> p 453, varied on other grounds [2001] 1 AC 268 (HL)). For the reasons given in ***Island Export Finance Ltd*** **v** ***Umunna*** a director may resign (subject, of course, to compliance with his contract of employment) and he is not thereafter precluded from using his general fund of skill and knowledge, or his personal connections, to compete . . . 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.

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.

In Plus Group Ltd **v** ***Pyke*** [2002] EWCA Civ 370; [2003] BCC 332, 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 . . .

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); [2003] 2 BCLC 523, 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 (Hart J, whose recent death is much mourned). And in ***Shepherds Investments Ltd*** **v** ***Walters*** [2006] EWHC 836 (Ch); [2007] 2 BCLC 202 the directors were found to have breached their fiduciary duties by reason of what they did while still 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. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company 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 . . .

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. Perhaps for this reason, appeals have been rare in themselves, and, of all the cases put before us, only ***Regal (Hastings)*** **v** ***Gulliver*** (not a case about a retiring director) demonstrates success on appeal. 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.

Whether, however, it remains true to say, as James LJ did in ***Parker* v *McKenna*** (cited in ***Regal (Hastings)* v *Gulliver***) that the principles are (always) 'inflexible' and must be applied 'inexorably' may be in doubt, at any rate in this context. Such an inflexible rule, so inexorably applied might be thought to have to carry all before it, in every circumstance. 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.

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*** [2005] EWCA Civ 959; [2005] WTLR 1573 at [82]–[84], [121]–[123], [156]–[158]; and see the solutions discussed in *Gower and Davies* at pp 420–421. 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***) 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 (***IDC***, ***Canaero***, ***Simonet***, ***British Midland Tool***). In the middle are more nuanced cases which go both ways: in ***Shepherds Investments* v *Walters*** 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.

On which side of the line does Mr Bryant fall?

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. 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 other words to retrace his steps. In this important aspect, Mr Bryant's case has no connection or similarity with, for instance, ***Canaero***'s 'faithless fiduciaries'.

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 . . .

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 . . .

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.

Held – Appeal dismissed.

Duty not to accept benefits from third parties

The statutory duty

Section 176 of the Companies Act 2006, provides that:

1 A director of a company 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 director.
2 A 'third party' means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.
3 Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.
4 This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
5 Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

Furthermore, according to s 170(2)(b), a person who ceases to be a director continues to be subject 'to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director'.

Duty to declare interest in proposed transaction or arrangement

The statutory duty

Section 177, CA 2006 requires a director to declare any interest he or she may have in a proposed transaction or arrangement. The declaration goes to the nature and extent of the interest but is only required if the director is aware of the interest.

1 If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
2 The declaration may (but need not) be made:
  (a) at a meeting of the directors, or
  (b) by notice to the directors in accordance with:
    (i) section 184 (notice in writing), or
    (ii) section 185 (general notice).
3 If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.
4 Any declaration required by this section must be made before the company enters into the transaction or arrangement.
5 This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.

For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

6 A director need not declare an interest:
- (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
- (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
- (c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered:
  - (i) by a meeting of the directors, or
  - (ii) by a committee of the directors appointed for the purpose under the company's constitution.

This is supported by s 182, which deals with existing contracts (as distinct from proposed transactions or agreements), and provides that:

1 Where a director of a company is in any way, directly or indirectly, interested in a transaction or arrangement that has been entered into by the company; he must declare the nature and extent of the interest to the other directors in accordance with this section.

This section does not apply if or to the extent that the interest has been declared under s 177 (duty to declare interest in proposed transaction or arrangement).

2 The declaration must be made:
- (a) at a meeting of the directors, or
- (b) by notice in writing (see s 184), or
- (c) by general notice (see s 185).

3 If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

4 Any declaration required by this section must be made as soon as is reasonably practicable. Failure to comply with this requirement does not affect the underlying duty to make the declaration.

5 This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.

For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

6 A director need not declare an interest under this section:
- (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
- (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
- (c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered:
  - (i) by a meeting of the directors, or
  - (ii) by a committee of the directors appointed for the purpose under the company's constitution.

As may be noted from the provisions outlined above, if an interest has already been declared under s 177, CA 2006, s 182 does not apply.

The related common law and equitable principles

In many respects, the case law which is applicable to the interpretation and application of CA 2006, s 177 overlaps to a considerable extent with that discussed in relation to s 175. As such, it is recommended that the analysis undertaken earlier in this chapter is read in conjunction with this section of the Companies Act 2006.

Effects of a breach of duty

1 The extent of liability

A director cannot be made liable for the acts of co-directors if he has not taken part in such acts and he had no knowledge of them and the circumstances were not such as ought to have aroused his suspicion. The fact that he does not attend all board meetings will not in itself impose liability but habitual absence may do so and the duty may be higher for the executive directors and qualified or experienced non-executive directors (see the ***Dorchester Finance*** case on p. 391).

A director who is involved in a breach along with others is jointly and severally liable with them and can be required to make good the whole loss with a contribution from his co-directors. There would be no contribution, of course, where money was misappropriated for his sole benefit.

As we have seen, the company can make a director account for any secret profit and a breach will usually entitle the company to avoid any contract it may have made with him. Property taken from the company can be recovered from the director if he still has it or from third parties to whom he may have transferred it unless they have taken the property in good faith and for value.

The court may also grant an injunction where a director's breach of duty is continuing or merely threatened.

2 The company may ratify the breach

The company may by ordinary (or written) resolution waive a breach of duty by a director. Thus, in ***Bamford* v *Bamford*** [1969] 2 WLR 1107 the directors allotted shares to a company which distributed their products. The object was to fight off a takeover bid because the distributors had agreed not to accept the bid. This was an improper exercise of the directors' powers but the allotment was good because the members (excluding the distributors' shares) had passed an ordinary resolution ratifying what the directors had done.

3 Company indemnity

By reason of the provisions of the CA 2006 the ability of the company to indemnify directors and managers (s 232) in regard to claims made against them was limited, indemnity could be given in these cases where a criminal or civil claim was successfully defended so that the person concerned had to bear his or her costs until the conclusion of the proceedings. Section 233 provides for the provision of insurance by the company to protect directors against the liability that might arise from s 232 and s 234 indicates that s 232(2) does not apply to qualifying third party indemnity provisions.

4 Relief by the court

The court has power to grant relief to a director who has acted honestly and reasonably and who ought, in all the circumstances, to be excused.

In Re Duomatic [1969] 1 All ER 161

The share capital of the company was made up of 100 £1 ordinary shares and 50,000 £1 non-voting preference shares. At one time E, H and T held all the ordinary shares between them and in addition were directors of the company. E and T did not consider that H was a good director. Although they could have voted him off the board, they decided instead to pay him £4,000 to leave the company perhaps largely because he was threatening to sue the company and generally to cause trouble if he was removed against his will. On payment of the £4,000 H left transferring his shares to E. No disclosure of the payment of the £4,000 was made in the company's accounts.

It was also the practice for each director to draw remuneration as required and for the members to approve these drawings at the end of the year when the accounts were drawn up. The amounts drawn were as follows:

In period A (E, T and H sole directors and ordinary shareholders)	£10,151 paid to E £5,510 paid to H.
In period B (E and T sole directors and ordinary shareholders)	£9,000 paid to E but no final accounts agreed.
In period C (when additional persons had become shareholders)	E informally agreed to limit his drawings to £60 per week but in fact drew approximately £100 per week.

The company then went into voluntary liquidation and the liquidator began proceedings against E, H and T for:

(a) repayment of the sums paid to E and H as salaries on the ground that these had never been approved in general meeting;
(b) repayment of the £4,000 paid to H for loss of office; and
(c) declarations that E and T had been guilty of misfeasance.

Held – by Buckley J – that:

(i) repayment of the sums of £10,151 and £5,510 could not be ordered since they had been made with the approval of all the shareholders;

(ii) although E had not obtained the approval of all the shareholders to the payment of the £9,000, final accounts not having been agreed, in the circumstances and in view of the general practice E ought to be excused repayment of the £9,000;

(iii) since there had been no disclosure to the preference shareholders of the payment of £4,000 compensation to H as required by company legislation, E and T had misapplied the company's funds and were jointly and severally liable to repay the sums. Furthermore, H held the money on trust for the company and if necessary could be required to repay it. E and T had not acted reasonably in this matter and could not be excused.

Ministerial 'eight-point guidance'

The DTI (now known as Department for Business, Enterprise and Regulatory Reform) issued Ministerial Statements on the 'Duties of Company Directors' in June 2007. Included in these

statements is an 'eight-point guidance' for company directors, which will not have the force of law. The points are of useful guidance to company directors who might not be fully familiar with the legal obligations set forth in the CA 2006:

1 Act in the company's best interests, taking everything you think relevant into account.
2 Obey the company's constitution and decisions taken under it.
3 Be honest, and remember that the company's property belongs to it and not to you or to its shareholders.
4 Be diligent, careful and well-informed about the company's affairs. If you have any special skills or experience, use them.
5 Make sure the company keeps records of your decisions.
6 Remember that you remain responsible for the work you give to others.
7 Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.
8 Seek external advice where necessary, particularly if the company is in financial difficulty.

Essay questions

1 'The rule of equity which insists on those who by use of fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud . . . The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.' *Per* Lord Russell of Killowen in ***Regal (Hastings) Ltd* v *Gulliver***.

Comment. (*University of Plymouth*)

2 (a) Give an account of the extent to which the common law fiduciary duties of company directors have been added to by statutory provisions.

(b) Henry is a non-executive director of Dreghorn plc. He also runs his own management consultancy business, Manpower & Co. Dreghorn is undergoing a process of internal restructuring. Without knowing of Henry's involvement with Manpower, one of the other directors proposes to the board of directors that Manpower & Co be engaged by the company to advise on recruitment of key staff. Henry, who happens to sit on the Staff Affairs Committee of the Board of Directors along with two other directors, mentions his connection with Manpower & Co at a meeting of that committee, but it is not minuted and is never mentioned again. The Board resolves to contract with Manpower & Co. Some months later, Henry's connection with Manpower comes to light.

Advise Henry as to his legal position. (*Napier University*)

3 A managing director is usually appointed by the other directors and his powers and duties will depend on his contract of service with the company.

(a) Explain and illustrate whether a director who has not been appointed as a managing director can bind the company as if he were managing director.

AND

(b) Explain the degree of skill and care which the law requires of a company director.

(*Glasgow Caledonian University*)

4 A director is in a fiduciary relationship with his company. Explain the meaning and effect of this statement with reference to decided cases. (*The Institute of Company Accountants*)

5 (a) What controls are there on the provision by a public company of loans to its directors and on other financial dealings with them?

(b) Eric, Frank and George are the directors of Happy Ltd. At a recent board meeting, Eric proposed that £50,000 be paid to Frank in recognition of his services in opening new trading opportunities for the company. The money has been paid to Frank although no vote was ever taken on the motion. George was away on holiday at the time of the meeting. Happy Ltd now wish to recover the £50,000 but Frank is insolvent. Can they recover it from either Eric or George? (*The Institute of Chartered Secretaries and Administrators*)

6 You have recently been appointed as company secretary to a large public company with a Stock Exchange listing for its securities. The board of directors has asked you for advice on certain matters relating to their duties as directors.

You are required to advise the board of directors on the legal aspects of the following three matters.

(a) The restrictions which exist upon the freedom of directors to issue company shares.

(b) The problems directors might encounter when they deal in the company's securities for their own personal gain.

(c) The restrictions which control the lending of funds by the company to directors to meet their business expenses. (*The Chartered Institute of Management Accountants*)

7 Landrut plc is a property company. Its principal activity is buying land, building private houses and selling those houses directly to the public.

Six directors form the board. The three executive directors are Jack, a solicitor, in charge of the legal department; Jeremy, a quantity surveyor, responsible for land buying; Philip, the third executive director, is in charge of advertising, marketing and house sales. The three non-executive directors are Joe (who founded the company 30 years ago with his brother Jim), Helen (Jim's widow) and Sam (a retired accountant). Joe is chairman of the board.

The following situations have arisen:

(i) The company recently purchased a small rectangular piece of building land for £500,000. Although the land was surrounded on three sides by existing development, it appeared on visual inspection to have access to the highway on the fourth. Jack dealt with the legal work necessary to complete the purchase. It now appears that a routine inspection of the title deeds would have revealed that a two-metre strip of land runs the length of the fourth side preventing access to the highway and making development impossible. The owner of this strip of land is willing to sell at a price of £100,000. Consider the liability to the company of Jeremy and Jack.

(ii) The company developed and sold a small site of town houses. The houses were marketed and quickly sold at £40,000 each. It is now clear that the houses were undervalued and would have easily sold at £45,000. While the company did not make a loss on the development, its profit was only marginal rather than substantial. Consider the liability to the company of Philip and Sam.

(iii) Jeremy asks the board to consider purchasing two building sites: Toddmoor for £750,000 and Rawsum for £500,000. After full discussion, the board decides to proceed with the purchase of Toddmoor and reject Rawsum. Joe later decides to buy Rawsum personally. He does so and immediately resells the site for £600,000. Sam and Helen who remain silent

throughout the discussion are also the only directors and shareholders of a small land company, Helsam Ltd, which is concurrently negotiating for the purchase of Toddmoor. Helsam Ltd subsequently acquires Toddmoor. Consider the liability to the company of Joe, Sam and Helen. (*The Association of Chartered Certified Accountants*)

Test your knowledge

Four alternative answers are given. Select ONE only. Circle the answer which you consider to be correct. Check your answers by referring back to the information given in the chapter and against the answers at the back of the book.

1 Mike has a service contract with Trent plc for a fixed term of 10 years which cannot be terminated by notice. The contract has not been considered in general meeting. What is the legal position?

A The contract is valid.
B The contract is void and the company can terminate it at any time by giving such notice as the company in general meeting may decide.
C The contract is void and the company can terminate it at any time by the giving of reasonable notice.
D The contract is void and the company can terminate it by giving six months' notice.

2 Joe is a director of Slow Ltd and has just unsuccessfully defended an action brought against him by a third party in regard to the affairs of Slow Ltd. Can Joe be indemnified in respect of the legal and judgment costs he incurred from the assets of Slow Ltd?

A The company cannot indemnify Joe without the approval of the members.
B The company cannot indemnify Joe in any circumstances.
C The company can indemnify Joe if the court approves.
D The company can indemnify Joe and the approval of neither the members nor the court is required.

3 Morgan is in breach of his fiduciary duty to the company. How may he be exempted from liability given that the breach is not a fraud on the minority?

A By a written or an ordinary resolution of the members.
B By a provision in the company's articles.
C By a provision in the company's memorandum.
D By a resolution of the board of directors.

4 Mostyn, who is a director of Test Ltd, has caused the company loss by negligent mismanagement. The company wishes to sue Mostyn but the articles of Test exempt the directors from liability for negligence in the course of their duties. What is the legal position given that Mostyn has left the board?

A The company cannot claim since Mostyn is no longer a director.
B The company can make a claim since the article is void and of no effect.
C The company cannot claim because the articles are binding.
D The company can claim if the court makes an order overriding the articles.

5 The register of directors and secretaries must, so far as directors are concerned, give particulars in regard to each director of other directorships currently held and those which have been held in the previous:

A Three years **B** Two years **C** Fifteen years **D** Five years

6 Dee Ltd has net assets of £650,000. It intends to enter into a transaction with one of its directors involving a non-cash asset. At which of the following figures of non-cash asset value will it be necessary to attain member approval?

A £100,000 **B** £2,000 **C** £65,000 **D** £6,500

Answers to test your knowledge appear on p. 616.

Visit **www.mylawchamber.co.uk/keenancompany** to access study support resources including practice exam questions with guidance, weblinks, legal newsfeed, answers to questions in this chapter, legal updates and further reading.

20 Vacation of office, disqualification and personal liability