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Citation: 8 S. Afr. Mercantile L.J. 40 1996



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Tue Feb 10 07:09:03 2015

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Corporate Opportunities: A South African Update (Part 1)*

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1 Introduction

The principles of the South African company law is currently under comprehensive review to consider their possible reform.¹ One of the areas under close scrutiny is corporate governance.²

This contribution concentrates on one aspect of a director's fiduciary obligation — the appropriation of what is generally referred to as a 'corporate opportunity'.

2 Directors' and Their Fiduciary Duties

A company is a legal entity or juristic person which exists separately from its management or shareholders.³ The functions and responsibilities of corporate directors arise by virtue of this nature of a company.

Since it cannot act on its own behalf, a company's acts are conducted through representatives — its organs. One of the organs, the board of directors, is entrusted with the management of the company's business.⁴

Company management can be effective only if those who manage are allowed a certain measure of freedom and discretion in the exercise of their function. But control over management is vital in the interests of the company itself, its shareholders, and its creditors.⁵ Company directors therefore have various duties. They are generally categorized as duties of care, diligence and skill, and other duties which arise either because of the recogni-

* This article formed the basis of a paper read on 23 February 1996 at the University of the Western Cape at the congress of the Society of University Teachers of Law.

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¹ To this end, the Co-ordinating Research Institute for Corporate Law (CRIC) held a conference during July 1993 on the 'Future Development of South African Corporate Law'. At this conference it was accepted that recent national and international developments necessitate a comprehensive review of South African corporate law, and that the present system of ad hoc amendments and modifications does not lend itself to a principled reappraisal and reform of South African company law: (1994) 1 *Corporate Development Series* i.

² The recent investigations by the Cadbury and King Committees in England and South Africa respectively reflect the importance of this area of company law: see the *Report of the Committee on the Financial Aspects of Corporate Governance* (1992) ('the Cadbury Report'), and *The King Report on Corporate Governance* (1994).

³ See, generally, the authorities cited in *Hahlo's South African Company Law Through the Cases: A Source Book* 5 ed by JT Pretorius (gen ed), PA Delpont, Michele Havenga & Maria Vermaas (1991) at 9ff.

⁴ HS Cilliers, ML Benade, JJ Henning & JJ du Plessis *Corporate Law* 2 ed (1992) 133; WA Joubert (founding ed) *The Law of South Africa* vol 4(1) sv 'Companies' (by MS Blackman) (1995) par 161; JS McLennan 'Directors' Duties and Misapplications of Company Funds' (1982) 99 *SALJ* 394 at 408.

⁵ Cadbury Report par 7.2.

tion of the fiduciary nature of their office,⁶ or by reason of express statutory provisions.

It is generally accepted that the paramount fiduciary duty of directors, individually and collectively, is to exercise their powers in good faith and in the best interests of the company.⁷ Compliance with the open-ended standard of good faith must be considered against the background of the *boni mores* or legal convictions of the community as reflected in our Bill of Rights.⁸ Also noteworthy is the right freely to engage in economic activity entrenched by s 26 of the interim Constitution.

3 Corporate Opportunities

It follows from the directors' fundamental duty to act in good faith and in the best interests of the company that they may not place themselves in a position in which they have or may have a personal interest which conflicts, or may possibly conflict, with their obligations towards the company.⁹ The phrase 'may possibly conflict' connotes that the reasonable person considering the relevant facts and circumstances of the particular case would think that there was a real possibility of conflict, and not that some

⁶ The *sui generis* basis of these obligations is widely recognized and has recently been confirmed in *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 171A–B. See, generally, Michele Kyra Havenga *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* (unpublished LLD thesis University of South Africa, 1995) at 315 and the authorities cited in n86. Contra JJ du Plessis *Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure* (unpublished LLD thesis University of the Orange Free State, 1990) at 101–103; JJ du Plessis 'Direkteure se Vertrouenspligte en die Grondslag van Aanspreeklikheid vir die Verbreking Daarvan' (1993) 56 *THRHR* 11 at 31ff; JSA Fourie 'Enkele Historiese Perspektiewe op die Vertrouenspligte van Direkteure en Artikel 248 van die Maatskappywet' (1991) 2 *Stellenbosch LR* 339 at 350.

⁷ *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* 1909 ORC 65 at 76; *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464 at 479; *Levin v Felt & Tweeds Ltd* 1951 (2) SA 401 (A); *R v Herholdt & others* 1957 (3) SA 236 (A); *In re Smith and Fawcett, Limited* [1942] Ch 304, [1942] 1 All ER 542 (CA); *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929; *SA Fabrics Ltd v Millman* 1972 (4) SA 592 (A) at 596; *Novick & another v Comair Holdings Ltd & others* 1979 (2) SA 116 (W) at 130; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T) at 197; MS Blackman *The Fiduciary Doctrine and Its Application to Directors of Companies* (unpublished PhD thesis University of Cape Town, 1970); Cilliers et al op cit note 4 at 135; *Farrar's Company Law* 3 ed by John H Farrar, Nigel E Furey & Brenda M Hannigan (1991) at 383; Hahlo op cit note 3 at 376; LCB Gower *Gower's Principles of Modern Company Law* 5 ed (1992) at 551ff; Robert R Pennington *Company Law* 7 ed (1995).

⁸ See ch 3 of the Constitution of the Republic of South Africa Act 200 of 1993, which came into operation on 27 April 1994. On the Constitution, generally, see DA Basson *South Africa's Interim Constitution: Text and Notes* (1995). On ch 3, which contains the Bill of Rights, see Lourens M du Plessis 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' 1994 *TSAR* 706ff; Lourens M du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994); Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994).

⁹ *Aberdeen Rail Co v Blaikie Bros* (1854) 1 Macq 461 at 473, (1854) 2 Eq Rep 1281 (HL) at 1286; *Bray v Ford* [1896] AC 44 (HL) at 51; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Boardman & another v Phipps* [1967] 2 AC 46 (HL) at 123–124. This rule has become clouded because of its many applications: Blackman op cit note 7 at 191; Havenga op cit note 6 at 343–345.

situation can be imagined as arising which might conceivably result in a conflict.¹⁰

Because of the director's fiduciary obligation, he or she is sometimes obliged to acquire economic opportunities for the company, if they are acquired at all. If the director acquires these opportunities for him- or herself, it is said that he or she has acquired a 'corporate opportunity'. The law then refuses to give effect to the director's intention and treats the acquisition as having been made on behalf of the company.¹¹ Accordingly, the company may claim property thus acquired from the delinquent director.¹² In addition,¹³ or where such a claim is no longer possible,¹⁴ the company may claim any profit the director may have made as a result of his breach of duty, or damages in respect of any loss caused by it to the company.¹⁵ In appropriate circumstances, where the breach of fiduciary duty is about to take place, a court order may be obtained to prohibit the impending action.¹⁶ The director may be dismissed and will have no claim for damages on the ground of breach of contract.¹⁷

3.1 Definition of a Corporate Opportunity

Defining a corporate opportunity has proved to be elusive.¹⁸ In certain instances, however, it may be of cardinal importance to establish whether a particular advantage may be regarded as such an opportunity. The validity of a decision to ratify and of the locus standi of members to institute derivative actions may depend on this definition.¹⁹

¹⁰ *Boardman v Phipps* supra note 10 at 124; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, [1972] 2 All ER 162 at 172; Joubert op cit note 4 par 223.

¹¹ Hahlo op cit note 3 at 342; *African Claim and Land Co Ltd v WJ Langermann* 1905 TS 494 at 505; *Robinson v Randfontein Estates* supra note 9 at 179-190 and 200.

¹² *Magnus Diamond Mining v MacDonald* supra note 6; *Robinson v Randfontein Estates* supra note 9 at 241; *Cook v GS Deeks & others* [1916] 1 AC 554 (PC).

¹³ It is submitted that this claim is not in the alternative, as suggested by Joubert op cit note 4 par 228.

¹⁴ *Henochsberg on the Companies Act* 5 ed by Phillip M Meskin (ed) (1994) at 470 cites the example where the director has already sold the opportunity to a third party. In this regard, see *Robinson v Randfontein Estates* supra note 9.

¹⁵ *Robinson v Randfontein Estates* supra note 9; *Industrial Development Consultants Ltd v Cooley* supra note 10 at 172; *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, (1973) 40 DLR (3d) 371 at 392; Henochsberg op cit note 15 at 470. Action may be instituted under the *actio legis Aquiliae*.

¹⁶ SJ Naudé *Die Regsposisie van die Maatskappydirekteur met Besondere Verwysing na die Interne Maatskappyverband* (1970) at 142n3 mentions the example of a director who is about to exercise his power for another purpose than that for which it was conferred upon him.

¹⁷ *Nourse v Farmers' Co-operative Co Ltd* (1905) 19 EDC 291 at 317. If no contract exists between the director and the company, the issue of a claim for damages does not arise. See, generally, JJ du Plessis *Ontslag van Maatskappydirekteure in die Suid-Afrikaanse Reg* (unpublished LLM dissertation University of the Orange Free State, 1986) at 54ff; Naudé op cit note 16 at 136n1.

¹⁸ Peter Brews 'Defining Corporate Opportunity — In Search of an Acceptable Approach' (1986) 10 *SA Commercial LJ* 4.

¹⁹ Leon van Rooyen *Die Geldigheid van die Besluite van 'n Algemene Vergadering in die Maatskappyreg* (unpublished LLD thesis Rand Afrikaans University, 1983) at 507n89.

Generally, it can be stated that this term connotes any economic or business opportunity, whether property or rights, which rightfully 'belongs' to the company or to which the company has some kind of claim.²⁰ The duty not to appropriate such an opportunity arises from the particular relationship which exists either between the director concerned and his or her company or between the company and the particular opportunity.²¹ The opportunity can pertain to material or immaterial property.²²

Various tests have been suggested to determine whether a particular opportunity is corporate in nature. The widest approach is to demand that directors should pass on to the company any and all opportunities of which they become aware, irrespective of the nature of the opportunity and its affinity to company interests, and irrespective of the manner in which knowledge of such an opportunity was acquired.²³ Every opportunity would therefore prima facie constitute a corporate opportunity. The narrowest approach is to state that only those opportunities in which a company has an existing legal right are corporate opportunities. The directors would then be free to appropriate almost every opportunity for their personal use.²⁴ In between these two poles, a number of tests, originating primarily in American law, have been applied.²⁵

The 'position test' resembles the secret profit rule. The existence or non-existence of a corporate opportunity is made dependent on the circumstances surrounding the manner in which the director became aware of the opportunity. If it was by virtue of his or her position as director, the opportunity is regarded as corporate in nature. In each case the court must therefore determine whether the director was acting as a fiduciary or in his or her personal capacity.²⁶

²⁰ Henochsberg op cit note 14 at 470–471; Joubert op cit note 4 par 228. Farrar et al op cit note 7 at 422 regard a corporate opportunity as a 'corporate asset which the directors cannot therefore appropriate to their own use'. RC Beuthin 'Corporate Opportunities and the No-profit Rule' (1978) 95 *SALJ* 458 describes a corporate opportunity as property or economic opportunities which either belong to the company, or in regard to which the company has some kind of claim (at 462). In this context, information which comes to a director's knowledge is included in the concept 'opportunity': *Cranleigh Precision Engineering Ltd v Bryant & another* [1965] 1 WLR 1293, [1964] 3 All ER 289; *Industrial Development Consultants Ltd v Cooley* supra note 10; Henochsberg op cit note 14 at 471. See *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 for corresponding authority in respect of partnerships.

²¹ *Cook v GS Deeks* supra note 12 at 561 and 563; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 179, 187, 208–211, 218, and 222.

²² *Cranleigh Precision Engineering Ltd v Bryant* supra note 20 (director held accountable for resigning directorship to obtain an exclusive licence under a patent, and forming a new company to manufacture the patented product with a development added to it); *Fine Industrial Commodities Limited v Powling* (1954) 71 RPC 253; *Thomas Marshall (Exporters) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193.

²³ Brews op cit note 18 at 9.

²⁴ *Idem* at 9.

²⁵ Brews op cit note 18 at 9ff; Hahlo op cit note 3 at 423.

²⁶ *Industrial Development Consultants Ltd v Cooley* supra note 10 at 173–174; Brews op cit note 18 at 10; Beuthin op cit note 20 at 458; Richard Brusser 'The Director's Duty of Loyalty: Corporate Opportunities Revisited' (1982) 6 *SA Company LJ* 69 at 72; Stanley M Beck 'The Quickening of Fiduciary Obligation: *Canadian Aero Services v O'Malley*' (1975) 53 *Canadian Bar R* 771 at 782; DD Prentice '*Regal (Hastings) v Gulliver* — The Canadian Experience' (1967) 30 *Modern LR* 450 at 453.

The 'conflict test' rests upon the principle that a fiduciary should not place him- or herself in a position where his or her private interests and duty to the company conflict. Under this test, the existence of conflict per se turns an ordinary opportunity into one of a corporate nature.²⁷ An opportunity will, accordingly, be deemed corporate in nature if it causes either a conflict of interest, or the possibility of such a conflict, between the director's personal interests and his or her duties to the company.²⁸

The 'expectancy test' derives from the American decision in *Lagarde v Anniston Lime and Stone Co.*²⁹ The court followed a narrow approach: it held that a corporate opportunity was an opportunity in which the company had an expectancy growing out of an existing right. In later applications of the test liability is incurred when the company has developed an interest in or is actively pursuing the particular opportunity.³⁰ No existing right is required. This test is representative of the approach followed by American courts, which emphasize the proprietary rights of a company to opportunities which are considered corporate in nature.³¹ A criticism which has been levelled at it is that it enunciates the obvious — that which the corporation is interested in, or actively pursuing, will obviously constitute a corporate opportunity. It is the opportunities which the company may be interested in pursuing or acquiring that present the actual problems. But these opportunities fall beyond the ambit of the test.³²

The 'present interest test', also formulated in *Lagarde*,³³ deems any opportunity a corporate opportunity if the company concerned has an existing interest in it. In *Lagarde*, the court held that the legal restrictions which rest upon directors in their acquisitions are generally limited to property wherein the corporation has an already existing interest, or in which it has an expectancy growing out of an existing right, or to cases where the directors' interference will in some degree balk the corporation in effecting the purposes of its creation. Modern American decisions consider the first two alternatives together to form the 'interest or expectancy' test.³⁴ The third

²⁷ Brews op cit note 18 at 6.

²⁸ *Boardman v Phipps* supra note 9 at 86; *Queensland Mines Ltd v Hudson & others* (1978) 52 ALJR 399 (PC).

²⁹ 126 Ala 26 (1900).

³⁰ D Prentice 'Corporate Opportunity — Windfall Profits' (1979) 42 *Modern LR* 215.

³¹ Brews op cit note 18 at 7.

³² *Idem* at 11.

³³ Supra note 29.

³⁴ See *Blaustein et al v Pan American Petroleum & Transport Co et al* 56 NE 2d 705 (NY 1944) at 714; *Rosenblum v Judson Engineering Corp et al* 109 A 2d 558 (New Hampshire 1954) at 563; *Alvest Inc v Superior Oil Corporation* 398 P 2d 213 (Ala 1965) at 215; *Northwestern Terra Cotta Corporation v Wilson* 219 NE 2d 860 (Ill 1966) at 864; *Burg v Horn* 380 F 2d 897 (2nd Cir 1967), discussed in 'Corporate Opportunity — Property Acquired by Directors of Close Corporations for Their Own Benefit Held not to Be a Corporate Opportunity' (1968) 43 *New York Univ LR* 187 at 900; *Kaplan v Fenton* 278 A 2d 834 (Del 1971) at 836; *Abbott Redmont Thinline Corporation v Redmont* 475 F 2d 85 (2nd Cir 1973) at 89; *Patient Care Services SC v Segal* 337 NE 2d 471 (Ill 1975) at 480; *Zidell v Zidell Inc* 560 P 2d 1091 (Or 1977) at 1093–1094; *Schreiber v Bryan* 396 A 2d 512 (Del 1978) at 519; *Science Accessories Corporation v Summagraphics Corporation* 425 A 2d 957 (Del 1980) at 963; *Southeast Consultants Inc v McCrary Engineering Corporation* 273 SE 2d 112 (Ga 1980) at 117; *Farber v Servan Land Company Inc* 662 F 2d 371 (5th Cir 1981) at 378; *United Seal and Rubber Company Inc v Bunting* 285 SE 2d 721 (Ga 1982) at 722–723; *Taylor v Terry* 649 SW 2d 392 (Ark 1983) at 393.

alternative formulated in *Lagarde*, 'where the directors' interference will in some degree balk the corporation in effecting the purposes of its creation', has, however, not been applied as an additional test.³⁵ The present interest test, too, emphasizes the American approach to rely on proprietary rights.³⁶

The essence of the 'line of business test' is that an opportunity, to be corporate in nature, must correspond with the existing and prospective interests or activities of the corporation concerned.³⁷ This test was applied in the leading Delaware decision in *Guth v Loft Inc.*³⁸ Subsequent decisions in Delaware and other jurisdictions have since adopted it.³⁹ Later decisions confirm that the line of business test is cumulative to the interest or expectancy test. An opportunity will therefore be a corporate one if it meets either the interest or expectancy or the line of business tests.⁴⁰ Thus the range of opportunities which may be deemed corporate in nature, and accordingly possible liability incurred by directors, is wider. This is in accordance with the trend to impose wider liability than would be imposed under the general prohibition against injury to the corporation.

The view that any opportunity which falls within the line of business of a corporation constitutes a corporate opportunity, has, however, been considered too general in some American jurisdictions. In *Burg v Horn*⁴¹ the court held that a New York court would, in each case, by consideration of the relationship between the director and the corporation, have to determine whether a duty to offer the corporation all opportunities within its 'line of business' can fairly be implied.⁴² The present and potential business of a company must therefore be established, after which it can be determined whether the particular opportunity fell within its ambit.

According to the 'fairness test', ethical standards of what is fair and equitable in the particular circumstances are applied.⁴³ If the circumstances indicate that it would be unfair for the fiduciary to take advantage of a particular opportunity, the opportunity will be deemed to be corporate. It is clear from American case law that decisions regarding fairness depend

³⁵ Brews op cit note 18 at 7.

³⁶ *Ibid.*

³⁷ Brews op cit note 18 at 7; D Menzies 'Corporate Opportunity' (1961) *Harvard LR* 765 at 768.

³⁸ 5 A2d 503 (Del 1939), discussed by CBK 'Corporations — Corporate Expectancy — Executive's Duty to Embrace Opportunity on Behalf of Corporation' (1939) 13 *Temple Univ LQ* 534 and Patricia Mahoney 'Corporations — Doctrine of Corporate Opportunity' (1951) 35 *Marquette LR* 44.

³⁹ See, for example, *Diedrick et al v Helm et al* 14 NW 2d 913 (Minn 1944) at 919; *Blaustein v Pan American Petroleum and Transport Co* supra note 34 at 713–714; *Central Ry Signal Co v Longden* 194 F 2d 310 (CA 1952) at 318–319; *Kerrigan v Unity Savings Association et al* 317 NE 2d 39 (Ill 1974) at 43–44; *Science Accessories Corporation v Summagraphics Corporation* op cit note 34 at 963; *Peterson Welding Supply Company Inc v Cryogas Products Inc* 467 NE 2d 1068 (Ill 1984) at 1072.

⁴⁰ *Equity Corp v Milton* 221 A 2d 494 (Del 1966) at 497; Robert Charles Clark *Corporate Law* (1986) at 228.

⁴¹ *Supra* note 34.

⁴² At 900.

⁴³ This test originated in *Durfee v Durfee & Canning Inc* 80 NE 2d 522 (Mass 1948).

largely on whether the opportunity presented is speculative and in the line of the corporation's business. If it is in the line of the corporation's business, the corporate opportunity doctrine is likely to be considered violated.⁴⁴ Opportunities that are highly speculative or of a different type than that ordinarily pursued by the corporation are likely to result in a contrary determination.⁴⁵ The outcome of a case has often depended upon whether the corporations involved had taken an active interest in the opportunities presented.⁴⁶

In *Miller v Miller*⁴⁷ the Minnesota Supreme Court combined the 'line of business' and 'fairness' tests. This approach has not escaped criticism and has not been widely followed.⁴⁸

South African courts have not yet laid down conclusive guidelines in respect of defining a corporate opportunity. However, decisions here and in other Commonwealth countries indicate that generally the test that should be applied is whether an opportunity can in all the circumstances be said to actually belong to the company,⁴⁹ or whether the company was justifiably relying upon the director either to acquire the opportunity for it,⁵⁰ or to give the company the chance of acquiring it,⁵¹ or at least of attempting to acquire it.⁵² The opportunity should therefore not only be in the line of business of the company, but in all the circumstances the company should be seen to have been justifiably relying upon the director(s) to acquire it or to assist in its acquisition for the company.⁵³

3.2 Developments in Some Other Legal Systems

American courts have, during the past century, developed the 'corporate opportunity doctrine', a special corporate doctrine which overlaps with,

⁴⁴ *Alvest Inc v Superior Oil Corporation* supra note 34 at 215; *Schreiber v Bryan* supra note 34 at 519.

⁴⁵ *New v New* 306 P 2d 987 (Cal 1957); *Fliegler v Lawrence* 361 A 2d 218 (Del 1976) at 224. In *New* highly speculative oil well drilling was not considered to be a corporate opportunity which the corporation could have pursued.

⁴⁶ *Johnston v Greene* 121 A 2d 919 (Del 1956) at 924-925; *Paulman v Kritzer* 219 NE 2d 541 (Ill 1966) at 546; *Burg v Horn* supra note 34 at 899; *Tower Recreation Inc v Beard* 231 NE 2d 154 (Ind 1967) at 156; *Epperly v E & P Brake Bonding Inc* 348 NE 2d 75 (Ind 1976) at 83; *Borden v Sinskey* 530 F 2d 478 (3rd Cir 1976) at 490; *Maryland Metals Inc v Metzner* 382 A 2d 564 (Md 1978) at 568-570; *Southeast Consultants Inc v McCrary Engineering Corporation* supra note 34.

⁴⁷ 222 NW 2d 71 (Minn 1974).

⁴⁸ Clark op cit note 40 at 229; Victor Brudney & Robert Charles Clark 'A New Look at Corporate Opportunities' (1981) 94 *Harvard LR* 998 at 998n2; Robert W Hamilton *Cases and Materials on Corporations including Partnerships and Limited Partnerships* 4 ed (1990) 819.

⁴⁹ In *Menier v Hooper's Telegraph Works* (1874) 9 LR Ch App 350 at 353 the court found that the directors had 'obtained certain advantages by dealing with something which was the property of the whole company'.

⁵⁰ *Cook v GS Deeks* supra note 12; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9.

⁵¹ *Canada Safeway Ltd v Thompson* [1951] 3 DLR 295.

⁵² *Industrial Development Consultants Ltd v Cooley* supra note 10.

⁵³ *Beuthin's Basic Company Law* 2 ed by RC Beuthin & SM Luiz (1992) at 227. The King Committee favours the 'line of business' test in its recommendation that managers shall not acquire for the benefit of the enterprise any economic opportunity which is in the same line of business as the enterprise they represent: *Code of Ethics for Enterprises and All Who Deal with Enterprises*, a supplement to the King Report note 2 para 7.3.4.

but operates in addition to, the usual fiduciary principles.⁵⁴ It entails that if a business opportunity is deemed to be a corporate opportunity of a given corporation, the fiduciaries of that corporation may not take or usurp the opportunity for themselves.⁵⁵ Its application was, at first, quite restricted.⁵⁶ Later decisions illustrate the gradual expansion of the doctrine.⁵⁷

The relevant rules in English law are based almost exclusively upon principles peculiar to Equity.⁵⁸ A fiduciary duty of loyalty and good faith between a director and his or her company is generally recognized.⁵⁹ Directors are also regarded as having some of the attributes of trustees, notably as regards assets of the company which are in their hands or under their control.⁶⁰ It was believed that the property of a corporation was held on trust by the corporation for its members. Since it would be the directors who managed the property, they would be liable as 'constructive trustees' if they misapplied it.⁶¹

Some English commentators regard an economic opportunity acquired for a director's personal gain in circumstances when he or she is regarded as being under an obligation to acquire it for his or her company, as a corporate asset,⁶² to which a constructive trust may be attached. Others are

⁵⁴ See, generally, Havenga op cit note 6 at 163ff and the authorities cited there.

⁵⁵ In this article, citations of American decisions refer to the National Reporter System. As parallel citations were not available, an indication is given of the state in which the decision was handed down.

⁵⁶ In the leading case of *Lagarde v Anniston Lime and Stone Co* supra note 29 the court stated that the legal restrictions imposed upon acquisitions by directors for their own benefit were limited to property in which the corporation had an interest or expectancy growing out of an existing right, or to cases where the directors' interference would in some degree frustrate the corporation in effecting the purposes of its creation.

⁵⁷ In *Rosenblum v Judson Engineering Corp* supra note 34, for example, the acquisition of a new business was not essential to the corporation's present needs. Still, the court held that the directors could be liable under the corporate opportunity doctrine. The issue to be determined was whether the business conducted by the directors personally was so closely associated with the existing and prospective activities of the corporation that the defendants should fairly have acquired that business for, or have made it available to, the corporation.

⁵⁸ See, generally, Havenga op cit note 6 at 90ff.

⁵⁹ See the authorities cited in note 7 above.

⁶⁰ *Charitable Corporation v Sutton* (1742) 2 Atk 400; *In re Lands Allotment Co* [1894] 1 Ch 616 at 631; *Great Eastern Railway Company v Turner* (1872) 8 LR Ch App 149 at 152; *Percival v Wright* [1902] 2 Ch 421 at 425; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, [1968] 2 All ER 1073; *In re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 426; *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation & others* [1986] 1 Ch 246; AJ Boyle (gen ed) & Richard Sykes (cons ed) *Gore-Browne on Companies* 44 ed (1986) para 27.2.3.

⁶¹ Fourie op cit note 6 at 341; Gower op cit note 7 at 550; Charles Harpum 'The Stranger as Constructive Trustee (Part I)' (1986) 102 *LQR* 114. On constructive trusts generally, see RP Austin 'Constructive Trusts' in PD Finn (ed) *Essays in Equity* (1985) at 196; PV Baker & P St J Langan *Snell's Principles of Equity* 28 ed (1982) at 192ff; *Hayton and Marshall Cases and Commentary on the Law of Trusts* 9 ed by David J Hayton (1991) at 301-377; *Underhill & Hayton Law Relating to Trusts and Trustees* 14 ed by David J Hayton (1987) at 14 and 28. On constructive trusts in company law, see DW Fox 'Constructive Trusts in a Company Setting' 1986 *J of Business L* 23ff. LS Sealy 'The Director as Trustee' 1967 *Cambridge LJ* 83n3 submits that the suggestion that directors could be regarded as 'constructive trustees' under this theoretical trust, should not be supported. The doctrine of constructive trusts is not recognized in South African law.

⁶² *Menier v Hooper's Telegraph Works* op cit note 49; Farrar et al op cit note 7 at 422.

more hesitant.⁶³ It is usually attempted to define a corporate opportunity by looking at the source of the opportunity.⁶⁴ But English company law does not recognize any separate doctrine to deal with this situation. Consequently the general fiduciary principles that a director may not make secret profits from his or her office, nor place himself or herself in a conflict of interest with the company, and that he or she has a duty to act bona fide in the interests of the company are applied.

Perhaps not unsurprisingly, because of its proximity to America, Canada was the first Commonwealth country expressly to acknowledge a corporate opportunity doctrine, in the noteworthy decision in *Canadian Aero Service Ltd v O'Malley*.⁶⁵ Various factors were listed by the court in terms of which, according to this doctrine, it can be established whether a director should incur liability for the appropriation of a corporate opportunity. They include the office or position held, the nature of the particular opportunity, the relationship of the director or officer to that opportunity, and the amount of knowledge possessed by the fiduciary.⁶⁶ However, the decision warns against the 'imprecise ethical standard' which it suggests has emerged from American case law.⁶⁷ The decision leaves no doubt that in addition to directors, some levels of senior, non-directorate management may also owe fiduciary obligations to their company.⁶⁸ New Zealand courts have followed *O'Malley* in a number of cases.⁶⁹ In Australia, too, there have been indications that the content of fiduciary duties will not necessarily be the same for all cases,⁷⁰ so that it may be possible to develop a separate doctrine.⁷¹

3.3 South African Case Law

The general principles regarding the accountability of agents for secret profits under South African law are set out in *Transvaal Cold Storage Co*

⁶³ LS Sealy *Cases and Materials in Company Law* 5 ed (1992) 269.

⁶⁴ *Burland & others v Earle & others* [1902] AC 83 (PC); *Industrial Development Consultants Ltd v Cooley* supra note 10 at 173–174; Farrar et al op cit note 7 at 422ff.

⁶⁵ Supra note 15. This decision was followed, inter alia, in *Abbey Glen Property Corp v Stumborg* (1976) 65 DLR (3d) 235, (1978) 85 DLR (3d) 35 (Alberta SC); *Martin v Columbia Metals Corporation Ltd* (1981) 12 BLR 72 (Ontario SC); *The Jiffy People Sales (1966) Ltd et al v Eliason et al* (1975) 58 DLR (3d) 439; *Weber Feeds Ltd v Weber* (1979) 24 OR (2d) 754 (Ontario SC).

⁶⁶ At 391.

⁶⁷ At 385.

⁶⁸ At 381–382.

⁶⁹ For example, *SSC&B: Lintas New Zealand Ltd v Murphy* (1981–1983) 1 NZCLC 98,384; *Pacifica Shipping Co Ltd v Andersen* (1985) 2 NZCLC 99,306.

⁷⁰ RP Austin 'Fiduciary Accountability for Business Opportunities' in PD Finn (ed) *Equity and Commercial Relationships* (1987) 141 at 159; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 60 ALR 741. In this case a commercial arrangement was held to give rise to fiduciary duties.

⁷¹ Austin op cit note 70 at 159.

Ltd v Palmer.⁷² The decision in *Robinson v Randfontein Estates Gold Mining Co Ltd*⁷³ dealt specifically with company directors. The Appellate Division confirmed that where one person stands to another in a position of confidence involving a duty to protect the interests of that other, he or she is not allowed to make a secret profit at the other's expense or to place him- or herself in a position where his or her interests conflict with his or her duty.⁷⁴ Innes CJ held that a transaction which falls within this sphere can be validated by the free consent of the principal following only upon full disclosure by the agent.⁷⁵ The director was ordered, in his capacity as mandatory, to account for profits made from the sale of the asset to the company. The court took a narrow view of the profit rule. It held that the general rule determined that if a director learned of a business opportunity in any sphere, he was under no obligation to put his company first unless it could be shown that there was a fiduciary relationship which 'directly affected' the acquisition.⁷⁶

In *Robinson*, it was clearly the duty of the board of directors to acquire the particular asset.⁷⁷ The fact that the seller had a predilection in favour of the defendant and would only have offered the property to any other party if the defendant refused it, did not alter this fact.⁷⁸ It can be inferred that the defendant had at least an implied mandate to purchase the asset for the company. The case is therefore not strictly speaking an example of the appropriation of a corporate opportunity, but an application of the secret profit rule.⁷⁹ Application of the principles in respect of secret profits sufficed to resolve the issue.⁸⁰

In *Bellairs v Hodnett & another*,⁸¹ the director of a company which acted as a property developer, purchased a lot for himself and not for the company. The Appellate Division held that the business of the company had been limited to the development of two specific properties. Since the company, represented by the minds of the directors, never contemplated further

⁷² 1904 TS 4. Innes CJ held that the principle of an agent's liability to account for profits is not based upon the fact that he or she has prevented the principal from earning those profits. Rather, it is founded on his or her duty in good faith to hand over to the employer every advantage directly or indirectly connected with the agency, except for the remuneration agreed upon (at 21). Although the defendant in this case was the manager, not a director, of the plaintiff company, the principles apply equally to company directors.

⁷³ *Supra* note 9.

⁷⁴ At 177.

⁷⁵ At 178.

⁷⁶ At 179. See also Brusser *op cit* note 26 at 76.

⁷⁷ Per Solomon JA at 229.

⁷⁸ Per Solomon JA at 239–240.

⁷⁹ Brews *op cit* note 18 at 13.

⁸⁰ The importance of drawing this distinction lies in the issue of ratification, which is discussed in the second part of this article.

⁸¹ 1978 (1) SA 1109 (A), noted by Beuthin *op cit* note 20 at 458; Brews *op cit* note 18 at 13–14; Bernard J Cartoon 'Taking Advantage of a Corporate Opportunity — The Legacy of Bellairs v Hodnett' (1980) 43 *THRHR* 67; Michael Larkin 'The Fiduciary Duties of the Company Director' 1979 *SA Company LJ* E1 at E-39–40; L van Rooyen 'Bellairs v Hodnett & another 1978 1 SA 1109 (A)' 1978 *TSAR* 160ff.

developments, no duty existed which made it encumbent upon Bellairs to pass on the opportunity.⁸²

The second aspect of the company's claim in *Bellairs* related to a property which had been offered to the company, but against the purchase of which Bellairs had advised. The company therefore did not buy it although it was suitable for its business and the company possessed the required financial resources. It was alleged that, since Bellairs had subsequently purchased the property for himself, he had breached his fiduciary duty to the company, and was liable to account for the profit derived from the acquisition. The court regarded the fact that the transaction was beyond the actual scope of the company's operations as the decisive factor. I believe that this is wrong. A director who acquires knowledge of a profit-making venture at a board meeting and recommends that the company does not accept the opportunity, surely places him- or herself in a position where his or her personal interests conflict with those of the company if he or she later acquires the opportunity for him- or herself.⁸³

As had been the case in the lower court,⁸⁴ the issue was regarded as one concerning competition between a director and his company.⁸⁵ Therefore, no principles were enunciated in respect of corporate opportunities.⁸⁶ The court probably found no need to consider this aspect in view of the particular facts and circumstances of the case. The relationship between Bellairs and Hodnett, likened to that between partners, was emphasized.⁸⁷ It is submitted that general principles relating to corporate opportunity matters

⁸² At 1129C and 1132F. This is in accordance with the 'line of business' approach, discussed above. The fact that the company was, in its memorandum, empowered to acquire further property was not regarded as of any consequence by the court. The judges were concerned not with the cold print of the memorandum, but with what business the company was actually carrying on or intended to carry on (at 1128F-G). This seems wrong. I think that effect should be given to the memorandum, as the company is accepted as a separate legal entity and the implications which arise from that should therefore be fulfilled. See also Brusser op cit note 26 at 78; Cartoon op cit note 81 at 70.

⁸³ See also Cartoon op cit note 81 at 71, who concludes, correctly, that the decisive factor should have been the actual conduct of the director, who acquired for himself a profit which, as director, he had deliberately refused on behalf of the company.

⁸⁴ The decision of the lower court was not reported, but large extracts of it appear in the report of the judgment on appeal.

⁸⁵ The approaches of the courts differed. The lower court was largely influenced in determining the scope of the company's business by the fact that the company was a separate legal persona, distinct from the only two directors and shareholders. The Appellate Division held that the business of the company, although it is a separate legal persona, does not transcend the contemplation of the persons embarking on a joint venture and employing the company as the means to achieve their object (at 1131H).

⁸⁶ Cartoon op cit note 81 at 71; JJ du Plessis 'The Duties of Directors with Special Reference to Deposit-taking Institutions' 1993 *TSAR* 57 at 59.

⁸⁷ At 1130-1131. In view of the unique circumstances in which the company had been formed and in which its business was conducted, the application of partnership principles can be justified. See also Brews op cit note 18 at 13-14; Du Plessis op cit note 86 at 59; Van Rooyen op cit note 81 at 164. It is suggested that courts should confine the approach taken in *Bellairs* to companies which are analogous to partnerships. In respect of larger companies, the Commonwealth position should be followed.

should, therefore, not be derived from the decision.⁸⁸ Although the outcome of the case seems fair in the circumstances, the approach indicated is contrary to that of the law in England and other Commonwealth countries, where an attempt is being made to modernize the law of corporate opportunity by widening the ambit of the director's duty of loyalty.⁸⁹

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*⁹⁰ a claim for certain interdicts and damages was based on unlawful competition in relation to the manufacture and sale of various guano-based fertilisers. One of the defendants had been the managing director of the company (Atlas). Claims against him were, in part, based on alleged breaches of his duty of good faith. The managing director of the plaintiff company had resigned his office. While serving the period of notice under his service contract, he took steps to create the defendant company. He also sabotaged the plaintiff company's chances to obtain long-term favourable raw material contracts, concluded these contracts for his own benefit and persuaded certain employees (among them, the sales manager) of the plaintiff company to resign with a view to joining the defendant company. Van Dijkhorst J held that the managing director had acted in breach of his fiduciary duties in diverting the contracts to himself and in inducing the employees to join his company.⁹¹ The setting up of a competitive company per se was, however, not regarded as an unlawful act.⁹²

In respect of the position of trust occupied by a director in relation to his company, the court confirmed that it is a director's duty to act for the company's, rather than his own, benefit.⁹³ Accordingly, the plaintiff was en-

⁸⁸ Contra Beuthin op cit note 20 at 466, who suggests that it can be inferred from the decision that the court found no corporate opportunity. An interesting aspect of the *Bellairs* decision is that the court did not find it necessary to consider how *Bellairs* obtained the property. This is explained by Larkin op cit note 81 at E-40 on the basis that once there is no competition it is irrelevant that the director may have obtained a profit by reason of holding office. Beuthin op cit note 20 at 466-467 stresses the importance of the agreement between the particular shareholders and contends that it would be wrong in principle to assume that simply because parties in the positions of the directors in *Bellairs* have agreed that it will not be necessary for the company to be given a chance of acquiring certain opportunities, they have also in this way agreed that each of them is free to acquire those opportunities for himself. I endorse this view.

⁸⁹ See, for example, *Industrial Development Consultants Ltd v Cooley* supra note 10; *Canadian Aero Service Ltd v O'Malley* supra note 15; *Abbey Glen Property Corp v Stumborg* supra note 65. These cases indicate that, although the facts and circumstances of each particular case remain important, a director is under a strict obligation not to place him- or herself in a position where his or her own interests conflict with those of the company, including those opportunities in which the company might be interested.

⁹⁰ Supra note 7, discussed by Michael Larkin 'M/D Under Notice — Duty of Good Faith' 1981 *SA Company LJ* E-29 and 1981 *Annual Survey of SA Law* at 311-315.

⁹¹ At 197F.

⁹² At 199B.

⁹³ At 197-198. See also *Cook v GS Deeks* supra note 12 at 563; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 177-180; *R v Herholdt* supra note 7 at 258; *S v De Jager & another* 1965 (2) SA 616 (A) at 625. In *Atlas* the position of trust and fiduciary duty of a director were connected to his position as 'agent' of the company. I have suggested elsewhere that the fiduciary duty owed by a company director should not be linked to his acting as agent of the company, but rather stems from his position of power in relation to the company: Michele Havenga 'Company Directors — Fiduciary Duties, Corporate Opportunities and Confidential Information' (1989) 1 *SA Merc LJ* 122 at 123.

titled to damages which were proved to have resulted from the appropriation of the corporate opportunity — the conclusion of the raw-material contracts.⁹⁴

The decision in *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC & others*⁹⁵ confirms the duty of a director not to make personal use of confidential information, which he acquired by reason of and in the execution of his office, to acquire a business opportunity for himself. With regard to a possible breach of the fiduciary duties owed to the company, Goldstone J indicated that these duties extend beyond instances where the director acts as an agent of the company.⁹⁶

4 Conclusions

Corporate opportunity issues are often resolved on the basis of the secret profit rule — that a director may not obtain any advantages in the course and execution of his or her office other than that to which he or she is entitled by virtue of holding such office.⁹⁷ In many instances, South African courts do not mention corporate opportunities as such, and possible competition between the director and his or her company is the crucial issue.⁹⁸

But the secret profit rule can also be applied in circumstances unrelated to the appropriation of corporate opportunities. A director may, also, learn of a corporate opportunity in other circumstances than by virtue of his or her office. In *Cooley*,⁹⁹ for example, the opportunity was offered to the director in his private capacity.¹⁰⁰ The fundamental distinction between taking a corporate opportunity and making a secret profit is that in the latter instance the profit is not necessarily made at the expense of the company, but it was obtained in some way as a result of the director's office.¹⁰¹ When a corporate opportunity is appropriated, it is deemed to be at the expense of the company, but the opportunity was not necessarily acquired by virtue of the director's position as such. There are other differences. The secret profit rule extends beyond the taking of corporate opportunities. It extends to all kinds of fiduciary relationships, including non-commercial ones.¹⁰²

⁹⁴ At 197F–H. Van Dijkhorst J did not use the term 'corporate opportunity'. The court's consideration of the issue of unfair competition is discussed in the second part of this article.

⁹⁵ 1988 (2) SA 54 (T). For the facts of the case, see *Havenga* op cit note 93 at 122–123.

⁹⁶ At 65B–G. However, because of the urgency of the matter before him, the judge assumed that a director's fiduciary duties so arise (at 67A).

⁹⁷ Naudé op cit note 16 at 116 (translation by Larkin op cit note 81 at E-31). See also *Blackman* op cit note 7 at 384, who notes that since our law is largely English law, it is hardly surprising that, in the few cases in South African law dealing with these situations, our courts have relied almost exclusively upon English authority.

⁹⁸ For example, *Bellairs v Hodnett* supra note 81; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* supra note 7.

⁹⁹ Supra note 10.

¹⁰⁰ *Beck* op cit note 26 at 782 and *Prentice* op cit note 26 at 453 suggest that opportunities do not come to directors in any particular capacity.

¹⁰¹ On the secret profit rule generally, see *Havenga* op cit note 6 at 69–74 and the authorities cited there.

¹⁰² See, for example, *Boardman v Phipps* supra note 9, where the defendants were not company directors, but a trustee and the solicitor to a trust.

Furthermore, the secret profit rule extends to all kinds of collateral profits, whereas corporate opportunity matters are restricted to the exploitation of business opportunities. The secret profit rule will, therefore, not always adequately resolve corporate opportunity matters.

The reported decisions show that there are at least three situations in which a director has a duty to acquire an opportunity for his company.¹⁰³

In the first instance, the director is under this duty if he or she has been given, expressly or impliedly, a specific mandate either to acquire the particular opportunity for the company,¹⁰⁴ or to inform the company as to its suitability.¹⁰⁵ In appropriate circumstances, for example, if a director has a mandate to purchase a particular asset for the company, the secret profit rule will suffice. But a corporate 'opportunity' also extends beyond the purchase of assets.¹⁰⁶ It connotes any chance, occasion, happening, or suitable circumstance.¹⁰⁷ When it comes to the issue of ratification the distinction between making of secret profits and appropriation of a corporate opportunity may be vital.

Secondly, a director must acquire an opportunity for his or her company if he or she, alone or with other directors, is given a general mandate to acquire particular types of opportunities for the company or to pass information regarding such opportunities to it.¹⁰⁸ The mandate may be express or implied.¹⁰⁹ A mandate will be inferred where the management of the company's business, or its business in regard to transactions of the kind in question, has been entrusted to the director, or he or she assumes control over the management with the acquiescence of the other directors.¹¹⁰ A managing director will normally resort under this category.¹¹¹ A director is also under this duty if he or she actually controls the company or those empowered to manage its affairs that the company cannot acquire opportunities, or that particular opportunity, without his or her consent.¹¹² Usually a mandate will be inferred in these circumstances. But

¹⁰³ See, generally, Joubert op cit note 4 par 228.

¹⁰⁴ *Burland v Earle* supra note 64 at 98–99; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9.

¹⁰⁵ *Olifants Tin 'B' Syndicate v De Jager* supra note 20.

¹⁰⁶ Beck op cit note 26 at 787 where the author indicates that the Canadian corporate opportunity doctrine is not circumscribed by any notion of 'commission or mandate to purchase'.

¹⁰⁷ *The Collins Concise Dictionary*. Webster defines an 'opportunity' as 'an appropriate or convenient time or occasion', where it is defined as a 'favorable position or chance'.

¹⁰⁸ *Cook v GS Deeks* supra note 12; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9; *Industrial Development Consultants Ltd v Cooley* supra note 10.

¹⁰⁹ *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9.

¹¹⁰ Joubert op cit note 4 at 128n12. In the case of a one man company such a mandate will inevitably be inferred: *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 180–181, 195–196, 218–223, and 228–229.

¹¹¹ Op cit note 4 par 228; *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* supra note 7; *Industrial Development Consultants Ltd v Cooley* supra note 10; *Bellairs v Hodnett* supra note 81.

¹¹² *Cook v GS Deeks* supra note 12; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9.

the duty may arise otherwise than by mandate. Even where a mandate cannot be inferred a director will in these circumstances be deemed to have been the agent of the company, or, at least, to have placed himself or herself in such a position that if he or she takes at all, he or she must take the opportunity for his or her company.¹¹³ Where the company is in substance a partnership, the court will look to the underlying agreement or understanding which exists between its members to determine the company's scope of business.¹¹⁴

In these circumstances, the director's duty concerns opportunities which fall within the company's scope of business and which an ordinarily prudent board of directors would decide that the company should acquire.¹¹⁵ The duty extends to all assets and opportunities which fall within the scope of the company's operations and are so manifestly of advantage to it that it would have been the duty of the board to acquire it.¹¹⁶ Obviously included are those opportunities which the company is already actively pursuing.¹¹⁷ The decision in *Bellairs* indicates that the fact that the company has the power to purchase the particular property is of less relevance than the actual or intended business of the company. The approach thus far adopted by South African courts indicates that the 'line of business' test will be applied. This approach was also followed by the King Committee.

Thirdly, a director may not usurp an opportunity which the company is actively pursuing or an opportunity which may as far as the company's directors are concerned, be said to belong to the company.¹¹⁸ In *Canadian Aero Service Ltd v O'Malley*, for example, the defendant had actively been seeking the same contracts on behalf of his company which he subsequently entered into on his own behalf. And in *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* it was clear that the company would have been interested in purchasing the particular property.

Once the duty has arisen, it is irrelevant that the person from whom the opportunity has to be acquired will not part with it to the company.¹¹⁹ It is also immaterial that the opportunity does not fall within the objects of the company as set out in the memorandum.¹²⁰

It is submitted that a determination should be made of what the director's duty entails in the particular circumstances of each case. A fiduciary must

¹¹³ Joubert op cit note par 228n16; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 196–197 and 233; *Cook v GS Deeks* supra note 12.

¹¹⁴ *Bellairs v Hodnett* supra note 81 at 1130–1132.

¹¹⁵ *Bellairs v Hodnett* supra note 81 at 1126–1128 (judgment in the lower court by Botha J); *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 221.

¹¹⁶ Joubert op cit note 4 par 228n118; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 9 at 210–211.

¹¹⁷ *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* supra note 7.

¹¹⁸ Joubert op cit note 4 par 228; *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* supra note 7 (company seeking property); *Canadian Aero Service Ltd v O'Malley* supra note 15 at 382.

¹¹⁹ In *Magnus Diamond Mining Syndicate v MacDonald and Hawthorne* supra note 7 the court accepted that the seller would have preferred to sell his property to the directors. They were nevertheless obliged to transfer the property to the company and to account for profits made. See also *Industrial Development Consultants Ltd v Cooley* supra note 10.

¹²⁰ Joubert op cit note 4; *Fine Industrial Commodities Limited v Powling* supra note 22.

not use his or her position for his or her personal advantage. He or she cannot appropriate for him- or herself property or opportunities which should have been acquired for the company. Whether the chance for the property or opportunity came to the director because of the position he or she occupied, is immaterial. All the relevant factors of the specific situation should be considered.¹²¹ No court can supply a comprehensive list of these factors, since the circumstances are so variable.¹²² It is suggested that the relevant factors include the particular office or position held in the company, the nature of the corporate opportunity, and the circumstances which led to its acquisition. The body of knowledge possessed by the director, how he or she came to acquire that knowledge, and whether it can be regarded as confidential information, will also be decisive. If the office has been resigned, it is submitted that the director will be in breach of his or her duty only if the resignation was prompted by the desire to acquire the opportunity for him- or herself.¹²³ It should be determined whether in all the circumstances the company was justifiably relying upon the director either to acquire the opportunity for it, or to give the company the chance of acquiring it,¹²⁴ or at least of attempting to acquire it.¹²⁵

It is, finally, suggested that the crucial issue remains whether what the directors have done has placed them in a position where their own interests and their duties conflict, in other words, whether they have complied with their basic fiduciary duty not to act in conflict with the interests of the company. The position occupied by the director in the company will not necessarily be decisive. An ordinary director may, in a smaller private company, play a more vital role in the day-to-day management of the company than will a managing director in a large public company.

¹²¹ According to Beuthin op cit note 20 at 468 this includes the precise relationship in which the director stands to the company, and the nature of the economic opportunity in question.

¹²² In *Canadian Aero Service Ltd v O'Malley* supra note 15, Laskin J took care to point out that his list was not exhaustive.

¹²³ The position of former directors is discussed in the second part of this article.

¹²⁴ *Canada Safeway Ltd v Thompson* supra note 51.

¹²⁵ *Industrial Development Consultants Ltd v Cooley* supra note 10.

A RECIPE FOR PEACE

'It is incumbent on every generation to pay its own debts as it goes. A principle which, if acted on, would save one-half the wars of the world.'

[Thomas Jefferson to Destutt Tracey, 1820]