



University of Cape Town
Faculty of Law
School for Advanced Legal Studies

**THE ROLE OF NON-EXECUTIVE DIRECTORS: CONCERNS
REGARDING THE STANDARD OF LIABILITY FOR BREACH OF A
DUTY OF CARE & SKILL**

Jaron David Carter
LLM in Commercial Law
CRTJAR003

Supervisor: Professor Jacqueline Yeats

Word Count: 24 647

March 2021

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the degree in Master of Laws (Commercial Law) in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (LLM) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed by candidate

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

TABLE OF CONTENTS

ABSTRACT	IV
CHAPTER 1: INTRODUCTION	1
1.1 SETTING THE SCENE	1
1.2 HOW SHOULD THE STANDARD OF LIABILITY BE ASSESSED?	4
1.3 OBJECTIVES OF THE RESEARCH AND SIGNIFICANCE OF THE STUDY	5
1.4 METHODOLOGY	6
1.5 ROADMAP	6
CHAPTER 2: EXECUTIVE, NON-EXECUTIVE & INDEPENDENT DIRECTORS ...	7
2.1 INTRODUCTION	7
2.2 ‘DIRECTOR’	7
2.2.1 ‘includes’	8
2.2.2 ‘occupying the position of a director’	8
2.2.3 ‘by whatever name designated’	9
2.2.4 ‘as contemplated in Section 66’	9
2.2.5 The following types of directors are also recognised in South African law.....	9
2.3 EXECUTIVE, NON-EXECUTIVE & INDEPENDENT DIRECTORS	9
2.3.1 South Africa.....	9
2.3.2 Australia	13
2.3.3 New Zealand.....	14
2.3.4 United Kingdom	15
2.3.5 Canada	15
2.3.6 United States of America.....	15
CHAPTER 3: ROLE OF A NON-EXECUTIVE DIRECTOR.....	18
3.1 INTRODUCTION	18
3.2 LEGAL LENS - THE ‘WHY’	18
3.2.1 Introduction	18
3.2.2 The Duty to Act in Good Faith and in the Best Interests of the Company.....	19
3.2.3 Duty to Act for a Proper Purpose	20
3.2.4 The Duty to Exercise an Independent Judgement	20
3.2.5 The Duty to Act Within Their Powers	21
3.2.6 Duty to Disclose a Conflict Interest	22

3.2.7 The Duty of Care, Skill & Diligence	23
3.3 GOVERNANCE LENS: - THE 'HOW'	24
3.3.1 Introduction	24
3.3.2 Cadbury Report	24
3.3.3 Greenbury Report	27
3.3.4 Hampel Report.....	27
3.3.5 Turnbull Report	28
3.3.6 Higgs Report.....	29
3.3.7 FRC Report.....	33
3.4 COMMERCIAL LENS - THE 'WHAT'	34
3.4.1 Introduction	34
3.4.2 Performance of the Board.....	35
3.4.3 Effectiveness.....	36
3.4.4 Monitoring.....	39
3.4.5 Individual Expertise.....	42
3.4.6 Board Committees	43
3.5 CONCLUSION	43
CHAPTER 4: LIABILITY FOR BREACH OF A DUTY OF CARE & SKILL	49
4.1 INTRODUCTION	49
4.2 SOUTH AFRICA	49
4.2.1 The Common Law Prior To The Companies Act	49
4.2.2 Section 76(3)(c) of the Companies Act	52
4.2.3 Analysis	54
4.3 AUSTRALIA.....	55
4.4 OTHER JURISDICTIONS.....	61
4.5 CONCLUSION	62
CHAPTER 5: CONCLUSION	64
BIBLIOGRAPHY.....	66

ABSTRACT

The importance of the role of a non-executive director ('NED') within a given company has steadily been increasing in recent years particularly as a result of a number of high profile corporate collapses having taken place in many developed countries. In the advent of such collapses, industry observers are often interested in knowing what the NEDs were doing during their time at the company and whether they failed in preventing the demise of the company.

The reasons for having NEDs on the board of directors are many and varied but include reducing the power of the executive directors, adhering to principles of good corporate governance, bringing an outside and independent perspective, acting as a boundary spanner between the board and the stakeholders' of the company, acting as internal advisors and monitoring the actions of the board etc.

In light of the many corporate collapses and in recognising that the Companies Act makes no distinction between executive and NEDs, it is deemed essential to consider the standard of liability applicable to NEDs and to critically engage with the question of whether there is a legitimate basis for departing from the current globular standard of liability applicable to all types of directors. If there is to a distinction between the standard of liability as between executive and NEDs, the distinction should be in relation to the duty to exercise reasonable care and skill.

The purpose of this research is, therefore, to investigate and clearly demonstrate the distinction between the role of a NED within a company as compared to their executive counterparts in order to support the conclusion that, indeed, an objective/uniform standard of liability applicable to all types of directors as regards the duty to exercise reasonable care and skill should be rejected.

CHAPTER 1: INTRODUCTION

1.1 Setting the Scene

Given that the Companies Act makes no distinction between executive and non-executive directors¹ ('NEDs'), it is necessary to examine and question the approach that South Africa has adopted with regards to the standard of liability imposed for breach of the duty of care as between executive and NEDs. In the case of *Howard v Herrigel*,² an application was brought under section 424 of the Companies Act 61 of 1973³ ('1973 Companies Act') against one of the NEDs of the company. The court held that for the purposes of establishing the extent of liability:

*'It is unhelpful and even misleading to classify company directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case. One of the circumstances may be whether he is engaged full-time in the affairs of the company: see the Fisheries Development case supra at 165G - 166B. However, it is not helpful to say of a particular director that, because he was not an 'executive director', his duties were less onerous than they would have been if he were an executive director.'*⁴ (Emphasis added).

The above indicates that even under the 1973 Companies Act, NEDs were at risk of being held liable to the same extent as their executive director counterparts, notwithstanding the large divergence in the nature of their respective roles. Furthermore, the court expressly stated that whether the inquiry be related to negligence, reckless conduct or fraud, the 'legal rules are the same for *all directors*'⁵ (emphasis added). Therefore, the court did not see it fit to take into consideration the non-executive status of the director in question when determining liability given that the court saw no real distinction in law between executive and NEDs.⁶ Furthermore, in the case of *Organisation Undoing Tax Abuse and Another v Myeni and*

¹ Stevens 'The Legal Nature of the Duty of Care and Skill: Contract or Delict?' (2017) 20 *Potchefstroom Electronic Law Journal* at 3.

² *Howard v Herrigel* 1991 2 SA 660 (A).

³ Companies Act 61 of 1973.

⁴ *Howard* supra note 2 at 678.

⁵ *Ibid.*

⁶ Shingirirayi Gona *The Role of the Independent Director In Maintaining Good Corporate Governance* (Published LLM thesis, University of Cape Town, 2009) 31.

Others,⁷ the organisation Undoing Tax Abuse and the South African Pilot Association issued summons against Ms Myeni⁸ whereby the plaintiffs sought an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008 ('Companies Act').⁹ Before being appointed as the chairperson of South African Airways ('SAA'), she was previously appointed as a NED of the SAA board.¹⁰ Regarding the standard of care to be applied by NEDs, the court referred to *Howard v Herrigel*¹¹ and stated that:

*'The fact that someone is a 'non-executive member' does not absolve her of any legal responsibility. The legal duties of all directors are the same. These principles were summarised in Howard v Herrigel And Another NNO where it was stated that both executive and non-executive directors are subject to the same legal duties, which include duties of care, skill and diligence. Compliance with these duties requires an assessment of the role actually played by the director, the information available to her and the information that could have been available. If one considers the powers executed by non-executive directors, it is clearly appropriate that no distinction be drawn between these two groups.'*¹² (Emphasis added).

The above is a further example of the courts drawing no distinction between executive and NEDs when determining the standard of care to be applied by NEDs in the context of liability. Although the court explicitly states that no distinction should be drawn between executive and NEDs, the court, somewhat paradoxically, mentions that when assessing compliance with legal duties, the role played by the director in question should be taken into account. As it will be argued, if the role of a NED, as compared to that of an executive director, is taken into account, then contrary to the explicit sentiments of the court, it should in actual fact be clear that the liability of these two groups of directors should not be the same. Furthermore, in the English case of *Dorchester Finance Co v Stebbing*,¹³ the court was called upon to determine the liability of a NED. The court held that when applying the requisite standards of care and skill, no distinction is to be drawn between executive and NEDs.¹⁴ This approach was adopted by the court in *Philotex (Pty) Ltd v Snyman*.¹⁵ In addition, in the Australian case of *Australian Securities and Investments Commission v Healey*¹⁶ the court stated that:

⁷ *Organisation Undoing Tax Abuse and Another v Myeni and Others* (15996/2017) [2020] ZAGPPHC 169.

⁸ *Ibid* para 1.

⁹ Companies Act 71 of 2008.

¹⁰ *Myeni* supra note 7 para 3.

¹¹ *Howard* supra note 2.

¹² *Myeni* supra note 7 para 32.

¹³ *Dorchester Finance Co v Stebbing* 1989 BCLC 498.

¹⁴ *Ibid* para e-f.

¹⁵ *Philotex (Pty) Ltd & Others v Snyman & Others* 1998 (2) SA 138 (SCA) at 145B.

¹⁶ *Australian Securities and Investments Commission v Healey* (2011) FCA 717.

‘Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company. A director must become familiar with the fundamentals of the business in which the corporation is engaged; a director is under a continuing obligation to keep informed about the activities of the corporation; directorial management requires a general monitoring of corporate affairs and policies, and a director should maintain familiarity with the financial position of the corporation...It is clear that an objective standard of care is applicable to both executive and non-executive directors.’¹⁷ (Emphasis added).

The attitude of the above courts with regards to the standard of care that is to be applied to NEDs for the purpose of determining liability forms the basis of this thesis. The notion that ‘it is unhelpful and even misleading to classify company directors as “executive” or “non-executive” for purposes of ascertaining their duties to the company’ is rejected. Furthermore, the notion that ‘it is not helpful to say of a particular director that, because he was not an “executive director”, his duties were less onerous than they would have been if he were an executive director’, is rejected. In addition, the notion that ‘if one considers the powers executed by non-executive directors, it is clearly appropriate that no distinction be drawn between these two groups’, is rejected. Furthermore, the notion that ‘an objective standard of care is applicable to both executive and non-executive directors’, is rejected. The aforementioned statements from the courts in *Howard v Herrigel*,¹⁸ *Organisation Undoing Tax Abuse and Another v Myeni and Others*,¹⁹ *Dorchester Finance Co v Stebbing*²⁰ and *Australian Securities and Investments Commission v Healey*²¹ demonstrate the arguably problematic state of affairs that when it comes to holding directors liable for breach of the duty of care and skill, both executive and NEDs are to be treated in a globular fashion in that a uniform/objective standard of liability is applied to all types of directors. It will be argued that the current approach in respect of holding NEDs liable, as set out above, is incorrect in light of the specific wording of section 76(3)(c)(i) of the Companies Act as well as the nature of the role of a NED within a company as compared to that of an executive director.

¹⁷ Ibid para 166 & 172.

¹⁸ *Howard* supra note 2.

¹⁹ *Myeni* supra note 7.

²⁰ *Stebbing* supra note 13.

²¹ *Healey* supra note 16.

1.2 How Should the Standard of Liability be Assessed?

The approach to be adopted is arguably that of Rogers J in the Australian case of *AWA Ltd v Daniels*,²² and Henry J in the New Zealand case of *Fletcher v National Mutual Nominees Ltd*.²³ Rogers J arguably makes the correct decision in rejecting an objective/uniform standard of care applicable to all directors when determining the standard of liability for breach of a duty of care as this essentially gives due recognition to the vastly differing roles assumed by NEDs as compared to executive directors. Similarly, the dictum of Henry J states that when assessing the standard of care that directors are subject to, regard must be had to the circumstances pertaining to the responsibilities to which the directors have undertaken. In other words, the particular role of the director in question should be taken into account when assessing the appropriate standard of care to be applied when determining liability. This is reflected in the wording of section 76(3)(c)(i) of the Companies Act which states that:

*'[A] director must exercise their powers and perform their functions with a degree of care, skill and diligence that may reasonably be expected from a person carrying out the same functions in relation to the company as those carried out by that director.'*²⁴
(Emphasis added).

Therefore, the Companies Act seems to imply a flexible objective standard of care which should, in theory, mandate the courts to take into consideration the role fulfilled by the particular director in question when determining whether there was a breach of the duty of care and skill. As per the above-discussed South African cases of *Howard v Herrigel*²⁵ and *Organisation Undoing Tax Abuse and Another v Myeni and Others*,²⁶ this unfortunately does not seem to be the case in practice. Executive directors are involved in the day-to-day running and management of the company whereas, as Rogers J notes, the duties of NEDs are intermittent in nature whereby they attend a few board meetings periodically throughout the year. Due to the part-time/intermittent nature of a NED's duties, their capacity to exercise their oversight function and maintain a steady stream of vital information about the company is limited. This is especially so in the case of independent NEDs who are complete outsiders when it comes to the affairs of the company. In addition, when NEDs are carrying out their functions, they will have to rely on the executive directors, and senior management, to provide them with sufficient and accurate information as regards the company. Therefore, NEDs are

²² *AWA Ltd v Daniels* (1992) 10 ACLC 933.

²³ *Fletcher v National Mutual Nominees Ltd* [1990] 3NZLR 641.

²⁴ Section 76(3)(c)(i) of the Companies Act.

²⁵ *Howard* supra note 2.

²⁶ *Myeni* supra note 7.

objectively worse off, as opposed to executive directors, when it comes to the flow of information about the company. In other words, executive directors will and should know if the company is in financial distress before the NEDs or anyone else. On the other hand, the continuous interaction with the company on a daily basis means that executive directors have day-to-day knowledge of the affairs of the company, and can easily use the resources of the company to source additional and relevant information. In the advent of a corporate collapse, it therefore seems a misfit to hold NEDs liable to the same extent as executive directors when NEDs, and especially independent NEDs, are simply not nearly as involved in the internal affairs/management of the company as executive directors are. Therefore, given that the nature of the role of a NED varies greatly to that of an executive director, and given the specific wording of section 76(3)(c)(i) of the Companies Act which seems to imply a flexible objective standard of care, it is submitted that the standard of care applicable to NEDs for the purpose of determining liability for breach of a duty of care and skill should be less onerous than that of their executive counterparts. As such, the current approach of an objective/uniform standard of care applicable to all types of directors when assessing liability is respectfully rejected.

1.3 Objectives of the Research and Significance of the Study

This thesis aims to draw attention to, as well as challenge the current approach, as discussed above, to holding NEDs liable for breach of a duty of care and skill. Furthermore, this thesis aims to clearly differentiate between the roles of executive and NEDs to highlight the less-than-desirable state of affairs of objective/uniform liability between these groups of directors. In differentiating between the role of an executive and NED, this thesis aims to contribute towards the understanding of NEDs by providing clarity with regards to the role and function of a NED within a company. Furthermore, in analysing the current approach to the liability of NEDs, both locally and internationally, this thesis aims to contribute to South Africa's policy framework by suggesting that the current approach be departed from in favour of a less onerous/flexible object standard of liability in the case of NEDs. In addition, conducting research into the subject matter at hand is essential for two primary reasons. Firstly, it is necessary to make a meaningful contribution to the literature pertaining to the role and standard of liability applicable to NEDs in South Africa. Secondly, the contribution towards policy reform, regarding the standard of liability of NEDs, in South Africa can in turn foster further research and debate. In essence, this thesis has both theoretical and practical significance.

1.4 Methodology

The methodology adopted in this thesis is that of traditional desktop-based research. This will involve the consideration of a number of sources such as journal articles written by academics knowledgeable in the field at hand, as well as textbooks, reports and web-based sources. Regard will also be had to the Companies Act, in particular, the sections relating to the standard of liability of directors for breach of the duty of care and skill. In addition, particular emphasis will be placed on the analysis of both local and foreign soft law in the form of varying corporate governance codes and reports.

1.5 Roadmap

Chapter 2 will analyse the concept of a 'director' as defined in section 1 of the Companies Act and will also give a high-level overview of the material differences between executive, non-executive and independent directors. After providing general clarity as the fundamental differences as between the aforementioned directors at a high-level, Chapter 3 will then focus in on a detailed analysis and unpacking of the role of a NED through three distinct lenses, namely, a legal, governance, and commercial lens. Defining the differences as between executive and NEDs will have provided the necessary theoretical foundation for Chapter 4 to then critically analyse the standard of liability applicable to NEDs for the breach of a duty of care. Chapter 5 will conclude.

CHAPTER 2: EXECUTIVE, NON-EXECUTIVE & INDEPENDENT DIRECTORS

2.1 Introduction

This chapter aims to engage with the concept of executive, non-executive and independent directors by way of a high-level overview in respect of the general characteristics of these directors. This is necessary as identifying and differentiating between these types of company directors is essential for the purposes of assessing the appropriate standard of liability for a NEDs breach of a duty of care. After dealing with the concept of a ‘director’, as contemplated in section 1 of the Companies Act, the concept of an executive, non-executive and independent director will be unpacked, at a high-level, through an analysis of case law and soft law. In so doing, regard will be considered to the South African approach to distinguishing between these types of directors, as well as engage in a comparative analysis of the approach, if any, adopted by other jurisdictions such as Australia, New Zealand, the United Kingdom, Canada and the United States of America.

2.2 ‘Director’

Section 66(1) of the Companies Act states that the business and affairs of the company are to be managed by or under the leadership of the board of directors, which has the authority to perform any functions of the company and exercise all powers of the company, subject to the Act or the company’s Memorandum of Incorporation (‘MOI’).²⁷ This provision is highly significant given that it marks, for the first time, a shift in the origin of the board’s power.²⁸ Previously, under the 1973 Companies Act, the power of the board of directors to manage the company did not derive from original power, rather, the power to manage the business of the company had to be delegated to the board of directors through the company’s MOI or be delegated by the members of the company at a general meeting.²⁹

Now, under the current Companies Act, the board of directors enjoys original power to manage the business of the company. It is clear to see that directors play a significant role with regards to managing the affairs of the company.³⁰ Therefore, it is essential to identify the

²⁷ Section 66(1) of the Companies Act.

²⁸ Rehana Cassim ‘The Power to Remove Company Directors From Office: Historical and Philosophical Roots’ (2019) 25 *Fundamina* at 37.

²⁹ Farouk HI Cassim, Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) 403.

³⁰ *Ibid.*

directors of the company, as well as to understand their scope and role within the company.³¹ This is so because the law is generally concerned with holding directors to account given that they have the power to manage the affairs of the company and to make critical decisions regarding the strategic direction of the company.³² Accordingly, identifying and differentiating between the types of company directors, particularly executive and NEDs, is critical in establishing the accountability of directors in relation their to conduct in leading and managing the company's affairs.³³ The Companies Act defines a 'director' as 'a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated'.³⁴ The definition of 'director' will now be unpacked.

2.2.1 'includes'

The addition of the word 'includes' points to the fact that the definition of 'director' is not exhaustive, but rather is inclusive.³⁵ Consequently, formalities are not necessary when determining who the directors of the company are³⁶ and, in addition, the meaning of 'director' is to be determined from the wording of the Act as a whole.³⁷ The definition of 'director' is intended to apply to all directors who are formally appointed as directors and, in addition, applies to those who are not formally appointed as directors.³⁸

2.2.2 'occupying the position of a director'

The phrase, 'occupying the position of a director', refers to a director who acts in the position thereof, with or without legal authority as opposed to the phrase 'holds an office' which refers to someone who is lawfully holding that office.³⁹ Therefore, given that the Companies Act employs the former phrase, one can imply that, for the purposes of the Companies Act, those who are not formally appointed as a director may nonetheless be deemed to be a director of the

³¹ Ibid.

³² Philip Stiles 'The Impact of the Board on Strategy: An Empirical Examination' (2001) 38 *Journal of Management Studies* at 646.

³³ Cassim et al op cit note 29 at 403.

³⁴ Section 1 of the Companies Act.

³⁵ Cassim et al op cit note 29 at 403.

³⁶ John de Lacy 'The Concept of a Company Director: Time for a New Expanded and Unified Statutory Concept (2006) *Journal of Business Law* at 269.

³⁷ *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 at 489; *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 at 255.

³⁸ Cassim et al op cit note 29 at 404.

³⁹ *Drysdale* supra note 37 at 242.

company if they are occupying the position of a director, either with or without lawful authority.⁴⁰

2.2.3 ‘by whatever name designated’

This is an essential phrase as it makes clear the fact that certain individuals must be regarded as directors despite them being designated a different name.⁴¹ Therefore, one’s title, name and description of position is not determinative of whether someone is indeed a director, rather, the substance of the person’s activities will be determinative of whether they are a director.⁴²

2.2.4 ‘as contemplated in Section 66’

Section 66 of the Companies Act recognises a number of different types of directors such as directors appointed in terms of the company’s MOI, ex officio directors and alternative directors elected by shareholders. The aforementioned types of directors do not form part of the subject of this thesis and therefore will not be discussed.

2.2.5 The following types of directors are also recognised in South African law

In addition to the above types of directors mentioned in section 66 of the Companies Act, South African law also recognises de jure directors, temporary directors, nominee directors, puppet directors, de facto directors, and shadow directors. The aforementioned types of directors do not form part of the subject of this thesis and therefore will not be discussed. However, executive, non-executive, and independent directors are central to the subject at hand and therefore will now be discussed.

2.3 Executive, Non-Executive & Independent Directors

2.3.1 South Africa

It is critical to reiterate that the Companies Act makes no distinction between executive and NEDs, however, a distinction between these types of directors is made both in practice and also in the various King Reports on Corporate Governance for South Africa (‘King’). At the most basic level, an executive director is tasked with the day-to-day running and management

⁴⁰ Cassim et al op cit note 29 at 404.

⁴¹ Ibid.

⁴² *Re Mea Corporation Ltd* (2007) BCC 288 para 82.

of the company, is a full-time employee of the company who receives a salary and is generally under a contract of service in relation to the company.⁴³ On the other hand, as stated by the court in *Fisheries Development Corporation Ltd v Jorgensen*,⁴⁴ a NED is not involved in the day-to-day running and management of the company, is not an employee of the company and is a part-time director of the company.⁴⁵ NEDs are usually appointed to the board to provide an independent and external perspective to the company's management team by providing an objective judgment on issues that the company faces.⁴⁶ Furthermore, the court stated that NEDs are not required to continuously devote attention to the affairs of the company, rather, their duties are intermittent in nature and are to be performed at periodical board meetings or at other meetings that require their attention.⁴⁷ The court in *Cronje v Stone*⁴⁸ confirmed the distinction made by the court in *Fisheries Development Corporation*.⁴⁹ With regards to soft law, King II⁵⁰ defined an executive director as 'an individual involved in the day-to-day management and/or in the full-time salaried employment of the company and/or any of its subsidiaries.'⁵¹ Furthermore, King II defined a NED as:

*'An individual not involved in the day-to-day management and not a full-time salaried employee of the company or of its subsidiaries. An individual in the full-time employment of the holding company or of its subsidiaries, other than the company concerned, would also be considered to be a non-executive director unless such individual by his/her conduct or executive authority could be construed to be directing the day-to-day management of the company and its subsidiaries.'*⁵²

In turning to the concept of an independent NED, such a director is not connected to the company in any way outside of their directorship.⁵³ Therefore, an independent NED is not involved in any sort of relationship with the company that could materially interfere with them being able to exercise an independent judgement.⁵⁴ According to the Companies Act, a director is considered to be independent if they are: i) not involved in the day-to-day management of the business for the previous financial year; ii) not a prescribed officer, or full-time employee,

⁴³ Cassim et al op cit note 29 at 411.

⁴⁴ *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W).

⁴⁵ Ibid at 165.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ *Cronjé NO v Stone En 'n Ander* 1985 (3) SA 597 (T).

⁴⁹ Ibid at 610.

⁵⁰ Institute of Directors, *King Report on Corporate Governance for South Africa* (2002).

⁵¹ King II Report at 7.1.

⁵² Ibid at 7.2

⁵³ Cassim et al op cit note 29 at 411.

⁵⁴ Ibid.

of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; or iii) not a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and iv) not related to any person as described above.⁵⁵ With regards to soft law, independence was described under King III⁵⁶ as ‘the absence of undue influence and bias which can be affected by the intensity of the relationship between the director and the company.’⁵⁷

Furthermore, King III laid out criteria that could be used by a governing body to determine whether a director could be considered as an independent NED.⁵⁸ As such, King III provides that an independent NED is a NED who:

- is not a representative of a shareholder who has the ability to control or significantly influence management or the board;
- does not have a direct or indirect interest in the company (including any parent or subsidiary in a consolidated group with the company) which exceeds 5% of the group’s total number of shares in issue.
- does not have a direct or indirect interest in the company which is less than 5% of the group’s total number of shares in issue, but is material to his personal wealth;
- has not been employed by the company or the group of which it currently forms part in any executive capacity, or appointed as the designated auditor or partner in the group’s external audit firm, or senior legal adviser for the preceding three financial years;
- is not a member of the immediate family of an individual who is, or has during the preceding three financial years, been employed by the company or the group in an executive capacity;
- is not a professional adviser to the company or the group, other than as a director;
- is free from any business or other relationship (contractual or statutory) which could be seen by an objective outsider to interfere materially with the individual’s capacity to

⁵⁵ Section 94(4)(b)-(c) of the Companies Act.

⁵⁶ Institute of Directors, *King Report on Corporate Governance for South Africa* (2009).

⁵⁷ King III Report, glossary, at 119.

⁵⁸ Institute of Directors Southern Africa ‘Practice Notes July 2017 Independence of Governing Body member’ available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/562ED5CF-02E8-4957-97C8-D3F0C66A7245/King_IV_Practice_Note_-_Independence_of_Governing_Body_Members.pdf, accessed on 10 October 2020.

act in an independent manner, such as being a director of a material customer of or supplier to the company; and

- does not receive remuneration contingent upon the performance of the company.⁵⁹

However, the concept of independence in King III, as discussed above, has since evolved⁶⁰ with the introduction of King IV.⁶¹ King IV describes independence generally as:

‘The exercise of objective, unfettered judgement. When used as the measure by which to judge the appearance of independence, or to categorise a non-executive member of the governing body or its committees as independent, it means the absence of an interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making.’⁶²

The approach that King IV takes is more practical and rather focuses more on the perception of independence as opposed to the approach in King III which provided for a list of disqualifications from independence in that should one of the disqualifications apply, the director in question could not be regarded as independent.⁶³ As such, King III’s factual/tick-box approach to independence was replaced by King IV’s approach which requires a more balanced assessment of independence by prioritising substance over form.⁶⁴ Therefore, King IV adopts a perceptual approach to independence in that a director’s level of independence should be judged from the perspective of a reasonable and informed third party.⁶⁵ As such, the key question, as described above, is whether or not the director in question has an association, interest, position, or relationship which is likely to unduly influence or cause bias in decision-making in the company’s best interests, when judged from the perspective of a reasonable and informed third party.⁶⁶ Although King III’s tick-box approach for assessing independence has been rejected, King IV nonetheless provides various factors/criteria which may be considered when undertaking an independence inquiry, for example the director:

⁵⁹ King III Report at 38 para 67.

⁶⁰ Deloitte ‘King IV Independent Directors’ available at https://www2.deloitte.com/za/en/pages/africa-centre-for-corporate-governance/articles/kingiv_independent_directors.html, accessed on 10 October 2020.

⁶¹ Institute of Directors, *King Report on Corporate Governance for South Africa* (2016).

⁶² Deloitte op cit note 60.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

- is a significant provider of financial capital, or ongoing funding to the organisation; or is an officer, employee or a representative of such provider of financial capital or funding;
- if the organisation is a company, participates in a share-based incentive scheme offered by the company;
- if the organisation is a company, owns securities in the company the value of which is material to the personal wealth of the director;
- has been in the employ of the organisation as an executive manager during the preceding three financial years, or is a related party to such executive manager;
- has been the designated external auditor responsible for performing the statutory audit for the organisation, or a key member of the audit team of the external audit firm, during the preceding three financial years;
- is a significant or ongoing professional adviser to the organisation, other than as a member of the governing body;
- is a member of the governing body or the executive management of a significant customer of, or supplier to, the organisation;
- is a member of the governing body or the executive management of another organisation which is a related party; or
- is entitled to remuneration contingent on the performance of the organisation.⁶⁷

2.3.2 Australia

In Australia, the statutory formulation of the duty to act with care and diligence does not necessarily indicate that there is a difference in position as between executive and NEDs.⁶⁸ However, the fact that the office held by the director in question and the responsibilities of the director forms part of what determines the degree of care and diligence to be exercised by the director indicates that the scope of the duty to exercise care and diligence is influenced by whether the director in question holds the office of executive or NED.⁶⁹ This is supported by the court in *AWA Ltd v Daniels*⁷⁰ whereby the court stated that an objective standard is used to measure the degree of skill that is required by executive directors whereas NEDs are not bound

⁶⁷ King IV Report at 52 para 28.

⁶⁸ Sulette Lombard *Director's Duties to Creditors* (unpublished LLD thesis, University of Pretoria, 2006) 213.

⁶⁹ *Ibid.*

⁷⁰ *AWA Ltd* supra note 22.

to continuously give attention to the company's affairs.⁷¹ The ASX Australian Corporate Governance Principles and Recommendations ('CGPR')⁷² defines a NED simply as a director who is not an executive director.⁷³ Furthermore, the CGPR defines an independent director as 'a director who is free of any interest, position or relationship that might influence, or reasonably be perceived to influence, in a material respect their capacity to bring an independent judgement to bear on issues before the board and to act in the best interests of the entity as a whole rather than those of an individual security holder or other party.'⁷⁴

2.3.3 New Zealand

Neither the New Zealand judiciary, nor the New Zealand legislature expressly makes a distinction between executive, non-executive and independent directors.⁷⁵ However, section 137(c) of the New Zealand Companies Act⁷⁶ does indicate that the '*position* (own emphasis) of the director and *the nature of the responsibilities* (own emphasis) undertaken by him or her' are factors to be taken into account when determining if the director in question acted with the requisite degree of care, skill and diligence. This seems to allow for a distinction to be drawn between executive and NEDs regarding what is expected of them in light of the nature of their office. The NZX Corporate Governance Code⁷⁷ does however draw a distinction between the varying roles of executive and NEDs.

⁷¹ Ibid at 869.

⁷² ASX Corporate Governance Council 'Corporate Governance Principles and Recommendations' available at <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>, accessed on 10 October 2020.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Lombard op cit note 68 at 215.

⁷⁶ Companies Act 1993 No 105.

⁷⁷ NZX Listing Rules 'NZX Corporate Governance Code' available at https://nzx-prod-c84t3un4.s3.amazonaws.com/s/JfnMk5Qmx53WDpbND3r9N28?response-content-disposition=inline%3B%20filename%3D%22Appendix%201%20-%20NZX%20Corporate%20Governance%20Code.pdf%22%3B%20filename%2A%3DUTF-8%27%27Appendix%25201%2520-%2520NZX%2520Corporate%2520Governance%2520Code.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAJABUQTI7JQTRAXGA%2F20210310%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20210310T180424Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=0a3b891a20e372755fbd520b7bbd3775bd8cea213cc368d823f695f51035015, accessed on 10 October 2020.

2.3.4 United Kingdom

In the old English case of *Re City Equitable Fire Insurance Co Ltd*,⁷⁸ the court did not recognise any distinction between executive and NEDs.⁷⁹ However, the UK Corporate Governance Code⁸⁰ ('the Combined Code') published by the Financial Reporting Council does indeed distinguish between the roles of executive and NEDs. The Combined Code states that the primary function of NEDs is to 'scrutinise and hold to account the performance of management and individual executive directors against agreed performance objectives.'⁸¹ The Combined Code also lists a number of instances which are relevant for determining the independence of a director.⁸²

2.3.5 Canada

In so far as the statutory duty of care, diligence and skill is concerned, the Canadian legislature does not distinguish between executive and NEDs.⁸³ However, section 122(1)(b) of the Canada Business Corporations Act⁸⁴ ('CBCA') states that every director is subject to a duty of care, skill and diligence that a 'reasonably prudent person would exercise in *comparable circumstances* (own emphasis).' The reference to 'comparable circumstances' may refer to a director's particular circumstances such as the duties they assume and the nature of the office they hold.⁸⁵

2.3.6 United States of America

Yet again, no clear statutory distinction is made between the position of an executive director and that of a NED.⁸⁶ However, section 8.30(a)(2) of the Model Business Corporation Act⁸⁷ ('MBCA') makes reference to the care exercised by a person in a 'like position' under 'similar circumstances' which seems to indicate that the particular position occupied by a director will play a determining role when establishing whether the director in question complied with their duty to act with care. Therefore a distinction between executive and NEDs could indirectly be

⁷⁸ *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

⁷⁹ *Ibid* at 1011.

⁸⁰ Financial Reporting Council 'Council Combined Code on Corporate Governance' available at <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>, accessed on 10 October 2020.

⁸¹ *Ibid* at 7 para 13.

⁸² *Ibid* at 6 para 10.

⁸³ Lombard *op cit* note 68 at 216.

⁸⁴ Canada Business Corporations Act (R.S.C., 1985, c. C-44).

⁸⁵ Lombard *op cit* note 68 at 216.

⁸⁶ *Ibid*.

⁸⁷ Model Business Corporation Act, 5th Edition.

drawn based on their differing roles. Furthermore, the judiciary in the United States makes a distinction between the overseeing role and the decision-making role of directors.⁸⁸ In respect of the overseeing role, the business judgement rule does not apply, however, in respect of the decision-making role, the duty of care is defined by the business judgement rule.⁸⁹ This distinction may play a large role in assessing the potential liability of executive and NEDs for breach of the duty of care.⁹⁰ This is so given that NEDs are not involved in the day-to-day decision making and management of the company, rather, NEDs fulfil a monitoring function.⁹¹ As a result, the business judgement rule may not be applicable in many instances when determining whether a NED is liable for breach of the duty of care. According to the New York Stock Exchange Rules, the board of directors must affirm that the potential director in question does not have a material relationship with the listed company etc, in order for them to qualify as an independent director.⁹²

2.4 Conclusion

After discussing the broad concept of a company ‘director’, as contemplated in section 1 of the Companies Act, it was established that the Companies Act, along with many other jurisdictions, makes no distinction between the various different types of directors and, as such, draws no distinction between executive and NEDs. Although this is the case in South Africa, and in many other jurisdictions as discussed, the South African judiciary, in *Fisheries Development Corporation*,⁹³ did indeed draw a distinction between executive and NEDs. In addition, the various King Reports, and equivalent in foreign jurisdictions, also draw a distinction between executive and NEDs. In essence, after considering the case law and the various corporate governance codes/reports, both local and foreign, it is concluded that executive directors are involved with the day-to-day running and management of the company and are full-time salaried employees of the company. However, in stark contrast to this, NEDs are not involved in the day-to-day running and management of the company and are not employees of the company, rather, they are part-time directors of the company who are appointed to the board

⁸⁸ Ibid at 217.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² New York Stock Exchange ‘Section 303A.01 Listed Company Manual’ available at https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-69, accessed on 27 February 2021.

⁹³ *Fisheries Development Corporation* supra note 44.

of directors to provide an independent and external perspective to the company's management team by providing an objective judgment on issues that the company faces on an intermittent and periodic basis. Furthermore, it was noted that an independent NED is one who is not connected to the company in any way outside of their directorship and is not involved in any sort of relationship with the company that could materially interfere with them being able to exercise an independent judgement. This high-level overview of the difference between an executive director and a NED is an important and useful starting point to begin the in-depth discussion and analysis of the role of a NED.

CHAPTER 3: ROLE OF A NON-EXECUTIVE DIRECTOR

3.1 Introduction

The role of a NED will be analysed through three distinct lenses i.e. a legal, governance, and commercial lens. In terms of identifying what defines the role of a NED through a legal lens, it is necessary to discuss the legal duties that directors are expected to adhere to when exercising their powers and performing their functions. Furthermore, the role of a NED will be analysed through a governance lens whereby a review of the evolution of corporate governance in the UK will track the development of role of a NED from a corporate governance perspective. The final lens to be discussed is the commercial lens which outlines what NEDs are supposed to do from the perspective of those who work in and around company boards. The analysis of the role of a NED through a legal, governance, and commercial lens will in each instance identify different characteristics that define a NED's role within a company. As such, the legal lens will consider common law precedents and legislation to identify *why* NEDs should act in the company's best interests.⁹⁴ The governance lens will define *how* NEDs should go about fulfilling the requirements for their role.⁹⁵ The commercial lens will identify *what* NEDs are expected to do from the perspective of those working in and around company boards.⁹⁶ After the analysis of the aforementioned, this chapter will conclude by summarising the essence of the role of a NED.

3.2 Legal Lens - The 'Why'

3.2.1 Introduction

The legal lens comprises the relevant common law and legislation and will focus on discussing the relevant fiduciary duties while also mentioning the duty of care, skill and diligence. The fiduciary duties to be discussed are the duty to act in good faith and in the best interests of the company, the duty to act for a proper purpose, the duty to exercise an independent judgement, the duty to act within their powers, and the duty to disclose a conflict of interest.

⁹⁴ Trevor Lipman *The Role of the Independent Non-Executive Director In Australia* (unpublished DBA thesis, Macquarie University, 2008) 38.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

3.2.2 The Duty to Act in Good Faith and in the Best Interests of the Company

Both the common law and the Act now impose the basic fundamental duty of good faith.⁹⁷ *Da Silvia v CH Chemicals*⁹⁸ highlighted that the common-law has firmly established the rule that directors have a fiduciary duty to act in the best interests of the company and also to exercise their powers in good faith.⁹⁹ Good faith has been described as a state of mind that consists of (1) honestly of purpose or belief, (2) remaining faithful to one's obligation or duty, (3) observing reasonable commercial standards that relate to fair dealing in a given business, or (4) the absence of the intent to seek unconscionable advantage or to defraud.¹⁰⁰ In general, good faith is a faithful, honest, sincere and reasonable belief that one is undertaking to do the right thing.¹⁰¹ Good faith depends to a large extent on honesty, which is subjective.¹⁰² Therefore, in order for a director to be held liable for a breach of the duty to act in good faith and in the best interests of the company, there is a requirement of subjective awareness of wrongdoing.¹⁰³ The court in *Re Smith & Fawcett Ltd*¹⁰⁴ laid down the often-quoted and long-standing legal principle that directors must exercise their powers and functions *bona fide* in respect of what *they* (emphasis added) consider to be in the best interests of the company, as opposed to what a court may consider to be in the best interests of the company. This is because, as the court in *Darvall v North Sydney Brick & Tile*¹⁰⁵ stated, company directors have more time, knowledge and expertise available to them in order to evaluate the company's best interests as opposed to judges.¹⁰⁶ The duty to act in good faith and in the best interests of the company is sometimes described as the duty of absolute honesty¹⁰⁷ and utmost good faith to the company.¹⁰⁸ The duty to act in good faith and in the best interests of the company also entails the duty to exercise an independent judgement as well as the duty to act within the powers conferred and also the duty to exercise said powers for a proper purpose.¹⁰⁹ As stated above, and as noted by the court in *Regentcrest plc v Cohen*,¹¹⁰ the test for good faith is not objective, but rather is subjective and therefore the issue of liability concerns the director's

⁹⁷ Cassim et al op cit note 29 at 523.

⁹⁸ *Da Silvia v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

⁹⁹ *Ibid* para 13.

¹⁰⁰ Bryan A. Garner *Black's Law Dictionary* 8 ed (2008) 713.

¹⁰¹ *Ibid*.

¹⁰² Cassim et al op cit note 29 at 523.

¹⁰³ *Ibid* at 524.

¹⁰⁴ *Re Smith & Fawcett Ltd* [1942] Ch 304.

¹⁰⁵ *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 15 ACLR 230 SC (NSW).

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ Peter Loose *The Company Director: Powers, Duties and Liabilities* 9 ed (2007) 247.

¹⁰⁹ Cassim et al op cit note 29 at 524.

¹¹⁰ *Regentcrest plc v Cohen* [2001] 1 BCLC 80.

state of mind.¹¹¹ However, as noted by the court in *Shuttleworth v Cox*¹¹² there are limits to this subjective test i.e. if the director in question did not have reasonable grounds for believing that they were acting in the company's best interests, they may be in breach of the duty to act in good faith.¹¹³ The test, as per *Charterbridge Corporation Ltd v Lloyd's Bank*,¹¹⁴ is whether an honest or intelligent individual in the position of the director could have reasonably believed that they were acting in the company's best interests, taking into account the whole of the circumstances.¹¹⁵

3.2.3 Duty to Act for a Proper Purpose

Section 76(3)(a) of the Companies Act requires that directors exercise their powers for a 'proper purpose'.¹¹⁶ The Act does not define what is meant by 'proper purpose', however, the common law takes it to mean that directors must exercise the powers that have been given to them for the objective purpose that the power was granted and must not exercise their powers for an ulterior or collateral purpose.¹¹⁷ Section 76(3)(a) of the Companies Act therefore refers to two duties, that being good faith and proper purpose.¹¹⁸ These are separate and distinct duties, yet they are also cumulative in the sense that even if a director subjectively acts honestly and in the interests of the company, the director may objectively be breaching their duty to discharge their powers for a proper purpose.¹¹⁹ Section 73(3)(a) of the Act is reflective of the common law and therefore effects no change in respect of this aspect of a director's fiduciary duties.¹²⁰ The legal principles that relate to the duty to act for a proper purpose are an attempt by the courts to restrain or control the use of the discretionary powers that have been conferred on directors.¹²¹

3.2.4 The Duty to Exercise an Independent Judgement

The common law, as per *Kregor v Hollins*,¹²² makes it clear that when directors are exercising their powers as well as deciding what is in the company's best interests, they must exercise an

¹¹¹ Ibid at 104.

¹¹² *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1972] 2 KB 9.

¹¹³ Ibid at 23.

¹¹⁴ *Charterbridge Corporation Ltd v Lloyd's Bank* [1970] Ch 62.

¹¹⁵ Ibid at 74.

¹¹⁶ Cassim et al op cit note 29 at 525.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² *Kregor v Hollins* (1913) 109 LT 225 (KB and CA).

independent judgement and unfettered discretion.¹²³ As such, directors must consider the company's affairs in an objective and unbiased manner.¹²⁴ Therefore, an agreement entered into by a director with a third party which stipulates how the director will exercise their discretion will not be enforced by a court.¹²⁵ Thus, the general rule is that directors may not bind themselves in the present on how they are going to vote in the future.¹²⁶ Furthermore, as illustrated by the case of *Fulham Football Club Ltd v Cabara Estates Plc*,¹²⁷ it is not necessary for the director to derive any personal benefit from an agreement such as the aforementioned.¹²⁸

3.2.5 The Duty to Act Within Their Powers

The common law imposes a fiduciary duty upon directors to not exceed the limits of their powers and authority.¹²⁹ As such, if the MOI of the company restricts, limits or qualifies the company's powers or activities, then the directors of the company will be acting beyond their powers if they enter into a contract that is in contravention of such a provision in the company's MOI. Therefore, the responsible directors will consequently be held liable for breach of their fiduciary duty not to act beyond their powers, unless the company has ratified their actions by way of special resolution.¹³⁰ It should be noted, however, that a contract may not be ratified if it contravenes the Companies Act.¹³¹ The court in *Cullerne v London and Suburban General Permanent Building Society*¹³² confirms that directors will be held liable to the company for breaching their fiduciary duty not to exceed the powers that have been conferred on them.¹³³ Although, section 76 of the Companies Act does not make explicit reference to this fiduciary duty as a distinct and separate duty, this duty does however form part of the fiduciary and statutory duty of directors to act in good faith and for a proper purpose and to act in the best interests of the company when discharging their powers as provided by section 76(3)(a) and (b) of the Companies Act.¹³⁴

¹²³ Ibid.

¹²⁴ Cassim et al op cit note 29 at 528.

¹²⁵ MSP Mdunge *A Critical Analysis of the Fiduciary Duties of Directors and Evaluation of the Development of These Duties In Terms of the Common Law and Statutory Law* (unpublished LLM, University of KwaZulu-Natal, 2017) 30.

¹²⁶ Cassim et al op cit note 29 at 529.

¹²⁷ *Fulham Football Club Ltd v Cabara Estates Plc* [1994] 1 BCLC 363 (Ch and CA).

¹²⁸ Cassim et al op cit note 29 at 529.

¹²⁹ Ibid at 532.

¹³⁰ Section 20(2) of the Companies Act.

¹³¹ Section 20(3) of the Companies Act.

¹³² *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD.

¹³³ Ibid at 485.

¹³⁴ Section 76(3)(a) and (b) of the Companies Act.

3.2.6 Duty to Disclose a Conflict Interest

The fiduciary duty to avoid a conflict of interest is very significant.¹³⁵ Therefore, to gain a proper understanding of the Companies Act in relation to the duty to avoid a conflicts of interest, the relevant common law principles need to be discussed.¹³⁶ In the case of *Keech v Sanford*,¹³⁷ the court stated that directors of a company are subject to a fiduciary duty to avoid situations where their personal interests are in conflict with the duties that they owe to the company.¹³⁸ In addition, the court stated that directors may not, subject to the company giving informed consent, make or retain a profit in the course of or as a result of their directorship i.e. while discharging their directors' duties.¹³⁹ The above test means that if a director makes a profit as a result of their position as a director, said profits will be disgorged.¹⁴⁰ Furthermore, the court in *Imageview Management Ltd v Jack*¹⁴¹ stated that the duty to avoid a conflict of interest mandates that if a director breaches this duty they will have to give full account for profits derived in breach of this duty.¹⁴² In addition, the court in *Parker v McKenna*¹⁴³ stated that this rule is inflexible and must be inexorably applied by the courts.¹⁴⁴ The court in *Boardman v Phipps*¹⁴⁵ explained the test for a conflict of interest as, would a reasonable man, taking into consideration the relevant circumstances and facts, be of the opinion that there was a real, sensible chance of a conflict of interest arising.¹⁴⁶ This test was later applied by the court in *Bhullar v Bhullar*.¹⁴⁷ Furthermore, the court in *Aberdeen Railway Co v Blaikie Bros*¹⁴⁸ made reference to a conflict of *interest* (emphasis added), however, this principle also applies to a conflicting duty.¹⁴⁹ As such, directors may also not involve themselves in situations where they owe conflicting duties to someone else, unless the company has consented.¹⁵⁰ This may arise in situations where one director may hold multiple directorships. The duty to avoid a conflict of interest is not dependant on the absence of good faith or fraud, or whether the company has

¹³⁵ Cassim et al op cit note 29 at 534.

¹³⁶ Ibid.

¹³⁷ *Keech v Sanford* (1726) Sel Cas Ch 61.

¹³⁸ Cassim et al op cit note 29 at 534.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *Imageview Management Ltd v Jack* [2009] BCLC 725.

¹⁴² Ibid at 739.

¹⁴³ *Parker v McKenna* (1874) LR 10 Ch App 96.

¹⁴⁴ Ibid at 124.

¹⁴⁵ *Boardman v Phipps* [1966] 3 All ER 721.

¹⁴⁶ Ibid at 756H.

¹⁴⁷ *Sub Nom Re Bhullar Bros Ltd* [2003] 2 BCLC 214.

¹⁴⁸ *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.

¹⁴⁹ *Boulting v Association of Cinematography, Television and Allied Technicians* [1963] 1 All ER. 716 (CA) 723.

¹⁵⁰ Cassim et al op cit note 29 at 535.

suffered a loss resulting from the fiduciary duty being breached, rather, liability will arise simply from the fact that a profit has been made by a director for their own benefit.¹⁵¹ The court in *Chan v Zacharia*¹⁵² stated that the no-profit rule aims to preclude directors from misusing or abusing their directorships for the purposes of personal gain.¹⁵³ In light of the above, there are two separate yet closely linked legal principles at play: i) the duty to avoid conflicts of interest and ii) a duty not to profit as a result of one's directorship.

In turning now to the Companies Act, section 76(2)(a) states that a director must not use their position of director, or any information obtained while acting in the capacity of director to (i) gain an advantage; or (ii) knowingly cause harm to the company.¹⁵⁴ Therefore, that fact that the company has not suffered any loss or damage may not be relevant for the purposes of section 76(2)(a) of the Companies Act.¹⁵⁵ In addition, it is irrelevant to take into consideration whether or not the director acted with honesty or not.¹⁵⁶ Moreover, section 76(2)(a)(i) of the Companies Act encompasses the common law 'no-profit' rule and imposes a positive and mandatory duty on directors to avoid a conflict of interest.¹⁵⁷ As such, the common law relating to this fiduciary duty is retained.¹⁵⁸

3.2.7 The Duty of Care, Skill & Diligence

The duty to act with care, skill and diligence will be discussed in detail in chapter 4. The meaning of 'diligence' under section 76(3)(c) likely refers to a director properly attending to their duties.¹⁵⁹ Such duties include devoting time and attention to the affairs of the company as well as exercising proper supervision and providing ongoing mentorship to the company's employees and officers.¹⁶⁰ As the court in *Re City Equitable Fire Insurance Co Ltd*¹⁶¹ stated, directors are expected to exercise reasonable care, skill and diligence when discharging their

¹⁵¹ Ibid.

¹⁵² *Chan v Zacharia* (1984) 154 CLR 178.

¹⁵³ Ibid at 198.

¹⁵⁴ Section 76(2)(a)(i) and (ii) of the Companies Act.

¹⁵⁵ Cassim et al op cit note 29 at 550.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid at 551.

¹⁵⁸ *Regal (Hastings) Ltd* [1921] 1 All ER 378 (HL); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Da Silva* supra note 98; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA).

¹⁵⁹ Cassim et al op cit note 29 at 560.

¹⁶⁰ Ibid.

¹⁶¹ *Re City Equitable Fire Insurance Co Ltd* supra note 78.

duties to such a degree that ‘an ordinary man might be expected to take in the circumstances on his own behalf.’¹⁶²

3.3 Governance Lens: - The ‘How’

3.3.1 Introduction

It is not easy to exact a definition of corporate governance given the many interlocking components thereof.¹⁶³ However, a commonly understood definition of corporate governance is contained in the Cadbury Report¹⁶⁴ which states that corporate governance is ‘the system by which companies are directed and controlled, with boards of directors being responsible for the governance of their companies.’¹⁶⁵ This section tracks the evolution of UK corporate governance codes to give a comprehensive overview of the role of a NED from a corporate governance perspective. The UK’s system of corporate governance was chosen for analysis on the basis that it is seen generally as an effective model and has greatly influenced the development of corporate governance in other jurisdictions such as Africa, Asia and Europe.¹⁶⁶

3.3.2 Cadbury Report

The Cadbury Report, published in 1992, was regarded as a watershed moment for the development of corporate governance in the UK as it was the first significant enquiry into the duties of directors and boards of directors in the UK.¹⁶⁷ The Cadbury Report was published in response to a series of significant business scandals which took place in the UK in the late 1980s.¹⁶⁸ For example, there was public outrage at the auditors’ failure to expose the imminent bankruptcy of the Bank of Credit and Commerce International, at the plundering of pension funds, and at the underserved large pay increases that were received by senior business executives.¹⁶⁹ As a result, the UK Stock Exchange commissioned a special committee, known

¹⁶² Ibid.

¹⁶³ Brian R Cheffins ‘Teaching Corporate Governance’ (1999) 4 *Legal Studies* at 516.

¹⁶⁴ Committee on the Financial Aspects of Corporate Governance ‘Report of the Committee on the Financial Aspects of Corporate Governance’ available at [https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-\(the-Cadbury-Code\).pdf](https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf), accessed on 21 November 2020.

¹⁶⁵ Cadbury Report para 2.5.

¹⁶⁶ Willem J L Calkoen *The Corporate Governance Review* 10th edition (2020) 330.

¹⁶⁷ Colin Boyd ‘Ethics and Corporate Governance: The Issues Raised by the Cadbury Report in the United Kingdom’ (1996) 15 *Journal of Business Ethics* at 172.

¹⁶⁸ Ibid at 167.

¹⁶⁹ Ibid.

as the Cadbury Committee, to investigate the financial aspects of corporate governance.¹⁷⁰ The resultant Cadbury Report proposed a Code of Best Practice for companies which focused on reducing the power of executive directors by emphasising a greater role for NEDs, a more active role for auditors and a change in board operations.¹⁷¹

According to the Cadbury Report, the calibre of a NED as a member of the board is of particular importance when it comes to setting and maintaining corporate governance standards within a company.¹⁷² To this end, the Cadbury Report describes NEDs as equal board members in terms of the leadership of the company.¹⁷³ In light of this, the Cadbury Report describes the role of a NED as someone who should bring an independent judgement to bear regarding issues that relate to the performance, key appointments, resources, strategy and standards of conduct of the company.¹⁷⁴ One of the recommendations put forth by the Cadbury Report is that the number and calibre of NEDs occupying a seat on the board of directors should be sufficient enough to ensure that their views and opinions carry enough weight to be impactful regarding the decisions of the board.¹⁷⁵ In this regard, the Cadbury Report recommended that all boards have a minimum of three NEDs and that one such NED be the chairman of the company in question with the qualification being that the chairman may not also be the executive head of the company.¹⁷⁶

The Cadbury Report highlights that one of the essential qualities that a NED should bring to the deliberations of the board is that of independent judgement.¹⁷⁷ In light of this, the Cadbury Report recommended that the majority of NEDs sitting on the board of directors should be independent of the company.¹⁷⁸ The Cadbury Report describes the test for independence as, apart from the shareholdings and directors fees received, the NED should be independent of the management of the company and, in addition, be free from any business of the company or any other relationship with the company which could materially interfere with the NEDs ability to exercise an independent judgement.¹⁷⁹ The various interests held by a

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Cadbury Report para 4.10.

¹⁷³ Ibid.

¹⁷⁴ Cadbury Report para 4.11.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Cadbury Report para 4.12.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

director should be disclosed in the form of a Director's Report and in light of the disclosures made, it is for the board of directors to decide whether or not the standard of independence has been met.¹⁸⁰ In order to take steps to safeguard the independent position of NEDs, the Cadbury Report regards it as good practice for NEDs not be involved in any share option schemes and for their service as a NED to not be pensionable by the company.¹⁸¹

With regards to the issue of access to information, NEDs lack the inside knowledge regarding the inner workings of the company, unlike executive directors who do indeed have knowledge of the company's internal affairs.¹⁸² Therefore, the effectiveness of a NED turns to a large extent on the quality of the information which they are provided with and on the manner in which the NED uses the information provided.¹⁸³ Therefore, the Cadbury Report recommends that boards should regularly review the extent and the form of the information that is provided by the company to all directors.¹⁸⁴

Furthermore, the Cadbury Report raised the concern that NEDs may eventually lose their independent edge if they remain on the board of directors for an extended period of time.¹⁸⁵ Related to this is the need for the composition of the board to change in line with new challenges which may arise.¹⁸⁶ In light of these propositions, the Cadbury Report recommended that NEDs should be appointed for specified terms and that their Letter of Appointment should detail their term of office, duties, remuneration and its review.¹⁸⁷ Regarding the reappointment of NEDs, the Cadbury Report noted that this should not be automatic, but rather should be a conscious decision made by the board of directors and the director concerned.¹⁸⁸

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Organisation for Economic Cooperation and Development 'G20/OECD Principles of Corporate Governance' available at <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1615577136&id=id&accname=guest&checksum=2EC5E2F9EAA5E8DFD5C7C371A868E90>, accessed on 21 November 2020.

¹⁸³ Cadbury Report 4.14.

¹⁸⁴ Ibid.

¹⁸⁵ Cadbury Report 4.16.

¹⁸⁶ Ibid.

¹⁸⁷ Cadbury Report para 4.16.

¹⁸⁸ Ibid.

3.3.3 Greenbury Report¹⁸⁹

The Greenbury Report, published in 1995, was the response to a period of public concern in the UK with regards to a trend which saw senior management of recently privatised utilities awarding themselves significant increases in pay, which appeared unrelated either to their calibre and personal expertise, or to any significant improvement to corporate performance.¹⁹⁰ The Greenbury Report recommended that companies establish a remuneration committee that is made up of only NEDs, with no personal or financial interests at stake, who would have the responsibility to decide on the salaries of senior management.¹⁹¹ The findings of the Greenbury Report recommended that NEDs be given wider powers so as to enable them to have a greater involvement in the decisions of the board and its committees, in the particular context of the remuneration of senior management.¹⁹² The aim of having the remuneration committee was to put an end to executive directors having influence over the settlement of their own remuneration.¹⁹³

3.3.4 Hampel Report¹⁹⁴

The Hampel Report was set up by the Financial Reporting Council, and published in 1998, to review the implementation of the Cadbury and Greenbury Reports' recommendations as well as to further extend the standards of corporate governance to an even higher level.¹⁹⁵ The Hampel Report indicates that NEDs are normally appointed to the board of directors primarily for their contribution towards the development of strategic direction of the company and, in addition, NEDs are also appointed to perform a monitoring function.¹⁹⁶ The Hampel Report finds that a further important function of a NED, particularly in the case of smaller companies, is to contribute valuable expertise to the board of directors that would not otherwise be available to management.¹⁹⁷ Likewise, a NED may serve as a mentor to executive board

¹⁸⁹ Sir Richard Greenbury 'Directors' Remuneration: Report of a Study Group' available at <https://ecgi.global/sites/default/files//codes/documents/greenbury.pdf>, accessed on 21 November 2020.

¹⁹⁰ Tshepo Mongalo 'Shareholder Activism in The United Kingdom Highlights the Failure of Remuneration Committees: Lessons For South Africa' (2003) 120 *SALJ* at 757.

¹⁹¹ *Ibid* at 760.

¹⁹² James J Hughes 'The Greenbury Report on Directors Remuneration' (1996) 17 *International Journal of Manpower* at 5.

¹⁹³ Thomas Clarke 'The Contribution of Non-Executive Directors to Effectiveness of Corporate Governance' (1998) 3 *Career Development International* at 118.

¹⁹⁴ Committee on Corporate Governance: Final Report 'The Combined Code: Principles of Good Corporate Governance and the Code of Good Practice' available at <https://ecgi.global/sites/default/files//codes/documents/higgsreport.pdf>, accessed on 21 November 2020.

¹⁹⁵ Lipman op cit note 94 at 65.

¹⁹⁶ *Ibid*.

¹⁹⁷ Hampel Report para 3.8.

members who are relatively inexperienced.¹⁹⁸ Importantly, what is essential in every case, is the ability of a NED to command the respect of the executive directors as well as the ability to work with them in a seamless manner as a cohesive team to further the interests of the company.¹⁹⁹

Furthermore, the Hampel Report recommended that a majority of the NEDs on the board of directors should be independent.²⁰⁰ In terms of the meaning of independent, the Hampel Report explicitly agreed with the above mentioned definition of independence submitted in the Cadbury Report. Furthermore, the Hampel Report agrees with the Cadbury Report in that it is for the board of directors to decide on whether a particular director is indeed independent in terms of the above definition.²⁰¹ The Hampel Report recommends that the board of directors should disclose which of the directors are considered to be independent in the annual report and in addition, should be ready to provide a justified view should the independence of a particular director be challenged.²⁰² However, the Hampel Report does recognise that even if a NED is not considered to be independent, they nevertheless may still be in a position to make meaningful contributions to the board.²⁰³ In addition, the Hampel Report notes that the need for NEDs exercising a robust independent voice on the board of smaller companies is as strong for same in larger companies.²⁰⁴ In the case of smaller companies, many of the executives are also major shareholders and therefore the level of scrutiny of other shareholders is low.²⁰⁵ In light of this, the Hampel Report notes that part of the role of a NED is to fill the vital function of safeguarding the interests of the minority and ensuring good governance.²⁰⁶

3.3.5 Turnbull Report²⁰⁷

The Turnbull Report, published in 1999, did not materially extend the advancements forwarded by the preceding reports, but rather developed new strategies with the aim of improving

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Hampel report para 3.9.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Hampel Report para 3.10.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ The Institute of Chartered Accountants in England and Wales 'Internal Control: Guidance for Directors on the Combined Code' available at <https://ecgi.global/sites/default/files//codes/documents/turnbul.pdf>, 21 November 2020.

corporate governance.²⁰⁸ The majority of these strategies revolved around designing, operating and maintaining sound internal control.²⁰⁹ The Turnbull Report represented the next stage in the natural evolution of the UK's corporate governance framework.²¹⁰ The period from the Cadbury Committee's establishment to the publishing of the Turnbull Report was just less than 10 years, yet, during this time, the progress made in relation to corporate governance was significant both in the UK and abroad.²¹¹ For example, the aforementioned Cadbury, Greenbury and Hampel Reports had a great influence on corporate governance on a global scale, leading to the publishing of similar reports such as the King Report in 1994 in South Africa, the Vienot Report in 1995 in France, the Peters Report in 1996 in the Netherlands and the Ramsay Report in 2001 in Australia.²¹²

3.3.6 Higgs Report²¹³

The UK Government's request for the Higgs Report came during a time of several high-profile corporate scandals in the USA, particularly, WorldCom, Enron, Tyco, Global Crossing, WorldCom and Xerox.²¹⁴ The intent of the report was to assist in preventing similar large corporate governance failures within British corporations.²¹⁵ The Higgs Report, published in 2003, reviews the role and effectiveness of NEDs and includes recommendations that both clarify the role of a NED and increase the effectiveness of a NED.²¹⁶ The earlier work done regarding corporate governance in the form of the Cadbury, Greenbury, Hampel and Turnbull Reports serve as the building blocks of corporate governance.²¹⁷ These earlier reports either sought to improve on previous recommendations, or reviewed untouched areas of corporate governance.²¹⁸ The Higgs Report, however, places more emphasis on how the board discharges its duties and how this can be improved.²¹⁹ The most relevant recommendations contained in

²⁰⁸ Lipman op cit note 94 at 69.

²⁰⁹ Nigel Turnbull 'Internal Control: Guidance for Directors on the Combined Code (The Turnbull Report)' (2000) 2 *Risk Management: An International Journal* at 66.

²¹⁰ Lipman op cit note 94 at 69.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Derek Higgs 'Review of the Role and Effectiveness of Non-Executive Directors' available at <https://ecgi.global/sites/default/files/codes/documents/higgsreport.pdf>, accessed on 23 November 2020.

²¹⁴ Kevin G. Corley 'Examining the Non-Executive Director's Role from a Non-Agency Theory Perspective: Implications Arising from the Higgs Report' (2005) 16 *British Journal of Management* at S1.

²¹⁵ Ibid.

²¹⁶ Lipman op cit note 94 at 71.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

the Higgs Report relate to the role of a NED, particularly in the areas of strategy, risk, people and performance.²²⁰

The Higgs Report submits that the role of a NED has two principle components. Firstly, a NED's function is to monitor executive activity.²²¹ Secondly, a NED's function is to contribute towards the development and strategy of the company.²²² The Higgs Report notes that placing an overemphasis on the monitoring and control functions of NEDs gives rise to the risk that NEDs may be seen by themselves, and others, as an alien policing influence who is detached from the rest of the board.²²³ Likewise, the Higgs Report notes that if an overemphasis is placed on the strategy function of NEDs, there is a risk of NEDs becoming too close to executive management, which in turn undermines shareholder confidence in the effectiveness of board governance.²²⁴

The Higgs Report considers it important that a spirit of mutual respect and partnership is established on the unitary board.²²⁵ For this to happen, the NEDs are required to build up recognition, regarding their contributions, from the executive board members in order to promote trust and openness.²²⁶ Only once an environment of trust and openness has been established within the board of directors can the NEDs contribute effectively.²²⁷ The Higgs report argues that the key to the effectiveness of a NED lies as much in relationships and behaviours as it does in processes and structures.²²⁸

In terms of the legal duties owed to the company, the Higgs Report notes that both the executive and NEDs are subject to the same general legal duties.²²⁹ However, crucial is the fact that the NEDs are not involved in the day-to-day running of the company, as is the case with executive directors, given that NEDs do not report to the chief executive.²³⁰ This allows NEDs to bring a fresh perspective to the board of directors and to contribute more objectively in

²²⁰ Ibid.

²²¹ Higgs Report para 6.1.

²²² Ibid.

²²³ Higgs Report para 6.2.

²²⁴ Ibid.

²²⁵ Higgs Report para 6.3.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Higgs Report para 6.5.

²³⁰ Ibid.

supporting the management team as well as allowing NEDs to constructively monitor and challenge the management team.²³¹

The Higgs Report notes further that NEDs must at all times endeavour to establish and maintain their own confidence in the management team's performance, in the conduct of the company, the adequacy of risk management and financial controls, the appropriateness of remuneration, the development of strategy and plans for management development and succession, and the appointment and replacement of key personnel.²³² In light of this, the role of a NED encompasses both supporting executive directors in their leadership of the company and also monitoring and supervising their conduct.²³³

In practice, NEDs will fulfil some of their functions through their role on the board committees.²³⁴ In addition, the Higgs Report notes that when it comes to smaller companies, NEDs bring a wealth of experience and specific expertise that often compliments the executive team.²³⁵ In smaller companies the NEDs often fulfil a role of coaching and supporting the management team.²³⁶ Importantly, the Higgs Report brings to light the behaviours and personal attributes of a NED by noting that the role of a NED is demanding, complex and requires experience, skills, integrity and particular personal and behaviour attributes.²³⁷ The Higgs Report notes that NEDs need to have an enquiring mind and be of sound judgement.²³⁸ During a meeting of the board of directors, the NEDs should pose intelligent questions, engage in constructive debate, rigorously challenge the strategy set by management and decide dispassionately.²³⁹ However, at the same time, NEDs should listen sensitively to the views held by others both inside and outside of the board of directors.²⁴⁰ As such, the Higgs Report identified a number of personal attributes that are required for a NED to be effective: i) integrity and high ethical standards; ii) sound judgement; iii) the ability and willingness to challenge

²³¹ Ibid.

²³² Higgs Report para 6.6.

²³³ Ibid.

²³⁴ Higgs Report para 6.8.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Higgs Report para 6.9.

²³⁸ Higgs Report para 6.10.

²³⁹ Ibid.

²⁴⁰ Ibid.

and probe; and iv) strong interpersonal skills.²⁴¹ These behaviours and personal skills will now be unpacked.

Firstly, and what is foremost, is integrity and high ethical standards.²⁴² This is a prerequisite for all directors.²⁴³ Secondly, having sound judgement is critical to the role of a NED as it is essential for each of the functions of a the NEDs role.²⁴⁴ Thirdly, all NEDs must have the ability to enquire and ask probing questions.²⁴⁵ In light of this, a NED should have the requisite strength of character that will enable them to seek and obtain satisfactory and full answers while also maintaining a collegiate environment on the board.²⁴⁶ A fresh perspective and a level of objectivity is required from NEDs to maintain a distance from the day-to-day running of the company, combined with the experience that has been acquired elsewhere, is what serves as the basis for challenging and questioning the accepted thinking of the executive.²⁴⁷ The act of questioning not only serves to raise specific concerns, but it also can have the effect of prompting stronger executive performance.²⁴⁸ If questioning is performed skilfully, it can be both penetrating and demanding.²⁴⁹ The responses given can both reassure the NED as well as stimulate actions and reflections that contribute towards more effective executive performance.²⁵⁰ Fourthly, it is essential for NEDs to have strong interpersonal skills to be effective given that much of the effectiveness of a NED depends on having the ability to exercise influence as opposed to giving orders, therefore, the establishment of a high level of trust is required.²⁵¹

The Higgs Report notes that the effectiveness of a NEDs contribution will inevitably change over time and therefore, a NED should be willing and able to independently acknowledge when their individual contribution to the board is no longer fresh.²⁵² Once this becomes apparent, the Higgs Report recommends that the NED concerned should step aside in

²⁴¹ Higgs Report para 6.12.

²⁴² Higgs Report para 6.13.

²⁴³ Ibid.

²⁴⁴ Higgs Report para 6.14.

²⁴⁵ Higgs Report para 6.15.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Higgs Report para 6.16.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Higgs Report para 6.17.

²⁵² Higgs Report para 6.18.

order to make way for newcomers and that this should be done in a managed and orderly way.²⁵³

3.3.7 FRC Report²⁵⁴

The FRC Report notes that on appointment, a NED should set aside time for a formal, comprehensive and tailored induction that should extend beyond just the boardroom.²⁵⁵

Certain initiatives for example pairing a NED with an executive member is likely to expedite the process of the NEDs acquiring the necessary understanding of principle areas of business activity, with particular emphasis on acquiring knowledge of areas involving significant risk.²⁵⁶ In addition, the FRC Report notes that NEDs are expected to visit the company's operations and engage with the managers and non-managerial members of the workforce.²⁵⁷

The aforementioned engagements should be used by a NED to gain a better understanding of the company's culture and the way in which things are actually done in practice as well as gain an insight into the concerns and experience of the workforce.²⁵⁸

The FRC Report notes further that it is highly essential that NEDs have sufficient time available to discharge their duties effectively.²⁵⁹ A NED should not underestimate the time commitment that is required to engage with shareholders and any other key stakeholders while also getting to know that business.²⁶⁰ The time required in this regard can be considerable.²⁶¹ Therefore, the FRC Report notes that it is advisable for NEDs to consider the demands of their various portfolios and their commitments in general before accepting any new appointments.²⁶² Furthermore, in order to NEDs to continue making a positive contribution to the board of directors and continue generating respect from the other directors, NEDs are recommended to dedicate time towards developing and refreshing their skills and knowledge.²⁶³

²⁵³ Ibid.

²⁵⁴ Financial Reporting Council 'Guidance on Board Effectives' available at <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF>, accessed on 23 November 2020.

²⁵⁵ FRC Report para 75.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ FRC Report para 76.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

Furthermore, it is critical for NEDs to actively insist on receiving information that is of a high quality sufficiently in advance of a board meeting so that pertinent issues relating to the company may receive thorough consideration and subsequently debated and challenged at the meeting of the board.²⁶⁴ In the event that the NED considers the information provided to lack clarity or to be inadequate, the FRC report recommends that the NED concerned seek clarity or amplification from management.²⁶⁵

3.4 Commercial Lens - The ‘What’

3.4.1 Introduction

The role of a NED in the commercial context is determined by the nature and size of the company that the NED is a director of, as well as other factors for example ownership structure, personal culture, complexity and traditions.²⁶⁶ It is important to restate the fact that the Companies Act does not differentiate between executive and NEDs and, in addition, does not mandate the inclusion of NEDs on a company’s board of directors. King IV, however, makes the suggestion that a company’s board of directors include a majority of independent NEDs with an appropriate blend of skill and expertise.²⁶⁷ However, with the advent of many significant corporate collapses occurring globally, NEDs have come under increasingly greater scrutiny.²⁶⁸ To this end, stakeholders and regulators want to be aware of what it is NEDs are doing, what they are contributing to the company and whether they are policing executive directors.²⁶⁹ Therefore, the role of a NED is evolving and the current commercial views regarding what the role of NEDs entails and also what it should be is diverse.²⁷⁰ The analysis of the role of NED through a commercial lens aims to set out what a NED is supposed to do from the perspective of those working in and around company boards. The themes to be explored in this section include, performance of the board, effectiveness, monitoring, individual expertise and board committees.

²⁶⁴ FRC Report para 77.

²⁶⁵ Ibid.

²⁶⁶ Lipman op cit note 94 at 82.

²⁶⁷ King IV Report at 50 para 7(a) and 8.

²⁶⁸ Lipman op cit note 94 at 82.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

3.4.2 Performance of the Board

One of the main concerns of any NED sitting on a company's board of directors should be to ensure to board's performance.²⁷¹ To this end, NEDs should ensure that the shareholders' performance expectations are being met, and in the event that they are not being attained, NEDs should investigate why.²⁷² Furthermore, NEDs should monitor management's recommendations regarding any significant changes to the company and if necessary, recommend that alternative advice be sought.²⁷³ In addition, NEDs should see whether the company has policies in place that limit the discretion of management, and should check whether the company has processes in place to ensure that these policies are being followed.²⁷⁴

Furthermore, given the recent and noticeable shift from a model of shareholder primacy to the acceptance of stakeholder capitalism, as exemplified by the Business Roundtable, directors are thus arguably also responsible to the company's stakeholders at large, as opposed to merely its shareholders.²⁷⁵ Stakeholders of the company include employees, creditors, the environment, the general public, suppliers and other individuals or groups who are affected by the operations of the company.²⁷⁶ Therefore, in fulfilling their function of ensuring the performance of the board, NEDs should take into account this broader spectrum of stakeholders.

Furthermore, independent NEDs can fill the role of a boundary spanner by undertaking to act as the communications link between shareholders and the board²⁷⁷ as well as between all other stakeholders and the board.²⁷⁸ Arguably, independent NEDs are best suited to undertake the role of a boundary spanner by virtue of the fact that they are independent and, unless they are dishonest, would only gain by relaying full and correct information between the company's

²⁷¹ John Roberts, Terry McNulty & Philip Stiles 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16 *British Journal of Management* at S6.

²⁷² Lipman op cit note 94 at 84.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Business Roundtable 'Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'' available at <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>, accessed on 14 March 2021.

²⁷⁶ World Economic Forum 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' available at <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>, accessed on 14 March 2021.

²⁷⁷ K Nicholas 'Independents not welcome on board' 2004 *Australian Financial Review* at 16.

²⁷⁸ Ruth Barratt & Nada Korac-Kakabadse 'Developing Reflexive Corporate Leadership: The Role of the Non-Executive Director' (2002) 2 *Corporate Governance* at 33.

stakeholders and the board.²⁷⁹ This role can also be expanded to include management as a stakeholder of the company whereby NEDs act as an independent body between management and the board.²⁸⁰ This would serve to facilitate a flow of accurate information to the board as information would not be blocked or edited by executive directors. By passing the comments and requests of external stakeholders back to the board, and by keeping external stakeholders well informed, NEDs are fulfilling a role of corporate social performance, thus enhancing the image of the company as being a good corporate citizen.²⁸¹

NEDs should be experienced and skilled professionals who are appointed to the board of directors for the purpose of providing the board with the knowledge, judgement, objectivity and balance that can only come from a NED.²⁸² Relying only on executive directors or only on NEDs is likely to limit the breadth of knowledge, judgement, objectivity and balance and thus in turn limit the effectiveness of the board.²⁸³ Similarly, having NEDs on the board of directors merely as an attempt to showcase adherence to corporate governance standards is likely to be detrimental to the performance of the board if the appointed NEDs do not add to the requisite knowledge and skill.²⁸⁴ Conversely, bringing on board competent and knowledgeable NEDs can bring accountability and transparency to the board.²⁸⁵ In addition, the business capabilities and credibility of the a NED can be highly beneficial to the performance of the company's board.²⁸⁶

3.4.3 Effectiveness

By definition, independent NEDs should be independent of the company's executive management and of the company itself.²⁸⁷ NEDs are expected to monitor the senior management of the company, which includes executive directors, as well as assist with the development of business strategies that will be implemented to manage the company and enable it to achieve its goals.²⁸⁸ Arguably, the more independent a NED is, the more effective

²⁷⁹ Lipman op cit note 94 at 85.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Thomas Clarke op cit note 193 at 119.

²⁸³ Lipman op cit note 94 at 85.

²⁸⁴ Ibid.

²⁸⁵ Ibid at 86.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Christopher Pass 'Corporate Governance and the Role of Non-Executive Directors in Large UK Companies: an Empirical Study' (2004) 4 *Corporate Governance* at 53.

they will be in discharging their duties.²⁸⁹ This is because their decisions, thoughts and recommendations will not be tainted by how management ordinarily runs the company.²⁹⁰ Rather, their decisions, thoughts and recommendations will be determined by their own experience, education and independent views of the company and the industry in which it operates.²⁹¹ The directors of a company are responsible for the company's financial performance, which is a reflection of the strategic decisions as set by the board.²⁹² In light of this, directors are expected to play an integral part in making strategic decisions and setting strategy with regards to all aspects of the policies of the company.²⁹³ NEDs in particular are expected to be heavily involved in the aforementioned given that they are appointed for their strategic expertise.²⁹⁴

In opposition to the above, some argue that the more independent a NED is, the less they are prone to having knowledge of the company and knowledge of the industry in which the company operates and that, therefore, such independent NEDs will resultantly be less effective than their executive counterparts or non-independent NEDs who both have extensive company and/or industry knowledge.²⁹⁵ However, the needs of each company are different and so the company's intentions will come into play when selecting NEDs.²⁹⁶ Appointees are in many cases selected on the basis of their particular expertise in specific areas, as well as for their knowledge of business in general.²⁹⁷ As such, a particular NED may be an asset in one company, but be of little use to another in a different industry.²⁹⁸ Some argue that a NED will become familiar with a company's industry and operations by working on the company's board and that this, combined with the NEDs' general business acumen and expertise, will enable them to add increasing value and effectiveness to the company over time.²⁹⁹ Conversely, a NED's value and effectiveness many in actual fact decrease over time.³⁰⁰ For example, the

²⁸⁹ Lipman op cit note 94 at 87.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Phillip S Scherrer 'Directors' Responsibilities and Participation in the Strategic Decision Making Process' (2003) 3 *Corporate Governance* at 87.

²⁹⁵ Colin B Carter & Jay W Lorsch *Back to the Drawing Board: Designing Corporate Boards for a Complex World* (2003).

²⁹⁶ Lipman op cit note 94 at 87.

²⁹⁷ Institute of directors 'What is the Role of the Non-Executive Director?' available at <https://www.iod.com/services/information-and-advice/resources-and-factsheets/details/What-is-the-role-of-the-NonExecutive-Director>, accessed on 6 March 2021.

²⁹⁸ Lipman op cit note 94 at 87.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

longer a NED serves on a board of directors, the less independent they become, in effect losing the fresh perspective they originally brought to the board.³⁰¹ For example, long-term service on a particular board will arguably diminish the usefulness and effectiveness of a NED over time as their ability to offer new concepts or ideas will decrease, and their process of thinking will gradually tend towards following that of the company's executive directors and management.³⁰²

Moreover, to fulfil their role of effectively providing strategic direction and guidance, NEDs can gain knowledge of the company's industry and the company itself by working on the board of directors or by relying on information provided by the executive directors or by the company's management.³⁰³ However, this information may be biased or flawed, resulting in the NED being unable to effectively perform their role to the standard that is required.³⁰⁴ In order for NEDs to effectively fulfil their role on the board, they should be able to understand the information that the company provides to them and, in addition, they should be able to determine its accuracy.³⁰⁵

Furthermore, NEDs should promote effectiveness by ensuring that the company's short-term goals form part of the company's long-term strategic direction that the board has set.³⁰⁶ The effectiveness of a NED is critical given that the capabilities of the board, and in particular that of the NEDs, will have a direct and substantial impact on the performance of the board of the company, the company's integrity, and how the company is viewed by investors, particularly professional investors, for example, investment funds.³⁰⁷ If the NEDs are not performing their functions effectively and proactively, this will become apparent to investors and consequently, the investment community will likely no longer see the company as a viable investment option.³⁰⁸ If investors are unsatisfied with the company's level of corporate governance or are unsure as to whether that their interests are being protected and monitored by the NEDs, then the company will likely find it difficult to source new equity for the purposes of growing the company.³⁰⁹

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Carter & Lorsch op cit note 295.

³⁰⁵ Scherrer op cit note 294 at 86.

³⁰⁶ Ibid.

³⁰⁷ Lipman op cit note 94 at 88.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

As mentioned, the Companies Act makes no formal distinction between executive and NEDs, whether or not the latter is independent. Both executive and NEDs should add value to the company by having regard to their areas of expertise as well as by contributing towards the better management of the company.³¹⁰ In addition, a NED lacks a formal job description, rather, their role will be determined by a number of factors such as the industry in which the company operates, the size of the company, the level of experience of and expertise that the NED can offer to the board and the level of experience and expertise of the other directors sitting on the board.³¹¹ Furthermore, there are a number of different reasons to appoint NEDs to the board, many of these reasons turn on the company's specific characteristics and the level of scrutiny experienced by the company from different stakeholders such as the media and the general public.³¹²

3.4.4 Monitoring

NEDs bring certain benefits to the board of directors that cannot be brought by the company's executive directors such as a greater wealth of knowledge, different views when it comes to issues and in some cases a more professional view of a particular situation.³¹³ In addition, a NED can also serve as a confidante or mentor to the CEO, a role that cannot be filled by senior management or executive directors given that they are operating at a junior level to the CEO.³¹⁴ Furthermore, NEDs should monitor and continuously evaluate the CEOs performance and also judge the CEOs performance against the performance of other CEOs, if they sit on multiple boards.³¹⁵ To add value in this regard, NEDs need to be constructive and effective and participate independently.³¹⁶

A further important aspect to the role of a NED is ensuring that management and the executive directors are monitoring and taking steps to guard against possible risks.³¹⁷ Taking risks is a necessary endeavour if the business is to grow. Thus managing these risks is a key

³¹⁰ Ibid at 89.

³¹¹ Lipman op cit note 94 at 89.

³¹² Ibid.

³¹³ Andrew Kakabadse, Keith Ward, Nada Korac-Kakabadse & Cliff Bowman 'Role and Contribution of Non-Executive Directors' (2001) 1 *Corporate Governance* at 4.

³¹⁴ Lipman op cit note 94 at 90.

³¹⁵ Ibid.

³¹⁶ Ibid at 91.

³¹⁷ Ibid.

issue.³¹⁸ Treasury risk management products are commonly used, however, they are not always understood properly.³¹⁹ For a NED to properly fulfil their monitoring functions, they should have a good understanding of the aforementioned product as well as how they are used and if there are any risks associated with using them.³²⁰ In addition, NEDs should also understand the exposure covered by these products, in terms of financial reporting.³²¹ Therefore, risk management policies should be established by senior management and these policies should be monitored on regular basis by the NEDs and the board at large.³²²

Furthermore, a NED should challenge the comments and views of the board, focusing particularly on the executive directors.³²³ A NED would not be fulfilling their monitoring/oversight function if they merely rubber stamped the comments and views put forth by the other members of the board.³²⁴ Rather, debate and constructive argument is what will benefit the board of the company the most, even if this means challenging the managing director or the CEO.³²⁵ To this end, a NED should essentially play ‘devil’s advocate’.³²⁶ In this sense, a NED should never be bound by the level of seniority of the other members of the board.³²⁷

Moreover, one of the board’s clear objectives is to oversee the management of the company as well as to ensure that there is accountability to shareholders.³²⁸ In the event that the NEDs constitute a majority on the board, as is the case in many large companies, they can influence the decisions the board and implement policy and strategy that may be contrary to what was proposed by the executive directors or management.³²⁹ This arguably gives shareholders a sense of confidence in the board given that shareholders see the board as

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid.

³²³ Ann-Maree Moodie ‘Corporate Governance: The Art of the Long View in Australian Boardrooms: In the Words of BHP Billiton Chairman and Former Banker Don Argus, Boards Need People with Courage and Conviction. It Also Means Debating and Resolving the Ethical Issues Which Have Been Around Since Plato’s Time’ (2003) 117 *Journal of Banking and Financial Services* at 18.

³²⁴ Ibid.

³²⁵ Ibid.

³²⁶ Ibid at 22.

³²⁷ Lipman op cit note 94 at 92.

³²⁸ Ibid.

³²⁹ Ibid.

responsible for making decisions that are in the company's best interests as opposed to the directors'.³³⁰

As mentioned, NEDs should not become involved in the day-to-day running or operations of the company, rather, they should assume the role of a corporate watchdog and in so doing should challenge the chairman, the executive directors and the board.³³¹ NEDs should therefore question anything that they consider to be unethical, or not in the best interest of the company.³³² To this end, NEDs should be ready and able to judge procedures and policies and be ready to investigate and expose any dishonesty or fraud.³³³ Furthermore, NEDs should be comfortable with understanding accounting policies and should be able to take an educated stance when challenging the company's accounting approach in an effort to ensure that international accounting standards are adhered to.³³⁴

Moreover, NEDs owe a duty of care to the company which thus requires them to make proper enquiries as to the performance and state of the company.³³⁵ NEDs cannot simply allow the executive directors to control the company or allow management to run the company without any oversight.³³⁶ NEDs must pose questions in relation to the company's performance, and if the information that is provided to them is unsatisfactory, they should make further inquiries.³³⁷ As mentioned, NEDs should not involve themselves in the company's daily business, but rather they should ensure to make themselves aware of the company's financial status so as to ensure that the company will be able to pay its debts.³³⁸

Given that NEDs should be concerned with both conformance and performance of the company, a NED should be vocal in the event that they observe non-conformance and should push members of the board of directors to adhere to all legal, moral and ethical requirements.³³⁹ To ensure that the board conforms to the aforementioned legal, moral and ethical requirements, NEDs are required to pose tough questions to the board, seek professional guidance or advice

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid at 93.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

should they require assistance in monitoring performance, be alert to the sign of possible issues arising, take an objective point of view when monitoring management and act to protect the interests of the company and its stakeholders should they feel it necessary to do so.³⁴⁰

Other than contributing significant vision and experience and bringing an independent view to the discussions of the board,³⁴¹ it is arguably preferable, and in the case of JSE listed companies is a requirement, for the majority of NEDs sitting on the board to be independent.³⁴² Since one of the roles of the board is to monitor, appoint and if necessary replace the CEO of the company, it is necessary for the board to be largely independent as if this was not the case, management would effectively be managing themselves.³⁴³

3.4.5 Individual Expertise

NEDs are invited to sit on the board of directors because they have a general sense of business experience as well as a certain level of expertise with regards to one of the areas in which the company operates.³⁴⁴ A lot of the time spent by NEDs is related to managing risk and its accountability which can in turn dictate the type of expertise a NED has.³⁴⁵ NEDs with expertise in law and accounting may be preferable to others who may limit the board's productivity or usefulness.³⁴⁶ Unless the general business knowledge and abilities of a NED are substantial, too many NEDs with the same or similar expertise can lead to a narrow reference pool which adds little value to the board.³⁴⁷ Depending of the expertise and experience of a NED, they may be in a position to provide commentary or advice on financial matters, but may be more effective in assisting in other areas.³⁴⁸ This argument is used in support of appointing NEDs with a variety of different experiences and backgrounds, so that the board of directors has a complete view of the company's operations as well as the issues that affecting the company.³⁴⁹

³⁴⁰ Ibid at 94.

³⁴¹ Stephen Hill 'The Social Organization of Boards of Directors' (1995) 46 *The British Journal of Sociology* at 266.

³⁴² Lipman op cit note 94 at 94.

³⁴³ Ibid.

³⁴⁴ Ibid at 95.

³⁴⁵ Ibid at 92.

³⁴⁶ Ibid at 93.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

3.4.6 Board Committees

One of the board's primary roles is to guide the company as well as to ensure that the requisite procedures and policies are established to detect and prevent fraud or errors in accounting or reporting.³⁵⁰ Although the board may not delegate these responsibilities to management, the board may delegate these responsibilities to a committee that has been appointed by the board, however, the board will still remain ultimately responsible.³⁵¹ An audit committee is usually established to take on the aforementioned whereby independent NEDs make up all of the committee members according to King IV.³⁵² The chair of the audit committee is always a NED.³⁵³ Some decisions should rather be taken by committees which have been established for a specific reason as opposed to the board taking the decision.³⁵⁴ For example, the remuneration of directors and senior management is a contentious issue that should not be determined by the board but rather by a committee of independent NEDs.³⁵⁵ This is to ensure that the confidence in the decisions of the remuneration committee are made at arm's length of the board.

3.5 Conclusion

This chapter has analysed the role of a NED through three distinct lenses, that being, a legal, governance, and commercial lens. The legal lens focused on identifying and discussing the various duties of directors in order to understand why NEDs act in the way that they do from a legal perspective. The fiduciary duties analysed in terms of the legal lens that NEDs are expected to comply with when exercising their powers and functions were the duty to act in good faith and in the best interests of the company, the duty to act for a proper purpose, the duty to exercise an independent judgement, the duty to act within their powers and the duty to avoid a conflict of interest. The duty of care, skill and diligence was also briefly discussed. The role of a NED was then analysed through a governance lens in order to understand how NEDs are supposed to go about fulfilling the requirements for their role. Here, the logical succession of industry reports commissioned by government in the United Kingdom was discussed, namely, the Cadbury Report, the Greenbury Report, the Hampel Report, the Turnbull Report and finally the Higgs Report. The Cadbury Report, published in 1992, focused on best practice

³⁵⁰ Ibid at 96.

³⁵¹ Ibid.

³⁵² King IV Report at 56 para 56.

³⁵³ Lipman op cit note 94 at 96.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

and recommended that more NEDs be appointed to the board of directors and that all directors act with an independent mind. The Cadbury Report also introduced all the major elements and sub-committees that are found today in the board of a public company.³⁵⁶ Furthermore, the Cadbury report stated that the role of a NED is to review the performance of the executives and the board and to provide leadership when in the event that a conflict of interest arises. The Greenbury Proposal, published in 1995, further expanded the responsibilities of a NED and recommended that NEDs be given wider powers, particularly in respect of issues relating to the remuneration of senior management thus bringing NEDs into likely conflict with executive directors. The Hampel Report, published in 1998, reviewed the recommendations forwarded by the Cadbury and Greenbury reports and promoted standards of corporate governance that were even higher than before by emphasising the value of principles as opposed to legislation as a means to improve the effectiveness of the board. The Hampel Report further expanded on the expectation and responsibilities of a NED by making it clear that NEDs have a strategic as well as monitoring role to play. The Turnbull Report, published in 1999, used the recommendations of the preceding reports of Cadbury, Greenbury and Hampel in order to establish a framework of good corporate governance. Lastly, the Higgs Report, published in 2003, advocated for the effectiveness of NEDs to be improved so that the performance of the board could be improved. The FRC Report was also discussed. The role of a NED was then analysed through a commercial lens to understand what NEDs are supposed to do from the perspective of those working in and around company boards. The themes explored in this section included, performance of the board, effectiveness, monitoring, individual expertise and board committees. Given the literature reviewed thus far, the role of a NED can be summarised by the following key characteristics:

General	<ul style="list-style-type: none"> • NEDs must not become involved in the day-to-day running and management of the company as NEDs do not report to the chief executive. Rather, the day-to-day running and management of the company is the responsibility of the executive directors who report directly to the chief executive. • Unlike executive directors, who are full time employees of the company, NEDs work on a part time basis and are also not considered employees of the company.
----------------	---

³⁵⁶ Rob Dixon, Keith Milton & Anne Woodhead 'An Investigation into the Role, Effectiveness and Future of Non-Executive Directors' (2005) 31 *Journal of General Management* at 2.

Principle functions of a NED	<ul style="list-style-type: none">• The two principle functions of a NED are, firstly, to monitor and supervise executive activity through constructively challenging the views of management/the executive directors i.e. bringing accountability to the board should anything unethical or contrary to the company's best interest arise and, secondly, to contribute towards the development and strategy of the company through their great wealth of experience, expertise and knowledge. This in essence is the task of ensuring the performance of the board. If performance expectations are not being met, NEDs are required to investigate why as well as be vocal about the non-performance.• Part of the monitoring/watchdog functions of a NED is ensuring that management is monitoring and taking steps to guard against possible risks by ensuring that the board is conforming to all legal, moral and ethical standards.• NEDs are therefore required to have an inquiring mind and be of sound judgement in order to pose intelligent questions, engage in debate and rigorously challenge the strategy set by management. As such, a NED may not rubber stamp the comments and views put forth by the board. A NED essentially plays 'devil's advocate' and should therefore never be bound by the level of seniority of the other members of the board.• At the same time, however, NEDs are required to listen sensitively to the views held by others both inside and outside the board.• In smaller companies, NEDs often fulfil the role of coaching and supporting the management team through the contribution of valuable expertise to the board of directors that would not otherwise be available to management.
-------------------------------------	--

	<ul style="list-style-type: none"> • In some cases, NEDs are required to seek professional guidance or advice in the event that they require assistance in monitoring the performance of the board.
Independent judgement	<ul style="list-style-type: none"> • One of the most essential qualities of a NED is to bring independent judgement to bear i.e. a fresh perspective regarding issues that relate to strategy, performance, resources, key appointments and standards of conduct of the company. A fresh perspective and a level of objectivity is required from NEDs as they are required to maintain a distance from the day-to-day running and management of the company. • NEDs should disclose any and all interests they hold as a way of assessing independence. • To safeguard independence, NEDs should not become involved in any share option schemes and should not receive a pension. As a further way to safeguard independence, NEDs should only be appointed for specific terms. • Since the effectiveness of a NEDs contribution will inevitably change over time, a NED should be willing and able to independently acknowledge when their individual contribution to the board is no longer fresh.
Calibre of NED	<ul style="list-style-type: none"> • The role of a NED is demanding and complex and therefore for NEDs to be effective, they are required to have integrity and high ethical standards, the necessary experience and skills, sound judgement, a willingness to challenge and probe, and strong interpersonal skills. As such, NED should have the requisite strength of character that will enable them to seek and obtain satisfactory and full answers while also maintaining a collegiate environment on the board.
Mentoring	<ul style="list-style-type: none"> • NEDs may also serve as a confidante or mentor to the chief executive given that this role cannot be filled by senior management or executive directors as that they are operating a junior level to the chief executive.

Boundary spanner	<ul style="list-style-type: none"> • Independent NEDs can fill the role of a boundary spanner by undertaking to act as the communications link between shareholders and the board as well as between all other stakeholders and the board. • By keeping external stakeholders well informed, NEDs are fulfilling a role of corporate social performance thereby enhancing the image of the company as a good corporate citizen.
Recognition	<ul style="list-style-type: none"> • In order for there to be a spirit of mutual respect and partnership established on the board, NEDs are required to build up recognition from the executive board member in order to promote trust and openness. Only once this environment has been established can a NED contribute effectively. As such, NEDs must be able to command the respect of the executive directors as well as have the ability to work with them in a seamless manner as a cohesive team to further the interests of the company.
Interests of the minority	<ul style="list-style-type: none"> • NEDs are also tasked with the vital function of safeguarding the interests of the minority, especially in the context of smaller companies whereby many of the executives are also major shareholders.
Remuneration committees	<ul style="list-style-type: none"> • Independent NEDs are also tasked with filling the positions of a company's remuneration committee.
Effectiveness	<ul style="list-style-type: none"> • The role of a NED is also to promote effectiveness by ensuring that the company's short-term goals form part of the company's long-term strategic direction as set by the board of directors.
Accounting standards	<ul style="list-style-type: none"> • NEDs should be comfortable with understanding accounting policies and should be able to take an educated stance when challenging the company's accounting approach in an effort to ensure that International Accounting Standards are adhered to.

Assuming the role of chairman of board committees	<ul style="list-style-type: none">• The chairman position of certain board committees is required to be filled by a NED, for example, the chairman of the audit committee is always a NED.
Legal duties	<ul style="list-style-type: none">• The role of a NED is also shaped by a number of legal duties such as the duty to act in good faith and in the best interests of the company, the duty to act for a proper purpose, the duty to exercise an independent judgement, the duty to act within their powers and the duty to avoid a conflict of interest and the duty of care, skill and diligence.

CHAPTER 4: LIABILITY FOR BREACH OF A DUTY OF CARE & SKILL

4.1 Introduction

Chapter 4 focuses on critically analysing the standard of liability applicable to NEDs for breach of a duty of care and skill. This will be done through an analysis of statute and case law at both a local and international level. It will be argued that the standard of liability applicable to NEDs for a breach of the duty of care and skill should be less onerous than their executive counterparts in light of the specific wording of section 76(3)(c)(i) of the Companies Act as well as the vastly diverging roles played by these groups of directors.

4.2 South Africa

4.2.1 The Common Law Prior To The Companies Act

A discussion of the common law prior to the Companies Act is necessary to properly understand section 76(3)(c) of the Companies Act which relates to a director's duty to exercise reasonable care, skill and diligence.³⁵⁷ Note that the duty to exercise reasonable care, skill and diligence is a non-fiduciary duty.³⁵⁸ As a general principle, directors may be held liable for negligence in carrying out their duties.³⁵⁹ As such, the duty of a director to act with reasonable care, skill and diligence is based on Aquilian liability for negligence and has been framed in largely subjective terms by the courts.³⁶⁰ In other words, adherence to this duty, according to the courts, has been contingent on the ability and experience of the specific director in question.³⁶¹ Consequently, the standard of care required by directors has been low given the undemanding manner in which the duty was couched.³⁶² To this end, directors were only expected to exercise a level of care, skill and diligence that they were in fact capable of exercising i.e. a director was only required to exercise a level of care and skill that would be expected of a person with *his or her* experience and knowledge, when performing their duties.³⁶³ Therefore, the more incompetent or inexperienced a director was, the standard of care

³⁵⁷ Cassim et al op cit note 29 at 554.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid at 555.

³⁶¹ Ibid.

³⁶² Jean J du Plessis 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia' (2010) 1 *Acta Juridica* at 263.

³⁶³ Cassim et al op cit note 29 at 555.

expected of such a director would be lower.³⁶⁴ In the context of directors' liability, this subjective test for care and skill meant that a director's inexperience or ignorance is what shielded them from liability given that less was expected of a director if they themselves knew less.³⁶⁵ This was reflected in the case of English case *Re Brazilian Rubber Plantations & Estates Ltd*³⁶⁶ whereby the directors of the company were unsuccessfully sued for the loss caused to the company as a result of their disastrous judgement regarding Brazilian rubber plantations.³⁶⁷ The decision of the directors to invest in the Brazilian rubber plantations was based on a false and fraudulent report regarding the output of the rubber plantations.³⁶⁸ The court held, in dismissing the proceedings, that a director's duty to act with reasonable care, skill and diligence is contingent on what can reasonably be expected of him, having regard to *his* knowledge and experience.³⁶⁹ The court stated that it is not a requirement for a director to be in possession of any special qualifications and as such it was perfectly acceptable for a director to manage a rubber company while being in complete ignorance of anything relating to rubber while also incurring no responsibility for any mistakes originating from such ignorance.³⁷⁰ However, the court also stated that if the director was knowledgeable about the rubber business, he must use his knowledge to benefit the company.³⁷¹ Importantly, the court held that a director is not liable for damage caused to the company as a result of errors of judgement.³⁷² The test for reasonable care and skill as laid down by *Re Brazilian Rubber Plantations & Estates Ltd*³⁷³ seems to contain a bias in favour of directors who are inexperienced while at the same time subjects directors who are more experienced to a greater risk of liability in the event that they fail to exercise reasonable care, skill and diligence.³⁷⁴

Furthermore, in the English case of *Re City Equitable Fire Insurance Co Ltd*,³⁷⁵ the managing director of the company was convicted of fraud following a substantial shortfall in the company's funds.³⁷⁶ As a result of the other directors' failure to become aware of the

³⁶⁴ Ibid.

³⁶⁵ FHI Cassim 'Fraudulent or Reckless Trading and s 424 of the Companies Act of 1973' (1981) 98 *SALJ* at 162.

³⁶⁶ *Re Brazilian Rubber Plantations & Estates Ltd* [1911] Ch 425 (CA) 437.

³⁶⁷ Cassim et al op cit note 29 at 555.

³⁶⁸ Ibid.

³⁶⁹ Ibid at 556.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ *Re Brazilian Rubber Plantations* supra note 366.

³⁷⁴ Cassim et al op cit note 29 at 555.

³⁷⁵ *Re City Equitable Fire Insurance Co Ltd* supra note 78.

³⁷⁶ Cassim et al op cit note 29 at 556.

ongoing fraud of the managing director, the liquidator of the company sought to hold them liable.³⁷⁷ The liquidator was successful in his endeavour as the court found that the directors had been negligent.³⁷⁸ However, the directors were shielded from liability due to an exemption clause contained in the company's MOI.³⁷⁹ After the court approved the subjective test laid down in *Re Brazilian Rubber Plantations & Estates Ltd*,³⁸⁰ the court proceeded to lay down three basic legal propositions which were then adopted by the South African judiciary³⁸¹ in *Fisheries Development Corporation*.³⁸² To gain a proper understanding of section 76(3)(c) of the Companies Act, it is necessary to examine the three legal positions laid down by the court in *Re City Equitable Fire Insurance Co Ltd*.³⁸³ First, the court stated that a director need not perform their duties at a degree of skill greater than that which can reasonably be expected from an individual of his or her experience and knowledge.³⁸⁴ This therefore confirmed that the standard to be applied is not that of a reasonable director, rather, the standard is subjective.³⁸⁵ Therefore, directors are not liable for mere errors of judgement. Second, the court stated that in respect of all duties that may properly be left to an official, a director is, absent suspicion, justified in trusting the official in question to perform their duties in an honest manner.³⁸⁶ However, the court also stated that it is not acceptable for a director to take a stance of unquestioning reliance when it comes to receiving information from others.³⁸⁷ Third, the court stated that a director is not bound to continuously give attention to the company's affairs, rather, the duties of a director are intermittent in nature and are to be performed at periodical board meetings.³⁸⁸ As such, the court determined that a relevant factor to consider when assessing

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ *Re Brazilian Rubber Plantations* supra note 366.

³⁸¹ Cassim argues that when the court in *Fisheries Development Corporation* adopted these principles, fifty years later, the court did so without any critical examination and without having regard to modern commercial attitudes regarding the role of directors in contemporary company law. Cassim argues that the court plainly ignored the fact that *Re City Equitable Fire Insurance Co Ltd* was decided during a time when directors were merely figureheads or honorary directors appointed as such merely due to their status or title as opposed to their business acumen. Cassim notes that today, the modern director is someone completely different in that a superior grasp of commercial matters is largely a prerequisite.

³⁸² *Fisheries Development Corporation* supra note 44.

³⁸³ *Re City Equitable Fire Insurance Co Ltd* supra note 78.

³⁸⁴ Cassim et al op cit note 29 at 557.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Cassim argues that this principle may have been relevant to NEDs in the past and that in light of modern times, this principle is no longer representative of what is expected even of a NED.

liability is that fact that the director in question was not involved in managing the company on a full-time basis, as is the case with NEDs.³⁸⁹

Furthermore, both South African law and English law have adopted the position that directors are not required to have any prerequisite qualifications to hold their office.³⁹⁰ However, English law has imposed upon company directors a duty of care which is far more rigorous than in South African common law.³⁹¹ The case of *Fisheries Development Corporation*³⁹² exemplifies this in that the court specifically made a distinction between executive and NEDs and in so doing stated that a NED is not liable for mere errors in judgement.³⁹³ Furthermore, the court stated that a NED is not required to have any singular ability, special business acumen, expertise, intelligence or even experience with regards to the business of the company.³⁹⁴ However, the court stated further that a NED must not shelter oneself behind culpable ignorance as to the affairs of the company nor must a NED be indifferent, nor must a NED blindly accept information or advice even if the information or advice is coming from someone who is apparently suitably qualified.³⁹⁵ Overall, the common law approach to the duty of care and skill in South Africa, prior to the Companies Act, was largely subjective in that the individual director's level of experience and knowledge was determinative in respect of liability.

4.2.2 Section 76(3)(c) of the Companies Act

The Companies Act is different in its approach to the duty of care and skill in that section 76(3)(c) of the Companies Act embodies a less subjective test and imposes a more demanding standard of care on company directors as compared to the common law standard discussed above.³⁹⁶ The statutory amendments that have been made to the common law duty now take into account the fact that in modern times company directors, especially in listed companies, have significant business experience and are often highly skilled professionals.³⁹⁷ Section 76(3)(c) of the Companies Act states that 'a director must exercise their powers and perform

³⁸⁹ Michele Havenga 'Creditors, Directors and Personal Liability under Section 424 of the Companies Act' (1992) 4 *South African Mercantile Law Journal* at 67.

³⁹⁰ Cassim et al op cit note 29 at 557.

³⁹¹ Ibid.

³⁹² *Fisheries Development Corporation* supra note 44.

³⁹³ Ibid at 156.

³⁹⁴ Ibid at 157.

³⁹⁵ Ibid.

³⁹⁶ Cassim et al op cit note 29 at 558.

³⁹⁷ Ibid.

their functions with a degree of care, skill and diligence that may reasonably be expected from a person (i) carrying out the same functions in relation to the company as those carried out by *that* (own emphasis) director; and (ii) having the general knowledge, skill and experience of that director.³⁹⁸ The standard of care and skill that is prescribed in section 76(3)(c) of the Companies Act is not objective in its entirety in that the common law's subjective standard with regards to the test for care and skill still indeed plays a part given that the scope of the duty will vary in accordance with the director's skill knowledge and experience.³⁹⁹ In light of this, section 76(3)(c) of the Companies Act introduces a dual/hybrid standard that is both partly objective and partly subjective in nature.⁴⁰⁰ On the one hand, the test/standard is objective in nature to the extent that section 76(3)(c)(i) of the Companies Act requires a director to exercise a level of reasonable care, skill and diligence as someone carrying out the same functions as the director in question.⁴⁰¹ Note that the standard here is not that of a reasonable director, but rather that of a reasonable person.⁴⁰² On the other hand, the test/standard is subjective in nature to the extent that section 76(3)(c)(ii) of the Companies Act requires that regard must also be had to the director's level of experience, skill and knowledge.⁴⁰³ To this end, if a director is more experienced or has any special skill or is more knowledgeable, the conduct of such director will be measured against this higher subjective standard.⁴⁰⁴ The way in which sections 76(3)(c)(i) and (ii) of the Companies Act are worded establishes the fact that the section's objective standard is in fact the minimum standard that all directors are expected to comply with.⁴⁰⁵

With regards to section 76(3)(c)(ii) of the Companies Act, the effect of the aforementioned is such that if a director has a higher level of skill, knowledge and experience, then the director in question is to exercise a higher level of skill and care.⁴⁰⁶ However, if a director is more inexperienced, a lower level of care and skill will be expected of them provided that at the very least a reasonable level of care and skill is exercised.⁴⁰⁷ As mentioned, this constitutes the objective minimum standard of care, skill and diligence that all directors are

³⁹⁸ Section 76(3)(c)(i) – (ii) of the Companies Act.

³⁹⁹ Cassim et al op cit note 29 at 559.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Du Plessis op cit note 362 at 269.

⁴⁰⁴ Cassim et al op cit note 29 at 559.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

expected to comply with.⁴⁰⁸ The subjective standard of skill, experience and knowledge is only taken into account when it improves or increases the objective standard that is expected of a reasonable director with regards to care and skill.⁴⁰⁹ To this end, if the knowledge or skill of a director is greater than a reasonably diligent person, the higher level of skill, experience and knowledge must be taken into account when deciding whether or not the director in question has adhered to a reasonable level of care and skill and has complied with the section 76(3)(c) requirements.⁴¹⁰ Therefore, the objective standard of section 76(3)(c)(i) of the Companies Act thus seems to be a reasonable and flexible standard which is arguably an essential feature given that ‘directors’ are not a homogeneous group, at least, this reasonable and flexible standard appears to be the case more so in theory.⁴¹¹ As will be discussed, the South African judiciary in recent times appears unwilling to take into account or recognise the flexible objective standard of section 76(3)(c)(i) of the Companies Act thus rendering its apparent flexible nature of little value.

4.2.3 Analysis

Although the Companies Act does not explicitly distinguish between the different types of directors and as such requires that all directors comply with section 76(3)(c)(i) of the Companies Act, this section arguably implies that a distinction be made between executive and NED’s and in turn implies that a different standard of care and skill be applied to NEDs.⁴¹² This proposition is supported by the wording of section 76(3)(c)(i) of the Companies Act itself i.e. ‘carrying out the same functions as those carried out by *that* (own emphasis) director’. Therefore, in theory, section 76(3)(c)(i) of the Companies Act should be fair and equitable in the standard of care that it imposes in that a director should be assessed against a standard that can reasonably be expected by a person in similar circumstances to that director.⁴¹³ However, the minimum objective standard of care contained in section 76(3)(c)(i) of the Companies Act, while in theory is flexible in nature, is in actual fact unfortunately not treated as such by the South African judiciary in practice. As discussed in Chapter 1, the court in *Howard v Herrigel*⁴¹⁴ and *Organisation Undoing Tax Abuse and Another v Myeni and Others*⁴¹⁵ rejected

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ *Stebbing* supra note 13; *Re D’Jam of London Ltd* [1994] 1 BCLC 561 (Ch).

⁴¹¹ Cassim et al op cit note 29 at 559.

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ *Howard* supra note 2.

⁴¹⁵ *Myeni* supra note 7.

the notion of drawing a distinction between executive and NEDs when determining liability. The court in the former case went so far as to explicitly reject a lower standard of liability for NEDs. Therefore, the courts have explicitly rejected taking into account the role and the functions carried out by the particular director in question when determining liability despite the clear wording of section 76(3)(c)(i) of the Companies Act. Arguably, if due regard is had in respect of the role and functions of ‘*that*’ (emphasis added) director, as is required by section 76(3)(c)(i) of the Companies Act, then given the vastly contrasting nature of the role of a NED as compared to that of an executive director, it is only logical to conclude that NEDs should not be held to the same standard of care as executive directors. As discussed, executive directors are involved in the day-to-day running and management of the company whereas the duties of NEDs are intermittent in nature whereby they attend a few board meetings periodically throughout the year. The continuous interaction with the company on daily basis means that executive directors have day-to-day knowledge of the affairs of the company, and can easily use the resources of the company to source additional and relevant information, unlike NEDs whose access to information may be limited as a result of the periodic and intermittent nature of their duties. In light of these material differences, as well as the specific wording of section 76(3)(c)(i), it is submitted that the standard of care applicable to NEDs for the purposes of determining liability should be less onerous than that of their executive counterparts.

4.3 Australia

Before commencing the discussion of Australian case law, it is necessary to engage with English case law. One of the earliest references to the role and liability of a NED came in 1892 from the English case of *Re Cardiff Savings Bank*⁴¹⁶ or otherwise referred to as the Marquis of Bute’s case. The Marquis was a director of Cardiff Savings Bank, however, he attended only one board meeting in 17 years given that he was only six months old when he was installed as a director and ‘President’ of the Cardiff Savings Bank after inheriting his father’s office.⁴¹⁷ At the one board meeting he attended, he apparently signed minutes, although he was generally ignorant of the affairs of the company.⁴¹⁸ After the company went insolvent as a result of the directors defrauding the company of substantial sums of money, the liquidator wanted to hold

⁴¹⁶ *Re Cardiff Savings Bank* [1892] 2 Ch 100.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

Marquis liable for a contribution for the company's losses.⁴¹⁹ The court stated that the duty of care that Marquis owed to the company was to be determined by the capability and knowledge of the director himself and as a result the held that Marquis was not liable.⁴²⁰ This case is an extreme example of the extent to which adopting a purely subjective approach to the duty of care can allow directors to escape liability. Essentially, the court made it an acceptable defence against liability for a director to invoke non-attendance at board meetings.

Later, in 1925, the decision in *Re Cardiff Savings Bank*⁴²¹ formed the basis for the court's decision in *Re City Equitable Fire Insurance Co Ltd*⁴²² whereby the court held that in the event that a director is not present at a meeting of the board, they could not be held liable for any of the issues that arose at the meeting, rather, the expectation was that a NED:

*'is bound to take ... reasonable care [and diligence] to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. [But] ... need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.'*⁴²³

Therefore, there was a shift in the standard of care expected from 1892 in *Re Cardiff Savings Bank*⁴²⁴ whereby no duty of care existed,⁴²⁵ despite the acts of fraud committed by other directors, to 1925 in *Re City Equitable Fire Insurance Co Ltd*⁴²⁶ whereby directors were expected to exercise reasonable care, skill and diligence when performing their duties that an ordinary man might be expected to take in circumstances on his own behalf, but were not liable for errors of judgement.⁴²⁷ Therefore, the court in *Re City Equitable Fire Insurance Co Ltd*⁴²⁸ recognised an objective standard with regards to care and diligence and a subjective standard in respect of skill.⁴²⁹

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ *Re Cardiff Savings Bank* supra note 416.

⁴²² *Re City Equitable Fire Insurance Co Ltd* supra note 78.

⁴²³ Ibid at 427 – 429.

⁴²⁴ *Re Cardiff Savings Bank* supra note 416.

⁴²⁵ The low expectations expected of directors during this time was also illustrated by *Re Denham & Co* (1883) 25 Ch D 752 (the court held that country gentlemen could not be expected to have accounting skills sufficient to detect fraud in accounts prepared by the chairman)

⁴²⁶ *Re City Equitable Fire Insurance Co Ltd* supra note 78.

⁴²⁷ Ibid at 429.

⁴²⁸ *Re City Equitable Fire Insurance Co Ltd* supra note 78.

⁴²⁹ Geoffrey Flint 'Non-Executive Directors' General Law Duty of Care and Delegation of Duty: But Do We Need a Common Law Duty of Care? (1997) 9 *Bond Law Review* at 202.

The aforementioned English cases set a precedent for a number of subsequent cases. In turning now to Australian case law, the majority in the 1988 case of *Metal Manufacturers Ltd v Lewis*⁴³⁰ found that if a director did not do anything and was not involved in the company incurring additional debts, the director in question could still be held liable for those debts incurred.⁴³¹ In this case, the wife of the managing director, who was also a director of the company, was not involved in the activities of the company and therefore the court decided that she was not expected to be aware of what was happening with regards to the company.⁴³² This is what became known as the ‘Sleeping Director.’⁴³³ The court ultimately found that the director in question was not liable for the additional debts incurred by the company given that the director was not involved in the day-to-day running and management of the company and the company was not aware of the particular transactions.⁴³⁴ The ‘Sleeping Director’ principle, which goes back to the case of *Cardiff Savings Bank*,⁴³⁵ no longer applies today⁴³⁶ given that the Australian Corporations Act⁴³⁷ has overridden this common law test in that directors will be liable for the company’s debts unless a director is able to raise one of the defences listed under section 588H of the Australian Corporations Act. A director may be excused or illness⁴³⁸ or other good reasons, however, failure to attend board meetings may not be raised as a defence.

In the 1992 Australian case of *AWA Ltd v Daniels*,⁴³⁹ AWA was a long established company that was in the business of importing and exporting electronic equipment.⁴⁴⁰ The company decided to engage in forward purchases of foreign currency against contracts of imported goods in order to hedge against currency fluctuations.⁴⁴¹ One of the company employees who was employed to manage the foreign exchange operation caused the company

⁴³⁰ *Metal Manufacturers Ltd v Lewis* (1988) 6 ACLC 725 1988.

⁴³¹ Lipman op cit note 94 at 40.

⁴³² Ibid at 50.

⁴³³ Ibid at 40.

⁴³⁴ The decision of the minority, penned by Kirby J, was followed in the case of *Statewide Tobacco Services v Morley* (1992) 10 ACLC 725. Furthermore, Santow J, in the case of *Australian Securities and Investment Commission v Adler and Four Ors* (2002) NSWSC 171 stated that a director is ‘not relieved of the duty to pay attention to the company’s affairs which might reasonably be expected to attract inquiry, even outside that area of expertise.’ This statement relied upon the comments made in *Re Property Force Consultants Pty Ltd* (1995) 13 ACLC 1051 at 1061.

⁴³⁵ *Re Cardiff Savings Bank* supra note 416.

⁴³⁶ Australian Institute of Company Directors ‘Director Tools: Board Composition – Role of Non-Executive Directors’ available at https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-1-11-mem-director-tools-bc-non-executive-directors_a4_web.ashx, accessed on 6 February 2021.

⁴³⁷ Corporations Act No 50 of 2001.

⁴³⁸ Section 588H(4) of the Corporations Act No 50 of 2001.

⁴³⁹ *AWA Ltd* supra note 22.

⁴⁴⁰ Geoffrey Flint op cit note 429 at 199.

⁴⁴¹ Ibid.

to incur substantial losses and, in addition, managed to conceal the fact that substantial losses were incurred.⁴⁴² The company auditor, Deloitte, conduct two audits of the company but in neither audit was the substantial losses disclosed to the board. The auditor did, however, note defects in the company's internal control system. AWA sued Deloitte for failing to qualify the audit reports and for failing to draw the board's attention to the internal control deficiencies.⁴⁴³ Deloitte denied a breach of any duty to AWA and, in addition, cross-claimed against the NEDs for contributory negligence.⁴⁴⁴ In the trial court, Rogers J had the following to say with regards to the standard of care that is applied to NEDs:

'In contrast to the [duties imposed on a] managing director, non-executive directors are not bound to give continuous attention to the affairs of the corporation. Their duties are of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which the director happens to be placed. Notwithstanding a small number of professional directors there is no objective standard of the reasonably competent company director to which they may aspire. The very diversity of companies and the variety of business endeavours do not allow of a uniform standard.'⁴⁴⁵ (Emphasis added).

Therefore, in drawing a distinction between the duties of executive and NEDs, Rogers J found that the standard of the duty of care owed by NEDs was to be judged subjectively, as opposed to objectively, with the need to take into account the circumstances of the particular director in question.⁴⁴⁶ Rogers J specifically stated that 'the distribution of responsibilities in the particular corporation was factor to be considered when assessing director's duties.'⁴⁴⁷ Rogers J's readiness to accept a lower standard of care on the part of NEDs⁴⁴⁸ was reasoned as such given that 'it is something of an anachronism to expect non-executive directors, meeting once a month, to contribute anything much more than decisions on questions of policy'⁴⁴⁹ and that NEDs are 'not expected to be informed of the details of how the company is managed.'⁴⁵⁰

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ *AWA Ltd* supra note 22 at 867.

⁴⁴⁶ Michael Corrigan 'AWA Case Provides Guidelines for Company Directors' (1992) 62 *Intheblack* at 55.

⁴⁴⁷ Ibid.

⁴⁴⁸ Anil Hargovan 'Australian Securities and Investments Commission v. Macdonald [No.

11]: Corporate Governance Lessons from James Hardie' (2009) 33 *Melbourne University Law Review* at 997.

⁴⁴⁹ *AWA Ltd* note 22 at 942.

⁴⁵⁰ Ibid at 867.

The views of the Rogers J were approved in the cases of *Vrisakis v ASC*,⁴⁵¹ *ASC v Gallagher*,⁴⁵² and *Permanent Building Society v Wheeler*.⁴⁵³

*AWA v Daniels*⁴⁵⁴ was appealed in the 1995 case of *Daniels v Anderson*⁴⁵⁵ whereby the NSW Court of Appeal unfortunately overturned Roger J's decision, holding that the test for the standard of care when determining the liability of a NED is objective, thus disagreeing with the trial court's decision that the assessment of a director's duties is a subjective exercise.⁴⁵⁶ In coming to the conclusion that executive directors and NEDs are subject to a uniform standard of care, the court held that 'the approach of Rogers J did not represent modern company law' and that all directors are required to 'take reasonable steps to guide and monitor the management of the company.'⁴⁵⁷ In rejecting a lower standard of care for NEDs, the court furthermore held that all directors have a 'continuing obligation to keep informed about the activities of the corporation.'⁴⁵⁸ Therefore, the court made it clear that NEDs are required to pay more attention to the affairs of the company than what was previously the case thus placing a considerable onus on NEDs who do not have day-to-day involvement in the running and management of the company.⁴⁵⁹ Effectively, the court found no difference in the obligations owed to the company by both executive and NEDs and thus held that there is no difference between the standard of care that is required of executive directors and of NEDs.⁴⁶⁰ The idea that a uniform standard of care should apply to all types of company directors was later affirmed by the NSW Court of Appeal in the case of *Adler v Australian Securities and Investments Commission*,⁴⁶¹ whereby the court held that 'a director should become familiar with the fundamentals of the company's business and is under a continuing obligation to keep informed about the company's activities.'⁴⁶² Furthermore, in 2006, the court in *Australian Securities and Investments Commission v Maxwell*⁴⁶³ held that:

⁴⁵¹ *Vrisakis v ASC* (1993) 11 ACLC 63.

⁴⁵² *ASC v Gallagher* (1993) 11 ACLC 286.

⁴⁵³ *Permanent Building Society v Wheeler* (1994) 12 ACLC 674.

⁴⁵⁴ *AWA Ltd* supra note 22.

⁴⁵⁵ *Daniels v Anderson* (1995) 3 ACLC 614.

⁴⁵⁶ Annette Greenhow 'The Statutory Business Judgment Rule: Putting the Wind into Directors' Sails' (1999) 11 *Bond Law Review* at 49.

⁴⁵⁷ *Daniels* supra note 455 at 501.

⁴⁵⁸ *Ibid* at 438 & 503.

⁴⁵⁹ Michael Lyons 'Non-Executive Directors Have No Lesser Duty' (1995) 65 *Intheblack* at 63.

⁴⁶⁰ Annette Greenhow op cit note 456 at 10.

⁴⁶¹ *Australian Securities and Investment Commission v Adler and Four Ors* (2002) NSWSC 171.

⁴⁶² *Ibid* at 347.

⁴⁶³ *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373.

'In determining whether a director has exercised reasonable care and diligence ... the circumstances of the particular corporation concerned are relevant to the content of the duty. These circumstances include [inter alia] the type of company, ... the size and nature of the company's business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director ... and the circumstances of the specific case.'⁴⁶⁴ (Emphasis added).

Later in 2009, the court in *Australian Securities and Investments Commission v Macdonald [No 11]*⁴⁶⁵ approved the legal proposition⁴⁶⁶ laid down in *Australian Securities and Investments Commission v Maxwell*⁴⁶⁷ and then proceeded to engage with the question of whether the law made a distinction between the standard of performance that is required of executive and NEDs.⁴⁶⁸ The court referred to the diverging judicial views whereby Rogers J in *AWA Ltd v Daniels*⁴⁶⁹ expressed a readiness to accept a lower standard of care for NEDs and the NSW Court of Appeal in *Daniels v Anderson*⁴⁷⁰ which held that Roger J's view on the matter was not a reflection of modern company law and that all directors are required to take reasonable steps to monitor and guide the management of the company. After reviewing the aforementioned case law, the court reiterated the court's view in *Adler*⁴⁷¹ that directors are supposed to familiarise themselves with the fundamentals of the company's business and also keep informed about the company's activities.⁴⁷² On the basis of the aforementioned cases, the court in *Macdonald*⁴⁷³ was satisfied that the same standard of care is to be imposed on all types of directors and as such relied on the court in *Adler*⁴⁷⁴ to espouse the following objective test for breach of section 180(1) of the Corporations Act i.e. the duty of care 'in determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf.'⁴⁷⁵ When the court applied the objective test to the facts of the case, the court held that all of the NEDs knew or should have

⁴⁶⁴ Ibid at 397.

⁴⁶⁵ *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR 199.

⁴⁶⁶ Ibid para 245–7.

⁴⁶⁷ *Maxwell* supra note 463.

⁴⁶⁸ *Macdonald* supra note 465 para 249–50.

⁴⁶⁹ *AWA Ltd* supra note 22.

⁴⁷⁰ *Daniels* supra note 455.

⁴⁷¹ *Adler* supra note 461.

⁴⁷² *AWA Ltd* supra note 22 para 250.

⁴⁷³ *Macdonald* supra note 465.

⁴⁷⁴ *Adler* supra note 461.

⁴⁷⁵ *Macdonald* supra note 465 para 250.

known that releasing the defective draft ASX announcement to the public would have brought about the negative impact that ensued.⁴⁷⁶

4.4 Other Jurisdictions

Section 137(c) of the New Zealand Companies Act⁴⁷⁷ indicates that the ‘position’ of the director and the ‘nature of the responsibilities’ undertaken by him or her are factors to be taken into account when determining if the director in question acted with the requisite degree of care, skill and diligence. Henry J in *Fletcher v National Mutual Nominees Ltd*⁴⁷⁸ echoed the aforementioned in stating that the standard of care to be exercised by directors ‘is to be assessed by also having regard to the circumstances pertaining to the responsibilities to which the directors have undertaken’.⁴⁷⁹ However, the court of appeal unfortunately rejected the notion that NEDs should be subjected to a lower standard of liability.⁴⁸⁰ A further word on Australia, section 180(1)(a) of Australian Corporation Act⁴⁸¹ states that a director must exercise a degree of care and diligence that a reasonable person would exercise if the they ‘occupied the office held by, and had the same responsibilities within the corporation as the director’ in question.⁴⁸² Furthermore, section 122(1) of the Canada Business Corporations Act⁴⁸³ states that when directors are discharging their duties and exercising their powers, they must exercise a level of care, skill and diligence that a reasonably prudent person would exercise in ‘comparable circumstances.’⁴⁸⁴ In addition, section 174(2)(a) of the UK Companies Act⁴⁸⁵ states that a director of a company must exercise a level of reasonable care, skill and diligence taking into account the ‘functions carried out by the director’ in relation to the company.⁴⁸⁶ Also, section 8.30(b) of the US MBCA states that board or committee members must discharge their duties with a level of care such that an individual in a ‘like position’ would reasonably believe appropriate in ‘circumstances that are similar.’⁴⁸⁷

⁴⁷⁶ Ibid para 250–1.

⁴⁷⁷ Companies Act 1993 No 105.

⁴⁷⁸ *Fletcher* supra note 23.

⁴⁷⁹ Ibid at 661.

⁴⁸⁰ John H. Farrar ‘The Duty of Care of Company Directors in Australia and New Zealand’ (1996) 7 *Canterbury Law Review* at 233.

⁴⁸¹ Corporations Act No 50 of 2001.

⁴⁸² Ibid.

⁴⁸³ Canada Business Corporations Act, 1985 R.S.C 1985, c. C-44.

⁴⁸⁴ Cassim et al op cit note 29 at 558.

⁴⁸⁵ Companies Act 2006 c 46.

⁴⁸⁶ Section 174(2)(c) of the Companies act 2006 c 46.

⁴⁸⁷ Cassim et al op cit note 29 at 558.

In an analysis of the above, it appears that the flexible objective standard contained in section 76(3)(c)(i) of the Companies Act is also the approach followed in other jurisdictions, at least in theory. As such, the particular position that is occupied by the director in question, along with their responsibilities, should in theory play a determining role in establishing whether the director complied with their duty to act with care and skill. This is so given the wording of the above identified statutes which evidently all seem to require that the responsibilities and position of the particular director in question be taken into account when determining the requisite standard of care and skill. It follows that if the nature and extent of the responsibilities/role of a NED is taken into account as compared to that of their executive director counterparts, one should arrive at the conclusion that the standard of care and skill should be less onerous for NEDs. The flexible objective standard is the approach in theory, however, practical application of this flexible approach through meaningful engagement with the differing roles as between executive and NEDs when assessing liability seems to be severely lacking by the courts both locally and in foreign jurisdictions.

4.5 Conclusion

Historically, liability for a breach of the duty to exercise reasonable care, skill and diligence was framed largely in subjective terms in that adherence to this duty was contingent on the ability and experience of the specific director in question whereby a director's inexperience or ignorance is what shielded them from liability. However, the introduction of the Companies Act brought about a seemingly flexible objective approach to the standard of care and skill in the form of section 76(3)(c)(i). The aforementioned section in theory recognises that 'directors' is not a homogenous group and as such seemingly requires that the responsibilities and the particular position occupied by the director in question e.g. a NED, play a determining role in establishing whether the director in question complied with their duty to act with care and skill. Through a statutory analysis of the South African, as well as foreign, approach to determining the appropriate standard of care and skill that is to apply when assessing the standard of liability for breach of a duty of care and skill, it was revealed that, in general, the particular position/office occupied by the director in question, along with the nature of their responsibilities, should play a determining role in establishing whether the director complied with their duty to act with care and skill. Therefore, a flexible objective approach as regards the standard of care and skill to be applied in assessing liability appears to be generally adopted, at least in theory, as most courts do not seem to take this approach in practice. It was ultimately

argued that in light of the specific wording of section 76(3)(c)(i) of the Companies Act as well as the vastly diverging roles as between executive and NEDs, the standard of liability applicable to NEDs for a breach of the duty of care and skill should be less onerous than their executive counterparts.

CHAPTER 5: CONCLUSION

The Companies Act makes no legal distinction between executive and NEDs. Rather, the Companies Act simply refers to ‘directors’ in a globular sense. As a consequence of this homogenous approach, NEDs have the same legal duties and are subjected to the same liabilities as their executive counterparts. The fact that NEDs are held to the same standard of liability for a breach of a duty of care as their executive counterparts, despite the nature of their largely differing roles and the clear wording of section 76(3)(c)(i) of the Companies Act, formed the basis of this thesis. Chapter 1 set the scene by demonstrating the readiness of the courts, both locally and internationally, to treat all types of directors as a single homogeneous group when assessing liability, despite the above. An analysis of both local and international case law demonstrated an arguably problematic general approach to determining the standard of liability applicable to NEDs. It was revealed that the courts find it ‘unhelpful and even misleading to classify company directors as “executive” or “non-executive” for purposes of ascertaining their duties to the company’ and that ‘an objective standard of care is applicable to both executive and NEDs’. Moreover, in some cases, the courts explicitly stated that it is appropriate that no distinction be drawn between executive and NEDs and that the fact that a director is a NED does not mean that their duties are less onerous than what they would have been had they been an executive director. The above described attitude of the courts i.e. an objective/uniform standard of care applicable to all directors, was rejected in light of the largely differing roles as between executive and NEDs as well as the clear wording of section 76(3)(c)(i) of the Companies Act. Chapter 2 then engaged with the concept of executive, non-executive and independent directors by way of a high-level overview in respect of the general characteristics of these directors. This laid the necessary foundation for chapter 3 which focused on an in-depth unpacking and analysis of the role of a NED through a legal, governance, and commercial lens. With the distinction between the role of an executive director as compared to that of a NED firmly laid out, chapter 4 then critically engaged with the standard of liability applicable to NEDs for breach of a duty of care and skill by analysing case law and statute from both local and foreign jurisdictions.

It was determined that the issue with taking a homogenous approach to the different types of directors when determining liability for breach of a duty of care and skill is that this approach fails to take into consideration the specific role and function played by ‘*that*’ (emphasis added) director as is contemplated by section 76(3)(c)(i) of the Companies Act. As was demonstrated

by the local and foreign cases discussed, the courts, in general, seem to have rejected having due regard to the role and functions played by the specific director in question when assessing liability despite the statutory requirement to do so which is arguably implied by the wording of section 76(3)(c)(i) of the Companies Act. In other words, section 76(3)(c)(i) of the Companies Act arguably implies a flexible object minimum standard of care which requires that the particular circumstances and responsibilities of the *'that'* (emphasis added) director be taken in consideration when determining the standard of liability that is to apply for breach of a duty of care and skill. It was argued that if due regard is had to the role and functions of NEDs when determining liability, then it should be clear that the standard of liability applicable to NEDs should be less onerous than that of their executive counterparts. In support of this, it was highlighted that executive directors are involved in the day-to-day running and management of the company whereas the duties of NEDs are intermittent in nature whereby they attend a few board meetings periodically throughout the year i.e. NEDs are not involved in the day-to-day running and management of the company. Due to the part-time/intermittent nature of a NEDs duties, it was also argued that their capacity to exercise their oversight function and maintain a steady stream of vital information about the company is limited. Similarly, it was also noted that when NEDs are carrying out their functions, they will have to rely on the executive directors to provide them with sufficient and accurate information as regards the company. It was therefore argued that NEDs are objectively worse off, as opposed to executive directors, when it comes to the flow of information about the company and as such, executive directors will and should know if the company is in financial distress before the NEDs or anyone else. On the other hand, it was noted that the continuous interaction with the company on a daily basis means that executive directors have day-to-day knowledge of the affairs of the company, and can easily use the resources of the company to source additional and relevant information. Therefore, it was ultimately submitted that since the nature of the role of a NED varies greatly to that of an executive director, and since the specific wording of section 76(3)(c)(i) of the Companies Act seems to imply a flexible objective standard of care which should in theory take into account the circumstances of *'that'* (emphasis added) director, the standard of care applicable to NEDs for breach of a duty of care and skill should be less onerous than that of their executive counterparts.

BIBLIOGRAPHY

Primary Sources

Statutes

Australia:

Corporations Act No 50 of 2001.

Canada:

Canada Business Corporations Act (R.S.C., 1985, c. C-44).

England:

Companies Act 2006 c 46.

New Zealand:

Companies Act 1993 No 105.

South Africa:

Companies Act 61 of 1973.

Companies Act 71 of 2008.

United States of America:

Model Business Corporation Act, 5th Edition.

Cases

Australian:

ASC v Gallagher (1993) 11 ACLC 286.

Australian Securities and Investment Commission v Adler and Four Ors (2002) NSWSC 171.

Australian Securities and Investments Commission v Healey (2011) FCA 717.

Australian Securities and Investments Commission v Macdonald [No 11] (2009) 256 ALR 199.

Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373.

AWA Ltd v Daniels (1992) 10 ACLC 933.

Daniels v Anderson (1995) 3 ACLC 614.

Darvall v North Sydney Brick & Tile Co Ltd (1989) 15 ACLR 230 SC (NSW).

Metal Manufacturers Ltd v Lewis (1988) 6 ACLC 725 1988.

Permanent Building Society v Wheeler (1994) 12 ACLC 674.

Re Property Force Consultants Pty Ltd (1995) 13 ACLC 1051.

Statewide Tobacco Services v Morley (1992) 10 ACLC 725.

Vrisakis v ASC (1993) 11 ACLC 63.

Canada:

Chan v Zacharia (1984) 154 CLR 178.

Corporate Affairs Commission v Drysdale (1978) 141 CLR 236.

England:

Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461.

Boardman v Phipps [1966] 3 All ER 721.

Boulting v Association of Cinematography, Television and Allied Technicians [1963] 1 All ER. 716 (CA) 723.

Charterbridge Corporation Ltd v Lloyd's Bank [1970] Ch 62.

Cullerne v London and Suburban General Permanent Building Society (1890) 25 QBD.

Dorchester Finance Co v Stebbing 1989 BCLC 498.

Fulham Football Club Ltd v Cabara Estates Plc [1994] 1 BCLC 363 (Ch and CA).

Imageview Management Ltd v Jack [2009] BCLC 725.

Keech v Sanford (1726) Sel Cas Ch 61.

Kregor v Hollins (1913) 109 LT 225 (KB and CA).

Parker v McKenna (1874) LR 10 Ch App 96.

Re Brazilian Rubber Plantations & Estates Ltd [1911] Ch 425 (CA) 437.

Re Cardiff Savings Bank [1892] 2 Ch 100.

Re City Equitable Fire Insurance Co Ltd [1925] Ch 407.

Re D'Jam of London Ltd [1994] 1 BCLC 561 (Ch).

Re Lo-Line Electric Motors Ltd [1988] Ch 477.

Re Mea Corporation Ltd (2007) BCC 288.

Re Smith & Fawcett Ltd [1942] Ch 304.

Regal (Hastings) Ltd [1921] 1 All ER 378 (HL).

Regentcrest plc v Cohen [2001] 1 BCLC 80

Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd [1972] 2 KB 9.

Sub Nom Re Bhullar Bros Ltd [2003] 2 BCLC 214.

New Zealand:

Fletcher v National Mutual Nominees Ltd [1990] 3NZLR 641.

South Africa:

Howard v Herrigel 1991 2 SA 660 (A).

Organisation Undoing Tax Abuse and Another v Myeni and Others (15996/2017) [2020] ZAGPPHC 169.

Philotex (Pty) Ltd & Others v Snyman & Others 1998 (2) SA 138 (SCA)

Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd 1980 (4) SA 156 (W).

Cronjé NO v Stone En 'n Ander 1985 (3) SA 597 (T).

Da Silvia v CH Chemicals (Pty) Ltd 2008 (6) SA 620 (SCA).

Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA).

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

Secondary Sources

ASX Corporate Governance Council 'Corporate Governance Principles and Recommendations' available at <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>, accessed on 10 October 2020.

Australian Institute of Company Directors 'Director Tools: Board Composition – Role of Non-Executive Directors' available at https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-1-11-mem-director-tools-bc-non-executive-directors_a4_web.ashx, accessed on 6 February 2021.

Barratt, Ruth & Nada Korac-Kakabadse 'Developing Reflexive Corporate Leadership: The Role of the Non-Executive Director' (2002) 2 *Corporate Governance*.

Boyd, Colin 'Ethics and Corporate Governance: The Issues Raised by the Cadbury Report in the United Kingdom' (1996) 15 *Journal of Business Ethics*.

Business Roundtable ‘Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’ available at <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>, accessed on 14 March 2021.

Calkoen, Willem J L *The Corporate Governance Review* 10th edition (2020) Law Business Research Ltd, London.

Carter, Colin B & Jay W Lorsch *Back to the Drawing Board: Designing Corporate Boards for a Complex World* (2003) Harvard Business School Pres, Boston, Massachusetts

Cassim, Farouk HI, Cassim, Maleka Femida & Cassim, Rehana et al *Contemporary Company Law* 2 ed (2012) Juta & Co Ltd, Claremont.

Cassim, FHI ‘Fraudulent or Reckless Trading and s 424 of the Companies Act of 1973’ (1981) 98 *SALJ*.

Cassim, Rehana ‘The Power to Remove Company Directors From Office: Historical and Philosophical Roots’ (2019) 25 *Fundamina*.

Cheffins, Brian R ‘Teaching Corporate Governance’ (1999) 4 *Legal Studies* at 516.

Clarke, Thomas ‘The Contribution of Non-Executive Directors to Effectiveness of Corporate Governance’ (1998) 3 *Career Development International*.

Committee on Corporate Governance: Final Report ‘The Combined Code: Principles of Good Corporate Governance and the Code of Good Practice’ available at <https://ecgi.global/sites/default/files//codes/documents/higgsreport.pdf>, accessed on 21 November 2020.

Committee on the Financial Aspects of Corporate Governance ‘Report of the Committee on the Financial Aspects of Corporate Governance’ available at

[https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-\(the-Cadbury-Code\).pdf](https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf), accessed on 21 November 2020.

Corley, Kevin G ‘Examining the Non-Executive Director’s Role from a Non-Agency Theory Perspective: Implications Arising from the Higgs Report’ (2005) 16 *British Journal of Management* at S1.

Corrigan, Michael ‘AWA Case Provides Guidelines for Company Directors’ (1992) 62 *Intheblack*.

Deloitte ‘King IV Independent Directors’ available at https://www2.deloitte.com/za/en/pages/africa-centre-for-corporate-governance/articles/kingiv_independent_directors.html, accessed on 10 October 2020.

Derek Higgs ‘Review of the Role and Effectiveness of Non-Executive Directors’ available at <https://ecgi.global/sites/default/files//codes/documents/higgsreport.pdf>, accessed on 23 November 2020.

Dixon, Rob; Keith Milton & Anne Woodhead ‘An Investigation into the Role, Effectiveness and Future of Non-Executive Directors’ (2005) 31 *Journal of General Management*.

Farrar, John H. ‘The Duty of Care of Company Directors in Australia and New Zealand’ (1996) 7 *Canterbury Law Review*.

Financial Reporting Council ‘Council Combined Code on Corporate Governance’ available at <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>, accessed on 10 October 2020.

Financial Reporting Council ‘Guidance on Board Effectives’ available at <https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF>, accessed on 23 November 2020.

Flint, Geoffrey 'Non-Executive Directors' General Law Duty of Care and Delegation of Duty: But Do We Need a Common Law Duty of Care? (1997) 9 *Bond Law Review*.

Garner, Bryan A. *Black's Law Dictionary* 8 ed (2008) Thomson West, Minnesota.

Gona, Shingirirayi *The Role of the Independent Director In Maintaining Good Corporate Governance* (Published LLM thesis, University of Cape Town, 2009).

Greenhow, Annette 'The Statutory Business Judgment Rule: Putting the Wind into Directors' Sails' (1999) 11 *Bond Law Review*.

Greenhow, Annette 'The Statutory Business Judgment Rule: Putting the Wind into Directors' Sails' (1999) 11 *Bond Law Review*.

Hargovan, Anil 'Australian Securities and Investments Commission v. Macdonald [No. 11]: Corporate Governance Lessons from James Hardie' (2009) 33 *Melbourne University Law Review*.

Havenga, Michele 'Creditors, Directors and Personal Liability under Section 424 of the Companies Act' (1992) 4 *South African Mercantile Law Journal*.

Hill, Stephen 'The Social Organization of Boards of Directors' (1995) 46 *The British Journal of Sociology*.

Hughes, James J 'The Greenbury Report on Directors Remuneration' (1996) 17 *International Journal of Manpower*.

Institute of directors 'What is the Role of the Non-Executive Director?' available at <https://www.iod.com/services/information-and-advice/resources-and-factsheets/details/What-is-the-role-of-the-NonExecutive-Director>, accessed on 6 March 2021.

Institute of Directors Southern Africa ‘Practice Notes July 2017 Independence of Governing Body member’ available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/562ED5CF-02E8-4957-97C8-D3F0C66A7245/King_IV_Practice_Note_-_Independence_of_Governing_Body_Members.pdf, accessed on 10 October 2020.

Institute of Directors, *King Report on Corporate Governance for South Africa* (2002).

Institute of Directors, *King Report on Corporate Governance for South Africa* (2009).

Institute of Directors, *King Report on Corporate Governance for South Africa* (2016).

Kakabadse, Andrew; Keith Ward; Nada Korac-Kakabadse & Cliff Bowman ‘Role and Contribution of Non-Executive Directors’ (2001) 1 *Corporate Governance*.

Lacy, John de ‘The Concept of a Company Director: Time for a New Expanded and Unified Statutory Concept (2006) *Journal of Business Law*.

Lipman, Trevor *The Role of the Independent Non-Executive Director In Australia* (unpublished DBA thesis, Macquarie University, 2008).

Lombard, Sulette *Director’s Duties to Creditors* (unpublished LLD thesis, University of Pretoria, 2006).

Loose, Peter *The Company Director: Powers, Duties and Liabilities* 9 ed (2007) Jordan Publishing Limited, Bristol.

Lyons, Michael ‘Non-Executive Directors Have No Lesser Duty’ (1995) 65 *Intheblack*.

Mdunge, MSP *A Critical Analysis of the Fiduciary Duties of Directors and Evaluation of the Development of These Duties In Terms of the Common Law and Statutory Law* (unpublished LLM, University of KwaZulu-Natal, 2017) 30.

Mongalo, Tshepo ‘Shareholder Activism in The United Kingdom Highlights the Failure of Remuneration Committees: Lessons For South Africa’ (2003) 120 *SALJ*.

Moodie, Ann-Maree ‘Corporate Governance: The Art of the Long View in Australian Boardrooms: In the Words of BHP Billiton Chairman and Former Banke Don Argus, Boards Need People with Courage and Conviction. It Also Means Debating and Resolving the Ethical Issues Which Have Been Around Since Plato's Time’ (2003) 117 *Journal of Banking and Financial Services*.

New York Stock Exchange ‘Section 303A.01 Listed Company Manual’ available at https://nyseguide.srorules.com/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-69, accessed on 27 February 2021.

Nicholas, K ‘Independents not welcome on board’ 2004 *Australian Financial Review*.

NZX Listing Rules ‘NZX Corporate Governance Code’ available at https://nzx-prod-c84t3un4.s3.ap-southeast-2.amazonaws.com/sJfnMk5Qmx53WDpbND3r9N28?response-content-disposition=inline%3B%20filename%3D%22Appendix%201%20-%20NZX%20Corporate%20Governance%20Code.pdf%22%3B%20filename%2A%3DUTF-8%27%27Appendix%25201%2520-%2520NZX%2520Corporate%2520Governance%2520Code.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAJABUQTI7JQTRAXGA%2F20210310%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20210310T180424Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=0a3b891a20e372755fbd520b7bbd3775bd8cea213cc368d823f695f51035015, accessed on 10 October 2020.

Organisation for Economic Cooperation and Development ‘G20/OECD Principles of Corporate Governance’ available at <https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1615577136&id=id&accname=guest&checksum=2EC5E2F9EAA5E8DFD5C7C371A868E90>, accessed on 21 November 2020.

Pass, Christopher 'Corporate Governance and the Role of Non-Executive Directors in Large UK Companies: an Empirical Study' (2004) 4 *Corporate Governance*.

Plessis, Jean J du 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia' (2010) 1 *Acta Juridica*.

Roberts, John; Terry McNulty & Philip Stiles 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16 *British Journal of Management*.

Scherrer, Phillip S 'Directors' Responsibilities and Participation in the Strategic Decision Making Process' (2003) 3 *Corporate Governance*.

Sir Richard Greenbury 'Directors' Remuneration: Report of a Study Group' available at <https://ecgi.global/sites/default/files//codes/documents/greenbury.pdf>, accessed on 21 November 2020.

Stevens, Richard 'The Legal Nature of the Duty of Care and Skill: Contract or Delict?' (2017) 20 *Potchefstroom Electronic Law Journal*.

Stiles, Philip 'The Impact of the Board on Strategy: An Empirical Examination' (2001) 38 *Journal of Management Studies*.

The Institute of Chartered Accountants in England and Wales 'Internal Control: Guidance for Directors on the Combined Code' available at <https://ecgi.global/sites/default/files//codes/documents/turnbul.pdf>, 21 November 2020.

Turnbull, Nigel 'Internal Control: Guidance for Directors on the Combined Code (The Turnbull Report)' (2000) 2 *Risk Management: An International Journal*.

World Economic Forum 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution' available at

<https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>, accessed on 14 March 2021.