

THE UNITARY BOARD: FACT OR FICTION?

*Alice Belcher**

Abstract

A recent consultation process in the UK produced strong support for the concept of the unitary board. Many respondents in this process connected the concept of the unitary board with the principle that all directors should have the same legal responsibilities or duties. This article explores the legal responsibilities of UK executive and non-executive directors and in doing so exposes the gap between the concept of the unitary board and the messy reality of the courts' treatments of specific non-executive scenarios. It also identifies a change in the language used to describe UK boards. Previously the unitary board, comprising executive and non-executive directors, had been described as a team. The most recent rhetoric is of a "partnership" between the executive and non-executive directors. This shift could signal the end of the unitary board.

Keywords: Board of Directors, executive directors, unitary board, non-executive directors

Introduction

The unitary board is one of the key features of the US and UK corporate governance systems whereas two tier boards are characteristic of the German and Dutch systems. In a two tier system supervisory and management functions are dealt with at different levels and by separate groups of individuals, although the German supervisory board is becoming increasingly involved in strategy. A unitary board is entrusted with both the making of corporate strategic decisions and the monitoring of corporate performance and activities of all sorts. With the introduction and further development of corporate governance codes over the last decade, the role of non-executive directors in unitary boards has been changing. The non-executives have been increasingly called on to monitor aspects of the executives' behaviour and this threatens both the concept and the operation of the unitary board. A recent consultation process in the UK produced strong support for the concept of the unitary board. Many respondents in this process connected the concept of the unitary board with the principle that all directors should have the same legal responsibilities or duties. This article explores the legal responsibilities of UK executive and non-executive directors and in doing so exposes the gap between the concept of the unitary board and the messy reality of the courts' treatments of specific non-executive scenarios. Although the article focuses on the UK position, the problems it reveals are likely to be encountered in any unitary board system in which the non-executives are given a strong governance role.

The article begins by giving some UK background. It then considers the collective responsibility of the unitary board. This section is brief because the collective responsibility of boards is an area that has only rarely been addressed by the UK courts. The article then demonstrates how the concept of the unitary board has been linked with there being no legal distinction between the different types of director. This leads into an analysis of the legal responsibilities of non-executive directors which reveals inconsistencies in the UK courts' decisions.

* Professor of Law, Department of Law, University of Dundee

The UK background

Following a major review of company law in the UK, the White Paper *Modernising Company Law* was published in July 2002.¹ In the White Paper the “general principles by which directors are bound”² are the same for *all* directors. In June 2002 Derek Higgs published his consultation paper “Review of the role and effectiveness of non-executive directors”.³ The paper was commissioned by the Secretary of State, Patricia Hewitt, and the Chancellor, Gordon Brown. Responses were to be submitted by September 6, 2002. The responses have been made available on the Department of Trade and Industry’s website. In January 2003 Higgs published his report, also entitled “Review of the role and effectiveness of non-executive directors”.⁴ Thus, a major review of company law resulted in a set of principles applicable to *all* directors, but at almost the same time the role of non-executives was subject to separate scrutiny. Higgs’s review focussed on the non-executives because of their key, and increasing, place in best practice in corporate governance. However, the very fact that their role was seen as deserving of special investigation points up the executive / non-executive divide.

The Unitary Board and collective responsibility

Higgs’ first recommendation is that a description of the role of the board should be incorporated into the UK’s Combined Code. Higgs states:

“The board is collectively responsible for promoting the success of the company by leading and directing the company’s affairs.”⁵

Also:

“In the unitary board structure, executive and non-executive directors share responsibility for both the direction and control of the company. ... Increasing the effectiveness of non-executive directors, while preserving the benefits of the unitary board, is a principal objective of the Review”⁶

One of the respondents to Higgs’ consultation paper stated:

“Non-executive directors have both a collective responsibility shared with the executive members of the board for the overall direction and performance of the company, and also individual contributions relating to their specific areas of expertise and to any roles they might have on board committees.”

IOD (Institute of Directors)

A key question is how the UK law recognises the collegiate nature of the board and its collective responsibility. However, this issue has been tackled very rarely by the courts. In *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths*⁷ the Court of Appeal accepted the following:

“... The collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. ... A board of directors must not permit one individual to dominate them and use them as Mr Griffiths plainly did in this case.”⁸

¹ *Modernising Company Law* Cm 5553 July, 2002.

² *Ibid.*, Companies Bill section 19 and Schedule 2.

³ Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, DTI, June, 2002

⁴ Higgs, *Review of the Role and Effectiveness of Non-executive Directors*, DTI, January, 2003.

⁵ Higgs, 2003, summary of recommendations.

⁶ Higgs, 2003, *para*, 4.2

⁷ [1998] 2 BCLC 646

⁸ *Ibid.*, at 653

This passage was cited by Hart J in his judgment in *Landhurst Leasing*⁹; a judgment that includes a summary of previous judicial pronouncements on the connected issues of collective responsibility and the extent to which an individual director may trust his or her colleagues. Lindsay J in the *Polly Peck* case stated

“As I have quoted them, these allegations seem to me to confuse what is the duty of the board as a whole with what are the duties falling to each individual respondent director. An individual director who has not been individually charged by the board with the task of (for example) instituting adequate financial controls, might or might not be in breach of a duty to the company to use his best endeavours to procure their institution but not, without more with their absence. Were that not so, a director who had striven manfully to introduce them would be as much in breach as one who has resisted them.”¹⁰

Hoffmann LJ (obiter) in *Bishopsgate Investment Management Ltd v Maxwell* stated: “... the existence of a duty to participate must depend on *how the particular company’s business is organised* and the part which the director could reasonably have been expected to play”¹¹

As to the extent to which an individual director may trust his or her colleagues, Hart J stated in *Landhurst Leasing* that:

“... even when there are no reasons to think the reliance is misplaced, a director may still be in breach of duty if he (sic) leaves to others matters for which the board as a whole must take responsibility.”¹²

Boards reporting compliance with the Combined Code of Best Practice should have drawn up a list of matters that they reserve to themselves. This list may not itself define the extent of a board’s collective responsibility as there may be a gap between the matters which a board should, in the view of a court, reserve to itself and the matters it does so reserve. Such a list will, however, assist a court in deciding “how the particular company’s business is organised.” Higgs recommends that individual boards should publish in the annual report a statement describing how the board operates and that this should include a high level statement of which decisions are taken by the board and which are delegated to management.¹³ Overall it can be concluded that collegiate responsibilities in the boardroom is an area that has not yet been fully worked through in the UK courts.

The role of the non-executive in the unitary board

A major problem in describing *the* role of the non-executive is that the role is sometimes best viewed as that of team member but at others it is better described as that of referee. The Hampel Report states:

“Non-executive directors are normally appointed for their contribution to the development of the company’s strategy. This is clearly right. We have found general acceptance that non-executive directors have *both a strategic and a monitoring function*. In addition, and particularly in smaller companies, non-executive directors may contribute valuable expertise not otherwise available to management; or they may act as mentors to relatively inexperienced executives. What matters in every case is that the non-executive directors should command the respect of the executives and should be able to work with them in a cohesive *team* to further the company’s interests.”¹⁴

⁹ *Secretary of State for Trade and Industry v Ball* also known as *Re Landhurst Leasing plc* [1999] 1 BCLC 286 at 346

¹⁰ *Re Polly Peck International plc (No 2)* [1994] 1 BCLC 574 at 594 and cited by Hart J in *Landhurst Leasing* [1999] 1 BCLC 286 at 345

¹¹ [1993] BCC 120 at 139 and cited by Hart J with emphasis in *Landhurst Leasing* [1999] 1 BCLC 286 at 345-346

¹² [1999] 1 BCLC 286 at 346

¹³ Higgs, 2003, *para.* 4.8

¹⁴ Hampel Committee, *Final Report* (January 1998), *para.* 3.8 (emphasis added): http://www.ecgi.org/codes/country_documents/uk/hampel_index , This paragraph was quoted by Higgs in his consultation paper

Despite the fact that the current UK corporate governance mechanisms rely heavily on the non-executives as monitors, Hampel's description placed their potential strategic contribution ahead of their monitoring function at least when appointments are being made. Hampel also saw the board functioning as a team. Some of Higgs' respondents also view the board as a team:

"Boards should always remember that they are working as a team on behalf of the shareholders."

Morley Fund Management, in response to Higgs' consultation paper

"We also agree with the observation that Non-executives and Executives should work together as a cohesive team so that individual Non-executive Directors can contribute different skills and experience to that team"

Scottish & Newcastle plc, in response to Higgs' consultation paper

Higgs' report recommends that a description of the role of the non-executive director should be incorporated into the Code. His proposed description can be seen in Figure 1.

Strategy: Non-executive directors should constructively challenge and contribute to the development of strategy.
Performance: Non-executive directors should scrutinise the performance of management in meeting agree goals and objectives and monitor the reporting of performance.
Risk: Non-executive directors should satisfy themselves that financial information is accurate and that financial controls and systems of risk management are robust and defensible.
People: Non-executive directors are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, senior management and in succession planning.

Figure 1. Higgs' proposed description on the role of the non-executive director

Like Hampel, Higgs places the strategic role at the head of his list. However, Higgs moves away from the use of the word "team" and places the idea of "challenge" ahead of "contribution." In place of working as a team, Higgs suggests that "it is important to establish a spirit of partnership and mutual respect on the unitary board."¹⁵ It should be remembered that the word "partnership" had been used in the UK in attempts to reconstruct the relationship between employers and trade unions. In the UK, therefore, "partnership" brings with it the idea of a veiled conflict. Despite Higgs' statements of support for the unitary board, I submit that his construction of the board is divisive.

The unitary board; no legal distinction between the different types of director

Respondents to Higgs' consultation paper were largely agreed on the link between the concept of the unitary board and the Company Law Review's expression of directors' duties. The responses to Higgs quoted in Figure 2 illustrate these views.

These respondents locate the threat to the unitary board in a potential legal difference between the two types of director. I submit that the more real threat to the unitary board lies in Higgs' move away from the idea of the board as a team and towards governance and monitoring role for the non-executives in which the two types of director have become two halves of a "partnership." The Accountancy body ACCA was one respondent alert to this more real threat:

"ACCA supports the present unitary board structure. It is important that any changes arising from this review do not have the effect of dividing the board by preventing executive and non-executive directors from working as a team."

ACCA, in response to Higgs' consultation paper

¹⁵ Higgs, 2003, para. 6.3

A	<p>“We believe that the UK unitary board concept has been a major factor in assisting non-executive directors to perform their role and responsibilities, including the increased monitoring role. ... It involves all directors with a proper sharing of responsibilities.”</p> <p>“We strongly support the proposed statutory statement of directors’ duties and firmly believe that to seek to distinguish in law between the executive and non-executive directors would damage the unitary board concept.”</p> <p><i>PricewaterhouseCoopers</i></p>
B	<p>“We are in favour of the concept of unitary board as the most appropriate mechanism for discharging collective responsibility of the board as a whole. Boards act as teams and need to have a common purpose. Creating a separate agenda for NEDs would result in a two-tier board structure which we oppose.”</p> <p>“There should be parity of treatment between executive and non-executive directors if the UK model of unitary board is to be preserved.”</p> <p><i>CIMA</i></p>
C	<p>“Most CBI members strongly believe in a unitary Board and support the view that all directors, whether executive or non-executive, should have the same responsibilities under company law, although the extent of individual liability may differ depending on the facts of the case, as determined by the courts. Any distinction between the legal responsibilities of executive and non-executive directors would create a de facto two tier Board.”</p> <p><i>CBI</i></p>
D	<p>“... we believe that the unitary board has served the UK well and for this reason believe that there should not be any distinction between the legal duties of executive and non-executive directors.”</p> <p><i>BBA (British bankers association)</i></p>
E	<p>“We believe in the concept of a unitary board and support the view that all directors should have the same responsibilities under company law, although the extent of individual liability may differ depending on the facts of the case as determined by the courts. Any distinction would lead to a de facto two-tier board.”</p> <p><i>GlaxoSmithKline plc</i></p>
F	<p>“We believe there should be no legal distinction between different types of director. Every member of the board should have the same over-arching obligations.”</p> <p><i>IOD</i></p>

Figure 2. Responses to Higgs on the unitary board

The legal responsibilities of the non-executive director

In this part of the article, I consider the present position of non-executives in UK law. At first this seems to be a simple matter. It was decided in the case of *Dorchester Finance Co v Stebbing*,¹⁶ in respect of a director’s duty of care and standard of care, that no distinction was to be drawn between executive and non-executive directors.

(i) The Standard of Care

In recent years the standard of care has developed from a purely subjective duty as expressed in *Re City Equitable Fire Insurance Co Ltd*¹⁷ to the combined subjective / objective standard as expressed in section 214(4) of the Insolvency Act 1986. The subjective version states: “a director need not exhibit in the performance of his duties a greater degree of skill than may

¹⁶ [1989] BCLC 498

¹⁷ [1925] Ch 407. I have characterised the City Equitable test as purely subjective. Other writers have contested this view. Walters for instance is struck by the “flexible objectivity” that can be seen in the application of the test as much as by its subjectivity. See Walters “Directors’ Duties: The Impact of the Company Directors Disqualification Act 1986”, *Company Lawyer*, 2000, 21, (4) 110-119, 111 and note 21.

reasonably be expected from a person of his knowledge and experience.”¹⁸ The combined subjective / objective standard was brought into the common law by Hoffmann J. in *Norman v Theodore Goddard* where he was “willing to assume that the test is as Miss Gloster QC submits [i.e. as given in s.214(4) of the Insolvency Act 1986],”¹⁹ Later, as Hoffmann L.J., in *Re D’Jan of London Ltd* he stated:

“In my view, the duty of care owed by a director at common law is accurately stated in s. 214(4) of the Insolvency Act 1986. It is the conduct of -

‘a 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 that director has.”²⁰

Following the Department of Trade and Industry’s (DTI’s) review of company law the government issued the White Paper *Modernising Company Law* in July 2002. The White Paper states:

“The Government agrees that:

- directors’ general duties to the company should be codified in statute largely as proposed in the Final Report This statement of duties will replace the existing common law and also section 309 of the [Companies] Act [1985]; ...
- all the directors of a company should be subject to the same set of general duties, regardless of any particular duties they might have under service agreements as employees.”²¹

This statement gives strong support to the proposition that legally there is no difference between executive and non-executive directors. The White Paper includes a Draft Companies Bill that in turn includes the proposed codification of directors’ duties mentioned above. The proposed formulation of the standard of care, skill and diligence is as follows:

“A director of a company must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both –

- (a) the knowledge, skill and experience which may reasonably be expected of a director *in his position*; and
- (b) any additional knowledge, skill and experience which he has.”²²

It can be seen that the proposed formulation draws heavily on the wording of section 214(4) Insolvency Act 1986.

The statutory codification of directors’ general duties will replace the existing common law. This is achieved in the draft bill by detailing the duties in Schedule 2 and providing in section 19 that “Schedule 2 ... has effect in place of corresponding equitable and common law rules”. This will mean that, for instance, the judgment in *Dorchester Finance Co v Stebbing* will no longer apply. However, it will be replaced and the White paper recommends that “all the directors of a company should be subject to the same set of general duties”.²³ In the draft Schedule 2 headed “General principles by which directors are bound”, the directors’ duties all take the form “A director (or former director) of company must (or must not) ...”.²⁴

Both the current and proposed versions of the basic legal principles apply the same tests to executives and non-executives. However, I submit that it is possible for the courts to apply the tests (both old and new) so as to produce different legal results for executives and non-executives. There is empirical evidence that boards are usually organised so that non-executives have a “special set of responsibilities”.²⁵ Also, the fact that the DTI has commis-

¹⁸ [1925] Ch 407 at 428

¹⁹ [1991] BCLC 1028 at 1031

²⁰ [1994] 1 BCLC 561 at 563 (emphasis added)

²¹ *Modernising Company Law*, *op. cit.*, para. 3.5

²² *Ibid.*, Draft Companies Bill, Schedule 2, 4, emphasis added.

²³ *Modernising Company Law*, 2002, para. 3.5

²⁴ Draft Companies Bill, Schedule 2, *passim*.

²⁵ Demb and Neubauer, (1992) *The Corporate Board: Confronting the Paradoxes* (Oxford University Press)

sioned Higgs' review of the role of non-executives indicates that there is official recognition that their role and functions are different.²⁶ Thus, when a non-executive's behaviour is judged against the standard of his or her "*functions in relation to the company*" or "*position*" the non-executive nature of those functions or that position will have to be taken into account by the court.

(ii) *The courts' treatment of non-executives*

I now turn to some cases where the courts have acknowledged the executive / non-executive distinction. It should be pointed out that most of the cases referred to relate to the disqualification of directors under the Company Directors Disqualification Act 1986. However, it is submitted that the approach of the courts in these cases fits well with my reading of the subjective / objective test of the standard of care expressed above. In *Re Stephenson Cobbold Ltd (in liquidation)*²⁷ the issue was whether a non-executive director, a Mr Henstock (H), should be disqualified under section 6 of the Company Directors Disqualification Act 1986. Under section 6 a director should be disqualified if the court is satisfied that his conduct as a director (of a now insolvent company) makes him unfit to be concerned in the management of a company. The link between the duty of care owed by a director at common law and a finding of unfitness under s.6 of the Company Directors Disqualification Act 1986 is not simple and direct.²⁸ Section 6 itself simply requires the court to make a disqualification order if it is satisfied "that his conduct as a director ... makes him unfit to be concerned in the management of a company". Schedule 1 of the 1986 Act lists "Matters for determining Unfitness of Directors" and the first item on the list is "Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company."²⁹ The list in Schedule 1 is not exhaustive³⁰ and the decision to disqualify or not therefore turns to a large extent on the court's assessment of the director's conduct as a director in the particular circumstances. The judgment in *Re Stephenson Cobbold Ltd (in liquidation)* includes the following:

"I refer to Mr Henstock's business experience in some detail because it is the Secretary of State's case that that experience demonstrates that Mr Henstock was experienced in the running of the financial side of companies. ... I do not propose to consider the conduct of which complaint is made in this application on the basis that Henstock was a man experienced in the running of the financial side of companies. I shall deal with this application *on the basis that Mr Henstock was a non-executive director* of Stephenson Cobbold, and for a period was, as the evidence shows, also a signatory on Stephenson Cobbold's bank account."³¹

Although the combined objective / subjective standard of skill and care is not referred to explicitly, it is clear that that was behind the judge's ruling. Had Mr Henstock's actual (subjective) "general knowledge, skill and experience" been greater, his conduct would have been measured by that standard. As he was not actually experienced in company finances, his conduct was judged "on the basis that Mr Henstock was a non-executive director" which I suggest is the judge's application of the objective standard to Mr Henstock's circumstances. In other words Mr Henstock's "*functions relation to the company*" or "*position*" can be summarised by reference to his non-executive status.

²⁶ Higgs, *op. cit.*

²⁷ *Re Stephenson Cobbold Ltd (in liquidation)*, *Secretary of State for Trade and Industry v Stephenson and others* [2001] BCC 38, [2000] 2 BCLC 614

²⁸ See Walters, *op. cit.*, for a discussion of this link.

²⁹ This is a matter that is "applicable in all cases" i.e. whether the company has become insolvent or not.

³⁰ "The words 'in particular' suggest that the court is not confined to looking at those matters": *Re Bath Glass Ltd* [1988] BCLC 329 at 332

³¹ [2000] 2 BCLC 614 at 620 (emphasis added)

*Re Barings plc (No 4), Secretary of State for Trade and Industry v Baker and others (No 4)*³² concerned an application under s.17 of the Company Directors Disqualification Act 1986 from a disqualified director (Mr Norris also referred to as N) to be given leave to continue to act as a director of three other companies (JBEL, CCC and SWL). The court held that:

“Since N’s directorships of JBEL and CCC did not involve executive responsibilities there was no possibility that the inadequate discharge of *executive responsibilities* which justified the disqualification order made against him would recur. N would be given leave to continue to be a director of JBEL and CCC *on condition that he remained a non-executive*, did not enter into a contract of employment and that his directorship remained unpaid.”²³

Again, the court has been willing to make a distinction between executive and non-executive functions. In order to reach this decision Sir Richard Scott V-C stated that, when considering the granting of leave under s.17, the improprieties which led to the original disqualification order have to be kept in mind. In Mr Norris’s case:

“The charge, shortly expressed, was that he had not given a number of highly significant events ... the attention that they had merited and that his senior position in Barings, and the responsibilities of that position, required him to have given”²⁴

Further:

“This is not a case in which the disqualification order was made necessary by a need to keep Mr Norris out of the boardroom in order to protect the public from dishonesty or impropriety.”²⁵

The implication is that while Mr Norris failed in the day to day management of “highly significant events” and is thus unfit and must be disqualified, he is not dishonest and can be trusted with non-executive responsibilities. I submit that a lapse of attention in a non-executive director could potentially be as serious as a similar lapse by an executive. This can be illustrated by thinking of a non-executive performing a monitoring role, for instance on the audit committee, where a lapse could allow poor governance to precipitate a disaster such as Enron.²⁶ When put in this way, the grounds for granting Mr Norris leave under s.17 seem rather weak. Also, *Re Barings plc (No 4)* can be contrasted with *Euro RSCG SA v Conran*.²⁷ In *Euro RSCG SA v Conran* a contract of employment included a restrictive covenant under which the employee agreed not directly to engage in competing business. The issue was whether the employee was in breach of the covenant when he became a non-executive director of a competitor. The court held that there was breach of contract because to become a director, whether executive or not, is to assume responsibility to manage a company’s affairs and therefore amounts to engaging in its business. Applying this reasoning to Mr Norris, in acting as a non-executive director of JBEL CCC and SWL he should be viewed as “assuming responsibility to manage” the affairs of these companies. However, given that Mr Norris was already subject to a s.6 disqualification order another court must have found that his conduct as a director of Barings him made him “unfit to be concerned in the management of a company”. The cases are inconsistent and, when read together, they highlight the weakness of the judgment in *Re Barings (No 4)*. They could perhaps be reconciled by suggesting that the court’s focus in *Euro RSCG SA v Conran* was on the potential for non-executives to manage whereas the court’s focus in was on Mr Norris’s actual functions as a non-executive of JBEL, CCC and SWL. However, this reconciliation itself serves to devalue the functions of non-executive directors. In both *Re Stephenson Cobbald* and *Re Barings plc (No 4)* the non-executive role is conceived of as less demanding than the executive one. However, where

³² [1999] 1 BCLC 262

²³ *Ibid.*, at 263 (emphasis added)

²⁴ [1999] 1 BCLC 262 at 264-5

²⁵ *Ibid.*, 265

²⁶ Another example of a non-executive lapse can be seen in the case of *Secretary of State for Trade and Industry v Ball also known as Re Landhurst Leasing plc* discussed below.

²⁷ The Times November 2 1992

non-executives are appointed because of their particular skills or qualifications that will be taken into account by a court in assessing their culpability. In *Re Continental Assurance of London plc*²⁸ Mr Burt was a senior executive of a bank and involved in negotiating bank loans to the company CAL, and in that capacity he was appointed as a non-executive director of CAL. The judgment states:

“... I do not find that Mr Burt knew what was going on. I do find, however, that any competent director *in his position* would have known what was going on; and that failure to know displays serious incompetence or neglect in relation to the affairs of CAL.”²⁹

Again, in the case of *El Ajou v Dollar Land Holdings plc (No 1)*³⁰ it was decided that, in the circumstances, a “nominee director with non-executive responsibility” could be identified as the company’s directing mind. Indeed, in some circumstances the courts will view the role of the non-executive director as more onerous than that of (some of) the executives. In the case of *Secretary of State for Trade and Industry v Ball also known as Re Landhurst Leasing plc*³¹ the court placed the onus of monitoring a director’s remuneration on the non-executive, as opposed to the executive, directors. In that case a Mrs Ball, the wife of the managing director and herself a director of the company, had been “remunerated by the company at the rate of £40,000 per annum despite the absence of any evidence of her having provided services.”³² The court held that:

“It must have been clear to every director from 1998 onwards, and at all times to the shareholders, that this remuneration was being paid. This seems to me to be quintessentially a matter which the non-executive directors could have raised if they had thought fit to do so, and it may be said that they should have done.”³³

This clearly aligns the legal responsibilities of non-executives with the monitoring functions set out in the UK’s Combined Code on Corporate Governance. Based, on the above analysis, it is submitted that the courts do consider the actual position of non-executives and their functions in the context of the particular company.

Conclusions

The UK’s unitary board has been changing with developments in corporate governance best practice. Before the publication of the Cadbury Report in 1992 it was probably true that ... “[n]on-executive directors [were] normally appointed for their contribution to the development of the company’s strategy.”³⁴ Following implementation of the Cadbury Code, which although a voluntary code has achieved a high level of reported compliance, the number of non-executives on UK boards has increased and mechanisms for their appointment have been improved. As the Cadbury Code has been developed into the current Combined Code, the monitoring burden placed on the non-executive directors has increased. If Higgs’ recommendations for changes to the Combined Code are accepted this monitoring role will be further increased.

The concept of the unitary board is grounded in its shared decision-making and collective responsibility. The importance of the UK board’s collective responsibility has been acknowledged the courts, but it has proved difficult for the courts to use in their judgments. Collective board responsibilities are much more difficult to formulate and operate than individual director responsibilities. In the UK both statutory law and case law clearly state that *all* direc-

²⁸ [1997] 1 BCLC 48

²⁹ *Ibid.*, at 56

³⁰ [1994] 2 All ER 685

³¹ [1999] 1 BCLC 286

³² *Ibid.*, at 342

³³ *Ibid.*

³⁴ Hampel Report, *para.* 3.8

tors have the same legal duties and are subject to the same standard of care. Responses to Higgs' consultation paper indicate that the concept of the unitary board has been collapsed into meaning that there *must* be no legal difference drawn between the two types of director.³⁵ Despite strong support for the idea of the unitary board, at least one of Higgs' respondents acknowledged the problems that might arise if no such distinction is drawn:

"It must in principle be right that, as now, all directors share responsibility for the actions of the board. However, in an increasingly litigious and complex society, it is unrealistic to maintain that NEDs, who are part-timers, are in a position to have the same influence on the way the company is run as are the executive. Nor are they paid commensurately for undertaking such risks."

British American Tobacco plc, in response to Higgs' consultation paper

At the same time there is a growing understanding that the UK courts will interpret the standard (to be applied in all cases) by reference to the role of a particular director within the context of a particular board. This article has demonstrated how, in a variety of judgments, the UK courts have drawn distinctions between executive and non-executive directors. It has also revealed inconsistencies in the ways the two types of director are viewed by the courts. Sometimes the courts appear to demand less of the non-executives,³⁶ and sometimes much more.³⁷

In conclusion, I submit that the UK's unitary board is strongly supported by Higgs' respondents and in Higgs report. However, it has been under threat from the outset, the danger being that the use of non-executives as monitors would produce two distinct groups in the boardroom; the "doers and checkers".³⁸ This danger was mentioned by several of Higgs' respondents, for example:

"The increasing burden of regulatory and governance responsibilities may lead to non-executive engagement being concentrated in these areas. We believe that it would be regrettable if this happened at the cost of engagement in the development of strategy."

3i, in response to Higgs' consultation paper

"There is a danger that the role of the non-executive will soon be cast exclusively as a corporate watchdog – overshadowing the greater contribution that they can make through their wise counsel and business experience."

Brewin Dolphin Securities Ltd, in response to Higgs' consultation paper

I submit that if Higgs' recommendations are accepted and the Combined Code is amended accordingly, the UK's unitary board will cross the line from fact into fiction. It will operate more like a two tier board and will be described in language that is more two tier than unitary. Higgs' report includes a recommendation that the non-executives should meet separately from the main board at least once a year.³⁹ This will mean that there are three types of meeting; meetings of the top management team (this will include all the executive directors, but not the non-executives); meeting of the non-executives; and meetings of the full board. This mirrors the types of meetings in the two tier system. The board will be described as a "partnership" rather than a team, and the non-executives' first role in strategy will be to "challenge". Only, one of Higgs' respondents recognised this:

"We already have two types of director. They should have different legal duties. I believe we should rapidly move towards a fully effective two-tier board system for our major (ie FTSE 100) companies."

Lord Clement-Jones, in response to Higgs' consultation paper

The analysis in this article supports Lord Clement-Jones' minority position.

³⁵ See Figure 1.

³⁶ For instance in *Re Stephenson Cobbold Ltd (in liquidation)*

³⁷ For instance in *Landhurst Leasing*

³⁸ An expression used by Peter Morgan of the Institute of Directors in 1992 quoted by Coulson-Thomas *Creating Excellence in the Boardroom* (London, 1993), 226.

³⁹ Higgs, 2003, para. 8.8