# Directors' Positive Duty to Act in the Interests of the Entity: Shareholders' Interests Bounded by Corporate Purpose

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Directors' duty to act in good faith and to act in the best interests of the company relates to the interests of shareholders held in the company as a separate legal entity. The obligation to act in the best interests of shareholders is potentially bounded by corporate purpose as the office requires directors to act in accordance with the constitution and Companies Act. The origin of the duty is traced to the emergence of permanent capital in the business corporation and the resulting new oaths sworn by directors in the seventeenth and eighteenth centuries with Charitable Corporation v Sutton considered in that historical context. The analysis illustrates that the duty is not owed to shareholders collectively at any time, but rather to the company as a separate entity from its shareholders. The interests of shareholders are held in the company as its capital base. The duty is considered in relation to the even longer-standing obligation that officers of corporations act faithfully to ensure compliance with the corporation's charter. The article concludes that the re-inclusion of purpose provisions in company constitutions combined with recognition that the modern company is an entity rather than contractual could significantly influence the application of the good faith and best interests duty.


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Keywords: duty of good faith, entity, best interests of the company, Corporate Fund, East India Company, shareholder primacy, corporate purpose



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**Title:**

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**Susan Watson and Lynn Buckley**

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**Key words**

duty of good faith; entity; best interests of the company; Corporate Fund; East India Company; shareholder primacy; corporate purpose

## 1. Introduction

A director's duty to act in good faith and in the best interests of the company is ubiquitous in jurisdictions across the world ('the good faith and best interests duty'[1]).[2]

The role of the good faith and interests duty remains unsettled in company law. Who directors owe the duty to is contested: either to shareholders at any time collectively or, to the company as a separate entity from the shareholders.[3] The two alternatives appear to be mutually exclusive. Also unsettled is the relationship of the good faith and best interests duty to other directors' duties.[4]

By focusing on the early origins of the duty (and in particular on the English East India Company as the first English company to have permanent capital[5]) this article aims to provide insight on these contested questions. The core conclusion is that the good faith and best interests duty is owed to the corporation as an entity separate from its shareholders. When operationalising the duty, the default position is that directors will act in the best interests of shareholders as a whole.[6] But the duty to act in the best interests of the company is not owed to the shareholders at any time as a collectivity. Rather, shareholders' interests are legally separated from shareholders as capital held in the company or corporation as a separate legal entity. By acting in the best interests of the company, directors will ideally make decisions that they believe will result in sustainable growth in the value of that entity and, therefore and resultingly, the value of the capital of the company. Shareholders will benefit as a consequence

[1] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA); *Re Smith and Fawcett Ltd* [1942] Ch 304 (CA).

[2] The duty is expressed differently in different jurisdictions: in the UK 'to promote the success of the company for the benefit of its members as a whole' Companies Act 2006, s 172(1); in the US to 'act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation' Modern Business Corporation Act 2016, § 8.30(a) (adopted by the majority of states who modify its provisions); in Canada to 'act honestly and in good faith with a view to the best interests of the corporation' Canada Business Corporations Act 1985, s 122(1)(a); in Australia to exercise powers and perform duties 'in good faith in the best interests of the corporation' Corporations Act 2001, s181(1)(a); in New Zealand to 'act in good faith and in what the director believes to be the best interests of the company' Companies Act 1993, s 131(1).

[3] Indeed, this debate is important in a business ethics and management context: David Gindis, 'Conceptualizing the Business Corporation: Insights from History' (2020) 16 J Institutional Econ 569.

[4] Matthew Conaglen, 'Fiduciary Regulation of Conflicts Between Duties' (2009) 125 LQR 111, 130 cf Rosemary T Langford 'Company Directors' Duties and Conflicts of Interest' (OUP 2019) ch 1, 11–42.

[5] Susan Watson, *The Making of the Modern Company* (Hart 2022), ch 3, 48–50.

[6] When a company is insolvent, or approaching insolvency, creditor interests may intervene (the Rule in *West Mercia*) recently approved by the UK Supreme Court in *Sequana*: *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709 [11], [257]. A similar principle exists in other jurisdictions, including in Australia (*Walker v Wimborne* (1976) 137 CLR 1; *Spies v The Queen* (2000) 201 CLR 603) and in New Zealand (*Nicholson v Permakraft* [1985] 1 NZLR 242 (CA)). Also, shareholders may agree on incorporation or at any time through the constitution of the company that a company will prioritise other constituent interests or adopt a purpose that limits the discretion of directors and restricts their ability to act solely in the interests of shareholders.

of owning shares in the capital. In this article, shareholder capital held in the company or corporation is referred to as the 'Corporate Fund'.

The story does not end there though. We subsequently consider the relationship of the good faith and best interests duty of good faith to purpose. The origins of an obligation to comply with the purpose of a corporation predate the origins of an obligation to the interests of shareholders. Understanding where corporate purpose sat historically in relation to the good faith and best interestsduty as it evolved in the business corporation sheds new light on the modern-day corporate purpose debate.[7]

That the good faith and best interests duty is owed to the company as a separate entity from its shareholders (with shareholders' interests represented in the Corporate Fund) and how the duty might relate to a corporate purpose – may have profound implications on the good faith and best interests duty. Together the core arguments offer an understanding of the duty which balances shareholder interests with corporate purpose. Indeed, as the article concludes, the re-emergence of corporate purpose provisions in corporate constitutions could mark the end of unbridled shareholder primacy. Instead the focus would come to be on sustainable value creation in a context where the company would need to serve a purpose that benefits society. It also follows that, if the good faith and best interests duty is not owed directly to current shareholders as a collectivity, short-term profit maximisation for current shareholders should not be the focus of directors complying with the duty. Rather, the company's interests should be understood in light of its purpose, with the value maximisation of the entity that would ultimately benefit shareholders through the Corporate Fund a consequence of a long-term

[7] This article does not consider the relationship of the duty of good faith to the duty of care. The relationship to the duties around conflict and profit is also not discussed in detail. The duty of good faith imposes positive obligations on directors in their decision making to consider the best interests of the company at all times. That differentiates the duty of good faith from the other fiduciary duties of directors. Those other duties may be considered as subsidiary to it as 'a list of situations where a director is most likely to be in breach of his fundamental duty' Janet Dine and Marios Koutsias, *Company Law* (Palgrave MacMillan 2007) [11.5]. See also the discussion on the possible origins of directors' duties in Watson (n 5) 81–99 where evidence from the early eighteenth century supports the subsidiary duties arising as a specific response to the fact situation. While the duties to avoid conflicts and profits: 'aim to prevent directors from being swayed from exercising their powers and duties in the interests of the company … [t]he duty to act bona fide in the interests of the company ensures that when those powers and duties are exercised they are exercised in the interests of the company' Rosemary Langford, 'Best Interests: Multifaceted But Not Unbounded' (2016) 75 CLJ 505, 508. See also Janet Dine and Marios Koutsias, *Company Law* (Palgrave MacMillan 2007) [11.5]. Thus, many examples exist where a director may not breach the subsidiary duties around conflict or profit, but may still not be acting in good faith and in the best interests of the company. An example might be a director who does not exercise independent judgment in decision making or who does not intervene in a board decision when the director knows that the other directors' primary motivation is not the interests of the company. Another example is a director failing to consider a relevant interest when it was appropriate to do so.

purpose-driven perspective.

An historical lens is applied initially considering to whom, or to what, the good faith and best interests duty is owed. The path leading to ultimate recognition that a company is a separate legal entity from its shareholders is traced. Different forms of shareholder primacy are discussed. The article then considers the early emergence of directors' duties, in particular the significance of oaths sworn by members of governing bodies of corporations. The relationship of the longstanding good faith duty in corporations and its expansion in business corporations to the interests of shareholders is set out. Against this backdrop, the oath, role and duties of directors in the seminal case of *The Charitable Corporation v Sutton*[8] are considered. The origin and role of corporate purpose are then discussed. Taken together, the analysis provides a new understanding of the good faith and best interests duty and its relationship tocorporate purpose.

## 2. To Whom, or To What, is the Duty of Good Faith owed?[9]

### 2.1 Before the general incorporation statutes

A modern company is an artificial legal person legally separate from its shareholders that transacts in the world as an entity acquiring and generating value.[10] The modern company first emerged in 1657 when Oliver Cromwell granted a corporate charter to the East India Company (EIC).[11] Although the EIC was first incorporated in 1600, it was only in 1657 that its new charter granted it the right to hold permanent capital.[12] The EIC was not the first business corporation to have permanent capital; that distinction belonged to the Dutch East India Company (the VOC).[13] The EIC was however the first corporation to have permanent capital that was both legally separated from its investing shareholders in the *persona ficta* or artificial

[8] (1742) 2 Atk 405, 26 ER 642.
[9] This section draws in part on the work of the first author: Watson (n 5).
[10] Susan Watson, 'How the Company Became an Entity: a New Understanding of Corporate Law' (2015) 2 JBL 120.
[11] While no copy of the 1657 charter survives, the text of the charter is also known because much of it was adopted in the later charter granted to the Company by Charles II: Shafaat Ahmad Khan, *The East India Trade in the XVIIth Century in its Political and Economic Aspects* (S Chand & Co 1923) 90.
[12] William Wilson Hunter, *History of India: The European Struggle for Indian Supremacy in the Seventeenth Century* (AVW Jackson ed, Grolier Society 1907) 282.
[13] The Dutch Estates General in 1623 granted the VOC perpetual existence, meaning its capital was permanent: Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 Harv L Rev 1333, 1376–77.

legal person, and also separated from shareholders through double entry bookkeeping.[14] For those reasons, it was the first modern company.

The confluence of permanent capital (termed in this article the Corporate Fund) and the corporation as a long-established organisational form led to a body of law that altered accounting, legal, and social relationships and obligations within the business corporation: 'The eighteenth century wrestled hard with the new importance of a fund in place of people'.[15] In particular, principles relating to the relationship between shareholders and directors, and the obligations of directors[16] to the Corporate Fund and to the modern company as an entity, were developed.[17]

Business corporations were a category of the long-established legal form – the corporation.[18] England in the Middle Ages was awash with forms of corporation used for ecclesiastical (religious) and lay purposes, with the latter further divided into eleemosynary (charitable) and civil purposes.[19] In the fifteenth century, words betokening corporateness became common.[20]

In English law, corporate separateness was linked to the status of corporations as juridical or legal persons. Corporations were, therefore, separate legal entities. Corporations were a

[14] Watson (n 5) ch 10, 144–146.
[15] Colin Arthur Cooke, *Corporation, Trust and Company: An Essay in Legal History* (Harvard UP 1951) 79.
[16] ibid.
[17] ibid 69.
[18] The concept of a corporation with a separate pool of assets and separate legal personality is 'distinctly European' even though its precise origins are contested: Gindis (n 3) 570.
[19] John Patterson Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State* (GP Putnam's Sons 1905) vol 1. Municipal and ecclesiastical corporations existed after the Middle Ages and were numerous throughout Europe: Adalbert Béla Levy, *Private Corporations and their Control* (Routledge 1950) 12. The Edwardian Statutes of Mortmain, aimed at limiting the land held by corporate bodies, were extended during the reign of Richard II to include 'Mayors, bailiffs, and commons of cities, boroughs and other towns that have a perpetual commonalty': Cecil Thomas Carr, *The General Principles of the Law of Corporations: Being the Yorke Prize Essay for the Year 1902* (Cambridge UP 1902) xii.
[20] Such as 'commonitas, perpetua, corpus political et corporatum': Carr (n 19) xiii. The term 'corporation' appears in the Year Books from 1429, the word 'corporate' from 1408, 'incorporate' from 1439, and 'body corporate' in a 1481 report: Quoted in Mich 8 Hen 6, pl 2, fo 1a–1b (1429.086) (corporation); Mich 10 Hen 4, pl 5, fo 3b (1408.005) (corporate); Mich 18 Hen 6, pl 6, fo 21a–22a (1439.006) (incorporate); Pasch 21 Edw 4, pl 21, fo 7a–7b (1481.029) (body corporate). A statute of 1461 also contains the first use of the word 'corporation' in a statute: Quoted in 1 Edw 4, ch 1 (1461). As cited in David J Seipp, 'Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge UP 2012) 38. Seipp says 'When distinguished from these collective bodies, we ordinary human beings were called bodies natural, private persons, singular persons, sole persons, natural persons, single persons, common persons, natural men, and material men': Seipp, ibid.

mechanism the Crown used to grant powers to cities, churches and universities. Only legal persons were capable of bearing rights and duties.[21]

The idea that legal persons did not need to contain natural persons, they could be *persona ficta* or artificial legal persons, was received into English law in the sixteenth century where Sir Edward Coke CJ, in his report on *The Case of Sutton's Hospital* in 1612, set out the classic exposition of the *persona ficta* theory of the corporation in the common law.[22] FW Maitland the legal historian was careful to term *persona ficta* 'the Italian Theory of the Corporation', recognising that, despite earlier glimmerings in the English Year Books, the concept did not develop in the common law until after the Middle Ages.[23] The concept of the *universitas* or corporation as a *persona ficta* existing in its own right as an artificial legal person separate from all other persons arguably originated with Pope Innocent IV.[24] To Innocent IV, the *universitas* or corporation was a 'person' at law: 'the College is in corporate matters figured as a person'.[25] Whilst being aware a legal person is not the same as a human being – 'Corporation as well as Chapter, Tribe, and so on, are legal terms rather than names of persons'[26] – Innocent IV appeared to consider the legal person existed separately at law from the corporate body comprising natural persons, decreeing that a *universitas* could not be excommunicated even though wrongdoing monks who were 'members' of the *universitas* could be.[27] The *persona ficta* concept of the corporation was adopted by Sir Edward Coke CJ applying to all forms of corporation, including business corporations, from 1612.

As a response to the Bubble Act of 1720,[28] an alternative to the business corporation was widely utilised by entrepreneurs and investors in the eighteenth century. The unincorporated contractual joint stock companies, known as deed of settlement companies, were not separate legal entities from their shareholders, at least at common law. In the deed of settlement

[21] Patrick William Duff, *Personality in Roman Private Law* (AM Kelley 1971) 1.

[22] *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960.

[23] Otto von Gierke, *Political Theories of the Middle Age* (Frederick William Maitland tr, Cambridge UP 1913) xiv.

[24] Maximilian Koessler, 'The Person in Imagination or Persona Ficta of the Corporation' (1949) 9 *Louisiana Law Review* 435, 437.

[25] Quoted in Pierre Gillet, *La Personnalite Juridique en Droit Ecclesiastique* (Malines, 1927) 165 (as cited in Koessler ibid 437).

[26] Koessler (n 24) 438 (footnotes omitted).

[27] ibid 437–38.

[28] Bubble Act 1720 (6 Geo 1 c 18) (UK).

company, the Corporate Fund was separated from shareholders by being settled on a trust.[29] A body of law developed around these deed of settlement companies, with the trust recognised by Chancery courts but with the form consistently treated as a partnership of shareholders by the common law.[30]

Although some legal commentators of the period may have viewed it differently,[31] for business corporations incorporated through charters or statutory instruments, the concept that the business corporation was a separate legal entity from its shareholders appears to have survived.[32] The common seal and the deed as expressions of corporate will with formal requirements separate from shareholders is evidence of this continuation[33] as was the requirement that corporations bring actions in their own names, not in the names of their members.[34]

*Bligh v Brent*, decided in 1836, is a significant case upholding separate legal entity in a business corporation. As the growth in significance of intangible forms of value began, it was accepted that the Corporate Fund was the property of the business corporation and that shares were personalty rather than real property.[35] Alderson B delivered the judgment of the full Court considering: 'the nature of the interest which each shareholder is to have'.[36] The court followed a 1781 case heard by then Master of the Rolls Sir Thomas Sewell, *Weekley v Weekley*, which had determined that shares were personal property.[37]

Alderson B concluded that a business corporation was a separate legal entity from its shareholders and that the joint stock of money subscribed by individual shareholders was 'entrusted' to the corporation:[38]

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[29] Watson (n 5) 111–127.
[30] Andreas Televantos, *Capitalism Before Corporations: The Morality of Business Associations and the Roots of Commercial Equity and Law* (Oxford UP 2021) 43: 'courts of the Regency era, especially Lord Eldon's Chancery, refused to treat deed of settlement companies as anything other than partnerships: the trust played only a minor role in their constitution, and did not oust most of the partnership law rules'. See also Susan Watson (n 5) ch 8, 115–127.
[31] Carr (n 19) cf William Blackstone, *Commentaries on the Laws of England, in Four Books, vol 1* (14th edn, A Strahan 1803).
[32] Watson (n 5) ch 7–ch 8, 100–127.
[33] Cooke (n 15) 68.
[34] See eg *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 'proper plaintiff rule'.
[35] See discussion in Cooke (n 15) 69–72.
[36] (1837) 2 Y & C 268, 160 ER 397, 407–408.
[37] (1781) 2 Y & C 283, 160 ER 403.
[38] *Bligh* (n 36) 408.

> Now in the first place we have a corporation to whose management the joint stock of money subscribed by its individual corporators is entrusted … The property is money- the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods and of changing and disposing of each from time to time; and the purpose of all this is the obtaining [of] a clear surplus profit from the use of this capital for the individual contributors. … It is this surplus profit alone which is divisible among the individual corporators … for the individual members of a corporation are quite as distinct from the metaphysical body called "the corporation" as any others of his Majesty's subjects are.

### 2.2 After the general incorporation statutes

General incorporation statutes were enacted in the midnineteenth century making incorporation through following the process set out in the statute a right if the process was followed, and no longer a privilege.[39] With general incorporation the Courts again wrestled with the relationship of the corporate body of shareholders to the incorporated company. Did the incorporation process, now through a general incorporation statute rather than by means of a charter or statutory instrument, create the same legal form as the pre-existing business corporation? Then the modern company would be an artificial legal person that was a separate legal entity from its shareholders owing its existence to the state through the incorporation statute. In other words, the modern company would continue to be a business corporation at law.

Alternatively, was the modern company essentially a deed of settlement company incorporated through registration under a general incorporation statute? If this alternative understanding prevailed after the general incorporation statutes, the collectivity of shareholders would be treated by the law *as if they were* a legal person, but the company itself would not be a *persona ficta* or artificial legal person that was a separate legal entity from its shareholders. Then the modern company would essentially be contractually based on its shareholders at any time with directors the legal agents of those shareholders.

At first it seemed the alternative understanding was the correct interpretation of the statute (and that may have been the intention of the legislature[40]). Through the second half of the nineteenth

[39] General incorporation was permitted initially in the Joint Stock Companies Act 1844 to control rather than facilitate access to Joint Stock Funds. However, the subsequent general incorporation acts of 1856 and 1862 were facilitative, with statutory limited liability for shareholders becoming the default position.
[40] Watson (n 10).

century though, probably driven by the impact of statutory limited liability separating the Corporate Fund from shareholders, the former conception gradually prevailed.[41] *Salomon v Salomon & Co Ltd* apparently settled once and for all that the modern company is a separate legal entity from its shareholders.[42]

Ambiguity in the speeches of the House of Lords in *Salomon* and the legacy in law of the unincorporated form meant debate over the essential legal nature of the modern company continued.[43] In the twentieth century in leading cases like *Allen v Gold Reefs of West Africa Ltd*, the company was treated as a separate legal entity from its shareholders. In other cases, the company was apparently considered to be comprised of its shareholders at any time.[44] For example, the headnote to the English case *Greenhalgh v Arderne Cinemas Ltd* states that the company as a whole does not 'ordinarily mean the company as a commercial entity as distinct from its corporators. It means the corporators as a general body'.[45] But those words were not used in the judgment itself. The facts in *Greenhalgh* are significant when understanding the outcome.[46] It was a case involving a purported 'fraud on the minority' where the minority shareholder was ultimately unsuccessful. The majority shareholders removed by special resolution a preemptive rights provision in the articles of association. As such, the case involved a shareholder resolution, not a resolution of directors, and should be understood as relating only to the exercise of powers by shareholders in relation to other shareholders, not the exercise of powers by directors in relation to the company. This reading of the case is supported by the subsequent section of the judgment where the Judge offers the counterfactual of a resolution discriminating between majority and minority shareholders.

English courts rationalised the conflicting lines of authority by distinguishing between cases where the conflict is between two groups of shareholders (where the *Greenhalgh* approach is taken) and cases where the conflict is between one or more shareholders on one side, and the company on the other.[47] This rationalisation is consistent with a taxonomy where the company

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41 See also discussions in Paddy Ireland, 'The Rise of the Limited Liability Company' (1984) 12 Journal of the Sociology of Law 239; Timothy L Alborn, *Conceiving Companies: Joint Stock Politics in Victorian Britain* (Routledge 1998); Watson (n 5) ch 10, 144–156.
42 [1897] AC 22 (HL).
43 See discussion in *Sequana* (n 6) [135]–[139] around the unanimous assent doctrine.
44 *Allen* (n 2) 672.
45 [1951] 1 Ch 286 (CA).
46 For detailed discussion see Jean J du Plessis, 'Directors' Duty to Act in the Best Interests of the Corporation: "Hard Cases Make Bad Law"' (2019) 34 Australian Journal of Corporate Law 3, 7–17.
47 *Citco Banking Corporation NV v Pusser's Ltd* [2007] UKPC 13, [2007] All ER(D) 369; *Re Charterhouse*

was regarded as a separate legal entity from its shareholders.

The UK Supreme Court may have finally resolved the separate legal entity debate.[48] In *BTI 2014 LLC v Sequana SA and others* in the majority speech for the Supreme Court, Lord Briggs stated:[49]

> I would start by accepting that the original, historical, justification for regarding the general duty of directors to their company as being to manage its affairs for the benefit of its shareholders arose from a perception that, as its corporators, shareholders could for that purpose be equated with the company itself … But the law has since moved on a long way from a view that the interests of others in relation to the company, and its relationships with others, are altogether irrelevant. Put shortly, of the two strands in the reasoning in the *Salomon* case, namely the company as a separate entity with its own interests and responsibilities and the company as an abstract equivalent of its shareholders, it is the first which has clearly prevailed over time.

We can conclude therefore that both the historical analysis and the most recent high authority support arguments that the company is a separate legal entity from its shareholders and that the duty of good faith is owed to the company as a separate legal entity from its shareholders. But the discussion cannot end there. If in fact, as Lord Briggs stated, the company is 'a separate entity with its own interests and responsibilities',[50] how do we then reconcile shareholder primacy developing in parallel with the relatively consistent trajectory towards recognising that the company is a separate legal entity from its shareholders? Also, in some of the jurisdictions where the common law is apparently codified, the duty of good faith is ultimately owed to members. For example in s 172 of the Companies Act 2006 (UK), even though a range of factors must be taken into account, the duty of a director is to 'act in the way he considers, in good faith, would be most likely to promote the success of the company *for the benefit of its members as a whole* …'.[51] How can the law have reached a point where the duty of good faith is owed to the entity itself and at the same time the law requires directors to act for the benefit of shareholders? The next section of this article will show how the duty being owed to the entity can be reconciled with the interests of shareholders.

*Capital Ltd* [2015] EWCA 536 [92]–[97].

[48] See also Eva Micheler, *Company Law – A Real Entity Theory* (OUP 2021) 195–196.

[49] *Sequana* (n 6) [139] (Briggs L).

[50] ibid [139].

[51] (emphasis added).

## 3. The Duty of Good Faith and Shareholder Primacy

When we talk about shareholder primacy, we may be talking at cross purposes.[52] Connor and O'Beid helpfully distinguish shareholder primacy into four categories:

- 'wealth maximisation (shareholder protection)' where 'directors must maximise the wealth of the shareholders but with minimal direct accountability to shareholders'.[53] Bainbridge's director primacy is an example.[54]
- 'bounded wealth maximisation (shareholder protection)' where 'directors must maximise the wealth of the shareholders … subject to a requirement that they cause the company to act in accordance with conventional morality, ethical custom and the law … but do not afford ultimate control of the corporation to them'.[55] Berle's work can be placed in this catagory.[56]
- 'wealth maximisation (shareholder autonomy)' where 'directors must maximise the wealth of the shareholders and afford ultimate control of the corporation to the shareholders'.[57] Contractual theories of the company espoused by Easterbrook and Fischel fall into this category.[58]
- 'bounded wealth maximisation (shareholder autonomy)' where 'directors must maximise the wealth of the shareholders and afford ultimate control of the corporation to the shareholders … but subject to a requirement that they cause the company to act in accordance with conventional morality, ethical custom and the law'.[59] Friedman's famous statement that the sole objective of business should be profit maximisation subject to the

[52] Tim Connor and Andrew O'Beid, 'Clarifying Terms in the Debate Regarding "Shareholder Primacy"' (2020) 35 Aust Jnl of Corp Law 276.
[53] ibid.
[54] Stephen M Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2002) 97 Nw U L Rev 547.
[55] Connor and O'Beid (n 52).
[56] See, for instance, Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44(7) Harv L Rev 1049; Adolf A Berle, 'Management Power and Stockholders' Property' (1927) 5(4) Harv Bus Rev 424. It is worth noting that Berle's concern was largely focused on protecting the interests of minority shareholders. As Connor and O'Beid highlight, Berle's views were coloured by the Great Depression and a desire to avoid the concentration of economic power in directors and shareholders of large US companies: Connor and O'Beid (n 52). As we have seen, the issue of a majority-minority shareholder dispute arose in *Greenhalgh v Ardene Cinema*. As we will see in the next section in the discussion of the EIC, disputes between majority and minority shareholders may be the origin of the earliest form of shareholder primacy.
[57] Connor and O'Beid (n 52).
[58] Frank H Easterbrook and Daniel R Fischel, 'The Corporate Contract' (1989) 89 Colum L Rev 1416.
[59] Connor and O'Beid (n 52).

basic rules of society, including those in law and ethical custom, can be seen as an example of this category.[60]

From the standpoint of the company as a separate legal entity from its shareholders, the 'shareholder autonomy' categories of shareholder primacy, which afford shareholders ultimate control over the corporation, are difficult to reconcile. These shareholder primacy concepts, which hold that the interests of current shareholders at any time are the primary obligation of the board, may have emerged from contractualist conceptions of the company that relate to unincorporated forms like the deed of settlement company. As discussed in the second section of this article, after the general incorporation statutes the contractual form ultimately did not prevail for incorporated companies. But a related conception of the company derived from law and economics, where the company is a nexus of contracts between parties is propounded by commentators like Easterbrook and Fischel. Once it is accepted that the directors are the economic agents of the shareholders, it seems to necessarily follow, first, that the obligations of directors are owed to those shareholders at any time as a collectivity, and secondly that shareholders should have autonomy. But that conception ignores the legal nature of the company focussing only on the economic relationships between corporate participants.[61]

How can shareholder primacy make a long-term perspective possible for directors? A contractualist conception of the company does not easily accommodate future contractual parties.[62] If the company is based contractually on its shareholders at any time why should current shareholders care about successor shareholders? Directors as agents can only act in the interests of current shareholders as a collectivity.

[60] Milton Friedman, 'A Friedman doctrine — The Social Responsibility Of Business Is to Increase Its Profits' *The New York Times* (New York, 13 September 1970).

[61] Easterbrook and Fischel (n 58). An account of how the nexus of contracts approach, which focuses on economic relationships to the detriment of traditional legal categories (most notably the company as a separate entity), made its way into corporate law discourse (as represented by Easterbrook & Fischel) can be found in David Gindis, 'On the Origins, Meanings and Influence of Jensen and Meckling's Definition of the Firm' (2020) 72(4) Oxf Econ Pap 966. This literature often points to the unincorporated companies of the Bubble Act period to highlight the contractual origins and essence of corporations. Some go so far as to argue that the unincorporated company shows that the benefits of treating the company as separate from its owners are so obvious that they never required governmental assistance to achieve. See David Gibbs-Kneller, David Gindis and Derek Whayman, 'Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms' (2022) 22(3) EBOR 573.

[62] The only way the contractual view can accommodate future parties is by relying — unrealistically — on contractual implication by courts, as explained in Gibbs-Kneller, Gindis and Whayman (n 61). A related transaction cost-based argument can be found in Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110(3) Yale L J 387 and Hansmann, Kraakman and Squire (n 13).

The entity conception, which may align with the shareholder protection forms of shareholder primacy set out by O'Connor and Beid and also Lord Briggs conception of the company in *Sequana,* solves the problem. Directors consider the entity rather than current shareholders. Directors maximise the wealth of shareholders through the entity that contains the interests of shareholders as the capital they contribute as the Corporate Fund.

A form of shareholder primacy can therefore be achieved when directors act in the long-term interests of the entity. Section 172 of the Companies Act 2006 legitimises the consideration of wider stakeholder interests so long as the primary obligation to operate the company for the benefit of its members is met.[63] By considering future shareholders, boards are in fact considering the future value of the Corporate Fund comprised of the economic interests of shareholders in the company. In other words, directors are acting in the economic interests of the Corporate Fund underpinning the entity. Once it is accepted that the company is a separate legal entity from its shareholders, a focus on the corporate entity that contains the interests of shareholders rather than the collectivity of shareholders at any time should be recognised as the correct application of the good faith and best interests duty.

Fiduciary obligations, which include the fiduciary duty of good faith, are traditionally thought to be owed to identifiable individuals, or groups of individuals, rather than to amorphous entities. However, fiduciary obligations may predate obligations to individuals. Ciepley identifies directors as purpose fiduciaries[64] arguing that historically, and therefore continuing

[63] The concept of the best interests of the company has received considerable attention in many jurisdictions, see for instance: Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom 'Enlightened Shareholder Value Approach'' Sydney Law Review 2007; Andrew Keay, *The Corporate Objective* (Edward Elgar 2011); Future of the Corporation, 'Principles for Purposeful Business' (2019) <www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> accessed 25 March 2024; Luh Luh Lan and Walter Wan, 'ESG and Director's Duties: Defining and Advancing the Interests of the Company' (2024) www.ecgi.global/working-paper/esg-and-director%E2%80%99s-duties-defining-and-advancing-interests-company accessed 20 March 2024; Martin Lipton and others, 'Some Thoughts for Boards of Directors in 2020' (2020) <www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26708.19.pdf> accessed 25 March 2024; *Peoples Department Stores Inc v Wise* [2004] 3 SCR 461; *BCE Inc v 1976 Debentureholders* 2008 SCC 69, 3 SCR 560; Liao, Carol, 'A Canadian Model of Corporate Governance' (2014) 37 Dalhousie Law Journal 560; *Bell Group Ltd (in liq) v Westpac Banking Corporation* [No 9] (2008) 39 WAR 1; *Westpac Banking Corporation v Bell Group Ltd (in liq)* [No 3] (2012) 44 WAR 1; Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Memorandum of Opinion' (*The Centre for Policy Development and the Future Business Council*, 7 October 2016) <https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf> accessed 25 March 2024; Noel Hutley and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum of Opinion' (*The Centre for Policy Development*, 26 March 2019) <www.cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf> accessed 25 March 2024; *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100.
[64] Drawing on Miller and Gold's distinction: Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015)

in corporate law today, 'directors have a fiduciary duty not to specific persons, but to the corporate entity and its authorized purposes'.[65] The analysis contained in this article so far is consistent with Ciepley's analysis and, as the next section considers, is supported by an examination of the obligations of directors that emerged in early business corporations.

## 4. Emerging Obligations of the Governing Bodies of Business Corporations

### 4.1 The role of oaths

On 11 November 1657, a General Assembly of the New Subscribers to the permanent Joint Stock in the EIC met[66] and asked the 24 committees (directors) to prepare a draft oath 'for the Governor, Deputy, and Committees when they enter upon the management'.[67]

The members of governing bodies of all forms of corporations, including business corporations, swore an oath. The 1661 charter of the EIC, which was almost identical to the lost 1657 charter,[68] required committees to swear an oath on election 'that they and every of them shall well and faithfully perform their said office of Committees in all things concerning the same'.[69]

In compliance with this requirement, the first section of the oath sworn by the members of the governing body of the EIC was 'to be faithfull and true during the tyme of your place of Governour, or Deputy, or trust as one of the Committees to the Fellowship or Company of the

57 Wm & Mary L Rev 513, 519–20.

[65] David Ciepley, 'Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426747> accessed 12 December 2022. See also Lyman P Q Johnson, 'Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose' in D Gordon Smith and Andrew S Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar 2018) 260; Asaf Raz, 'A Purpose-Based Theory of Corporate Law' (2020) 65(3) Villanova Law Review 523.

[66] The members of the generality were the freemen of the Company, also called adventurers. (In the 1657 charter it remained possible to be a freeman or member of the Company without holding stock. The shareholding requirement was introduced in the 1661 charter.)

[67] Ethel Bruce Sainsbury, *A Calendar of the Court Minutes etc. of the East India Company, 1655–1659* (Clarendon Press 1916) 184.

[68] 'Charters of the East India Company with Related Documents: the Parchment Records' (The National Archives 1600–1947) *<https://discovery.nationalarchives.gov.uk/details/r/16e42ef9-0b6c-4f6e-acb6-27cac99de0b4>* accessed 23 July 2021. After the Restoration, all copies of the 1657 charter of the English East India Company were apparently destroyed in an attempt to expunge Cromwell's legacy. Nevertheless contemporary accounts record that the 1661 English East India Company charter gave greater powers to the Company, but was otherwise similar to the 1657 charter.

[69] *The East-India companies charter, Granted by the Kings most excellent Majesty Charles the second, under the great seal of England, dated the third day of April, in the 13th. year of his Majesties reign, 1661* (The Making of the Modern World 1759).

Merchaunts of London trading into the East Indies, and their successors'.[70] That part of the oath was sworn by members of governing bodies of all form of corporation, not just business corporations. It was an oath that clearly related to office – here as a governor, deputy governor or committee of the EIC. Those roles equate to the chair, deputy chair, and directors of a twenty-first century company with the word 'faith' found in the first part of the modern good faith and best interests duty traced back to the wording of the oath.

This oath to perform one's duty faithfully when taking up an office was common at the time. Yet it almost never appears in litigation meaning the oath may not have been legally enforceable. Although that part of the oath had clearly been breached in the Charitable Corporation, the seminal case discussed in the next section, Lord Hardwicke did not address that breach in the case itself.[71] What, therefore, was the significance of oaths sworn by members of governing bodies of corporations in seventeenth century and eighteenth century England?

Prior to the sixteenth century, adding an oath to a promise would effectively create two simultaneous legal obligations. The promisee could sue for 'perjury or breach of faith' in an ecclesiastical court and enforce the underlying promise or contract in a regular court.[72] But by the sixteenth century, jurisdiction over perjury had shifted to the King's Bench[73] with oaths almost never litigated.[74] Contemporary thinking on oaths was 'cynical'; in the words of Selden 'now oaths are so frequent, they should be taken like pills swallow'd whole, if you chew them you find them bitter, if you think of what you sweare twill hardly goe down.'[75] As another contemporary writer put it 'the world is divided between those who would swear to nothing and those who would swear to anything.'[76]

Despite this cynicism, oaths continued to be used frequently. According to Pufendorf, oath

[70] ibid.
[71] *Charitable Corporation* (n 8).
[72] Richard H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, vol 1 (OUP 2004) 358.
[73] RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (CUP 2006) 19–20.
[74] Barbara Shapiro, 'Law and the Evidentiary Environment' in Lorna Hutson (ed), *The Oxford Handbook of English Law and Literature, 1500–1700* (OUP 2017) 259–60.
[75] Frederick Pollock and Edward Fry (eds), *Table Talk of John Selden* (Quaritch 1927) 85–87, 146 as cited in Caroline Robbins, 'Selden's Pills: State Oaths in England, 1558–1714' (1972) 35 Huntingdon Library Quarterly 303, 303.
[76] ibid.

takers added moral obligations to pre-existing legal ones:[77]

> Oaths in themselves produce no new and distinct obligation, but come in as a kind of accessory bond to an obligation already valid in itself. For in the taking of an oath we presuppose something, upon the non-fulfilment of which we call down upon our heads the punishment of God.

The supporting nature of the oath did not mean that oaths were pointless, as ‘all men except atheists believe that God punishes the violation of promises’.[78] Oaths were particularly useful where ‘fear of men did not seem effective enough’,[79] and where there was a risk of ‘lack of confidence, unfaithfulness, ignorance and passion’.[80]

According to Condren, oaths of office were not seen as binding contracts, but entailing a ‘heavy ethical reciprocity’.[81] As oaths were not legally binding, there was a genuine risk that someone who did not believe in the sanctity of oaths would not be bound by them. This argument was made to deny public offices to Catholics.[82] Quakers who wished to replace oaths with solemn declarations ‘also argued that if we, contrary to our principles and consciences were forced by penalties to swear allegiance … it might well be suspected of us, that at opportunity we would breach such oaths’.[83]

The idea of a dual moral and legal duty is evident in the wording of corporate oaths of office. Good faith does not appear by itself. Instead, directors swore to faithfully perform a duty: ‘faithfully to perform their office’,[84] and ‘for the due and faithful performance of their duty’,[85] to ‘well and faithfully perform their said office’[86] and ‘in the execution of the said office of director, I will faithfully and honestly demean my self’.[87] In other words, good faith relates to

[77] Samuel Pufendorf, Charles Henry Oldfather and William Abbot Oldfather (trs), *De Jure Naturae et Gentium Libri Octo*, vol 2 (Clarendon Press 1934) 501.
[78] ibid.
[79] ibid 492.
[80] ibid 494.
[81] Conal Condren, *Argument and Authority in Early Middle England: The Presupposition of Oaths and Offices* (CUP 2006) 240.
[82] ibid 237.
[83] Edward Burrough, *A Just and Righteous Plea Presented unto the King of England and his Council, being the True State of the Present Case of the People, Called Quakers* (Robert Wilson 1661).
[84] John Shaw, *Charters Relating to the East India Company from 1600 to 1761* (R Hill at the Government Press 1887) 21–22.
[85] *A Copy of the Kings Majesties Charter for Incorporating the Company of the Massachusetts Bay in New England in America* (Printed by S Green for Benj Harris 1689) 16.
[86] *The Royal Charter for Incorporating the Hudson’s Bay Company* (R Causton & Son 1816) 2.
[87] Bank of England, *A Copy of the Charter of the Corporation of the Governor and Company of the Bank of England* (H Teape 1758) 15.

the performance of the office.

The Bank of England was an early business corporation. The 1694 charter of the Bank of England required both directors and shareholders to swear oaths. Directors swore that they owned £2000 of stock in the bank (the minimum), and:[88]

> I A.B. do swear that in the office of a Director of the corporation or company of the Bank of England, I will be indifferent and equal to all manner of persons, and I will give my best advice and assistance, for the support and good government of the said corporation. And in the execution of the said office of director, I will faithfully and honestly demean my self, according to the best of skill and understanding.

Directors at that time were clearly officers and, mirroring the wording always used in petitions for charters, their role derived from the Crown and related to good government. The fundamental obligation of members of governing bodies as officers of the Company was, in common with all forms of corporation, therefore, to comply with the provisions of the charter and any corporate bylaws when occupying the office. By taking the office, the governor and committees assumed this obligation. As discussed in section six, that charter would always have a public purpose. [89]

### 4.2 'Newe oaths' for business corporations

John Evelyn, the diarist, was an investor and a member of the generality or small shareholders of the EIC. Evelyn was aware of the changes in the EIC describing it in the key year of 1657 as having:[90]

> … newe oaths, new orders a mixt committee & I thinke so reformed as that if Warrs with Holland (which we feare) doe not decompose us, it is likely to prove one of the most profitable secure & hopefull trades in Europe.

The 'mixt committee' referred to by Evelyn clearly relates to the fact that the governing body of the EIC was (in the context of its time) more diverse. In the earlier part of the seventeenth century the EIC had been controlled by elite merchants with big shareholdings. The founders needed investment capital for expensive and lengthy voyages. That capital was provided by

[88] ibid.
[89] For a short discussion of corporate officer accountability see Steve Kourabas, Nick Sinanis and Timothy Peters, 'A Historical Perspective on Corporate Officer Accountability' (2024) <www.ecgi.global/blog/historical-perspective-corporate-officer-accountability> accessed 3 March 2024.
[90] Gillian Darley, *John Evelyn: Living for Ingenuity* (Yale UP 2006) 149.

small shareholders who became known as the generality.

Leaders of the generality group in the EIC were frequently members of the English gentry. It was a period where Latin grammar education meant notions of virtuous civic service were permeating through society with an understanding of and commitment to classical political ethics. These generality leaders are likely to have been exposed to ideas from Plato and Aristotle of community, justice, citizenship, freedom and equality.[91] By the midseventeenth century members of the generality had become members of the governing body of the EIC. One of their number, Maurice Thomson, was elected governor in 1657 when Cromwell granted a charter with permanent capital.

The reference to 'newe oaths' relates to the requirement that the governing body consider the interests of 'the adventurers in this present Stocke'. Ciepley suggests that the 1657 charter conceptualised stockholders as the incorporators. If this is correct, it is not surprising that their interests had to be taken into account.[92] However the longstanding distinction between *membership* of the EIC, which cost five pounds, and a member then choosing to invest in the present stocke or capital still remained, as evidenced by the wording of the oath set out below. Directors swear to be fair 'to all the adventurers that shall adventure or putt in stocke'.

The Meeting of 17 November 1657 of the committees (directors) for the New Stock decided that the wording of the *new* oath to be taken by the governor, deputy, and 24 committees on their election to manage the affairs of that stock would be as follows.[93]

> [Y]ou shall sweare to be faithfull and true during the tyme of your place of Governour, or Deputy, or trust as one of the Committees to the Fellowship or Company of the Merchaunts of London trading into the East Indies, and their successors; the good estate of the adventurers in this present Stocke you shall favour and affect; and the priviledges graunted unto them (to your power) endeavour to maintaine and preserve. You shall be carefull to see and provide that an equall and indifferent hand be carried in the government of this fellowship and in the affaires thereof to all the adventurers that shall adventure or putt in stocke; and that an equall division from tyme to tyme be made to all the adventurers according to the proportion of their several stocke duly paid in.

[91] James Farnell, 'The Social and Intellectual Basis of London's Role in the English Civil Wars' (1977) 49 The Journal of Modern History 641, 656.
[92] David Ciepley, 'The Anglo-American Misconception of Stockholders as 'Owners' and 'Members': Its Origins and Consequences' (2020) 16(5) J Institutional Econ 623, 636.
[93] Sainsbury (n 67) 186–87.

The longstanding requirement to be faithful and true, which relates to office, remains. But several aspects of the 1657 new oath when considered in relation to the shareholders and the entity are striking. First the obligation to 'the good estate of the adventurers in this present Stocke',[94] read in context with the rest of the oath, supports arguments that part of the duty was owed to the *interests* (good estate) of investing shareholders ('adventurers in this present Stocke'). For the first time in 1657 that 'present Stocke' was held in the Company as permanent capital (or the Corporate Fund). The wording of the oath does not support the duty being owed directly to the current shareholders of the stock (the obligation is to the good estate of the adventurers). Nor is the obligation owed to all the members of the EIC only those who 'invest in this present Stocke'.

Secondly, the requirement to be 'carefull to see and provide that an equall and indifferent hand be carried in the government of this fellowship and in the affaires thereof to all the adventurers that shall adventure or putt in stocke'[95] ensures that committees (directors) who are also adventurers not favour their own interests above the interests of all of the stockholders (shareholders).

How did the new obligations in the new oath arise? In the early part of the seventeenth century, the controlling elite and majority shareholders of the EIC made up its governing body. The controlling elite were wealthy merchants who had initially made distributions to shareholders as commodities. They had also purchased commodities from the EIC at rates favourable to themselves as they had established retail networks where they were able to sell on those commodities. The commodities were often sold through the Levant Company, where many of the controlling elite were also major shareholders. These arrangements therefore favoured the controlling elite but not the investing shareholders who were usually not merchants. The investing shareholders who comprised the generality agitated through the general meeting (also an EIC innovation) for distributions to be made to shareholders in cash not commodities, and for sales of commodities to be made at market rates to all parties including the controlling elite. Before the adoption of permanent capital in the EIC, the EIC acted as a framework within which a series of terminating joint stocks were operated for a voyage or series of voyages. Each member of the EIC could decide whether or not to invest in a terminating stock. The EIC therefore depended on investment by the generality to mount voyages so eventually the

[94] ibid 187.
[95] ibid.

controlling elite gave into the demands of the generality.[96]

By the time the EIC sought a charter from Cromwell in the 1650s, members of the Court of Committees had conceded that the role of the governing body could not be perpetual or hereditary. Instead, it was to manage the company:[97]

> [I]f any failure is attributed to the managers … it may be for the future be managed by those who have lived and are well versed in these parts, with the help of others of known ability and integrity, and be chosen by the adventurers themselves, their posts not being perpetual or hereditary.

The transition of the governing body into modern managers, which EIC's generality had long demanded, heralded a significant change. The governing body transitioned away from being personally accountable for property and consumable surplus to individual investors at the end of each terminating stock, and instead became responsible for a financial return on the Corporate Fund as permanent capital held in the EIC as a corporation and a separate legal entity. For that purpose, the EIC began to recognise the need to distinguish capital from revenue: 'the greatest of accounting's responsibilities is to hold management accountable for the rate of return on capital employed'.[98] With accountability for a return on the Corporate Fund, we can see a shift towards a form of shareholder primacy. Although shareholders had the right to elect members of the governing body, shareholders did not control the decision making of the governing body and the governing body was no longer directly accountable to individual shareholders. In Connor and O'Beid's classification of shareholder primacy, therefore, it is a form of shareholder protection.

The requirement 'that an equall division from tyme to tyme be made to all the adventurers according to the proportion of their several stocke duly paid in'[99] supports assertions that by 1657 the EIC was essentially a capitalist enterprise focused on a return on capital contributed by shareholders, rather than being focused on individual shareholders. The governing body was expected to consider 'the affaires' or interests of the shareholders, rather than the shareholders

[96] Watson, *The Making of the Modern Company* (n 5) ch 4, 51–64. See also Rob Bryer, 'The History of Accounting and the Transition to Capitalism in England: Part 2 Evidence' (2000) 25 Accounting, Organizations and Society 327; William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury Publishing 2019).
[97] Sainsbury (n 67) 128.
[98] ibid 368.
[99] ibid.

themselves.[100] The obligation was owed to the EIC as the entity holding the Corporate Fund rather than to the shareholders themselves.

The requirement 'to see and provide that an equall and indifferent hand be carried in the government of this fellowship and in the affaires thereof'[101] also supports arguments that the duties around conflict and profit were subsidiary and arose from the fundamental good faith and best interests duty. It also reveals the original origins of the best interests' part of the obligation were in long-running disputes between majority and minority shareholders of the EIC; a fact situation broadly similar to the one that drove the outcome in *Greenhalgh* discussed above.

The 'newe oaths' referred to by John Evelyn may relate to the fact that this oath includes new obligations to 'the good estate of the adventurers in this present Stocke'.[102] It may well be that in the debate that led to the drafting of the wording of the oath the investing generality required the inclusion of those words to protect their interests.

The possible source of the obligation to act in the best interests of the company in the modern good faith and best interests duty can therefore be seen as emerging later than the good faith aspect of the duty. As discussed in section 4.1, oaths were sworn by members of governing bodies of all forms of corporation; ecclesiastical, eleemosynary, civil, municipal, and including business corporations. Before the EIC acquired permanent capital and before the generality successfully agitated for their rights to be considered by the governing body, the oath sworn by the members of the governing body was simpler including only the good faith aspect that related to office. Under the original charter of the EIC in 1600, the governor and members of the Court of Committees (directors) as the governing body swore an oath 'faithfully to perform their said Office'.[103]

[100] ibid.
[101] ibid 186–87.
[102] ibid.
[103] *Charter granted by Queen Elizabeth to the East India Company* (Good Press 2021). A later seventeenth century oath had the wording '… you will be faithful to the Governour, his Deputy and Company of Merchants of London, trading onto the East-Indies, in the management of their Trade …'. Colin Waters 'A[n] old document containing the oath of fidelity to the East India Company also known as EIC …' (*Alamy*, 2014) <www.alamy.com/a-old-document-containing-the-oath-of-fidelity-to-the-east-india-company-also-known-as-eic-the-honourable-east-india-company-heic-east-india-trading-company-eitc-the-british-east-india-company-or-informally-as-the-john-company-company-bahadur-or-simply-the-company-it-originally-traded-as-governor-and-company-of-merchants-of-london-trading-into-the-east-indies-and-traded-cotton-silk-indigo-dye-salt-spices-saltpetre-tea-

Only business corporations had Joint Stocke and then after 1657 in business corporations like the EIC permanent capital that became the Corporate Fund. In that way, business corporations can be differentiated from the other forms of corporation of the time. The words relating to the 'the good estate of the adventurers in this present Stocke' therefore did not develop in the oaths sworn by members of other forms of corporation.

Members of governing bodies of all forms of corporation were obliged to take the sacrament up until 1661. In the Corporation Act 1661 all municipal officeholders were required to receive the sacrament of Holy Communion in accordance with the rites of the Church of England. The purpose was to exclude from public office Roman Catholics, followers of the Jewish faith, and Protestant dissenters like Anabaptists. The Act was passed a year after the Restoration and did not apply to directors of business corporations where many members of the governing body were Anabaptists. John Evelyn in his diary in 1657 decried the reluctance of Anabaptists to take the full oath.[104] As well as a differentiation in the wording of the oaths for business corporations from other forms of corporation, by 1661 the requirements for governing bodies of business corporations were less stringent than those for officers of municipal corporations. Committees (directors) of business corporations like the EIC did not have to swear the oaths of Allegiance and Supremacy that the Corporation Act 1661 required of officers of municipal corporations.[105] These oaths were required from all holders of public office, with the relaxing of the requirements evidence of the beginning of a differentiation in the requirements of officeholders in business corporations from other forms of corporations.

The differentiation in the wording of the oath continued in some, but not all, business corporations. In 1692, in the charter of the Greenland Company, the position of committees was referred to as one of 'trust', as well as directors swearing an oath to be faithful, to preserve the joint stock of the company, and to treat all members equally:[106]

> You swear to be faithful and true during the time of your place of trust as one of the committees to the Company of Merchants of London trading to Greenland … the

and-opium-it-began-trading-circa-1600-and-was-absorbed-by-the-british-indian-government-in-1858-image351454087.html> accessed 3 October 2021.

[104] J Evelyn, *The Diary of John Evelyn* (vol 1, W Bray ed, M Walter Dunne 1901) 318.

[105] The subsequent Oaths of Allegiance and Supremacy Act 1688 required all office holders, clergy and Members of Parliament to swear allegiance and supremacy to the new monarchs, William III and Mary II. The Oath of Supremacy still exists and is a requirement for anyone taking public or church office in the Kingdom of England or Ireland. It requires the individual to swear allegiance to the monarch as the Supreme Governor of the Church. Failure to take the oath was considered treason. The Oath of Allegiance is a promise to be loyal to the British monarch, and his or her heirs and successors. Some UK public servants swear the Oath of Allegiance.

[106] Greenland Trade Act 1692, s 11.

> good Estate of the Adventurers in this present Joynt Stock you shall favour and affect and the Priviledges granted unto them (to your power) endeavour to maintaine and preserve. You shall be carefull to see and provide that an equal and indifferent hand be carried in the Government of the Company.

The change in the wording of the oath was not universal: not all business corporations required directors to swear the new form of oath. The South Seas Company is mentioned by Lord Hardwicke in his speech in *The Charitable Corporation v Sutton* discussed in the next section.[107] It is the Company linked with the Bubble Act 1720 and had links with members of the Government. The focus of the oath remained on good faith in office.

In 1717, the Directors of the South Sea Company swore the following oath:[108]

> I do faithfully promise, that in the office of director … I will give my best advice and assistance for the support and good government of the said company, and I will faithfully and honestly demean my self, and execute the said office accordingly, to the best of my skill and understanding. So help me God.

The directors of the Charitable Corporation itself swore the following oath:[109]

> [Y]ou shall swear you will duly and faithfully perform the trust of a committee man of the Charitable Corporation, to the best of your knowledge and judgment for the benefit and advantage of the said corporation, so long as you shall continue in the said trust.

The emerging differentiation of the wording of the oath required from members of governing bodies of business corporations compared with other forms of corporation does indicate a divergence. Obligations were *also* owed to the interests of the stockholders by the inclusion of the additional requirements that ‘the good estate of the adventurers in this present Stocke you shall favour and affect’.

In summary therefore, the fundamental obligation of the members of governing bodies of all form of corporations was to be faithful in the performance of the office. The oath sworn by members of the governing body created a moral duty that supported the legal duty. After 1661 directors of business corporations were differentiated by not being required to swear the oath

[107] *Charitable Corporation* (n 8).
[108] South Sea Company and Great Britain, *An abstract of the several acts of Parliament, commission for taking subscriptions, charter, and by-laws of the honourable South-sea company* (Richard Mount, 1718) 26.
[109] *A Short History of the Charitable Corporation* (A Millar 1732) 21.

of allegiance and supremacy. New oaths sworn by directors of some business corporations included additional obligations relating to the permanent capital, with Corporate Funds holding the interests of investing shareholders and with accountability for a return on capital rather than accountability directly to investing shareholders. The form of shareholder primacy that was emerging was based on shareholder protection. In all business corporations though, the ongoing inclusion of the good faith obligation meant that directorship remained an office, with the best interests obligations additional.

Governing bodies were required to exercise powers in accordance with and within the scope of the charter granted to the corporation, with that charter demonstrating a purpose that benefitted the public.[110] The wording of the oaths and inclusion of the wording that the 'good estate of the adventurers in this present Stocke you shall favour and affect'[111] in business corporations like the EIC may be significant therefore in understanding the source of the modern duty of directors to act in the interests of the company where those interests are understood to be the economic interests of shareholders collectively held as the Corporate Fund. However, the context in which that wording was found in the oath indicates that it was not the only, or even the primary, obligation of directors. The primary obligation related to the faithful performance of office aligning with the purpose for which the charter was granted. This is the historical context within which the relationship between office and the obligation to the interests of shareholders was considered by Lord Hardwicke in *The Charitable Corporation v Sutton.*[112]

## 5. *The Charitable Corporation v Sutton*

*The Charitable Corporation v Sutton* is a foundational case on the obligations of directors. Lord Hardwicke famously stated 'committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation … By accepting of a trust of this sort a person is obliged to execute it with fidelity

[110] As an example, one of the first acts of the EIC after the granting of the new charter in 1657 was a petition asking the Protector if a ship and frigate could be sent to St Helena to bring EIC ships home as there was a rumour the Spaniards planned to intercept them. The wording of the petition mentions the honour and benfit of the nation and Cromwell's positive answer refers to the 'incouragement of the East India Trade' clearly viewed as a benefit for the nation: A Petition to Oliver Cromwell in W Griggs *Relics of the Honorable East India Company – A Series of Fifty Plates* (Bernard Quaritch 1909) 12.
[111] Sainsbury (n 67) 184, 186–187.
[112] *Charitable Corporation* (n 8).

and reasonable diligence.'[113]

Pamphleteers writing about the Charitable Corporation itself, before the case was decided in 1742, were unsure about the nature of directors' duties. Directors clearly had a duty to manage the corporation, supervise those beneath them and inspect warehouses and accounts.[114] Good faith is discussed: they were 'sworn to the due and faithful execution of this duty', and had they complied with this obligation, the Charitable Corporation would have suffered no loss.[115]

The word 'trust' is used extensively in the oath taken by directors of the Charitable Corporation. The concept of trust is discussed by pamphleteers. One author tried to:[116]

> … examine seriously the nature of that trust which is reposed in the directors, and by what limits they are restrained, with whatever else naturally belongs to the decision of this question, of which hitherto we may justly say, that it has been as little known as it has been much talk'd of.

Whereas Lord Hardwicke in *Charitable Corporation* does not consider directors will incur liability for actions based on faulty policy, he does consider directors will incur liability if they do not act with fidelity and reasonable diligence. Directors are then liable for breaches of trust committed by other directors. *Sutton* is classified by Geltzer as a case where 'fiduciary office was identified as a category running alongside trusteeship of property' where Lord Hardwicke 'assimilated nonfeasance in failing to supervise with misfeasance of office'.[117]

The words 'trust', 'entrusted' and 'trusty' were used when describing the role of directors throughout the period. The word 'entrusted' in relation to directors was used by Alderson B in *Bligh v Brent* in 1836 in relation to directorship of a business corporation. 200 years earlier John Evelyn recorded in his diary that, on 4 December 1657, he attended the sermon to the company given by Dr Raynolds (Reynolds). That sermon was given at the point Cromwell had granted a charter with permanent capital to the EIC. Reynold's sermon was on Nehemiah, xiii. 31 showing, 'by the example of Nehemiah, all the perfections of a trusty person in public affairs'.[118]

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[113] ibid 644.
[114] *The Case of the Charitable Corporation* (London 1732) 1–2.
[115] ibid 2.
[116] *A Short History of the Charitable Corporation* (n 109) 16.
[117] Joshua Getzler, 'Rumford Market and Genesis of Fiduciary Obligations' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 595.
[118] John Evelyn, *Memoirs, Illustrative of the Life and Writings of John Evelyn* (William Bray ed, Henry Colburn

Rather than trusteeship in the sense we now understand the term, the word trusty as used in that period may have related to general obligations around being entrusted. The online etymology dictionary traces the meaning as ‘reliable, to be counted on’ from the fourteenth century onwards; we would today say trustworthy.[119] It is notable that governance of the EIC was viewed as relating to public affairs. The trusty persons in public affairs were the new governors and committees (directors) of the EIC, giving an insight into how the obligations of governing bodies of business corporations were conceived of in 1657.

The emergence of the trust concept in corporations' law may relate to the use of trusts in the unincorporated deed of settlement form that had emerged after the Bubble Act in 1720. Rather than being ‘entrusted’ or ‘trusty’ directors of business corporations are coming to be viewed as trustees. Getzler considers the fact that all were made liable despite all breaching their duties in different ways, ‘as evidence of a key step in the use of fiduciary relations to construct entities in law’.[120] A simpler explanation, as outlined in the previous section, is that the business corporation was considered to be an entity that directors owed obligations to. In business corporations, as evidenced by the new oaths sworn by directors, from 1657 those obligations began to extend beyond faithful performance of office to acting in the interests of all of the investing shareholders (held in the company as the Corporate Fund). A further extension is considering directors as trustees of the Corporate Fund  for investing shareholders .

The statement by Lord Hardwicke that directors are agents is most often excerpted from the case and can be used to support arguments that Lord Hardwicke considered directors to be legal agents of the current shareholders of the company, with the term agent given its modern meaning. It is suggested that the use of the term agent should not be interpreted as the directors being the legal agents of the shareholders. Agency did not emerge as a separate concept in the modern form until the nineteenth century[121] and the historical conception of the roles of

1818) 254.

[119] (Online Etymology Dictionary) <https://www.etymonline.com/search?page=1&q=trusty&type=> accessed 12 December 2022.

[120] Getzler (n 117) 596.

[121] ‘[I]t must never be forgotten that agency did not be-come a single or significant subject until (very roughly) the turn of the nineteenth century … Its modern history … will fully unfold … doctrine by doctrine, the nineteenth century developments.’ Wolfram Müller-Freienfels, ‘Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty’ (1964) 13 Am J Comp L 193. The only reference to the term agent in Giles Jacob's 1729, *New Law-Dictionary* is to agent and patient where it refers to where ‘a Perfon is the Doer of a Thing, and the Party to whom done’. The example of a man making a creditor his executor is used: Giles Jacob, *New Law-Dictionary: Containing, the Interpretation and Definition of Words and Terms Used in the Law* (London, 1729)

members of governing bodies relates to their obligations of office and their obligations to the interests of shareholders held in the entity. It is suggested that the sense in which Lord Hardwicke is applying agency is different to the modern understanding and the case should be read in its historical context. By saying directors were 'agents to those who employ them in this trust' Lord Hardwicke may be saying no more than directors must protect the interests of investing shareholders who appoint them; a concept closer to trusteeship than agency. 'Agents' is used in the sentence where Lord Hardwicke states directors "are most properly agents to those who employ them in this trust."

That statement should in turn be read in the context of the first three paragraphs of Lord Hardwicke's speech; the first two sentences in particular:[122]

> I take the employment of a director to be of a mixed nature. It partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government; and for this reason none of the directors of the great companies, the *Bank, South-sea &c.*, are required to qualify themselves by taking the sacrament. Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation … By accepting of a trust of this sort a person is obliged to execute it with fidelity and reasonable diligence.

The role of director remained mixed[123] consistent with the content of the oath of office sworn by many directors of business corporations since 1657, with both a pre-existing public aspect relating to office (good faith) and an emerging obligation to the interests of stockholders in the entity which we would today term private (best interests). Lord Hardwicke says directorship has the nature of a public office arising from the charter. Despite the obligation to the interests of shareholders that was no longer wholly public, business corporations remained a form of corporation. Although having a nature of public office, Lord Hardwicke said directorship was not an office of public government, as directors did not have to take the sacrament. (As we have seen, the requirement not to take the sacrament dated from the waiver of the requirement

xxix. By 1829, in James Whishaw *New Law Dictionary*, the modern meaning of agent as 'a person appointed to transact the business of another' had emerged: James Whishaw, *New Law Dictionary: Containing a Concise Exposition of the Mere Terms of Art, and Such Obsolete Words as Occur in Old Legal, Historical and Antiquarian Writers* (J & WT Clarke 1829) 12.

[122] Getzler (n 117) 644.

[123] On the medieval origins of the idea of mixed office see Samuel F Mansell and Alejo José G Sison, 'Medieval Corporations, Membership and the Common Good: Rethinking the Critique of Shareholder Primacy' (2020) 16(5) J Institutional Econ 579.

for Anabaptists in 1657 in the EIC and the removal of the requirement for directors of business corporations in 1661.) The differentiation of the wording of the oath required from directors of business corporations compared with other forms of corporation had developed into a significant difference in the role of directors of business corporations by 1742 in that Lord Hardwicke considered the obligations of directors related to the interests of those who employed them in this trust; investing shareholders.

Lord Hardwicke did not say that the public nature of the role of director was no longer relevant or significant; the employment of director is of a 'mixed nature'. Directors of business corporations were still officers. The duty to comply with the charter continued to apply to directors of business corporations in common with all corporations. As discussed in the next section, this aspect of the duty may easily be aligned with the obligation of directors of modern companies to exercise powers for a proper purpose, meaning the purpose for which the power is granted or conferred.[124] In addition all business corporations continued to need to demonstrate a public purpose to be granted a charter. The significance of *Charitable Corporation v Sutton* is that the secondary obligation owed by directors of business corporations to the interests of those who 'employ them in this trust, and who empower them to direct and superintend the affairs of the corporation'[125] had become increasingly significant or perhaps even paramount. That best interests obligation was not initiated in *Sutton* – it had first emerged in the earlier oaths sworn by directors of business corporations like the EIC. Although a watershed case, *The Charitable Corporation v Sutton* was therefore a more incremental development than a leap.

If the wording in the charter was in conflict with interests of shareholders, which part of the duty would prevail? An anonymous pamphlet published in the wake of the collapse of the Charitable Corporation, but before the case was decided, may give clues about how directors' duties had come to be viewed in the period immediately before Lord Hardwicke's judgment.[126] The author, like Lord Hardwicke, views directorship as a 'mixed office' so the interpretation also assists in understanding the case itself. The Charitable Corporation was founded with 'the publick Advantage of the nation into our View'.[127] The charter was granted because of this

[124] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC).
[125] *Charitable Corporation* (n 8).
[126] *A Short History of the Charitable Corporation* (n 109) 7.
[127] ibid.

public benefit: 'A charter was *accordingly* granted by her late majesty'.[128] But the company was also intended to benefit its shareholders. As 'publicke utility thus mix'd with the private emolument (of shareholders) it was highly reasonable to suppose that they should soon be supported by a publick sanction'.[129]

The author suggests two duties. The first is to consider the charter and the *purpose* for which it was granted by the Crown.[130] The second is to act in the best interests of the shareholders: 'a man ought to reflect whence he had that trust … when the proprietors chose him into that charge, it was that he might direct their affairs to the best advantage.'[131] Directors were indeed seen as both occupying a public office and as privately elected 'agents' or 'trustees' in the sense that directors were elected and entrusted to the role of directing the affairs of the company by the shareholders. As discussed above, affairs can be equated with the modern use of the word interests. But, crucially, where those duties conflicted, the *purpose* of the corporation won out: 'In most cases the design and interest of the proprietors is to pursue that purpose (of the charter), and their directors ought *therefore* keep this continually in view.'[132]

In summary, as well as establishing the obligation that directors act in the best interests of the company, Lord Hardwicke in *The Charitable Corporation v Sutton* affirmed that an aspect of the role of directors still was in the nature of public office. The public office presumably extended to acting faithfully ensuring compliance with the charter and its purpose. Lord Hardwicke set down judicially for the first time the duty that directors were charged with acting in the interests of those who empowered them to direct the affairs of the corporation. This article suggests that the interests of the shareholders were held in the Corporate Fund. An argument can be advanced that the new obligation of directors to the interests of shareholders had its origins in the pre-existing oath sworn by directors that had moral but not legal force. That oath sworn by directors of business corporations with permanent capital often included to 'be faithfull and true … [to]; the good estate of the adventurers in this present Stocke'[133] or in the Charitable Corporation itself to "faithfully perform the trust of a committee man of the Charitable Corporation, to the best of your knowledge and judgment for the benefit and

[128] ibid.
[129] ibid.
[130] ibid 17 (emphasis added).
[131] ibid 20.
[132] ibid 17.
[133] Sainsbury (n 67) 184, 186–87.

advantage of the said corporation." But a fundamental requirement in common with officers of all corporations was to be faithful by complying with the charter of the corporation and the purpose for which the corporation was established. The next section of this article considers the relationship of corporate purpose to the good faith and best interests duty.

## 6. The Good Faith and Best Interests Duty as it Relates to Corporate Purpose

To say interest in corporate purpose has increased in recent years is an understatement.[134] Yet, even in the Middle Ages, when corporations were intermediary organisations that sat between the Crown or State and individuals, purpose clauses gave artificial legal persons 'a purpose or operational imperative [that they did not have] as a matter of natural law'.[135] Purpose is therefore more fundamental to business corporations than even the duty to act in the best interests of shareholders. Complying with the charter was a pre-existing obligation that applied to all governing bodies of all forms of corporation that related to office and the obligation to act faithfully. The oath sworn by members of governing bodies of corporations predated the inception of business corporations and applied to all forms of corporation.[136] Charters permitting corporations were concessions from the Crown or Parliament with the primary obligation of governing bodies was to ensure that the corporation complied with the purpose of the charter.

Business corporations were a form of corporation. Charters would not be granted unless corporations ostensibly had a public purpose. Business corporations emerged when the public purposes for granting corporate charters were extended to include economic purposes. Petitioners for charters to incorporate business corporations used similar forms of words from their beginning in the sixteenth century through to the Victorian era. Petitioners cited their past industry and expense, and pleaded their enterprise would be advanced by a charter. The public aspect for business corporations was their patriotic designs for commerce, civilisation and good government.[137] Once it was accepted that commerce, civilisation and good government would

[134] Eg, Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (OUP 2019); Elizabeth Pollman and Robert B Thompson (eds), *Research Handbook on Corporate Purpose and Personhood* (Edward Elgar 2021).
[135] Elizabeth Pollman, 'The History and Revival of the Corporate Purpose Clause' (2021) 99 Tex L Rev 1423, 1430.
[136] Ciepley (n 65).
[137] Cecil T Carr, *Select Charters of Trading Companies A.D. 1530–1707*, vol XXVIII (Bernard Quaritch 1913) xiv.

provide a public benefit, chartering of business corporations became possible.

Business corporations were different however from other forms of corporation because investing shareholders provided capital that by 1657 was permanent capital comprising the Corporate Fund. By 1657 the wording of the oath sworn by the members of the governing body of the EIC had shifted to create what John Evelyn called a 'newe oath' that included obligations by the governing body to the interests of shareholders held in the corporation as the Corporate Fund. As discussed above, the origins of that requirement were to protect minority shareholders from majority shareholder expropriation in the period before the subsidiary duties had developed.

Members of governing bodies of business corporations did not need to take the sacrament after 1661. But that did not mean that the purpose for which the corporation was established was no longer relevant and the oaths sworn by directors had no meaning. The obligation remained to comply with the charter including the *purpose* for which it was granted by the Crown.

In *The Charitable Corporation v Sutton*, we see the apparent elevation by Lord Hardwicke of the obligations of directors to shareholders above the public nature of their office. *Sutton* may therefore appear to support contractualist versions of shareholder primacy which favour shareholder autonomy and where directors owe duties to shareholders as a collectivity comprising the company. But as argued in this article, the obligation was to the *interests* of shareholders held in the Corporate Fund. And Lord Hardwicke would always have considered that the directors were obliged to comply with the charter including its purpose. As Pollman explains, as purpose clauses ultimately lost their specificity, the courts, in applying fiduciary duty doctrine, evolved to focus on the interests of the company and its shareholders, as opposed to focusing on whether the company's articulated purpose was being faithfully pursued by the corporate fiduciary.[138] Nevertheless charters continued only to be granted if petitioners could demonstrate that incorporation would bring a public benefit. Manufacturing enterprises rarely obtained charters in the first half of the eighteenth century.[139] Public benefit was more easily demonstrated with infrastructure projects like canals.

General incorporation statutes made incorporation a right if a process set out in the statute was

[138] Pollman (n 135) 1430, 1447.
[139] Hansmann, Kraakman and Squire (n 13) fn 142.

followed. Within the general incorporation statutes, a demonstration of a public purpose was no longer required. A requirement to identify objects of the company within the memorandum of association and also the powers that related to the objects was however included in the legislation.[140]

A legal concept of purpose survives in current company law. The proper purpose doctrine prevents an "abuse of power, by doing acts which are within its scope but done for an improper reason."[141] Proper purpose is a different concept to the concept of the grant of incorporation requiring demonstration of a public benefit or purpose that existed in the period before the general incorporation statutes. As a concept, current calls for companies to operate with a purpose is closer to the objects clauses of the general incorporation statutes of the nineteenth and early to mid twentieth century where objects were the purpose for which a company was incorporated stripped of any need to demonstrate public benefit. Notably the objects, which might have been the manufacture of railway sleepers or selling dog food, always related to the business activities of the company. Shareholder profit maximisation or shareholder wealth maximisation could never be an object.

In the twenty-first century corporate purpose clauses are not included in legislative or corporate constitutional instruments.[142] In a way that is broadly similar to business corporations before general incorporation needing to demonstrate benefit to commerce, civilisation and good government, there is a call for companies to have a purpose that benefits people and planet. Some commentators suggest purpose should be incorporated in constitutions; a similar concept to its inclusion in corporate charters or the objects clauses that followed the general incorporation statutes. Pollman argues that 'the purpose clause has enduring relevance even as the debate on corporate purpose shifts because it remains a tool for coordinating long-term ventures and associations, and it still reflects the public-private collaboration that is at the heart of the corporate enterprise.'[143] The corporate purpose movement runs with a tide that seeks to make corporations focus on more than the interests of shareholders. There is no reason why the

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[140] With the abolution of the doctrine of ultra vires companies no longer have objects and related purposes, however, a duty to exercise powers for a proper purpose remains.
[141] *Eclairs Group Ltd v JKX Oil and Gas Plc* [2015] UKSC 71; [2016] 3 All ER 641 at [15] followed in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 (PC, Bermuda) at [55]. See also *Re Smith and Fawcett Ltd* [1942] Ch 304 (CA) at 306 and Len S Sealy ''Bona Fides' and 'Proper Purposes' in Corporate Decisions' (1989) 15 Monash ULR 265.
[142] Pollman (n 135) 1430.
[143] ibid 1447–1448.

requirement for purpose provisions could not be re-included in general incorporation statutes giving some teeth to these developments. A more difficult question is whether it would be enough for companies to set down a business purpose in the same way companies were required to have objects. If we assume that commercial activity benefits society, a  business purpose would ensure the focus of corporate decisionmaking turned away from shareholder wealth maximisation which would nevertheless still be a consequence of the company's activity. Or would companies be required to demonstrate public benefit resulting from their proposed activities?

The least extreme form of shareholder primacy classified by Connor and O'Beid is 'bounded wealth maximisation (shareholder protection)' where 'directors must maximise the wealth of the shareholders … subject to a requirement that they cause the company to act in accordance with conventional morality, ethical custom and the law … but do not afford ultimate control of the corporation to them.'[144] Even that form of shareholder primacy does not take into account the corporate purpose, because purpose clauses are either no longer included in the constitutions of companies and corporations or their wording is so broad that they are effectively meaningless.[145] A re-emergence of corporate purpose provisions in corporate constitutions would see the demise of shareholder primacy in all its existing forms. The interests of shareholders would still be significant but would be bounded not only by 'conventional morality, ethical custom and the law',[146] but also by the purpose of the corporation contained in its constitution.

We can readily understand therefore that the aspect of the good faith and best interests duty \which relates to the interests of shareholders in the Corporate Fund, would need to be applied in line with a corporate purpose. Many jurisdictions now have statutory directors' duties. It is suggested that the same relationship exists between the statutory duties. For instance, the obligation in s 172 of the Companies Act 2006 (UK) fundamentally relates to the interests of members. That obligation arguably descends from the new obligations relating to the interests of all shareholders  in the oaths sworn by directors of business corporations in the seventeenth and eighteenth centuries and from Lord Hardwicke's elevation of those obligations in *Sutton*. More longstanding was the good faith obligation that arose from holding office in a corporation

[144] Connor and O'Beid (n 52).
[145] As is the position in the US: Pollman (n 135) 1430.
[146] Connor and O'Beid (n 52).

that included complying with the charter of a corporation and the public purpose for which a charter was granted.

Section 172 must be read in conjunction with s 171. Section 171 imposes a fundamental obligation to comply with the incorporating Act and constitution. A link with the aspect of the oaths sworn by directors of corporations to act faithfully in the early business corporations and the recognition that directorship is an office can be seen. Within the current legislation, it is possible for founder shareholders to set down a purpose on incorporation via s 171(2). While incorporation may no longer be a concession in the sense that it must be petitioned for, the right to incorporate still requires that the process set out in the statute is followed.[147] Recognising, as Ciepley argues, that directors of companies are purpose fiduciaries ensures that they exercise the good faith and best interests duty to the entity.[148] The re-inclusion of purpose provisions in constitutions or as a requirement in general incorporation statutes could avoid a myopic focus on wealth maximisation for current shareholders unconstrained by any overarching purpose. Instead the focus would be on the purpose with sustainable value creation that would ultimately benefit shareholders a consequence.

## 7. Conclusion

This article explores the early origins of the good faith and best interests duty. In doing so, it draws on oaths sworn by directors of governing bodies of early business corporations, including developments in the EIC as the first corporation to have permanent capital. The seminal case of *The Charitable Corporation v Sutton* is also analysed. Taken together, the analysis illustrates that the good faith and best interests duty is not owed to shareholders collectively at any time, but rather to the company as a separate entity from its shareholders .

The discussion raises, and subsequently engages with, a related question – how then did the law reach a point where the good faith and best interests duty is owed to the entity itself and at the same time be generally formulated in many jurisdictions to require directors to act for the benefit of shareholders? Through a consideration of Connor and O'Beid's classifications of shareholder primacy,[149] we can see how conceptions of the corporation based on shareholders

[147] Micheler (n 48) 14-17.
[148] Ciepley (n 65).
[149] Connor and O'Beid (n 52).

rather than a corporation as a separate legal entity from shareholders, and relatedly shareholder autonomy forms of shareholder primacy, are inconsistent with the settling of the law on the duty as being one owed to the entity. In contrast, an entity conceptualisation encompasses the interests of shareholders by virtue of their interests being held in the company as the Corporate Fund.

Considering the development of the 'newe oaths' in the EIC,[150] which relate to the requirements that the governing body consider the interests of all shareholders, reveals that the form of shareholder primacy which was emerging by 1657 was that of 'bounded wealth maximisation (shareholder protection)'.[151] It is suggested that disputes between majority and minority shareholders may well be the origin of this earliest form of shareholder primacy.

Importantly however, this emergence must be understood against the longstanding backdrop that the role of directors of all forms of corporation related to public office, as detailed in *The Charitable Corporation v Sutton.* The primary obligation of governing bodies was to comply with the charter. To be granted a charter, petitioners needed to demonstrate a public purpose and benefit. Public purpose and benefit extended in the seventeenth century to include patriotic designs for commerce, civilisation and good government meaning business corporations could be chartered.[152]

New light is shed on the good faith and best interests duty when its relationship to the corporate purpose doctrine is understood. Purpose provisions could be included in company constitutions, or be required in general incorporation statutes, thereby shifting priorities beyond shareholder wealth maximisation. Indeed, such a change could mark the end of shareholder primacy in all its existing forms with the best interests of shareholders remaining significant but bounded by the company's purpose. The implications for the good faith and best interests duty would also be profound – directors would focus on purpose with the sustainable value that would ultimately benefit and be in the interests of shareholders a consequence rather than a primary focus.

Operating companies with a purpose does not in and of itself ensure a public benefit. How can

[150] Darley (n 90).
[151] Connor and O'Beid (n 52).
[152] Carr (n 138) xiv.

the corporate form be required to serve the societies that enable its existence through general incorporation statutes whilst remaining a legal form attractive to entrepreneurs and investors as a means of value generation? Berle and Means argued for a new concept of the corporation focusing on corporate enterprise. They identified that modern corporations have a concentration of power and a wide variety of interests, with a constant struggle to make this power the servant of the bulk of the individuals it affects.[153] The same kind of struggle led to the reformation of the Catholic Church in religious power, and constitutional law regarding political power.[154] How to make the bulk of capital serve the bulk of the people is the same question that communism and socialism were trying to answer.[155]

Berle and Means concluded that, to ensure the demand for public benefit be met, a convincing system of community obligations would need to be worked out, with societal interests superseding the passive property right of shareholders that in this article are identified as the interests of shareholders held in the Corporate Fund. Berle and Means use as an example, fair wages, security to employees, reasonable service to the public and stabilisation of business that would divert a portion of the profits away from passive property owners. In the twenty-first century, we would add protecting the environment to the list of interests, and class these as ESG (environmental, social, governance) interests. The existing duty owed by directors to an entity holding the interests of shareholders as the Corporate Fund that was bounded by directors acting in good faith by aligning with a corporate purpose that incorporates ESG interests may realise Berle and Means' ideal modern corporation.

[153] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (rev edn, Harcourt, Brace & World 1968) 309–10.
[154] ibid 310.
[155] ibid.

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