director owes the duties arising out of his office to the company itself, the separate person, and to no one else'.[132] Given that the company is a separate legal person, the fact that directors owe their duties to the company and the unpersuasive nature of arguments in favour of shareholder value discussed above,[133] there is no legal basis to equate the interests of the company with the interests of the shareholders. As Attenborough argues, the traditional common law interpretation of what it means to act in the best interests of the company is wide of the mark.[134]

From a judicial standpoint shareholder value does not have to be the approach taken. Not all cases on this topic say that the interests of the company are synonymous with the interests of shareholders and many of the cases that do favour of shareholder value from the common law are in a different context to directors' duties. Other cases advocate directors taking non-shareholder interests into account when running a company and others view the company as a completely separate legal entity. The point is that there is precedent for a different interpretation that the one currently taken by the Irish courts. There is a sufficient legal basis for Irish courts to reinterpret what it means to act in the interests of the company.

On a re-examination of the English common law it can be questioned as to what degree it actually embraced shareholder value. Many of the cases cited in support of shareholder value are considered in a different context to directors' duties. The comments of Evershed MR *Grennhalgh v Ardene Cinemas* that the company as a whole simply means the shareholders as a general body[135] were made in the context of shareholders altering the articles and it is doubtful if he intended to lay down a principle of

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[128] *Smith v Cork and Bandon Railway Co* (1870) 5 IR EQ 63; *Percivil v Wright* [1902] 2 Ch 421. *Dawson International plc v Coats Platon plc* [1989] BCLC 233.
[129] *Crindle Investments et al v Wymes et al* [1998] 2 ILRM 275, 288.
[130] *Re A Company (No. 004415)* [1997] BCLC 479 Ch D, 491.
[131] *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd* [2014] IEHC 93.
[132] *ibid*, 3 quoting Patrick Ussher, *Company Law in Ireland* (Sweet & Maxwell, 1986), 203.
[133] See text to note 49.
[134] Daniel Attenborough, 'How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339, 339.
[135] *Greenhalgh v Ardene Cinemas Ltd* [1950] 2 All ER 1120, 1126.

general application.[136] The statement of Nourse LJ in *Brady v Brady* was made in the context of a potential breach of section 151 of the Companies Act 1985 which deals with financial assistance and not directors' duties.[137] While there are cases which advocate a shareholder value approach to directors' duties,[138] there are also cases which take a wider view of directors' duties. It would be extremely difficult to run a successful company whilst consistently disregarding the interests of a company's stakeholders[139] and it is questionable if English common law ever advocated such an approach. Even the early cases of *Hampson v Price*[140] and *Hutton v West Cork Railway*[141]did not advocate strict adherence to shareholder value principles. Both cases held that gratuitous payments to employees were legal if they had the potential to indirectly benefit the company.[142] Other cases have found in favour of treating the company as a distinct legal entity[143] which facilitates a more long term approach than strict adherence to shareholder value.[144] Evidence for such an approach can be found in *Allen v Gold Reefs* which held that the interests of the company itself should take priority over shareholders' interests.[145] Similar to *Greenhalgh v Ardene Cinemas* this statement was made in the context of the shareholders' power to alter the articles. Despite both *Allen v Gold Reefs* and *Greenhalgh v Ardene Cinemas* reaching directly opposed conclusions on this topic, it is *Greenhalgh* which is often cited in directors' duties cases[146] and not the judgment in *Allen*. There seems to be no rationale for the courts to apply *Greenhalgh* to directors' duties,[147] particularly when the principle laid down in case is at odds with other judgments on the topic of shareholders' power to alter the articles.

In relation to how directors are to act when subject to takeover bid, the Scottish case of *Dawson International Plc v Coats Platon plc*[148] Lord Cullen held first of all that directors were agents of the company and not the shareholders.[149] He stated that there 'was no good reason' that directors should

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[136] Daniel Attenborough, 'How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339, 343.
[137] Andrew Keay, ' Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective' [2006] *Lloyd's Maritime and Commercial Law Quarterly* 335, 343.
[138] *Parke v Daily News Ltd* [1962] Ch 927; *Heron International Ltd* [1983] BCLC 244.
[139] Alexander Schall, Lilian Mines & Simon Goulding, 'Promoting an Inclusive Approach on the part of the Directors: The UK and German Position' (2006) 6 *Journal of Corporate Law Studies* 299, 306.
[140] *Hampson v Price's Patent Candle Co* (1876) 45 LJ Ch 436.
[141] *Hutton v West Cork Railway* {1883} L.R. 23 Ch.D 654.
[142] Ibid, 672- 673.
[143] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656; *Dawson International Plc v Coats Platon plc* [1989] BCLC 233.
[144] Deirdre Ahern, *Directors' Duties: Law and Practice* (Roundhall, 2009), 153.
[145] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671.
[146] *Parke v Daily News Ltd* [1962] Ch 927; *Gaiman v National Association for Mental Health* [1971] Ch 317; *Heron International Ltd* [1983] BCLC 244; *Peskin v Anderson* [2000] BCC 1110.
[147] Daniel Attenborough, 'How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh' (2009) 20(10) *International Company and Commercial Law Review* 339.
[148] *Dawson International Plc v Coats Platon plc* [1989] BCLC 233.
[149] Ibid, 243.

owe a general duty to shareholders and that directors have but one master, the company.[150] Lord Cullen stated what is in the interests of current shareholders may not necessarily coincide with what is in the interests of the company accepting that those two interests may well diverge.[151] A similar view was expressed in *Re BSB Holdings Ltd*[152] where it was stated that 'As respects the potential conflict between the interests of the members and the interests of the company, it seems to me…..where the proposed act is required to be done in the interests of the company, the interests of the company prevail'.[153]

In support of the view that the company's interests do not equate directly with the shareholders' interests, there is judicial support for requiring directors' to consider non-shareholder interests. In *Lonhro v Shell Petroleum* it was stated that the best interests of the company were not exclusively those of the shareholders but may include the creditors.[154] *Fulham Football Club v Cabra Estates* held that a company is more than just the sum total of its members and includes creditors and employees.[155] In *Evans v Brunner Mond & Co Ltd*[156] a large chemical company had resolved in general meeting to make large donations to universities and other institutions for scientific research. Eve J. rejected claims that the resolution was ultra vires on the basis that any benefit to the company would be too indirect, would benefit competitors and would only amount to a benefit to the community. Eve J. held that such research was necessary for its continued progress as a chemical manufacturer.[157] This was despite the fact that there was going to be no direct benefit to the shareholders.

The decisions in the above cases have led to claims that the common law may not have adopted a shareholder value approach at all[158] and certainly never advocated a strict interpretation of shareholder value.[159] Wen argues that the principle of non-shareholder consideration which leads to eventual benefit of the company has been acknowledged by English common law for over a century.[160] However in an English common law context, the debate regarding the two different interpretations of the best interests of the company has been made redundant through the UK Companies Act 2006 and

[150] Ibid.
[151] Ibid.
[152] *Re BSB Holdings Ltd* [1996] 1 BCLC 155.
[153] Ibid, 249.
[154] *Lonhro v Shell Petroleum* [1980] 1 WLR 637 HL 634.
[155] *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363,379.
[156] *Evans v Brunner Mond & Co Ltd* [1921] 1 Ch. 359.
[157] Ibid, 369.
[158] Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11, 12. John Armour, Simon Deakin and Suzanne Konzelmann 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 531.
[159] Elaine Lynch, 'Section 172: A Ground Breaking Reform of Directors' Duties, or the Emperor's new Clothes? (2010) 33(9) *Company Lawyer* 196, 198 and Alistair Alcock, 'An Accidental Change to Directors'' Duties' (2009) 30 *Company Lawyer* 362, 363.
[160] Shuangge Wen, 'Exploring the Rationale of Enlightened Shareholder Value (ESV) in the Realm of UK Company Law – The Path Dependence Perspective' (2011) 14 International *Trade and Business Law Review* 153, 157.

Enlightened Shareholder Value. Under Enlightened Shareholder Value it is clear that the success of the company is framed in terms of the shareholders and that the shareholders' interests take priority over all others, even the company's. In an Irish context however, as the Companies Act 2014 still maintains the duty to act in the interests of the company, the debate around the interpretation of this phrase is still very much relevant. What the above discussion highlights is that there are alternatives to taking a shareholder value approach and that there is a strong legal basis for avoiding such an approach. The doctrine of separate legal personality, the nature of directors' fiduciary duties and several cases from England all support the view that the company is a distinct entity, separate from its shareholders.

The proposed solution

To take the correct legal approach the current Irish view of what it means to act of the interests of the company should be reinterpreted. The duty to act in the interests of the company should be held to mean the interests of the company as a separate legal entity. In this regard inspiration can be drawn from Canadian law. The Canada Business Corporations Act 1985 states that directors have duty to act 'in good faith with a view to the best interests of the corporation'[161] The provision is extremely similar to the Irish common law duty and the duty contained in section 228(1)(a) of the Irish Companies Act 2014. Like Ireland, Canada traditionally seemed favour a shareholder value approach to corporate governance.[162] However more recently the Canadian courts have come to a different conclusion as to what it means to act in the interests of the company. The Canadian duty came under examination in *Peoples Department Stores Inc. (Trustee of) v Wise*[163] with the Supreme Court holding that the duty to act in the best interests of the company is not to be simply equated with acting in interests of the shareholders.

> Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the 'best interests of the corporation' should be read not as simply the "best interests of the shareholders". From an economic perspective, the 'best interests of the corporation' means the maximisation of the value of the corporation. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.[164]

This approach recognises the legal reality that the corporation is a distinct entity. It also acknowledges that doing what is best for the company, even from an economic perspective, includes considering non-shareholder interests. The court goes on to say that:

[161] The Canada Business Corporations Act 1985 s 122(1).
[162] See, *Palmer v Carling O' Keefe Breweries of Canada Ltd* (1989) 67 OR 161; *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165.; *Maple Leaf Foods Inc v Schneider Corp* (1998) 42 OR 177.
[163] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461.
[164] Ibid, 481.

> We accept as an accurate statement of law that in determining whether they [the directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.[165]

This appears to be identical to Enlightened Shareholder Value, which has been criticised above for being essentially shareholder value under a different name, but there is one important difference. Under Enlightened Shareholder Value the success of the company is framed exclusively in terms of the Shareholders. As a result the shareholders' interests always take priority over any other interests, including the company as an entity. Under the Canadian approach the interest which takes priority over all others is the corporation. This allows directors to sacrifice shareholder value if the good of the company requires it. Similarly it allows directors to sacrifice shareholder value if a particular decision was damaging to a stakeholder interest, and the damage to that stakeholder would negatively impact the company as an entity. Importantly the judgement emphasised that directors would not owe any direct duty to stakeholders and so was not embracing stakeholder theory.

> At all times directors and officers owe their fiduciary duties to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholder.

Another Canadian Supreme Court decision continued this approach in *BCE Inc v 1976 Debentureholders.*[166] The court stated that, 'There is no principle that one set of interests – for example the interests of the shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors.'[167] They stated not only that directors are entitled to take into account stakeholder interests[168] but also that, in certain circumstances, where the best interests of the corporation required it, directors would be obliged to consider the impact of their decision on stakeholders.[169] Again it is important to stress this is not stakeholder theory, stakeholders are only to be considered to the extent that it benefits the company as an entity.

It is submitted that the Canadian approach to this issue is preferable to both shareholder value and Enlightened Shareholder Value and that there is sufficient scope afforded to the Irish courts under the Companies Act 2014 to follow the Canadian decisions. When assessing the UK's reform of directors' fiduciary duties, the CLRG stated that the UK's approach was 'susceptible to fossilisation' ….and that

[165] Ibid, 482.
[166] *BCE Inc v 1976 Debentureholders* [2008] SCR 560.
[167] Ibid, [84].
[168] Ibid, [39].
[169] Ibid, [66].

the preferred 'a more general statement which gives the judiciary interpretational latitude.'[170]As highlighted by the CLRG, the major advantage of simply requiring directors to act in the interests of the company is that it provides scope for judicial interpretation. Unlike in the UK legislation which defines company success in terms of the shareholders, Irish have been given 'interpretational latitude' and so can follow example set by the Canadian Supreme Court and the strand of English case law, which views the company as an entity distinct from its shareholders. A move to a less shareholder approach to company law and directors' duties would reflect other areas of Irish corporate law. The public enforcement of directors' duties is one such example. Ahern states that the shift to public enforcement through disqualification and restriction in Ireland has occurred within an overall context of viewing compliance with directors' duties as serving a public interest function rather than protecting the interests of shareholders.[171]

Conclusion

Companies continue to exercise ever growing influence over the economy and society. How the law requires companies to act in terms of their aims and objectives is a subject of significant importance yet there is no consensus on what the corporate objective should be. Given the power and wealth that companies can possess, the law should demand more than simply increasing profits for its shareholders. Of all the arguments in favour of a shareholder value approach the most persuasive is that the model best allows companies to provide benefits to all stakeholders, including society in general. While this may be true when stakeholder theory is the only possible alternative, shareholder value is not the best way to benefit all stakeholders. Instead, viewing the company as an entity, distinct from all its participants, is the best way to ensure such benefits are achieved. Viewing the company as an entity allows stakeholder interests to be taken into account and even prioritised over shareholder interests, if it is of benefit to the company as an entity. It also provides the company itself with the best chance of being successful, even in economic terms, as the company's interests can take priority over any other interest group including the shareholders. And it also eliminates many of the negatives associated with shareholder value such as encouraging excessive risk taking from directors requiring them to focus on the short term.

The Companies Act 2014 has introduced a statutory duty to act in the interests of the company however the common law interpretation of this duty is likely to continue to be applied under the new Act.[172] The common law interpretation of the duty requires directors to act for the shareholders'

[170] Company Law Review Group, First Report, (Department of Jobs, Enterprise and Innovation, Dublin, December 2011) available at http://www.clrg.org/1streport/first.asp p239 paragraph 11.3.6.
[171] Deirdre Ahern 'Directors' Duties: Broadening the Focus Beyond Current Context to Examine the Accountability Spectrum' (2011) 33 *Dublin University law Journal* 116, 140.
[172] The Companies Act 2014 s 227 (4); *Bloxham (in Liquidation) v The Irish Stock Exchange Ltd* [2014] IEHC 93.

benefit[173] and therefore implements shareholder value. However, unlike the corresponding UK reform, there is sufficient scope in the Companies Act 2014 for the Irish Courts to reinterpret this duty as a duty to act in the interests of the company as a separate legal entity. The UK legislation defines company success in terms of the shareholders but the Companies Act 2014 provides scope to the Irish courts to alter the current meaning of the duty to act in the interests of the company. Based on the well-established legal doctrine of separate legal personality and the nature of directors' fiduciary duties, in addition to English[174] and Canadian[175] case law, this paper has argued for a reinterpretation by the Irish courts of what it means to act in the best interests of the company. This would not only provide a much truer reflection of the legal nature of a company but also provides a chance to better promote both private and social wealth through company law.

[173] *G &* Doherty (19 *S Doherty Ltd v* June 1969, unreported); *Irish Press Plc v Ingersoll Irish Publications Ltd* (15 December 1993, unreported).
[174] *Lonhro v Shell Petroleum* [1980] 1 WLR 637; *Fulham Football Club v Cabra Estates* [1994] 1 BCLC 363; *Dawson International Plc v Coats Platon plc* [1989] BCLC 233; *Evans v Brunner Mond & Co Ltd* [1921] 1 Ch. 359.
[175] *BCE Inc v 1976 Debentureholders* [2008] SCR 560. *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461.