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COVID-19 and the spotlight on stakeholderism

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10. COVID-19 and the spotlight on stakeholderism

Pearlie Koh²⁶⁹

The global disrupter that is COVID-19 has profoundly impacted human life on earth. Lives and livelihoods have been lost. But even for those amongst us fortunate enough to escape such calamity, significant adjustments have had to be made to the ways in which we live, play and work. As the United Nations noted, “[t]his is much more than a health crisis. It is a human, economic and social crisis. The coronavirus disease ... is attacking societies at their core”.²⁷⁰

Even as the pandemic exacts its toll at a very human level, there has been cataclysmic consequences for businesses worldwide. The International Monetary Fund has described the pandemic as the “worst economic crisis since the Great Depression of the 1930s”²⁷¹ and the World Trade Organisation has forecast a fall in global trade of between 13% to 32% this year.²⁷² In Singapore, the Ministry of Trade and Industry expects the Singapore economy to shrink by 7% to 4%, making it Singapore’s worst-ever recession since independence in 1965.²⁷³ In the face of this grim reality, legislators and policy makers have responded by enacting or amending relevant laws. In Singapore, the COVID-19 (Temporary Measures) Act²⁷⁴ provides legal reprieve for individuals and businesses unable to fulfil their contractual obligations as a result of the pandemic by temporarily suspending or relaxing the application of certain rules. Additionally, adjustments were made to debt thresholds and time frames under insolvency laws so as to provide respite for businesses and individuals in financial distress.

These are indeed, to state it mildly, unusual times. However, even as it has been existentially necessary for companies and their management teams to work out how best to ride out the pandemic, many have also seemingly de-prioritised the maximization of economic value and reoriented, at least temporarily, towards a broader societal and communitarian role. Apart from donating in cash or in kind, companies around the world have taken on entirely new challenges to assist where help is needed in the struggle against COVID-19. For example, a French luxury conglomerate converted some of its cosmetics and perfume factories to manufacture disinfectant

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²⁷⁰ United Nations, ‘Everyone Included: Social Impact of COVID-19’ <<https://www.un.org/development/desa/dspd/everyone-included-COVID-19.html>>.

²⁷¹ ‘Coronavirus: Worst economic crisis since 1930s depression, IMF says’ (*BBC*, 9 April 2020) <<https://www.bbc.com/news/business-52236936>>.

²⁷² DG Azevedo, ‘Trade forecast press conference’ (*World Trade Organization*, 8 April 2020) <https://www.wto.org/english/news_e/spra_e/spra303_e.htm>.

²⁷³ Ovais Subhani, ‘Singapore heads for worst recession since independence; economy to shrink by 7% to 4% on COVID-19 impact’ (*The Straits Times*, 26 May 2020) <<https://www.straitstimes.com/business/economy/spore-to-sink-into-deeper-recession-than-expected-2020-growth-forecast-cut-to>>.

²⁷⁴ COVID-19 (Temporary Measures) Act 2020 (No 14 of 2020).

which were distributed free to French hospitals.²⁷⁵ In Singapore, a gaming hardware manufacturer set up an automated face mask manufacturing line to produce face masks which were initially made available free to citizens and residents.²⁷⁶ As an observer noted, many companies are “returning to their mission statements, those lofty sentiments that so many put aside in their relentless pursuit of growth”.²⁷⁷

This revives that enduring debate over what a corporation’s purpose should be but in a very real and present context. It is interesting to note that the famous Berle-Dodd debate that started it all also occurred during a time of severe worldwide economic depression. The fundamental question that has divided commentators is whether the company ought to be seen as essentially a private organisation dictated solely by shareholder interests, or as a responsible corporate citizen and hence run in the interests of multiple “stakeholders” or constituencies including its employees, creditors and the larger public. The COVID-19-precipitated trend of companies looking beyond shareholder value is the latter view of corporate purpose being put in practice. The fact is that there has been, in recent times, increasing emphasis and support for a more expansive view of a company’s purpose, a purpose that embraces environmental, social and communitarian themes.²⁷⁸ The question then is whether and how the existing legal framework for corporate governance accommodates and supports this wider concept of “corporate purpose”.

At law, it would seem that “corporate purpose” may have different applications and perspectives. Historically, legislation dictated the inclusion of a statement of the company’s “objects” in its constitution which restricted its scope of business. This gave rise to the idea that the company’s legal capacity was limited and thence to the wretched doctrine of ultra vires. From this perspective, a company’s “purposes” is narrowly defined as its “objects”, and any authority conferred on company managers to exercise corporate powers is necessarily constrained by these “purposes”. Companies are no longer required to include a statement of their objects in their constitutions although they retain the option to do. This dispensation means that companies may potentially engage in any lawful business as their legal capacity is no longer circumscribed. Nevertheless,

²⁷⁵ Leila Abboud, ‘Inside the factory: how LVMH met France’s call for hand sanitiser in 72 hours’ (*Financial Times*, 19 March 2020) <<https://www.ft.com/content/e9c2bae4-6909-11ea-800d-da70cff6e4d3>>.

²⁷⁶ Aradhana Aravindan, ‘Gaming firm Razer to roll out mask vending machines in Singapore’ (*Reuters*, 13 May 2020) <<https://www.reuters.com/article/us-health-coronavirus-singapore-masks/gaming-firm-razer-to-roll-out-mask-vending-machines-in-singapore-idUSKBN22P0I3>>.

²⁷⁷ Jeff Pundyk, ‘Corporate Purpose Becoming a Prerequisite for Recovery’ (*The Conference Board*, 11 May 2020) <<https://conference-board.org/blog/marketing-communications/Corporate-Purpose-Prerequisite-Recovery>>.

²⁷⁸ Klaus Schwab, ‘Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution’ (*World Economic Forum*, 2 Dec 2019) <<https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>>; Punit Renjen, ‘Societal Impact: Purpose Begins to Pay Off’ (*The Wall Street Journal*, 28 January 2019) <<https://deloitte.wsj.com/riskandcompliance/2019/01/28/societal-impact-purpose-begins-to-pay-off/?mod=relatedInsights?mod=relatedcontent>>.

any statement of objects only discloses *what* the company can do; it does not articulate *why* the company is carrying on business in the first place, or for whose benefit it does so.

The conception of “corporate purpose” at general law may be somewhat more pertinent to the “why” question. Here, the notion of “purpose” defines the outer limits of managerial power, not only as a function of authority but also as a measure of *duty*. Directors are required to exercise their powers “in the interests of the company and not for any collateral purpose”. Any purpose that is not in the company’s interests would fail to be a corporate purpose. However, although the notion of “corporate interests” is potentially wide enough to encompass interests beyond shareholder value, the law has mostly assumed that companies existed for the benefit of their incorporators and shareholders, and that accordingly, the interests of the company are represented by the collective interests of “the corporators as a general body”. Thus, whilst the law countenances consideration of these other interests, the interests of the company remains ultimately anchored by shareholder benefit and value. The UK’s statutory statement of directors’ duties affirms this, and the Singapore position, whilst less explicit, is likely to be the same. But even against this legal background, the courts are generally loathe to interfere with genuine commercial decisions made in good faith by commercial men. This is the basis of the business judgment rule. Thus, any consideration of wider stakeholder interests may well be justifiable and justified as “good business” even if, in the shorter term, profitability, and hence shareholder interests, is deprioritised. This is perhaps especially so during the pandemic as how a company conducts itself during times of stress is likely to have a lasting impact on its long-term future. It has been observed that “purposeful” companies tended to be more resilient in times of stress,²⁷⁹ an observation that has been corroborated by the fact that the companies that have thrived notwithstanding the difficulties presented by the pandemic are those that subscribe to “an authentic and integrated commitment to purpose larger than profitability or growth”.²⁸⁰

Thus, it may be said that the law is largely accommodative of the idea of a more inclusive “purposive-ness”. Indeed, the Companies Act enshrines this by making it explicit that directors can take account of employees’ interests. While the law does not, as a general rule, compel “stakeholder-ism”, things change when the company is in financial difficulties. Here, the law requires directors to deprioritise shareholder interests in favour of, specifically, creditors’ interests. The courts have therefore repeatedly asserted that “as long as there are reasons to be concerned that the creditors’ interests are or will be at risk because of difficult financial circumstances, the directors ignore those interests at their peril.” Although not as all-encompassing as stakeholderism

²⁷⁹ See also Jeff Pundyk (n 277); The Purposeful Company website <<http://www.biginnovationcentre-purposeful-company.com/>>.

²⁸⁰ Nell Derick Debevoise, ‘Why Purpose-Driven Businesses Are Faring Better In COVID-19’ (*Forbes*, 12 May 2020) <<https://www.forbes.com/sites/nelldebevoise/2020/05/12/why-purpose-driven-businesses-are-faring-better-in-COVID-19/#15a6a37c22a0>>.

might demand, this legal obligation does underscore the need to look beyond shareholder value in times of crisis, and is therefore consistent overall with the idea of “purposiveness”. Thus, an insistence on adhering to the narrower traditional conception of “purpose” might well mean a failure on the part of the board to adjust to the times, hence a possible breach of duty.