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Corporate opportunities law and the non-executive director

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ABSTRACT

This article considers the current state of the fiduciary duty to avoid conflicts of interest as it applies to non-executive directors (NEDs) of UK companies, particularly in the context of corporate opportunities discovered by them in an outside capacity. The article charts the current law through the no-conflict and no-profit rules developed by the common law, and argues that the Companies Act 2006 leaves significant real-world uncertainties for the modern non-executive with outside business interests. Empirical data gathered from the largest listed companies in the UK are used to show that companies do attempt to legislate for this problem, but in a way that is only partially satisfactory. Finally, the article argues that the courts can and should develop the law in a way that accords with these real-world contractual solutions and the commercial expectations of NEDs, and suggests how the courts should approach cases of this type.

Non-executive directors (NEDs) have long been regarded as a key part of the corporate governance landscape, and it would now be rare to find a significant UK company with dispersed or professional shareholders that does not have at least one non-executive on its board. In some cases, especially in private companies, these NEDs will be nominated by particular shareholders,[1] while others will be appointed following a recommendation of the board's nominations committee (or similar body).[2] Corporate governance scholars

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[1]See e.g. M Wright, DS Siegel, M Meuleman and K Amess, 'Private Equity, Leveraged Buyouts and Corporate Governance' in M Wright, DS Siegel, K Keasey and I Filatotchev (eds), *The Oxford Handbook of Corporate Governance* (Oxford University Press 2013) 541.

[2]The UK Corporate Governance Code (Financial Reporting Council 2012) requires a nominations committee 'to lead the process for board appointments and make recommendations to the board' (B2). The Listing Rules of the London Stock Exchange (Financial Conduct Authority 2013) require all UK incorporated companies with a premium listing of equity shares to report on how they have applied the Code in their annual report (LR 9.8.6 (6)).

in both the agency theory[3] and resource dependence[4] traditions have offered theoretical support for the idea that outsiders, who are independent of (or at least separate from) management, can add value to a company, whether by more robust oversight of the executives, or by the addition of valuable resources (or both). And—although it is fair to say that the empirical support for their impact on corporate performance is, at best, mixed[5]—the value of NEDs has been widely acknowledged by regulators, policymakers, institutional shareholders and other stakeholders. The UK Corporate Governance Code[6] and the European Commission Recommendation of 15 February 2005[7] are two prominent best practice standards that wholeheartedly endorse them.[8]

In the UK, these NEDs owe the same basic duties to the companies on whose boards they sit as their executive colleagues. A unitary board (as opposed to the two-tier model, which is common in parts of continental Europe) has all directors sitting around the same board table, and the law imposes the same duties on each of them. It may be that different directors are held to different standards of care, according to their function in relation to the company and their actual level of knowledge, skill and experience,[9] but the core legal duties that they owe to the company are the same.

[3]Agency theorists argue that a central role for corporate governance is mitigation of the agency costs that arise from the separation of ownership and control, and many have postulated that outside directors are well placed to undertake that function, provided that they are appropriately separated from management. See e.g. EF Fama and MC Jensen, 'Separation of Ownership and Control' (1983) 26(2) *Journal of Law and Economics* 301.

[4]Resource dependence theory suggests that NEDs can enhance corporate value by providing a wide range of additional resources, including access to and communication with outsiders, legitimacy and advice. See e.g. J Pfeffer and GR Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Stanford University Press 2003).

[5]See B Lawal, 'Board Dynamics and Corporate Performance: Review of Literature, and Empirical Challenges (2012) 4(1) *International Journal of Economics and Finance* 22, for a review of the theoretical and limited empirical support for the proposition that board composition has a positive effect on firm value (esp 25). See also S Bhagat and B Black, 'The Non-Correlation between Board Independence and Long-Term Firm Performance' (2002) 27(2) *The Journal of Corporation Law* 231, who find that 'firms with more independent boards do not perform better than other firms' (p 231). More recently, see C Volonté, 'Boards: Independent and Committed Directors?' (2015) 41 *International Review of Law and Economics* 25, whose study of 1,494 companies finds no evidence that the 'independence' of directors is positively related to Tobin's *Q*, which is used as a proxy for firm value.

[6]The UK Corporate Governance Code (Financial Reporting Council 2012), Sections A4 and B1.2 (among others).

[7]Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, 2005/162/EC.

[8]As regards shareholders, see e.g. the Investment Association's (previously the Investment Management Association) *Principles of Remuneration* 2014 (para ii, c), which emphasise the importance of non-executive directors in overseeing executive remuneration. As regards other stakeholders, see e.g. the TUC's *Trade Union Voting and Engagement Guidelines* (26 March 2013), which generally endorse the role of (independent) non-executive directors (see in particular pp 8 and 9).

[9]See Companies Act 2006, s 174(2). Also relevant is the case law prior to the 2006 Act, in particular the judgments of Jonathan Parker J in *Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 433 and of Langley J in *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263. See also the discussion in D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 441.

It is now a little easier for an NED to discover what her most important duties are when she accepts a position on a company's board: the main duties of a director, at least while a company is solvent, are listed in Part 10 of the Companies Act 2006. But, in one very important respect, this newly-appointed director will get very little help from that statutory statement of duties: the law on 'corporate opportunities'[10] remains unclear,[11] especially in the way that it affects a part-time director who also has a 'day job'. An NED presented with an opportunity to make an investment, for example, may find it difficult to discover what the law requires her to do with it.

Despite this unfortunate lack of clarity, in this article I will argue that it remains open to the courts to apply and develop the law in a way that is consistent both with commercial expectations and long-standing legal principles. They can do this by adopting and developing the concept that directors, especially those who are recruited by the company on an explicitly part-time basis, are—with full knowledge and informed consent from the company—able to act in different 'capacities' at different times, and that when clearly not acting in their capacity as a director of the company concerned, they do not owe fiduciary duties to the company. Although I argue that this approach to directors' duties has always been inherent in the common law, and remains part of the law after codification, it is not an approach that has been clearly and explicitly developed in the cases or by commentators.

If the courts do not adopt this approach, and instead choose to take a more conservative line, I argue that the law would create real problems for those non-executive directors who have a variety of other interests alongside the part-time commitment they are willing to make to any one particular company, and that remains true even after the reforms in the 2006 Act, which have made it easier for conflicts to be authorised by the company. That would be problematic because it is these very people—those with expansive networks and deep experience in a particular sector—who are among the most sought-after and the most valuable part-time directors that a business can have.[12]

This article proceeds as follows: in Section A, I will argue that the no-conflicts and the no-profits rules, developed in tandem by the common law to

[10]In this article I use the phrase 'corporate opportunities' to mean opportunities to make investments, or otherwise to make use of information or property, which arise to the director of a UK company, whether or not those opportunities arise while the director is acting in her capacity as such.

[11]Some recent contributions to the continuing academic disagreement as to the scope of the duty include: D Gibbs, 'The Absolute Limit of Directors' Fiduciary Liability for Conflicts Of Interest: The Director's Perspective' (2015) 36 *The Company Lawyer* 231; S Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72 *Cambridge Law Journal* 720; SS Churk, 'Just Abolish the No-profit Rule' (2015) 7 *International Company and Commercial Law Review* 244.

[12]Resource dependency theorists would no doubt agree that such people would be among the most effective directors—see *supra* n 4.

deal principally with corporate opportunity cases, have been replaced with a single no-conflicts rule by the 2006 Act. That rule is a statutory restatement of the common law, and the Act makes clear that its future application and development by the courts will need to be consistent with the pre-2006 Act cases that relate to the no-conflict rule. However, I will argue that the courts can treat cases dealing with the other aspect of the common law corporate opportunities doctrine, the no-profit rule, differently and are not obliged to—indeed, they should not—follow the principles developed in those cases. Such an approach, combined with the new authorisation mechanism, might suggest a more limited and manageable corporate opportunities doctrine.

A closely-related question for the modern NED is whether she is able to undertake multiple directorships and, if so, what approvals are needed for those directorships themselves and any conflicts that subsequently arise from them. Therefore, in Section A, I also set out the current state of the law on multiple directorships.

In the second section of this article, I will argue that even the 2006 Act's arguably more permissive approach to corporate opportunities creates significant problems for the non-executive, especially one who has a range of interests in one particular sector: she may well find herself in possession of opportunities that give rise to a conflict, and may not be in a position to seek informed consent to exploit them.

In the third section, I consider how, if at all, companies attempt to legislate for this problem through an examination of the conflict management provisions in the Articles of Association of the 30 largest UK listed companies. I find that none of these companies seeks to exempt non-executives from corporate opportunities law generally (and nor could they), but all purport to give directors a wide-ranging exemption from duties to disclose information to their company, and all include a mechanism, or combination of mechanisms, to allow conflicts of interest to be authorised and managed.

Finally, I will suggest how the courts could apply these real-world contractual solutions consistently with the 2006 Act's no-conflicts rule to establish an application of corporate opportunities law, and indeed directors' duties more generally, which facilitates the appointment of specialist NEDs on boards, while preserving the prophylactic effect of the corporate opportunities rules in appropriate circumstances.

Section A: corporate opportunities law after the 2006 Act

The UK common law developed its rules on how directors should deal with investment opportunities that come to their attention along two separate, but intertwined,[13] tracks—adopting 'the two negative principles which are universal to the fiduciary doctrine of loyalty'.[14] The result is a strict approach, which seeks not only to prevent directors from abusing their position, but to make sure that they are not led into temptation.

1. The twin tracks of the common law: the no-conflict rule

First, the reasoning adopted in many of the cases is that which is applied to corporate conflicts of interest more generally, most classically stated (in the context of self-dealing transactions)[15] by Lord Cranworth LC in *Aberdeen Rail Co v Blaikie Brothers*:[16]

> it is a rule of universal application that no one having such 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.

It is the no-conflicts rule that guides the judgment of Lord Hodson and the dissenting judgment of Lord Upjohn in *Boardman v Phippsi*,[17] and appears as an integral part of the reasoning adopted in virtually all corporate opportunities cases reported since. For example, it dominates the analysis of Jonathan Parker LJ in the significant case of *Bhullar v Bhullar*,[18] and is strongly endorsed by the Court of Appeal in the more recent case of *O'Donnell v Shanahan*.[19]

Self-evidently, applying the 'no-conflicts' rule to corporate opportunity cases required the courts to decide what the interests of the company were, in order to establish whether the director had an interest (or owed a duty to a third party) that was in conflict with those interests.[20] As described below,[21] this was not always a straightforward exercise and they usually approached the task very cautiously.

[13]Indeed, as observed by Richard Sheldon QC in *O'Donnell v Shanahan* ([2008] EWHC 1973 (Ch) at [176]), in many cases the application of the two rules was so intertwined that it is hard to discern which is being applied and how to distinguish between them.

[14]A Stafford QC and S Ritchie QC, *Fiduciary Duties: Directors and Employees* (2nd edn, Jordan 2015) 32.

[15]Self-dealing transactions are now dealt with by disclosure under Companies Act 2006, s 177, substantially modifying the common law approach.

[16][1843–60] All ER Rep 249.

[17][1967] 2 AC 46.

[18][2003] EWCA Civ 424.

[19]*Re Allied Business and Financial Consultants Ltd; sub nom O'Donnell v Shanahan and another* [2009] 2 BCLC 666.

[20]The important (post-resignation) case of *IDC v Cooley* ([1972] 2 All ER 162) illustrates how the no-conflicts rule can apply to a conflict of personal interest and duty, even where the company had no 'interest' in the opportunity because it would not have been available to it. Here, Roskill J argues that the defendant was under a duty to the company to disclose the existence of the opportunity, and placed himself in a position where his personal interests and his duty to the company were in conflict by not doing so.

[21]See Section 1.4.

But whatever the court's approach to the scope of the company's interests, it might be assumed that application of the no-conflicts rule does not require an assessment of how the director becomes aware of an opportunity; what matters is whether the company could take advantage of that opportunity, and therefore whether there is an actual or potential conflict. However, I will argue in Section D of this article that, in fact, the courts recognise that fiduciary duties have limits, that their scope is circumstance-specific, and that the circumstances in which the opportunity arises *are* important in determining whether there is a fiduciary duty to be navigated at all.

2. The twin tracks of the common law: the no-profit rule

A second way in which the courts approached these problems, often in the same judgments as they applied the (overlapping) no-conflicts rule, was to apply another rule applicable to fiduciaries, this one famously articulated in *Keech v Sandford*.[22] In that case it was held that a trustee could not take a lease renewal for himself, even though its renewal for the benefit of the trust had been refused. Lord King LC said:

> It may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that rules should be strictly pursued, and not in the least relaxed …

Perhaps the best-known application of this rule to directors was by the House of Lords in *Regal (Hastings) Ltd v Gulliver and Others*.[23] In that case, the harshness of the rule was expressed clearly by Lord Porter:

> Their liability … does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf.[24]

An earlier application of the same rule can be seen in the joint judgment of Rich, Dixon and Evatt JJ in the High Court of Australia in *Furs Ltd v*

[22] [1558–1774] All ER Rep 230. See also Lord Herschell's comments in *Bray v Ford* ([1896] AC 44, 50): 'It is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit.'

[23] [1942] 1 All ER 378.

[24] ibid 395. Lord Russell expressed a similar view (385): 'Nevertheless, they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit. ' Viscount Sankey, Lord Wright and Lord Macmillian adopted similar language.

Tomkies,[25] which was cited with approval by the Court of Appeal in *Gwembe Valley Development v Koshy (No 3)*.[26]

In contrast to the no-conflicts rule, this alternative approach did not require the courts to concern themselves with questions about the company's interests, but rather to decide whether the opportunity arose while the director was acting in a fiduciary capacity.[27] Applying this logic, and putting the obvious evidential problems to one side, if a director had been approached independently, in her personal capacity, no profit would arise 'by reason' of her directorship, and so there would be no liability to account if she took the opportunity for her personal benefit. On the other hand, it would imply that, if she was approached qua director, even if the company could not take advantage of the opportunity itself—and so no conflict arose between the director and the company—the courts would hold the director liable to account, in the same way as Lord King held the trustee liable to account in *Keech v Sandford*.

Whether these were two separate rules, or whether the 'no-profits' rule is merely a specific application of the 'no-conflicts' rule, was not clearly established by the cases and has been the subject of considerable academic discussion.[28] However, the previous law is now only relevant in so far as it is preserved by the 2006 Act and, as we shall now see, the Act expressly adopts one of the rules and makes no mention of the other.

3. The Companies Act's rejection of the no-profits rule

It has often been observed that in adopting such a strict approach to corporate opportunities law, the UK courts made a clear policy decision that it was more important to err on the side of safeguarding 'the integrity of the

[25](1936) 54 CLR 583, 592. The court said: 'An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company itself could not have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. ' It seems clear from this passage that the ultimate purpose of the rule is to *prevent* a conflict arising, so that no conflict is required for the strict rule to operate when a director is acting as a director.

[26][2004] 1 BCLC 131, 146 [44]. For a more thorough review of the history of the application of the no-profit and no-conflict duties to corporate opportunity cases see SM Beck, 'The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered' (1971) 49 *Canadian Bar Review* 80, 85ff.

[27]See P Koh, 'Once a Director, Always a Fiduciary?' (2003) 62(2) *Cambridge Law Journal* 403, 406, who says that 'liability … depends on there being a connection or link between gain and office'.

[28]See e.g. P Koh, 'Once a Director, Always a Fiduciary?' (2003) 62(2) *Cambridge Law Journal*, 403, who argues that, 'it is perhaps more accurate to say that these are really independent rules' (406); while the contrary view is put by D Kershaw, 'Does it Matter How the Law Thinks About Corporate Opportunities?' (2005) 25(4) *Legal Studies* 533 , who says that, 'the weight of authority provides that the no-profit rule operates within the parameters of the no-conflicts principle' (539). See also PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-151; J Lowry, 'Codifying the Corporate Opportunity Doctrine: The (UK) Companies Act 2006' (2012) 5 *International Review of Law* 7; and Keay, *Directors' Duties* (2nd edn, Jordans 2014) 268–75.

director's duty of loyalty'[29] than to promote an 'enterprise culture',[30] and a number of scholars have argued that it is time to reconsider the demarcation between those two objectives.[31] To some extent at least, such a reconsideration was undertaken during the review process that ultimately led to the 2006 Act, and the most important innovation was a new approval mechanism designed to make it easier for conflicts of interest to be authorised.[32] However, in the process of restating the law, other important changes were also made, and it is not entirely clear that these were fully understood by Parliament at the time. One such change was the apparent rejection (or, at least, subjugation) of the no-profits rule.

Section 175(1) of the 2006 Act, which both restated and modified the common law, provides as follows:

> A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

This looks very much like the formulation of Lord Cranworth LC in *Aberdeen Rail*.[33] It uses the language of the no-conflicts approach,[34] with no explicit mention of the no-profits rule, nor any language reminiscent of that used to set the boundaries of the no-profit rule, such as the phrase used by Lord Porter in *Regal (Hastings)*:[35] 'by reason of his relationship to the company.'[36]

[29]D Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' (2005) 25(4) *Oxford Journal of Legal Studies* 603, 603.

[30]J Lowry and R Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61 *Modern Law Review* 515, 521. See JH Farrar and S Watson, 'Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform' (2011) 11(2) *Journal of Corporate Law Studies* 495 for a description of various attempts to balance the 'efficient transactions' and the 'conflict of interest' theories.

[31]See e.g. J Lowry and R Edmunds (n 30) who argue that the UK courts should be 'influenced by the pragmatism intrinsic in the jurisprudence generated by the Supreme Court of Delaware' (537). David Kershaw (n 29) offers a critique of the approach in Delaware and its origins.

[32]See Section B1 below.

[33]See *supra* n 16 and accompanying text.

[34]Interestingly, the section addresses itself to conflicts of *interest* between the director and the company, and is not confined to (although it does include) cases where personal interest conflicts with a duty to the company, as the principle was expressed by Lord Herschell in *Bray v Ford* [1896] AC 44, 51.

[35]See *supra* n 24 and accompanying text.

[36]Although the statement of duties laid out in Part 10 of the Companies Act 2006 is clearly not intended to be exhaustive, it cannot have been intended to preserve such an important rule without doing so explicitly. Note that some commentators have argued that the no-profits rule is restated by s 176 (including, it seems, J Lowry in 'Codifying the Corporate Opportunity Doctrine: The (UK) Companies Act 2006' (2012) 5 *International Review of Law* 7), but that is not the dominant view—see the discussion in D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 574, including n 75 (which cites the *Oxford Annotated Companies Acts* [OUP 2007] 10–36 as giving the counter-view), and in PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-174. The dominant view is that s 176 does restate a version of the no-profits rule, but not one which would apply to a corporate opportunity. In any event, s 176(4) makes it clear that a conflict of interest is also required in order for the section to be breached, so it is clear that even if the courts were to interpret the provision more broadly, they will still need to go further than simply establishing that the benefit arose 'by reason' of the director's directorship and find some actual or possible conflict.

But that is not necessarily the end of the matter, because section 175 does not render the previous law redundant. On the contrary, section 170(4) tells us that the 'corresponding' common law rules and equitable principles are relevant in interpreting and applying the directors' duties set out in the Act (and therefore for determining when a conflict arises). If the common law no-profits rule was an integral part of the no-conflicts rule, then we cannot entirely ignore pre-2006 Act cases that approached the corporate opportunities question through the no-profits lens, and we should consider whether, if an opportunity arises to a director by reason of her directorship, then there is *automatically* a legal conflict as a consequence of that fact. If, on the other hand, they were separate (albeit overlapping) rules, then we need to consider whether the 2006 Act has effectively abolished the no-profits rule, and we can now interpret the new law without reference to those judgments that applied it (even if, in some cases, it is hard to disentangle the two principles).[37]

It is submitted that, even though Lord Upjohn in *Boardman v Phipps*[38] regarded the no-profit rule as a sub-set of the no-conflicts rule, it seems clear that more recent judgments have not approached it in that way. They have generally treated the no-profit rule separately, in the sense that they have not regarded it as bounded by the question of whether there is any actual conflict, nor explicitly stated that the effect of the no-profit rule is to establish a deemed conflict upon which the no-conflict rule can bite. In *Wilkinson v West Coast Capital and others*,[39] Warren J says:

> There are two important rules which, if not qualified, generally affect directors, as they affect all fiduciaries. They can be called the 'no conflict' rule and the 'no profit' rule …

Perhaps more significantly this approach was also taken by the Court of Appeal in the more recent case of *O'Donnell v Shanahan*,[40] in which Rimer LJ expressed the view that:

> Once [the judge] had found, as he did, that the opportunity to buy Aria House came to the respondents' attention in their capacity as directors of the company acting on the company's business and using information they also obtained in the course of so acting, that was the end of the point.

It was not 'the end of the point' because any conflict was thereby established or assumed; it was so because the no-profit rule did not require anything further to be established.

[37]See references *supra* n 28 above for various academic views on the 'one rule/two rules' question.
[38][1967] 2 AC 46, and see D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 531.
[39][2005] EWHC 3009 (Ch) [248].
[40]*Re Allied Business and Financial Consultants Ltd; sub nom O'Donnell v Shanahan and another* [2009] 2 BCLC 666

It is true that the two rules stem from the same underlying principle: that directors should not be allowed to put themselves in positions of conflict;[41] and they have the same underlying purpose: 'to control the opportunism of those with limited access to the assets of others'.[42] However, over time, the rules came to be articulated and applied separately by the courts. It became clear that the no-profits rule, at least as expressed in numerous cases, did not require an *actual* conflict, and was not therefore a sub-rule. Section 175, on the other hand, plainly does require there to be a 'conflict', and it seems clear from the Act that the fact that the opportunity arose while a director was acting as such will not now be 'the end of the point' as it was for Rimer LJ.[43]

As one commentator says of the law, post implementation of the 2006 Act: 'There is one rule, a no-conflict rule, and a prohibition on profiting when in a position of conflict.'[44] On one level, it may be right to say that the no-profit rule has been 'subsumed' within section 174[45] (in the sense that this is the only relevant section to apply in corporate opportunities cases), but it is not clear, where there is a conflict on which section 175 can bite, what work there is left for the no profit rule to do;[46] and if there is no such conflict, then it seems equally clear that there can be no breach of the rule. Given this, it would seem more accurate to say that the no-profit rule has been rendered redundant by the Act, and cases that dealt with that rule on a stand-alone basis, such that it was not constrained by the no-conflict rule, are likely to mislead as to the current state of the law. Section 170(4) does not require the courts to take that part of the common law into account,

[41]See e.g. the comments of the High Court of Australia in *Furs Ltd v Tomkies* (n 25). In the recent Supreme Court case of *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45, Lord Neuberger refers with approval to Lord Upjohn's assertion in *Boardman v Phipps* that the no-profits rule is part of the 'wider' no-conflicts rule.

[42]R Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 *Law Quarterly Review* 449, 449. See also R Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35.

[43]It is true that there are circumstances where the 'no-conflict' rule itself does not require an *actual* conflict, such as where the company could not have taken advantage of the opportunity (see the discussion of 'capability facts' in Section 1.4 below). However, it is notable that the draftsmen of the Act felt it necessary to deal with that point specifically (in s 175(2)), but did not make any equivalent mention of opportunities discovered while acting as a director, which by implication argues in favour of the view that how the opportunity was discovered is not relevant to the determination of whether there is a conflict.

[44]B Hannigan, *Company Law* (3rd edn, Oxford University Press 2012) 11–12. See also L Sealy and S Worthington, *Sealy and Worthington's Cases and Materials in Company Law* (10th edn, Oxford University Press 2013) [7.24] 370, who say: 'to the extent that the statutory no conflict rule and the third party benefits rule [S.176] fails to cover the no profit rule, the new statutory regime deviates from the existing equitable rules.'

[45]See e.g. E Lim, 'Directors' Fiduciary Duties: A New Analytical Framework' (2013) 129 *Law Quarterly Review* 242 who says 'there is no longer a standalone no-profit rule as s 175(2) has subsumed it under the no-conflict rule' (252).

[46]It seems now that there is also no difference between the remedies available for a breach of the no-profit rule and the no-conflict rule. Sarah Worthington ('Fiduciary Duties and Proprietary Remedies' [n 11]) had suggested that the availability of a proprietary remedy might depend upon which rule applied; however, that distinction was not adopted by the Supreme Court in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* ([2014] UKSC 45).

because that part of the common law does not 'correspond' to an equivalent general duty under the Act.

In fact, the effective abolition of the 'no-profit' rule as a matter of corporate law may make little practical difference,[47] and it seems likely that Parliament was of the view that no meaningful change in law followed from its reformulation of the duty solely as a duty to avoid conflicts of interest.[48] That is because, as pointed out by Davies and Worthington,[49] the leading no-profit cases, including *Regal (Hastings)* itself, can be re-characterised as 'no-conflict' cases. In *Regal*, the court is clearly sceptical about the directors' motives for investing in the subsidiary personally, especially as a sale was contemplated, and the board clearly did face a conflict of interest when deciding whether to raise money through the parent company or to invest it itself. Although the court assumed their *bona fides*, there is no suggestion that they did not face a conflict. Other commentators[50] have pointed out that there is a significant overlap in coverage between the two rules, with one observing that in many cases 'judicial language mixes the two rules simply because conflict and profit are both present'.[51] In arguing that the 2006 Act effectively abolished the no-profit rule for directors, it should be pointed out that, in some significant cases since the Act came into force, the 'no-profits' rule has been repeated or affirmed by the courts. For example, in *Thermascan v Norman*,[52] a case about exploitation of a corporate opportunity after termination of a directorship, the parties agreed that section 175 did not change the pre-existing law, and the judge, David Donaldson QC, appeared to concur. However, the principles that were then enumerated—taken from a pre-2006 Act case, *Foster Bryant Surveying Limited v Bryant*[53]—focused very much on conflicts

[47]However, as made clear by RP Austin, although the rules cover much of the same ground, there are (at least in theory) cases where only one of the rules will apply—see RP Austin, 'Fiduciary Accountability for Business Opportunities', in PD Finn (ed), *Equity and Commercial Relationships* (Sweet & Maxwell 1987) 146–47. See also SS Churk, 'Just Abolish the No-Profit Rule' (2015) 7 *International Company and Commercial Law Review* 244, who gives examples of situations in which the no-profit rule could give rise to difficulties in practice.

[48]For example, the remarks of Lord Goldsmith in Grand Committee on the relevant sections of what was then known as the Company Law Reform Bill make clear that, although there were certain intended liberalisations of the law (such as the inclusion of a reasonableness test in s 175(4)(a), and the procedure allowing the board to approve conflicts), no dramatic change was intended to the basic prohibition as it related to the exploitation of corporate opportunities (HL Deb 6 February 2006, vol 678, cols GC285-GC294 and HL Deb 9 February 2006, vol 678, cols GC322-GC329).

[49]PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-149–16-151.

[50]See e.g. P Koh, 'Once a Director, Always a Fiduciary?' (2003) 62(2) *Cambridge Law Journal*, 403, 407; SM Beck, 'The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered' (1971) 49 *Canadian Bar Review* 80.

[51]SM Beck, 'The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered' (1971) 49 *Canadian Bar Review* 80, 90.

[52][2009] EWHC 3694 (Ch).

[53][2007] EWCA Civ 200 [8]. In fact the Court of Appeal was itself quoting from an earlier unreported case, *Hunter Kane Ltd v Watkins* [2003], where the judge applied the principles set out by Lawrence Collins J in *CMS Dolphin Ltd v Simonet and another* [2001] 2 BCLC 704.

of interest (or a conflict of interest and duty), and did not imply that a situation in which there was in fact no conflict would automatically give rise to a duty to account if the director became aware of an opportunity in the course of acting as a director. In fact, it was said that:

> A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any property or business advantage either belonging to the company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations.[54]

Such a narrow formulation was, perhaps, driven by the facts of the particular case, and may not have been intended to be a comprehensive statement of the law.

More significantly, in *Sharma v Sharma*,[55] Jackson LJ summarised the duty under section 175 as follows:

> A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which come to his attention through his role as director or (b) any other opportunities which he could and should exploit for the benefit of the company .

However, in this case, the parties had conceded that there would have been a breach of the relevant rule if the shareholders had not consented to the director's personal pursuit of the opportunity,[56] and so questions as to the ambit of the rule itself were not before the court. Nevertheless, there must remain some doubt as to the way in which the courts will approach section 175 in subsequent cases, in light of these authoritative comments.

4. The Companies Act's version of the no-conflicts rule

Even if, as argued above, the common law's application of the no-profits rule has limited relevance to directors since the 2006 Act, as a result of section 170 (4), the common law clearly does remain relevant to the question of whether there is a conflict, at least to the extent not varied by section 175. And, as already noted, the courts have traditionally been very cautious when defining the company's interests for this purpose. First, they have taken the view that if the director herself could have any impact on whether the company was capable of taking advantage of the opportunity—for example, by persuading shareholders to lift a constitutional bar to the acquisition—then they will simply assume that the company does have an interest in the opportunity; in other words, they will regard capability facts as immaterial in determining

[54][2007] EWCA Civ 200 [8].
[55][2013] EWCA Civ 1287 [52].
[56][2013] EWCA Civ 1287 [36].

whether there is a conflict. So, in *Bhullar*,[57] the fact that the board, at the instigation of the claimants, had resolved not to undertake any new investments was not relevant. The board was not given the opportunity to reconsider this determination, and the court will not second guess what answer it would have given if it had been. The judgment in *Bhullar* closely follows the logic of *Boardman v Phipps*,[58] in which the majority held that neither rejection of the opportunity by the trustees, nor the fact that it would have been necessary to apply to court in order to take advantage of the opportunity, were relevant in deciding whether Mr Boardman, solicitor to the trust, was conflicted in pursuing an opportunity for personal benefit.

There were, however, limits to this approach. For example, Warren J in *Wilkinson v West Coast Capital*,[59] said that if the director who wanted to take advantage of the opportunity was also a shareholder who could (in that capacity) prevent the company from taking advantage of the opportunity, then it would not be a breach of duty for her to exploit it personally (although the judge does also say that there might be an obligation for directors to bring the opportunity to the attention of the board, even if discovered 'other than in their capacities as directors'). It also seems that an absolute statutory prohibition on the company making the acquisition would be relevant in determining the scope of its interests.[60] However, these limits are fairly extreme, and in a case in which a constitutional barrier to acquisition could be lifted by a shareholder vote—and the director, acting in a separate, non-fiduciary capacity, could not block such a shareholder decision—then the barrier to acquisition was not relevant at common law.

Section 175(2) confirms that strict approach, and may even cast doubt on the limited capability-type exceptions discussed in *Wilkinson*, saying that it is 'immaterial whether the company could take advantage of the … opportunity'.[61]

The other possible line of argument for a director who wants to pursue an opportunity personally might be that, as a commercial matter, the company would not be interested in it. In this regard, she might say that it was outside of the company's existing or anticipated sphere of activity.

The common law has not been entirely clear as to its position on this line of argument,[62] although some support for it appears in the authorities,

[57][2003] EWCA Civ 424.
[58][1967] 2 AC 46.
[59][2005] EWHC 3009 (Ch).
[60]ibid [296].
[61]Note the discussion in D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 572, which suggests that the apparently more flexible wording in s 175(4)(a) ('cannot reasonably be regarded as likely to give rise to a conflict of interest') than under the common law ('real, sensible possibility of conflict') could be said to mean that the Companies Act will allow capability facts to be taken into account. However, given the clear contradiction with s 175(2) the author concludes that s 175(4)(a) cannot refer to capability facts, a view with which the present author respectfully concurs.
[62]See J Armour, 'Corporate Opportunities: If in Doubt Disclose (But How?)' (2004) 63 *Cambridge Law Journal* 33, who says (34) that some 'proximity' of the opportunity to the company's interests is required.

most recently in *Wilkinson v West Coast Capital*.[63] In that case, *obiter dictum* of Warren J suggests that the qualification to the no-conflict rule first proposed by Lord Upjohn in *Boardman v Phipps*[64]—that there must be a 'real, sensible possibility' of conflict (and not just a theoretical one)—would mean that taking an opportunity in a completely different line of business would not render the director in breach of the duty to avoid conflicts.[65] Given that the rule is predicated on the existence of a conflict, the principle of this approach is easy to understand. However, from a policy point of view, one can see why the court might be sceptical of dismissing the possibility of a conflict in cases where the company's current line of business is in an apparently unrelated area, for the same reason that they have been unwilling to dismiss conflicts in cases where the company is subject to a limitation that restricts its ability to take up the opportunity if that restriction is capable of being lifted by the board or the shareholders. The company's line of business is often in the control of the board and, even where it is not, the directors could ask shareholders to consider widening the current scope of the company's business interests if they believe that it would be in the company's commercial interests to pursue a particular investment opportunity.

In *O'Donnell v Shanahan*[66]—looking through the no-profits lens—the Court of Appeal dismissed any business area limitations. However, as noted above, the Court treated the no-profits rule and the no-conflicts rules as entirely separate in this case, and its rejection of scope of business restrictions was specifically in the context of its application of the no-profits rule.[67] As

However, see also D Prentice and J Payne, 'The Corporate Opportunity Doctrine' (2004) 120 *Law Quarterly Review* 198 who argue that, although 'the test is probably that the opportunity must be one that falls within the company's line of business', 'it would be in keeping with the approach in *Bhullar* to treat anything of economic value to the company as potentially within the company's line of business' (201).

[63] [2005] EWHC 3009 (Ch).

[64] [1967] 2 AC 46.

[65] At [253] Warren J says: 'A company with a wide objects clause could, in theory, diversify its business in limitless ways if the necessary funding were available. But a director of a company selling fashion clothing for women could hardly be in breach of the "no conflict" rule if he took a stake in a company distributing farm machinery, even if the company did have such a wide objects clause. There would simply be no "real sensible possibility" of conflict. In contrast, if the board of the fashion clothing company had been actively considering diversification into the distribution of farm machinery, there would be a real sensible possibility of conflict in a director taking a stake in such a company.' See also *Bhullar v Bhullar* [2003] EWCA Civ 424, where it seems relevant to the decision that the relevant opportunity was to acquire land which was adjacent to another existing commercial property that the company already owned; the implication is that there would have been no duty to disclose an opportunity to acquire an investment property which had no connection whatsoever to the existing or anticipated future business of the company.

[66] *Re Allied Business and Financial Consultants Ltd; sub nom O'Donnell v Shanahan and another* [2009] 2 BCLC 666

[67] Rimer LJ does say that the partnership case of *Aas v Benham* is 'of relevance in considering the extent and application of the 'no profit' and 'no conflict' rules' [67]. However, this is in a part of the judgment dealing specifically with the no profit rule.

argued above, that rejection is no longer directly relevant.[68] On the other hand, Rimer LJ's finding that there was also a breach of the no-conflicts rule was for a different reason: he did not appear to regard the taking of the opportunity as the relevant conflict, but rather the question as to whether the company should receive a commission (a question in relation to which the directors did have a clear conflict on the facts of the case). On that analysis, the pre-2006 Act law, which appeared to give room for arguments based on business line restrictions, remained, even after the decision in *O'Donnell*. However, it is not clear whether it has survived the Act's new formulation of the no-conflicts rule.

As to the position after the 2006 Act, it has been argued[69] that a scope of business restriction, as was referred to in *Wilkinson*, could be preserved by section 175(4)(a) of the 2006 Act, which says that there is no breach of the no-conflicts rule if 'the situation cannot reasonably be regarded as likely to give rise to a conflict of interest'. This phrase, similar to that used by Lord Upjohn in *Boardman v Phipps* and adopted in *Wilkinson* by Warren J, could be used by the courts to confirm (or re-establish) that the current legal position is that there are business-line restrictions on the no-conflicts rule, even if they continue to approach the definition of a company's scope of business cautiously, taking a broad view of which opportunities the company can be expected to want to pursue, or at least consider. However, this remains a matter of speculation, and it is perhaps unlikely that the courts will take up the opportunity that section 175(4)(a) offers them.[70]

5. Application of the no-conflicts rule to multiple directorships

Many NEDs, perhaps even most, act as directors of more than one company, and indeed this may be regarded positively by the companies concerned, on the basis that it will broaden the experience and network of the NED. Most Articles do not ban NEDs from holding other directorships,[71] and the fact that an NED (or even an executive director) is likely to have outside commitments, including other directorships, is acknowledged in many best practice

[68]See E Lim, 'Directors' Fiduciary Duties: A New Analytical Framework' (2013) 129 *Law Quarterly Review* 242 for a more detailed discussion of Rimer LJ's reasoning. Lim argues that Rimer LJ was wrong to reject the scope of business test even in applying it to the no-profits rule.

[69]D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 573. David Kershaw acknowledges that there is 'nothing in the legislative record' to support the view that this was the intention of s 175(4)(a), and the argument is made tentatively.

[70]The general reluctance of the courts to get involved in matters of commercial judgement is well established—see e.g. *Carlen v Drury* [1812] 35 ER 61. Their unwillingness to involve themselves in defining the company's 'line of business' to exclude certain activities is, perhaps, consistent with that general approach.

[71]In summarising the results of an empirical study carried out for the purposes of the review process that led to the 2006 Act, it was said to be 'very rare for non-executive directors to be barred from being directors of other firms, confirming their advisory role'––see S Deakin and A Hughes, 'Directors' Duties: Empirical Findings *Report to the Law Commissions*, August 1999, s 5.1. See also Section C below.

codes. For example, the UK Corporate Governance Code[72] says that a full-time executive director should not be permitted to take on 'more than one non-executive directorship in a FTSE 100 company nor the chairmanship of such a company', while NEDs (including the chairman) are required to ensure that they have 'sufficient' time available, and required to disclose their 'other significant commitments'. The Code's provisions are therefore focused more on the need for directors to have sufficient time available, rather than being concerned specifically with conflicts of interest.[73]

Academic evidence of the impact of multiple directorships on corporate performance is unclear, but there are a number of studies that find a negative correlation between firm performance and the number of outside appointments of board members.[74] Most recently, however, Christophe Volonté, in a study of 1,494 companies from the Swiss Performance Index from 2005 to 2012, found 'no strong empirical evidence that … the number of outside activities [of directors] would affect firm value'.[75]

In any event, these studies are generally concerned with the question of whether there is a link between 'busy' boards and performance, using outside directorships as a proxy for 'busy-ness', and (since outside commitments can come in many forms) are not focused on the effect of multiple directorships *per se*. And neither do these studies look at the impact of multiple directorships in smaller and unlisted companies. In short, it is not possible to draw any specific prescriptions for the law's attitude to multiple directorships from the academic evidence.

Nineteenth- and early-twentieth-century UK courts certainly had no problem with multiple directorships; indeed, the position famously taken by

[72]Financial Reporting Council 2012, B3.

[73]Other Corporate Governance Codes have tended to take a similar approach: for example, the Australian Code (ASX, 2nd edn, August 2007, amended 2010, p 19) says that 'directors should consider the number and nature of their directorships and calls on their time from other commitments', while the US Council of Institutional Investors (Policies on Corporate Governance, April 2015, 2.11) provides that: 'Absent unusual, specified circumstances, directors with full-time jobs should not serve on more than two other boards. Currently serving CEOs should not serve as a director of more than one other company, and then only if the CEO's own company is in the top half of its peer group. No other director should serve on more than five for-profit company boards.'

[74]See e.g. P Jiraporn, YS Kim and WN Davidson III, 'Multiple Directorships and Corporate Diversification' (2008) 15(3) *Journal of Empirical Finance* 418; EM Fich and A Shivdasani, 'Are Busy Boards Effective Monitors?' (2006) 61(2) *Journal of Finance* 689. See also VD Sharma and ER Iselin, 'The Association between Audit Committee Multiple-Directorships, Tenure, and Financial Misstatements' (2012) 31(3) *Auditing: A Journal of Practice & Theory* 149, who conclude from a study of 191 companies who had misstated their financial statements (matched with 191 companies who had not) that 'independent audit committee members serving on multiple boards may be stretched too thinly to effectively perform their monitoring responsibilities', given the positive correlation they found between multiple directorships and misstatement. However, they did not find this relationship for audit committee members with accounting expertise, suggesting that directors with special skills can have a positive impact even if heavily committed elsewhere.

[75]C Volonté, 'Boards: Independent and Committed Directors?' (2015) 41 *International Review of Law and Economics* 25. See also S Ahn, P Jiraporn and YS Kim, 'Multiple Directorships and Acquirer Returns (2010) 34 *Journal of Baking & Finance* 2011, who do find that multiple outside board seats are related to poor acquisition performance, but 'only when the number of multiple directorships reaches a high threshold' (p 2026).

the court in *London & Mashonaland Co Ltd v New Mashonaland Exploration Co Ltd*,[76] subsequently approved by the House of Lords,[77] was that a director could even act as a director of two competing companies. This view was certainly controversial,[78] and the *Mashonaland* principle has since been construed narrowly.[79] Following *Plus Group Ltd v Pyke*,[80] it would seem hard for an *active* director, even a non-executive, to be a director of two *competing* companies without specific authorisation.

But even after the decision in *Plus Group*, it had not been entirely clear where to draw the dividing line between a situation that is prohibited because the director is conflicted, and one where there is no legal bar to the dual (or multiple) directorships. That is because the courts were prepared to accept that something short of an actual conflict was enough for the law to intervene. As Sedley LJ[81] put it:

> there has never been any warrant for treating [the Mashonaland decision], or therefore its endorsement in the House of Lords, as a licence for directors or other fiduciaries to put themselves or to stay put in situations where their duties and/or interests *can* come into conflict. (emphasis added)

The use of the word 'can' in this extract was deliberate; a little earlier in the judgment Sedley LJ confirms that the law will intervene where there is an 'impending or potential breach', and affirmed the view of Lawrence Collins J in *CMS Dolphin Ltd v Simonet and another*[82] that the correct formulation of the relevant legal principle was that 'a fiduciary must not place himself in a position where his duty and his interest *may* conflict' (emphasis added). Indeed, in his famous formulation in *Aberdeen Rail Co v Blaikie Brothers*,[83] Lord Cranworth LC made it clear that directors could not enter into engagements where a personal interest 'possibly may conflict' with the interests of the company. The potential breadth of that formulation was recognised by Lord Upjohn in *Boardman v Phipps*;[84] he (as noted above) said that it should be restricted to cases where there was a 'real sensible possibility of conflict'.[85] However, in cases of multiple directorships, it would not always

[76][1891] WN 165.
[77]*Bell v Lever Brothers Ltd* [1932] AC 161 (Lord Blanesburgh).
[78]See the judgment of Sedley LJ in *Plus Group Ltd v Pyke* [2002] EWCA Civ 370, who cites various academic commentaries. See also M Christie, 'The Director's Fiduciary Duty Not to Compete' (1992) *Modern Law Review* 506, who concludes that the decision is 'inconsistent with long established principles of Equity regulating directors' (520).
[79]See *Plus Group Ltd v Pyke* [2002] EWCA Civ 370 [84] in which Sedley LJ said: 'If one bears in mind the high standard of probity which equity demands of fiduciaries, and the reliance which shareholders and creditors are entitled to place upon it, the *Mashonaland* principle is a very limited one.'
[80][2002] EWCA Civ 370.
[81]*Plus Group Ltd v Pyke* [2002] EWCA Civ 370 [88].
[82][2001] 2 BCLC 704 [84].
[83][1843-60] All ER Rep 249.
[84][1967] 2 AC 46.
[85][1967] 2 AC 46, 124. The full quotation from the case bears repeating: 'In my view [the phrase "possibly may conflict"] means that the reasonable man looking at the relevant facts and circumstances of the

be easy to determine whether a possible conflict (perhaps a chance that the companies would compete in future) could be ruled out as being too remote. At the same time, it was very clear that the scope of the duty would depend on the facts of the case.[86]

As discussed extensively above, the Companies Act 2006 reformulated the general duty to avoid conflicts, while at the same time introducing new procedures to allow directors to authorise the conflicts of their fellow directors. During the Parliamentary Standing Committee debates about what is now section 175, there had been some disagreement as to whether this reformulation would make it more difficult for directors to take on multiple directorships, with some arguing that the clause would involve a significant change to the common law position, on the basis that any other directorship might well put the director in a position of potential conflict.[87] However, the government insisted that the clause merely reflected the existing common law position; the Solicitor General said that that there was no problem with multiple directorships[88] but that, if the fact of a second directorship gave rise to a foreseeable conflict of interest, it would need to be authorised by the directors or otherwise dealt with in accordance with the company's constitution, and the directors or the members would need to make an 'informed decision' as to whether it should be permitted.[89] There does seem to be more scope here for section 175(4)(a) to take on a role similar to that which is argued for it above in relation to corporate opportunities. While, in the face of a specific, profitable investment opportunity, it might be difficult for the courts to apply a clear business line restriction to say that no conflict arises,[90] it may be easier for them to conclude that it is not likely that there will be circumstances in which a conflict will arise in future, if a director holds a position with two companies that have entirely different businesses (at least no more likely than if he is undertaking any other commercial activity outside of the company).

particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.'

[86]See e.g. Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46, 107, a passage cited by Brooke LJ in *Plus Group* [2002] EWCA Civ 370 [75] when he says that 'the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made'.

[87]Company Law Reform Bill [Lords] Deb 11 July 2006, cols 607–11.

[88]Indeed, he acknowledged that there may be 'quite substantial benefits—see ibid, col 612.

[89]ibid, col 615. The Solicitor-General said: 'If a person cannot possibly foresee a situation, it cannot be reasonably regarded as being likely to give rise to a conflict of interest. On the other hand, if they can foresee it, the director or members of the company should be able to make an informed decision about whether it is an acceptable conflict of interest or whether the matter should be dealt with in accordance with applicable provisions under the company's constitution.'

[90]See *supra* discussion at n 69.

However, as Gower points out,[91] this may leave a director in a difficult position: first, she will have to assess whether acceptance of a second directorship could 'reasonably be regarded as likely to give rise to a conflict of interest',[92] and, if it does, she will need authorisation from the non-conflicted members of the board (or other authority from the company) before she can take it on. Then, if the situation changes and the possibility of a conflict becomes an actual conflict, or the facts otherwise change from those provided to the board initially, it seems likely that a further authorisation would be needed for the new 'situation' in which the director now finds herself. In practice, it may be likely that a director will want to get prior authorisation in any event, or at least to make full disclosure to the board, in case a conflict does later arise and it is argued that this was a foreseeable outcome.

Section B: the problem for NEDs

Notwithstanding the (theoretically) more relaxed post-2006 Act formulation,[93] which as I have argued would look for the existence of an actual or likely conflict before holding a director liable for a breach of section 175, the law will still pose a significant practical problem for many non-executive directors. It is often expected that an NED will have outside interests;[94] indeed, these may be at the heart of the value that they can add. Their networks, current commercial experience and ability to maintain financial independence are often key qualifications for the job.[95] Those other responsibilities are likely to lead them to find other investment opportunities (or 'information or property', which are also specifically mentioned in section 175). In many cases, they may even be employed by another company specifically to identify other investment opportunities, as would be commonly the case with an NED appointed by a private equity shareholder. And a business angel investor, who may well sit on the board of the company in which she has invested, is unlikely to constrain herself to one investment. Indeed, in writing about the position in the US, it has been observed that 'conflicts of interest are endemic to the commercial setting that the corporation calls home'.[96]

[91]PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-169.

[92]Companies Act 2006, s 175(4).

[93]It may be theoretical because, as discussed above, in practice, most of the decided cases on corporate opportunities were ones where a 'conflict' could be identified.

[94]See *supra* discussion at n 73.

[95]For example, the 11 'independent non-executive directors' listed on the website of BP plc on 28 October 2014 had a total of 17 other commercial directorships or supervisory board memberships, and one was a 'senior advisor' to a leading private equity fund management company. These were in addition to various government and industry appointments and academic posts.

[96]JD Cox, 'Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors With Independent Counsel' (2003) 48 *Villanova Law Review* 1077, 1079 (cited by A Keay, 'The Authorising of Directors' Conflicts of Interest: Getting A Balance?' (2012) 12(1) *Journal of Corporate Law Studies*, 129, 132).

The fact that the law now appears to restrict the scope of the corporate opportunities doctrine to cases of conflict is unlikely to provide much comfort to most NEDs; indeed, they might be more likely to recognise when an opportunity arises 'by reason' of their directorship, than to recognise when one puts them in a position of legal conflict, and may regard the company as having a more legitimate claim to the former than the latter. Many investors, whether individual or institutional, will focus on a particular sector in which they have special expertise. That means that any opportunities they do discover are quite likely to be of interest to the company on whose board they sit, and so give rise to the type of conflict dealt with by section 175. This problem is exacerbated by the fact that—even if the courts are willing to have any regard to a company's existing scope of business—the cases discussed above demonstrate that they will (and, from a policy point of view, should) still interpret the company's interests expansively. And even existing board resolutions constraining further investment, or constitutional bars to an acquisition, are likely to be ignored by the courts if they could be overturned by directors or shareholders (unless, perhaps, following *Wilkinson*, the director herself could block exploitation of the opportunity by the company in a non-fiduciary capacity—which may be the case for a business angel, but would be rare otherwise).[97]

So the NED appointed to a company's board might feel that a conflict of the type outlawed by section 175 is quite likely to arise. She might, however, look to statutory authorisation mechanisms, and to the Articles themselves, for some comfort that these situations will be manageable. I shall now consider those mechanisms in turn.

1. Independent directors' authorisation

Section 175(4)(b), in an important departure from the common law, provides that the duty to avoid conflicts of interests is not infringed if the matter has been authorised by the directors.[98] Section 175(5) states that a private company needs no provision in its constitution to enable directors to authorise a conflict; they may do so unless the constitution says otherwise. Public companies, on the other hand, must include specific authority in their Articles.

[97] Those charged with advising the UK government on what became the 2006 Companies Act recognised this problem, and suggested abandoning the no-conflicts approach in favour of something more akin to the no-profits approach, but their advice did not ultimately prevail. Their suggested approach (which would have been similar in effect to that applied by the Delaware courts), while not entirely solving this problem, would have alleviated it. See *Modern Company Law: Final Report*, Annex C (June 2001), and D Kershaw, 'Does it Matter How the Law Thinks About Corporate Opportunities?' 25(4) *Legal Studies* 533 for a critical evaluation of the proposal.

[98] For a detailed analysis of this new approval mechanism and the reasons why it might not give rise to optimum results for shareholders, see A Keay, 'The Authorising of Directors' Conflicts of Interest: Getting A Balance?' (2012) 12(1) *Journal of Corporate Law Studies* 129; B Hannigan, *Company Law* (3rd edn, Oxford University Press 2012) 245.

Section 175(6) makes it clear that the director who has the conflict, and any other 'interested' directors, may not be counted in the quorum for the directors' meeting, and any vote has to be passed by the disinterested directors alone.

This provision could be used to authorise a director to take an investment opportunity personally (or for the benefit of some other person), when to do so would otherwise have been a breach of section 175. However, there are several problems with this apparent solution. First, it seems likely that full information as to the nature of the actual or proposed conflict would have to be provided to the disinterested directors, and therefore that any authorisation could only cover such potential or actual conflicts as are known at the time the authorisation is given. This is not just because, as a practical matter, directors are unlikely to authorise a specific opportunity without being told what it is, but also because the courts might well invalidate any consent if it was not given on a fully informed basis. For example, in the case of *Gwembe Valley Development Company Ltd and another v Koshy and others*[99] (where the courts were dealing with the common law requirement to make disclosure to shareholders in order to avoid a duty to account for an unauthorised profit), Mummery LJ said:

> Disclosure requirements are not confined to the nature of the director's interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are 'fully informed of the real state of things,' as Lord Radcliffe said in Gray v. New Augarita Porcupine Mines [1952] 3 DLR 1 at 14.

A similar approach was taken (in a case dealing with disclosure of interests under a company's articles) in *Neptune v Fitzgerald*,[100] where Lightman J said:

> The requirement is for a full and frank declaration by the director, not of 'an' interest, but of the precise nature of the interest he holds, and, when his claim to the validity of a contract or arrangement depends upon it, he must show that he has in letter and spirit complied with the section and any article to like effect (see Lord Cairns in *Liquidator of Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189 at 205).

This would imply that the directors may authorise the potential conflict that arises by virtue of a director owing duties to specified third parties, but there must be considerable doubt as to whether the board could validly pre-authorise the director to take personally any investment opportunity of which he becomes aware in the future.[101]

[99][2003] All ER (D) 465 (Jul) [65]. See also *Dunne v English* [1874] LR18 Eq524.
[100]*Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1995] 1 BCLC 352.
[101]See also A Keay, 'The Authorising of Directors' Conflicts of Interest: Getting A Balance?' (2012) 12(1) *Journal of Corporate Law Studies* 129, who says: 'Naturally, any authorisation by the directors must be on a properly informed basis' (134).

A somewhat similar situation was recently considered by the Court of Appeal in *Sharma v Sharma*,[102] another case dealing with shareholder consent, in which Jackson LJ confirmed that, in order for a beneficiary's consent to be effective, the fiduciary must have disclosed all material facts. In that case, it was held that the director had discharged that obligation by making it plain that she would acquire some dental practices in her own name, even though not all of the details of any such purchases been identified at that point. Jackson LJ therefore confirmed that there were limits to the duty of full disclosure, but that sufficiently specific information had to be provided to allow an informed decision.

It therefore seems likely that, if no particular opportunities are in contemplation at the time of authorisation of a general conflict, a further, specific authorisation would be needed to authorise a specific situation, so that the directors could take into account the new information that was now relevant to their decision. That might be commercially unacceptable for a director, who would surely be concerned that an opportunistic board might seek to take the (future, as yet unknown) opportunity for itself by refusing the specific authorisation that is subsequently sought.

Second, in authorising a conflict, the directors must take account of the fact that they themselves owe duties to the company—most notably, perhaps, the duty to act in the way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole[103] —and the disinterested directors might take the view that it is not for the benefit of the members as a whole to authorise a director to take a specific profitable opportunity that the company would itself like to take for personal benefit, or to pre-authorise opportunities more generally. They may, therefore, be reluctant to use this power to authorise these types of conflicts of interest.[104]

Third, authorisation by the directors would not be available where all directors face a similar conflict, or where there are not enough disinterested directors to constitute a quorum.[105] This may be the case in a private equity situation if the board is solely or mostly comprised of private equity appointees.[106]

[102][2013] EWCA Civ 1287.

[103]Companies Act 2006, s 172.

[104]The objections to a general directors' authorisation are most likely to be based on their own duties to the company. While it is clear that board actions that fetter future discretion are permitted (see *Fulham Football Club Ltd v Cabra Estates plc* [1992] BCC 863), the directors would need to be satisfied that a general waiver was in the best interests of the company, and without specific information, they would be well advised to consider very carefully whether that would be the case. See further PL Davies and S Worthington, *Gower & Davies:Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-169.

[105]s 175(6)(a) states that neither the conflicted director nor 'any other interested director' can be counted in the quorum.

[106]In such a case, it may be possible to arrange authorisation by the shareholders, but that might pose challenges of its own—see Section 2.2 below.

Fourth, even in cases where the directors would be willing to authorise a specific opportunity that a director puts to the board, this authorisation mechanism only works if the director is at liberty to make disclosure of the details of the opportunity to the rest of the board. That may not be possible if the opportunity came to the attention of the director while acting in a separate capacity, in which case she is likely to be subject to confidentiality restrictions on what can be disclosed to others.[107]

2. Authorisation by the shareholders

Section 180(4)(a) says that the general duties of directors (which would include the duty to avoid conflicts)[108] 'have effect, subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty'. This section therefore preserves the common law position that enables shareholders to pre-authorise an act or omission that would otherwise not be duty-compliant. This is true even though section 232(1) of the Act renders void any provision that 'purports to exempt a director … from any liability that would otherwise attach to him in connection with any … breach of duty'. Section 232(1) must be read subject to section 180(4)(a), so that common law pre-breach authorisations are an exception to the general prohibition on exemptions.

The problem with the approach taken by the Act is that the common law position on pre-breach authorisation is far from satisfactory.[109] In particular, it seems clear from the common law that not all breaches are capable of authorisation by the shareholders, unless perhaps approval is given unanimously,[110] and it is also unclear whether anyone could authorise a breach when the company is on the verge of insolvency (but before an insolvency office-holder has been appointed), even if it would be in the company's interests for such an approval to be given.[111]

[107]If, for example, a director acquired knowledge of the opportunity while acting as an employee or director of another company, it is likely that she would be under a common law, contractual and/or company law duty to keep it confidential and/or use that information for the benefit of that other company. See e.g. the standard form service agreement for an executive director, Encyclopaedia of Forms and Precedents (Lexis Nexis Butterworths) vol 14(1)(a), cl 14.

[108]See Companies Act 2006, s 170(1), which refers to the 'general duties' specified in Sections 171–77 of the Act.

[109]PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) ch 16.

[110]See e.g. *Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Others* [1986] Ch 246, where Slade LJ said: 'the clear general principle is that any act that falls within the corporate capacity of a company will bind it if it is done with the unanimous consents of all the shareholders or is subsequently ratified by such consents' (296).

[111]See the judgment of Street CJ in *Kinsela v Russell Kinsela Pty Ltd* (*in liq*) (1986) 4 NSWLR 722, 730, approved by Dillon LJ in *West Mercia Safetywear Ltd (in liq) v Dodd and another* [1988] BCLC 250, 252.

The general proposition (which applies to both authorisations and ratifications) is often stated to be that 'a majority of the shareholders may not by resolution expropriate to themselves company property, because the property of the company is something in which all the shareholders of the company have a (pro rata) interest'.[112] In *Cook v Deeks*[113] that rule was applied to contracts that the directors had diverted to themselves instead of entering into in the name of the company, and the court said that the shareholders should not be able to make a 'present to themselves'. And although in *Regal (Hastings) Ltd v Gulliver*[114] Lord Russell said that directors would not be liable to account for profits if their acquisition of shares had been approved 'by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting', commentators have pointed out that in *Regal*, the directors made no attempt to damage the company to the detriment of the minority and, indeed, acted in a way that they thought would benefit the company, or at least that was the assumption the court made.[115] Therefore the validity of any authorisation resolution might depend upon whether it was designed to deprive the company of a valuable business opportunity in favour of the majority shareholders, which, of course, it might well be, particularly in the case of a private equity-backed company.

But even if shareholders were able to authorise a specific opportunity, similar problems will arise as discussed above with regard to board approval. First, any authorisation that is given would need to be specific enough to cover the actual situation that arises.[116] This means that the efficacy of a general authority would be open to doubt.

Second, the precise circumstances of the conflict may be confidential and commercially sensitive, and the director may be under a duty not to disclose those circumstances to the company or its (unrelated) shareholders. In such a case, it may be impossible to formulate a sufficiently specific resolution to cover the conflict.

Finally, as with board approval, the NED is unlikely to be able to take the risk that the shareholders will decline to authorise any specific opportunity, with the result that she is unable to exploit the opportunity for herself or for another party to whom she may owe duties, and approval may not even be practical in the case of a listed company or one with many widely-dispersed shareholders. It therefore seems unlikely that shareholder approval will generally be a viable mechanism for approving corporate opportunity conflicts.

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[112]PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-196.
[113][1916] 1 AC 554, PC.
[114][1942] 1 All ER 378, 389.
[115]See e.g. D Kershaw, *Company Law in Context* (2nd edn, Oxford University Press 2012) 654.
[116]It seems that a general waiver of duty would fall foul of s 232(1) of the Act. Also see *Gwembe Valley Development Company Ltd and another v Koshy and others* [2003] EWCA Civ 1048; All ER (D) 465 (Jul).

3. Authorisation by the Articles

In Sections A and B, I have described the current state of the law on corporate opportunities, and argued that the 2006 Act narrowed the scope of the prohibition somewhat (at least in theory) by making it clear that the rule will not apply unless there is a conflict, effectively abolishing any separate no-profit rule whose application did not rely on there being a conflict. I have nevertheless suggested that the law on corporate opportunities does pose an ongoing problem for directors, especially part-time ones, and that the various common law and statutory authorisation mechanisms that exist will frequently not solve the problem. In light of this, the part-time NED might hope that the Articles of Association will come to her aid and, indeed, provisions that deal with conflicts of interest are, in fact, commonly included in a company's constitution. In the next section of this article I will examine how Articles of Association tackle this problem in practice.

Section C: what do Articles provide in practice?

In order to understand the ways in which listed UK companies legislate for corporate opportunities discovered by their non-executive directors, I have analysed the Articles of the 30 largest listed UK companies.[117] Not surprisingly, this analysis revealed many striking similarities between the Articles of the companies concerned, covering similar territory and in many cases adopting identical (or near-identical) wording.[118]

1. General provisions on conflicts of interest

All 30 of the companies whose Articles I analysed gave the board of directors a general power to authorise a director's conflict of interest, taking advantage of the provisions of section 175, which allow such an authorisation when, in the case of a public company, there is a specific enabling provision in the company's constitution. That is noteworthy it itself, given

[117]During August and September 2014, I analysed conflict of interest provisions in the following companies: Anglo American plc, AstraZeneca plc, Aviva plc, BAE Systems plc, Barclays plc, BG Group plc, BHP Billiton plc, BP plc, British American Tobacco plc, BT Group plc, Centrica plc, Compass Group plc, Diageo plc, GlaxoSmithKline plc, HSBC Holdings plc, Imperial Tobacco Group plc, Legal & General Group plc, Lloyds Banking Group plc, National Grid plc, Prudential plc, Reckitt Benckiser Group plc, Rio Tinto plc, Rolls-Royce Holdings plc, Royal Dutch Shell plc, SABMiller plc, Scottish and Southern Energy plc, Standard Chartered plc, Tesco plc, Unilever plc and Vodafone Group plc. These were selected because they were the largest 30 companies in the FTSE 100 by market capitalisation as at 19 August 2014, excluding the 3 that are not UK incorporated (Glencore plc, Shire plc and WPP plc).

[118]Some of the wording used is itself taken from the 2006 Act's Model Articles or the model Articles (Table A) established by previous Companies Acts, while much of it is taken from a publication entitled *GC100 Companies Act 2006—Directors' conflicts of interest* (8 January 2008), referred to at n 122 below. It also seems likely that companies using a common law firm as their corporate advisers will tend to show greater similarity in their Articles, but this hypothesis was not tested in my analysis.

that the DTI decided against including the power in the Model Articles for public companies on the basis that it would be appropriate for each public company to decide whether it wants to confer such a power on its directors.[119] It seems that the top 30 companies were unanimous in their decision.

There is considerable variety in the wording employed by the 30 companies, but all give the directors a wide-ranging power to the full extent permitted by the Act, and some track the wording of the Act quite precisely in doing so. So, for example, the Articles of Rio Tinto plc state that:

> For the purposes of Section 175 of the Companies Act 2006, the Directors shall have the power to authorise any matter which would or might otherwise constitute or give rise to a breach of the duty of a Director under that Section to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the Company.

Or, more simply, the Articles of GlaxoSmithKline plc say:

> The board may, subject to the quorum and voting requirements set out in this article, authorise any matter which would otherwise involve a director breaching his duty under the Companies Acts to avoid conflicts of interest.

In all cases, these general enabling provisions would appear to allow the board to authorise a director to take a specific corporate opportunity that arises. However, as discussed above, it seems likely that, as a matter of general corporate law, any relevant opportunity would have to be taken to the board and enough details given to the independent directors to enable them to make a decision as to whether to authorise the particular opportunity (and, in doing so, the independent directors would have to be cognisant of their own duties, in particular the duty to promote the success of the company). As argued above, corporate opportunities would require such authorisation if they were within the scope of the company's business (interpreted widely by the courts or perhaps even regarded as all-encompassing), and the company's capacity to take the opportunity is irrelevant (save, perhaps, in extreme cases such as where the director is also a shareholder with the right to veto the company taking the opportunity).

Although such a procedure may be workable in some situations, in the vast majority of cases this position seems untenable for the real world NED, for the reasons given above. Even if she were permitted to make full disclosure of an opportunity discovered while she was acting on behalf of someone else, she

[119]See *Implementation of Companies Act 2006: A Consultative Document*, para 3.76: http://webarchive.nationalarchives.gov.uk/20121029131934/, http://www.bis.gov.uk/files/file37974.pdf accessed 4 September 2015.

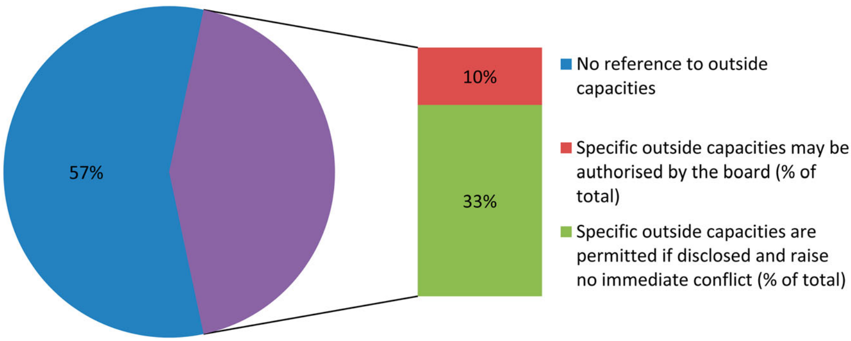

Figure 1. Capacity authorisation in listed company Articles.

would not be able to rely on the board being willing to authorise it in a specific case.

2. Outside directorships and other offices or employment

As discussed in Section A5 above, many NEDs will sit on the board of more than one company, and may need (or prefer to have) authorisation to do so by reason of section 175. It is, of course, possible for a company's Articles *specifically* to allow a director to take on outside directorships or other appointments, or to permit the board to authorise a director to take on outside appointments. Of the 30 sets of Articles I analysed, 13 (43%) made such an explicit provision and the remaining 17 (57%) were silent (see Figure 1). However, in all cases, the general ability to authorise conflicts of interest (or potential conflicts of interest) referred to above would in any event be wide enough to permit the board to authorise an outside appointment. As expected,[120] no company in my sample included an absolute prohibition on outside appointments.

Of the 13 instances where specific provision is made, only 3 (10% of the total) give the board an unconditional power to authorise outside appointments (as opposed to appointments with group companies), and these also give the board power to further specify how conflicts of interest arising out of such an appointment should be dealt with. The wording used in these 3 cases is similar, with a typical Article being that used by British American Tobacco:

> The directors may (subject to such terms and conditions, if any, as they may think fit to impose from time to time, and subject always to their right to vary or terminate such authorisation) authorise, to the fullest extent permitted by law … (b) a director to accept or continue in any office, employment or position

[120]See *supra* discussion at n 71.

> in addition to his office as a director of the Company and, without prejudice to the generality of paragraph (1)(a) of this article, may authorise the manner in which a conflict of interest arising out of such office, employment or position may be dealt with, either before or at the time that such a conflict of interest arises …

The 10 remaining companies that specifically contemplate outside appointments merely provide that the director is allowed to take them on, provided she has declared her interest and there is no *immediate* conflict. The relevant Article used by GlaxoSmithKline is typical and stipulates that:

> Provided he has declared his interest in accordance with paragraph (A), a director may: … be or become a director of any other company in which the company does not have an interest and which cannot reasonably be regarded as giving rise to a conflict of interest at the time of his appointment as a director of that other company.

The effect of such a provision would appear to be that a director does not need special permission to take on an outside appointment, even if that outside appointment may give rise to a *potential* conflict of interest in the future, provided that there is no actual conflict of interest at the time she takes it on and it is fully disclosed.[121] In contrast, it may be assumed that an outside appointment of a director of a company without such a provision would need approval if it can reasonably be regarded as likely that such an appointment might give rise to a conflict in the future, which is the position set out in section 175(4) of the Act, as discussed above.

Although these 13 companies contemplate outside appointments, none deals specifically with future corporate opportunities arising from that appointment. It may be that, in the case of those 3 that give the board power to specify how conflicts that arise out of an appointment should be dealt with, the board could stipulate that any corporate opportunities that arise to the director when acting in her outside capacity do not need to be offered to the company, but (as discussed above) the directors might find it hard to square such a blanket waiver of opportunities with their own duties, particularly without a more specific authority to do so from the shareholders.

[121]However, there may be some debate as to whether, if circumstances change and an actual conflict arises, a further and specific authorisation would be required. The question would arise as to the precise scope of the authorisation and, if it was too broad, whether it would be consistent with s 232. This question was discussed in the House of Lords Grand Committee debate on this section, and Lord Goldsmith argued that it may well be that authorisation given to one director to take a non-executive post in another company could be capable of covering any conflicting interest or duty that subsequently arose as a result of that other appointment (HL Deb, 9 February 2006, vol 678, col GC323). However, the government subsequently rejected an amendment tabled by the opposition that would have allowed a 'general' authorisation to be given on the basis that the board may not have enough information to make an 'informed' decision.

3. Confidentiality

As mentioned above, one problem for the NED who discovers a corporate opportunity while working on behalf of someone else (perhaps as an employee or director of another company) is that she may owe duties of confidentiality to that other person and may not be in a position to make full disclosure to the board. The NED might take comfort from the fact that all 30 companies whose Articles I analysed include a provision protecting a director from an obligation to disclose information to the company, or to use it for the company's benefit, in circumstances where they owe a duty of confidentiality to a third party.[122] However, in all cases, the provision is conditional. In 13 (43%) of the Articles surveyed, waiver of the requirement to disclose confidential information to the company only applies if, in the course of approving a conflict or a specific outside appointment, the board stipulates that such a waiver shall apply. The Articles of Royal Dutch Shell plc are typical of this type of provision:

> Where the board gives authority in relation to a Conflict or where any of the situations described in paragraph (F) applies in relation to a director … the board may also provide that where the relevant director obtains (otherwise than through his position as a director of the company) information that is confidential to a third party, the director will not be obliged to disclose that information to the company, or to use or apply the information in relation to the company's affairs, where to do so would amount to a breach of that confidence …

Therefore, assuming that a waiver is given to a director having a separate capacity that creates an actual or potential conflict, and that the board resolution takes advantage of this additional board power, the NED will be protected from a general duty to disclose the information to the company or to use it for the company's affairs.

In the remaining 17 (57%) of cases, the waiver of confidentiality does not itself require specific board approval but follows automatically once a matter or an outside appointment has been approved by the board. This is achieved in two slightly different ways. Four of the surveyed companies waive confidentiality only in relation to matters or appointments that have been approved; however, most of them (13 of the 17) give a general waiver where the director is under a duty of confidentiality to a third party but condition that waiver so that, where the duty arises from a conflict situation, the

[122]Shortly after the 2006 Act became law there was some debate about how to deal with the new provisions in Articles of Association and the Association of General Counsel and Company Secretaries of the FTSE 100 published a paper entitled *GC100 Companies Act 2006—Directors' Conflicts of Interest* (8 January 2008), cited in A Keay, *Directors' Duties* (2nd edn, Jordans 2014) 283, n 112. This paper has been used as the basis for the drafting of many of the Articles now found in the Articles of the companies considered in this Article, including those dealing with confidentiality, which seek to make use of s 180 (4)(b).

waiver will only apply if the conflict or potential conflict has itself been authorised. The British American Tobacco Articles are typical of the first type of provision:

> If a matter, or office, employment or position, has been authorised by the directors in accordance with this article then (subject to such terms and conditions, if any, as the directors may think fit to impose from time to time, and subject always to their right to vary or terminate such authorisation or the permissions set out below): … the director shall not be required to disclose to the Company, or use in performing his duties as a director of the Company, any confidential information relating to such matter, or such office, employment or position if to make such a disclosure or use would result in a breach of a duty or obligation of confidence owed by him in relation to or in connection with that matter, or that office, employment or position;

The HSBC Articles are typical of the second type of provision:

> 136.1 Subject to Article 136.2, a Director shall be under no duty to the Company with respect to any information which he obtains or has obtained otherwise than as a Director of the Company and in respect of which he has a duty of confidentiality to another person. In particular, the Director shall not be in breach of the general duties he owes to the Company under the Act because he fails to: (a) disclose any such information to the Board or to any Director or other officer or employee of the Company; and/or (b) use or apply any such information in performing his duties as a Director of the Company.
>
> 136.2 To the extent that the relationship between a Director and a person to whom he owes a duty of confidentiality gives rise to a conflict of interest or possible conflict of interest, Article 136.1 applies only if the existence of that relationship has been authorised by the Board pursuant to Article 134 or if Article 133 applies to the relationship.

However, in all 30 cases, the confidentiality waiver would not seem to extend to a permission to take advantage of a corporate opportunity without further authorisation and approval. They provide that there is no obligation to use the information for the company's benefit, but do not give express permission to use it for anyone else's. The lack of any such express waiver would be particularly troubling where the opportunity created a position of conflict, such as a case in which the company might want to take advantage of the opportunity itself if it were given the chance to do so.

Directors might also be troubled that the enforceability of even these more limited waivers of confidentiality may be open to some doubt. It seems clear from several cases dealing with both conflicts of interest and the duty to act in the best interests of the company (which is now the section 172 duty to promote success) that directors are under a positive duty to make disclosure of information that it would be in the interests of the company to know, and it does not appear to matter whether or not the relevant information was obtained in the course of acting as a director: in both *Bhullar*[123] and *IDC v Cooley*,[124] the director was under a duty to disclose information relating to a corporate opportunity and, in a slightly different context, a director has been held to be under an obligation to disclose his own misconduct. The latter finding was held by Arden LJ not to establish an independent duty to disclose, but to be an aspect of the fundamental duty of loyalty.[125] It therefore seems clear that a duty to disclose relevant information forms part of the panoply of directors' duties. That being so, a provision in a company's Articles that waives that duty must be tested against section 232(1) of the Companies Act, as it would seem that it 'purports to exempt a director of a company … from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty'.

There are two possible arguments in favour of enforceability of these provisions. First, section 232 goes on to provide[126] that provisions in a company's articles dealing with 'conflicts of interest' that were previously lawful can continue to be used, despite the wording of section 232(1). However, it is far from clear whether a complete exemption from confidentiality was 'previously lawful', and such a blanket exemption has never been included in the default Articles set out in previous Companies Acts.

The second, and superficially more attractive argument, is that section 180 (4)(b) specifically provides that the general duties are not infringed by 'anything done (or omitted) by the directors, or any of them' in accordance with 'provisions for dealing with conflicts of interest' in a company's Articles. This provision would seem to apply to waivers of disclosure of confidential information, which would give rise to a conflict. However, there is academic support for the view that section 180(4), like section 232(4), should also be bounded by what was previously lawful, given the apparent conflict with section 232, and the circumstances in which the section was introduced into the Companies Act.[127] There does not seem to be any clear authority for the proposition that a provision allowing a director to withhold confidential information that would be valuable to the company was lawful.

If that view is correct, then we would have to find an alternative reason to suppose that directors are entitled to maintain the confidentiality of information that they receive in a separate capacity. It would not be commercially

[123][2003] EWCA Civ 424. See also D Prentice and J Payne, 'The Corporate Opportunity Doctrine' (2004) 120 *Law Quarterly Review* 198.

[124][1972] 2 All ER 162.

[125]See *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244. This decision is applied by Newey J in *GHLM Trading Ltd v Maroo and others* [2012] EWHC 61 (Ch) 192–95, who says that a director's duty of loyalty requires him to disclose information if he subjectively concludes that to do so would be in the best interests of the company.

[126]s 232(4).

[127]PL Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16-201ff.

viable to have part-time directors on boards with any outside interests at all unless some basis could be found to allow them to respect the confidentiality of information obtained in a separate capacity. I shall argue in Section D of this article that such a basis does exist.

4. Duty to account for benefits

Another provision included in 28 of the 30 sets of Articles of the companies surveyed (the exceptions being HSBC and BHP Billiton)[128] expressly permits a director to keep 'benefits' arising from authorised conflicts or outside appointments. In each case, the source of the benefit or the relationship giving rise to it must itself have been disclosed or authorised (as appropriate). The Articles deal with this situation in a variety of ways, but the provision in the Vodafone Articles is a typical example:

> Subject to any conditions or limitations imposed under Article 100.4, a director shall not, save as otherwise agreed by him, be accountable to the Company for any benefit which he (or a person connected with him) derives from any matter authorised by the directors under Article 100.1 and any contract, transaction, arrangement or proposal relating thereto shall not be liable to be avoided on the grounds of any such benefit.[129]

The wording used in these Articles is similar to the wording of section 176 of the 2006 Act, which says that a director 'must not accept a benefit from a third party conferred by reason of (a) his being a director or (b) his doing (or not doing) anything as a director'. Although it has been suggested that this is a codification of the 'no-profit rule', as discussed above,[130] the prevailing consensus is that section 176 is in fact a re-statement of the common law prohibition on 'bribes'. In any event, section 176 is only dealing with benefits derived from (or in some way arising out of) the directorship, while this Article is clearly aimed at benefits that are unrelated to the director's position as a director, but that are related to an outside appointment or conflict situation, which has itself been authorised. In eleven of these 28 sets of Articles, the permission is in fact specifically extended to cover 'profits' as well as 'benefits'.

It is possible that this Article is intended by the companies concerned to deal with the situation where a corporate opportunity arises, and that opportunity places the director in a position of conflict because the opportunity is one that the company might be interested in pursuing. However, in that case, it seems likely that it is only designed to cover benefits or profits that arise directly and foreseeably from the situation or appointment authorised. So,

[128]These companies do provide that there is no duty to account for certain types of interest, but not for benefits received from authorised conflict situations.
[129]The wording of these Articles follows closely the wording of Reg 85(c) of the Companies Regulations (Tables A-F) Regulations 1985, on which it is clearly based.
[130]See *supra* discussion at n 36.

for example, if a specific corporate opportunity were authorised by the directors, any profit arising from it could be kept by the director, or if an outside directorship were approved, any directors' fees or other remuneration would be covered. It seems unlikely that these Articles would be construed to allow a director to exploit and keep the profits from any profitable corporate opportunity within the scope of the company's business that she discovers while operating in an (authorised) separate capacity. In any event, it is doubtful whether any such broad exemption would be valid, given the restriction on exemptions from liability in section 232.

In summary, all 30 sets of Articles permit boards to authorise actual or potential conflicts of interest and, although only a minority specifically contemplate outside directorships or employment, the scope of the board's authority is broad enough to allow such appointments to be authorised. For authorised conflict situations, there are also waivers (in some cases automatic and in others at the option of the board) of confidentiality, and in most cases the directors can be allowed to retain 'benefits'. However, none of these Articles explicitly deals separately with corporate opportunities, and none gives a clear and unconditional waiver of opportunities that arise to a director while she is acting in a capacity other than as a director of the company concerned.

Does this mean that a non-executive director of one of these companies, who has been granted permission by the board to also act on behalf of a third party, would have to offer an attractive investment opportunity discovered while acting in that separate capacity to the company, assuming that the company might have an interest in it? In the absence of a specific board approval of the conflict arising out of the opportunity, would the director face sanctions for breach of section 175 (or indeed other duties, such as the duty of loyalty)? If so, it would increase the risks for NEDs, and could put a director in a very difficult situation.

I will argue in the next section of this article that, despite the absence of specific provisions in the Articles, the law is not—or at least does not need to be held by the courts to be—so draconian.

Section D: the boundaries of fiduciary duties

As we have seen, in practice Articles of Association do not generally try to explicitly exempt directors from the obligation to seek specific approval for corporate opportunities that they discover and wish to take personally or in another capacity, and indeed I have argued that it is likely that blanket exemptions of that nature in the Articles are likely to be ineffective: section 232's prohibition of exemptions from liability for breaches of duty (a provision that was previously found in section 310 of the Companies Act 1985) limits the generally contractarian approach of company law in this respect.

Articles do, however, often acknowledge that directors may have other directorships and roles, especially non-executive directors, and sometimes these are contemplated and permitted by the Articles themselves, while in other cases a separate directors' approval is required for the potential conflict that may ensue. Articles also typically say that the manner of resolution of any actual conflict that arises from any other position may be determined by the directors either at the time it arises or before it arises. They also purport to exempt the director from the requirement to make disclosure of any confidential information relating to any approved position (or 'capacity') if to do so would be a breach of an obligation to maintain confidentiality, although (as discussed above) the enforceability of such a provision may be open to doubt. They often also exempt directors from an obligation to account for 'benefits' received from an authorised position.

It is submitted that explicit disclosure and, in appropriate cases, authorisation of potential conflicts arising from other capacities (or outside appointments and duties) has wider consequences: it is part of the factual matrix that helps to define the scope of a director's fiduciary duty to her company. There is no need for a contractual exemption from a duty, which could be called into question by section 232(1), if no duty exists in the first place; and the courts have always asserted that the existence and scope of a duty depends on the specific circumstances.

1. When is a director not a fiduciary?

The starting point for an analysis of the bounded nature of fiduciary duties owed by a director is the uncontroversial assertion that a company director, whether full or part time, is not *always* in a fiduciary relationship with her company, even when the Articles are silent on the question. Indeed, the basic position in an owner-managed company is that the directors will not be required to exercise their votes as shareholder in a way that is consistent with their fiduciary duties as directors; they have separate 'capacities' and are permitted to take their director's hat off when sitting in the general meeting. That position was re-stated by Warren J in *Wilkinson v West Coast Capital*[131] and is clearly correct. It is also plain that directors may act in a private capacity in managing their personal financial affairs; for example, when making personal pension arrangements, a company director has no duty to offer any investment opportunity put to her by her pension adviser to the company before she can invest personally.

The cases have also recognised other specific situations in which directors do not owe duties to their company, or when those duties are curtailed in

[131] [2005] EWHC 3009 (Ch) esp [299].

some way. For example, in *CMS Dolphin Ltd v Simonet*,[132] Lawrence Collins J held that a director's power to resign was not a fiduciary power, and he was entitled to resign 'however damaging it may be to the interests of the company'. In *In Plus Group Limited* v *Pyke*[133] the Court of Appeal held that a director who had been excluded from the company of which he was a director did not commit a breach of fiduciary duty by competing with it. In each of these cases, the court is not seeking to argue that there would have been no breach of duty had a duty been owed—on the contrary, it is clear that there would have been—but that the scope of the duty owed was narrowed or eliminated by the circumstances. In *In Plus Group*, Sedley LJ said:

> Quite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts (explicable and even justifiable though they may have been) of his sole fellow director and fellow shareholder … [134]

The question is not, therefore, whether directors are always bound by all of their fiduciary duties all of the time—it is clear that they are not—but whether, in the particular circumstances that arise, they are bound by any particular fiduciary duty and, if so, which one(s). No doubt, when sitting around the boardroom table, they are bound by all duties, and indeed that is the default position. However, there are circumstances when that is not the case.

This proposition, that the scope of a duty differs according to the circumstances, finds widespread support in judicial summaries of the relevant principles in the cases; indeed, it is hard to find corporate opportunity cases in which this point is not made. In *Boardman v Phipps*, Lord Upjohn made it clear that rules of equity have to be applied 'with particular attention to the exact circumstances of each case',[135] a view echoed more recently in *In Plus Group Limited* v *Pyke*,[136] in which Brooke LJ (with whom Jonathan Parker LJ agreed) said, 'the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made'.

It is therefore necessary to examine more closely when the duty to avoid conflicts arises, and the types of circumstances in which it can safely be assumed not to apply.[137]

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[132] [2001] 2 BCLC 704 [87].
[133] [2002] EWCA Civ 370. See in particular [89].
[134] [2002] EWCA Civ 370 [90].
[135] [1967] 2 AC 46, 123.
[136] [2002] EWCA Civ 370 [75].
[137] See also D Gibbs, 'The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: The Director's Perspective' (2015) 36 *The Company Lawyer* 231, who argues that, in determining the scope of directors' duties, the courts should have regard to what the director has taken responsibility for. However, this is only one of the relevant factors, because it is clear that a director cannot unilaterally define the scope of her duty.

2. Opportunities discovered by executive directors in their 'spare time'

It is well established that it is not necessarily an answer to a claim for breach of the duty to avoid conflicts that the opportunity was discovered during a director's 'spare time'. *Bhullar v Bhullar*[138] is clear authority for the proposition that a director who discovers an opportunity while not wearing her director's hat will nevertheless be in breach of duty if she does not take that opportunity to the company, and there is a conflict in pursuing it. However, it is significant that, in *Bhullar*, the directors had no other disclosed business interests, and according to the judge 'had, at the material time, one capacity and one capacity only'.[139] One of the key cases relied on by Jonathan Parker LJ in reaching his conclusion was the decision of Roskill J in *Industrial Development Consultants Ltd v Cooley*,[140] and in that case the director concerned was the managing director—a fact that is stressed in the case itself and in the extracts Jonathan Parker LJ cites. Indeed, the phraseology used by Jonathan Parker LJ is borrowed from Roskill J, who says of the defendant in *IDC v Cooley*:

> [He] 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.[141]

So, although in both *Bhullar* and *IDC v Cooley* the relevant opportunities were discovered by directors in their 'spare time',[142] it was clearly important that they only had one 'capacity' (so far as the company was concerned), and that the scope of the directors' fiduciary duties had not been clearly delineated by the company (either expressly or by necessary implication). These cases do not establish that directors can only ever have one capacity, but rather that these particular directors, on the facts before the court, only had one capacity. The cases are not, therefore, determinative of a situation in which a director does have more than one capacity that is known to the company at the relevant time.

It is also clear from *Bhullar* that, although the no-conflict rule itself is said to be an 'inflexible' one, its application is very fact-specific. Adopting the approach of Lord Upjohn in *Boardman v Phipps* referred to above,[143] Jonathan Parker LJ says that 'flexibility of application is of the essence of the rule', and the question is whether the 'fiduciary's exploitation of the opportunity is such

[138] [2003] EWCA Civ 424.

[139] It is also clear from the judgment of John Behrens QC in the High Court that the relevant directors were employed to work for the business and were closely involved in the day-to-day running of the business. See *Bhullar v Bhullar* (unreported) 2002 WL 1654842, 10 May 2002 esp [42]–[51].

[140] [1972] 2 All ER 162.

[141] [1972] 2 All ER 162 at 173.

[142] In *IDC v Cooley* the opportunity was not so much discovered in the director's 'spare time', but rather it was accepted in the case that the approach was made to him 'in a personal capacity' (in the sense that the person making the approach did not intend that the company should take the opportunity).

[143] See *supra* n 135.

as to attract the application of the rule'.[144] In *Bhullar* the circumstances in which the opportunity arose and the role that the director had with the company dictated that the scope of the fiduciary duty was wide enough to cover it; in other cases, the scope of the duty will be narrower.[145]

It is true that Lady Justice Arden in *Item Software (UK) Ltd v Fassihi and others*,[146] having cited *Bhullar* and *IDC v Cooley*, said: 'These authorities go to show that the fact that a director was acting otherwise than as a director in making a secret profit is no answer to a claim by the company to recover the profits. ' However, as noted above, the cited authorities for that proposition are both cases where there had not been any clear acknowledgement by the company (indeed, there had been no acknowledgement at all) that the director was able to act otherwise than as a director at any time. In other words, his duties were all-encompassing because no limits had been set by the company. No other 'capacity' had been disclosed and agreed to by the board or by the shareholders, and holding that the scope of the no-conflict rule extends to opportunities discovered in their 'spare' time for full-time directors does not imply that the scope of the duty to avoid conflicts automatically applies to part-time directors when they are acting in another capacity. It is that scenario that I will now consider.

3. Opportunities discovered while acting in another 'capacity'

As discussed in the second section of this article, part-time (or non-executive) directors will often have other commercial interests, often including (but by no means limited to) directorships of other companies. While these commercial interests may not directly compete with those of the company, there will often be a realistic chance that they will discover attractive business opportunities in these other 'capacities' which, for the reasons explained above, they may not be in a position to disclose to the company or to seek specific authority for personal exploitation.

This situation was considered in the Scottish case of *Commonwealth Oil and Gas Company Limited v Baxter and Eurasia Energy*.[147] In that case, it was accepted that the director concerned was a director mainly for tax reasons, and had no executive functions nor received any remuneration from the company. It was also known to the company that he was pursuing investment opportunities in a personal capacity in a related or identical business

[144][2003] EVCA Civ 424 [28].

[145]It is submitted that the outcome would have been different in *Bhullar* if the company's Articles had said that the defendants were allowed to act in a separate capacity outside of office hours, and that opportunities discovered outside of office hours did not need to be disclosed to the company, because the circumstances, and therefore the scope of the duty, would have been different—see the discussion at Section D3 below.

[146][2004] EWCA Civ 1244 [38].

[147][2009] CSIH 75.

area.[148] Nevertheless, the court held that the director had fiduciary duties and that, in the circumstances of the case, he was in breach of those duties in exploiting an opportunity for his personal benefit rather than taking it to the company. Both the Lord President and Lord Nimmo Smith refused to accept the general proposition, advanced by counsel, that the duty to avoid conflicts only arises when a director is acting in his capacity as a director.[149]

However, the reasoning in the case is instructive, and supports the view that the scope of the duty to avoid conflicts will be determined by the circumstances in which the director finds herself. Having referred to comments made by Rix LJ in *Foster Bryant Surveying Limited* v *Bryant*,[150] who said that the extent of a director's duty 'may depend on the circumstances', the Lord President went on to assert as follows:

> In the same way, if a director were to draw to the attention of his company a particular commercial opportunity, whether in an embryonic or developed state, and to obtain the company's consent to pursue that opportunity on his own personal behalf, his duty to avoid a possible conflict of interest would not extend to that opportunity. Similarly, it seems to me that if, without the identification of any particular opportunity, the company, expressly or implicitly, were to give its prior consent to a director pursuing possibly competing interests, his duty would not extend to avoiding such conflicts. If, for example, in the present case agreement had been reached between Mr Baxter and COGCL that some opportunities (say, any onshore) would be brought to COGCL but that others (say, offshore) could be exploited by Mr Baxter for his own interest and benefit, the scope of Mr Baxter's duties would have been modified by that arrangement. Even without express agreement, the actings of parties could in some circumstances have given rise to a modification of Mr Baxter's duties.

Lord Nimmo Smith makes similar comments, and refers to the duty to avoid conflicts being avoidable with 'informed consent'. He seems to agree with the Lord President that it would be possible to vary the scope of the duty owed by the director in a general way, rather than requiring a specific corporate opportunity to be put to the board. This would not mean that there would be no conflict in relation to a particular opportunity, but that the duty to avoid conflicts would not apply to it.[151]

Lord Browne-Wilkinson emphasises these points in *Henderson v Merrett Syndicates*:[152]

> The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That

[148]See The Opinion of the Lord Ordinary, Lord Reed, at first instance, whose extensive description of the factual background was approved on appeal: [2007] CSOH 198, in particular at [59].
[149][2009] CSIH 75 at [11] and [79].
[150][2007] 2 BCLC 239.
[151][2009] CSIH 75 [80].
[152][1995] 2 AC 145, 206.

> is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties.

While section 232(1) of the 2006 Act[153] makes it plain that a contractual provision (including one appearing in the Articles) purporting to exempt a director (to any extent) from liability for breach of duty would be void, that provision does not seek to prevent the company from defining the scope of the duty itself, as successive cases have made clear.[154] Provisions in the Articles, and the other surrounding factual circumstances, will be crucial in determining that scope, and it is submitted—in line with the principles and authorities referred to above—that a provision which allows directors to take on other (potentially competing) engagements, and to work for other commercial organisations in circumstances that might lead to conflict, will enable the courts to define the scope of the duty in a way that makes commercial sense for both the director and the company. In other words, the types of conflict that a director has a duty to avoid are determined by the surrounding circumstances, including the terms of the Articles, just as the duty to act in the corporate interests can be more or less demanding depending on the role the director has undertaken and the capacity in which she is acting at the relevant time.

4. Application of the test in practice

If the fact of having a separate capacity creates the possibility of a conflict, then (as discussed above)[155] section 175 requires that the separate capacity should be disclosed and authorised. Once that has happened, it will be an important part of the factual matrix that the court will examine to determine the scope of the duties owed and, therefore, whether exploitation of a particular opportunity—or the withholding of information in relation to which the director owes a duty of confidence to a third party—amounts to a breach of duty.

In most cases, the court is likely to find that there is no duty to avoid conflicts of interest (or indeed any other duty—including, importantly, the duty to promote the success of the company) while a director is very clearly acting in that other (fully disclosed and accepted) capacity. Just as it is clear that there is

[153]In this respect, it has the same effect as its predecessor, s 310 of the Companies Act 1985.

[154]This is also consistent with the principle applicable to fiduciaries more broadly that the terms of the contract which establishes the relationship are relevant in determining the scope of the fiduciary's duty; see e.g. *Northampton Regional Livestock Centre Company Ltd v Cowling and another* [2014] EWHC 30 [180].

[155]See *supra* discussion at n 91 and related text.

no duty upon a director to vote any shares that she holds in the company in accordance with her fiduciary duties as a director, because she is acting qua shareholder, so a director who has an acknowledged separate capacity outside the company is likely to have no duty to the company, or very limited duties, when acting in that capacity. No exemption has been given by the company from the duty; it is simply that the law will not impose a duty in those circumstances.

It may be, of course, that a director has a number of different 'capacities' with several different companies, such as a business angel investor who sits on the board of a number of portfolio companies. In each case, it will be necessary to analyse the extent to which the director owes a duty to each company in relation to opportunities discovered by her. Such an analysis might lead to the conclusion that the opportunity should be offered to one of the companies, if (for example) it arises out of the business angel acting in her capacity as a director of that company. It is possible that it might give rise to a conflict between two or more of the companies, particularly if the separate capacities have not been well defined and fully agreed to by the companies concerned. But if the separate capacities have been properly delineated, the business angel may not owe a duty to avoid conflicts to any of the companies in the circumstances in which the opportunity arises, and she will be free to exploit it personally (or to take it to any one of the companies if she so chooses).

For the well advised NED, therefore, it will be vital to make full disclosure of, and to get informed consent for any outside capacities that she wishes to maintain during the continuance of her directorship. Ideally, the Articles should specifically acknowledge that such outside capacities are permitted, subject to disclosure and approval, but the empirical examination discussed in Section C above reveals that only a minority of Articles do so. However, given that the question is not whether breaches of duty are permitted but whether the scope of a duty extends to the situation at hand, and since that is a matter to which all surrounding circumstances are relevant, informed consent of the board in a way permitted by the Articles to that outside capacity should lead the courts to define the scope of the duty narrowly enough to allow directors to take opportunities that accrue to them in that separate capacity for their own benefit (or the benefit of some other company or business to whom they owe duties).

Conclusion

In Section A of this article, I examined the existing state of corporate opportunities law, in light of the twin tracks adopted by the common law and the choice made by the 2006 Act to endorse the no-conflicts approach and reject the no-profits doctrine in its pure form. In Section B, I identified the residual problem for the modern NED, which would arise from a very broad view of the law, coupled with the limitations imposed by section 232 on the ability of a company to contract out of certain fiduciary duties. In Section C, I analysed the provisions seen in the Articles of large listed companies since the new rules on conflicts became effective, to identify the ways in which companies seek to deal with this residual problem. I argued that some of these provisions would not help a director who is faced with a potential breach of duty and some may even be invalidated by section 232. However, in Section D of this article I argued that all is not lost: an NED on the board of UK company might expect the courts to continue their ‘flexible’ approach to defining the extent of a director’s duty to her company, and to examine all the surrounding circumstances (including the Articles and the knowledge and approval of the board) in doing so. In summary, the court must ask two questions: (i) given all the circumstances, including the company’s constitution, the role of the director in the company, and the knowledge and consent of the company to her outside interests and activities, what is the scope of the duties owed by this director to this company? And (ii) on the facts before the court, was there a breach of that duty?

Such an approach is likely to mean that where an opportunity arises, or information is received ‘by reason’ of the director’s directorship (for example, in the clearest case, when she receives it in a letter addressed her as: ‘Ms X, Director of ABC Ltd’), personal exploitation of it would have to be authorised by the company (either by the disinterested directors or by the shareholders), because in most conceivable cases, the scope of the duty to avoid conflicts would cover such a situation (assuming that it also gives rise to a conflict, as defined by the law). Any such authorisation (whether by directors or shareholders) would require specific information to be provided about the opportunity and, in order for the director to be able to make alternative use of the opportunity, that would also need to be specifically approved.

However, if the opportunity or information arises when the director is acting in a separate capacity, provisions in the Articles that acknowledge that a director is permitted to have separate capacities and authorisation of that capacity by the board, will be helpful in making out a case that no duty to avoid conflicts (or duty to promote success, or disclose relevant information) applies. The question for the courts is not whether the Articles permit a director to retain opportunities or withhold information (which may be too general an exemption to be enforceable), but rather whether they contribute to the factual matrix that enables them to conclude that no relevant duty arises in the first place.

It is perhaps unfortunate that Parliament did not take the opportunity provided by the 2006 Act to clarify the law in this area, and to make it clear that it is open to a company to restrict the scope of a director’s duties to a company, at least in the important area of corporate opportunities law. It is to be hoped that the courts will develop the new law in a way that ameliorates, rather than exacerbates, the residual problem that the Act has perpetuated for the modern NED.

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