THE CORPORATE OPPORTUNITY DOCTRINE – AN INFLEXIBLE OR FLEXIBLE RULE

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Abstract

The corporate opportunity doctrine is often seen as a prophylactic rule of strict ethic which is inflexibly applied in enforcing the fiduciary duties owed by directors to their companies. A close examination of some of the cases in which the rule has been applied, however, reveals that apart from the general restatement of the rule by the courts, the actual application of the rule in those cases are reflections of the peculiarities of the individual cases. The paper argues that a flexible approach is more realistic and enjoins the courts in interpreting and applying the various provisions of the statute that have codified this rule, to lean more on those decisions that reflect sensitivity to the peculiarities of the cases.

Keywords: Corporate Opportunity, Directors, Common Law, Statute, United Kingdom, South Africa

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Introduction

Company directors are generally seen as standing in fiduciary relationship with the company. The word 'fiduciary' refers to trust and confidence. A fiduciary is one who acts for, or on behalf of another person, in relationship of trust and confidence.[1] The existence of fiduciary relationship is fact based,[2] it involves a close scrutiny of the nature of the relationship and not just the category or the title assumed by the persons involved.[3] The recourse to facts could entail the extension of fiduciary relationships to other employees of the company, other than the directors, whose entrusted power cannot be detailed; who are not subjected to control by the owners of the assets entrusted to them, nor could they be controlled by others without eliminating the value of their services.[4] Directors are fiduciaries to the extent that they are entrusted the company's assets and powers which they must apply to the benefit of the company. In the exercise of their powers, equity imposes on the directors the duty of loyalty which requires them to promote the interest of the company, to the exclusion of any other extraneous interests.[5]

Fiduciary duties are broadly defined, but the existence of a particular duty in individual cases is, just like the defining of the existence of fiduciary duty itself, fact sensitive.[6] The court must therefore closely

[1] *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (CA) per Millett LJ. See also D. French, S. Mayson & C. Ryan *Mayson French & Ryan on Company* (Oxford: Oxford University Press, 30th ed, 2013) 478.
[2] *Phipps v Boardman* [1967] 2 AC 46, 107 per Lord Upjohn; *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370 at [75] per Brooke LJ.
[3] *681210 Alberta Ltd (Okotoks Cinemas) v Hunter* 2011 ABQB 320 (CanLII) at [79] per McDonald J; *Phillips v Fieldstone Africa (Pty) Ltd & Another* 2004 (3) SA 465 (SCA) at [34] per Heher JA; La Forest J in *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC).
[4] See T. Frankel *Fiduciary Law* (New York: Oxford University Press, 2011) 42-43. See *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 (SCC) where fiduciary duty was extended by the court to those in the senior management of the company.
[5] Frankel ibid, 4; Mayson, French & Ryan n 1 above, 478.
[6] *Sibex Construction (SA) (Pty) and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T), 65 per Goldstone J; *Bellars v Hodnett and Another* 1978 (1) SA 1109 (A), 1130; *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch) at [17] per Warren J. In *Henderson v Merrett Syndicates* [1995] 2 AC 145, 206 Lord Browne-Wilkinson emphasised that '[t]he phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and

examine the facts of each case to determine the existence of a duty, the extent of such duty, and the breach, if any, as alleged. Some of the traditional common law duties, such as the duty to avoid conflict of interest and secret profit, are in recent times gaining statutory recognition in different jurisdictions. The paper examines both duties, which have gained popularity over the years as corporate opportunity doctrine, both at common law and under the statutes especially in the United Kingdom and South Africa.

The Corporate Opportunity Doctrine

There is no precise definition of corporate opportunity doctrine,[7] though the concept has enjoyed extensive usage by writers and the courts to express the dual principles (the no conflict and no profit rules) of strict ethic imposing a prophylactic rule on company directors and others in the managerial positions to ensure the observance of fairness in the discharge of their responsibilities to the company. One of such attempts at defining or describing the doctrine was offered by Prentice who stated that the corporate opportunity doctrine 'makes it a breach of fiduciary duty by a director to appropriate for his own benefit an economic opportunity which is considered to belong rightly to the company which he serves'.[8] This description, by reference to the economic opportunity considered as belonging to the company, falls short of articulating the full scope of the concept. Directors have been found to have breached the fiduciary duty simply by being in conflict of interest and duty, and even when the company which they serve has no economic interest in the resulting opportunity. Thus, in *681210 Alberta Ltd (Okotoks Cinemas) v Hunter*[9] McDonald J observed, adopting the statement of Ellis,[10] that the corporate opportunity doctrine provides that a fiduciary may not place himself in position of conflict of interest with his corporation. Paul Morgan QC, sitting as a Deputy Judge, in *Quarter Master (UK) Ltd v Pyke*[11] held as follows:

It is not because he has made a profit from trust property or a profit from his fiduciary position that the director is liable under the conflict rule. Rather, it is because, being in a fiduciary position, he has entered into a transaction, inconsistent with his fiduciary duty of loyalty to the company, which has yielded the profit and he has thereby misused his position. The opportunity to make the profit may not arise from the director's fiduciary position; he might just as well as have had the opportunity if he had not been in that position but even so his liability in respect of the profit arises because of the conflict of interest. In many cases, where the conflict rule applies, the director will also have taken advantage of the property of the company or of his fiduciary position but this will not always be so.

A similar essence of this doctrine is encapsulated in the observation of VanDuzer that if fiduciaries were permitted to invest personally in projects to the exclusion of the corporation, there is a risk that, in pursuit of their self-interest, they would appropriate to themselves valuable investment opportunities that they should have sought for the corporation. The fiduciary duty prohibits the fiduciaries from allowing their personal interest to conflict with their duty to the corporation in this way.[12]

The above assertions are reflections of the 19th century common law court decision in *George Bray v John Rawlinson Ford*[13] where Lord Herschell set down the rules of equity as applied to a fiduciary as follows:

It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being

nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties'.

[7] A phrase attributed by Prentice to the American jurisprudence. See D.D. Prentice 'The Corporate Opportunity Doctrine'(1974) 37 (4) *The Modern Law Review* 464.

[8] ibid. See also J. Lowry and R. Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61(4) *The Modern Law Review* 515 where the writers observed that although corporate opportunities do not in the strict sense mean assets of the company, they are regarded as such with the consequence that it is not open to the company directors to exploit them for their own personal gain.

[9] 2011 ABQB 320 (CanLII) at [84].

[10] M.V. Ellis *Fiduciary Duties in Canada*, Loose leaf (Toronto: Carswell, 2004) 15-10.2.

[11] [2005] 1 BCLC 245 (Ch) at [54-55].

[12] J.A. VanDuzer *The Law of Partnerships and Corporations* (Toronto: Irwin Law, 3rd ed, 2009) 352.

[13] [1896] AC 44 (HL), 51-52.

swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.

The inflexibility of the rule, as stated by Lord Herschell, is also reflected in the earlier decision of Lord King LC in *Keech v Sandford*,[14] a case involving a trustee who had taken benefit of a lease upon the refusal of the owner to renew for the minor. Lord King LC, while holding the trustee accountable to the minor, said:

I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use.

The rule has been applied to directors as rigorously as it was applied to trustees in those cases. The reasons are simply borne out of the similarities attendant to both positions of directors and trustees.[15] If the rule is not founded on morality as stated by Lord Herschell in *George Bray's case*, it should be founded on pragmatism and which should countenance the business context in which the directors and the companies operate. It is simply too harsh to assume, as Lord King LC seemed to assume in *Keech* that every director or trustee would be dishonest in dealing with the trust assets.

Although the courts have in a number of cases espoused the strict ethic and inflexibility of the rule,[16] and proffered cogent reasons for upholding the rule,[17] a close scrutiny of some of the decisions would reveal that the rule enjoys enormous flexibility and that the decisions in a number of them were actually informed by the facts of each case. The strict and seeming inflexible expressions by the courts are like beacons establishing the parameters but do not hinder the manoeuvring or adaptation of individual cases to the existing facts, and indeed, this is what equity in its purest form enjoin. In *In Item Software (UK) Ltd v Fassihi*[18] Arden LJ alluded to the adaptability of the rule as a reflection of the flexibility of the rule of equity, as follows:

The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It

[14] [1726] EWHC Ch J76; (1726) 2 Eq Cas Abr 741; 25 ER 223; (1726) Sel Cas t King 61.

[15] See *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch) at [148] per Newey J referring to Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2011] 3 WLR 1153 at [34], where he observed that '[a]lthough company directors are not strictly speaking trustees, they are in a closely analogous position because of the fiduciary duties which they owe to the company: *Bairstow v Queens Moat Houses plc* [2001] 2 BCLC 531, 548. In particular they are treated as trustees as respects the assets of the company which come into their hands or under their control: per Nourse LJ in *In re Duckwari plc (No 2)* [1999] Ch 253, 262'.

[16] For instance, in *Towers v Premier Waste Management Ltd* [2011] ECWA Civ 923 at [2] Mummery LJ described the rule as simple, strict and salutary. In *Belliveau v. Belliveau* 2011 NSSC 397 (CanLII) at [72] Duncan J held that fiduciary relationship imposed upon the directors a 'strict ethic', a duty of loyalty, good faith and avoidance of a conflict of duty and self-interest. In *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch) at [27] Warren J relying on *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592; *Gwembe Valley Development v Koshy (No. 3)* [2004] 1 BCLC 131 (CA), 146; *Regal (Hastings) v Gulliver* [1967] 2 AC 134, 144, described the rule as strict and inflexible. See also *Wrexham Association Football Club Ltd v Crucial Move Ltd* [2006] EWCA Civ 237 at [39] per Sir Peter Gibson LJ; *Bhullar v Bhullar* [2003] EWCA Civ 424 at [27] per Jonathan Parker LJ; *O'Donnell v Shanahan* [2009] EWCA Civ 751 at [66] per Rimer LJ; *Volvo (SA) (Pty) Ltd v Yssel* 2009 (6) SA 531, 535 per Nugent JA; *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 at [35] per Heher JA.

[17] See *Canadian Aero Services Ltd v O'Malley* 1973 CanLII 23 (SCC), [1974] SCR 592, 610 where Laskin J observed that '[s]trict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour'. See also *CMS Dolphin Ltd v Simonet & Anr* [2001] EWHC Ch 415 at [93] per Lawrence Collins J. In *Parker v Mckenna* (1874) 10 Ch App 96, 118, Lord Cairns observed that it was not within the province of the court to ascertain whether the company has or has not lost by the acts of the directors. James LJ at 124 stated that the 'rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that'.

[18] [2004] EWCA Civ 1244 at [41], [44]. See also Cardozo J in *Meinhard v Salmon* 164 N.E. 545, 548 (US).

is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity…. "Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish".

The importance of flexibility in the application of the rule is reflected in the judgment of Etherton J in *Shepherds Investments Ltd v Walters*[19] where his Lordship, referring to Professor Clark,[20] observed that the 'general fiduciary duty of loyalty is a residual concept that can include factual situations that no one has foreseen and categorised. The general duty permits, and in fact has led to a continuous evolution in corporate law'.

The key to the survival and sustenance of every general rule that applies to corporations lies on the inherent quality of adaptability of such rule to the dynamics of the corporate enterprise. The application of the rule in each case must be guided by the peculiar facts of the case.[21] Scott JA of the South African Supreme Court of Appeal expressed a similar sentiment in *Da Silva and Others v CH Chemicals (Pty) Ltd*[22] as follows:

Ultimately, the inquiry will involve in each case a close and careful examination of all the relevant circumstances, including in particular the opportunity in question, to determine whether the exploitation of the opportunity by the director, whether for the director's own benefit or for that of another, gave rise to a conflict between the director's personal interests and those of the company which the director was then duty-bound to protect and advance.

A contextual analysis of Laskin J's decision in *Canadian Aero Services Ltd v O'Malley (Canaero)*[23] which is often referred to as espousing a strict ethic and the application of an inflexible rule of equity,[24] reveals a high level of flexibility. In that case the defendants who were directors and other officers of the company had devoted effort and planning in respect of a particular corporate opportunity as representatives of Canaero. The defendants subsequently resigned, incorporated a new company and obtained the corporate opportunity through the new company. In holding the defendants liable to account for the profits, Laskin J said:

An examination of the case law…shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which the company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.[25]

Laskin J by this statement did not intend to lay down any rule of strict ethic.[26] The reference to senior officer in the passage was because O'Malley and Zarzycki had protested that they were not directors but were general manager/president and chief engineer respectively of Canaero. The judge had to adapt the rule on fiduciary duty, which applies generally to directors, by extending it to any other officer of the company holding a position of responsibility, as the defendants in that case. This initiative did not originate from Laskin J, he relied on the expatiation of the principle by Professor Gower.[27] Subsequent

[19] [2006] EWHC 836 (Ch) at [85].
[20] R.C. Clark, *Corporate Law* (Boston: *Little, Brown* and Co, 1986) 34 and 141.
[21] See *Phipps v Boardman* [1967] 2 AC 46 where Lord Upjohn observed that rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.
[22] 2008 (6) SA 620, 627 at [19]. See also *Excel Health (Pty) Ltd v Masia* [2013] LSCA 6 at [13] per Scott JA.
[23] 1973 CanLII 23 (SCC), [1974] SCR 592, 610.
[24] See, for instance, the South African court decision in *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T), 67E where Goldstone J opined that 'the Courts should recognise and strictly enforce the 'strict ethic' in this area of the law to which Laskin J referred so that persons in positions of trust be less tempted to place themselves in a position where duty conflicts with interest'.
[25] n 23 above, 607.
[26] A fact which was admitted by the judge where he said: 'In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute.' ibid, 620.
[27] See L.C.B. Gower, *Principles of Modern Company Law* (London: Stevens & Sons, 3rd ed, 1969) 518 where the author stated that 'these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not

decisions of the courts in Canada have shown even greater flexibility in their application of the rule, some have insisted that the existence of fiduciary obligation would be marked by three characteristics, namely: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be used unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power.[28] The other aspect of Laskin J's decision in *Canaero* is the reference to maturing corporate opportunity. This is also borne out of the facts of that case in that the negotiation which the defendants were engaged on behalf of the company had reached an advanced stage when the defendants resigned and formed a new company that was eventually awarded the contract. This cannot be taken as an expression of a general proposition that the directors would only be liable where the company is 'actively pursuing' a particular business opportunity.[29] In *Pan Pacific Recycling Inc v So*[30] Sigurdson J observed that the reference to 'maturing business opportunity' or 'ripening business opportunity'[31] are misleading terms to the extent that they suggest that the fiduciaries are only barred from taking opportunities that the corporation is actively pursuing. Myers J had cautioned in *First Majestic* that 'the court should be cautious in determining that something which was initially a corporate opportunity ceased to be such because, according to the fiduciary, the company was not pursuing it with sufficient alacrity'.[32] The determination of whether a fiduciary is in breach of duty is a question of fact,[33] which is resolved by a consideration of a number of factors some of which were set down by Laskin J as follows:

[T]he factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

In *Foster Bryant Surveying Ltd v Bryant*[34] Rix J came to the conclusion, founded on the above analysis, that Laskin J saw the rule, strict as it might be, in somewhat flexible and merit-based terms. Davies had similarly observed that Laskin J seems to have favoured a flexibility greater than English case law allows.[35] A comparison with the House of Lords decision in *Regal (Hastings) Ltd v Gulliver*[36] lends credence to these assertions. A brief facts of that case are that a company owning a cinema wished to acquire two more cinemas but was financially constrained following the demand by the leasor that a certain minimum amount must be raised as the paid up capital or personal guarantee given by the directors. The directors who were initially favourably disposed to giving the guarantee subsequently changed their minds and proceeded to acquire the shares for themselves and through their nominees from which they made profits upon the sale of the entire undertaking. The House of Lords held the directors liable to account for the profits. The relevant individual expressions of their Lordships are captured by Rix LJ in *Foster*.[37] Two of those expressions by Lord Russell of Killowen and Lord Macmillan

so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity'. The present authors of the book do not seem to have changed their views on this. See P.L. Davies, S. Worthington and E. Micheler, *Gower & Davies Principles of Modern Company Law* (London: Sweet & Maxwell, 9th ed, 2012) 515 where they observed that the view of the Canadian Supreme Court is not inconsistent with these developments, since it too was derived from an analysis of the functions of the employees in question as senior management employees, though there will be scope for argument on the facts of each case about how extensive the fiduciary aspects of the employees duties are.

[28] See *Frame v Smith* [1987] 2 SCR 99 (SCC), 136 per Wilson J; *Hodgkinson v Simms* [1994] 3 SCR 777 (SCC), adopted by the South African court in *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA), 482.

[29] See *First Majestic Silver Corp v Davila* 2013 BCSC 717 (CanLII) at [150-151] per Myers J.

[30] 2006 BCSC 1337 at [175].

[31] See *Alnor Services Ltd v Sawyer* 1990 CanLII 649 (BC SC); *Cranewood Financial Corp v Norisawa* 2001 BCSC 1126 (CanLII).

[32] n 29 above at [152].

[33] Laskin J alluded to this earlier in his judgment where he emphasised that the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company... any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company. *Canaero* n 26 above, 606-607.

[34] [2007] EWCA Civ 200 at [58].

[35] See P.L. Davies, *Gower and Davies Principles of Modern Company Law* (London: Sweet & Maxwell, 6th ed, 2003) 420.

[36] [1967] 2 AC 134.

[37] n 34 above at [51].

respectively reflecting the perceived inflexibility of this prophylactic rule of equity are set down here. In the opinion of the former:

The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[38]

Lord Macmillan emphasised in his judgment that there are only two conditions for the attachment of liability, namely: '(i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves'.[39]

Some decisions by the South African courts which have accepted that the rule should apply in the same manner as under the common law are similarly expressed in such strict and inflexible terms. For instance, in *Phillips v Fieldstone Africa (Pty) Ltd and Another*[40] Heher JA observed that '[t]he fundamental question is not whether the appellant appropriated an opportunity belonging to the respondents, but whether he stood in a fiduciary relationship to them when the opportunity became available to him; if he did, it "belonged to the respondents"'.

The suggested justifications for the seeming inflexibility of the rule as in *Regal* are: first, that it relieves the court of having to make a judgment on business issues which it is not well placed to do, ie, whether the company was genuinely unable to raise the finance itself; and secondly, that as it is the duty of the director to obtain the opportunity for the company, if the director is relieved of that duty and allowed to take the opportunity personally where there is only a low chance of the company obtaining the opportunity itself, it will give an incentive to the director not to strive as hard as he might have done to promote the company's interest.[41]

The suggestion, as in *Regal*, that an opportunity that comes to the company, but which the company is unable to exploit, remains the company's opportunity is questionable. An opportunity remains an opportunity; it does not transform into company's property simply because the company would have benefitted from it. If the director must be prevented from exploiting such an opportunity, it must be because the company is interested, actively pursuing, and is in a position financially and otherwise to take benefit of that opportunity. It is only in that state of affairs that such an opportunity could rightly be referred to as the company's opportunity and the director be prevented from exploiting it. Where the company seemingly lacks the financial strength, as in Regal, to exploit such an opportunity, there is no basis for referring to it as company's opportunity if by that it is seen in the same light as the asset of the company. A director who exploits such an opportunity could perhaps be said to have placed himself in a position of conflict of interest and duty in that he is at that point serving personal interest which could interfere with his obligation to the company especially if he is an executive director. Such a director certainly cannot be vilified as having taken 'corporate opportunity' as the opportunity is at that point beyond the reach of the company.[42] Although both situations could give rise to a similar consequence, ie, an account for the profit, but a different consideration applies in dealing with a conflict of interest. Lord

[38] n 36 above, 144G.
[39] ibid, 153E.
[40] 2004 (3) SA 465, 482 at [35]. See also *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others*1988 (2) SA 54 (T); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[41] See Davies, Worthington & Micheler n 27 above, 590 and 593.
[42] See *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (High Court of Australia) where the court held that '[i]t is no answer to the application of the rule that the profit is of a kind which the company itself could not have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company'.

Cranworth in *Aberdeen Railway Co v Blaikie Brothers*[43] laid down the rule on conflict of interest where he said:

And it is a rule of universal application, that no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which *possibly may conflict*, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

The phrase, 'possibly may conflict' was interpreted by Lord Upjohn in *Phipps v Boardman*[44] as meaning that 'the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict'. A reasonable man in the context of *Regal* must be taken as an average director who finds himself in similar circumstances as the directors of Regal. The question would be: what would such a director have done? There are three possible options: (i) provide the guarantee demanded by the leasor or assist the company financially; (ii) take benefit of the transaction if the company is unable to raise the fund; or (3) allow the business opportunity to fizzle out as suggested by Lord King in *Keech*. The last option would be obviously unacceptable to a business minded director endowed with business skill and knowledge. The first option would be almost unassailable in a one or few members company where the director's interest is virtually inextricably bound together with that of the company. But in large companies, such as Regal, where the director assumes the status of a paid employee, it would be well beyond the director's duty to provide financial assistance or guarantee to the company even if he could have done so. So long, and only so long, as the director is not seen to have either prevented the company from taking advantage of the business opportunity by his action, or inaction if under a positive duty to act (and these can be proved by evidence), it is bereft of reason to contend that the director is the only person of all mankind who should not take benefit of the business opportunity.[45]

A pragmatic approach would suggest that where the inability of the company was not created by the director, there cannot be a conflict of interest and duty as the company's interest in the opportunity realistically ceased once the company is unable to meet the demands of the opportunity, and if taking the opportunity personally does not involve a conflict with the interest of the company, there is no reason to deprive the director of his profit.[46] The realistic approach being espoused here was adopted by the UK Court of Appeal in *In Plus Group Ltd v Pyke*[47] the relevant facts are reflected in that part of the judgment of Brooke LJ where he observed as follows:

In the present case Mr Pyke, who was a sick man following his stroke, had been effectively expelled from the companies of which he was a director more than six months before any of the events occurred of which the claimants now make complaint. Although he had invested a very large sum of money in the first and second claimants on interest free loan accounts, he was not being permitted to withdraw any of it. At the same time he was being denied any remuneration from the companies. When he entered into business with Constructive in the autumn of 1997 he was not using any of the claimants' property for the purpose of that business. Nor was he making use of any confidential information which had come to him as a director of any of the companies.[48]

His Lordship came to the conclusion that in these circumstances, Mr Pyke was not in breach of any fiduciary duty. Brooke LJ had described the facts of the case as 'so unusual',[49] and was strengthened in his decision by the statement of Lord Upjohn in *Phipps v Boardman*[50] that the facts and 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. Sedley LJ in a concurring decision showed some unease and out-rightly rejected some aspects of the decision of the trial judge,[51] but ultimately accepted that the facts

[43] (1894) 1 Macq 461, 471. Emphasis added.
[44] [1967] 2 AC 46, 123B-D.
[45] See *Keech's case* n 14 above.
[46] See Davies, Worthington & Micheler n 41 above, 590.
[47] [2002] EWCA Civ 370.
[48] ibid at [76].
[49] ibid at [75].
[50] n 44 above, 107.
[51] Where he said:'I am not prepared, at least on the facts before us here, to accept his further qualification "... where the company from which he takes work has made it known that it will in no way deal with the company from which he has been excluded". Every decision of this kind, within the principle discussed above, is fact-specific. The judge's first proposition is critical because it is factually correct and it eliminates the duality of interest or duty which the law seeks to

justified the decision in that '[q]uite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts…of his sole fellow director and fellow shareholder'.[52] Sedley LJ proffered philosophical justification for the judgment as follows:

Hard as it may seem, judgment is not a prize for being the more truthful or the less evasive party. "Even truth," a 17th-century commentator on the law wrote, "will jostle its adversary in a narrow pass." The judge's task is to come as close as he can to deciding – often with precious little help from the witnesses – what the truth is, and to base his judgment on it. That the result is sometimes surprising to an onlooker is no reason for saying that it is wrong, much less perverse.[53]

The unease shown by Sedley LJ in that case is a reflection of how deeply embedded in the minds of some judges the idea of a strict ethic which is inflexibly applied and unyielding to any considerations of facts. It remains to imagine the sought of argument at the judgment conference which convinced Sedley LJ to shift ground even modestly as it seems. Rix LJ in *Foster*[54] described *Pyke's case* as rare, and which presents a somewhat novel position. The case is rare in the sense that for the first time an English court refrained from merely restating and applying the prophylactic rule, but allowed itself to be guided by the facts and peculiar circumstances of the case. There are obviously other options at the disposal of Pyke such as an action for unfairly prejudicial conduct, or seek a winding up on just and equitable ground, a relief which he would readily have obtained in that circumstances. The path he chose was the more difficult one as shown by the existing authorities which were referred to by the court. The courage exhibited by their Lordships in deciding that case on its own peculiarities and with the application of the same equitable principles is a mark of flexibility and good conscience which are the pillars of equity. The court had, in good conscience, refused to allow equitable consideration to become instrument of inequity.[55]

The wisdom expressed in *Pyke's case* was not applied in *Bhullar v Bhullar*,[56] where the court apparently reverted to the misconceived idea of inflexibility of no profit and no conflict rules. The facts showed that relationships had broken down in a company owned by two families which has as one of its objects the acquisition of property, and that a formal decision had been taken by the two families at the board meeting that no further property should be acquired by the company while negotiations for the winding up of the company were in progress. These were the state of affairs when one of the families acquired a property without disclosure to the other. These facts were not considered material factors by Jonathan Parker LJ (who ironically was in the panel that decided *Pyke's case*) in setting down the applicable test as follows:

In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, *is not whether the party to whom the duty is owed (the Company, in the instant case) had some kind of beneficial interest in the opportunity*: in my judgment that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule.[57]

Indeed, the question which was rejected by Jonathan Parker LJ should have been the more appropriate in the context of that case which shows that at the material time the company was at the twilight of its existence and obviously had no interest in the acquisition of any more property, a fact which was positively expressed by the decision of the board, in spite of the objects in its memorandum. The reliance by his Lordship on Roskill J's decision in *Industrial Development Consultants Ltd v Cooley*[58] where the defendant was found liable in spite of the fact that 'the opportunity was not one which the company itself

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guard against. For reasons given by my Lords, however, it is impossible to divorce the acquisition of Constructive's work by Mr. Pyke and his new company from the cessation of Constructive's relationship with the claimants. The judge's second proposition is therefore factually incorrect.' n 49 above at [89-90].

[52] ibid at [90].

[53] ibid at [91]. See also the brief but incisive opinion of Jonathan Parker LJ suggesting that the level of exclusion of Mr Pyke from management is as good as being forced to resign from the company and which justifies the step taken by Pyke. ibid at [92-94].

[54] n 37 above at [70].

[55] ibid at [77]. See also *Murad v Al-Saraj* [2005] EWCA Civ 959 at [83, 121] where Arden and Jonathan Parker LJJ respectively called for a review of the perceived inflexibility of the rule on secret profit and conflict of interest to accommodate the facts of individual cases.

[56] [2003] EWCA Civ 424.

[57] ibid at [28]. Emphasis supplied.

[58] [1972] 1 WLR 443.

could have exploited'[59] is inappropriate; both cases are founded on fundamental contextual differences. *Cooley's case* raises serious issues of moral burden founded on dishonesty by Cooley who misrepresented his state of health to secure quick release by the company in a bid to exploit the opportunity which initially was open to the company. These were more weighty in invoking the equitable principle against Cooley, and justifiably so, than the mere incidental consideration of whether or not the company could have acquired the opportunity. *Bhullar's case* does not reveal any facts of dishonesty on the part of the appellant, but rather the contrary, as shown by the evidence of the appellant that he consulted a solicitor who advised, and supposedly rightly so, based on the existing facts and peculiarities of the company, that it was safe for the appellant to acquire the property for their personal benefit. The caution expressed by Lord Upjohn in *Phipps v Boardman*[60] against reformulating the rule which was copiously referred to by Jonathan Parker LJ[61] seemed to have been wrongly construed. In that passage Lord Upjohn had emphasised that the rule is applicable like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships' House in cases where this great principle is being applied *must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled.*[62]

The real inference from this judicial expression is that the applications of the rule must take into cognisance the peculiarities of individual cases. This is also evident in the statement of Lord Wilberforce in *New Zealand Netherlands "Oranja" Inc v Kuys*[63] where his Lordship enjoined that the strictness of the rule must be tailored to the context of each case. He said: '[n]aturally it [the no conflict and no profit rule] has different applications in different contexts…the precise scope of it must be moulded according to the nature of the relationship'. The company in *Bhullar* was a family company, run by two families, guided by mutual respect, trust and understanding, and was thriving when all was well. At the time of the purchase of the property by one of the families, that cordiality has broken down and the families have parted ways. It is simply unrealistic to expect that the family that purchased the property should have communicated the existence of such an opportunity to the other family in the existing state of affairs. The decision in *Pyke* shows that when relationship has broken down in a case such as this, it is not realistic to demand the same level of indulgence (fiduciary duty) from the directors. On the other hand, where cordial relationship exists in a few members company, or where relationship has broken down in large companies where the relationship of the director to the company is not characterised by personal attachment to the wellbeing of the company, the duty of loyalty will prevail in either case. There would be little argument that a director who receives or comes across any business opportunity that is within the scope of the company's business owes it a duty to disclose such information to the company.

The UK Court of Appeal in *O'Donnell v Shanahan*[64] showed unwillingness to confine the application of the rule within the scope of the company's business with a result that could hardly withstand the test of reasonableness as propounded by Lord Upjohn in *Phipp's case*. That case involved a quasi-partnership company founded on trust and confidence between the shareholders. The company's business was to provide clients with financial advice and assistance, including arranging bank loans, mortgages and insurance. Two of the directors were sued for a breach of fiduciary duty for engaging in a transaction in which they privately purchased a property without first referring the opportunity to the company. The trial court absolved the directors on the ground that the purchase of the property was outside the scope of the business of the company, though they relied on information available to them as directors. The first instance court relied on *Aas v Benham*[65] in which a partner who engaged in business outside the scope of the partnership business was absolved from liability notwithstanding that the information came to him in the course of his duty as a partner. Lindley LJ emphasised that '[b]y "information which the partnership is entitled to" is meant information which can be used for the purposes of the partnership. It is not the source of the information, but the use to which it is applied, which is important in such matters'.[66] The

[59] See *Bhullar's case* n 57 above at [36].
[60] n 50 above, 125.
[61] See *Bhullar's case* n 59 above at [28].
[62] Emphasis added.
[63] [1973] 1 WLR 1126 (PC), 1129. Also referred to by Jonathan Parker LJ in *Bhullar* n 61 above at [31].
[64] [2009] EWCA Civ 751.
[65] [1891] 2 Ch 244 (CA).
[66] ibid, 255. See also Bowen LJ where he observed that the information that is the property of the partnership is information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest. ibid, 257.

court held that it would be absurd to hold that a partner cannot derive any personal benefit from information that comes to him as a partner.

The Court of Appeal in *O'Donnell* declined to follow this pragmatic approach in applying the rule. Rimer LJ said:

The authorities relating to trustees' and directors' duties to account for profit earned in consequence of a breach of the 'no profit' rule are legion, they all appear to me to point to the same conclusion *and none appears to qualify the liability to account by reference to whether the impugned transaction was (in the case of an alleged breach by a director) within or without the scope of the company's business.*[67]

His Lordship relied on the House of Lords distinction between partnership and trustee in *Phipps v Boardman*[68] where Lord Guest observed that the scope of the partners' power to bind the partnership can be closely defined in relation to the partnership deed unlike in trusteeship where the scope is not defined, and as such, any information obtained by the trustee is obtained in the course of the fiduciary position.

It is short sighted to suggest that as at the time of the decision in *O'Donnell* there was no court decision which qualifies the director's liability to account by reference to the scope of the company's business. Such decisions abound in the American jurisprudence. The Supreme Court of Delaware, for instance, had in *Guth v Loft*[69] observed as follows:

It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein. On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, *in the line of the corporation's business* and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectance, and, by embracing the opportunity the self interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Judicial decisions apart, common sense would indicate that directors do not work in the wilderness, they are not exactly trustees with no defined boundaries to the discharge of their responsibilities. Companies, like partnerships, have objects which are set out in the memorandum. The exercise of the director's powers are geared at realising the objects of the company. Any breach of duty must therefore be defined in relation to the stated objects of the company. It cannot be correct, as suggested by Rimer LJ,[70] that unlike partnership, director's fiduciary duties are not circumscribed by the terms of a contract. Although fiduciary duties are equitable imputations or impositions on existing relationships, and not necessarily a contractual prescription if by that it is meant a formal document containing settled terms, the scope of the duty itself is guided by the objects of the contractual relationship, ie, what the relationship sets out to achieve. In the context of a company, the objects of the company as contained in the memorandum fulfil that purpose in the same manner as the deed of partnership.

The South African courts have shown some commendable level of flexibility in issues of this nature. In *Ghersi v Tiber Developments (Pty) Ltd*[71]Cloete JA emphasised that [i]t does not follow that, because a person is a director of a company which engages in property development, such person is automatically, in the absence of an agreement to the contrary, obliged to offer all property developments of whatever nature to the company, on pain of being held to have breached his or her fiduciary duty to the company and being required in consequence to hand over profits made from the developments not so offered.

[67] n 64 above at [55]. Emphasis added.
[68] n 60 above, 117 F.
[69] 23 Del.Ch. 255, 5 A.2d 503 (1939 5) 510-511. Emphasis added. See also *Martha Stewart Living Omnimedia, Inc v Stewart* 833 A.2d 961, 972-73 (Del. Ch. 2003).
[70] n 67 above at [68].
[71] 2007 (4) SA 536 (SCA) at [9].

The court found strength in the much earlier exposition of this legal position by Bristowe AJA in *Robinson v Randfontein Estates Gold Mining Co Ltd*[72] where the appeal court judge said:

To establish that the defendant's purchase…was covered by his fiduciary relation… it would not be enough to show that the purchase was within the company's power or that the property might have been useful to it…it would be intolerable if a director…could be held accountable for any private purchase of property merely because his company might conceivably want it.

A realistic invocation or application of the equitable rule on the director would demand a holistic approach, taking into consideration the company's objects, the functions performed by the director, the prevailing relationship of the director to the company and with the other directors as well as the general business environment which could impact positively on the perceived opportunity.[73] These factors were not taken consideration by Scott JA while presiding at the Lesotho Court of Appeal in *Excel Health (Pty) Ltd v Masia & Others*[74] with a result that could hardly withstand the test of flexibility as seen in *Pyke*. This was a case in which a number of medical practitioners had incorporated a company (the appellant company) to take benefit of business opportunities in a hospital run by the fourth respondent. The first respondent was one of the directors and represented the appellant on the board of the fourth respondent. As relationships began to strained, the first respondent complained of being isolated in the scheme of affairs in spite of being the greatest contributor to the wellbeing of the appellant and would want the existing dispute to be referred to arbitration, a demand which was not met by the other directors. It was at the thick of the dispute that the first respondent shifted his loyalty, incorporated the second respondent with his wife and through which he acquired shares from the fourth respondent. The appellant challenged the acquisition of the shares as being a usurping of business opportunity of the appellant. Scott JA, in holding that the first respondent was in breach of his fiduciary duty, said:

The taking up of the shares in Mepco was clearly an opportunity that fell within the scope of the appellant's business. It had previously acquired a 15 percent stake in Ts'epong and the purchase of a similar interest in Mepco would have constituted an opportunity to further its business interests. The opportunity became available by reason of Dr Masia's membership of Ts'epong's board as the appellant's representative. It was in the circumstances a corporate opportunity which can rightly be said to be the property of the appellant. By causing the shares to be purchased by Musanda, Dr Masia was in my view quite clearly acting in breach of his fiduciary duty owed to the appellant.[75]

The judgment did not address the nature of this company, a private company, run by medical practitioners, founded on mutual trust, respect and confidence which they reposed on one another. There is clearly personal attachment by each member, including the first respondent who is being vilified, on the company. The back ground upon which the first respondent acted as he did was the breakdown of these cordial relationships that bound the members. At that point in time the first respondent could no longer reasonably and realistically be expected to exhibit the same level of loyalty to the company as he had always done under normal conditions. The company in such circumstances should be seen by the court as the corporate expression of the identities of the various individuals that comprise it and not as a distinct entity. In that perspective a realistic approach would be adopted in dealing with any alleged breach of duty.

Duty after Resigning from Company

A director could, subject to compliance with the terms of his engagement, resign from the company at any time during the course of his engagement. The law respects the right of the director to resign even if his resignation might have negative impact on the business or reputation of the company.[76] The resignation of a director does not, however, severe all the links between the director and the company in the sense of granting the director an unrestricted freedom to do for himself what he could have done for the company. This restriction upon directors is upheld by the courts which insist that the fiduciary duty of a director does not terminate upon resignation, and that the duty cannot be renounced at will by the director by the

[72] 1921 AD 168, 268.
[73] See P. Delport, Q. Vorster, D. Burdette, I. Esser & S. Lombard, *Henochsberg on the Companies Act 71 of 2008* (South Africa: Lexis Nexis, 1st ed, 2013) Vol 1, 290(1).
[74] [2013] LSCA 6.
[75] ibid, [14].
[76] *CMS Dolphin Ltd v Simonet & Anr* [2001] EWHC Ch 415 at [95] per Lawrence Collins J; *Shepherds Investments Ltd v Walters* [2006] EWHC 836 at [109] per Etherton J.

termination of his employment with the company.[77] As a general rule, a director is not allowed to use confidential information acquired by him while in the employment of the company for his own purpose after his resignation. This is in recognition of the fact that such confidential information remains asset of the company and that a director as a trustee of such an asset cannot justifiably apply it to his own use even after his resignation.[78] The extent of application of this rule must, however, be defined by the peculiarities of each case. This is the reasonable inference from Laskin J's decision in *Canaero* where he stated that 'he [the director] is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired'.[79]

The facts of that case, as earlier shown, supports the principle as expressed by Laskin J. The conduct which immediately proceeded the resignation of the directors in that case unambiguously manifested a link between the resignation and the intention to exploit a 'maturing corporate opportunity'. There is good sense in circumscribing the application of this rule in that manner as the power of a director to resign is not a fiduciary power,[80] and any information or skill acquired by a director in the course of his employment constitutes part of his personal development which the law cannot justifiably deprive him.[81] Any judicial policy that would deprive a director of such acquired skill must be manifested by such facts as would render it inequitable to allow the director to exploit the opportunity and not simply by mere presumed post resignation continuance of fiduciary duty. The appellate court in South Africa had emphasised that it is the policy of the courts not to impose undue restraint on post resignation activities except where circumscribed by contract in realisation of the fact that both the common law and the Constitution of South Africa[82] promote productivity in the interest of the society by permitting all persons to engage in trade and commerce or their professions.[83] The more difficult part, however, relates to where to draw the line when the director is at the preparatory stage of resigning from the company, in other words, should a director who is contemplating resigning from the company or has served notice of resignation be allowed to engage in certain activities which a serving director would not ordinarily safely engage in?

Generally, a director who intends to remain in business after leaving his present employer will be expected to adequately prepare himself for the new challenges in his career. Whatever he does towards this end is expected to attract some level of opprobrium from the present employer, but the court should not be goaded by such sentiment, it must realistically examine the circumstances to ascertain whether the resigning director is acting within what is reasonably necessary to prepare him for a new life after the company which he serves. In *Balston Ltd v Headline Filters Ltd*[84] Falconer J emphasised that an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading, while he remains a director.

In *Framlington Group Plc v Anderson*[85] directors who shortly after their resignation took up employment with a competitor to whom their own company had sold a fund management business in which they had previously played a leading role in anticipation of their resignation but did not participate in the final negotiations that led to the actualisation of the transaction were absolved from liability for a breach of

[77] *Canaero* n 25 above, 615 per Laskin J.

[78] See *Albert A Volk Inc v Fleschner Bros Inc* (1945) 60 NYS 2nd 244. See also *CMS Dolphin's case* n 76 above at [96] per Lawrence Collins J where he observed that the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties and, by seeking to exploit the opportunity after resignation he is appropriating for himself that property.

[79] n 77 above, 607. See also *Cooley's case* n 58 above, which also buttresses the sensitivity of the facts to the decision of the court.

[80] *CMS Dolphin* n 78 above at [95].

[81] See *Island Export Finance Ltd v Umunna* [1986] BCLC 460, 482b where Hutchinson J observed that 'directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position'.

[82] See s 22 of the Constitution of the Republic of South Africa No 108 of 1996.

[83] See *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA), 628 per Scott JA. See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 at [15].

[84] [1990] FSR 385, 412.

[85] [1995] 1 BCLC 475 (Ch).

duty of no conflict rule. Blackburn J held that the negotiations by the three directors at a time when the group was in negotiation with Rathbone, of the remuneration package that they could expect to receive on joining Rathbone was not in itself, with or without disclosure to FIM, a breach of any general duty of good faith owed by them to FIM. The decision was founded on pragmatism in the sense that the only wrong which the directors were alleged to have done was negotiating a safe landing (remuneration) with a competitor at the same time as the competitor was negotiating the acquisition of their company's business. There was no suggestion that they influenced the outcome of the transaction one way or the other. Under the strict application of the prophylactic no conflict rule, their status as directors in FIM at that point in time would have invoked the application of the rule, but Blackburn J preferred to be ruled by the facts where he said:

In the absence of some special circumstance (for example a prohibition in a service contract) a director commits no breach of his fiduciary duty to the company of which he is a director merely because, while a director, he takes steps so that, on ceasing to be a director (and, if he is one, an employee of the company), he can immediately set up business in competition with that company or join a competitor of it. Nor is he obliged to disclose to that company that he is taking those steps.[86]

The earlier decision of Hoffmann J in *Bishopsgate Investment Management Ltd (in Liq) v Maxwell (No.2)*[87] had shown that although a director's duty of loyalty could be generally expressed, what that duty precisely is in individual cases must depend 'upon how the particular company's business is organised and the part which the director could reasonably have been expected to play'.[88] The fact that in *Framlington* the directors were not involved in the final negotiation for the sale of the business was decisive in absolving them from conflict of interest. It is simply not enough that they were directors of the company at the material time.

In *Shepherds Investments Ltd v Walters*[89] Etherton J attempted drawing a distinction between when a breach arises and when a director could safely carry on with his preparation to engage in competition after resignation, but concluded that each case is based on facts. He said:

What the cases show, and the parties before me agree, is that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company.... The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties…. At the other end of the spectrum, it is plain that soliciting customers of the company… or the actual carrying on of trade by a competing business would be in breach of the duties of the director…. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case.

His Lordship had rejected Hart J's prescription in *British Midland Tool Ltd v Midland International Tooling Ltd*[90] that a director must resign once he has irrevocably formed an intention and has launched himself in the actual taking of preparatory steps for a post resignation competition. Ironically, however, the decision of Hart J in *Midland* seems to command greater support based on the facts than that of Etherton J in *Shepherd's case*. In the former the three directors who were aware of the activities of the retiring director in poaching the employees of their company did nothing to stop him but in fact 'actively promoted the success of the process'. Hart J described the conduct of the retiring director simply as 'conduct of that kind' and proceeded to hold that '[h]e [the retiring director] was perfectly free to proceed to set up MIT and invite employees of BMT to join it'. [91] But the other three directors who did nothing to stop the poaching activity and actually encouraged the exercise were found to be in breach of duty. The

[86] ibid, 498b.
[87] [1994] 1 All ER 261, 264.
[88] See also *Foster's case* n 55 above at [65] per Rix LJ.
[89] [2006] EWHC 836 at [108].
[90] [2003] EWHC 866 at [31].
[91] ibid at [32].

decision is consistent with the realistic approach that a director who retires or resigns must be allowed room to engage in necessary arrangements, while still with the present employer, that would enable him to establish himself after leaving the present company. The statement of Hart J demanding the resignation of a director once an irrevocable intention to compete is formed should be seen merely as advisory, indicating what such a director is expected to do and not what he must do. In the latter case, although Etherton J had proceeded from the right premise in setting down of the applicable principle, he seemed to have set the threshold of preparatory steps below what it should ordinarily entail where he said: '[b]y the time Mr Simmons resigned the Individual Defendants had not only made a firm decision to set up a competing business, but they were well advanced in the development of a rival and, in their view, superior investment "product".' The judge found on these facts that the defendants have breached their fiduciary duties to the company. It only takes a moderate analysis to expose the obvious inconsistency in this finding as against the principle earlier set down by the judge. A director that intends to engage in trading after resignation will, if he has the financial strength, reasonably be expected to acquire the items of such trade before disengagement so as to ensure continuity. The developing of a product in such situation, whether superior or inferior, by a retiring director which he intends to market after his retirement or resignation cannot be more than a preparatory step towards retirement or resignation, so long as such product is not placed in the public domain, ie, sold or placed at the disposal of the prospective customers. The product developed by a business inclined director should not attract more weight than the office accommodation, furniture and stationaries acquired by another retiring director that intends to engage in consultancy services after resignation. The decisive question should always be whether the director in taking those steps, usurped any property of the company either in the form of business opportunities or trade secrets. The answer should always reflect the realities of the case as dictated by common sense founded on a flexible approach as demanded by the individual cases.[92]

The case of *Da Silva and Others v CH Chemicals (Pty) Ltd*[93]tested the South African courts resolve in adopting a realistic or a prophylactic approach in enforcing a director's duty of loyalty. The facts are that the respondent company was offered a business opportunity by a potential competitor which it declined. An approach was subsequently made to the director to head up a subsidiary of the company to be established in South Africa and in competition with his employer. The director after a period of negotiation accepted the offer, promptly tendered his resignation notice and informed the chairman of the company that he was going to take up a new job with the potential competitor. Employment agreement was signed by the director with the new employer after tendering his resignation notice but before final disengagement. The trial court, applying the strict prophylactic rule found that the director was in breach of his duty of loyalty by negotiating and ultimately taking up employment with the competitor which, as found by the court, amounts to usurping of business opportunity of his former employer. The approach of the appellate court, while reversing the decision of the trial court, was more pragmatic in the application of the rule which was given a contextual flavour. Scott JA did not find anything reprehensible in the acceptance of an offer by a director even from a competitor and before his disengagement where such an opportunity was earlier rejected by his company. The appellate judge observed as follows:

Da Silva was to contribute nothing more than his services as managing director….The point is, it was not the transaction pursued by the plaintiff; it was the very antithesis of what was pursued and Da Silva was under no duty to obtain and exploit it for the plaintiff. It follows that in my view the plaintiff's claims under the rubric of the Resinex opportunity had to fail and the court a quo's finding to the contrary was wrong.[94]

Although as further revealed by the facts, Da Silva played some role in declining the offer made to the company by writing the letter of rejection, but there was no evidence that he influenced the decision to reject the offer as the records show that the substance of the rejection letter was dictated by the chairman and this was after receiving a memorandum from the managing director (not Da Silva) indicating

[92] See *Foster* n 88 above at [76] per Rix LJ. Common sense pervades the decision in *Foster* especially as shown in the observation of Rix LJ that '[a]s for the extent of his fiduciary duties [after tendering resignation notice], it seems to me that the judge's realistic findings as to the position within the company after Mr Bryant's resignation makes it very arguable that, so long as he remained honest and neither exploited nor took any property of the company, his duties extended no further than that. To demand more while he is excluded from his role as a director appears to me to be unrealistic and inequitable.' ibid at [93].
[93] 2008 (6) SA 620 (SCA).
[94] ibid, 636 at [37]. Scott JA inexplicably failed to exhibit a similar pragmatism in his decision in *Masia's case*. n 74 above.

unfavourable disposition towards the offer. There could therefore not have been any wrongdoing on the part of Da Silva in accepting the subsequent offer.

The appellate court had upheld the general rule that fiduciary duty does not necessarily terminate with the resignation of the director,[95] but what it failed to address are those preparatory steps which a director could justifiably engage in before his ultimate disengagement from the company. Such preparatory steps would ordinarily include the discussions, as in this case, which Da Silva had with the prospective employer culminating in the signing of the agreement. While the 'no conflict rule' could preclude a director from working for a competitor, it certainly does not prevent him from discussing the prospects of a new offer of employment. This was addressed by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[96] where the judge held that the planning by a director of his future and the preparatory steps taken to enable him to obtain alternative employment and earn a living even if taken during his month of notice cannot be regarded as against public policy and therefore unlawful. It is certainly not the law, as suggested by Cassim,[97] that once an offer of employment is made to a director by a potential competitor, he is in breach of the 'no conflict rule'. Adopting such a policy would be too harsh, unrealistic and bereft of the flexibility which some judicial decisions have exhibited in this arm of the law. The law does not frown at an offer of future employment, and should indeed not do so, and even permits the acceptance of an offer of employment so long, and only so long, as the retiring director does not proceed to perform or undertake some positive acts which are inimical to the interest of his present employer. The acceptance of an offer would remain within a reasonable remit of the preparatory arrangement by the director towards a post resignation career endeavour.

Statutory Recognition of the Common Law Rules

The corporate opportunity doctrine is increasingly gaining recognition by companies statutes in different jurisdictions. In South Africa and United Kingdom, for instance, the rule is now codified in varying terms under the Companies Acts operating in those jurisdictions respectively. The UK statutory provision has narrowed down the perceived two rules component ie, the no conflict and no profit rules, of the doctrine into one rule by adopting the wider concept, ie, the no conflict rule, and incorporating the latter as an instance of the former.[98] The Act provides in section 175 as follows:

(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).[99]

This provision stands as a statutory recognition of the prophylactic rule of strict ethic as laid down over a century ago by the House of Lords in *Aberdeen Rly Co v Blaikie Bros*[100] and *Regal (Hastings) Ltd v Guilliver*[101] respectively whose relevance in promoting the demands of modern corporate business are now questionable. One of the controversies at common law lies in defining the scope of the opportunity which the director must not exploit. Should it be restricted to the company's line or scope of business or every other business opportunity? The word 'any' before property, information or opportunity in subsection (2) suggests that the scope of the prohibited opportunity is not circumscribed, implying that every business activity of the director must be geared at promoting the interests of the company in order to avoid a conflict of interests and duty.[102] Enforcing such strict ethic in modern commercial world would almost certainly require a director to be turned into a robot remotely controlled by the company.

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[95] ibid, 628 at [20].
[96] 1981 (2) SA 173(T) , 199C.
[97] M.F. Cassim, 'Da Silva v CH Chemicals (Pty) Ltd: Fiduciary Duties of Resigning Directors' (2009) 126(1) *South African Law Journal* 61. Cf R. Cassim, 'Post-Resignation Duties of Directors: The Application of the Fiduciary Duty not to Misappropriate Corporate Opportunties' (2008) 125(4) *South African Law Journal* 731 who sees the appellate court decision in Da Silva as an upholding of flexibility which is in consonance with the demands of modern commercial world.
[98] See French, Mayson & Ryan n 5 above, 502.
[99] Emphasis added.
[100] [1854] 1 Macq 461 (HL).
[101] [1967] 2 AC 134.
[102] See s 175(7) of the Act which provides that any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

On the positive side, however, the provision is expected to rest the controversies arising from inferences drawn from Lord Herschell's statement in *Bray*[103] suggesting the existence of two and not just one fiduciary duty. It is now clear, as observed by Hannigan, that there is only one rule, a no conflict rule, and a prohibition on profiting when in a position of conflict.[104]

The objective approach espoused by Lord Upjohn in *Phipps v Boardman*[105] is implicitly recognised in section 175(4)(a) of the Act which provides that duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest. A reasonable likelihood of conflict can only be ascertained by recourse to an objective standard which is encapsulated by the concept of a reasonable man. The only attempt to mitigate the harshness of common law is found in the provisions of subsections (3)(4)(b) which exempt from giving rise to situations of conflicts, transactions or arrangements between the director and the company, and transactions authorised by the directors, respectively. These are not as far reaching as would have been expected to promote the director's enterpreneur skill without breaching the duty. The preferred flexible approach seen in some later English court decisions that laid emphasis on the peculiarities of individual cases do not seem to have been fancied by the parliament. This is buttressed by the rigid expression in section 170(2)(a) to the effect that a person who ceases to be a director continues to be subject to the duty in section 175 as regards the existing corporate opportunities which he became aware while a director. There is no consideration in that provision as to the reason for the person ceasing to be a director as evidenced by some of the decided cases. However, there is room for the courts to manoeuvre under section 170(3)(4) of the Act which provides for the adoption of the common law and equitable principles in the interpretation and application of the various provisions. Some of the later decisions of the common law courts have adopted a commendable level of flexibility giving room for the consideration of the peculiar facts of individual cases, and had applied the rule in such manner as accords with reason and demands of modern corporate operations. The courts in interpreting and applying the statutory provisions will remain within the remits of the law if they are tailored in such flexible manner as would take cognisance of the peculiarities of individual cases.

In South Africa, the relevant provision is found in section 76(2) of the Companies Act 71 of 2008 which concisely provides as follows:

A director of a company must - *(a)* not use the position of director, or *any information obtained while acting in the capacity of a directo* - (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company.[106]

Guidance for the interpretation and application of this provision is provided in section 77(2) of the Act which requires the courts to have recourse to the common law principles relating to breach of fiduciary duty. Although the two arms of the rules encompassed in the corporate opportunity doctrine (ie, no conflict and no profit rules) are reflected in section 76(2), the scope of that provision seems narrower than what is obtainable under the English law in the sense that there must be proof that the director has gained an advantage,[107]or has caused an advantage to be gained for another person other than the company. The alternative is that the company must have suffered harm by the conduct of the director. These are questions which the English courts do not consider relevant in a quest to uphold a strict ethic in the enforcement of the prophylactic rule. A predominant number of the South Africa courts' decisions have shown a strong inclination to a flexible approach insisting that a mere perceived position of conflict of interests and duty is inadequate to impose liability on the director.[108] The plaintiff must now, as a matter of statutory obligation, prove that the position of conflict has conferred an advantage on the director, directly or indirectly, or that such a position has caused harm to the company, and in a manner that is deemed reprehensible under the law.

[103] n 13 above.
[104] B. Hannigan, *Company Law* (Oxford: Oxford University Press, 3rd ed, 2012) 223. See also A. Dignam & J. Lowry, *Company Law* (Oxford: Oxford University Press, 7th ed, 2012) 366.
[105] n 44 above, 123b-d.
[106] Emphasis added.
[107] The reference to 'advantage' instead of 'profit' will ensure that any controversy relating to the nature of the benefit, whether monetary or otherwise, is avoided.
[108] See *Movie Camera Co (Pty) Ltd v Van Wyk & Another* [2003] 2 All SA 291(C); *Ghersi v Tiber Developments (Pty) Ltd* 2007 (4) SA 534 (SCA); *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) 620 (SCA); *CyberScene Ltd & Others v i-Kiosk Internet and Information (Pty) Ltd* 200 (3) SA 806 (C); *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1923 AD 155.

The reference to 'information obtained while acting in the capacity of a director' by the provision, addresses the time of obtaining of the information and when it is utilised by the director. Thus, it would be immaterial, as under the common law, that the director has resigned from the company when he makes use of the information. This interpretation obviates the need for a specific provision on post-resignation usurping of corporate opportunity as under the English law although the latter is obviously clearer in its terms.[109] Every application of any statutory provision that touches on post-resignation duty of director would always recall the statement of Laskin J in *Canaero*[110] suggesting that there should be some link between the resignation and exploitation of the corporate opportunity, but must not lose sight of the later caution by the same judge in the same judgment that he was not laying down any general rule of liability that should be read as if it were a statute.[111] Contextually, the statement perfectly falls in line with the established principle as the directors in that case had used their positions to obtain an advantage in a manner which the court rightly found to be reprehensible. The appellate court in South Africa has shown that in every post-resignation breach of duty, the ultimate inquiry would involve scrutinising of the relevant facts and circumstances of each case and not just relying on principles.[112] The position should not attract any different consideration in applying the statutory provisions on resigning directors.

A unique feature of the South African Companies Act provision is the extension of the fiduciary duty of a director to the subsidiary of the holding company. The director's duty at common law is owed to the company and not to its subsidiary.[113] The Act adopts a holistic approach in dealing with the holding company and its subsidiaries so that the wellbeing of the subsidiary is not overlooked in the discharge of the obligation of the director to the holding company.

Conclusion

The demands of ever increasing corporate competitive commercial activities opening up new opportunities on daily basis require enhanced flexibility in the application of the corporate opportunity doctrine whether under the statute or at common law. There is little sense in insisting that a director is the only person of the whole mankind who should not venture in a particular opportunity simply because the company which he serves could have interest, and even when it is unable to exploit that opportunity for whatever reason. Where it is shown, on objective assessment, that the director has exerted all his effort to secure the opportunity for the company but that the impossibility is created by a situation well beyond the powers of such director, and that he did not create or contribute to the existing impossibility, there is no sense in insisting that the director, a business man which he is, should let the opportunity 'run out' than taking personal benefit of it. Such a rigid stance could, if viewed from the human rights perspective, be seen as discriminatory. The office of a director is an office for the exercise of commercial dexterity and should not be made to look like a burden on the holder. It is in recognition of the obvious hardship inherent in the inflexible application of the rule that the three judges in the recent UK Court of Appeal decision in *Murad & Anr v Al-Saraj & Anr*[114] had unanimously but individually forcefully voiced their desire for a more liberal approach. Jonathan Parker LJ, for instance, said:

[T]here can be little doubt that the inflexibility of the 'no conflict' rule may, depending on the facts of any given case, work harshly so far as the fiduciary is concerned... it may be said that commercial conduct which in 1874 was thought to imperil the safety of mankind may not necessarily be regarded nowadays with the same depth of concern… I can envisage the possibility that at some time in the future the House of Lords may consider that the time has come to relax the severity of the 'no conflict' rule to some extent in appropriate cases.[115]

The future is now, the Court of Appeal need not wait for the House of Lords to revisit the decision in *Regal* and that line of cases. Lord Upjohn had laid the foundation for a flexible approach as far back as

[109] Cf R.Cassim n 97 above, 732 where the writer suggests that s 76(2) does not cover post-resignation breach of duty. That is a narrow view of that provision.
[110] n 79 above, 607.
[111] ibid, 620.
[112] See *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
[113] See *Scottish Co-operative Wholesale Soceity Ltd v Meyer* [1959] AC 324 (HL); *Adams v Cape Industries Plc* [1990] Ch 433 (CA). See also *Henochsberg on Companies Act 71 of 2008* n 73 above, 290.
[114] [2005] EWCA Civ 959.
[115] ibid at [121]. Arden LJ at [83] said: 'In short, it may be appropriate for a higher court one day to revisit the rule on secret profits and to make it less inflexible in appropriate circumstances'. Similarly, Clarke LJ at [167] expressed a preference for a flexible approach.

1963 in *Boulting v Association of Cinematograph Television and Allied Technicians*[116] where he cautioned that a broad rule like this must be applied with common sense and with an appreciation of the sort of circumstances in which, over the last two hundred years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest, and not to some theoretical or rhetorical conflict.

Rix LJ in *Forster* found strength in this statement in adopting a commendable level of flexibility in his decision in that case. Some of the South African and Canadian courts' decisions have also shown similar inclination to flexibility. Although not much of this is expressly reflected in the statutory provisions, the reference to the common law as a guide for interpretation and application of those provisions should strengthen the courts in leaning more on those decisions that emphasised some level of flexibility as being more conducive to the modern corporate commercial activities.

[116] [1963] 1 All ER 716, 730.