Similarly, an agreement made between all of the shareholders and the company itself and which is stated to take precedence over the Articles of Association is capable, I consider, of displacing the duties which would otherwise rest on a director. I say 'those duties, or at least many of them' because there may be certain core duties which cannot be modified, just as there are certain core duties of a trustee (*eg* of a commercial trust such as a pension scheme or a family settlement) which cannot be abrogated or qualified. I do not think I am concerned in the present case with that point since it seems clear to me that the Articles could have validly provided expressly that Mr Gorman and Mr McMahon could purchase for themselves in a case where the relevant 65% majority of votes could not be obtained …

272 Mr McCaughran [counsel for the defendants] identifies Mr Wilkinson's main complaint this way: The directors of NGS obtained information about Birthdays, and the opportunity to acquire Birthdays, in the course of carrying out their role as directors of NGS; that because of this, the directors were not free to take up the opportunity to acquire Birthdays themselves; and that they were in breach of duty in doing so. However, I think that the complaint goes wider than that: even if the directors learnt of the opportunity, and of the relevant information to permit them to formulate their offer, quite independently of their capacity as directors of NGS, nonetheless they were in a position of conflict in relation to the acquisition of Birthdays and should not have acquired it for themselves.

273 In considering that complaint, Mr McCaughran says, correctly I think, that one must have regard not only to the scope of the directors' duties, but also to the related question of the scope of NGS's business. In that context, he relies on the decision of the Court of Appeal in *Aas v Benham* **[7.26]**, the decision of the Privy Council in *Trimble v Goldberg* [1906] AC 493 and on certain passages of the judgments in *Boardman v Phipps*.

274 *Aas v Benham* was a partnership case [citing the extract at **[7.26]**] … Mr McCaughran submits that exactly the same approach should be applied in the case of a company and the duties owed to it by a director …

281 So *Aas v Benham* is an illustration of the importance of defining the scope of the duty before being able to decide whether a person is in breach of it and in particular whether the 'no conflict' rule or the 'no profit' rule applies …

284 [Mr McCaughran] also says that there is nothing in the company law authorities 'which in any way detracts from the principle in *Aas v Benham*'. I am not sure that there is anything which warrants the epithet 'principle' which can be derived from *Aas v Benham* … The case possibly establishes, or re-affirms, a negative proposition *viz* that there is no principle which entitles a firm to benefits derived from the use of information for purposes which are wholly outside the scope of the firm's activities.

285 In applying that negative principle, one must act with care because the firm's activities may not be limited by the formal partnership agreement …

295 Mr McCaughran submits that what these cases [all the usual orthodox authorities] show is only that, *once a conflict has been established*, a director who makes a profit, is accountable for the profit. They do not establish accountability where no conflict is established. Of course, a fiduciary can only be made to account for a profit if he has made a profit. That goes to remedy. At this stage, however, I am more concerned with whether there has been any breach of duty—at a time when it cannot be known whether a profit will in fact be made. Mr McCaughran accepts that, once a conflict has arisen and a profit has been made, it is no defence for the director to allege that the company could not *as a matter of fact* have acquired the opportunity itself, for example because the company could not afford to pursue the opportunity (as in *Regal (Hastings) Ltd v Gulliver*) or because the third party would not have wanted to deal with the company (as in *Industrial Development Consultants Ltd v Cooley*). But he submits that none of the cases is concerned with the situation where, as in *Aas v Benham* there was a legal impediment to the company taking up the opportunity; he says that, where there is a legal impediment of this sort, there is no relevant conflict of interest. On the facts in the present case there was, he submits, a legal impediment to the acquisition of Birthdays by NGS and therefore no relevant conflict of interest in the acquisition by WCC and Mr Gorman …

(p. 385) 297 However, what I think is important in the present case is not so much the effect of a legal impediment on the duty of directors generally; but rather the impact of the director himself being able, in a non-fiduciary capacity, to prevent the company of which he is a director from obtaining the benefit of the opportunity. I doubt very much that a legal impediment requiring shareholder consent to certain matters impacts to any great extent on the duties of a director who is not a shareholder. It does not follow from the fact that a particular acquisition requires shareholder consent that a director is freed from any duty which would otherwise arise to bring an opportunity of acquisition to the attention of the board and the shareholders. In contrast, the ability of a shareholder, who also happens to be a director, to block certain action on the part of the company may be of great importance in the context of his duties to account under the 'no conflict' and 'no profit' rules.

298 Let me take an example. Consider a company (call it X) carrying on a particular business. Suppose X has three equal shareholders A, B and C, each of whom is a director; and suppose that it has one additional, non-shareholder, director D. Suppose that the Memorandum and Articles of Association restrict X's business to its current business but so that activities can be diversified (either directly or through a corporate acquisition) with the consent of 66% of the shareholders.

299 Suppose, then, that an opportunity to acquire a company (call it Y) whose business is outside the scope of X's existing business becomes generally known. There would be nothing, I think, to prevent A and B acquiring Y for themselves even if the board of X considered that it would be a good thing for X to acquire Y. In these circumstances, there is of course a conflict between the personal interests of A and B on the one hand and their duties, as directors, to X on the other hand. But it is not a conflict to which the 'no conflicts' rule has any application because A and B are entitled, as shareholders, to block the acquisition by X. There is, I consider, no duty on them to use their votes as shareholders to approve the acquisition (and this is so, in my judgment, even though it may be in the interests of X to make it and even though they are directors). There is no risk (such as that which caused concern in *Keech v Sandford*) which needs to be guarded against and no occasion for the intervention of equity. There is no question of the application of the 'no profits' rule either since the opportunity is, in the example, generally known.

300 The position would be the same, I consider, if the opportunity had come to the attention of A and B other than in their capacities as directors. It would be open, I think, for them to keep that opportunity for themselves. At most, detecting a possible advantage to X in acquiring Y, it may be their duty, acting in the interests of X, to bring the opportunity to the attention of the board. But having done that, they could not be compelled to agree to the actual acquisition by X of Y. Being able, acting perfectly properly, to block such an acquisition, there is, as before, no relevant conflict of interest; and, in this case, there would clearly be no use of a corporate opportunity were A and B to acquire Y for themselves. I ignore the possibility of intervention by a court [of] equity if Y would be in competition with X. But that is not the present case, where the businesses of TGS and Birthdays were so different to make it unrealistic to think that they were competitors.

301 Now suppose that the opportunity has, instead, come to the notice of X and its board in circumstances where that opportunity is clearly that of X exclusively (*eg*because the owner of Y approaches D in his capacity as a director with an offer to sell to X). The board and the shareholders decide that it might be in the interests of X to effect the acquisition of Y because its business, whilst outside the scope of its own business, presents synergies with that business. Actual acquisition of Y will require the consent of A, B and C once the merits of the acquisition have been investigated. Suppose that the vendor of Y provides confidential information to the board to enable X to make an offer. At this stage, there is a 'maturing business opportunity' which belongs to X and if D were to attempt to divert it, both the 'no conflict' rule and the 'no profit' rule would apply if he in fact acquired the target business/company and made a profit. It would not be open to D to claim, as against X or A, B and C, that the scope of X's business, and therefore his duty, was restricted by the scope of X's current business and that he could therefore obtain Y for himself. Nor would he escape the rules if X were unable to make the acquisition because it could not raise the finance: the case would fall squarely within the principles established in *Regal (Hastings) Ltd v Gulliver*.

(p. 386) 302 Next suppose that the board, having looked carefully at the potential acquisition, decides, for commercial reasons, not to proceed. It is a very difficult question whether this would take D out of either or both the ‘no conflict’ and ‘no profit’ rules. *Aas v Benham* certainly does not provide an answer. That D can do so with the informed consent of the company in general meeting is clear; that he cannot do so without it is not clear.

303 Whatever the position of D, however, the position of any two of the other shareholders, say A and B, acting together may be different. As before, where the opportunity is generally known, there is, I consider, no duty on them to use their votes as shareholders to approve the acquisition; they remain able to block it. Further, for the reasons already given in the example where the opportunity is generally known, I do not consider that there is any scope for the application of the ‘no conflicts’ rule. The question then is whether there is any scope of the application of the ‘no profits’ rule when the opportunity is confidential to X. Can A and B, who are both directors and shareholders and who, together as shareholders, can block the acquisition be permitted to take advantage of the opportunity themselves? That is not an easy question to answer; and I prefer to leave it unanswered since, as will be seen, I do not consider that, on the facts, it arises in that stark form.

304 Applying these principles to the present case, there has, in my judgment, been no breach by Mr Gorman or Mr McMahon (or indeed by Sir Tom even if he is a *de facto* director) of the ‘no conflicts’ rule. On my findings of fact, there was no agreement that NGS should acquire Birthdays so that they were, as shareholders, able to block the acquisition. There is no question, on my findings, of the board being able to proceed with the acquisition in the face of the provisions of the Shareholders Agreement to which NGS itself was a party. In any event, Mr Gorman and Mr McMahon could not be criticised if, acting as board members, they had voted against NGS acquiring Birthdays in order to respect the provisions of [the] Shareholders Agreement which, as between 100% of the shareholders and NGS itself, were stated to take precedence over the unamended Articles. There is no ‘omission’ for the purposes of section 459 in the board failing to acquire Birthdays for NGS.

305 There is more difficulty with the ‘no profit’ rule. It is, of course, the position that the confidentiality agreement was given by Mr Gorman on behalf of TGS (so that, strictly speaking, the information provided by Birthdays in reliance on that confidentiality agreement was provided to TGS rather than NGS but no point has been taken about that). Moreover, a considerable amount of work in the evaluation of the Birthdays business was carried out by NGS personnel in NGS time and, initially at least, at NGS expense. In these circumstances, WCC and Mr Gorman were able to make the successful bid only by use of the information provided to TGS and work done by NGS personnel.

306 However, this is not a case where the original opportunity came to NGS. The possibility of acquiring Birthdays did not come to the notice of Mr Gorman because he was a director of NGS/TGS or because of the trial sales of TGS products in Birthdays’ shops. It came to his notice because he knew Mr Boland and spoke to him about the opportunity. Nor did the possibility of the acquisition come to the notice of Mr McMahon because he was a director of NGS/TGS or to Sir Tom because of his connection with NGS/TGS. They learned of the possibility through a combination of their network of information in the business world and Mr Gorman. Perhaps it would not have been an opportunity which would have interested them if they had not been connected with NGS; and it was clearly an opportunity which they thought could have been of value to NGS, otherwise they would not have been considering an acquisition through NGS. But that does not alter the fact that they did not become aware of the opportunity as directors (or in Sir Tom’s case as a *de facto* director if he is one). …

310 That, however, is not an answer to the question whether the ‘no profit’ rule applies: see the passage from the speech of Lord Russell in *Boardman v Phipps*quoted by Lewison J in paragraph 1321 of *Ultraframe* …

312 Had a profit been made out of Birthdays, this would be a real issue: were NGS bringing an action to make Mr Gorman—and possibly Mr McMahon (and even Sir Tom if he was a *de facto* director)—account for the profit made, then there are powerful arguments that he (or they) should do so. However, the fact is that Birthdays was sold at a loss and there is no profit to account for. **(p. 387)** Further, NGS has suffered no detriment as a result of the acquisition by New Gifts: NGS was unable to acquire Birthdays itself and, as I have already found, it would not have acquired Birthdays even if WCC and Mr Gorman had been advised

that they could not themselves acquire it …

316 It might have been argued, had Birthdays been sold at a profit, that the directors were in breach of their duties in not suing New Gifts for an account of such profit; and that such a breach would have been unfairly prejudicial conduct. But that argument does not begin to get off the ground on the facts …

➢ Questions

1. Does this judgment adopt the 'scope of business' test (from *Aas v Benham* **[7.26]**) or some other test of 'corporate opportunity'?

2. If the company's constitution (ie its objects or its articles) do not permit the company to pursue the venture in question, then its pursuit for personal benefit by the directors is surely not in breach of their duty to avoid conflicts. Is this the key to the *Wilkinson v West Coast Capital* **[7.28]** decision? Put another way, if the company*could not* pursue the opportunity *unless* the directors, as shareholders, exercised their vote to expand the scope of the business of the company, then the law would not compel the directors to vote to do so, and therefore the opportunity would never be classed as a 'corporate opportunity'.

3. Is the conclusion the same if the directors hold sufficient shares to *be able* to change the company's objects so that pursuit by the company is not permitted, even if those votes have not yet been used to make this change? If the directors tried to make this change at a late stage, after discovering the opportunity but before pursuing it themselves, *could* they use their shareholder votes to this end? (See 'Alteration of the articles', pp 219ff, especially *Allen v Gold Reefs* **[4.22]**.)

4. Equally, could the controlling director-shareholders use their powers under a shareholders' agreement to block the pursuit by their company of a venture that was otherwise allowed and within the scope of business of the company, so that they could then take the benefits personally?

5. Is it important to the analysis in this case that the company is a party to the shareholders' agreement?

6. Towards the end of the judgment, there is a suggestion (*obiter*) that although the no conflict rule is not breached, the no profit rule might nevertheless be breached (but was not here because no profits had been generated). Is this logical? If sale of the new venture *had* generated a profit, what would the outcome have been on this approach? Is that justified, notwithstanding that the directors' entry into the new venture involved no conflict (according to the earlier part of the judgment)?

7. Is it material that the company might have suffered a *loss* because it could not take up the new venture (although here it did not, because the new venture was eventually sold at a loss)? Which breaches of directors' duties allow recovery of the company's losses, and which allow recovery of the profits generated by the defaulting director?

Resigning to take up a corporate opportunity

Directors may seek to pursue opportunities while still engaged as directors, but often pursuit of a corporate opportunity by the defaulting director is linked with retirement—the directors retire, either in advance of or slightly after commencement of the new venture, so that they can devote their full attention to the alternative endeavour. Section 170(2) indicates that s 175 is to apply to a limited extent (this is not elaborated) to directors who are no longer in office (see 'Conflicts of interest and "corporate opportunities"', p 370). Even without this, however, the common law rule is that the remedy for pursuit of the corporate opportunity **(p. 388)** while the director was in office may include profits gained after retirement, since those profits are causally connected to the breach.[58]

The following cases are illustrative of the equitable rules, including a recent (and rare) appeal to the Court of Appeal: *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd* **[7.29]**. Note that the statute may now lead to different conclusions on the same facts.

Before reading extracts from this Court of Appeal decision (which also provides a useful summary of earlier authorities), a short summary of these earlier precedents is useful. In *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, the president and the executive vice-president of the plaintiff company ('Canaero') had been engaged on behalf of Canaero in negotiating for a large aerial surveying and mapping contract with the government of Guyana, to be financed by the external aid programme of the Canadian government. Instead of securing the contract for Canaero, they resigned their managerial posts and formed their own company ('Terra'), to which they successfully diverted the contract. The Supreme Court of Canada held that their fiduciary duty had survived their resignation and that that duty was enforceable against Terra as well as the individual defendants. The remedy took the form of an award of damages for breach of duty, rather than an account of profits. All three features are noteworthy. Key factors in this case were that: (i) the defendants had diverted for their own benefit a 'maturing business opportunity' which their company was actively pursuing; (ii) they were participants in the negotiations on behalf of the company; (iii) their resignation had been 'prompted or influenced' by a wish to acquire the opportunity for themselves; and (iv) it was their position with the company rather than a 'fresh initiative' which led them to the opportunity which they later required.

These elements were all present in *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, where Cooley, an architect, was managing director of the plaintiff company, which was in business as building and development consultants. As the company's representative, he took part in negotiations with officers of the Eastern Gas Board, endeavouring to secure contracts for the company to build four large depots; but these negotiations were unsuccessful because the Gas Board would not engage a firm of consultants (as distinct from a private architect). Shortly afterwards, the work was offered to Cooley in his private capacity. Cooley obtained a release from his employment (by falsely representing that he was in ill health), and was later given the contract by the Gas Board. Roskill J held that he was accountable to the company for the whole of his benefits under the contract or, alternatively, liable in damages for breach of his service contract. The amount awardable under the second head would, however, have been relatively small—it was put by the judge at 'a 10% chance'—because the likelihood that the company might itself have secured the contract was so remote.

Note that in these two cases the issue was relatively straightforward because the officers in question had an express mandate from the board to negotiate for the acquisition of the particular contract on behalf of their company; and there was also no question of ratification.

In contrast with *Canaero* and *Cooley*, Umunna, the director in *Island Export Finance Ltd v Umunna* [1986] BCLC 460, was allowed to keep the profits he had derived from contracts he obtained after he had resigned as the managing director of his company, IEF. These contracts to supply postal boxes to the Cameroons postal authorities were of the same kind, and made with the same party, as an earlier contract which he had secured for IEF while working as its managing director. But Hutchinson J accepted evidence that IEF was not actively seeking further orders either when Umunna resigned or when he later obtained the contracts; that the resignation was for unrelated reasons; and that Umunna had not made improper use of any confidential information.

(p. 389) So which opportunities are caught? In *Balston Ltd v Headline Filters Ltd* [1990] FSR 385, Head, an employee and director of Balston who had worked for it for 17 years, gave notice terminating his employment and resigned his directorship. He had already agreed to lease premises where he intended to set up his own business, but he said in evidence that he had not then decided what that business was to be. Shortly afterwards one of Balston's customers telephoned Head after being notified by Balston that it would continue to supply him with a particular kind of filter tube for only a limited further period. As a result of this call, Head commenced business making the filter tubes and supplied them to the customer. Falconer J held that it was not a breach of fiduciary duty for a director to form an intention to set up business in competition with his company after his directorship had ceased, and that there was no maturing business opportunity in which the company had a 'specific interest' which Head had improperly diverted to himself.

These cases illustrate the difficulties in reaching predictable conclusions in different situations. As Rix LJ expressed it in *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd* **[7.29]**:

At one extreme (*In Plus Group v. Pyke* **[7.33]**) the defendant is director in name only. At the other extreme, the director has planned his resignation having in mind the destruction of his company or at least the exploitation of its property in the form of business opportunities in which he is currently involved (*ID*, *Canaero*, *Simonet*,*British Midland Tool*). In the middle are more nuanced cases which go both ways: in *Shepherds Investments v. Walters* **[7.30]** the combination of disloyalty, active promotion of the planned business, and exploitation of a business opportunity, all while the directors remained in office, brought liability; in *Umunna*, *Balston*, and*Framlington*, however, where the resignations were unaccompanied by disloyalty, there was no liability.

Resigning and moving on to new work without breaching the conflicts rule.

[7.29] Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd [2007] EWCA Civ 200, [2007] BCC 804 (Court of Appeal)

Bryant, a director, was effectively forced out of the company by his business partner and co-director, Foster, who was the majority shareholder in the company. Bryant resigned, although not in order to take work or clients from the company. Nevertheless, during his notice period, the company's major client (Alliance) pressed Bryant to continue working for Alliance after his departure from the company. Bryant agreed, and took up what was essentially an employee's role, but through a new company of his own. This company was formed a few days before Bryant's resignation took effect, and, when it took effect, he started to work for the client. Previously, Alliance had channelled all its work exclusively to the company, under an exclusivity contract which had expired without renewal a few weeks before the resignation took effect. However, Alliance, in its own interests, wanted the personal services of Bryant and Foster, not anyone else, and was determined to split the work, or to use other suppliers. Bryant was found not to have breached his fiduciary duty.

RIX LJ:

8 At trial it was common ground between the parties that the synthesis of principles expounded by Mr Livesey QC, sitting as a deputy judge of the high court, in*Hunter Kane Limited v. Watkins* [2002] EWHC 186 (Ch) … accurately stated the law … Mr Livesey said:

'1. A director, while acting as such, has a fiduciary relationship with his Company. That is he has an obligation to deal towards it with loyalty, good faith and avoidance of the conflict of duty and self-interest.

(p. 390) 2. 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.

3. A director's power to resign from office is not a fiduciary power. He is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the Company.

4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are the feature of the fiduciary relationship. [But now see CA 2006 s 170(2).]

5. Acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of the implied term as to loyalty and fidelity.

6. Directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which is plainly in the public interest that they should be free to exploit it in a

new position. After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the 'stock in trade' of the knowledge he has acquired while a director, even including such things as business contacts and personal connections made as a result of his directorship.

7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position with the Company rather than a fresh initiative that led him to the opportunity which he later acquired.

8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the Company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.

9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the Company is that the opportunity is to be treated as if it were the property of the Company in relation to which the director had fiduciary duties. By seeking t[o] exploit the opportunity after resignation he is appropriating to himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.

10. It follows that a director will not be in breach of the principle set out as point 7 above where either the Company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not pursuing further business orders nor where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself.

11. As regards breach of confidence, although while the contract of employment subsists a director or other employee may not use confidential information to the detriment of his employer, after it ceases the director/employee may compete and may use know-how acquired in the course of his employment (as distinct from trade secrets—although the distinction is sometimes difficult to apply in practice).' …

48 It may be observed that the factual situation presented by this case falls uneasily between the scenarios dealt with in [earlier] jurisprudence. This is not a case where a director has used corporate property. It is not a case where a director has resigned in order to make use of a corporate opportunity. It is not a case where a director has solicited corporate business in competition with his company. It is not a case where a director has acted in bad faith, deceitfully or **(p. 391)** clandestinely. It is, however, at any rate arguably, a case where, by agreeing, while still a director, to work for Alliance after he ceased to be a director, Mr Bryant was still obtaining for himself a business opportunity, possibly even existing business, of the company, or putting himself in a position of conflict with the company, before he was free to do so. Moreover, these events happened at a time of transition, after a forced resignation but before the resignation had taken contractual effect, in circumstances where both parties might be said to be in need of protection. It is possibly above all when a director is leaving that a company needs the protection which the law relating to directors' fiduciary duties provides. But it is also when a director is forced out of his own company that he needs the protection that the law allows to someone who has thereafter to earn his living. Many of these considerations are discussed in the jurisprudence, but not in our particular setting.

49 *Regal (Hastings) Ltd v. Gulliver* **[7.23]** is perhaps in many ways still the leading case … It is well described in *Gower and Davies' Principles of Modern Company Law*, 7th ed, 2003 at 417/418, where the observation is made that the decision illustrates the extreme severity of the law but also that it possibly

carries equitable principles to an inequitable conclusion …

50 … It would thus seem that even though the directors had in fact been proved to have been acting honestly, and even though it had been in fact proved that the company had suffered no loss, the position must in law be regarded, for the safety of mankind, as though they had been acting secretly and dishonestly, to the loss of their company, and no inquiry otherwise was to be permitted.

51 In other respects, however, that was a straightforward case where the directors had acquired their personal profits by reason of and in the course of acting as directors of their company. As Viscount Sankey said (at 139E): 'At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors'. Lord Russell pointed out that they acquired their shares 'by reason and in course of their office of directors' (at 145F, see also at 149F). Lord Macmillan said that the critical findings of fact which the claimant company had to establish were '(i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves' (at 153F). Lord Wright said that the stringent rule was that a director must account to his company 'for any benefit which he obtains in the course of and owing to his directorship' (at 156C). Lord Porter said that the shares were obtained by the directors 'by reason of their position as directors' (at 158C) and that the relevant rule was that 'one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position' (at 158F). [Then followed a discussion of other authorities, including *Boardman v Phipps*, *Industrial Development Consultants v Cooley* [1972] 1 WLR 443, *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (2d) 371 ('*Canaero*') (noting the features outlined at 'Resigning to take up a corporate opportunity' p 387, and continuing:]

57 The defendants [in *Canaero*] were castigated as 'faithless fiduciaries'. It was again irrelevant that the company might not have obtained the contract, for the defendants' liability was their gain rather than the company's loss. *Gower & Davies* comment (at 420) that in that passage Laskin J seems to have favoured a flexibility greater than English case law allows. However, the decision on the facts appears best encapsulated in the following extract from his judgment (at 382):

> 'An examination of the case law … shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which the company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, *or* where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.' [Emphasis added[59]] …

(p. 392) 66 In *CMS Dolphin Ltd v. Simonet* [2001] 2 BCLC 704 the relevant jurisprudence was carefully considered by Lawrence Collins J, as he then was. The director there resigned (without any notice) in order to profit from the claimant company's business. Having made plans in advance of resignation, after his departure he immediately set up in competition, first in partnership and subsequently through a new company. He approached the claimant's staff and clients, to draw them both to him. Before long, the claimant had no staff and no clients. The director was found to be in breach of fiduciary duty and liable to account. By resigning, he had exploited the maturing business opportunities of the claimant, which were to be regarded as its property. The case made by the claimant and accepted by Lawrence Collins J was that the director had been prompted or influenced to resign by a wish to acquire for himself or his company the business opportunities which he had previously obtained or was actively pursuing with the claimant's clients and had now actually diverted to his own profit.

67 Lawrence Collins J considered the legal principles at paras 84/97. Having referred to *Regal (Hastings) v. Gulliver*, he said that the case before him concerned the question of how far the principle of that case,

which concerned directors who were in office at the time of acquisition of the shares, extended to—

> 'a director who resigns his office to take advantage of a business opportunity of which he has knowledge as a result of his having been a director' (at para 87).

68 … He concluded:

> 'In English law a director's power to resign from office is not a fiduciary power. A director is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company. So also in English law, at least in general, a fiduciary obligation does not continue after the determination of the relationship which gives rise to it (see *A-G v Blake (Jonathan Cape Ltd, third party)* [1998] 1 All ER 833 at 841, [1998] Ch 439 at 453, varied on other grounds [2000] 4 All ER 385, [2001] 1 AC 268 (HL)). … In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties.'

69 In my judgment, Lawrence Collins J was not saying that the fiduciary duty survived the end of the relationship as director, but that the lack of good faith with which the future exploitation was planned while still a director, and the resignation which was part of that dishonest plan, meant that there was already then a breach of fiduciary duty, which resulted in the liability to account for the profits which, albeit subsequently, but causally connected with that earlier fiduciary breach, were obtained from the diversion of the company's business property to the defendant's new enterprise.

70 *In Plus Group Ltd v. Pyke* **[7.33]**, a rare case in this court, presents a somewhat novel position. There the claimant company sought over a period of many months, but without success, to force the defendant director to resign following a bout of severe illness. The relationship between him and his partner in the company completely broke down, and he was deprived of any remuneration or information; he was also refused the repayment of his loans to the company. But he steadfastly refused to resign. In this state, but while still a director, the defendant set up his own company and began competing with the claimant, even to the extent of working for its major client. Both trial court and this court held that there was no breach of fiduciary duty. …

74 Finally, there have been two further cases in which the essence of the finding of a breach of fiduciary duty has consisted in what the directors had done while directors, rather than in post-resignation competition. Thus in *British Midland Tool Ltd v. Midland International Tooling Ltd* [2003] EWHC 466 (Ch), … the director who merely resigned in order to compete was not in breach, but his three former colleague directors who remained and thereafter conspired with him to poach the claimant's employees were in breach … And in *Shepherds Investments Ltd v. Walters* **[7.30]** the directors were found to have breached their fiduciary duties by reason of what they did while still **(p. 393)** directors in anticipation of the competition they planned after their resignations. In the latter case, Etherton J said—

> 'What the cases show, and the parties before me agree, is that the precise point at which the preparations for the establishment of the competing business by a director become unlawful will depend on the actual facts of any particular case. … It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the

duties of the director and the obligations of the employee …' …

76 … The jurisprudence which I have considered above demonstrates, I think, that the summary is perceptive and useful. For my part, however, I would find it difficult accurately to encapsulate the circumstances in which a retiring director may or may not be found to have breached his fiduciary duty. As has been frequently stated, the problem is highly fact sensitive … There is no doubt that the twin principles, that a director must act towards his company with honesty, good faith, and loyalty and must avoid any conflict of interest, are firmly in place, and are exacting requirements, exactingly enforced … Nevertheless, the jurisprudence has shown that, while the principles remain unamended, their application in different circumstances has required care and sensitivity both to the facts and to other principles, such as that of personal freedom to compete, where that does not intrude on the misuse of the company's property whether in the form of business opportunities or trade secrets. For reasons such as these, there has been some flexibility, both in the reach and extent of the duties imposed and in the findings of liability or non-liability. The jurisprudence also demonstrates, to my mind, that in the present context of retiring directors, where the critical line between a defendant being or not being a director becomes hard to police, the courts have adopted pragmatic solutions based on a common-sense and merits based approach.

77 In my judgment, that is a sound approach, and one which reflects the equitable principles at the root of these issues. Where directors are firmly in place and dealing with their company's property, it is understandable that the courts are reluctant to enquire into questions such as whether a conflict of interest has in fact caused loss. Even so, considerations that equitable principles should not be permitted to become instruments of inequity have been voiced: see for instance *Murad v. Al-Saraj* **[7.35]** … Where, however, directors retire, the circumstances in which they do so are so various, as the cases considered above illustrate, that the courts have developed merits based solutions. At one extreme (*In Plus Group v. Pyke*) … [see **[7.33]**] …

78 On which side of the line does Mr Bryant fall? …

79 Mr Bryant's resignation had no ulterior purpose. In human terms, and even though there was no repudiation of the shareholders' agreement, it was forced on him by Mr Foster's hostile and truculent manner and the sacking of Mrs Bryant [who was an employee of the company]. As soon as he was told that his wife was to be made redundant, Mr Bryant, not unreasonably, reacted by announcing his resignation. At that time his intention was to find employment with a firm of chartered surveyors … In this important aspect, Mr Bryant's case has no connection or similarity with, for instance, *Canaero's* 'faithless fiduciaries' …

87 All that Mr Bryant did was to agree to be retained by Alliance after his resignation became effective. He did nothing more. His resignation was not planned with an ulterior motive. He did not seek employment, or a retainer, or any business from Alliance. It was offered to him, it might be said pressed upon him …

88 Moreover, in considering the claim for loss and damage, the judge was unable to identify any existing projects which had actually been subsequently transferred to Mr Bryant or his new company …

(p. 394) 93 … As for the extent of his fiduciary duties, it seems to me that the judge's realistic findings as to the position within the company after Mr Bryant's resignation makes it very arguable that, so long as he remained honest and neither exploited nor took any property of the company, his duties extended no further than that. To demand more while he is excluded from his role as a director appears to me to be unrealistic and inequitable. As for the innocence of his resignation, although the matter may not be free of doubt, it again seems well arguable on the authorities that it is critically opposed to liability to account, where there is no active competition or exploitation of company property while a defendant remains a director. And as for a reassignment of projects, I have already pointed out that the judge was unable to find that any existing company projects had been reassigned …

96 … I would dismiss the appeal.

MOSES and BUXTON LJJ delivered concurring judgments.

➢ Questions

1. In the course of his judgment, Buxton LJ made the following point:

> as Sedley LJ emphasised in his judgment in *In Plus Group Ltd v Pyke* **[7.33]**, … the mere fact that a fiduciary has not sought to place himself in a position where his interest conflicts with his duty does not exonerate him from the obligation to perform that duty. Accordingly, it cannot be in any way conclusive that it was Mrs Watts who offered Mr Bryant the opportunity, indeed pressed it on him, rather than that he resigned in order to be free for that purpose, or asked for the opportunity once he had resigned.

Nevertheless, Buxton LJ held that, in the circumstances, it was not a breach for Bryant to accept the offer. Where is the line drawn?

2. In the course of his judgment, Rix LJ noted the trial judge's conclusions on Bryant's potential liability if he *had* been found in breach of his duties (see Rix LJ at para [46]). The trial judge noted that if Bryant had ruled himself out of working for Alliance, the work he might have done would *not* then have gone to his old company, as it had in the past—recall Alliance wanted the personal services of Bryant and Foster—it would have gone elsewhere. The significance of this, so the trial judge thought, was that in*Warman International Ltd v Dwyer* (1995) 182 CLR 544, the High Court of Australia emphasised that the rule requiring a fiduciary to account for profits should not be applied in a manner which makes it a vehicle for unjust enrichment of the claimant. It followed, according to the trial judge, that even if Bryant *had* breached his duty, there were no profits for which he was liable to account. This, however, seems to confuse claims for profits disgorgement from Bryant with claims to recover the company's loss. In assessing profits, it is irrelevant that the company could not itself have generated those profits (*Regal (Hastings)*; *Boardman v Phipps*). *Warman*, by contrast, was concerned to ensure that the *net* profits (emphasising net profits, not gross profits) of the offending venture were assessed fairly, and linked causally to the breach that generated them.

3. Would the outcome have been the same under CA 2006, given ss 170(2) and 175?

Resigning and pursuing competing opportunities in a way that breaches the conflicts rule.

[7.30] Shepherds Investments Ltd v Walters [2006] EWHC 836 (Chancery Division)

This was a claim against former directors (and employees) of Shepherds for various breaches of duty, including setting up a competing business, diversion of a business opportunity and misuse of confidential information. Walters and Hindle were directors and employees of Shepherds (Financial) Ltd ('Financial'). Simmons was a former employee and *de facto* **(p. 395)** director of Shepherds Investments Ltd ('Investments'). 'Assured' and 'PSL' were the companies through which the individuals carried on their competing business. The individuals were held to have breached their duties, and were therefore liable to account for the profits generated for the period of 'advance start' that their breach had given them, but not liable for damages because no loss was proved to have been caused by the breach.

> ETHERTON J:
>
> 82 At the heart of these proceedings is the question whether, in taking the steps which they did to establish Assured and PSL prior to their retirement from Financial and Investments, the Individual Defendants acted in breach of their duties to the companies which employed them and of which they were directors. The parties are not agreed on the legal principles and test applicable to determine that central issue.