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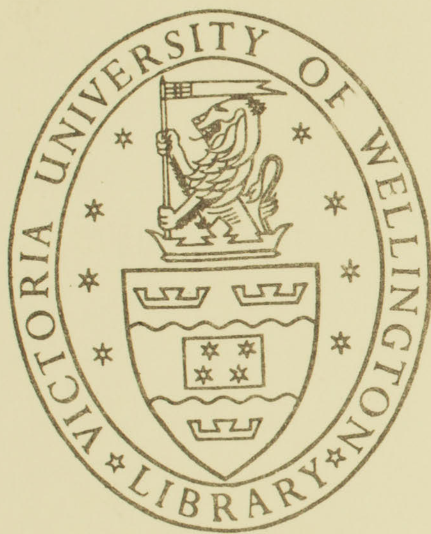
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RESEARCH PAPER FOR LAW OF BODIES
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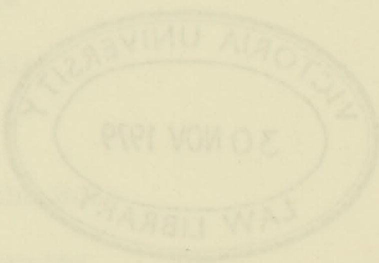
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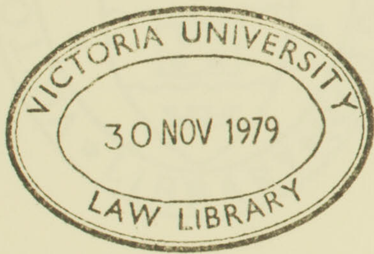

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1. Introduction

Multiple directorates (1) exist where a person is a director of more than one company or other body corporate. Many objections have been raised to the holding of multiple directorates on the grounds of restriction of competition, conflicts of interest, decreasing opportunities for young managers, and debasement of the quality of business management.

This paper will focus on the microeconomic problem of conflicts of interest, rather than on the macroeconomic objections of multiple directorates. The extent of multiple directorates will be examined before analysing the law governing the "problem". The statutory provisions will be the first point of reference. Two parallel avenues of equity will then in turn be examined, as well as the possible remedies. The need for reform of this area of the law will be concluded upon.

The position of directors of a subsidiary and of its holding company raises issues relating to multiple directorates. However there exist particular problems relating to the oppression of minorities and of acting "in the interests" of the group rather than of the individual companies. The latter particular problem arises in all nominee directorates. Although the examination undertaken in this paper does have applicability to nominee and group directors, the particular problems of those directors are outside the scope of this paper (2). Henceforth the term "multiple directorate" refers to the situation of a person being a director of two or more unrelated companies, or other bodies corporate.

(1) A variety of terms can be used, for example "dual directorships", "plural directorates" and other permutations.

(2) See e.g. P.R. Kyle: "The Government Director and his Conflicting Duties" (1973) 7 V.U.W.L.R. 75; and A.G. Archer Industrial Democracy - Prospects for New Zealand (LL.M. Bodies Corporate and Unincorporate Research Paper, V.U.W.; 1978) pp. 32-40.

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2. The Extent of Multiple Directorates

Some details of the extent of multiple directorates in New Zealand's largest public companies are provided by two studies done at Victoria University (1). The earlier work only briefly referred to the phenomenon. In respect of the 58 public companies surveyed in 1962, there were 3 persons holding 4 directorates and 12 persons holding 3 directorates (2).

The later study, the results of which have been published (3), was more specific in exploring the extent of potential interlocking directorates. "An interlocking directorate exists only where the link is of definite potential benefit to the firms involved, and is actually taken advantage of" (4). Owing to the problems which the requirement of actual benefit creates for research, only potential interlocks were able to be explored in respect of the 160 public companies involved. The study, being directed to the effect on competition, examined both direct and indirect interlocks (5). Interlocks of four different natures were identified: with competitors, suppliers, customers, and financial institutions (6). Of the 876 directors involved, 65% held more than one directorate, while 5% of the directors held 20.7% of the directorates (7). The prevalence of multiple directorates is thus shown to be relatively high.

(1) G. FOGELBERG : A Study of the Ownership and Control of Public Companies in New Zealand (unpublished M.C.A. thesis, V.U.W.; 1963); and C.R. LAURENT : Interlocking Directorates in New Zealand (Unpublished M.C.A. thesis, V.U.W.; 1972).
(2) FOGELBERG, ibid, p.60.
(3) G. FOGELBERG and C.R. LAURENT : Boards of Directors in New Zealand Companies (Department of Business Administration, V.U.W.; 1974).
(4) LAURENT, supra n.(1), p.4.
(5) A direct interlock is where one director serves on the board of two companies. An indirect interlock is where directors of two companies are members of the board of a third company. Indirect interlocks are outside the scope of this paper, as the emphasis will be on the personal liabilities of persons holding multiple directorates.
(6) LAURENT, supra n.(1), pp.174-175.
(7) Ibid, p.168.

However the study only considered one third of the directors to be involved in potential interlocks. Also less than 9% of the directors formed almost two-thirds of those potential interlocks. Fogelberg and Laurent concluded that the evidence indicated "the possible existence of a small powerful dominating group in New Zealand's large companies" (8).

That study was directed towards situations in which both companies might benefit from the multiple directorate. Particular emphasis was placed on the significance of interlocks which restrict competition. For instance, the possibility of preferential trading resulting from interlocks with customers and suppliers was noted (9).

That emphasis is also to be found in the United States where the anti-trust laws are important statutes. The major legislative effort against multiple directorates has been section 8 of the Clayton Act of 1914. That section basically prohibits persons from being director of two companies which have shareholders' funds exceeding $1 million and which are competitors. Other sections of the Clayton Act, as well as other statutes, regulate particular industries with greater stringency. The measure has not been entirely successful because of evasion by indirect interlocks and use of non-directors to form the interlock. Furthermore, the provision does not restrict interlocks which prevent competition from arising with the company's expansion into new areas or products. However the competitive aspect is not the sole object of that legislation. The Federal Trade Commission saw the fundamental purposes of the enactments as being "to preserve competition and economic opportunity and to forestall the acceptance of inconsistent and conflicting responsibilities by the directors of our large business corporations" (10). As already stated, the latter point is the emphasis of this paper.

(8) FOGELBERG and LAURENT, <u>supra</u> n.(3), p.21.

(9) <u>Ibid</u>, p.19.

(10) Federal Trade Commission : <u>Report on Interlocking Directorates</u> (Washington, Government Printing Office; 1951) p.5.

The concern with the restriction of competition is a valid one if one is concerned with the interests of the economy as a whole. But that is not the test of the legality of directors' actions. In relation to the individual company, the directors are required to act "in the interests of the company", which means in the interests of shareholders (11). Thus other interests, such as the restriction of competition or employees' interests, are outside the criteria by which directors' acts are judged (12). Instead, it is necessary to determine in the individual circumstances of each company whether an interlocking directorate is in the interests of the company.

The more specific problem relating to multiple directorates is that of conflicts of interest. One facet of the problem, ignored by the studies already referred to, is that of loss of corporate opportunity. Interlocks with competitors, suppliers, customers, and financial institutions also have importance, for conflicts of interest can arise in any of those interlocks. A further example of a situation where a conflict of interest might occur is where a person is a director of both the takeover offeror and offeree company in a takeover or merger (13).

The problem of loss of corporate opportunity may exist in either of two forms. First, company A's board of directors may decide, contrary to the apparent best interests of the company, to refrain from pursuing a business opportunity owing to the existing or future involvement of company B, sharing a common director X, in that area of opportunity (14). Second, company A may perceive

(11) This has been suggested to be the result of the members being the company in the early deed-of-settlement company; L.S. SEALY: "The Director as Trustee" [1967] Camb. L.J. 83, 90.
(12) PARKE v. Daily News Ltd. [1962] Ch. 927.
(13) The provisions of the Second Schedule to the Companies Amendment Act 1963 attempt to deal with the situation.
(14) The propriety of the decision or the bona fides of the directors are usually irrelevant where a conflict of interest exists; see p.37 post.

a business opportunity, such as a compatible takeover victim or a new product line, but company B, sharing common director X, seizes that opportunity. The second type may be termed a "leak" situation.

The problem of loss of corporate opportunity differs from those problems associated with the links of mutual benefit with suppliers, customers, and financial institutions, and even in some cases with competitors. In the various cases of links of mutual benefit, it is improbable that any member of a company involved would object to the link at a shareholders' meeting or through the courts. Links involving the supplier/customer relationship, including the supply of finance, generally have advantages obvious to shareholders. So too may links with competitors of a cartel nature.

However these links of mutual benefit do not inevitably result in links which are "in the interests of the company". That is particularly true of links with competitors. In a number of cases, possibly a majority, the primary concern will be to prevent the competitor from taking advantage of the situation. In fact the situation resembles that of loss of corporate opportunity except that there is better knowledge of the risk of leaks of information. It is convenient to note that Fogelberg and Laurent discovered 98 cases of direct interlocks with competitors in the 160 companies studied (15).

By contrast to the links of mutual benefit, there are likely to be objections raised by shareholders in the case of loss of corporate opportunity, when the true position becomes known. The basis of those objections in the legal sphere is the topic to be analysed in this paper. There are many difficulties involved, apart from the legal foundation of the action. First it may be difficult to discover that a loss of corporate opportunity has occurred. Second there is the problem of possessing locus standi to bring the suit. Third evidentiary

(15) FOGELBERG and LAURENT; supra n.(3), p.24.

problems may arise in the proof of a leak to the other company. Furthermore, there is the problem of actually getting a suitable remedy from the court.

It is not possible to precisely identify, in advance, the creation of situations involving loss of corporate opportunity. Quite a number of the second type, that is the "leak" situation, have actually reached the courts, although often only where a director or other senior executive officer takes advantage of a business opportunity of the company, sometimes by means of a company specially created for the purpose (16).

The extent of directors' conflicts of interest cannot be determined. However the potential extent can be judged by reference to the total number of multiple directorates, as that determines the maximum possible number of such conflicts. The actual number of conflicts is, of course, much smaller. Some appreciation of the extent of multiple directorates in New Zealand can be gained from the listing of directorates in The New Zealand Business Who's Who (17). The listing includes overseas companies and some private companies, as well as public companies, whether listed on the Stock Exchange or not. Directors of some other types of business entity, such as building societies, are also included. Directors of some subsidiaries are included. The resulting figures are shown in Table I. There are thus almost 3500 persons who are presently able to be in a position where their duty to one company may conflict with their duty to another company.

TABLE I

Number of directorates	2	3	4	5	6	7	8	9	10	11 - 15	16 - 20	20+
Number of persons	2078	654	251	172	102	68	35	24	17	56	13	12

(16) Two such examples are Industrial Development Consultants Ltd v. Cooley- [1972] 2 All E.R. 162 and Canadian Aero Services Ltd. v. O'Malley (1973) 40 D.L.R. (3d) 371.

(17) (Wellington, F.E.P. Productions Ltd; 1978)

The resulting number of possible two-company conflict of interests is in excess of 22,000. Also significant is the fact that 12 persons hold more than 20 directorates. Subsequent investigation showed that 3 of those persons actually hold less than 20 directorates, owing to the method of compilation of the listing. Therefore the figures do overstate the true position, but the figures are unlikely to be significantly affected by the error (18).

An example of the problem being addressed in this paper is the following. X is a director of A Ltd. and B Ltd. A Ltd., a retailer, with diverse interests, identifies Q Ltd., a manufacturer of goods sold by A Ltd., as suitable for takeover. B Ltd. is also a manufacturer but of a different range of goods to Q Ltd. B Ltd., just before A Ltd. decides to make a formal takeover offer, makes a successful offer for 55% of the shares in Q Ltd. (19). The following sections of this paper represent an attempt to explore the possible liability of X in that or any other situation involving a loss of corporate opportunity. It might be observed that the above example actually involves both types of loss of coprorate opportunity identified earlier. The "leak" situation is clearly apparent. But the first type of situation in which a board refrains from acting is also present, for the board of A Ltd. has refrained from pursuing the takeover opportunity or the possibility of litigation. The following discussion is equally applicable to a situation involving an apparent link of mutual benefit which has been exploited to one company's advantage.

Before commencing an exploration of the legal principles which could be relied on in bringing an action against X and B Ltd., some policy considerations which could influence the courts deserve mention. The considerations might influence the court to take a more or a less stringent approach to any issue involving multiple directorates in New Zealand.

(18) The error evolves out of some larger companies which have branches being listed more than once.

(19) Assuming that the provisions of the Companies Amendment Act 1963 are inapplicable or are complied with.

The first of the policy considerations is the small size of the population of New Zealand, which may place strains on the pool of persons sufficiently talented to act as directors. Laurent identifies five reasons for the appointment of a particular person as a director. They are: (a) to represent a controlling interest; (b) to gain the person's specialised knowledge and general skill; (c) prestige factors; (d) to create an interlock with another company; and (e) to have the right contacts (20). If one assumes that ability is evenly distributed in different countries, then _prima facie_ New Zealand's smaller population must create pressures for duplication of personalities on the boards of independent companies, as there is a proportionately high number of companies in New Zealand compared to overseas countries. It can be argued that New Zealand courts might therefore take a less onerous approach to the legal liabilities of persons with multiple directorates.

However Fogelberg and Laurent concluded that in the area of interlocks, there was the indication of "the possible existence of a small powerful dominating group in New Zealand's large companies" (21). The courts might therefore be persuaded to use their powers to influence the dissolution of this concentration of economic power. However the courts are likely to abdicate such a role, owing to their inherent conservatism, by referring to the matter as being one for Parliamentary attention. A further objection to the argument based on the small population is that there appears to exist a substantial pool of untapped talent capable of acting as directors. The writer's view is that the argument

(20) LAURENT, _supra_, n.(1), pp.21-22.

(21) _Supra_ n.(8). Laurent was more forceful in using the phrase "a power elite" : _supra_, n.(1), p.166.

based on the size of the New Zealand population is inconclusive, and that the courts are unlikely to alter their position because of it.

A more significant factor distinguishing New Zealand directors from overseas directors is the aspect of remuneration. The New Zealand director is not well paid for his services as director (22). Because of the low level of remuneration, the outside director appears more willing to accept a number of directorates than his overseas counterpart. The result frequently is that the outside director does not make a significant contribution to the management and direction of the company's business. At some stage it becomes physically impossible for the person holding a number of directorates to spend sufficient time attending to the affairs of his directorates. The judicial response to the low level of remuneration could be a less stringent approach to the director's liabilities in the multiple directorate context. However such a factor has not influenced the courts to relax their strict attitude to the activities of trustees, who are not paid in the absence of specific authorisation. Indeed, policy appears to demand a stringent approach for two reasons. First, it would serve to increase the standards expected of businessmen's conduct. Second, it would recognise that persons holding a large number of directorates are, in reality, professionals. As professionals, the law should demand professional standards from them. The conduct of persons holding multiple directorates in New Zealand does not necessarily indicate that a stringent approach is required. But an attitude of allowing matters to be solved by Parliament after the horse has bolted appears inexcusable. That is not a plea for greater judicial activism; instead, it is a request that policy is not used to induce an unjustifiable lenient attitude on the part of the courts enabling persons to unscrupulously take advantage of the situation.

(22) Executive directors, however, do appear to be reasonably rewarded, but this is not due to the directors' fees component of their total remuneration.

The modern judiciary places a greater emphasis on explicit policy considerations (23). However, the writer's view is that is is virtually impossible to predict the significance of policy factors, such as those outlined above, in a judicial determination. However it does not appear that there are any policy considerations which demand that the New Zealand courts approach the problem of multiple directorates in a manner different from the courts elsewhere in the Commonwealth.

The surveys show that the extent of multiple directorates in New Zealand is not inconsiderable. A number of different types of problem can arise out of multiple directorates. The extent of the actual existence of these problems cannot be determined. However, given the significant number of multiple directorates, it appears appropriate that we should examine the state of the law regarding conflicts of interest which can arise out of the holding of multiple directorates, particularly the problem of loss of corporate opportunity.

(23) Particularly in the law of negligence : see especially Anns v. London Borough of Merton [1977] 2 W.L.R. 1024.

3. Statutory Provisions

The first aspect of the law concerning multiple directorates to be examined must be that statutory provisions, for they can override any common law or equitable principles which might be applicable. However the Legislature has not paid much attention to the problem of multiple directorates. The only legislative effort in New Zealand which has any effect on the problem is section 199, Companies Act 1955 (1). The section is a recognition that problems may exist where directors have interests to consider other than those of the company. Indeed, in recognising the possibility of persons being directors of more than one company, the section appears to tacitly approve of the legality of multiple directorates. But the section expressly does not purport to affect the operation of any rule of law restricting directors from having interests in contracts with their company (2). Thus the section cannot be relied upon as an implied statutory authority for multiple directorates.

The section cases a duty upon the director who is interested in any way, whether directly or indirectly, in a contract or proposed contract with the company to declare the nature of his interest at a board meeting. The section must be complied with where a director is "interested" in a contract. What, then, is the necessary "interest"? By the use of the words "who is in any way, directly or indirectly, interested...", the Legislature appears to have intended a wide range of interests. The writer's view is that the words are inherently broad enough to include the director's interest as an officer of the other

(1) The section is based on section 199, Companies Act 1948 (U.K.). See L.C.B. GOWER : Principles of Modern Company Law (London, Stevens & Sons; 3rd edn., 1969) p. 529-531.

(2) Section 199(5), Companies Act 1955.

contracting party. Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co. (3) illustrates that a mere interest as a trustee activates the equitable principle, which actually underlies the section. However in Wilson v. L.M.S. Ry. (4), the interest of a director as a salaried director of another company was held not to require that director to vacate office. That decision was based on a decision of the House of Lords (5) interpreting the Municipal Corporations Act 1882 which is worded similarly to section 199 (6). However section 199(3), which provided for the giving of general notice, refers to being "a member of a specified company or firm", so there remains scope for a director not holding shares in the other contracting party to be sufficiently "interested" (7). The point has little relevance, for in the majority of cases directors do hold shares, either because of a share qualification requirement or as a sign of good faith. But because of the consequences of non-disclosure, the well-advised director would declare all such interests.

The director must declare the nature of his interest. Thus the director does not have to disclose all the material facts about his interest. But he does have to disclose interests which are not material (8). For proposed contracts, the declaration must be given at the first board meeting at which the contract is considered, or at the next board meeting where the director was not initially present. Alternatively if the director becomes interested after

(3) [1914] 2 Ch. 488.
(4) [1940] Ch. 169.
(5) Lapish v. Braithwaite [1926] A.C. 275.
(6) It only omits "in any way".
(7) But the object of section 199(3) was to prevent inconvenience, not to generate more disclosure.
(8) Cf. Australian Uniform Companies Act 1961, s. 123(2).

the contract is made, then he must declare at the next board meeting (9). Further, subsection (3) provides for members of other companies or firms to give a general notice. It serves as notice of the director's interest in any contracts with the specified companies or firms which thenceforth are entered into by the company to whom notice is given.

A remarkable feature of the provision is that the declaration is to be made to the company's board of directors. The reason for this appears to be sheer convenience. The equitable principle, on which the section is superimposed, requires disclosure to the shareholders, although this may be excluded by the articles.

Nothing in the section prejudices the operation of any rule of law restricting such contracts. Thus compliance with the section does not necessarily validate a contract in which a director is interested. The equitable rules may still operate to invalidate the contract at the company's option. However the real effect of the section is to require a minimum level of disclosure of directors' contracts, below which the articles cannot exclude the equitable rule.

In Hely-Hutchison v. Brayhead (10), a strong Court of Appeal (11) had opportunity to consider the provision. Their Lordships agreed that the effect of non-compliance with the section is to render the contract void at the instance of the company and to make the director accountable for any secret profit he makes (12).

(9) Section 199(2). The structure of the subsection indicates that no declaration is required for contracts not considered by the board: GOWER, supra, No.(1), p.530.

(10) [1968] 1 Q.B. 549.

(11) Coram: Lord Denning M.R., Lord Wilberforce and Lord Pearson.

(12) Supra, n.(10), 585, 589, 594.

The provision is a relatively important one, although the writer suspects that compliance is rather mechanically performed. Reforms suggested by the Jenkins Committee (13) to improve the section's effectiveness, related to the problems of materiality, contracts not considered by the board, and the extent of disclosure.

The section has significance for persons holding multiple directorates as it is not unlikely that the two companies concerned will at some time actually enter a contract with one another. However the paper is primarily concerned with the problem of loss of corporate opportunity. That problem does not involve the entry of the two companies into contractual relations. Thus section 199 does not provide the aggrieved shareholder with any form of action with which to confront the director, X, in the hypothetical situation postulated earlier in this paper. Instead, he must rely on the Common Law and Equity for the protection of his interests in his company, A Ltd.

(13) Cmnd. 1749. No comment on section 199 was made by the Macarthur Committee.

4. The Director and His General Obligations

A. The Position of Directors

To the employee, a director is "one of the bosses". He is a manager. Even the shareholders would agree that he is responsible for the management of the company.

However that does not assist the lawyer, accustomed, as he is, to masters, servants, principals, agents, trustees and beneficiaries. The nineteenth-century lawyers and judges faced with the emergence of the joint-stock company, struggled to determine what a director actually was, in order to decide his legal liabilities. The closest analogy appeared to be that of trustee (1). However the lack of ownership of the directors of the company's funds emphasized the agency of the directors for the company. Agents came to be considered to be "fiduciaries". So too did directors; the term "fiduciary" displacing the use of "trustee". Today the director is a fiduciary who owes duties to the company.

However the liabilities of directors in different contexts are different: in some, the analogy of trustee still applies, while in others it is that of agent (2). Directors are more accountable in respect of the company's money and property, than for their conduct of the company's business. The courts are more capable of applying stricter standards in respect of the former than the latter.

The major point to be noted is the fiduciary position of the director.

(1) See generally G.W. KEETON : "The Director as Trustee" (1952) 5 C.L.P. 11, and L.S. SEALY : "The Director as Trustee" [1967] Camb. L.J. 83.

(2) Great Eastern Railway Co. v. Turner (1872) L.R. 8 Ch. App. 149, 152, per Lord SELBORNE L.C.

The conclusion that a person is a fiduciary is not generally able to be so promptly reached as it is with a director. It is generally a question to be answered on the facts of the relationship existing (3). Finn (4) emphasizes this point, and would probably contest the conclusion that a director is a fiduciary. That author's approach is that a person who has certain obligations of a fiduciary character case upon him, is only then fit for description as a "fiduciary".

The effect of the fiduciary position can be two-fold (5). First, the powers given to the directors are to be exercised by the directors for the benefit of the company, that is "in the interests of the company". Those powers are called "fiduciary powers", and they are outside the purview of this paper. Second, the position of director imposes certain fiduciary obligations upon the director. These will be examined in Chapter 5.

B. Duties of Care

Apart from the two types of fiduciary responsibility, directors have a third set of duties. These may be best described as the duties of care. These have a common law basis, by contract to the equitable foundation of fiduciary powers and obligations. The duties of care are not onerous. This is mainly the product of judges being reluctant to become involved in issues of business, economics and administration, particularly the exercise of business judgement (6). Chancery judges appear to have had

(3) E.g. Boardman v. Phipps [1967] 2 A.C. 46, 123, per Lord UPJOHN.
(4) P.D. FINN : Fiduciary Obligations (Sydney, Law Book Co., 1977) Ch.1.
(5) Ibid, p.2.
(6) V. POWELL-SMITH : The Law and Practice Relating to Company Directors (London, Butterworths; 1969) p.120; and L.C.B. GOWER : The Principles of Modern Company Law (London, Stevens & Sons; 3rd edn. 1969) p. 550.

greater familiarity with business matters than their Common Law bretheren, so that their response to the new situations created by the emergence of companies in the nineteenth century was less compromising. Indeed Danckwerts J. in a case applying the equitable rule concerning harming an employer's business, stated the functions of directors in a positive manner:

> "The functions of a director is to supervise the carrying on of the company's business for the benefit of the company and its shareholders and to advance these interests" (7).

Such a statement, while astounding the lawyer, would come as no surprise to the layman.

The law concerning the duties of care owed by directors was summarized into three propositions by Romer J. in Re City Equitable Fire Insurance Co. (8). The first proposition is that a director need exhibit in the performance of his duties no greater degree of skill than may reasonably be expected of a person of his knowledge and experience. The test has both subjective and objective elements. The effect of the increased competence of persons acting as directors has probably been to increase the standard required of directors. In Dorchester Finance Co.Ltd. v. Stebbing (9), Forster J. appeared to be influenced by the accountancy experience of the directors.

(7) Aubanel & Alabaster v. Aubanel (1949) 66 R.P.C. 343, 346-347.

(8) [1925] Ch. 407, 428 et seq. See generally Gover, supra, no.(6), pp. 549-552; Powell-Smith, supra, no.(6), Ch. 4 ; A.B. Afterman: Company Directors and Controllers : Their Duties to the Company and the Shareholders (Melbourne, Law Book Co.; 1970), pp.126-130.

(9) (Unreported, 22 July 1977, 1974 D No. 3538). Referred to by B.A.K. Rider: "Changes in Company Law - Directors' Duties" (1978) 128 New L.J. 1116, 1117-1118.

Romer J.'s second proposition is that a director is not bound to give continuous attention to the affairs of the company. He is not necessarily required to attend board meetings.

The third proposition is that a director is entitled to rely, in the absence of grounds for suspicion, on an official to whom duties have been properly left. This proposition is fully supported by Dovey v. Cory (10).

C. Procedure

At this point reference ought to be made to the effect of the rule in Foss v. Harbottle (11). Not only are the standards required of directors quite low, but it may be rather difficult for a shareholder to bring an action against the directors, owing to the rule. Duties of all types are primarily owed to the company by directors (12). Thus it is the company which must bring any action against the directors. There are exceptions to that rule. First, a shareholder may bring a personal action where his personal rights are subject to infringement, although such an action will primarily be against the company rather than the directors. Alternatively, a derivative action might be permitted by the Court to be brought by an individual shareholder where some fraud on the minority is present. Gower identifies three categories of fraud on the minority: an expropriation of company property, breach of the directors' duties of subjective good faith and voting for resolutions not

(10) [1901] A.C. 477.

(11) (1843) 2 Hare 461. See Gower, supra, n.(6), Ch. 25; K.W. Wedderburn: "Shareholders' Rights and the Rule in Foss v. Harbottle' [1957] Camb. L.J. 194 and [1958] Camb L.J. 93.

(12) An example of where duties are owed to individual shareholders is provided by Coleman v. Myers [1977] 2 N.Z.L.R. 225.

bona fide in the interests of the company (13). To that list, a further category might be added as a result of the decision in Daniels v. Daniels (14); negligence of the directors which results in a profit to themselves. Additionally for a derivative action, Gower suggests that it must be shown that the alleged wrongdoers control the company (15).

The rule represents a significant impediment to the enforcement of duties which the director imposes on directors. Its major effect is on the Common Law duties of care which a director owes. However, the rule also serves to restrict the possibility of actions being brought in respect of certain of the fiduciary obligations owed by directors; the rule relating to misuse of property held in a fiduciary position being an obvious exception. Other exceptions must depend on the facts of the cases in which the duties are breached.

D. Fiduciary Obligations

The classification of the director as a fiduciary raises a number of questions to be answered, as Frankfurter J. pointed out in Securities and Exchange Commission v. Chenery Corporation (16):

> "To say that a man is a fiduciary only begins analysis: it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?"

Those questions will be attempted to be answered in the following parts

(13) Gower, supra, n.(6), pp. 564-570.
(14) [1978] 2 W.L.R. 73. Cf. Pavlides v. Jensen [1956] Ch. 565.
(15) Gower, supra, n.(6), p.589.
(16) 318 U.S. 80, 85-86 (1943).

of the paper (17). The second and third questions are the subject of Chapter 5. The fourth question is part of the subject-matter of Chapter 7, while the first question will now be addressed.

The general fiduciary position of the director emerged during the currency of the deed-of-settlement company. Sealy (18) provides this as the reason for fiduciary obligations of directors being owed to the company, which actually represents the shareholders. That the duty is owed essentially to the shareholders is made clear in a number of cases which refer to the possibility of disclosure to and consent by the shareholders (19). However two recent cases have questioned that conclusion. Instead of requiring disclosure to be made to the shareholders for the purpose of waiver, ratification or approval, these recent cases have referred to disclosure to the board.

In Peso Silver Mines Ltd. v. Cropper (20), the Supreme Court of Canada accepted that rejection of an opportunity by the board of directors permitted individual directors to take advantage of those opportunities. That is not exactly the same as saying that the fiduciary duties are not indirectly owed to the shareholders, but that is the practical effect if the Court is correct. One commentator has referred to the significance of the directors having the management of the company (21). Thus the directors might be able to reject opportunities, but probably cannot approve of a director's breach of fiduciary

(17) Lord Upjohn in Boardman v. Phipps [1976] 2 A.C. 46, 127 stated four propositions which essentially follow the same structure as Frankfurter J.'s dictum.

(18) Supra, n.(1), 90.

(19) E.g. Regal (Hastings) Ltd. v. Gulliver [1967] 2 A.C. 134; Richard Brady Franks Ltd. v. Price (1937) 58 C.L.R. 112, 113, per Dixon J.

(20) (1966) 58 D.L.R. (2d) 1. For fuller discussion, post, pp. 46-48.

(21) N.A. Bastin : "The Honest Director and Secret Profits" (1978) 128 New L.J. 527.

obligation, despite the contrary implication in Peso. Alternatively the proposition may be rejected on the basis that Peso was wrongly decided.

In Queensland Mines Ltd. v. Hudson (22), the Privy Council held that, "with the fully informed consent of the Queensland Mines board", the defendant director, who had taken advantage of mining licenses which he had initially acquired for the company, was not liable to account. The decision was a short one, considering the factual complexities of the case. Furthermore, the opinion of the Privy Council was mainly directed to summarizing those facts. The legal reasoning supporting the above conclusion does not appear on the face of the record.

However the legal conclusion may be rationalised by reference to the facts. The defendant director made disclosure to the plaintiff's board of directors, of which he was a member, and gained its approval to his actions. The plaintiff company, being a joint venture company with two corporate shareholders, really had no other organ than its board. A meeting of shareholders presumably would have been indistinguishable from a board meeting. Informal consent of the shareholders was taken to be the equivalent of a resolution formally passed by the company in general meeting or by entry in the minute book (23). The defendant thus fulfilled his duties by disclosing to the representatives of the other shareholder, and gaining their consent. The shareholder, whom the defendant director represented on the plaintiff's board, had separate duties owed to it by virtue of the defendant's position as its

(22) (1978) 18 A.L.R. 1, 10. For fuller discussion, post, pp. 54-56.

(23) This approach was taken in Re Duomatic Ltd. [1969] 2 Ch. 365 and C.H. Mitchell Ltd. v. Wellington Meat Export Co. Ltd. [1962] N.Z.L.R. 768.

managing director (24). Therefore the fact that the defendant did not make any disclosure to the company he represented, or to its holding company of which he was also managing director, should not have been relied upon (25), and was not relied upon by the Privy Council. To rely upon it, would have enabled the other shareholder to have shared in the defendant's profits, despite having consented, after full disclosure, to the defendant having the opportunity of making them. In other words, that other shareholder should have been estopped from compelling the plaintiff (26) to bring the action against the defendant.

Despite the uncertainties which those cases have induced, a reasonable statement of the law is that directors owe their fiduciary duties to company in general meeting. All the members of the High Court affirmed that disclosure must be to the shareholders, in Furs Ltd. v. Tomkies (27). In that case there had been some knowledge, and tacit approval, by some directors of the defendant director's secret profit, but that was treated as being irrelevant. In the Regal case, there was full knowledge and consent by the directors, as all the directors were involved in the scheme, but that was obviously to be ignored by the House of Lords. Furthermore, the decision of the Court of Appeal in Coleman v. Myers (28) emphasizes the position of individual shareholders being owed fiduciary obligations in certain circumstances. Bastin argues strongly for the disclosure being required to be made to the shareholders as a protection of their position (29).

(24) Possibly implicit in this view is that an action would not have been statute-barred, unlike the view of the trial judge.
(25) As did the trial judge.
(26) The other shareholder held 51% of the shares.
(27) (1936) 54 C.L.R. 583, 591, 592, 599, 600.
(28) Supra, n.(12).
(29) Bastin, supra, n.(21), 528-529. On disclosure generally, see R. Baxt: Judges in Their Own Cause: The Ratification of Directors' Breaches of Duty"(1978) 5 Monash U.L.R. 16.

5. Fiduciary Obligations of Directors

A. General

The analysis of Finn (1) has already been referred to (2). That author has identified eight separate "fiduciary obligations" which may arise. They are: undue influence; misuse of property held in a fiduciary capacity; misuse of information derived in confidence; purchases of property dealt with in a position of a confidential character; conflict of duty and interest; conflict of duty and duty; renewals of leases and purchases or reversions; and inflicting actual harm on an "employer's" business (3). These rules have been evolved by the courts of Equity in an attempt to ensure that a person in whom trust or confidence is placed by another does not abuse that trust or confidence (4). Finn's approach is that a person is a fiduciary when one of the above rules applies to him, for the purposes of that rule (5). However for the purposes of the present paper, that logic is not required.

There is clear authority for the proposition that a company director is a fiduciary. Thus he owes certain fiduciary obligations. It is consistent with the aims of Equity that directors be classed as fiduciaries. However the director is not afflicted by all of those obligations identified by Finn.

In particular, the director is not affected by renewals of leases and purchases of reversions. The director is also not affected by the rules relating to undue influence. Nor is he affected by the rule relating to misuse of information derived in confidence, by mere virtue of his position as a director (6). The present writer doubts whether either of these latter two obligations

(1) P.D. FINN : Fiduciary Obligations (Sydney, Law Book Co.; 1977).
(2) *Ante*, p.16.
(3) Finn, *supra*, n.(1), pp.79-80.
(4) *Ibid*, pp.3-4.
(5) *Ibid*, p.2.
(6) Chapter 6, *post*.

may properly be referred to as being "fiduciary", especially the obligation of confidence. Admittedly they are obligations enforced by Equity. However, these two obligations are not the result of the person who owes the obligation having been in a pre-existing position of trust. In other words, the writer views the fiduciary obligation as being born out of a pre-existing fiduciary position.

The present paper is primarily directed to the resolution of the problem of loss of corporate opportunity. Thus the rule relating to purchase of property dealt with in a confidential position is not appropriate for analysis here.

The analysis of Finn may be contrasted with that of Sealy (7). That writer identifies four categories of fiduciary relationship, with the possibility of a fifth relating to confidential information. His four categories, like those of Finn, overlap to some extent. The first is where a person has control over property which is, in Equity, the property of another. Second there is the situation where a person has undertaken, possibly merely in Equity's view, to act on behalf of another for that other's benefit. Third there are the two propositions flowing from <u>Keech</u> v. <u>Sandford</u> (8), that a person in a fiduciary position may not profit from his situation, and that a trustee (9) may not acquire greater rights in accretion to property of the trust than he already holds in the property. Fourth is the doctrine of undue influence. The present writer respectfully doubts the utility of the classification, at least for the purposes of the paper, for it lacks the specificity of Finn's. However the distinction made between Sealy's first and second categories has significance

(7) L.S. SEALY : "Fiduciary Relationships" [1962] Camb. L.J. 69 and "Some Principles of Fiduciary Obligation" [1963] Camb. L.J. 119.
(8) (1726) Sel. Cas. Ch. 61.
(9) Also life tenants, mortgagees in possession, and others.

in terms of the available remedies (10).

The overlapping, alluded to above, inherent in Finn's classification is most serious in respect of the "conflict of duty and interest" and "conflict of duty and duty" rules. In principle at least, the present writer sees no distinction between the two rules. For the purposes of the former rule hereafter referred to as the "duty of loyalty" rule, "interest" generally means some pecuniary advantage. But persons are also interested to minimise their pecuniary responsibilities or liabilities. A person who owes a duty, assuming the enforceability of such duty (11), will be looking to his own interests by complying with that duty. Thus conceptually, the writer perceives no necessity for the distinction drawn by Finn, or for its application in considering the problems of directors as competitors (12).

Indeed Swinfen Eady L.J. in Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co. (13) accepted this view, stating:

> "Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion without the rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director."

The same view was countenanced by McDonald J. in Abbey Glen Property Corporation v. Stumborg (14), whose decision was upheld by the Alberta Court of Appeal (15). Moreover Lord Upjohn appears in Boardman v. Phipps (16)to have equated "duty" and "interest" when referring to the position of socicitors. Even Finn

(10) Sealy (1963), supra, n.(7), p.119.

(11) Enforceability by individual shareholders in the company context is complicated by the rule in Foss v. Harbottle (1843) 2 Hare 461: ante, p.18.

(12) Cf. D. JACKSON : "A Note on the Director as Competitor: Can He Serve on the Board of a Competitor: (1976) 9 Uni. of Q. L.R. 260.

(13) [1914] 2 Ch. 488, 503.

(14) (1976) 65 D.L.R. (3d) 235, 278. For fuller discussion, post, pp. 63-66.

(15) (1978) 85 D.L.R. (3d) 35. For fuller discussion, post, pp. 56-58.

(16) [1967] 2 A.C. 46, 126.

acknowledges that "duty" is not used in its technical sense (17).

However the agency cases, in relying on a conflict of duty and duty rule (18), do appear to impose a different test than that applied under the duty of loyalty rule. For that reason, and the reason that a director is not solely a fiduciary but also an agent, Finn's analysis will be adopted, albeit with reluctance.

B. Misuse of Property Held in a Fiduciary Position

The legal duality of the director's position has already been commented upon in Chapter 4. The director in controlling the company's property, in which he has no necessary interest, has a position which closely resembles that of a trustee. In the case of trustees, it is clearly the law that any dealing in the trust property for the trustee's benefit, is actually done for the benefit of the cestuis que trust, according to the view of Equity. That the principle applies to company directors was made clear by Lindley L.J. in In re Lands Allotment Co. (19). The principle has two significant implications. First, the proprietary remedies of constructive trusteeship and tracing are available in addition to the personal claim against the director (20). Second, it is not possible for the directors voting as shareholders to ratify a misappropriation of the property of the company to themselves (21). The principle fetters the power of directors to do as they please with the company's property. To the writer's mind (22), it provides the rationale for

(17) Finn, supra, n.(1), p.203.
(18) Section D, post.
(19) [1984] 1 Ch. 616, 631.
(20) Chapter 7, post.
(21) Cook v. Deeks [1916] A.C. 554, 564.
(22) Cf. L.C.B. GOWER : The Principles of Modern Company Law (London, Stevens & Sons; 3rd edn., 1969) p. 137.

the decision in Marshall's Valve Gear Co. v. Manning (23) that the shareholders could override the directors' wishes in bringing an action. The action was in respect of company property, a patent, which distinguishes the case from the other case concerning the bringing of an action, John Shaw & Sons (Salford) Ltd. v. Shaw (24).

The problem of loss of corporate opportunity does not, however, involve any misappropriation of company property except in two possible regards. These will be discussed in the following two sections.

(a) Misappropriation of Contracts

The first of these two possibilities is the misappropriation of a contract, which the company had some expectancy of gaining, to the director's benefit, as occurred in Cook v. Deeks (25). The Privy Council applied the rule, holding the directors accountable for taking a contract in which the company had an interest. The decision in Westminster Chemical N.Z. Ltd. v. McKinley (26) is quite similar. The line of cases applying the rule to directors will not be explored in this paper for the writer believes that similar results can be obtained by relying on the "duty of loyalty rule". Indeed the cases are similar to the developing corporate opportunity doctrine (27).

(b) Information as Property

The second possibility is that of misappropriation of company information. But the premise that "information is property" must first be established

(23) [1909] Ch. 267.
(24) [1935] 2 K.B. 113.
(25) Supra, n.(21), 564.
(26) [1973] 1 N.Z.L.R. 659, 663.
(27) Post, pp. 51-52.

before the possible advantages of the proprietary remedies may be enjoyed.

The premise is one which has not been categorically established by the courts; but nor has it been categorically refuted. The division of the House of Lords in Boardman v. Phipps (28) demonstrates the controversy which exists.

In developing the argument for the proposition, the first stage is an analysis of the concept of "property" in English law. The term does not necessarily mean a physical object. Rather, it refers to rights of ownership in a particular thing, which itself may be tangible or intangible. The Property Law Act 1952 may assist the analysis in defining "property" as including:

> "real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest."

The reference to a "thing in action", or a chose in action, may be significant. A chose in action is a personal right of property which can only be claimed or enforced by action (29). It is not a bare right to sue; it must be connected with property. Thus the chose in action generates an uncertain result for our inquiry.

But the statutory definition does refer to "any other right or interest".

(28) Supra, n.(16)

(29) R.E. MEGARRY and P.V. BAKER (eds.) : Snell's Principles of Equity (London, Sweet & Maxwell; 27th edn., 1973) p.69.

(30) The writer presumes that all the judicial dicta referring to the proposition that information is property were made with an awareness of the special position of confidential information. But that presumption has a dobutful basis when Judges accept the proposition but reject it on the facts of the case before them, for example, Viscount Dilhorne : post, p.29.

(31) (1741) 2 Atk. 342.

Thus a right of action would represent property. The right of action for breach of confidence, however, is not of sufficiently general application to found the proposition that all information is property (30). The common law, however, developed copyright protection for the authors of letters and of unpublished manuscripts. That development occurred in Pope v. Curl (31). However the right was not extensive for the recipient of the letter has property in that letter.

In two cases, information has been held, rather than merely stated obiter, to have some of the characteristics of property. In Green v. Folgham (32), it was held that information can be the subject-matter of a trust. The more recent decision in In re Keene (33) held that property passing to a trustee in bankruptcy included information.

The statements of their Lordships in Boardman v. Phipps require analysis. Viscount Dilhorne accepted the possibility of "some information and knowledge" being able to be regarded as property, although the information in the case was not, in his view of the facts, to be regarded as property of the trust (34). His Lordship might have been referring to confidential information. Aas v. Benham (35) was then referred to, where the test was "whether use of the information was valuable to the partnership and a use in which they had a vested interest". However the information was not in his Lordship's opinion of any value to the trust unless the trust wished to buy the shares (36). Viscount Dilhorne was, however, dissenting.

(32) (1823) 1 S. & St. 398.
(33) [1922] 2 Ch. 475.
(34) Supra, n.(16), 89-90.
(35) [1891] 2 Ch. 244, 255-256, per BOWEN L.J.
(36) Supra, n.(16), 91.

Lord Cohen stated briefly : "Information is, of course, not property in the strict sense of that word" (37). Lord Hodson, by contrast, stated:

> "Each case must depend on its own facts and I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called "know-how" in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge and with the Court of Appeal that the confidential information acquired in this case was capable of being and was turned to account can be properly regarded as the property of the trust" (38).

The writer does not believe that any significance should be attached to the use of the word "confidential", for there was no obligation of confidence owed to the trust in respect of the information (39). Lord Guest stated that he saw no reason why information and knowledge cannot be trust property (40).

Lord Upjohn, in his forceful dissenting speech, stated:

> "In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then the courts of equity will restrain the recipient from communicating it to another" (41).

His Lordship was thus careful to distinguish confidential information from other information, but does not appear to have countenanced the possibility of other information being property. Information, according to Lord Upjohn's view, can be used for a person's own benefit provided there is no breach of confidence, or there was no conflict of interest and duty arising from the use of the information by the person who received it in a fiduciary capacity (42).

(37) Ibid, 102.
(38) Ibid, 107.
(39) Post, Chapter 6.
(40) Supra, n.(16), 115.
(41) Ibid, 127.
(42) Ibid, 129.

The conclusion reached is that three of the Law Lords thirteen years ago thought that information could be property. In relying on those dicta, the mixing of majorities (43) should be noted. Moreover it was not made clear that the references to "information" meant all information, or were limited to confidential information. The fact that two of their Lordships denied the suggestion and that Viscount Dilhorne reached a contrary conclusion on the facts, and so might have been thinking of confidential information, cannot be overlooked.

The proposition has also been commented upon by the Court of Appeal in Bell Houses Ltd. v. City Wall Properties Ltd. (44). All the learned Lord Justices (45) accepted that knowledge of sources of finance was property of the company which could be sold (46). The proposition has also received judicial scrutiny in North & South Trust Co. v. Berkeley (47), with Donaldson J. rejecting it.

The significance of the suggestion, if correct, is that misuse of company information by a director would be contrary to his fiduciary obligations; and there is no need to establish that the information is confidential to bring an action against the director. A company director could therefore be held a constructive trustee of the information rather than merely being liable to account. Third parties with knowledge, actual or constructive, of the source of the information, would also be liable (48). Thus benefits derived from the use of that information would be vested, in equity, in the company as beneficiary of the constructive trust. Moreover it would not be permissible

(43) Cf. R.P. MEAGHER, W.M.C. GUMMOW and J.R.F. LEHANE : Equity : Doctrines and Remedies (Sydney, Butterworths; 1975) p.133.
(44) [1966] 2 Q.B. 656.
(45) Coram: Sellers, Danckwerts and Salmon L.J.J.
(46) Supra, n.(44), 680, 693.
(47) [1971] 1 W.L.R. 470, 484.
(48) Chapter 7, sections B and C, post.

for the misuse to be approved by the shareholders. It is however extremely significant that the suggestion has not been needed to be relied upon in any of the reported cases to provide the basis for an action. Given the adaptability of the rule discussed in the following section, it is questionable whether the suggestion need be adopted into English law.

C. Duty of Loyalty Rule

The rule has been variously defined by the courts. Suffice it to say that the general attitude of the courts is that the various formulations of the rule, obligation, or duty, have the same effect. That proposition will be examined in this section, as well as considering the effect on multiple directorates of the rule.

1. Policy of the Rule

The rule is a strict one. The existence of the rule is founded on an unfavourable view of human nature. It is thought that persons in whom trust is placed may be inclined to take advantage of their position, without the restraining influence of the law. Lord King L.C. in Keech v. Sandford (49) referred to the consequences of allowing trustees to take leases formerly possessed by the trust. Lord Herschell in Bray v. Ford (50) stated:

> "I regard it [the rule]... as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

(49) Supra, n.(8), 62.

(50) [1896] A.C. 44, 51.

That human nature has not changed, even in "the nuclear age", was accepted by Roskill J. in Industrial Development Consultants Ltd. v. Cooley (51). Whether a strict rule is required in respect of directors was doubted by Bull J.A. in British Columbia Court of Appeal in Peso (52). But the views of the dissenting judge in that Court are to be preferred. Norris J.A. stated (53):

> "... it seems to me that the complexities of modern business are a very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or a shield behind which fraud might be perpetrated.... It might as well be said that such an argument if given effect to would open the door to fraud, and weaken the confidence which ordinary people should have in dealing with corporate bodies. In order that people may be assured of their protection against improper acts of trustees it is necessary that their activities be circumscribed within rigid limits."

2. Subrules

The object of the rule has been stated to be two-fold by Finn (54). However the better view is that the two objects relate to slightly different formulations of the rule, henceforth referred to as subrules (55). The first object, which relates to a subrule emphasizing conflict, is to prevent a person who has undertaken to act for or on behalf of another to allow any undisclosed interest to sway him from the proper execution of that undertaking. It is within this subrule that, in principle, the conflict of duty and duty rule fits. The second object, which produces a subrule that a person shall not profit from his trust, is to prevent a person from actually taking

(51) [1972] 2 All E.R. 162, 175.
(52) (1965) 56 D.L.R. (2d) 117, 154-155.
(53) Ibid, 139.
(54) Finn, supra, n.(1), p.200.
(55) Cf. A.J. McClean: "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alberta L.R. 218.

advantage of his position.

The difference between these objects, and the derivative subrules, become apparent when the general rule is applied to the facts of particular cases. But that is to be expected, for the judges have emphasized that the extent of the fiduciary obligation depends on the particular facts of a particular case (56). However the rule is not a flexible one, despite those judicial statements. There are, in fact, very few decisions in which liability has not been imposed in the absence of full disclosure to and consent by the person to whom the fiduciary obligation is owed.

Two facets of the rule have no especial relevance for the problem under consideration in this paper. Unauthorised remuneration, particularly "bribes", are not involved in the problems of multiple directorates and loss of corporate opportunity. Prohibition of contracting with the company by the director is also not the concern of this study (57).

The variety of formulations of the rule may now be considered. A recent statement of the rule is that of the Privy Council delivered in <u>New Zealand Netherlands Society "Oranje" Inc</u>. v. <u>Kuys</u> (58):

> "The obligation not to profit from a position, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness."

Earlier formulations of the rule by members of the House of Lords include the following:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, ... is not, unless otherwise expressly

(56) E.g. <u>Regal (Hastings) Ltd</u>. v. <u>Gulliver</u> [1967] 2 A.C. 134, 153 <u>per</u> Lord MacMillan; <u>Boardman</u> v. <u>Phipps</u>, <u>supra</u>, n.(16), 125, <u>per</u> Lord Upjohn.

(57) The statutory rule has however been considered, primarily to demonstrate the lack of legislative intervention in this area.

(58) [1973] 2 N.Z.L.R. 163, 166, <u>per</u> Lord Wilberforce.

> "provided, entitled to make a profit; he is not entitled to put himself in a position where his interest and duty conflict" (59).

> "And it is a rule of universal application, that no one having such 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" (60).

> "The rule of equity ... insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit..." (61)

These statements of the highest persuasive authority demonstrate the earlier allegation of duality in the rule. The statements of Lord Wilberforce and Lord Herschell acknowledge both subrules. By comparison, Lord Cranworth focusses on the conflict aspect, while Lord Russell of Killowen stresses the profit element. In the Regal case, Viscount Sankey essentially recited Lord Cranworth's statement (62), while Lord MacMillan, Lord Wright and Lord Porter adopted the profit subrule (63).

Lord Upjohn in Boardman v. Phipps provides what is possibly the only judicial attempt at rationalising the two subrules. His Lordship stated the position to be "that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict" (64). But that decision was a dissenting one, although it is generally considered that Lord Upjohn merely dissented on the application of the law to the facts.

The correctness of Lord Upjohn's rationalisation is however open to question. The difficulty with that rationalisation is that it is possible to have

(59) Bray v. Ford, supra, n.(50), 51, per Lord Herschell.
(60) Aberdeen Railway Co. v. Blaikie Bros. (1854) 1 Macq. 461, 471. per Lord Cranworth L.C.
(61) Regal (Hastings) Ltd. v. Gulliver, supra, n.(56), 144, per Lord Russell of Killowen.
(62) Ibid, 137.
(63) Ibid, 153, 154, 158.
(64) Supra, n.(16), 123.

situations which are outside the scope of one of the subrules but which are caught by the other subrule (65). That possibility indicates the unreconcilable duality of the rule. But the present writer does not accept the proposition of McClean that there are actually two rules. Instead they are, in the language of set theory, two intersecting sets with neither being the subset of the other, but with a considerable degree of overlapping. The union of the two sets represents the "rule". The two subrules are not different rules owing to their common origin, and their frequent concurrent applicability to the same facts. The correctness of the writer's proposition will be examined through an analysis of the cases which apply the duty of loyalty to the company director.

There has not been any reported case which has involved facts similar to those hypothesized earlier in the paper. But the application of the rule of loyalty to company directors should provide an indication of the likely approach of the courts to such a hypothetical situation concerning a multiple directorate, if it were to arise.

3. Application of the Rule

The Privy Council decision in Cook v. Deeks (66) may be viewed as an application of the profit subrule as the directors made a profit through representing themselves to be acting for the company in obtaining a construction contract. However the decision was not made on the basis of either of the subrules, which were equally applicable. Instead it was framed on the basis of misappropriation of property. The possibility of use of the duty of loyalty does again demonstrate the overlapping of the fiduciary obligations.

(65) McClean, supra, n.(55), p.227.

(66) Supra, n.(21).

The leading case applying the rule is the 1942 decision of the House of Lords in Regal (Hastings) Ltd. v. Gulliver. The plaintiff company owned one cinema and then formed a company to acquire the lease of two further cinemas. The lessor however required a personal guarantee from the plaintiff's directors or that the new company have a paid-up capital of at least £5,000. The first alternative was unacceptable to the directors, while the plaintiff was not sufficiently liquid to subscribe for more than 2,000 £1 shares. Therefore the company was incorporated with a subscribed capital of £5,000; £2,000 being subscribed by the plaintiff company. The remaining £3,000 was subscribed in lots of £500 by four of the five directors of the plaintiff, and by the company's solicitor at the board's invitation. The remaining £500 was subscribed by persons procured by the chairman. The companies were later sold, and the shareholders in the subsidiary realised a profit of almost £3 per share. The new owners of the plaintiff then commenced an action against the five former directors and the solicitor for recovery of the realised profit.

The case is notable for having applied the rule to company directors. The result of the application of the rule naturally flowed, despite not appearing fair to these admittedly honest directors. Lord Russell of Killowen fairly summarized the position:

> "The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made". (67)

Neither fraud nor mala fides were present in the Regal case. Furthermore,

(67) Supra, n.(56), 144-145.

given the lack of liquidity of the plaintiff and the prospective lessor's requirements, it was not possible for the plaintiff to have made the profit. The irrelevance of such facts must be noted by the multiple director; in particular, good faith is no defence.

However the directors had acted as directors in the creation of this opportunity for profit. It was therefore irrelevant for the court to consider the actual propriety of the directors' actions. The directors had breached their fiduciary obligation of loyalty to the company. That breach arose by a profit having been made out of a fiduciary position, although Viscount Sankey applied the conflict subrule to reach the same conclusion. Lord MacMillan formulated the following test:

> "The plaintiff company has to establish two things: (i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves" (68).

That test must be classified as belonging to the second permutation of the rule, the profit subrule (69). Applied to the facts, the result was that the directors were liable to account.

The solicitor however was not a director, although, as the company's solicitor, he did owe the company some fiduciary obligations. But he had been released from any such obligations, as he acted with the full knowledge and consent of the plaintiff's board of directors (70).

(68) Ibid, 153.

(69) Cf. S.M. Beck: "The Sage of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. B.R. 80, 90.

(70) The Directors, legally, are the appropriate body to relieve a company's solicitor from breach of fiduciary obligation to the company. It is appropriate for the power of management is generally vested in the directors by the articles. But whether the directors should have a relieving power, given their possible lack of independence, is an open question.

The position of the directors was different. They could only be excused by the fully informed consent of the shareholders of the company in general meeting. Such a formal approval (71) could either be antecedent or subsequent, according to Lord Russell of Killowen (72).

One matter which has importance in any consideration of the problem of loss of corporate opportunity via a multiple director is the position of third parties. The difficulty is in imposing some liability on an independent company which benefits from the director's breach of the fiduciary duty of loyalty. No real problems arise where the director incorporates a new company to take personal advantage of the opportunity, for the courts will lift the corporate veil. One feature of the decision of the House of Lords has considerable importance in determining the position of third parties. The chairman had procured the subscription of two companies of which he was a member and a director, as well as of a friend. It having been found that those subscribers had taken beneficially, the chairman was held not liable to account for the profits which they had made. The extent of the profit made by a person thus limits his liability to account. The liability of the third parties themselves, was not at issue and so unfortunately was not determined. Thus it is essential that the other company be made a defendant, as the director is not liable for the company's profits.

Professor Gower (73) has noted that the two persons most responsible for the scheme escaped liability, while their followers did not. But of greater significance is the fact that the decision enabled recovery of the consideration paid in excess of the par value of 2,000 shares. Only Lord Porter referred to this windfall which

(71) The requirement of formal approval was ratio for the directors controlled sufficient votes to have ensured shareholders' approval of their actions. Thus the approach taken in Re Duomatic Ltd. [1969] 2 Ch. 365 was not adopted. Cf. Queensland Mines Ltd. v. Hudson (1978) 18 A.L.R. 1: ante, pp. 21-22.

(72) Supra, n.(56), 150.

(73) Gower, supra, n.(22), p.537.

the purchasers of the shares obtained (74). It was a wholly undeserved benefit for both the contracting parties had made a fair bargain. It would appear that the mistake of both parties as to the existence of the right of action is not sufficient for the directors to bring an action for contractual mistake (75).

The decision was followed by Gresson J. in G.E. Smith Ltd. v. Smith (76). The director was held liable to account to the company for import licenses, or the benefit from them, which he had obtained for his own benefit; their procural having been "in the interests of the company". The profit subrule was applied, as it had been by four of the Law Lords. The Regal decision has also been applied by the Canadian courts in a wide variety of cases (77).

Questions left unanswered by the House of Lords have necessitated resolution in subsequent cases. In particular, the hypothetical posed by Lord Greene M.R. in the Court of Appeal in Regal (78) required some consideration in two cases separately decided in 1966. The English case, although not directly concerning directors, is significant for our purposes. It is Boardman v. Phipps.

Briefly the facts were that the defendants, the solicitor of a trust and one of the trust's beneficiaries, purported to act as agents of the trust. They were thus given access to information, not otherwise available to them, about a company in which the trust had a significant shareholding. Eventually they were able to buy virtually all the shares in the company not already held by the trust. The defendants had not gained the fully informed consent of all the

(74) Supra, n.(56), 157.

(75) See J.F. Northey: Cheshire & Fifoot's Law of Contract (Wellington, Butterworths; 4th N.Z. edn., 1974) p.183 et seq.

(76) [1952] N.Z.L.R. 470.

(77) E.g. Canada Safeway Ltd. v. Thompson [1951] 3 D.L.R. 295; Zwicker v. Stanbury [1953] 2 S.C.R. 438; and Hawrelak v. City of Edmonton (1975) 54 D.L.R. (3d) 45.

(78) Supra, n.(56), 152.

trustees, or of all the beneficiaries under the trust.

The position of the two defendants was not immediately obvious, for there is no position of solicitor to a trust, and a beneficiary of a trust does not occupy a fiduciary position. Their Lordships, however, agreed that a fiduciary relationship did exist, but for possibly differing reasons (79).

A notable point of concurrence of all their Lordships is their accepting that liability to account for profits earned by a fiduciary does not flow a fortiori from the existence of a fiduciary relationship (80). Something more is required (81).

It has already been speculated that there might be two distinct subrules. Applying that analysis to the speeches delivered in the House of Lords, an interesting result emerges. The conflict subrule appears to be the basis of the speeches of Viscount Dilhorne and Lord Upjoh, the dissenting Law Lords, as well as providing an alternative basis for the decision of Lord Cohen (82). The speeches of the majority, by contrast, appear premised on the profit subrule. Viscount Dilhorne also cursorily made use of the latter subrule (83).

(79) Lord Cohen placed more emphasis on the defendants both being agents of the trust for the purpose of gaining information about the company. To a lesser extent, so did the dissenting Law Lords. The position taken by Lord Hodson and Lord Guest, and also by Lord Upjohn, was that the defendant beneficiary was affected by the fiduciary position of the defendant solicitor, as he had declined to have his position determined separately. The differences are irrelevant for present purposes.

(80) Supra, n.(16), 88, per Viscount Dilhorne.

(81) Ibid, 100 (Lord Cohen), 105 (Lord Hodson), 117 (Lord Guest), 127 (Lord Upjohn).

(82) Ibid, 103-104.

(83) Ibid, 88-89.

The conflict subrule prohibits a person in a fiduciary position from putting himself in a position where his duty and interest conflict, or may possibly conflict. The rule enunciated by Lord Cranworth L.C. has already been referred to. It appears very relevant for multiple directorates.

Viscount Dilhorne cited Viscount Sankey in the Regal case (84), which represents the conflict subrule, but also cited formulations of other members of the House of Lords in the Regal case which appear to connote the profit subrule (85). However his Lordship clearly adopted the approach of the conflict subrule, stating:

> "If they had entered into engagements in which they had or could have had a personal interest conflicting with the interests of those they were bound to protect, clearly they would be liable to ...[account]. On the facts of this case there was not, in my opinion, any conflict or possibility of conflict between the personal interests of the appellants and those of the trust" (86).

The factual conclusion was primarily based on the fact that one of the trustees was opposed to the trust buying any of the shares. Given the need for unanimity for the trustees to act, the trust appeared to be precluded from ever seeking to purchase the shares. That situation is similar to rejection of an opportunity by a company's board of directors, but the majority did not accept that factual conclusion of Viscount Dilhorne so it seems that the House of Lords would not accept rejection of an opportunity by the company's board.

Lord Cohen (87) reached a different conclusion from that of Viscount Dilhorne, despite identifying the same issue, the possibility of the trust wishing to

(84) Supra, n.(56), 137.
(85) Ibid, 144-145, 153, 154, 158.
(86) Supra, n.(16), 88.
(87) Ibid, 103-104.

acquire the shares. Lord Cohen referred to the defendant solicitor not being able to give unprejudiced advice if consulted by the trustees about an application to the court to sanction the purchase of shares. Therein lay the possibility of a conflict. Lord Cohen appears to have contemplated a duty on a solicitor to advise the trust, if consulted. But the solicitor, unlike a barrister, may refuse to act for a client. Alternatively he may disclose his interest and gain the client's consent (88).

Lord Upjohn appears to have taken a more realistic view of solicitors vis-a-vis their clients, in reaching the same conclusion as Viscount Dilhorne (87). Lord Upjohn also discussed the substance of the conflict subrule. His Lordship cited the statements of Lord Herschell and Lord Cranworth, already quoted (89), and then proceeded:

> "The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict" (90).

That test is a flexible one unlike the test of "possibility of conflict". Sufficient flexibility would thereby be retained to deal with cases as they arise, although Lord Upjohn's test lessens the risk of liability of those holding fiduciary positions. That lessening may be inconsistent with the

(88) Finn, supra, n.(1), p.245.

(89) But the defendants might alternatively be viewed as having a conflict arising out of their positions as agents of the trust.

(90) Ante, pp. 34-35.

(91) Supra, n.(16), 124.

previously considered policy that the rule be a strict one. The result, however, would have been more just to the defendants in the case, applying that test. But the rule is designed to protect the beneficiaries of fiduciary relationships, who indirectly are the shareholders in the company context.

The majority applied the profit subrule, so as to hold the defendants accountable. The subrule prevents a profit from being made out of the fiduciary position. The prohibition is against profits gained by reason of or use of the fiduciary position.

Lord Cohen, having taken the view that the defendants were agents of the trust for limited purposes, referred to the opportunity to purchase the shares having come from the defendants' negotiations, purportedly on behalf of the trustees. The opportunity could not have come to the defendants in any other way, given that the company was a private one (92). His Lordship also rejected counsel's argument based on the trust not being able to make use of the information, because of his view of the source of the opportunity (93).

Lord Hodson referred to Boardman having, as solicitor to the trustees, obtained the information on which he based his decision to purchase (94). His Lordship, as did Lord Guest, also referred to the partnership case of Aas v. Benham (95). In that case the defendant had made a profit from consultancy work which was outside the scope of the partnership's business, ship-broking. He was held not liable to account. Both their Lordships (96) distinguished the case from the one before them on the basis of the defined area of business in the

(92) Ibid, 101.
(93) Ibid, 102.
(94) Ibid, 106.
(95) [1891] 2 Ch. 244.
(96) Supra, n.(16), 108 (Lord Hodson), 117 (Lord Guest).

partnership situation which is not present in the case of trustees and directors. In the present case the profit had been made out of and in the course of their fiduciary position. The decision in Aas v. Benham must be taken to still be the law, for none of their Lordships cast any doubt on its correctness, actually distinguishing it (97). Therefore the scope of the directorate becomes relevant in respect of companies.

The result of this dissension within the House of Lords is unclear. But what is clear is that both subrules have received the highest support. Moreover, despite Lord Upjohn having dissented, his decision has been relied upon by subsequent courts, so it cannot fairly be said that the conflict subrule has been rejected, representing as it does the approach primarily of the minority. That the conflict subrule is still part of the law is vital for its suggested application to multiple directorates.

The impossibility of the use of information and of the opportunity to acquire the shares by the trust is a factor which can be argued in respect of either subrule. But the argument is one destined to failure, as the Regal decision clearly showed. Neither did the argument succeed in Boardman v. Phipps, although the two dissenting Law Lords accepted it in finding no possibility of conflict. The need for trustees to act unanimously and the opposition of the active trustee to the purchase of the shares weighed heavily with both their Lordships. The need to apply to the Court for its consent to such a purchase also was a relevant consideration, in the minority's opinion. Moreover the trust lacked the necessary financial resources. However, the majority rejected

(97) Cf. Meagher, Gummow & Lehane, supra, n.(43), p.114.

all such factors. Thus financial considerations cannot be relied upon as a defence by a multiple director to excuse "leaking" an opportunity to another company of which he is a director.

A further feature of the case is the consideration of the defence of fully informed consent. It is the only defence to an action for breach of the duty of loyalty (98). Wilberforce J. at first instance had held that the disclosure made by the defendant solicitor to the plaintiff beneficiary had not been adequate, so that the plaintiff's consent was not binding. Disclosure had not been made to all the trustees, and so not all of them had consented.

The application of the principles, reiterated in both of these House of Lords decisions, in subsequent cases may now be examined. Those principles apply to all fiduciaries, not just to trustees. Thus the principles can apply to persons holding multiple directorates. The question to be considered in examining the subsequent cases is: How have the later cases affected the hypothesis of the existence of two subrules? But first, a consideration of the other 1966 decision, Peso Silver Mines Ltd. v. Cropper (99).

The case came before the Supreme Court of Canada. The defendant had acted as managing director of the plaintiff, a mining company. In 1962, the plaintiff's board of directors rejected three of numerous offers of mining claims. The prospector, who had offered the claims, approached the defendant, leading to the setting up of two companies, Cross Bow and Mayo, to explore the claims by the defendant, two other directors, and the plaintiff's consulting geologist.

(98) Supra, n.(16), 93, 105.
(99) (1966) 58 D.L.R. (2d) 1. Noted S.M. Beck: "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. B.R. 80.

In 1963 Charter Oil Ltd. took control of the plaintiff. The new chairman sought disclosure of interests of directors in other mining companies. The defendant disclosed his interests, but was dismissed for refusing to turn over his interests, at cost, to the plaintiff company.

The statements of principle in the Regal case were referred to by the Court. Cartwright J., speaking for the Court, concluded:

> "On the facts of the case at bar I find it impossible to say that the respondent obtained the interests he holds in Cross Bow and Mayo by reason of the fact that he was a director of the appellant and in the course of the execution of that office" (100).

Thus the profit subrule was applied. The decision proceeds on the assumption that the rejection of the offer by the board means that the offer is henceforth outside the scope of the directorate, and so may be taken advantage of by the director in his personal capacity. That proposition may be alternatively expressed as a defence of informed consent.

The legal effect of the decision is that rejection by the board of a proposal relieves directors from their fiduciary duty of loyalty in respect of that proposal; they may, then, take advantage of it personally. But it is important to note that the rejection was made bona fide in the interests of the company. However that result appears totally inconsistent with the result attained in Regal, not to mention the principles there enunciated. The significance of the fact that the person to whom the fiduciary duty is owed is unable, or has decided not, to take advantage of the opportunity has been dismissed as being immaterial in both decisions of the House of Lords. (101). Both cases

(100) Ibid, 8.

(101) Cf. Walden Properties Ltd. v. Beaver Properties Pty. Ltd. [1973] 2 N.S.W.L.R. 815, 847, per HUTLEY J.A.

contained elements of inability to undertake the opportunity and of rejection of the opportunity. It is thus submitted that the decision is incorrect, unless bona fide rejection by the board can be viewed as limiting the scope of the directorate. But that proviso cannot stand alongside the conflict subrule for the possibility remains of the board reconsidering its rejection of the proposal, in which case a conflict of duty and interest would exist. The practical result of the decision was possibly the right one (102).

Considering the hypothetical situation earlier outlined, it seems quite clear that even if the board of A Ltd., entrusted with the company's management by the articles (103), not improperly rejects the takeover opportunity, X cannot then convey the opportunity to the board of B Ltd., unless of course he gains the fully informed consent of the shareholders of A Ltd. That conclusion is reached applying the approach of the House of Lords, rather than that of the Supreme Court of Canada in the Peso case. As we shall see, the Supreme Court had changed its approach by 1973, so that the Peso approach cannot reasonably be relied upon.

The next case in the chronological progression is Industrial Development Consultants Ltd. v. Cooley (104), an oral judgment of Roskill J. The plaintiff was a construction project company of which the defendant was managing director. The defendant negotiated for the building of four depots

(102) Cf. Beck, supra, n.(99).
(103) E.g. Table A, article 80.
(104) [1972] 2 All E.R. 162. Noted D.D. Prentice: "Fiduciary Duties - The Corporate Opportunity Doctrone" (1972) 50 Can. B.R. 623. Also H. Rajak: "Fiduciary Duty of a Managing Director" (1972) 35 M.L.R. 655; and J.G. Collier [1972] Camb. L.J. 222.

with the Eastern Gas Board, but the Board was not prepared to deal with the plaintiff because of its set-up. The following year the Board approached the defendant to act as project manager for the building of the depots. The defendant then resigned from the plaintiff on the false grounds of ill-health. A few days later the Board appointed the defendant to act as project manager. The conflict subrule was applied. Roskill J. considered the duties owed by a director to his company. The learned judge referred to a duty which previous cases had not identified, stating:

> "Information which came to him while he was managing director and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs because between himself and the plaintiffs a fiduciary relationship existed" (105).

His Honour had preceded that dictum by stating categorically that the defendant had only one capacity in which he was carrying on business and that was as the plaintiff's managing director. The defendant was thus held accountable, not being permitted to keep a profit which he got by virtue of his breach of fiduciary duty (106). The judgment concluded with a refernece to the over-riding principle that a person's interests and fiduciary duties should not be allowed to conflict (107). Finn sees the decision as being somewhat contrary to his attitude that a specific duty, rather than a general duty, for liability to account to exist (108). Finn in adopting that attitude appears hidebound by the duties of directors enunciated in Re City Equitable Fire Insurance Co. (109) and does not recognise the wider approach of

(105) Ibid, 173-174.
(106) Ibid, 175.
(107) Ibid, 176.
(108) Finn, supra, n.(1), p.240.
(109) [1925] Ch. 407.

Danckwerts J. in Aubanel & Alabaster v. Aubanel (110).

The alternative ratio put forward by Prentice views the decision as an application of the rule that a fiduciary cannot benefit from his position, without fully informed approval (111). The present writer respectfully disagrees. The classic formulation applied in the case was that a fiduciary shall not allow his interests and duties to conflict. The defendant did not make his profit out of his fiduciary position, except insofar as the Court accepted that he only had one position, that of the plaintiff's managing director. It may be of no little significance that the defendant was a managing director and also that he had no other business interests (112).

The decision, in rejecting the fact that the plaintiff was highly unlikely to have received the contract supports the position taken by the House of Lords in the Regal decision and in Boardman v. Phipps. That point, as already noted, has significance for the multiple director in the situation under consideration in the paper (113). For the purposes of a subsidiary cause of action based on breach of contract, Roskill J. assessed the chance of the plaintiff gaining the contract at ten percent (114).

The decision of Roskill J. is also important for having recognised that the fiduciary obligation of loyalty may survive resignation from the fiduciary position. That was, however, a rather inevitable result, given the circumstances of the defendant's resignation.

(110) (1949) 66 R.P.C. 343, 346-347: ante, p.17.
(111) Prentice, supra, n.(104), 176.
(112) Post, pp. 65-66.
(113) Ante, p.48.
(114) Supra, n.(104), 176.

The same proposition was accepted by the Supreme Court of Canada in Canadian Aero Services Ltd. v. O'Malley (115). The plaintiff was a topographical mapping company. O'Malley was its president and Zarzycki was its vice-president. Those defendants acted for the plaintiff in pursuing a contract with the Guyanian Government. That contract was however awarded to Terra Surveys Ltd., which O'Malley and Zarzycki had formed after resigning their positions. Terra won the contract because its proposal was more detailed, despite neither O'Malley nor Zarzycki having visited Guyana after Terra's incorporation.

Doubts about whether the defendants were directors of the plaintiff were irrelevant as the Court held them to be in a fiduciary relationship because they were senior officers of the company (116). Such a relationship, according to Laskin J. speaking for the Court, requires "loyalty, good faith and avoidance of a conflict of duty and self-interest" (117). The learned judge referred to a strict ethic in the law which "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" (118). Such a "corporate

(115) (1973) 40 D.L.R. (3d) 371. Noted S.M. BECK : "The Quickening of Fiduciary Obligation: Canadian Aero Services v. O'Malley" (;975) 53 Can. B.R. 771; and D.D. PRENTICE: "The Corporate Opportunity Doctrine" (1974) 37 M.L.R. 464.

(116) Rajak, supra, n.(104) argues that some fiduciary obligations are owed by all employees, primarily on the basis of Reading v. Attorney-General [1951] A.C. 507 and without reference to Hivac v. Park Royal Scientific Instruments Ltd. [1946] Ch. 169: post, p.70.

(117) Supra, n.(115), 382.

(118) Idem.

opportunity" doctrine (119) can be founded on either of the previously identified profit or conflict subrules. Such a usurpation or diversion of corporate opportunity produces more than the mere possibility of a conflict between the person's interests and his duties to the company. Alternatively, the profit derived from the opportunity has arisen by reason of the fiduciary position, although the profit subrule only appears to prohibit the fiduciary from profit-making. Thus the corporate opportunity doctrine primarily rests on the conflict subrule. A usurpation similar to Canaero had occurred in the Cooley case. But as we have already seen, the existing rule was adequate for the task of holding the delinquent director liable. It is submitted that the rule has sufficient vitality to deal with cases as they arise without the need to resort to the American corporate opportunity doctrine, or even the doctrine of unjust enrichment (120).

The Supreme Court deemed irrelevant any consideration of whether the plaintiff would have won the contract, there being other tenderers. The object of the damages awarded to the plaintiff company was to compel the fiduciaries to account for their gain. It was irrelevant to consider the quantum of the profit which the plaintiff might have lost through the actions of the defendants (121). Thus the attitude of the Supreme Court had changed significantly from the Peso approach. The emphasis on the breach of duty, rather than on the effect on the company, places the director in a strait jacket.

Laskin J. referred to a number of factors which could be considered in determining whether the conduct of a director or senior officer meets the

(119) For the position in the U.S.A., see Note: "Corporate Opportunity" (1961) 74 H.L.R. 765.

(120) Cf. G. Jones: "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472.

(121) Supra, n.(115), 392.

standards demanded of a fiduciary. Those factors 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 inwhich it was obtained and 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..." (122)

The list was not intended to be exhaustive.

The adoption of such a corporate opportunity doctrine represents an important step. It is, however, very similar to the rule relating to the misuse of trust property (123). The reference to "diversion" in addition to "usurpation" in the earlier quotation is significant, for with it Laskin J. appears to contemplate the situation of diversion of an opportunity to a company which is not necessarily the <u>alter ego</u> of the fiduciary. It is clear that the corporate veil will be lifted in cases involving a breach of the duty of loyalty, enabling a company to be held to be the director's <u>alter ego</u>. Thus, Laskin J.'s use of the phrase "another person or company with whom or with which he is associated" (124) must be considered to be sufficiently broad to cover independent companies of which the fiduciary is a director. That is, assuming the subsumption of the corporate opportunity doctrine under the duty of loyalty, the duty of loyalty extends to cover the multiple directorate problem being considered in the paper.

Determination of what constitutes a "corporate opportunity" is important if the doctrine is to become the basis on which liability in this type of situation

(122) <u>Ibid</u>, 382.
(123) <u>Ante</u>, section B, Chapter 5.
(124) <u>Supra</u>, n.(115), 382: <u>ante</u>, p.51.

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is to be founded (125). Three possibilities have been recognised by the American courts (126). The first is whether the company has an expectancy or inchoate interest in the transaction (127). The second concerns "opportunities in the line of business" (128). The third applies an ethical standard of what is fair and equitable to particular sets of facts (129). There does not appear, to the writer, to be any particular advantage in substituting any of these vague tests for the vague, yet flexible, tests already existing.

The position of the third party, Wells, who formed Terra with O'Malley and Zarzycki, is worthy of note. Wells had been a director of the plaintiff, but resigned in the year before the incorporation of Terra. No liability was imposed on Wells.

The Privy Council had occasion to consider the rule in Queensland Mines Ltd. v. Hudson (130). The defendant Hudson was chairman and managing director of Australian Oil Exploration Ltd. (AOE), a subsidiary of Kathleen Investments Ltd., of which he was managing director. AOE formed the plaintiff company with Factors Ltd. holding the other 51 percent of the shares, to explore for uranium. Factors Ltd. was a member of the Korman group of companies. Hudson was appointed managing director of the plaintiff. Later the plaintiff was "mothballed" after no one was prepared to exploit the uranium. The plaintiff

(125) Cf. the writer's view of the need for its development.
(126) Prentice, supra, n.(115), 96.
(127) Lagarde v. Anniston Lime & Stone Co. (1900) 28 So. 199, 201.
(128) Rosenblum v. Judson Engineering Corp. 109 A. (3d) 558, 563, (1954).
(129) Durfee v. Durfee & Canning Inc. 80 N.E. (2d) 522, 529, (1948).
(130) (1978) 18 A.L.R. 1. Noted R. Deutsch: "Directors as Fiduciaries: Queensland Mines Ltd. v. Hudson & Ors" (1979) 9 Syd. L.R. 668.

however pursued an opportunity in Tasmania resulting in the defendant being granted two mining licences, which he held for the plaintiff. Korman, the financier, was however in severe financial difficulties and was unable to proceed with the opportunity. Hudson, honouring his obligations to the Tasmanian Government, gained the approval of the plaintiff's board to his personally exploiting the licences. He then exploited the licences by means of the two defendant companies, which he set up. Thus the issue of to whom is the obligation owed arose, as previously examined (131).

The issue posed by Lord Scarman was whether Hudson had acted in a way in which "there was a real sensible possibility of conflict" between his interest and the interests of the plaintiff company (132). He was held liable to account unless he could show fully informed consent, which was shown.

The conflict of interest and interest is, however, not the test for fiduciaries in general (133). But directors are required to act "in the interests of the company". That is their duty, so a conflict of interests for a company director is within the conflict subrule, A further point to be noted is that the Privy Council, in stating its conclusion on the issue of consent, used two different formulations (134). One of these referred to the venture with the licences being "outside the scope of the agency created by the relationship", which represents language very similar to that used in Aas v. Benham (135). We have already noted that merging of the defence of informed consent with the

(131) Ante, pp.21-22.
(132) Supra, n.(130), 4.
(133) Finn, supra, n.(1), p.233.
(134) Supra, n.(130),
(135) Supra, n.(95).

"scope of position" element of the profit subrule (136).

The most recent case, which may yet be subject to appeal, is Abbey Glen Property Corporation v. Stumborg (137), a decision of the Alberta Court of Appeal. The defendants were Jerome and Clarence Stumborg, and their holding company, Gem Holdings Ltd. The Stumborgs incorporated Terra Developers Ltd., which after a number of amalgamations became Abbey Glen Property Corporation, the plaintiff. The Stumborgs had a number of interests in land investment, apart from their positions as shareholders and directors of Terra. Two specific opportunities for purchase by Terra were considered by the Court, the Ebbers and Zima lands (138). Jerome Stumborg, acting for Terra, informed Traders Finance Corporation Ltd. of these opportunities, seeking to establish a joint venture for their development. However Traders refused to deal with Terra as the Stumborgs were not controlling shareholders. When informed of this during negotiations, the Stumborgs personally entered a joint venture with a subsidiary of Traders utilising Green Glenn Developments Ltd., which was thenceforth owned equally. The contract was reported to the Terra board, with the Stumborgs offering to turn over their interests in Green Glenn in return for a management contract. Later such a contract was concluded, providing for payment by Gem to Terra of all receipts from Green Glenn during the period of the contract or any renewals. Two years later, all the shares in Terra were sold and the Stumborgs resigned. The new shareholders then caused the company to bring the action. Before the action was tried, the Stumborgs had sold their shares in Green Glenn.

(136) Ante, p.47.

(137) (1978) 85 D.L.R. (3d) 35. Noted D. PRENTICE: "Corporate Opportunity - Windfall Profits" (1979) 42 M.L.R. 215.

(138) Other opportunities were before the trial judge: post, pp. 63 -66

The defendants were held liable to account, with a proprietary remedy being impossible as the shares had been sold. The liability to account was on the basis of the fiduciaries having profited out of their position. The facts were also within the conflict subrule, although no reference was made to the conflicts which arise when an agent begins negotiating for himself instead of pursuing the original negotiating position on behalf of his principal (139). The Court properly treated as irrelevant the fact that Terra could not have been involved in the joint venture because of Traders' attitude (140). The case provides an interesting contrast with the Cooley case, for there Roskill J. stated that the defendant had only one business capacity. In Abbey Glen, the Stumborgs had numerous business interests. The result, however, was the same, but that must be because of the change in negotiating position (141).

The most significant feature of the case concerned the windfall profits. By means of the action, the new shareholders recovered money which they had not bargained for when purchasing the shares (142). McDermid J. dissented only on the basis of the change of shareholders between the time of breach and the commencement of the action. The majority however considered that the emphasis should be placed on enforcement of the principle that a fiduciary shall not profit from his position (143).

(139) McDermid J.A. did accept the conflict subrule as stated in the Canaero case: supra, n.(137), 43, 45.

(140) Ibid, 43, per McDermid J.A., 59 per Clement J.A. (Haddad J.A. concurring).

(141) For further discussion, Section 4, post.

(142) The action was commenced within two months of the takeover, which raises the question whether there was an intention to purchase the right of action against the Stumborgs.

(143) Supra, n.(137), 63.

Reference was also made to the corporate entity of the company (144). That is, the corporate veil was not lifted, although it is submitted that the result might have been different if it had been shown that the takeover offerors had had in mind the bringing of the action. But the Stumborgs were not in such a position to ensure approval by the general meeting of Terra (145), so the offerors' intentions might be irrelevant.

McDonald J., at first instance (146), dealt with the implication of the management contract. The learned judge stated that assuming waiver of rights by the board was possible, the contract was not explicit and clear enough to express an intention to waive rights of action for breach of fiduciary obligations. Moreover the board could not, according to McDonald J., waive the company's right to complain of a breach of fiduciary obligation (147), which lends further weight to the conclusions earlier reached in the paper (148). The decision emphasizes the point that if the multiple director seeks to avail himself of the defence of consent, he must comply with certain requirements. First, the disclosure and consent must be to and by the appropriate organ of the company, the shareholders in general meeting (149). Second, there must be full disclosure to the shareholders of the director's breach of duty, including the facts that his actions constitute a breach of

(144) Ibid, 63-64.
(145) Cf. the directors in Regal (Hastings) Ltd. v. Gulliver, supra, n.(56).
(146) (1976) 65 D.L.R. (3d) 235.
(147) Ibid, 279-280.
(148) Ante, pp. 20-22.
(149) The approach of Re Duomatic Ltd. [1969] 2 Ch. 365. of informal approval of a majority of shareholders will not be sufficient according to the Regal decision. Cf. the distinguishable Queensland Mines Ltd. v. Hudson: ante, pp. 21-22.

duty and that waiver of legal rights of the company is being sought (150). Of necessity, because of McDonald J.'s holding, the shareholders' resolution must clearly express the intention of waiving the company's rights. <u>Quaere</u> whether the amount of profit derived from the breach must be disclosed.

Having reviewed these leading cases, consideration must now be given to their effect on the hypothesis of the existence of two subrules. Both subrules have been relied upon in the cases, and neither has been applied to the exclusion of the other. The cases may be used to support the conclusion that there exist two rules, but the writer's interpretation is that the two formulations both come under the umbrella of a "duty of loyalty rule", primarily because the subrules appear to have the same basis and frequent concurrent applicability. Possibly in all the cases which have been considered, both subrules have been able to be applied. However that is not the case in all situations. For instance, the director may not derive a profit out of his position, yet allowing his duties and interests to possibly or actually conflict. Thus Lord Upjohn saw the conflict subrule as the dominant rule. However McClean (151) points to the decision in <u>In Re Gee</u> (152) as illustrating a situation where the profit subrule applied but the conflict subrule did not.

It is impossible to read the cases which apply the profit subrule as denying the existence of the conflict subrule. That is an important conclusion, for the conflict subrule has greater relevance for the resolution of the

(150) See <u>Winthrop Investments Ltd</u>. v. <u>Winns Ltd</u>. [1975] 2 N.S.W.L.R. 666.
(151) <u>Supra</u>, n.(55), 236.
(152) [1948] Ch. 284.

problem of multiple directorates. As stated earlier (153), the writer sees "interest" in the conflict subrule as including duties owed to some other company as director. However such an interpretation is only required for the extreme case of the director who holds no shares. In the ordinary situation, the multiple director will have an interest in the other company, either because of a qualification share requirement or merely holding shares, so that he will clearly be within the conflict subrule once those interests conflict or possibly conflict with his duties to the company.

An important aspect of the duty of loyalty is that the only defence is that of fully informed consent, once the director comes within the scope of either subrule. Good faith cannot be relied upon in any way to excuse liability to account. Equally irrelevant is the rejection of the opportunity by the board of the company.

4. Multiple Directorates

The foregoing cases and the principles which they apply have quite serious possible implications for persons holding more than one directorate. It should be noted that cases similar to Cook v. Deeks (154) have been given little attention in the paper. The major reason for that is that the situation is plain; a director negotiating purportedly on behalf of the company but in reality for himself is bound to account. More importantly, such cases fall within both subrules.

In the case of large public companies the extent of directors' shareholdings in their companies is not great (155). Thus the extent of the director's

(153) Ante, p.25.
(154) Supra, n.(20).
(155) G. Fogelberg & C.R. Laurent: Boards of Directors in New Zealand Companies (Wellington, Department of Business Administration, V.U.W.; 1974) pp.5-9.

profit will be small. Take the extreme case of the common director, X, holding no shares in B Ltd. which takes advantage of a corporate opportunity of A Ltd. The profit subrule is not adequate to found liability to A Ltd. as X has not profited from his fiduciary position. However, if there is an impropriety, will not Equity intervene? As already mentioned, the conflict subrule must be applied to deal with the alleged impropriety of X. Thus a breach of fiduciary duty owed by X may be established, so that B Ltd. may incur liability as a party to the breach of fiduciary duty.

The conflict subrule is the element of the rule already argued to be the same in principle as the conflict of duty and duty rule (156). The latter rule requires an actual conflict to be shown before liability to account arises (157). But as we have seen, the requirement for the conflict subrule is only for a possibility of conflict, or perhaps a "real sensible possibility". (158). That latter test is very much akin to a requirement that an actual conflict be shown (159). Therefore Lord Upjohn may be interpreted as supporting the merging of the two rules. But if that attitude is correct, serious limitations may be placed on the courts' ability to deal with multiple directorates. But the two rules are different, with the conflict subrule being sufficient to deal with any hint of impropriety arising out of multiple directorates.

The more recent cases, discussed above, have called into question the earlier cases supporting the notion that a person can act as director of more than one

(156) Ante, pp.25-26.
(157) Post, section D.
(158) This is Lord Upjohn's test enunciated in Boardman v. Phipps and applied by the Privy Council in Queensland Mines Ltd. v. Hudson.
(159) Which is not the same as needing to show an actual impropriety.

company. Chitty J. held in London & Mashonaland Exploration Co. Ltd. v. New Mashonaland Exploration Co. Ltd. (160) that the courts would not restrain a person from so acting, even for a rival company. The exceptions, which were not present in that case, are any form of prohibition in the company's articles or any suggestion that the director is about to disclose information received confidentially as a director. To those exceptions, must be added a contractual term prohibiting the director from so acting. That decision was approved of by Lord Blanesburgh in Bell v. Lever Bros. Ltd. (161). Plowman J. in In re Lundie Bros. Ltd. (162) appears to have adopted the same position.

The situation is different in respect of competing partners (163) and employees (164), and possibly also in the case of trustees (165). Lord Denning in Scottish Co-operative Wholesale Society Ltd. v. Meyer (166) criticised the approach taken in respect of directors by Chitty J. and Lord Blanesburgh. The effect of the cases on breach of the duty of loyalty is that a person may hold more than one directorate only where his duties do not actually or possibly conflict with his interests and so long as he does not make a profit out of his position. However, in accepting a multiple directorate, a person cannot discount the chance of facts arising in which a conflict or possible conflict or a real sensible possibly of conflict would be present. In such a situation the multiple

(160) [1891] W.N. 165.
(161) [1932] A.C. 161, 195.
(162) [1965] 1 W.L.R. 1051, 1058.
(163) E.g. Aas. v. Benham, supra, n.(95). Also section 33, Partnership Act 1908.
(164) E.g. Hivac Ltd. v. Park Royal Scientific Instruments Ltd., supra, n.(116).
(165) In re Thomson [1930] 1 Ch. 203. Cf. Moore v. M'Glynn [1894] 1 Ir. R. 74.
(166) [1959] A.C. 324, 367.

director would have liability to account. Furthermore, it is logically inconsistent for directors to be subject to fewer constraints than employees.

Perhaps the only judge who has been forced to consider the problem of multiple directorates is McDonald J., at first instance in Abbey Glen Property Corporation v. Stumborg (167). The facts of that case were extremely complicated. Only the facts relevant to the appeal were outlined in the earlier discussion of the decision of the Alberta Court of Appeal. Those facts concerned the Ebbers and Zima lands, and Green Glenn Developments Ltd. (168). But for a consideration of the multiple directorate problem, further facts are required to be outlined.

From the outset, the Stumborgs had extensive personal business interests including shares and directorates in at least two companies other than Terra. One of those companies, Gem Holdings Ltd., was a tax shelter, and was treated as the Stumborg's alter ego. The other company, Clarepine Oil & Gas Ltd., has greater significance. The company was 26% owned by the Stumborgs, 13% by McAlpine, and 61% by the general public. McAlpine considered himself, together with friends excluding the Stumborgs, to control Clarepine. The Williams land was referred to Clarepine by Jerome Stumborg, and McAlpine arranged its purchase. The actual purchase was by a joint venture company, Greenway Investments Ltd., jointly owned by Clarepine and Forest Glenn (Traders' subsidiary). The trial judge rejected that the Stumborg's interest in Greenway Investments

(167) Supra, n.(146).

(168) Ante, p.56.

constituted a usurpation or diversion of a "maturing business opportunity" of Terra, or the acquisition of a business advantage of Terra, or an example of benefits being obtained by reason of position as directors (169). In respect of the Groot lands, the Stumborgs' participation was limited to their acting as directors of Clarepine. That land was acquired by a company owned 30% by Clarepine and 70% by Traders. The trial judge rejected all the plaintiff's arguments that the defendants were liable to account, on the same basis as the Williams land.

After considering the Williams and Groot lands, McDonald J. considered the defendants' submission that the Stumborgs could be directors of rival companies. The submission, based on the Mashonaland decision, was that "it could not be said that there was a breach of their [the Stumborgs'] fiduciary duty to Terra if what they did was in honour of their obligation to Clarepine" (170). The learned judge after quoting Gower (171), stated that the issue did not require decision in the case before him. But his Honour then stated (172):

> "I do not hesitate to express my opinion that the sweeping proposition for which the London & Mashonaland case and Lord Blanesburgh's dicta are cited is not the law. Even where there is no question of a director using confidential information, there may well be cases in which a director breaches his fiduciary duty to company A merely by acting as a director of company B. This will particularly be possible when the companies are in the same line of business and where acting as a director of a company B will harm company A. Beyond that I need go no further than to say that the question whether a breach of a director's duty to company A must be determined upon the basis of the factors enumerated in Canadian Aero Service Ltd. v. O'Malley and Regal (Hastings) Ltd. v. Gulliver, and a negative answer will not necessarily be produced by the mere fact that the director is also a director of company B and owes it a like fiduciary duty."

(169) Supra, n.(146), 275.

(170) Ibid, 277.

(171) Gower, supra, n.( ), p.548.

(172) Supra, n.(146), 278.

Two other parcels of land required consideration. Terra sold the French land to Forest Glenn in 1969, but McDonald J. rejected that as a ground for an accounting as the Stumborgs had no interest in or position with Forest Glenn. The other parcel, the British-Goebel-King lands were acquired by Green Glenn as a result of the meeting at which the purchase of the Ebbers and Zima lands had been arranged. Insufficient evidence was presented to establish that the Stumborgs had acquired an interest in the land in breach of their fiduciary obligations. McDonald J. accepted the defendants' contention that a director is not ipso facto precluded from acquiring land in competition with the company's business. But that general right is qualified by the director not being permitted to breach his fiduciary obligations (173).

There may be a certain amount of inconsistency between McDonald J.'s dictum and his application of the rule to the facts. The dictum places the multiple director in an insecure position, with the possibility of his being in breach of his fiduciary obligations merely by so acting. However in applying the rule, the learned judge appears to be swayed by the numerous business interests of the Stumborgs (174). Perhaps the possession of numerous interests entitles the director to compartmentalise his business activities. Such an approach appears to have been approved of in a taxation avoidance case, Slutzkin v. F.C. of T. by Barwick C.J. (175):

> "Mr Rosenblum was concerned in that operation [of dividend stripping] as a director of Cadiz Corp and as one of the new directors of the company ... He had in fact taken Counsel's opinion on the propriety of his acting in his many capacities. I am satisfied that his various capacities were separately pursued..."

(173) Ibid, 272.

(174) Their interests in at least two land investment syndicates has been ignored in the foregoing analyses of the facts. Nothing really turned on those interests: Supplementary Reasons, ibid, 283-286.

(175) (1977) 7 A.T.R. 166, 168. (High Court of Australia).

By contrast, Roskill J. in the Cooley case referred to the director as only having one capacity (176). However the defendant in that case had no other business interests, and also was a managing director. Therefore the approach taken in Cooley might be distinguishable where the director has numerous interests. But two directorates might not be sufficiently numerous to distinguish Cooley on that basis.

However it is not entirely certain that McDonald J. would accept such a compartmentalisation approach. The learned judge reached the conclusion that there was no liability to account in respect of these parcels of land on the basis of the evidence. In respect of none of the parcels was it shown that Terra had any interest, that the opportunity for purchase had come as a result of the Stumborgs' position as directors of Terra, or that there was an actual or possible conflict of duty and interest. Thus it is important for the plaintiff to adduce sufficient evidence to found the action.

Of those factual conclusions just mentioned, which are at least implicit in McDonald J.'s judgment, only that relating to the possibility of a conflict of interest appears questionable. It supports the narrower view of the duties of a director of Finn (177), which requires the existence of a specific duty for liability to exist under the conflict subrule. The breadth of the director's duties is still an unanswered question.

Reference has already been made to Roskill J.'s duty to pass on information of relevance to the companies of which he is a director (178). That duty, if

(176) Supra, n.(104), 173. Cf. Weitzen Land & Agricultural Co. v. Winter (1914) 17 D.L.R. 750.

(177) Supra, n.(1), p.240: ante, p.49.

(178) Supra, n.(104), 103-104: ante, p.49.

the law, could oblige our director X to communicate the corporate opportunity of A Ltd. to B Ltd., or be in breach of his duty to B Ltd. But the communication of that opportunity involves a breach of the fiduciary duty of loyalty owed by X to A Ltd., without any requirement of the confidentiality of the opportunity to A Ltd. That is a totally imponderable position for all multiple directors. Breaches of the duty to pass on information could also arise where the director acquires information from a different source and fails to pass it on to both companies.

The position of multiple directorates is far from clear. But it would seem that the statement in Mashonaland that there is nothing illegal in multiple directorates is a gross over-simplification. The rule requiring loyalty from directors is capable of being used to prevent any person from holding more than one directorate. However the courts have not been presented with cases involving the situation of loss of corporate opportunity to an independent company via a multiple director. But it does seem clear that the courts will act where impropriety is shown to be present, and possibly in other cases as well (178a).

D. Conflict of Duty and Duty Rule

The rule prohibits a person who owes fiduciary duties to one person from owing conflicting duties to another person. It applies particularly to agents, preventing them from acting for two principals in respect of the same transaction, without the fully informed consent of the principals. Directors are agents in respect of their conduct of the company's business (179). Therefore the rule must apply to some extent to directors, although the cases have concerned mere agents. There is considerable similarity with the application of

(178a) Cf. H.L. Misener & Son Ltd. v. Misener (1977) 77 D.L.R. (3d) 428. But see Addendum.

(179) Ante, p.15.

the duty of loyalty rule to a fiduciary contracting with the person to whom he owes his fiduciary obligations (180).

The leading English case is Fullwood v. Hurley (181), decided by the Court of Appeal. The plaintiff, a hotel broker, supplied a list of hotels for sale to the defendant, referring to his "usual commission". The defendant purchased one of the hotels and the plaintiff sued for his commission. The claim failed as the plaintiff had received commission from the vendor. Scrutton L.J. stated the rule:

> "No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal unless he makes the fullest disclosure to each principal of his interest and obtains the consent of each principal to the double employment" (182).

The only requirement not expressly incorporated into that dictum is that an actual conflict of duties must exist. That was stressed by the High Court of Australia in Blyth Chemicals Ltd. v. Bushnell (183). The High Court in that case rejected the mere appointment of the plaintiff, the defendant's manager, as chairman of directors of a potential rival as being sufficient ground for dismissal.

The rule has recently been accepted in two cases involving insurance brokers Megaw J. in Anglo-American Merchants Ltd. v. Bayley (184) referred to the obvious "potential dangers and undesirable consequences" of an agent acting for two parties in a transaction. Those comments were made obiter, but the acceptance of the rule by Donaldson J. in North & South Trust Co. v. Berkeley (185) was ratio decidendi.

(180) This particular application is not examined in the paper.
(181) [1928] 1 K.B. 498.
(182) Ibid, 502.
(183) (1933) 49 C.L.R. 66, 74, 82.
(184) [1979] 1 Q.B. 311, 323.
(185) Supra, n.(47).

Informed consent is the only possible defence. It is also a defence to an action by the sole party from whom consent was gained (186). That is, informed consent acts in a manner similar to an estoppel. Such a proposition, if also applicable to the duty of loyalty rule, supports the conclusion already reached as to the rationale behind the Privy Council's opinion in Queensland Mines Ltd. v. Hudson (187). But consent might not be a defence in situations in which the fiduciary's duty to one beneficiary necessitates a breach of duty to the other beneficiary. That situation would arise if the duty postulated by Roskill J. in Industrial Development Consultants Ltd. v. Cooley (188) to pass on information is correct. Even with the two companies consenting to the director's holding the two directorates, the rule prohibiting a conflict of duty and duty would be breached in such a situation.

In the predominant situation with multiple directorates, there will be a general notice given to the companies' boards of directors under section 199(3), Companies Act 1955. That notice represents disclosure of the director's position as director, or member, of another company or companies. But does its receipt represent consent by the board? Can the board even give a valid fully informed consent? Is it not the shareholders who must give their fully informed consent, as we have already seen? (189). The writer's view is that the disclosure in respect of all of the ratifiable breaches of fiduciary obligation must be to the shareholders, rather than to the board of directors. Thus compliance with section 199 cannot be relied upon to excuse a breach of fiduciary obligation.

The conflict of duty and duty rule has limited utility for the problem of

(186) Finn, _supra_, n.(1), p.253.
(187) _Supra_, n.(130).
(188) _Supra_, n.(104).
(189) _Ante_, pp.20-22.

multiple directorates, assuming the correctness of the earlier assertion of the paper that the duty of loyalty's conflict subrule includes neforceable duties on its prohibition. If that assertion is correct there is no need to rely on the conflict of duty and duty rule, with its limiting requirement of actual conflict, for the duty of loyalty's conflict subrule prohibits the possibility of conflict. But if incorrect, the rule would be an obvious form of action to be utilised.

E. Harming an "Employer's" Business

Finn sees the harming an "employer's" business rule as being the product of limitations in the obligation of confidence, and the two rules just discussed (190). Whether there are such inherent limitations is debatable. The emergent rule, however, deserves some mention for it may be yet another alternative form of action which can be relied upon to deal with situations such as that hypothesized earlier.

The obvious application of the rule is where an employee directs customers away from his employer's business to another's business (191). But other situations are covered.

The leading case is Hivac Ltd. v. Park Royal Scientific Instruments Ltd. (192), decided by the English Court of Appeal. The plaintiff company employed a husband and wife, two of the defendants, as production engineer and forewoman, respectively. They were engaged in highly skilled work manufacturing valves for hearing aids. The wife gained a discharge from the plaintiff due to ill-health. When she recovered, she began working part-time for the defendant company. Later the husband, in his spare time, designed valves for the defendant company, incorporating improvements he had made in the plaintiff's

(190) Finn, supra, n.(1), p.266.
(191) E.g. William R Barnes & Co. v. MacKenzie (1973) 34 D.L.R. (3d) 343.
(192) Supra, n.(116).

valves. The husband and wife induced other employees of the plaintiff to work for the defendant company in their spare time. The entry of the defendant company onto the market affected the plaintiff's pre-existing monopoly. The husband was dismissed when the facts became known to the plaintiff's managing director. An injunction was granted by the Court.

The decision was based on the general duty of fidelity owed by an employee to his employer, although Lord Greene M.R. admitted the lack of clarity as to the extent of that duty (193). The basis of the decision, and of the rule, is that it would be deplorable if an employee could "knowingly deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business" (194). But mere detriment to the employer's business will be insufficient; infliction of great harm is the requirement.

Few cases have arisen outside of the employment sphere (195). On the basis of those cases, and the logic of imposing standards on directors equal to, if not actually greater than those on employees, commentators have argued for the application of the principle to company directors (196). The requirement of detriment makes the action unsuitable in cases of rejection of an opportunity by the company's board, unless it can be clearly demonstrated that the company suffered great detriment through some other company taking advantage of the opportunity. The Aubanel decision also shows that the duty cannot be relied upon to restrain a director or other person from acting as director of another company, in the absence of something like solicitation of customers. In that case,

(193) Ibid, 174.
(194) Ibid, 178.
(195) Two cases are Aubanel & Alabaster v. Aubanel, supra, n.(110). (director) in In re Irish (1888) 40 Ch. D. 49 (receiver/manager).
(196) Finn, supra, n.(1), pp.268-269; and Gower, supra, n.(22), p.548.

Danckwerts J. rejected that there was anything improper in the director merely being involved in a partnership which was competing with the company; but the learned judge drew the line at solicitation. Thus the action may only have limited usefulness for the resolution of the problem of multiple directorates per se. However it could be relied upon where some impropriety has occurred. It may be particularly applicable where a company has suffered or is suffering a detriment due to the actions of a director, without the director or any person or company associated with him making a profit, or even a cost saving.

6. Breach of Confidence

The action for breach of confidence (1) does not depend on the existence of any fiduciary relationship, unlike the obligations just considered. Instead the right of action emerges when a confidant threatens to break or does break a confidence wherein the confider imparted information to the confidant. But the courts will not intervene until such time as such action can be shown to have taken place or to be contemplated by the confidant.

The origin of the action is not altogether certain, although the action clearly exists. The early decisions in Prince Albert v. Strange (2) and Morison v. Moat (3) support the existence of the right to bring an action. The former case concerned etchings made by Queen Victoria and Prince Albert which had come into the defendant's hands via a servant of the plaintiff's printer. The defendant was restrained from publishing a catalogue of the etchings and the etchings themselves. Lord Cottenham L.C. granted the injunction on the basis of the plaintiff's property in the etchings, and alternatively on the basis of the breach of trust, confidence or contract (4) by which the defendant had acquired the etchings. Significant is the fact that the injunctive relief was granted against the defendant who had not been a party to the breach of confidence. An injunction was also granted in Morison v. Moat in respect of the unpatented secret recipe. Turner V.C. stated that it was unquestionable that the court

(1) See generally: Law Commission: Breach of Confidence (Working Paper No.58); G. Jones: " Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 L.Q.R. 463; P.D. Finn: Fiduciary Obligations (Sydney, Law Book Company; ;977) Ch. 19; R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane: Equity: Doctrines and Remedies (Sydney, Butterworths; 1975) Ch. 41; and R. Goff & G. Jones: The Law of Restitution (London, Sweet & Maxwell; 2nd edn., 1978) Ch. 35. Also A.E. Turner: The Law of Trade Secrets (London, Sweet & Maxwell Ltd; 1962); and J. Prothroe: "Misuse of Confidential Information: (1978) 16 Alberta L.R. 256.

(2) (1849) 1 H. & Tw. 1; 47 E.R. 1302.

(3) (1851) 9 Hare 241; 68 E.R. 492.

(4) His Lordship did not distinguish between these.

had jurisdiction, although its basis was uncertain (5).

A significant case of more recent vintage is Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (6). The decision of the Court of Appeal did not merely rest on contract, but also on the breach of confidence. The breach was the use of the plaintiff's drawings for the defendant's benefit, without the consent of the plaintiff. Lord Greene M.R. stated the general principle:

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights" (7).

His Lordship also stated that information to be confidential "must not be something which is public property and public knowledge" (8).

The decision of the Court of Appeal in Seager v. Copydex Ltd. (9) is a leading example of the application of the action to trade secrets. The case involved an unpatented carpet grip (10). Lord Denning M.R. summarized the foundation of the action:

> "The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent" (11).

Reliance was placed on the "springboard doctrine" as expressed by Roxburgh J. in Terrapin, Ltd. v. Builder' Supply Co. (Hayes), Ltd. (12):

> "As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and

(5) Supra, n.(3), 255; 498.
(6) (1948) [1963] 3 All E.R. 413n.
(7) Ibid., 414.
(8) Ibid., 415.
(9) [1967] 2 All E.R. 415.
(10) It may be noted that the right of action cannot exist in respect of patented inventions: pp. 78-79, post.
(11) Supra, n.(9), 417.
(12) [1960] R.P.C. 128, 130.

> springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."

At this point it might be noted that the development of the action for breach of confidence has no relationship to the extension of Crown privilege in recent years to protect confidential sources of information in judicial proceedings (13).

Megarry J. in Coco v. A.N. Clark (Engineers) Ltd. (14) laid down three requirements of an action for breach of confidence:

> "First the information itself, in the words of Lord Greene in the Saltman case..., must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it."

That dictum provides an initially convenient mode of examining the action.

A. Confidential Information

As already mentioned, Lord Greene M.R. stated that confidential information cannot be public knowledge. However it can be a public secret. Lord Widgery C.J. in the Crossman diaries case (15) accepted that "when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court" (16).

The information, however need not have commercial value to be the subject of an action, for in Duchess of Argyll v. Duke of Argyll (17) relief was granted. That case concerned the proposed publication of intimate confidences between husband and wife. However the value of the information must have some significance in determining the exact remedy, if any, to be awarded by the

(13) The most recent case is D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171.
(14) [1969] R.P.C. 41, 47.
(15) Attorney-General v. Jonathan Cape Ltd. [1976] Q.B. 752.
(16) Ibid., 770.
(17) [1967] Ch. 302.

court in the exercise of its discretion.

The "springboard doctrine" is relevant in many cases in determining whether information is confidential or not. It is often the case that the information comprises some information which is public knowledge, or is already known to the recipient, and some information which is confidential. The confidant may be able to use the public knowledge. But he is not allowed to abuse the confidence by using the public knowledge in the way that the confider has used it to develop some invention or idea. The basis of the doctrine is "that since the possessor of the mixed information has been given a head start over the general public he is in a unique position to exploit it" (18). Seager v. Copydex Ltd. (19) demonstrates the point: the confidant developed a patented invention after hearing the confider's analysis of the problems involved in developing a carpet grip. The confidant had unconsciously utilised ideas of the confider, who had already incorporated them in an unpatented carpet grip. Similarly in A.B. Consolidated Ltd. v. Europe Strength Food Co. Pty. Ltd. (20), the New Zealand Court of Appeal upheld an injunction and account of profits. There the defendant had been shown the plaintiff's process for the manufacture of health food bars, during negotiations which eventually broke down. The plaintiff's process was novel, but only consisted of techniques the defendant knew of.

Gowans J. in Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd. (21) is to like effect:

> "All of its separate features may have been published, or capable of being ascertained by actual inspection by any member of the public, but if the whole result has not been achieved, and could not be

(18) Law Commission, supra, n.(1), p.21.
(19) Supra, n.(9).
(20) [1978] 2 N.Z.L.R. 515.
(21) [1967] V.R. 37, 49.

> achieved, except by someone going through the same kind of process as the owner, it will not fail to qualify by reason of the publication."

That statement imposes quite considerable restrictions on the ability of the confidant to make use of the information, unless he repeats the confider's analysis of known facts. Plowman J. in Suhner v. Transradio Ltd. (22) made a similar statement.

It is also irrelevant that there are people other than the confider and confidant who possess the information. So long as relative secrecy exists, the confider can maintain his right of action (23). But as Finn notes, it may be difficult to (factually) determine whether the information is public or confidential (24).

The point has much significance for the problem we are considering. The director may acquire information from one company which is essentially only an analysis of publicly available facts. On the authorities just considered, that director would be liable for a breach of confidence if he were to pass on that information to another company of which he is a director. A practical example of this situation might be where an analysis is performed by an employee of one company of a prospective takeover victim. All the information upon which that analysis is based might be publicly available, possibly as a matter of public record at the Companies Office. However the analysis itself would be confidential, just as Mr Seager's analysis was confidential in Seager v. Copydex Ltd. (25); it is not available to the public. Of course, the director could request an employee of the second company to undertake the analysis. But even in that situation the inspiration is still the confidential analysis. That latter problem can be avoided by the director requesting an

(22) [1967] R.P.C. 329.

(23) See Franchi v. Franchi [1967] R.P.C. 149, 152-153, per Cross J.

(24) Finn, supra, n.(1), p.146.

(25) Supra, n.(9).

analysis of prospective takeover opportunities in a particular industry, allowing the employee to identify the best opportunity (26). Such an approach may even be advantageous to the second company for an independent analysis may reveal flaws in the original analysis and also reveal other prospects for the second company, rather than being a pointless exercise in order to comply with the law.

Distinctions are drawn between confidential information and ordinary skills derived from employment. The basis of the distinction is that it is contrary to public policy to restrain an ex-employee from making use of the skills and experience which he has acquired during the period of his employment (27). The House of Lords in Herbert Morris, Ltd. v. Saxelby (28) struck down (29) a restrictive covenant to be contrary to public policy for "it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him" (30). It seems improbable that the position of an outside director would be distinguished from the employment context.

Publication of his secret by the confider is fatal to any claim he might have in respect of future breaches of confidence. The grant of a patent is the most striking demonstration of this exception. In Mustad & Son v. Dosen (31), the House of Lords refused injunctive relief in respect of an invention which

(26) See Interfirm Comparison (Australia) Pty. Ltd. v. Law Society of New South Wales (1975) 5 A.L.R. 527.
(27) Jones, supra, n.(1), p.471.
(28) [1916] 1 A.C. 688.
(29) For application of Illegal Contracts Act 1971, see H.& R. Block v. Sanott [1976] 1 N.Z.L.R. 213.
(30) Supra, n.(28), 699, per Lord Atkinson.
(31) (1928) [1964] 1 W.L.R. 109n.

had been patented. Franchi v. Franchi (32) proceeded on the same footing with argument only on the period for which damages were awardable. However knowledge of the grant of a patent is capable of being confidential information, according to the decision of Roskill J. in Cranleigh Precision Engineering Ltd. v. Bryant (33). There the defendant became aware of the grant because of his contractual and confidential relationship with the plaintiffs. The facts were rather special so the decision may only apply to similar facts. Otherwise knowledge of public information acquired in the course of employment or through a directorate could be considered to be confidential information; but the cases do not support such a conclusion (34).

B. Confidential Situation

Turning now to the second requirement stated by Megarry J., we should note the impracticality of compiling an exhaustive list of the situations in which the obligation of confidence may be created. Megarry J. has however formulated a "reasonable man" test (35):

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".

That test, however, does not really provide much assistance in determining when the courts might intervene.

The position of persons who were not privy to the confidence must be noted in relation to this prerequisite for an obligation of confidence. Analysis of their liability necessitates reaching a definite conclusion as to the basis of the action. Such a conclusion was not necessary for the purposes of the

(32) Supra, n.(23).

(33) [1965] 1 W.L.R. 1293.

(34) Ante, p.78.

(35) Coco v. A.N. Clark (Engineers) Ltd., supra, n.(14), 48. Despite noting the prevalence of such tests, Megarry J. also referred to the usefulness of an "officious bystander" test: supra, 50.

discussion of the confidentiality of the information. Confidentiality of the information is also of importance in express contractual stipulations of confidence.

The early cases were not certain as to the foundation of the right of action, as noted earlier (36). The law of contract does not provide a foundation which is satisfactory for all purposes. However many cases have arisen in which express or implied contractual terms have imposed an obligation of confidence. These primarily arise in the employment context. But the law of contract is not able to deal with the abuse of confidential information in the hands of a third party, or which has been derived during unsuccessful negotiations because of the lack of privity or of a contract. The action, furthermore, is not based in tort (37).

Theidea that information is property is also not totally appropriate. Jones points to the obligation applying to the bona fide purchaser of the information who later learns that it has been acquired in breach of confidence (38). There is scope for the application of the principle of nemo dat quod non habet despite the information being protected by Equity. The concept of information as property has already been discussed. The cases have not relied on the concept, but have, instead, relied on an equitable doctrine.

The basis of a claim for breach of confidence is solely dependent on the equitable principle of good faith. It does not depend upon any pre-existing fiduciary relationship. Therefore the principles apply equally to persons in every-day life, and to directors and other fiduciaries. The courts have held the obligation of confidence to exist in respect of relationships as diverse

(36) Ante, pp.73-74.
(37) A.B. Consolidated Ltd. v. Europe Strength Food Co. Pty. Ltd., supra, n.(20), 520, per Woodhouse J.
(38) Jones, supra, n.(1), p.465.

as those between husband and wife (39), employer and employee (40), manufacturers and traders (41), and Cabinet Ministers (42); and even between an anthropologist and male aborigines (43). The essential feature in the cases is that the confider has an expectation of confidence being maintained. The expectation must reasonably exist in the confider. In Fraser v. Evans (44), the plaintiff had agreed to keep his report to the Turkish Government confidential. But the Government had made no such reciprocal undertaking. The plaintiff's action failed against a newspaper, who had obtained a copy of the report through a leak by a Government official.

The expectation of confidence was clearly present in A.B. Consolidated Ltd. v. Europe Strength Food Co.Pty. Ltd. (45) where the defendants were only shown the plaintiff's process after habing sought that opportunity. The information was given for the limited purpose of assisting the parties' negotiations.

The factor of limited purpose has also been present in most of the cases (46); quaere whether the intimate confidences in Argyll v. Argyll (47) are an exception. The Saltman case (48) illustrates the point. There the drawings were provided only to enable the production of the required number of leather punches. The limited purpose of taking photographs of the plaintiff was

(39) Duchess of Argyll v. Duke of Argyll, supra, n.(17).
(40) Cranleigh Precision Engineering Ltd. v. Bryant, supra, n.(33).
(41) Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd., supra, n.(6).
(42) Attorney-General v. Jonathan Cape Ltd., supra, n.(15).
(43) Foster v. Mountford & Rigby Ltd. (1977) 14 A.L.R. 71.
(44) [1969] 1 All E.R. 8.
(45) Supra, n.(20).
(46) Particularly those involving negotiations.
(47) Supra, n.(17).
(48) Supra, n.(6).

exceeded in Pollard v. Photographic Company (49) by the photographer selling copies to the public. Where a limited purpose is present, the confidant will have to satisfy a heavy burden to repel the contention that he is bound by an obligation of confidence (50).

The factor of limited purpose is clearly present in the position of the company director. Any information he is provided by the company is obviously being given to him for the limited purposes of acting in the company's interests as a director. Furthermore, information is generally given to the director in circumstances where an obligation of confidence is expected.

There are three possibilities whereby a third party may acquire the information. He may acquire it as the result of a breach of confidence by one of the original parties, or without any such breach, or he may acquire confidential information which has never been confided to anyone.

In the first situation it is appropriate that the third party should be prevented from using the information where he know, or ought to have known that the information was given to him in breach of confidence. Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd. (51) provides an example of actual knowledge of the breach. There one defendant knew that the two ex-employees of the plaintiff had breached the plaintiff's policy of secrecy in respect of its rubber glove manufacturing process. Prince Albert v. Strange (52) clearly demonstrates that an injunction will lie against a third party who ought to have known of the breach of confidence. Presumably owing to the suggestion of fraud even if only equitable, in a breach of confidence, which is

(49) (1888) 40 Ch. D. 345.
(50) Coco v. A.N. Clark (Engineers) Ltd., supra, n.(14), 48, per Megarry J.
(51) Supra, n.(21).
(52) Supra, n.(2).

a ground for lifting the corporate veil, the courts view companies created by parties to a breach of confidence to be those parties' alter ego (53).

The position of the innocent recipient is different. He may be a bona fide purchaser for value without notice, and thus apparently free from restraint by the courts of Equity. Indeed in Morison v. Moat (54), Turner V-C. stated that the position of a purchaser for value of the secret without notice of any obligation affecting it might be different from the usual position concerning a breach of faith. Lloyd-Jacob J. expressed the contrary view in Stevenson, Jordan & Harrison Ltd. v. Mcdonald & Evans (55) that express notice of the breach of confidence before use of the information by the third party imposed the obligation on the bona fide purchaser. However on appeal no view was expressed on that dictum (56).

Lord Denning M.R. in Fraser v. Evans (57) adopted that contrary view stating:

> "No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence he can be restrained from breaking that confidence."

The position thus appeared to be fairly clear that Turner V-C. was incorrect, for the other members of the Court of Appeal did not dissent from the judgment of the Master of the Rolls.

However in a more recent case Lord Denning M.R. appears to have substantially altered his position. In Dunford & Elliott Ltd. v. Johnson & Firth Brown Ltd. (58)

(53) E.g. H. & R. Block Ltd. v. Sanott, supra, n.(29), 216.
(54) Supra, n.(3)
(55) (1951) 68 R.P.C. 190, 195.
(56) (1952) 69 R.P.C. 10.
(57) Supra, n.(44), 361, Emphasis added.
(58) [1977] 1 Lloyds Rep. 505, 510. Emphasis added. Noted B.A.K. Rider: "Abuse of Inside Information" (1977) 127 New L.J. 830.

the Master of the Rolls stated:

> "At any rate, there may be sufficient doubt about their [the defendants'] guilt, that they ought not to be restrained by injunction. After all, they made no promise to anyone that they would not use it [the information]".

If the later dictum is correct, then an innocent third party could not be restrained from using the confidential information, although pecuniary relief might be awardable. Furthermore the underlined words suggest that no restraint could even be placed on the recipient who ought to have realised that the information was given to him in breach of confidence. Indeed Lord Denning had that very position before him, for the defendants had only been allowed to take notes of the report of the plaintiff's financial advisers, rather than being allowed to copy the report. Fortunately the dictum cannot be regarded as binding for Lord Denning's judgment was based on a different ground, that of the reasonableness of the stipulation of confidence (59). Further, the other members of the Court of Appeal disagreed with Lord Denning's approach in refusing the interlocutory injunction sought.

The foregoing analysis is of considerable importance in determining the position of any company which receives information from one of its directors who is a director of another company. It would appear that that company could be prevented from using such information, assuming its confidentiality, if it has come from the other company. But it could not be prevented from using the information while it has no notice of the breach of confidence, express or constructive.

The second and third situations are where the information is acquired without any breach of confidence. Professor Jones discusses these possibilities on the basis of "reprehensible means", concluding, in the absence of any English authority, that he believes that the courts will impose liability in appropriate cases in those situations (60).

(59) See discussion, post, p.87.
(60) Jones, supra, n.(1), p. 482-483.

C. Use of the Information

The third requirement postulated by Megarry J. concerns the use and abuse of the information without authorization (61). There are two possible formulations of the law concerning the requirements. One is that there is a duty to refrain from using or disclosing the confidential information without the confider's consent. The other is that there is no right to use such information without reasonably compensating the confider for its use. The former approach is that of Lord Greene M.R. in the Saltman case, as shown by the dictum quoted earlier (62). The approach of Lord Denning M.R. in Seager v. Copydex Ltd. (63) represents the second approach. It might be noted that there is a close degree of correlation between this latter approach and the "springboard doctrine": both are concerned with head-starts, rather than prohibition. The distinction is an important one for an injunction is the remedy primarily applicable under the first approach, while damages or some other form of compensation are appropriate under the second approach.

Megarry J. in Coco v. A.N. Clark (Engineers) Ltd. (64) addressed himself to the two formulations of the duty. His Honour was particularly concerned that the former and more stringent formulation was not reasonably able to be performed by law-abiding citizens. His Honour concluded:

> "the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all. It may be that in fields other than industry and commerce (and I have in mind the Argyll case) the duty may exist in the more stringent form; but in the circumstances present in this case I think that the less stringent form is the more reasonable" (65).

(61) Megarry J.'s requirement also referred to the element of detriment: post, p.86.

(62) Supra, n.(7).

(63) Supra, n.(9).

(64) Supra, n.(14).

(65) Ibid., 50.

The position of company directors is, of course, within the fields of industry and commerce. Thus the less stringent form of the duty would be appropriate according to the view of Megarry J. However it is not altogether certain that His Honour's comments were directed to the types of confidential information which a company provides to its directors. The case before the learned judge, like so many of the cases, concerned a "quasi-patent" situation. That is where the information is of an unpatented invention or of an industrial process. Information given to directors is more likely to be of a financial nature, such as the financial adviser's report as to the company's immediate prospects in the Dunford & Elliott takeover case (66). That may be a ground for distinguishing the position of directors. Indeed in that takeover case the Court of Appeal appears to have only contemplated injunctive relief rather than the payment of compensation for the use of the information, although that may only be because of the interlocutory nature of the proceedings.

Megarry J. referred to a requirement of detriment. The learned judge considered that detriment would generally be required before Equity would intervene, although there might be cases where intervention was appropriate without detriment being suffered by the plaintiff (67). That attitude may be contrasted with Equity's position in relation to conflicts of interest and duty in the case of a fiduciary (68), where there is no requirement of detriment. The position remains uncertain.

D. Reasonableness of Obligation of Confidence

The three requirements postulated by Megarry J. were accepted by the Court of

(66) Supra, n.(58).
(67) Supra, n.(14), 48.
(68) Ante, Ch.5, Section C

Appeal in the Dunford & Elliott takeover case (69). However the Master of the Rolls added a further requirement. It is that the stipulation of confidence was reasonable at the time it was made, and that it has not subsequently become unreasonable. Otherwise the court will not enforce the obligation (70).

The facts of the case require elaboration. The plaintiff required additional capital, so it approached its institutional shareholders, who held 43% of the plaintiff's capital, to underwrite a rights issue. Those institutions were provided, on a stipulation of confidence, with the report of the plaintiff's financial advisers as to the plaintiff's immediate prospects. The defendants, a competitor of the plaintiffs, were shown that report by one of the institutions, as it was considered that a larger injection of capital was required. The defendants rejected the invitation to join in underwriting the rights issue. Instead, they shortly thereafter announced that they were making a takeover offer for the plaintiff. The plaintiff then sought an injunction preventing the offer from being made.

Lord Denning M.R. held the stipulation unenforceable for it was unreasonable for the institutional shareholders to be given better information than private investers. Also, directors of the plaintiff had used the report when purchasing shares at a low price, although disclosure was made.

However Roskill and Lawton L.JJ. refused the interlocutory injunction on the balance of convenience in accordance with the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. (71). The timing of the injunction so as to prevent the takeover offer plus the possibility of disclosure of the

(69) Supra, n.(58).
(70) Ibid., 509.
(71) [1975] A.C. 396.

contents of the report by the plaintiff in reply to the takeover bid (72) influenced the learned Lord Justices. It is thus uncertain whether the requirement of reasonableness exists for the learned Lord Justices dissented from the approach of the Master of the Rolls. But Megarry J. did formulate a "reasonable man" test, so reasonableness may yet be a relevant factor.

E. Defences

There appear to be a number of possible defences to an action for breach of confidence. The first of these has been said to be that of bona fide purchase without notice. Goff and Jones (73) refer to such a defence, stating that "a person who buys in good faith confidential information without notice of any breach of confidence is free to exploit that information." A number of cases are cited for the proposition, but all except Morison v. Moat (74) are American authorities. However, as already discussed (75), the position appears to be that once the innocent purchaser receives notice of the breach, he is bound by the obligation of confidence. The learned authors do qualify their proposition, but only in a manner incorporating the second possible defence.

That defence is the one of change of position of the defendant. Goff and Jones (76) believe it to be equitable that the defendant should be allowed to defeat a claim for breach of confidence where he has detrimentally changed his position. The Law Commission does not favour that approach (77). The defence is not one which the English Courts have as yet recognised.

(72) Problems in relation to compliance with the Code of the City Panel on Takeovers and Mergers were dismissed on the grounds of urgency.
(73) Supra, n.(1), p.519. Also Jones, supra, n.(1), pp.477-478.
(74) Supra, n.(3).
(75) Ante, pp. 83-84.
(76) Supra, n.(1), p.520.
(77) Law Commission, supra, n.(1), p.64.

A third possible defence is that disclosure is required inthe public interest. Disclosure of fraud or crime is an exception to the obligation of confidence (78). So too is disclosure of "misconduct of such a nature that it ought in the public interest to be disclosed to others" (79). "Public interest" is however a two-edged sword. In the Crossman Diaries case (80), the public interest of frank discussion in Cabinet was the basis of the claim of confidentiality. But Lord Widgery C.J. considered the ten-year time lag to vitiate the need for confidentiality. That might alternatively be considered to be an application of the requirement of reasonableness of the obligation of confidence. In a case arising out of the thalidomide disaster (81), the public interest of proper administration of justice requiring confidentiality of discovery documents outweighed the public interest in disclosure of the terrible tale. Publicity-seeking also has similar attendant risks as some British pop stars discovered (82).

F. Conclusion

The nature of the remedies available to a plaintiff who can satisfy all three, or four, requirements will be dealt with in the subsequent section. At this point it is convenient to note that the New Zealand courts have developed the right of action in the same way as the English courts. The recent Court of Appeal decision (83) illustrates that comment, as do decisions in the

(78) Gartside v. Outram (1856) 26 L.J.Ch. 113 (falsification of sale notes).
(79) Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396, 405, per Lord Denning M.R. (restrictive trade agreements).
(80) Supra, n.(15).
(81) The Distillers (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] 1 All E.R. 41.
(82) Woodward v. Hutchins [1977] 1 W.L.R. 760. Noted G. Hammond: "Superstuds and Confidence" [1977] N.Z.L.J. 464.
(83) A.B. Consolidated Ltd. v. Europe Strength Food Co. Pty. Ltd., supra, n.(20).

Supreme Court (84).

It is important to observe that the right of action is sufficiently well developed through the "quasi-patent" cases to be applied to leaks of information by directors. But as the Law Commission noted in its working paper (85) the lack of certainty about the precise principles on which the action is based makes it difficult to predict the future ambit of the obligation. There have, however, been a few cases in which the action has been involved in relation to directors.

In the cases where a contractual element was present, the courts have appeared to rely interchangeably on implied contractual terms and the equitable obligation of confidence, in the absence of express contractual terms. Similarly, the courts in cases concerning directors appear to confuse the equitable obligation with the fiduciary obligations of directors. Such a confusion crept into the judgement of Stephen J. in Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd (86), where the action was founded on breach of fiduciary duty.

In Baker v. Gibbons (87), Pennycuick V-C. had no hesitation in accepting that the principle applying to confidential information "applied with particular force as between a director and his company". However an interlocutory

(84) Conveyor Co. of Australasia Pty. Ltd. v. Cameron Bros. Engineering Co. Ltd. [1973] 2 N.Z.L.R. 38; Westminster Chemical N.Z. Ltd. v. McKinley [1973] 1 N.Z.L.R. 659; N.Z. Needle Manufacturers Ltd. v. Taylor [1975] 2 N.Z.L.R. 33; H. & R. Block Ltd. v. Sanott, supra, n.(29); Whimp v. Kawakawa Engineering Ltd. [1978] N.Z. Recent Law 114; and Air Chief Services Ltd. v. Wellington Gas Co. Ltd. (Unreported).

(85) Law Commission, supra, n.(1).

(86) (1975) 49 A.L.J.R. 74, 92 (Barwick C.J. concurring). For discussion of case, post, pp.96-98.

(87) [1972] 2 All E.R. 759, 765.

injunction was refused because the information as to the company's selling agents' names and addresses was not confidential; it was even available in a phone book. The Court of Appeal dismissed the company's appeal (88).

The decision of Speight J. in Westminster Chemical N.Z. Ltd. v. McKinley (89) is very similar. The subject-matter of the action for breach of confidence, names of the plaintiff's suppliers, was held not to be confidential for the names "would be known to any person knowledgeable in the plastics trade" (90). The learned judge denied the interim injunction as it would debar the defendant from his trade. The decision is thus consistent with the earlier conclusions reached from the English cases as to the distinction between confidential information and general employment skills and knowledge (91).

The action for breach of confidence is one which applies to directors. But it will usually be the case that the director will be liable for some breach of his fiduciary obligations or his contractual obligations when he breaches confidence. Nevertheless, the form of action still has value in respect of directors, if only as a subsidiary cause of action. But objections may be raised that multiplicity of actions is not in the interests of the expeditious and simple administration of justice.

(88) Ibid, 767n.
(89) Supra, n.(84).
(90) Ibid., 667.
(91) Ante, p.78.

7. Remedies

There exist a wide variety of remedies which a court can grant in exercising its equitable jurisdiction. Some do not have any relevance for the liability explored in the two preceding chapters. For instance, specific performance, appointment of a receiver and manager, and rectification of documents are inappropriate remedies for use in a multiple directorate problem. It should be remembered that all the remedies, being equitable, are purely discretionary. There is no right to receive a particular remedy or, indeed, any remedy at all. A convenient means of examining the remedies which may be available is a classification of the equitable remedies into three types: injunctive, pecuniary and proprietary. Each of these classes will be separately examined, relating the remedy to the liability on which it may be based, as it is usually the case that a plaintiff is interested in a particular remedy rather than in a particular liability of the defendant.

A. Injunctive Remedies

The injunction (1) is probably the best known remedy which Equity may award to the successful plaintiff. It generally requires the person subject to the order to refrain from pursuing some course of conduct. There are three types of junction: permanent, interim and quia temet. The first is granted after the full hearing of an action in respect of a right which has been breached. The interim injunction is issued to preserve the status quo before the action is finally determined. The quia temet injunction is used to prevent impending breaches of the plaintiff's rights.

(1) See P.H. Pettit: Equity and the Law of Trusts (London, Butterworths; 3rd edn., 1974) Ch. 13; R.P. Meagher, W.N.C. Gummow & J.R.F. Lehane: Equity: Doctrines and Principles (Sydney, Butterworths; 1975) Ch. 21; R. Megarry & P.V. Baker (eds.): Snell's Principles of Equity (London, Sweet & Maxwell; 27th edn., 1973) Pt. VII, Ch.6.

The preceding two chapters have examined five different forms of action which may be brought in respect of multiple directorates and loss of corporate opportunity. It is possible for an injunction to be issued in respect of each of those actions. But it is a matter of judicial discretion. The injunction is most likely to be utilised in actions for doing harm to an "employer's" business, and for breach of confidence. In respect of the former, injunctions have often been granted, particularly to prevent the solicitation of customers. For actions for breach of confidence, the injunction is an important remedy. This is especially so where the interim injunction is sought in order to restrain the use of the confidential information until the hearing of the action. If the action succeeds, a permanent injunction may be awarded as well as some pecuniary remedy. But the divergence of judicial opinion on which remedy is the most generally appropriate must be noted (2). Thus it may be that a permanent injunction will be a rarity in respect of an action for breach of confidence. The recent decision of Chilwell J. in Whimp v. Kawakawa Engineering Ltd. (3) illustrates the point that an injunction will not always be granted. There the injunction was refused because the defendant had developed a substantial business on the faith of the plaintiff's orders and because some major features of the invention were not novel. However, damages were to be awarded on the basis of the "springboard doctrine". By contrast, injunctive relief was deemed to be most appropriate in A.B. Consolidated Ltd. v. Europe Strengh Food Co. Ltd. (4), although an account of profits was also ordered.

The award of an interim injunction has produced a number of the significant cases on breach of confidence. The leading decision on interim injunctions is that of the House of Lords in American Cyanamid Co.

(2) Ante, p. 85.

(3) [1978] N.Z. Recent Law 114. Also Seager v. Copydex Ltd. (No.2) [1969] 1 W.L.R. 809.

(4) [1978] 2 N.Z.L.R. 515.

v. Ethicon Ltd. (5), which did not concern breach of confidence. The decision stresses that the balance of convenience is to be the test, provided, of course that the plaintiff shows a prima facie case. That decision was followed by a majority of the Court of Appeal in Dunford & Elliott Ltd. v. Johnson & Firth Brown Ltd. (6). There the interlocutory injunction was refused because its purpose was not to maintain the status quo, but to forestall a takeover offer being made.

The injunction may enjoin third parties who were not involved in the confidential situation. The position reached by the cases appears to be that third parties will be restrained from using or disclosing confidential information if they know that the information was derived in a breach of confidence (7). Thus an action seeking an injunction can be brought against any third party who has acquired the confidential information (8), although it is probably wise for the plaintiff to inform the third party before filing his writ. The nature of the information may determine whether injunctive or pecuniary relief will be granted, as already noted (9).

An injunction could conceivably be granted in respect of any of the three remaining forms of action. However it is frequently the case that knowledge of the facts sufficient to establish the right to bring an action is acquired after the "damage" has been done. It is unlikely that the loss of corporate opportunity will be an ongoing one requiring an injunction. If the argument is accepted that a director in holding a directorate in an actual or possible competitor has breached the conflict subrule of the duty of loyalty rule, then an injunction might be granted prohibiting that director from so acting.

(5) [1975] A.C. 396.
(6) [1977] 1 Lloyds Rep. 505. For further discussion: ante, pp. 87-88.
(7) Ante, pp. 83-84.
(8) Duchess of Argyll v. Duke of Argyll [1967] Ch. 302, 333, per Ungoed-Thomas J.
(9) Ante, pp. 85-86.

The writer speculates that the injunction so granted could be seen as being a quia temet injunction, which the courts are reluctant to grant. However the director does owe duties to his company, and so the company must have certain rights, which are breached by the director acting as director of another company, on the basis of the argument already made. Even applying Lord Upjohn's "real sensible possibility" test, an injunction is not beyond the realms of likelihood in respect of general competition or competition for a specific opportunity between the two firms. An injunction is, however, less likely to be granted in respect of the profit subrule, the misuse of property, or the conflict of duty and duty rule, until such time as an actual breach of fiduciary obligation has occurred. But then pecuniary remedies will primarily be sought, as each of those actions involves an advantage having been taken by the multiple director. Furthermore, in those cases the miscreant director will almost certainly be dismissed (10), if not earlier persuaded to resign; a continuation of the breach of duty is thus unlikely.

B. Pecuniary Remedies

The main pecuniary remedy in Equity's inherent jurisdiction is an account of profits (11). The defendant is thereby required to account to the plaintiff for all his profits derived from the breach of his duty or obligation. No consideration is given to loss or damage suffered, or not suffered, by the plaintiff; the sole focus is on the profit made by the fiduciary or confidant. The position of the chairman of directors in Regal (Hastings) Ltd. v. Gulliver (12) demonstrates the latter point. As he had made no profit he was

(10) Section 187, Companies Act 1955.

(11) See Meagher, Gummow & Lehane, supra, n.(1), Ch. 25; Snell, supra, n.(1), Pt.VII, Ch. 5; Pettit, supra, n.(1), pp. 470-473.

(12) [1967] 2 A.C. 134: ante, pp. 39.

held not liable to account. The treatment of the making of savings through a breach of fiduciary duty or of confidence is not yet satisfactorily based (13). However in the breach of confidence cases, the saving of effort, time and expense through use of an invention in breach of confidence has sometimes been penalised by the order of an account of profits (14) and sometimes by an order for compensation. Nor is the position of third parties, who make a profit because of the breach, entirely clear. The preferable view is that they too should be liable to account where they had actual, or perhaps constructive, knowledge of the breach, whether it was within the duty of loyalty rule, a misuse of property or of confidential information, or due to a conflict of duty and duty.

The position of third parties in respect of a breach of confidence is relatively clear, for if the court will restrain a third party from using or disclosing confidential information (15), then logically it will grant pecuniary relief against such a person in appropriate cases. Pecuniary relief is obviously not an appropriate companion remedy in respect of situations where an injunction is issued before the actual misuse or disclosure has occurred (16). It must be remembered that the third party must have acquired knowledge of the breach in order to be bound by the obligation of confidence.

A recent case illustrating the position of third parties in respect of a breach of fiduciary obligation rather than a breach of confidence is the decision of the High Court of Australia in Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd. (17). Walton, a solicitor, controlled a group of

(13) P.D. Finn: Fiduciary Obligations (Sydney, Law Book Co.; 1977) p.127.
(14) E.g. A.B. Consolidated Ltd. v. Europe Strength Food Co. Ltd., supra, n.(4).
(15) Ante, pp.83-84.
(16) E.g. Duchess of Argyll v. Duke of Argyll, supra, n.(8).
(17) (1975) 49 A.L.J.R. 74.

companies including D.P.C., the plaintiff. Grey, one of the defendants was managing director of another company in the group which provided managerial services for the group. Grey was responsible for locating properties to be purchased by the group, primarily by D.P.C., after decision by Walton. The defendant company, Consul, was a family company of which the defendant Clowes became managing director. By coincidence, Clowes was an articled clerk in Walton's law firm. Grey and Clowes collaborated in the purchase of properties by Consul, with Grey providing the information as to the availability of properties. Although both Grey and Clowes tried to keep their transactions secret from Walton, Clowes was found to have reasonably believed Grey who said that the Walton group had rejected the properties.

Grey was held liable to account, by the New South Wales Court of Appeal, for the profits he would receive on the sale of the properties, for breach of the duty of loyalty. He was also, in actual fact, acting in breach of an express stipulation in the terms of his employment. Grey did not appeal to the High Court.

The trial judge's finding did not show Clowes to have had any actual knowledge of Grey's breach of fiduciary and contractual duties. Clowes knew, because of his employment, that Walton was in financial difficulties, so that he reasonably believed Grey's assertions. Thus Clowes' conduct did not represent encouragement of Grey's breach of fiduciary duty. That conclusion was accepted by Barwick C.J., Gibbs and Stephen JJ., with McTiernan J. dissenting (18). The judgment of Stephen J., in which Barwick C.J. concurred,

(18) Menzies J. died before judgment.

then proceeded that Clowes and Consul had not received any property or money of the plaintiff, as knowledge of prospective vendors was not property (19). Thus the doctrine of constructive notice did not apply to deem Clowes and Consul constructive trustees by failing to make inquiry, as no misuse of property.

Actual knowledge, it was stated by the learned judges, of the "fraudulent and dishonest design" is required to include a third party as a participant in that activity, unless the person has received trust property (20). That statement was made rejecting the suggestion of Ungoed-Thomas in Selangor United Rubber Estates Ltd. v. Cradock (No.3) (21), which had been approved of by Brightman J. in Karak Rubber Co. Ltd. v. Burden (No.2) (22). Stephen J. preferred the contrary views of the Court of Appeal in Carl-Zeiss-Stiftung v. Herbert Smith & Co. Ltd. (23) which distinguish misuse of trust property from other breaches of fiduciary duty in applying the doctrine of constructive knowledge to hold third parties liable in the absence of actual knowledge of the breach. Gibbs J. in the Consul case (24) preferred the views expressed by Ungoed-Thomas J. However he did hold Consul not to be a constructive trustee for on the facts Clowes knew to exist there was no actual or constructive knowledge of a breach of fiduciary duty.

In some of the cases the award of damages appears to be an alternative to an account of profits. But damages are not a remedy within the inherent equitable jurisdiction. Their origin in Equity was statutory, being Lord Cairns' Act

(19) Supra, n.(17), 92. Cf. the earlier discussion: ante, pp.27-32.
(20) Ibid, 91.
(21) [1968] 2 All E.R. 1073, 1104.
(22) [1972] 1 All E.R. 1210.
(23) [1969] 2 Ch. 277.
(24) Supra, n.(17), 85.

of 1858. That Act authorized the award of damages in addition to or in substitution for an injunction. Thus any award of damages should be based on considerations wholly apart from those relating to pecuniary relief. Viscount Haldane L.C. in Nocton v. Lord Ashburton (25) clearly stated that a court of Equity could not order the defendant to pay damages, although an order for restition or compensation was possible.

However the courts have at times confused the two pecuniary remedies of damages and account (26). Such a confusion is most apparent in the decision of the Supreme Court of Canada in Canadian Aero Services Ltd. v. O'Malley (27) where Laskin J., speaking for the Court, spoke of damages which were not to be related to loss, but to the profit made. Laskin J. was obviously referring to an account of profits.

Viscount Haldane L.C.'s speech was relied on by Dixon A.J. in McKenzie v. McDonald (28) as authority for remedying breaches of fiduciary duty by decrees of compensation. Compensation has been viewed by a number of judges in breach of confidence cases as the appropriate means of imposing a "starter's handicap" on the party in breach (29). The remedy compensates the confider in such a way as if the confidant had purchased the information from the confider.

(25) [1914] A.C. 932, 952.

(26) Orders for restitution are not considered in the paper for they are inappropriate for the problem under examination.

(27) (1973) 40 D.L.R. (3d) 371, 392.

(28) [1927] V.L.R. 134, 146.

(29) E.g. Whimp v. Kawakawa Engineering Ltd., supra, n.(3); Seager v. Copydex Ltd. [1967] 2 All E.R. 415, 417, per Lord Denning M.R.

C. Proprietary Remedies

There are two proprietary remedies, both of which have some degree of potential utility in respect of multiple directorates. The two remedies are constructive trusteeship (30) and tracing (31). Although constructive trusteeship is not always considered to be a remedy in English law, unlike its position in American law, it is a product of the action which a plaintiff may seek to gain redress for a breach of the duties owed to him by a fiduciary. The case of Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd. (32) provides an example of a plaintiff unsuccessfully seeking the remedy of constructive trusteeship.

Constructive trusteeship is manifestly appropriate in the case of misappropriation of property. An order will also be made against anyone else who holds the property provided that he had actual or constructive knowledge of the misappropriation. The effect of such an order is that the person holding the property holds it not for himself but for the benefit of the person to whom the breached fiduciary obligation was owed. A tracing order is extremely similar. It is however essential that the property being traced is identifiable or disentangleable (33). That requirement also applied to property which is to be ordered to be the subject-matter of a constructive trust.

The constructive trust is the more extensive remedy than liability to account.

(30) See D.W.M. Waters: The Constructive Trust (London, University of London; 1964).

(31) See Snell, supra, n.(1), pp.284-292; Pettit, supra, n.(1), pp.460-470; R.H. Maudsley: "Proprietary Remedies for the Recovery of Money" (1959) 75 L.Q.R. 234.

(32) Supra, n.(17).

(33) Re Diplock [1948] Ch. 465, 536.

It has a number of advantages over the personal remdy of account. First, it avoids the problem of the personal remedy being ineffective, perhaps due to the fiduciary's insolvency. Second, it will give priority to the plaintiff over the other creditors of the person holding the property, which may be important if that person is insolvent (34). Moreover it can enable the plaintiff to force the defendant to turn over shares or other property acquired by the defendant. In Abbey Glen Property Corporation v. Stumborg (35) the turning over of shares was not possible as they had been sold before trial, but the Alberta Court of Appeal indicated that it would have ordered the transfer of the shares if restitution had been possible. The matter was left to be resolved by the parties in Boardman v. Phipps (36), after an order of constructive trusteeship was made.

The possibility that information is property has earlier been canvassed in the paper (37). However a tracing order in respect of information, while being conceptually possible, does appear to present practical difficulties. The principles governing tracing at equity have been developed slowly through the decisions in Re Hallett's Estate, (38) Sinclair v. Brougham (39) and Re Diplock (40). The result, as enunciated by the Court of Appeal in its classic judgment in Re Diplock, is that tracing is possible into a mixed fund of money or property providing that the trust property can be identified. Following at common law is precluded by mere mixing of property or by the property being sought to be followed being a mere equitable right. Thus to trace information, the equitable

(34) Snell, supra, n.(1), pp.284-285.
(35) (1978) 85 D.L.R. (3d) 35.
(36) [1967] 2 A.C. 46.
(37) Ante, pp.27-32.
(38) (1880) 13 Ch. D. 696.
(39) [1914] A.C. 398.
(40) Supra, n.(33).

principles must be relied upon, for information is clearly only an equitable right, and owing to its abstract character it is inevitably mixed with other property when it is utilised. It would appear that information is also not able to be identified or to be disentangled and so cannot be traced, unless further steps, or leaps, are taken by the courts to enlarge the applicability of tracing orders from those enunciated in Re Diplock. The lack of traceability may, in the final analysis, determine the issue of whether information is property against the proponents of that theory. In this regard it is important to note that tracing is a primary remedy for the misuse of trust property, so that the inability to resort to the remedy makes the hypothesis of information being property little more than academic, for the hypothesis only has usefulness in that particular form of action. A constructive trust of information may yet be possible, but the effect of such an order can hardly be different from that reached by ordering an account of profit. The position in respect of an action for breach of confidence must be the same.

The principles of tracing draw a distinction between two types of third parties into whose hands the property has gone. A third party who took with notice is subject to the full stringency of the principles. However in the case of an innocent volunteer, that is a person who takes without notice but did not give value, tracing is limited, where there has been mixing by the third party, to a claim ranking equally with the third party's claim on his own fund (41). Tracing is, of course, not possible against property in the hands of a *bona fide* purchaser for value without notice.

In the discussion of the Consul case, mention was made of the divergence of the

(41) *Ibid*, 539.

majority of the High Court of Australia on the matter of the breadth of the doctrine of constructive notice. The issue of whether constructive knowledge is sufficient to impose liability on a third party in respect of a breach of fiduciary duty other than a misuse of trust property is yet to be decided. The controversy was generated by Ungoed-Thomas J. in Selangor case. If the learned judge is correct, then the position of third parties to breaches of fiduciary obligations is not secure. Thus B Ltd. which reaps a benefit at A Ltd.'s expense through the efforts of common director X might be made accountable for the gains thereby made. B Ltd. would possibly be viewed as being put on its guard by the director's general disclosure under section 199, Companies Act 1955. Unfortunately the courts are likely, even if they adopt the suggestion of Ungoed-Thomas J., to view such a notice as insufficient to found constructive knowledge, except possibly where the two companies were actually competing at the time when the notice was given. However judicial opinion appears to be weighted against the suggestions, as the Consul and Carl-Zeiss-Stiftung cases demonstrate.

The position of third parties thus appears to be a relatively safe one, which is very regrettable as it is the third parties who derive the benefit from the breaches of fiduciary obligation in the situations with which the paper has been concerned. Both means explored in the paper of attacking the sanctity of the third party's position, the hypothesis of information being property and the application of the doctrine of constructive notice to ordinary breaches of fiduciary duty, appear unlikely to be successful. However the writer's hope is that Equity would not refrain from acting in appropriate cases, regardless of the lack of specific authority, because the seeds for its intervention have already been sown. Furthermore there does not seem to be any logical reason for the distinction between misuse of trust property and other breaches of

fiduciary obligation requiring the application of the doctrine of constructive notice only in respect of the former.

D. Statutory Defence

Section 468, Companies Act 1955, provides the Court with power to grant relief in respect of any proceeding for negligence, default, breach of duty, or breach of trust. The section may only be invoked where the person has acted "honestly and reasonably" and "having regard to all the circumstances of the case, ... he ought fairly to be excused". The section exists as a foil to section 204. That latter section invalidates any provision in the articles or in a contract which exempts a director from, or indemnifies him against, any liability for negligence, default, breach of duty, or breach of trust (42).

However section 468 might not be able to be relied upon by directors in the situations which we have considered, unless "breach of duty" is widely interpreted. Negligence is not present in the actions already considered. Nor is "default". The misuse of property action however does fall within the words "breach of trust" for the company property of which the director has control is not infrequently referred to as "trust property". For the director to seek relief under section 468 in respect of potential liability under the other four forms of action which apply to multiple directorates, he must shown that the allegation is one of "breach of duty". It may be possible that "duty" only refers to the duties of care required of the director by the Common Law. However fiduciary obligations are often referred to as duties. The difference

(42) But clauses exempting a director from liability to account are not invalidated, for they modify the director's obligations: L.C.B. Gower: The Principles of Modern Company Law (London, Stevens & Sons; 3rd edn., 1969 p.529, n.(85).

is merely semantic. Therefore section 468 appears to be a possible ground for relief in respect of a breach of the fiduciary obligations Chapter 5. Whether a breach of confidence is properly to be referred to as a "breach of duty" may be an arguable point as there is no pre-existing fiduciary duty. But in Dimond Manufacturing Co. Ltd. v. Hamilton (43), McCarthy J. referred to the broad view taken of the equivalent section under the trustee legislation. The only limitation which the learned judge thought might apply was that the action be one brought by the company, the shareholders or some other person to whom a statutory duty was owed. That limitation would not apply in respect of a breach of confidence action, so section 468 could conceivably be available.

The section requires the defendant to have acted "honestly and reasonably". It is difficult to see how a fiduciary who breaches his obligations can be said to have acted "reasonably", given the strict attitude of Equity. Honesty is however frequently present in these types of cases. Reliance on legal advice is often seen as an indication of reasonable behaviour (44), but it is now unlikely that legal advice would be given that multiple directorates are legally inviolable, given the developments in the recent cases. In respect of an action for breach of confidence, misuse of information known to have been derived in confidence could not be seen as being "reasonable" by any standards.

The test of section 468 is a conjunctive one, according to White J.

(43) [1969] N.Z.L.R. 609, 630.
(44) E.g. Re Duomatic Ltd. [1969] 2 Ch. 365.

in Re Day-Nite Carriers Ltd. (45). But it is quite unlikely, given the policy underlying the fiduciary obligations, for a director to be fairly thought by the courts to be fairly excused in respect of a breach. Breaches of confidence must inevitably be similarly approached, whether or not reasonableness is a requirement or not (46).

The section only provides relief for the honest officer. It could not be relied upon by a party to the breach of duty or confidence. However the existence of such third parties may indicate that the case is not one in which the Court should exercise its power to grant relief.

(45) [1975] 1 N.Z.L.R. 172.

(46) Ante, Chapter 6, section D.

8. Conclusion

The precise extent of the problems arising out of multiple directorates cannot be stated. Potential problems do exist both at the macroeconomic and microeconomic levels. The paper has been addressed to the problems which may arise with significance for the individual company, that is at the micro-economic level. Those problems are frequently referred to as "conflicts of interest". Within that generic term are to be found problems of loss of corporate opportunity to companies sharing a common director. Inevitably when the facts are apprised, assuming that to be possible, the finger is pointed at that common director.

Forms of action do exist which may be attempted against that multiple director. Statute and Common Law however do not provide any basis on which an action can be brought. Equity, with its inherent flexibility, is capable of dealing with the great variety of undefinable situations which may be generated by multiple directorates. Five existing forms of action to enforce obligations required by Equity have been explored in the paper. Those obligations arise in two different ways. First, because the director occupies a fiduciary position he owes certain obligations to his company unless he gains the approval of the shareholders in general meeting to a breach of those obligations. Second, the director may also be in a position of confidence whereby he acquires confidential information, which he is not permitted to use or disclose. The conclusion reached from a review of those actions must be that the law is sufficient to deal with improprieties arising out of multiple directorates. That is even true of the hypothetical referred to earlier in the paper, which may be a rather abstract example. It appears that each of the five actions are able to be utilised in respect of that situation, even all of them in a "scattergun" approach.

Adequate remedies are required to make the expense, inconvenience and

nastiness of such actions worthwhile for the plaintiff company which is intent on receiving undivided loyalty from its directors. Similar considerations apply where an individual shareholder wishes to bring the action, which would appear not to be precluded. In the arena of remedies, the flexibility of Equity has produced an incomprehensible maze. There is a high degree of uncertainty as to the remedies which will be awarded, if any at all, once a breach of obligation has been established. Legislative reform would therefore seem to be required in the area of remedies, particularly to resolve the seemingly secure position of third parties, in particular companies who benefit from the multiple directorate. Imposing liability on the companies might be the most effective means of disbanding the large number of multiple directorates we have in New Zealand, although no evidence exists of losses of corporate opportunity having occurred. However a problem exists in that it is impossible to alter the law relating to the remedies without attempting a codification of the rights and duties in respect of which the remedies are to be awarded.

Codification has been performed in Canada (1) and Australia (2), as well as having been proposed in the recently-lapsed United Kingdom Companies Bill 1978 (3). It does not appear that such codification aids the interests of those protected by Equity. Codification may represent a strait-jacket preventing successful action from being taken in novel situations which may arise out of multiple directorates (4). Indeed, it is highly improbable that legislation would be introduced which prohibited the holding of multiple directorates in all situations or just in respect of competing companies (5),

(1) Canada Business Corporations Act 1975, section 117.
(2) Uniform Companies Act, section
(3) Clause 44.
(4) The Companies Bill 1978 provisions would not cover the hypothetical referred to earlier in this paper.
(5) Cf. the U.S.A. Legislation: ante, p.3.

because of political considerations, yet it is not inconceivable that the Courts of Equity will prohibit such directorates. But the codification which has been attempted has merely been limited to the statement of general principles. The question then however arises of whether such codification serves any useful purpose.

The conclusion reached is that there exists a sufficiently extensive body of latent law to deal with the problems of multiple directorates and loss of corporate opportunity. Those problems are not limited to competitors, for circumstances can arise in which any two companies can take advantage of the same business opportunity, in which cases the multiple director is in a potentially dangerous situation. The review of the application of the duty of loyalty rule to a wide variety of situations provides the basis for the conclusion that Equity is inherently flexible and capable to deal with those situations should they arise.

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ADDENDUM

A decision applying the duty of loyalty to the multiple directorate problem has just come to the writer's attention. It is a decision of the British Columbia Supreme Court at first instance. In Redekop v. Robco Construction Ltd. (1) a majority of shares in the defendant company were held by Robillard, a director. Robillard, together with Credit Foncier, formed C.F.R. Properties Ltd. The defendant company then began constructing buildings for C.F.R. under contract, rather than on its own account as had been the previous practice. The plaintiff, a shareholder in the defendant company, sued arguing a breach of fiduciary duty by Robillard and oppression under section 221, Companies Act 1973 (B.C.).(2).

Meredith J., referring to Canadian Aero Services Ltd. v. O'Malley (3), thought that there might have been a diversion of a maturing business opportunity (4). Whether that was so or not was irrelevant for the learned judge thought that the statement of Viscount Sankey in Regal (Hastings) Ltd. v. Gulliver (5) applied. The approach of Meredith J. is thus consistent with the view expressed in the paper that the existing subrules are sufficient and there is no need for a new corporate opportunity doctrine. Reference was also made to the fact that good faith cannot be relied upon to exonerate a person whose self-interest conflicts with the interests of those he is bound to protect, so that Credit Foncier's attitude was irrelevant just as Traders' attitude had been in Abbey Glen Property Corporation v. Stumborg (6). Meredith J. held Robillard liable to account for his shares in C.F.R. Quaere why not constructive trusteeship (7).

The decision represents a reiteration of the principles examined in the paper, as well as their application to a case closer to the hypothetical posed in the paper. The two companies were not competitors, although in the same general line of business. The decision however deserves note primarily for an aspect of Meredith J.'s treatment of the oppression application. The defendant asserted that no rule precludes a director from participating in another company. In response to that submission, Meredith J. referred to Lord

(1) (1979) 89 D.L.R. (3d) 507.
(2) A similar provision to section 209, Companies Act 1955.
(3) (1973) 40 D.L.R. (3d) 371; ante, pp. 51-54.
(4) Supra, n.(1), 511.
(5) [1967] 2 A.C. 134; 137: ante, p.35.
(6) (1978) 85 D.L.R. (3d) 35: ante, pp.56-58.
(7) Ante, Chapter 7, section C.

Denning's statement in Scottish Co-operative Wholesale Society Ltd. v. Meyer (8) that a director of a rival company was subject to an allegation of oppression. Meredith J., however, went further (9):

> "Robco and CFR may not be, strictly speaking, "rival" companies. But
> "the interest of Robillard in the two companies did conflict. If
> "Robillard chose to serve two conflicting interests he ran the risk of
> "the present application."

Two points emerge from that important statement. First, it would appear to implicitly recognise the application of the conflict subrule of the duty of loyalty to the pure multiple directorate situation, even where the companies are not competing. Second, and more explicitly stated, is that the statutory oppression remedy is available as a further possible means of attacking the position of multiple directors. That possibility was not considered in the paper for Lord Denning's statement had been made obiter in a nominee director case. Highly significant is the view that competition is not a prerequisite for invoking the oppression provision. It would appear from the decision in the Redekop case, although further proceedings are pending, that there is a reserve to the armoury of weapons displayed in the paper.

(8) [1959] A.C. 324, 366.
(9) Supra, n.(1), 515.

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