Directors’ duties, dry ink and the accessibility agenda

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"L.Q.R. 114 I. Introduction

One of the most significant aspects of the company law reform process leading to the enactment of the Companies Act 2006 was the policy drive towards a statutory statement of duties for directors. In setting directors’ duties on a legislative footing, the United Kingdom followed in the well-worn path of other common law jurisdictions such as Canada, Australia and New Zealand. Prior to this, largely created and moulded by the Courts of Chancery in the nineteenth century by analogy with the duties applicable to trustees, directors’ duties had endured remarkably, subject to incremental refinement by the courts to meet new factual scenarios and changing societal expectations. Accordingly, the transfer of directors’ duties to a legislative scheme qualified as a major landmark in the evolutionary history of the duties. The transition to a legislative model in Ch.2 of Pt 10 of the Companies Act 2006 means that the core duties of directors no longer stand apart from legislative embellishments on their duties and responsibilities but, instead, are integrated within the architecture of an ambitious unifying legislative code.

The primary policy justification presented by the English and Scottish Law Commissions, the Company Law Review Steering Group and the government for a statutory statement of the general duties of directors was the desire to improve their accessibility. Accessibility was associated with transparency in the law and ease of reference for the user and there was a tacit assumption of a positive correlation between accessibility of the law and compliance. While much has been written on the minutiae of individual duties, the focus of this article is the more generic subject of the underlying accessibility rationale. In particular, the objective is to engage in an early stage exploration of the extent to which an accessibility goal can be said to be achieved in view of the considerable challenges for the key audience of the statutory statement, directors and lawyers, in seeking to understand what the law is and how it might be applied to a given fact scenario. Based on the methodology adopted in the 2006 Act for legislating for directors’ duties, a central question is whether or not the law can be regarded as easily ascertainable from a statutory statement which represents a partial codification of the rich heritage of pre-existing equitable and common law principles. This question raises complex issues concerning the role of pre-enactment and post-enactment case law in the interpretation of directors’ duties and the developmental role of the courts and Parliament.

Relevant issues are explored primarily with reference to the text of the Companies Act 2006 and the modest body of case law which has to date emerged concerning the restated duties. Policy documents and Parliamentary debates, writings on the nature of codification as well as principles of statutory interpretation "L.Q.R. 115 in relation to codifying measures are also drawn on. Part II of this article sets out the background to the statutory statement in Ch.2 of Pt 10 of the 2006 Act, including the prior judicial evolution of directors’ duties, the place of codification in the United Kingdom and policy consideration of the question of codifying directors’ duties. Part III critically examines the accessibility agenda pursued by the Law Commissions and the Company Law Review, and notes the limitations on seeking to make law accessible to the layperson. This provides the foundation for subsequent examination of particular challenges to accessibility in the chosen legislative model. Part IV examines the challenges presented by the partial codification approach adopted which involved a non-exhaustive statement of duties thus necessitating recourse to be had to other sources of law. The appropriate approach to interpretation of the duties is considered in Pt V, where it is suggested that the novel legislative clues in this context have created some doubt which will hopefully be resolved over time. There is an understandable tension between an accessibility agenda in the context of a codification of well-recognised principles and the need to avoid stunting the growth of legal principle.
Consequently in Pt VI there is an exploration of the potential role of the courts and Parliament in relation to addressing gaps in the statutory statement. Part VII considers whether the legislative approach to issues of enforcement and remedy hinder the accessibility agenda. The article's conclusion suggests that while accessibility is a laudable policy goal, which is in part achieved by the statutory statement of seven general duties, realistically there are limits to accessibility in this sphere and some difficult interpretive challenges remain to be ironed out by the courts concerning the role of case law and the courts. At this early stage in the life of the Companies Act 2006, complex issues of statutory interpretation militate against any cursory finding that the law is now readily accessible to those to whom it is of direct or indirect interest.

II. Background to the Statutory Statement

The equitable and common law duties of directors

Until the Companies Act 2006, well-established equitable and common law duties were owed by directors to the company. These duties were largely formulated by the courts in the nineteenth century by analogy with those of trustees and refined over time. The Company Law Review set out the following general duties as being applicable to directors:

"To comply with the company constitution and use powers under it for proper purpose; to run the undertaking for the benefit of the company … and not for any other purpose; to avoid profiting personally from their position and to avoid conflicts of interest without the consent of the members or the authority of the constitution; to act fairly as between members; and to apply reasonable care and skill in exercising all their functions."

The fundamental principles underlying these duties were remarkably enduring. In the application of each of the duties identified, following the principle of stare decisis, the purpose and kernel of the duties remained relatively unscathed in more than a century of judicial application. However, although fundamentally moulded in the late nineteenth century, directors' duties were not fossilised at that point but rather made the subject of incremental refinements in the course of judicial application. To a large extent, base principles in relation to these duties remained settled but different factual scenarios gave rise to refinements of principle and application by the courts. The courts were responsive to changing societal expectations, most notably in relation to the reworking of the duty to exercise care, skill and diligence in Re Barings Bank Plc (No.5); Secretary of State for Trade and Industry v Baker. There was some flux, for example in relation to the appropriate principles to be applied in corporate opportunity cases to determine the entitlement of a director to take advantage of an opportunity. These shifts showed that, far from being static, the duties under the guardianship of the courts were responsive to the demands of modern commercial life. Given the flexibility of the equitable and common law duties and the overall deftness of approach by the courts who were sensibly guided by a business judgment rule, moving to the fixed wording of a statutory statement raised concerns as to the risk of loss of that subtlety of judicial approach. Understanding the policy behind statutory statement as fundamentally concerned with improving the accessibility of the law requires some contextual appreciation of the place of codification in the United Kingdom's legal system which in turn provides a contextual background for specific policy consideration of the codification of directors' duties.

Codification in the United Kingdom

Codification was a successful feature of English commercial law in the late nineteenth and early twentieth century, largely as a result of the pioneering approach and drafting zeal of Sir Mackenzie Chalmers. Although often identified with criminal law, the United Kingdom is no stranger to codification in the field of commercial law. Drafted by Chalmers, based on inspiration while working on the Indian Penal Code of 1860, the Bills of Exchange Act 1882 and the Sale of Goods *L.Q.R. 117 Act 1893 were the first codifying acts and involved codes based on both statute law and case law and were followed by the Marine Insurance Act 1906. In appropriate instances, the opportunity was taken to fill in relevant gaps in the law. The codification concept has enjoyed less currency in recent
decades in commercial law, the Arbitration Act 1996 being a notable exception.

The concept of codification is one which has assumed a certain amount of currency in legal circles without an accompanying in-depth fathoming of its deeper recesses. Although long established, not being a term of art, the concept is not free of definitional controversy. Indeed, in utilising the term “codification” and proposing to “codify” directors’ duties, the Law Commissions acknowledged that the term is used in other senses such as the common usage in the United States in relation to a non-binding restatement of the law. Sometimes there can be improbable expectations of codification in terms of simplification of the law or enhancement of legal certainty. An idealised vision of codification based on a civil law conception of an all-embracing code is unrealistic. In relation to accessibility, one of the hazards of codification is that once a body of case law emerges concerning a particular provision, this may overlay the text of the provision and thus undermine its status as a source of law. Thus the identification of codification with accessibility of the law is not black and white.

Policy debate on codifying directors’ duties

The legislative recasting of directors’ duties in the consolidating and reforming Companies Act 2006 represented the culmination of a long drawn-out policy discussion on the subject with much wavering along the way. Notably, initial policy reviews by company law reform committees did not favour a statutory statement of duties. Opponents of codification regarded any attempt to reduce the duties to statute as doomed to failure and likely to create rather than reduce uncertainty. The Greene Committee appointed to review the Companies Acts 1908 to 1917 concluded that “any attempt by statute to define the duties of directors would be a hopeless task”. The issue arose again for consideration by the Jenkins Committee appointed to review the Companies Act 1948 which recommended against attempting an exhaustive definition of the duties of directors in legislation. It considered that to attempt to set out directors’ duties in statute would inevitably lead to lacunae which would make it difficult to determine what the law was. Instead it recommended some statutory supplementation of the general duties. Later, policy began to swing the other way and other reform initiatives followed “L.Q.R. 118” which promoted a statutory statement of directors’ duties. An attempt to introduce the codification of directors’ duties followed in the Companies Bill 1978 which contemplated a statutory statement which would take effect “instead of any rule of law stating the fiduciary duties of directors of companies”. In the event, the proposals came to nothing when the government fell.

The beginning of the modern policy momentum in the direction of codification was marked when the subject was revisited by the English and Scottish Law Commissions as part of their statutory mission to promote the codification of the law where appropriate. They had recommended reforms to the derivative action which would assist in pursuing directors for actual or threatened breaches of duty. It was noted that on the basis of the debate concerning the need for a statutory statement of directors’ duties having arisen on a number of occasions, “the matter ought to be canvassed fully and publicly”. The Law Commissions considered a number of options ranging from a comprehensive codification to a partial codification of some of the general duties as well as other measures such as a statutory statement for guidance, complementing the general duties and a series of authoritative pamphlets. The Law Commissions’ work in this area was informed by a review of the function of the duties in a broader economic context which involved looking at economic efficiency considerations. Related empirical research revealed widespread support among directors for a statutory statement of directors’ duties, particularly among directors of smaller companies who felt that this would provide information on and clarification of the law.

To a certain extent, the work of the Law Commissions in this area overlapped with that of the independent Company Law Review Steering Group which was given a wide-ranging remit to review company law. Consequently, the Law Commissions shied away from reviewing the content of the duties (other than in the case of the duty to exercise care and skill) and focused instead on the issue of whether a codification or partial codification was warranted. Government White Papers also advanced the codification agenda which was ultimately reflected in Ch.2 of Pt 10 of the Companies Act 2006. While issues surrounding the ramifications of codification on the future development of the law were adverted to in the work of the Law Commissions and the Company Law Review which preceded the 2006 Act, it was at Parliamentary debate stage that many of these issues came to the fore and that much lobbying was done by professional organisations who were concerned about the effects of reducing directors’ duties to statute.

*L.Q.R. 119 One of the key concerns with a statutory statement of this kind is the level of generality
at which it is pitched. On the one hand, there is a need to allow for some flexibility in application of the duties. Detailed, directive provisions may suffer from being inflexible as to their application. However, very broad general principles will be concomitantly less certain as to their application to individual fact scenarios. The policy approach taken to issues of form changed over time from initial endorsement of very broad statements of headline principles by the Law Commissions and the Company Law Review to a more detailed statement of principles, for example, in relation to the conflicts of interest duty. The Company Law Review’s draft from Parliamentary Counsel envisaged that the statement of duties would form a schedule to the Act with explanatory notes included within the statutory framework itself so as to make the accessible to the user. However, when the Company Law Reform Bill was introduced to the House of Lords on November 4, 2005, the treatment of the duties of directors had been integrated into the body of the Bill and explanatory notes remained separate and non-statutory. Furthermore, the level of detail in relation to the drafting had intensified. Rather than merely sketching broad general principles, quite detailed provisions were adopted. However, it remained the case that they would still have to be applied to individual fact scenarios.

Chapter 2 of Pt 10 of the 2006 Act headed “General Duties of Directors” contains a statement of seven discrete general duties applicable to directors: the duty to act within powers (s.171), the duty to promote the success of the company (s.172), the duty to exercise independent judgment (s.173), the duty to exercise reasonable care, skill and diligence (s.174), the duty to avoid conflicts of interest (s.175), the duty not to accept benefits from third parties (s.176) and the duty to declare an interest in a proposed transaction or arrangement (s.177). The statutory duties were stated by Mummery L.J. in *Towers v Premier Waste Management Ltd* to “extract and express the essence of the rules and principles which they have replaced.” The Explanatory Notes to the Act note the difficulty of reducing judicial pronouncements to statutory provisions in stating that:

“Frequently the courts may formulate the same idea in different ways. In contrast legislation is formal. It is not easy to reconcile these two approaches but the draft sections seek to balance precision against the need for continued flexibility and development.”

### III. The Accessibility Agenda

A number of different factors were influential at a policy level in the decision to endorse a legislative statement of directors’ duties. The Law Commissions considered that statutory grafting onto directors’ duties, such as in the area of loans *L.Q.R. 120* and substantial property transactions involving directors, only made sense if there was also a statutory statement of the general duties of directors. In addition, looking outwards at codification efforts in other common law jurisdictions as part of an overhaul of company legislation, the international dimension led the Commissions to conclude that “a modern UK Companies Act would look odd without one.” However, the primary influencing factor behind policy support for a legislative statement of general duties was the carrot of transparency. At the heart of policy support for a statutory statement was an accessibility agenda, a desire to make the law more easily available to those to whom it was relevant, first and foremost, directors, and also the wider audience beyond the director class—shareholders, professional advisers such as lawyers and accountants, and the courts. The Law Commissions saw directors’ duties, being case-law based, as inaccessible and felt that compliance with the law in this area would benefit from being more transparent.

For its part, the Company Law Review regarded directors’ duties as being “laid down by complex and inaccessible case law, developed over some two and a half centuries.” Its view was that a statement of directors’ duties would provide clarity for directors and members in relation to the legal expectations of directors. Consistent with this, the Attorney General noted that “the main purpose in codifying the general duties of directors is to make what is expected of directors clearer and to make the law more accessible to them and to others.” In one of the first crop of cases arising under the Companies Act 2006, *Eastford v Gillespie*, Lord Hodge of the Outer House of the Court of Session regarded the statutory statement as “intended to make those duties more accessible to commercial people.”

The ability to source the law is important, not least because directors’ duties arise by operation of law. Thus of direct relevance to the director body is the principle of *Ignorantia Juris Neminem Excusat*. As Lord Denning observed in *Kiriri Cotton Co Ltd v Dewani*:

“It is not correct to say that everyone is presumed to know the law. The true proposition is that … no man [may] excuse himself from doing his duty by saying that he did not know the law on the matter.”

The Commissions commented on the need for ease of reference for directors as follows:
“It is said that law should be such that anyone who looks for it will find it and such that it can be explained to him in reasonably comprehensive terms. A layman should not have to look to his lawyer whenever he needs to know the basic principles. What a director needs is to know what to do before he acts, not afterwards, since he may be sued or subject to disqualification proceedings if he fails to comply with his obligations.”

The importance of directors being familiar with their legal duties is heightened by the lack of qualitative entry controls (other than public policy controls) and the application of the duties to both executive directors and non-executive directors as well as to de facto directors (and potentially shadow directors). Although the Law Commissions were in favour of having every director sign the proposed code which would help to draw their attention to their duties, the Government decided against this course on the basis that it might give the misleading impression that the statement of duties was exhaustive in nature which was not the case. Nonetheless, the statutory statement has been found to have “renewed emphasis on directors’ responsibilities.”

The Regulatory Impact Assessment preceding the Companies Act 2006 took the view that considerable costs savings were possible based on obviating the need to seek professional advice on the duties. This was based on a view that as the statutory duties would for the most part be identical with the pre-existing legal position, there would be no costs to businesses associated with the change. This stance seems unduly optimistic given the need for advice on the application of the duties and the considerable debate surrounding how s.172’s duty to promote the success of the company should be complied with in practice.

The question is whether an accessibility agenda can be all things to all people, particularly directors. Within the context of an accessibility goal, there is a clear divide between providing accessibility for professional advisors and the courts and providing it for the director class. Legal professionals can be taken to be at home with general principles of statutory interpretation and consulting other sources such as case law and commentaries. By contrast, the director class is a disparate body. Some may be commercially savvy directors of large companies and some may have attained chartered director status with the Institute of Directors. However, a large proportion of directors have considerably less understanding of the nuances of their legal responsibilities, reflecting the ease with which a person may become a director, often in association with incorporating a company to obtain the benefits of limited liability. Indeed, the application of the legal duties in Ch.2 of Pt 10 to all types of directors from directors of large multi-national companies to directors of small family undertakings was a cause for concern during the Parliamentary debates which preceded the enactment of the 2006 Act. This lack of homogeneity highlights the continuing importance of director education, and, where appropriate, legal advice.

The educative role of statute law for the layperson is often idealised, as is apparent in the following assessment:

“It is important to remember why our statutes should be framed in such a way as to be clearly comprehensible to those affected by them. It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that the law shall be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not of Law.”

The vision of statute law as opening the law to the man on the street seems particularly optimistic in relation to codification measures including a partial codification of the kind set out in Ch.2 of Pt 10 of the 2006 Act where a wealth of meaning derives from a body of case law which informs the understanding of the statutory provisions.

When considering the limits of an accessibility agenda, cognisance must also be taken of the fact that the general nature of the duties means that, for the most part, direct statutory guidance is not provided on how to act in a specific situation. This reflects the fact the relevant principles are drawn in broad terms so as to be capable of application to a broad range of circumstances. As stated in the Explanatory Notes:

“The general duties form a code of conduct, which sets out how directors are expected to behave; it does not tell them in terms what to do.”

In each instance, a measure of judgment is required to determine how best to proceed to ensure compliance. Consequently, the Law Society was of the view that greater clarity would be created for the layperson by publishing a non-statutory guide to directors’ duties rather than by attempting to reduce the duties to statute.
In policy debate preceding the enactment of 2006 Act it was frequently asserted that placing the general duties of directors on a statutory footing would render directors’ duties more accessible, well known and comprehended.\textsuperscript{52} However, it would be somewhat facile to assume that a statement of general duties can do more than act as a signpost concerning key legal principles. As discussed below, within the quixotic contextual setting of s.170(3) and (4) of the 2006 Act, application of these principles in practice requires considerable discernment based on an understanding of the pre-existing case law and the application of principle to a particular factual setting.

The reality is that it will remain difficult for directors to know how the duties will be interpreted in any given case. The general statement of duties gives an indication of what is expected but will not remove the need for directors to seek professional advice as to the detailed application of the duties.\textsuperscript{54} Several layers of complexity are overlaid in any search for principle. The general duty or duties which may apply must be located. This stage will usually be unproblematic. Understanding what the relevant duty means will inevitably involve having to refer to pre-existing case law and/or academic commentary. Deciding how to \textit{L.Q.R. 123} approach the issue of interpretation is most difficult in the case of a change of direction, as in s.172. The final step of deciding how the law might be applied in an individual case will often require legal advice or direct judicial guidance. It is relevant that the courts’ interpretation of the duties of directors has been consistently sensitive to the particular environs within which individual companies and individual directors operate.\textsuperscript{55} The consequence of this is that, while the principle-based duties were generic in nature, they were not judicially applied on a “one size fits all” basis, rather their application was bespoke, befitting the individual circumstances. This is consonant with the director class constituting a non-homogeneous grouping and is unlikely to change.

In his writings on codification, Hahlo contended that while codification can rejuvenate law where it has become clogged up by the “accumulated silt” of centuries of case law and academic debate, it cannot be expected to make the law comprehensible to the lay person.\textsuperscript{56} The Law Society expressed significant concerns in relation to the likelihood of a statutory statement achieving its objectives of providing an intelligible framework for directors.\textsuperscript{52} A goal of improved rather than perfect accessibility appears more realistic. Indeed, whilst acknowledging that lawyers would still be involved in their interpretation,\textsuperscript{56} the Law Commissions did not believe that this should prevent their accessibility being improved by statutory statement. There is therefore a strong argument for conceding that the concept of legislation for the layman is a somewhat Utopian one and for concentrating attention and resources on the education of directors as to the practical effect of their duties. In this regard, the Institute of Directors’ chartered director qualification is a step towards recognising the value of competence-enhancing activities.

Some efforts have been made to assist those seeking to interpret the new statutory duties. Although not endorsed by Parliament, the publication of Explanatory Notes to accompany the 2006 Act is of assistance.\textsuperscript{52} Furthermore, the Department of Trade and Industry sought to address the comprehension gap by publishing non-statutory guidance in respect of the statutory duties couched in accessible language.\textsuperscript{52} That being said, during the Bill’s passage through the Houses, the government’s intention to publish non-statutory guidance on the statutory duties of directors was seen by some as negating the accessibility of the statutory statement.

\textbf{IV. The Challenges Presented by Partial Codification}

An assessment of the extent to which the accessibility agenda has been delivered on requires a review of the general legislative approach taken in relation to \textit{L.Q.R. 124} transposition of well-worn common law and equitable duties to statute. The Australian approach of introducing a parallel statutory statement in addition to the general law which would assist in rendering the duties accessible was given short shrift by the Law Commissions on the basis that directors would be subject to two overlapping regimes covering the same territory.\textsuperscript{58} Nor did the Law Commissions favour a full codification in the sense of an exhaustive statement of the general duties of directors which would entirely replace the general law. It was felt that full codification would prevent the flexible development of the law in areas where it was not settled.\textsuperscript{53} Rather, they opted to recommend a partial codification which would involve setting out the principal duties owed by the directors. It was envisaged that partial codification would involve a statutory statement of the settled duties, leaving the general law to apply in areas not dealt with on the basis that this would better facilitate the development of the law. Such an approach is supported by the first architect of codification, Sir Mackenzie Chalmers, who cautioned against attempting codification of any branch of the law which is in the process of formation.\textsuperscript{53}
Some points may validly be made about the impact of partial codification on the underlying accessibility agenda. Inherent in a partial codification is the notion that certain duties are left to be developed organically at common law outside the confines of the statutory statement. However sensible this may be from a jurisprudential perspective, it presents several challenges to the accessibility agenda, particularly, but not only, for the lay user. With partial codification, it is important that a misleading impression is not given that the statutory statement of general duties is exhaustive i.e. that other duties do not arise for directors under the general law. This has significance in relation to the accessibility agenda but arguably the issue was not handled as deftly as it might have been. Understanding that there are duties which exist other than those which appear in the 2006 Act takes some ingenuity since this information is not imparted in as direct a fashion as would be desirable. The Law Commissions were cognisant of the potential confusion for directors in relation to the existence of other duties and noted that the existence of statutory duties could be made clear in the statutory statement as had been done in Australia. Section 179(1) of Australia’s Corporations Act 2001 adverts to the existence of other duties by stating that the relevant provisions set out “some of the most significant duties of directors” and expressly acknowledging that “other duties are imposed by other provisions of this Act and other laws (including the general law).” However, this approach was not adopted in the 2006 Act.

The need to advert to the potential existence of other duties is partially reflected in s.172(3) which indicates that in some circumstances there may be a duty to consider or act in the interests of creditors. The decision to expressly signal in s.172 the potential application of a duty to consider the interests of creditors arose from concerns of the Law Commissions which received further consideration by the Company Law Review. It was decided by the Company Law Review that the duties owed to creditors in an insolvency situation should be dealt with by a statutory provision advertiting to their existence rather than attempting to capture the developing law in this area. This is a fruitful area and one in which uncertainties remain, particularly in relation to what is expected of directors in the twilight zone between solvency and insolvency.

A more general express signal in Pt 10 that duties other than the codified duties may exist would have been helpful. As matters stand, to discover this requires some digging in the absence of an express statutory pointer. There is, however, recognition of this position in the Explanatory Notes, which acknowledge that directors are subject to other legislative duties and that “other duties remain uncodified, such as any duty to consider the interests of creditors in times of threatened insolvency.” The Attorney General acknowledged as much in stating that other duties may be owed to the company in addition to the general duties listed including obligations under the Insolvency Act 1986. Commentators have also viewed this as being implicit in s.170(3) of the 2006 Act which provides that the statutory general duties are based “on certain common law rules and equitable principles” which indicates that Ch.2 of Pt 10 is not an exhaustive code of directors’ duties and that non-codified duties survive.

One of the challenges presented by the partial codification approach adopted is the identification of relevant non-codified duties. What other duties may be lurking? Section 170(1) makes it clear that ss.171-177 cover duties owed by a director to the company and therefore would not cover the circumstances in which there may be a duty owed to individual members in exceptional circumstances as unlike the duty to consider the interests of creditors which is regarded as being owed to the company, such a duty is not generally understood as being owed to the company. There is potential scope for applying certain principles and sub-duties, both recognised and under development. One such candidate is the rule in Re Hastings-Bass, Hastings Bass v IRC, which indicates that a director may be invalid if they failed to take into account a material consideration. It may be speculated that there is also room for the courts to refine the burgeoning duty to disclose wrongdoing which has received judicial and academic consideration. In relation to the duty to exercise reasonable care, skill and diligence, since Baring, there are sub-duties of active participation in the collective management of the company, a requirement to be appropriately informed and a duty to appropriately monitor persons to whom responsibility has been delegated.

V. Interpreting the Statement of Duties

A key litmus test for the accessibility agenda is the ease with which the legislative statement of duties may be interpreted. To some extent this is an issue for all legislation, but in the case of the statement of directors’ duties in 10, this is complicated by the peculiarities of a sui generis codification that purports to replace the pre-existing common law yet still seeks to be informed by that same heritage
as well as developments in allied fields of trust and agency. This raises a number of issues relating to the pre-eminence of the code including the appropriate rules of interpretation, the role of case law and the potential for judicial innovation. During the legislative process, the attempt to have the best of both worlds by replacing the relevant equitable and common law duties but looking to pre-existing case law as a guide to interpretation of the statutory duties has engendered both confusion and opposition. The appropriate approach to interpretation has spawned a variety of views, not all of which can be easily reconciled.

**General approach to interpretation**

A key issue in relation to codification measures is whether the legislative treatment can be regarded as in the nature of a stand-alone code in relation to matters within its remit with no need for further recourse outside it. While codification is not susceptible to a universally accepted definition, on one view a true codification of the law involves leaving behind the pre-existing case law. As Hahlo describes it:

“A code is an end and a beginning. Unlike a statute, which is superimposed upon the common law like a ship floating on the water, a code supersedes the common law, excluding all reference (except on very special grounds) to any source of law other than itself.”

However, more realistically, as Skinner contends, a successful common law codification requires an interpretive approach which strikes an appropriate balance between the code and case law. As will be seen, some specific legislative cues are given in the 2006 Act but these give rise to some difficulties of their own.

There has been some speculation as to when previous case law will continue to be relevant. The approach taken in the Bills of Exchange Act 1882, the Sale of Goods Act 1893 and the Marine Insurance Act 1906 was to provide for the continuing application of the pre-existing common law rules in a saving clause except where they are inconsistent. The Arbitration Act 1986 did not deal expressly with the relevance of pre-existing case law but the House of Lords subsequently held that the Act itself constituted the principal source of law rather than relying on pre-existing case law as a guide to interpretation.

Judicial statements on other codification efforts have indicated that the proper approach is to regard the natural language of the statute as the only port of call if its meaning is clear and not to begin by looking at the law which it was sought to codify.

Indeed, it was noted by the Law Commissions that codification would be likely to involve a change of approach from looking at the policy behind decided cases to approaching the issue as one of statutory interpretation based on the wording employed. This deference to legislative wording is important to ensuring that a code’s status as the principal source of law is not undermined. This perspective is supported by judicial pronouncements on the appropriate approach to interpreting codification measures. The Law Commissions referred to Lord Herschell’s comments in favour of a codifying statute in *Bank of England v Vagliano Bros* to the effect that it obviated the need for “roaming over a vast number of authorities in order to discover what the law [is], extracting it by a minute critical examination of the prior decisions”. That may be the case where the provisions are regarded as clear of application on their face. In *Vagliano Bros* Lord Herschell stated:

“I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.”

This approach can also be seen in more recent times in *R. v Smurthwaite (Keith)* where Taylor L.C.J. said that the appropriate approach to a codifying statute “is simply to examine the language of the relevant provision in its natural meaning and not to strain for an interpretation which either reasserts or alters the pre-existing law.”

Prima facie support for the *Vagliano Bros* approach can be found in s.170(3) of the 2006 Act which states:

“The general duties are based on certain common law rules and equitable principles as
they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.”

Indeed, in the Parliamentary debates preceding the enactment of the 2006 Act, Lord Goldsmith said that the implication was that “once the Act us passed, one will go to the statutory statement of duties to identify the duty that the director owed.” However, some confusion is engendered by s.170(4) which states:

“The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.”

This is not a provision previously utilised in UK codification measures nor is it paralleled in previous efforts to codify directors’ duties in Canada, Australia or New Zealand, nor in South Africa’s subsequent Companies Act 2008. The decision to include such a provision may be seen as reflecting a desire not to lose the role which equitable doctrine traditionally has to play in directors’ duties, thus requiring a measure of flexibility in interpreting directors’ duties in their statutory form. This perspective seems tacit in the instruction in s.170(4) to interpret the duties by reference to “corresponding common law rules and equitable principles”.

The Attorney General had the following to say in relation to the appropriate approach to take to interpreting how the duties should be applied:

“Subsection (4) deals with the interpretation of those duties. The issue here is how to balance the need for a clear statement of what the basic general duties are together with the flexibility needed to deal with a vast array of different circumstances. The decision, therefore, is to point the courts to the existing interpretation and application of the duties that are now being replaced by the statutory duties in understanding what they mean.”

While the need for flexibility is understandable, nevertheless, a certain amount of confusion is undoubtedly created by s.170(3) signalling that pre-existing common law rules and equitable principles are to be replaced while s.170(4) goes on to state that the statutory duties are to be understood and applied in the same manner as the rules and principles they replace. As a consequence, the courts are being given a legislative signal that the usual approach to codifying measures of examining the natural meaning and purpose is seemingly to be modified in relation to the interpretation and application of the statutory duties. In *Towers* Mummery L.J. regarded the effect of s.170(4) as being that s.170(3) “did not consign the replaced rules and principles to legal history”. This is a double-edged sword as far as accessibility is concerned. Users can be guided by pre-existing case law as to the import of the statutory provisions but, on the other hand, this requires the pre-existing case law to be consulted to ascertain meaning.

*L.Q.R. 129* Not only does s.170(4) refer the reader to the case law predating the Act, the Explanatory Notes regard s.170(4) as allowing future developments in the law of trusts and agency to be reflected in the interpretation and application of the duties. Understandably, there has been much criticism of this approach as being likely to create uncertainty and litigation. Indeed, pre-enactment policy discussion concerning the relationship of the statutory statement of directors’ duties with pre-existing case law sparked a series of responses which were not always consistent. During the Bill’s passage Lord Freeman was critical of the confusion likely to be caused by the “double complication” of “codification but still with reliance on interpretation from the common law”. In the House of Commons, the Opposition quoted the views of Herbert Smith to the effect that subs.s.(3) and (4) were “fundamentally inconsistent” and that it was therefore “difficult to see how the codified duties [would] be more accessible or comprehensible (indeed arguably they could prove to be more uncertain and more complex).” The Law Society predicted that this type of hybrid provision would lead to litigation.

While existing authorities should not lose their relevance as illustrative of the practical application of the rules, some have argued in favour of a narrower approach which is more confining of the role of the pre-existing heritage in conformity with the classical approach to statutory interpretation of codifying measures. In a useful insight provided by Arden L.J., writing extra-judicially before the enactment of the 2006 Act, the reforms were viewed as intending a complete replacement of the corresponding equitable and common law rules such that in general the courts would not look at previous case law where the import of the relevant statutory provision was clear on its face. This is consonant with the approach envisaged by the Law Commissions whereby the courts would give effect to the meaning of the words used and only in the event of an ambiguity have regard to the law
that it was intended to codify. Thus the narrower approach confines reference to the pre-existing case law to cases where there is an ambiguity or absurdity on a plain reading of the statutory duty.

To the contrary, it has been contended that the courts should generally apply the new law in the same way as the pre-existing law but where there are differences, regard should be had to the statutory language. This is novel in that it relegates the statutory provision to second place. However, the approach appears to have garnered some tentative judicial support. Although objectionable in principle, in the small body of case law which has emerged on the statutory duties, the courts have gravitated towards beginning with recognising the purpose of provisions as being to reflect the pre-existing law rather than commencing with a reading of the provision on its face. This is a more crude method of statutory interpretation and, while pragmatic, is open to criticism for unnecessarily displacing the textual significance of the provision itself. In taking this approach the courts have been *L.Q.R. 130* guided in their approach of equating provisions with the prior law by referring to leading texts.

In *Re West Coast Capital (Lios) Ltd* 101 Lord Glennie stated that s.171 (duty to act within powers) appeared to do “little more than set out the pre-existing law on the subject”. Similarly, in relation to s.174’s duty of care, skill and diligence, the courts have expressly recognised this as encapsulating the hybrid approach previously borrowed by the courts from s.214(4) of the Insolvency Act 1986. In *Gregson v HAE Trustees Ltd* 102 Robert Miles Q.C. (sitting as a deputy High Court judge) said that s.174 “codifies the existing law.” The same approach has been taken in relation to the conflicts of interest duty in s.175. In *Eastford Ltd v Gillespie* 103 Lord Hodge regarded s.175(1) as codifying the conflict of interest rule and the case proceeded on the basis that the parties agreed that the relevant test was whether there was a “real sensible possibility of conflict.” This preserved the pre-existing common law approach over the express wording in s.175(4)(a) of whether the situation can “reasonably be regarded as likely to give rise to a conflict of interest.” Similarly, in *Thermascan Ltd v Norman* 104 the case proceeded on the basis of the parties’ understanding that s.175 did not alter the pre-existing law as set out by the Court of Appeal in *Foster Bryant Surveying Ltd v Bryant*. 105

Notably, in these cases the courts have not engaged in a textual analysis of the relevant provisions but have simply equated the provisions with the pre-existing law and decided the case by reference to pre-existing case law principles. While the appeal of familiar principles is understandable and is endorsed by s.170(4), an overly expansive embracement of the pre-existing law is detrimental to establishing the legislative framework as the central and overriding source of law in relation to the general duties of directors. That is not to deny the relevance of pre-existing case law but it would be preferable if the courts first looked at the natural meaning of the provision and then used case law to help understand the application of the provision in practice where necessary.

Given the importance of ensuring a uniform and sound approach to interpretation of the statutory duties, it would be of assistance if a body of direct judicial guidance were to emerge on the appropriate approach to interpretation.

**Resolving ambiguity**

One can empathise with Hahlo’s rather pessimistic view that the effect of introducing a code is to create a lengthy period of uncertainty as to its application based on its combination of reformulating old rules and adopting new rules. He colourfully describes the process in the following terms:

“For each head of controversy that has been cut off, there will arise, hydra-like, one or more new ones. And it will only be decades later, after the codes has become overlain with a thick encrustation of case law, that the old measure of legal certainty (or uncertainty) will be restored.”

Certainly, in the short term there will continue to be a period of flux while clarification is awaited on aspects of the significance of the duties for directors in practice.

If any of the statutory provisions relating to the general duties is considered to be ambiguous, there are a number of extrinsic aids to ascertaining meaning apart from having recourse to the pre-existing case law as suggested intrinsically by section 170(4). Although non-statutory, the Explanatory Notes accompanying the Companies Act 2006 are of assistance in understanding the purpose of the relevant provisions and can be relied on for that purpose. It is also possible to have regard to official publications which led to the publication of legislation such as reports of the Law Commissions, the Company Law Review’s reports and government white papers. Since *Pepper v*
The Law Commissions considered that any ambiguity in the legislative duties could be judicially resolved by reference to the general law which it was intended to codify. There is now judicial authority which supports the relevance of pre-existing case law in the context of resolving an ambiguity. In Eastford v Gillespie Lord Hodge's opinion of the Outer House of the Court of Session was concerned with s.171 of the 2006 Act which provides that a director must act in accordance with the company's constitution. In seeking to interpret whether an unauthorised act could be ratified, he said that “one must look at the purpose of the statutory statement which is revealed in the 2006 Act.” He concluded that there was nothing to suggest that Parliament had intended to alter the pre-existing rules of the law of agency permitting ratification of the unauthorised acts of a director. In addition, he gave a clear statement that the courts were entitled to have regard to the pre-existing case law.

A particular interpretive challenge arises in relation to duties for which there is no identifiable common law or equitable comparator where material differences exist. This pitfall led the Law Society to be critical of the legal uncertainty which would result since it would be unclear what relationship these provisions would have with pre-existing principles and concepts. There is no ready solution in the Companies Act 2006 to the interpretive conundrum which results where the relevant provision involves not merely a consolidation of existing case law but also reform. The problem is most acute in relation to the expanded duty of loyalty in s.172 encompassing the concept of enlightened shareholder value. The official position in the accompanying Explanatory Notes is that the only departure from the pre-existing law occurred in relation to providing for board authorisation of conflicts of interest. It is rather disingenuous to suggest that the adoption of an enlightened shareholder value approach did not change the existing law but the official line appeared to be designed to assuage concerns of the commercial community in relation to the significance of s.172. This was a particular bone of contention during the Parliamentary debates on the Bill. The duty to promote the success of the company in s.172 with its enlightened shareholder value approach clearly went beyond the pre-existing law by requiring the long term interests of the company to be taken into account as well as a range of other interests. The difficult issue of how appropriate account can be said to be taken of the different factors listed in s.172 within the enlightened shareholder model remains as yet unconsidered in any detail by the courts. This has left room for a huge amount of industry, professional and academic speculation in relation to how directors should comply with the provision, in the process seriously negating the accessibility of the provision.

VI. Filling in the Gaps: the Role of the Courts and Parliament

Before the Companies Act 2006, sporadic consideration of directors’ duties did not advance the bigger picture—the case by case application of principles within the blinkers of the facts at hand meant that gaps remained unplugged or at least imperfectly considered. The use of broad general principles in the statutory statement of the general duties of directors does not change this as many specific situations will require judicial clarification when an appropriate case arises. Therefore, in considering the effect of codification, it is appropriate to quote Lord Scarman's advice that in resolving the relationship of a code with judge-made law, “it is not a question of total war involving the destruction of one or the other but a study in coexistence.” This reflects the fact that what we are dealing with is not a code in the civil law sense but rather a statement of broad principles. A code cannot be expected to be completely self-contained in the sense of dealing with all issues and dispensing with the need for judicial interpretation. The expectation of a code should be more modest. As Hahlo observes, the most a codification can hope to do is to set out general principles which will require interpretation as to their application in individual cases:

“The propositions codes enshrine are the kind of general legal principles which are trite in any system of law, codified or not. It is when it comes to their application to concrete cases that the doubts arise, and here a clause in a code is generally of no more use to the lawyer than a statement in a textbook or digest.”

Therefore there remains a distinct role for judges in shedding light on the intricacies of the statutory duties when the opportunity arises. As Donaldson J. commented in Corocraft Ltd v Pan American Airways Inc on the role of judges, “they are not legislators, but finishers, refiners and polishers of
legislation which comes to them in a state requiring varying degrees of further processing.” Indeed, the paradox of codification is that once the courts have pronounced on any of the statutory duties, the legal meaning will thereafter be ascertained by reference to that decision. As Lord Scarman wisely noted: “the very first decision interpreting a section of the code would begin the reinstatement of judicial decision as a law-shaping force.” It can be expected that the courts will continue to follow sound instincts by sensibly locating the application of duty within the broader factual surroundings to take account of the type of company, its organisational structures and the nature of the role undertaken by the director.

**Scope for judicial activism in relation to the legislative duties**

It has been aptly said that “the judicial process involves constant application of principles to ever changing factual settings and circumstances presented by real-world economic forces.” This categorises the role of the courts as involved in the active development of the law on a case by case basis which permits the incremental development of new principles and new applications of principle as the need arises. The pre-existing role of the courts as guardian of directors’ duties permitted judicial upholding of base principles in relation to these duties while refining their application to meet new circumstances and changing societal expectations. This was central to the durability of the duties.

Prior to the legislative restatement, one of the key challenges for the longevity of the duties was to ensure their continuing relevance. As Bull J.A. observed in *Peso Silver Mines v Cropper*:

“*L.Q.R. 134* “That the principles, and the strict rules applicable to trustees upon which they are based are salutary cannot be disputed, but care should be taken to interpret them in the light of modern practice and way of life.”

It was famously said by Lord Denning MR that “Equity is not past the age of child-bearing.” It is fair to say that the dynamic handling of the duties by the courts meant that the duties remained relevant. The flexibility of broad, principle-based judge-made rules facilitated judicial revitalisation of the duties where required to move with the changing world view in relation to corporate standards. Age-old principles proved capable of yielding new applications and new perspectives and this was instrumental in ensuring that the duties retained both credibility and relevance. Thus in relation to care, skill and diligence, we have witnessed the emergence of sub-duties such as a duty to participate in company affairs, a duty to be appropriately informed about company affairs, and a duty to monitor and supervise other corporate actors.

One of the major issues with a “codification” of directors’ duties is the potential loss of flexibility and the possibility of overly specific rules imposing “an unbearable straitjacket”. It is crucial for a statement of duties to allow the law to be responsive to changing needs and changing expectations by allowing incremental development within the spirit of the broad principles set out. As no statement of principle can ever be comprehensive enough to cover any situation which may arise there will always be need for some discerning application of judicial thinking. Codification should not remove flexibility and the possibility of responding to changing circumstances. But just how much flexibility does the statutory scheme give judges? Lawson described a judge using a code as being “like a man who has been told he could walk about more or less as he liked in a room, but could not go outside.” That is a narrow view. Chalmers, the architect of codification in the common law world, put the matter more broadly:

“I think you may compare a code to a building and the common law to the atmosphere which surrounds that building, and which penetrates every chink and crevice where the bricks and mortar are not. We cannot escape from the common law, and we should not try to do so.”

The question of how much scope there would be for judicial activism generated considerable discussion at policy level in the run up to the enactment of the 2006 Act. There was a discernible divergence of approach between the Law Commissions and the Company Law Review in relation to the flexibility to be afforded to the courts. While the Law Commissions had envisaged a non-exhaustive set of principles that could be added to by the courts, this creative possibility was subjected to some doubt by the Company Law Review. The Law Commissions’ view was that the courts’ role would be to apply the law to given situations and, where appropriate, “to fill in gaps in the law.” However, the Company Law Review expressed doubts about the Law Commissions’ approach of leaving the way open for the courts to develop new general principles. It preferred the view that the development of new principles as opposed to developing existing
principles should be a matter for Parliament. The Attorney General observed that “[t]he courts should be left to interpret the words Parliament passes”. His view was that flexibility was achieved through putting the duties in broad and general language which would permit “organic development … to take account of changing circumstances and new situations”. The Explanatory Notes indicate that while the duties articulated in the case law are tailored to a particular fact scenario, the general statement of duties aims to be capable of application to a wide variety of circumstances.

Looking at the legislative cues, s.170(4), when combined with the Explanatory Notes thereto, indicates an expansive approach based on judicial ability to take account of developments in related spheres. In particular, it has been envisaged that this would include the ability of the courts to take account of subsequent case law developments in relation to the rules governing trustees and agents so that historical connections with principles of trust law and agency would not be lost. At this point it remains to be seen what approach the courts will take to gap-filling, but in Eastford v Gillespie Lord Hodge's opinion of the Outer House of the Court of Session regarded s.170(4) as providing a mechanism for allowing the law to develop. He said of s.170(4):

“This subsection seeks to address the challenge which the Law Commissions and the Company Law Review had identified, namely of avoiding the danger that a statutory statement of general duties would make the law inflexible and incapable of development by judges to deal with changing commercial circumstances. Parliament has directed the courts not only to treat the general duties in the same way as the pre-existing rules and principles but also to have regard to the continued development of the non-statutory law in relation to the duties of other fiduciaries when interpreting and applying the statutory statements. The interpretation of the statements will therefore be able to evolve.”

The impact of legislative amendment

It was memorably observed that “codification, presupposing infinite knowledge, is a dream.” The idea of an autonomous self-contained code in relation to directors' duties is not only militated against by the role of the courts in putting flesh on the bones of the statutory principles, it is also undermined by the possibility of subsequent legislative amendments. Hahlo correctly identifies that one of the perennial problems with codification is that “almost as soon as the ink on the code is dry the need for legislative amendments will become manifest.” Since legislative amendments would, in the absence of a statutory restatement, be contained in separate primary legislation, it would thereafter be necessary to be aware of, locate and interpret the effect of those amendments.

While the possibility of legislative amendment may seem to weaken the accessibility agenda, as proponents of codification note, it allows for periodic adjustments to be made to ensure that the law remains relevant. Judgement calls are necessary in relation to the question of when parliamentary intervention will be more appropriate than leaving it to the courts to develop the law. The Law Commissions noted the problem that if the statutory statement of directors' duties was considered to be out of step with changing commercial circumstances, primary legislation would be needed to amend it. The Company Law Review's view was that it would not be open to the courts to develop completely new bases of liability for directors, rather this would be a matter for Parliament after democratic debate. However, some doubt is thrown on this view by the Explanatory Note to s.170(4) which envisages judicial account being taken of developments in relation to trustees and agents.

There have already been calls for legislative amendment. In the wake of the financial crisis, there were calls for amendments to s.172 to make clearer an obligation to wider society and for directors to be required to consider the effect of the company's activities on the stability of the financial system as a whole. These proposals involved a shift in the balance of the enlightened shareholder value approach which many would regard as going too far.

VII. Enforcement and Accessibility

Development of directors’ duties has always required an appropriate opportunity for judicial consideration. This was hindered by the rule in Foss v Harbottle and the complexities of the common law derivative action. However, parallel consideration of the duties frequently arose in other contexts such as disqualification, unfair prejudice and wrongful trading cases. In principle it might be thought that increased awareness of the statutory duties would lead to increased direct enforcement of directors’ duties. It has been pondered whether the statutory clarification of directors’ duties might
herald an increase in derivative actions against directors based on the reworked derivative claim in Pt 11, particularly in relation to s.172 and the extent to which the listed factors have been taken into consideration. On the other hand, increased transparency may also lead to increased compliance and consequently to less litigation. At this early stage in the life of the statutory duties, it would be foolish to make any rash assumptions in relation to either compliance or enforcement, which are in any event influenced by a multiplicity of variables.

Despite increased transparency, the incidence of corporate claims against directors for breaches of duty are unlikely to increase significantly given the deterrent posed by uncertainty of outcome, high legal costs and adverse publicity. On the other hand, reform of derivative claims in Pt 11 of the 2006 Act has made it easier in principle for minority shareholders to pursue directors for a broader range of behaviour through the removal of outdated technicalities. Although it is early days, an increase in derivative claims is not borne out in the case law to date. Indeed, anecdotal evidence suggests that informational asymmetries and the costs of bringing a claim for permission to continue have been contributing factors. That being said, the small body of case law in which there has been peripheral consideration of directors’ duties under the 2006 Act has largely arisen in the context of applications for permission to pursue a derivative claim as s.263(2) requires permission to be refused if the court is satisfied that a person acting in accordance with the duty imposed by s.172 to promote the success of the company would not seek to continue the claim.

What is starkly obvious in the post-codification environment is that the broad-brush accessibility of the general duties in the 2006 Act contrasts sharply with the morass of complex, overlapping personal and proprietary remedies for breach. Section 178 of the 2006 Act provides that the civil consequences of breach of threatened breach “are the same as would apply if the corresponding common law rule or equitable principle applied”. This neatly avoided the need to list what those remedies were and to work out how to set them out in statute in a satisfactory manner. As the Company Law Review stated:

“Remedies are mainly regarded as ‘Lawyers’ Law’; but they are the obverse of rights, and what litigants ultimately want, and arguably should be as clear and accessible as the rights they vindicate.”

However, while the Company Law Review supported consideration being given to codification of remedies, in the end no such codification occurred. The failure to grasp the nettle in relation to the range of remedies available is unsurprising given the sheer scale of the task. Consequently it remains the case that company lawyers are somewhat uncomfortable in the murky realm of equity and restitution, wrestling with the application of principles which are the traditional preserve of the trust lawyer.

VIII. Conclusion

The central premise underlying the shift to a statutory statement of the core duties of directors within the architecture of the Companies Act 2006 was a desire to capture the essence of relevant principles in the hope that it would lend transparency which would facilitate greater understanding among directors as to their legal duties. Directors and their professional advisors now know where to go to find the general duties and they are conveniently housed alongside other relevant obligations in Pt 10 of the Companies Act 2006. Codification has led to greater discussion of directors’ duties and non-statutory guidance has been made available to directors. As a consequence directors may be more aware that they are subject to legal duties. Thus, to a certain extent, the accessibility goal can be said to have been achieved.

Stepping back from the rhetoric of accessibility, it is clear that achieving an accessibility policy goal had to be balanced against the need for judicious drafting to ensure that the duties were sufficiently flexible to be applied to a wide range of circumstances. This necessitated a relatively broad-brush drafting style. Achievement of an accessibility agenda was also counter-balanced by the partial codification approach pursued. Given the nuances surrounding codification of directors’ duties identified in this article, achievement of the accessibility goal which was presented as the pre-eminent argument in favour of codification is fairly modest for both the director class and lawyers. The statement of duties reveals complexities in relation to accessing and interpreting the law and enforcing the duties themselves. We should therefore be clear about the limitations of an accessibility agenda. Menzies aptly observed that “company law is statute law, but nobody could hope to become a company lawyer merely by reading and understanding the words of the statute.” Realistically,
accessibility, in the sense of transparency of legal rules, can only be achieved at a generic level. Ascertaining the relevant law is a sophisticated process perhaps now requiring more rather than less discernment given the complex interplay between statutory language and case law. Despite legislative efforts aimed at promoting access to relevant legal principles, professional advice will more often than not be needed as to the interpretation of duties and the consequences of non-compliance.

The reality is that the reform and consolidation of directors’ duties within a new companies code marked the beginning not the end of a process. Many questions remain. Clearly no statement of principle can ever be comprehensive enough to cover any situation which may arise--there will always be need for some discerning application of judicial thinking. The courts continue to have a role to play in both interpreting, applying and developing the law and this role is subject to some specific legislative cues. Much will depend on a sensible approach being taken to filling in the gaps in the legislative scheme and arriving at an interpretation of the statutory provisions in a consistent manner which will serve the interests of posterity as well as justice in an individual case. It remains to be seen whether codification will entail a reduced judicial activism in the sense of innovation rather than clarification.

There have been diverging opinions on the correct approach to be taken to statutory interpretation. It is nevertheless interesting to note that, rather than following the classical approach to interpreting codifying measures, the evidence to date suggests that the courts have been largely content to adopt a low key approach to interpretation of the statutory duties based on equating the relevant statutory provision with the pre-existing case law. While convenient, if this continues it may prove inimical to the bedding down of the statutory duties and their distinct terminology. That being said, there has been very little judicial consideration of the duties to date and the most divisive provision, s.172, has yet to receive detailed judicial consideration. The ink may be dry on the Companies Act 2006 but until a greater body of case law emerges, it is still too early to pass judgment on the effect of legislative statement on the organic development of the general duties of directors. All in all, it is fair to conclude that behind a facade of accessibility lies much complexity.


17. See cl.52 of the Companies Bill 1973 which was designed to implement this recommendation. The Bill fell on the calling of the first general election in 1974.

18. See the following abortive legislative initiatives: cl.52 of the Companies Bill 1973, cl.44 and 45 of the Companies Bill 1978.


21. Law Commissions Act 1965, s.3(1). However, previous efforts to bring about a contract code were ultimately unsuccessful: Company Directors: Regulating Conflicts of Interests (1998), at para.14.13.

22. See further Law Commission, Shareholder Remedies (LCCO142, 1996), (LC246, 1997).


25. This was based on the work of S. Deakin and A. Hughes of the ESRC Centre for Business Research, University of Cambridge. The Law Commissions, however, expressly declined to consider the stakeholder issue, which was regarded as being within the remit of the Company Law Review.


31. This reflects Attorney General for Hong Kong v Reid [1994] 1 A.C. 324.

32. [2011] EWCA Civ 923.


35. Company Directors: Regulating Conflicts of Interests (1999), at para.4.43.

36. It has been noted that the underlying behavioural assumptions were not rigorously investigated: P. Davies, Gower and Davies: The Principles of Modern Company Law, 8th edn (London: Sweet & Maxwell, 2008), at p.477.

37. Modern Company Law for a Competitive Economy: Developing the Framework (fn.2 above), at para.3.7.

38. The Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Completing the Structure, (Department of Trade and Industry, 2000), at para.3.3.


42. In *Base Metal Trading Ltd v Shamunin* [2004] EWCA Civ 1316; [2005] 1 W.L.R. 1157 at [76] Arden L.J. emphasised that the duties of directors arise as a matter of law and “do not depend on the content of any agreement between the company on the one hand and the director on the other hand.”


46. This is the effect of s.250 of the Companies Act 2006 which continues the long-standing legislative definition of a director as including “any person occupying the position of director by whatever name called.”

47. The question of the application of the statement of duties to shadow directors has been left to be determined based on the rather nebulous criterion of the extent to which “the corresponding common law rules or equitable principles so apply”: s.170(5) of the Companies Act 2006. On this see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] 2 All E.R. 983 (CA) at [1284], [1289]:[1291].


50. House of Commons, Mr D. Jones (Clwyd, West) (Con), June 6, 2006, Col.204.


55. The need for a fact-sensitive approach was expressed most potently by Jonathan Parker J. in his seminal judgment in *Re Barings* [1999] 1 B.C.L.C. 433 at 489. On appeal this received the imprimatur of the Court of Appeal: [2000] 1 B.C.L.C. 523 at [36].


58. On the wisdom of the subject of legislation seeking appropriate professional advice on questions of statutory interpretation see F. Bennion, *Bennion on Statutory Interpretation*, 5th edn (London: LexisNexis, 2008), at p.34.

59. See fn.34 above.


64. *Company Directors: Regulating Conflicts of Interests* (1999), at para.4.09.

65. In the House of Lords debates, Lord Freeman noted that “the codified duties apply generally and are primarily directed to the carrying on of business in solvent and ongoing companies”: House of Lords, February 6, 2006, Col. GC249.

66. The ultimate statutory position was preceded by a consideration by the Company Law Review of the wisdom of codifying the principle in *West Mercia Safetywear Ltd v Dodd* [1988] B.C.L.C. 250 or simply including a warning to directors. See *Modern Company Law for a Competitive Economy: Final Report* (fn.2 above) at paras 3.12-3.20, pp.347-348, 354.


70. Lord Goldsmith, House of Lords, February 6, 2006, Col.GC249.


74. [1975] Ch. 25.

75. [2004] EWHC 1085 (Ch); [2005] 1 B.C.L.C. 175.


90. [2011] EWCA Civ 923.


93. Lord Freeman, House of Lords Hansard, February 6, 2006, Col.GC245.


95. See further J. Harris, “Law Society Issues Criticisms of Company Law Reform Bill at Second Reading” (fn.54 above).


100. See, e.g., the reference to Palmer's *Company Law in Lexi Holdings (in administration) v Luqman* [2008] EWHC 1639 at [36] and references to *Gore-Browne on Companies and Palmer's Company Law in Eastford v Gillespie* [2009] CSOH 119 at [10].


102. *Re West Coast Capital (Liobs) Ltd* [2008] CSOH 72 at [21]. However, his approach to s.171 has been subject to criticism for allowing an improper purpose to be inferred where a decision to allot shares had no commercial justification, on the basis that this went beyond the pre-existing understanding of improper purpose: Goddard, "Directors' Duties" (2008) 12(3) Edin. L.R. 468 at 471.

103. [2008] CSOH 72.

104. [2008] 1 All E.R. (Comm) 457 at [24]. See also *Lexi Holdings (in administration) v Luqman* [2008] EWHC 1639 at [36].


111. See generally *Companies Act 2006: Duties of Company Directors: Ministerial Statements*.


115. See the comments of Lord Freeman on the *Company Law Reform Bill 2005* (UK): House of Lords, February 6, 2006 Col.GC239. See also Lord Razzall, House of Lords, February 6, 2006, Col.GC246.

116. See J. Harris, "Law Society Issues Criticisms of Company Law Reform Bill at Second Reading" (fn. 54 above).


133. Chalmers, "Codification of Mercantile Law" (1903) 19 L.Q.R. 10 at 10.
134. Modern Company Law for a Competitive Economy: Developing the Framework, at para.3.82 where the preference was for an exhaustive statement of duties.
136. Modern Company Law for a Competitive Economy: Developing the Framework, at para.3.16 and following.
139. Lord Goldsmith, House of Lords, February 6, 2006, Col.GC244.
142. Lord Goldsmith, House of Lords, February 6, 2006, Col.GC244.
151. (1843) 2 Hare 461.
155. Modern Company Law for a Competitive Economy: Completing the Structure, at para.13.73.

156. Modern Company Law for a Competitive Economy: Final Report, at para.15.30. See also the London Stock Exchange's opinion that clear remedies for breach of each duty should be set out in statute: Department of Trade and Industry, Responses to White Paper (2005–Modern Company Law) URN 05/928.


160. Codification; Company law; Directors' powers and duties

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Start studying Directors Duties. Learn vocabulary, terms and more with flashcards, games and other study tools. Held: Directors have duty of skill and care/loyalty to the company, not shareholders. Upheld Saloman v A Saloman, company has separate legal personality from shareholders. Dawson International v Coats Paton. Directors are not agents of shareholders. s.172 CA 2006. Duty to employees to pay wages run company properly. s. 172(3) CA 2006. Director duties: Introduction. Directors are appointed as fiduciaries; as such they must direct the organisation’s affairs with a duty of diligence, loyalty & obedience. “directors have many fiduciary duties toward the organisation. “they may be held personally liable for breach of their fiduciary duties. If the director has sound grounds for his action, and provided all the provisions of the Act were complied with and the director acted honestly & reasonably, the court may offer the director either full or partial relief from any liability. The Act furthermore defines the word “knowing”, as is the case when the director knowingly trades in the organisation & they actually know the organisation will be placed in financial distressed position, or possibly liquidated. Directors are personally liable for actions or omissions, can be disqualified from acting as a Director and can be made personally liable for the company’s debts. Did you know that as a director of a limited company, you have a duty to try to make the company a success, using your skills, experience and judgment? Company Directors have responsibilities which include ensuring that the company trades lawfully and complies with all legislation and regulation. In addition the company, as a separate legal entity, is subject to statutory controls and the Directors are responsible for ensuring that the company complies with them. In the UK the Companies Act 2006 sets out seven general duties of directors which are Directors need to be aware that they are personally subject to statutory duties in their capacity as directors of a company. In addition, the company as a separate legal entity is subject to statutory controls and the directors are responsible for ensuring that the company complies with such statutory controls. The Companies Act 2006 codified certain common law and equitable duties of directors for the first time. The act sets out the general duties of directors, which are: The statutory duties that replace the fiduciary or equitable duty are interpreted in accordance with the previous case la