New English Business Law 2006

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INTRODUCTION

The Companies Act 2006 ***British companies' law, Act 2006*** (the "Act") is considered the large project ever that has been lodged to the British Parliament. The aims behind this are to give a proactive potential business arena contemplated to promote, simultaneously, the modern development in the companies' concepts and affairs.

The British Parliament had a prolonged debate on the sections comprised at the Bill, eventually to get the members' majority approval. There were tremendous thoughts that had the opportunities to produce legal literatures by scholars, ex-officials, members and Lords, in the fact that, the yet Act contains 1300 sections and 16 schedules.

In my research, I will focus on the General Duties of Directors stipulated in Part (10) Chapter (2) of the Act, in particular sections 171 – 177 to asses and evaluate, the passing of the Act has or has not fulfilled the stated aims of the legislation.

These elements shall be investigated in the legal environment whether producing a success, in the promotion of businesses or not, in the more sustainable in the long term, along the wider group of issues, as the matter may requires.

The Directors' Duties have significance role in the new Act due to the shining fact that, they would have the secret keys in the company's affair in terms of its promotion or liquidation. The British legislators in this respect have imposed radical general duties to be applied compulsory by directors and left the unstipulated issues to be decided by common /equitable principles in the interpretation of each case essence. Having said this, the Act in this regards, has not set aside the common law rules

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and equitable principles in its jurisprudence. On the contrary has enhanced the practice of the hybrid legal culture.

The new chapter of Director's Duties stipulated in the Act has given a robust mean of corporate governance principles, particular in the contemporaneous time, where we have seen the melt - down of huge companies that had ignored these principles eventually reached the disastrous results.

This bad corporate theatre, for sure, had been done by the **Opportunist Directors** who have nothing to believe other than private benefits far than owning the sincerity to their own companies in particular, and the community as general.

For these facts, definitely the Act has developed new era in companies' law by establishing the right track for businesses to perform better in lasting for long term of business.

The Act in sections 171 to 177 has established **7 general duties for the directors** to abide with to run the day to day business. All these duties are fiduciary duties, however, it happens sometimes the court may take a relaxed means in the concept. In the case law of ***MURAD v Al - SARAJ. Murad v Al Saraj [2005] All ER (D) 503 (JUL), CA paras 82 - 3.***

The court had differentiated the essence of the claim i.e. tort and breach of fiduciary duty by a suggesting if the claimant would had given the information withheld from the respondent. So, even in the existence of fiduciary due, the court nevertheless could apply the principle of common law and equitable principles, as the proper remedy.

These above duties do owe to the company and not to the shareholders individually or collectively nor the company's creditors. In the case of ***MULTINATIONAL GAS and PETROCHEMICAL CO. v MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LTD***. the court stated that directors owe duty to the company and not to creditors, individually or collectively.

- **Section 171** has stipulated that, a director must act as per the company's constitution and practice power for the purpose for which they are conferred. As per the constitution of the company, the shareholders have the right to remove the directors via selling their shares to new buyers e.g. ***HOWARD SMITH LTD V AMPOL PETROLEUM LTD's*** case.

This shows that, with all power that directors are enjoying, nevertheless, have to abide by the constitution of the company in the fact that, shareholders are the owners of the company and they should do their utmost endeavor to promote the business in profitable manner.

In conclusion, for any good business to perform better, if the law is available to protect both shareholders and directors, even stakeholders, then that shall enhance the investors to put their feet in such lawful area. This has been emphasized by the Act.

- **Section 172** of the Act, has stipulated that, a director must act in bona fide in what he considers to be in the interest of the company. This brings cultural changes. *H.H. Margaret Hodge has described section 172 as a radical departure from the previous law in which catch a cultural change* ***H.H Margaret Hodge, DTI, CA 2006, duties of company directors, ministerial statements (June 2007) p2,*** the mixture of culture always provides the best. If the Act acts in radical departure as said by Margaret, then this would be a good environment for profitable business. This section dealing most properly with stakeholders who also should practice their duties in good faith.
- **Section 173** of the Act, directors should deal in their duties with independent judgment. Courts prior to the issuance of the Act have dealt with directors in accordance with section 214 (4) as a statement of general norms of care and skill to apply on directors. H.H Margaret has stated in her speech that:

Again, this is not about requiring companies to list their suppliers or produce miles and miles of paperwork. This is about the directors using their judgement to decide what is relevant in the supply chain for them to report on. As section 417 says, a quoted company must include information in its Business Review "to the extent necessary for an

understanding of the development, performance or position of the company's business".

H.H Margaret is analyzing the better and quick understanding to what is meant by making the judgement. It is about their decision in terms of supply chain to report to. The matter does not need a prolonged process of bulk of papers and pens. She meant to say, the Act is far from the ordinary process that fostering the malpractice of bureaucracy.

This is absolutely the new world of technology, speed and electronic communication. Thus the notification from x- Minister has the proper weight. However, most of businessmen would like to see this factually far from theories and brochures. Would anticipate then the speech shall be translated to the better interests of investment in reality.

- **Section 174** of the Act, duty of director to conduct care, skill and diligence. The Act has emphasized these talents on a director to conduct his duty in good attitude to meet the challenges that he may face during his normal office. The Act by this condition has also established the proper personal character acquired by a director in order to fulfill the aims purported at the Act.
- **Section 175** of the Act, duty of a director to avoid conflict of interest. The case of ***ABERDEEN RAILWAYS CO. V BLAIKIE BROS,*** concerns the fiduciary duty and in particular not to involve in private dealings without the board knowledge. The case has laid the principle that, if a director is interesting in dealing he should inform the board. If not the contract shall be voidable to the company's will. The duty of a director is to avoid conflict of interest.
- **Section 176** of the Act, duty of a director not to accept benefits from third parties. The section has identified third parties as a person other than the company, associate, corporate. The benefits are not regarded if the third party acting as a director or otherwise.

  Section 177 of the Act, duty of a director to declare interest in proposed transaction or arrangement, the director has a duty to disclose his intention to enter into a given transaction and also has the burden to prove that he had disclosed the same to the board. Lord Goldsmith has stated at the

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Grant committee ***Lord Goldsmith, lord's grand committee, 9 February 2006. Column 334***, that:

"[This] clause is deliberately intended to apply only to proposed transaction if a company is told that a director has an interest in a proposed transaction, it can decide whether to enter into the transaction, on what terms and with what safeguards.

[As for] "a director is treated as being aware of matters he ought reasonably to be aware". I believe that the test is objective – that is, one judge objectively whether this is a matter of which the director ought to be aware reasonably".

This is a direct surety for shareholders to make sure that directors are in the focus of any transactions that seem to be of dubious nature. Lord Goldsmith has assured the objectivity of the test of whether a director ought to be aware reasonably or not for the remedy of the law case.

ENLIGHTEN SHAREHOLDER VALUE

The creation of concepts like the "enlighten shareholder value" has established the real essence and perfect definition for of an ideal director who shall take care of all general duties stipulated in the Act. *H.H Margaret* has stated that: *the "the enlighten shareholder " is enshrined in the Act and recognize that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders.* ***H.H Margaret Hodge, DTI, CA 2006, duties of company directors, ministerial statements (June 2007) p2***

I do absolutely agree with this. This creating is similar to the common law rules. Whenever most of the community would have known this concept, it shall develop hence to reach the more ranked abided rule in the best interest of the aims intended for the legislation.

Also the Act has provided the remarkable gesture in the protection of the minor directors by establishing the "derivative claim" to give them the

right to sue on behalf of the company for any infringement that may jeopardize the overall interest of the company.

The Act might have been the developed legitimate fetus of the parent i.e. the Insolvency Act 1986 which developed itself by the Enterprise Act 2002.

William v Natural Life Health Foods Ltd [1] the Judicial precedent related to the liability of director in tort and company laws. The Plaintiffs claim loss that occurs as a result of negligent advice rendered to them by the respondent company. The precedent based on a major question whether a director of a Franchisor company is responsible personally to the Franchisee for the loss. It also clarifies that, once a person is acting as the company will not be responsible in tort unless by the personal liability set up under the principle of Hedley Byre[2].

The Hadley Byre principle relates to negligence misstatement. The major legal question in this case is based on the "sufficient care" in providing advice however to evade the negligence liability. The Hadley Byre principle is based on "special relationship" ought to be established between the parties. Misstatement in Hadley may therefore amount to the tort of deceit.

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LIFTING THE VEIL

lifting the veil is a company that loses its liability protections, and this could apply to Corporations or LLCS. An LLC or Corporation entails a **legal entity that's separate from its owners**. This means the owners cannot be held liable for any business debts that a company incurs. However, there are cases where the courts may get such protection if a business owner commits some type of **malfeasance.**

For example, if an owners mix personal and business assets, a Judge may pierce the corporate veil by holding owners accountable for business obligations or debts.

[1] William v Natural Life Health Food Ltd[1998] 2 ALL ER 577 [1998] 11 WLR 830 (House of Lords)
[2] Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465

There are other cases where the courts may pierce the corporate veil. Thus, a full compliance with the law should have been known. Judges may also remove liability protection in cases where the distinction between the shareholders and business becomes **blurred.**

بهذا يتم رفع الحجاب ، وبالتالى سوف تفقد الشركة الحماية القانونية بحكم مسئوليتها تجاه حاملى الأسهم ، ويمكن أن ينطبق هذا على الشركات أو الشركات ذات المسؤولية المحدودة . ولكن تستلزم الشركة ذات المسؤولية المحدودة ، كيانًا قانونيًا منفصلًا عن مالكيها. هذا يعني أنه لا يمكن تحميل المالكين المسؤولية عن أي ديون تجارية تتكبدها الشركة. ، ومع ذلك هناك حالات قد تتغلب فيها المحاكم على هذه الحماية إذا ارتكب صاحب العمل نوعًا من المخالفات.

على سبيل المثال ، إذا قام المالكون بخلط الأصول الشخصية والتجارية ، فقد يرفع القاضي حجاب الشركة من خلال مساءلة المالكين عن التزامات العمل أو الديون .

هناك حالات أخرى قد ترفع فيها المحاكم حجاب الشركة ، لذا يجب أن يعرف الشركاء قواعد الولاية لضمان الأمتثال الكامل للقانون ، وبالتالى يجوز للقضاة إزالة حماية المسئولية في الحالات التي يصبح فيها التمييز بين المساهمين والأعمال غير واضح ! وهذا ينطبق فى معظم الشركات فى السودان بأنواعها المختلفة ! لهذا وبموجب هذا التحليل القانونى ، يكون التعريف لمعظم الشركات فى السودان وفقاً لرفع الحجاب ، هو الإحتيال والمخالفات التى تنم عن إخفاء الأسماء الحقيقة للشركاء بغرض الإحتيال وعدم المساءلة القانونية فى حالة إتهامهم فى القضايا المختلفة .

هنالك بعض السوابق القضائية التى تم إرساءها بواسطة المحاكم الإنجليزية نذكر بعضها على سبيل المثال كما يلي :

Wallersteiner Vs. Moir

وفيها وصف اللورد ديبيننق المدعى عليه كواجهة فقط ، و مجرد مخلوق للدخول فى عالم الشركات وإستخدامها كدمى (جمع دمية) .

Akin wunmjo. Alade Vs. Alic (Nig) LTD

وفيها لفتت المحكمة إلى وجوب رفع الحجاب في حالة وجود السلوك الإحتيالي المتهور .

Adedipe Vs. Frameinendur

قضت المحكمة أنه في حالة فشل الشركة في تطبيق الأموال للغرض المستلم ، فإن المديرين سيكونون مسؤولين بشكل شخصي وفقًا لقواعد (CAMA) .

ESSENCE OF CORPORATE VEIL

Lifting the Corporate Veil essentially means that a courts have disregarded a corporate personality and looks straight to an owner or

owners for accountability. **If fraud** or any other criminal activity occurs, owners cannot invoke Limited Liability protections. However, members or shareholders of a business may still not be held accountable for the acts of a business, even if that person **holds the entire portion of a company's capital**. . وهذا وفقاً لما ذكر د. عاطف عن الشركات التى يتملكها شخص واحد

When running a business, all assets and money belonging to the company qualify as business assets that cannot be seized by creditors. **The notion of separating a legal business from the shareholders is called a veil of incorporation**.

أساس حجاب الشركات

إن رفع حجاب الشركة يعني في الأساس أن المحاكم قد تجاهلت الشخصية الاعتبارية وتتطلع مباشرة إلى المالك أو المالكين للمساءلة. في حالة **حدوث احتيال أو أي نشاط إجرامي آخر** ، لا يمكن للمالكين التذرع بحماية المسؤولية المحدودة ، رغم ذلك ، لا يزال الأعضاء أو المساهمون في الشركة غير مسؤولين عن أعمال الشركة ، حتى لو كان هذا الشخص يمتلك الجزء الكامل من رأس مال الشركة.**(شركات الشخص الواحد)** .

عند إدارة الأعمال التجارية ، فإن جميع الأصول والأموال العائدة للشركة مؤهلة كأصول تجارية لا يمكن الاستيلاء عليها من قبل الدائنين ، حيث يطلق على فكرة فصل العمل القانوني عن المساهمين حجاب التأسيس.

إذا حتى يتسنى عدم رفع الحجاب ، يجب العمل على منع السلوك غير اللائق أو الاحتيال ، وتحديد طبيعة العمل إذا تبين أن العمل مزيف ، وعلى جميع الشركات عدم تجنب الالتزامات القانونية في القضايا شبه الجنائية، والعمل بمثابة وصي أو وكيل للمساهمين حماية لحقوقهم ، وفى حالة المخالفة ، يتعتبر الأمر إحتيالاً بمعنى الكلمة ودون نقاش .

The personal liability of a director is significant where a company is one man -company or insolvent. The liability of the director for tort committed by the company hence contradicts the principle of Salomon v Salomon & Co. Ltd[3], although, the general rule assures that: no liability should automatically be laid to the director in tort.

However, courts are concern about an individual not to escape liability by sheltering behind the corporate veil. For this reason, a director should

[3] Salomon v. Salomon [1897] AC 22

always be responsible for his personal act that causes tort. However, it would be difficult to determine a liability of tort in this situation as director shall always claims acting on behalf of the company.[4]

The corporate liability in contract emphasizes that: the parties must ensure: 1/ the commitments are made within the capacity of the company and the authority of an authorized senior level.2/ any due formalities of execution have been noted.[5]

When specify a corporate liability in tort towards a company as an artificial legal entity, however, tort occurs by a company in this respect shall be considered as committed by human agents. Hence, an agent or an employee shall be liable personally for tort, while a company shall be vicariously liable and they are both joint tortfeasors. Therefore, in this basis, a director who commits a wrongful act shall be personally liable as an agent acting within his authority[6]. Such authority can be actual or ostensible, but both can be express or implied.

The advantages, one can have the notion that, this case has identified the various liabilities to be taken into consideration when assuming the liability on tort occurred by senior managers of a legal entity. This shall lead to the best interest of trade consistency, shareholders and the stakeholder as well.

The disadvantage, might somewhat enhance the power enjoyed be directors, subsequently might have paved a way for the entire power of directors.

Customers always would like to deal with someone who has the sole power to provide discount and other related incentives. Therefore, I believe the decision by the HoLs would enhance such customers for better way of purchasing and marketing wise.

[4] B. Hannigan, *Company Law,* 2nd edn., Oxford University Press, 2009, at 74
[5] B. Hannigan, *Company Law,* 2nd edn., Oxford University Press, 2009, at 73
[6] B. Hannigan, *Company Law,* 2nd edn., Oxford University Press, 2009, at 73-74

The analogy by Lord Denning, describes a company as a human body, is the best way to establish a practical concept to consider tort, contract and company liability over a juristic entity. The directors and senior level of a company must endeavor their best level to insure the prosperity and the going concern of a company and must be held accountable whenever an organ does causes damage to the whole structure of an entity/body.

LEVEL OF AUTHORITY

The case of ***Tesco supermarkets Ltd v Nattrass***[7] defines the level of authority and responsibility pertains to the company's senior management and junior management. The company has advertised discount in price by way of (flash packs). Later on, the company marked a discount price on a Radiant washing powder by the same way. Mr. Coane on his shopping, desired to purchase an item a per the company's advertisement. He paid more than the lower price on a pack marked a higher price, as he has been told the lower price pack is out of stock. Tesco was prosecuted under the Trade Description Act 1968 for the failure of one of its shop manager i.e. Mr. clement. In the first instance court, the company had been found as exercised a reasonable care in advertising system o its items.

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On the appeal the company pleaded that, Mr. Coane is not considered as the direct mind and will of the company and the act was due to some other person. The HoLs decided that, the manager could not be treated as the embodiment of the Defendant Company.

This case is a true expression of the differences laid out in the identification of agency and authority as the directing mind and will of the company in terms of determine the responsibility and default acts that lead to a tortuous liability or criminal charges. The case also weighed and measured the liability structure of a company as a separate entity in analogy of a natural person in specifying the liabilities whether directed to a company or one of its employees in their various employment categories.

[7] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (House of Lords)

Learned Lord Reid in this case, has approached the concept adopted by Lord Denning i.e." directing mind and will of the company" in determining the difference and absolute identification of the directing mind as those who have the real managerial power to control the business of a company and not those subordinates who receive instruction by such senior managers e.g. directors, managing directors and top level superior of a company.

Lord Reid has also indicated the parity to top level staff for those who have been delegated the power to represent and act as the company. In his reasoning, Lord Reid has given the indication that, a company as a separate legal entity; nevertheless, should also endeavor to separate its authority and agency in identification the legal capacity of persons whether juristic or natural in the line of tortious and criminal liabilities. In other words, junior staffs are representing agency means while seniors are representing the authority or directing mind. The tortious liability in this concept, if applied to Tesco case, shall lead to uphold the findings reached by the House of Lords and also give rise to the natural persons to be responsible as being the company, unlike other staffs who denied it.

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The Learned Lord Diplock, has approached in different mechanism in his question on who are the natural persons as to be treated as being the company and not merely the agent for exercising diligence?

Lord Diplock has the notion that, in criminal liability the company cannot be held responsible because the agent state of mind should not be ascribed to the company as per the criminal law principle that recognizes a person as responsible for his own crime only! And that the principle of negligence and duty of care should be adopted, hence, a person can escape a liability by proving otherwise.

Lord Diplock, had also the notion that, a natural person in line of his delegated authority should relates to the company's constitution/Article of Association. He described directors' authority as to be determined in the constitution and general meeting hence not required by the Act.

Lord Diplock had a question about natural person as to be treated as a company, according to his course of duty as determined in the Article of Association by an action taken by directors or general meeting in terms of the delegation of powers of the company.

Lord Ried in the agency and authority principles in Tesco had adopted the notion of directed mind and will of the company by identify a natural person in the course of his business. This liability shall be determined as a guide for the responsibility in tort or criminal incidents, once a due care or diligence has been violated.

Lord Diplock had analyzed these liabilities as determined in the Article of Association of the company in line of authorities that have been rendered to a given natural person in the company business. This approach shall lay it shadows over the identification of natural person in the areas of agency and the directing mind and will of the company, however, once decided by the company in its formal documents, minutes and regulatory manual

MAJOR ORGANS

A company has two major organs i.e. the shareholders and directors. The director's organ is entrusted for the high executive management of the company, while the shareholder's organ embodied the ownership of the company. The general meeting is comprised these two organs to discuss issues relate to the overall business of the company. In the recent days these two organs have faced the uprising of the new technology embodied in cyber realm the matter that insisted to reveal the best solution to adapt this new technology to the best interest of both shareholders and directors.

The main purpose of the general meeting is to insure the well "**Going On Concern**" of the company by scrutinizing the financial internal reports and director's reports. Also the general meeting has an authority within its agenda to appoint the external auditors and to fix their remuneration. As well as an effective board, good corporate governance relies on the effective shareholders control of the board.[8] The main forum for

[8] B. Hannigan Company Law (2nd edn OUP, Oxford 2009) at 129

shareholders is the general meeting[9]. In recent years it has been emphasized that, the general meeting does acts as counterbalance to the all-powerful board and the attention is now lie on the good implementation of corporate governance. [10]

The board of the company aims for the good links with shareholders via the chief executive officer and internal auditor. It has also entrusted for the senior management of the company, taking a proper objectively decision for the interest of the company under the guidance of an effective chairman[11]. The board contains for a balance of independent of non-executive and executive director in order to insure the good corporate governance.[12]

The electronic aids and cyber meeting technique have got a lot of concern nowadays in the telecommunication revolution. Sometimes e.g. general meeting fails to convene as a result of bad notices or infringes to the specific period stipulated in a relevant company laws.

The new method of cyber space can enhance a proper way to success convene of general meeting as well as the board meeting in lieu for the actual presence of a shareholder/director to virtually attend a meeting.

However, despite the well accepted idea, so far, for cyber idea, there is a professional study clarifies that:

The electronic brainstorming system (EBS) which a group support system (GSS) tool explores the problem of information overload within the context of an idea-organization task in a face-to-face electronic meeting [13].

[9] Ibid
[10] Ibid
[11] Ibid at 121
[12] Ibid
[13] Information overload: addressing the productivity paradox in face-to-face electronic meetings **http://dl.acm.org/citation.cfm?id=1195844, accessed** 20/8/2011

Although of the notion for a success of a cyber space effect, it seems there might appear Legal challenges rest in the evidence law area. Generally, laws have parallel track consist of concrete evidence requires to prove a given fact. It might be difficult to lay evidence before a given fact that a shareholder/director has attended a meeting.

I believe, cyber space has a significant role in the coming year for the enactment of laws via secured routes via internet amongst legislatures, provided that some required legal thoughts might be heavily demanded by scholars worldwide in order to contribute in the quality and development of laws. This tend shall make easy the produce of timely regulation/laws in a specific period of time subsequently evading the time lost.

Cyber technology is the best potential solution that would enhance the electronic communication in general and the shareholders and directors meeting in specific.

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We have observed evidently, some advance companies have utilized the service of high technology in cyber world, thus managed the path for a robust solution in inviting a shareholders/directors meeting.

COMPANIES CORPORATE GOVERNANCE

Back to four hundred years, company law has endeavored to solve the core problem of Corporate Governance i.e. the separation of ownership and control[14].

The example of ***V.O.C i.e. Verenigde Oostindische Compagnie,*** has given the first step for supervisory structure. The V.O.C had an internal system to what is known today as one-tier board model[15].

In recent years corporate governance has changed to reflect the separation and good balancing of inside and outside control system, especially in the

[14] K.J. Hopt and P.C. Leyens 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy'(2004) *ECGI - Law Working Paper No. 18/2004*
[15] Ibid at 2

area of external auditing[16]. The Enron case considered one of the major factors that have revealed this fact, consequently, for a better development of corporate governance in general and for various models of boards apply in Europe in specific, however in various methods.

There are various models of boards structure have been adopted in certain countries in Europe i.e. UK, France, Germany and Italy, in the area of corporate governance structure.

1/ Germany:

Has adopted the two tier model by law, in which companies are obligated to state their compliance with the annual report. The German supervisory board i.e. the one tier, is responsible for the control of management in its compliance with the law, articles of association, business strategy and for bringing legal actions against the management board i.e. the other tier, in the breach of duty of care. However, the supervisory board has faced with a difficult question about its independence, objectivity and conflicts of interest issues.

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The internal control and auditing of the German model has witnessed the interaction between the supervisory board and the external auditing as a central point of corporate governance issues reflecting the fact that, the external auditing is an instrument of management board.

However, Corporate governance in the German model, in a quest to tackle this question, has adopted the tendency that, external auditors should deliver a statement of independence for a proper election at the general meeting, and also to strengthen the role of external auditors as a '' partner'' to the shareholders.

The German model has indicated that, the supervisory board has superior power over the other tier i.e. the management. The German model has also given the notion that, shareholders are delegating their power to the supervisory board.

[16] ibid

The key strengths points on this model enhance a high percentage rather than the weaknesses points. The two tier method, embodied in the supervisory board, can hold the control of the implementation of good corporate governance inside the company. The board of directors hence shall adhere to the modern principles of corporate governance.

2/ United Kingdom:

Has adopted the one tier model which thought to be more flexible and lenient than the German model.

The UK one tier model entrusts both management and control to the hands of the board of directors who vested a universal power[17].

According to the Combined Code, formal matters should be reserved to the board decision in parity with the German model. A separate line has to be pointed between the executive and non-executive directors despite the fact that, all have the same powers. The non-executive directors in UK model can take an approach in management unlike the German model.

The UK model in the area of corporate governance, has adopted the danger of shareholder resolution rather that enforcing of managerial care by directors.

The Combined Code has confirmed that, both directors i.e. executive and non-executive, in the composition of board are likely to affect the director's decision.

The internal control and auditing in the UK model, has given the authority to the audit committee to supervise the result of audit, independency, objectivity and cost effectiveness.

The case of Caparo [18] has become the major point for auditor liability in UK model in the area of tort and negligent misrepresentation.

[17] Ibid at 17

[18] Caparo plc v Dickman [1990] 2 AC 605

The UK model has given more power to the board of directors in management and control. Shareholders are likely to surrender to the decision adopted by board of directors.

The weaknesses point in UK model might rise due to the influence of the board of directors. The Enron case has proven the bad influence of such board, if rendered more authority compared with the management and of course within the normal absence power of shareholder's organ.

3/ France:

Has adopted a third board model in producing a choice between the one tier model as on top, and the two tier model, relatively describes to the German supervisory model.

The recent development in France model is the issuance of the (principle of corporate governance) code, in the same manner conducted in UK and in Germany, especially in business that requires a prior approval of the board.

The model has lifted the percentage of non-executive directors from one third to half of the board and also adopted the concept of dual auditor-ship.

The France model has increased the power of non-executive directors and the auditors as well. Auditors have parallel power as seems to be described to directors, likely shareholders have venerable role in management.

The strengths points on corporate governance principles shall overwhelm the weaknesses points in this model, especially after the adoption of dual auditor-ship concept.

4/ Italy:

The Italian model has introduced two new board model options.

There are some differences compared with the German supervisory board that, in Italy model an employee cannot hold a position as a member of

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the *collegio sindacale*. Also the rules on independency in the Italian model are similar to the Combined Code in UK and French code that provide samples of non-independency.

Italy has issued a Decree that enable companies to choose among two new different boards model the proper method of internal control. The first option described as related to the two tier model following the German structure. The second described as related to one tier structure that follows the UK model i.e. contains at least one third of independent directors.

The Italian model seems to render more power to the shareholders, depends on the elected board model option.

There are likely weaknesses points more than strengths ones in the area of corporate governance principles. Shareholders could elect a method of management control, depends to their solely desirous to hold an authority over the management and the board of directors simultaneously.

Eventually, there should be a fair distribution of powers amongst the two organs of a company in order to grasp the true concept of modern principles in corporate governance method.

The separation of power is a must for a better quest to apply the transparency, accountability and fairness to all level of company structure, regardless the various adopted methods of board models.

DIRECTOR'S GENERAL DUTIES

The most important changes occurred to the CA is the inclusion for the first time of a statutory statement of directors' general duties. The statutory statement (the "SS') faced by positive and negative controversial debates. However the recommendation adopted by the Company Law Review (the "CLR") has determined the significance of the legislation of the statutory statement, therefore, the CLR does not intend to substitute the current corresponding equitable and common law rules by the SS[19], therefore, has recommended a full codification of directors' duties[20].

[19] B. Hannigan, Company Law, 2nd edn., Oxford University Press, 2009, at 171
[20] Company law review, final report vol. 1 (2001) para. 3.9-3.10

Advantages:

The LCR has laid down the important of the legislation of the SS and advantages in three reasons: 1/the clarity and accessibility.2/ enable the law to update the modern business practice to tackle especially the issue of conflict of interest, 3/ address what the CLR name it as (scope issue)[21] i.e. interest for running a company.

Also within the scope of the de jure and de facto directors, the SS have paved a way for good understanding of the shadow director stipulated in S 170 (5) by preventing an easy avoidance of fiduciary duties, which in common law, is rather unclear.

Disadvantages:

The SS has provided the general duties of directors, i.e. 1/ duty to act within powers 2/promote the success of the company 3/exercise independent judgment / exercise reasonable care, skill and diligence.

Some of these general duties might overlap one another and constitute a disadvantage area of the SS. For instance, a director may ask to promote the success of the company, simultaneously contradicts with his independent judgment.

Also the SS is not exhaustive and also does not set up the remedies of breach of trust and the uncertain relationship between the SS and the pre-existing law on directors' duties, an issue addressed in CA 2006, S 170 (3) (4)[22].

The advantages of SS, shall cast its shadow over a clear path of the litigation process. The parties henceforth shall follow the SS Sections to determine/identify their rights and obligations in the companies' realm.

The disadvantages of SS, shall rely on the legal diligence produce by English court to identify the obscure points do exist in the SS.

[21] Company law review, final report vol. 1 (2001) para. 3.7

[22] B. Hannigan, Company Law, 2nd edn., Oxford University Press, 2009, at 173-174

The law now has clarified certain points which have had prior missed a robust interpretation in the corresponding equitable and common law rules. For instance, the SS has marked a radical departure in explaining the connection between the good for the company and what is good for society in common[23].

Also has clarified the position of the shadow directors in determining that, the law is still developing the position by letting behind the controversial area previously held on the corresponding equitable and common rules, and therefore, left these area ,as now, to the courts to decide[24].

More questions might lie on the response to the true values/means of SS by directors. However, stringent/demanding question might require for codes of conduct/ethics to be signed/adhered by directors for the well practice attitude in their duties in particular and the society in general.

Section 260 (4) of CA 2006 [1] has assured that, *it is immaterial whether the cause of action arose before or after……..became a member of the company* . In S 148 (1) 1 in German company law has stipulated a rigid proviso not to hold shares before the claimed breach of duty or damages. It is not logic, to lay this condition as the member need to prove that he had no knowledge of the alleged breach; this constitutes further burden of proof lay on the member without justifiable cause.

Also the German company has provided another proviso that, a member should not hold less than 1% of share capital in order to bring a claim against a director. This is also another track vary the concept of derivative action. A legitimate question shall arise, what is the status if a shareholder holds less than 1% of share capital has discover an omission or negligence done by a director of the company? Should then such member to keep

[23] Duties of company directors - Ministerial statement - Margaret Hodge Minster of State for Industry and the region to be found in< http://www.berr.gov.uk/files/file40139.pdf> at 1

[24] Duties of company directors - Ministerial statement- Lord Goldsmith, Lords Grand Committee, 9 May 2006, column 828 - 14 to be found in < http://www.berr.gov.uk/files/file40139.pdf> at 14

silence!!! S 148 91) 2 of German company law, has the same logic stated at CA 2006.

In S 148 (1) 3 of German company law has stipulated uncertain facts in order to bring an action that need more concrete evidences, subsequently lay more burden on shareholder to prove the alleged claim. Moreover, the derivative action in CA 2006 needs certainly over a claimed defaulted fact, thinner as a claimant would need.

Section 148 (1) 4 of German company act, has given the court the power to assess if a claim raised by a member would be of the best interest of the company. This might reject a claim if the court e.g. wrongly considers a claim as malicious, hence caused injustice inadvertently.

I do agree that the German company law in this comparison i.e. derivative action, yet to be considered so.

Directors might need to rely on the solid **Principles of Humanity, Ethics and Professionalism**, in their general duties; to lessen the unjust gaps in the hierarchy of the company, if any.

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The nature and content of general duties shall be crystal clear, if directors could have known the absolute values of justice, honesty and creditability.

I'm on the notion that, the replacement of CA 1985 by the recent CA 2006 in Section 172 does made differences on directors' duties.
The term "duty to promote the success of the company" has made it clear that, '' a success" is more appropriate than the world "interests", as **SUCCESS** has different objective to achieve the contemplated target that each company might hope for. Success in commercial company has the meaning of long- term increase of value; while in charities companies e.g. means to attain its objective ***Lord Goldsmith, Lords Grand Committee, 6 February 2006, column 255***

The CA 2006 in Section 172 has emphasized that, *a director must act in the way he considers, in good faith, would be most likely……. benefit of its members as a whole*. Here we may see the difference

illustrates, not e.g. to benefit the majority of shareholders but the whole stakeholders. In this respect, the CA 2006 has adopted the principle of "***Enlightened shareholder value"*** to reflect this concept.
To this extent, these differences on director's duties would therefore, resolve any confusion for the true fact that, the interests of the company are to prevent any inclination in the identification of the same. ***Lord Goldsmith, Lords Grand Committee, 6 February 2006, column 255***

However, a director's independent judgment means the final decision must be his responsibility, but this does not strict him to take advice elsewhere in the first place.
Sometime, it happens a director may fail the external advice that might lead him to lose the balance of independent judgment, subsequently convert it to the failure of the whole company in direct result to his own bad discretion. ***Lord Goldsmith, Lords Grand Committee, 6 February 2006, column 282***

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For instance, a managing director who empowered by the board of directors to manage a company, might ignore a significant internal/external legal advice for the better success to promote his company, eventually, causes huge loses that contradicts his independent judgment.

It is advisable to use the following data that comprised the following areas:

- The extent of the remaining influence of common law vis-a-vis statutory statement enacted at the new Company Act 2006.
- The controversial debate over the statutory statement i.e. pros and cons.
- The need to use references of other laws/doctrine/custom, hence such shall be in the scope.
- Till my further study for finalizing the Module, there might some issues arise I'm not aware about then shall be included in the scope.

with regards the material I believe no limit can stop researches, however, the main resources shall be as <u>follows:</u>

The primary resources:

- The UK Company Act 2006, especially sections 170 - 174.
- Case law.
- The text book i.e. Brenda Hannigan, company law, 2th edn., oxford university press,2009.

The secondary recourses:

- The legal Articles/book and journals as secondary material for the proposed case.
- The Minister's statement on Companies Act: intention, interpretation and implementation at http://www.berr.gov.uk/aboutus/ministerialteam/Speeches/page38106.html).
- Information on the Companies Office website at (http://www.companieshouse.gov.uk/) on the Statement 'Companies Act 2006—a summary of what it means for private companies', at http://www.berr.gov.uk/files/file42262.pdf).
- Research with regard stakeholders, at http://www.berr.gov.uk/files/file40139.pdf). *Chivers, D. (2007) 'The Companies Act 2006: Directors' Duties Guidance', The Corporate Responsibility (CORE) Coalition (available at http://corporate-responsibility.org/wp/wp-content/uploads/2009/09/directors_guidance_final.pdf).*

3/ The scope supported by the materials all together that shall trigger the ambiguity should arise in the study of Company Act 2006. Therefore, to address the following will be fruitful:

- Discuss the issues of the common law accompanied by the new Company Act in justification/ implement; to gain a proposed guideline to illustrate the ambiguities do exist that pertain to the director's duties in the Company Act.
- Endeavor and establish a clear direction for the idea of enlightened shareholder value in connection with a proposed new definition of the shareholder interests.

- Endeavour a comparison research in the subject matter with US similar concepts in company law.

DUTY TO PROMOTE THE SUCCESS OF A COMPANY

China has promulgated the first company law in 1993. The purpose was basically referred to control the poor company compared by the strong administrative influence of the government, ***R. Lee 'Fiduciary Duty without Equity: Fiduciary Duties of Directors under the Revised Company Law of the PRC' (2006) 47*****Virginia Journal of International Law *at 899.***

Though china has survived the Asian crisis in 1997, the need was insisted for more development in corporate law to attract the investors. Chine within the path to evolve its corporate arena has consequently jointed the World Trade Organization and finally enacted the new company law in January 2006.

The significant amendments to the old law were imposed at the revised law i.e. the directors' duties and a new concept of their fiduciary loyalty.

Nevertheless, the revised company law has not comprehensively applied the application of the fiduciary doctrine. Accordingly, this Article is an endeavor by the author R. Lee to explore the equitable concept in a civil law jurisdiction among its cons and pros in terms of fiduciary duties under the revised company law of the People Republic of China (PRC).

China, for the first time, has stepped a legal approach of fiduciary duties by imposing on directors a separate/independent obligation of loyalty. The directors' duties have become more obvious and clear compared with the old company law. Moreover, and for the first time, the revised company law has stipulated that, a director owes an obligation of loyalty to the company, nevertheless has failed to explain the nature of the obligation of loyalty.

The concept of fiduciary duties however remains partially uncovered. The authorities have imposed negative duties in order to prevent the incident

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of a conflict of interest or making secret profits. The revised law has only approved the directorial discretion as basis regulator to bar abuses.

The revised law has taken similar ways at in the CA 2006 in outlining the content of the fiduciary duties and the duty of loyalty. The different between the revised law and the CA 2006, might illustrates in the nature of the fiduciary duties and the lack of case law, in addition of the fact that, Chinese court actually do not interpret legislation or deciding the content of fiduciary duties of directors in addition to its rigidity practice in handling various case. Also the revised Law is silent on the duration of fiduciary duties supposed to be imposed on a director upon his resignation. The revised law has not identified the cases where a director shall be considered in breach of fiduciary duties.

The revised Law did not explain specifically the source of which these fiduciary duties relate to. The revised law e.g. did not identify the relationship between the company and its directors. The CA 2006 apparently has identified this relationship as one of agency which deems as a special nature of the fiduciary duty.

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This special nature has its impact over the overall concept worldwide in dealing with legal implication and complexities that might exist by individuals or companies in their/its endeavor to sue a defaulting directors those who have violated the Doctrine/Principle of fiduciary duties. This shall enhance and evolve a better hygienic environment for applying and involving the parallel principle of corporate governance in the robust structure fiduciary duties in particular and of company laws in general.

S. Lee advice for future development of company law in the PRC is that, to reinforcement of director’s duties together with the availability of further civil remedies along with the introduction of a concept of fiduciary loyalty are to be recommended. Lee also suggested that, the difficult of codification of the equitable fiduciary doctrine, thus there is a risk in specific rules set out. Also has suggested that, the differences between the common law and the civil law can be defeated subsequently equity ‘s contribution to fiduciary doctrine can be implemented. Lee also suggested

that, there are good opportunities for Chinese court to evolve the essence of fiduciary concepts. With all these factors Lee suggested the notion that, corporate governance shall promote in the legal and regulatory scope of China.

I do agree with most Lee's suggestions. However, in the area of the Chinese court to be more motivated to develop the content of fiduciary concept, I do not agree with this. As china still under different culture in which yet do not have the rooted experience in developing the concept of fiduciary duties. This task should yet be entrusted to common law courts who had owns the history of the developing concept of various aspect of Equity and Case Law.

In US I think the fiduciary duties of directors are rapidly developing to increase the general duties for directors.

Professor Bernard S. Black has indicated this in his article "the Principal Fiduciary Duties of Boards of Directors". ***Professor Bernard S. Black, The Principal Fiduciary Duties of Boards of Directors, available at*** < ***http://www.oecd.org/dataoecd/50/53/1872746.pdf>***

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He has suggested the increase of general duties to include two more duties. This is obviously indicating the fact that, the principle is rapidly spreading over considerable areas of common law, therefore, the possibility of codification is properly high.

There is some interrelationship nowadays start to exist in two culture of laws. One is the Anglo-American law, and the other is the civil law. This bridge might lead to a concept of some principles to unify the laws prevail in many different cultured eventually, unifies the laws that might be needful in the corporate area, especially in line of the significance increase of global trade and revolution of telecommunication.

China has been deemed in past to be one of the Communist camp and now is stepping humbly to capitalism camp. If the world has a common concept for mutual cooperation in commercial area, then it would be more

helpful to enter into common paths to unify the various doctrines into one international basket of laws.

A duty of loyalty has been cast for directors in the general duties according the **CA 2006. Salomon principle has recognized a company as one legal entity.**

In this sense, why should we track the directors' obligation in their 7 general duties, and lean a cheek out of the company itself. Why not to recognize a company to have a loyalty duty to its staff including its directors and vice versa?
l. Sealy and S. Worthington, have the notion that, some complexity may arise when a company makes a gift such as donation to charity or to a political party or enter a transaction not strictly gratuitous and has an altruistic character and, *fortiori*, the payment of bonuses, pensions may also have called into question as being unauthorized or unmerited!
L.Sealy, & s.Worthington, cases and materials in Company Law.8th edn.,Oxford University Press, 2002.at 146

The company, I believe, in such case has no loyalty to **SOME** of its directors. Perhaps, one could imagine this unique situation by speculating the complexity here to endeavor a path to establish a bilateral obligation should have then enacted or included to the CA 2006 to reflect this!

LAW COMMISSION

The Law Commission (the "LC") had a prolonged legal discussion with regards the possibility of a shareholder to pursue an action. The outcome of this discussion was the statutory derivative claim as stipulated in part 11 of the Act. The Law Commission's 1997 report 'Shareholder Remedies' (LC246), p. 2, available online at <http://www.justice.gov.uk/lawcommission/docs/lc246_Shareholder_Remedies.pdf>
Basically, the Common Law shareholder's remedies are dominated by the rule of Foss v Harbottle **Foss v Harbottle (1843) 2 Hare 461,** that comprises two elements: the proper plaintiff; where a transaction be made

on the company by a simple majority. While the rule on Foss v Harbottle is based on two major principles of company law i.e. the separate legal entity of the company and the principle of majority rule.

The LC, eventually recommended a statutory derivative claim for two reasons: 1/ consistency between England and Scotland 2/ the desirable to include the statutory for more code in relation to shareholder remedies

Upon the recommendation of the LC, the legislator adopted this recommendation and included the statutory derivative claim in part 11 of the Act.

In S 263 (3) the legislator has inserted a list of items that the court must take into account whether to give permission (or leave) ***263 (3) Companies Act 2006*** **that** is: (a) the member should act in good faith in seeking to continue the claim. It is natural to put a condition like this. A shareholder should act faithfully within the interrelation of the principle of common law i.e. a claimant must act bona fide.
The claimant must act in accordance with 172 i.e. duty to promote the success of the company, would attach to continuing it. If the court is satisfied that: a director acting within s172 would not seek to continue the claim or the omission has not been authorized or ratified by the company ***B. Hannigan, 'Company Law', (2009), second edition, Oxford University Press, at 18-30***

The authorization and ratification stipulated in s263 C/D need the court to consider the actual position within the individual company. However, sometimes an authorization or ratification may not stand prima facie in accordance with common law principles.
A company may decide not to pursue the claim, as oppose to ratification and authorization, if the company has not used its power not to pursue the claim, the court may do so to allow for that consideration. ***B. Hannigan, 'Company Law', (2009), second edition, Oxford University Press, at 18-47***

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Whether the act or omission in respect of the claim gives rise to a cause of action that the member could pursue by himself! I do agree with Hannigan in her sought. There might bring an interrelation between the private interest and common interest i.e. other shareholders, envisaged to stakeholders related to the company.

The court in s 263 (4) shall have particular regard to any evidence before the members who have no personal interest direct or indirect in the matter. Court may entail evidences that permissible to proof the claim, but how could a member with no direct interest being involved with matte? Court will definitely reject such evidence as irrelevant.

Capacity to sue is the most elements to bring action before the court. The company in its capacity as one separate legal entity as defined by Salomon principle and the analogy of Lord Denning, would accept the notion to uphold the rule held in Foss v Harbottle. The derivative claim would properly shatter the solid structure having been known as one legal entity.

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However, I think the Primary resources have lesser significance in annotating the resource; nevertheless, its importance is embodied in its nature of mandatory terms.

Directors duties, considers one of the main object that enhanced the British Legislator to step forwards for the enactment of CA 2006.

I do believe the Minister's statement on Act CA 2006, has established the core point to understand the major aim of the director’s duties comprised in s 170 and 174 of the legislation in clear ideas and the formal purpose of proceed the Bill to Parliament, compared with resources, that let no choice other than depends a lot on this resource in my final project.

The primary resource:

- The CA 2006: I will concentrate on s 170 and s 174 on directors' duties and any relevant sections that might relate to the duties in terms of the obligation and rights in practicing their duties e.g. the derivative

claims. Also I will have a turn on the concept of the enlightened shareholder value.

- Case law, I have got the impression that, Case law is the important element in this study. The CA2007 has relied in most terms to this resource in order to establish the base for the development of the Act. Taking into consideration that, the Common law and principle equity remains in the loop with no trend to eliminate the same. The case that I intend to use in my final project are: ***MURAD V AL SARAJ***: the principle retrieved in this case that, the court can take from legislation stance to adopt more easy approach to devising the suitable remedy. This will help a better understanding in acknowledging the proper moves that director should stand and the role of the court to devise the remedy in more equitable principle of common law. ***MULTINATIONAL GAS AND PETROCHEMICAL CO. V MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LTD***, the case identify the duties owed to the company by directors, which shall explain the split line between the company and the shareholders, which I believe shall enhance the corporate governance culture and the concept in favor of stakeholders that guide the new concept and role of modern companies in recent years. ***HOWARD SMITH LTD V AMPOL PETROLEUM LTD.*** This case relates to the company constitution which will help in knowing the guideline for the directors to abide the rule, regulation and the Article of Association of the company. ***RE D'JAN OF LONDON LTD COPP V D'JAN***, a case that helps to discus in directors' and skill and independent judgment. 5/ ABERDEEN RAILWAYS CO. V BLAIKIE BROS. A case to avoid conflicts of interest and explain the duty of directors in this area.6/ FOSS V HARBOTTLE. I have chosen this case for its importance in the diver's challenges that facing directors in the derivative claims.
- The book of **BRENDA HANNIGAN** "the company law". Brenda has the foremost for her endeavor in writing and authors this book about the new CA 2006. Definitely the author has given an enlighten view over the CA 2006 and explained deeply with the supporting evidences in case law and equitable principles of common law the main targets for the enactment of this new law. The author in this respect has joined together all the above machines in one boat of understanding the core and essence

do exist in the spirit of the new dimensions in UK that hoped for the establishment of the modern companies' structure along with the factor of new technology.

The secondary resources:

- H.H. Margaret Hodge MBE MP former Minister of state for Industry and region in the resource: intention, in interpretation and implementation at <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/aboutus/ministerialteam/Speeches/page38106.html> has given a clear picture on director's duties. The resource explained that, case law is the vehicle to develop the directors' duties to make the rule more accessible in the line to promote the success of the company for the benefit of the shareholders as a whole, and the interest of the stakeholders, the community and company reputation in specific. I believe by this, the resource has included also the stakeholders and the reputation, which are the most factors for the real promote of the company. The resource has expanded in explaining the new structure of directors' age and the numbers, their address and the protection of such information in Companies House. The resource has also explained the derivative claim in the legislation and the process for minority shareholders in their pursuit to sue the directors in certain provisos on behalf of the company in a very clear language and accessible manner for understanding the material. I believe the resource has triggered a very important issue in electronic communication and its significance in the new business world by implementing a new type of links between the shareholders and directors and the AGMs in utilizing this mean.
- BERR Department for given business Enterprises & Regulatory Reform, a summary of what is means for private companies, at http://www.berr.gov.uk/files/file42262.pdf. This Article has been issued after the enactment of CA 2006, and has updated the company law to assure its modern purposed. The purpose for this academic summary is to ease the ways for setting up the company currently hoping to utilize the new company law and the contemplated companies in the future. The

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summary has contained consultation of stakeholders in the small and large companies. The summary has concentrated in the new legislation interested for private companies. This resource shall help my final project in identifies the new area of directors' duties and gives more expansion to know these duties in consultation with the stakeholders, the community affairs and business environment.

- Companies Act 2006 - duties of directors - Ministerial Statement, available at <http://www.berr.gov.uk/files/file40139.pdf>. This resource is very important in identifies the pros and cons of the CA 2006. It contains also the statement of H.H Margaret Hodge as supporting resource to the previous one, and the statement of other valued scholars statement of Lord Goldsmith, Lord Grand, Alistair Darling and Lord Sainsbury of Turville. These statements have paved the way for a better understanding the Bill in general and the directors' duties in specific. The resource in this sense has also discussed the potential of business environment in terms of these duties.
- Companies Act 2006: Directors Duties Guidance by David Chivers QC. This resource assists the private and public companies as well to understand the CA 2006 and the directors for their legal duties. The resource concentrates in the new duty of the directors to promote the success of the company. The resource suggests that the new CA 2006 has no legal guidance from the courts subsequently directors can protect themselves from claims. The resource explains the directors' duties with regards to their management in certain areas and the proper decision to be made by consulting the right qualified person. This resource shall assist in determining the directors' duties in terms of the need of consulting external advisors whether in the areas of legal, administration of finance.

The above resources are addressing the British new company law issued in 2006 in general and the director's duties in particular. Some of these duties have been established or amended by the Act subsequently have given rise to the obligation to promote the success of the company and the shareholders remedy by establishing the right of shareholders to sue the directors by way of derivative claims.

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The annotation of these resources shall further illustrate the relationship between the directors and the stakeholders for their mutual target to promote the success of the company in two hands instead of one hand.

These resources shall hopefully, in indirect way reveal the hidden fact - if I'm correct - that the CA 2006 aims also to address the stakeholders' category by given them the right to contribute in the decision making and gives them the right by enhancing the corporate governance principle to share directors the responsibility.

COMPANY CAPITAL MAINTENANCE

The company capital has two resources of finance, one provided by the shareholders and the other from creditors. There two type of lending contributing in company capital. One is long- term lending and the other is short - term lending.

Short - term creditors, such as suppliers of inventory of services and bank overdraft facilities, and long - term creditors such as bank loans, mortgage or loans from shareholders.

Shareholders and debenture holders constitute the two providers to company's capital, and both have different and similar legal relationship with the company.

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Similarity:

Shareholders and debentures holders in their relationship with the company have rights related to the contribution in the company's capital. The debentures holders are expecting to be redeemed their loan as soon as possible in the maturity date, and therefore get the interest out of loan provided to the company.

Shareholders as well have their expectation to benefit from their equity contributed in the company's shareholdings and get the contemplated dividend from the profit that the company had achieved.

Shareholders have the pre-emptive right on the occasion the company desires to issue more shares to be added to company's capital. Here the shareholders have the absolute right to buy such shares in proportion to their current shares. The debentures holders in parallel line have, in case of dissolution of company, upon the security/protection cover their loan,

to have a privilege/priority right to get their loan back with interest compared with other normal creditors.
Shareholders and debentures holders both are keen to promote the success of the company. Of course shareholders shall have the intention and aim to expect and endeavor the level best to promote the business of the company in order to get their dividends eventually.
The debenture holders shall in the same line endeavor the level best for the success of the company for one reason to redeem the loan and the interest.

Difference:

The shareholder's dividend cannot by approved unless upon the AGMs that shall determine dividend. In return, debenture holders have the right to get their loan as per the scheduled mode of payment regardless the AGMs.
The return of capital, a landmark case i.e. *Trevor v Whitworth*[25] had given the courts the consistency to the effect that, a company cannot, with the leave of the court, return its capital to it shareholders or give away its capital in the case of disposition[26]. The shareholders in this situation cannot ratify the return of capital, even by unanimously resolution. [27]

The debentures holders have been protected by the Doctrine of capital maintenance in their right not to be affected by any return of capital to the shareholders.

Shareholders are surrendering to the voting system in the company as per the Article of Association in all resolutions related to their proportion of shares. While debenture holders shall be approved by the board of directors.

Shareholders are providing capital to the company as well as debenture holders. However, sometimes shareholders are forced to rob third parties to redeem the capital paid by the debenture holders.

[25] Trevor v Whitworth (1887) 12 App Cas 409.
[26] B. Hannigan, 'Company Law', (2009), second edition, Oxford University Press on page 515 at 20-5
[27] Ibid.

The Doctrine of capital maintenance precludes the return of capital to the shareholders ahead to the winding up of the company. ***B. Hannigan, 'Company Law', (2009), second edition, Oxford University Press on page 513 at 20-2***

The Doctrine in this regards, has established a proper protection to the creditors / debentures holders to the extent that, the reduction of the company was barred, unless get leave by courts. However, by the enactment of CA 2006, S 641 (1) it became possible for private companies to reduce the capital without the permission of courts as mentioned above.

Consequently, it has been restricted only not to return the capital to the shareholders nor give away its capital in the case of disposition to non-shareholders. This protection structured for creditors, in line with the commercial normal concepts in potential capital raise and the remaining of capital subject to business needs.

The floating charges are not in favor supported at the consequence of its surrender to insolvency rules. This is materializing on the liquidation of the company that, the asset of the company falls in two categories i.e. one secured for creditors and the other for free asset. In this regards, e.g. one of the major problem is that, the preferential debts shall consume the quality of floating charges of creditor unlike the fixed charge holder that, shall not be affected by the statutory.

FLOATING CHARGES

The floating charges as being described by Rood Goode in his writing, is "one of equity's most brilliant creation"[28]. The floating charges and fixed charges are both in one track for the securing of debts, but floating charge remains while a company is going concern till the occurrence of the company's default, subsequently crystallize into fixed charge in favor of debenture holders.

[28] By Roy Goode writing in Getzler & Payne, company charges, Spectrum and Beyond at page 11.

Lord *McNaughton* has defined the floating charge in the case of Illingworth v Houldsworth [29] that:

"...a floating is ambulatory and shifting in nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

The floating charge however, should be constituted by a company only over its current/future equity, until some event to occur, as stated by ***Lord McNaughton***. The criticism here is that, the chargor can do its normal business regardless the burden of charge. So, many scholars have suggested that the floating charge prior to crystallization may have no proprietary interest at all in the charged assets[30]

The House of Lord in ***Spectrum* Case** [31] has introduced a well test for a floating charge that, in case if the debenture holders do not have effective control over assets, while the chargor is practicing his normal business thereof i.e. deposit of receivables, drawing from account and preferential debts. Subsequently shall be considered as floating charge.

In terms of the remedy, I think once the floating charges are surrender the insolvency rules, then a written automatic crystallization to be included in the debenture, would be the perfect remedy, if requested by the claimant.

DUSTINGUISHING A SHAREHOLDER AND DEBENTURE

There is a situation that might be, one of the grey area in distinguishing a shareholder and a debenture holder. This might occur when a shareholder provides a loan to a company by way of the "Shareholder Loan Agreement".

In such case, the preferential situation in returning backs the debts upon the dissolution of a company, would be of some misty, especially if the shareholder thereof, has no security to the loan and holds shares and debentures simultaneously. Who will have the privilege to queue first

CREDITORS IN LLC COMPANIES

[29] Illingworth v Houldsworth [1904] AC 355 at 358
[30] WJ Gough, Company Charges, 2nd edn, (1996)
[31] National Westminster bank plc v Spectrum Plus Limited and others

Since 1855 the courts concern has turned to protect the creditors, especially within the new existence of limited liability companies. ***B. Hannigan, 'Company Law', (2009), second edition, Oxford University Press on page 513 at 20-1***

The doctrine of capital maintenance starts to evolve particularly in the literature produced in case law.

The Doctrine basically lays concern on the distribution restriction and outlines the principle to be served in share capital of the company in order to protect the creditors and the shareholders as well.
The landmark case of ***Trevor v Whitworth, (1887) 12 App Cas 409,*** has established the principle rule of the doctrine that is; no returns of capital other than a court leaves in sanctioning a reduction of capital.

Lord Watson in this case had briefed the notion of working capital compared with the normal risk should rise in the normal business of the company. He had established the basic ground for the protection of creditors in limited liability companies in terms of a proper redemption to creditors for their loan. Lord Watson in this path had produced the notion in presuming ***bona fide*** of creditor in dealing with the company.

The Doctrine has reflected in the provisions of CA 2006, in the payment of capital, purchase by the company of its own share, the reduction of capital and the distributions to shareholders.

- The main provision of the doctrine has enhanced the concepts of capital maintenance by introducing rules that pour in the better interest of share capital in emphasizing that, the company obtains the capital which supposed to raise, and is maintained subject to the business needs. [4]
- The CA 2006 in s 658 (1) provided that, a limited liability company may not acquire its own share. The prohibition here does not apply over acquisition of shares in case of the reduction of capital process. This is rational as a consequence reaction that, the company is losing capital anywhere and it is better to own the share other than the interference of third parties. This also shall give creditor more convenience on the

company credibility. However, the CA 2006, has stated the word (may) that could be interpreted somewhat as a relax of the prohibition in this case. Also does not apply on the purchase pursuant to court order under certain provisions, or the forfeiture of shares. However, public or private companies may purchase their own shares including redeemable shares.

- The reduction of capital could be accompanied by a return of capital. The statute has allowed currently the reduction of capital, and this could be in many ways, by purchasing its own shares in private companies, as stated above, or by a solvency statement or in accordance with court's leave.
- The distribution to the members has many shapes and governed by Part 23 of CA 2006. Dividend is the most common way of distribution to shareholders. A bad distribution is *ultra vires* and might lead the company to aim two categories i.e. the recipient of unlawful distribution and directors who authorized the same.

The capital, on the establishment of the company, is utilized initially as a tool for the production and the fulfillment of the objects of the company. Capital, however, can be described as the fuel of a vehicle, while assets represent the body.

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So, I think both capitals are "**buffer zone**" and the prevention of asset stripping by company and shareholder, are both accumulate on another.

The company has two fund providers i.e. shareholders and creditors. Both in this sense have to protect the reciprocal benefits for the success of the company in promoting their commercial relationship to the best horizon level. By this concept, shareholder may be framed as the asset keeper while creditor framed as the keeper of the standard level of capital.

To this end, one can envisage the true fact that, cooperation is taken place in the real endeavor by both, to reach the company's final destination i.e. the fruition of the promotion taken for the success of the company.

The solvency declaration has been the alternative method for the doctrine of capital maintenance due the criticism aimed the latter. This alternate

method, has reached the CA 2006 in the form of the statement the directors of private company must sign before payment is made out of capital.

I think a solvency declaration helps in given the confidence to creditors in the credibility of the company and may therefore, protect them and the shareholders in the court of law by given evidence of the right. However, the disadvantage exists in the fact that, the company is basically runs its business through goodwill and reputation and do not need a deed to prove the solvency.

Even in insolvency situation, the solvency declaration or statement shall in no way in a position to prove the debt, as then the money and assets of the company shall be vanished away with no return.

Therefore, I think the Doctrine needs further maintenance, in particular in enhancing the corporate governance rules.

The Doctrine is a good experiment in protecting the debentures and shareholder's rights and keeping an eye/hint for bad auditors and lawyers to prevent the unlawful deed that might take place by them.

The doctrine need to escort by the new rules of corporate governance to cohere the principle of transparency, good conduct and ethics.

WINDING UP / LIQUIDATION

The winding up/ liquidation take place when a company has an incident to not going a concern and ending its existence. [1] This incident may occur to a solvent or insolvent company. A solvent company may go for winding up if its objects have been achieved in which the company had set up thereof. Insolvent winding up occurs when a company is unable to pay its debts, subsequently collect its assets by an office - holder and distributed ***pari passu***. [2]

The Insolvency Act 1986 ss 47 in case where the court appoints an administrative receiver for the company's property, he can require information from the officers of the company, those taken part in

company's formation 1 year before the appointment, those who are in the employment of the company and those who was in the employments 1 year before the appointment. The information that the administrative receiver can get from the above category are, the company's assets/debts/liabilities, the names/address of creditors, securities held by creditors /dates and any other information may be prescribed.

In creditors' voluntary winding up Ss 99 of the Act, here the information is provided by the directors of the company via a statement as to the company affairs before the creditors meeting showing the company's assets, debts and liability. [3] The liquidator afterwards, if appointed by members' meeting or a court, must then establish in the *Gazette* and deliver to the registrar of companies a notice of his appointment.

Ss 122 of the Act, stipulates where a company is being wound up by a court. The liquidator here is an officer of the court and has fiduciary relationship with the company. Therefore, the liquidator has the power to get the required information to proceed with the liquidation process.

Ss 131 of the Act, the office - holder is an official receiver in case if the court made a winding up order or appointed a provisional liquidator. The information to be gathered by the receiver is the same as stipulated in ss 47 of the Act.

Ss 133 of the Act, in case a company is being wound up by the court. An official receiver or the liquidator (in Scotland) before the dissolution of the company, apply to the court for the public examination for person who has been an officer of the company, has acted as liquidator/receiver/manager or being concerned/taken part in the promotion of the company. The person shall then be directed for a public examination on a day appointed by the court.
Ss 234 - 237 of the Act, concerning the management by administrators, liquidators, etc. applies in the case of a prior winding up include an official receiver regardless being a liquidator. The office - holder here, may from a person that have act as officer, taken part, employment, 1-year prior as officer, in case of wound up by court any person who has acted as

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receiver/ administrator/liquidator, require information concerning the promotion of the company, business, dealings, formation and its property. The main purposes for such available information should be put to the orderly paths of companies' evolvement in modern area within the complexity of cross - boarder's business.
The liquidator once gathered the relevant information must report the findings during the liquidation to creditors and on completion to the shareholders or court, as the case may be.

The information of companies is of significant role in the company management, promotion and even in case of liquidation. Most of e-countries have governed this information via the companies' market authority for public companies. The e-information relates to the liquidation of companies, has constituted the step for an easy process of liquidation.

Professor Bernard S. Black in his Article i.e. "the principle fiduciary duties of board of directors" has identified these duties as the classic statements which still remain in many American law school textbooks.

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He further clarified his notion about the fiduciary duties as duty of loyalty and duty of care. He believes that this ramification is too simple, thus has elaborated it to two additional core duties. One of these duties is a *duty of disclosure* and the other is a duty that has no precise name, but called it a *duty of extra care* when a company is a takeover target.

Professor Bernard S. Black, The Principal Fiduciary Duties of Boards of Directors, available at <http://www.oecd.org/dataoecd/50/53/1872746.pdf>

Is it justifiable to adopt the concept that, a duty of disclosure by a director can be measured as a fiduciary duty? Is a self-dealing transaction should be decided by a non-interested director/shareholder or both, in order to approve a transaction? What do you think? I cannot find a justified cause to lay a director a duty of disclosure or extra care, as illustrates in the article!

CONCLUSION

The BRITISH ACT 2006, will be proven its positivity and objectivity in the business of UK. The Act has comprised various situations that can deal for each situation in logic manner. Other jurisdiction has no the hybrid nature that enjoys by the Act. The insistence to maintain the rules of Common Law and equitable principle would have given the remedy for most of the complex status that may confront the proper implementation of the Act. The Act still in its infancy, thus, the parent i.e. common law and equitable principles shall raise it to the aspiration deems fit to meet the requisites of the modern invention and creations i.e. electronic communications.

The creation of concepts like the "enlighten shareholder value" has established the real essence and perfect definition for of an ideal director who shall take care of all general duties stipulated in the Act. H.H Margaret has stated that: *the "the enlighten shareholder " is enshrined in the Act and recognize that directors will be more likely to achieve long term sustainable success for the benefit of their shareholders***. *H.H Margaret Hodge, DTI, CA 2006, duties of company directors, ministerial statements (June 2007) p2.***

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I do absolutely agree with this. This creating is similar to the common law rules. Whenever most of the community would have known this concept, it shall develop hence to reach the more ranked abided rule in the best interest of the aims intended for the legislation.

Also the Act has provided the remarkable gesture in the protection of the minor directors by establishing the "**derivative claim**" to give them the right to sue on behalf of the company for any infringement that may jeopardize the overall interest of the company.

The Act might have been the developed legitimate fetus of the parent i.e. the Insolvency Act 1986 which developed itself by the Enterprise Act 2002.

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