CORPORATE LAW'S FIDUCIARY PERSONAS

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I. INTRODUCTION

A fiduciary relationship is created when a person undertakes (commits or agrees) to perform a representative function on behalf of another person or in relation to a specified purpose, *and* when the fiduciary is empowered (provided with the legal authority) to perform that function. Recent case law has foregrounded these elemental components of fiduciary relationships. For example, in *Halton International Inc (Holding) Sarl v Guernroy Ltd* Paton J, as he then was, observed that:

> "A critical and usually determinative feature of any fiduciary relationship is the *agreement of the fiduciary to act in the interests of the principal* in the exercise of *the power which is granted* or in relation to the principal's property or business affairs."[1]

More recently, in *Nehayan v Kent*, Leggatt J, as he then was, observed, "fiduciary duties typically arise where one person *undertakes* and *is entrusted with* authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person".[2]

The core duty of the fiduciary is to perform the undertaking, the performance of which is the reason for the existence of the relationship. The

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[1] [2005] EWHC 1968 (Ch) at [148] (emphasis supplied).

[2] [2018] EWHC 333 (emphasis supplied). In reaching these conclusions, both Patten J and Leggatt J drew upon the High Court of Australia's judgment in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97. The debate about the conditions pursuant to which fiduciary obligations are created is far more extensive and contentious than I have the space to address here (see for example: E.J. Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1; J. Edelman, 'When Do Fiduciary Duties Arise' (2010) 126 *L.Q.R* 302; L. Smith, 'Contract and Consent and Fiduciary Relationships' in P. Miller and A. Gold, eds *Contract, Status and Fiduciary Law* (Oxford: Oxford University Press, 2016); and P. Finn, 'The Fiduciary Principle' in T. Youdan (eds) *Equity*, *Fiduciaries, Trusts* (Ontario: Carswell, 1989).

foundational questions in any fiduciary context are, therefore: what did the fiduciary undertake to do and what was she empowered to do? Consider in this regard, for example, the trusts case of *Boardman v Phipps*,[3] which involved an action brought against agent-fiduciaries of a trust who took a business opportunity which arose in connection with shares held by the trust. Lord Upjohn observed that the starting point was an examination of the relationship "to see what duties are thereby imposed on the [fiduciary], to see what is the scope and ambit of the duty imposed upon him".[4] The "duty" he was referring to here was the scope and ambit of the undertaking that the fiduciary-agents had agreed, and that the trustees had empowered them, to perform.

The performance of this core undertaking or duty is regulated by what is referred to in this article as the general duties—the fiduciary duties[5] to act in good faith in the performance of the undertaking and to avoid a conflict of undertaken duty and personal interest, and the duty of care. The general duties, as Matthew Conaglen[6] has observed, are *second order* obligations which serve the effective *performance* of this core duty;[7] they are only meaningful through their interaction with the *first-order* undertaking—a fiduciary who undertakes to exercise delegated power for a specified purpose is required to exercise the delegated power in good faith to further that purpose; the fiduciary must take due care when exercising the delegated authority; and when performing the undertaking the fiduciary may not place himself in a position where he has a conflicting personal financial interest with the performance of the undertaking.

Real and legal persons can give and perform multiple and distinct fiduciary undertakings. That is, one person can have multiple fiduciary personas. A person can, for example, undertake and be empowered to act as trustee, agent, solicitor, and guardian for the same person who is beneficiary, principal, client, and child. The creation of each fiduciary persona is a function of the above elemental conditions: a specific undertaking and the empowerment to perform that undertaking. Each such undertaking is separate and each is, separately, subject to the general duties. These undertakings cannot be merged into one by choosing one of the fiduciary relationships—

[3] [1967] 2 AC 46.
[4] [1967] 2 AC 46 at 127.
[5] This article does not engage with the debates about which duties are fiduciary duties.
[6] M. Conaglen, *Fiduciary Loyalty* (Oxford: Hart Publishing, 2010) at 61-61 and 32-34.
[7] This representation distorts somewhat Conaglen's position, which is that the function of "peculiarly fiduciary duties" is to provide an "enhanced likelihood of…the proper performance of the fiduciary's non-fiduciary duties". The argument here is all of the general duties—good faith, care and no-conflicts—are designed to enhance the effective performance of the undertaking.

trustee, agent, guardian—as a label for all of them. If we did so we would risk confusing the fiduciary's obligations in relation to the performance of those distinctive undertakings. What if the trust requires only the holding and transfer of bank account claims to the child on a specified birthday, yet the agency undertaking involves a full-time undertaking to pursue all promotion activities related to the child-prodigy's brand and musical activities? To merge all the undertakings under one fiduciary label—say the label of the agent—would risk overspill from the broad prescriptive agency undertaking into the very narrow and limited trusteeship undertaking.

This article is concerned with corporate law's multiple fiduciary personas. It argues that although corporate law is very familiar with the idea that one person can have several capacities in which she has a relationship with the company—as, for example, shareholder, creditor, employee and director—it has lost sight of the similar and basic fiduciary insight. It has come to treat all the fiduciary relationships which a person who is a director of the company has with the company as being subsumed by the role of director, when in fact a person who is a director may undertake multiple and separate fiduciary obligations *qua*, *inter alia*, director, senior manager or agent.[8]

Corporate law's fiduciary persona-myopia is seen most easily in relation to the *de facto director* concept. It has led some courts to assume that the only way an individual can be deemed to be subject to corporate fiduciary obligation is if she is held to be a de facto director, resulting in senior managers who do not perform, and are not held out as performing, any formal or informal directorial function being deemed to be de facto directors. More significantly, however, this fiduciary persona-myopia has resulted in UK company law making a profound category error: it has built its modern (post-1970) understanding of the nature of a directors' duties on the basis of cases that, properly categorised, address a different fiduciary relationship, namely senior managers as fiduciaries. The directorial undertaking is a narrow, limited and periodically exercised one which focuses on the collective exercise of board power and responsibility for its exercise; whereas the managerial undertaking is a broad positive full-time undertaking. The effect of this category error is the absorption of the prescriptive duties which rightly reflect full-time managerial undertakings into a "director's duties", *applicable to all directors*, thereby significantly expanding the obligations of directors beyond the job description

[8] For an important and rare consideration of the importance of the tension between the managerial and directorial role see P. Davies and S. Worthington, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 10th eds, 2016) at 475-476.

and the directorial undertaking. This in turn has destabilised and altered the no-conflicts rule as it apply to directors, radically changing the constraints placed upon a director's external/extra-company business activities and reconfiguring the incentive structure for accepting a directorial role, rendering it much less attractive and thereby invoking a policy concern about deterring board service which courts have, since the mid-18th century, encouraged us to take seriously.[9] The article first addresses this category error and its doctrinal effects before turning to de facto directors.

II. FIDUCIARY-PERSONA AND UNDERTAKING MYOPIA

1. Foregrounding Corporate Fiduciary Undertakings

Real persons who perform governance and/or operational roles within the corporation may make, and be empowered to perform, several distinct and separate fiduciary undertakings. But modern corporate law is, as this section of the article will demonstrate, only capable of seeing the directorial fiduciary role. Although a few cases have recognised that senior managers and employees may be fiduciaries, when a person who performs multiple representative roles for a company is a director then the category of director displaces all of these other fiduciary roles.

One of the drivers of corporate law's failure to distinguish between different fiduciary roles performed by the same real person is the language that has been (and still is) deployed to describe those senior managers who are also directors. Today, in common corporate parlance we follow the American vernacular and distinguish between a director and a chief executive officer. The latter is typically also a director but the distinction makes it clear that there are two separate capacities/roles—as director and as management employee. However, prior to this shift in our vocabulary it was commonplace to refer to the CEO as the "managing director"—a term of corporate legal art that elided the distinction between director and employee and implied that the senior manager of the company had to be a director. However, the position of managing director is an executive not a directorial position. Article 84 of the

[9] *Knight v Earl of Plymouth Dickens* 120 (1747), per Lord Hardwicke: "to add hazard or risque to that trouble and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring everyone from accepting so a necessary office".

Table A model articles issued pursuant to the Companies Act 1985 provided, for example, that "the directors may appoint one or more of their number to the office of managing director *or to any other* executive office". Similarly, today we distinguish between executive and non-executive directors; a distinction that underpins the UK's modern soft-law regulation of the board through the Corporate Governance Code. However, as with "managing director", the notion of an "executive director" elides the distinction between executive and director. There is no capacity or office which is "the executive director", there is only a person who is both an executive (an employee) and a director. The managing director or the executive director is a person who has made two separate fiduciary undertakings and has been subject to two separate forms of empowerment, just as a person could be a trustee, agent and guardian in relation to same real person. But the terminology of managing director and executive director guides us when thinking about fiduciary obligations to see only the noun and not the adjective.

The notion that there are separate and distinct fiduciary personas and undertakings given by the same senior real persons in the corporation is not only supported by careful application of basic fiduciary law principles, it is encoded within the Companies Acts through the oft neglected concept of the "the office". With its origins in public and ecclesiastical law,[10] the concept of an "office" has long referred to the performance of a representative function. John Leach, later Master of the Rolls, argued before Lord Eldon in 1808 that "there is no public officer, from the Crown downwards, who is not in some sense a trustee".[11] The concept of "the office" has permeated UK corporate charters and codes since the inception of incorporation by charter or statutory registration. The East India Company's charter of 1600, for example, refers to the "office" of the Governor and Deputy-Governor[12] and the term peppers the UK's earliest general incorporation statutes.[13] And the concept of corporate "officer" remains a key part of modern corporate legislation. Importantly, the Companies Act 2006 provides that an "officer" includes not only a director but also a manager or secretary, thereby importing the notion that a manager or a company secretary is also "in some sense a trustee".[14] In this regard, consider also that Table A referred to the role of managing director as an executive "office" and that the "summary remedy" provided by section

[10] J.G. Allen, 'The Office of the Crown' (2018) 77 *C.L.J.* 298, 307-312.
[11] *Attorney General v Brown* (1818) 1 Wils Ch. 323, 357.
[12] Charter Granted by Queen Elizabeth to the East India Company, 31 December 1600.
[13] See, for example, Companies Act 1862, inter alia, ss. 42, 43, 58, 60, and 64.
[14] S. 1173 Companies Act 2006.

212 of the Insolvency Act 1986—a version of which has been in place since 1862[15]—refers to the fiduciary duties of officers. And, as a comparative aside, it is noteworthy that the Australian Corporation Act not only defines officer in a way that includes, *inter alia*, senior managers[16] but, in contrast to the UK statute, explicitly makes the general duties application to both directors and officers.[17] But note finally in this regard that through the lens of the elemental conditions for fiduciary relations a person is not a fiduciary because he is deemed to occupy the status of "officer" but because "officer" is a label for a person who has given a distinct representative undertaking, which may include a representative managerial undertaking, and has been empowered to perform it.

To foreground more clearly the separate and distinct representative fiduciary undertakings made to a corporation, consider the following examples:

Example A
Jill agrees to accept the role of a director on the board of a large listed company (Company A). She is not an employee or manager of the company. She does not agree to perform any role on any committee of the board. She is informed by the company prior to her appointment that there are ten half- to full-day meetings of the board each year and a separate two-day strategy away-day held during the summer months. She is informed that the expectation is that a director attends at least eight of the board meetings in person, but may dial into two of those meetings remotely. Board meeting agendas are set by the chair of the board in close co-operation with the chief executive officer of the company. Board materials are often significant requiring one to two days of reading time.

Jill's undertaking is limited. She does not undertake to perform any operational or managerial role. She undertakes only to attend duly convened board meetings and at such meetings to participate in the collective exercise of board power on the issues brought before the duly convened board by the chair of the board. Her undertaking to play a role in the collective exercise of board power extends to the appointment of, and the delegation of power to, senior management as well as being responsible for that delegation. Nor does she undertake to determine what issues should be brought before the board. Necessarily, in determining which issues are brought before the board, she must rely on the chair and senior managers who have a closer working knowledge of the operations of the company.

[15] S. 165 Companies Act 1862.
[16] S.9 Australian Corporations Act 2001.
[17] S.181 Australian Corporations Act 2001. See *CellOS Software Ltd v Huber* [2018] FCA 2069, where the High Court both focused on the CEO's duties as fiduciary, but also, consistent with the argument in this article, observed that the nature of his fiduciary duty was "defined by the scope of his engagement and responsibilities as CEO" (at [786]).

More formal support for understanding Jill's undertaking in this limited board-focused way can be found a company's articles of association—which contain the company's understanding of the directorial role which a director in accepting the role undertakes to perform—as well as in UK Corporate Governance Code. The Corporate Governance Code's understanding of the non-executive role is organised around key decision-making roles (for example, appointment and removal,[18] remuneration,[19] nomination[20]) and the effective and inclusive exercise of board power.[21] Prior to 2006, articles of association typically provided that "the business of the company shall be managed by the directors, who…may exercise all such powers of the company";[22] phrasing that, contrary to the above understanding, could be read as providing for a broader managerial undertaking by Jill. Note, however, that in a UK company although power is typically delegated to all directors (rather than to a board),[23] it can only be exercised collectively. Standard pre-2006 articles made clear that the business was "despatched"[24] by directors only in board meetings, where directorial power could only be exercised when the meeting was quorate. Furthermore, as noted above, these articles provided explicitly for the "office" of managing director, to whom individual, rather than collective, power could be delegated. The modern Model Articles of Association now provide that the directors are "responsible for the management of the company's business" through the collective exercise of power;[25] a responsibility which is fulfilled by participating in the collective exercise of power on matters brought before the board and taking responsibility for the exercise of that power, which would include supervision of management.

Example B.

Felix also accepts a role as director of Company A but also accepts the role of executive chair of the board. This is a full time, but non-operational role. Not only, as in Jill's case, is Felix's undertaking to exercise power collectively in relation to the issues brought before the board, but as chair he also undertakes to work with management to proactively determine the board's meeting timetable, the board agenda and to provide for the effective functioning of the board. The UK Corporate Governance Code observes in this regard that "the chair leads the board and is responsible for its overall effectiveness".[26]

[18] UK Corporate Governance Code (2018), 2.13.
[19] UK Corporate Governance Code (2018) 5.32.
[20] UK Corporate Governance Code (2018) 3.17.
[21] UK Corporate Governance Code (2018) 1.5.
[22] Table A Articles issues pursuant to the Companies Act 1948.
[23] Art. 3 Model Articles for Public or Private Companies.
[24] Table A Articles pursuant to the Companies Act 1862 (art. 66); Companies Act 1929 (art. 81); Companies Act 1948
[25] See Articles 3 and 7 Model Articles for Public Companies.
[26] UK Corporate Governance Code, Principle F.

Example C

Jill (from *Example A*), although she is not a manager and has no employment contract with the company, is informed at a board meeting that a new opportunity in the company's area of business has presented itself, however, senior management does not have the time to pursue it. Jill offers to take steps to acquire the opportunity on the company's behalf. The board expresses their gratitude for her efforts and looks forward to hearing from her on this, thereby empowering her to perform the role. Jill here does not alter her directorial undertaking rather she makes an additional fiduciary undertaking, just as a person who is already a trustee makes an additional fiduciary undertaking when she agrees to act as a beneficiary's agent. She becomes a fiduciary-agent in relation to this discrete project. These fiduciary roles are connected through the corporate principal, but are distinct.

Example D.

Sara agrees to accept the role of director and CEO of Company A. Like Jill, she undertakes to exercise power delegated to her collectively with the other directors on the issues that the board is asked to consider. She also undertakes to exercise the power and authority delegated to her to operationally manage and run the company. This undertaking involves a full-time work commitment and an undertaking to proactively deploy and delegate corporate power to further the company's business and purpose, and to report to the board on the performance and operation of the company. Sara makes two separate fiduciary undertakings and they are as distinct as her two roles. Her undertaking as a director is identical to Jill's. Her second fiduciary undertaking is an undertaking in a separate capacity, as a managerial agent of the company.

Example E.

The nature of this board-power undertaking is easier to see in a listed company with a director who performs no managerial role such as Jill, and the separate duties owed by Sara are easier to see when her directorial role is juxtaposed next to Jill's. But this same directorial undertaking and the separate managerial undertaking also apply at the opposite end of the corporate spectrum, to a director-manager in a small one-person company. A director-manager of such a one-person company does not act as a director when he signs a contract or decides to build a new product; in such circumstances he acts as a manager or as an agent with general or specific power delegated to him, as manager or agent, by him as director. Placing the regulation of informal meetings to one side, he acts a director only when a board meeting is called and a decision is made in that meeting to exercise board power. Like Jill, his directorial undertaking relates to and is necessarily only performed in such board meetings.

These examples offer two lessons. First, there is a specific directorial undertaking that applies to all directors (whether or not a person who is a director makes any additional undertakings) and is limited to the collective exercise and delegation of power. Of course the directorial undertaking may vary depending on the nature of the board role—the chair of the board, or the chair of a committee of the board makes an additional and distinctive *directorial* undertaking. Second, an individual person who is a director may undertake to perform, and be empowered to perform, different representative tasks for the company, including proactive positive functions, however, these fiduciary undertakings are separate from the directorial undertaking. We might attempt to categorize or label such undertakings as managerial undertakings, task-specific agency undertakings, or even quasi-partnership undertakings, although, any such categorizations are to some degree inaccurate as the nature of the undertaking is always role and circumstance specific.

2. Excavating Managerial Undertakings from Directors' Duties

In *Industrial Development Consultants Ltd v Cooley*,[27] one of the most influential cases in the UK's modern law on directors' duties,[28] the High Court was asked to consider whether a former managing director had to account for profits that he had made from a contract for architectural services which the company had actively pursed, but failed to obtain, whilst the defendant was the company's managing director. The Court did not distinguish between director and managing director and indeed at times suggests that the duties of both are identical. "The right approach", Roskill J held, "is first to consider the duty which a director (including a managing director) owes to the company of which he is a director".[29] However, in considering the facts and the defendant's actions, the court had no regard to the role of the defendant as a member of the board of directors, or to the exercise of board power, but focused exclusively on the defendant's executive role as managing director. In reaching its conclusion that the defendant had a "duty to pass on" information to the company about the opportunity, the court observed that:

> "The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity *was as managing director of the plaintiffs*. Information which came to him while he was *managing director* and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs because between himself and the plaintiffs a fiduciary relation existed...

[27] [1972] 2 ALL ER 162.
[28] For example: *Bhullar v Bhullar* [2003] 2 BCLC 241 relying on *IDC*.
[29] [1972] 2 ALL ER 162 at 171.

> It seems to me plain that throughout the whole of May, June and July 1969 the defendant was in a fiduciary relationship with the plaintiffs. From the time he embarked on his course of dealing…which put his personal interest…in direct conflict with his pre-existing and continuing duty *as managing director of the plaintiffs*."[30]

The nature of the defendant's duty identified in *IDC*—a proactive obligation to pass on information—was the product of the nature of his fiduciary undertaking as a manager not as a director. As a full-time senior manager of the company, Cooley undertook to use the corporate power and authority delegated to him to proactively further the interests of the company in relevant business opportunities;[31] an expansive, prescriptive undertaking very similar to that made by an active partner who has a positive duty to engage in business and to seek opportunities within the scope of the partnership.[32] Indeed, this is how some subsequent cases have interpreted the case. In *University of Nottingham v Fischel*,[33] for example, the court observed that: "the important feature of *Cooley's* case, which is clearly implicit in this judgment, is that the defendant had *a specific duty* to secure contracts of this nature".[34]

IDC is potentially misleading as it can be read as treating the managing director undertaking as synonymous with the directorial undertaking. It is not correct that the "defendant had one capacity and one capacity only"; rather he had two fiduciary capacities—as director and managing director/CEO. However, if we read this sentence carefully we can see that in relation to the facts of this case—"in which he was carrying on business *at that time*"[35]—he did have one capacity and it was as managing director of the company with a specific positive duty to acquire contracts of this nature. His fiduciary role as a director of the company was not in play on these facts as the board was not required to consider an exercise of corporate power. *IDC* is, therefore, an authority in relation to the fiduciary obligations of senior managers, *not*, as it is generally understood, in relation to the fiduciary obligations of directors. Subsequent case law, most importantly the Court of Appeal's decision in *Item Software (UK) Ltd v Fassihi*,[36] has relied on *IDC* to support the position that directors owe a duty of disclosure related to their own wrongdoing or breach

[30] [1972] 2 ALL ER 162 at 174 (emphasis supplied).
[31] The demarcation of those company interests raises difficult questions which are not addressed in this article. See further, D. Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambridge University Press, 2018) at 416-418.
[32] *Dean v. McDowell* (1878) 8 Ch.D. 345; *Aas v. Benham* (1891) 2 Ch. 244.
[33] [2000] ICR 1462.
[34] [2000] ICR 1462 at 1495 (emphasis supplied).
[35] [1972] 2 ALL ER 162 at 173 (emphasis supplied).
[36] [2004] EWHC Civ 1244.

of duty. Lady Justice Arden (as she then was) observed that *IDC*, spoke of "*the director* owing a duty to disclose".[37] Yet, the extent to which *IDC* is authority for such a prescriptive duty it was not one that applied to Mr Cooley as director but as a senior-management fiduciary. Such a prescriptive duty of disclosure—to "pass on"—was the derivative product of his positive undertaking as a senior manager to devote himself on a full-time basis to identifying and acquiring such opportunities.[38] It cannot, therefore, be generalised to the distinct fiduciary persona of director, which not only was not in issue in *IDC,* is incongruent with it.

To see this more clearly, note the nature of Cooley's fiduciary obligation would not have been any different had he not been a director, *de jure or de facto*.[39] Although employees in English fiduciary law are not an established category of fiduciary, where they undertake a representative role to act on their employer's behalf, and are empowered to act on their behalf, courts recognise them as fiduciaries to the extent of their contractually demarcated undertaking. In *University of Nottingham v Fishel*, for example, a senior employee who was given the title of director in a unit of the University of Nottingham's Faculty of Medicine was held to be a fiduciary, although he was not a director of a company and his position could not "be equated with that of an executive director of a company". However, in spite of being a fiduciary, the nature of his duty/undertaking did not, as was the case in *IDC*, include a "specific duty to secure the work abroad for the University".[40] Consider also *Tesco Stores Ltd v Pook*,[41] *Crowson Fabrics Ltd. v Rider*[42] and *QBE Management Services (UK) Ltd v Dymoke*,[43] where senior managers who were not directors were held to be fiduciaries. In *QBE Management Services*, for example, the head of one of the claimant company's divisions, who was not a director of the company, was found to be a fiduciary. In reaching this conclusion the court focused on his senior representative capacity, the trust reposed in him and his responsibility for "developing and implementing" the company's strategic and business plans. His contractual undertaking as senior manager involved a broad positive obligation to "promote and protect the interests of the group"; an undertaking that was transposed directly into his fiduciary "duty to use his best endeavours

[37] [2004] EWHC Civ 1244 at [39] (emphasis supplied).
[38] L. Smith, 'Fiduciary relationships: ensuring the loyal exercise of judgment on behalf of another' (2014) 130 *L.Q.R.* 608, 631.
[39] See Section IV on fiduciary persona myopia and de facto directors.
[40] [2000] ICR 1462 at 1495.
[41] [2003] EWHC 823.
[42] [2007] EWHC 2942 (Ch).
[43] [2012] EWHC 80 (QB).

to promote and protect the interests of the Group of companies, of which [his company] formed part".[44]

Most late twentieth and early twenty-first century cases do not, as easily as *IDC* does, enable a reading of the case which distinguishes between the defendant's directorial and managerial undertakings and functions. Most of these cases focus exclusively on the defendant's duties as a director. However, in many instances the duties in question are better characterised as arising from a managerial undertaking and have nothing to do with a directorial undertaking connected to the collective exercise of corporate power. Consider, for example, *Crown Dilmun v Sutton*.[45] In this case a manager-director of a real estate development company took an opportunity for himself after it had been presented to him in his managerial capacity at a meeting with a third party on company premises. The defendant was the "managing director" and the "dominant figure in the company".[46] His employment contract effectively prohibited outside investments and competition with the company;[47] a contract upon which the court laid particular emphasis and in relation to which it referred to the "contracts of employment of fiduciaries".[48] However, although the court focuses on the defendant's role and contractual undertakings as employee and managing director, its conclusions about the defendant's duties are brought solely within his fiduciary capacity as director. That is, although the court's conclusions about his duties naturally reflected his full-time senior management undertaking and his contractual obligations *vis a vis* other investments and opportunities, these duties were then placed under the directorial umbrella. The court concluded that "*as a director*…he had a duty to exploit every opportunity that he became aware of for the benefit of the claimants".[49] And it is these positive duties which arose from the managerial undertaking that support the court's short, in-passing observation that the defendant director was under a duty to disclose his own misconduct.[50] In *Crown Dilmun* the directorial role colonises the defendant's other fiduciary personas.

For more recent examples of the court's fiduciary-persona myopia consider *O'Donnell v Shanahan*[51] and *Cullen Investments Ltd. v Brown*.[52] *O'Donnell v*

[44] [2012] EWHC 80 at [28].
[45] [2004] ALL ER (D) 222.
[46] [2004] ALL ER (D) 222 at [20].
[47] [2004] ALL ER (D) 222 at [184].
[48][2004] ALL ER (D) 222 at [51].
[49] [2004] ALL ER (D) 222 at [179] (emphasis supplied).
[50] [2004] ALL ER (D) 222 at [181].
[51] *O'Donnell v Shanahan* [2009] EWCA 751.
[52] [2017] EWHC 1586 (Ch).

Shanahan involved an action brought by one shareholder-director-manager against the two other shareholder-director-managers for an accounting of profits in relation to the taking of a corporate opportunity and lost commissions for the company in relation to that opportunity. The question the court asked was whether the taking of the opportunity breached the duties owed by them as directors. But both of these directors were also full-time managers; indeed, the Chancery Court at multiple junctures describes the company as a quasi-partnership and the director-managers as quasi-partners.[53] The opportunity itself came to them in their role as operational managers; a full-time role and undertaking consistent with the positive duty identified by the Court of Appeal to "to achieve a proper reward for the company for negotiating the sale of [the opportunity]".[54] Indeed, the board of directors and the collective exercise of corporate power by the board played no role in the identification, creation or approval of the opportunity. And yet, as was the case in *Crown Dilmun*, the obligations and positive duties of the defendants are understood by the Chancery Court and the Court of Appeal exclusively through the lens of their role "as directors". "Director" in *O'Donnell v Shanahan* is a receptacle for all the fiduciary obligations owed by an actual person who makes several distinctive fiduciary undertakings to the company.

The same fiduciary-persona myopia can be seen more explicitly in *Cullen Investments Limited v Brown*, where a CEO/director, Mr Julian Brown, and a fellow director, Quentin Brown (who was not performing an executive role),[55] took an opportunity in their personal capacities, which the company had been exploring taking for itself, although it was unclear whether the company was willing to provide the financing to acquire the opportunity. In its consideration of whether there had been a breach of the directors' duties, in relation to Julian the court focused upon his role as CEO of the company. It was the set of obligations that follow from such a senior full-time undertaking which stand behind Mr Justice Barling's identification of a broad positive *directorial* duty. For the court, the "seeking out [of] business opportunities, reviewing them, and if appropriate structuring and implementing them" were "carried out in *his capacity of CEO*"; and, "as [Julian] was paid a salary by [the company] for performing functions which included sourcing and implementing attractive property deals[,] it [was] simply not sustainable to suggest that in

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[53] [2008] EWHC 1973 at [7], [29] and [207].
[54] [2009] EWCA 751 at [75].
[55] For a short period he was a "back-room worker" for the company ([2017] EWHC 1586 (Ch) at [204]).

those circumstances the opportunity did not come to [him] in *his capacity of a director*".[56]

In *Crown Dilmun* and *O'Donnell*, placing the managerial fiduciary undertaking under the directorial umbrella necessarily made no difference to the outcome of the case: in both cases the defendants would have been liable on the same fiduciary grounds had the case focused only on the defendants as managerial fiduciaries. However, the category error made in these cases—as well as the category error involved in treating *IDC* as a case addressing the fiduciary obligations of directors—becomes problematic when the "directorial" obligations identified in these cases are treated as being universally applicable to any person who is appointed as a director, with the effect that some directors, such as Jill from *Example A* or Quentin Brown in *Cullen*, are deemed to have made fiduciary undertakings which they have not made and which they were not asked to perform. Quentin, who was also found to be in breach of duty, was only a director and performed no executive role, yet for the court as both Julian and Quentin held the status of director they were subject to the same obligations: "*as director* he was subject to the *same fiduciary and other duties* as [Julian]".[57] Naturally, given the absorption into the directorial obligation of Julian's managerial undertaking, this included for Quentin an expansive and prescriptive duty of "undivided loyalty" to the company;[58] a duty which (as we can see from the discussion of *Example A* above) is wholly inconsistent with a mere directorial undertaking. As Quentin's only fiduciary persona was as a director there was no positive directorial duty to be performed in relation to the opportunity and therefore no disclosure obligation in relation thereto. Accordingly, there could be no breach of directorial duty or a conflict of duty and interest[59] until the matter was addressed by the board.[60]

Such effects could be prevented if courts, whilst treating the status of director as a receptacle for all fiduciary undertakings, were to consider each director individually and to treat findings as to the undertakings made by one director as being of no precedential value when considering the fiduciary undertakings of any other director. Although impure from a fiduciary law perspective, such an approach would quarantine these legal risks. Courts, however, have not taken this path, and treat prior holdings as explorations of

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[56] [2017] EWHC 1586 (Ch) at [238].
[57] [2017] EWHC 1586 (Ch) at [250].
[58] [2017] EWHC 1586 (Ch) at 251.
[59] On the no-conflict rule see Section III.2 below.
[60] *See infra* note 123 on the likely application of the no-profit rule in this case.

the obligations of the status of "director".[61] As a result these legal risks are now beginning to crystalize.

III. FIDUCIARY PERSONA MYOPIA AND THE NO-CONFLICT RULE

1. *Undertaking and Directorial Competition*

The law on whether directors are allowed to serve on the boards of competitor companies or compete directly with the company is generally viewed as perplexing. Several commentators suggest[62] that we would expect that as serving a competitor of the company generates an obvious conflict of interest or duty with duty that it would be prohibited. It is "strange",[63] therefore to discover that late nineteenth and 20th century authority approved of directors serving on the boards of competitor companies.

The permissive stance with respect to directorial competition contrasts with the position in partnership law, which provides that a partner is prohibited from competing with the partnership, and is prevented from pursuing opportunities that fall within the scope of the partnership's business.[64] Courts and commentators have often noted the stark contrast between partnership law and company law in this regard, but typically do so to suggest that the directorial position is anomalous within fiduciary law.[65] However, through careful attention to the scope and ambit of the directorial undertaking we are able to see that there is no anomaly.

An active partner is prohibited from competing with the partnership because of the undertaking which she has given—to dedicate herself on a full-time basis to the governance, operation and betterment of the partnership; a prescriptive undertaking that is continually being performed so long as she remains a partner. Necessarily such a positive managerial and operational duty

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[61] *See*, for example, *Crown Dilmun* [2004] ALL ER (D) 222 at [179]-[180] and *Item Software (UK) v Fassihi* [2005] 2 BCLC 91 at [39].

[62] *See* Palmer's Company Law (London: Sweet & Maxwell) at [8.534]; and P. Davies and S. Worthington, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 10th eds 2016) at 552 (a sentiment articulated in earlier editions, eg. P. Davies, *Gower's Principles of Modern Companies Law* (London: Sweet & Maxwell, 6th eds, 1997) at 622).

[63] P. Davies and S. Worthington, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 10th eds 2016) at 552.

[64] *Dean v Macdowell* (1878) 8 Ch.D. 345, 353. The competition prohibition is codified in s. 30 of the Partnership Act 1890.

[65] P. Davies and S. Worthington, *Gower's Principles of Modern Company Law* (London: Sweet & Maxwell, 10th eds 2016) at 552.

would conflict with any attempt to further her personal interests through another venture that falls within the scope of the partnership business. For the Court of Appeal in *Dean v Macdowell*, for example, a partner would not be capable of competing with the company, or taking an opportunity that fell within the scope of the partnership, because "it is [the business] which he ought to have engaged in only for the purposes of the partnership".[66] Accordingly, any attempts whatsoever to form, to actively explore the possibility of forming, or to join a competitor whilst a partner remains subject to this undertaking would result in her being in breach of duty—for *either* actively contravening the undertaking or failing to disclose the competitive activity which may be viewed as a derivative duty of the positive undertaking[67]—as well as being in breach of the no-conflict obligation at the moment such personal interests are concretised.[68] Senior managers give a very similar fiduciary undertaking; they are, therefore, also subject to such a competition prohibition.[69] But when we distinguish the directorial from the managerial undertaking and ask what is involved in the role of director and the agreement to serve as a director, we see that a director is not *qua director* subject to such a positive undertaking and therefore competition, and board service with a competitor, is possible, although sometimes difficult to manage and police.

To see this, consider the directorial undertaking given by Jill as a non-executive director in *Example A* in Section II.1 above. Jill's undertaking relates to the collective exercise of delegated power, and responsibility for that delegation, to be performed at periodic board meetings which she does not call or determine the agenda of. Mere membership of a board of a competitor company (Company B) does not generate any possibility for conflict of interest and duty to Company A. But does such a conflict arise when she attends a board meeting of one of the companies to perform her undertaking, for example, in relation to a new opportunity considered by the board of Company B that would be significant interest to, but is not to her knowledge being considered by, Company A? From Company A's perspective as the matter has not been brought before the board of Company A, Jill's duty/undertaking to Company A is not in play. She has therefore no duty to perform in her role as a director of Company A at that moment in relation to such opportunity. Of

[66] (1878) 8 Ch.D. 345 at 354.
[67] *See* text to notes 36-38.
[68] (1878) 8 Ch.D. 345 per James LJ at 350.
[69] *Shepherd Investments Ltd v Walters* [2006] EWHC 836 (Ch.); *QBE Management Services (UK) Ltd v Dymoke* (2012) EWHC 80.

course, if the matter is also brought before Company A then the performance of her *duties* are in conflict[70] and she must obtain authorisation from both companies, or resign her position from one of the companies. From Company B's perspective, however, one might say that a director participating in a board decision for Company B is subject to a conflict of duty and interest arising from the existence of the competing directorship with Company A. Clearly the director's duty for Company B is being performed so whether there is a breach of the no-conflict rule depends on whether the personal "interest" arising from that competing directorship is an "interest" for the purpose of this rule. The legal boundaries of "interest" have, however, received limited attention in the case law. It is clear from the authorities that many general "interests" in other capacities are not legally cognizable for this no-conflict duty—interests arising from, for example: the performance of a duty that affected the personal interests of a director's colleagues/friends;[71] keeping your job as director and manager in the context of a contested takeover offer;[72] or, in a company in the vicinity of insolvency, the non-aligned interests of the shareholder constituency (of which the director is a member) with the interests of creditors, in whose interests the director is now required to act.[73] The authorities where a breach has been established suggest that for the no-conflict duty "interest" must be a personal and realised financial one[74] and one that arises in the context of the performance of the duty; a position which Lord Eldon articulated when he observed in *Ex Parte Lacey*, one of the foundational no-conflict cases, that that a trustee must not "*manage* for the benefit and advantage of himself".[75] Classic examples of such performance related interest/profit are any of the self-dealing cases that established the rule, but

[70] *See Paterson v Portobello Town-Hall Company* (1866) 4 M 726. See also, *Ex parte Bennett* (1805) 10 Vesey Junior 381 and *Boulting v Association of Cinematograph, Television and Allied Technicians* [1960] 2 QB 606. See generally, M. Conaglen, 'Fiduciary Regulation of Conflicts between Duties' (2009) 129 *L.Q.R.*359.
[71] *Regentcrest v Cohen* [2001] 2 BCLC 80.
[72] *Hogg v Cramphorn Ltd*[1967] 3 ALL 420.
[73] *Colin Gwyer & Associates v Palmer* [2002] EWHC 2748.
[74] For a rare direct consideration of this issue consider David Richards J's (as he then was) observation in *Newgate Stud Company v Penfold* [2004] All ER (D) 372 that "none of the statements of principle or authorities to which I referred define it in terms other than a personal financial interest, direct or indirect of the director" (at [231]). See also, *Cullen Investments Ltd v Brown* [2017] EWHC 1586 (Ch) where the defendant did not have a personal interest for the purposes of this rule merely by virtue of his defendant brother's interest but only when "the promise of a share of the profits was made and accepted" (at [253]). But see also *Burns v Financial Conduct Authority* [2017] EWCA Civ 2140 providing for a broader reading of interest.
[75] *Ex parte Lacey* (1802) 6 Vesey Junior 626, 626 (emphasis supplied).

also leading opportunities cases including *Keech v Sandford*[76] and *Regal Hastings v Gulliver*,[77] which are best read in this way.[78] This view of "interest" would not result in the competing director acting for Company B being in breach of the no-conflict prohibition in these circumstances.

This understanding of the relationship between the directorial undertaking and the competition permission is seen clearly from the case that established that directors could take a position on a competitor's board: the much maligned *London and Mashonaland Exploration Company, Limited v New Mashonaland Exploration Company, Limited*.[79] In that case the plaintiff company brought an action against the defendant company and Lord Mayo, who was a director of the plaintiff company, to prevent an announcement that Lord Mayo was a director of the defendant company. The court observed that there was nothing in the articles, nor was there any express or implied contract requiring Lord Mayo "to give *any* part of his time…*to the business of the company*" or "to give his personal services to the plaintiff company"; nor did the articles prohibit him from becoming "a director of any similar company". That is, Lord Mayo's undertaking related only to board service not to the operation of the business. Accordingly, although taking the competing directorship was in Lord Mayo's personal interest, the mere appointment, as in Jill's case above, did not and could not, conflict with his undertaken duty. It was for this reason that Chitty J concluded that "the analogy sought to be drawn by the plaintiff company's counsel between the present case and partnerships was incomplete". For Chitty J the directorial undertaking given by Lord Mayo was not comparable to that of a partner; although it is submitted that it would have been, and Lord Mayo would have been prohibited from being a director of the competitor company, had he given a full-time managerial undertaking in relation to "the business of the company".

London Mashonaland was given the imprimatur of the House of Lords in *Bell v Lever Brothers Limited*;[80] approval which modern courts have struggled to come to terms with. However, again, through careful attention to the fiduciary undertaking we can see that the decision does not represent a pre-modern aberration in which courts failed to take the role of directors seriously. The company was a trading company which, *inter alia*, dealt in cocoa. The defendant

[76] [1558-1774] All ER Rep 230.
[77] [1967] 2 AC 134.
[78] *See* D. Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambridge University Press, 2018) at 389-394.
[79] (1891) WN 165.
[80] [1932] A.C. 161.

directors (chair and vice chair of the board) were also senior managers tasked with "the reorganization and management" of the plaintiff company. In their personal capacities the manager-directors entered into four commodities exchange transactions in cocoa differences. One of the questions in issue was whether this involved a breach of duty. The court concluded that the directors "had no liability whatsoever". The consideration of this issue was placed by Lord Blanesburgh within the lens of competing with the company and, citing *London Mashonaland* favourably, he observed that what a director could do for another company he could "do for himself". However, central to this holding was that their undertakings to the company did not involve an undertaking to refrain "from private speculations of their own…in stocks and shares".[81] For the House of Lords, the director-managers' full time undertaking did not encompass a duty to refrain from commodities market trading for their personal account; accordingly, they had no duty to perform for the company in relation to those market transactions. The court would not, however, have countenanced, for example, consulting for a competitor, as that would have violated the undertaking to "devote all [their] time and attention during business hours"[82] to the company.

The position set forth in *London Mashonaland*, and approved of in *Bell* v. *Lever Brothers*, is treated in commentary and case law as a problematic anomaly. Pearlie Koh, for example, has described the rule as "aberrational and difficult to defend".[83] In *In re Plus Group Ltd v Pyke*,[84] Sedley LJ observed that commentators' views of the permission "range from the dubious to the sceptical" and suggested that the rule required "reconsideration in the light of modern standards and jurisprudence".[85] He weighed in against an expansive interpretation of *London Mashonaland*, observing that "there has never been any warrant for treating [Chitty J's] decision or its endorsement in the House of Lords as a license for directors or other fiduciaries to put themselves or to stay put in situations where their duties and/or interests can come into conflict". He observed further that the *Mashonaland "principle"* is "a very limited one"; "if for example", he suggested, "the two Mashonaland Exploration companies had been preparing to tender for the same contract, I doubt whether Lord Mayo's position would have been tenable".[86]

[81] [1932] A.C. 161 at 196.
[82] [1932] A.C. 161 at 201.
[83] P. Koh, 'The Director's Fiduciary Obligations – a Fresh Look' (2003) 62 *C.L.J.* 42.
[84] [2002] EWCA Civ 370.
[85] [2002] EWCA Civ 370 at [81], [88].
[86] [2002] EWCA Civ 370 at [84], [88].

Through the lens of fiduciary undertaking foregrounded in this article, Sedley LJ's critique is perplexing. There is no *Mashonaland* "principle"; no exception or qualification[87] to the no conflict of duty and interest rule arising from the case, merely an application of that rule to Lord Mayo's narrow directorial undertaking. And there is no question—nor would Chitty J have been in any doubt—that had Lord Mayo been voting on the same contract for both companies then there would have been a prohibited conflict—not of, for the reasons outlined above, of duty and interest but of duty and duty. Moreover, Sedley LJ's approach in *In re Plus Group* can be read as being entirely consistent with *London Mashonaland*. The director (and former 50% shareholder and manager) who had competed with the firm had been prevented from performing any directorial or managerial role. *Per* Sedley LJ, as he had no representative capacity ("his role as a director of the claimant's was throughout the relevant period entirely nominal") he had no director's duty to perform. For Sedley LJ, in effect he was no longer a director—or for that matter a senior manager—subject to the no-conflict prohibition: "he might as well have resigned".[88] That is, the actions of the other director in this case rendered the defendant's fiduciary undertaking(s) and the authority transfer to perform the undertaking nugatory. There was, therefore, no duty to perform which could be breached or conflict with the ex-director's personal interest in the competing activity.[89] An approach which is structurally identical to that taken in *London Mashonaland* and *Bell v Lever Brothers*, where the limited nature of the undertaking meant that there was no conflict with the undertaken duty in the circumstances of those cases.

Sedley LJ's judgment is, therefore, paradoxical. Whilst he is critical and disapproving of *London Mashonaland*, his decision can be understood through the same approach and rule: if there is no undertaking to perform which conflicts with competitive activity, then there can be no breach of duty or violation of the no-conflict rule. The reason for this paradox is that Sedley LJ implicitly assumes that for any *functioning* director breach and conflict is unavoidable in any competing situation. It follows, therefore, that *Mashonaland* must be a strange and ill-considered[90] exception which in limited circumstances suspends an ostensible breach and allows a normally prohibited conflict to

[87] *British Midland Tool v Midland International Tooling Ltd* [2003] 2 BCLC 523 at [81] referring to London Mashonaland as a "qualification".
[88] [2002] EWCA Civ 370 at [90].
[89] *See* M. Conaglen, *Fiduciary Loyalty* (Oxford: Hart Publishing, 2010) at 183 stressing the disappearance of the undertaking ("the non-fiduciary duty").
[90] Sedley LJ emphasises the extempore nature of Chitty J's judgment on an interlocutory motion ([2002] EWCA Civ 370 at [79].

persist. This assumption, however, implicitly merges directorial and managerial undertakings under the director umbrella implying that directors have a broad positive duty to protect the corporate interest which will, as with partners, necessarily prevent competitive activity. It fails to see that the directorial undertaking is a distinct and limited fiduciary undertaking which may conflict with another duty or personal interest, but is much less likely to than a positive managerial or partner undertaking. Chitty J had clear sight of this. Indeed, distinguishing between the directorial and managerial fiduciary personas, we see that in *In re Plus Group* had the defendant not been excluded from the company he would have been prevented from competing with the company on two separate fiduciary grounds: first because his positive managerial undertaking would have prevented any such competition; and second, because as the competing company was pursuing the same clients there would in all likelihood also have been a conflict of duty and duty with his narrow directorial undertaking when the matter was addressed by the board.

The implicit prescriptive understanding of the directorial obligation set forth in *In re Plus Group* is aligned with the merging of managerial undertakings under the directorial umbrella seen above in *Cullen*, *Crown Dilmun,* and *O'Donnell*, as well as in the standard interpretation of *IDC*. This understanding of directorial obligation renders the competition permission unsustainable, and renders the cases that approved of it "dubious" legal landmarks to be managed and quarantined. However, given *Bell v Lever Brothers*' approval of *London Mashonaland*, it cannot just be ignored or deemed incorrect by lower courts. The result is notable judicial contortion and uncertainty. Consider, for example, *British Midland Tool Ltd v Midland International Tool Limited*[91] where director-senior managers of the claimant company set up a competing enterprise which contributed to the failure of the company. As is commonplace in contemporary UK corporate fiduciary law, the court in *British Midland* does not distinguish between the defendants' directorial and managerial fiduciary undertakings, and incorporates the positive managerial undertakings within the directorial umbrella, resulting in what the court thought *should be* a "simple [and generalizable] proposition" that "a director would be under a duty to alert [their] fellow members to a nascent commercial threat to the future prospects of the company".[92] The court's preference in *British Midland* was clearly to hold that competitive activity was incompatible with the positive directorial obligation they identified, but because the court

[91] [2003] 2 BCLC 523.
[92] [2003] 2 BCLC 523 at [81].

did not distinguish between directorial and managerial fiduciary undertakings the court thought that *London Mashonaland* and *Bell v Lever Brothers* stood in the way of this. The court's workaround involved holding that competitive directorships, although lawful, could not be maintained in the absence of disclosure and, as the directors had failed to disclose whilst they were directors, they were in breach of duty.

Seen through the undertaking lens promulgated in this article, the court reached the correct conclusion but that conclusion was based on a flawed fiduciary analysis. As managerial fiduciaries, just like partner fiduciaries, engaging in competitive activity was a breach of their full-time, positive duty to further British Midland Tool's interests, and any profits resulting therefrom amounted to a breach of the no-conflict prohibition; a position that would have garnered Chitty J's approval. Importantly, disclosure alone would not be enough to avoid breach, only an independent board[93] authorising the conflict following full disclosure would suffice. But through this undertaking-centric lens, they had no general positive duty *qua directors*[94] to protect the company, to pursue the general corporate interest or disclose threats which they were aware of; indeed their board undertaking was not triggered at all precisely because the competitive activity was hidden—the case does not refer to any board decisions during this period.[95]

2. *Inventing a Conflict of Interests?*

Above we saw that precise attention to the subject's fiduciary persona(s) and the undertaking given *qua* director, senior manager or partner allows us to make sense of the much maligned early case law dealing with the duty to avoid a conflict of interest and duty (or of duty and duty) in the context of competitive board service. And such attention to undertaking provided clearer sight of how the competition permission should function today. However, that analysis sidestepped the more fundamental transformation in the nature of the

[93] The board is the principal vis a vis a managerial fiduciary. A position that makes sense of *Australian Mines v Hudson* [1978] 52 ALRJ 399, a case which has caused some confusion about whether the board could at common law authorise directorial breach of duty. Mr Hudson, however, was the managing director and his breach of duty should be understood as a breach of his duty as a managerial fiduciary (the court referred to the "duty owed by Mr Hudson as managing director"), hence the board, as principal, could authorise and ratify the breach of duty without shareholder involvement.
[94] As shown in *Example B*, adjustments to this proposition may be required depending on the directorial role.
[95] Of course if board meetings were held and decisions made in this period then it is clearly plausible that such decisions may have involved a conflict of performed duty and realised personal interest.

no-conflict rule which has taken place in the past 20 years; a largely unnoticed change from a conflict of interest *and duty* to a conflict of interest*s*. This subtle anti-director *re*-presentation of the no-conflict rule significantly expands the restraints on personal business activity imposed on directors. Corporate law's fiduciary and undertaking myopia is again a central component of this transformation.

As we have observed, Conaglen's key insight[96] is that fiduciary duties serve the performance of what he refers to as non-fiduciary duties, which are the duties to perform the representative role the fiduciary undertook and was empowered to perform. Through this lens we see that all the general duties to which a fiduciary in her representative capacity is subject are designed to enhance the performance of the undertaken duty. Axiomatically, the conflict prohibition is organized around the undertaken duty, as a means of enhancing its effective performance by preventing a directors' personal interests from interfering with the performance of the undertaking. That is, the prohibition both was and is a prohibition on a conflict of undertaken *duty* with personal interests or of *duty* with *duty*. It was not a duty addressing a conflict of the beneficiary/principal's general interest (what would be of interest to it) and the fiduciary's personal interest. At most, until recently, such a conflict of *interests* rule could only be a short-cut expression where the undertaken duty was to proactively act/take all necessary steps to further the principal/beneficiaries' interests. Yet today, for directors, section 175 of the Companies Act 2006 provides that the duty as regards opportunities and information about opportunities is to avoid a situation in which personal interest conflicts or may possibly conflict with "the interests of the company". A statement of the law taken, almost verbatim, from the statement of principle set forth in 1854 by Lord Cranworth in *Aberdeen Railway Company* v. *Blaikie Brothers*.[97] Section 175(7) provides that this prohibition applies also to a conflict of interest and duty, suggesting implicitly that the conflict of interests prohibition is distinctive and the primary rule.

The idea that fiduciary law prohibits a conflict of general corporate and personal interests is the product of late twentieth century case law. There are two drivers of this development. The first is the elevation and literal interpretation of Lord Cranworth's statement of principle in *Aberdeen Railway* brought about by Lord Upjohn's jurisprudence, most importantly in his House

[96] M. Conaglen, *Fiduciary Loyalty* (Oxford: Hart Publishing 2010) at 32-34 and 61-61.
[97] [1843-60] All ER Rep 249.

of Lords' judgment in *Boardman v Phipps*.[98] In *Aberdeen Railway*—English law's foundational corporate self-dealing case—the board of the Aberdeen Railway Company approved a transaction to buy railway chairs from a partnership in which the chairman of the board was also a partner. Lord Cranworth's holding, following existing fiduciary law, established that without shareholder approval such self-dealing contracts were voidable. In reaching his conclusion, Lord Cranworth referred to "a rule of universal application" that:

> No one having 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.[99]

It is clear that Lord Cranworth did not think that in making this statement of principle he was altering the then prevailing legal rule prohibiting a conflict of duty and interest or duty with duty. As the case involved a self-dealing contract approved by the board the statement was made in a context which necessarily involved a conflict of exercised duty and interest. Referring to Lord Eldon's foundational no-conflict jurisprudence[100] to support his statement, Lord Cranworth observed that "the English authorities on this subject are numerous and uniform"[101] and singled out *Ex Parte James*, where Lord Eldon held that no benefit, or ostensible benefit, could be made in the performance of the duty. Moreover, in applying the no-conflicts principle Lord Cranworth focuses on the director's conflict of duty and personal interest. The reason, for example, that Lord Cranworth concluded that the fact that the majority of directors were disinterested was irrelevant, was not because there nevertheless remained a conflict of company and personal interest but because a conflict of duty and interest remained as the director's "duty [was] to give his co-directors, and through them to the company, the full benefit of all the knowledge and skill he could bring to bear on the subject".[102]

The only instance prior to *Aberdeen Railway* in which an English court refers to a conflict of interests is Lord Brougham's judgment in *Hamilton v Wright*[103] in 1842. Lord Brougham was the only other named judge in the House of Lord's judgment in *Aberdeen Railway*. In *Hamilton v Wright* a trust was created for the benefit of a debtor's creditors with any residue for the benefit

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[98] [1967] 2 AC 46.
[99] [1843-60] All ER Rep 249 at 252.
[100] *See*, for example, *Ex Parte Lacey* (1802) 6 Vesey Junior 626 where Lord Eldon observed that a trustee may not "manage for the benefit or advantage of himself"; see also *Ex Parte James* (1803) 8 Ves. Jun. 338 and *Ex Parte Bennett* (1805) 10 Vesey Junior 381.
[101] [1843-60] All ER Rep 249 at 253.
[102] [1843-60] All ER Rep 249 at 253.
[103] [1842] IX Clark & Finnelly 110.

of the debtor. The trustee purchased an annuity that had been granted by the debtor, rendering any decision the trustee made in the exercise of the performance of the trust in conflict with his personal financial interests as a creditor. Lord Brougham held that "it was his duty as trustee to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the *interests of the trust*".[104] However, as in *Aberdeen Railway*, it is evident from the case that Lord Brougham was not of the view that this statement represented a departure from the conflict of duty and interest rule, which at multiple junctures structures his judgment. For Lord Brougham, the trustee's purchase of the annuity was invalid because "his duty was to keep the residue as large as possible" whilst he had a direct "interest in cutting it down".[105]

Over a century later in *Boardman v Phipps*, where agent-fiduciaries of a trust took a business opportunity that arose out of shares held by the trust, Lord Upjohn commenced his analysis with reference to "the *fundamental rule* of equity… that a trustee must not place himself in a position where his *duty* and his *interest* conflict".[106] He supported this statement by citing Lord Hershell in *Bray* v. *Ford* who observed "that it is an inflexible rule of equity" that a fiduciary is "not allowed to put himself in a position where his interest and duty conflict" to avoid the fiduciary "being swayed by interest rather than duty";[107] a case that makes no reference to a conflict of interests. For Lord Upjohn it was *this* no-conflict of duty and interest rule "that is perhaps stated most highly"[108] by Lord Cranworth's conflict of interests principle, a principle that later in his judgment Lord Upjohn also refers to as an "exemplifi[cation]" of "*the* fundamental principle".[109] That duty is the reference point for conflict is also clear from Lord Upjohn's approach to the case, which takes as is the starting point the question: "what is the scope and ambit of the duties charged upon him".[110] The answer to this question was determinative of whether there had been a breach of duty and whether "his duty and interest may possibly conflict".

Nevertheless, although Lord Upjohn, like Lords Cranworth and Brougham, envisaged no legal departure by referring to a conflict of interests, the literal meaning of a conflict of interests—which poses the question: what

104 [1842] IX Clark & Finnelly 110 at 122 (emphasis supplied).
105 [1842] IX Clark & Finnelly 110 at 124.
106 [1967] 2 AC 46 at 123 (emphasis supplied).
107 [1896] AC 44, 51.
108 [1967] 2 AC 46 at 124.
109 [1967] 2 AC 46 at 125 (emphasis supplied).
110 [1967] 2 AC 46 at 127.

are the interests of the fiduciary's charge?—naturally takes on its own legal significance. We see this in Lord Upjohn's judgment in *Boardman* itself. In an important example provided to support his position that the agent-fiduciaries had not placed their duty in conflict with their interest, Lord Upjohn outlined a hypothetical example of a trust holding Blackacre, which is adjacent to Whiteacre.[111] In this example, he argues that there is no question of the trustees or the beneficiaries being generally "interested" in Whiteacre and the trustee would not therefore be precluded from buying Whiteacre for himself even if he found out information about Whiteacre as a result of the trusteeship. For Lord Upjohn as "*they have no interest in Whiteacre*… their trustees have no duty to perform in respect thereof".[112] In this example, a conflict of *interests* structures the analysis. Moreover, the determination of duty follows and is subordinate to general trust interests, even though duty is not—and was not in *Boardman* v. *Phipps*—a function of general trust interests. We also see here that where duty is derived from general interest it is ineluctably prescriptive.

A second, and symbiotic, driver of the shift towards the independent legal significance of a conflict of interest*s* is the fiduciary-persona myopia phenomenon addressed in this article. If the managerial undertaking is absorbed into the directorial role, and the status of director is treated as involving a full-time undertaking to positively and continuously further the corporate interest, then even though the legal prohibition relates to a conflict of duty and interest, the nature of the prescriptive duty is such that to state the prohibition in terms of a conflict of interests is congruent with, and is an alternative expression of, the duty/interest prohibition. Put differently, the conflict of interests rule is a short-cut version of the traditional no conflict of duty and interest rule *when* the director is deemed to have undertaken (or a person who occupies the status of director is treated as being subject to) a broad, prescriptive obligation to further the corporate interest. In this regard, it is noteworthy that Lord Cranworth's no-conflict of interests statement itself may be read through this short-cut lens. Although the precise managerial role of the defendant director-chairman in *Aberdeen Railway* is unclear on the facts, Lord Cranworth appears to view him though a managerial lens with an accompanying expansive prescriptive duty. He observed, in his consideration of the relevance of Lord Eldon's foundational no-conflict jurisprudence to the corporation, that "I cannot entertain a doubt of its being applicable to the case of a party who is acting *as a manager* of a mercantile or trading business". And

[111] [1967] 2 AC 46 at 130.
[112] [1967] 2 AC 46 at 130.

in relation to the defendant's role as chairman, he observed that "it was his bounden duty to make the best bargains he could for the benefit of the company".[113] Moreover, it is also noteworthy that all of the pre-2006 corporate cases considered below which treat the conflict of interests framework as the operational rule for directors, involved directorial defendants who performed managerial functions. In these cases, the failure to distinguish between corporate fiduciary personas and the resulting implicit or explicit absorption of the positive managerial undertaking into the directorial role renders the restatement of the rule as a conflict of interest*s* uncontroversial and thereby enables the literal application, and the independent legal significance, of Lord Cranworth's version of the "fundamental rule".

Consider, for example, *Bhullar v Bhullar* where manager-directors of a company took for themselves a real estate opportunity situated next to property owned by the company. Following extensive citation of the section of Lord Upjohn's speech that details Lord Cranworth's "fundamental rule", at first instance the court held that the directors were liable to account because "this was a case where the interests of [the company] and those of [the directors] conflicted".[114] In the Court of Appeal in *Bhullar* the court similarly adopts a conflict of interest framework where duty follows interest: as the opportunity was "commercially attractive"[115] to the company the defendant directors had a positive "duty to communicate" it to the company, and they were therefore in breach of duty and the no-conflict prohibition. Here we see an inversion of the traditional rule, intimated in Lord Upjohn's Whiteacre/Blackacre example. Under the traditional rule, where a corporate fiduciary has given a broad prescriptive undertaking to act in the interest of the company then what is in the company's interests is relevant to the demarcation of duty; and when she has not given such an undertaking then corporate interest alone cannot be determinative of the scope and ambit of the duty. But here the conflicts of interest/s rule is the starting point which structures the investigation and is applicable to all directors. And the duty to disclose the opportunity arises not from an exploration of the scope and ambit of the undertaking but from the fact that the opportunity is of interest to the company.[116] Other pre-2006 cases similarly evidence the developing

[113] [1843-60] All ER Rep 249 at 253.
[114] *Bhullar v Bhullar* (2002) WL 1654842 at [272].
[115] *Bhullar v Bhullar* [2003] EWCA Civ 424.
[116] [2003] EWCA Civ 424 this structure is seen most clearly at [41].

independent legal significance of the idea of a conflict of interests and all of them involved manager-directors.[117]

Following the enactment of section 175 of the Act, the literal conflict of interests approach now naturally dominates the law. Consider, for example, *O'Donnell v O'Shanahan*,[118] where the court adopts a conflict of interests framework which, alongside the merging of the directorial and managerial undertakings,[119] contributes to the Court of Appeal's conclusion that the defendants "*as directors*" had a positive duty to "to achieve a proper reward for the company". Consider also *Cullen Investments Ltd v Brown*,[120] where the court's consideration of section 175 is structured by the determination of whether the opportunity in question is of interest to the company, or *Sharma v Sharma*, where the courts application of 175's no-conflict of interests prohibition drives the conclusion that the director has a duty to seek out opportunities which "he could and should exploit for the benefit of the company".[121]

This shift towards a conflict of interests represents a significant late-20th century expansion of the constraints imposed by the no-conflicts rule on the director's personal affairs; [122] which is of particularly concern for directors who do not also perform a full-time managerial function. Recall Jill's undertaking and duty, which is not an undertaking to act positively but one related to the exercise of power in periodic board meetings. For her, a prohibition on placing herself in a position in which her personal interests conflict with the general interests of the company is wholly different than the effects of the prohibition on the conflict of exercised duty and company interest. Through a traditional lens, as she had not given a positive undertaking to be performed in relation to an opportunity that has not been presented to the board, if she takes that opportunity for herself she does not breach the no-conflict of interest and duty prohibition, although depending on the circumstances she may be in breach of the no-profit rule, which is not considered here. But under the modern conflict of interests prohibition, if the opportunity falls within the general interests of the company she is, without authorisation from the company, prevented from financially benefiting from it.

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117 Consider, for example, *Framlington Group v Anderson* [1995] 1 BCLC 475; *Balston Limited v Headline Filters Ltd* [1990] F.S.R 385; *British Midland Tool v Midland International Tooling Ltd* [2003] EWHC 466 at [81]; *Shepherds Investments Ltd. v Walt* [2007] 2 BCLC 202 at [110].

118 [2009] 2 BCLC 666 (legally a pre-Act but chronologically a post-Act case).

119 *See* text to notes 51-54.

120 [2017] EWHC 1586 (Ch).

121 [2013] EWCA Civ 1287 at [51(i)].

122 On the drivers of this anti-director shift of the law in this and other duty contexts see D. Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambridge University Press, 2018) at 57-58, 413-416.

And this is not merely a theoretical concern. Recall Quentin Brown, one of the directors in *Cullen Investments Limited v Brown* discussed above. Although he was not a manager and had given only a narrow directorial undertaking, his involvement in the corporate opportunity placed his interests in conflict with the companies and, therefore, he was deemed to have violated section 175. Whereas on traditional principles he would not have been liable *on this basis*[123] because given the nature of his undertaking he had no duty to perform in relation to the opportunity.

Important work in this regard by Simon Witney[124] attempts to curtail the extended reach of this no-conflict of interests principle by arguing that persons who are directors operate in multiple capacities and when operating in a different (fully disclosed and authorised) capacity they are not in a fiduciary relationship with the company and not subject to fiduciary duties in relation to the activities associated with that separate capacity. That is, when operating in another (fully disclosed and authorised) capacity the "court is likely to find that there is no duty to avoid a conflicts of interest (or indeed any other duty…)".[125] The benefit of this approach is that, taking the law as it currently stands, it offers a sensible limit on the expansive reach of the new conflict of interest approach; a reach that, as Witney shows, is wholly inapposite for directors who are not managers, particular in a private equity setting where directors may have several other directorial and managerial capacities in companies whose interests may overlap.[126] If one accepts the transition from conflict of interest and duty to conflicts of interests, Witney's approach is the most pragmatic way of dealing with its problematic effects by demarcating the situations in which it does and does not apply. The downside of the approach is that it addresses only the legal symptom and not the cause of the problem, and it only addresses the symptom for those directors who have other directorial capacities which they can disclose *ex ante* and obtain authorisation for.

An undertaking-focused approach, sensitive to the distinctive nature of each fiduciary undertakings, would address the cause of the problem and

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123 Although note on the facts of this case, on any reading of the no-profit rule he would have had to account on a separate no-profits basis. See further, D. Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambridge University Press, 2018) at 376-402.

124 S. Witney, 'Corporate opportunities law and non-executive director' (2016) 16 *Journal of Corporate Law Studies* 145.

125 S. Witney, 'Corporate opportunities law and non-executive director' (2016) 16 *Journal of Corporate Law Studies* at 183-184. See *Cullen Investments v Brown* [2017] EWHC 1586 (Ch) at [233] and [236] rejecting a similar approach although in very different circumstances to those envisioned by Witney.

126 S. Witney, 'Corporate opportunities law and non-executive director' (2016) 16 *Journal of Corporate Law Studies* 163-169.

provide a cleaner solution for all individuals who have only given a directorial undertaking. Through an undertaking-focused lens which views the no-conflict principle as a means of regulating that undertaking, no matter what other roles or capacities a person who is a fiduciary has, as a fiduciary she is always a fiduciary and the general duties always apply to the undertaking until she rejects the undertaking (resignation) or the authorization is revoked (dismissal). However, although such an undertaking is always subject to the general duties the undertaking given by a director is a narrow one, leaving significant scope for lawful business activities that do not bring personal interest into conflict with the undertaking (and therefore do not require disclosure and authorisation), even though a layman might describe such actions as involving a conflict of interests. But where the director is also a managerial fiduciary, the breadth and positive nature of her managerial undertaking means that the no-conflict of interest and duty rule would leave very little room for personal business activities that overlap with the company's interests.

IV. FIDUCIARY-PERSONA MYOPIA AND DE FACTO DIRECTORS

Fiduciary-persona myopia has not only severely compromised the law of director's duties, it has also resulted in doctrinal contortion surrounding the question of which individuals should be treated as de facto directors.

The question whether a person, typically a senior manager, should be treated as a de facto director when she has clearly not been appointed as a director is a question of modern vintage. As Lord Collins observed in *Re Paycheck*,[127] traditionally the "de facto director" question related to whether a person who had ostensibly been appointed as a director was still to be treated as a director in spite of some flaw in the appointment process which meant she had not actually been appointed as a director.[128] New legal questions are often the product of changes in legislative provisions or market conditions, or of longstanding problems that had not been brought into focus by litigation. They can, however, also be the product of shifts in the structure or conceptual framework of legal thought which create the question. The modern de facto director question can be seen through both of these lenses. Questions surrounding, for example, whether the directors or shareholders of corporate

[127] *Re Paycheck Services 3 Ltd* [2011] 1 BCLC 141.
[128] [2011] 1 BCLC 141 at [54].

directors are de facto directors[129] are the product of the exploration of extant, but previously backgrounded questions. But in several modern cases, questions relating to whether real people, typically managers, are de facto directors are of the law's own making; they are the product of its fiduciary-persona myopia.

If a senior manager who has not been appointed as a director attends and votes at board meetings, or is involved in informal processes that exercise board power, and the other directors acquiesce to his acting as a director then he is an empowered fiduciary and his directorial undertaking is subject to fiduciary restraint. This is why in *Re Hydrodam*, Millet J (as he then was), in determining whether the defendant was a de facto director for the purposes of section 214 of the Insolvency Act 1986, focused first on the question of "whether he *undertook* functions in relation to the company which could properly be discharged *only by a director*",[130] and second, on whether such an undertaking was combined with congruent empowerment which he finds is implicit where the person is "held out as a director by the company".[131] Labelling a person a de facto director is merely a short-cut for these underlying elemental fiduciary facts. But what of a senior manager who does not attend and vote at board meetings, who makes no directorial undertaking and who is not informally empowered (through acquiescence, holding out or otherwise) to participate in the collective exercise of board power? It seems self-evident that such a person could not possibly be labelled a de facto director, no matter how powerful or important her role is as a manager; just as a drummer who is crucial to the performance of a band is not, by reason of her centrality, the guitarist. Yet in several recent cases courts have mistakenly treated such managers as de facto directors. The driver of this error is fiduciary-persona myopia which results in some courts concluding that senior managers who are not de jure directors can only be subject to fiduciary obligations if they are deemed to be de facto directors.

In *Shepherds Investments Ltd. v Walters*[132] for example, the question of whether a senior manager "sales director"—who was not appointed as a director and played no role in the exercise of board power and attended no board meetings, even in an informal capacity[133]—was subject to fiduciary restraint was treated by the court as a function of whether he could be deemed

[129] [2011] 1 BCLC 141.
[130] [1992] BCLC 180, 183 (emphasis supplied).
[131] [1992] BCLC 180, 183.
[132] [2006] EWHC 836 (Ch).
[133] [2006] EWHC 836 (Ch) at [76].

to be a "de facto director",[134] which the court concluded he was.[135] That is, the inability of the court to see the actual managerial fiduciary relationship generated the strange conclusion that a person who had never attended a board meeting should be treated as a director. Similarly, in *Re Mumtaz Properties Ltd* the question of whether a manager had breached his fiduciary duty was treated as dependent on whether he was a de facto director, resulting in the court when making this determination focusing on facts that had nothing to do with actual exercise of board power—which the court accepted he had not exercised[136]—and which were associated with his managerial role (such as having a corporate credit card). In concluding that the High Court was correct in finding that the defendant was a de facto director, the Court of Appeal observed that "he was one of the nerve centres from which the activities of the company radiated".[137] But from a fiduciary perspective, there are several nerve centres in a corporation and they are distinct. Managerial activities and undertakings are distinct from directorial activities and undertakings, and managerial activities cannot therefore be relevant to the determination of whether a person has *in fact* undertaken and been empowered to perform a directorial role. These courts find themselves pushed into this corner because they think that the only way of holding the manager accountable as a fiduciary is to hold that he is a de facto director. But attention to traditional fiduciary principles shows us that this view is incorrect. In both these cases a strong argument could be made that the defendants were managerial fiduciaries and as such liable for breach of duty.

V. CONCLUSION: BACK TO FIDUCIARY BASICS

It is a basic fact of fiduciary relations that the same person can perform several fiduciary roles in relation to another person, such as trustee, guardian or agent. And it is self-evident that the undertaking given by the fiduciary in relation to each of those roles is separate and distinct and, in each case, is separately, subject to the general duties. Necessarily, to understand the nature of each relationship and the extent of the fiduciary's obligations in relation to each of her personas, we need to identify the nature and scope of the undertaking. And

134 [2006] EWHC 836 (Ch) at [73] and [78] referring to a "director in fact".
135 Note the court does raise the question of whether senior managers could be fiduciaries but treats it as a rare and sui generis possibility ([2006] EWHC 836 (Ch) at [74] – [76]).
136 [2011] EWCA Civ 610 at [36].
137 [2011] EWCA Civ 610 at [47].

in relation to each of those personas it would strike us absurd to suggest that the undertaking given in relation to one of those personas would affect or could be incorporated into another persona. It would be as legally silly as it would be to suggest that a fiduciary undertaking given by one real person would affect, or be incorporated into, the undertaking given by another real person. Nevertheless, this is precisely what has happened in UK company law: it has developed a fiduciary-persona myopia resulting in the category and status of director incorporating the separate fiduciary persona of the managerial fiduciary. The effects, as detailed in the article, have been ruinous, including: the imposition of broad, prescriptive obligations on all directors wholly detached from their board focused role; an incoherent position on directorial competition; an expansive anti-directorial transformation of the no-conflict rule; and the puzzling imposition of de facto director status on senior managers who have no involvement with the board.

The way out of this predicament is straightforward. Corporate fiduciary law must reconnect to these basic fiduciary facts and recognise that senior managers who are also directors provide separate and distinct representative undertakings, both of which are regulated separately by the general duties. Doing so will then allow courts to see and consider the distinctive nature of the directorial undertaking— to determine its "scope and ambit"[138]—and to understand that for a director, whether or not she is also a senior manager, this directorial undertaking is a limited undertaking, whose board-focused parameters are encoded in companies' articles of association and reflected in the Corporate Governance Code. Seen through this lens, the directorial competition permission is not aberrational but sensical and consistent with fiduciary law (if in practice often difficult to navigate), the expansive conflicts of interests' prohibition in section 175 must be read down in accordance with the conflict of interest and duty body of precedent on which it rests, and there is no need to force the square peg of senior managers into the round hole of the de facto director.

This approach to directors' duties necessarily results, *for directors*, in a less demanding and accountability-focused body of law. Pursuant to this approach the status of directors does not result in the imposition of a positive duty to further the corporate interest both within and outside of the boardroom; competitive directorships become possible and not fanciful; and opportunities can be taken by a director that would be of interest to the company. Individuals who perform only the role of directors would indeed be

[138] *See* text to note 4.

relieved by this return to fiduciary law basics; relief that is justified by the most basic of common law principles: individuals should be held to account for what they agreed to do. There is a duplicity in the law as it currently stands. Whilst regulation and the model articles offer a limited, board focused understanding of the directorial role—that also likely reflects how the parties often explain and understand the role when a person is invited to become a board nominee—the common law is much more demanding.

For many, however, notwithstanding these observations, this accountability deficit will be of grave concern. It is submitted that it should not be. When we pay due regard to the core fiduciary observation that one person can have multiple and separate fiduciary personas then this accountability deficit substantially evaporates. In nearly all of the cases considered in this article, under this approach the defendants who were held to be liable and in breach of duty would remain so. Full-time senior managers to whom power is delegated to manage and operationally control the company are, whether or not they are also directors, managerial fiduciaries. Their managerial undertaking is a full-time positive undertaking to pursue the corporate purpose and interest; an undertaking subject to the common law requirements to perform it in subjective good faith to further that purpose and those interests; a positive duty that cannot be brought into conflict with the manager's personal financial interests without board[139] authorisation—a duty that is congruent with an alternative presentation that the manager's personal interests cannot be brought into conflict with the company's interests.

Given the codification of the general duties of directors this does create some variation in the wording, but not the substantive effect, of the general duties for directors—who are subject to the Act's codified duties—and management fiduciaries who are not. For example, a director must perform her undertaking in good faith to promote the success of the company for the benefit of the members; a management fiduciary must perform her undertaking in good faith to further the corporate interest. This is an unfortunate consequence of a codification built on a body of case law subject to the flaws outlined in this article. This is something we should learn to live with in the interests of a more coherent, determinate and fair body of law regulating directorial and managerial behaviour.

[139] *See* note 93.