professional capacity, i.e. executive directors, have a higher objective standard of care to comply with (see ***Lister* v *Romford Ice and Cold Storage Co*** [1957] 1 All ER 125), and so have non-executive directors who are qualified or experienced in a relevant discipline.

Dorchester Finance Co Ltd* v *Stebbing [1989] BCLC 498

On 22 July 1977 Foster J dealt, in the Chancery Division, with this case which concerned the duties of skill and care of company directors. The decision was not initially reported, which is unfortunate since it seems to be the first decision in this area of the law since ***Re City Equitable Fire Insurance Co Ltd***. The case concerned a money lending company, Dorchester Finance, which at all material times had three directors. Only one, S, was involved in the affairs of the company on a full-time basis. No board meetings were held and P and H, the other directors, made only rare visits to the company's premises. S and P were qualified accountants and H had considerable accountancy experience, though he was in fact unqualified. It appeared that S caused the company to make loans to other persons and companies with whom he had some connection or dealing, and that he was able to achieve this, in part at least, because P and H signed cheques on the company's account in blank at his request. The loans did not comply with the Moneylenders Acts and adequate securities were not taken so that the loans could not be recovered by the company which then brought an action against the three directors for alleged negligence and misappropriation of the company's property.

Held – by Foster J – that all three directors were liable to damages. S, who was an executive director, was held to have been grossly negligent and P and H were also held to have failed to exhibit the necessary skill and care in the performance of their duties as non-executive directors, even though the evidence showed that they had acted in good faith throughout. The decision is of particular importance in regard to P and H because the judge appears to have applied a higher standard for non-executive directors than that laid down in the ***Re City Equitable*** case. In particular, the judge rejected any defence based upon non-feasance, i.e. the omission of an act which a person is bound by law to do. Contrary to ***Re City Equitable***, therefore, it would seem from this case to be unreasonable for a non-executive director not to attend board meetings or to show any interest in the company's affairs and merely rely on management, or, according to the judge, on the competence and diligence of the company's auditors.

Comment

It is not possible to say with certainty whether this decision affects the liability of non-executive directors who are not qualified or experienced in a discipline relevant to company administration. It was obviously of importance that P and H were experienced accountants and one would have expected a more objective and higher standard to be applied to such persons, even in their capacity as non-executive directors. The matter is really one which should be dealt with by legislation but there is nothing which is relevant to this problem in the Companies Act 1985. However, it is worth noting that Foster J did not make any distinction between executive and non-executive directors, stating that their duties were the same.

See p. 554

The UK standard of care is also being derived from the law relating to wrongful trading by directors. In particular, s 214 of the Insolvency Act 1986 (see further Chapter 25) provides for personal liability for directors in such amount as the court may decide in an insolvent liquidation as a contribution to the company's debts. The section is based on negligence and the standard is objective. The qualified/experienced (or talented) director is judged by the higher standard he ought to have but other directors are required to reach a level of competence to an objective standard. The court will consider current practice.

Of course, s 214 of the Insolvency Act 1986 can only be applied specifically when the company is in insolvent liquidation but the standard required by the section has been cited particularly in ***Norman* v *Theodore Goddard*** [1992] BCLC 1028 and ***Re D'Jan of London*** [1994] 1 BLCL 561 as being an accurate statement of a director's duty at common law which could be applied more widely than in wrongful trading; in the ***D'Jan*** case, for example, to make a director, who failed to read but signed an insurance proposal, which contained inaccurate information and which was repudiated by the insurance company, potentially liable in negligence. Lord Justice Hoffman accepted that a director's duty at common law is the same as that set out in s 214.

Section 13 of the Supply of Goods and Services Act 1982 imposes an implied contractual term that a supplier of a service acting in the course of business will carry out that service with reasonable care. SI 1982/1771 provides that s 13 shall not apply to the services rendered by a company director to his company. It is evidently thought to be enough that they have to act in good faith, carry out fiduciary duties and meet the common law standard of reasonable skill and care.

As regards the duty of directors not to act negligently so as to injure outsiders, the following case is relevant.

Thomas Saunders Partnership* v *Harvey [1989] 30 Con LR 103

The claimants were architects who were retained on a project to refit office premises, one requirement being for raised access flooring. The defendant was a director of a subcontracting flooring company. He was asked whether the flooring his company offered conformed to the relevant specifications. He confirmed in writing that it did. In fact it did not and the architects were sued by the end users for £75,000, the claim succeeding. They sought an indemnity from the defendant, his company having gone into liquidation. The claim, part of which was based on negligence, succeeded even though the written confirmation had been given on behalf of and in the name of the company. The defendant was a specialist in the field and had assumed a duty of care when making the statement. He was liable in negligence. The judge did not see why the cloak of incorporation should affect liability for individual negligence.

Comment

(i) The decision has implications for companies whose products or services depend to a considerable extent on the skills and expertise of individual directors. In particular, firms of accountants who are transferring from the partnership regime to the limited company regime may not find that this affects their personal liability for negligence.

(ii) Much depends upon the facts of the case and in ***Williams* v *Natural Life Health Foods Ltd*** (1998) *The Times*, 1 May, the House of Lords decided that a managing director was not liable for a negligent statement as to the profits likely to be made by the claimant under a franchise agreement. He made the statement on behalf of the company as its agent. Their Lordships said that in order for the MD to be liable the claimant must show that he could reasonably rely on an assumption of personal liability by the MD so that a special relationship was created between the claimant and the MD. The claimant had not, they said, established such a relationship. In particular, he did not know the MD and had no significant pre-contractual dealings with him. Furthermore, there had been no conduct by the MD which would have suggested to the claimant that the MD was accepting liability nor did the evidence show that the claimant believed he was. Nevertheless, if the special relationship can be established the court will in effect go behind the corporate structure and find liability in those who are effectively in charge of the company. This, of course, gets around limited liability and is particularly useful where the company is insolvent.

(iii) As the above materials show, directors cannot be held personally liable for negligent misstatements unless a special relationship can be established between themselves and the claimant. However, directors may be personally liable for fraudulent misstatements (the tort of deceit) irrespective of whether a special relationship is found to exist (see ***Standard Chartered Bank* v *Pakistan National Shipping Co (No 2)*** [2003] 1 All ER 173). The criminal standard of proof applies to civil claims for fraud, i.e. proof beyond a reasonable doubt so that it is notoriously difficult to prove. It follows that it remains difficult to impose personal liability upon directors whether in respect of negligent or fraudulent misstatements.

Where a person is a director of a number of companies that are within the same group duties are owed to each company within the group individually (see ***Re Pantone 485 Ltd*, *Miller* v *Bain*** [2002] 1 BCLC 266).

What action can directors take to reduce the risk of claims for damage to the company following 'bad' business decisions? The following steps should be taken where it is thought that, although the transaction is in general terms for the benefit of the company, there are some risks:

- take all proper advice which it is thought necessary;
- document fully and clearly the reasons for the various decisions made;
- enshrine these in the board minutes or other written document; and
- in difficult cases consult the shareholders and ask them to formally approve the decisions by ordinary (or written) resolution. Ratification by the shareholders should protect the directors from the risk of subsequent proceedings by the company against them. Directors/shareholders may vote and give this ratification unless, for example, they are seeking to approve their own fraud.

If the above steps are taken, the directors could hardly be regarded as in breach of their management duties and so could ratify the action as shareholders even if they held a majority of the membership votes (***North West Transportation Co* v *Beatty*** (1887) 12 App Cas 589).

Duty to avoid conflicts of interest

The statutory duty

Section 175 of the Companies Act 2006 states:

1. A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
2. This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
3. This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
4. This duty is not infringed:
   (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
   (b) if the matter has been authorised by the directors.

5 Authorisation may be given by the directors:
   (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
   (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
6 The authorisation is effective only if:
   (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
   (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
7 Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

The related common law and equitable principles

A director must account to the company for any personal profit he may make in the course of his dealing with the company's property (which includes not only physical assets of the company but also commercial information and opportunities). This is now embodied in ss 175 and 177 of the Companies Act 2006. Thus, if a director buys shares in the company at par when the issue price is greater, he must account to the company for the difference; where he has sold at a profit, he must account for the profit. Again, if a director receives gifts of money or shares from the promoters of the company or from persons selling property to it, he must account for these sums to the company. The reason for this is that there has been a *conflict of interest*.

A company director is expected to undertake negotiations with a view to securing the greatest benefit for the company, and he can hardly have done so if he was taking gifts from the other party. He must also account for commissions received from persons who supply goods to the company. In addition, a director who in the course of his employment obtains a contract for himself is liable to account to the company for the profit he makes, even if it can be shown that the company would not necessarily have obtained the contract. The accountability arises from the mere fact that a profit is made by the director; it is not a question of loss to the company.

Industrial Development Consultants v *Cooley* [1972] 2 All ER 162

The defendant was an architect of considerable distinction and attainment in his own sphere. He was employed as managing director by Industrial Development Consultants who provided construction consultancy services for gas boards. The Eastern Gas Board were offering a lucrative contract in regard to the building of four depots and IDC was very keen to obtain the business. The defendant was acting for IDC in the matter and the Eastern Gas Board made it clear to the defendant that IDC would not obtain the contract because the officers of the Eastern Gas Board would not engage a firm of consultants. The defendant realised that he had a good chance of obtaining the contract for himself. He therefore represented to IDC that he was ill and because IDC were of the opinion that the defendant was near to a nervous breakdown, he was allowed to terminate his employment with them on short notice. Shortly afterwards the defendant took steps which resulted

in his obtaining the Eastern Gas Board contracts for the four depots for himself. In this case IDC sued the defendant for an account of the profits that he would make on the construction of the four depots.

Held – by Roskill J – that the defendant had acted in breach of duty and must account. The fact that IDC might not have obtained the contract itself was immaterial. *Per* Roskill J:

> Therefore it cannot be said that it is anything like certain that the [claimants] would ever have got this contract [. . .] on the other hand, there was always the possibility of the [claimants] persuading the Eastern Gas Board to change their minds; and ironically enough, it would have been the defendant's duty to try and persuade them to change their minds. It is a curious position under which he should now say that the [claimants] suffered no loss because he would never have succeeded in persuading them to change their minds.

Comment

The High Court ruled in ***Gencor ACP Ltd*** v ***Dalby*** [2000] 2 BCLC 734 that the fact that a fiduciary, such as a director, has made a profit makes him liable to account for it to the company. Whether the company would or would not have obtained the profit is irrelevant.

Regal (Hastings) Ltd v ***Gulliver*** [1942] 1 All ER 378

The Regal company owned one cinema and wished to buy two others with the object of selling all three together. The Regal company formed a subsidiary so that the subsidiary could buy the cinemas in question but the Regal company could not provide all the capital needed to purchase them and the directors bought some of the shares in the subsidiary themselves thus providing the necessary capital. The subsidiary company acquired the two cinemas and eventually the shares in the Regal company and in the subsidiary were sold at a profit. The new controllers of the Regal company then caused it to bring an action to recover the profit made.

Held – by the House of Lords – that the directors must account to the Regal company for the profit on the grounds that it was only through the knowledge and opportunity they gained as directors of that company that they were able to obtain the shares and consequently to make the profit. In particular, the House of Lords stated that directors were liable to account to the company once it was established:

(a) that what the directors did was so related to the affairs of the company that it could 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
(b) that what they did resulted in a profit to themselves.

Comment

(i) This same question was considered by the House of Lords in ***Boardman*** v ***Phipps*** [1967] 2 AC 46 where the ***Regal*** case was followed. It is generally felt that the fiduciary duty to account which was placed on the directors in these two cases is rather high. In the ***Regal*** case the directors did not have a majority of shares in the company. It would have been possible for them to obtain ratification of their acts by the company in general meeting. Furthermore, it was always conceded that they had acted in good faith and in full belief in the legality of their action, so that it had not occurred to them to obtain the approval of a general meeting. It is also true to say that the directors had not deprived the company of any of its property. The shares in the subsidiary were bought with their own money and those shares had never been the company's property on the facts as the court found them. It would seem that the mere possession of information which results from the holding of office as a director is sufficient to raise the duty to account.

(ii) A further case in point is ***Re Bhullar Bros Ltd*** [2003] All ER (D) 445 (Mar). The company was a family company running a grocery business from several properties. It also owned investment properties. The two families involved fell out. They decided not to buy any more investment properties and to divide the assets of the company between them. Negotiations came to nothing and one of the families asked the court to order the sale of the shares held by one family to the other family or to the company under s 459 (unfair prejudice). The court refused a buy-out order. However, it was discovered that two of the company's directors had, while the company was still trading, bought at an advantageous price two investment properties next to the company's existing investment properties on their own behalf. The Court of Appeal ruled that the directors concerned held the newly acquired properties on a constructive trust for the company. The Court of Appeal affirmed the ruling of the High Court that the properties should be transferred to the company at the price that was paid for them. As the appeal judgment says, whether the company could or would have taken the opportunity to acquire the properties had it been aware of the facts was not to the point. The existence of the opportunity was information that it was relevant for the company to have and the directors concerned were under a fiduciary duty to communicate it to the company.

A director is not accountable for the profits of a competing business which he may be running (***Bell*** v ***Lever Bros Ltd*** [1932] AC 161), unless the articles or his service contract expressly so provide, but he will be accountable if he uses the company's property in that business, or if he uses its trade secrets, or induces the company's customers to deal with him. Furthermore, a director of two or more companies takes the risk of an application under s 994, CA 2006 (unfair prejudice) if he subordinates the interests of one company to those of the other (***Scottish CWS*** v ***Meyer*** [1958] 3 All ER 66). A director is not allowed, either during or after service with a company, to use for his own purposes confidential information entrusted to him by the company (***Baker*** v ***Gibbons*** [1972] 2 All ER 759).

The High Court has ruled that a director who, on leaving his company, persuaded former clients to transfer their advertising business to a new company run by him had acted in breach of his fiduciary duty. The diversion of clients was a misappropriation of the original company's property and the director was liable for profits derived from that property (see ***CMS Dolphin Ltd*** v ***Simonet Ltd*** [2001] 2 BCLC 704). The High Court has also ruled that a director who registered the company's name as his own trademark was in breach of a fiduciary duty to the company because the registration was in his own personal interest and in conflict with the interests of the company (see ***Ball*** v ***Eden Project Ltd***, ***Eden Project*** v ***Ball*** [2001] 1 BCLC 313).

It is, of course, possible for a director's service contract to be so drafted as to debar him from running a competing business, allowing the company to seek an injunction if such a business was carried on. It might also justify dismissal if the contract was breached. By contrast, a shareholders' agreement may provide individuals who are both members and directors of a company with control over the direction which the company is to take. As such, as in the case of ***Wilkinson*** v ***West Coast Capital*** [2005] EWHC 3009, those directors may be able to deny that a new venture could be classed as a 'corporate opportunity'.

A director may keep a personal profit if the company consents, but the consent must be given by the members in general meeting and not by the board, and a resolution in general meeting may be rendered invalid as prejudicial to the minority, if the director concerned controls the voting in general meetings (***Cook*** v ***Deeks***, 1916, see Chapter 14). Shareholder approval can be given by the unanimous written resolution procedure though in such a case there would be no question of the abuse of minority rights.

See p. 276

However, a director may take advantage of a corporate opportunity on his own account if his company has considered the same proposition and rejected it in good faith.

Peso Silver Mines Ltd (NPL) v Cropper (1966) 58 DLR (2d) 1

The board of directors of Peso was approached by a person named Dikson who wanted to sell to Peso 126 prospecting claims near to the company's own property. The board of Peso rejected this proposal after bona fide consideration. However, a syndicate was then formed by Peso's geologist to purchase Dikson's claim. A company called Cross Bow Mines Ltd was incorporated by the syndicate for the purpose. Cropper was a director of Peso and had taken part in the earlier decision of the Peso board and also become a shareholder in Cross Bow Mines. This action was brought claiming that Cropper was accountable to Peso for the Cross Bow shares which he had obtained.

Held – by the Supreme Court of Canada – that he was not bound to account. On the facts, Cropper and his co-directors had acted in good faith solely in the interest of Peso and with sound business reasons for rejecting the offer. There was no evidence that Cropper had any confidential or other information which he concealed from the board. The court also found that when Cropper was approached to join the syndicate it was not in his capacity as a director of Peso but as an individual member of the public whom the syndicate was seeking to interest as a co-adventurer.

Finally, a director may choose to resign from a company so as to take up a corporate opportunity on his own, raising the question as to whether this would amount to a conflict of interest. The answer is that directors may pursue private opportunities while working for a company, though these would be subject to the duties outlined in ss 175 and 177 CA 2006; in particular the requirement to declare their activities to the company. (The key message should always be, '*if in doubt, disclose*'.) A more common situation with which the courts are faced is where a director chooses to resign around the time that such a private venture is commenced so that they are able to devote their attention to it.

There are a number of important cases in this area including ***Industrial Development Consultants Ltd* v *Cooley*** [1972] 1 WLR 443, which involved an architect who pursued an opportunity in his private capacity. A more recent Court of Appeal case, ***Foster Bryant Surveying Limited* v *Bryant, Savernake Property Consultants Limited*** [2007] BCC 804, deals with a situation whereby a director resigned his position and subsequently commenced new work without breaching the conflicts rule. The judgment of Rix LJ also provides a good summary of the case law in this area.

Foster Bryant Surveying Limited* v *Bryant, Savernake Property Consultants Limited [2007] BCC 804

The appellant company (S) appealed against the decision that the respondent director (B) had not been in breach of his fiduciary duties before his resignation had taken effect. S had been set up by a chartered surveyor (F) who was the majority shareholder. S had an agreement to carry out all the surveying and project management work for its largest client (C). F persuaded B, another chartered surveyor, to join him as a director and shareholder of S. B's wife also worked for S. Two years later F had lost confidence in B and made B's wife redundant. As a result B had resigned his directorship. Before B's resignation took effect C requested B to work for it under a retainer arrangement. C offered to share its work between B and S but F declined. S brought a claim against B. The judge found that B had been excluded from his role as director after his resignation,

that there had been no breach of fiduciary duty by B and that even if B had been in breach of fiduciary duty the company had suffered no loss as a result. S submitted that the judge had been wrong to find that B had been excluded from discharging his role as a director of the company as from his resignation, that he had been wrong not to recognise that what B did during his notice period between resignation and departure was a breach of fiduciary duty, and that once that breach was established, then a duty to account was inevitable and did not depend on the need to establish any loss. *Per* Rix LJ

> 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 Ltd* v *Watkins*** [2003] EWHC 186 (Ch), which Mr Livesey had himself taken largely from the judgment of Lawrence Collins J in *CMS* ***Dolphin Ltd* v *Simonet*** [2002] BCC 600 and the authorities there cited and discussed, accurately stated the law. In this court in ***In Plus Group Ltd* v *Pyke*** [2002] EWCA Civ 370; [2003] BCC 332 Brooke LJ described the ***Simonet*** analysis as 'valuable'. 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.
> > 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.
> > 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 the 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).

In the present proceedings the principles with which we are most concerned are 1, 2, 4, 5, 7, 8, 9 and 10 . . .

It may be observed that the factual situation presented by this case falls uneasily between the scenarios dealt with in that 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 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.

Regal (Hastings) Ltd* v *Gulliver [1967] 2 AC 134n; [1942] 1 All ER 378 is perhaps in many ways still the leading case. It was decided in the war and not reported otherwise than in the All England Reports until it was printed in the Law Reports as a note to ***Boardman* v *Phipps*** [1967] 2 AC 46. It is well described in *Gower and Davies' Principles of Modern Company Law* (7th edn, 2003, Sweet & Maxwell) at pp 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 . . .

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.

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 p 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 p 145F, see also at p 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 p 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 p 156C). Lord Porter said that the shares were obtained by the directors 'by reason of their position as directors' (at p 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 p 158F).

Twenty-five years later a majority of the House of Lords applied ***Regal (Hastings) Ltd* v *Gulliver*** to a somewhat similar situation in ***Boardman* v *Phipps*** [1967] 2 AC 46, save that the defendants there were a trustee and the solicitor of a trust rather than directors of a company, and the shares bought

by the defendants were bought from third parties. The defendants obtained a profit for themselves as well as for their beneficiaries in buying shares where the trust would not have been able or willing to do so, and had acted openly and honourably albeit mistakenly. On this occasion, however, their Lordships, although agreed on the principle to be applied, were divided in its application. Lord Cohen said that information was not property in the strict sense and that it did not follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity; that must depend on the facts of the case; but here in buying the shares the defendants were acting on behalf of the trust and its beneficiaries and they had put themselves in a position of conflict or possible conflict with the interests of those whom they were bound to protect (at pp 102–104). Lord Hodson thought that information could properly be described as property, albeit each case must be decided on its own facts (at p 107). Lord Guest thought the same (at p 115). However, Viscount Dilhorne and Lord Upjohn saw the matter differently, although they were agreed on the great principles at stake.

In both those cases, what happened was that the defendants obtained a profit for themselves out of property of their trust while acting as fiduciaries. However, the application of the underlying principles, that fiduciaries must not profit from their role nor put themselves in a position of conflict of interest, has raised problems in circumstances where a director resigns and reaps his profit after resignation. A number of cases, considered by the judge below, have illustrated the problems . . .

The defendants 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 and Davies*** comment (at p 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 p 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. . . .

In ***CMS Dolphin Ltd*** **v** ***Simonet*** [2002] BCC 600 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.

Lawrence Collins J considered the legal principles at [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'.

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*** [1998] Ch 439, at

> 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.