"CORPORATE GOVERNANCE AND ENTERPRISE RISK"

By Robert Hildyard QC

Introduction: the purpose of Company Law and the pressure for change

1. A company is a legal vehicle for investment in commercial risks with limited liability. The objective of Company Law should be to encourage wealth creation within a framework which discourages corporate wrongdoing. As stated in the Consultation Document from the Company Law Review Steering Group, "Modern Company Law for a Competitive Economy: the Strategic Framework":

   "It is not for the law to substitute for the business judgements involved, but to provide optimal conditions for their proper exercise."

2. As also there stated, the limited company form has proved over the last 150 years an outstandingly successful means for organising productive activity, deploying and protecting investment and allocating risks. Enormous changes have been both absorbed and promoted by the corporate form. As is our way in England, development of the law in this changing context has been organic, or some would say, more critically, piece-meal. The origins of the Companies Act 1985 are perfectly plainly in the Companies Act 1862, and there has been really quite little in the way of radical change. But by and large, company law has played a constructive part in promoting this corporate success, treading a reasonable line between freedom and regulation, enterprise and restriction, and enhancing the credibility and efficiency of business by providing a framework for the control of abuse.

3. Over the past few years, however, a number of factors have prompted calls for a more radical re-think of company law. There would be different views as to the relative importance of these factors; but I would single out the following as being of particular importance:

   * the increasing importance attached to transparency as a means of control

   * a growing recognition that vast multi-national enterprises need a different framework of control than do small close companies, whose activities may well be largely the domestic concern of their participants

   * the growth of the corporate group as the predominant economic unit, and the increasing tension between the traditional approach of company law to regard each company as a separate entity and the commercial reality that regards the group as a single economic enterprise

   * the growth in support for some intra-company reviewing agency to monitor the activities of executive directors, given perceived inadequacies of the company in general meeting as a check and balance to directorial power, and

the difficulties in relying on the ability and motivation of shareholders in large enterprises to scrutinise corporate decision-making processes

* increasingly strong views that company law's mix of remedies should be adjusted in favour of much greater use of civil as opposed to criminal remedies

* the influence of foreign jurisdictions, both in terms of our European obligations and in terms of recognising the experience of change in other sophisticated jurisdictions such as Delaware and Australia, whose citizens appear to be delightfully litigious and therefore admirable empirical testers of the law

* the recognition that if this country's company law is regarded, by comparison with other sophisticated jurisdictions, to be unduly prescriptive, inflexible, inaccessible or onerous, businesses will choose to incorporate elsewhere

* the public desire to see change in the wake of scandals which would probably have happened whatever the framework of control, and are very much the exception, but which nevertheless prompt anxiety and calls for review

* the climate of increasing expectation surrounding company direction encouraged by such reviews as the Cadbury Report

* the political imperative, particularly of the present government, to be seen to be pro-active in promoting change and in presenting changes as both socially responsible and enterprise-encouraging.

4. In the light of these sort of factors and concerns on 4th March 1998 Margaret Beckett, then Secretary of State for Trade and Industry and President of the Board of Trade, announced the launch of a fundamental review of company law with the principal objective of considering how core company law can be modernised in order to provide a simple, efficient and cost effective framework for carrying out business activity which:

   * permits the maximum amount of freedom and flexibility to those organising and directing the enterprise and

   * at the same time protects, through regulation where necessary, the interests of those involved with the enterprise, including shareholders, creditors and employees

   * and is expressed in clear, concise and unambiguous language which can readily be understood by those involved in business enterprise.

5. That is a welcome and perhaps overdue emphasis on the need to review company law by reference to its economic function; but it is also, of course, a magnificently ambitious prescription. It is also far too strong and long a cocktail to tackle before lunch, even on a Friday, and I will not attempt to do so! For this morning, all I want to do is to address briefly three or four particular problem areas, assess what prescription is likely to be offered, and seek to identify the likely consequences in terms of the D&O market.

The balance between civil and criminal law and individual and corporate liability in the enforcement of company law

6. I start with the question of sanctions. In doing so, of course, I follow the prescription of the Queen in Alice in Wonderland that sentence should and must precede trial.

7. There are essentially two questions:

   * First, to what extent should company law be enforced by imposing personal liability on directors and managers as opposed to enterprise liability?

   * Secondly, what should be the balance between civil liability and criminal sanctions?

8. Obviously both questions impact on the development of D&O liability.

9. As to the first question, it is plain that the drift of the law has been towards enforcement by use of personal liability rules. This is evident most obviously from:-

   * The development of the notion that a director who procures a company to commit a tort will himself be liable as a tortfeasor: whereas only 15 years ago in *C. Evans v. Spritebrand Ltd* the notion was regarded as so unlikely and such an incursion on the principle of limited liability that an application to strike it out as misconceived was made, now it seems to be well accepted;

   * Insolvency legislation, the premise of much of which is, in the words of the *Report of the Insolvency Law Review Committee* in its report in 1982 prior to the present Insolvency Act 1986, the creation of a climate

     "in which those who abuse the privilege of limited liability can be made personally liable for the consequences of their conduct."

   * A noticeable tightening in the standards expected of directors, auditors and their advisors.

10. This is, to some extent, inevitable. Partly it is the product of a retributive outlook, which is certainly not confined to this sphere, and reflects not only a "blame" mentality but also a feeling that "fat cats should pay if caught in the cat-flap". Partly also it is the consequence of the deficiencies of the alternatives. Put shortly, there are too many flaws and difficulties in enterprise-based controls and in market-based constraints, including:

   * the difficulty of establishing a satisfactory general test for corporate liability as opposed to an individual's fault

   * the problem of what Vanessa Flinch of L.S.E. has termed (in an interesting article from which I have derived much assistance[1]) "sanction efficiency"; and principally, the problem of imposing a sufficient penalty without seriously affecting innocent parties, such as the company's investors, employees, suppliers, consumers and distributors

   * the problem that individuals may not be dissuaded from misconduct if not personally exposed.

11. But there are obvious disadvantages in a framework which seeks to control corporate wrongdoing by focusing so heavily on personal liability. These include:-

   * the most important disadvantage is the danger that in consequence directors become too risk-adverse, thus undermining one of the principal benefits of incorporation with limited liability as a vehicle for entrepreneurial risk

   * the threat of personal liability can also encourage not only risk-aversion and overreaction but also consequential costs and inefficiencies, including not only the costs of compensating risk-bearers and excessive monitoring procedures but also the danger of buck-passing risk-laden decisions, sometimes upwards in the chain but sometimes also by delegation to subordinates less likely to make an experienced decision, or to outside consultants who may not have the same degree of knowledge or direct experience

   * the danger that individuals are forced to underwrite deficiencies in the law, for example where in perfectly good faith they undertake what appears to be a permissible transaction in an apparently permissible way but is later established to be in breach of an insufficiently clearly defined rule; and this is a problem which rapid legislative change further exacerbates. Legislators are entitled to mean what they say and prescribe liability for breach, but it is

1 "Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance"; (1994) MLR 880

their responsibility to say what they mean and it is harsh to penalise someone else for shortcomings in this regard

* last but by no means least, the danger that prudent and sensible people will in consequence decline to take on corporate responsibilities at all; this being a problem to which I shall be returning in the context of discussing the role of non-executive directors, for whom the risk-reward balance may often be particularly unsatisfactory.

12. The scope for D&O insurance to mitigate some of these very real disadvantages of a framework for control based upon personal liability is readily apparent. However, before turning to that, I should address the second question I have posed in relation to this topic, which is as to the desirable balance between civil liability and criminal sanction. A flick through the Companies Act 1985 reveals a perhaps surprising variety of sections attracting a criminal sanction for breach. Is this wise?

13. It certainly used to be thought so, just as the Australian legislature appears previously to have thought it so in originally prescribing heavy criminal penalties (of up to 5 years in prison, as well as civil liability) for breach of their satisfactorily defined duties of directors, thus encompassing acts which might be a long way from what one would otherwise regard as commensurate with real dishonesty. In Australia, however, this "overkill" led to some revulsion:

    * from some on grounds of moral principle

    * but also from the enforcement authorities, because of the importation of the criminal standard of proof and the difficulties, delay, unfairness and expense in bringing prosecutions and securing convictions.

    There, as in New Zealand, it has resulted in reforms designed to restrict criminal liability under the Companies Act to conduct which really smacks of fraud[2]. The message from these jurisdictions is that criminalising breaches of duty short of fraud is counter-productive. Should we adopt the same approach?

14. One's instinct is to say "yes"; and this has so far been the strong view emerging from comments on the DTI Consultation Paper. Any equivocation relates to:

    * matters regarded as of such fundamental importance that the criminal sanction is considered necessary in order to concentrate the minds of directors and their advisers just that extra bit more. An example at present, though probably not for the future, is the criminal sanction for breach of section 151 (financial assistance) - a reminder of the importance attached at least in the past to the principle of maintenance of capital. Anyone called

2 See Len Sealey: "Reforming the Law on Directors' Duties" (1990) Company Lawyer vol. 12 no. 9; page 175.

upon regularly to advise on the section will know the focus the sanction brings but also the complexity it encourages

* the tendency for the public to howl for criminal sanctions in response to activities of corporate demons such as Boesky (insider trading), Maxwell (pension funds) or Saunders (for reasons not perhaps so well defined)

* the tentative suggestion that there may be some room for modified criminal sanction, such as suspended sentence, as a means of monitoring and ensuring compliance, as has been suggested by the Law Reform Commission of Canada.

15. None of these represents more than a light gloss on the general conclusion that criminal sanctions should be restricted to behaviour which is really criminal in a broader sense. It seems to me that it can be predicted with a reasonable degree of confidence (though, remembering Willie Whitelaw, all predictions are uncertain, particularly about the future!) that the preferred remedy or form of liability for breach of company law rules will increasingly be exclusively civil, monetary and personal.

16. Once again, the impact in terms of D&O cover is readily apparent; but once again I intend to shelve that discussion and either whet or blunt your appetite for it by moving next to the second topic I thought briefly to address, which is the closely related topic as to the definition and proper ambit of directors' duties and the legal mechanics of their enforcement.

Directors' duties: should they be refined, re-aligned or defined?

17. This second topic is a very broad one indeed. I intend to address particular aspects of it with a selectivity and brevity which is entirely unjustified by reference to its importance, being the topic which has attracted the most interest of all in the course of the DTI consultation process. All I can plead in my defence is my feeling that a certain "directors' duties fatigue" is setting in after such a deluge of paper on the subject.

18. The first aspect of this enormous topic which I propose to touch on is the question which, as I understand it, lies at the borderline between the English concept of directors' duties and the Delaware/US "business judgement rule". Assuming good faith and no conflict of interest:-

* Should the test of culpability be that the decision should have been *unreasonable in the sense of being imprudent*?

* Or should the touchstone be that the decision should have been wholly *irrational*?.

19. This may seem excessively semantic; but there could be a real difference, as perhaps is apparent from brief reflection on the judgements each of us makes in daily life. As Melvin Eisenberg notes in his article on the Business Judgement Rule[3], it is common to characterise a person's conduct as imprudent or unreasonable, but it is very uncommon to characterise a person's conduct as irrational.

20. Although both "jurisdictions", UK and US, accept that the Court should not, in the oft-quoted words of Lord Wilberforce in *Howard Smith Ltd v. Ampol Ltd*[4] "assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at", the US Courts and legislature have sought to reinforce that self-denying injunction by recourse to the "business judgement rule". This states (and I hope that I do not here, and in the presence of my American colleague, horribly misrepresent US law!) that a director who makes a business judgement in good faith fulfils his duty if:-

   * he is not interested in the subject of his business judgement

   * he is informed with regard to the subject to the extent that he reasonably believes (note this attenuated but important element of objectivity) to be appropriate under the circumstances and

   * he rationally believes that his business judgement is in the interest of the corporation.

21. Again taking the possibly imprudent[5], but I hope not irrational, risk of misdescribing US (and now indeed Australian) law, the rule (to quote Len Sealy) "in practice shifts the court's attention from the correctness of the directors' decision to the adequacy and propriety of the procedure leading up to their decision: from the result to the process ... Note how subjectively phrased the test is! In the US, the business judgement rule is said to be the articulation of a policy that informed business judgement should be encouraged in order to stimulate innovation and risk-taking: it is a rule that provides a "safe harbour" for directors who act in good faith"[6].

22. There is much to be said for this, subject to one great proviso: its premise is directorial competence and *informed* business decisions. When that proviso and premise is taken into account, there is, as it seems to me, less substantive difference between the approaches in the two jurisdictions.

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3 Melvin Aron Eisenberg: "The Duty of Care and the Business Judgement Rule in American Corporate Law"; (1997) CFILR 185

4 [1974] AC 821, 832F

5 The possibility being reduced by my being in the company of, and indebted to, Len Sealy: see his article cited above!

6 Ibid.

23. But one difference of emphasis may remain. The business judgement rule serves to emphasise that in the case particularly of business risk-taking, hindsight is an inappropriate basis of review. The standard of irrationality serves to emphasise the distinction between bad decisions for which there was no rational basis and for which there should be culpability, and proper decisions that turn out badly, for which culpability is inappropriate even if hindsight reveals them to have been imprudent. As Melvin Eisenberg puts it:

"As a result of a systematic defect in cognition known as the hindsight basis ... under a reasonableness standard of review fact-finders might too often erroneously treat decisions that turned out badly as bad decisions, and unfairly hold directors and officers liable for such decisions. Experimental psychology has shown that in hindsight people consistently exaggerate the ease with which outcomes could have been anticipated in foresight. People view what has happened as relatively inevitable. (as one historian put this tendency - "Dear Diary, The Hundred Years' War started today".) Accordingly, people who know that a bad outcome resulted from a decision overestimate the extent to which the decision-maker should have predicted the outcome. Thus, persons who review the quality of decisions tend to unfairly attribute bad outcomes to bad decisions ... The business judgement rule protects directors and officers from the unfair imposition of liability as a result of the hindsight bias, by providing directors and officers with a large zone of protection when their decisions are attacked... "

24. Having identified the problem of hindsight in the review of directorial decisions, which is a problem to which the business judgement rule may be in part a possible solution, and which no doubt will be considered in the context of the review process, may I back-track a little bit to consider the second aspect I want to spot-light? This is the debate as to whether the *standard of care* should be subjective or objective, and the indications so far available as to the likely resolution of that debate.

25. It is fairly notorious that English common law historically adopted a tolerant, indeed lax, view, exemplified in the judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd*[7] and encapsulated in *Farrar's Company Law*[8] as a "subjective test with no minimum reasonable amount of skill being required." But this is undoubtedly changing, indeed it has already changed, largely under the influence of Lord Hoffmann as he now is.

26. Three cases in particular have signalled a far less tolerant approach:

7 [1925] Ch 407, 428-9

8 3rd edition 1991 at 397

* First in chronological sequence was *Norman v Theodore Goddard*[9]. Hoffmann J (as he then was) there propounded an objective requirement that a director should at least possess such skill as would reasonably be expected from someone undertaking such duties, adding by way of illustration of the standard required:

"A director who undertakes the management of the company's properties is expected to have reasonable skill in property management, though not in off-shore tax avoidance."

* This of itself was a departure from the old and comfortable dispensation. But in addition in the same case Hoffman J observed that in considering what a director might reasonably know or infer, one should take into account the knowledge, skill and experience which he or she actually had, as well as that which a person carrying out such functions should ordinarily be expected to have. This mix of objective and subjective standards to produce the higher test is very similar to the approach both in Australia and the US in the context of the requisite standard of care.

* Next, in 1993, now in the Court of Appeal, Hoffmann LJ in *Bishopsgate Investment Management Ltd v Maxwell (No 2)*[10] expressly recognised that the law was evolving to require a more demanding standard of care.

* Thirdly, and at about the same time, in *Re D'Jan of London Ltd*[11] Hoffmann LJ accepted that the duty owed by a director may be summarised as in section 214(4) Insolvency Act 1986, which includes a plainly objective element in requiring the standard of care of

"the reasonably diligent person having both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company; and (b) the general knowledge, skill and experience that the direct has".

* As so stated, English law appears largely to have caught up (if that is the right way to look at it) on the issue as to the *standard* of care with longer established jurisprudence on the issue in the US and Australia.

27. Such differences as remain relate principally[12] to the extent to which:

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9 (1992) BCC 14 at 15

10 [1994] 1 All ER 261

11 (1993) BCC 646 at 648-9

12 This summary is derived from an edited version of a lecture delivered by The Honourable Mr Justice Ipp, a Judge of the Supreme Court of Western Australia, to the Institute of Advanced Legal Studies in 1996: see The Company Lawyer, vol 18 no. 6.

* the professional skill required is proportionate to (and increases in accordance with) the size and status of the company concerned, and the directorial status of the individual concerned

* the extent to which directors are entitled to rely on the prima facie integrity of officials to whom responsibilities are delegated (the Australian position being stricter in this regard)

* the degree to which it is recognised (as it is for example, in Australia) that whether or not a director is negligent will depend on the reasonable expectations (objectively assessed) of those whose reliance on the director concerned has proved misplaced.

27. Through this aspect too will no doubt be discussed further, for the present the trend in relation to this aspect does seem clear and consistent with the growing emphasis on professionalism and increased training of company directors; as Mr Justice Ipp has put it[13], in this context at least the expectations of the public and politicians make it likely that

"The burden of directors, whether executive or non-executive will become heavier, the test for negligence will become more stringent, and the number of cases in which directors will be held to be liable for the failure to exercise due diligence will increase. There will be undoubted economic consequences. If the trend is taken too far, the entrepreneurial spirit will be dampened and the candidates for appointment will diminish. Changes may also occur in the nature of the structures by which venture or risk capital is employed. Account has to be taken of the ingenuity of lawyers [a bit of a back-hander there, I think!] *Already in Australia a sophisticated trading trust is emerging; this is a vehicle designed to avoid the legislative duties now imposed on companies and directors".*

29. In other words, there is in this context, as so often, a tension between the demands for control and the entrepreneurial demand for freedom to take risks. The conundrum of how to fashion at one and the same time an objective test for standard of care which does not unduly chill enterprise and a mechanic whereby both to reduce the propensity for unfair hindsight and second judgement, and yet encourage high standards of decision making remains.

30. That brings me to the third and last of the particular aspects of the continuing debate as to the proper scope of directors duties which I had wanted to address this morning. That is the question as to whether the directors should owe duties not only to the company and in some senses its shareholders as a group, but

13 Ibid

beyond that to its employees, its suppliers, its customers, Uncle Tom Cobbley and all. This is euphemistically referred to in the Consultation Document as the "pluralist approach", its theory being that a successful economic enterprise can only secure broader long term success by recognising obligations to all those affected by its activities.

31. It is with not a little sense of relief and release that I anticipate that time will not allow further examination of this aspect, which would carry us off well beyond Wonderland and into a world of limitless liability, a polarity apart from the initial premise of limited liability.

The role of non-executive directors in corporate governance: fact or fantasy?

32. Time also mandates an unduly cursory treatment of the great white hope identified by the Cadbury Committee: the non-executive director. We have time only for a few bullet points:

    * The Cadbury Committee's apparent optimism as to the vital contribution which they felt non-executive directors might make in (a) 'reviewing' the performance of the board and (b) 'taking the lead where potential conflicts of interest arise'[14] seems to me more a leap of faith than an empirically based conclusion

    * There are substantial reservations in principle in respect of any attempt to use non-executive directors as a "Trojan Horse" for a two-tier board approach

    * More pragmatically, the problems of 'reviewing' their appointors are not insignificant. Particularly as outside directors are unlikely to have the depth of knowledge and the support of colleagues available to 'insider' directors

    * They have "whistle-blowing" capability, but it is an unattractive option in all the circumstances

    * As Professor Brudney has put it[15], the reality is that

    "The independent director is not the institution to legitimate corporate power or to substitute for regulation in the interests of investors or society. "

33. More generally, there have been conflicting messages, on and off stage, as to what should be the appropriate degree of skill and standard of care to be required of non-executive directors, having regard to their necessarily more detached position in relation to their company and the fact that they will not be

14 Cadbury Report, paras 4.5 and 4.6

15 Brudney, "The Independent Director - Heavenly City or Potemkin Village?"; (1982) 95 Harv. L Rve 597 at 636

engaged full-time, their duties typically being of an intermittent or occasional nature. As to this:

* The law is undoubtedly in a state of flux and uncertainty

* It is plain that the standard to be required of non-executives has tightened since the days of *Re Denham*[16], when the standard was lax even in comparison to the fairly minimal expectations in relation to a full-time director

* The broad division presently is between, on the one hand, those who consider that there should be a single objective standard applicable to all directors, with increased expectations according to an individual's skills and special responsibilities and, on the other hand, those who consider that it is better to recognise the different position and functions of non-executive directors and accept a lower standard

* The debate has been particularly fierce in Australia, as illustrated by the diametrically different approaches of the first instance Judge (Rogers CJ) and the Court of Appeal for New South Wales in *AWA v Daniels*[17]. In this country, there have (as I have indicated) also been inconsistent messages, and an acknowledgement that the law is in the process of clarification. I refer for example to the decision of Chadwick J in *Re Continental Assurance Co of London plc*[18], where in language that some have construed as rather ominous, Chadwick J found the non-executive directors to have been incompetent but in terms of a disqualification period accepted a minimum period on the basis that they should be entitled to have the benefit of a climate which recognised a lesser standard *'at least until the views of the courts have become known"*

* More recently still, and perhaps to correct any sense of foreboding Lord Hoffmann said this extra-judicially (in fact in the Fourth Annual Leonard Sainer Lecture, "The Company Director Today"[19]):

"It seems to me by no means clear that corporate efficiency would be improved by tightening up the Brazilian Rubber Plantations standards[20]*. If Greenbury is right about the desirability of independent non-executive directors, it would if anything be likely to discourage people from accepting office. The position of a non-executive director pitted against the executives with their superior access to information and familiarity with the corporate culture is, when push comes to shove, difficult enough at the best of times... I do not think that the standard of*

16 (1884) 25 Ch D 732
17 (1992) 10 ACLC 933, 1012-1015
18 [1997] 1 BCLC 48
19 (1997) Co Law 194, 196
20 [1911] 1 Ch 425

people accepting such positions would be improved by the thought that they were likely to be sued for damages for failing to take sufficient action. On the contrary, I think it would be likely to make non-executives, as a self-defensive move, less trusting and more likely to intervene than they are at present which may well be a wasteful addition to the costs of corporate decision-making'.

34. This eloquent statement of the contradictions between strict standards and economic needs is a fitting place to turn to my conclusion and a few thoughts on the role of D&O insurance, as promised repeatedly before (and as by now, for mixed motives, you may be thirsting for!).

Conclusions and some thoughts on the role of insurance in corporate governance

35. It will, I hope, by now be apparent that my view is that there are inevitable, and in some senses, irreconcilable tensions between on the one hand the need to encourage commercially justifiable risk-taking, and on the other hand providing a framework to curtail abuse. This certainly does not mean that the effort is useless, nor do I in any sense wish to suggest that the review of company law will not be useful or productive. We can get closer to the objective by sustained effort, even if the objective is ultimately just beyond our grasp.

36. My second conclusion may appear contradictory. It is that the more that company law is set in its economic context, the more the prevailing demand for economic answerability may tend to win out over encouraging enterprise. The prevailing "blame" culture demands a suitable victim, and if as is frequently stated a company has no soul to damn and no body to kick, then some other victim must be chosen and the directors are it.

37. As the removal of the embargo against it in the context of directors liability illustrates, it is now commonly accepted that insurance can be used in the effort to bridge the gap between control and enterprise by spreading the risk of loss and giving directors the opportunity to take commercial justifiable risks and reducing the tendency to inefficient defensiveness. Indeed it has been said that:

"Business and commerce cannot operate and prosper on a large scale, until and unless businesses and investors are provided with some mechanism for risk aversion... Insurance is a vital factor in business activity because it acts as an important mechanism by which identified risks of loss may be averted."[21]

38. A further means in which insurance may control governance without chilling enterprise is that insurance companies, working as they do in a competitive world, provide a mechanism for differentiating good and bad risks; they gather

21 Ewald, "Insurance and Risk"

information and scrutinise the performance of their insureds and they thus operate in effect as a sort of private regulatory system[22]. Companies police their directors so as to avoid premia penalties and restrictions; directors are given incentives to operate non-negligently, and are monitored by both insurers and their company in a context where personal liability is reduced or removed.

39. Another advantage of particular interest is in thereby encouraging more competent people to accept office, particularly as non-executive directors.

40. So cheer up! You are part of the process of reconciling the irreconcilable! You will, however, know better than I do the pit-falls in this rosy analysis. Such an audience hardly needs to be told:

   * of the difficulties of adequate identification of particular risk areas, and particularly poor risk directors or companies, and of the expense of trying to do so, which no doubt increases costs and thus premia

   * of the concern that the courts, on becoming aware of insurance cover, cannot resist the temptation to impose unpredictably high standards of skill and care and/or to ramp up the assessment of damages

   * of the consequential pressure on insurers to respond by imposing restrictions on cover and availability of insurance, or requiring high excesses or deductibles on claims

   * of the consequence that the broad uptake of insurance is likely to magnify the costs of legal uncertainty

   * in short, of the limitations of insurance in terms of its use as an instrument of corporate governance.

41. Put another way: resort to insured personal liability is not a satisfactory method of dealing with the fundamental issue of corporate design. Ultimately, it is for the law and not the market which has to provide the framework for enterprise subject to adequate rules of corporate governance. That is therefore a shared objective. Despite the difficulties I have outlined, I would suggest that the experience of the past has been on balance positive and that the outlook for the future is similarly so in terms of ensuring that the UK corporate framework continues to common respect and favour as providing a reasonable, even if inevitably imperfect, balance between control and enterprise.

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22 as Vanessa Finch puts it: op cit