The Judicial Construction of Fiduciary Loyalty: A Case for English Stewardship

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Abstract—This article argues that English law, properly developed, offers a more coherent and institutionally attractive framework for fiduciary loyalty in modern corporate governance than Delaware law. The point is not that English law is already satisfactory, nor that Delaware has nothing to teach. Rather, English law contains a distinctive combination of resources: an equitable tradition that regulates entrusted power through objective and prophylactic standards, and a statutory framework in the Companies Act 2006 capable of judicial development in continuity with that tradition. Delaware, by contrast, has addressed modern governance failures by stretching loyalty through the language of good faith and conscious disregard. That move is often admired as sophisticated and realistic. This article contends that Delaware's approach is conceptually unstable, evidentially awkward and insufficiently suited to the governance problems it purports to solve. The article proceeds in four stages.

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First, it reconstructs the English law of fiduciary loyalty before and after codification, identifying the tension between statutory flexibility and equitable discipline as a point of interpretive potential rather than contradiction. Second, it explains why Delaware is a tempting comparator, but argues that its approach lacks the capacity to address contemporary governance failures in a principled and predictable way. Third, it advances three proposals for English law: a stronger proper-purpose reading of section 172; objective systems liability under section 174; and a substantive interpretation of section 172 as inclusive long-termism. Finally, it argues that these developments would not judicialise business judgement but would instead produce a clearer and more coherent jurisprudence of corporate stewardship.

I. Introduction

The fiduciary duty of loyalty is one of equity's most enduring legal achievements. Yet loyalty has never been a self-defining concept, and in company law its judicial construction has taken markedly different forms. English law has historically approached fiduciary obligation through objective and prophylactic controls that regulate the fiduciary's position, the purposes for which powers are exercised, and the conditions under which discretion may be trusted. Delaware law, by contrast, has developed a more subjective and managerially accommodating architecture. Here the language of loyalty, good faith and conscious disregard is used to reach serious failures of directorial performance, while broad deference to business judgement remains intact. Both systems respond to the same problem: how should the law control those who exercise discretionary power over others' economic interests? They do so in different ways.

This article argues that English law offers the superior answer for the modern corporation. Contemporary governance failures do not always appear as straightforward self-dealing. They include weak internal controls, poor monitoring systems, chronic compliance failures, short-termist incentives, the externalisation of costs onto employees and communities, and the neglect of risks whose significance emerges only over time. A law of fiduciary loyalty confined to direct conflict is too narrow, while a law that responds by stretching loyalty into a general inquiry focused on bad faith, culpability or boardroom psychology risks becoming conceptually unstable and institutionally unhelpful.

The task is to modernise fiduciary law without sacrificing coherence.

Delaware is central to that challenge because it is the most influential example of a sophisticated corporate law model responding to modern governance problems.[1] Its specialist courts and elaborate jurisprudence make it the natural comparator for any system seeking to move beyond a narrow model. This article argues that English law should resist that pull. Delaware's apparent modernity conceals real weakness: it blurs loyalty and care, depends too heavily on speculative inquiry into collective states of mind, and often yields accountability that is rhetorically severe but uncertain in practice.

English law possesses a better doctrinal architecture because it can develop the statutory duties in continuity with equity's objective concern for entrusted power. The Companies Act 2006 did not abolish the core fiduciary constraints that had long shaped directors' duties; it restructured them. Section 175 preserves the anti-conflict core, section 174 states an objective duty of care, and section 172 requires directors to promote success while having regard to long-term and relational considerations. The unresolved question is whether those duties will be read thinly, through subjective good faith and broad managerial latitude, or more robustly, through purpose, governance and stewardship.

The article advances three connected proposals. First, section 172 should be interpreted through a stronger proper-

[1] Stephen M Bainbridge, 'Introduction' in Stephen M Bainbridge and others (eds), *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* (CUP 2018) 1.

purpose lens, so that an honestly asserted belief in corporate benefit does not suffice where the real object of the decision is managerial entrenchment, presentational short-termism or some other collateral aim inconsistent with fiduciary office. Second, section 174 should be developed to impose objective systems liability for serious failures to establish, maintain or use governance and monitoring structures adequate to material corporate risks. Third, section 172 should be understood as embodying what this article calls inclusive long-termism: a long-term conception of corporate success that treats the relational and systemic conditions of enterprise viability as internal to what directors are required to promote.

The argument advanced here is one of judicial development, not legislative reform. The Companies Act 2006 preserved open-textured standards whose content necessarily depends upon interpretation, especially in relation to corporate success, proper purpose, and directorial care.[2] The question is how courts should shape the post-codification law.

Part II reconstructs the English foundations and explains what the Companies Act 2006 changed, preserved and left unresolved. Part III identifies the central tension within the post-codification law. Part IV turns to Delaware. Part V develops the three proposed reforms. Part VI addresses the main objections and concludes.

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[2] Explanatory Notes to the Companies Act 2006, paras 325–28, 338.

II. The English Foundations: From Equitable Discipline to Statutory Settlement

The English law of fiduciary loyalty did not originate in the public corporation. Its classical habitat was the trust, the agency relationship, and the officeholder entrusted with discretionary authority over another's interests. Yet the institutional logic of fiduciary doctrine remains central to company law. Where one person is entrusted with authority capable of affecting another's interests, the law must decide how far it is prepared to rely on *ex post* inquiry into motive, causation and loss, and how far it should instead insist upon *ex ante* structural discipline. Equity's characteristic response was to prefer the latter.

The classic authorities reveal both the severity and the rationale of this response. In *Keech v Sandford*, the trustee was required to account for a renewal obtained for himself even though the beneficiary could not have secured it.[3] The point was precisely that fiduciary restraint does not depend on proof that the principal would otherwise have obtained the benefit. The rule instead operates prophylactically, by denying the fiduciary the possibility of appropriating an opportunity connected with the office. The same structural logic later appears in *Regal (Hastings) Ltd v Gulliver*[4] and *Boardman v Phipps*.[5] Even where the company or trust could not itself exploit the opportunity, and even where the fiduciary acted in good faith, the law remained unwilling to

[3] (1726) Sel Cas Ch 61; 25 ER 223.
[4] [1942] 1 All ER 378 (HL) 386 (Lord Russell).
[5] [1967] 2 AC 46 (HL).

allow entrusted power to become a source of personal gain. A legal system seriously concerned with entrusted power cannot safely make its primary mode of control depend upon proving disloyal states of mind after the event. It must instead regulate position and power before abuse occurs. The no-conflict and no-profit rules therefore express the idea that certain forms of self-regarding conduct are structurally incompatible with fiduciary office.

Even so, this logic has always required adaptation in company law. Directors are not trustees in any simple or exhaustive sense. They govern an enterprise, deploy assets in pursuit of commercial objectives, assume risk and make strategic judgements under conditions of uncertainty. Company law has therefore had to accommodate entrepreneurial discretion without relinquishing fiduciary discipline altogether. Before codification, that accommodation was achieved through an uneasy combination of equitable conflict rules and common-law duties of care.[6]

The Companies Act 2006 sought to restate and rationalise this field while reorganising earlier fiduciary and common-law constraints in statutory form. In doing so it preserved the conceptual importance of fiduciary responsibility but also made a series of significant choices about the structure of directorial office. Three features matter most.

First, the Act preserved the anti-conflict core of fiduciary doctrine. Section 175 codifies the duty to avoid situations in

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[6] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 (HL); *Re D'Jan of London Ltd* [1994] 1 BCLC 561 (Ch); Explanatory Notes to the Companies Act 2006, para 300.

which a director has, or may have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.[7] At the same time, it provides mechanisms of authorisation and thereby recognises the practical reality that modern companies cannot operate through an inflexibly rigid anti-conflict regime. The common law's prophylactic logic remains, but it is adjusted to corporate form by allowing certain conflicts to be managed through constitutionally recognised procedures rather than treated as automatically fatal.

Second, the Act codified the common-law duty of care, skill and diligence in section 174.[8] That provision is especially important because it is explicitly objective in part. It measures directors against a reasonably diligent person carrying out the same functions while taking account of any greater skill or experience the particular director in fact possesses. Section 174 therefore confirms that directorial office is not exhausted by honesty, sincerity or the absence of conflict. Directors are expected to perform governance functions with reasonable competence, attentiveness and seriousness.

Third, and most controversially, the Act introduced section 172.[9] This requires a director 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, while requiring him to have regard to long-term consequences, employee interests, relationships with suppliers and customers, community and environmental impact, high standards of

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[7] Companies Act 2006, s 175.
[8] Companies Act 2006, s 174.
[9] Companies Act 2006, s 172.

conduct, and fairness between members. The provision is often described as embodying enlightened shareholder value.[10] The phrase is useful up to a point, but it is imprecise. Section 172 does not establish stakeholder primacy, nor does it merely exhort directors to behave in an enlightened fashion while leaving the substance of corporate success unchanged. Rather, it structures the route through which success is to be pursued.

The statute therefore did more than codify. It provisionally settled the relationship between anti-conflict fidelity, competence in office and judgement about corporate success, but it did not resolve the most important interpretive questions. How subjective is section 172 in practice? What legal force attaches to the listed factors? What relation should courts draw between section 172 and proper purpose? How far can section 174 be developed to address failures of oversight, internal control and governance systems? These questions determine whether English law after codification will become thinner, more subjective and more deferential or whether it will retain and modernise the objective logic inherited from equity.

The Companies Act 2006 reorganised directors' duties in statutory form while preserving the underlying concern with entrusted power and adapting it to the institutional realities of the modern company. It did not itself enact a full jurisprudence of fiduciary stewardship, but neither did it leave the pre-existing equitable and common-law framework untouched. In doing so it left significant questions of content and direction unresolved,

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[10] Explanatory Notes to the Companies Act 2006, paras 325–28; Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2013) 1–2.

particularly in relation to corporate success, proper purpose and the demands of directorial care.

That point becomes clearer if attention is paid not only to what the Act did, but also to what it conspicuously left undone. It did not define success exhaustively. It did not specify whether the factors listed in section 172 are merely evidential prompts or substantive components of the duty. It did not determine whether an objectively improper purpose can defeat a sincerely asserted belief in corporate benefit. Nor did it prescribe in detail what governance systems directors must establish to satisfy section 174 in relation to modern enterprise risk. In each of these respects the statute leaves room for judicial interpretation.

These issues remain open not simply because Parliament legislated in broad terms, but because subsequent doctrine has not fully resolved them. Section 172 has often been read through the language of subjective good faith, with the result that its listed factors can appear more rhetorical than constraining.[11] Section 174, though objective in form, has not yet been systematically developed into a doctrine of systems-based responsibility for serious governance failure. Nor has proper purpose, while well established in relation to specific powers, been fully integrated into the general duty to promote the company's success.[12] The interpretation advanced here is therefore an argument for judicial

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[11] Keay (n 10) 119, 205; Carrie Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33 LS 141–142.

[12] Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance' (2015) 35 LS 252, 254–255, 274–275; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] AC 1343 [15]–[16].

development within an existing statutory framework whose central concepts remain under-specified.

III. Tension as Potential: The Unresolved Structure of the Post-2006 Law

The central tension within modern English company law is best understood as an unfinished accommodation between two competing intuitions. The first is that directors must be given real latitude to manage a complex enterprise, take risks and make commercial judgements under conditions of uncertainty. The second is that directors hold an office of entrusted power and therefore ought not to be judged solely by reference to sincere belief or broad appeals to business complexity. The post-2006 law contains both intuitions; the question is how they are to be reconciled.

Section 172 most clearly exposes this tension. On one view, the provision's requirement that a director act 'in the way he considers, in good faith' gives the duty a strongly subjective cast and encourages substantial judicial restraint. A director who can plausibly maintain that he honestly believed a risky strategy or aggressive restructuring would promote the company's success may therefore appear largely insulated from challenge. Yet the same subsection also requires the director, 'in doing so', to 'have regard' to long-term consequences, employee interests, business relationships, community and environmental impact, standards of conduct, and fairness between members. If that language is to

have practical legal consequences, section 172 cannot be reduced to sincerity alone.[13]

The same tension appears in the relation between section 172 and the proper purpose doctrine. English company law has long recognised that directors may act honestly and yet exercise power for an improper purpose. The doctrine prevents fiduciary control from collapsing into bare assertions of beneficial motive. A share issue designed to manipulate voting control, for instance, may be unlawful even if directors believe themselves to be acting in the company's interests. Yet section 172 has often been interpreted and analysed as though subjective good faith were the dominant consideration. The unresolved issue is therefore how far the proper-purpose doctrine should shape the content of the general duty to promote the company's success.[14]

Section 174 reveals a parallel tension. Its requirement that a director exercise 'reasonable care, skill and diligence', measured in part by 'the general knowledge, skill and experience that may reasonably be expected' of a person carrying out the relevant functions, suggests a robust basis for policing failures of competence and governance structure. In practice, however, courts have often approached directors' decision-making with considerable caution and deference, especially where liability would require close scrutiny of commercial judgement.[15] If section 174 is treated as little more than a residual negligence provision, it will have limited capacity to address the kinds of

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[13] Companies Act 2006, s 172(1); *Regentcrest plc v Cohen* [2001] 2 BCLC 80 (Ch) [120]; *R (People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin) [44]–[46].
[14] *Regentcrest plc v Cohen* [2001] 2 BCLC 80 (Ch) [120]; Keay (n 10) 119, 205.
[15] Companies Act 2006, s 174(1) and (2); *Re D'Jan* (n 6); *Sharp v Blank* [2019] EWHC 3096 (Ch) [118]–[126].

serious oversight failure that modern corporate governance makes salient. Yet there is nothing in the text of the section that requires such weakness. On the contrary, the section's objective component appears designed to make office performance legally assessable.

This tension should be understood as revealing scope for judicial development in continuity with equitable tradition, rather than as a contradiction within the post-codification law. The Act has not dictated a complete and fully determinate model of directorial responsibility. Courts retain a choice about how to interpret the statutory duties, and that choice can be exercised in continuity with equitable tradition. The significance of that continuity is practical as well as conceptual. It means that the law need not await legislative amendment to respond to issues in modern corporate governance; the materials are already present.

That is why the US state of Delaware must be examined before the positive solution is offered. There is a temptation to resolve English law's tension by moving closer to Delaware, which is often admired as the paradigmatic modern corporate law jurisdiction.[16] It offers a body of fiduciary doctrine that seems to combine deference to commercial judgement with the possibility of liability for serious governance failure. For anyone concerned that English fiduciary law may be too rigid, too trust-like or insufficiently adapted to public companies, Delaware's approach may appear to offer the most plausible route of development. Unless the attraction of that model is shown to be misguided, the

[16] Bainbridge (n 1) 1–3.

case for an English jurisprudence of stewardship remains incomplete.

IV. Delaware's Attractiveness and Its Inadequacy

Delaware's prestige in corporate law is not accidental. It is a developed jurisdiction with specialist courts and a large body of case law. The Delaware Court of Chancery is widely recognised as the pre-eminent forum for disputes concerning the internal affairs of corporations, and Delaware corporate law is widely treated as the dominant American model in this field. Its doctrines of fiduciary duty and standards of review have developed against a background of intense transactional practice and repeated judicial engagement with board decision-making.[17] Where English law sometimes appears sparse, Delaware appears rich, nuanced and institutionally confident.

That reputation makes Delaware an especially powerful comparator. The attractiveness does not lie in prestige alone, but in doctrine. Delaware appears to offer a way of addressing serious governance failure without abandoning broad deference to business judgement: direct self-dealing remains subject to classic loyalty review, while failures of board oversight are addressed through the language of good faith and the *Caremark* line of liability for sustained failures of monitoring and reporting. On that model, boards may fail not only by serving themselves, but by consciously failing to establish or respond to systems of

[17] Delaware Court of Chancery, 'Who We Are' <https://courts.delaware.gov/chancery/> accessed 9 April 2026; Bainbridge (n 1) 1–3.

compliance and control. Delaware therefore seems to supply a distinctly modern response to governance failure, one capable of reaching derelictions of attention, monitoring and compliance oversight that a narrower anti-conflict model might leave insufficiently addressed.[18]

The attractiveness is heightened by a common criticism of English law. If loyalty remains conceptually tied to conflict and self-dealing, then non-conflicted but egregious governance failures may seem to fall into a gap. Delaware appears to close that gap by extending the language of loyalty and good faith to certain failures of board oversight, particularly where directors have consciously failed to implement or monitor systems of reporting and control.[19] It can therefore appear to offer a more serious legal response to grave failures of board oversight.

That appearance is misleading. Delaware's solution is conceptually unstable because it makes loyalty do work that is not naturally its own. Loyalty concerns the ends for which fiduciary power is exercised. It addresses conflict, self-preference, misuse of entrusted opportunity and the corruption of office by collateral purposes. By contrast, a board's failure to establish proper reporting systems or respond adequately to compliance risks is better seen as a failure of care, attention or office performance. Delaware's tendency to subsume such matters under good faith and loyalty stretches the meaning of disloyalty to cover conduct that is not about divided purpose at all.

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[18] *In re Caremark International Inc Derivative Litigation* 698 A 2d 959 (Del Ch 1996) 970–71; *Stone v Ritter* 911 A 2d 362 (Del 2006) 369–70.

[19] Stone v Ritter (n 18).

This has practical consequences. Once loyalty is used to condemn serious non-conflicted failures of oversight, courts need some way to distinguish ordinary managerial error from the kind of breakdown grave enough to justify intervention. Delaware's answer has been to insist upon high thresholds: bad faith, conscious disregard and sustained failure to exercise oversight responsibility.[20] This preserves the rhetoric of serious accountability while maintaining broad deference to management, but at a considerable price. The law becomes dependent on retrospective attempts to determine what directors knew, noticed, appreciated, ignored or deliberately failed to confront.[21]

That is a poor organising principle for the governance of large companies. Boards are collective bodies and their knowledge is mediated through committees, management, advisers and incomplete records. The question whether 'the board' consciously disregarded a known obligation often has no clear factual counterpart. It invites courts to reconstruct a collective mental state from records not designed to answer that question. The resulting inquiry is both expensive and unreliable.

A framework built around bad faith can generate dramatic doctrinal language without supplying clear *ex ante* guidance. Directors may know that they must not consciously disregard their duties yet still lack concrete legal direction about what governance systems, reporting structures or monitoring practices are actually required. The high-profile *Disney* litigation illustrates the problem: it generated severe judicial language and

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[20] In re Caremark (n 18); Stone v Ritter (n 18).

[21] Robert B Thompson, 'The Case for Iterative Corporate Law' (2012) 1(1) *Journal of Law and Courts* 3; *Stone v Ritter* (n 18); *In re Walt Disney Co Derivative Litigation* 906 A 2d 27 (Del 2006) 66–67.

enormous cost, yet offered limited stable guidance about what ordinary boards are legally required to do before governance failure occurs.[22]

The weakness becomes sharper when one asks how Delaware's model addresses specific modern governance problems. A board may fail to create structures for monitoring climate transition risk, physical risk, disclosure exposure or the financing consequences of a carbon-intensive model. Such failures are unlikely to appear as conflicted transactions or to generate the dramatic evidence needed to prove conscious disregard. The real problem is structural: whether the board treated material long-term risk as requiring institutional oversight.[23]

The same is true of labour abuse in complex supply chains, chronic compliance weakness or data-security failure. A board may not knowingly authorise abuse or breach yet still fail to create reporting channels, escalation mechanisms and supervisory structures capable of bringing serious risk to the centre of decision-making. The wrong is not one of loyalty; it is a failure of governance architecture.

One might defend Delaware by saying that it stretches loyalty because ordinary care claims are too weak or easily exculpated. There is some force in that explanation, but this instrumental defence only underscores the conceptual strain. It treats culpable inattention as a species of infidelity because the law lacks a cleaner doctrinal route for treating it as serious.

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[22] In re Walt Disney (n 21).

[23] Keay and Loughrey (n 12).

English law need not make that move, because section 174 of the Companies Act 2006 already provides the better route.

In short, Delaware law is attractive because it appears to modernise fiduciary doctrine for the public corporation. It is inadequate because it blurs loyalty and care, relies on speculative mental-state inquiry and intervenes rarely, expensively and too late. English law should preserve Delaware's insight that governance failure matters while rejecting its unstable doctrinal route.

V. The English Alternative: Towards a Jurisprudence of Stewardship

The English alternative is not a wholesale reinvention of company law; it is a programme of judicial development within the existing statutory framework. The underlying idea is stewardship. Directors are not trustees in every sense, but they are office-holders entrusted with power over a continuing enterprise whose success depends upon legally recognisable conditions of sustainability, institutional competence and responsible governance. A jurisprudence of stewardship would coordinate loyalty, purpose, care and long-term judgement into a coherent structure of directorial responsibility.

A. Proper Purpose within Section 172

The first step is to reconstruct section 172 of the Companies Act 2006 through a stronger proper-purpose analysis. Much modern discussion treats section 172 as dominated by the subjective formula that the director must act in the way he considers, in good

faith, would be most likely to promote the success of the company. The leading formulations have emphasised whether the director honestly believed the decision was in the company's interests.[24] That reflects a legitimate concern: courts should not simply substitute their own view of commercial wisdom for that of directors charged with managing the company. However, if subjective honesty becomes the whole of section 172, the provision loses much of its legal structure. It becomes too easy for directors to convert fiduciary accountability into an assertion of personal belief.

That cannot be right: section 172 is not merely a sincerity rule, but a fundamental duty attached to fiduciary office. It requires directors to promote corporate success through a mode of deliberation structured by identified factors. The question is therefore not merely whether the director believed he was acting in the company's interests, but whether the power of management was exercised for purposes consistent with the office itself.

The proper-purpose doctrine offers the appropriate conceptual tool. In English company law it has long functioned as a control on the use of directors' powers. Cases on share issuance and shareholder-oriented actions show that a power may be exercised honestly yet for an improper purpose.[25] That distinction reveals a limitation on fiduciary authority deeper than honesty alone. The fiduciary must not only avoid acting

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[24] *Regentcrest* (n 13) [120].

[25] Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC) 835; Eclairs Group v JKX (n 12).

dishonestly; he must use his powers for the reasons the law recognises as appropriate to the office.

Applying that logic to section 172 would sharpen the section considerably. It would mean that courts need not accept at face value an assertion that a decision was thought beneficial to the company if, viewed in substance, the decision served collateral purposes inconsistent with proper stewardship. Those collateral purposes may include classic self-interest, but in modern company law they are often subtler. They include managerial entrenchment, the suppression of inconvenient information to preserve executive reputation, the pursuit of short-term metrics at the expense of long-term resilience, or the strategic neglect of stakeholder and systemic risks treated as external to the company's real interests.

This reading is better aligned with the structure of section 172 itself. Directors must act for the success of the company while having regard to long-term consequences, employee interests, supplier and customer relationships, community and environmental impact, standards of business conduct and fairness between members. Those matters would be reduced to near irrelevance if section 172 were nothing more than a test of subjective sincerity. Proper-purpose reasoning helps explain how the statutory factors can have real doctrinal force without transforming the section into open-ended stakeholder review.

To be clear, this is not to suggest that section 172 already unambiguously incorporates the full proper-purpose analysis defended here. The prevailing tendency has been to read the provision primarily through subjective good faith, while proper purpose has remained more closely associated with the exercise

of specific powers than with the general duty to promote success. The argument is therefore one of judicial development, not simple restatement. That development would remain constrained by the existing limits of proper-purpose doctrine: the question is not whether the court regards the decision as commercially unwise, but whether directors' stated pursuit of corporate success can be reconciled with the legal purpose for which the relevant managerial power was exercised.

Nor would this approach collapse section 172 into a judicial mandate to review the merits of business strategy. The inquiry would remain legal and properly structured, since a court would not be required to ask whether it would itself have made the same decision. It would ask whether the power of management was genuinely exercised for the kinds of purposes that section 172, read in light of fiduciary constraints on directors' powers, permits directors to pursue. In answering that question, the court would look not simply to verbal assertions of belief, but to board materials, incentive structures, deliberative process, surrounding context and the relation between the stated rationale and the company's sustainable interests.

This matters particularly in modern governance contexts where serious risk often arises not from classic self-dealing, but from the distortion of corporate judgement by short-term managerial incentives and the underweighting of longer-horizon threats.[26] A board may, for example, pursue a course that preserves short-term market presentation by underinvesting in

[26] John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report* (July 2012) Executive Summary; Jonathan Bailey, Vincent Bérubé, Jonathan Godsall and Conor Kehoe, 'Short-Termism: Insights from Business Leaders' (*FCLTGLOBAL*, January 2014) < https://perma.cc/7PB7-2BSM >.

compliance systems or internal reporting structures, while continuing to insist that it believed the strategy to be in shareholders' interests. A purely subjective reading of section 172 would struggle to scrutinise such conduct unless clear bad faith could be shown. Proper-purpose analysis provides a more stable and more orthodox route. It asks whether corporate power was being used for the lawful pursuit of the company's success, or whether the claimed objective was masking a collateral end inconsistent with the disciplined exercise of fiduciary office.

B. Objective Systems Liability under Section 174

The second step is to develop section 174 into what this article calls objective systems liability: liability directed not at subjective bad faith, but at the objective adequacy of the governance systems through which directors receive information, monitor risk and supervise compliance. If the modern corporate problem is often one of poor information architecture, weak controls and board-level oversight failure, then company law must be able to address those deficiencies directly. There is no need to do so by stretching loyalty or importing a bad-faith framework. Section 174 already provides a more coherent doctrinal basis.

The proposal is not that every corporate misfortune should be recast as a breach of the duty of care. Nor is it that directors should become guarantors of compliance or enterprise outcomes. The claim is that where the company's scale, business model or risk profile makes certain governance systems objectively necessary, a serious failure to establish, maintain or use such systems should be capable of amounting to a breach of section 174. It is not that every compliance lapse should generate liability, but that where the nature of the company's business,

regulatory environment or exposure makes some level of monitoring system objectively necessary, the sustained absence of such systems should be capable of constituting a breach without any need to prove conscious disregard.

The proposal fits the statutory language. Section 174 measures directors against the reasonably diligent person carrying out the functions of the relevant director. That objective structure means English law need not pretend that failures of monitoring are really failures of loyalty. It can address them as what they are: failures to exercise an office with adequate competence, diligence and organisational discipline.

The proposal also improves conceptual clarity. The wrong is not disloyalty, but deficient stewardship in the exercise of a professional office. Large firms are governed through systems, reporting lines, committees, controls and information structures. If law is to discipline governance meaningfully, it must be able to address those structural features directly.

The evidence needed for such claims is also realistically obtainable. Courts can examine board minutes, committee structures, internal audit arrangements, risk registers, reporting protocols, escalation mechanisms and expert governance standards. They can ask whether systems existed, whether they were adapted to the enterprise's risks, whether information reached the board in a usable form and whether repeated failures exposed architectural weaknesses. These questions do not require courts to decide whether a collective board really knew or consciously disregarded enough to warrant fiduciary condemnation.

This has direct relevance to specific governance problems. Each of the following may present a case of deficient systems: a heavily regulated firm that lacks meaningful compliance reporting lines; a multinational enterprise with no serious board-level visibility over labour abuse or environmental disruption in critical supply chains; or a data-intensive firm whose information-security governance is fragmented and under-resourced. The legal issue is not whether directors hated the company or consciously courted disaster, but whether they fulfilled the governance responsibilities inherent in directing it.

An obvious objection is that if a company suffers a major failure, courts will simply infer with the benefit of hindsight that its systems must have been inadequate. The objection is not decisive since the proposed standard is not outcome-based. A company may suffer substantial loss despite having systems that were reasonable at the time, just as a company may avoid visible disaster despite having systems that were seriously deficient. The court's task is therefore to assess *ex ante* adequacy rather than to reason backwards from corporate failure, asking whether the governance architecture was reasonably proportionate at the time to the company's risk profile, regulatory environment and operational complexity.[27]

Nor does this approach imply that courts must become experts in running businesses. Courts would not ask whether the board adopted the best conceivable governance architecture. They would ask whether the board met the standard of reasonable diligence in establishing and maintaining systems commensurate with the company's functions and risks. The inquiry would

[27] Companies Act 2006, s 174(2)(a).

therefore be one of adequacy, not optimisation. That distinction preserves managerial discretion while refusing to treat governance structure as legally optional.

This route is preferable to that of the Delaware system. Delaware reaches oversight failure by forcing it through the language of bad faith and conscious disregard, but English law can reach the same terrain more directly and more coherently. It need not wait for exceptional psychological culpability. It can insist, through section 174, that serious governance responsibilities are part of the ordinary legal content of directorial office.

C. Section 172 as Inclusive Long-Termism

The third step is to interpret section 172 as imposing a substantive duty of what this article terms inclusive long-termism. The term is used to denote a legal conception of corporate success in which directors are required to pursue the company's success by reference to its long-term, relational and systemic conditions of viability rather than through any model of stakeholder primacy or short-term shareholder gain alone. The danger in current interpretation is not only that section 172 is read too subjectively, but that the idea of success is treated too narrowly. If the provision is understood as requiring little more than an honest belief in shareholder benefit, the statutory list of factors becomes largely rhetorical. Long-term consequences, employee interests, business relationships, environmental impact and standards of conduct are then reduced to matters directors may mention without those matters materially shaping the legal content of the duty. That reading is difficult to reconcile with the structure of the section.

The more legally coherent interpretation is one of inclusive long-termism. This is not stakeholder primacy. Section 172 remains framed around promoting the success of the company for the benefit of its members and nothing in the provision converts directors into general arbiters of shareholder welfare.[28] But the route to that success is legally structured. The listed factors are not external moral aspirations appended to an otherwise unchanged model of shareholder advantage; they are part of the statutory framework through which corporate success is to be pursued.

Such an interpretation is not yet the settled position of English law: section 172 has often been treated primarily through subjective good faith, with the result that its listed factors can appear more rhetorical than constraining, and that tendency has made the provision appear difficult to police.[29] On this article's view, the section is not treated as having already settled the matter, but as making available a judicially defensible interpretation that gives real weight to the statutory factors without converting them into freestanding stakeholder rights.

This interpretation offers the most coherent reading of the statutory structure.[30] Parliament did not merely instruct directors to promote success and leave the matter there. It required them, in doing so, to have regard to long-term and relational considerations.[31] That drafting choice would be oddly weak if those considerations were no more than evidential prompts. It makes better sense if the provision is understood as

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[28] Companies Act 2006, s 172(1).
[29] *Regentcrest* (n 13) [120]; Keay (n 10) 93–4, 99.
[30] Keay (n 10); Bradshaw (n 11).
[31] Companies Act 2006, s 172(1)(a)–(f).

embedding a legal conception of corporate success that is temporally extended and institutionally situated. Directors are required to pursue the company's success not in abstraction, but in light of the conditions on which that success depends.

Inclusive long-termism therefore requires more than procedural awareness of the statutory factors. A board should not satisfy section 172 merely because minutes record that employees, environmental impact or long-term consequences were mentioned before the preferred course was adopted. The law must be able to ask whether those matters were engaged with seriously enough to form part of the board's actual conception of corporate success.

The strongest illustrations arise in relation to systemic or long-horizon risk. Climate-related exposure is an obvious example. For some firms, transition risk, physical risk, disclosure risk, financing risk and regulatory pressure are not peripheral social concerns but central determinants of future viability. A board that fails to integrate those matters into its decision-making may not be discharging section 172 merely because it can assert an honest belief in present shareholder value. The same is true of chronic supply-chain abuse, repeated compliance failures in a regulated business or commercial practices that predictably erode the trust of employees, customers or counterparties on which the enterprise depends. In such cases the issue is not whether directors owe free-standing duties to every affected group, but whether they have lawfully promoted the company's success considering the conditions that make such success durable. The same basic logic is reflected in adjacent fiduciary contexts, where financially material long-term risks cannot simply be treated as

external to the interests that fiduciaries are bound to protect.[32] In both contexts, fiduciary judgement about long-term financial interests cannot ignore systemic risks that bear directly on the durability of those interests. The analogy should therefore be used carefully. Company directors are not pension trustees, and section 172 is not a pensions provision, but the broader point holds.

The comparison with Delaware is again instructive. Delaware asks whether an exceptional threshold of bad faith or conscious disregard can be shown. The English model asks whether the company's long-term success, as structured by statute, was pursued through proper purpose, adequate governance and serious attention to sustainable enterprise. That is not a weaker standard, but a more coherent one.

VI. Objections and Conclusion: Why Stewardship is the Better Reading

The most predictable objection is that the proposals advanced here judicialise business judgement. If section 172 is read through proper purpose, section 174 through objective systems liability, and section 172 again through inclusive long-termism, are courts not being invited to scrutinise the merits of business decisions under a fiduciary vocabulary? The concern must be taken seriously, but it is overstated.

None of the proposed developments authorises free-ranging merits review. Proper-purpose analysis asks whether a power was used for legally appropriate ends. Systems liability asks

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[32] Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 6.56.

whether governance architecture was objectively adequate to the company's material risks. Inclusive long-termism asks whether directors genuinely engaged with the statutory factors and whether the conception of success adopted was legally intelligible in light of those factors. These are legal questions about office, process and statutory structure, not invitations to courts to become shadow boards.

In one respect the English model is less intrusive than Delaware's. A regime centred on bad faith and conscious disregard sounds deferential because the threshold is so high. Yet to determine whether that threshold is met, courts may be drawn into speculative inquiries into motives, awareness and collective consciousness. By contrast, a law focused on objective purpose, governance structure, systems adequacy and reasoned attention to statutory factors channels the inquiry into more verifiable forms of proof.

The second objection is that the proposals conflate loyalty and care. This would be serious if the article argued that all governance failure is a breach of loyalty, but it does not. Proper purpose remains centrally concerned with loyalty in the sense of office-aligned use of power. Section 174 addresses care in the structured performance of governance responsibilities. Section 172 mediates between them by defining the legally relevant conception of corporate success. The resulting framework is one of stewardship, not doctrinal collapse.

The third objection is that section 172 cannot bear the weight of substantive long-termism because Parliament

deliberately avoided creating stakeholder-enforceable duties.[33] The point is correct as far as it goes, but it does not defeat the argument. Nothing in the proposed reading creates freestanding stakeholder claims or equalises the interests of all constituencies. Members remain the beneficiaries of the company's success. The claim is simply that Parliament chose to define the promotion of that success through a list of factors that make long-term and relational conditions legally relevant.

The fourth objection is practical. Would stronger duties not encourage opportunistic litigation and defensive governance? Here the English procedural setting matters. Derivative claims require permission, and the court already filters weak or bad-faith cases.[34] Those gatekeeping mechanisms reduce the risk of opportunistic 'strike suits'. Clearer substantive standards may also reduce wasteful litigation by making expectations more predictable.

The final objection is more political than doctrinal. The article does not argue that directors must maximise welfare across all affected groups, nor that company law should become a general instrument of public policy. It argues only that English law already recognises that corporate success is not intelligible in isolation from the long-term, relational and systemic conditions on which the enterprise depends. A company that undermines those conditions may injure others, but it also jeopardises its own durable success.

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[33] Companies Act 2006, s 172(1); Explanatory Notes to the Companies Act 2006, paras 325–328; Andrew Keay (n 10) 111–113.

[34] Companies Act 2006, s 261.

The judicial construction of fiduciary loyalty is not a marginal classificatory issue, since it determines how the law understands directorial office and what kinds of governance failure it treats as serious. English law need not choose between antiquated anti-conflict formalism and Delaware's unstable subjectivism. It can instead develop a coherent law of stewardship. On that view, directors remain decision-makers rather than trustees in every respect, but they are recognised as holders of an office whose powers must be exercised for proper purposes, within governance systems adequate to material risks and in pursuit of a conception of corporate success structured by long-term and relational conditions of enterprise viability.

If English law develops in this direction, fiduciary loyalty will cease to function merely as a narrow anti-conflict doctrine and instead become part of a broader jurisprudence of responsible corporate governance. The better alternative to Delaware is not less accountability, and not more moralism, but a coherent law of stewardship.