

THE CENTRE FOR ENTERPRISE, MARKETS AND ETHICS

# IS THE NON-EXECUTIVE DIRECTOR WORTH SAVING?

REVD DR RICHARD TURNBULL

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For further information please contact the Director, Revd Dr Richard Turnbull, at:

The Centre for Enterprise, Markets and Ethics  
First Floor, 31 Beaumont Street  
Oxford OX1 2NP

#### ABOUT THE AUTHOR

Richard Turnbull is the Director of the Centre for Enterprise, Markets and Ethics. He holds degrees in Economics and Theology and a degree of Doctor of Philosophy in Theology from the University of Durham. He is also a chartered accountant. He has authored or edited numerous books, articles and other publications in church history and business ethics, including an acclaimed biography of the Earl of Shaftesbury. He is a visiting Professor at St Mary's University, Twickenham and a Fellow of the Royal Historical Society.

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# CHAPTER 1

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## INTRODUCTION

Is the non-executive director (NED) an endangered species?

Does it matter?

Neither corporate collapse nor corporate scandal are new. They rightly attract media scrutiny and the interest of policymakers and regulators. Illustrative examples include Thomas Cook (2019), Carillion (2018), Patisserie Valerie (2018), Northern Rock (2007) and, earlier, Barings Bank (1995). In the charity sector, Kids Company (2015) is a further notable instance. Global examples include Volkswagen (2015) and Enron (2001). Most of these cases have resulted in some type of regulatory or legal action. Proceedings have included legal actions for fraud initiated by the Serious Fraud Office, actions against auditors and – of concern here – cases against directors, often seeking disqualification under the Company Directors Disqualification Act 1986. Such action may be initiated by the Insolvency Service on behalf of the Secretary of State or, in particular circumstances, other official bodies.

What follows argues that the continued role of the NED matters not only to the individual director, to business and companies but also to society as a whole. The contention is that without effective NEDs, corporate governance will be weaker, companies more exposed and society less well served. If that is the case, then *education* is as important as *law* in enabling NEDs themselves, policymakers, media and wider society to understand and appreciate both the responsibilities and the limits of the NED role. In conclusion some recommendations will be made to this effect.

Following collapse of the well-known charity Kids Company in August 2015, the Official Receiver commenced disqualification proceedings against its directors (who were also the trustees of the charity). The judgment in the application, in *Re Keeping Kids Company* (2021), was delivered in the High Court by Mrs Justice Falk, who rejected the disqualification application. The judgment contains useful legal analysis and opinion drawing on past cases around the various aspects of directors' duties and liabilities. However, the judge also drew attention to the wider implications of the proceedings, an aspect of the judgment often not referred to in legal discussion. Mrs Justice Falk reminds us of the importance of NEDs broadly and the importance of their role – both as directors and, in this case, also charity trustees – in the service of society more broadly.

Paragraph 911 of the judgment reads:

The charity sector depends on there being capable individuals with a range of different skills who are prepared to take on trusteeship roles. Most charities would, I would think, be delighted to have available to them individuals with the abilities and experience that the Trustees in this case possess. It is vital that the actions of public bodies do not have the effect of dissuading able and experienced individuals from becoming or remaining charity trustees. Disqualification proceedings, or the perceived risk of them, based on wide ranging but unclear allegations of incompetence rather than any want of probity, carry a high risk of having just that effect, and great caution is therefore

required. This is particularly so for individuals otherwise involved in the management of businesses, and professionals for whom additional regulatory issues may arise: in fact, the sorts of individuals whose experience is often most needed. The result of proceedings being brought in other than the clearest of cases is likely to be to deter many talented individuals who take the trouble to understand and appreciate the risks either from charitable trusteeship at all, or at least from all but the most wealthy, well endowed, charities which are likely to have least need of their skills.<sup>1</sup>

This judgment is directly applicable to the wider role of the NED in the commercial sector. Society is served by highly competent, experienced and responsible business executives acting as NEDs. In doing so they deliver both commercial wisdom and competence in governance, and in a functioning market economy exercise a role that also conveys confidence in business and the economy.

The role of the NED matters perhaps more than many realise or are prepared to admit. Should we celebrate it more than we do? We should, as a society, certainly do more to understand it, its purposes and its responsibilities.

Corporate failure or malfeasance, individual culpability, professional negligence or neglect of duty rightly attract criticism and action. Nevertheless, the understandable tendency to allocate blame often fails to give due weight to both the complexity of the corporate environment and respective responsibilities for failure. It is axiomatic that NEDs should discharge their duties competently in accordance with the law and with moral intent in the service of society. However, any lack of clarity over those duties, particularly in law, or potential exposure to regulatory action as a consequence of confusion over roles or responsibilities, will not only reinforce unrealistic expectations but also discourage NEDs from taking on this important corporate and social duty.

This would be detrimental to society's reasonable expectations of good governance. Non-executive directors are rightly held to account under law but clear expectations, both in law and more broadly, are also essential. Consequently, society too must be clear about the role it wishes NEDs to discharge, to ensure the continued flow of suitably qualified individuals.

The concern here is with law, with expectation but most of all with education.

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<sup>1</sup> 'In the matter of Keeping Kids Club and in the matter of the Company Directors Disqualification Act 1986, in the High Court of Justice', [2021] EWHC 175 (Ch), Approved Judgment, paragraph 911.



## CHAPTER 2

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### HOW HAVE WE GOT HERE?

The current debates around the roles, responsibilities and liabilities of NEDs are not occurring in a vacuum: as recently as October 2023 the Insolvency Service's disqualification action against the NEDs of Carillion (on behalf of the Secretary of State) was dropped a few days before the trial was due to commence. The aim here is not to analyse individual cases but to understand the background issues and the implications in respect of NED duties and expectations more broadly.

Not only are there relevant contemporary cases and challenges but also a history of reviews and reports on corporate governance, as well as academic reflection. In the short space available it is at least possible to summarise how we have got to this point.

#### 2.1 CORPORATE GOVERNANCE REPORTS

Corporate governance reports have been a feature of the British corporate and regulatory scene for many decades. They have been in more or less direct response to failure or scandal. As well as a regularly updated 'UK Corporate Governance Code'<sup>2</sup> reflecting best practice there is also a history of reports that have specifically discussed the role of the NED. In addition, though beyond the main concern here, there have been proposals for a new governance regulator to replace the Financial Reporting Council (FRC).

This section will review the Corporate Governance Code and its guidance and also summarise the relevant provisions of previous corporate governance reports. Section 3 will return to legal and Section 4 to practical implications for this discussion.

The current Code, applicable to all UK companies with a premium listing on the London Stock Exchange and representing best practice for other companies, is the 2018 version published by the FRC. It has also published additional guidance, the most relevant being the 'Guidance on Board Effectiveness'.

In 2024 the FRC published a revised Code that makes a number of amendments to that of 2018, particularly in relation to internal controls. The FRC also combined three elements of guidance, including 'Guidance on Board Effectiveness', into one document, the '2024 Code Guidance', to which the online Code contains hyperlinks. The 2024 Code will apply mainly to financial years beginning on or after 1 January 2025.

The 2024 Code Guidance sets out the responsibilities of the various actors, including board chair, executive directors, the senior independent director and NEDs. Before turning to the specific roles and duties of the NED, it is worth noting what the Guidance says about directors more generally. Paragraph 69, dealing with the role of executive directors, states:

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<sup>2</sup> Financial Reporting Council, 'UK Corporate Governance Code', London: FRC, January 2024; see [https://media.frc.org.uk/documents/UK\\_Corporate\\_Governance\\_Code\\_2024\\_kRCm5ss.pdf](https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_kRCm5ss.pdf).

Executive directors have the same duties as other members of a unitary board. These duties extend to the whole of the business, and not just that part of it covered by their individual executive roles. Nor should executive directors see themselves only as members of the chief executive's team when engaged in board business. Taking the wider view can help achieve the advantage of a unitary system, meaning greater knowledge, involvement and commitment at the point of decision. Executive directors are likely to be able to broaden their understanding of their board responsibilities if they take up a non-executive director position on another board.<sup>3</sup>

This paragraph recalls some of the basic principles of the roles and duties of a director and emphasises the importance of experience across the executive and non-executive roles. This is rather contrary to the perceived public narrative of 'revolving doors' – that is, of executives retiring from an executive role and immediately taking up a non-executive appointment – and a reminder of the educational theme at the heart of this publication.

The 'Guidance on Board Effectiveness' sets out several areas of guidance on board composition, roles, divisions of duties and other matters. The role of the NED is specifically commented on in paragraphs 75–78 and elsewhere. These points may be summarised as the importance of devoting sufficient time, demonstrating integrity, understanding the business and its culture and insisting on high-quality information. For example, the Guidance states in paragraph 76 that it 'is vital that non-executive directors have sufficient time available to discharge their responsibilities effectively'.<sup>4</sup> Paragraph 77 continues:

Non-executive directors need to insist on receiving high-quality information sufficiently in advance so that there can be thorough consideration of the issues prior to, and informed debate and challenge at, board meetings. They should seek clarification or amplification from management where they consider the information provided is inadequate or lacks clarity.<sup>5</sup>

The 'UK Corporate Governance Code' itself reflects a history of reports that have included the role of NEDs in wider reviews of corporate governance. The 1992 'Report of the Committee on the Financial Aspects of Corporate Governance' (Cadbury Report) lays the foundation of the roles and responsibilities of NEDs in corporate governance. Paragraph 1.8 reinforces the position, now firmly established in both law and guidance, that 'all directors are responsible for the stewardship of the company's assets ... [and] ... whether or not they have executive responsibilities, have a monitoring role.'<sup>6</sup>

The Cadbury Report strongly advocated the unitary board system – that is, one single board (see Section 4.1) – and argued for the role of the NED in these terms: 'the appointment of appropriate non-executive directors should make a positive contribution to the development of [the] businesses.'<sup>7</sup>

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3 Financial Reporting Council, 'Guidance on Board Effectiveness', July 2018, paragraph 69, [https://media.frc.org.uk/documents/Guidance\\_on\\_Board\\_Effectiveness\\_MmfcOrz.pdf](https://media.frc.org.uk/documents/Guidance_on_Board_Effectiveness_MmfcOrz.pdf).

4 'Guidance on Board Effectiveness', paragraph 76.

5 'Guidance on Board Effectiveness', paragraph 78.

6 'Report of the Committee on the Financial Aspects of Corporate Governance', December 1992 (Cadbury Report), paragraph 1.8, <https://www.icaew.com/-/media/corporate/files/library/subjects/corporate-governance/financial-aspects-of-corporate-governance.ashx?la=en>.

7 The Cadbury Report, paragraph 3.15.

In paragraphs 4.1–4.6, Cadbury sets out its view that the roles of the NED are to:

- bring a wider perspective to the business;
- review board performances and effectiveness;
- resolve conflicts of interest;
- play a different role from executive directors even though equal in status.

A Remuneration Committee, consisting of NEDs, is an example of the last item in that the independent mind can reconcile the wider needs of the company with executive-director claims around pay, bonuses and other incentives, and ensure an alignment of interests between executives and members of the company.

Two other qualities the report brings out are *independence* and *calibre*. In respect of independence: ‘non-executive directors should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct.’

Naturally there are instances when such independence is threatened (for example, remaining on a board for too long or becoming too close to the executives), but sight should not be lost of the fact that Cadbury makes an articulated case and vision for the role and positive impact of NEDs in the conduct of business.<sup>8</sup>

Appearing in 1998, the Hampel Report<sup>9</sup> was another key building block in the development of the ‘UK Corporate Governance Code’. This reinforced Cadbury’s points on board balance, independence and the importance of the information supplied to NEDs – a recurring theme. Hampel also endorsed common duties for all directors but differed importantly from Cadbury in respect of the role of the NED.

Hampel argued that Cadbury overemphasised the *monitoring* role of the NED and insisted that NEDs ‘should have both a strategic and a monitoring function’.<sup>10</sup> This is an important corrective: in terms of public understanding of the NED’s roles, and indeed the media narrative, an overemphasis on monitoring at the expense of strategy has certainly been a feature of regulatory and legal actions against directors. Both Cadbury and Hampel argued for a substantial proportion of NEDs on boards.

A further piece of the framework came in 1999 with the Turnbull Report.<sup>11</sup> This focused principally on internal controls. The main points raised concerning NEDs are in respect of board *balance*. Turnbull argued that boards should be at least one-third NEDs and that no individual or group should exercise excessive power, and made other provisions, including in relation to audit committees and terms of office.

The Higgs Review of 2003, commissioned in the light of scandals and corporate failure, was specifically titled a ‘Review of the Role and Effectiveness of Non-Executive Directors’.<sup>12</sup> Higgs

8 The Cadbury Report, paragraph 4.11.

9 ‘Committee on Corporate Governance, Final Report January 1998’ (Hampel Report), <https://www.icaew.com/technical/corporate-governance/codes-and-reports/hampel-report>.

10 Hampel Report, paragraph 3.8.

11 Internal Control Working Party of The Institute of Chartered Accountants in England & Wales, ‘Internal Control: Guidance for Directors on the Combined Code’ (Turnbull Report), September 1999, <https://www.ecgi.global/publications/codes/internal-control-guidance-for-directors-on-the-combined-code-turnbull-report>.

12 Derek Higgs, ‘Review of the Role and Effectiveness of Non-Executive Directors’, January 2003 (Higgs Review), <https://webarchive.nationalarchives.gov.uk/ukgwa/20121212135622/http://www.bis.gov.uk/files/file23012.pdf>.

returns us to the strategy-versus-monitoring discussion and draws a distinction between US and UK developments, noting that: ‘the role of the non-executive director in this process contrasts with that of US regulators, who have tended to emphasise the monitoring role at the possible expense of the contribution the non-executive director can make to wealth creation.’<sup>13</sup> The report argued that lack of clarity around the role of the NED had been a recurrent theme in submissions to the committee.<sup>14</sup> Higgs reinforced the role of the NED around strategy, performance, risk and remuneration. The report also argued that at least 50 per cent of a board, excluding the chair, should be NEDs, hence a majority. One new feature was a recommendation that the NEDs should meet alone once a year.<sup>15</sup> Although some might argue that this introduces a division in the unitary view of a director, Higgs saw these as informal meetings that did not conflict with the wider partnership and trust across the board as a whole. The Review also picked up the question of diversity and the dangers of informality, and the use of personal contacts in the appointment process, which not only lacked rigour but tended simply to replicate the background of existing directors.

A final area of interest concerned the question of liability, which has become increasingly prominent. The overall position set out in Higgs has stood the test of time:

Although non-executive directors and executive directors have the same legal duties and objectives as board members, the time devoted to the company’s affairs is likely to be significantly less for a non-executive director than for an executive director and the detailed knowledge and experience of a company’s affairs that could reasonably be expected of a non-executive director will generally be less than for an executive director. These matters may be relevant in assessing the knowledge, skill and experience which may reasonably be expected of a non-executive director and therefore the care, skill and diligence that they may be expected to exercise.<sup>16</sup>

Consequently, there needs to be clarity around roles and expectations, appropriate induction and training and clear reasons given in case of resignation.

Higgs recommended a further review committee that would give prominence and guidance around the skills and experience needed to expand the pool of NEDs by identifying suitable candidates in the non-commercial sector. That came to fruition, also in 2003, as the Tyson Report,<sup>17</sup> which argued that: ‘Individuals with successful leadership careers in the non-commercial sector are likely to have attributes, skills and experience relevant to NED positions in the commercial sector.’<sup>18</sup> Examples included the chief executives or finance directors of large charities. Expanding the recruitment pool into the non-commercial sector was also likely to increase the representation of women. Tyson further recommended looking outside the domestic market.

## 2.2 ACADEMIC CONSIDERATIONS

Much of the discussion around non-executive directors in corporate governance codes draws on the academic literature, a review of which reveals three key aspects:

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13 Higgs Review, paragraph 1.12.

14 Higgs Review, paragraph 6.4.

15 Higgs Review, paragraph 8.8.

16 Higgs Review, Annex A, p. 92.

17 ‘The Tyson Report on the Recruitment and Development of Non-Executive Directors’, June 2003, [https://web.actuaries.ie/sites/default/files/erm-resources/250\\_tyson\\_report.pdf](https://web.actuaries.ie/sites/default/files/erm-resources/250_tyson_report.pdf).

18 Tyson Report, p. 13.

- 1 the NED's acknowledged role and its development, as well as its increasing importance;
- 2 residual confusion over the role of the NED;
- 3 a variety of subsidiary issues, for example the pool of potential NED candidates.

The evolution of corporate governance has been shaped by a confluence of global changes and academic developments, each playing a crucial role in transforming governance structures worldwide. In the 1970s and 1980s, a seismic shift occurred, marked by more widespread shareholding, increased shareholder activism, hostile takeovers and leveraged buyouts, particularly in the USA. This period prompted a re-evaluation of corporate governance structures, emphasising the need to align the interests of shareholders and managers. While managers are tasked with maximising shareholder value (or at least acting in shareholders' best interests), without adequate governance mechanisms they may make decisions that benefit themselves at the expense of shareholders. Simultaneously, in academic circles the 1970s saw the emergence of agency theory (though the ideas existed prior to the term), a foundational framework that scrutinised the principal-agent relationships within organisations. It refers to the idea that a principal actor (for example, the shareholders) appoints an agent (the board) to act on their behalf. This theoretical underpinning provided crucial insights into the conflicts of interest between shareholders and executives, laying the foundation for subsequent academic research and discussions on corporate governance.

The practical reforms in corporate governance gained momentum after the 1980s, not least with the many UK reports into it, the most significant of which, as they relate to NEDs, were discussed above. Consequently, the role of the NED became more prominent and was placed under more scrutiny, as a governance mechanism aimed at introducing objectivity and reducing potential conflicts of interest. Hence the global evolution of corporate governance has been influenced by both practical proposals and academic insights, representing an interplay between theory, regulatory responses and the ever-changing landscape of business practice.

The focus on agency theory has been significant. Each successive wave of scandal or failure has exposed divergence of interests between executives and shareholders, but also between business and society more generally. Mahmoud Ezzamel and Robert Watson summarised the thinking around independent directors, examining 'the managerial and governance functions of the board of directors and the changes in terms of their composition and governance roles brought about by recent reforms', and focusing on 'the governance roles now expected of the non-executive directors on the board':

In the US and UK, these part-time NEDs are now expected to undertake two distinct and somewhat contradictory roles. On the one hand, they are expected to be full members of the top corporate management team with exactly the same responsibilities for the formulation and management of corporate strategy as their executive board colleagues. On the other hand, however, they are also required to be independent of these same colleagues. This is because NEDs are also now expected to be primarily responsible for ensuring the quality and reliability of corporate information disclosures, keeping executives focused on the generation of shareholder value, via the design and implementation of appropriate employment and remuneration schemes, and the disciplining of their executive director colleagues that appear to be underperforming.<sup>19</sup>

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19 Mahmoud Ezzamel and Robert Watson, 'Boards of Directors and the Role of Non-Executive Directors in the Governance of Corporations', in *Corporate Governance: Accountability, Enterprise and International Comparisons*, ed. Kevin Keasey, Steve Thompson and Mike Wright, Chichester: Wiley, 2005, pp. 118–36.

The role of the NED has generally been affirmed in the literature. For example, Svetlana Mira, Marc Goergen and Noel O’Sullivan argue, albeit with perhaps an overemphasis on the monitoring role of the NED, that:

In the UK, over the past 25 years the board of directors has been emphasized as one of the most important instruments of corporate governance. Central to this has been an emphasis on the monitoring potential of non-executive directors, with successive governance codes stressing the need for significant non-executive participation on boards. Consequently, a majority of board positions in large UK companies are now held by non-executive directors. The expectation is that non-executives are able to actively monitor the behaviour of management, ensuring that corporate decisions are made in the interests of shareholders.<sup>20</sup>

Anup Agrawal and Sahiba Chadha found that the presence of independent directors and, indeed, good governance more widely, had a positive influence when dealing with accounting scandals.<sup>21</sup> Mira et al. found that ‘the non-executive labour market is efficient and rewards non-executives for good acquisitions’, by which they meant that a non-executive director associated with good board decisions is likely to have other future non-executive opportunities. Nevertheless, it is also the case that deficiencies in the role of the NED may be seen as contributing to the global crisis of corporate governance,<sup>22</sup> and that NEDs may be failing to make the executives accountable. There are also significant debates around appointment, not least the reliance on informal networks.<sup>23</sup>

A 2010 article by Alessandro Zattoni and Francesca Cuomo reviewed the literature on NEDs and concluded that:

- Non-executive directors’ independence is a commonly recommended governance practice, the meaning of which differs widely among countries.
- Non-executive directors’ competencies and incentives are not considered a governance issue to be regulated in detail.
- Agency theory and the search for appropriate board demography tend to dominate the recommendations of governance literature and codes.<sup>24</sup>

In a sense this academic discussion reflects both the strengths and weaknesses of the public narrative around NEDs, which will figure more below. Independence is key, but also the idea of NEDs as guardians or buffers – stewards of the corporate good and a barrier between the executive directors and shareholders. Christopher Pass represented a more empirical approach in the literature with his study of 51 large UK companies and their boards drawn from annual reports.<sup>25</sup>

20 Svetlana Mira, Marc Goergen and Noel O’Sullivan, ‘The Market for Non-Executive Directors: Does Acquisition Performance Influence Future Board Seats?’, *British Journal of Management* 30:2 (2019), pp. 415–36, <https://doi.org/10.1111/1467-8551.12290>.

21 Anup Agrawal and Sahiba Chadha, ‘Corporate Governance and Accounting Scandals’, *The Journal of Law & Economics* 48:2 (2005), pp. 371–406, <https://doi.org/10.1086/430808>.

22 Jill Solomon, *Corporate Governance and Accountability*, 3rd edn, Chichester: Wiley, 2010.

23 Jay A. Conger and Edward Lawler, ‘Building a High-Performing Board: How to Choose the Right Members’, *Business Strategy Review* 12:3 (2001), pp. 11–19, <https://doi.org/10.1111/1467-8616.00179>.

24 Alessandro Zattoni and Francesca Cuomo, ‘How Independent, Competent and Incentivized Should Non-executive Directors Be? An Empirical Investigation of Good Governance Codes’, *British Journal of Management* 21:1 (March 2010), pp. 63–79, <https://doi.org/10.1111/j.1467-8551.2009.00669.x>.

25 Christopher Pass, ‘Corporate Governance and the Role of Non-executive Directors in Large UK Companies: An Empirical Study’, *Corporate Governance* 4:2 (June 2004), pp. 52–63; DOI: 10.1108/14720700410534976.

A further example of this empirical methodology came from John Roberts, Terry McNulty and Philip Stiles, who argued that too much of the academic literature on NEDs, governance and board effectiveness was dominated by agency theory and its underlying assumptions. Their study examined the effectiveness of boards and NEDs based on 40 interviews with directors commissioned for the Higgs Review, and concluded that board effectiveness was determined by conduct and behaviour more than governance and structure, though clearly these are not mutually exclusive. They argued that it is perceptions of board effectiveness, rather than the actual experience of directors, that might shape approaches to corporate governance reform.<sup>26</sup>

This swift consideration of the academic literature serves as a reminder of the conceptual basis on which the various reviews of corporate governance were built, and the continued importance of both ideas and practicalities.

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26 John Roberts, Terry McNulty and Philip Stiles, 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom', *British Journal of Management* 16:s1, pp. S5–S26 (2005), <https://doi.org/10.1111/j.1467-8551.2005.00444.x>.

## CHAPTER 3

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### THE COMPANIES ACT AND DIRECTORS

What expectations are set out in law in respect of directors? The legal provisions are found in sections 170–177 of the Companies Act 2006.

Section 172 is intended to clarify the wider expectations and responsibilities relating to a director, who must act in ‘good faith’, and in acting for the benefit of the company’s members (shareholders) as a whole, must take into account several other factors, including the long-term consequences of decisions, a company’s various stakeholders (employees, customers, suppliers), sustainability, fairness and the ‘desirability of the company maintaining a reputation for high standards of business conduct’ (s 172(1)(e)). The Oxford Business Law Blog discusses the reasonableness of decision-making by directors in company law:

Under s 172 of the Companies Act 2006 (‘the Act’), courts will not interfere with the board’s decision concerning an alleged breach of the duty to promote the success of the company unless it is one that no reasonable director could have made, which is known as the *Wednesbury* standard. Section 172 has been interpreted to mean that courts are to abstain from reviewing on objective grounds whether the board’s decision was actually in the best interest of the company; it is for the directors, in their subjective view, to decide. Courts will only intervene if the decision is one that no reasonable director could have considered to be in the company’s best interest. In short, the standard of conduct required of directors under s 172 is subjective, and the standard of review adopted by courts is rationality or plausibility.<sup>27</sup>

The *Wednesbury* standard referred to derives from *Associated Picture Houses Ltd v Wednesbury Corporation* (1948): a decision is unreasonable or irrational only if it is so unreasonable that no reasonable person acting reasonably could have made it. In essence it puts in place a reasonableness test in the discharge of directors’ duties under Section 172.

Courts have generally been reluctant to find directors in breach of their Section 172 duties if they have acted reasonably. One recent example is in *Re Marylebone Warwick Balfour Management Limited* (2022), where the court found that the directors had discharged their duties under Section 172 by taking and relying on professional advice in respect of a tax avoidance scheme.<sup>28</sup> A further example is *Atkinson & Mummery v Kingsley and Smith* (2020), where a director was found not to be in breach of their Section 172 duty in failing to prevent access to the company bank account for one of the directors with whom relationships had deteriorated and who made a transfer from that account. While the facts are specific to the case, the point under Section 172 is that the initial test is *subjective*: based on the information available, did the director honestly believe they were acting in the best interests of the company and its shareholders? The court then applied an *objective* test:

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27 Ernest Lim, ‘Judicial Intervention in Directors’ Decision-Making Process: Section 172 of the Companies Act 2006’, Oxford Business Law Blog, 22 February 2018, <https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/02/judicial-intervention-directors-decision-making-process-section-172>.

28 This case is under appeal.



would an honest and intelligent person have taken the same actions to comply with their duties? This ensures that directors cannot simply ignore things and absolve themselves of responsibility, but there is also a reasonableness test in place. The recent case of *ClientEarth v Shell Plc* (2023) reinforced these points. It is for the directors themselves, acting in good faith, to determine how to act in the best interests of the company under Section 172. A breach requires proof of conduct other than in good faith. Indeed, under the general duty of reasonable skill, care and diligence imposed under Section 174 (discussed below), the law does not ‘superimpose on that duty more specific obligations as to what is and is not reasonable in every circumstance’.<sup>29</sup>

Section 172 is not without its controversies and detractors, and forms part of the wider debate around company purpose. Some criticism focuses on the expectation that the directors must act for the *success* of the company rather than any stated wider purpose.

A further important provision is Section 174 of the Companies Act 2006. This sets out that a director must exercise reasonable skill, care and diligence – a legal provision that applies to all directors, not just NEDs, in accordance with the principle that all directors have the same duty of care and diligence. This duty, however, is also qualified by both an objective *reasonableness* test and a subjective *contextual* test, set out in Section 174 (2) as follows:

- 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.<sup>30</sup>

In respect of proceedings under the Company Directors Disqualification Act 1986, the test under its section 6 (1) (b) is that of unfitness. The courts have found that this test is also one that must be measured by context, by the actual responsibilities undertaken by the director. In *Re Keeping Kids Company* (2021), Falk J, at paragraph 144, cited Jonathan Parker J, in his judgment in *Re Barings plc* (No. 5) (1999), summarising the principles to be used in respect of disqualification and making clear that conduct must be evaluated in context, by reference (paragraph 144 (h)) to the actual role and responsibilities.

We might summarise the legal position around directors’ duties as a standard duty of care but tested by reasonableness and context. Thus, *Gower’s Principles of Modern Company Law* (11th edition) states:

What does this all mean for directors? First, although directors, executive and non-executive, are subject to a uniform and objective duty of care, what the discharge of that duty requires in particular cases will not be uniform. As the statutory formulation itself recognises, what is required of the director will depend on the functions carried out by the director, so that there will be variations, not only between executive and non-executive directors but also between different types of executive director (and equally of non-executives) and between different types and sizes of company.<sup>31</sup>

29 *ClientEarth v Shell plc*, [2023] EWHC 1897 (Ch), paragraph 31.

30 Companies Act 2006, Part 10, Chapter 2, ‘General duties of directors’, Section 174, <https://www.legislation.gov.uk/ukpga/2006/46/section/174>.

31 *Gower: Principles of Modern Company Law*, 11th edn, ed. Paul Davies, Sarah Worthington and Chris Hare, London: Sweet & Maxwell, 2021.

## CHAPTER 4

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### WHAT DO WE REALLY WANT FROM A NON-EXECUTIVE DIRECTOR?

The public narrative around NEDs illustrates a real tension between a proper desire to hold directors to account and a lack of understanding of the nature and complexity of the NED role. Complaints about ‘cosy clubs’, ‘asleep at the wheel’ or ‘overpaid’ NEDs will often feature on front pages at times of crisis.

We might ask, therefore: What is the real point of a non-executive director? Do we need such a role and, if so, what are the reasonable expectations and standards against which we might measure performance and accountability? Reputation matters for qualified individuals, and if we fail properly to establish expectations and boundaries, fewer quality candidates will accept the role, particularly if rather than being overpaid, as per the popular narrative, the risk/reward ratio becomes a disincentive to accepting office.

There is also a clear distinction to be drawn between SMEs and large public companies, often with multiple subsidiaries and geographical locations. How much grasp of detail should be expected of NEDs? How much can NEDs reasonably rely on assurances from management or professional advisors? Are NEDs expected to know of every activity, or even error or fraud, in every small subsidiary in a complex corporate structure? Society must be clear if that is what is expected – and then not be surprised if few wish to accept the responsibility.

There is a clear disconnect with the public, policymakers and regulators, which has led to the emphasis on criminal liability. There is a reason why we have NEDs as part of the functions of corporate structure at the level that we do, namely the proper exercise of governance. However, we do need greater clarity over their role and the expectations of society.

#### 4.1 BOARDS

The nature of boards is a central feature of corporate governance reviews and discussions. The tradition in the UK, at least for listed and significant private companies, has been for a unitary board containing both executive and non-executive directors. This contrasts with some European approaches to corporate governance, which feature a supervisory board composed exclusively of NEDs sitting over a board of executives. There have sometimes been suggestions that the UK should adopt a similar model. In company law there is nothing to prevent UK companies adopting that approach (at least notionally, even if legally there remained one board), but in practice they have not. Nevertheless it is an important principle that nothing in law or practice requires a director to function as an executive; indeed, there is something both distinctive and important in the very idea of a non-executive director.

The contention here is that boards, executives and NEDs are all more effective in their strategic and accountability roles if they sit on the same single board, in the same room, have the same information before them (although, as discussed below, in practice the executives will have more company knowledge and information at their disposal), interact with one another and hold one another to account.

The attractions of the supervisory board – with its inherent separation of structure, people and function and yet within a system that views all directors as equal – are illusory. Indeed, the existence of such a model with Volkswagen did not prevent the 2015 emissions scandal and little suggests it assisted with the response. There is no evidence that a supervisory board model results in more effective corporate governance than a unitary system.

A single unitary board also brings both executives and non-executives into regular contact with advisers (auditors and lawyers), which can only enhance the governance process. Boards have traditionally, of course, been the slaves of the shareholders. Although these still appoint or remove the board, there is increasing recognition of the importance of other stakeholders. A variety of personnel on a single board not only prevents the passing of responsibility to others who are not in the room, but can also ensure a mix of voices are heard at the table.

However, that is not to say the existing structure works perfectly. There are several improvements that would enhance the role of all directors but which have particular relevance for NEDs.

One question relates to the number of executive directors on a board relative to non-executives. It is revealing that the regular flow of governance reports saw a steady increase in the recommended proportion of NEDs. This went from one-third (Turnbull Report, 1999), to a majority (Higgs Review, 2003), to the practice that seems most common today, especially in larger companies, of only two executive directors on the main boards (the Chief Executive Officer and the Chief Financial Officer, although others such as the General Counsel may be invited to attend).

This trend carries a number of implications. First, there is a potential concentration of power in the hands of one or two directors, in particular a chief executive, who might easily dominate one other senior executive on a board. Even if others attend, the effect is to diminish the range of comment and expertise. This may also weaken the wider insight available to NEDs and render them more dependent on the chief executive, in detriment to their strategic role. Second, and related, the existence of a wider group of executives on the board can act as a constraint on the chief executive – there are more voices that might challenge and/or offer alternatives. There is always the contrary danger, of course, that executives might *not* challenge a chief executive, but formal board membership rather than an invitation to attend makes the wider responsibilities much more explicit to all parties. Consequently, a board is likely to be better advised and able to make better decisions.

This does also raise the wider question of board composition and diversity in relation to NEDs, which Section 4.4 below will consider.

In conclusion, the role of non-executive director is best discharged within a *unitary* board, with a minimum of *one-third executive directors* (although NEDs should remain in the majority). This would enhance not only the diversity of skills on a board but also the shared mutual responsibilities it bears. It is a structure that gives the maximum weight to ensuring the appropriate balance of expertise and experience.

## 4.2 PURPOSE AND INDEPENDENCE

Clarity over the role and purpose of a non-executive director is core. There is a clear tension in the governance reports and the academic literature between the *strategic* and the *monitoring* roles of the NED. This goes to the heart of purpose. It is, perhaps, imbalance between these two roles that has led to unrealistic expectations among the public and policymakers, a confusion that might also lie

behind the failure of some recent actions for disqualification, when the actual actions of directors are compared to legal duty and found wanting.

The NED is a long-term company steward if nothing else, and must therefore be both allowed and encouraged to focus on long-term strategy, alongside the expectations of monitoring, accountability and compliance. An effective NED will give weight to strategy, its development and assessment of progress towards achievement. This should lie at the heart of expectations.

As well as steward, Christopher Pass, noted earlier, sees the non-executive director as guardian. But steward or guardian of what? On a narrow basis we might argue that NEDs are stewards of the assets of the company, although that is not a responsibility specific to them but resides in the whole board. But the stewardship specific to a non-executive director goes much deeper. For Pass, the guardianship offered by the NED is of the corporate good of the company, although this still leaves the issue of definition. Some might argue that corporate good lies specifically in the maximisation of shareholder value, others that it should embrace a wider concern for stakeholders, for purpose and for society.

A few observations can be made. First, the NED role is *long term*. A recent report from PwC noted that the median length of service for a chief executive was five years. In addition, in the years reviewed (2000–18), although there were some longer-term CEOs there was also increased turnover. The report also noted a rise in ethical lapses and failures.<sup>32</sup> The NED can take the long view of a company, its history and wider purposes and what one might call the company's well-being. Could we, then, see NEDs as long-term stewards of the company's well-being and purpose?

Second, the NED role is, at least in part, *strategic*. We need to articulate, and have recognised in law, that a key role of a non-executive director is strategic oversight. Clearly, as the Higgs Review noted,<sup>33</sup> there is a balance to be struck between the strategic and monitoring roles, but an overemphasis on compliance may have the unintended consequence of directing NED attention away from strategy. Both are needed. Executives are focused on company performance, probably rightly; non-executives can place that in a broader context of strategic direction. This requires high levels of competence, independence of mind, vision and experience (see Section 4.4). The combination of the long-term and strategic aspects of the role of NEDs is essential to their very purpose, fundamental to the success of a company and foundational to the proper exercise of corporate governance in the social contract between business and society. It is for this reason that we need both greater clarity about the role but also more celebration of the NED.

Third, the NED is *independent*. This is more complex than it appears because some of the allegations laid at the door of NEDs concern actual or perceived threats to independence and the problem of loss of objectivity through long periods of service (that is, there is a degree of tension here with the long-term role of the NED). These are often issues of culture, and one function of an independent NED is to observe and, where necessary, challenge inappropriate cultures.

The NED represents an independent check on the executives, at one remove from the daily business of the company. He or she expresses the principle of independence in both *approach* and *function*. In terms of approach, their role is to bring an external view and an enquiring mind to the board. Their independence is born of both character and experience (again, more on this in Section 4.4). In terms of function, independence is in practice written into board structures through the particular roles and functions of NEDs, worked out in how they operate in respect of

32 PwC CEO Success Study, 2018, <https://www.strategyand.pwc.com/gx/en/insights/ceo-success.html>.

33 The Higgs Review, paragraph 6.2.

specific board committees. We see this in examples such as the nominations committee (appointing of board members), remuneration committee (setting remuneration, incentives and bonuses for senior executive) and audit committee (accounting and internal control oversight and liaison with external auditors). These are essential functions and activities of corporate governance, and the role of the NED is indispensable to their effective discharge. Society benefits from the external voice, the proper assessment of – and even constraint on – executive remuneration, the ensuring of good governance. These activities and responsibilities are key levers for the oversight of the company, its strategy, performance and key appointments, including advisers. In addition, NEDs play a central role in both the hiring – and firing – of the chief executive.

One of the complexities contributing to the confusion about role is the danger of overemphasis on monitoring, policing and compliance. Inevitably, the more weight put on this, the stricter will be the liabilities applied ('Did the NED tick this box or that?') and the less useful will be the role itself. There is an appropriate place for monitoring and accountability, but without the independent NED's strategic, long-term stewardship of the company's well-being and purpose, the corporate governance process will be the poorer and the flow of quality candidates reduced. Society will be less well served.

#### 4.3 TIME AND INFORMATION

Time and information are central matters of concern in non-executive directors' proper role and discharge of responsibilities. It has been shown that although the law recognises only one type of director, there are differences in the way directors' duties apply, according to context. This was clear in discussion of Section 174 of the Companies Act and the various proceedings for potential disqualification under the Company Directors Disqualification Act. It was also noted that there is one general duty of care, skill and diligence, but that duty is limited by a general test of reasonableness and by the particular responsibilities and context.

Nowhere does this distinction come more into play than in the amount of time dedicated to a task by – and the nature of the information in the hands of – a non-executive director and an executive respectively. Any proper appreciation of the role of the NED requires evaluation of this difference.

The first issue is the *time* directors are able to dedicate to the business. The executive director is full time and their entire focus is on the company and their particular responsibilities. Hence the Chief Financial Officer, both in skill and role, will have considerably more expertise and capacity to acquire, process and indeed understand financial information. The same is true across the range of executive responsibilities. Contrast that with the typical NED, who might spend perhaps two days a month on company business. Not only is this a fraction of a full-time executive's time, it may not be the NED's only appointment. Consequently, the NED may feel they are always playing catch-up, needing to absorb and analyse information in a short timescale and possibly under pressure. Equally, the NED is always learning – no bad thing, but they have to contend with what is the daily beat of the executive with less time and potentially fewer direct skills.

This is not to excuse NEDs from their proper duties and responsibilities. Rather the intention is to expose the problem of the time gap between executives and non-executives.

It is largely for this reason that although the general duty still applies, it is unreasonable for the law to expect identical liabilities to accrue under such different circumstances. As was shown, the law does not so expect. A non-executive director cannot have full awareness of every issue or problem in a complex corporate structure. Perhaps corporate structures themselves have become too complex, impeding the flow of information (a topic in itself); in any event there needs to be greater

understanding, clarity of expectation and proper responsibility in recognising the consequences of the time differential.

This issue is reinforced by the *information* challenge. Executives and non-executives are in possession of different information, at different levels of detail, for the very reason that their roles and time commitments are different. Hence it is more than possible for the volume of information to overload (a quantity problem) or even overwhelm (a comprehension problem) a non-executive director. This may result in poor decision-making if papers are not properly read, understood or weighed up, and if trends and material changes are not identified and assessed. Similarly, the outcome may affect the ability of the NED properly to discharge their legal duties and, indeed, their wider responsibilities to society.

As a result, what is important for the effective NED is not quantity of information but quality. They must have in their possession information that is summative, strategic and suited to the decisions in hand, as well as access to relevant company personnel and professional advisers. Information is also power, hence it is a further test of NED quality and independence that they be able to secure the most apposite information, presented to them in the most useful way for their purposes. Information must also be delivered to the directors – but especially the NEDs – in a timely fashion.

If the role of the NED is to make effective long-term strategic decisions in the best interests of the company, then the information received will inevitably be summative – covering key issues, backed by analysis, but avoiding excessive detail that might hamper effective decision-making. Nonetheless, the NED has a responsibility to press for the information they need to facilitate decision-making.

The question, then, is not whether the NED knows everything, or even made the correct decision, but whether they made a decision that a reasonable person could have made in the context.

There is also a gap between what information actors in media and public policy seem to assume NEDs have at their disposal and the reality – the nature of the information, its presentation and its digestibility. To define expectations of NEDs and appreciate their role, this gap needs to be closed – essentially, then, an education exercise (see Conclusions and recommendations below).

#### 4.4 CHARACTER AND EXPERIENCE

It is clear that the role of the NED carries significant responsibility but also serves wider business and society. While debating role, function, purpose, independence and so on, there is something more intangible at the heart of the effective NED, namely character. The combination of high moral character with the experience acquired over many years of executive responsibility delivers the highest-quality NED who, other things being equal, will deliver integrity and honesty in all dealings.

We should not shy away from a debate around moral character, by which is not meant particular religious convictions or commitments to various personal behaviours, but something deeper. What are the values that form and shape the life of the particular individual? Do they reflect the central importance of integrity, honesty, transparency, objectivity, selflessness, accountability and leadership – in other words, the ‘Nolan’ principles of public life?<sup>34</sup> These values represent moral character and we should expect them in all walks of public life, including business, boards and NEDs.

34 ‘The Seven Principles of Public Life’, <https://www.gov.uk/government/publications/the-7-principles-of-public-life>. For their latest iteration, see ‘The Committee on Standards in Public Life, ‘Upholding Standards in Public Life: Final report of the Standards Matter 2 review’, November 2021, Appendix 1 (p. 92), [https://assets.publishing.service.gov.uk/media/617c02fae90e07198334652d/Upholding\\_Standards\\_in\\_Public\\_Life\\_-\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/media/617c02fae90e07198334652d/Upholding_Standards_in_Public_Life_-_Web_Accessible.pdf).

Hence character is an important starting point, not least because it is about the inner person, before that is overlaid by other aspects of life within or without business. The effective NED does not lay moral character over other skills and experiences, rather it forms their very basis.

How might this character be expressed in the potential or actual NED? We would expect some combination of service and leadership but also curiosity and an enquiring mind. These are the characteristics that lead to asking the right questions, probing effectively and providing an outlook of long-term stewardship and strategic direction and decision-making.

But while character is central it is not alone in the formation of the NED. The most effective NEDs bring to the board experience, wisdom and insight gained from careers elsewhere in business, most often as executive directors.

This does, of course, raise again the question of board appointment and diversity. It is hardly surprising that corporate governance reports and academic reflection lend weight to the question of appointment, ensuring proper processes – rather than informal networks – and enhancing boards’ diversity. There are good reasons to welcome this trajectory – it would be strange to argue that boards do not benefit from a diversity of backgrounds. However, elevating monitoring over strategy is likely to result in recruitment of lower-quality NEDs, with insufficient weight lent to business experience and leadership.

The effective NED will be a person of moral character *and* relevant experience. They will be naturally inquisitive and curious, deeply imbued with the values and principles reflected in Nolan. The law does provide protection for acting in good faith, and when the director has acted honestly and reasonably in their decision-making. Perhaps we need to make these expectations of character and experience more explicit. This would make clearer the qualities necessary for effective discharge of the role.

#### 4.5 GETTING LIABILITY RIGHT

Company failures happen, alongside frauds and other misdemeanours. Most people consider it appropriate for society to hold individuals to proper account. In some cases there may be culpability, and the law can impose sanctions, from prosecution for criminal offences to civil proceedings for disqualification as a director. However, in other cases, instances of failure, insolvency or simply corporate difficulty are just part and parcel of the nature of the market economy.

In holding directors to account, the question arises whether society’s expectations of what boards and NEDs can achieve are out of kilter with reality, reflecting at the least misunderstanding. There is too the problem of the desire to apportion blame. The high bar (gross incompetency) in the case of official actions (for example, proceedings for disqualification) may be difficult to prove and not even accurate in law. Yet there is pressure to take action due to the mismatch of expectations. The burden of court proceedings can pressurise defendants to settle, which might not be entirely just. The government Insolvency Service has faced criticism from the courts for its handling of disqualification cases (see for example Farepak (2012) and in *Re Keeping Kids Company* (2021)). Liability must be about actual culpability based on fair evidence, not simply potentially arbitrary allocations of fault.

What is important is the nature of any potential liability. Recent cases have pursued what is generally known as a strict liability, and this may have significant consequences. It means holding a director liable for certain conduct or actions without regard to either their state of mind or the reasonableness of their actions. Thus in the case of *Carillion*, it was argued that the NEDs were strictly liable in the matter of executives’ misconduct in respect of alleged false accounting,

regardless of their efforts to inform themselves. The consequence is that from the moment of appointment the director is strictly liable, assumed to be in possession of full information and knowledge of the company, its finances and all other aspects of its operation, without taking into account the reasonableness of their actions. Hence they may be subject to proceedings (for example for disqualification), irrespective of their actual role, knowledge or actions. This is not the law as it stands, nor should such a strict liability form part of the regulatory armoury – it would be damaging to the NED role, to business and to society.

The Insolvency Service, however, seems to have pursued exactly this policy in some recent cases. The aim here is not to debate the merits of recent failures and scandals or to apportion blame and culpability, rather to consider specific liabilities laid at the door of NEDs (leaving them exposed to disqualification proceedings), as well as implications for the role itself. Thus, in *Re Keeping Kids Company* (2021), Falk J made clear that the Official Receiver had failed to make out a single allegation against any of the directors. What is perhaps more surprising is that the mistake was repeated in the failed attempt to proceed against the NEDs of Carillion:

legal experts and defense counsel said the case was unclear, wrong in law and repeated mistakes made in the government's failed attempt to disqualify the trustees of a charity in 2021, which was subject to criticisms over its handling of the case and for leaving defendants in the dark.<sup>35</sup>

The concept of a strict liability in respect of directors' duties is and could not be the law in any reasonable assessment. This returns to the distinction between strategic and monitoring roles. The role of the NED is not essentially operational. It is to ask the right questions, probing, exercising skill and judgement and displaying curiosity, while not stifling management. The job is strategic oversight. As has also been shown, in terms of resources at their disposal, NEDs are disadvantaged relative to executives, auditors and other professional advisers.

In the wake of scandal, governments have to be seen to act. One temptation is to view everything through the eyes of criminal law, perhaps prompting draconian regulatory action. Hence a regulator views failure to prevent fraud – which may have multiple causes and not necessarily involve liability for directors – from an exclusively criminal or regulatory angle, which may not be to the general good: attempts to sanction directors, not least NEDs, for every failure or failing may have negative consequences for recruitment, retention and the role of NEDs. In a free and responsible society, not every action of a director that might be challenged, or for which a different decision could reasonably have been made, or that might be criticised or fall short of the ideal, should result in criminal or even regulatory action.

There is a rather fundamental mismatch of expectations. Directors cannot predict or know everything. The law recognises this, not however the political world, media and wider society. A narrative develops around what directors should have known, which then suggests that, as the chief architects of the company's structure, organisation, policies and direction, directors may have been asleep at the wheel and hence should be held to account. The problem, though, is whether in *law* this constitutes a breach of duty and a liability, and whether in *public policy* it is a reasonable expectation of a non-executive director.

The danger is that we make British business an unattractive place to work, damaging aspiration and economic efficiency. This issue, again, is fundamentally one of education.

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<sup>35</sup> Joanne Faulkner, 'Axing Carillion Case Puts Watchdog's Approach in Spotlight', 25 October 2023, LAW360, <https://www.law360.com/articles/1736763>.



## CHAPTER 5

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### CONCLUSIONS AND RECOMMENDATIONS

If these observations are accurate, NEDs face such potentially severe liabilities, and the mismatch of expectations is so great, that there will be problems in recruitment and retention as well as more serious issues. A role may have been undermined that serves business and society with high standards of corporate governance. High-quality candidates will be lost.

What could be done about this?

The importance of the educational task was noted several times above; that is, educating society – tuning its expectations – about the proper role of NEDs, and NEDs about the expectations of society. This process might cover:

- ensuring the highest quality of individual – good governance requires good people;
- recognition of the nature of the role – that it is not a sinecure;
- high standards in recruitment and remuneration;
- clarity of expectations and duties;
- recognition of the different practical roles of executives and non-executives;
- balance of strategic and monitoring roles.

Professional bodies, trade groups, think tanks, individual companies and directors themselves have a shared responsibility for this task.

As a society, how do we get NEDs to do the job we want them to do? How do we implement good practice? Directors perform an essential role and must be held to the highest standards of governance, but proportion, balance and perspective are essential, along with recognising the complexities and the tensions.

Business and indeed business organisations have an educational responsibility, not only to their own constituents but also to society and policymakers, about the role of business, boards and directors. Society too has a responsibility to make known the benefits as well as the responsibilities of business. There needs to be more open dialogue about: principles rather than rules; an acceptance of learning from mistakes; and a need for greater realism. Fairness is a two-way street – the framework must be fair to individuals, business and wider society. NEDs need to be aware of their duties and the expectations put on them. We need to create a new system to encourage high-quality, thinking people to become NEDs – and they need to know that the legal standard is clear and the enforcement system fair. There must be clarity over what liability comes with honest decisions made in good faith.

Recommendations arising from this discussion are as follows:

- consideration of a revision to company law to reflect the strategic nature of the director's role, alongside compliance and monitoring, and clearer statements of duty and liability, excluding strict liability;

- the publication, perhaps as an appendix in the Corporate Governance Code,<sup>36</sup> of a summary of the role of, and expectations placed on, a non-executive director;
- a review of the methodology of investigations, and how proceedings are instituted against individuals, recognising proper accountability but distinguishing between mistake and culpability;
- business organisations and other interested parties to undertake an educational exercise to ensure that the proper role of the NED is set out, understood and articulated.

Non-executive directors should be reminded of their duties and responsibilities and given clarity as to society's expectations. The answer is not further liabilities. Knee-jerk reactions to scandal are unhelpful – not all failures involve scandal and some, in the normal course of business, afford opportunity to learn lessons. We should *clarify* and *celebrate*. The NED is a bridge between business and society – ensuring proper corporate governance while playing a wider role in societal leadership. We need people of character and experience to discharge this role. With this clarity, we can say that the non-executive director is indeed worth saving.

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<sup>36</sup> Financial Reporting Council, 'UK Corporate Governance Code', London: FRC, January 2024; see [https://media.frc.org.uk/documents/UK\\_Corporate\\_Governance\\_Code\\_2024\\_kRCm5ss.pdf](https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_kRCm5ss.pdf).

## COMPLETE LIST OF CEME PUBLICATIONS

- Richard Turnbull, *Quaker Capitalism: Lessons for Today*, 2014.
- Edward Carter, *God and Enterprise*, 2016.
- Richard Turnbull (ed.), *The Challenge of Social Welfare: Seeking a New Consensus*, 2016.
- Richard Turnbull, *The Moral Case for Asset Management* (jointly with New City Initiative), 2016.
- Martin Schlag, *Business in Catholic Social Thought*, 2016.
- Andrei Rogobete, *Ethics in Global Business*, 2016.
- Ben Cooper, *The Economics of the Hebrew Scriptures*, 2017.
- Lyndon Drake, *Capital Markets for the Good of Society*, 2017.
- Richard Turnbull and Tim Weinhold (eds), *Making Capitalism Work for Everyone*, Vol. 1, 2017.
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