Making and Regulating Business Judgement: Judicial Practice, Logics and Orders

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Abstract

The paper is about judicial practice in litigation brought against directors of a company, Continental Assurance of London plc (*Continental)*. The paper utilizes the "judgement", a contemporaneous text of the legal ruling in which the judge explains the reasoning behind his decision. By drawing on a judge's narrative account, and combining it with social, organizational and legal theorising, the paper demonstrates how individual action is connected to societal order through mechanisms of practice and logics. This processual analysis of judicial practice is valuable for the development of practice theorising that has been criticised for an inability to handle big topics, as well as the development of micro-foundations of institutional theory.

Introduction

The paper analyses the practice of a judge in litigation when called upon to examine the decisions made by the directors of *Continental*. In the case of *Re Continental*,[1] the litigation started with the liquidator on behalf of the company, seeking personal contribution from the former directors to the company for the alleged losses suffered as a result of the directors' actions[2]. This cause of action triggered judicial action that involved the judiciary considering the particulars of the claim, the response and the evidence in support, deciding whether to subject director decision-making to review at law, and associated issues of liability.

[1] *Re Continental Assurance Company of London plc (in liquidation)(No 4)* [2007] 2BCLC 287
[2] See Insolvency Act 1986, ss 212 and 214

The study is timely as there is a growing interest in the treatment of business judgement by the judiciary. While directors make business judgement, judges are called upon to review and regulate the making of business judgements when litigation is brought against directors. Corporate law places directors at the top of a corporate hierarchy, possessed of all of the powers of the company, to pursue the commercial objectives of it. Authority conferred, corporate law does however, provide for accountability in respect of its exercise, at the instigation of shareholders, the company itself, liquidators and the State. These accountability mechanisms created at the institutional level of the law, are perpetuated and developed through judicial practice across the institutional orders. However, a perceived judicial deference towards business judgement is at the centre of debate about the controversial relationship between director authority and director accountability in law.

Our particular focus of attention is a judge administering company law as it relates to director's business judgement. We analyse the "judgement", a contemporaneous text of the specific judge's decision by taking a narrative approach to the case (Langley, 1999; Brooks and Gewirtz, 1996), and using theories of practice (Schatzki, 2017; 2006) and logics (Thornton, Ocasio and Lounsbury, 2012). This methodology, complemented by the application of legal, organisation and social theory to decided case-law, enables us to identify a theoretical relationship between the individual judge's action, collective judicial practice and plural logics of the social order.

Empirically, the judicial practice revealed by analysis of the judgment, displays patterns, including beliefs, values and assumptions, that appear to guide the judge's frames of reference, the legal theories he engages with, his narrative statements of the law and the facts, and his reasoning whereby he arrives at a decision. We label these contrasting patterns as a 'creditor- regarding logic', and a director-regarding, 'director's business judgment logic'. These available but competing logics, are 'captured' particularly through the language and rhetoric of the judicial narrative, as the judge appears to mediate the contest between the two logics as he reasons his way to a decision through the

litigation process. In the end analysis, the judge rejects the creditor-regarding logic and adopts categorically a director-regarding business judgment logic. The authority of the director granted through the institution of corporate law is respected, and the business judgments made pursuant to that authority are afforded protection.

The study reveals how available institutional logics, here labelled creditor-regarding and director-regarding, are enacted by the relationality between judicial practice and institutional orders. Ultimately, through the judicial narrative of the judgement, as it reveals the agency of the judge within the specific context of the case, we can identify how the litigation process and the judical practice that constitutes the process has the potential to shape the future of the institution of corporate law and reverberate through the adjacent fields of commerical practice and corporate governance. Our bringing to light the connection between individual action and societal order is valuable to practice theories which are subject to criticism that they are unable to attend to the individual or deal with big topics well (Hui, Schatzki, & Shove, 2017:2) as well as to institutional theory, where the concern is a lack of micro-foundations. The findings reasonate with arguments that the action available to any individual within a practice, the judge is this case, reflects agency as a socially embedded process of engagement (Emibayer & Mische, 1998).

Corporate law and litigation against company directors

Company law is a social structure composed of cultural-cognitive, normative and regulatory elements (Scott, 2003) that provide stability and meaning to the incorporation and regulation of the registered company and its commercial activities. Corporate law in the UK derives its mainframe from the combination of hard and soft law legal structures, principally, and for our present purposes, those found in the Companies Act 2006 and the Insolvency Act 1986 (as amended by the Enterprise Act 2002) (the Acts).

The field of corporate law also consists of common law precedents, that is judge-made law, whereby judicial rulings in one court bind future courts in specified circumstances. This combination of statute and common law precedent, both enables and constrains director activity, and lies at the epicentre of the adjacent field of corporate governance, and the ongoing debate around balancing director authority and accountability. Directors exercise the powers of the company in pursuit of the commercial enterprise, but to counter-balance these enabling provisions, accountability mechanisms are provided, first in the duties owed under the Companies Act 2006[3], and then in the shareholder and other company constituencies' rights to initiate a cause of action against the director in relation to loss suffered by the company resulting from the exercise of authority[4].

In this paper we study litigation involving the business judgement of directors. A variety of civil (as opposed to criminal) causes of action can be commenced by various parties for a number of reasons. The judge, when considering a cause of action against a director must decide whether as a part of his practice, he is to review business judgments or not. A judge has a degree of discretion as to what decisions he will and will not review, and on what basis.

How judges act and rule in litigation with regard to business judgement while a very practical question, poses a theoretical challenge of understanding the relationship between individual judicial agency and collective practices and logics that prevail within the fields and societal context in which judicial action is embedded. To begin to examine this question further the next section introduces practice and logics perspectives of organising.

Practices and Logics

A Practice Perspective

Practice theorising is an approach to understanding how people act in social contexts, how actions relate to structures, and how practices constitute reality

[3] Companies Act 2006, ss 171-178, 182
[4] See Companies Act 2006, Pt 11

(Feldman and Orlikowski, 2011). The main supposition of the practice perspective is that social life consists of embodied, materially, interwoven practices ordered across time and space (Hui, 2017). Amidst the different approaches to practice theorising that are available Schatzki's concept of practice, with its linkage between actions, practice organisers and social order serves our 'empirical' and 'theoretical' interests in understanding how judicial practice is interpenetrated with social order and consequential for that order (Feldman and Orlikowski, 2011).

A practice is a pattern filled out by a multitude of actions (Hui, 2017:53), that is, organised sets of doings and sayings, with human activity tied to the body and the evolving practices of which it is a moment (Schatzki, 2017; 2006). The action and sequences of performances that compose a practice are organized by: rules, teleo-affective structures, practical and general understandings. These are normative, teleological and affective structures guiding what we do and what makes sense. Practices connect to material arrangements – bodies, artefacts, living creatures, and things of nature – to form practice-arrangement bundles. Social order consists of bundles of practices that are related, via: common actions; chains of action; motivating events; participants in one bundle being intentionally directed to other bundles; physical connections and causality (Schatzki, 2017:134). Practices become taken-for-granted and actors can be seen to take one another into account as they carry out their own such practices. Such bundles connect to form wider constellations of practices and arrangements, and all social phenomena consist of sectors, slices or aspects of bundles and constellations" (Schatzki, 2017:133). Bundles and constellations form one gigantic nexus of practices and arrangements, which Schatzki calls 'the plenum of practice'. So, for Schatzki and others the social world is a mesh of material-practice arrangements with people, as social beings, constituted by practices, discourses and institutions such as government and corporations (Schatzki, 2017; Watson, 2017).

The reference to institutions raises the challenging prospect of complementing practice and institutional logics perspectives of organising. Attention to

practice is common to both perspectives, as is a shared interest in discourse and language. A difference, and hence a potential synergy, lies in the contrasting emphasis of the logics perspective on the institutional order of society on the one hand, versus the activity emphasis of the practice perspective, on the other. Complementing the practice perspective, the logics perspective views practices are fundamentally related to institutional logics, such that identifiable activities can be examined for a relation to the logics, informing these practices. Logics are characteristics of societal orders but actors may draw on multiple, and often contradicting, institutional logics from different orders. Practices differ depending upon the logic they are informed by (Thornton, Ocasio and Lounsbury 2012: 132).

An Institutional Logics Perspective

Institutional logics are 'the socially constructed, historical patterns of cultural symbols and material practices, including assumptions, values and beliefs, by which individuals and organisations provide meaning to their daily activity, organize time and space, and reproduce their lives and experiences' (Thornton, Ocasio and Lounsbury, 2012:2). Practices are manifestations and reflections of institutional logics, that guide how to act in a particular situation (Thornton, Ocasio and Lounsbury, 2012:129/130). The relationality and mutual constitution (Feldman and Orlikowski, 2011) of logics, practices and action is mediated by social interaction mechanisms of decision-making, sense-making and collective mobilisation.

Institutions of society are organized by institutional orders, for example: family, state, religion, market, profession, corporation and community, each being a domain of institutions built around a key cornerstone institution. Each order is a governance system made up of cultural symbols and material practices that provide a frame of reference, which pre-conditions sense-making choices. Symbols and material practices are "building blocks" of the order, for example, sources of legitimacy, authority, identity, norms, bases of attention, as well as mechanisms of control that specify organising principles that shape preferences, interests and behaviour.

The "microfoundations" of the institutional logics perspective theorise that "…an array of institutional logics may be available to actors, but only certain institutional logics or categorical elements of logics are readily accessible and likely to be used" (Thornton, Ocasio and Lounsbury, 2012:171). Furthermore "individuals" capacity to recognise and attend to institutional logics and apply them strategically is based on their availability and the accessibility of prior knowledge and experience in relation to the differences in institutional orders of society.

Language 'embodied in theories, frames and narratives and embedded in vocabularies of practice, provides a critical lynchpin by which institutional logics are constructed and meanings and practices are brought together' (Thornton, Ocasio and Lounsbury, 2012:150). Here we see both practice and logics perspectives converge on the importance of discourse, understood here as situated 'language in use' (Schatzki, 2017; Heracleous and Marshak, 2004). Schatzki (2017) emphasises the discursive component of practices viewing language as having a structuring significance for social life in contributing to the hanging together of bundles and constellations…" (Schatzki, 2017:140). Similarly, scholars of the logics perspective identify that language mutually constitutes practices and symbolic constructions, through the emergence of field-level vocabularies of practice (Thornton, Ocasio and Lounsbury, 2012:149). Logics "are culturally constituted through the emergence of vocabularies of practice, as theories, frames and narratives (three forms of symbolic representations) coalesce into a common language for sense-making, decision-making and mobilisation around categories of practice" (Thornton, Ocasio and Lounsbury, 2012:149). Common ground which is critical for collective action is based on practices participants share (Bechky, 2003), as well as a common vocabulary about those practices (Thornton, Ocasio and Lounsbury, 2012). Practices then '…are not conceptualized as purely localised phenomena, but are institutionally constituted and shaped' (Thornton, Ocasio and Lounsbury, 2012: 135), and so it is that we can identify and connect the worlds of institutions and the worlds of the actors who populate them and practice within them (Lawrence et al., 2011).

As with others whose work is heavily discursive (Levina and Orlikowski, 2009), judges use of language, including narrative and rhetoric (Gewirtz, 1996) and reading of texts is critical to their work administering company law. It is to their practice in relation to business judgement, and specifically their actions and decisions in respect of, to review or not review business judgement that the discussion proceeds. To analyse judicial practice the paper focuses empirical attention on the written text of a judgement.

Business Judgement and Judicial Practice

Business decisions and judgements are an everyday activity in the lives of directors. The contrasting arguments for more or less authority and/or accountability, more or less judicial review, and the rationales and governance implications behind all of these, provoke a need for insight as to what is business judgement, and explanation about how and why judges decide to review or refuse to review business judgement. This concept, the business judgement, has perhaps been 'black-boxed' (Woolgar and Neyland, 2013). In law, what we refer to as the business judgment 'rule' is sometimes applied and sometimes not, and so through this examination of judicial and director practices we can better understand the existence, practices and effects of business judgement. "Business judgement" is therefore situated in the work of directors but, more importantly for our present purposes, the work of the judge in review or non-review in the course of litigation. Directors make and judges regulate business judgements. Judges' practice in litigation is directly related to directors' practice through the causes of litigation brought by parties and as such judicial practice transpires in relation to bundles of practices within and across a variety of institutional orders and fields.

The litigation process can be understood as unfolding in stages (Langley, 1999). Accountability under law for business judgement is pursued through a cause of legal action, which is initially generated out of a series of events that take place in the field of business enterprise. The cause of action triggers the judicial process within which the judge must decide to review or not review

the business judgments of the directors concerned. The judge, when considering action must decide whether the action taken by the director was negligent or otherwise in breach of statutory provisions, and this requires a judicial review of the actions of the director. The judge, having reviewed or taken a decision not to review business judgments which lead to those actions then arrives at a conclusion and delivers a ruling which in the English common law legal system has the potential to create a legal precedent which is binding on future courts. In this way, the judge can create law, which contributes to the regulation of directors' action in field of corporate enterprise, and in turn impacts on the corporate governance mainframe that seeks to balance the director's legal authority so to act, and the accountability in law for those actions.

In the case of *Re Continental* case that follows, the cause of action was commenced by the liquidator on behalf of the company, seeking personal contribution from the former directors to the company for the alleged losses suffered as a result of the director's actions. The remainder of the paper examines the narrative account of judicial activity and practice, and specifically how the judge accesses, navigates and mediates available and accessible plural logics, which characterise the institutional orders within which this practice is embedded?

Data Collection and Analysis

Case law exemplifies the idea that texts circulate within and inform practices (Schatzki, 2017; Maquire and Hardy, 2013), it is core to the institution of law. Case law represents an account by a participant actor, the judge, who organises a set of events and accounts of actions into a cohesive whole narrative. In keeping with a view that language constitutes activity and practices, cases are a highly reliable record of what individual judges say and do, in this instance, when deciding whether to review or not review the decisions of director. By affording immersion in the case of litigation and by being rich in revelation of the doings and sayings of judges and other parties to the litigation, cases facilitate understanding of how judicial action is organised, what was done,

what could have been done, what was brought to the judgement and what was not. As such they afford a practice ontology and processual understanding (Feldman and Orlikowski, 2011; Langley et al, 2013; Langley, 1999).

Re Continental concerned a very expensive liquidation, the costs of which well exceeded £6million. The hearing ran for 72 days and the recorded judgement was reported over 154 pages in length (95,167 words). An abductive analysis (Locke, Golden-Biddle and Feldman, 2008) of the case was developed by drawing on the empirical data offered by the full text of the judgement, and connecting that to theories of practice and logics, to generate a theoretical account of how individual action relates to collective practices, logics and orders.

The case was subjected to several iterations of reading, analysis, discussion and presentation involving two researchers, that is, the authors, one of whom is a lawyer. The text was first analysed for indicators of the four organisers of practice: 'rules, understandings (general and particular), and teleo-affective structures'. With a developing sense of understanding of the practice at the level of individual actor – Justice Park– we then sought to understand and embed this appreciation of judicial practice in its institutional context by augmenting the practice perspective with a logics perspective.

Further readings enabled us to identify institutional orders and logics involved in the case. The components of practice and orders pointed the way to the logics, by relating judicial practices when reviewing the business judgment of the directors to wider patterns of cultural symbols and practices (Thornton, Ocasio and Lounsbury, 2012). By seeing the judge as an actor engaged in practice that relates to several institutional orders, we sought to understand and draw-out the logics at play in the case that are characteristic of one or more orders. Analytically, we focused our attention on those aspects of the raw data of the recorded judgment where the judge reasons and decides. This process of analysis and interpretation included searches and coding of language and emotion using NVivo computer software. Word occurrences and combination frequencies allowed us to capture data revealing of the judge's

behaviour in fleshing out his reasoning, showing his use of vocabulary and frames of reference. These data inform our finding that the case involves two logics, labelled here as: creditor-regarding and director-regarding. These two logics represent alternative values and beliefs at play and which inform the final judgement in this case.

Research Findings

Facts:

The case concerned the collapse of a small insurance company, and the liquidators sought contribution to the company's assets from the directors on the grounds of wrongful trading and breach of the duty of care. The wrongful trading claim was brought on the basis that the directors kept on trading, when they knew or should have known that the company was insolvent. The breach of duty claim related to specific payments the directors had made. One of the principal issues at the heart of the litigation was that had an appropriate accounting policy been adopted by the company, the directors would and should have appreciated that the company was insolvent, and they would and should have stopped trading.

This case reflects the efforts of the liquidator, on behalf of the company (in liquidation) and its creditors, to persuade the court, to exercise discretion granted to it under the corporate insolvency legislation, to order the former directors to make significant personal contributions to the company, to compensate it for the losses suffered because of the directors' actions. This provision is designed to increase the amounts available to the liquidator to pay the company's creditors. In the event, the liquidator's case failed on all counts and the judge refused to hold the directors liable. In what follows, our attention is directed to the judge's review of the business judgments of the former directors – decisions taken to apply certain accounting principles, and to keep on trading.

Our analysis of the text of the judgment first identifies the plurality of logics encountered by the judge throughout the litigation process. The it analyses

judicial practice which reveals the agency of the judge, but also the collective practices of judges in past cases to which the judge refers as precedents relevant to his practice, and how through practice judges navigate these plural logics. Finally, it connects the analysis of logics and practices to institutional orders of society, the institution of corporate law and the associated field of corporate governance.

Logics

In the recorded judgment of *Re Continental*, the narrative reveals the focus of the judge's attention, that is the business judgment of the company's directors, and the implications for and impact of this on the company's creditors. Throughout this narrative, we can detect patterns in the practices and symbolic representations, including beliefs, values and assumptions that guide the legal theories he engages with, the judge's frames of reference and his narrative statements of both the law and the facts. We label these patterns as a 'creditor- regarding logic', and a director-regarding, 'director's business judgment logic'.

Creditor-regarding logic

The judge, in his consideration of the position of the company's creditors, blends concepts of corporate and insolvency law to guide his consideration and actions regarding the protection, redress and remedy available to the company's creditors in respect of losses suffered by the company as a result of the business judgment of the directors. Blending legal concepts of director duties and creditor interests, the judgment narrative reflects how these considerations encourage the law to elevate the interests of the creditors in an insolvency situation:

> '…when a company is insolvent the directors, in fulfilment of their duties to the company, must recognise that the persons with the primary interest in it have become the creditors rather than the shareholders.'

The judge uses frames of reference which reflect his concerns for creditors, and the protections and remedies he has at his disposal with regard to their position in the liquidation that has befallen the company. So he frequently considers 'the point of view of the creditors', different 'kinds of creditors', 'unsecured creditors', 'creditors' interests', their 'position', in relation to each other and 'improvements' and 'worsening' in that position. He addresses 'the losses to creditors', 'deficiency to creditors', 'assets available to creditors', and the question at the heart of the litigation, the 'duties owed' to creditors.

In summarising the complex and lengthy sequence of events leading up to the liquidation of the company, and constructing the 'case story', the judge engages in a narrative describing the complexity of those events, the changing fortunes of the company and referring in minute detail to board meetings, witness recollections and minutes of these meetings. As the judge observes, 'This has been a very protracted case in every way...The hearing before me was very long, and I am afraid that this judgment is very long to match.' In parts the judge uses a simplified example, to express his interpretation of the law, to 'bring out the question of principle' as it applies to the facts of the case, an example which reveals a creditor-regarding logic which will inform his decision-making:

'I describe a simplified example which brings out the question of principle. …. The continued trading… (must) make the company's position worse, so that it has less money available to pay creditors, rather than to leave the company's position at the same level. It must make the company's position worse before it becomes appropriate for the court to order the directors to make a contribution".

And throughout, there is reference to the available creditor-regarding logic, the judge claiming to have 'every sympathy for the creditors… for the very real misfortunes of the creditors…' But the judge nevertheless allows 'other considerations', in which we identify a competing logic, to guide his decision-making. This we observe as a director-regarding, 'director's business judgment

logic'. Again, we see how this logic directs his theoretical considerations, characterises the frames of reference, and defines the judge's narrative of events and the law.

Director's Business Judgment Logic

Inherent within the director's business judgment logic, is an assumption, a belief that directors under the enabling provisions of corporate law can, and indeed are required, to exercise all of the legal powers of the company to carry on the business of the company, and that accordingly, subject to certain requirements and conditions, judicial deference should be paid to director's business judgments made in the course of this exercise. The law which enables the director and confers this discretion also constrains the director by imposing duties on directors requiring they take reasonable care, skill and diligence when exercising their powers. The director's business judgment logic therefore has two distinct but related essential characteristics: director authority and director accountability. The narrative of judgement reflects as it engages with legal theory around the corporate form, the board of directors that sits at the top of the corporate hierarchy, and the law which confers authority and also imposes duties on directors in the exercise of this authority. The judgement refers to the director's express 'authority' and 'implied authority', and to 'the nature and discharge of director's duties', the 'competence and understanding' required in the exercise of their powers. Directors 'have a duty to use reasonable care and skill and to act in good faith.' But there are then theoretical distinctions to be made when examining the level of 'care and skill' expected, and the judge goes on to expand this through frames of reference around 'standards'.

The judge refers throughout to concepts of reasonableness and fairness when examining 'the standards the law expects' referring to an objective minimum standard of skill and care, in relation to a director of the type of company concerned, which objective minimum can be raised subjectively depending on the characteristics and experience of the particular director:

'The duty is not to ensure that the company gets everything right. The duty is to exercise reasonable care and skill up to the standard which the law expects of a director of the sort of company concerned, and also up to the standard capable of being achieved by the particular director concerned'.

Reflecting this director-regarding business judgment logic, the judge in this case concludes that the directors have met those standards and have demonstrated a 'wholly responsible and conscientious attitude'. Despite that, 'with hindsight it can now be seen that the judgment which the directors formed did not work out…that does not mean it was a breach of duty on their part to form it' and that 'the directors behaved with a full and proper sense of responsibility'.

Again, in the narrative of the law but in the narrative of events giving rise to the cause of action, the judge expands on the standards of care and skill, again reflecting a director-regarding logic. The directors of Continental are directors of an insurance company but the judge comments on standards.

'In my view they would have been expected to be intelligent laymen. They would need to have a knowledge of what the basic accounting principles for an insurance company were… They would be expected to be able to look at the company's accounts and, with the guidance which they could reasonably expect to be available from the finance director and the auditors, to understand them. They would be expected to be able to participate in a discussion of the accounts, and to ask intelligent questions of the finance director and the auditors. What I do not accept is that they could have been expected to show the sort of intricate appreciation of recondite accounting details possessed by a specialist in the field…'

These directors, the judge concludes, meet the standards of skill and care required and expected. He contrasts the present case to previous cases where a creditor-regarding logic would appear to have persuaded previous judges to a finding of liability:

'None of the previous cases in which directors have been held to be liable has been remotely like this one. Typically, they have been cases in which the

directors closed their eyes to the reality of the company's position and carried on trading long after it should have been obvious to them that the company was insolvent and that there was no way out for it. In those cases, the directors had been irresponsible, and had not made any genuine attempt to grapple with the company's real position.'

'Having heard the evidence I am wholly satisfied that that none of the directors viewed the position lightly, or approached it in a perfunctory manner, or had any inclination to bury his head in the sand and just hope that the problems would go away.... On the contrary, they considered it directly, closely and frequently.'

So, in the end analysis, we can see that the judge in this case firmly rejects the creditor-regarding logic and adopts categorically a director-regarding business judgment logic. The authority of the director granted under the institution of corporate law is respected, and the business judgments made pursuant to that authority are afforded protection.

The judge appears to go further agreeing with the submissions of the directors' legal representatives condemning the liquidator's complaints as 'infested with hindsight and (which) wholly ignore the realities of being a company director'. The accountability, protection and remedy sought by the liquidator on behalf of the company and its creditors are denied. The judge concludes that 'the way in which the directors reacted …was entirely appropriate…and the liquidators' case for liability … has not been made out. Accordingly, it fails.'

This manifestation of plural and competing logics, creditor-regarding and director-regarding, while it provides a rich illustration of how multiple logics exist in this domain of corporate law, our interest lies in how this plurality manifests in the practices of the judge, and the implications of this for the broader societal context in which this judicial practice plays out. We now move our analysis forward, operationalising Schatzki's concept of practice with particular attention to organisers, with a view to linking this judicial practice to a broader societal and institutional context

Judicial practice

For Schatzki (2017), organisers of practice are: rules; general and practical understandings; and teleo-affective structure. Throughout the narrative of the judgement, the organising effect of the rules of law and procedure on the judicial practice under consideration is clearly apparent. These rules include those that come from statute (which the judge refers to as 'the law') and those that come from the established common law, previous case law (which the judge refers to as 'the cases'). The doctrine of precedent, operates as a system whereby a judge in the present case is bound by decisions of judges in previous cases, and so lends a collective character to the judge' s practice. These rules are described and ordered as the reference point whereby the judge reviews and 'judges' the behaviour, good and bad, of the directors, and the business judgments they made, and the rules prescribe the actions the judge may take in relation to this. The judge sets out 'the full texts of sections 212 and 214 of the Insolvency Act 1986', the words of which 'are at the very heart of this case' and which 'give to the court a discretion to declare that a director (or former director) is liable to make a contribution to the company's assets'. Having referred to the statutory rules, the judge moves on 'to mention the cases' to which he gives 'proper consideration…in forming (his)… conclusions in the present case.'

The rules however only intermittently and partially determine what the judge does and says (Schatzki, 2017). It is the understandings expressed by the judge around this statement of the rules, that further shape the practice. General understandings include such things as concepts and values, and in our study, includes concepts of the corporation at the heart of commercial life, and how corporations are populated and directed by categories of corporate actors, namely directors, boards and chairmen. It is also generally understood that corporate enterprise is often heavily reliant on credit, and that credit as a concept is only viable if those extending credit are afforded some protection in relation to the attendant risk associated with it. We can detect the judge's general understandings around duties and the values and concepts of care, skill and diligence expected of directors, but also notions of reasonableness and

fairness in terms of protections and remedies that should be available to creditors.

These general understandings inform the judge's action 'drawing a number of threads together and considering the matter in a relatively general way'. We see a general understanding of the dilemmas directors face when the company gets into financial trouble, and the unenviable position and the decision they face, 'the difficult decision' to shut down and go into liquidation or carry on trading 'and hope to turn the corner'. There is a general understanding of the personal risks the directors face, culturally significant understandings about 'courage' and the stigma of taking 'the coward's way out'. General understandings may be seen here to have an integrating function (Welch and Warde, 2017), integrating the judicial practices into an overarching cultural formation (Schatzki, 2002) as to what standards of behaviour, what levels of care and skill we expect of directors in such situations, what levels of personal risk we expect them to bear, and the extent of the accountability we demand of them. The judge demonstrates this understanding in a series of rhetorical questions (Gewirtz, 1996).

'In this case, when the directors were confronted in June 1991 with the unwelcome news that Continental had suffered large and unforeseen losses…Could they have decided intuitively that Continental's position was hopeless, that the business should be closed-down instantly, and that a liquidation should follow rapidly? Obviously not. Could they there and then have calculated for themselves, avoiding intuition, that Continental was insolvent already and must close down? Again, the answer is: obviously not.'

We understand the judge to be engaging in general understandings of notions of pragmatism, common sense and efficiency required of the directors in confronting the financial crisis facing the company. The judge refers throughout the judgment to the skills, abilities, and the capacities he employs as he reads and evaluates the documentary evidence. 'Having listened', 'considered' and 're-considered' the oral evidence, the judge then has to

evaluate that evidence. We regard these as 'practical understandings' used by the judge in settling his version of the facts, from which he then goes on to consider the law, and the arguments of legal counsel on the law. His legal and analytical skills then allow him to interpret and apply the law to the facts as he sees them. In this way the judge describes how he 'reasons' his way to a judgement. Telos, can be identified in the narrative of the judgement in the judge's empathy for the directors and the 'unenviable dilemma' they face regarding the decision, the business judgment, to trade on, or cease trading and proceed to liquidation. The judge's tacit approval of the way in which the directors 'approached' the position, taking a 'wholly responsible and conscientious attitude both to (the company's) position and to their own responsibilities as directors', can be contrasted with his apparent condemnation of the liquidator on behalf of the creditors, who in the judges' view, had an 'unrealistic' and unreasonable expectation of what the directors should and should not have done in the situation that they found themselves. The judge, appearing keen not to encourage defensive business practice, cautions that if directors are judged too harshly, 'with the benefit of hindsight', such an 'austere approach' may lead directors to rush too soon to put their companies into liquidation for fear of being sued for wrongful trading. The judge empathises with directors who find themselves in this no-win situation: '… if the directors decide to close down immediately and cause the company to go into an early liquidation, although they are not at risk of being sued for wrongful trading, they are at risk of being criticised on other grounds ...creditors…will complain bitterly that the directors shut down too soon…liquidating too soon can be stigmatised as the coward's way out'.

It is in the plurality of the creditor-regarding and director-regarding business judgment logics, as these manifest in the actions and practice of the judge, and the way in which he navigates these through the process of the litigation and the organisation of his judicial activities, that we identify links to the broader societal activities within which these judicial and director activities take place. These competing logics, captured in the agency revealed through our analysis of judicial practice, serve to demonstrate the link between those practices and

the institutional context within which they take place. Judicial practice, as a manifestation of these competing logics, has implications at a broader societal level for the ongoing tussle between director authority and director accountability.

Logics, practices and links to institutional societal orders

The judge's practice reveals the judge acting as an agent of the state, with the discretion to operate a significant re-distribution mechanism, whereby he, can order one group of citizens to assign assets to another, exercising a 'bureaucratic dominance', focussing attention on the status of one group, the creditors, in relation to another, the directors, with the potential to redistribute assets and capital between them. The judge must decide whether to hold the directors personally liable for the business judgement to continue trading (which with the benefit of hindsight turned out to be the wrong decision), informed by a creditor-regarding logic, affording remedy to the creditors, or, whether informed by a director-regarding logic, to protect the directors and their business judgment on the basis that it was made with the appropriate levels of skill and care. On the facts of this case the judge's action appear to be informed by a director-regarding logic, which leads him to conclude that it would be 'an extraordinarily harsh result' if the directors were found personally liable.

At the level of the legal profession, the narrative is an intimate account of this professional aspect of his practice, and in particular the 'reasoning' component of that practice. The issue before the judge, the cause of action, has at its centre the behaviour of directors in relation to the companies they serve, and towards specific corporate constituencies such as shareholders and creditors. The judgement is therefore cast in the institutional context of the corporation, a cornerstone institution of society, addressing the functions, composition of and relationships of delegation and reliance between its various organs, principally in this case, the company itself, with its creditors and directors. The judge is ever mindful of the 'reality of commercial and corporate life' and the

difficulties, events and other happenings to which the company is subject, as well as the board processes around these, are exhaustively examined in this case. The significant implications of this at the institutional and societal level is, that if such an order is made, it offends the fundamental principle of the corporation as a separate entity and of limited liability which provides the very cornerstone of the institutions of the corporation itself, and the institution of corporate law that enables and constrains its creation and existence.

Finally, there are related but distinct communities who have an interest in the judicial practices around the review of the business judgements of directors. These include the community of corporations in aggregate, shareholders and the wider corporate investment community, the corporate creditor community, and the corporate director community. Each of these communities is affected by the judicial practice which administers corporate law and the rules regarding director authority, director duties and accountability in respect thereof. The law provides that directors are expected to adhere to norms of behaviour, and are subject to duties, so as afford protections to the communities who have a stake in the companies they direct. Nevertheless, the judge in this case appears keen to protect the director community, and not 'to set the standard required of the directors at an unrealistically high level' or 'beyond what (the law) expects'. At the societal level of the director community the judge is concerned that 'if the non-executive directors were liable to pay millions of pounds to the liquidators in this case, it is hard to imagine any well-advised person ever agreeing to accept appointment as a non-executive director of any company', with associated implications for the talent pool available to boards.

As a summary of empirical findings, the judicial narrative of judgment captures competing logics, here creditor-regarding and director-regarding business judgment logics, as they are revealed through the agency of the judge. This we have uncovered through a 'Schatzkian' analysis of the judge's narrative and we demonstrate through this analysis, how these logics are characteristics of institutional orders (Thornton, Ocasio and Lounsbury, 2012) perceived here as

the institutional orders of state, profession, corporation and community. Applying our combined theoretical perspective to our analysis of the narrative, we illustrate how this judicial practice is embedded in a broader societal context.

Discussion

This analysis contributes to theorising about process, practices, logics and accountability. It shows that practice theory can address 'big topics'. It demonstrates that process and practice theorising are intertwined. It is novel in combining practice and logics perspectives, theoretical and empirically, to capture plural logics and show a connection between agency, practice and institutional order. Finally, it throws a fresh light on accountability and how to study practices that constitute accountability.

The study lends weight to advocates of practice theory who refute criticism that it cannot handle 'big topics' and that it neglects the individual (Hui, Schatzki and Shove, 2017:2). It treats litigation processes as significant events whereby judges play a key role, with consequences that go beyond the winners and losers in each case. The making of law, the regulation of business judgement in this instance, has the potential to reverberate through practices, fields, institutions and orders over time. The study shows this by linking the individual practices of the judge in this case to the institutional orders and domains across which those practices are played out. By addressing the institutional and legal implications of the judge's practice, as it relates to the decisions and actions of directors, the study shines a light onto the wider governance debate, revealing mechanisms, process and outcomes of director accountability at law.

Our conceptualising judicial practice in a processual way engages with the legal ruling as a narrative to reveal how a judge enters the process of litigation in its ultimate stages, drawing the process to a close through a ruling and the delivery of a judgment. Set from within the context of the wider litigation process, the study delves deeper into judicial processes and practices by

analysing the judge's account of his individual actions, seemingly from when he first evaluates the evidence, settling and organising his version of the sequence and series of events and others' accounts of actions, into a cohesive narrative of the facts, and then 'reasoning' his way to a ruling, before explaining and justifying his decision and decision-making. This narrative with all its language-in-use (Schatzki, 2017) is shown to be infused with practice-organisers such as rules, understanding and telos. This is one way in which the analysis reveals that process meets practice. The vocabularies of practice, found in the 'stories' and facts of the case before the judge, the statements of the law, and the vocabularies of the judicial reasoning afford us to encounter communications between the advocates for the liquidator, the defendant directors, and the judicial response to the same. Judges summarise the facts, make sense of events, reach and rhetorically deliver a ruling. In these observations we can appreciate the judge's agency, encompassing sense-making, choice and ultimate decision-making. But in keeping with practice theory this agency is to be understood not as individual, but rather collectively constituted judicial practice shaped by past judicial practice, future aspirations and institutional logics. In this way the study makes a theoretical connection between individual agency and societal order through practices and logics.

By attending to practices and logics the study is different to existing work in a couple of key respects. First, other studies have skilfully uncovered a relationship between law and logics (McPherson and Sauder, 2013) but that analysis involved multiple parties each with a different logic. This study is different in that it centres on a single actor – a judge – a significant social actor, faced with competing claims, navigating available and accessible logics, captured by the analysis (Reay and Jones 2016), and expressed here through the dichotomy of 'creditor-regarding' and 'director regarding' logics. Second, it is unusual to find studies that attempt to actually and explicitly offer a theoretical and empirical combination of practice and logics perspectives. Having used a narrative approach to identify and follow-up a common interest in language and discourse (Schatzki, 2017; Thornton, Ocasio and Lounsbury, 2012) the study captures plural logics, makes a connection between practice

and social order, and shows the judge exploiting the agentic opportunity afforded him through the process of litigation. The judge's agency is socially and temporally embedded, informed by the past, through the doctrine of legal precedent, the cultural phenomenon whereby judicial practice in the present invokes the past through the judge's attention to previous cases, and where the judge's own aspirations and judgement have implications for the future (Emibayer and Amir, 1998). Temporality features as the judge mentions, considers, follows and applies precedent cases as part of his own immediate practice. Judicial practice in *Continental* is thereby generated out of, and contributes to a dynamic collective of judicial practice, and has the potential in turn to constitute and shape the institution of the law itself.

Beyond the boundaries of the law and work of the judiciary the case situates judicial practice as part of the category of organizing practices known as 'corporate governance' (Thornton, Ocasio and Lounsbury, 2012). This case lends rare insight into how judicial practice is embedded within the field of corporate governance, a practice which directly tackles the thorny and topical issues around director accountability within boards, to the companies they serve, but also and to other communities of corporate stakeholders, such as creditors. The relationship between corporate governance and law warrants further research for greater understanding. The question of what is perceived as a legitimate intervention by courts and others such as regulators has taken on greater significance in the light of the financial crisis and more recent events when boards and directors were perceived to have been incompetent in the judgement of risk. Debate about the consequences for directors and what cases should and should not be reviewed at law is a matter of international legal and public debate fuelled by the variety of international practice in the matter of business judgement.

By way of concluding, we offer the research and this analysis as an approach to opening-up further analysis of regulatory activities and practices that have a strong discursive and textual component. Our focus on judges, rather than consultants (Levina and Orlikowski, 2009), is distinctive for its attention to text as a core feature of practice and institutional order, the production of which

can have significant consequences for a range of adjacent fields, practices and actors. In this regard, there is scope to consider other situations where actors and agency are being increasingly drawn into practices of review and regulation. Such research could be about those social actors in regulatory roles who review the work and conduct of others in commerce, public services, or those who lead public and quasi-public inquiries into events in the aftermath of crises which seemingly have, or threaten to have, a destabilising effect on established logics and order.

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