

# Codification of Company Law: The Companies Act 2006 in Context

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*Statute Law and Alternative Solutions:  
Codification, Restatement, Common Law*

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*“If history repeats itself, and the unexpected always happens, how incapable must Man be of learning from experience.”* (George Bernard Shaw)

*“Experience is simply the name we give our mistakes.”*  
(Oscar Wilde)

# What do we mean by Codification?

- Consolidation
- Restatement
- Codification – all things to all men?
  - Diagnostic problem - not a term of art:
  - transfer of case law principles to statute.
  - masterly transfer of pre-existing piecemeal legislation into a unifying Act.
  - reform not excluded.

# Companies Act 2006

- 1,300 sections and 16 schedules.
- Government: *“most extensive reform in this area for 150 years”*.
- Professor Paul Davies: *“Undoubtedly it is long, but ... length is not necessarily the enemy of good law.”*
- Fundamental review but did it go far enough? – company, shareholder and stakeholder interests.

# Formative Legislative Landmarks

- *Joint Stock Companies Act 1844*
- *Limited Liability Act 1855*
- *The Joint Stock Companies Act 1856*
- *Consolidating Companies Act 1862*
- Private company formally introduced in the *Companies Act 1907*.

# The 20<sup>th</sup> Century Cyclical Reactive Review Process

- No fundamental policy review of the aims of company law.
- Greene Committee Report (1925)  
 Companies Act 1929;
- Cohen Committee Report (1945)  
 Companies Act 1948;
- Jenkins Committee Report (1962)  
 disparate implementing measures in companies  
legislation of 1967, 1980 and 1981.

# Late 20<sup>th</sup> Century Development of Companies Legislation

Work of Law Commissions:

- Law Commission and Scottish Law Commission, *Amendment of the Companies Acts 1948 – 1983* (1983);
- Law Commission and Scottish Law Commission, *Further Amendments of the Companies Acts 1948 – 1983* (1984).

 Companies Act 1985

# Companies Act 1985

- Consolidated Companies Acts 1948-1983 without major amendments.
- Securities regulation and financial services legislation later housed in stand-alone legislation.

# Reform of Company Law in the Common Law World

→ Fear that UK lagging behind.



# The Zeal for Codification

- Company law constructed on Victorian foundations;
- Subsequent amendments

*“created a patchwork of regulation that is immensely complex and seriously out of date.”*

Company Law Review, *Modern Law for a Competitive Economy* (1998), Foreword.



# The Company Law Review

- Launched by DTI in 1998 to review the operation of the Companies Act 1985.
- Establishment of independent Company Law Review with broad composition.
- First wide-ranging review of the objectives and structure of company law.
- Impressive output: 9 consultation documents.
- Final report to Government July 2001: *“We believe that our recommendations represent a major re-working of the whole framework of company law which meets the aim of making it fit for the new century.”*

# Company Law Review

## Perspective on Codification

*“it is not satisfactory that basic rules of business operation and organisation should only be capable of being extracted from a historical examination ... of centuries of decisions ...”*

- Decided to

*“propose statutory restatements, or codification, often based on significant simplification, or more radical reframing of the common law rules.”*

Company Law Review, Final Report (2001)

# The Road to Legislation

- Government white paper *Modernising Company Law* (2002).
- Government consultation process leading to the publication of draft clauses.
- Introduction of the Companies Bill in the House of Lords on 4 November 2005.
- Deft handling of parliamentary process and amendments.
- Royal Assent on 8 November 2006.

# Managing the Mammoth Task of Implementation

## Commencement

- 1300 provisions and 16 Schedules.
- Staggered implementation up to 1 October 2009.
- 8 commencement orders.

## Use of Statutory Instruments

- Use for technical provisions and matters likely to require future amendment.
- 101 SIs made under the Act.

# Consolidation, Restatement or Codification?

- “An Act to reform company law and restate the greater part of the enactments relating to companies ....”
- The Companies Act 2006 involved a large measure of consolidation.
- However, breadth and the scale of the reforms undertaken marked it out as going beyond consolidation.
- Important reforms based on recommendations of the Law Commissions, Company Law Review and also the impact of EU Directives.

# Underlying Philosophy: Key Messages

- Better Regulation – ‘Think Small First’.
- The plain language agenda.
- A long-term investment culture.
- Shareholder engagement.

# Objective: Facilitatory of Business

- Primary approach was “*that company law should be primarily enabling or facilitative ...*” (Final Report, p.xi).
- Theme taken up in the 2002 Government White Paper :

*“Company law has a direct impact on enterprise. It can actively promote and encourage enterprise – or hold it back. The Government is strongly committed to promoting enterprise ... while maintaining adequate safeguards against abuse.”*

*Modernising Company Law Cm 5553-I (2002), p.11.*



# Making it Easier to Do Business

Deregulatory measures included:

- removing the requirement to have a company secretary;
- Permitting companies to dispense with AGMS.
- Facilitating informal unanimous decision-making.
- Reducing the accounting and audit burden on small companies.
- Reforming the capital maintenance rules.

# Move to Plain Language in Model Articles: Appointment of Directors

## 1985 Model Articles

78. Subject as aforesaid [re notice], the company may by ordinary resolution appoint a person who is willing to act to be a director either to fill a vacancy or as an additional director and may also determine the rotation in which any additional directors are to retire.

79. The directors may appoint a person who is willing to act to be a director, either to fill a vacancy or as an additional director, provided that the appointment does not cause the number of directors to exceed any number fixed by or in accordance with the articles as the maximum number of directors. A director so appointed shall hold office only until the next following annual general meeting and shall not be taken into account in determining the directors who are to retire by rotation at the meeting. If not reappointed at such annual general meeting, he shall vacate office at the conclusion thereof.

## 2008 Model Articles

17. - (1) Any person who is willing to act as a director, and is permitted by law to do so, may be appointed to be a director-

by ordinary resolution, or

by a decision of the directors.

# SOME CHALLENGES



# Proposed Reforms which fell by the wayside

- Law Commission's recommended simplification of the system for registration of charges.
- Back-tracking by the Chancellor of the Exchequer on the controversial Operating and Financial Review.

# An Unwieldy Rule-book?

- Already more than 100 SIs made under 2006 Act.
- Some textual amendments have occurred eg s.80 of the Enterprise and Regulatory Reform Act 2013 inserted a new Chapter 4A dealing with directors' remuneration policy.
- Non-textual amendments.
- EU-driven amendments .
- Prospective amendments.



# Theory versus Reality

Reform of the derivative action in Part 11 of the 2006 Act not adjudged a success – academic law didn't take account of practical realities.

# Statutory Interpretation

*Judges “are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.”:*

*Corocraft Ltd v Pan American Airways Inc*  
[1969] 1 Q.B. 622, 638, *per* Donaldson J.

# Does a Reforming Act Displace the Prior Common Law?

*Re Fort Gilkicker Ltd; Universal Project Management Services Ltd* [2013] EWHC 348 (Ch) Briggs J.

Does a reforming statutory codification impliedly create an exhaustive code?

- Statute could only be construed as displacing common law principles including rights only if it does so expressly or by necessary implication.
- Referred to competing academic camps.
- Found a justice-based solution in deciding on survival of common law right to pursue a ‘multiple derivative action’.



# **Codification of Directors' Duties: Plenty for the Layman and the Lawyer**



## Changing Policy on Codification of Duties

- Greene Committee (1926): *“any attempt by statute to define the duties of directors would be a hopeless task”*.
- Jenkins Committee (1962): attempting an exhaustive definition of the duties would be unwise.
- Preference for statutory supplementation of the general duties.
- Abortive attempts at codification: Companies Bills 1973 and 1978.
- Law Commission and CLR: a statutory statement would improve accessibility.

# The Statutory Statement of Duties: Chapter 2 of Part 10 of the CA 2006

- Statement of seven duties.
- Lewison LJ: “The duties of a director have been partially codified.”

*Ranson v Customer Systems Plc* [2012] EWCA Civ 841

Issue of uncodified duties.

Regulatory Impact Assessment:  
cost-saving on legal advice?



# Judicial View

Lord Hodge regarded the statutory statement as  
*“intended to make those duties more accessible to  
commercial people.”*

*Eastford v Gillespie* [2009] CSOH 119

Mummery LJ: The statutory duties “extract and express the  
essence of the rules and principles which they have replaced”.

*Towers v Premier Waste Management Ltd* [2011] EWCA Civ  
923

# Section 172 and Enlightened Shareholder Value: A Damp Squib

- Directors required to “have regard” to the interests of stakeholders such as customers, community and the environment while acting to promote the long-term success of the company.
- No direct means of enforcement provided to stakeholders.
- Meaningless formula inspired box-ticking.



## A Deceptively Simple Landscape

- The accessibility agenda has not been delivered upon to any real extent.
- While transparency has increased, ease of interpretation of the duties has not.
- Highly complex interplay between the statutory rules and pre and post-2006 judicial pronouncements.

# Interpretation: Which Path to Take?



# Interpreting the Duties: Dissonant Legislative Signals

Section 170(3) : “The general duties are based on certain common law rules and equitable principles ... and *have effect in place of those rules and principles* as regards the duties owed to a company by a director.”

Section 170(4): “The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and *regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.*”

# Statutory Interpretation and Codification: The Traditional Judicial Approach

- Classical judicial approach: legislation first port of call, only refer to pre-existing case law in event of ambiguity.
- Case law on directors' duties has, however, begun by looking at the prior case law it was sought to codify.
- *Towers v Premier Waste Management* [2011] EWCA Civ 923

Mummery LJ: effect of section 170(4) is that section 170(3) “did not consign the replaced rules and principles to legal history”.

# Future Development of the Duties: Role of the Courts and Parliament

- Interpretation of duties to be informed by trust and agency law developments (Explanatory Notes on s.170(4)).
- Scope for judicial development but not judicial activism?

# Conclusions

- Broad welcome for the legislation:
- Plain language welcomed.
- Useful reforms.
- In terms of accessibility: plenty of pitfalls for the unwary.
- A code does not stand still.
- Importance of regular review.
- *“Codification, presupposing infinite knowledge, is a dream.”* (Clarke, 1898, *The Science of Lawmaking*)