THE CODIFICATION OF DIRECTORS' DUTIES: CAPTURING THE ESSENCE OF THE CORPORATE OPPORTUNITY DOCTRINE

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1. The mechanics of the UK company law reform process

In March 1997 the UK Government announced what was potentially 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 President of the Board of Trade, noted that the current company law regime is a complex regulatory amalgam founded upon mid-19th century legislation as amended over the intervening century and a half by numerous additions[3] (including EC Directives) and consolidations which no longer serve the needs of 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 administratively independent from the DTI. The Company Law Review Steering Group (hereafter the CLR), which stood at centre stage in the reform process, was charged with ensuring that the review's outcome is "clear in concept, internally coherent, well articulated and expressed, and workable."[6] The Steering Group'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] was introduced into the House

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1 The Limited Liability Act 1855.

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

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

4 Above, 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 as that announced by the DTI 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).

5 Above, 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.

8 Published 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).

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

of Lords on 1 November 2005. It was brought forward to the House of Commons on 24 May 2006 where it completed the Commons Committee Stage at the end of July 2006. It received Royal Assent in November 2006 and will come into force during 2007.

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, involves several core policy considerations that served to inform its specific recommendations. Underpinning the CLR's approach towards the scope and nature of the review is the axiom "think small first". The point is made that the vast majority of companies are small, private and generally owner managed.[12] From the economic perspective it is 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 should be 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 is expressed as being "simplification and accessibility." The objective is to remove unnecessary detail together with excessive regulation.[15] The CLR noted that many of the provisions of the Companies Act 1985 do not apply to small private companies while those that do are not tailored to meet their specific needs. The Companies Act 1985 thus proceeds on the false assumption that the paradigm company is a large publicly quoted business. It is therefore peppered with detailed adaptations and derogations introduced on a piecemeal basis.[16] The cumulative effect of this process has been to leave the present law in a state which is 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]

Towards Enhancing Shareholder Engagement: An Exhaustive Code of Directors' Duties?

Following an extensive consultation process by the CLR, the Government states in the March 2005 White Paper that it believes that companies work best where the respective roles and responsibilities of directors and shareholders are clearly understood.[22] It is 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 therefore decided to codify the duties of directors by way of a statutory statement in the Act.

The issue of codification generated considerable debate. It was a central issue that was

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

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

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

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 simplication 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 in 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 unwieldly: "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.

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 Combined Code on Corporate Governance and the City Code on Takeovers and Mergers.

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 made out and that 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: ie. 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 statement for three principal reasons.[24] First, directors should know what is expected of them and therefore such a statement will 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 differs 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 is stated 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. The statement will 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 accept the proposal that directors' general duties to the company should be codified,[30] and the Government seeks to settle the matter of whether the code should be exhaustive by noting that it will so drafted as to "enable the law to respond to changing business circumstances and needs."[31] Further, it is stressed that the code will 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 is 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 172-178. 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 results in an overlap between the duties. In this respect, it should be noted that section 180 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, by way of an overview, the statutory formulation of directors' fiduciary duties 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 particular concern is whether the statutory language adequately encapsulates the nature of the fiduciary relationship. More particularly, within the realms of directors' fiduciary duties lies the so-called corporate opportunity doctrine. As such it is a significant facet of the no-conflict rule not least because, in the company law context, it is this aspect 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

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[24] All 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.

[27] Above, 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,

[30] In 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."

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

[32] *Ibid.* See, in particular, section 171(3) and (4), considered below.

[33] See sections 400 and 405.

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.

2. Codification: Part 10 of The Companies Act 2006

Part 10 of the 2006 Act sets out a statutory statement for directors that is intended to codify the case law and, thereby, make the law more accessible not only to directors, but also to shareholders and other interested stakeholders in accordance with a key objective of the CLR. It is not proposed to review in detail each and every aspect of the code, for the focus of this paper is on the no-conflict rule as manifested where a director intercepts a corporate opportunity for his or her own benefit. For present purposes a limited overview of other relevant provisions suffices as a means of first, understanding how the core objectives of the reforms in this regard have sought to be implemented; and, secondly, to facilitate our assessment of the no-conflict rule by viewing it against the wider landscape of the codified fiduciary duties of which it forms part. In any case, as has been noted, the duties are declared by section 180 to be cumulative and so they cannot be adequately assessed in isolation from each other.

Section 171 provides the starting point for considering the scope and nature of the new regime governing the general duties owed by directors to their companies. 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 171(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 176, below) or to an action where a director has accepted a benefit from a third party (see section 177, below).[36] As noted above, there was considerable debate as to whether the code should be exhaustive. Section 171(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 replicate or, indeed, replace the pre-existing duties.[37] Such uncertainty arises because the draftsmen use 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 the case law that Part 10 seeks to codify has not been enlisted by the Parliamentary draftsmen.

Enlightened Shareholder Value

Other provisions of the code enact settled principles derived from the case law: that directors must act within their powers (section 172), that directors: must act in good faith in promoting the success of the company (section 173) and exercise independent judgment (section 174). Of these three provisions, section 173 is arguably the most controversial and warrants comment since it affords some insight into the Government's approach towards framing an appropriate model of corporate governance and how it views the particular status of constituencies other than corporate shareholders. It provides, so far as is relevant for present purposes, that:

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to -

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,[39]
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

[34] See, for example, *Percival v Wright* [1902] 2 Ch 241. But in special circumstances, directors may owe duties to individual shareholders. See, for example, *Peskin v Anderson* [2001] 1 BCLC 372.

[35] One 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, 2003), 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.

[36] See, 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.

[37] For example, the duties of directors now enshrined in sections 176 and 177 are not the same as the current common law rules or equitable principles applying to those duties. See below, and associated text.

[38] See ns. 62-63, below, and associated text.

[39] This provision replaces section 309 of the Companies Act 1985.

(f) the need to act fairly as between members of the company.

(2)…

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

This provision arises out of the CLR's considerable deliberations over the question of what should represent the core duties of company directors which, so it was felt, hold the key for the proper determination of the true scope of company law.[40] More particularly, this is linked to the question of what is meant by the phrase "the interests of the company" which represents the reference point contained in the case law for determining to whom directors owe their duties. This, of course, is bound up with the critical issue of whether or not the UK should adopt what the CLR referred to as "the stakeholder model",[41] or adopt the wider "pluralist" model as the means for determining the scope of company law.[42] Although the CLR recognised the merits of a stakeholder approach it did not recommend its adoption. Rather, it concluded that a core duty of directors should be founded upon the need to promote ''enlightened shareholder value''.[43] This duty has two elements. First, a director must act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Secondly, in doing so, the director should have regard (amongst other matters) to the factors listed in section 173(1). This list is not exhaustive, but highlights areas of particular importance that reflect wider expectations of responsible business behaviour. The over-arching fiduciary duty is that of good faith which the CLR, based on recent judicial pronouncements,[44] referred to as the duty of loyalty. In *Re Smith & Fawcett*,[45] Lord Greene MR said that directors should exercise their powers 'bona fide in what they consider, – not what a court may consider – is in the best interests of the company.'[46] The meaning of the term "company" in this context was construed by the courts as referring to present and future members,[47] and section 173 proceeds on the basis that it is owed to the "members as a whole", subject to the requirement to take into consideration the interests of other stakeholders.

The factors listed in section 173(1) to be taken into account by directors in discharging this duty are designed to give content to the concept of "enlightened shareholder value", which, in the view of the CLR, "is more likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all."[48] It should be noted that in response to debates in the House of Lords, as well as detailed engagement with interested parties, the Government amended subsection (1) so as to put beyond doubt that the need to have regard to certain factors (including the interest of the employees and impact on the environment) is subject to the overriding duty to act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Interested parties, such as the Confederation of British Industry, had brought considerable pressure to bear on the Government to have the provision diluted.[49] The concern here was that the duty on directors to have regard to the interests of wider constituencies could potentially increase liability for directors, create additional bureaucracy and result in directors being too cautious in their decision-making.[50] Notwithstanding its amendment, the duty continues to have teeth because in taking account of the factors listed in the provision directors are bound to exercise reasonable care, skill and

40 See *The Strategic Framework* , above n. 7.

41 That is to say, whether UK company law should continue to uphold the primacy of members' long term interests as the driver underlying directors' duties, but with the proviso that the interests of others should be taken into account. See, J Parkinson *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford, OUP, 1993). See also, J Parkinson, "Inclusive Company Law in *The Reform of United Kingdom Company Law* J de Lacy (ed), (London, Cavendish, 2002).

42 In essence, under the "pluralist" model directors are to take account of all relevant constituencies but give primacy to none. See, G Kelly and J Parkinson, "The Conceptual Foundations of the Company: A Pluralist Approach in *The Political Economy of the Company* J Parkinson, G Kelly and A Gamble (eds) (Oxford, Hart Publishing, 2001).

43 See, *Developing the Framework* (URN 00/656, Department of Trade and Industry (DTI), 2000), paras 2.19–2.22; *Completing the Structure* (URN 00/1335, DTI, 2000), para.3.5). According to this approach, directors, whilst ultimately required to promote shareholder interests, must take account of the factors affecting the company's relationships and performance. The CLR proposed to formulate the duty in such a way as to remind directors that shareholder value depends on successful management of the company's relationships with other stakeholders. This is now reflected in section 173.

44 See, for example, Millett LJ's judgment in *Bristol & West Building Society v Mothew* [1998] Ch 1.

45 [1942] Ch 304. He went on to add that directors should not exercise their powers for any collateral purpose, see section 157, above.

46 *Ibid,* at 306. Similarly, in *Dorchester Finance v Stebbing* [1989] BCLC 498, at 501-502, Foster J stated '[a] director must exercise any power vested in him as such, honestly, in good faith and in the interests of the company…'

47 See, for example, *Gaiman v Association for Mental Health* [1971] Ch 317, at 330, Megarry J said 'I would accept the interests of both present and future members of the company as a whole, as being a helpful expression of a human equivalent.'

48 See the *Final Report*, above, n. 7, and the White Papers, above, ns. 8 and 9, respectively.

49 It was argued that the original provision would significantly increase the liabilities of directors.

50 *The Telegraph*, 7 June 2006, 'Investors the true arbiters of social role'.

diligence as laid down in section 175.[51] A director will, therefore, need to demonstrate that the stakeholder interests listed in section 173 informed his or her deliberations. Paying mere lip service to these interests will not, therefore, be sufficient to discharge the duty to promote the success of the company because a director must exercise good faith and comply with the section 175 standard of care. However, the question of what will promote the success of the company is one for the director's good faith judgment.[52] This aligns the duty with the position long taken by the courts that, as a general rule, their role is not to interfere in the internal management of companies. The point here is that the management of companies is best left to the judgment of their directors, subject to the good faith requirement.[53]

Finally, it should be noted that section 173(3) displaces the duty when the company is insolvent. The reference to any "rule of law" appears to encompass the trend found in the modern case law to the effect that where the company is insolvent, the interests of creditors supersede those of its members with the consequence that the focus of the duty changes accordingly.[54] The breadth of this a duty is unclear.

As is the timing when it triggers. For example, will directors have to take account of creditors interests when the company is of "doubtful solvency", as suggested by Cooke J in *Nicholson v Permakraft (NZ) Ltd*?[55] The drafting of subsection (3) is such as to leave the matter open to doubt and the Explanatory Notes that accompanied the Bill state that it is intended to leave the law to develop in this area.[56] But there is a significant practical difficulty that arises, namely that of identifying when a company's finances are such as to render it of "doubtful solvency".[57]

The search for a satisfactory test in this respect is a nebulous exercise and is one that should not be left to the judges who are ill-equipped to tackle issues involving accounting problems.

3. Codifying The Corporate Opportunity Doctrine

Of the specific duties, those found in section 176 (duty to avoid conflicts of interest) and section 177 (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 find translation

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51 Section 175 provides:
a) A director of a company must exercise reasonable care, skill and diligence.
b) This means the care, skill and diligence that would be exercised by a reasonably diligent person with-
a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
b) the general knowledge, skill and experience that the director has.

52 ''This ensures that business decisions on … the strategy and tactics are for the directors, and not subject to decision by the courts, subject to good faith.'' see the Explanatory Notes to the Bill available at: www.publications.parliament.uk/pa/ld200506/ldbills/034/en/06034x–.htm The Law Society raised a concern that this could raise the spectre of courts reviewing business decisions taken in good faith by subjecting such decisions to objective tests, with serious resulting implications for the management of companies by their directors. See, the Law Society's 'Proposed Amendments and Briefing for Parts 10 & 11', (issued 23 January 2006).

53 This non-interventionist policy (the internal management rule) was explained by Lord Eldon LC in *Carlen v Drury* (1812) 1 Ves & B 154, who said: 'This Court is not required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom.' Indeed, Lord Greene MR in his formulation of the good faith duty in *Re Smith & Fawcett*, paid particular emphasis to the point.

54 See, for example, *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250, in which the Court of Appeal cited, with approval, the view expressed by Street CJ in *Kinsela v Russell Kinsela Pty Ltd* (1986) 10 ACLR 395, at 401, that "where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration…" See also, *Walker v Wimborne* (1976) 50 ALJR 446. In *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd*, [2003] 2 BCLC 153, it was held that a resolution of the board of directors passed without proper consideration being given by certain directors to the interests of creditors would be open to challenge if the company had been insolvent at the date of the resolution. In *Winkworth v Edward Baron Development Co Ltd* [1987] BCLC 193, Lord Templeman stated that directors owe a duty to the company and to its creditors to ensure that its affairs are properly administered and that its property is not dissipated. See also, *Yukong Line Ltd of Korea v Rendsburg Investment Corpn of Liberia (No 2)* [1998] 2 BCLC 385; *Re Pantone 485 Ltd* [2002] 1 BCLC 266; and *Whalley (Liquidator of MDA Investment Management Ltd) v Doney* [2004] 1 BCLC 217.

55 [1985] 1 NZLR 242.

56 At para 314.

57 Subsection (3) also makes express reference to "any enactment". In this respect, it should be noted that section 214(2)(b) of the Insolvency Act 1986 provides that a liquidator of a company in insolvent liquidation can apply to the court to have a person who is or has been a director of the company declared personally liable to make such contribution to the company's assets as the court thinks proper for the benefit of the unsecured creditors. The liquidator must prove that the director in question allowed the company to continue to trade, at some time before the commencement of its winding up, when he knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. See, for example, *Rubin v Gunner* [2004] EWHC 316. In *Re Continental Assurance Co of London plc* [2001] BPIR 733, Park J stressed that '[t]he continued trading – albeit wrongful – has to make the company's position worse, so that it has less money available to pay creditors, rather than leave the company's position at the same level.' See further, *Re DKG Contractors Ltd* [1990] BCC 903.

in these two provisions.[58] With respect to the no-conflict rule and corporate opportunities section 176 of the Act provides:

(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 inter-related elements. The first deals with liability. It gives statutory force to the fiduciary obligation that prohibits directors placing themselves in conflict situations. Its 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 framers of the provision clearly had this in mind.[59] The provision owes its antecedents to equitable principles. As the jurisprudence amply demonstrates, 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*:[60]

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... [61]

Yet, 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.[62] 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 Institute of Directors that "many company directors are not clear about their general

[58] Section 177 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. This section therefore overlaps with section 176 and a breach will trigger both provisions. While section 176(5), discussed below, provides for board authorisation in respect of conflicts of interest, this is not the case with this particular duty. However, the company may authorise the acceptance of benefits by virtue of section 181(4).[58] 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 177(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.

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

[60] Above, n. 44. See also, Arden L J in *Item Software (UK) Ltd v Fassihi* [2004] EWCA (Civ) 1244, at [43].

[61] *Ibid,* at 18.

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

duties".[63] The primary target here is the private company of which, in the language of Lord Wilberforce, the "quasi-partnership" is paradigm.[64] Significance is given to the need to reduce recourse to legal advice and its consequent expense, not least because the rules are currently contained in "complex and inaccessible case law."[65] Therefore, attaining these objectives depend in no small measure upon the statutory code being clear, authoritative and intelligible to the lay director.

As seen above, one important division of opinion concerned whether or not the duties contained within the statutory statement should be exhaustive and conclusive.[66] 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 dynamism, 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.

Section 171(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, section 171(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 invite 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.

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,*[67] 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.[68] In *British Midland Tool Ltd v Midland International Tooling Ltd*,[69] it is as if the existence and extent of such a duty is 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*,[70] 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,*[71] 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 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

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[63] White Paper I, above, n. 8, para 3.2.

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

[65] Above, n. 63.

[66] See ns. 22-32, above.

[67] [1932] AC 161.

[68] Arguably 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. Discussed further below.

[69] [2003] 2 BCLC 523 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].

[70] Above, n. 60.

[71] [1972] 1 WLR 443,, at 451.

tested the existence in law of any duty to disclose misconduct.[72] Delivering the leading judgment, Arden LJ's principal concern is to locate the duty to disclose misconduct. Rejecting the argument that such a separate and independent duty exists, she takes the view that the disclosure duty is intrinsic to the over-arching duty of loyalty.[73] 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 is surely right to see authorities such as *Cooley*,[74] 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…[75]

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 176, it becomes a matter of speculation whether or not it would have assumed such prominence. 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 173 (duty to promote the success of the company).

More generally, the wording of section 176 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 conduct to be avoided. The fraudulent interception of a contract for a director's own benefit is a obvious example of a misuse of an opportunity belonging to the company.[76] The point has been regularly reinforced by the courts. A recent example can be found in *Crown Dilmun v Sutton,*[77] a decision falling squarely within the robust tradition of *Regal (Hastings) Ltd v Gulliver.*[78] 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*,[79] down to *IDC v Cooley*:[80]

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.[81]

The language used in section 176 neatly accommodates such a blatant breach. And were the facts to be put to a putative director, he or she

[72] The second ground of appeal related to the Apportionment Act 1870.

[73] It 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.

[74] Above, n. 71. 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.

[75] Above n. 70, at [40].

[76] *Cook v Deeks* [1916] AC 554.

[77] [2004] 1 BCLC 468.

[78] [1942] 1 All ER 378, HL. See also, *Oil & Minerals Development Corporation Ltd v Mahdi Sajjid and Oasis International LLC* [2002] EWHC 1258 (Comm).

[79] (1726) Cas temp King 61.

[80] Above, n 71.

[81] Above n. 77, at 511, [179].

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*,[82] 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 176 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.

In this regard, the question arises as to when can it be said that an "opportunity" is an opportunity of the company? The 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 North America.[83] However, in this jurisdiction 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. [84] 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.[85] Looking to the broad language of section 176, 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 176 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*, [86] in which, albeit by oblique means, the Court adopted the stricter of the two approaches: the line of business test. 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 in to 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*: [87] that 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.[88]

The Court of Appeal does not express itself directly by using the language of the line of business test. Rather, much of Jonathan Parker LJ's distillation of the governing legal principles owes much to the traditional line of authority, including

[82] In *Industrial Development Consultants Ltd v Cooley,* above, n. 71, 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.

[83] See, 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.

[84] See, for example, *IDC v Cooley,* above, n. 82.

[85] See 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.

[86] [2003] 2 BCLC 241. Noted, Prentice and Payne, [2004] *LQR* 198.

[87] Above, n. 71.

[88] Above, n 86, at 252, [26]. Two other references to the term 'line of business' appear in the report, at 250 [19] and 251, [24].

Aberdeen Rly Co v Blaikie Bros,[89] *Regal (Hastings) Ltd v Gulliver*,[90] and *Boardman v Phipps*.[91] Decisions associated with expressions of liability 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 unmistakeable 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.

While 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 176(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 *Plus Group Ltd v Pyke*,[92] 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 *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.[93] 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 *Plus Group*, by, differing routes, exonerated Mr Pyke. 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.[94] 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.[95]

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*,[96] 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",[97] 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 he was denied any remuneration.

[89] (1854) 1 Macq 461, HL.
[90] [1967] 2 AC 134n.
[91] [1967] 2 AC 46.
[92] [2002] 2 BCLC 201.
[93] *Ibid,* at 207, [20].

[94] *Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165. See below. See M. Christie, "The Director's Fiduciary Duty Not to Compete" [1992] MLR 506.
[95] *Ibid* 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.
[96] [1967] 2 AC 46.
[97] *Ibid,* at 107.