> fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.

(p. 363) Application of the rules

Taking corporate opportunities for personal benefit—constructive trust remedies.

[7.22] Cook v Deeks [1916] 1 AC 554 (Privy Council)

Three of the four directors of the Toronto Construction Company (Deeks, Deeks and Hinds—the three defendants) resolved to break their business relations with the fourth director, Cook (the plaintiff). The company had built up considerable goodwill with the Canadian Pacific Railway Company as a result of the satisfactory performance of a series of construction contracts, each of which had been negotiated with the railway company's representative by one of the defendants. The last of these contracts, the Shore Line contract, was negotiated in the same way, but when the arrangements were completed, the defendants took the contract in their own names and not that of the company. Cook claimed that the company was entitled to the benefit of the contract, and that a shareholders' resolution (which the defendants had carried by their own votes) purporting to confirm (ie ratify) that the company claimed no interest in the contract was ineffective. The Privy Council upheld both contentions, reversing the decisions of the courts in Ontario in favour of the defendants.

> The opinion of their Lordships was delivered by LORD BUCKMASTER, who stated the facts, and continued: Two questions of law arise out of this long history of fact. The first is whether, apart altogether from the subsequent resolutions, the company would have been at liberty to claim from the three defendants the benefit of the contract which they had obtained from the Canadian Pacific Railway Company; and the second, which only arises if the first be answered in the affirmative, whether in such event the majority of the shareholders of the company constituted by the three defendants could ratify and approve of what was done and thereby release all claim against the directors.
>
> It is the latter question to which the Appellate Division of the Supreme Court of Ontario have given most consideration, but the former needs to be carefully examined in order to ascertain the circumstances upon which the latter question depends.
>
> It cannot be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs Deeks and Hinds and the company that they controlled. Now it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the company in order to stand well with the Canadian Pacific Railway when the next contract should be offered, and although Mr McLean [Manager of the Toronto Construction Co] was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the trial judge upon this point is well founded when he said that 'it is hard to resist the inference that Mr Hinds was careful to avoid anything which would waken Mr Cook from his fancied security', and again, that 'the sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint'. In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the conduct of the affairs of the company they

deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect …

(p. 364) It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

Their Lordships think that, in the circumstances, the defendants TR Hinds and GS and GM Deeks were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached.

In their Lordships' opinion the Supreme Court has insufficiently recognised the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit,[[48]] to the case of the director dealing with property which, though his own at law, in equity belonged to his company. The cases of *North-West Transportation Co v Beatty* **[4.33]** and*Burland v Earle*,[49] both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the court to make a new contract between the parties.[[50]] It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognised by Lord Davey in *Burland v Earle* and is the foundation of the judgment in *North-West Transportation Co v Beatty* **[4.33]**, and is clearly explained in the case of *Jacobus Marler Estates Ltd v Marler*[51] …

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West Transportation Co v Beatty* **[4.33]** and *Burland v Earle* have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for **(p. 365)** themselves. Such use of voting power has never been sanctioned by the court, and, indeed, was expressly disapproved in the case of *Menier v Hooper's Telegraph Works*.[52]

If their Lordships took the view that, in the circumstances of this case, the directors had exercised a discretion or decided on a matter of policy (the view which appears to have been entertained by the Supreme Court) different results would ensue, but this is not a conclusion which their Lordships are able to accept. It follows that the defendants must account to the Toronto Company for the profits which they have made out of the transaction …

Also see *Item Software (UK) Ltd v Fassihi* **[7.16]**.

➢ Note

The ratification rules set out in cases such as *North-West Transportation Co Ltd v Beatty* **[4.33]** (which allowed the interested director to vote in shareholder meetings to approve or ratify the offending transaction, even if the vote was only carried by the director's shares) have been abrogated by statute: CA 2006 s 239. There is now no difference between the procedures that must be followed to ratify the various different directors' duties. Note that s 239(7) does not affect any other rules of law imposing additional requirements or rendering acts incapable of being ratified by the company.

➢ Questions

1. Would the position have been any different if the defendants had told Cook beforehand of their plans? Or if the matter had been put to a members' meeting in advance, and the defendants had used their majority votes to carry a resolution giving them a 'clearance' to proceed independently of the company? Now see s 175(4)–(6), and 'Duty to avoid conflicts of interest: CA 2006 s 175', pp 361ff.

2. Can you suggest circumstances in which the directors might be said to have 'exercised a discretion or decided on a matter of policy', with the result that the defendants could have had the benefit of the Shore Line contract for themselves?

3. Did the Privy Council regard this breach as 'unratifiable'? Should it be, or has CA 2006 s 239 adopted appropriate safeguards? Does CA 2006 s 239 itself incorporate the notion of 'unratifiable' breaches?

Taking corporate opportunities for personal benefit when they cannot be exploited by the company—personal restitutionary remedies.

[7.23] Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378, [1967] 2 AC 134n (House of Lords)

The appellant company ('Regal') owned a cinema in Hastings, and the directors decided to acquire two others in the same area and sell all three to an outsider as a going concern. For this purpose, they formed a subsidiary company, Hastings Amalgamated Cinemas Ltd ('Amalgamated') to lease the other two cinemas. The landlord of the cinemas insisted on either a personal guarantee of the rent from the directors or that the paid-up capital of Amalgamated be increased to £5,000. Regal was unable to pay for more than 2,000 £1 shares in Amalgamated from its own resources, and so the directors, not wishing to give the requested guarantees, agreed to take up the other 3,000 shares between themselves. **(p. 366)** In the event, four directors took 500 shares each personally, the chairman Gulliver found outside subscribers for 500, and the remaining 500 were offered by the board to Garton, the company's solicitor. Some three weeks later, the proposal for a sale of the actual cinemas was abandoned, and was replaced by an agreement to sell to the purchasers all the shares in the two companies. As a result, the directors and others who had subscribed for the 3,000 shares in Amalgamated made a profit of £2 16 *s* 1 *d* [£2.80] per share. Regal, now under the control of the purchasers, then issued a writ claiming reimbursement of this profit from the four directors and Gulliver and Garton. The action was based alternatively in negligence, misfeasance and money had and received. Before the House of Lords, only the last of these claims was argued, and the four directors (but not Gulliver or Garton) were held severally liable to account.

> LORD RUSSELL OF KILLOWEN: … We have to consider the question of the respondents' liability on the footing that, in taking up these shares in Amalgamated, they acted with bona fides, intending to act in the

interest of Regal.

Nevertheless, they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit …

… 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 he took a risk or acted as he did for the benefit of 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. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

The leading case of *Keech v Sandford*[53] is an illustration of the strictness of this rule of equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused. It was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own benefit. Though his duty to obtain it for the infant was incapable of performance, nevertheless he was ordered to assign the lease to the infant, upon the bare ground that, if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of cestuis que trust. Lord King LC said, at p 62: 'This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed

…' …

Let me now consider whether the essential matters, which the plaintiff must prove, have been established in the present case. As to the profit being in fact made there can be no doubt. The shares were acquired at par and were sold three weeks later at a profit of £2 16 *s* 1 *d* [£2.80] per share. Did such of the first five respondents as acquired these very profitable shares acquire them by reason and in course of their office of directors of Regal? In my opinion, when the facts are examined and appreciated, the answer can only be that they did …

It now remains to consider whether in acting as directors of Regal they stood in a fiduciary relationship to that company. Directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. In some respects they resemble trustees, in others they do not. In some respects they resemble agents, in others they do not. In some respects they resemble managing partners, in others they do not. [His Lordship considered a number of the authorities and continued:]

(p. 367) In the result, I am of the opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v Sandford* and … similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the cestui que trust in *Keech v Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain. The result is that, in my opinion, each of the respondents Bobby, Griffiths, Bassett and Bentley is liable to account for the profit which he made on the sale of his 500 shares in Amalgamated.

The case of the respondent Gulliver, however, requires some further consideration, for he has raised a separate and distinct answer to the claim. He says: 'I never promised to subscribe for shares in Amalgamated. I never did so subscribe. I only promised to find others who would be willing to subscribe. I only found others who did subscribe. The shares were theirs. They were never mine. They received the profit. I received none of it.' If these are the true facts, his answer seems complete. The evidence in my opinion establishes his contention … As regards Gulliver, this appeal should, in my opinion be dismissed …

There remains to consider the case of Garton. He stands on a different footing from the other respondents in that he was not a director of Regal. He was Regal's legal adviser; but, in my opinion, he has a short but effective answer to the plaintiffs' claim. He was requested by the Regal directors to apply for 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but at the request of his client.

My Lords, in my opinion the right way in which to deal with this appeal is (i) to dismiss the appeal as against the respondents Gulliver and Garton with costs, (ii) to allow it with costs as against the other four respondents, and (iii) to enter judgment as against each of these four respondents for a sum of £1,402 1 *s* 8 *d* [£1,402.08] with interest at 4% …

LORD PORTER: My Lords, I am conscious of certain possibilities which are involved in the conclusion which all your Lordships have reached. The action is brought by the Regal company. Technically, of course, the fact that an unlooked for advantage may be gained by the shareholders of that company is immaterial to the question at issue. The company and its shareholders are separate entities. One cannot help remembering, however, that in fact the shares have been purchased by a financial group who were willing to acquire those of Regal and Amalgamated at a certain price. As a result of your Lordships' decision that group will, I think, receive in one hand part of the sum which has been paid by the other. For the shares in Amalgamated they paid £3 16 *s* 1 *d* [£3.80] per share, yet part of that sum may be returned to the group, though not necessarily to the individual shareholders, by reason of the enhancement in value of the shares in Regal—an enhancement brought about as a result of the receipt by the company of the profit made by some of its former directors on the sale of Amalgamated shares. This, it seems, may be an unexpected windfall, but whether it be so or not, the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact as it is in law an immaterial consideration.

VISCOUNT SANKEY and LORDS MACMILLAN and WRIGHT delivered concurring opinions.

(p. 368) ➢ Notes

1. In an editorial note to the All ER report of this case, it is stated: 'As their Lordships point out, no question as to the right to retain this profit could have arisen if the respondents had taken the precaution of obtaining the approval of the appellant company in general meeting, and this would have been a mere matter of form, since they doubtless controlled the voting.' In contrast, in *Prudential Assurance Co Ltd v Newman Industries (No 2)* **[13.21]**, at 308, Vinelott J at first instance said: 'I can see nothing in the report which indicates that the defendant directors controlled the voting and, as I understand this passage in the speech of Lord Russell of Killowen, he contemplated that the defendant directors might have protected themselves by a resolution in general meeting precisely because they had no control of the majority of the votes.' However, the researches of Richard Nolan show that the directors did control a majority of the votes and, as this fact is stated in the judgments of the courts below, Lord Russell was no doubt aware of the position. Now see s 175(4)–(6).

2. Although there is superficially a close resemblance between this case and *Cook v Deeks* **[7.22]**, it is most difficult to attempt to reconcile them on points of detail, and especially to deal satisfactorily with this question of ratification (which is now academic, given the statutory provisions in CA 2006 s 180).

On the question of ratification, the nature of the claim brought in *Regal* may be of relevance, and these remedial distinctions remain important (CA 2006 s 178). Note that the defendants were held *severally* liable in *money had and received* proceedings, that is, accountable in each case as *debtor* for what he had received. On this basis, the observation that that transaction could have been authorised or ratified by the company in general meeting was consistent with some earlier authorities, such as *Lister & Co v Stubbs* (1890) 45 Ch D 1 (although now note the debate over the legal principles and merits in this and similar cases: see *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, PC noted in **[7.38]**, p 431, and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* **[7.38]**). By contrast, had the claim in negligence succeeded, *all five* of the directors would have been *jointly* and *severally* liable for the loss suffered by the company, and the company, might, it seems, still have ratified (see the *Multinational Gas* case **[7.39]**; although *Daniels v Daniels*, may suggest the contrary: see 'Consent, approval or authorisation by members: CA 2006 s 180', p 436). But had the court been prepared to hold, analogously with *Cook v Deeks*, that the business opportunity which the defendants exploited 'belonged' in equity to the company, all *six* defendants could have been held *jointly* and *severally* liable in equity for the value of the 'property' improperly paid away, and the members could not have ratified. And, as in *Cook v Deeks*, those directors still holding identifiable profits of the breach would hold those profits on constructive trust for the company.

The task of distinguishing the cases is not made easier by the absence of any reference to *Cook v Deeks*, or to the constructive trust remedy (or to any consequential personal liability in equity), in the *Regal (Hastings)* judgments. It is plain that Lord Russell would have taken a different view of the matter had he thought that the profit had been 'corruptly' made, or that there had been a 'plot or arrangement to divert from the company to themselves a valuable investment'; but even on this view he was perhaps contemplating a remedy by way of 'damages for misconduct', which is not the proprietary disgorgement of profits which was awarded in *Cook v Deeks*.

To say that in *Cook v Deeks* the directors were under a 'duty' to give their company the benefit of the opportunity, but that there was no corresponding duty in *Regal*, is not merely to beg the question, but also to ignore the result reached in the latter case. There was plainly a 'duty' in both cases, and if the litigation itself perhaps relied on allegations of different 'duties' with different sanctions, and (prior to CA 2006) different ratification mechanisms, then what different duties and why is unclear. It also seems to beg the question to say that the opportunity in *Cook v Deeks* 'belonged in equity' to the company: this too readily assumes that our jurisprudence has accepted the concept of an 'opportunity' as property; **(p. 369)** and it also does not explain why the opportunity in *Regal* was not so regarded. This remains a fraught area in modern cases: see 'Which corporate opportunities are caught by the no conflict rule?', pp 372ff, and especially *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* **[7.38]**.

Unless, therefore, it is thought that the finding of bona fides was crucial, it is difficult to say why the impropriety in *Regal* was assumed to be capable of ratification (whether or not by the directors' own votes as members), while that in *Cook v Deeks* was held not to be.

➢ Questions

1. Would it have mattered whether the directors of *Regal* had voted as shareholders on a resolution to ratify their acts?

2. Now see CA 2006 s 175(4)–(6). Applying these statutory rules, the matter could not have been authorised by the board of directors prior to the transaction. How might the directors have protected themselves, prior to the deal, in these circumstances?

[7.24] Towers v Premier Waste Management Ltd [2012] BCC 72 (Court of Appeal)

Mr Towers, a director of a waste disposal and treatment company, accepted a personal loan of plant and equipment without charge from an existing client, Mr Ford, and failed to disclose such dealing to the board. He was found to have breached the duties of loyalty he owed to the company. Although this was a pre-CA 2006 case, reference was also made to the directors' duties as codified in CA 2006 as 'it is unrealistic to ignore the terms in which the general statutory duties have been framed for post-2006 Act cases.'

MUMMERY LJ for the court (MUMMERY, WILSON and ETHERTON LJJ):

Scope of duty

47 The emphasis in Mr Quiney's [counsel for Mr Towers] submissions was that Mr Towers did not make a significant profit from plant and equipment in poor condition that would have been of no value to the Company and that there was no evidence that Mr Towers would have gone out into the market to hire equipment at commercial rates. It was not established that he had obtained a valuable benefit.

48 In my judgment, the submissions miss the point. The applicable duties are of a director's loyalty to the Company and the duty to observe the no conflict principle, which embrace a duty not to make a secret profit for himself. The no conflict duty extends to preventing Mr Towers from disloyally depriving the Company of the ability to consider whether or not it objected to the diversion of an opportunity offered by one of its customers away from itself to the director personally …

Breach of duty

51 The 'commercially sensible' defences set up by Mr Quiney to the breach of the undivided loyalty duty also miss the point: the strict loyalty and no conflict duties were breached by Mr Towers. The absence of evidence that the Company would have taken the opportunity, or has in fact suffered any loss, or that Mr Towers or Mr Ford had any corrupt motive or that, if there had been no free loan, Mr Towers would have hired that sort of equipment in the market; the fact that the value of the benefit to Mr Towers was small and that Mr Ford received no benefit from it; the fact that Mr Rafter [a subordinate of Mr Towers in the company] and not Mr Towers dealt directly with Mr Ford and was the prime mover: none of those matters supported the contention that there was no breach of the duty of loyalty or the no conflict duty.

 ➢ Question

Given that the director here did not pay for the benefit received, would the case now be analysed as a conflicts case (CA 2006 s 175) or as a third party benefits case (CA 2006 s 176)? What difference (if any) does the classification make to proof of breach, ratification and remedies?

Statutory changes to the equitable rules

The general rule set out in s 175(1) is a reformulation of the statement of the equitable rule in *Aberdeen Railway Co v Blaikie Bros* **[7.34]**. It comprehends actual and potential conflicts. The codification does, however, effect a number of important changes to the law:

(i) The exclusion of conflicts of interest arising in relation to transactions or arrangements *with* the company (s 175(3)), noted earlier, is perhaps statutory acknowledgement that companies' articles routinely permit their directors to have interests in company transactions, provided they are declared. Instead, these transactions will merely have to be declared to the other directors (see s 176 and CA 2006 Pt 10, Ch 3), unless the transaction is a substantial transaction requiring the approval of members (as defined in CA 2006 Pt 10, Ch 4).

(ii) The statutory duty to avoid conflicts of interest replaces the equitable *no conflict* and *no profit* rules by a single rule[54] (although also see s 176 later). To the extent (if any) that the statutory no conflict rule and third party benefits rule fails to cover the no profit rule, the new statutory regime deviates from existing equitable rules.
(iii) The statutory duty substantially modifies the equitable rules with regard to *authorisation of conflicts of interest* (see s 175(4)(b), (5) and (6)).
(iv) The statutory duty covers both conflicts of interest and duty and conflicts of duties (see s 175(7)). The precise implications and remedial consequences of this bundling may need further working out.
(v) Section 170(2) makes it clear that a person who ceases to be a director will continue to be subject to the duty to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director. This will come into play, for example, in situations where a director exploits an opportunity *after* he resigns from the directorship.

Conflicts of interest and 'corporate opportunities'

Conflicts of interest are easy (or relatively easy) to assess when the conflict involves a defaulting director making use of the company's tangible or intangible property. The assessment is much more difficult where the conflict (or alleged conflict) involves directors taking opportunities for themselves that might have been pursued by their companies. Many of the cases in this area involve directors pursuing lucrative commercial interests on their own behalf, or on behalf of other companies with which they are associated. *Cook v Deeks* **[7.22]** is a classic and dramatic illustration, where three directors plotted to acquire a contract for their own company rather than for the company they were supposed to be representing.

(p. 371) But it cannot be the case that directors have no 'private self', and that no commercial venture is open to them in their private capacity once they assume the role of director. This, taken to extremes, would prevent personal ownership or investment, and offend many of the aspects of autonomy we take for granted. For the law, therefore, the difficult task is to draw the line between opportunities that can be pursued privately and without censure, and those that are regarded as 'corporate opportunities' where pursuit should, and will, attract legal sanctions and liability to the company which the director is supposed to be serving. Many of the following extracts illustrate the difficulties in drawing this line satisfactorily: see *Cook v Deeks* **[7.22]**, pp 363ff.

The general rule set out in s 175(1) bars unauthorised conflicts of the director's personal interest with the *interests* of the company, not with *duties* to the company (as in the formulation in *Bray v Ford* [1896] AC 44 at 51–52, at 'Orthodox statements of the no conflict rule', p 362). The wider formulation may make it easier, especially in relation to corporate opportunities, to argue that pursuit of the opportunity involves a conflict. Earlier cases on the equitable rule vary in their approach, some taking a narrow view of which opportunities are caught (*Balston Ltd v Headline Filters Ltd* [1990] FSR 385 at 412; *Industrial Development Consultants Ltd v Cooley* noted in *Bhullar v Bhullar* **[7.25]**, p 376), and some a wider view (*Bhullar v Bhullar* **[7.25]**; *Allied Business and Financial Consultants Ltd v Shanahan* (also known as *O'Donnell v Shanahan*) **[7.27]**).

Section 175(2) repeats the equitable rule that it is immaterial whether the company could take advantage of the property, information or opportunity exploited by the defaulting director. This must also indicate that this element is immaterial in deciding whether a situation can reasonably be regarded as likely to give rise to a conflict of interest (s 175(4)(a)). This accords with the equitable rule (see *Keech v Sandford* (1726) Sel Cas Ch 61; *Regal (Hastings) Ltd v Gulliver* **[7.23]**).

Section 175(4)(a) indicates the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest. On this basis, it may now be the case that if a company considers a new venture and concludes, on a properly informed and bona fide basis, that it will *not* pursue the venture, then the company's directors will be free to pursue the venture on their own account (see the controversial Canadian decision to this effect, *Peso Silver Mines Ltd (NPL) v Cropper* **[7.32]**).

The company's articles may include exemption clauses preventing a conflict of interest arising in the first place. Whether such a restriction on the liability of directors will be valid is left to the common law: see s 232 (provisions protecting directors from liability).

Prior authorisation by the directors will excuse a potential breach

Section 175(4)(b) states that the duty is not infringed if the matter has been authorised by the directors, and s 175(5) describes how and when such authorisation may be given by the directors. Section 175(5) distinguishes between private and public companies. Authorisation may be given by the directors of a private company so long as the constitution does not contain any provision to the contrary; whereas authorisation may only be given by the directors of a public company if the constitution contains a provision enabling the directors to authorise the matter and they do so in accordance with this provision.

Section 175(6) states the minimum procedural requirements for an authorisation to be effective. In particular, it provides that the director in question and any other interested director is not to be counted for quorum requirements nor for voting numbers. It follows that this route could not have been used on the facts in *Regal (Hastings)* **[7.23]** or*Cook v Deeks* **[7.22]**. The provision also appears to override any more lenient approaches to disapplying the conflicts rules that might be set out in a company's articles (so, eg, the approach in *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 636 is **(p. 372)** no longer relevant). On the other hand, in Grand Committee, Lord Goldsmith explained that this kept in place any additional restrictions derived from constitutional rules or rules of the common law:

> any requirements under the common law for what is necessary for a valid authorisation remain in force. I draw the Committee's attention to [s 175](6)], which says: 'The authorisation is effective only if'. It then sets out certain specific requirements. It deliberately does not say that if those requirements are met the authorisation is effective. There might be other conditions in relation to the authorisation that would be required—for example, the company's constitution may have some specific provision with which it would be necessary to comply. Those formalities and those conditions need to be complied with as well. (HL GC Day 4, Hansard HL 678, 9/2/06, col 326)

For example, the common law indicates that any authorisation must be 'informed authorisation' in order to be effective.

Ratification of breaches of duty

Note that a breach of the duty to avoid conflicts may be ratified by a majority of members in general meeting, although the statutory rules on this (see s 180(4)(a) (consent, approval and authorisation by members)) effect several important changes when compared with the common law (eg *North-West Transportation Co Ltd v Beatty* **[4.33]**). Ratification may be useful where the board has either failed or refused to authorise a conflict of interest.

Conflicts of duty and duty

Section 175(7) makes it clear that a conflict of interest includes conflicts of interest and duty and conflicts of duties. The general equitable rule prohibits a fiduciary from entering into a position which gives rise to conflicting fiduciary duties to another person, without the informed consent of both principals (*Clark Boyce v Mouat* [1994] 1 AC 428). The statutory formulation adopts this equitable rule (see *In Plus Group Ltd v Pyke* **[7.33]**), and discards the controversial approach found in *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165; *Bell v Lever Bros Ltd* [1932] AC 161 at 195; and *Item Software (UK) Ltd v Fassihi* **[7.16]** (Arden LJ, *obiter*). These latter cases suggested that a director of one company may be a director of competing companies unless prohibited by contract. This is inconsistent with the equitable rule on conflict of duties, and now also, it seems, with CA 2006.

Since conflicting multiple directorships are now caught by the duty to avoid conflicts of interest, these appointments will need to be authorised according to the process outlined in s 175(5) and (6).

Which corporate opportunities are caught by the no conflict rule?

As indicated earlier (see 'Conflicts of interest and "corporate opportunities"', p 370), the most difficult task in dealing with the no conflict rule is to draw the line between opportunities that can be pursued by directors in their private capacity, without censure, and those that are regarded as 'corporate opportunities', where pursuit will be a breach of duty which attracts legal liability.

Some cases take an exceptionally wide view of the opportunities that are caught—anything that could possibly be of interest to the company, even if pursuit is legally or practically impossible, is deemed a 'corporate opportunity'. *Regal (Hastings)* **[7.23]** and *Boardman v* **(p. 373)** *Phipps* (even though not a company case) are sometimes put in this class (although both might well also be caught by narrower rules). *Bhullar v Bhullar* **[7.25]** is in this class.

But too wide a view is generally seen as unrealistic, even when the goal is to secure the highest possible standards of loyalty. Inevitably, therefore, some means of narrowing the range of prohibited opportunities have been sought. An intermediate approach confines 'corporate opportunities' to those that lie within the company's own '*scope of business*'. Pursuit of these opportunities involves a conflict with the company's interests, and so constitutes a breach of duty; but outside this category there is no breach. (But see the rejection of this approach in *Allied Business and Financial Consultants Ltd v Shanahan* (also known as *O'Donnell v Shanahan*) **[7.27]**.)

A still tighter definition of 'corporate opportunities', and one that gives even greater freedom to directors to pursue their own personal interests, is the '*maturing business opportunity*' test. Only opportunities that are real and maturing business opportunities for the company (as in *Cook v Deeks* **[7.22]**) are prohibited; other opportunities are open to the director to pursue in a private capacity. The following extracts illustrate the arguments and analyses that have found favour. (The 'maturing business opportunity' test emerges in the later cases concerning directors who resign in order to take up alternative opportunities: see 'Resigning to take up a corporate opportunity', pp 387ff.) A similar limitation is inherent in the restriction that a conflict only arises if the company has a 'specific interest' in the relevant corporate opportunity (*Balston Ltd v Headline Filters Ltd* [1990] FSR 385: see 'Resigning to take up a corporate opportunity', pp 387ff). (But again see *Allied Business and Financial Consultants Ltd v Shanahan* (also known as *O'Donnell v Shanahan*) **[7.27]**.)

Conflicts arise even when the company is not pursuing the opportunities in question, and they are presented to the directors in their private capacity.

[7.25] Bhullar v Bhullar [2003] EWCA Civ 424, [2003] BCC 711 (Court of Appeal)

Two brothers, M and S, founded and equally controlled a family company (BBL), later dividing their respective shareholdings among their wives and sons. By May 1998, family relations had broken down to the point where negotiations to split the company's assets and business between the M family and the S family had taken place but were not successful. Around this time, M and one of his sons told S and his sons, I and J (the appellants), at a board meeting that they did not wish any more properties to be purchased by the company, which S and his sons accepted in principle. In June 1999, I and J learned that the property next door to one of the company's existing properties was for sale, and they purchased it in the name of Silvercrest, a company controlled by them. The M family issued a petition under CA 1985 s 459 (now see CA 2006 s 994, the 'unfair prejudice' provision) seeking relief on this basis or on the basis of breach of fiduciary duty. The judge held that I and J had committed a breach of their fiduciary duty by purchasing the property for their own benefit. As a consequence, he held that Silvercrest held the property on trust for the company and ordered the appellants to compel Silvercrest to transfer the property to the company at cost, and to account for any other profits. I and J appealed, arguing that a director was under no duty to offer to the company business opportunities which came to him privately, notwithstanding that the company might be in a position to exploit such opportunities. The Court of Appeal upheld the judgment of the lower court, with Jonathan Parker LJ delivering the leading judgment. This case also provides a useful summary of older precedents.

(p. 374) JONATHAN PARKER LJ:

20. Mr Berragan [counsel for I] … submits that a director of a company is under no duty to offer to the company business opportunities which come to him privately, notwithstanding that the company may be in

a position to exploit such opportunities. He submits that the judge was in error in holding that because the Company might possibly have been interested in acquiring the Property, *ergo* the appellants were in breach of their fiduciary duty in acquiring it for themselves. He submits that, applying the principles laid down in *Phipps v. Boardman*, the first step is to identify the nature and scope of the appellants' pre-existing duty as fiduciaries in relation to the purchase of the Property. Until the nature and scope of that pre-existing duty has been identified, he submits, one cannot determine whether in purchasing the Property the appellants breached that duty.

21. He submits … that the opportunity to purchase the Property cannot be regarded as in any sense belonging to the Company, and that the mere fact that the Company might have been interested in purchasing the Property was not in itself enough to make it so. …

24. … Miss Rosalind Nicholson [counsel for M], relying in particular on the speech of Lord Upjohn in *Phipps v. Boardman*, submits that the equitable rule as to the accountability of directors is not limited to cases in which there is a "maturing business opportunity" but extends to cases in which the director either has or can have (to use the words of Lord Cranworth LC in *Aberdeen Railway Co v. Blaikie* (1854) 1 Macq. 461, 471) 'a personal interest conflicting, or which possibly may conflict, with the interests of whose whom he is bound to protect': in other words, as Lord Upjohn explained in *Phipps v. Boardman* (at p.124), where there is 'a real sensible possibility of conflict'. She submits that on the facts the instant case is such a case. In the instant case, the opportunity to acquire the Property was plainly in the Company's line of business. Relying on the decision of the Privy Council in *New Zealand Netherlands Society 'Oranje' Inc v. Laurentuis Cornelis Kuys* [1973] 1 WLR 1126, she submits that that is enough to give rise to a real sensible possibility of conflict of interest. She submits that the circumstances in which the opportunity presented itself to the director are immaterial, since accountability does not depend on whether the director happens to be acting as such at the time.

25. Nor, Miss Nicholson submits, is it necessary that the director should have profited by taking the opportunity which presented itself. In support of this submission she relies on *Parker v. McKenna* (1874) LR 10 Ch 124. Citing *Movitex Ltd v. Bulfield* [1988] BCLC 104 at 117 per Vinelott J, she reminds us that a director faced with such an opportunity may always free himself from the obligation to account by obtaining the company's full and informed consent.

26. She further submits, relying on *Industrial Development Consultants Ltd v. Cooley* [1972] 1 WLR 443 at 451F per Roskill J, that a director may come under a positive duty to make a business opportunity available to his company if it is in the company's line of business or if the director has been given responsibility to seek out particular opportunities for the company and the opportunity concerned is of such a nature as to fall within the scope of that remit.

Conclusions

27. I agree with Mr Berragan that the concept of a conflict between fiduciary duty and personal interest presupposes an existing fiduciary duty. But it does not follow that it is a prerequisite of the accountability of a fiduciary that there should have been some improper dealing with property 'belonging' to the party to whom the fiduciary duty is owed, that is to say with trust property. The relevant rule, which Lord Cranworth LC in *Aberdeen Railway Co v. Blaikie* described as being "of universal application", and which Lord Herschell in *Bray v. Ford* [1896] AC 44 at 51, described as 'inflexible', is that (to use Lord Cranworth's formulation [in *Aberdeen Railway Co v Blaikie*]) no fiduciary 'shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect'.

28. In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed (the Company, in the instant case) had some kind of beneficial interest in the opportunity: in my judgment **(p. 375)** that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary's exploitation of the opportunity is such as to attract the application of the rule. As Lord Upjohn made clear in *Phipps v. Boardman*, flexibility of application is of the essence of the rule. Thus, at *ibid*. p.123