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

he said:

> ‘Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.’

Later in his speech (at p.125) Lord Upjohn gave this warning against attempting to reformulate the rule by reference to the facts of particular cases:

> ‘The whole of the law is laid down in the fundamental principle exemplified in Lord Cranworth’s statement [in *Aberdeen Railway Co v Blaikie*]. But it is applicable, like so many equitable principles which may affect a conscience, however innocent, to such a diversity of different cases that the observations of judges and even in your Lordships’ House in cases where this great principle is being applied must be regarded as applicable only to the particular facts of the particular case in question and not regarded as a new and slightly different formulation of the legal principle so well settled.’

29. To my mind that warning is particularly apt in the instant case …

30. As it seems to me, the rule is essentially a simple one, albeit that it may in some cases be difficult to apply. The only qualification which is required to Lord Cranworth’s formulation of it is that which was supplied by Lord Upjohn in *Phipps v. Boardman*, where he said this (at p. 124):

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

31. The strictness of the rule, and the flexibility of its application, was stressed by Lord Wilberforce in the Privy Council decision in *New Zealand Netherlands Society etc. v. Kuys*, where he said (at p.1129):

> ‘The obligation not to profit from a position of trust, or, as it [is] sometimes relevant to put it, not to allow a conflict to arise between interest and duty, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords in *Phipps v. Boardman* … It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship.’ …

36. In so far as reference to authority is of assistance in applying the rule to the facts of any particular case, the authority which (of those cited to us) is nearest on its facts to those of the instant case is the decision of Roskill J in *Industrial Development Consultants Ltd v. Cooley*. In that case, a commercial opportunity was offered to the defendant, who was at the time the managing director of the plaintiff company, in his private capacity. The defendant subsequently obtained his release by the company in order to exploit that opportunity for his own benefit. Had the company known that he had been offered that opportunity, it would not have agreed to release him. He was held accountable for the benefits he had received by exploiting the opportunity. The opportunity was not one which the company could itself have exploited.

37. Roskill J, after quoting extensively from Lord Upjohn's speech in *Phipps v. Boardman*, observed (plainly correctly, if I may respectfully say so) that although Lord Upjohn dissented (with Viscount **(p. 376)** Dilhorne) in the result, there was no difference between any of their Lordships as to the applicable principles, but only as to the application of those principles to the facts of the case. Turning to the facts, Roskill J said this (at p.451):

> 'The first matter that has to be considered is whether or not the defendant was in a fiduciary relationship with his principals, the plaintiffs. [Counsel for the defendant] argued that he was not because he received this information which was communicated to him privately. With respect, I think that argument is wrong. The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity was as managing director of the plaintiffs. Information which came to him while he was managing director and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs because between himself and the plaintiffs a fiduciary relationship existed. …' …

39. He went on to stress the rigidity with which the rule had since been applied. As confirmation of this, he cited the following well-known passage from the judgment of James LJ in *Parker v. McKenna*:

> 'I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal in the danger of such an inquiry as that.'

40. I turn, then, to the facts of the instant case.

41. Like the defendant in *Industrial Development Consultants Ltd v. Cooley*, the appellants in the instant case had, at the material time, one capacity and one capacity only in which they were carrying on business, namely as directors of the Company. In that capacity, they were in a fiduciary relationship with the Company. At the material time, the Company was still trading, albeit that negotiations (ultimately unsuccessful) for a division of its assets and business were on foot. As Inderjit accepted in cross-examination, it would have been 'worthwhile' for the company to have acquired the Property. Although the reasons why it would have been 'worthwhile' were not explored in evidence, it seems obvious that the opportunity to acquire the Property would have been commercially attractive to the Company, given its proximity to Springbank Works. Whether the Company could or would have taken that opportunity, had it been made aware of it, is not to the point: the existence of the opportunity was information which it was relevant for the Company to know, and it follows that the appellants were under a duty to communicate it to the Company. The anxiety which the appellants plainly felt as to the propriety of purchasing the Property through Silvercrest without first disclosing their intentions to their co-directors—anxiety which led Inderjit to seek legal advice from the Company's solicitor—is, in my view, eloquent of the existence of a possible conflict of duty and interest.

42. I therefore agree with the judge when he said … that 'reasonable men looking at the facts would think there was a real sensible possibility of conflict'.

BROOKE and SCHIEMANN LJJ concurred.

This case is noted, D Prentice and J Payne, 'The Corporate Opportunity Doctrine' (2004) 120 LQR 198.

➢ Note

Bhullar and many other cases like it make it clear that disputes can easily arise when a director learns of an opportunity and then pursues it on his or her own account, rather than for **(p. 377)** the benefit of the company. Yet it is surely not the case that a director must pursue every opportunity for the company's benefit alone, and not for personal gain. What seemed to be a useful 'scope of business' test was articulated over a century ago by Lindley LJ in the case next extracted.

Outside the corporate context, a 'scope of business' test is used to limit the range of potential conflicts of interest.[55]

[7.26] Aas v Benham [1891] 2 Ch 244 (Court of Appeal)

The facts are immaterial, other than to note that the case concerned a partnership, *not* a company; see how the case was therefore distinguished in **[7.27]**.

> LINDLEY LJ: As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business, nor does the language of Lord Justice Cotton in *Dean v. MacDowell* [8 Ch D 345] warrant any such notion. By "information which the partnership is entitled to" is meant information which can be used for the purposes of the partnership. It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd. Suppose a partner to become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject, could the firm claim the profits thereby obtained? Obviously not, unless, by publishing the book, he in fact competed with the firm in their own line of business.
>
> [Lindley LJ had earlier distinguished these 'corporate opportunities' cases from cases where the fiduciary used the principal's assets for personal advantage, or competed directly with the principal in the same line of business. On those matters, he said:]
>
> It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection … It is equally clear law that if a partner without the consent of his co-partners carries on business of the same nature as, and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business … *Dean v. MacDowell* [8 Ch D 345] shews that a partner is not bound to account to his co-partners for profits made by him in carrying on a separate business of his own, unless the case can be brought within one or other of the two principles to which I have alluded, even if he carries on such separate business contrary to one of the partnership articles.

➢ Note

The next extract, **[7.27]**, suggests that this 'scope of business' test is not applicable in the context of directors, whatever its merits might seem as a matter of principle. The issue is important, given the modern

significance of ‘corporate opportunities’ in the context of proprietary remedies (see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* **[7.38]**.

(p. 378) ***No ‘scope of business’ test for corporate opportunities?***

[7.27] Allied Business and Financial Consultants Ltd v Shanahan (also known as O’Donnell v Shanahan) [2009] EWCA Civ 751, [2009] BCC 822 (Court of Appeal)

O and S and L were shareholders and directors of C, which provided clients with financial advice and assistance. S and L had been involved in property investment and development on their own account through their own company (K). O, in an action under CA 1985 s 459 [CA 2006 s 994], claimed that S and L’s conduct of C’s affairs had unfairly prejudiced her interests as a member, and, in particular, that S and L’s acquisition of an investment property through K was in breach of S and L’s duties as directors of C; and that the acquisition should have been channelled through C, as S and L had come across the opportunity to purchase it in the course of C’s business when one of C’s clients dropped out of the purchase opportunity himself. At first instance, and relying on *Aas v Benham* **[7.26]**, the judge held that the equitable no conflict and no profit rules [CA 2006 s 175 was not then in force] had not been breached because the acquisition fell outside the ‘scope of business’ of C. The Court of Appeal allowed the appeal, and held that *Aas v Benham* was of no relevance in considering the extent and application of the no conflict and no profit rules so far as they applied to fiduciaries such as trustees and directors.

RIMER LJ:

52 Subject to the *Aas v. Benham* ‘scope of business’ point, to which I will come, I would regard this as a plain case in which Mr Shanahan and Mr Leonard had (without the company’s informed consent) adopted for their private benefit a business opportunity that came to them in their capacities as directors of the company with the consequence that they would in principle be accountable to the company for any profit derived from it. The prime mover of the two in the Aria House matter [the property purchase in issue] as a whole was Mr Shanahan, but neither the judge nor the argument before us drew any distinction between the roles of the two respondents.

53 Mr Sulaiman’s engagement of the company [C] (acting by Mr Shanahan) to find a purchaser of Aria House was the company’s first venture into estate agency. That shows that by 1999 the categories of its activities were not closed. All that Mr Shanahan then learnt about Aria House and its virtue as an investment opportunity derived from information he obtained as a director of the company in seeking such a purchaser: in particular, the Matthews & Goodman report, the interest of the banks and Jacobsens’ work. It may be that Mr Shanahan and the company owed duties of confidence to Mr Walsh with regard to the use of this information, and Mr Walsh might legitimately have complained about its appropriation by others. But as between Mr Shanahan and the company, the latter had the better right to its use than the former because it was information obtained by Mr Shanahan in the course of acting as a director of the company. When Mr Walsh withdrew from the purchase, it was this information that Mr Shanahan used in acting on behalf of the company in seeking a substitute purchaser; and when the opportunity arose for the respondents to participate personally in the purchase, it was this information that they used in making their decision.

54 In my judgment, this was obviously a case in which, once that opportunity arose, the respondents could not properly make use of the information they had so obtained in deciding to take up the opportunity for their own benefit. That was because they had obtained the information in the course of acting as directors of the company; and the opportunity also came to them in such course. As I shall explain, I consider that the opportunity led the respondents straight into a breach of ‘no conflict’ rule. But quite apart from this, it was one that they ought obviously to have made known to the company. In practice, that meant that they needed to discuss it with Ms O’Donnell. If the company was not interested in taking up the opportunity, its members could consent to its being taken up by the respondents personally. As the respondents did not offer the opportunity to the company, but took it up personally, they engaged in a transaction that rendered them liable to account under the ‘no profit’ rule.

(p. 379) 55 The authorities relating to trustees' and directors' duties to account for profit earned in consequence of a breach of the 'no profit' rule are legion, they all appear to me to point to the same conclusion and none appears to qualify the liability to account by reference to whether the impugned transaction was (in the case of an alleged breach by a director) within or without the scope of the company's business. The principle of accountability by directors in breach of the rule derives from the strict rule affecting trustees, the leading case in the latter field being *Keech v. Sandford* Sel. Cas. Ch. 61. In that case it had been *impossible* for the trustee to obtain a renewal of the trust's lease for the beneficiary, but the trustee was nevertheless held accountable for then renewing it for himself. It may be thought odd that a strict principle of that nature, which fathered the like principle of accountability applicable to directors, can enable a director to answer a claim under the 'no profit' rule by asserting that the impugned transaction was unimpeachable because it was not the kind of transaction the company ordinarily engaged in. That is to ignore the point that the rationale of the 'no conflict' and 'no profit' rules is to underpin the fiduciary's duty of undivided loyalty to his beneficiary. If an opportunity comes to him in his capacity as a fiduciary, his principal is entitled to know about it. The director cannot be left to make the decision as to whether he is allowed to help himself to its benefit.

56 The authorities relating to directors' accountability not only do not support the 'scope of business' exception in relation to the 'no profit' rule, they are contrary to it. They show that the principle is a rigorous one. In *Parker v. McKenna* (1874) 10 Ch. App. 96, the directors of a bank acquired for themselves, and made a profit on, certain shares the subject of a new issue that were not taken up by the bank's shareholders. Lord Cairns LC said, at 118:

> 'The Court will not inquire, and is not in a position to ascertain, whether the bank has or has not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the Court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal.'

James LJ said, at 124:

> '… it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.'

57 According to James LJ, therefore, nothing less than the 'safety of mankind' depends on the rigorous application of the 'no profit' rule. How, it might be asked, is it consistent with that for the profiteer to claim, as do the respondents, that the company would not have taken advantage of the acquisition opportunity because it was outside the scope of its business? In *Furs Ltd v. Tomkies* (1936) 54 CLR 583, Rich, Dixon and Evatt JJ affirmed in their joint judgment in the High Court of Australia, at 592:

> '… the inflexible rule that, except under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all material facts are disclosed to the shareholders and by resolution a general meeting approves his doing so or all the shareholders acquiesce.[56] An **(p. 380)** undisclosed profit which a director derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which

> the company itself could not have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company …'

58 The like rigorous approach is also to be found in the speeches in the House of Lords in *Regal (Hastings) Ltd v. Gulliver* **[7.23]**. …

59 In the same case, at 153E, Lord Macmillan posed the relevant issue as being one of fact:

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

And Lord Wright said, at 154F:

> 'What the respondents did, it was said, caused no damage to the appellant and involved no neglect of the appellant's interests or similar breach of duty. However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which would otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.'

60 Those statements, of high authority, appear to me to exclude the making of the 'scope of business' inquiry that the judge made in this case. Once he had found, as he did, that the opportunity to buy Aria House came to the respondents' attention in their capacity as directors of the company acting on the company's business and using information they also obtained in the course of so acting, that was the end of the point. In principle, subject to any defences that might be available (acquiescence, for example), the respondents would have been liable to account to the company for any profit they made by their purchase. Their proper course was to obtain the company's informed consent to their private venture. They did not do that.

61 What of *Aas v. Benham* **[7.26]** ? That was a decision of a strong court, binding upon us, and showing that, in the context of a commercial partnership, the strict duties of accountability in accordance with the principles of, for example, *Parker v. McKenna* and *Regal (Hastings) Ltd v. Gulliver* will not apply in a case in which partnership information has been used by the defendant partner for the purpose of a separate business of a nature beyond the scope of the partnership business.

62 *Aas v. Benham* was not cited in *Regal (Hastings) Ltd v. Gulliver*, but it was cited in *Boardman and Another v. Phipps* [1967] AC 46, a case involving a successful claim against the appellants that they were accountable to a trust on the basis that, as agents of the trustees, they had obtained information that they then used to buy shares for themselves. The appellants argued (inter alia) that their case was akin to *Aas v. Benham* in that the purchase of the shares was 'wholly outside the scope of any agency undertaken for the trustees' ([1967] AC 46, at 66C). The test was said to be whether the information could have been used by the principal for the purpose for which it was used by the agent; and if the answer was no, the information was not the principal's property ([1967] AC 46, at 71A). The counter-argument was that *Aas v. Benham* was 'distinguishable as being a very special case for a partner is only in a fiduciary position in relation to matters within the ambit of the partnership business.' ([1967] AC 46, at 70A). … [Then followed an interesting assessment of the treatment of *Aas v Benham* by the House of Lords in*Boardman v Phipps*.]

67 Coming to my conclusions on the ‘no profit’ case, in my judgment the answer to the reliance placed by the judge and (before us) by Mr Mallin [counsel] on *Aas v. Benham* is that it is of no relevance in considering the extent and application of the ‘no profit’ and ‘no conflict’ rules so far as they apply to fiduciaries such as trustees and directors. By way of an introduction to the reason why, **(p. 381)** it is helpful to consider Lord Browne-Wilkinson’s observations in *Henderson and Others v. Merrett Syndicates Ltd and Others* [1995] 2 AC 145, at 206:

> ‘The phrase “fiduciary duties” is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. Thus, in the case of an agent employed under a contract, the scope of the fiduciary duties is determined by the terms of the underlying contract.’

68 The point about *Aas v. Benham* is that it concerned the fiduciary duties owed by a partner whose duties were circumscribed by the contract of partnership. The extent of Mr Benham’s fiduciary duties was determined by the nature of the partnership business, which was expressly limited by the terms of the partnership agreement. The consequence was that if he used partnership information for any purpose that fell within the scope of the partnership business, he was required by the fiduciary obligations to which the contract subjected him to account to the firm for any profits so made; but his fiduciary obligations did not require him similarly to account to the firm for any profits made by the use of such information for a purpose that was beyond the scope of the business of the partnership. To those familiar with the wider obligations of accountability to which trustees and directors are subject, the decision in *Aas v. Benham* may at first sight appear to reflect a surprisingly narrow approach. But the explanation is that a trustee’s and director’s fiduciary duties are not similarly circumscribed by the terms of a contract. That distinction was squarely recognised by Lord Hodson in *Boardman v. Phipps*, and also, I consider, by Lord Guest. The explanation for the decision in *Aas v. Benham*was correctly summarised in the respondents’ submission to the House of Lords that I have earlier cited ([1967] AC 46, at 70A).

69 By contrast with Mr Benham’s position, directors of companies occupy what Lord Hodson in *Boardman v. Phipps* called a ‘general trusteeship or fiduciary position’. By that he was referring to those occupying a position whose fiduciary obligations are not circumscribed by contract. In his argument for the appellants in*Boardman v. Phipps*, Mr Arthur Bagnall QC, in distinguishing the appellants’ case from that of the directors in *Regal (Hastings) Ltd v. Gulliver*, submitted that the directors ‘were at all times directors of the company and therefore they were in a fiduciary capacity which was unlimited’ ([1967] AC 46, 65G). Submissions do not always reflect the law so much as what the advocate might wish the law to be. But I would regard it as correct to characterise the nature of a director’s fiduciary duties as being so unlimited and as akin to a ‘general trusteeship’. In my judgment, the decision in *Aas v. Benham* provides no assistance in determining the nature and reach of the ‘no profit’ rule so far as it applies to trustees and directors. In particular, in the present case, the scope of the company’s business was in no manner relevantly circumscribed by its constitution: it was fully open to it to engage in property investment if the directors so chose. The resolution of Ms McDonnell’s claim in the present case was and is not assisted by reference to *Aas v. Benham*. The relevant authorities are those relating to the fiduciary duties of directors, of which*Regal (Hastings) Ltd v. Gulliver* is the leading one.

70 The statements of principle in the authorities about directors’ fiduciary duties make it clear that any inquiry as to whether the company could, would or might have taken up the opportunity itself is irrelevant; so also, therefore, must be a ‘scope of business’ inquiry. The point is that the existence of the opportunity is one that it is relevant for the company to know and of which the director has a duty to inform it. 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.

71 This was a case in which, in the course of acting as directors on behalf of the company in an estate agency capacity, the respondents obtained information relating to the virtue of Aria House as an investment and were given the opportunity of personally sharing in the opportunity of purchasing **(p. 382)** it. 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. Nor, until Mr Sulaiman telephoned Mr Shanahan, did the company do estate agency work. There was no bright line marking off what it did and did not do.

72 In my judgment the judge came to the wrong conclusion on the 'no profit' rule. I consider that, in principle, the respondents' acquisition of their interest in Aria House exposed them to a claim for an account of profits by the company. …

AIKENS and WALLER LJJ concurred.

➢ Questions

This is a significant case on 'corporate opportunities', so it is important to understand the analysis.[57]

1. What is the rationale for applying *Aas v Benham* to fiduciaries who are partners, but not to fiduciaries who are trustees or company directors? Does it make sense in practice, given their different (or similar) roles?

2. Could the Court of Appeal have reached the same conclusion by *applying Aas v Benham*, but holding that on the facts the opportunity was within the 'scope of business' of C, since C's business was not well defined? What practical difference would this have made for future cases?

3. Is every company with wide objects, or with no specified objects (see 'Corporate capacity', pp 83ff), or with an undefined business plan, at an advantage in claiming the loyalty of its directors as a result of this decision?

4. Whatever the width of the objects of a company, *should* the no conflicts rule catch corporate opportunities that it 'may have been improbable that the company could or would want or be able to take up' (para [71] in the extract)? Given that the equitable rule is not breached unless there is a 'real, sensible possibility of conflict' (Lord Upjohn in *Boardman v Phipps*), is the conclusion in this case justified? What impact, if any, would CA 2006 s 175(4)(a) have had on this decision?

5. The decision relies heavily on *Keech v Sanford*. There, the trust property was a lease, and the trustee was not allowed to take a renewal of the lease for his own personal benefit even though the lease could not be renewed for the benefit of the trust. But does the analysis in that case go the extra step, and suggest that the trustee could not have taken the personal benefit of *any* lease without first obtaining the approval of the beneficiary? What is the difference between the conflict in the former situation and in the latter?

6. It is much easier to assess breaches of the no conflict rule where the director uses corporate property (whether real property, personal property or intellectual property) to achieve his or her ends. Where the director uses information, as in this case, the assessment is much more difficult. Why?

A shareholders' agreement giving shareholder-directors control over the direction of the company may enable those directors to deny that a new venture could be classed as a 'corporate opportunity'.

[7.28] Wilkinson v West Coast Capital [2005] EWHC 3009, [2007] BCC 717 (Chancery Division)

[Also see on this case the Note and Questions at the end of the section entitled 'Shareholders' agreements', p

249.] W held 40% of the shares in N. The remaining 60% of the shares were **(p. 383)** held by X and G. Y, a company owned and controlled by X and G, purchased a company, B. B was subsequently sold by Y at a loss. W asserted that B's acquisition should have been by N because the opportunity to acquire it was a corporate opportunity belonging to N, and the shareholders of N had agreed that it should do so (this latter assertion of agreement was held not to be sustainable). Further, W asserted that the directors of N were in breach of the fiduciary duties that they owed to N in causing B to be purchased by Y. W submitted that he had relied upon the terms of the shareholders' agreement entered into by the members of N, which had provided that certain actions of N required the consent of more than 65% of shareholders, and that each shareholder should use all reasonable and proper means to promote the interests of N. W claimed that the provisions of the shareholders' agreement meant that, even if the 65% requirement had not been fulfilled in relation to the acquisition by N of B, X and G were obliged to use all proper and reasonable means to bring about that acquisition. W unsuccessfully claimed a remedy for unfair prejudice under CA 1985 s 459 [now CA 2006 s 994].

WARREN J:

The Shareholders Agreement

221 I now turn to the detail of the Shareholders Agreement dated 2 May 2003. It is made between (1) the Original Shareholders, Mr Wilkinson and Mr Elvidge (2) NGS and (3) the Investors, WCC and Mr Gorman …

222 There are three issues arising out of these provisions. The first is whether the provisions of Clause 7 (effectively obliging the shareholders to take reasonable and proper steps to promote the interests of the NGS) override those of Clause 5 (containing the requirement that certain actions by NGS require the consent of more than 65% of the shareholders). The second is whether 65% of the shareholders did consent to the acquisition by NGS of Birthdays; if they did, questions then arise about what follows from such consent. The third is the extent to which the Shareholders Agreement defines the scope of the duties of the directors of NGS …

224 Mr Crystal [counsel for W] says that the contrary interpretation [ie that Clause 7.1 does not take precedence over the provisions of Clause 5] would render Clause 7.1 essentially worthless. …

225 I reject Mr Crystal's submission concerning the interaction of Clauses 5 and 7. In my judgment, the obligations under Clause 7.1, which are couched in wide general terms, take effect only subject to the specific provisions of Clause 5. The parties have seen fit to make special provision for certain matters which cannot be effected without the requisite 65% support; that provision qualifies the extent to which each shareholder is obliged to use all proper and reasonable means to maintain, improve and develop the business of NGS and other group companies. It can be said that, in the context of the agreement read as a whole, 'reasonable' means would not include taking action which Clause 5.1 provides should be subject to the requirement of consent. This does not render Clause 7.1 essentially worthless. The shareholders must continue to promote the interests of NGS but are only obliged to do so in a way which does not conflict with Clause 5.1. I do not consider that it is a purpose of Clause 7.1 to ensure that the powers under Clause 5.1 are exercised in the interests of NGS. Indeed, if that were the case, it would be Clause 5.1 which was rendered essentially worthless …

Directors' duties

245 The courts have, over the last century or more, had a great deal to say about the duty of directors and their obligations as fiduciaries. It is clearly of great importance in any case based on breach of duty to be careful to ascertain the scope of that duty. Some general principles can be set out [and were set out, at length, later in this judgment]. But it must always be remembered that the content of any fiduciary duty is, in the ultimate analysis, fact dependent; it is trite law that not all relationships described as fiduciary relationships import precisely the same duties …

246 Further, whatever duties may generally be cast on a director, those duties, or at least many of them, can be qualified in various ways. For instance, Articles of Association may define those duties in specified situations and provide for a narrower duty than might ordinarily apply, or exclude **(p. 384)** a duty altogether.

Similarly, an agreement made between all of the shareholders and the company itself and which is stated to take precedence over the Articles of Association is capable, I consider, of displacing the duties which would otherwise rest on a director. I say 'those duties, or at least many of them' because there may be certain core duties which cannot be modified, just as there are certain core duties of a trustee (*eg* of a commercial trust such as a pension scheme or a family settlement) which cannot be abrogated or qualified. I do not think I am concerned in the present case with that point since it seems clear to me that the Articles could have validly provided expressly that Mr Gorman and Mr McMahon could purchase for themselves in a case where the relevant 65% majority of votes could not be obtained …

272 Mr McCaughran [counsel for the defendants] identifies Mr Wilkinson's main complaint this way: The directors of NGS obtained information about Birthdays, and the opportunity to acquire Birthdays, in the course of carrying out their role as directors of NGS; that because of this, the directors were not free to take up the opportunity to acquire Birthdays themselves; and that they were in breach of duty in doing so. However, I think that the complaint goes wider than that: even if the directors learnt of the opportunity, and of the relevant information to permit them to formulate their offer, quite independently of their capacity as directors of NGS, nonetheless they were in a position of conflict in relation to the acquisition of Birthdays and should not have acquired it for themselves.

273 In considering that complaint, Mr McCaughran says, correctly I think, that one must have regard not only to the scope of the directors' duties, but also to the related question of the scope of NGS's business. In that context, he relies on the decision of the Court of Appeal in *Aas v Benham* **[7.26]**, the decision of the Privy Council in *Trimble v Goldberg* [1906] AC 493 and on certain passages of the judgments in *Boardman v Phipps*.

274 *Aas v Benham* was a partnership case [citing the extract at **[7.26]**] … Mr McCaughran submits that exactly the same approach should be applied in the case of a company and the duties owed to it by a director …

281 So *Aas v Benham* is an illustration of the importance of defining the scope of the duty before being able to decide whether a person is in breach of it and in particular whether the 'no conflict' rule or the 'no profit' rule applies …

284 [Mr McCaughran] also says that there is nothing in the company law authorities 'which in any way detracts from the principle in *Aas v Benham*'. I am not sure that there is anything which warrants the epithet 'principle' which can be derived from *Aas v Benham* … The case possibly establishes, or re-affirms, a negative proposition *viz* that there is no principle which entitles a firm to benefits derived from the use of information for purposes which are wholly outside the scope of the firm's activities.

285 In applying that negative principle, one must act with care because the firm's activities may not be limited by the formal partnership agreement …

295 Mr McCaughran submits that what these cases [all the usual orthodox authorities] show is only that, *once a conflict has been established*, a director who makes a profit, is accountable for the profit. They do not establish accountability where no conflict is established. Of course, a fiduciary can only be made to account for a profit if he has made a profit. That goes to remedy. At this stage, however, I am more concerned with whether there has been any breach of duty—at a time when it cannot be known whether a profit will in fact be made. Mr McCaughran accepts that, once a conflict has arisen and a profit has been made, it is no defence for the director to allege that the company could not *as a matter of fact* have acquired the opportunity itself, for example because the company could not afford to pursue the opportunity (as in *Regal (Hastings) Ltd v Gulliver*) or because the third party would not have wanted to deal with the company (as in *Industrial Development Consultants Ltd v Cooley*). But he submits that none of the cases is concerned with the situation where, as in *Aas v Benham* there was a legal impediment to the company taking up the opportunity; he says that, where there is a legal impediment of this sort, there is no relevant conflict of interest. On the facts in the present case there was, he submits, a legal impediment to the acquisition of Birthdays by NGS and therefore no relevant conflict of interest in the acquisition by WCC and Mr Gorman …