Article:

Keay, A (2019) Having regard for stakeholders in practising enlightened shareholder value. Oxford University Commonwealth Law Journal, 19 (1). pp. 118-138. ISSN 1472-9342

https://doi.org/10.1080/14729342.2019.1619238

Having regard for stakeholders in practising Enlightened Shareholder Value

Andrew Keay[*]

Abstract: Section 172(1) of the Companies Act 2006 introduced the principle of enlightened shareholder value ('ESV') to UK law. The provision imposes a duty on directors to act in the way they consider, in good faith, will promote the success of the company for the benefit of the shareholders. The subsection also requires directors to have regard to various factors when doing this. This is the enlightened aspect of ESV, as the factors encompass different stakeholder interests, such as employees and customers. There has been and continues to be uncertainty over several elements of s 172(1) and the paper addresses the uncertainty over the directors obligation to have regard to the factors. It examines the factors in the provision and what it means for directors to have regard to these factors. It also explores what directors are to do when actions will involve a conflict between different factors.

Keywords : enlightened shareholder value, directors, stakeholders

Introduction

When the Company Law Review Steering Group ('CLRSG')[1] proposed, during its comprehensive examination of UK company law in the late 1990s and earlier months of this century, enlightened shareholder value (ESV) it caused a substantial amount of interest, debate and uncertainty among law and policy makers, directors, investors, company secretaries, legal practitioners[2] and academics, and not just in the UK.[3] This continued when the legislature decided to implement ESV through the Companies Act 2006 ('the Act'). Commentators saw ESV as a new approach to resolving the issue of for whose benefit should the company be run and how should it be run. Section 172(1) of the Act provides the essence of ESV, and since the enactment of the provision the interest, debate and uncertainty surrounding the concept of ESV has not subsided.[4]

---

[*] Professor of Corporate and Commercial Law, Centre for Business Law and Practice, School of Law, University of Leeds and Barrister, Kings Chambers and 9 Stone Buildings, Lincoln's Inn. I wish to thank an anonymous reviewer for helpful comments. I am responsible for all errors.

[1] Company Law Review *Modern Company Law for a Competitive Economy*: 'The Strategic Framework' (DTI, 1999), para 5.1.17.

[2] For instance, see J. Loughrey, A. Keay and L. Cerioni, 'Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance' (2008) 8 *Journal of Corporate Law Studies* 79.

[3] See for example, Joint Parliamentary Committee on Corporations and Financial Services, *Corporate Responsibility : Managing Risk and Creating Value,* Commonwealth of Australia, 2004, para 4.42; I. Esser, 'Recognition of Various Stakeholder Interests in Company Management' June 2008, unpublished LLD thesis, University of Pretoria, South Africa, 314; G. Henderson, 'The Possible Impacts of "Enlightened Shareholder Value" on Corporations' Environmental Performance' 2009, unpublished LLM thesis, University of Toronto; ; S. Carsley, 'A Rudderless Regime : The United Kingdom's 'Enlightened Shareholder Value' as a Model for the Duty of Loyalty in Canada' 2010, unpublished LLM thesis, University of Toronto; V. Ho, '"Enlightened Shareholder Value" : Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 *Journal of Corporation Law* 59; J. Ho, 'Directors' duty to promote the success of the company – Should Hong Kong implement a similar provision?' (2010) 10 *Journal of Corporate Law Studies* 17.

[4] For instance, see A. Keay, *Enlightened Shareholder Value and Corporate Governance* (Routledge, 2013); S. Kiarie, 'At Crossroads : Shareholder Value, Stakeholder Value and Enlightened Shareholder Value :

One of the reasons for the debate and interest surrounding s 172(1) is the fact that, notwithstanding the subsection has been in force since 1 October 2007, in many ways it, or at least parts of it, remain somewhat of a mystery. This is because of several reasons. Three are : the way that parts of the provision were drafted; the fact that few cases that have been founded on a breach of the provision have reached the courts; no court judgment has addressed the subsection in any substantial detail.[5] The courts have tended simply to say that the provision is to be considered in light of its pre-codified precursor, the duty to act bona fide in the best interests of the company, and they have seen it as a natural successor to this common law duty. For example, in *Cobden Investments Ltd v RWM Langport Ltd,*[6] Warren J said that: 'They [the previous duty and s 172] come to the same thing with the modern formulation giving a more readily understood definition of the scope of the duty.'

Section 172(1) provides as follows:

> 'A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
>
> > (a)The likely consequences of any decision in the long term
> > (b)the interests of the company's employees
> > (c)the need to foster the company's business relationships with suppliers, customers and others
> > (d)the impact of the company's operations on the community and the environment
> > (e)the desirability of the company maintaining a reputation for high standards of business conduct, and
> > (f)the need to act fairly between the members of the company.'

Arguably one of the most uncertain aspects of s 172 is what is meant by 'having regard to,' words immediately preceding the factors adumbrated in the sub-section in paragraphs (a)-(f). Lord Freeman said in Parliament when the provision was being debated that the words 'must . . . have regard to' had caused much consternation.[7] Such a sentiment still rings true. As the phrase relates to the factors set out in the subsection it causes one to ask : how does the requirement to have regard to the factors fit into the overall thrust of s 172 and how are

---

Which Road Should the United Kingdom Take?' (2006) 17 *International Company and Commercial Law Review* 329; D. Fisher 'The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties?' (2009) 20 *International Company and Commercial Law Review* 10; A. Alcock, 'An Accidental Change to Directors' Duties?' (2009) 30 *Company Lawyer* 362.

5 A few cases have considered the provision in brief. For example, *Re West Coast Capital (LIOS) Ltd* [2008] CSOH 72; 2008 Scot (D) 16/5 (Scottish Court of Session, Outer House); *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) (High Court of England and Wales) (HC); *Odyssey Entertainment Limited (in liquidation) v Kamp* [2012] EWHC 2316 (Ch); *Madoff Securities International Ltd (in liq) v Raven* [2013] EWHC 3147 (Comm) (High Court of England and Wales); *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692 (Ch) (High Court of England and Wales); *Breitenfeld UK Ltd v Harrison* [2015] 2 BCLC 275 (High Court of England and Wales); *Re Barclays Bank plc* [2018] EWHC 472 (Ch) (High Court of England and Wales). There have been a number of cases where s 172 is only mentioned, or is only relevant to another aspect of a claim by the claimant, such as in the derivative action case law.

6 [2008] EWHC 2810 (Ch) (HC) [52]. For a more recent case, see *Re Edwardian Group Ltd* [2018] EWHC 1715 (Ch) (High Court of England and Wales)

7 Lords Grand Committee, 6 February 2006 : Column GC263.

directors to approach the section's mandate to have regard to the factors? There are three general issues of note. First, what does 'have regard to' entail and what do directors have to do in order to 'have regard to' a particular factor. Secondly, how does what the directors have to do relate to the general requirement that they are to promote the success of the company for the benefit of the members? Thirdly, how are directors to deal with the situation where the factors conflict? For instance, what are directors to do if a contemplated activity benefits one factor but is prejudicial to one or more of the other factors?

The relevance of the inquiry into ascertaining what directors need to do in order to fulfil their obligation to have regard to the factors is four-fold. First, directors need to know what they should be doing in order to discharge their obligations both in terms of not being in breach and acting professionally. Secondly, boards need to know what directors should be doing in order for them to know whether to discipline directors or even whether they should institute proceedings against directors for a breach of s.172. Thirdly, in a similar vein the shareholders need to be aware of what directors are required to do so that they are able to determine whether or not to commence derivative proceedings against errant directors if the company fails to do so.[8] Fourthly, stakeholders should be apprised of what directors are required to do so that in circumstances where directors are not having regard to the factors they may use any breach in order to enable them to place pressure on boards to ensure that the latter gets directors to act in line with their obligation. The study encompassed in this paper is particularly timely given that on 16 July 2018 the Financial Reporting Council issued a revised corporate governance code which makes reference to s 172 and the Companies (Miscellaneous Reporting) Regulations 2018,[9] which were enacted in 2018 and came into force on 1 January 2019, insert a new provision in the Act, s 414CZA, that states: 'A strategic report for a financial year of a company must include a statement… which describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172.'[10] The study is also likely to be of interest to Commonwealth jurisdictions which are considering amending companies legislation to address the issue of shareholder value and State governments in the US which may consider amending their constituency statutes. These statutes provide that directors must[11] or may[12] take into account the interests of stakeholders in making decisions.[13]

The paper argues that directors must pay attention to and think carefully about all of the factors mentioned in s 172(1) and any others that are pertinent to any decision or course of action being contemplated. In in doing so directors are to act in a way that will benefit those interests covered by the factors that will enable the directors to promote the success of the company for the benefit of the members and all of this must be done in good faith. The paper contends that where directors find that there is conflict between factors they need to engage in a balancing exercise to determine what should be done. Nevertheless it is submitted that if

8 It is recognised that shareholders will not usually be overly concerned if directors do not have regard to the factors save where it in some way does not promote the success of the company for the benefit of the shareholders.

9 2018/860

10 Introduced by Strategic Report, the Companies (Miscellaneous Reporting) Regulations 2018, reg 4.

11 For example, see Connecticut: CONN. GEN. STAT s.33-313 (2003); Arizona: ARIZ. REV. STAT s.10-1202 (2002); Idaho: IDAHO CODE s.30-1602 (2002).

12 For example, see Indiana, IND. CODE, s.23-1-35-1(d); Ohio, OHIO REV. CODE ANN, s.1701.59(E) (Supp 1989).

13 For a discussion of the statutes in the context of a discussion of s 172, see Keay (n 4); A. Keay, 'Moving Towards to Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?' (2011) 22 *European Business Law Review* 1.

directors fail to give sufficient or any regard for a particular factor or they place too much emphasis on one to the exclusion of another, they will only be liable if a claimant can establish that they did not act in good faith and did not believe that it would promote the success of the company.
The paper is structured as follows. First, the paper examines the factors. Secondly, the paper explores the meaning of 'have regard to' and what directors should do. Thirdly, the paper examines what directors should do where there is a conflict between factors. Fourthly, the paper briefly considers whether s 174 of the Act is relevant to the issues addressed here. Section 174 codifies the director's duty to use care and skill in the discharge of his or her functions. Finally, there are some concluding remarks.

The Factors

What probably captured most people's attention and interest with s 172(1), either when the CLRSG proposed it or when it was enacted, was the inclusion of the factors in paras (a)-(f). Other than the first one, the factors have been regarded, adroitly, as referring to the interests of stakeholders.[14] The employment of the factors precipitated some to think that the UK was moving towards implementing more of a stakeholder approach in relation to how companies should be managed. Several commentators have scotched this notion. They argue that shareholder primacy,[15] traditionally regarded as determining the direction of UK corporate law, has been maintained because ultimately the directors must manage the company to benefit the members.[16] Nevertheless, it is submitted that the inclusion of the factors is not completely otiose as is evident from the following discussion. Also of note is that there have been several submissions by commentators that the shareholder primacy principle should be moderated,[17] and arguably this is what s 172(1) does.

The Explanatory Notes to the Act stated that the factors mentioned 'highlight areas of particular importance which reflect wider expectations of responsible business behaviour…'[18] The requirement of directors to have regard to the factors is a significant part of the 'enlightened' element of ESV. It clearly mandates that the practice of shareholder value, another way of referring to shareholder primacy, is to be undertaken with concern for the interests of various critical interests. The people and groups mentioned in s 172(1)(a)-(f), such as employees, suppliers and customers make what the finance literature refers to as 'firm-specific investments' in companies and this means that their economic fortunes are tied,

14 For example, see GC100, 'Guidance on Directors' Duties: Section 172 and Stakeholder Considerations,' 23 October 2018, 5 : uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=ca2b6551-a04f-44f3-aa3a-45d185fae44e&contextData=(sc.Default)&navId=75AD3CB81E3EF45EDA7034FC2D7EFF49&comp=pluk&firstPage=true&bhcp=1 accessed 25 October 2018.

15 This provides that the directors must see the interests of shareholders as paramount.

16 For example, see Keay, 'Moving Towards to Stakeholderism? (n 13).

17 For example, see C. Mayer, *Prosperity : better business makes the greater good* (Oxford University Press, 2018); L. Fink, 'Purpose and Profit' : https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter accessed 24 January 2019. The latter was a letter sent by Larry Fink of Blackrock to CEOs in 2018. He emitted some similar comments in his letter of 2019:https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter accessed 25 January 2019.

18 Explanatory Notes to the Companies Act 2006, para 326.

inextricably in many cases, to a company's fate.[19] R Edward Freeman et al expressed the rationale behind the need to consider non-shareholders in this way:

> 'Business is about putting together a deal so that suppliers, customers, employees, communities, managers and shareholders all win continuously over time. In short, at some level, stakeholder interests have to be joint – they must be traveling in the same direction – or else there will be exit, and a new collaboration formed.'[20]

ESV does not embrace stakeholder theory, that is, a company should be run in the best interests of all of its stakeholders, and stakeholders should be seen as an end and not a means to an end, namely the benefit of the shareholders.[21] The CLRSG had no intention of proposing that at all. It regarded directors as under a duty to seek, ultimately, the benefit of the shareholders. Nevertheless, the CLRSG was concerned that directors did not ignore the interests of stakeholders as their involvement with, and in, companies is an important part of a company succeeding in the long term. Companies simply cannot function well without their stakeholders contributing. Thus, a company will not succeed if its workers are disgruntled and are even taking industrial action, or its customers, existing and/or potential, are disenchanted with the company's products. The idea that companies should take into account the interests of their stakeholders was not new when the CLRSG raised it. Many advocating shareholder primacy had long held the view that stakeholder interests must be considered and often catered for.[22] The Confederation of British Industry stated in its evidence to the Hampel Committee, a committee constituted to address issues of corporate governance in the UK in the late 1990s, said that directors were accountable to shareholders, but they are responsible for relations with stakeholders.[23] Subsequently, the Hampel Committee's report concluded that to ensure that there is long-term shareholder wealth, directors have to develop and sustain relationships with stakeholders.[24] To many this makes good sense as there are good reasons for considering stakeholder interests in the process of achieving shareholder value.[25] Many shareholder value scholars who hold to the directors being obliged to run the company for the benefit of the shareholders have accepted that having regard for stakeholder interests is not necessarily going to disadvantage the shareholders. Taking into account factors other than shareholder interests might produce financial benefits for the company, and ultimately for the shareholders. In fact, having regard for interests other than those of the members may produce some benefits for members that had not previously been considered. Also, arguably, there was nothing in the case law that prohibited directors, prior to the advent of s 172, from

---

[19] M. Blair and L. Stout take issue with this: 'Director Accountability and the Mediating Role of the Corporate Board' (2001) 79 *Washington University Law Quarterly* 403, 418.

[20] S. Venkataraman, 'Stakeholder Value Equilibration and the Entrepreneurial Process' in R. E. Freeman and S. Venkataraman (eds), *The Ruffin Series No 3 : Ethics and Entrepreneurship,* (Philosophy Documentation Center, 2002), 45.

[21] A. Keay, 'Stakeholder Theory in Corporate Law : Has It Got What It Takes?' (2010) 9 *Richmond Journal of Global Law & Business* 249.

[22] M. Becht, P. Bolton and A. Roell, 'Corporate Governance and Control' Finance Working Paper No. O2/2002, European Corporate Governance Institute Working Papers in Finance, 31 October 2002 and last revised, 3 April 2006 at 9 and accessible at : ssrn.com/abstract=343461 accessed 30 October 2018; M. Jensen, 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 7 *European Financial Management* 297; A. Keay, 'Shareholder Primacy in Corporate Law: Can It Survive? Should It Survive?' (2010) 7 *European Company and Financial Law Review* 369.

[23] *Final Report of the Committee on Corporate Governance*, January 1998 (Gee Publishing) para 1.17.

[24] Ibid, para 1.18.

[25] For example, see D. Greening and D. Turban, 'Corporate social performance as a competitive advantage in attracting a quality workforce' (2000) 39 *Business and Society* 254.

taking into account the interests of non-shareholders, provided that the directors acted in good faith in the best interests of the company as a whole. So, s 172(1) was not introducing something that was inconsistent with existing law. However, the new section now makes it clear that it is mandatory, rather than merely permissible, for directors to have regard to stakeholder interests.

The factors are not referred to only in s 172(1). ESV was always meant to consist of two parts. First, s 172(1) sets out the duty. Secondly, there is a reporting aspect. The directors must include in a report to shareholders how they fulfilled the obligations set out in s 172, unless their company is entitled to the small companies exemption explained in s 414B.[26] Originally this report was to be in what was known as the Business Review.[27] This was replaced with the Strategic Report in 2013.[28] Section 414C of the Act states that: 'The purpose of the strategic report is to inform members of the company and help them assess how the directors have performed their duty under section 172.' The provision is very much directed at giving information to shareholders and not an attempt at really engaging with stakeholders. This is manifested by the fact that the Report was to give a review of the business, and its development, in the previous year.[29] However, s 414CB(1) states that 'the non-financial information statement has to contain information, to the extent necessary for an understanding of the company's development, performance and position and the impact of its activity, relating to, as a minimum— (a)environmental matters…, (b)the company's employees, (c)social matters, (d)respect for human rights, and (e)anti-corruption and anti-bribery matters.' Thus, directors must address certain stakeholder and moral issues.

After a significant review by the Department of Business Energy and Industrial Strategy ('BEIS') of corporate governance, including ESV and particularly the reporting requirements in the Strategic Report, and following responses from stakeholders and professional associations to a Green Paper that BEIS had circulated in 2016,[30] the Companies (Miscellaneous Reporting) Regulations 2018[31] was enacted.[32] From 1 January 2019 a new provision in the Act, s 414CZA, operated. It provides that: 'A strategic report for a financial year of a company must include a statement… which describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172.'[33] This requirement is designed to encourage directors to think more carefully about how they are taking account of the factors.[34] The intention is to give shareholders more information with which to hold directors to account.[35] To assist in understanding how to address the requirements of the Strategic Report the Financial Reporting Council ('FRC') published, in July 2018, a guidance document.[36]

---

26 Also, see s 414A(2).

27 Section 417

28 Section 414A. This was introduced by Companies Act 2006 (Strategic Report and Directors' Report) Regulations (2013/1970).

29 Section 414C(2)(3)

30 Department of Business, Energy and Industrial Strategy, 'Corporate Governance Reform,' Green Paper, November 2016.

31 2018/860

32 Although not all provisions in it are in force at this point. Parts will only become operative from 1 January 2019.

33 Introduced by Strategic Report, the Companies (Miscellaneous Reporting) Regulations 2018, reg 4.

34 Explanatory Memorandum to the Companies (Miscellaneous Reporting) Regulations 2018/860, para 7.3.

35 Ibid

36 FRC, 'Guidance on the Strategic Report' July 2018 : www.frc.org.uk/getattachment/fb05dd7b-c76c-424e-9daf-4293c9fa2d6a/Guidance-on-the-Strategic-Report-31-7-18.pdf accessed 22 October 2018.

Soft law has also dealt with the factors in that the board of directors in listed companies which have to comply with the UK Corporate Governance Code ('the Code'), as revised in July 2018,[37] must describe in the annual report how the factors in s 172(1) have been considered in board discussions and decision-making.

After its review of ESV, the government decided that it would not amend s 172, but it invited the GC100 Group (Association of General Counsel and Corporate Secretaries in FTSE 100 companies) to prepare and publish new guidance to directors on the practical interpretation of s 172, and it published this guidance on 23 October 2018.[38] The paper refers to it at various points in this paper. It must be noted that while s 172(1) applies to all companies, the GC100 Group has large listed companies generally in mind.

A critical issue that warrants mentioning is whether directors are merely to take the factors into account insofar as this promotes shareholder value - a purely instrumental concern - or whether it enables or even requires directors to be concerned with such interests as ends in themselves. The background to the provision and the specific comments of the CLRSG, together with the way that it is drafted, means that while a more enlightened and responsible approach was sought, the former interpretation is correct. But assuming that that is correct, it is suggested that while shareholder interests are to be seen as the ultimate focus of the directors, the requirement to have regard to the factors means that in taking action to promote the company's success for the ultimate benefit of the shareholders the directors are obliged to take into account the interests of other stakeholders in how they seek to achieve the success of the company.

The government has, in several documents,[39] as has the FRC[40] made it clear that while the factors relate to stakeholders the shareholders are the main focus. For instance, the latter has stated: 'the Strategic Report…should contain information that is material to shareholders.'[41]

All of the above makes it plain that the factors are seen as an important element of company law. However, unfortunately none of the developments in reporting give an obvious direction as to what 'have regard to' in s 172 actually entails. We now turn to consideration of that issue.

The meaning of 'have regard to' and what are directors to do in order to 'have regard to'?

First, we should note what is meant by the phrase 'have regard to.' The phrase suggests, according to the *New Oxford Dictionary of English*, that it involves paying attention to or being concerned about something.[42] It is likely that it can be used interchangeably with the phrase 'must take account of.'[43] In a 2007 Ministerial Statement that purported to give

---

37 FRC, 'UK Corporate Governance Code,' July 2018, para 5 : www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF accessed, 30 October 2018.
38 GC100 (n 9).
39 For example, Explanatory Memorandum to the Companies (Miscellaneous Reporting) Regulations (n 27), para 7.3.
40 FRC (n 36).
41 FRC (n 36), para 5.2.
42 J. Pearsall (ed), (Oxford University Press, 2001), 1561
43 Options4.co.nz, 'Statutory Interpretation' : www.option4.co.nz/Information/mfdefinitions.htm accessed 22 October 2018.

guidance to directors, the then Minister responsible for the Companies Bill 2005 that became the Act, Margaret Hodge MP, stated that 'have regard to' meant that directors were 'to give proper consideration to' the factors.[44] All of this accords with s 414CZA, mentioned earlier, that provides that the directors must describe how they have had regard to the matters set out in s 172(1)(a) to (f) when performing their duty under s 172(1).

There is nothing in any secondary legislation or in the Code that really contributes to our understanding of what directors are to do. Notably the Code says that the board must divulge how the factors have been considered and the FRC's 'Guidance on the Strategic Report'[45] provides that the directors are to state how they have considered the matters set out in s 172(1). This suggests that in having regard to the factors this involves the directors needing to consider them. The *New Oxford Dictionary of English* states that 'consider' means 'think carefully about (something, typically before making a decision).'[46]

What the above does not tell us is what directors should do in paying attention to, taking into account, being concerned with or giving consideration to the factors. Neither s 172 nor any other provision in the Act assists. Furthermore, neither the Guidance to Key Clauses issued with the draft Companies Bill in the March 2005 White Paper nor the Explanatory Notes to the Act provide any real assistance.

What is meant by 'have regard to' is likely to be a fact-sensitive matter. Nevertheless, it is important that we examine some of the things that directors are likely to need to do and the general direction that is being given by s 172(1). Critically directors must be able to establish that they have had regard to the factors. The FRC's 'Guidance on the Strategic Report'[47] includes some questions that directors should ask in relation to some of the factors, and they probably represent some assistance in determining what having regard to involves practically. For instance, it provides that in relation to employees directors should ask :

> 'Is the entity's business model dependent on current employees' skills and experience? What is the composition of the workforce? Are there any risks associated with its employment model? How does the entity consider the interests of employees and maintain good employee relationships? What channels of communication are there with employees? Are there different approaches in different parts of the world or at different levels of seniority?'

In the context of s 172(1) does the phrase mean that the directors simply have to note that they have considered the stakeholders or does it mean that they have to go further and investigate the impact of a decision on all of the factors, and, perhaps in some circumstances, obtain a report from consultants or relevant people or groups on the impact? Certainly it might be argued that the directors must determine the impact of any decision. Paragraph (d) specifically states that the directors are to have regard to 'the impact of the company's operations on the community and the environment.' None of the other paragraphs refer to impact but it might well be implied. Section 414CB(1) also addresses impact for it states that 'the impact of its [the company] activity, relating to, as a minimum— (a)environmental

---

44 'Duties of Company Directors,' DTI, June 2007, Introduction and Statement of Rt Hon Margaret Hodge MP, June 2007, 9: webarchive.nationalarchives.gov.uk/20070628230000/http://www.dti.gov.uk/files/file40139.pdf accessed 29 October 2018.

45 FRC (n 36), para 7A.3.

46 Pearsall (n 42), 391.

47 FRC (n 36), para 7A.42.

matters…, (b)the company's employees, (c)social matters, (d)respect for human rights, and (e)anti-corruption and anti-bribery matters.' Effectively this addresses the issue of how do the directors establish that they have had regard to the factors. So consideration of impact is needed and this might, depending on the circumstances, entail the procuring of reports from advisers or communicating with the stakeholders concerned.

The GC100 takes the view that s 172 does not require a checklist approach to the factors where each factor has to be considered for everything that is done because directors have such a wide range of issues with which they must deal and it would be an unworkable approach to governance.[48] That might be the case, but surely directors should at least be able to point to the fact that they considered whether a particular factor needed to be taken into account before coming to the view that the factor was not pertinent to the decision or action to be taken.

Part of the FRC's 'Guidance on the Strategic Report' suggests that the requirement in s 172(1) to have regard to involves engaging with stakeholders,[49] something that the GC100's 2018 Guidance also suggests.[50] While there is no common agreement on what engagement with stakeholders means,[51] and it 'can mean many things to many people,'[52] arguably it means interacting with stakeholders, and listening to what they say, rather than merely considering their interests. It is submitted that this involves more than just having regard to the factors. 'Engagement implies a long-term relationship with active involvement.'[53] Pamela Sloan opines that engagement is the process of involving people and groups that affect or are affected by the activities of a company.[54] Michelle Greenwood defines engagement as: 'practices the organization undertakes to involve stakeholders in a positive manner in organizational activities.'[55] Engagement is very much encouraged by the sustainability literature, but it is doubtful that this was envisaged either by the CLRSG when positing the notion of ESV or by Parliament when s 172 was enacted. Engagement is going further than having regard to the factors. There is a different mind-set that is required for directors seeking to engage with stakeholders compared with having regard to them. The former entails a much richer and deeper exercise. While engagement with stakeholders might be regarded as laudable and beneficial for the company, s 172 does not require it.

The CLRSG advocated a hierarchy of obligations when it proposed the inclusion of the factors,[56] and this involved the promotion of the benefit of the members' interests above those of the broader interests set out in paras (a)–(f). There is no indication in the section or the discussions in the reports of the CLRSG or elsewhere as to the extent to which directors are to have regard for wider interests, save for the fact that the CLSG stated that the directors

---

48 GC100 (n 14), p8.
49 FRC (n 36), para 8.11(b).
50 GC100 (n 14), p6.
51 P. Sloan, 'Redefining Stakeholder Engagement : From Control to Collaboration' (2009) 36 *Journal of Corporate Citizenship* 25, 26.
52 M. Greenwood, 'Stakeholder Engagement : Beyond the Myth of Corporate Responsibility' (2009) 74 *Journal of Business Ethics* 315, 315.
53 G. Shiplee, 'Stakeholder engagement – What does it mean and are we getting it right?' Corporate Citizenship, 21 September 2016: corporate-citizenship.com/2016/09/12/stakeholder-engagement-mean-getting-right/ accessed 24 October 2018.
54 Sloan (n 51), 26.
55 Greenwood (n 52).
56 Company Law Review *Modern Company Law for a Competitive Economy: Completing the Structure* (DTI, 2000), para 3.19.

have complete discretion in determining which factors are relevant and how much weight to attach to each one in considering the promotion of the success of the company.[57]

What is clear is that, as noted by the Explanatory Notes to the Act, directors would not fulfil the 'have regard to' injunction merely by paying lip service to the factors.[58] This might mean that directors must demonstrate systematic awareness of the factors, as well as any other factors which may pertain to the company's interests in respect of a particular matter, and to take them into account in the decision-making process.[59]

Having regard to the factors is likely to be relevant to major decisions that are made by a board. Therefore, boards might be minded, in such situations, to proceed through all of the factors separately and consider whether they are important in making the decision. Some may well be dispensed with summarily. Further, it has been suggested that the factors should not be considered in isolation, but consideration should occur in the broader context of determining whether a particular course of action is likely to promote the success of the company.[60] However, the CLRSG did not seem to think that this was, necessarily, required. It opined that:

> 'In deciding whether and how to consider such interests [the factors] the director will be required to exercise the care and skill required…This ensures that the list [of factors] does not have to be absolutely to be considered in every case, but only where a reasonably careful and skilful director would do so.'[61]

Yet, it is submitted that it is likely that the situation which will lead to directors being at most risk of being in breach of their duty, if not actually made liable, is if they did not give adequate attention to any of the factors addressed in s 172 and resultant decisions are clearly unsuccessful in business terms,[62] or a factor that should clearly have been considered was not.

What will courts consider in determining whether a director has had regard to a particular factor or not? Will it be acceptable to fulfil the requirement if a director provides evidence, orally or in a witness statement, that he or she did have regard for each of the factors? The contents of a strategic report might be of assistance to the directors, but in any event one would think that it would be necessary for a director to explain what he or she did. Unless the evidence is such that a judge disbelieves the director then no breach would occur as the test is subjective, namely did the director consider in good faith what was done was in the best interests of the company?

What we can note is that the term 'have regard to' does not indicate what weight should be given to individual factors.[63] This is something that is left to the directors and their discretion which is to be exercised in good faith. It might mean that directors seek to balance the various

---

57 Ibid.

58 Explanatory Notes (n 11), para 328.

59 J. Davies, 'A Guide to Directors Obligations Under the Companies Act 2006' Association of Chartered Certified Accountants, August 2007, para 6.38: <www.accaglobal.com/pubs/publicinterest/activities/library/company_law/tech-tp-cdd.pdf> accessed 21 August 2007.

60 Ibid, para 6.38.

61 Company Law Review, *Modern Company Law for a Competitive Economy* : Developing the Framework, 2000 (DTI), para 3.56.

62 Ibid.

63 Davies (n 59), para 6.38.

interests in the company. What if a course of action is going to promote the success of the company and benefit the members, but the directors ascertain that this action can be implemented in one of two ways, with each way enhancing the interests of different factors? Are directors to engage in a balancing exercise in such circumstances? This issue is discussed later.

As adverted to earlier, it would make sense if directors, where appropriate, contacted people or groups covered by the factors when having to make critical decisions so that they can ascertain the position of stakeholders and, perhaps, to explain to them any decision that is to be made. This would certainly seem to qualify as having regard to the factors. From a practical point of view, it is worthwhile doing so anyway for if such contacts are not made or stakeholders are not shown appropriate respect then there is always the risk of them withdrawing their input. All of this is common-sense in business terms. Of course, once directors have done this and received responses from stakeholders the directors will have a hard time ignoring them.[64] Nevertheless they could do so, legally, if, in good faith, they believe that to ignore them would promote the success of the company for the benefit of the members.

We have considered the meaning of 'have regard to' from the point of its normal meaning and the comments of government and quasi-government bodies. What do we have so far from the courts? As mentioned earlier, the courts appear to have refrained from discussing the factors and this could be because: the factors were not relevant in the cases that have come before them, the parties did not address them in argument and so the courts did not feel that it was necessary or appropriate to do so, or it could mean that the courts are unsure as to how to deal with the factors. Some judges have quoted the factors without either explaining or applying them and a few have referred to specific factors. Primarily the latter has been done in the derivative action cases where shareholders have endeavoured to bring claims on behalf of their companies because boards have refrained from proceeding. For instance, in *Cullen Investments Ltd v Brown*[65] the deputy judge in that case said that 'Of the six specific matters mentioned in sub-paras (a)–(f) of s.172(1), only (a) and (f) are of potential relevance on the facts of this case…'[66] But the deputy judge did not discuss them in his judgment. In other derivative action cases, *Hughes v Weiss*,[67] *Phillips v Fryer,*[68] *Parry v Bartlett*[69] and *Re Seven Holdings Ltd*,[70] the respective judges said that it was only factor (f) that was relevant. Yet in none of these cases did the court go on and provide an indication of how the factor was relevant to the application of the section.

Conflict between factors

Setting the scene

The CLRSG recognised the fact that where the long-term interests of the company are in view, there could well be a clash between the interests of some or all of the holders of the interests mentioned in the factors, on the one hand, and those of the shareholders, on the

64 Henderson (n 3), 29.
65 [2015] EWHC 473 (Ch).
66 Ibid [54].
67 [2012] EWHC 2363 (Ch), [30].
68 [2013] BCC 176, [13]
69 [2011] EWHC 3146 (Ch), [76]-[77].
70 [2011] EWHC 1893 (Ch), [12].

other.[71] Examples given by the CLRSG included the closing down of a plant or the termination of a long-term supply contract when the continuation of either will impact adversely on shareholder returns.[72] The answer to that, given s 172(1), is that they should take the action that does not affect shareholder returns unless, perhaps, taking the action would be prejudicial in the long term for the company's success and hence for the shareholders.[73] It appears clear that the requirement to have regard to the factors is not intended to require directors to do something that might benefit the factors but be deleterious for shareholders. The CLRSG stated that: 'These considerations [the factors] are thus subordinate to the objective of success on behalf of the shareholders and to be regarded as of value to the extent that they contribute to that object.'[74]

Whilst determining what to do in the examples provided by the CLRSG may well not be easy, a more difficult determination is likely to have to be made where in contemplating a prospective action or strategy, the directors ascertain that the action would lead to two or more of the factors being in actual or potential conflict? That is, the action will benefit one or more factors but be harmful to one or more other factors. The issue that directors might have to confront can be demonstrated with the following simple example. The directors of X plc are considering changing the way that X's factory operates. This will save costs and, therefore, produce more profits. The strategy is considered by the directors in light of the factors. The directors envisage that the action will be good for the environment for it will, inter alia, involve the use of fewer resources, such as less electricity and water. However, the strategy will also involve the redundancy of some of the company's workforce. Thus, there is a conflict between the interests of the employees and the environment. There is lack of guidance for directors where there is a conflict or a potential conflict between various interests, which, one would think, would not be an infrequent occurrence. This is made manifest when one considers that the list of stakeholders in s 172(1) is not exhaustive, because following the words 'have regard to' there is, in parentheses, 'amongst other matters,'[75] thus there could be a plethora of factors to be taken into account in any particular situation.

There is no importance attached to the order in which the factors are set out in s 172(1), that is, no hierarchy of interests is intended, with no factor, prima facie, having precedence over others. But, obviously, in any given situation one or more might be considered of greater importance than others. Ahmed A-Hawarndeh et al have suggested that 'many companies may have internal rankings of the importance of stakeholders depending on what is concerned.'[76] Companies engaged in certain types of industry might have to focus more on the effects on the environment in making their decision when compared with other companies, and conceivably this could affect other factors. This seems to have been acknowledged by the CLRSG when it stated that not all of the factors will be equally relevant in every case.[77] Thus, directors have to determine what is relevant and to what extent.

---

71 Company Law Review (n 1), para 5.1.15.

72 Ibid.

73 Institute of Chartered Secretaries and Administrators, *Guidance Noted: Directors' General Duties,* June 2015, para 2.2.2: <www.icsa.org.uk/assets/files/free-guidance-notes/directors-general-duties(1).pdf> accessed 26 July 2018.

74 Company Law Review (n 61), para 3.55.

75 The FRC sees this as including stakeholders who will have an impact on the long-term success of the company (FRC (n 36), 4).

76 A. Al-Hawarndeh et al, 'The interpretation of the director's duty under section 172 Companies Act 2006: Insights from complexity theory' [2013] *Journal of Business Law* 417, 430.

77 Company Law Review (n 61), para 3.55.

There is no case law that dealt with the old duty where there was a conflict between stakeholders. This could be because directors did not consider the interests of stakeholders or at least not in any great detail. Another reason could have been that stakeholders had no, and still do not have, any enforcement option available to them, so any discussion of stakeholder rights in a judgment is likely to have been only a subsidiary issue to the main one, namely did the director act in the best interests of the company?

Balancing

Where there is a conflict between factors, is one solution to require directors to balance the factors? The GC100 in its 2018 Guidance document advocates directors 'weighing up all the relevant factors' before asking which course of action will best bring success to the company. The Group recognises that certain stakeholders might be adversely affected by the action.[78] The notion of 'weighing up' involves the assessment of the nature or importance of a factor with a view to making a decision. Arguably, this cannot be done without some element of balancing if there is a conflict.

The only judgment that has referred to balancing in the context of s 172 is *Shepherd v Williamson,*[79] although it did not involve a claim for a breach of duty, but a petition claiming unfair prejudice under s 994 of the Act. In this case the petitioner (S) and the respondent (W) had become the only directors and shareholders of a company, P, and both were also employees of P. P's articles of association set a fixed price at which shares were to be sold to existing shareholders when a shareholder ceased to be an employee or director. P had engaged in unlawful collusive practices in which S had not been directly involved. The practices involved engaging in covering. 'Covering' is an anti-competition measure that had been undertaken by several building contractors. It involved the contractors colluding in such a way that they would decide amongst themselves who would get a particular contract and to make sure that this transpired another company would submit a higher bid than the company which had been selected to be entitled to the contract. No other companies would bid for the job. P was investigated by the Office of Fair Trading and S left an anonymous voicemail with a hotel, for which P did a lot of work, that the company had been involved in covering. S said that he was concerned about an Office of Fair Trading investigation and the reputation of his company. S was later made redundant by W. Employment proceedings were commenced by S and an employment tribunal made findings of fact including that S's call to the hotel had been made with the intention of protecting P. S then instituted proceedings under s.994 against W. It was alleged by W that S's conduct was underhand, reckless and potentially extremely damaging to P meaning that S had not acted in good faith and so could not avail himself of s.994. W argued that S had acted wrongly and in breach of his duties as a director. Proudman J stated that :

> 'Applying the criteria laid down in s. 172, Mr Shepherd [S] was balancing the deleterious consequences of his conduct as far as its relations with its [the petitioner's company] major customer was concerned, and the potential for damage to the Company's employees if the contract was not gained

---

78 GC100 (n 14), p5.
79 [2010] EWHC 2375 (Ch) (High Court of England and Wales), [103]

(s.172(1)(a)(b)(c)), against the Company's reputation as a whole (s.172(1)(d) and (e)) in light of the OFT investigation.'[80]

The judge said that S could not be criticised for wanting to ensure that the contract was not obtained by the use of collusive activities, irrespective of whether it meant that P might lose the contract altogether. The judgment suggests that where there might be a conflict of the factors directors are to balance the interests and they are entitled to focus on those interests that they consider will promote the success of the company.

Balancing is a tricky matter, but it has been said that it is something that directors do all of the time and is part and parcel of being a director. Some management specialists have even said that managing competing interests is a primary function of management.[81] The balancing of diverse interests has been recognised to be within directors' abilities and skills by government bodies.[82] The chairman of the US company, Standard Oil, once stated, that the business of companies should be carried on 'in such a way as to maintain an equitable and working balance among the claims of the various directly interested groups – stockholders, employees, customers and the public at large'.[83] There is evidence that directors are often seeking to balance interests in the decisions which they make.[84]

Balancing involves an 'inherently subjective process,'[85] and has been the subject of significant criticism over the years,[86] particularly in relation to the need to balance the interests of a company's stakeholders. For instance, the CLRSG was critical of pluralist approaches that require balancing,[87] and in its response to the second White Paper and the draft Companies Bill, the Law Society for England and Wales indicated significant concern in relation to directors having to weigh up the list of factors contained in a precursor of s 172(1) when making decisions. Its fear was that it would lead to practical problems.[88]

Traditionally the balancing of interests by directors has been regarded as problematic. First, unless the balancing exercise is performed with an aim in mind it is very difficult to undertake. Secondly, it might be argued that directors will not understand the interests of non-shareholder groups.[89] Thirdly, balancing might enable directors to promote their own

---

80 Ibid.

81 H. Ansoff *Strategic Management* (Prentice-Hall, 1984) and referred to in J. Harrison and R. Freeman 'Stakeholders, Social Responsibility and Performance: Empirical Evidence and Theoretical Perspectives' (1999) 42 *Academy of Management Journal* 479, 479. Management commentators have asserted that directors are in effect to act as referees between two stakeholder groups (M. Aoki *The co-operative game theory of the firm* (Clarendon Press, 1984) and referred to in T. Donaldson and L. Preston 'The Stakeholder Theory of the Corporation Concepts, Evidence, and Implications' (1995) 20 The *Academy of Management Review* 65, 86,).

82 *Company Law Reform* (Cmnd 5391), paras 55–59.

83 Quoted in M. Blair *Ownership and Control* (The Brookings Institute, 1995), 212 and in N. Craig Smith *Morality and the Market* (Routledge, 1990), 65.

84 It has been noted that directors do already consider the interests of various constituents: *Report of the Committee on Corporate Governance* (chair, Sir Ronald Hampel) (1998) and referred to by J. Dine 'Implementation of European Initiatives in the UK: The Role of Fiduciary Duties' (1999) 3 *Company, Financial and Insolvency Law Review* 218, 223.

85 J. Parkinson, 'Models of the Company and the Employment Relationship' (2003) 41 *British Journal of Industrial Relations* 481, 498.

86 For instance, see T. Hurst and L. McGuiness, 'The Corporation, The Bondholder and Fiduciary Duties' (1991) 10 *Journal of Law and Commerce* 187, 205; M. Siems, 'Shareholders, Stakeholders and the 'Ordoliberalism' (2002) 13 *European Business Law Review* 139, 141.

87 Company Law Review (n 1), generally in section 5.1.

88 June 2005, 35.

89 M.van der Weide, 'Against Fiduciary Duties to Corporate Stakeholders' (1996) 21 *Delaware Journal of Corporate Law* 27, 60.

interests.[90] That is, balancing will make it easier for directors who wish to self-deal or cover up their incompetence, and to escape from being held liable for a breach of duty, to rely on the assertion that their actions were in accordance with the interests of one or more of those mentioned in the factors in s 172, and it would be difficult to contradict the assertion.[91]

It is likely that many balancing exercises are going to be fraught with difficulties. It might well be that directors, in order to alleviate the burden on them, will delegate consideration of some of the factors mentioned in s 172(1) and will require reports for board meetings which have to make decisions that might affect the factors mentioned. However, the directors are ultimately responsible for the final decision taken.

The glib answer to how directors are to deal with conflicts between factors and whether they are to balance them might be that so long as the directors resolve any conflicts, or conduct a balancing exercise, on the basis of their good faith judgment, their actions cannot be impugned. In addition, if they do so the courts may well be reluctant to interfere with such commercial decisions.[92] We must not lose sight of the fact that the overarching requirement for directors is to promote the success of the company for the benefit of the members as a whole and that will be the final determining issue. It is submitted that any regard to the factors in s 172(1) must be such that it does not impinge on the members' benefits. This is indicated by what the Institute of Chartered Secretaries and Administrators Guidance on Directors' General Duties stated:

> 'At times these six factors, and any others that are being considered, may be in conflict but the key issue for decision making is that the directors should choose the action that will promote the overall success of the company for the benefit of members as a whole, even if that may sometimes have a negative impact on one or more of the six factors.'[93]

The real difficulty would be where directors could adopt various approaches all of which would promote the success of the company, but they would affect the factors in different ways. In such a situation it is highly likely that the various approaches could promote the success of the company to different degrees and the directors should adopt that approach that would provide the best for the company.

Liability Under Section 174?

Generally, directors are not going to be in breach of s 172(1) if they fail to consider one or any of the factors set out there or they choose actions that benefit one factor and harms those included in another factor provided they act in good faith. However, could a director be in breach of s 174? This provision has rarely been considered in case law. It states that:

'(1) A director of a company must exercise reasonable care, skill and diligence.

---

90 Parkinson (n 85), 498; M. Roe, 'The Shareholder Wealth Maximization Norm and Industrial Organization' (2001) *University of Pennsylvania Law Review* 2063, 2065

91 Parkinson (n 85), 498

92 P. Beale, 'Directors Beware' (2007) 157 *New Law Journal* 1033.

93 ICSA International, *ICSA Guidance on Directors' General Duties*, January 2008, para 3.2.2.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.'

Like s 172, there are few claims under s 174 that are the subject of reported cases. It is not within the scope of this paper to consider the reason(s) for this. What we can ask is whether directors could be held liable under this section? Is it possible to claim that a director failed to exercise reasonable care, skill and diligence if he or she: did not have regard to a factor; only had regard to some factors; chose one or more factors over other factors in making a decision? Certainly, the CLRSG seemed to envisage it. It said that: 'In deciding whether and how to consider such interests [the factors] the director will be required to exercise the care and skill required below.'[94] The paragraph of the report in which this was stated then went on to say that a director should act as a reasonable and skilful director would. The guidance issued by the Department of Trade and Industry at the time of s 172's enactment expressed a similar view. It stated that in having regard for the factors the duty to exercise reasonable care and skill will apply.[95] Directors could be liable under s 174 even if they acted in good faith, as good faith is not relevant to the application of s 174. Whether a director would be held liable will depend on the individual facts of each case.

Conclusion

The uncertain meaning and application of elements of s 172, such as the phrase 'have regard to,' has meant that there is uncertainty as to what directors actually need to do to fulfil their obligations under the section. Inter alia this has meant that the practical importance of the provision as far as stakeholders are concerned is unclear.[96] What is clear is that under s 172(1) directors must have regard to the factors listed in the sub-section and contained in paras (a)-(f). What the provision does not do is to explain what this entails. In light of this, the paper has explored what it means to have regard to the factors. The paper concluded that it means, in the context of s.172, that the directors must pay attention to and think carefully about the factors. What this means in practice and what directors must do to fulfil the requirement is not easy to discern.

It is contended that directors are to consider all of the factors mentioned in s 172(1) and any others that are pertinent to any decision or course of action that is contemplated, and in doing so act in a way that will benefit those interests covered by the factors so to enable the promotion of the success of the company for the benefit of the members. All of this must be done in good faith. This accords with the view emitted by Margaret Hodge MP during the debates in Parliament concerning s 172. She said: 'We believe it is essential for the weight given to any factor to be a matter for the director's good faith judgement.'[97] The factors are

---

[94] Company Law Review (n 61), para 3.56.

[95] Referred to in GC100 (n 14), 14.

[96] K. Chalaczkiewicz-Ladna, I-M. Esser and I. MacNeil, 'Engaging stakeholders in the UK in corporate decision-making through strategic reporting : An empirical study' unpublished paper, October 2017, 7: papers.ssrn.com/sol3/papers.cfm?abstract_id=3049203 accessed, 22 October

[97] HC Comm D 11 July 2006, Cols 591-593.

not to be the subject of mere lip-service but subject to careful consideration that might even involve communicating with the stakeholders or seeking advice on the impact on the stakeholders.

Where directors find that there is conflict between factors concerning a course of action, the paper considered whether directors need to engage in a balancing exercise to determine what should be done. The paper noted that in many cases balancing is not an easy task, but it is perhaps easier in the context of s 172(1) as the provision requires anything that is done should aim to promote the success of the company for the benefit of the members. The real difficulty would be where directors could adopt various approaches all of which would promote the success of the company, but they would affect the factors in different ways. In such a situation it is highly likely that the various approaches could promote the success of the company to different degrees and the directors should adopt that approach that would provide the best for the company.

If directors fail to give sufficient or any regard for a particular factor in s 172(1) or they place too much emphasis on one to the exclusion of another, it would seem that they could only be held liable under the sub-section if a claimant can establish that they did not act in good faith and did not believe that it would promote the success of the company. While a judge could always disbelieve a director who asserts he or she acted in good faith, it is unlikely that there will be many formal legal challenges to the actions of directors as far as having regard to the factors are concerned. Nevertheless, if directors do not have regard to the factors they might find themselves subject to discipline by the board or the respondent to derivative proceedings instituted by shareholders. Furthermore they might find that some stakeholder groups will exert pressure to have a director disciplined or some stakeholders may choose to refrain from have any links with the company in the future.