

*POST-RESIGNATION DUTIES OF DIRECTORS:
THE APPLICATION OF THE FIDUCIARY DUTY
NOT TO MISAPPROPRIATE CORPORATE
OPPORTUNITIES*

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‘[I]t is a rule of universal application that no one, having such [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.’

Aberdeen Railway Co v Blaikie Brothers (1854) 1 Macq 461 at 471, per Lord Cranworth LC

INTRODUCTION

A director stands, from the time of his appointment, or if not formally appointed, from the time he commences to act as such, in a fiduciary relationship to his company.¹ This generally betokens on his part, ‘loyalty, good faith and avoidance of a conflict of duty and self-interest.’² Duties which flow from the fiduciary duty on a director not to place himself in a position where his personal interests conflict, or may possibly conflict,³ with his duties to the company, are the duty to disclose any interest in a contract with the company; the duty to account for secret profits (the no-profit rule); the duty not to misappropriate corporate opportunities (the corporate opportunity rule); and the duty not improperly to compete with the

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¹ *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL) at 387–9; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 65.

² *Canadian Aero Service Ltd v O’Malley* (1973) 40 DLR (3d) 371 at 382.

³ In *Boardman v Phipps* [1966] 3 All ER 721 at 756 Lord Upjohn said that the phrase ‘possibly may conflict’ means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a reasonable sensible possibility of conflict — not that you could imagine some situation arising which might result in conflict. This sentiment was approved by Parker LJ in *Bhullar & others v Bhullar & another* [2003] 2 BCLC 241 at 253d–e.

company.⁴ These common-law fiduciary duties have now been given statutory force in ss 75 and 76 of the Companies Act 71 of 2008.⁵ Notably s 77(2) of the Companies Act provides that the common law will continue to apply to the fiduciary duties of directors which are set out in ss 75, 76(2) and 76(3)(a) and (b) of the Companies Act.⁶

The no-profit rule is clearly embodied in s 76(2) of the Companies Act but it is submitted that the corporate opportunity rule is arguably not explicitly, but rather, implicitly incorporated in s 76(2).⁷ A detailed analysis of s 76(2) of the Companies Act is beyond the scope of this article, but for the purposes of this article it suffices to say that the common-law principles relating to the corporate opportunity rule and the no-profit rule will play a significant role in the application and interpretation of s 76(2) of the Companies Act, once it comes into force.

Section 76(2) of the Companies Act fails to clarify a notoriously difficult issue which has plagued courts for some time: when would it be appropriate to hold a former director accountable for the appropriation of corporate opportunities which occur *after* his resignation from the company? Once a director has resigned he no longer holds the position from which his

⁴ J A Kunst, P Delpont & Q Vorster *Henocheberg on the Companies Act* 5 ed (1994) vol 1 (Service Issue 27, June 2008) 470.

⁵ Hereafter referred to as 'the Companies Act'. The Companies Act was assented to on 8 April 2009. The commencement date of the Companies Act will not be less than one year from the date it was assented to.

⁶ Section 77(2) of the Companies Act provides as follows: 'A director of a company may be held liable — (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75 [the duty to disclose a personal financial interest in board matters or an agreement or other matter in which the company has a material interest], 76(2) [the duty not to use the position of a director or information obtained while acting in the capacity of a director to gain an advantage or to cause harm to the company and the duty to communicate corporate information to the board of directors] or 76(3)(a) [the duty to act in good faith and for a proper purpose] or (b) [the duty to act in the best interests of the company] . . .'

⁷ Section 76(2) of the Companies Act provides as follows:

'A director of a company must —

- (a) not use the position of director, or any information obtained while acting in the capacity of a director —
 - (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
 - (ii) to knowingly cause harm to the company or a subsidiary of the company; and
- (b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director —
 - (i) reasonably believes that the information is —
 - (aa) immaterial to the company; or
 - (bb) generally available to the public, or known to the other directors; or
 - (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.'

fiduciary obligation derives.⁸ It follows that once a director ceases to be a director of a company, then prima facie the conflict of interest rule would cease to apply to his conduct.⁹ However, the leading authorities suggest that a former director will in certain circumstances continue to owe fiduciary obligations to the company and that it would be appropriate to hold him accountable for the appropriation of corporate opportunities which occur after his resignation.¹⁰ The difficulty lies in determining when the fiduciary duty of a director not to misappropriate a corporate opportunity would survive his resignation. The Supreme Court of Appeal¹¹ in the case of *Da Silva v C H Chemicals (Pty) Ltd*¹² was again recently confronted with this issue.

This article will examine whether any principles may be deduced from the common-law jurisprudence which may serve as a guideline to interpreting s 76(2) of the Companies Act, specifically in regard to when a director's duty not to misappropriate a corporate opportunity will continue to apply after his resignation from the company. An underlying issue in the application of these rules to directors post-resignation is whether South African law is bound to the strict, absolutist approach traditionally adopted to the duty on a director not to place himself in a position of a conflict of interest (evident from the celebrated speech of Lord Cranworth LC in *Aberdeen Railway Co v Blaikie Brothers*,¹³ quoted above), or whether a more flexible and pragmatic approach may, and ought to be, applied in a modern commercial reality.

THE FIDUCIARY DUTY NOT TO MISAPPROPRIATE CORPORATE OPPORTUNITIES

The corporate opportunity rule is to the effect that a director must not appropriate for himself or for others an economic or business opportunity, whether property or rights, which rightfully belongs to the company, or to which the company has some kind of claim.¹⁴ The no-profit rule is to the effect that a director is accountable for profits arising 'by reason of and in

⁸ Michele Havenga 'Corporate opportunities: A South African update (Part 2)' (1996) 8 *SA Merc LJ* 233 at 234.

⁹ *Quarter Master UK Ltd (in liquidation) v Pyke & others* [2005] 1 BCLC 245 at 264.

¹⁰ See for example *Spieth v Nagel* [1997] 3 All SA 316 (W) at 324; *CyberScene Ltd & others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) at 820; *Phillips v Fieldstone Africa (Pty) Ltd & another* [2004] 1 All SA 150 (SCA) para 31; *Island Export Finance Limited v Umunna & another* [1986] BCLC 460 at 480; *Quarter Master UK Ltd (in liquidation) v Pyke* supra note 9 at 264; and *Canadian Aero Service Ltd v O'Malley* supra note 2 at 382.

¹¹ Hereafter referred to as 'the SCA'.

¹² 2008 (6) SA 620 (SCA), hereafter referred to as '*Da Silva*'.

¹³ (1854) 1 Macq 461 at 471.

¹⁴ R C Beuthin 'Corporate opportunities and the no-profit rule' (1978) 95 *SALJ* 458 at 462; Michele Havenga 'Corporate opportunities: A South African update (Part 1)' (1996) 8 *SA Merc LJ* 40 at 43.

[the] course of his fiduciary office.¹⁵ In other words, the liability to account for the profits arises merely from the fact that a profit was made by the director in some way out of his office as a director and in the course of his execution of that office.¹⁶

A director's duty not to misappropriate an opportunity arises from the particular relationship existing between the director and his company or between the company and the particular opportunity.¹⁷ Various tests have been proposed to determine whether an opportunity is a corporate opportunity. The widest test requires a director to pass on to the company any opportunity of which he becomes aware, regardless of the nature of the opportunity, whilst the narrowest approach requires a director to report only those opportunities to which the company has a legal right.¹⁸ The approach generally adopted by South African courts has been the line of business test,¹⁹ which requires the opportunity to correspond with the existing and prospective interests or activities of the company,²⁰ or to be closely associated with it.²¹ The company must also be seen to have been justifiably relying upon the director to acquire the opportunity or to assist in its acquisition for the company.²²

If a director acquires a corporate opportunity for himself the acquisition will be treated as having been made for the company.²³ The company accordingly may claim the opportunity from the director²⁴ or, where such a claim is no longer possible, it may claim any profits which the director may

¹⁵ *Regal (Hastings) Ltd v Gullivers* supra note 1 at 385D.

¹⁶ R C Beuthin & S M Luiz *Beuthin's Basic Company Law* 3 ed (2000) 203.

¹⁷ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 179; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* supra note 1 at 66; *Joseph Forman Holdings (Pty) Ltd & another v Forim Holdings & others* [1999] 3 All SA 204 (W) at 218–19; *Canadian Aero Service Ltd v O'Malley* supra note 2 at 391.

¹⁸ Havenga op cit note 14 at 43.

¹⁹ *Movie Camera Company (Pty) Ltd v Van Wyk & another* [2003] 2 All SA 291 (C) paras 47 and 57; Havenga op cit note 14 at 54.

²⁰ *Movie Camera Company (Pty) Ltd v Van Wyk* supra note 19 para 45; Havenga op cit note 14 at 54.

²¹ Beuthin & Luiz op cit note 16 at 202.

²² Beuthin & Luiz op cit note 16 at 202; Havenga op cit note 14 at 46. Justifiable reliance is founded upon a duty which the director owes to his company by virtue of some special relationship with it. For instance, the duty may arise from the previous duties or activities of the director (see *Cook v Deeks* [1916] 1 AC 554 (PC)); from some special authority conferred upon him to acquire opportunities for the company; from his being charged with the control and management of the company's business (as was the case in *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, hereafter referred to as 'Cooley'); or from his having been given information to pass on to the company (as was the case in *Cooley*). (See *Movie Camera Company (Pty) Ltd v Van Wyk* supra note 19 para 46 and Beuthin & Luiz op cit note 16 at 20.)

²³ *Da Silva* supra note 12 para 18; *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 17 at 179 — 80 and 241.

²⁴ *Ibid.*

have made as a result of the acquisition of the opportunity,²⁵ or it may claim damages in respect of any loss which it may have suffered.²⁶

RESIGNATION OF THE OFFICE OF A DIRECTOR

A director may terminate his office simply by tendering his resignation, and depending on the requirements of the articles of association, he may do so by giving written or oral notice to the company or the board of directors.²⁷ Resignation is taken to be a final unilateral act, and therefore, the concurrence or acceptance of the resignation by the company is not required in order to terminate the appointment of the director.²⁸ However, in *Harding v Standard Bank of South Africa Ltd*²⁹ the court stated that where the articles of association require written notice of resignation to be given by a director, if he gives oral notice of resignation such oral notice becomes effective only upon acceptance by the company.³⁰

In *CMS Dolphin Ltd v Simonet*³¹ the court made it clear that a director's right to resign from office is not a fiduciary power.³² This means that a director is entitled to resign from the company even if his resignation may have a disastrous effect on the business or reputation of the company.³³ Unless restricted by contract, a director may resign from the company at any time 'with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business.'³⁴ However the position would be different where the entire board of directors of a public company resigns simultaneously, as occurred in the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd & others*.³⁵ The court in this case held that the board of directors was under a duty to act bona fide in the interests of the company and that by resigning en masse (in order to evade complying with certain legal duties imposed on the company by a High Court order enforcing a ministerial directive preventing water pollution for which they would ultimately be responsible), they had failed to

²⁵ Ibid.

²⁶ *Da Silva* supra note 12 para 18; *Cooley* supra note 22 at 176; *Canadian Aero Service Ltd v O'Malley* supra note 2 at 392.

²⁷ *Harding & others NNO v Standard Bank of South Africa Ltd* 2004 (6) SA 464 (C) at 469I–J.

²⁸ *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corp (Pty) Ltd* 1969 (1) SA 300 (T) at 302F–H. See further *Symington & others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) para 18.

²⁹ Supra note 27.

³⁰ Ibid at 469I–J.

³¹ [2001] 2 BCLC 704.

³² Ibid at 733.

³³ Ibid.

³⁴ *Raines et al v Toney et al* (1958) 313 S W 2d 802 at 809 (a judgment of the Supreme Court of Arkansas), approved in *Canadian Aero Service Ltd v O'Malley* supra note 2 at 386.

³⁵ 2006 (5) SA 333 (W).

comply with this duty because what they had achieved by resigning was to incapacitate themselves from discharging their duties towards the company and its members.³⁶

In *Spieth v Nagel*,³⁷ which was the first South African case which precluded a director from continuing to exploit a corporate opportunity for himself after his resignation, the court, per Schwartzman J, made it clear that the fiduciary duty of a director does not terminate once a director ceases to hold such office. The court stated that

‘there is no reason in principle why *in an appropriate case*, a company should not, while such duty survives, be protected by way of an interdict from an irreparable loss it may otherwise suffer if the director, following his resignation, is allowed to continue to exploit a commercial opportunity created in breach of his fiduciary duty. To afford such protection must accord with public policy and the boni mores of the commercial community. To do so is not to punish the delinquent director for his past misconduct but to secure the cessation of an unlawful course of conduct . . .’³⁸

The rationale for extending a director’s fiduciary duty in certain circumstances beyond his resignation is that should this not be done, a director ‘may with impunity conceive the idea of resigning so that he may exploit some opportunity of the employers, and, having resigned, proceed to exploit it for himself.’³⁹ Of course, if what a director has learned before his resignation does not fall within the category of a corporate opportunity, or if the opportunity only arose after his resignation, or was one of which he was unaware prior to his resignation, it is no breach of his fiduciary duty to exploit the opportunity after his resignation.⁴⁰

Certain principles may be deduced from an examination of the common-law jurisprudence which may serve as a guideline to interpreting s 76(2) of the Companies Act, specifically in regard to when a director’s duty not to misappropriate a corporate opportunity will continue to apply after his resignation from the company. But, before these principles are examined, an underlying issue in the application of these rules must be canvassed, namely, what is the approach of the courts and what approach ought it to adopt, in a modern commercial world, to the whole question of a director’s duty to avoid a conflict of interest post-resignation — a strict absolutist approach or a pragmatic common-sense approach? This is examined below.

³⁶ Ibid para 16.6.

³⁷ Supra note 10.

³⁸ Ibid at 324 (my emphasis).

³⁹ *Island Export Finance Limited v Umunna* supra note 10 at 480f–g.

⁴⁰ *Da Silva* supra note 12 para 20; Paul L Davies (ed) *Gower & Davies Principles of Modern Company Law* 8 ed (2008) 565.

THE COURTS' APPROACH TO THE DUTY TO AVOID A CONFLICT OF INTEREST: POST-RESIGNATION OF DIRECTORS

An examination of the case law on fiduciary duties reveals that there is a predominant and widespread adherence to the strict approach to the fiduciary duty of a director to prevent a conflict of interest. The rationale behind this strict ethic has been said to be due to a need to deter directors from breaching their fiduciary duty and to ensure a high degree of protection for companies which by their very nature are always vulnerable to fiduciaries.⁴¹ In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*⁴² Goldstone J stated that courts should enforce the strict ethic in this area of the law 'so that persons in positions of trust will be less tempted to place themselves in a position where duty conflicts with interest.'⁴³ Cardozo CJ opined in *Meinhard v Salmon*⁴⁴ that such absolutism is necessary because human infirmity makes it difficult to resist temptation, and it is only thus that the level of conduct for fiduciaries can be 'kept at a level higher than that trodden by the crowd.'⁴⁵

The traditional orthodox approach of the English courts has been not to investigate the circumstances surrounding the breach of the fiduciary duty, on the basis that the director's liability does not depend upon the equity of the case but arises from his appointment to the office of director.⁴⁶ Liability is thus triggered on the basis of the capacity of the director — referred to as the 'capacity-based' approach⁴⁷ — under which the focus is on the director's capacity as a fiduciary, while his bona fides is regarded as being irrelevant.⁴⁸ This approach was concisely stated by Lord Wright in *Regal (Hastings) Ltd v Gulliver* as follows:

'... both in law and equity, it has been held that, if a person in a fiduciary

⁴¹ *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 (SCC) at 176b–c and 179c–e; Andrew Hicks & S H Goo *Cases and Materials on Company Law* 5 ed (2004) 325; Ross Grantham 'Can directors compete with the company?' (2003) 66 *The Modern Law Review* 109 at 112; John Lowry & Rod Edmunds 'The corporate opportunity doctrine: The shifting boundaries of the duty and its remedies' (1998) 61 *The Modern Law Review* 515 at 515.

⁴² *Supra* note 1.

⁴³ *Ibid* at 67E–F.

⁴⁴ (1928) 249 NY 456.

⁴⁵ *Ibid* at 464.

⁴⁶ John Lowry & Rod Edmunds 'Judicial pragmatism: Directors' duties and post-resignation conflicts of duty' 2008 *The Journal of Business Law* 83 at 84; Hans C Hirt 'The law on corporate opportunities in the Court of Appeal: *Re Bhullar Bros Ltd*' 2005 *The Journal of Business Law* 669 at 670.

⁴⁷ Lowry & Edmunds *op cit* note 41 at 520; Hirt *op cit* note 46 at 670.

⁴⁸ Hirt *op cit* note 46 at 684. For an enunciation of the strict, inflexible approach traditionally adopted in English law see also *Bray v Ford* [1895–99] All ER 1009 at 1011; *Parker v McKenna* (1874–75) LR 10 Ch App 96 at 125; and *Regal (Hastings) Ltd v Gulliver* *supra* note 1 at 388G and 393A–C, which approved of the strict approach adopted in *Parker v McKenna*.

relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged.⁴⁹

The courts in the United States of America have developed what is known as the ‘corporate opportunity doctrine’, which precludes a director from personally pursuing a business opportunity which corresponds with the line of business of the company in which he or she is a director.⁵⁰ The US corporate opportunity doctrine differs from the traditional English-law capacity-based approach in that in seeking to identify those business opportunities which are corporate opportunities, the liability of a director is not capacity-based but instead the wider surrounding circumstances are investigated, including the nature of the business opportunity, the company’s ability to exploit it and the integrity or fides of the director involved.⁵¹ This is a flexible approach which, while accepting the orthodox approach, is a pragmatic and fact-intensive approach which takes into account the circumstances surrounding the fiduciary’s conduct.⁵²

In accordance with the approach adopted in the US, the Supreme Court of Canada in *Canadian Aero Service Ltd v O’Malley*⁵³ (per Laskin J) favoured a departure from determining the fiduciary’s liability in terms of an absolute proscription. Laskin J criticized the test propounded in *Regal (Hastings) Ltd v Gulliver* as being too narrow and instead favoured the wider, flexible approach to the question of whether a director had breached his fiduciary duty, with due regard being given to all the relevant circumstances.⁵⁴ In direct contrast to Lord Wright’s dictum in *Regal (Hastings) Ltd v Gulliver* (quoted above), Laskin J asserted as follows:

‘I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director’s or managerial officer’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and

⁴⁹ *Supra* note 1 at 392G–H.

⁵⁰ John Lowry & Rod Edmunds ‘The no-conflict no-profit rules and the corporate fiduciary: Challenging the orthodoxy of absolutism’ 2000 *The Journal of Business Law* 122 at 123.

⁵¹ Lowry & Edmunds *op cit* note 50 at 140; Hirt *op cit* note 46 at 683–4. This is in direct contrast to the position in English law under which the fiduciary’s good faith is irrelevant, as was the case in *Regal (Hastings) Ltd v Gulliver* *supra* note 1.

⁵² H A J Ford, R P Austin & I M Ramsay *Ford’s Principles of Corporations Law* 13 ed (2007) para 9.260; Hirt *op cit* note 46 at 670.

⁵³ *Supra* note 2 at 383 and 387.

⁵⁴ *Ibid* at 383 and 391.

whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.⁵⁵

Notably, there seems to be a recent emerging trend in modern English jurisprudence of moving away from this strict ethic to a more flexible approach, under which the courts have had regard to the wider circumstances surrounding the alleged breach of fiduciary duty.⁵⁶ Lowry and Edmunds go so far as to boldly assert that what is emerging in the lower English courts is akin to a silent revolt against the decisions of the House of Lords in *Regal (Hastings) Ltd v Gulliver*⁵⁷ and *Boardman v Phipps*⁵⁸ and all they represent, and a move towards giving equal weight to the US corporate opportunity doctrine as to the English authorities.⁵⁹ But it is not only the lower English courts which are adopting a different approach to this issue. In the recent English Court of Appeal case of *Foster Bryant Surveying Ltd v Bryant*⁶⁰ it was observed by Rix LJ that, ‘while the principles remain unamended, their application in different circumstances has required care and sensitivity both to the facts and to other principles, such as that of personal freedom to compete, where that does not intrude on the misuse of the company’s property whether in the form of business opportunities or trade secrets.’⁶¹ The judge noted that for these reasons, there has been some flexibility in the reach and extent of the duties imposed in the finding of liability or non-liability of directors.⁶²

Is the strict ethic of the fiduciary duty of a director to prevent a conflict of interest the dominant approach in South Africa, or is there scope for us too to move towards a more flexible approach? The principles which govern fiduciary duties were adopted into South African law from English law and consequently the South African law on fiduciary duties relies heavily on English law for the formulation and the development of the relevant legal principles.⁶³ But in *Movie Camera Company (Pty) Ltd v Van Wyk & another*⁶⁴

⁵⁵ *Ibid* at 391.

⁵⁶ See for instance *Island Export Finance Ltd v Umunna* supra note 10 (discussed below); *Balston Ltd v Headline Filters Ltd* [1990] FSR 385; and *Framlington Group plc v Anderson* [1995] 1 BCLC 475.

⁵⁷ *Supra* note 1.

⁵⁸ *Supra* note 3.

⁵⁹ Lowry & Edmunds *op cit* note 50 at 140.

⁶⁰ [2007] EWCA Civ 200.

⁶¹ *Ibid* para 76.

⁶² *Ibid*.

⁶³ *Phillips v Fieldstone Africa (Pty) Ltd* supra note 10 para 30; Michele Havenga ‘Directors’ fiduciary duties under our future company-law regime’ (1997) 9 *SA Merc LJ* 310 at 310–11. As Innes CJ stated in *Robinson v Randfontein Estates Gold Mining Co Ltd* supra note 17 at 179, ‘the test [of fiduciary duties] is expressed, for the most part, in terms peculiar to the English law; but the principle which underlies it is not foreign to our own.’

Cleaver J emphasized that it is impossible and indeed unwise to lay down any conclusive guidelines which are to be applied in assessing whether or not one is dealing with a corporate opportunity which rightfully belongs to the company, and that it is necessary to examine carefully the relevant factors in order to arrive at a conclusion.⁶⁵ Cleaver J approved of the flexible approach laid down by Laskin J in *Canadian Aero Service Ltd v O'Malley*⁶⁶ 'as a very useful starting point',⁶⁷ where Laskin J set out some of the relevant factors in this regard. Notably, in a similar vein the SCA in *Da Silva*⁶⁸ stated as follows:

'Ultimately, the inquiry will involve in each case a *close and careful examination of all the relevant circumstances, including in particular the opportunity in question*, to determine whether the exploitation of the opportunity by the director, whether for the director's own benefit or for that of another, gave rise to a conflict between the director's personal interests and those of the company which the director was then duty-bound to protect and advance.'⁶⁹

These dicta indicate that there is room for a flexible approach to be adopted in South African law on the duty not to misappropriate a corporate opportunity, with due regard being given to all the relevant circumstances surrounding the breach of the fiduciary duty, as opposed to the traditional capacity-based approach of the English courts. But should we adopt the flexible approach to directors post-resignation?

On the one hand a strict application of the duty is necessary in order to deter directors from resigning in order to exploit an opportunity for personal profit, and it is also essential that directors are subjected to high standards of conduct.⁷⁰ But on the other hand, in this modern age the traditional approach to corporate opportunities may well 'needlessly inhibit the development of opportunities by the entrepreneurial-minded director,'⁷¹ the effect of which may rebound to the detriment of the economy as a whole.⁷² The commercial reality which pervades modern companies is that in today's commercial world it is not exceptional for directors to change jobs, or to engage in management buyouts, for perfectly legitimate reasons.⁷³ While in clear cases of abuse of position the strict proscription against conflicts of duty should no doubt apply,⁷⁴ in those less clear-cut instances adopting a flexible approach may strike the correct balance between furthering entrepreneurship and protecting companies against directorial abuse.⁷⁵ As observed by

⁶⁴ Supra note 19.

⁶⁵ Ibid para 48.

⁶⁶ Supra note 2 at 391.

⁶⁷ Supra note 19 para 48.

⁶⁸ Supra note 12.

⁶⁹ Ibid para 19 (my emphasis).

⁷⁰ Lowry & Edmunds op cit note 50 at 141.

⁷¹ Ibid at 124.

⁷² Ibid.

⁷³ Eilís Ferran *Company Law and Corporate Finance* (1999) 193.

⁷⁴ Lowry & Edmunds op cit note 46 at 90.

⁷⁵ Hirt op cit note 46 at 684.

Rix LJ in *Foster Bryant Surveying Ltd v Bryant*, the jurisprudence on post-resignation liability shows that the critical line between a defendant being or not being a director is often hard to draw.⁷⁶ His solution in less clear-cut cases is for the courts to adopt ‘pragmatic solutions based on a common-sense and merits-based approach’.⁷⁷ It is submitted that the application of the corporate opportunity rules relating to directors post-resignation ought to take into account the facts surrounding an alleged breach of the fiduciary duty as well as other considerations such as the rules on restraint of trade and the freedom to compete.⁷⁸ Admittedly, the flexible approach may stop short of an absolute proscription but it would nevertheless continue to perform the function of deterrence while retaining the potential to promote economic efficiency.⁷⁹

As Rix LJ noted, it is difficult accurately to encapsulate the circumstances in which a director may or may not be found to have breached his fiduciary duty post-resignation because the issue is ‘highly fact sensitive’.⁸⁰ Accordingly, in examining the circumstances when the corporate opportunity rule may apply to the post-resignation of directors, it must be borne in mind that these are merely guiding principles and are not inflexible rules. It is also important to draw attention to the SCA’s statement in *Da Silva* that the general policy of the courts is not to impose undue restraints on post-resignation activities.⁸¹ With these sentiments in mind, some of the instances when the corporate opportunity rule may survive post-resignation of a director, based on an examination of the jurisprudence on this issue, are canvassed below.

GUIDELINES AS TO WHEN THE CORPORATE OPPORTUNITY RULE MAY APPLY POST-RESIGNATION OF A DIRECTOR

Maturing business opportunity which the company is actively pursuing

One tenet which emerges from the jurisprudence on post-resignation liability is that where a director resigns in order to take up personally an opportunity which the company was actively pursuing, his resignation will not prevent him from being held accountable to his former company. In *Canadian Aero Service Ltd v O’Malley*⁸² Laskin J used the concept of a ‘maturing business opportunity which the company is actively pursuing’ as the basis for drawing a line between permissible and impermissible conduct by a director.⁸³ This principle was approved by the SCA in *Da Silva*.⁸⁴

⁷⁶ Supra note 60 para 76.

⁷⁷ Ibid.

⁷⁸ See *Foster Bryant Surveying Ltd v Bryant* supra note 60 para 76; Lowry & Edmunds op cit note 46 at 90.

⁷⁹ Lowry & Edmunds op cit note 41 at 524.

⁸⁰ *Foster Bryant Surveying Ltd v Bryant* supra note 60 para 76.

⁸¹ Supra note 12 para 20.

⁸² Supra note 2.

⁸³ Ibid at 382.

In *CMS Dolphin Ltd v Simonet*⁸⁵ Lawrence Collins J suggested that the rationale behind the maturing business opportunity principle is that the opportunity is treated as the property of the company, in the sense of an intangible asset, and hence is treated as a species of trust property.⁸⁶ However, in *Ultraframe (UK) Ltd v Fielding*⁸⁷ Lewison J expressed the view that although some cases loosely describe a corporate opportunity as trust property, it is usually not in fact property in the strict sense.⁸⁸ The judge stated that a liability to account is personal, and that when judges speak of someone being accountable as a ‘constructive trustee’ they are generally speaking of a personal liability to account, and are not generally describing a proprietary remedy.⁸⁹

The maturing business opportunity principle was applied in *CyberScene Ltd v i-Kiosk Internet and Information (Pty) Ltd*,⁹⁰ where Hlophe DJP found that the former directors of CyberScene Ltd had indeed diverted maturing business opportunities which had existed for the benefit of the company by, shortly before their respective resignations, approaching a potential client of CyberScene Ltd (the City of Tygerberg) and passing themselves off as being associated with the company.

The leading case of *Industrial Development Consultants Ltd v Cooley*⁹¹ is also one where a director had resigned in order to take up personally an opportunity which the company had been actively pursuing. The facts of this case were that Mr Cooley was the managing director of Industrial Development Consultants Ltd (‘IDC’), which offered building and development consultant services. Mr Cooley, as the company’s representative, sought to obtain contracts for IDC from the Eastern Gas Board in connection with four depots which the Eastern Gas Board planned to build. The deputy chairman of the Eastern Gas Board had indicated to Mr Cooley that the Eastern Gas Board was not prepared to enter into the contracts for the development of the depots with IDC, but that they were willing to contract with Mr Cooley in his private capacity. Thereafter, Mr Cooley resigned from his office on the pretext of ill health and personally entered into the contract with the Eastern Gas Board. Roskill J, in holding Mr Cooley accountable to IDC for all benefits accruing under the contract with the Eastern Gas Board, found that there was no doubt that Mr Cooley had obtained the contract for himself as a result of work that he had done while he was still IDC’s managing director, even though the contract was not concluded until after he had left IDC. Roskill J stated that it was Mr Cooley’s

⁸⁴ Supra note 12 para 20.

⁸⁵ Supra note 31.

⁸⁶ Ibid at 733e–f.

⁸⁷ [2005] EWHC 1638 (Ch).

⁸⁸ Ibid para 1474.

⁸⁹ Ibid para 1517.

⁹⁰ Supra note 10.

⁹¹ Supra note 22.

duty once he got the information to pass it on to his employers and not to guard it for his own personal purposes and profit, and accordingly that Mr Cooley had ‘put himself into the position where his duty and his interests conflicted.’⁹² As observed in *Ultraframe (UK) Ltd v Fielding*⁹³ and *Wilkinson v West Coast Capital*,⁹⁴ the reasoning underlying the decision in *Cooley*’s case is an application of the corporate opportunity rule, based on the finding that Mr Cooley had used information which had come to him while he was still the managing director of the company,⁹⁵ ‘even though it might be easier, conceptually, to view it as an application of the “no profit” rule.’⁹⁶

In both *Cooley* and *CyberScene* the director(s) in question had resigned from the company in order personally to pursue a business opportunity which their respective companies were actively pursuing. A difference between *Cooley* and *CyberScene* is that in *Cooley* Mr Cooley had been approached by the Eastern Gas Board in his private capacity whereas in *CyberScene* the directors themselves had approached the City of Tygerberg with a view to obtaining the contract with the City of Tygerberg for themselves. Another difference is that in *Cooley* the contract was obtained *after* Mr Cooley had resigned, although as a result of what he had done whilst still the managing director of IDC, whereas in *CyberScene* the directors had attempted to obtain the contract with the City of Tygerberg whilst *still* employed by CyberScene Ltd. A further difference between the two cases is that in *Cooley*’s case IDC probably would not have obtained the contracts with the Eastern Gas Board (there was a very small chance — put at ten per cent by the court — of IDC obtaining the contract),⁹⁷ whereas in *CyberScene* CyberScene Ltd probably would have obtained the contract with the City of Tygerberg. It matters not if the director pursued the opportunity whilst still a director (as in *CyberScene*) or after he had resigned (as in *Cooley*) or if the director was approached in his private capacity with a view to pursuing the opportunity⁹⁸ (as in *Cooley*) or if he took steps to obtain the opportunity himself (as in *CyberScene*). Further, it does not matter if the company would have been able to obtain the opportunity or not.⁹⁹ The legal principle in both cases is clear: a director may not resign in order to pursue a maturing business opportunity which the company is actively pursuing.

⁹² Ibid at 175d. See also *Bhullar v Bhullar* supra note 3 at 256 where Parker LJ, in applying the principles of *Cooley*, stated as follows: ‘Whether the company could or would have taken the opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the company to know, and it follows that the appellants were under a duty to communicate it to the company.’

⁹³ Supra note 87.

⁹⁴ [2005] EWHC 3009 (Ch).

⁹⁵ *Ultraframe (UK) Ltd v Fielding* supra note 87 paras 1336 and 1340.

⁹⁶ *Wilkinson v West Coast Capital* supra note 94 para 264.

⁹⁷ *Cooley* supra note 22 at 176h.

⁹⁸ This is discussed further below.

⁹⁹ This is discussed further below.

In *Island Export Finance Ltd v Umunna & another*¹⁰⁰ the court adopted a flexible approach by having regard to the wider circumstances surrounding the alleged breach of fiduciary duty by a director who had resigned from the company. The facts were that Mr Umunna had secured a contract for postal caller boxes for IEF Ltd from the Cameroon's postal authorities. IEF Ltd had hoped to receive further such orders but had received no such assurance from the Cameroon's postal authorities that further orders would be forthcoming. Mr Umunna resigned from IEF Ltd, and subsequently obtained for his own company an order for postal caller boxes from the Cameroon's postal authorities. IEF Ltd argued that Mr Umunna had resigned in order to exploit a business opportunity which belonged to it and had accordingly breached his fiduciary duty owed to the company. The court was willing to accept evidence that at all material times IEF Ltd was not actively interested in acquiring fresh contracts for postal caller boxes and was not actively pursuing further orders when Mr Umunna had resigned or when he had obtained the contract with the Cameroon's postal authorities.¹⁰¹ It found that Mr Umunna had not breached his fiduciary duty since IEF Ltd's hope of obtaining further orders for postal caller boxes was not a maturing business opportunity, and therefore Mr Umunna was free to exploit the opportunity personally.¹⁰² The court endorsed the flexible approach adopted by Laskin J in *Canadian Aero Service Ltd v O'Malley*.¹⁰³

On a strict application of the principle in *Cooley*, Mr Umunna had in fact been under a duty to pass on to IEF Ltd information which had come to him qua director and not to guard it for his own personal purposes and profit, just as Mr Cooley was held to have been under a duty to pass on such information to IDC. It has been opined that *Umunna's* case may well have opened the way to a more flexible view of the corporate opportunity doctrine in English company law whereby the nature of the opportunity in question will receive due consideration, thus departing from the preoccupation with the capacity of the individual concerned.¹⁰⁴

Where the opportunity is obtained by the director in his private capacity

If a director, acting in his private capacity, becomes aware of an opportunity which, if known by the company, it might wish to pursue, may the director resign and pursue the opportunity personally, or is the director duty-bound to inform the company about the opportunity? The clear principle which emerges from *Cooley* is that a director would breach the corporate

¹⁰⁰ *Supra* note 10.

¹⁰¹ *Ibid* at 477 and 482f-g.

¹⁰² *Ibid* at 482f-g.

¹⁰³ *Ibid* at 481g.

¹⁰⁴ See John Lowry 'Regal (Hastings) fifty years on: Breaking the bonds of the Ancien Régime?' (1994) 45 *Northern Ireland Legal Quarterly* 1 at 10; Hicks & Goo op cit note 41 at 331.

opportunity rule if he pursued an opportunity which came to him in his private capacity.¹⁰⁵

Whilst it is possible to conceive of circumstances where the nature of the information acquired would be so important or sensitive to the company's operations that it must be disclosed to the company by a director, is the duty of loyalty not taken too far to require a director to confess everything which he hears of in his private capacity which might be of interest to the company? Ferran argues that if the corporate opportunity rule is applied too strictly in this situation it may have cost implications, since directors would expect to receive remuneration packages which would compensate them appropriately for completely sacrificing their personal interests in all circumstances in favour of those of the company.¹⁰⁶ It is submitted that it may be too harsh to expect directors to disclose everything which they hear of in their private capacity that might be of interest to the company. On the other hand to require directors to disclose only information which is important or sensitive to the company's operations may well result in directors unwittingly placing themselves in a position of a conflict of interest, as a director could honestly be of the view that certain information is not important or sensitive to the company's operations while the company, if it were aware of the information, may think otherwise.

If the company were unable to take the opportunity

Some reasons why a company may be unable to take an opportunity may be that the offering party is unwilling to deal with the company;¹⁰⁷ the company may be financially unable to pursue the opportunity; there may be restrictions in the company's articles of association or memorandum of association or other contracts to which the company is a party; or there may be other legal constraints.¹⁰⁸ Roskill J in *Cooley* made it clear that it is no defence to a director who resigns from his company in order to pursue a corporate opportunity that the company was unable to pursue the opportunity, by stating as follows:

'When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant.'¹⁰⁹

In *Da Silva* the court affirmed this principle by stating that it is of no consequence in the particular circumstances of the case that an opportunity would not or even could not have been taken up by the company.¹¹⁰ The rationale behind this principle is that if directors were permitted to take

¹⁰⁵ *Cooley* supra note 22 at 173h–4a.

¹⁰⁶ Ferran op cit note 73 at 195.

¹⁰⁷ As was the case in *Cooley* supra note 22.

¹⁰⁸ Havenga op cit note 8 at 236.

¹⁰⁹ *Cooley* supra note 22 at 175j.

¹¹⁰ *Da Silva* supra note 12 para 19. See also *Regal (Hastings) Ltd v Gulliver* supra note 1 at 392H–3A and *Phillips v Fieldstone Africa (Pty) Ltd* supra note 10 para 31.

opportunities which the company were not able to take, they would be tempted to refrain from exerting their strongest efforts on behalf of the company since an opportunity for profit would be available to them personally.¹¹¹ As Roskill J pointed out in *Cooley*, it was Mr Cooley's duty to persuade the Eastern Gas Board to change its mind about awarding the contract in question to IDC, and it would have been 'a curious position under which he whose duty it would have been to seek to persuade them to change their minds should now say that the plaintiffs suffered no loss because he would never have succeeded in persuading them to change their mind.'¹¹²

May a director resign in order to pursue an opportunity which the board of directors has rejected? As established in the Canadian case of *Peso Silver Mines Ltd v Cropper*,¹¹³ where the board of directors has bona fide and for sound business reasons decided not to pursue an opportunity, the opportunity ceases to be a corporate opportunity and individual directors may pursue the opportunity on their own account and retain the resulting profit.¹¹⁴ This is subject to the provisos that the director in question must make full disclosure of relevant information about the opportunity in his possession,¹¹⁵ and must overcome the hurdle of the no-profit rule, if necessary in the circumstances of the case.¹¹⁶

However, *Peso's* case has been criticized on the basis that it is difficult for the courts to test whether subjectively the board did reject an opportunity in good faith and in the interests of the company.¹¹⁷ It could never be entirely clear whether disinterested directors were acting in the best interests of the company or of their fellow directors in rejecting a corporate opportunity.¹¹⁸ There is thus a risk that situations which do run contrary to the duty of loyalty, for example where the board had declined an opportunity under pressure from a dominant individual director who wished to secure the

¹¹¹ *Irving Trust Co v Deutsch* 73 F 2d 121 (2nd Cir 1934) at 124; Davies op cit note 40 at 559; D D Prentice 'The corporate opportunity doctrine' (1974) 37 *The Modern Law Review* 464 at 467.

¹¹² *Cooley* supra note 22 at 176g.

¹¹³ (1966) 58 DLR (2d) 1.

¹¹⁴ *Ibid* at 8.

¹¹⁵ Beuthin op cit note 14 at 465.

¹¹⁶ It must be noted that even if an opportunity ceases to be a corporate one as a result of it being rejected by the board of directors, if a director wishes to pursue the opportunity himself he would still have to overcome the hurdle of the no-profit rule in circumstances where the opportunity had come to the director by virtue of his office and in the course of the execution of his duties as a director (as illustrated by *Regal (Hastings) Ltd v Gulliver* supra note 1). In order to overcome this hurdle the director would have to obtain the prior approval or the subsequent ratification of the majority of the shareholders in general meeting (see *Regal (Hastings) Ltd v Gulliver* supra note 1).

¹¹⁷ Ferran op cit note 73 at 191-2.

¹¹⁸ Stanley M Beck 'The saga of *Peso Silver Mines*: Corporate opportunity reconsidered' (1971) 49 *The Canadian Bar Review* 80 at 113.

opportunity personally, or on an understanding of mutual ‘backscratching’, may go unremedied.¹¹⁹

The motive for resigning — Whether the resignation was prompted or influenced by a wish to acquire the opportunity for himself

In *Canadian Aero Service Ltd v O’Malley* the court stated the principles applicable to directors who resign from their company (in relation to the continuation of their fiduciary duties) as follows:

‘An examination of the case law in this court and in the courts of other like jurisdictions on the fiduciary duties of directors and senior officers 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 his 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.’¹²⁰

From this quotation it is evident that the court set out two principles applicable to directors who resign: First, a director may not usurp an opportunity where his resignation is prompted or influenced by a wish to acquire for himself the opportunity sought by the company; secondly, where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired (this latter principle is discussed in the next section).

In regard to the first principle, in most instances, where a director resigns in order to pursue a corporate opportunity his motive for resigning would be to acquire the opportunity for himself. For example in *Cooley* Mr Cooley had resigned from IDC in order to acquire the opportunity with the Eastern Gas Board for himself. However, if a director’s motive for resigning is not to acquire the opportunity for himself, it may be the case that he has not breached his fiduciary duty by acquiring the opportunity after his resignation. For instance, in *Island Export Finance Limited v Umunna*,¹²¹ the court found that Mr Umunna’s resignation from IEF Ltd was not prompted by or influenced by a wish to appropriate the business of IEF Ltd, but his resignation was due to his own sense of dissatisfaction with his role as managing director of the company and his desire to branch out on his own.¹²² This was one of the factors that led the court, in its adoption of the flexible approach, to conclude that Mr Umunna had not breached his fiduciary duty to IEF Ltd.

¹¹⁹ Ferran op cit note 73 at 192.

¹²⁰ Supra note 2 at 382 (my emphasis).

¹²¹ Supra note 10.

¹²² Ibid at 477d–e.

This first principle has been accepted as being uncontroversial¹²³ but it has been questioned whether the second principle stated in *Canadian Aero Service Ltd v O'Malley* perhaps goes too far, as discussed below.

Position with the company that led the director to the opportunity which he acquired after his resignation (rather than a fresh initiative)

As discussed in the previous section, the court in *Canadian Aero Service Ltd v O'Malley* set out two principles applicable to directors who resign, the second one being that a director may not usurp an opportunity where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired. This principle was challenged in *Island Export Finance Limited v Umunna*,¹²⁴ where Hutchison J opined that the court in *Canadian Aero Service Ltd v O'Malley* had stated this legal principle too widely. Hutchison J stated that, literally construed, the second part of the formulation could justify holding former directors accountable for profits wherever information acquired by them as such led them to the source from which they subsequently acquired business.¹²⁵ A director's position with a company would usually provide the director with information about the markets in which the company operates.¹²⁶ Accordingly, on a literal interpretation of the second part of the formulation of the test laid down in *Canadian Aero Service Ltd v O'Malley*, in order for Mr Umunna to be liable for a breach of his fiduciary duties to IEF Ltd he had to have become acquainted with the existence of a market in the Postal Department of the Cameroons while and because he was a director of IEF Ltd, which is in fact what occurred. However, Hutchison J, in finding that Mr Umunna had not breached his fiduciary duty owed to IEF Ltd, emphasized that directors acquire a 'general fund of knowledge and expertise' in the course of their work, and that it is in the public interest that directors should be permitted to carry with them their general fund of knowledge and expertise on the basis that it is tantamount to their 'stock-in-trade' and that they should be free to exploit it in a new position.¹²⁷ Furthermore, he asserted that to state the rule so widely conflicts with the rules of public policy as to restraints of trade.¹²⁸ In other words, if directors were not allowed to use the information which they acquired as part of their general fund of knowledge and expertise in the course of their work, they would be in a worse position than employees in terms of restraints on their activities after they resign from their place of

¹²³ See for example *Island Export Finance Limited v Umunna* supra note 10 at 481d; and Michael S Blackman, Richard D Jooste & Geoff K Everingham *Commentary on the Companies Act* (2002) vol 2 (Revision Service 5, 2008) 8–176.

¹²⁴ Supra note 10 at 481e–f.

¹²⁵ Ibid.

¹²⁶ Stephen Mayson, Derek French & Christopher Ryan *Mayson, French & Ryan on Company Law* 21 ed (2005) 559.

¹²⁷ *Island Export Finance Limited v Umunna* supra note 10 at 482c–d.

¹²⁸ Ibid at 483a.

employment.¹²⁹ Accordingly, even though Mr Umunna's position with IEF Ltd rather than a fresh initiative had led him to the opportunity with the Postal Department of the Cameroons, the court held that his own skill and knowledge was something which the law did allow him to use for his own benefit and in competition with the plaintiff after cessation of his appointment as a director.¹³⁰ The underlying consideration in this type of situation is that fiduciary duties should not be drawn so tightly that they in effect tie a director to one company and prevent him from ever taking the general knowledge and skill that he acquired as a director elsewhere.¹³¹

Lawrence Collins J in *CMS Dolphin Ltd v Simonet*¹³² expressed agreement on this point with Hutchison J and opined that is likely that Laskin J in *Canadian Aero Service Ltd v O'Malley* meant 'and' in the passage rather than 'or', and that the passage after the word 'or' is probably meant as indicating the element of causation necessary to make the director liable, and not as indicating a separate ground for making him liable.¹³³ He emphasized that there must be some relevant connection or link between the resignation and the obtaining of the business.¹³⁴

How is the second principle formulated in *Canadian Aero Service Ltd v O'Malley* to be interpreted in South African law? In the South African cases of *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*¹³⁵ and *Spieth v Nagel*¹³⁶ the respective courts approved of both principles laid down in *Canadian Aero Service Ltd v O'Malley*, including the second principle, without any qualification. Does this mean that in South African law former directors are to be held accountable whenever they exploit for their own or a new employer's benefit information which, while they may have come by it solely because of their position as directors of their former company, in truth forms part of their general fund of knowledge and expertise and their stock-in-trade?

In *Da Silva* the SCA was at pains to emphasize that 'the expertise and experience acquired by a director during his period of employment with his company and in general even the personal relationships established by him during that period belong to him and not to the company.'¹³⁷ It is submitted that this dictum indicates that the SCA impliedly endorsed the approach adopted to this issue in *Island Export Finance Limited v Umunna* and *CMS*

¹²⁹ See *Dranetz Anstalt & others v Hayek & others* [2002] 1 BCLC 693 at 720d–g; Davies op cit note 40 at 565.

¹³⁰ *Island Export Finance Limited v Umunna* supra note 10 at 483h.

¹³¹ Ferran op cit note 73 at 190.

¹³² Supra note 31.

¹³³ Ibid at 731f–h.

¹³⁴ Ibid. Rix LJ in *Foster Bryant Surveying Ltd v Bryant* supra note 60 affirmed that there must be a causal connection between the resignation by the director and the subsequent diversion of the opportunity to the director's new enterprise (para 69).

¹³⁵ Supra note 1 at 65J–66F.

¹³⁶ Supra note 10 at 324.

¹³⁷ Supra note 12 para 20.

Dolphin Ltd v Simonet and impliedly rejected the second principle laid down in *Canadian Aero Service Ltd v O'Malley* that a director would breach his fiduciary duty where it was his position within the company that led him to the opportunity. The SCA based its view on s 22 of the Constitution,¹³⁸ which enshrines the principle that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or their professions.¹³⁹ Accordingly, as mentioned previously, the SCA stated that the general policy of the courts is 'not to impose undue restraints on post-resignation activities.'¹⁴⁰

It is submitted that the second principle in *Canadian Aero Service Ltd v O'Malley* is indeed too wide. Information which comes to directors by virtue of their position may be general in nature, and it may be too harsh, and perhaps unrealistic to expect former directors to refrain from using such information indefinitely.¹⁴¹ In an age where directors, particularly non-executive directors, are appointed as such precisely because of their expertise, it may be inappropriate to regard everything a director knows or does as belonging exclusively to his company.¹⁴² Indeed, if a director were unlawfully dismissed by the company it may be unreasonable to expect him to abstain from using business contacts or information acquired during his term of office in order to establish alternative employment.¹⁴³ But this does not mean that a director may use any and all information which he acquired by virtue of his position as a director in order to acquire a corporate opportunity after his resignation. In *SA Historical Mint (Pty) Ltd v Sutcliffe & another*,¹⁴⁴ in dealing with the question whether a former director had misappropriated confidential information of his former company, the court held that a director is free to use his own knowledge and skills, which is not regarded as belonging to the company, provided that this information does not amount to trade secrets or confidential business information.¹⁴⁵ In addition, a director may not exploit information after his resignation if any contractual restraints not to do so have been agreed upon.¹⁴⁶

¹³⁸ The Constitution of the Republic of South Africa, 1996 (hereafter referred to as 'the Constitution').

¹³⁹ See *Da Silva* supra note 12 para 20 and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 15. Section 22 of the Constitution provides as follows: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

¹⁴⁰ *Da Silva* supra note 12 para 20.

¹⁴¹ See *Havenga* op cit note 8 at 235.

¹⁴² *Lowry & Edmunds* op cit note 50 at 137.

¹⁴³ *Havenga* op cit note 8 at 235.

¹⁴⁴ 1983 (2) SA 84 (C).

¹⁴⁵ *Ibid* at 91B. See for example *Cranleigh Precision Engineering Ltd v Bryant & another* [1964] 3 All ER 289.

¹⁴⁶ *Davies* op cit note 40 at 565.

TAKING STEPS TO SET UP A COMPETING BUSINESS

In the absence of some special circumstance,¹⁴⁷ a director will not commit a breach of his fiduciary duty merely because, during his notice period, he takes steps to ensure that, on ceasing to be a director, he would be able to immediately set up business in competition with his former company.¹⁴⁸ In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*¹⁴⁹ the court made it clear that setting up business in competition with the company was not unlawful by stating as follows:

‘The planning of [the director’s] future and the preparatory steps taken to enable him to obtain alternative employment and earn a living even if taken during his month of notice cannot be regarded as against public policy and therefore unlawful. It can therefore not be branded as unfair competition.’¹⁵⁰

A director is not even obliged to disclose to the company that he is taking such steps.¹⁵¹ But most importantly, as part of those steps, he may not divert opportunities to himself.¹⁵²

In *Da Silva’s* case¹⁵³ Jose Da Silva, a managing director of C H Chemicals (Pty) Ltd (‘Chemicals (Pty) Ltd’), had inter alia resigned from Chemicals (Pty) Ltd and while serving out his notice period he had acquired two shelf companies; had changed their names to Resinex Plastics (Pty) Ltd (the second defendant) and Resinex Southern Africa (Pty) Ltd (the third defendant); was appointed a director of both companies; and had hired premises for the two companies.¹⁵⁴ In accordance with and in full agreement with the principles laid down in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*,¹⁵⁵ the SCA unanimously found that on a ‘common sense’ approach this conduct did not amount to a breach of Da Silva’s fiduciary duty or to unfair competition on the part of the second defendant on whose behalf the steps were taken.¹⁵⁶

But Da Silva had taken further steps than simply incorporating companies which would in the future compete with Chemicals (Pty) Ltd: while serving out his notice period, but acting for and on behalf of Resinex Plastics (Pty) Ltd, he had purchased three containers of a plastic substance called linear low

¹⁴⁷ For example, a prohibition in an employment contract (see *Framlington Group plc v Anderson* supra note 56 at 498a–b and *Da Silva* supra note 12 para 21).

¹⁴⁸ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 199C; *Movie Camera Company (Pty) Ltd v Van Wyk* supra note 19 para 55; *Da Silva* supra note 12 para 21.

¹⁴⁹ Supra note 148.

¹⁵⁰ Ibid at 199C.

¹⁵¹ *Balston Ltd v Headline Filters Ltd* supra note 56 at 412; *Framlington Group plc v Anderson* supra note 56 at 498a–b.

¹⁵² See *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* supra note 148 at 200E–G.

¹⁵³ Supra note 12.

¹⁵⁴ Ibid paras 13 and 55.

¹⁵⁵ Supra note 148 at 199C.

¹⁵⁶ *Da Silva* supra note 12 paras 54 and 55.

density polyethylene ('LLDPE') which he had arranged to be on-sold by Resinex Plastics (Pty) Ltd to a local South African company.¹⁵⁷ Da Silva argued that his conduct did not amount to unfair competition with Chemicals (Pty) Ltd on the grounds that Chemicals (Pty) Ltd did not normally deal in LLDPE products and that the purchasers of the LLDPE product were not existing clients of Chemicals (Pty) Ltd.¹⁵⁸ But, based on the evidence presented to it, the SCA found that any transaction involving the purchase and sale of plastic products did fall within the scope of the business of Chemicals (Pty) Ltd, and that any purchaser of plastic products in South Africa was a potential customer of Chemicals (Pty) Ltd.¹⁵⁹ The SCA stated that, while it may be difficult in certain circumstances to decide just where to draw the line when adopting a common-sense approach, it was satisfied that the transaction in question was one which Da Silva, while still the managing director of Chemicals (Pty) Ltd, was obliged to pursue for the benefit of Chemicals (Pty) Ltd and not for the benefit of Resinex Plastics (Pty) Ltd.¹⁶⁰ Accordingly, the SCA found that Da Silva's conduct had 'amounted to a breach of his fiduciary duty owed to the plaintiff and to unfair competition on the part of the second defendant on whose behalf the transaction was concluded.'¹⁶¹

The approach of the SCA in *Da Silva* is best expressed in *Balston Ltd v Headline Filters Ltd*,¹⁶² where Falconer J expounded the legal principles relating to a director who sets up a business in competition with the company after his directorship has ceased as follows:

'In my judgment an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading, while he remains a director.'¹⁶³

CONCLUSION

In certain circumstances it may be appropriate to hold a former director accountable to his company for the appropriation of corporate opportunities which occur after his resignation. Some of these circumstances which emerge from the common-law jurisprudence would be where a director resigns in order to take up personally a maturing business opportunity that the company was actively pursuing; where he obtains the opportunity in his

¹⁵⁷ Ibid para 55.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Supra note 56.

¹⁶³ Ibid at 412. These principles were approved in *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 para 81.

private capacity; where he pursues an opportunity which his company is unable to take (but this does not include opportunities which the board of directors has bona fide and for sound business reasons rejected); where his resignation is prompted or influenced by a wish to acquire the opportunity for himself; and, somewhat contentiously, where his position with the company led him to the opportunity which he acquired after his resignation. As illustrated by *Da Silva*,¹⁶⁴ a director may take steps to set up a competing business during his notice period provided he does not divert opportunities to himself and there is no actual competitive activity on his part while he remains a director. As mandated by s 77(2) of the Companies Act, these common-law principles will play a significant role in the application and interpretation of s 76(2) of the Companies Act, once it comes into force.

As discussed, some of these principles have been challenged as being too wide or too harsh in a modern commercial world, where there is a tension between the strict equitable formulation of the conflict principle and commercial practicality. The SCA's enunciation of the legal principles in *Da Silva*¹⁶⁵ seems to indicate that South African courts may be leaning towards adopting a more flexible approach of examining the relevant circumstances surrounding the breach of the fiduciary duty, as opposed to the traditional capacity-based approach of the English courts. It is submitted that in clear cases of abuse of position, the strict proscription against conflict of duty must no doubt apply, but in those less clear-cut instances the facts surrounding the alleged breach of the fiduciary duty as well as considerations such as the rules on restraint of trade and the freedom to compete should be taken into account. Accordingly, while the common-law principles may provide a guideline as to when it would be appropriate for a director's duty not to misappropriate a corporate opportunity to continue post-resignation, at the end of the day, it is submitted that a pragmatic solution based on 'a common-sense and merits-based approach'¹⁶⁶ ought to be adopted. Indeed, in a modern commercial world adopting a flexible approach may well strike the correct balance between furthering entrepreneurship and protecting companies against directorial abuse.

¹⁶⁴ *Supra* note 12.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Foster Bryant Surveying Ltd v Bryant* (per Rix LJ) *supra* note 60 para 76.