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Review article

Codifying the corporate opportunity doctrine: The (UK) Companies Act 2006

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ABSTRACT

Part 10 of the UK Companies Act 2006 codifies the fiduciary and common law duties of directors as a means of addressing the key policy considerations which underpinned the company law reform project launched by the Labour Government in 1998. Focusing on the core fiduciary duty of loyalty and its corporate law manifestation in the form of the 'corporate opportunity doctrine', the article critically examines whether the statutory language adequately captures the totality of the duty as developed in the case law. It concludes that the formalistic language of the relevant provisions neither encompasses the breadth of the pre-existing jurisprudence nor addresses the policy objectives of the reform exercise.

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[http://dx.doi.org/
10.5339/irl.2012.5](http://dx.doi.org/10.5339/irl.2012.5)

Published: 30 April 2012
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BACKGROUND—THE SCOPE AND MECHANICS OF THE CODIFICATION EXERCISE

In March 1997, the then UK Labour Government announced what was the most far-reaching review of company law since Gladstone's Joint Stock Companies Act 1844 and the introduction of limited liability in 1855.¹ In her Foreword to the first consultation document which formally launched the review,² Margaret Beckett, then Secretary of State at the Department of Trade and Industry, (DTI, since renamed the Department for Business, Innovation and Skills (BIS)), noted that the then UK company law regime was a complex regulatory amalgam founded upon mid-19th century legislation as amended over the intervening century and a half by numerous additions³ (including EC Directives) and consolidations which no longer facilitated the Government's strategy for national competitiveness. The principal objective was stated as being to devise:

[A] framework of company law, which is up-to-date, competitive and designed for the [new] century, a framework that facilitates enterprise and promotes transparency and fair dealing.⁴

The mechanism which the DTI put in place for undertaking the reform exercise was devised to maximise 'openness and independence' together with ensuring wide consultation.⁵ The review was led by the Company Law Review Steering Group (hereafter the CLR). It was charged with ensuring that the outcome was 'clear in concept, internally coherent, well articulated and expressed, and workable.'⁶ The CLR's consultation exercise was comprehensive,⁷ and its *Final Report* was presented to the Secretary of State for Trade and Industry on 26 July 2001. The first White Paper, *Modernising Company Law*, which contained a draft Companies Bill, was published in July 2002.⁸ After a period of consultation, the second White Paper was published in March 2005,⁹ and the Company Law Reform Bill, subsequently renamed the Companies Bill,¹⁰ received Royal Assent in November 2006 and was implemented in stages spanning a three-year period, which ended in October 2009.

From the outset the CLR stated that company law should be enabling and facilitative so that the new regime should allow enterprise 'to flourish freely in a climate of discipline and accountability.'¹¹ Achieving this objective, in its view, involved several core policy considerations that served to inform its specific recommendations. Underpinning its approach towards the scope and nature of the reform exercise was the axiom 'think small first'. The point was made that the vast majority of companies are small, private and generally owner-managed.¹² From the economic perspective it was stated that the role of such companies is critical in laying the foundations for future growth. The law governing small private companies should therefore 'provide an optimal framework for the establishment, efficient operation and development and growth of these companies.'¹³ The new regime would be

¹The Limited Liability Act 1855.

²*Modern Company Law for a Competitive Economy*, March 1998 (DTI/Pub 3162/6.3k/3/98/NP).

³Such additions were generally introduced to address deficiencies of the existing legislation in protecting investors and as knee-jerk reactions to particular scandals of the day. See, for example, the White Paper, "The Conduct of Company Directors" (Cmnd. 7037, 1977).

⁴Above, n 2. The UK is not alone in its quest for a modern economically efficient regime for companies. For example, a corporate law reform programme along similar strategic lines has been ongoing in Australia since 1990: see the Corporations Law Scheme which commenced operation on 1 January 1991; the Corporations Legislation Amendment Act (No 1) 1991; the Corporate Law Reform Act 1992; the Corporate Law Reform Act 1994; the Company Law Review Act 1998; and the policy discussion papers of the Corporate Law Economic Reform Programme (Canberra, AGPS, 1997).

⁵Above, n. 2, para 7.1.

⁶*ibid* at para 7.2.

⁷*Company Law for a Competitive Economy: Final Report*, July 2001 (DTI/Pub 5552/5k/7/01/NP). Consultation Documents issued by the CLR include: *The Strategic Framework* (URN 99/654) February 1999; *Company General Meetings and Shareholder Communication* (URN 99/1144) October 1999; *Company Formation and Capital Maintenance* (URN 99/1145) October 1999; *Reforming the Law Concerning Overseas Companies* (URN 99/1146) October 1999; *Developing the Framework* (URN 00/656) March 2000; *Capital Maintenance: Other Issues* (URN 00/880) June 2000; *Registration of Company Charges* (URN 00/1213) October 2000; *Completing the Structure* (URN 00/1335) November 2000; and *Trading Disclosures* (URN 01/542) January 2001.

⁸Published in two volumes, *Modernising Company Law* (Cm 5553-I); and *Modernising Company law –Draft Clauses* (Cm 5553-II) (hereafter White Paper I and White Paper II respectively).

⁹*Company Law Reform* (Cm 6456).

¹⁰The title of the Bill was changed during committee stage in the House of Commons in July 2006.

¹¹*Final Report*, above, n. 7, para 9.

¹²At the end of the 1997/98 year there were 1.32 million companies on the (UK's) Companies House register of which 12,000 (amounting to 1%) were public limited companies. See *The Strategic Framework*, above n. 7, Annex.

¹³*Final Report*, above, n. 7, para 1.27.

constructed on the basis that it corresponds with the reasonable expectations of business people so that regulatory traps for the unwary are avoided while, in times of crisis, the response of the law is both predictable and constructive.¹⁴ The guiding principle was expressed as being ‘simplification and accessibility.’¹⁵ The CLR noted that many of the provisions of the Companies Act 1985, the principal statute in the companies legislative regime then in force, proceeded on the false assumption that the paradigm company was a large publicly quoted business. It was therefore peppered with detailed adaptations and derogations introduced on a piecemeal basis.¹⁶ The cumulative effect of this process had been to leave the law in a state which was described as obtuse, overly complex and inaccessible for small business users.¹⁷

At the time of the announcement of the reform exercise in March 1998, the English Law Commission and the Scottish Law Commission had already embarked upon an examination of directors’ duties that culminated with the publication in September 1998 of a joint consultation paper, *Company Directors: Regulating Conflicts of Interests And Formulating A Statement Of Duties*.¹⁸ As part of the CLR’s wider project, the Law Commissions undertook to place their final report before the CLR.¹⁹ The DTI had charged the Commissions with the objective of determining whether or not the relevant statutory provisions could be ‘reformed, made more simple or dispensed with altogether.’²⁰ The Law Commissions exercise was not, therefore, self-contained. Its aim was to examine the presentation of the law governing directors’ duties so as to inform the CLR’s wider review of company law.²¹

Following an extensive consultation process by the CLR, the Labour Government stated in the March 2005 White Paper that it believes companies work best where the respective roles and responsibilities of directors and shareholders are clearly understood.²² It also noted that the general duties of directors are currently found in case law that spans over a century, rather than contained in the Companies Act by way of a statutory code.²³ It was also stressed that directors may not appreciate what their duties were under the law and, similarly, that such obligations may be misunderstood by shareholders, in whose interests, after all, the directors should be acting. As a means of making the relevant law ‘consistent, certain, accessible and comprehensible’, the Government decided to codify the duties of directors by way of a statutory restatement in what became Part 10 of the Companies Act 2006.

The issue of codification had generated considerable debate. It was a central issue that was explored in the earlier work of the Law Commissions which found that the case against such codification was founded on loss of flexibility, while in its favour there were obvious advantages in terms of certainty and accessibility. The Commissions conclusion was that the case for legislative restatement was convincing and the issue of inflexibility could be addressed by (i) ensuring the restatement was at a high level of generality by way of a statement of principles; and by (ii) providing that it was not exhaustive: i.e. while it would be a comprehensive and binding statement of the law, it would not prevent the courts inventing new general principles outside the field. The *Final Report* of the CLR accepted the recommendation that directors’ duties should be set out in a legislative

¹⁴ *ibid*, para 1.53.

¹⁵ *ibid*, para 1.54.

¹⁶ For example, the Financial Reporting Standard for Smaller Entities and the DTI’s work on simplification of SME accounts. See the Companies Act 1985 (Accounts of Small and Medium-sized Companies and Minor Accounting Amendments) Regulations 1997.

¹⁷ *The Strategic Framework*, above, n. 7, para 5.2.5. The point is reinforced at para 5.2.13 where the CLR concludes that the complexity of the 1985 Act is such that, from the perspective of smaller companies, it is burdensome and unwieldy: “These are general concerns, but smaller companies are precisely those which do not have the time or funds to devote to legal advice; their owners and managers cannot delegate and must focus on day-to-day survival and growth.”

¹⁸ Consultation Paper No 153; Discussion Paper No 105. Note also the earlier work of the Law Commission, LCCP No 124, *Fiduciary Duties and Regulatory Rules* (London, TSO, 1992).

¹⁹ The Law Commission and the Scottish Law Commission joint report, *Company Directors: Regulating Conflicts of Interests And Formulating A Statement Of Duties* (Nos 261 and 173, respectively), Cm 4436, (London, TSO, 1999).

²⁰ The Law Commissions Consultation Paper No 153, para 1.7.

²¹ The report was lodged with the CLR in July 1999.

²² Above, n 9, at 16.

²³ For listed companies regard must also be had to the requirements of the UK Corporate Governance Code, http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf and the City Code on Takeovers and Mergers.

statement for three principal reasons.²⁴ First, directors should know what is expected of them and therefore such a statement would further the CLR's objectives of reforming the law so as to achieve clarity and accessibility. Indeed, these objectives underpin a core principle of the CLR's vision that company law should provide 'an accessible framework' for wealth generation.²⁵ Second, the process of formulating such a statement would enable defects in the present law to be corrected 'in important areas where it no longer corresponds to accepted norms of modern business practice.'²⁶ The CLR thought that this was particularly so, with respect to the duties of conflicted directors. Third, such a statement would underpin the question of 'scope' of the proposed company law regime: 'scope' being defined as relating to the question of in whose interests should companies be run.

However, the CLR's vision of the codified statement of directors' duties differed substantially from that of the Law Commissions. While the Law Commissions had proposed partial codification leaving the courts free to develop new general principles,²⁷ the CLR took a narrower view. In *Completing the Structure* it made clear that the statement should be treated as 'exhaustive' so that the only other duties to which directors are subject are those imposed by other legislative provisions. But the statement would be capable of 'judicial development within its terms'.²⁸ In reaching its conclusion, the CLR explained that:

We have not been able to think of any new principles, nor areas where it is desirable to leave scope for the judges to develop completely new ones . . . We are therefore inclined to favour the proposed restatement as being exhaustive. . .²⁹

Both the 2002 and 2005 White Papers accepted the proposal that directors' general duties to a company should be codified,³⁰ and the Government sought to settle the matter of whether the code should be exhaustive by noting that it will be drafted so as to 'enable the law to respond to changing business circumstances and needs.'³¹ Further, it stressed that the code would leave scope for the courts to interpret and develop its provisions in a way that 'reflects the nature and effect of the principles they reflect.'³² The result was that the statutory statement of directors' fiduciary duties, together with the standard of care, skill and diligence they are expected to exhibit in their conduct as directors, is to be found in Part 10 of the Companies Act 2006, sections 171–178. In one sense Part 10 is not exhaustive, for example, the duties relating to the preparation and delivery of accounts are encountered elsewhere in the Act.³³ Further, the drafting of Part 10 results in an overlap between the duties. In this respect, it should be noted that Section 179 makes it clear that the duties are cumulative. It is therefore necessary for directors to comply with every duty that, in any given situation, may apply.

The purpose of this article is to examine the statutory formulation of a director's fiduciary duty to avoid conflicts of interest as a means of determining whether, in accordance with the CLR's aims, it represents an exhaustive and accessible codification of the case law which spans over one hundred and fifty years. A central concern is whether the statutory language adequately encapsulates the nature of the fiduciary relationship. More particularly, within the realms of the no-conflict duty lies the so-called 'corporate opportunity doctrine'. This aspect of the no-conflict duty is breached when a director intercepts a corporate opportunity for his or her own benefit. As such, it is a significant facet

²⁴All of which are rehearsed in the *Final Report*, above, n 7, para 3.7. See also the March 2005 White Paper, above n 9, at 20.

²⁵*Final Report*, *ibid*, para 9 of the Foreword.

²⁶*Ibid*, para 3.7.

²⁷Above, n 19, paras 4.7 and 4.48. The Law Commissions had come down in favour of partial codification: a statement of the main, settled duties, including the director's duty of care. It would not be exhaustive so that the general law would continue to apply in those areas not covered by statute.

²⁸*Completing the Structure*, above, n 7, para 3.12.

²⁹*Developing the Framework*, above, n 7, para 3.82. The CLR's main recommendations in this respect are summarised in the *Final Report*, above, n 7,

³⁰In 2004 the DTI launched a further consultation exercise, *Company Law: Flexibility and Accessibility*, <http://www.dti.gov.uk/cld/condocs.htm>, which reiterated the Government's commitment to introduce a major Bill, albeit after further consultation, clauses of which will provide: "... clarity on the responsibilities of directors by making statutory provisions setting out the duties of directors via a statement of duties, and introducing related reforms to the rules governing directors' conflicts of interests."

³¹See The March 2005 White Paper, above, n 9, at 21.

³²*Ibid*. See, in particular, Section 170(3) and (4), considered below.

³³See the Companies Act 2006, Part 15, Chapter 4.

of the no-conflict rule not least because, in the company law context, it is this limb of the rule that continues to generate a significant body of litigation. This, therefore, begs the question as to what extent the statutory formulation is likely to be subject to judicial development in the future. While the answer here must necessarily be speculative, it must depend in part on whether the code is so drafted as to encompass the explications of the corporate opportunity doctrine found in the burgeoning case law.

In terms of the general fiduciary and common law duties of directors set out in Part 10 of the 2006 Act, Section 170 provides the starting point for considering their scope and nature. Sub-section (1) restates the long-established principle that the duties of directors are owed to the company.³⁴ It therefore follows that the proper claimant in any action for breach is the company itself.³⁵ Section 170(2) goes on to codify the common law position that resignation is no defence to an action for breach of the no-conflict rule (see section 175, below), or to an action where a director has accepted a benefit from a third party (see section 176, below).³⁶ As commented above, there was considerable debate as to whether the code should be exhaustive. Section 170(3) seeks to place the issue beyond doubt. It states that the general duties are so drafted as to reflect the case law in which the equitable and common law duties governing the behaviour of directors was developed. Secondly, it states that the code replaces those principles. This provision is supplemented by subsection (4). It directs the courts to interpret and apply the codified duties having regard to the pre-existing case law. Taking these two provisions together, it is far from settled whether the codified duties merely replicates or, indeed, replaces the pre-existing duties.³⁷ Such uncertainty arises because of the use of different phraseology to that found in the judicial formulations of the duties contained in the case law. As is explored further below,³⁸ curiously the terminology of 'fiduciary' and the duty of 'loyalty' commonly encountered in case law that Part 10 seeks to codify has not been enlisted by the Parliamentary draftsmen.³⁹

THE DUTY TO AVOID CONFLICTS OF INTERESTS

Of the specific duties, those found in section 175 (duty to avoid conflicts of interest) and section 176 (duty not to accept benefits from third parties) traverse the terrain of liability previously captured by the equitable fiduciary obligations applied in the corporate context since the nineteenth century. In equity, recourse is made to the duty proscribing a conflict of interests and to the director's duty not to profit from his or her position. Both duties are reflected in the drafting of these two provisions. With respect to the no-conflict rule and corporate opportunities section 175 of the Act provides that:

³⁴See, for example, *Percival v. Wright* [1902] 2 Ch 241. In *Multinational Gas and Petrochemical Co Ltd v. Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, Dillon LJ explained, at 288, that: 'directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders.' But in special circumstances, directors may owe duties to individual shareholders. See, for example, *Peskin v. Anderson* [2001] 1 BCLC 372.

³⁵One of the main ways in which the company can take legal action against a director (or, more usually, a former director) for breach of duty is through 'a derivative claim' brought by one or more shareholders to enforce a right which is vested not in himself or herself but in the company. See P. Davies *Gower and Davies' Principles of Modern Company Law*, (London, Sweet & Maxwell, 2008), ch 17. This is encapsulated in the rule in *Foss v. Harbottle* (1843) 67 ER 189 now reformed by Part 11 of the Bill, sections 260–269. Discussed, in part, below.

³⁶See, for example, *IDC v. Cooley* [1972] 1 WLR 443; *Canadian Aero Service Ltd v. O'Malley* (1973) 40 DLR (3d) 371; and *CMS Dolphin Ltd v. Simonet* [2001] 2 BCLC 704.

³⁷For example, the duties of directors now enshrined in sections 175 and 176 are not the same as the current common law rules or equitable principles applying to those duties. That said, in *Eastford Ltd v. Gillespie* [2010] CSOH 132, at [13], Lord Hodge, considering s. 170(4), observed that it "seeks to address the challenge which the Law Commissions and the Company Law Review had identified, namely of avoiding the danger that a statutory statement of general duties would make the law inflexible and incapable of development by judges to deal with changing commercial circumstances. Parliament has directed the courts not only to treat the general duties in the same way as the pre-existing rules and principles but also to have regard to the continued development of the non-statutory law in relation to the duties of other fiduciaries when interpreting and applying the statutory statements. The interpretation of the statements will therefore be able to evolve." See also, *Towers v. Premier Waste Management Ltd* [2011] EWCA Civ 923, in which Mummery LJ stated, at [3], that the statutory duties in Part 10 of the Companies Act 2006 'extract and express the essence of the rules and principles which they have replaced':

³⁸See ns 69–72, below, and associated text.

³⁹Other provisions of the code enact settled principles derived from the case law: that directors must act within their powers (section 171); that directors: must act in good faith in promoting the success of the company (section 172); they must exercise independent judgment (section 173); and the common law duty of directors to exercise reasonable care, skill and diligence (section 174). See J. Lowry 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap through Efficient Disclosure' [2009] *CLJ* 607; and J. Lowry 'The Irreducible Core of the Duty of Care, Skill and Diligence of Company Directors' [2012] *MLR* 249.

- (1) A director of a company must avoid a situation in which he has or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
- (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
- (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
- (4) This duty is not infringed-
 - (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
 - (b) if the matter has been authorised by the directors.
- (5) Authorisation may be given by the directors -
 - (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
 - (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
- (6) The authorisation is effective only if-
 - (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
 - (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
- (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

The provision has two interrelated elements. The first deals with liability. It gives statutory force to the fiduciary obligation that prohibits directors placing themselves in conflict situations. The second limb provides a means by which liability may be avoided by a reformulated disclosure mechanism.

A notable feature of the first limb of the provision is its reference to the 'exploitation of any property, information or opportunity'. This seeks to encapsulate the common manifestation in the corporate law context of the no-conflict rule. Typically, it generally comes to the fore where a director usurps for his or her own benefit, a so-called corporate or business opportunity that rightly belongs to the company. Indeed, the architects of the provision clearly had this in mind.⁴⁰ The provision owes its antecedents to equitable principles. As the jurisprudence amply demonstrates,⁴¹ there has long been a lack of consensus on the categorisation of these equitable duties, and the extent to which they are mutually exclusive. Be that as it may, there is a momentum in favour of identifying their shared bedrock as a fiduciary duty of loyalty. The point is well expressed by Millett LJ in *Bristol and West Building Society v. Mothew*⁴²:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his beneficiary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict...⁴³

⁴⁰See the *Final Report*, above, n 7, the Explanatory Notes to the Statement of Directors' Duties, para 24.

⁴¹See ns 45–48 below, and associated text.

⁴²[1998] Ch 1.. See also, Arden LJ in *Item Software(UK) Ltd v. Fassihi* [2004] EWCA (Civ) 1244, at [43]. See also, *Midland Tool Ltd v. Midland International Tooling Ltd* [2003] 2 BCLC 523; and *Lexi Holdings plc v. Lugman* [2008] 2 BCLC 725.

⁴³*Ibid*, at 18.

Section 176 codifies the common law rule prohibiting the exploitation of the position of director for personal benefit. Subsection (1) prohibits a director accepting a personal benefit, including a bribe, from a third party, which is conferred on him or her *qua* director. Thus, it applies only to benefits conferred because the director is a director of the company, or, because of something that the director does, or, does not do as director. The word 'benefit', for the purpose of this section, includes benefits of any description, including non-financial benefits.⁴⁴ This section therefore overlaps with section 175 and a breach will trigger both provisions.

There has been some debate over whether the no-conflict duty (section 175) and the no-profit rule (section 176) are distinct. In *Boardman v. Phipps*,⁴⁵ Lord Upjohn described the no-profit rule as being but a part of the wider no-conflict duty; and in *Bray v. Ford*,⁴⁶ Lord Herschell took the view that there was only one rule. This followed the approach of Lord Cranworth LC in *Broughton v. Broughton*.⁴⁷ However, in *Chan v. Zacharia*,⁴⁸ Deane J thought that the two rules, whilst overlapping, are distinct. Accordingly, a transaction may be struck down on the basis that it involves a conflicted director irrespective of whether or not he profits from it. The drafting of these two provisions mirrors this latter line of reasoning by splitting the duty into two separate parts. However, it is noteworthy that while section 175(5) provides for board authorisation in respect of conflicts of interest, this is not the case with the section 176 duty. However, the company may authorise the acceptance of benefits by virtue of section 180(4).

Subsection (2) defines a 'third party' as a person other than the company, or its holding company, or its subsidiaries, and thus subsection (3) provides that benefits provided by the company fall outwith the prohibition. Section 176(4) adds the proviso that, the duty is not infringed if the acceptance of a benefit from a third party cannot reasonably be regarded as likely to give rise to a conflict of interest.

The omission of the language of 'loyalty' from the statutory language

Just as with the term fiduciary, so the expression 'loyalty' is not used in the statutory code. This raises a fundamental question as to whether the drafting of Part 10 of the Act adequately encompasses the totality of directors' fiduciary duties laid down in the pre-existing case law.⁴⁹ More particularly, the question arises whether the provision fully captures the breadth of the so-called 'corporate opportunity doctrine'. The anxiety here derives from the underlying impetus behind the move towards codification, which, as commented above, is in part inspired by the perception that it will cure directors' ignorance of their duties. How far this will successfully reduce the occasions when directors flout their fiduciary duties is hard to measure.

The 2002 White Paper places emphasis on the inaccessibility to the layman of the duties and the findings of the UK Institute of Directors that 'many company directors are not clear about their general duties'.⁵⁰ The primary target here is the private company of which, in the language of Lord Wilberforce, the 'quasi-partnership' is paradigm.⁵¹ Significance is given to the need to reduce recourse to legal advice and its consequent expense, not least because the rules are currently

⁴⁴See the Explanatory Notes to the Companies Act 2006, available at <http://www.legislation.gov.uk/ukpga/2006/46/notes>.

⁴⁵[1967] 2 AC 46.

⁴⁶[1896] AC 44.

⁴⁷(1855) 5 De G M and G 160.

⁴⁸(1984) 154 CLR 178.

⁴⁹See J Birds 'The Reform of Directors' Duties' in John de Lacy (ed) *The Reform of United Kingdom Company Law* (London, Cavendish, 2002).

⁵⁰White Paper I, above, n 8, para 3.2. The Department for Business, Innovation & Skills (DBIS) has recently undertaken a project to evaluate the main provisions of Companies Act 2006. The purpose of the project was to evaluate the main outcomes of the Act and the consequences of the regulatory changes for companies, shareholders and other stakeholders. With respect to Part 10 of the Act, it was found that: 'Although awareness of the codification of directors' duties was high (79%), the proportion of those perceived to have responded was lower at 50%, given the codification did not represent a change in the current law, (all must comply with these provisions) but for just under half of companies interviewed, the codification had not prompted a change in how they carry out their duties). Overall, one-fifth of those who had responded agreed the statutory statement had had an impact on the way directors discharged their duties, and almost three fifths were aware of the changes to the procedure for bringing about a derivative action for breach of duty (59%). Of those companies not initially aware of the changes relating to directors' duties, over one-third indicated that they would now take advice from the company's accountant on the nature of their requirements.' The DBIS findings can be found at <http://www.bis.gov.uk/policies/business-law/company-and-partnership-law/evaluation%20of%20companies%20act%202006>

⁵¹*Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360, HL.

contained in ‘complex and inaccessible case law.’⁵² Therefore, attaining these objectives depend in no small measure upon the statutory code being clear, authoritative and intelligible to the lay director.

The exhaustive nature of the codification

As seen above, one important division of opinion concerned whether or not the duties contained within the statutory statement should be exhaustive and conclusive.⁵³ One assumption separating these two standpoints is the idea that the courts might in the future proceed to invent some hitherto unrecognised head of directorial liability. Views may legitimately differ on the likelihood and necessity of any such freedom. But opting for a comprehensive statutory statement may be thought to curtail such judicial creativity, and thereby indirectly promote the security with which the director can rely upon, the principles as setting out the totality of the duties owed to the company.

As noted above, section 170(3) appears to settle the point conclusively by stating that the general duties as codified by the Act ‘have effect in place of’ the corresponding equitable and common law rules. Further, as we have seen, section 170(4) states that the code ‘shall be interpreted and applied in the same way as common law rules or equitable principles’ and directs the courts to ‘have regard to the corresponding common law rules or equitable principles in interpreting’ the code. Presumably, this means that even if the case law is superseded, it will still remain available as a means of construing the language of the statutory statement. Indeed, it might be argued that the vague and general language of the statutory provisions positively invites lawyers to call upon the extensive jurisprudence when dispensing advice. If they supplant the pre-existing equitable rules, this must also remove the scope for judicial development of hitherto unidentified heads of fiduciary liability.

The duty of disclosure

In recent times, the closest the courts have come to expanding director’s duties in the fiduciary context, concerns claims that a director has an obligation to disclose his own breach of fiduciary duty to the company, or, similarly, breaches by his fellow directors. As a matter of authority, it seems possible to trace the roots of such a claim into at least two strands of existing judicial thinking. One strand approaches the matter as a mixed question of company law and employment law, whereas the second finds support exclusively within the realms of company law. The first forms part of the unresolved aftermath flowing from *obiter dicta* in the House of Lords in *Bell v. Lever Ltd*,⁵⁴ which, subject to exceptions, broadly seems to stand against the existence of any such duty. However, more recently, the point has perhaps become clouded by at least one notable feature of the wider factual context in that celebrated decision.⁵⁵

In *British Midland Tool Ltd v. Midland International Tooling Ltd*,⁵⁶ it was as if the existence and extent of such a duty was regarded as peripheral, the more central concern being whether to assimilate the position of employees with that of directors. For whatever procedural or substantive reasons, recent case law has not facilitated a determination of how far the obligations consequent upon holding the office of director do, and should converge with the obligations arising from the contract of employment. Rather, the Court of Appeal in *Item Software (UK) Ltd v. Fassihi*,⁵⁷ shifted the focus by finding that a fiduciary duty to disclose a breach of duty, was but an incident of the core duty of loyalty, and not, as had been argued on the basis of a tenuous dictum of Roskill J. in *IDC v. Cooley*,⁵⁸ a separate, self-contained fiduciary obligation.

In *Item Software*, Fassihi was employed as the sales and marketing director of the claimants. He set out to disrupt the claimants’ renegotiation of their distribution agreement for software products with Isograph Ltd. He first unsuccessfully attempted to procure the contract for RAMS International Ltd, a company he established for that purpose. Thereafter, he persuaded the claimants to adopt a tough

⁵²Above, n 50.

⁵³See ns 27–31, above.

⁵⁴[1932] AC 161.

⁵⁵Arguably a second distraction can be located in the vexed question of the circumstances, if any, when holding directorships in competing companies might infringe a fiduciary principle: *London and Mashonaland Company Ltd v. New Mashonaland Exploration Co Ltd* [1891] WN 165.

⁵⁶Above, n 42, at 557–561, [81–92]. See also the summary by Nicholas Strauss QC in *Item Software (UK) Ltd v. Fassihi* [2003] 2 BCLC 1, especially at 17–19, [51–54].

⁵⁷Above, n 42.

⁵⁸[1972] 1 WLR 443, at 451.

bargaining stance with Isograph. Notwithstanding these breaches of fiduciary duty, Item could not establish any resultant loss. The negotiations with Isograph failed because the claimants had pressed them too hard, not because of Fassihi's influence. And, Isograph did not contract with RAMS. This explains how critical it became to identify a further basis of liability to which Item's loss of the contract might be attributed.

At first instance, the trial judge held that Fassihi had a 'superadded' duty (both as employee and director) to disclose his misconduct. Had he done so, this would have caused the claimant to accept Isograph's proposed terms. It therefore followed that the claimant was entitled to recover for the particular losses flowing from Isograph's termination. One of the two grounds of appeal tested the existence in law of any duty to disclose misconduct.⁵⁹ Delivering the leading judgment, Arden LJ's principal concern was to locate the duty to disclose misconduct. Rejecting the argument that such a separate and independent duty exists, she took the view that the disclosure duty is intrinsic to the over-arching duty of loyalty.⁶⁰ Once so established, it was clear-cut that Fassihi was in breach of his duty of loyalty, by failing to tell Item that he had set up RAMS and planned to acquire the contract for himself.

Such a rationalisation is indisputably neat and attractive. Both as a matter of precedent and policy, Arden LJ was surely right to see decisions such as *Cooley*,⁶¹ as weak authority for the existence of a self-standing duty of disclosure. Her pertinent observation on the better way to read such cases is persuasive:

It may be that in those cases the courts spoke of a duty to disclose simply to explain why in those cases the information obtained in a private capacity gave rise to a liability to account for secret profits. . .⁶²

The decision cannot be dismissed as being preoccupied with arid issues of categorisation. It represents more than a timely reminder of the equitable foundations of the duty of loyalty, for it accentuates equity's continuing potential for dynamism and flexibility. Resisting the temptation to proliferate new independent obligations may seem conservative, and resonate with the desire to have an exhaustive statutory statement of directors' duties. And yet, the decision suggests that the courts can and will continue to identify fresh rules that form an explication of the over-arching duty of loyalty. This may lend credibility to the argument that the Government's preference for codification still allows scope for judicial development albeit within its structure. However, it is worth recognising that Arden LJ's analysis proceeds from a duty that is not specifically mentioned, namely the duty of loyalty. Had the case fallen to be decided under section 175, it becomes a matter of speculation whether or not it would have assumed such prominence.⁶³ There is every chance that Arden LJ would not have felt constrained from tracing to first principles. Nevertheless, it may be that the reasoning would have had to anchor the duty to disclose misconduct to the terms of one or other of the specific provisions, for example section 172 (duty to promote the success of the company).

More generally, the wording of section 175 will often be more than adequate to portray, whether to the director or to the legal advisor, conduct that is to be avoided. Indeed, there is a weight of case law that serves to illustrate types of prohibited conduct. The fraudulent interception of a contract for a director's own benefit, is an obvious example of a misuse of an opportunity belonging to the

⁵⁹The second ground of appeal related to the Apportionment Act 1870.

⁶⁰It is notable that American judicial and academic views are cited in reasoning towards this conclusion: see Cardozo J in *Meinhard v. Salmon* 164 NE 545, at 548; and Professor Robert C Clark *Corporate Law* (New York, Little, Brown, 1986), respectively.

⁶¹Above, n 58. See also, *Coleman Taymar Ltd v. Oakes* [2001] 2 BCLC 749, where failure to notify a conflict of interest and misuse of confidential information was integral to the defendant's breach of fiduciary duty.

⁶²Above n 42, at [40].

⁶³The disclosure duty did come to the fore in *GHLM Trading Ltd v. Maroo* [2012] EWHC 61 (Ch), in which Newey J, considering the directors' duty of good faith (section 172), noted, at [195] that: 'it can be incumbent on a fiduciary to disclose matters other than wrongdoing. The 'single and overriding touchstone'[citing Etherton J in *Sheperds Investments Ltd v. Walters* [2007] 2 BCLC 202] being the duty of a director to act in what he considers in good faith to be in the best interests of the company... there is no reason to restrict the disclosure that can be necessary to misconduct. Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so.' The judge also considered whether a director is under a duty to disclose his misconduct to shareholders. He took the view that if a director subjectively concluded that it was in the company's interest for a matter to be disclosed to a person who is not a director then he must make such disclosure. See also, *Simply Loans Direct Ltd v. Wood* [2006] All ER (D) 291 (Jun).'

company.⁶⁴ The point has been regularly reinforced by the courts. A recent example can be found in *Crown Dilmun v. Sutton*,⁶⁵ a decision falling squarely within the robust tradition of *Regal (Hastings) Ltd v. Gulliver*.⁶⁶ The dispute centred on the £50 million sale of Fulham Football club's Craven Cottage ground. As managing director of Crown Dilmun, Sutton's primary role was to identify suitable investment opportunities for the claimant company. Acting in this capacity, he first declined the development proposal of Craven Cottage on behalf of the claimant company. Thereafter, he pursued negotiations for a revised development project through the medium of the second defendant company, which Sutton established specifically for this purpose. Peter Smith J had no difficulty in rejecting Sutton's evidence of his genuine belief that the company would not have been interested in the development opportunity, finding it to be untrue and dishonest. The judge's consequent application of settled principle of fiduciary liability is equally trenchant, and explicitly rooted in the line of authorities ranging from *Keech v. Sandford*,⁶⁷ down to *IDC v. Cooley*⁶⁸:

Given my decision that Mr Sutton had no right to make any decision to take opportunities which came his way whilst he was a director of the claimants, the parties all agree that he came under a duty not to take opportunities which arose that might put him in conflict with his duties to the claimants. As a director of the claimants, he had a duty to exploit every opportunity that he became aware of for the benefit of the claimants. The only exception is if they permit him to take such opportunities after he has made full and frank disclosure and they have given full and informed consent.⁶⁹

The language used in section 175 neatly accommodates such a blatant breach. And were the facts to be put to a putative director, he or she would, no doubt, readily understand the existence and need for liability. Where the breach is flagrant and obvious, it probably does not then matter that the provision fails to refer explicitly to the failed line of argument, put both by Sutton in *Crown Dilmun* and previously in *Cooley*,⁷⁰ to the effect that the opportunity would not have been given to the claimant company. What is more questionable is whether the bald statement of liability in section 175 accurately and sufficiently informs as to the limits and scope that have percolated through the judicial application of what is succinctly referred to as the 'business opportunity doctrine'.

The meaning of 'opportunity'

The question arises as to when can it be said that an 'opportunity' is an opportunity of the company? The English jurisprudence surrounding the corporate opportunity doctrine reveals variants of two approaches towards determining whether an opportunity belongs to the company. The courts have oscillated between grounding liability either on the broad basis that the opportunity lies within the company's putative line of business or, more narrowly, because it falls within the company's contemplation or expectation. That the parameters of this categorisation itself are open to debate and conflation is better recognised in North America.⁷¹ However, in England there is nascent evidence of a judicial preference for delineating when the opportunity can be said to belong to the company, by recourse to the line of business approach. This more expansive judicial formulation sets an inflexible prohibition against exploiting any opportunity that falls within the company's line of business.⁷²

⁶⁴*Cook v. Deeks* [1916] AC 554.

⁶⁵[2004] 1 BCLC 468.

⁶⁶[1942] 1 All ER 378, HL. See also, *Oil & Minerals Development Corporation Ltd v. Mahdi Sajjid and Oasis International LLC* [2002] EWHC 1258 (Comm).

⁶⁷(1726) Cas temp King 61.

⁶⁸Above, n 58.

⁶⁹Above n 65, at 511, [179].

⁷⁰In *Industrial Development Consultants Ltd v. Cooley*, above, n 58, Roskill J, having taken the view that at most there was only a 10% chance of the company actually securing the contract with the Eastern Gas Board, concluded that "if the defendant is not required to account he will have made a large profit as a result of having deliberately put himself into a position in which his duty to the plaintiffs who were employing him and his personal interests conflicted." Roskill J's reasoning thus places emphasis on Cooley's breaches of fiduciary duty prior to his resignation from the company. Cooley had diverted to his own benefit a contract it was his job to secure for the company notwithstanding that it was unlikely that the company would have secured the contract.

⁷¹See, for example, the US cases examined by J Lowry and R Edmunds, in 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61 *MLR* 515.

⁷²See, for example, *IDC v. Cooley*, above, n 58.

A narrower test limits liability to instances where the opportunity is said to be maturing, in the sense that its pursuit is actively being contemplated by the company.⁷³ Looking to the broad language of section 175, it fails to make explicit which, if either, of these two approaches is intended to apply in the future. This is of significance both in terms of lawyers' understanding of how the principle will operate and also in assessing the extent to which, as declared by the CLR, it should make the law consistent, certain, accessible and comprehensible to the lay director without immediate recourse to legal advice.

Looking at section 175 through the lens of the case law it seeks to codify, it can be seen that it fails to reflect with precision the subtleties of the no-conflict rule/corporate opportunity doctrine long constructed by the courts. If it aims to codify the law in order to achieve consistency and coherence, the drafting of the provision might, at the minimum, have been informed by the reasoning of the Court of Appeal in *Bhullar v. Bhullar*,⁷⁴ in which, albeit by oblique means, the Court adopted the stricter of the two approaches: the line of business test.⁷⁵ Whatever the merits of the Court's preference for such a test, it at least settled the vexed issue of how liability should be determined.

The facts of the case are relatively straightforward. Silvercrest, a company controlled by the two appellants, acquired a property, White Hall Mill, at a time that they, along with other family members who included the respondents, were directors of Bhullar Bros Ltd. Bhullar Bros Ltd's objects included the acquisition of investment property. It already owned property in the vicinity of White Hall Mill; and in evidence the appellants conceded that its acquisition would have been commercially worthwhile. One of them even sought legal advice on the propriety of Silvercrest entering into the transaction. However, before the purchase, Bhullar Bros Ltd's board resolved to divide its business, and refrain from making any further property acquisitions. The appellants therefore resisted Bhullar Bros Ltd's claim to White Hall Mill, because, they argued, its purchase was not related to that company's affairs, nor could it be described as a maturing business opportunity available to it. Counsel for Bhullar Bros Ltd countered with a submission based upon *IDC v. Cooley*⁷⁶:

[T]hat a director may come under a positive duty to make a business opportunity available to his company if it is in the company's line of business or if the director has been given responsibility to seek out particular opportunities or the company and the opportunity concerned is of such a nature as to fall within the scope of that remit.⁷⁷

The Court of Appeal does not express itself directly by using the language of the line of business test. Rather, Jonathan Parker LJ's distillation of the governing legal principles owes much to the traditional line of authority, including *Aberdeen Rly Co v. Blaikie Bros*,⁷⁸ *Regal (Hastings) Ltd v. Gulliver*,⁷⁹ and *Boardman v. Phipps*.⁸⁰ Decisions associated with expressions of liability are couched in terms of prophylaxis. As such, it is noted that reasonable men looking at the facts, would have concluded that the appellants faced a real sensible possibility of conflict of interest. To which, it is no answer to say that the board decision effectively meant that Bhullar Bros could, or would not take the opportunity itself. But alongside the conventional terminology, the Court of Appeal's reasoning affirms counsel's ostensible preference for a broad, capacity-based approach as articulated by Roskill J in *Cooley*. Overall, the unmistakable impression engendered by the decision is that any opportunity within the company's line of business is off-limits to the director, unless he or she properly obtains the company's permission to proceed.

⁷³See the approach taken in *Island Export Finance Ltd v. Umunna* [1986] BCLC 460; *Balston Ltd v. Headline Filters Ltd* [1990] FSR 385; and *Framlington Group plc v. Anderson* [1995] 1 BCLC 475.

⁷⁴[2003] 2 BCLC 241. Noted, Prentice and Payne, [2004] LQR 198. Cf *Foster Bryant Surveying Ltd v. Bryant* [2007] EWCA Civ 200. See J. Lowry, 'Judicial Pragmatism: Directors' Duties and Post-Resignation Conflicts of Duty' [2008] JBL 83.

⁷⁵See also, *O'Donnell v. Shanahan* [2009] 2 BCLC 666, at [55], in which Rimer LJ roundly endorsed the inflexibility of the no-conflict duty as laid down in the early trusts cases such as *Keech v. Sandford*: 'the rationale of the no conflict' and 'no profit' rules is to underpin the fiduciary's duty of undivided loyalty to his beneficiary. If an opportunity comes to him in his capacity as a fiduciary, his principal is entitled to know about it. The director cannot be left to make the decision as to whether he is allowed to help himself to its benefit.' See also, *Towers v. Premier Waste Management Ltd* [2011] EWCA Civ 923.

⁷⁶Above, n 58.

⁷⁷Above, n 74, at 252, [26]. Two other references to the term 'line of business' appear in the report, at 250 [19] and 251, [24].

⁷⁸(1854) 1 Macq 461, HL.

⁷⁹[1967] 2 AC 134n.

⁸⁰[1967] 2 AC 46.

It has been argued that the provision is deficient in terms of the determination of liability, nevertheless its framers adopted some flexibility of language in so far as the avoidance of liability for breach of the no-conflict rule is concerned. section 175(4)(a) states that the duty is not infringed 'if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest. . . .' The wording is capable, it is suggested, of encompassing the judicial leniency recently exhibited by the Court of Appeal in *In Plus Group Ltd v. Pyke*,⁸¹ where, on the particular facts, no conflict of interest was proved.

The defendant, Pyke, and Plank were the only two directors and shareholders of the claimant company. A stroke in 1996 resulted in the defendant being unable to work. His absence continued when his working relationship with Plank broke down early in 1997. From that time until the defendant formally resigned, he was effectively excluded from decision-making and participation in the management of the claimant company's affairs. In June 1997, during this period of exile, the defendant incorporated his own company, John Pyke Interiors Ltd, through which he procured and discharged a contract worth £200,000 with Constructive Ltd, an important customer of *In Plus Group Ltd*. It was this which raised issues concerning his breach of fiduciary duty to the claimant company.

The evidence from the correspondence between Constructive Ltd and the claimants pointed to the fact that the relationship between the two had deteriorated to such an extent, that it was highly unlikely that further contracts would be placed with the claimants.⁸² On this basis, the case cannot be placed within the line of decisions which lend support to the maturing opportunity test. By the same token, the contract cannot be ruled as being outwith the claimant's line of business merely because Constructive would not have offered it to Plus Group. This is made plain in *IDC v. Cooley*, where the Eastern Gas Board had refused to contract with *IDC*. As such, it is surprising that the Court of Appeal in *In Plus Group*, by differing routes, exonerated Mr Pyke.⁸³

Once more the three judgments traverse the terrain of the no-conflict rule. But even here, the Court of Appeal observes a long-standing exception to it. The majority tread timidly around the widely discredited Victorian decision that sees no inconsistency between the no-conflict rule and a director being allowed to hold office in another company, in the same line of business.⁸⁴ Even more intriguing is the way in which Mr Pyke finds further absolution for what Sedley LJ acknowledges to have been successful poaching of a customer because:

Quite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts (explicable and justifiable as they may have been) of his sole fellow director and fellow shareholder Mr Plank...The defendant's role as a director of the claimants was throughout the relevant period entirely nominal, not in the sense which a non-executive director's position might (probably wrongly) be called nominal but in the concrete sense that that he was entirely excluded from all decision-making and all participation in the claimant company's affairs. For all the influence he had, he might as well have resigned.⁸⁵

In a similar vein Brooke LJ also adopted a fact intensive approach towards the issue. Calling in aid the observation of Lord Upjohn in *Phipps v. Boardman*,⁸⁶ to the effect that the circumstances of 'each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made',⁸⁷ he laid particular emphasis on the fact that following his stroke Mr Pyke had been effectively expelled from the companies some six months prior to any of the events in question. Brooke LJ stressed that although the defendant had invested a significant sum of money in the companies of which he was a director and on favourable interest-free terms, he was not permitted to withdraw any of it and was denied any remuneration. Further, at the time of the contract

⁸¹[2002] 2 BCLC 201.

⁸²*Ibid*, at 207, [20].

⁸³Though it is noteworthy that in *Foster Bryant Surveying Ltd v. Bryant* [2007] EWCA Civ 200, Rix LJ, at [70] referred to *In Plus Group* as 'a rare case in this court' which presented 'a somewhat novel position.'

⁸⁴*Mashonaland Exploration Co Ltd v. New Mashonaland Exploration Co Ltd*, above n 55. See M. Christie, "The Director's Fiduciary Duty Not to Compete" [1992] MLR 506.

⁸⁵Above, n 81, at 226, [90]. See also Brooke LJ at 221–22, [76–77] and Parker LJ at 227, [94]. In a similar vein, see the leniency afforded to a 'nominal' executor by the Court of Appeal in *Holder v. Holder* [1968] Ch 353.

⁸⁶[1967] 2 AC 46.

⁸⁷*Ibid*, at 107.

with Constructive, he was not using any of the claimants' property nor was he using any confidential information which came to him *qua* director of the companies. He therefore concluded that in contracting with Constructive, Mr Pyke was not in breach of fiduciary duty.

That Mr Pyke was judicially characterised as the victim faced with no realistic alternative other than to behave as he did, may at first sight seem startling. Exclusion from management after all is a paradigm illustration of conduct amenable to an unfair prejudice action under section 994 of the Companies Act 2006. This makes all the more curious Brooke LJ's suggestion that it was unrealistic to expect Mr Pyke to extricate himself from his predicament.⁸⁸ Alternatively, Mr Pyke may have been a worthy candidate for full relief from liability by virtue of section 1157 of the Act, replacing section 727 of the Companies Act 1985, which confers on the court the discretion to relieve, in whole or in part, a director from liability for negligence or breach of fiduciary duty.⁸⁹

For the future, section 175(4)(a) may well provide the court with the means of adopting a fact-intensive exercise towards the determination of liability, so as to do justice in the way that the Court of Appeal was clearly intent on achieving for Mr Pyke, without the need to resort to its jurisdiction to grant discretionary relief found in section 1157.

Post-resignation liability

According to section 170(2), liability under section 175 will apply to former directors as well as those who are currently holding office. The existence and extent of the former directors' liability is not self-evident. A lay director may readily assume that with resignation liability is at an end. But, of course, section 170(2) signals that activity that pre-dates resignation may continue to be the source of fiduciary liability. In this it draws upon the case law. Yet, taking the two sections together, they fail to do justice to the multifarious conditions that attend imposition of liability in equity, conditions that depend upon the specific facts in dispute. Once more, the putative director will find that the devil is in the detail. There is a range of permutations that lie buried beneath the surface of the statutory language, involving both fact and law.

Directors are free to resign at any time. Absent specific terms in the contract of employment, their fiduciary relationship does not continue beyond resignation.⁹⁰ Should they subsequently use their expertise in the pursuit of an opportunity that might have been of interest to their former company, this will not automatically engage liability within the terms of section 175. To that extent they are free to use their fund of general knowledge and skill. How far this knowledge includes specific information acquired in furtherance of the previous company's enterprise, may vary with each case. Sometimes the information will not be open for exploitation but take the form of a trade secret or property belonging to the ex-directors' former company. This fact alone indicates a problem for the lay director who may find little guidance on a significant demarcation simply by studying the language in the statute.

Juxtaposed with the sparse language of section 175, it confirms that what directors need to know about their potential liability may not readily be encapsulated in a blanket restatement. This is hardly surprising. The recent case law has had to confront multifarious issues deriving from modern competitive enterprise. This issue typically arises where the allegation is that an ex-director has exploited specialist knowledge and skill acquired while in his or her former employment. In *Dranex Anstalt v. Zamir Hayek*,⁹¹ Evans-Lombe J held that a company cannot claim protection in respect of know-how and general knowledge memorised by a director as part of his or her job, notwithstanding that such fund of knowledge will equip the director as a competitor. The exception concerns information that qualifies as 'trade secrets'. Noting that this is an area where detailed and accurate pleadings are required, the judge drew upon Mummery LJ's observations in *FSS Travel and Leisure Systems Ltd v. Johnson*,⁹² a case involving computer software:

⁸⁸Above n 81, at [77]. section 1157 was available to Mr Pyke as a 'member' notwithstanding he held 50 per cent of the shares. See *Re Baltic Real Estate Ltd (No 1)* [1993] BCLC 499.

⁸⁹See for example the judicial exercise of the power in *Coleman Taymar Ltd v. Oakes* [2001] 2 BCLC 749, at 771–72, [99]–[100]; discussed below. See J Lowry and R Edmunds 'The Continuing Value of Relief for Director's Breach of Duty' [2003] *MLR* 195.

⁹⁰*Att. Gen. v. Blake* [1998] Ch 439, at 453, varied on other grounds [2000] 3 WLR 625 (HL).

⁹¹[2001] 1 BCLC 693. Appealed on other grounds: [2003] 1 BCLC 278.

⁹²1998 IRLR 382.

This distinction necessitates examination of all the evidence relating to the nature of employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition with the employer.⁹³

Typical examples of trade secrets include company databases, customer lists, suppliers' agreements, and business and sales strategy.⁹⁴

A director who anticipates leaving one company to go it alone, may find little guidance in the code on how far it is permissible to set about establishing a new enterprise while still engaged by the old. Of course this is a challenging area in terms of equitable principles of liability. One of the favoured rationalisations for fiduciary obligations is to ensure that everything the director does is exclusively in furtherance of the principal company's economic advantage. Taken at face value, this seems to rule out the possibility of a director being allowed to begin his own venture until he has ceased to hold office. However, as is clear from the case law, the courts are prepared to engage in a fact intensive exercise when determining whether the activities of a director undertaken in anticipation of resignation have crossed the line.

For example, in *Balston Ltd v. Headline Filters Ltd*,⁹⁵ the defendant (Head) had been an employee and director of Balston for some seventeen years. Immediately before resigning from the company he agreed to take a lease of commercial premises in order to start-up his own business. At that stage, he had not decided upon the nature of the business he would enter. Shortly after his resignation, one of Balston's customers contacted Head after being told that the company would be discontinuing its supply to him of a certain type of filter tube. Head therefore began manufacturing the filters and supplied them to the customer. Balston Ltd sought to hold him to account. Falconer J held that it was not a breach of fiduciary duty for a director to start-up a business in competition with his former company after his directorship had ceased, even where the intention to commence business was formed prior to the resignation. On the evidence, Head had not attempted to divert to himself a maturing business opportunity, an opportunity which was in the contemplation of Balston Ltd. The issue continues to be litigated.

A more recent illustration is *Coleman Taymar Ltd v. Oakes*.⁹⁶ The claimant, Coleman Taymar Ltd, had decided to close both the manufacturing process and its research and development facility in the UK. Mr Oakes, while still technically a director of, but after the termination of his employment with Coleman Taymar Ltd, launched GoGas (UK) plc as a competitor. In so doing, several of his preparatory steps in establishing GoGas were breaches of his general fiduciary duty as a director. Thus Oakes was liable by: making use of confidential company reports in negotiating leases of premises vacated by the claimant; indirectly buying equipment at full value from the claimant, and using Taymar's employees to assist him in establishing GoGas. In terms of liability, the claimant's victory seems somewhat pyrrhic, insofar as the judge found that Oakes's preparatory activities were honest and reasonable breaches for which it was fair to relieve him of liability under section 727 of the Companies Act 1985.

Not surprisingly, pre-resignation activities, which are flagrantly designed to denude the company of an opportunity by diverting it to the defendant director, will attract the full rigour of equity's proscription. For example, in *CMS Dolphin Ltd v. Simonet*,⁹⁷ CMS Dolphin (CMSD), an advertising company, successfully claimed that Simonet, its former managing director, was in breach of fiduciary duty by diverting a maturing business opportunity to a new company established by him, following his resignation from CMSD.⁹⁸ It was argued that Simonet had resigned in order to acquire for himself the opportunity sought by CMSD, and that he had diverted parts of CMSD's business and taken its staff with him to his new company. Lawrence Collins J held that a director's power to resign from office is not a fiduciary power and a director is entitled to resign even if it might have a disastrous effect on

⁹³*Ibid*, at 385.

⁹⁴See, for example, *Item Software (UK) Ltd v. Fassihi*, above n 42; and *Quarter Master UK Ltd v. Pyke* [2005] 1 BCLC 245.

⁹⁵[1990] FSR 385. See also, *Framlington Group plc v. Anderson* [1995] 1 BCLC 475. See J. Lowry and R. Edmunds 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61 *MLR* 515.

⁹⁶Above, n 61.

⁹⁷[2001] 2 BCLC 704.

⁹⁸As is typical in such litigation, CMSD bolstered its claim by arguing that there was also a breach of the duty of fidelity by virtue of his employment contract.

the business or reputation of the company, and he was not precluded from using his general fund of skill and knowledge to compete with his former company. However, not surprisingly, it was held that appropriating a maturing business opportunity belonging to CMSD was a misuse of its property for which Simonet was liable.

Rix LJ's judgment in *Foster Bryant Surveying Ltd v. Bryant*,⁹⁹ holds important lessons for future courts. Having subjected *In Plus Group* to close scrutiny, he stressed that there must be 'some relevant connection or link between the resignation and the obtaining of the business.'¹⁰⁰ He emphasised the need to demonstrate both lack of good faith with which the future exploitation was planned whilst still a director, and the need to show that the resignation was an integral part of the dishonest plan. Thus, in cases where liability for post-resignation breach of duty had been found, there was, he noted, a causal connection between the resignation and the subsequent diversion of the opportunity to the director's new enterprise.¹⁰¹ However, Rix LJ recognised the difficulties of accurately summarising the circumstances in which retiring directors, may or may not be held to have breached their fiduciary duties because the issue is necessarily 'fact sensitive.'¹⁰²

These cases serve to illustrate the types of conduct undertaken in anticipation of resignation that fall either side of the line. And, on their facts, no one can dispute the reasoning adopted by the judges. Yet, notwithstanding the underlying objectives of the CLR in codifying the duties, the statute offers little guidance beyond the somewhat abstract language of section 175(4)(a) which provides that the duty will not be broken if the 'situation cannot reasonably be regarded as likely to give rise to a conflict of interest'.¹⁰³ Whether this is sufficient to convey the distinction drawn in the case law between the permissible exploitation of know-how and general knowledge on the one hand, and steps that might be taken which represent the diversion of a corporate opportunity on the other, is open to doubt. No doubt, legal advisors will have little difficulty in appreciating the distinction. But that belies the CLR's goal of simplifying the law and, thereby, making it accessible to the lay director.

Avoiding liability for conflicts of duty: the modified duty of disclosure

Section 180 of the Act preserves the common law position whereby the members of the company may authorise conflicts that would otherwise contravene the no-conflict duty. A major concern expressed by the CLR was that the pre-existing case law 'fetters entrepreneurial and business start-up activity by existing directors' so that 'the law should only prevent the exploitation of business opportunities where there is a clear case for doing so.'¹⁰⁴ section 175(5(a)) implements the CLR's recommendation that conflicts may be authorised by independent (i.e. disinterested) directors unless the company's constitution otherwise provides. However, in the case of a public company the directors will only be able to authorise such conflicts if its constitution so permits (section 175(5)(b)). Further, section 175(6) provides that board authorisation is effective only if the conflicted directors have not participated in the taking of the decision, or if the decision would have been valid even without the participation of the conflicted directors; the votes of the conflicted directors in favour of the decision will be ignored and the conflicted directors are not counted in the quorum.¹⁰⁵

The new regime governing ratification does not sit well with the fundamental principle that the fiduciary duties of directors are owed to the company. This, it will be recalled, is restated in section 170(1).¹⁰⁶ Yet section 175(5), without more, permits disinterested directors (subject to certain conditions listed therein), rather the company in general meeting, to authorise conflicts. As with the

⁹⁹Above, n 74; see J. Lowry 'Judicial Pragmatism: Directors' Duties and Post-Resignation Conflicts of Duty' [2008] *JBL* 83. See also, *Framlington Group plc v. Anderson*. [1995] BCC 611. See further, *CMS Dolphin Ltd v. Simonet*, above n 97, where the judgment contained a careful analysis of the balance to be struck when a director has resigned his office and thereafter taken up what the company alleges is a corporate opportunity.

¹⁰⁰Above, n 74, at [91].

¹⁰¹*Ibid.* at [69], citing the Court of Appeal decision in *In Plus Group Ltd v. Pyke*, above n 81, [76].

¹⁰²*Ibid.* at [76].

¹⁰³Although, as Lord Goldsmith explained when the Bill was going through Parliament: 'Once you know that you are now in a situation of conflict, you will have to do something about it, but you are not in breach simply because it happened when, as is set out in subsection (4)(a), it could not, 'reasonably be regarded as likely to give rise to' the conflict.' See the Official Report, 6/2/2006; coll. GC289.

¹⁰⁴*Completing the Structure*, above n 7, para 3.26. The March 2005 White Paper, above n 9, at para 3.26, echoes this concern by stating that it is important that the duties do not impose impractical and onerous requirements which stifle entrepreneurial activity.

¹⁰⁵Thus overruling *North-West Transportation Co Ltd v. Beatty* (1887) 12 App Cas 589.

¹⁰⁶See n. 34, above and associated text.

law of trusts, one would think that only the beneficiary of the fiduciary duties should be permitted to authorise a breach, i.e. the company in general meeting. Further, the provision does not sit with the pre-existing case law that required the unanimous consent of shareholders in cases involving a director misappropriating company property or benefiting personally at the expense of the company.¹⁰⁷ Moreover, the extent to which such authorisation might impact on the right of shareholders bringing a derivative action is unclear.

Although section 263 of the Act, which lays down the conditions to be met by a member seeking the court's permission to bring a derivative claim, states that permission will be refused if the director's conduct in question has been authorised or ratified by the company (see, section 263(2)c); see also section 263(3)(c)), no mention is made of authorisation by disinterested directors under section 175(5). This must represent a failure of joined-up thinking on the part of the legislator in this regard, a failure which positively invites the courts to imply language into the statute in order to make sense of its disparate provisions. At a fundamental level, this lacunae runs counter to the CLR's objective of constructing a company law regime which is 'internally coherent', 'intelligible' and 'workable'.¹⁰⁸

CONCLUSION

It is suggested that section 175 is too compendious in its drafting. A consequence of this is that the declared objectives of the CLR to make the law comprehensible and, therefore, accessible is undermined. It fails to capture the essence of the principles that have emerged from the case law on the no-conflicts rule and the corporate opportunity.¹⁰⁹ If section 175 is open to any pronounced judicial development, this may itself impinge upon the extent to which the code is a reliable and accessible guide to the director of a small private company. Further, in the light of the prominence afforded to the duty of loyalty in the case law, it comes as a surprise that the terminology of loyalty was not expressly incorporated in the statutory provisions. Any reservations about it being a meaningless general concept may be overcome by identifying the existing specific duties encompassed in the code as its non-exhaustive components. This would ensure accessibility by spelling out the content of the duty, while recognising the integrity of the code as faithfully transposing the existing equitable principles and facilitating their future development.

Further, the differing approaches towards the determination of liability by the Court of Appeal in *Bhullar* and its progeny¹¹⁰ on the one hand, and the more open-textured approach towards the issue in *Pyke* on the other, illustrates the dichotomy of the case law surrounding the corporate opportunity doctrine, which the language of section 175 fails to resolve. As indicated above, *Bhullar* appears to mark an entrenchment of the traditional stance taken by equity that fiduciaries are to be held strictly liable if they personally profit from their position. One reading, of the authorities upon which the Court in *Bhullar* rested its decision places the basis of liability for breach of a fiduciary obligation within the realms of restitution. Where directors in furthering their own interests sacrifice those of the company, their liability is based solely upon the fact of their exploitation of an opportunity, i.e. the diversion into their hands of a corporate asset whether it is actually vested in the company or is one which should have been pursued with due diligence on behalf of the company. If such a breach takes the form of a fraudulent expropriation of corporate assets, it cannot be whitewashed by obtaining the sanction of the company.¹¹¹

As Professor Birks cogently explained,¹¹² the duty, therefore, extends to abstaining from 'wealth which the beneficiary could not take', so that it is not just about preventing enrichment, but is also directed at preventing the commission of a wrong. In this respect the policy underlying the duty must be based upon deterrence.¹¹³ While section 175(1) translates this into a bold statement of proscription, its meaning and scope may have been clearer had subsection (2) gone on to

¹⁰⁷ See *Burland v. Earle* [1902] AC 83; and *Cook v. Deeks* [1916] 1 AC 554.

¹⁰⁸ See n 6, above.

¹⁰⁹ *CF* the dictum of Mummery LJ in *Towers v. Premier Waste Management Ltd*, above n 37.

¹¹⁰ See *O'Donnell v. Shanhan*, above n 75.

¹¹¹ See *Cook v. Deeks*, above, n 107, where the defendant directors fraudulently intercepted a contract for their own benefit which they should have procured for the benefit of the company. The court treated the contract as belonging to the company from the start.

¹¹² See P. Birks *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1989), at 340.

¹¹³ *Castlereagh Motels Ltd v. Davies-Roe* (1967) 67 SR (NSW) 279, at 287.

encapsulate the strict 'line of business' test that found favour in *Bhullar*—a phrase, it is suggested, that is readily comprehensible to the lay director, rather than leave it to formalistic language embracing concepts such as 'property, information or opportunity'—the component parts of which carry technical meanings which are not necessarily accessible or self-evident to the lay director.

ACKNOWLEDGEMENT

I owe a debt of gratitude to the anonymous referee for the insightful comments made on an earlier draft of this paper. The usual caveat applies.