

The absolute limit of directors' fiduciary liability for conflicts of interest: The director's perspective

ABSTRACT

The absolute limits of fiduciary loyalty are misunderstood in the context of directors as analyses focus on the interests of the principal alone. This article will demonstrate that such an approach is inconsistent with traditional fiduciary analysis and that it is the specific undertaking to the principal's interests that determine the limits of loyalty in a fiduciary relationship.

I. OUTER LIMITS OF FIDUCIARY LIABILITY

A fiduciary is required to be loyal to their principal's interests<sup>1</sup> that they take responsibility for. However, what a director takes responsibility for in their fiduciary relationship with the company is not easy to determine. The company does not have eyes to see or ears to hear and requires its directors to act for it to make up for this defect in corporate personality. Therefore, unlike fiduciary relations involving natural persons, such as a solicitor-client, where the fiduciary may take responsibility for only a specific interest of the principal, and thus be loyal to it, a company requires its directors to do everything for it. This has led to uncertainty and indeterminacy of a director's fiduciary liability since it is difficult to find the outer limits of the duty since a company is capable of doing anything. This has led academics and the courts alike to postulate as to what exactly the company's interests are, in an attempt to define the outer limits of the duty. This article intends to demonstrate these attempts approach the question from the wrong perspective. It will be evidenced that liability, as with other fiduciaries, extends to only those interests that directors take responsibility for in line with orthodox fiduciary analysis. Thus liability, it is contended, must be ascertained

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<sup>1</sup> *Bristol and West Building Society v Mothew* [1998] Ch. 1, 18

from looking at it from the director's perspective as to determining what interests they undertake responsibility for and not simply what are the interests of the company. In doing so a wide interpretation of their responsibility is argued that it extends to all potential interests unless it is specifically restricted. Those who disagree with a wide interpretation cite the negative consequences it would have to matters such as multiple directorships, directors' and officers' (D&O) insurance and entrepreneurial activity. This article will consider the impact such a wide interpretation has on these matters and show that those concerns are unfounded.

Before continuing, this article will only be considering the outer limits of fiduciary liability in respect of conflicts of interest by identifying what a director takes responsibility for. Thus it will not consider how specific terms of the fiduciary undertaking may limit the duty's application, known as contract first,<sup>2</sup> or liability in respect of benefits from third parties or self-dealing unless otherwise stated.

## II. LOYALTY CIRCUMSCRIBED BY THE UNDERTAKING: THE PERSPECTIVE OF THE FIDUCIARY

Understanding the role and function of a director is important for determining fiduciary liability because where someone who has the ability to determine how the interests of the beneficiary are to be served this requires the supervision of equity.<sup>3</sup> Where the director does not have that freedom then the supervision of equity is not required. Thus

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<sup>2</sup> See, for example, *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB); *Hilton v Barker Booth and Eastwood* [2005] UKHL 8; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41; *Henderson and Others v Merrett Syndicates Ltd and Others* [1995] 2 A.C. 145; *Kelly v Copper* [1993] A.C. 205; *Moody v Cox* [1917] 2 Ch. 71

<sup>3</sup> P Finn, *Fiduciary Obligations* (Law Book Company, 1977); cited by *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [51]; citing G Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship*, (Clarendon Press, 1995) 165-7

Lord Wilberforce held, 'the subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking'.<sup>4</sup> This is true in respect of other areas in respect of obligations to others. The House of Lords have held, in the context of the duty of care, 'the inquiry must be whether the director, or anyone on his behalf, conveyed directly or indirectly to the client that the director assumed personal responsibility to the client'<sup>5</sup> and this has been relied upon in the context of fiduciaries.<sup>6</sup> Thus, one must approach liability from the perspective of the fiduciary and ask what interests they took responsibility for rather than from the perspective of the principal as to what are their interests. As the Court of Appeal explained, if there is no responsibility then there is nothing the duty can be "hung from".<sup>7</sup>

The duty is regulated in such a way due to the risk of objectionable self-interest in the performance of one's functions. When a director undertakes responsibility for the interests of the company there is a concern that the control it gives the director may not be used for the benefit of the company where the interest of the company is in conflict with the interest of the director. That self-interest is of concern as the director may, amongst other things, be negligent in the performance of their role and function so as to advance their own interests.<sup>8</sup> Thus a director may use their control over the company's interests to act opportunistically and divert interests to themselves. To mitigate against this, liability for a breach is strict. The duty is prophylactic in that it

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<sup>4</sup> *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126, 1130; citing *Tufton v Sporni* [1952] 2 T.L.R. 516; *Birtchnell v. Equity Trustees, Executors and Agency Co Ltd* (1929) 42 C.L.R. 384, 408

<sup>5</sup> *Williams v Natural Life Ltd* [1998] 1 WLR 830, 835

<sup>6</sup> *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 81 at [254]

<sup>7</sup> *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [68]

<sup>8</sup> *Whichcote v Lawrence* (1798) 3 Ves 740, 750-752 (30 ER 1248)

guards against not just actual conflicts but the risk of one.<sup>9</sup> Thus the courts are unconcerned with points such as the company not being interested, the director acting in good faith or honestly, or the opportunity not belonging to the company. In *Bhullar v Bhullar* it was stated that whether the company had a beneficial interest in an opportunity was too formalistic, 'rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule'.<sup>10</sup> In *Ross River Ltd v Waveley Commercial Ltd* the Court of Appeal overruled the High Court decision that a fiduciary was entitled to make payments to itself and connected parties provided they were reasonable and did not disadvantage the principal. The judgment ruled that this was contrary to normal fiduciary principles.<sup>11</sup> The Supreme Court have gone on to say that:

The notion that the Rule should not apply to a bribe or secret commission received by an agent because it could not have been received by, or on behalf of, the principal seems unattractive. The whole reason that the agent should not have accepted the bribe or secret commission is that it puts him in conflict with his duty to his principal.<sup>12</sup>

These cases show that the focus of the court should simply be whether there was a conflict between the duty owed to the company and the interests of the director. *FHR European Ventures LLP v Cedar Capital Partners LLC* makes it clear that attempts to justify a conflict based on ownership of an asset or whether a bribe could be said to be intended for the principal would have been permissive in allowing a fiduciary to escape strict liability and obtain interests of the principal personally in conflict with their duty, defeating its purpose. In *Ross River* it was also added that said such deviation from

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<sup>9</sup> Companies Act 2006, s.175(1)

<sup>10</sup> *Bhullar v Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711 at [28]; approved in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [14], [36]

<sup>11</sup> *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [93]

<sup>12</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [37]

normal fiduciary principles enabled the fiduciary to impose the risk of the relationship not working out on the principal. The judge said such relaxation:

[P]ermitted WCL and Mr Barnett to contend that whether a payment was justified depended on reasonable foresight as to the eventual outcome at the date of the payment, thereby putting Ross River at the risk of the conclusion to which the judge came, that because the evidence at trial had not included any investigation of what outcome could reasonably have been foreseen at any relevant dates, therefore Ross River was not entitled to any compensation, not having proved a breach by WCL or Mr Barnett of the fiduciary obligation.<sup>13</sup>

The Court of Appeal noted this shifted the onus of proof on to the principal<sup>14</sup> but it is for the fiduciary to prove they were not disloyal as modern cases are emphasising.<sup>15</sup>

However, where there is no undertaking to the company there can be no objectionable self-interest. In principle, it is possible for a fiduciary to take on multiple appointments and even act against the principal on matters not retained for<sup>16</sup> because there is no undertaking at one firm to allow for any opportunistic diversion. On this basis a director would be prevented from competing with their principal on any matter they undertake responsibility for. Therefore there is only a breach if the personal interest conflicts with the duty owed to, and not necessarily the interests of, the principal.<sup>17</sup> Requiring loyalty

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<sup>13</sup> *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [93]

<sup>14</sup> *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [94]

<sup>15</sup> *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) at [188]; *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [64], [94]-[95]; *Rossetti Marketing Limited v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 at [21]

<sup>16</sup> *Boardman v Phipps* [1967] 2 A.C. 46, 126

<sup>17</sup> See, for example, *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [68]; *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2011] EWHC 3154 (QB) at [23]; *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] B.C.C. 332 at [80]; *University of Nottingham v Fishel* [2000]

outside of their function would be disproportionate as in those situations there is no risk of opportunistic diversion.

Loyalty only extends to those interests the individual takes responsibility for and whether an individual is liable requires an examination of the facts.<sup>18</sup> Thus to reason by analogy in fiduciary liability is said to be dangerous<sup>19</sup> because directors do not take on the same responsibility as other types of fiduciaries such as solicitors, trustees or partners. *University of Nottingham v Fishel*, for example, stated that whilst the duty in a partnership or joint venture may be circumscribed by the scope of the business undertaken the same could not be said for an employee's fiduciary duty because for the latter:

Such persons are undertaking to share the work which falls within the scope of the partner or joint venture. The same principle cannot simply be treated as being automatically applicable in the very different context of the employment relationship. The employee does not in general promise to give his employer the benefit of every opportunity falling within the scope of its business.<sup>20</sup>

Thus the court looks at the issue from the fiduciary's perspective. In *Fishel* the court is asking, "what did the employee promise to do?" It appreciates that the employer's interests may be wider than this but the employee does not "promise" to act in the interest of the employer for all of them. A recent application of this was in *Ranson v Customer Systems Plc*.<sup>21</sup> The Court of Appeal noted that the High Court had not

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I.C.R. 1462, 1496; *Hodgkinson v Simms* [1994] 3 S.C.R. 377, 464; *New Zealand Netherlands Society*

*"Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126, 1130

<sup>18</sup> *Cook v Elliot (No 2)* [1992] 1 NZLR 676, 685

<sup>19</sup> *Cook v Elliot (No 2)* [1992] 1 NZLR 676, 685

<sup>20</sup> *University of Nottingham v Fishel* [2000] I.C.R. 1462, 1496; cited with approval in *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [43]

<sup>21</sup> *Ranson v Customer Systems Plc* [2012] EWCA 841

analysed the duty correctly because they had not judge had not made any clear findings as to what the job of the employee was.<sup>22</sup> He noted that the judge had erred as a result where it was stated that the fact the opportunities the employee pursued were outside his territory that he worked in did not help him.<sup>23</sup>

This interpretation is particularly beneficial when the fiduciary unilaterally takes responsibility for the principal's interests. Looking at what interests the fiduciary takes responsibility for allows the court to mould itself to any novel attempt at self-interest. For example, in duty-duty conflicts, whilst a fiduciary may not have a duty in respect of confidential information about one principal held by the other, any use of it may be a fiduciary breach as their access has allowed them to advance another's interests.<sup>24</sup> As well in *Aas v Benham*<sup>25</sup> the court was able to look at the wider responsibility of the partner and not just the scope of the partnership's business in ascertaining whether they had breached their duty.

It has been contended by Rimer LJ that liability for directors is not circumscribed in the same way since the constitution is open to any business, meaning they stand in a general fiduciary position with the company and therefore fiduciary liability of a director is unlimited.<sup>26</sup> However, this approaches liability from the perspective of the company, looking only at what its interests are. Rimer LJ reaches the conclusion without any

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<sup>22</sup> *Ranson v Customer Systems Plc* [2012] EWCA 841 at [63]

<sup>23</sup> *Ranson v Customer Systems Plc* [2012] EWCA 841 at [68]

<sup>24</sup> See, for example, *Bolkiah v KPMG* [1999] 2 A.C. 222; *Marks & Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741; [2005] P.N.L.R. 4; see also, J Edelman, 'When do fiduciary duties arise?' (2010) *Law Quarterly Review* 302

<sup>25</sup> *Aas v Benham* [1891] 2 Ch. 244, 254

<sup>26</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751; [2009] B.C.C. 822 at [69]; see also *Boardman v Phipps* [1967] 2 A.C. 46, 65

justification beyond the company's constitution being open to any business but this is sparse reasoning. Just because the constitution is open to any business does not justify a director having unlimited fiduciary capacity because it does not automatically follow that they take responsibility for everything the company is potentially interested in. A solicitor's client's interests are potentially open-ended but this is no justification for the solicitor to be loyal to all the potential interests of the client. A solicitor's duty is circumscribed by contract so there appears no good reason why a director's duty should not be also. There was, in fact, no need for Rimer LJ to resort to such reasoning. As he himself noted the fact it was the company's first venture in to property development did not avail the directors from liability<sup>27</sup> but not because the constitution is open to any business but because the directors had taken responsibility for it. As mentioned, the duty can mould itself to novel attempts at self-interest, including first attempts at new interests, as it looks at what the individual fiduciary takes responsibility for and this can differ from person to person.

*Bhullar* makes a similar error. Whilst the judge correctly observed the question is simply a matter of whether the action attracts the application of the rule he then turned to answer that question purely from the perception of the company and its interests. The judge used the term 'worthwhile' in trying to determine if the company was interested.<sup>28</sup> As *Ranson* highlights, in failing to ascertain the role of the fiduciary the result of the duty's application can be erroneous. It is questionable that the responsibility of the directors in *Bhullar* extended to the opportunity. The company was deadlocked with the directors agreeing not to pursue any more opportunities. Thus, the directors could no longer be said to have responsibility for those interests of the company. Such deviation from traditional fiduciary principles, focusing on whether the

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<sup>27</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751; [2009] B.C.C. 822 at [53]

<sup>28</sup> *Bhullar v Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711 at [41]

interest was worthwhile would permit the director to act opportunistically if they deem it to not be worthwhile but also shift the risk and burden on to principal.

Company law authorities support the position that the undertaking circumscribes liability. The judgment given by Sedley LJ in *Plus Group Ltd v Pyke* was approval of this. He observed that, ‘the fiduciary duty of a director to his company is uniform and universal. What vary infinitely are the elements of fact and degree which determine whether the duty has been breached’.<sup>29</sup> This is clear approval from the Court of Appeal that the duty will be circumscribed based on the undertaking of the director. Here a director was allowed to compete with another company he was director of on the basis his fiduciary obligation was nominal as his role was nothing more than a name on paper.<sup>30</sup> The position in *Pyke* received positive treatment in *Halcyon House Ltd v Baines* that the fiduciary duty of the director not to compete had ceased because of the director’s nominal role.<sup>31</sup> Thus the factual circumstances ‘eliminates the duality of interests or duty which the law seeks to guard against’.<sup>32</sup>

Another example is *Framlington Group plc v Anderson*.<sup>33</sup> The directors managed part of the company’s assets but were excluded from them when a rival company made an offer for it with a view to acquire the services of the directors to continually manage it. The directors, as part of the offer but not disclosed to the selling company, were offered a substantial sum. By being specifically excluded they no longer had responsibility for

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<sup>29</sup> *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] B.C.C. 332 at [80]

<sup>30</sup> *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] B.C.C. 332 at [90]; see also, *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] W. N. 165

<sup>31</sup> *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) at [226]-[227]

<sup>32</sup> *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) at [226]; citing *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] B.C.C. 332 at [90]

<sup>33</sup> *Framlington Group plc v Anderson* [1995] B.C.C. 611

the part of the company's interests and so there could be no conflict. Blackburne J held:

I am not willing to assume, without more, that each was under the particular duty alleged. But the point is academic because it is clear that, as regards the sale to Rathbone, the three were instructed by Mr Loach speaking on behalf of Framlington plc... not to take part in the sale negotiations with Mr Ingall.<sup>34</sup>

*Pyke, Halycon House* and *Framlington* all demonstrate that where the director does not have responsibility then there is no need for the supervision of equity since the director cannot determine the interests of the company. Conversely *FHR* and *Bhullar* show that where there is a conflict between personal interest and duty then this attracts the application of the rule.

Further evidence in a company context may be drawn from the Supreme Court in *Revenue and Customs Commissioners v Holland*<sup>35</sup> and *Bath v Standard Land Co Ltd*,<sup>36</sup> which demonstrate directors are only accountable for what they undertake responsibility for. In *Bath* it was established that a director was not responsible for his principal's own undertaking. 'Directors are in a fiduciary relation to the company, but not to a stranger with whom the company is dealing.'<sup>37</sup> The Supreme Court in *Holland* implicitly approves of *Bath*. In the appellate history the Court of Appeal rejected that an individual was a *de facto* director<sup>38</sup> of his principal's own undertaking as a corporate

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<sup>34</sup> *Framlington Group plc v Anderson* [1995] B.C.C. 611, 628-9

<sup>35</sup> *Revenue and Customs Commissioners v Holland* [2010] UKSC 51; [2010] 1 W.L.R 2793

<sup>36</sup> *Bath v Standard Land Co Ltd* [1911] 1 Ch. 618, CA

<sup>37</sup> *Bath v Standard Land Co Ltd* [1911] 1 Ch. 618, CA, 625; cf. *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [42]

<sup>38</sup> For *de facto* directors see, *Re Canadian Land Reclaiming and Colonizing Co* (1880) LR 14 Ch D 660; *Morris v Kanssen* [1946] A.C. 459; *Re New Par Consols Ltd* [1898] 1 Q.B. 573; *Re Lo-Line Electric Motors Ltd* [1988] Ch. 477

director simply because they were the individual who controlled the corporate director. The Supreme Court then refused to extend the concept to such individuals on the basis, *inter alia*, that the modern cases required an assumption of responsibility.<sup>39</sup> *Holland* is clear authority that a director's fiduciary responsibility, generally, does not extend to separate third party relationships and from that it can be inferred that fiduciary loyalty is not owed to principal interests that they are not responsible for.

These cases show that adopting Rimer's LJ approach would be disproportionate as directors may undertake a limited role within the company. Applying unlimited fiduciary liability to a director like the ones in *Pyke* or *Halycon House* would require them to be loyal to a company they effectively had no involvement in. Thus, there is a good policy reasons for maintaining that the undertaking circumscribes liability for directors. Equally, approaching liability from the sole perspective of the principal can lead to erroneous application of the duty, as it does not consider the role of the fiduciary, such as the case was in *Bhullar* and the High Court's decision in *Ranson*.

### III. WHAT DO DIRECTORS TAKE RESPONSIBILITY FOR?

If liability is based on the undertaking of the director the next consideration for determining the outer limits of their liability is to ascertain what, exactly, they take responsibility for. Determining what interests a fiduciary takes responsibility for may be more difficult in certain cases of fiduciary relationships such as directors. In instances of solicitors, partners or employees there may be a contractual document setting out what the respective responsibilities of the fiduciary were,<sup>40</sup> although that contractual

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<sup>39</sup> *Revenue and Customs Commissioners v Holland* [2010] UKSC 51; [2010] 1 W.L.R. 2793 at [96]

<sup>40</sup> See, *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [34]; *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117, 135; cf. *University of Nottingham v Fishel* [2000] I.C.R. 1462, 1493; cited by *Halycon House Ltd v Baines* [2014] EWHC 2216 (QB) at [219]

document may not be conclusive evidence and the judge may look at the circumstances of the relationship.<sup>41</sup> In these relationships there is likely to be a desired specific outcome with details on specific responsibility of the fiduciary. For directors the desired outcome is known<sup>42</sup> but the means of achieving it are not. In modern times a company has unrestricted objects.<sup>43</sup> It can diversify in the market and does not have to restrict itself to where it operates and what goods or services it provides. The Companies Act 2006 does not set out what is a director's role and function. Section 250 only provides that a director is 'anyone occupying the position of director, by whatever name called'. Neither the Articles or Association or Common Law definitions offer more help with the Model Articles conferring powers of general management on the directors.<sup>44</sup> Company law cases on *de facto* directors offer some guidance with phrases such as those who have "real influence over the corporate governance structure"<sup>45</sup> used to identify those responsible as directors.

*i. Scope of business test or competing companies?*

Two propositions as to what directors take responsibility for are the scope of business test and asking whether the interests compete. However both, in truth, are not seeking to ascertain what interests the director took responsibility for and are purely trying to determine liability based on the interests of the company without reasoning what is a company's scope of business, what can be said to be a competing company or why their liability only extends to these.

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<sup>41</sup> *Aas v Benham* [1891] 2 Ch. 244, 254; *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [62]

<sup>42</sup> See, Companies Act 2006, s. 172

<sup>43</sup> Companies Act 2006, s. 31; *cf.* Companies Act 2006, s. 7(2)

<sup>44</sup> The Companies (Model Articles) Regulations 2008 (SI 2008/3229), Part 2 art. 3

<sup>45</sup> *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 at [30]; citing *Re Gemma Ltd* [2008] EWHC 546 (Ch); [2008] B.C.C. 812 at [40]

a. *Scope of business test*

The scope of business test, derived from the decision in *Aas v Benham* involving partners, lacks any support in the context of directors from the judiciary but has been supported by academics. Kershaw and Worthington try to perceive liability based on ownership of the opportunity. Worthington argues that only a personal benefit received by a fiduciary will only be a breach, *inter alia*, if it can be said that the opportunity belonged to the principal on the basis that it came to the director in their position as director.<sup>46</sup> Kershaw proposes the approach in *Aas* is 'epistemologically consistent with the no-conflicts approach but articulates more clearly what remains implicit in the no-conflicts approach'.<sup>47</sup> By this he means opportunities can be viewed through a property-type lens that allows the company to exclude the director from pursuing the opportunity personally that falls within the company's scope of business.<sup>48</sup> He contends that the scope of business test is consistent with the strict orthodox approach and the test does not consider any fairness facts.<sup>49</sup> He argues this is because it can be easily ascertained what is within the company's scope of business.<sup>50</sup> Lim has contended that directors, like partners, have their duty circumscribed by contract since Lindley LJ in *Aas* looked at the circumstances as well as the partnership agreement,

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<sup>46</sup> S Worthington, 'Fiduciary Duties and Proprietary Remedies' (2013) *Cambridge Law Journal* 720, 734

<sup>47</sup> D Kershaw, 'Does it matter how the law thinks about corporate opportunities' (2005) 25(4) LS 533, 536

<sup>48</sup> D Kershaw, 'Does it matter how the law thinks about corporate opportunities' (2005) 25(4) LS 533, 549

<sup>49</sup> D Kershaw, 'Does it matter how the law thinks about corporate opportunities' (2005) 25(4) LS 533, 554-5

<sup>50</sup> D Kershaw, 'Does it matter how the law thinks about corporate opportunities' (2005) 25(4) LS 533, 554-5, 558

whereas Rimer LJ only referred to the latter when considering *Aas*.<sup>51</sup> Lim submits directors' and partners' duties are similar insofar that there is an expectation that they behave in a similar way and that the company's scope of business can be determined by looking at relevant corporate documents which will identify the circumstances the director agreed to act.<sup>52</sup>

Rimer LJ denied that the scope of business test applies to directors. His judgment concluded that:

It is not for the director to make his own decision that the company will not be interested and to proceed, without more, to appropriate the opportunity for himself. His duty is one of undivided loyalty and this is one manifestation of how that duty is required to be discharged.<sup>53</sup>

Such a statement has previous support in *Cook v Deeks*, where it was held that it is not for a director to unilaterally decide what a company is or is not interested in.<sup>54</sup> Rimer LJ continued that:

It may have been improbable that the company could or would want or be able to take up the opportunity itself. But the opportunity was there for the company to consider and, if so advised, to reject and it was no answer to the claimed breach of the 'no profit' rule that property investment was something that the company did not do... There was no bright line marking off what it did and did not do.<sup>55</sup>

Even though he later concluded that liability is unlimited rather than looking at the undertaking of the director, Rimer LJ highlights how the scope of business test contradicts normal fiduciary principles. Strict liability is imposed on the fiduciary to

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<sup>51</sup> E Lim, 'Directors' fiduciary duties – A new analytical framework' (2013) 129 LQR 242, 253; citing *Aas v Benham* [1891] 2 Ch. 244, 254

<sup>52</sup> E Lim, 'Directors' fiduciary duties – A new analytical framework' (2013) 129 LQR 242, 253

<sup>53</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751; [2009] B.C.C. 822 at [70]

<sup>54</sup> *Cook v Deeks* [1916] 1 A.C. 554 (PC), 563

<sup>55</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751; [2009] B.C.C. 822 at [71]

prevent against the risk of opportunistic diversion. The director is not free to unilaterally decide what does and does not fall within the company's scope of business. If a director is left to choose what the company is or is not interested in by circumscribing their duty by scope of business, this would go against the rigid orthodox of fiduciary duties and the prophylactic concerns and allow the director the possibility to pursue new opportunities personally. Equally, it may result in over-inclusive application if applied to scenarios like *Pyke*. Take, for example, a company in financial distress. If an opportunity is presented to a director that is outside the company's existing scope of business it cannot be left to the director to decide whether he or she could have the benefit if that opportunity could save the distressed company. If so, as Lord Loughborough LC argued, there would be great temptation to be negligent.<sup>56</sup> Another example may be as a market diversifies. Companies such as Tesco or Apple may be good practical examples of the issues a scope of business test would face. Would a Tesco director be free to personally pursue an opportunity in designer fashionwear since the company only produces quality fashionwear, for example.

Therefore, Kershaw's and Worthington's arguments based on ownership of the interest are purely looking at the issue from the company's perspective. They do not consider what the director takes responsibility for nor do they fully engage with the questions of what is the company's scope of business and why their responsibility would only extend to this. Worthington, for example, argues hypothetically that if directors of FTSE 100 companies were invited to an art sale there would be a breach if they use corporate assets to purchase art or 'their company is in the business of acquiring art'. She contends outside this there would only be a breach if they were invited to attend the sale on behalf of their company and not on their own account.<sup>57</sup> *FHR* has noted this

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<sup>56</sup> *Whichcote v Lawrence* (1798) 3 Ves 740, 752 (30 ER 1248)

<sup>57</sup> S Worthington, 'Fiduciary Duties and Proprietary Remedies' (2013) *Cambridge Law Journal* 720, 734

latter point is too formalistic and incorrect, detracting attention from the application of the rule. However, she does not explain why a director of a company that was not in the business of “acquiring art” would not be liable. In *Re Allied Business* just because the company had not previously engaged in property development, and was in the business of arranging commercial loans, did not mean they could not pursue such an opportunity. Worthington does not explain why the company would not be interested in this opportunity or why the director has no responsibility to pursue it. She seemingly takes it as a fact that the responsibility only extends to the company’s scope of business where she notes that proprietary remedies for a breach of loyalty will be available for those opportunities pursued personally that are in the company’s line of business.<sup>58</sup> *Cooks v Deeks* makes clear that the director cannot unilaterally decide that the company is not interested. The duty is proscriptive, thus a director must not act with a conflict. There is no recognised exception that the director must not act with a conflict except when they can determine the opportunity did not belong to the company or fall within its scope of business.

The uncertainty in determining what is within the company’s scope of business also offers strong policy reasoning to reject such a test. ‘Clarity and simplicity are highly desirable qualities in the law.’<sup>59</sup> Whilst Lim tries to argue that the scope of business can be ascertained by looking at the company’s documents,<sup>60</sup> this is a far too simplistic view. It presumes a judge is well placed to ascertain what is the company’s business and also that a company discloses all its potential interests in its corporate documents. On such reasoning it would be possible for a director of Apple to pursue opportunities

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<sup>58</sup> S Worthington, ‘Fiduciary Duties and Proprietary Remedies’ (2013) *Cambridge Law Journal* 720, 732

<sup>59</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [35]

<sup>60</sup> E Lim, ‘Directors’ fiduciary duties – A new analytical framework’ (2013) 129 *LQR* 242, 253

in wearable technology until the point Apple announced in its corporate documents it would be manufacturing smart watches.

Lim does try to offer an explanation as to why a director's responsibility is limited to the company's scope of business by drawing his analogy with partners. Lim's argument that the roles are similar is misguided. The company constitution is open to any business. A partnership agreement and even extending circumstances were not, at least in *Aas*. 'Since fiduciary obligations are not "one size fits all" it is, in my judgment, dangerous to reason by analogy.'<sup>61</sup> A partner agrees to take responsibility for advancing the interests stipulated in the partnership agreement and any other interests evidenced beyond that making a scope of business test appropriate for partners because it identifies the limits of the partner's responsibility. Likewise a scope of business test is inappropriate for employees since an employee does not agree to pursue every opportunity falling within the company's scope of business.<sup>62</sup> However, the constitution is open to any business and so the duty has the potential to reach beyond the company's current business therefore distinguishing it from a partnership agreement. It certainly is not for the director to decide what the company is or is not interested in and so it is wrong to draw an analogy with a partner's fiduciary duty.

#### *b. Competing Companies*

Whilst the courts have specifically rejected the scope of business test, common law decisions have shown support for a test based on whether the companies compete.<sup>63</sup>

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<sup>61</sup> *Ranson v Customer Systems plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [24]

<sup>62</sup> *University of Nottingham v Fishel* [2000] I.C.R. 1462, 1496

<sup>63</sup> See, for example, *Bell v Lever Brothers* [1932] A.C. 161; *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] B.C.C. 332 at [83]; *JD Wetherspoons plc v Van de Berg & Co Ltd* [2009] EWHC 639 at [599]; *Cambridge v Makin* [2011] EWHC 12 (QB) at [48]; *Rossetti Marketing Limited v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 at [22]-[23]

Again, though, such a test does not cognitively address what is meant by a competing company and focuses solely on the interests of the principal. For example, in *JD Wetherspoons plc v Van de Berg & Co Ltd*.<sup>64</sup> The case concerned an agreement between Wetherspoons (JDW) and Van de Berg (VDB) for the latter to identify and acquire plots of land for JDW for use as a public house. It was later discovered that VDB had offered land to a known competitor of JDW, Barracuda. Originally the land was not offered to Barracuda by VDB, but to Old Aberdeen, a company that the directors of VDB were personally interested in, as VDB believed the land would be too small for JDW. The court held:

In the case of Sidcup ... the property was too small for JDW and he therefore decided not to pass the details to JDW but instead Aberdeen made an offer to purchase the freehold. As I have said I see nothing improper if such an occasion occurs provided it does not result in a transaction which puts VDB in a conflict of interest. Once it is proposed by Old Aberdeen or Old Bacchus to let the premise to Barracuda that in my view is a breach of fiduciary duty owed by VDB. It is simply not correct to pass these opportunities on to a competitor of the nature of Barracuda.<sup>65</sup>

In JDW's case it was not to the point whether Barracuda was a competitor. There was a clear conflict even before the leasehold was passed to them since VDB unilaterally decided the land was not suitable for JDW and passed it to Old Aberdeen. The judgment demonstrated the role of VDB was to locate and introduce JDW suitable sites for acquisition.<sup>66</sup> As *Cook v Deeks* and this case itself make clear,<sup>67</sup> the word "suitable" makes no difference as it is not for the director to unilaterally decide which sites are or are not of interest.

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<sup>64</sup> *JD Wetherspoons plc v Van de Berg & Co Ltd* [2009] EWHC 639

<sup>65</sup> *JD Wetherspoons plc v Van de Berg & Co Ltd* [2009] EWHC 639 at [599]

<sup>66</sup> *JD Wetherspoons plc v Van de Berg & Co Ltd* [2009] EWHC 639 at [30]

<sup>67</sup> *JD Wetherspoons plc v Van de Berg & Co Ltd* [2009] EWHC 639 at [600]

Therefore competing companies and scope of business tests focus attention on the interests of the company and do not consider what exactly does a director take responsibility for. As such there is still a need for an explanation as to a director's specific undertaking.

*ii. Is responsibility implied?*

Another contention for the scope of business test to apply is that it is implied in to the undertaking that the director only takes responsibility for the interests falling within the company's scope of business.<sup>68</sup> Save for the reasons given by Rimer LJ to reject it, this seems practically and legally difficult. Practically, the point remains that ascertaining what a competing company is or what is within the scope of business is uncertain. Technically all companies compete and where the constitution is open there are no readily defined limits to what the company can do. Therefore, leaving it to the director to determine is not acceptable in light of the purpose and function of the duty. Legally, this assertion overlooks key decisions on implied terms. Notably, *Hilton* offers a strong rebuttal to a proposition that it would be implied in to the constitution that a director could act with self-interest outside the company's scope of business. The court stated clearly that in absence of express terms to mould the duty<sup>69</sup> the notion one breach of duty in acting for multiple principals could exonerate another 'seems contrary to common sense and justice'.<sup>70</sup> A fiduciary who puts themselves in such a position 'does not exonerate him from liability'.<sup>71</sup> From the judgment it seems unlikely that a director would be able to satisfy the tests for implied terms, such as the officious

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<sup>68</sup> E Lim, 'Directors' fiduciary duties – A new analytical framework' (2013) 129 LQR 242, 253-4

<sup>69</sup> *Hilton v Barker Booth and Eastwood* [2005] UKHL 8 at [30]

<sup>70</sup> *Hilton v Barker Booth and Eastwood* [2005] UKHL 8 at [38]

<sup>71</sup> *Hilton v Barker Booth and Eastwood* [2005] UKHL 8 at [44]

bystander or reference to business efficacy.<sup>72</sup> Lord Walker's view in the Court of Appeal, which the House of Lords agreed with, was that:

The proposed implied term cannot be justified by any of the various tests for the implication of terms into a contract. If, when instructing the respondent firm to act for him, the proposed implied term had been put to the appellant, it is inconceivable that he would have responded "Yes, of course", or with words to that effect. He would have asked what sort of information his solicitors were talking about and to whom the duty of confidentiality was owed. He would surely have asked for guidance as to whether his assent to the proposed term would be prejudicial to his interests. The implied term route as a way of relieving the respondent solicitors of contractual obligations that they would otherwise have owed the appellant seems to me to be an impossible one.<sup>73</sup>

It seems equally inconceivable that a company would respond "yes, of course" in allowing a director to pursue opportunities the director him or herself viewed as outside the company's scope of business. Surely, the company would want to know more and if the opportunity was of no interest the company could authorise the director to pursue it personally. The High Court and Court of Appeal have both since offered doubt over implied terms of such nature in most fiduciary relationships. The High Court opined that such an implied term is only available where it is inherent to the business.<sup>74</sup> 'Residential agents must be free to act for several competing principals otherwise they will be unable to perform their function.'<sup>75</sup> The same cannot be said of directors. They are fully capable of fulfilling their functions without acting for multiple principals. Thus the Court of Appeal refused to allow the defence of an implied term to an agent who

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<sup>72</sup> *Hilton v Barker Booth and Eastwood* [2005] UKHL 8 at [37]; see also, *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10

<sup>73</sup> *Hilton v Barker Booth and Eastwood* [2005] UKHL 8 at [6]

<sup>74</sup> *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) at [186]

<sup>75</sup> *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) at [187];

*Rossetti Marketing Limited v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 at [23]; citing *Kelly v Copper* [1993] A.C. 205, 214

promoted and sold furniture.<sup>76</sup> The High Court added that ‘any argument promoting the extension of the inapplicability of the normal fiduciary obligations would need to be very cogently justified with strong evidence’.<sup>77</sup> Such an implied term continues to be contrary to the purpose and function of the duty as it seeks to be permissive in allowing directors freedom to choose which interests to be loyal to regardless of undertaking.

*iii. Fact sensitive responsibility*

Upon incorporation of the company a separate legal entity is recognised.<sup>78</sup> Yet it has a defect in that personality. It requires a natural person for it to act because it cannot act for itself. The shareholders do not fulfil this role as they, generally, lack the incentives to do so. As a result, the courts and legislature have both recognised that a company will have directors,<sup>79</sup> even in the case even where one has not been validly appointed, because of this requirement to have someone act for it. The director is essentially a market-induced mechanism to run the company for its benefit. Conversely a solicitor’s client does not require the solicitor to act. The client may simply require the solicitor’s expertise on a particular matter. The solicitor asked to advise a client on the sale of a property does not undertake responsibility to advise on the client’s purchase of an unconnected property. Therefore directors’ responsibility is to undertake to advance the open-ended interests of the company generally because the company cannot act without them. Therefore the rejection of Rimer’s LJ reasoning may have little practical difference for some directors since the duty would still be very wide, most likely encompassing *all* opportunities, regardless of how they are received or the nature of them.

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<sup>76</sup> *Rossetti Marketing Limited v Diamond Sofa Company Limited* [2012] EWCA Civ 1021 at [27]

<sup>77</sup> *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) at [187]

<sup>78</sup> Companies Act 2006, s. 15(1)

<sup>79</sup> *Imperial Hydropathic Hotel Co Blackpool v Hampson* (1883) LR 23 Ch. D. 1; Companies Act 2006, s.

What is shown here is that a company requires its directors to act for its open-ended interests. A partner or solicitor, generally, on the other hand only undertakes responsibility for specific interests. A director's duty extends further because what they take responsibility for goes beyond the existing business of the company to every interest since it cannot act without its directors. A company can diversify and if a new opportunity is presented to a director that is outside the existing scope of business of the company, it cannot be left for the director to take the benefit without authorisation since, however improbable, the company may have been interested and the director generally will have undertaken responsibility to pursue it. This may be demonstrated in the following four figures:

Figure 1: Employee-Employer

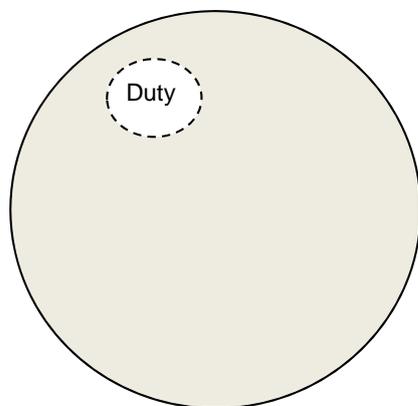


Figure 2: Solicitor-Client

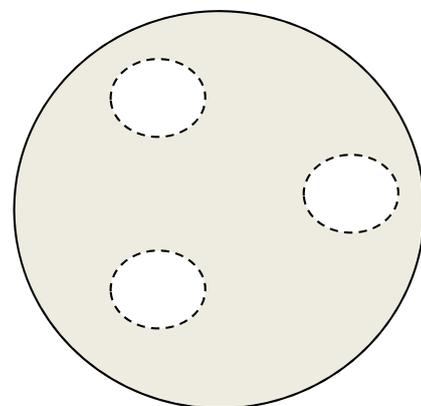
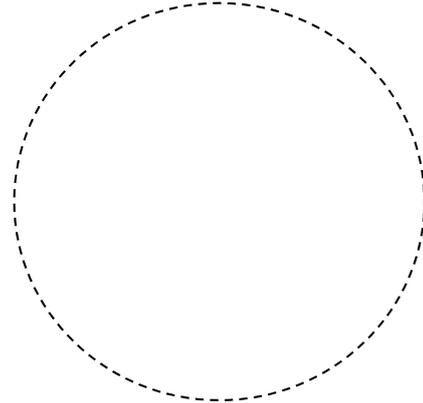
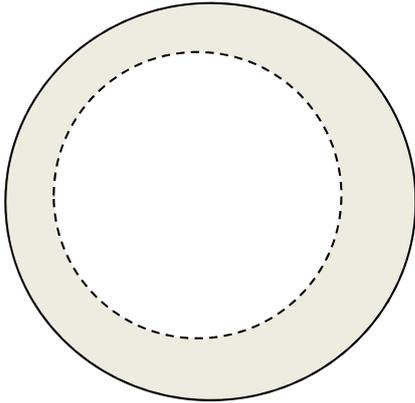


Figure 3: Partners-Partnership

Figure 4: Company-Director



As all four figures illustrate a principal's interests, in the darker area, can be anything regardless of whether the principal can actually have them. Yet, the duty of each individual fiduciary operates differently within those potential interests. The employee will have a specific job whilst a solicitor may handle several matters for a client. The partnership duty encompasses those interests set out in the partnership agreement but future agreements may enable the partnership to extend further. The director's duty totally encompasses the interests of the company because of the nature of their undertaking.

This wide test can be distinguished from that in *Bhullar*. *Bhullar* based its liability on the company's interests alone taking a wide perspective in rather opaque terms as to what is "worthwhile". The approach here focuses on the responsibility of the director and they may not always take on such wide responsibility. *Pyke* and *Framlington* demonstrate that directors may not always agree to advance the open-ended interests of the company but the notion that all directors agree to advance the open-ended interests of the company with few exceptions may not be the case. Instances concerning non-executive directors may mean it is more common because their role

is limited compared to that of the executive.<sup>80</sup> Executive and non-executive are business terms. Both can be categorised as general fiduciaries. The Companies Act 2006 does not differentiate between them and the duties owed.<sup>81</sup> However, their fiduciary duty is different because they do not undertake the same responsibility within the company. Therefore, failing to differentiate between these types of directors and applying such tests based on the company's interests alone may result in disproportionate application because they may not accurately identify the undertaking of the director in question.

#### IV. CONSEQUENCES

With such a wide interpretation of director's loyalty this may have some significant consequences in respect of many issues, particularly in relation to additional appointments, D&O insurance and entrepreneurial activity.

##### *a. Entrepreneurial activity*

One concern of a wider interpretation of the extent of the duty for directors is the impact it might have of entrepreneurial activity. However, empirical evidence fails to support that a wider duty would have any significant negative impact. Deakin and Hughes' study in 1999 revealed that any disclosure requirements should not be costly as internal procedures are already in place within most companies.<sup>82</sup> The research reported only 7% of directors gave up on an opportunity because of a conflict, and only

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<sup>80</sup> See, for example, N Sinclair, D Vogel, R Snowden, *Company Directors: Law and Liability Vol 1* (Sweet & Maxwell, 1997) para 3.56; cited by *Cambridge v Makin* [2011] EWHC 12 (QB) at [48]; UK Corporate Governance Code A.4

<sup>81</sup> See, Companies Act 2006, ss. 170, 250

<sup>82</sup> S Deakin and A Hughes, *Directors' Duties: Empirical Findings – Report to the Law Commissions* (ESRC Centre for Business Research, University of Cambridge 1999) (hereinafter ESRC Report), para 5.3.1

6% reported approval to pursue an opportunity.<sup>83</sup> As well, it has been reported that enforcement of duties has been particularly difficult with low levels of litigation as there were effectively zero claims filed against directors of public listed firms between 2004-2006<sup>84</sup> and only 2% of directors reporting their firm to have commenced litigation against one of its directors for breach of duty.<sup>85</sup> However, it is considered that such responses depend on the respondents understanding of what a conflict is. This figure may be susceptible to increase if the respondents considered a conflict to be a narrower interpretation than that proposed here. Kershaw has shown more support recently of this noting that disclosure costs are in fact minimal under the current system and a strict rule does not detriment entrepreneurial activity.<sup>86</sup> Therefore, companies will generally have first refusal over their directors, provided it falls within the director's undertaking, but anything else would go against the purpose and function of the duty. As well, the encompassing nature of the duty for directors would not cause any significant practical problems such as cost of disclosure or deterring entrepreneurial activity.

*b. D&O insurance*

Despite there being little risk to directors of litigation from the company itself,<sup>87</sup> with this wide interpretation, given the inconsistencies in judicial and academic interpretations

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<sup>83</sup> S Deakin and A Hughes, *ESRC Report*, para 5.2

<sup>84</sup> J Armour *et al*, 'Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and United States' (2009) 6(4) *Journal of Empirical Legal Studies* 687, 699-700

<sup>85</sup> S Deakin and A Hughes, *ESRC Report* (ESRC Centre for Business Research, University of Cambridge 1999) para 5.2

<sup>86</sup> D Kershaw, 'Lost in translation: Corporate opportunities in comparative perspective' (2005) 25(4) *OJLS* 603, 615-620

<sup>87</sup> See also C Baxter, 'Demystifying D&O Insurance' (1995) 15(4) *Oxford Journal of Legal Studies* 537, 538-9

of the scope of a director's fiduciary duty, there is the consequence that directors' insurance,<sup>88</sup> if they have any, may not adequately cover their potential liability, especially since such claims, when they occur, are large.<sup>89</sup> It may be that directors will find themselves facing claims when the personal interest pursued is far removed from the business of his current principal, but given the constantly changing nature of a company's business, such as in the examples of Apple or Tesco, it should be of concern to directors as to whether any policy suitably covers such liability. Would a director of Apple be suitably covered for an interest in a fashion retail company if a claim were to be made against that director, even before they produced watches?

Normally insurance cover will be available for directors. Whilst Companies Act 2006, Ch 7 makes clear that any provision purporting to exempt a director from liability for a breach of duty is void,<sup>90</sup> Section 233 makes it permissible to maintain insurance for the director against any such liability mentioned in section 232.<sup>91</sup> However, after the Equitable Life litigation,<sup>92</sup> Roach noted that the cost of insurance was increasing yet the coverage was less comprehensive and awards made against directors may

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<sup>88</sup> For a good overview of directors' and officers' insurance see, C Parsons, 'Directors' and Officers' Liability Insurance: a target or a shield (2000) *Company Lawyer* 77; C Baxter, 'Demystifying D&O Insurance' (1995) 15(4) *Oxford Journal of Legal Studies* 537; and V Finch, 'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance' (1994) 15(6) *Modern Law Review* 880

<sup>89</sup> See, C Parsons, 'Directors' and Officers' Liability Insurance: a target or a shield (2000) *Company Lawyer* 77, 84

<sup>90</sup> Companies Act 2006, s.232

<sup>91</sup> Companies Act 2006, s. 233

<sup>92</sup> *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408 (HL)

outstrip cover.<sup>93</sup> If cover is not available or suitable though the company itself can advance legal fees to the director in respect of a claim brought by it against the director, that advance is treated as a loan if the director loses the litigation.<sup>94</sup> Parsons has noted the complexities of D&O insurance citing the multiple sources of law on directors' duties and its own complexity as a reason behind this.<sup>95</sup> Given the wide, uncertain and strict nature of the duty these provisions may leave directors vulnerable if they are not adequately covered by their insurance. Certainly more research on such breaches of duty would be beneficial.

### *c. Multiple directorships*

A final concern is that a duty that encompasses all opportunities would essentially make it difficult to serve on more than one corporate board, which is a common feature for non-executive directors. It has been argued that such a wide interpretation effectively gives the company first refusal on opportunities, whilst Lim argues that, as a matter of policy, the scope of business test should apply to enable directors to sit on other corporate boards.<sup>96</sup>

Such positions are difficult to reconcile with though. In respect of first refusal, directors should be aware that, generally, their role is to undertake responsibility for the open-ended interests of the company. It cannot be left to the director to then decide what

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<sup>93</sup> L Roach, 'An Equitable solution for non-executive directors? (2006) *International Company and Commercial Law Review* 117, 119; see also, A Jones 'Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law' 44(3) *American Business Law Journal* 475, 483

<sup>94</sup> Companies Act 2006, s. 205

<sup>95</sup> C Parsons, 'Directors' and Officers' Liability Insurance: a target or a shield (2000) *Company Lawyer* 77, 83

<sup>96</sup> E Lim, 'Directors' fiduciary duties – A new analytical framework' (2013) 129 *LQR* 242, 255; citing *Boardman v Phipps* [1967] 2 A.C. 46 *per* Viscount Dilhorne

opportunities the company is interested in because, as Rimer LJ stated, there is no “bright line” marking off what the company is capable of doing however improbable it is that the company might pursue the opportunity.<sup>97</sup> If directors were free to decide they may not fulfil their undertaking to pursue the open-ended interests of the company because of the prospect of personal gain, thus failing to adhere to the purpose and function of the duty.

With multiple appointments the point is taken that multiple appointments can be of benefit to a company and should not be deterred if taken for the benefit of the company. Lord Upjohn believed it would be a “great pity” if such a conclusion was reached that multiple appointments could not be taken,<sup>98</sup> legislators, such as Baroness Noakes have described them as a “reality of modern life”,<sup>99</sup> and economists, notably Fama and Jensen, who highlighted those with existing appointments had proven worth in the managerial labour market.<sup>100</sup> Yet it is predominately non-executives who take on additional roles and it has been noted that their role is not as burdensome as an executive. Therefore, a wide interpretation of the duty will not affect non-executives in the same way it would an executive director, as it is unlikely that they take responsibility for all potential interests. Yet, the test focusing on what the director specifically takes responsibility for by looking the facts enables the court to impose liability where a non-executive does take responsibility. Therefore it is an unfounded argument that directors would be incapable of sitting on other boards if a wide interpretation is adopted.

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<sup>97</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751; [2009] B.C.C. 822 at [70]-[71]

<sup>98</sup> *Boardman v Phipps* [1967] 2 A.C. 46, 128

<sup>99</sup> Hansard HL Vol 678, Official Report 6/2/06 Col GC288

<sup>100</sup> E Fama and M Jensen, ‘Separation of Ownership and Control’ (1983) 26(2) *Journal of Law and Economics* 301, 315

It is also a useful reminder that whilst a wide duty may impact on these three areas, if the director honestly believes the company would not be interested then they should seek authorisation from the principal and immunise themselves from liability. Therefore entrepreneurial activity and additional appointments would not be affected and insurance would not be an issue.

## V. CONCLUSIONS

The duty of a fiduciary is strict. Once there is a conflict between duty and interest the fiduciary may only avail themselves from liability through authorisation. Yet this applies only when action attracts the application of the rule. This means if there is no duty i.e. no undertaking for a particular interest, then the duty does not apply. This applies equally to directors as it does any other type of fiduciary. A director is free to act against his or her principal's interests provided that the action falls outside the scope of their responsibility to the company so it does not attract the application of the rule. Thus, one must approach liability from the perspective of the fiduciary and ask what responsibility have they undertaken. Yet, company law authorities, including *Bhullar* and *Re Allied Business*, have sought to determine liability by looking at liability from the perspective of the principal and trying to ascertain what are its interests. *Re Allied Business* notably was incorrect in its reasoning as it did not offer a clear explanation for diverging from traditional fiduciary principals other than saying a company's constitution was open to all business. As the High Court stated, if fiduciary principles are to be changed then there needs to be a clear and cogently reasoned argument for doing so.<sup>101</sup> Whilst *Bhullar* did not diverge from the traditional principles and confirmed that it is a matter of whether the action attracts the application of the rule, the application of those principles differed much as they did in *Ross River*. As *Ranson* highlighted the judge must be guided by the job undertaken by fiduciary to determine

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<sup>101</sup> *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) at [187]

their liability and thus looking at what the fiduciary promised to do. *Bhullar* did not engage with this question and looked at liability from the perspective of the fiduciary, asking whether the opportunity was “worthwhile” for the company. Arguably this reaches an erroneous conclusion but as a matter of law and not as a matter of policy that others have argued.<sup>102</sup>

Existing authorities and principles should guide judges when determining fiduciary liability of a director. No cognitively reasoned argument has been presented for treating directors differently and determining liability on the basis of the company’s interests alone. Existing company law authorities do exist on this matter and it is surprising that the decision in *Pyke* is not more widely cited.

Even though there is acceptance amongst academics and the courts, in places, that directors do have their duty circumscribed by their undertaking there is further dispute as to what that undertaking is and often the focus turns once again on the perspective of the company as to what its interests are. These attempts such as scope of business, competing companies and implied terms do not explain why a director’s responsibility is only limited to these issues, what these terms mean and how they are justified in differing from the orthodox fiduciary analysis. Where such explanations are offered, such as *Lim* who contends directors are like partners and that their duty should be circumscribed by the scope of business he does not appreciate the differences in the undertaking of a director compared to a partner as his analysis is purely focused on the interests of the principal. If a director’s responsibility is to only extend to those

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<sup>102</sup> P Davies and S Worthington, *Gower and Davies: Principles of Modern Company law* (9<sup>th</sup> edn Thomson/Sweet & Maxwell, 2012) 590-601; E Lim, ‘Directors’ fiduciary duties – A new analytical framework’ (2013) 129 LQR 242; H Hirt, ‘The law on corporate opportunities in the Court of Appeal: Re *Bhullar Bros Ltd*’ (2005) *Journal of Business Law* 669, 671

opportunities within the company's scope of business there has yet to be a clearly defined argument that supports this approach. Three key arguments make such a test unlikely to receive adoption. First, given the uncertainty in such an approach, it is unlikely to be adopted. Second, such a test would permit the director to act opportunistically within the confines of their undertaking and third, shift the burden and risk on to the principal. Both the Supreme Court and Court of Appeal, in *FHR* and *Ross River* respectively, have ruled such attempts as outside normal fiduciary principals and are unlikely to be adopted. It is evidenced that the responsibility of a director encompasses all opportunities and if they wish to pursue opportunities personally, they must receive authorisation from their principal. Failing that, the director would need to evidence that they have not been disloyal by showing the opportunity fell outside their responsibility to the company's interests or as the Companies Act 2006 puts it 'the situation cannot reasonably be regarded as likely to give rise to a conflict of interest'.<sup>103</sup>

Even with such a wide duty the negative consequences some propose would occur are unfounded. Directors can still sit on multiple boards and it is unlikely they would be exposed to increased litigation that is uninsured. As the empirical evidence suggests, neither would it stifle entrepreneurial activity by giving the company first refusal on all opportunities. The courts should be quick to recognise the wide extent of a director's duty so directors themselves can adequately assess their liability and the judiciary can avoid and further erroneous application of the duty.

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<sup>103</sup> Companies Act 2006, s. 175(4)(a)