THE PREVENTION OF CONFLICT OF INTEREST AS A FIDUCIARY DUTY IN SOUTH AFRICAN COMPANY LAW

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Content

CHAPTER 1: DISSERTATION OVERVIEW

1.1. INTRODUCTION

The legitimacy of law rests *inter alia* on known and accessible laws. A law without these qualities would lack normative value in that the rule of law would be undermined with the result that, while it may be enforced, it cannot be a law so properly called.[1] The South African corporate law context presents a complex and diverse environment in which to live, conduct business and business-related activities or transactions. The heterogeneous nature of South Africans, both in language and culture, lends further complexity to the context. South Africa's economy consists of a highly developed first-world economy, with the concomitant complexity in commercial transactions that axiomatically accompanies such an economy, existing alongside and in stark juxtaposition to an emerging economy more rudimentary in nature and less complex in structure.[2] The law regulating the conduct of directors in South Africa must be alive to these considerations.

It is submitted that the current challenge for South Africa is, to a degree, far more pronounced than in the jurisdictions from which we derived our corporate law, such as England. It is further submitted that our laws need to be easily accessible and readily understood by the persons that fall within its scope of application. Corporate law cannot escape this challenge. This is especially so when cognisance is taken of the ease with which one can register a company with the Companies and Intellectual Property Commission. As a mandatory requirement of registering a company, it is necessary to register one person, at least, as a director thereof.

Given that every director of a company must adhere to and act under her fiduciary duties, regardless of the level of sophistication of the director or the size of the company, it stands to reason that she should be aware of these duties as well as their meaning and the extent of their application. Accordingly, this paper seeks to provide a view as to whether and to what extent the fiduciary duty is meaningfully conveyed and accessible in the Companies Act 71 of 2008 (the "**Companies Act**" or "**Act**") and contained in our law.

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[1] Beinart (1962) *Acta Juridica* 99 at 99.
[2] Callebert (2014) 84 *Cambridge University Press Africa* 119 at 120.

1.2. PROBLEM STATEMENT

This paper will flesh out a director's fiduciary duty to prevent a conflict of interest as it currently exists in South African company law in two broad themes. First, the nature, ambit, and effect of the director's fiduciary duty to prevent conflict of interest ("the fiduciary duty") as it is statutorily set out in sections 75 and section 76(1), (2)(a), (b) and (3) of the Act will be canvassed. Secondly, it will be demonstrated that a proper understanding of the common law concepts underpinning the Act is essential to the effective application of the fiduciary duty as found in the Act. These two themes are indicative of the partial codification of South African company law. The main issue that this research paper seeks to address is whether the manner in which this fiduciary duty is captured in our law is adequate to ensure compliance by persons who fall within its scope of application.[3] To assess this, the common law and statutory positions will be analysed in detail.

1.3. ASSUMPTIONS / HYPOTHESES

This research is based on the assumption that the conflict of interest doctrine has a broader scope of application than that which is set out in the Act. It is also an assumption that the courts frequently misapply and conflate the no-profit and corporate-opportunity rule; and that the fiduciary duties applicable to directors, particularly those that relate to the prevention of conflict of interest are difficult to properly interpret.

1.4. RESEARCH METHODOLOGY

The research methodology employed will be a non-empirical comparative analysis of existing case law, legislation, and academic writings on the topic to contextualise the fiduciary duty to prevent conflict of interest and attempt to capture its essential elements at the legislated and common law levels. The United Kingdom, with a particular focus on England, will be the jurisdiction that is used for purposes of the comparative study. The choice of English law for the comparative study is motivated by the fact that the fiduciary duty to avoid a conflict of interest originates from English

[3] The scope of application of s 75 and 76 is slightly wider than an ordinary director as defined in s 1 of the Companies Act. The scope of application to directors extends to prescribed officers, alternate directors and persons who sit as members of a board committee in a company. See ss 75(1) and 76(1) of the Companies Act in this regard.

law.[4] In addition to the foregoing, English law has also adopted a partial codification of directors' fiduciary duties in their law.[5]

1.5. DELINEATIONS AND LIMITATIONS

This research will focus on the avoidance and/or prevention of a directors' conflict of interest in terms of the common law as well as under the current iteration of the Companies Act.

In an effort towards clarity and for the sake of completeness the terms "avoidance" and "prevention" concerning the fiduciary duty will be used interchangeably in this research.

1.6. CHAPTERS – AN OUTLINE

1.6.1. CHAPTER 2: THE COMPANIES ACT – AN IN-DEPTH ANALYSIS

The sections in which the fiduciary duty to prevent conflict of interest in the partially codified sense will be set out and expanded upon in this chapter. Key definitions will be introduced as well. The application and location of the fiduciary duty to prevent conflict of interest in the Act will also be explained. This chapter will discuss the status of the common law as envisaged in the Act, as well as the duty that the Act places on the courts to develop it. From the explanation of partial codification, it will naturally flow that a proper understanding of the Act will require an in-depth analysis of the concept at common law.

1.6.2. CHAPTER 3: COMMON-LAW ORIGINS – FLESH ON THE BONES

The origin of common law as stemming from the English law of trusts will be explained. This will involve a discussion of relevant case law as well as the two rules underlying the fiduciary duty to prevent conflict of interest, namely the no-profit rule, understood to include the no-conflict rule and the corporate-opportunity rule. The reasons for differentiating between the rules will be advanced. The chapter will then proceed with a discussion of the case law applicable to each rule. There will be some overlap between cases but this will be explained. Thereafter, the chapter will

[4] Cassim *et al* (2012) at 509.
[5] Makovski R (2008) 9 *Common LR* 17 at 20.

assess the post-resignation duties of directors in the context of preventing a conflict of interest. Various cases will be discussed in detail under the common law position.

1.6.3. CHAPTER 4: LIABILITY

This chapter will open with an analysis of liability for breach of the fiduciary duty to prevent conflict of interest in our law through decided case law. The various remedies for breach of the duty to avoid a conflict of interest will also be explained. After establishing the basis of liability at common law, the chapter will set out the sections that provide for directors' liability for breach of this fiduciary duty at statute level. Sections 77 and 76 will be analysed to determine the extent and manner in which they provide for liability. A view will also be put forward as to the position of common law liability in light of the wording of the Act.

1.6.4. CHAPTER 5: COMPARATIVE STUDY - ENGLISH LAW

The law in respect of fiduciary duty in English law will be analysed. This chapter will critically approach section 175 of the Companies Act of 2006 to determine whether the English approach is compatible with our own. The manner and scope of liability for a breach of the fiduciary duty under English law will also be assessed. Further, the chapter will compare South Africa's approach to the partial codification of the duty to avoid a conflict of interest to the English law approach.

1.6.5. CHAPTER 6: CONCLUSION

In conclusion, it will be shown that an understanding of the various underlying common law elements making up the fiduciary duty is essential to the proper appreciation and implementation of the fiduciary duty in our law. A view will be expressed regarding whether a director's fiduciary duty to avoid a conflict of interest as contained in the Act is meaningfully conveyed by the Act both in substance and form.

CHAPTER 2: THE COMPANIES ACT 71 OF 2008 – AN IN-DEPTH ANALYSIS

2.1. INTRODUCTION

This chapter will begin by delineating the term "fiduciary duty" in the context of directors' fiduciary duties. It will be demonstrated that the term fiduciary duty does not have an exact meaning but rather arises from the facts of the matter. It will be shown that directors in the broad sense are fiduciaries towards the company. As a result of their occupying a fiduciary position, they are required to act in a prescribed manner towards the company. In this regard, the Companies Act has partially codified the fiduciary duties of directors through sections 75, 76(2), and 76(3) of the Act. However, the common law is still applicable in so far as when interpreting the content and extent of the fiduciary duties as set out in the Act. While it is not questioned that the duty to prevent conflict of interest is inculcated in the Act., it is not immediately clear where the duty is seated in the Act. The various views of authors will be expanded upon together with recent case law decided by the SCA in analysing the position of the fiduciary duty more carefully.

2.2. BACKGROUND: FIDUCIARY DUTY

At the outset, it is essential to formulate the meaning of the term fiduciary and fiduciary relationship so that we can make sense of the underlying rationale for fiduciary duties and their purpose. This will allow a meaningful engagement with the content and structure of the Companies Act. This will also facilitate a proper understanding so as to why directors are said to stand in a fiduciary relationship with a company. It is for this reason that the discussion of the Act will be preceded by an analysis setting out what is meant by the term "fiduciary duty".

At common law, directors of a company owe fiduciary duties to the company.[6] However, an exact description of the term fiduciary duty does not exist. This is very clearly demonstrated by the comments of Heher JA in the case of *Phillips v Fieldstone*[7] where the learned judge said that "there is no magic in the term fiduciary duty nor is there a closed list of fiduciary relationships or a comprehensive definition of who a fiduciary is".[8] It has been stated that a fiduciary can be

[6] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at 27.
[7] Ibid at 27.
[8] Ibid at 27

described as someone who acts for or on behalf of another person in a relationship of trust and confidence.[9] This view was reaffirmed by the SCA in the case of *Modise and Another v Tladi Holdings (Pty) Ltd* where the court recently restated the principles of fiduciary duties owed by directors and the interrelation thereof with the Act.[10]

The development of fiduciary duties in common law has its roots in the English law applicable to trustees.[11] At common law, the duty of a director to avoid a conflict of interest is a strict and inflexible one.[12]

In the case of *Peffers, No and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control*[13] Theron J relied upon "the universally respected one [principle] that no transaction where interest and duty conflict should be recognised or countenanced by the law".[14] It is submitted that this statement, while made concerning a fiduciary relationship arising from a contract, it does go to some lengths to demonstrate the underlying rationale of the fiduciary duty to avoid a conflict of interest.

Delport *et al* posit that the fiduciary duty has four elements at common law.[15] They are namely: the duty to disclose any interest in a contract, the duty to account for secret profits, the duty not to misappropriate corporate opportunities, and the duty not to improperly compete with the company.[16] In comparison, Cassim *et al* state that there are "two separate and independent but closely related legal principles that apply" in respect of the fiduciary duty at common law and that these are "(a) duty to avoid a conflict of personal interests ("the no-conflict rule"), and (b) a duty not to make a profit from the fiduciary's position as a director ("the no-profit rule")".[17] Havenga supports the approach of Cassim in her analysis of the exploitation of corporate opportunities.[18]

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[9] *Cassim et* al (2012) 476.
[10] *Modise and Another v Tladi Holdings (Pty) Ltd* (Case No 307/2019) [2020] ZASCA 112 at 35 and 49.
[11] Ashburner (2012) 421; see also Havenga (1997) 9 *SA Mer LJ* 310 at 310-1.
[12] *Cassim et* al (2010) at 534.
[13] *Peffers, No and Another v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control* 1965(2) SA 53 (C).
[14] Ibid at 56.
[15] Delport *et al* (2019) 282.
[16] Ibid at 282.
[17] *Casssim et* al (2012) 535.
[18] Havenga (2013) 8 *SALJ* 257 at 264.

2.3. THE MEANING OF DIRECTOR

In the first instance, the Act under section 76(1) states that—

> "in this section, 'director', includes an alternate director, and—
>
> (a) a prescribed officer; or
> (b) a person who is a member of a committee of a board of a company, or the audit committee of a company,
>
> irrespective of whether or not the person is also a member of the company's board."

The Act defines a director as "a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated".[19] Whereas an "alternative director" is defined as meaning "a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company".[20] Furthermore, section 66 provides for four types of directors namely; directors appointed in terms of the MOI of the company[21], *ex officio* directors[22], alternate directors[23] , and a director elected by shareholders.[24]

At common law, a director is appointed to his office through the offer of such position to him, by persons with proper authority, and his or her subsequent acceptance of such offer and where a person accepts a position or appointment as a director they stand in a fiduciary relationship towards the company and "are obliged to show the company the utmost good faith in their dealings on behalf of the company".[25] This duty is also codified to a certain degree by section 66(7) of the Act.[26]

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[19]Section 1 of the Companies Act.
[20]Section 1 of the Companies Act.
[21]Section 66(4)(a)(i) of the Companies Act.
[22]Section 66(4)(a)(ii) of the Companies Act.
[23]Section 66(4)(a)(iii) of the Companies Act.
[24]Section 66(4)(b) and 68(1) of the Companies Act.
[25]*Howard v Herrigel* 1991 (2) SA 660 (A) at 678A.
[26]Section 66(7) of Companies Act.

As pointed out by Delport *et al*, the ordinary meaning of the word director is applied and a "person who occupies the position of a director is a director for the Act whether he is described as such or not".[27] The author goes on to illustrate that the definition of director includes a *de facto director*. The meaning of *de facto director* is neatly explained as "a person who has been appointed as a director but in whose appointment there is some defect or irregularity".[28] This view is supported by Deplort *et al* who states further that its use should not be extended to so-called "pretend, directors".[29] The Act's use of the words "position of director" should be taken to mean a person whom by the Act or the Memorandum of Incorporation of the Company is vested, either alone or with others, with the ultimate control or management of the company to the exclusion of others excepting the company's shareholders.[30]

Liability attaches to a director in terms of the Act under section 77 read with section 76(2). A director who has not been formally appointed as such (i.e. de facto directors) incurs liability from the time she acts as a director, as the fiduciary relationship owed to the company by a director flows does not arise "as an incident of the office" but rather as a consequence of the nature of a director's position in relation to the company which is one with a basis in good faith.[31] Given that the fiduciary relationship of a director stems from his or her relationship of good faith and trust, liability in respect of fiduciary duties extends to non-executive directors.[32]

It remains to consider the concept of a "shadow" or "puppet" director. In this respect Hiemstra J stated as follows:

> "Our law does not know the complete puppet who pretends to take part in the management of a company whilst having no idea what it is to which he puts his signature … the Courts will punish it [such conduct] as a fraud… the more is this

[27]Delport *et al* (2019) at 22.
[28]*R v Mall* 1959 (4) SA 607 (N) at 521.
[29] Delport *et al* (2019) at 22.
[30]*Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) at 17 and 79.
[31]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177 -178.
[32]*Howard v Herrigel NO* 1991 (2) SA 660 (A).

so when an entire board consists of puppets manipulated from outside by persons who are ostensibly unconnected with the company".[33]

The fiduciary duties of directors both at common law and under the Act are extended, in certain circumstances, to senior management and employees of the company.[34] As pointed out by Cassim *et al* the wide, open-ended definition of a director ensures that most persons who have control over the management of companies fall within the ambit of the definition of a director".[35]

2.4. PARTIAL CODIFICATION OF THE DUTY TO PREVENT CONFLICT OF INTEREST UNDER THE COMPANIES ACT 71 OF 2008

Directors' fiduciary duties have been partially codified under the Act in sections 75 and 76 thereof.[36] Section 75 deals with the personal financial interests of directors, in the wide sense whilst section 76 deals with the standards of directors' conduct. The aforementioned section 75 states that directors, save in certain circumstances provided by the section, have disclosure obligations in respect of personal financial interest concerning a matter to be considered at a meeting of the board, or where such directors know that a related person has a personal financial interest in the matter.[37] In such instances, the director—

"(a) must disclose the interest and its general nature before the matter is considered at the meeting;

(b) must disclose to the meeting any material information relating to the matter;

(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

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[33] *S v Shaban* 1965 (4) SA 646 (W) at 233.

[34] *Phillips v Feildstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at 486.

[35] Cassim *et al* (2012) at 510.

[36] Delport *et al* (2019) at 281.

[37] Section 75(5) of the Companies Act. In this regard, a related person is defined in s 2(1)(c) of the Companies Act as (1) For all purposes of this Act – (c) a juristic person is related to another juristic person if – (i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with (2) (ii) either is a subsidiary of the other; or (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with ss (2).

(d) if present at the meeting must leave the meeting immediately after making any disclosure contemplated in (b) or (c);

(e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);

…

(g) must not execute any document on behalf of the company in relation to the matter unless specifically directed to do so by the board."[38]

Section 76 (2) provides that:

> "A director of a company must – (a) not use the position of director, or any information obtained while acting in the capacity of a director (i) to gain any advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company".[39]

Further to the foregoing section 76(2)(b) requires that a director must communicate at the earliest practicable opportunity any information that comes to her attention unless she reasonably believes that the information is immaterial to the company[40] or is generally available to the public[41]provided that she is not bound to disclose information that is ethically or legally privileged.[42]

Delport *et al* explain that various possible interpretations flow from the consideration of sections 75 and 76 of the Act.[43] First, it can be argued that section 76(3) is a catch-all provision for all fiduciary duties that are found at common law but not expressly found in the Act's provisions relating to the director's conduct. Secondly, it can be interpreted that section 76(2), if widely interpreted, is a general conflict of interest duty which includes the no-profit rule and taken to

[38]Section 75(5)(a)-(e) and (g) of the Companies Act.
[39]Section 76(2) (a) (i) of the Companies Act.
[40]Section 76(2) (a) (ii) of the Companies Act.
[41]Section 76 (2) (b) of the Companies Act.
[42]Section 76 (2) (b) (ii) of the Companies Act.
[43]Delport *et al* (2019) at 295 and 297.

include the no-conflict and the corporate opportunity rule.[44] However, the authors go on to note that section 76(2) only relates to information belonging to the company.[45] This approach differs from that of Cassim *et al* as explained below.

Cassim *et al* observe in respect of the operation of section 76(2)(a)(i) and (ii) that honesty or lack of intention does not result in the director not having contravened section 76(2)(a)(i).[46] It is also irrelevant whether the company has suffered loss or if it was not deprived of an opportunity it might have used for its advantage.[47] The authors go on to point out that the inclusion of a fiduciary duty being owed by a director to a wholly-owned subsidiary of the company represents a welcome extension of the common law; and further state that section 76(2)(a)(i) and (ii) is wide enough to encompass both the no-profit rule (understood to include the no-conflict rule), expressly, and the corporate -opportunity rule, implicitly so.[48] With regards to section 76(2)(a)(ii), the authors posit that an objective standard of knowledge is required, as opposed to a subjective one, in respect of whether a director "knowingly caused harm to the company or a [its] subsidiary".[49] In support, thereof, the authors set out the definition of knowledge as it is found in section 1 of the Act.[50] The adoption of the objective standard is viewed as being in line with the common law position.[51]

For purposes of this research, it is submitted that the interpretive approach of Cassim *et al*, with respect, seems to be the preferable one given that it at the very least considers the corporate opportunity doctrine in one locus while still maintaining its distinctive elements and objective approach to the enforcement of the fiduciary duty. This is an interpretive analysis that is more in line with a position at common law.[52]

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[44]For a discussion on the no-profit and no-conflict rules and their interrelation with the corporate opportunity rule the reader is referred to Chapter 3.2 and 3.3 below.
[45]Delport *et al* (2019) at 281.
[46]Cassim *et al* (2012) at 550.
[47]Ibid at 551.
[48]Ibid at 551.
[49]Ibid at 551.
[50]Section 1 of the Companies Act which defines knowingly as meaning that a person either (a) had actual knowledge of that matter; (b) was in a position in which the person reasonably ought to have (i) had actual knowledge (ii) investigated the matter to an extend that would have provided the person with actual knowledge; or (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with the actual knowledge of the matter; also see Cassim *et al* (2012) at 550–53.
[51]Cassim *et al* at 550–53.
[52]See Chapter 3.1 below and the case law discussed therein.

In the *Modise* case, the SCA seems to have endorsed the view that section 76(3) does indeed include the duty to avoid a conflict of interest where it said that "[at] common law directors have an overarching duty to exercise their powers in good faith and the best interests of the company. Section 76(3)(c) of the Companies Act 71 of 2008 codifies this".[53] It is unfortunate, that the court did not take the opportunity to expressly address the link between the duty to avoid a conflict of interest, which is not expressly mentioned in section 76(3), and the other fiduciary duties that are expressly set out therein.[54]. Perhaps one could read into the silence of the judgment in respect of the link between the duty to avoid a conflict of interest, which is not expressly mentioned in section 76(3) and the other fiduciary duties that are expressly set out therein.[55] Perhaps the learned judges, the judgment being unanimous, viewed the inclusion of the duty to avoid a conflict of interest as trite and therefore as not requiring elucidation.

It is submitted that if one considers the wording "the duty encompasses at least three rules"[56] it would seem that the learned judges have either intentionally or without realising it conflated the directors' duty to act in the best interests of the company with that of a director's duty to avoid a conflict of interest. However, the judgment without a doubt correctly sets out the underlying principles of no-profit and no-conflict rules including the corporate opportunity doctrine.

Delport *et al* link section 75 of the Act to the fiduciary duty to prevent conflict of interest.[57] Whereas, Havenga states that the situations envisaged in section 75 are wider than, but may overlap with, situations where corporate opportunities are involved.[58] It is submitted that a plain reading of section 75 suggests that the section ought to be considered alongside the duty relating to corporate opportunities due to the potential overlap in application.[59]

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[53]*Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112 at paragraph 53 and 36.
[54]Ibid at 36.
[55]Ibid at 36.
[56]Ibid at 36.
[57]Delport *et al* (2019) at 296.
[58]Havenga (2013) 2 *SALJ* at 264.
[59]For the sake of completeness, the applicable section in respect of corporate opportunities is section 76(2) of the Companies Act which states that—

> "a director of a company must –

Cassim *et al* point out that the fiduciary duty to avoid a conflict of interest is one of the most important fiduciary duties held by directors.[60] The authors state further that it is necessary to understand the common law principles underlying the fiduciary duty to properly understand the Act.[61] The learned authors are undoubtedly correct in this respect. For this reason, in addition to investigating the extent of the Act's application as set out above, it will be necessary to fully set out the position at common law.

2.5. CONCLUSION

In conclusion, the duty to avoid a conflict of interest has been carried across from common law. This is inclusive of the no-profit and no-conflict rules as well as the doctrine of corporate opportunities. It has been shown that the application of fiduciary duties in terms of the Act is wider than at common law. This wider application finds expression in the expansion of the meaning of director by the Act and by the extension of fiduciary duties to subsidiary companies. While the broad application of fiduciary duties has merit, the seating of the fiduciary duty to avoid a conflict of interest as it is found in the Act is not clear. The recent SCA decision in the *Modise* matter seems to have subsumed the fiduciary duty to avoid a conflict of interest within the duty to exercise their powers in good faith and in the best interests of the company. It is submitted that the difference between the duty to avoid a conflict of interest and the fiduciary duty to act in good faith and the best interests of the company are based upon more than mere nuance and that that the difference ought to expressly acknowledged and diligently maintained.

(a) not use the position of director, or any information obtained while acting in the capacity of a director –
  (i) to gain for the director, or another person other than the company or a wholly-owned subsidiary of the company; or
  (ii) to knowingly cause harm to the company or a subsidiary of the company; and
(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director –
  (i) reasonably believes that the information is –
    (aa) immaterial to the company; or

    (bb)generally available to the public, or known to the other

    directors; or

is bound not to disclose that information by any legal or ethical obligation".

[60]Cassim *et al* (2012) at 534.

[61]Ibid.

CHAPTER 3: THE COMMON LAW

3.1. INTRODUCTION

As has been shown, the Act has adopted the partial codification method in respect of directors' fiduciary duties. In this respect, the court has described the common law as the "[sub]structure of company law upon which the superstructure of the Act rests".[62] The result being that common law is still applicable and directors' duties are still flexible and capable of development.[63]

The development of fiduciary duties at common law has its roots in the English law applicable to trustees.[64] At common law, there are three broad categories of fiduciary duties namely the duty to act in good faith and with loyalty towards the company, the duty to exercise powers in a bona fide manner, and in the best interests of the company, and finally the duty to avoid a conflict of interest.[65] We are solely concerned with the duty to avoid a conflict of interest. At its core, the duty of a director to avoid a conflict of interest is a strict and inflexible one. The application and scope of the fiduciary duty are prophylactic.[66]

In turn, the duty to avoid a conflict of interest encompasses at least three sub duties, namely that:

(a) she may not place herself in positions of conflicts of interest of duty (the no-conflict rule); and/or
(b) she may not make a secret profit (the no-profit rule); and/or
(c) she may not acquire economic opportunities for herself (the corporate opportunity rule).[67]

The fiduciary duty to avoid a conflict of interest requires that a director does not place herself in a position where she has a personal interest or a duty, that conflicts or "may conflict" with her duty to the company.[68] It is important to note that the existence of the fiduciary duty, its nature, and the extent of its application are questions of fact adduced by a consideration of the relevant

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[62]*Mthimunye Bakoro v Petroleum Oil and Gas Corporation of South Africa (SCO) Limited and Another* [2015] (6) SA 338 (WCC) at 35.
[63]Delport *et al* (2019) at 297.
[64]Ashburner (1902) 421.
[65]Mupangavanhu (2017) 28 *Stell Lr* 2017 at 150-151.
[66]Cassim *et al* (2012) 534: see also *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112) at 35
[67]Ibid at 536.
[68]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178-179.

circumstances of the relationship in question.[69] The fiduciary duty to avoid a conflict of interest has been described as the core duty of a fiduciary. This is so as the duty requires that a director account for any secret profit(s) made or received by her in breach, where the duty is breached.[70]

The strictness of the duty's application is encapsulated in the case of *Bray v Ford* wherein Lord Herchell famously stated: "that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; that he is not allowed to put himself in a position where his interest and duty conflict". The rule is based on the consideration that, "human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary duty being swayed by interest rather than by duty and thus prejudicing those whom he was bound to protect".[71] The duty to avoid a conflict of interest usually finds application, especially before the prevalence of electronic record keeping, in circumstances where there is a lack of evidence that the party owing the duty has subordinated the interests of those he stands as a fiduciary to, to his own.[72] In the case of *Ex parte Bennett*, Lord Eldon held that the "safest rule is that a transaction, which under circumstances should not be permitted, shall not take effect upon the general principle; as if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases"[73] It is submitted that Lord Eldon ought to be understood to mean that the strict application of the duty is warranted by power underlying power dynamic between the fiduciary and trustee together with the need to circumscribe future transgressions of the fiduciary duty.

This is reinforced by the decision in the case of *Aberdeen Rail Co v Blaikie Bros* where Lord Cranworth stated "no one having duties to discharge of a fiduciary nature shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."[74]. The echo of Lord Cranworth's judgment is heard in our law reports. One such echo being the judgment of Theron J where it is stated that there exists "the universally respected one [principle] that no transaction

[69]*Phillips v Fieldstone Africa (Pty)* Ltd 2004 (3) SA 465 (SCA) at 477 H.
[70]Cassim *et al* (2012) 534.
[71]*Bray v Ford* [1896] A.C. 44 at 51
[72]Ashburner (1902) 422.
[73]*Ex parte Bennett* (1805) 10 Ves. 381 at 400.
[74]*Aberdeen Rail Co v Blaikie Bros* (1854) 1 Macq. 461 at 471.

where interest and duty conflict should be recognised or countenanced by the law"[75]. It is submitted that this statement while made about a fiduciary relationship arising from a contract, goes some lengths in demonstrating the underlying rationale of the enforcement of fiduciary duty.

In assessing a breach of the fiduciary duty to avoid a conflict of interest the test used is the reasonable man standard, having regard to "common sense" and the "particular circumstances of the case".[76] It has been shown that certain duties flow from the general duty to avoid a conflict of interest. These are: (a) the rule against self-dealing and the rule (the fair dealing rule) that requires disclosure of interests in company contracts; (b) the duty to account for secret or incidental profits; (c) the duty not to take up corporate opportunities for personal gain; (d) the duty to not misuse confidential [company] information: and (e) the duty not to compete with the company.[77] These duties are viewed as sub-rules to the general duty to avoid a conflict of interest.[78]

In comparison, Cassim *et al* state that there are "two separate and independent but closely related legal principles that apply" at common law namely:"(a) duty to avoid a conflict of personal interests ("the no-conflict rule"), and (b) a duty not to make a profit from the fiduciary's position as a director ("the no-profit rule")". These two rules are augmented by the corporate opportunity rule which prohibits a director from usurping contracts, information, or other opportunities properly belonging to the company, for herself.

It is submitted that the analytical approach adopted by Cassim *et al* and Delport *et al* differ only in form, in substance they are identical. Whereas Delport *et al* consider the various elements of fiduciary duty in the pure sense, Cassim *et al* follow the more entrenched approach. It is further submitted that the approach of Cassim *et al* follows that of the courts.[79] Their approach admits of this, and it is submitted, seeks to posit a practical approach inclusive of the subparts. It is for this reason the analysis that follows will draw from their analytical framework.

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[75]Peffers No and Another v Attorneys Notaries and Conveyancers Fidelity Fund Board of Control 1965(2) SA 53 (C) at 56D.

[76]*Boardman v Phipps* 1967 2 AC 46 at 123-4.

[77]Delport *et al* (2019) 298(1) to (6).

[78]Williams *et al* (2013) 141.

[79] *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112 at 35. See also *Symington and Others v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd* 2005 (5) SA 550 SCA.

3.2. THE NO-PROFIT AND NO-CONFLICT RULES

The English case of *Regal Hastings v Gulliver*[80] is the locus classicus of the duty to avoid a conflict of interest at common law. As pointed out by Cassim *et al* this "seminal case best illustrates the strict-application of the no-profit rule".[81]

The no-profit rule can be described as one that prohibits directors of a company from profiting at the expense of the company.[82] To trigger a breach of the fiduciary duty, the profit made by the director must be acquired during "the course and execution of the duties of her office"[83] or by "the use of her office".[84] The duty is sometimes referred to as the duty to account for secret profits or the rule against self-dealing.[85] It is submitted that the use of the word secret is misleading given that, as demonstrated above, known profits also fall within the ambit of the duty. The definition of "profit" is not limited to money but is much wider and includes all gains or advantages obtained by a director who gains some benefit in violation of the fiduciary duty.[86]

The South African courts adopted this reasoning from the *Regal Hastings* in the case of *Phillips v Fieldstone*.[87] The strict application of the no-profit rule is counter-balanced by the disclosure provisions set out in section 75 of the Act. As explained above, a director is entitled to retain profits that would accrue to her where she has obtained the free consent of the required majority to pass the necessary resolution in terms of the company's Memorandum of Incorporation, shareholder agreement, or both, after full disclosure.[88] It is submitted that this tempers the strict application of the no-profit rule.

In the case of *Aero Service Ltd v O'Malley*[89]("the *Canero* case"), the Canadian Supreme Court ("the SCA") supported the view that the profit may have to be disgorged, even in instances where the profit was not gained at the expense of the company, on the ground that a director must not be

[80]*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL); [1967] 2 AC 134.
[81]Cassim *et al* (2012) 536.
[82]*Parker v Mckenna* (1874) LR 10 Ch App 96 at 118.
[83]*Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4 at 33-4.*
[84]*Regal (Hastings) Ltd v Gulliver* [1967] 2 AC.
[85]Williams *et al* (2013) 141 and Delport *et al* (2019) 298(4).
[86]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[87]*Philips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 482 (E).
[88]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at para 31.
[89]*Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371.

permitted to use her position as a fiduciary to benefit from the company even in instances where the opportunity is not available to the company.[90]

In the strict sense, the no-conflict of interest rule is only breached in instances where a director, acting on behalf of her company, does so in a manner or instance where she has an interest or duty that conflicts with or may possibly conflict with, a duty she owes to the company.[91]

The no-conflict rule is distinct from the no-profit rule in that a contravention of the no-conflict rule does not require that the directors to have made a profit. Therefore, the importance of the distinction between the no-profit and no-conflict rules lies in the extension of the fiduciary duty to not only actual conflicts of interest but also potential conflicts of interest.[92]

It is submitted that an understanding of the distinction between the no-profit and no-conflict rules facilitates the proper understanding of the nature and extent of the corporate opportunity rule. It is for this reason that the no-profit and no-conflict rules have been discussed together, separately from the corporate opportunity rule.

3.3. THE CORPORATE OPPORTUNITY RULE

A director is in certain circumstances required to acquire an economic opportunity for the company. Such an economic opportunity is described as a corporate opportunity and is the property of the company.[93] In instances where a director acquires a corporate opportunity for herself, the law will treat the acquisition as if it has been made on behalf of the company. This will allow the company to claim the opportunity back for itself or, in instances where it is no longer feasible or possible to claim back the opportunity, allow the company to claim that the director disgorge her profits[94] made from usurping the opportunity, or damages from the delinquent director.[95] The duty not to usurp a corporate opportunity of the company does not arise in the abstract relationship

[90]Cassim *et al* (2012) at 538.
[91] *Aberdeen Rail Co v Blaikie Bros* (1854), 1 Macq. 461, p.471.
[92] Ibid Cassim *et al* (2012) at 537; see also *Philips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 479 para 31.
[93]Delport (2019) 298(4).
[94]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at paragraphs179 -180 200.
[95]Ibid at 241.

between a director and a company but rather arises from a relationship between the company, the director, and a particular corporate opportunity.[96]

The High Court in the recent case of *Big Catch Fishing* set the tone for the courts' approach in stating that "a strict ethic pervades this area of law which ethic disqualifies a director or senior officer from usurping for himself or diverting to another person with whom he or she has associated a business opportunity even after his resignation".[97] Whether a director has breached his fiduciary duties by subverting a corporate opportunity properly belonging to the company can only be answered concerning the particular facts and circumstances of the case.[98] That being said, the courts have found that a director would be said to have breached her duty where she is simultaneously on the board of two competing companies.[99] In the *Sibex case*, the court stated "it would be a most unusual situation which allowed directors … of one company to act in the same or similar capacity for a rival without actual or potential conflict situations arising with frequent regularity".[100]

The corporate opportunity rule is distinct to and different from the no-profit understood to encompass the no-conflict rule in that the corporate opportunity rule prohibits a director from usurping any contract, information, or other opportunities that properly belong to the company, the diversion of which, by the director to himself, would constitute a breach of the fiduciary duty. The SCA recognised the separate existence of the rule in the *Da Silva v CH Chemicals* case ("**the *Da Silva* case**").[101] In this case, the SCA stated that "while any attempt at an all-embracing definition is likely to prove a fruitless task, a corporate opportunity has been variously described as one which the company was 'actively pursuing'[which term is congruent with the *Canero* case]; or one which can be said to be within the 'the company's existing or prospective business activities' or which 'related to the operations of the company within the scope of its business' [in line with *Bellairs v Hodnet and Another* above] or which fall within its line of business [*Movie*

[96]Ibid at paragraphss 179 ,187 208-11,218,222 and *Sibex Construction (SA) Pty Ltd v Injectaseal* CC 1988 (2) SA 54 (T) at 66.
[97] *Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others* [2019] ZAWCHC 20 at 32.
[98]*Sibex Construction (SA) Pty Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 65-67. See also *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C) at 313.
[99]*Atlas Organic Fertilizers v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) 173 (T) at 198.
[100]*Sibex Construction (SA) Pty Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 201.
[101]*Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at 627B-E; see also Cassim *et al* (2012) at 538.

Camera v Van Wyk]".[102] The court went on to state that the inquiry will require careful attention to be given to the facts of the case as well as the particular opportunity in question to determine if the exploitation of the opportunity for the advantage of the director contravened the fiduciary duty.[103]

Three primary situations place a director in the crosshairs of the corporate opportunity rule. First, where a director is given a duty, either in express terms or by implication, to acquire a corporate opportunity for the company or advise the company in respect of the particular opportunity.[104] Secondly, if she has been given, expressly or impliedly, a general mandate to acquire opportunities or advise on or pass the information on to the company in respect of the particular duty or if she controls the company or those who manage the company's affairs and where the company cannot acquire the opportunities without her consent.[105] Thirdly, the corporate opportunity rule prohibits a director from usurping an opportunity the company is actively pursuing or can be said to belong to the company.[106]

The duty to prevent conflict of interest extends to situations where there is a real possibility of a conflict of interest and is not limited to situations where actual conflicts of interest are present.[107] The duty extends in certain circumstances to senior employees and managers.[108] The duty includes a duty to convey information that comes to a director in their capacity as director of the company. Resigning as a director does not release a director from the obligation to pass on the information.[109]

The duty to prevent a conflict of interest is breached where a director sabotages the contractual opportunities of the company for her advantage.[110] As stated in the *Cyberscene* case,[111] a director breaches the fiduciary duty where he or she "uses confidential information to advance the interests

[102]*Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C) at 313 para 57.
[103]*Da Silva and Others v CH Chemicals* 2008 (6) SA 620 (SCA)at 627 I - J.
[104]*Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325.
[105]*African Claim and Land Co Ltd v WJ Langermann* 1905 TS 516.
[106]*Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 382.
[107]*Aberdeen Railway Co v Blaikie Bros* [1854], 1 Macq. 461at 471.
[108]*Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371.
[109]*Industrial Development Consultants v* Cooley [1972] 2 ALL ER 162.
[110]*Du Plessis NO v Phelps 1995* (4) SA 165 (C) at p 170 – 1.
[111]*Cyberscence (Ltd) and Others v I-Kiosk Internet and Information* (Pty) Ltd 2000 (3) SA 806 (C).

of a rival concern or his own business to the prejudice of those of his company."[112]In reaching its decision in the *Cybersecene* case, the court referred to the diversion of maturing business opportunities that properly belonged to the company.[113]

The strict application of the no-profit and no-conflict rules was adopted in the case of *Bhullar v Bhullar*,[114]However, this strict and inflexible approach, it seems, has been tempered by the approach of the SCA in the *Ghersi* case[115] wherein Cloete JA stated, in a unanimous judgment, stated that "It does not follow that because a man is a director of a company which engages in property development, such person is automatically, in the absence of an agreement to the contrary, obliged to offer all property developments [opportunities] of whatever nature to the company, on pain of being held to have breached his fiduciary duty".[116] The SCA in the *Ganes* case[117] confirmed that where an employee in the course of his employment is in breach of the fiduciary duty owed by the employee to the employer may claim back any secret profit made by the employee. Moreover, a director does not escape the ambit of the duty not to misappropriate corporate opportunities through resignation.[118]

In instances where a company has a sole member and director, the decision of the director to acquire a corporate opportunity for herself, where the opportunity properly belonged to the company, is not a breach of the duty to avoid acquiring corporate opportunity. This is so because the knowledge of the director is considered to be the knowledge of the company with the result that the company tacitly consented to the acquisition.[119]

3.4. CONCLUSION

It is clear from the above that the duty to avoid a conflict of interest is, at common law, made up of the no-profit and no-conflict rules taken together with the corporate opportunity doctrine. More specifically, a director may not through her capacity as a director make a profit in breach of her

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[112]Ibid at 821.
[113]Ibid at *816–89.*
[114]*Bullar v Bullar* [2003] 2 BCLC 241 (CA); see also Cassim *et al* (2012) at 543.
[115]*Ghersi and Others v Tiber Developments (Pty) Ltd and Others* 2007 (4) SA 536 (SCA).
[116]*Ghersi and Others v Tiber Developments (Pty) Ltd and Others* at 9.
[117]*Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 262E-G.
[118]*Spieth v Nagel [1997] 3 ALL SA 316 (W) at 322-4.*
[119]*Pressings & Plastics (Pty) Ltd v Sohnuis* 1985 (4) SA 524 (T) at 529.

fiduciary duty. It has been shown above that the term “secret” when describing profit, while useful conceptionally, should be used with caution as any profit that is made by a director in breach of her fiduciary duty, not only secret ones, will fall foul of her fiduciary duties. The concept of profit is a broad one and is not limited to mere profit.

The no-conflict rule requires a director not to be or act in conflict with the interest of the company. It is sufficient to breach this rule where there is merely a reasonable apprehension, by a reasonable person, that a real sensible possibility of conflict exists. The no-conflict rule is not confined to assets but also includes confidential information.

Finally, the duty to avoid a conflict of interest prohibits the acquisition of economic opportunities of the company and includes the corporate opportunity doctrine. Where a director misappropriates or usurps an opportunity that properly belongs to the company then she is in breach of her fiduciary duty. Senior employees are included in the prohibition. The prohibition extends itself not only to corporate opportunities that the company is pursuing but also to those that are within the company’s line or are maturing business opportunities. At common law, the full consent of the company, acting through its shareholders is sufficient to allow a director to pursue a corporate opportunity.

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CHAPTER 4: LIABILITY

4.1. INTRODUCTION

This chapter analyses director liability for breach of fiduciary duties as found at common law as well as under the Companies Act. It will be shown that liability in respect of a director's fiduciary duties is *sui generis* in nature as opposed to delictual or contractual. Liability in this respect will be discussed both as it is found at common law in terms of which the duty to account for secret or incidental profits, disclosure of interests in contracts, the so-called fair dealing rule, and finally liability in respect of corporate opportunities will be canvassed. Also, liability, as it is established under the Act, will be discussed. It will be demonstrated that the continued strict application of the fiduciary duty is ameliorated by the disclosure provisions found in section 75 of the Act.

4.2. LIABILITY AT COMMON LAW

The facts involved in cases concerning a director's breach of fiduciary duty to prevent conflict of interest are generally involved and complex.[120] This is clear when one has regard to the debate surrounding whether the basis in law for action in terms of a breach of fiduciary duties should be seated in the aquilian action for damages ("delict centred approach"), are contractual in nature ("contract centred approach") or whether it should be regarded as *sui generis*.[121]

The argument in support of the delict-centric approach was put forward by Du Plessis. The rationale thereof being twofold, namely that the court's reliance on English Law principles is unnecessary and secondly that such a response would aid in legal certainty.[122] However, despite its immediate appeal, certain pitfalls concerning the delict-centric approach are revealed on closer inspection. Namely, that such an approach would entail an undesirable conflation of the director's duty of care and skill and her duty to avoid a conflict of interest owed to the company[123]. It is the breach of a director's duty of care and skill that is delictual in nature.[124] Also, the approach would entail a narrowing of the enforcement of fiduciary duties. Moreover, the delict-centric approach

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[120]See *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) and *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL); [1967] 2 AC 134.
[121]Havenga (1996) *SA Merc LJ* 366 – 376.
[122]Du Plessis (1990) 103.
[123]Havenga (1997) 376; for an example of the SCA recently conflating director's fiduciary duties the reader is referred to *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112 at 35.
[124]Havenga (2006) 18 *SA Merc LJ* 229 *at* 234.

would by implication entail either a departure from established case law or its application would experience difficulty, in certain circumstances, satisfying the elements of wrongfulness and damage.[125]

Liability for breach of fiduciary duties cannot be contract-centric in that a director does not stand in a contractual relationship with the company merely by her appointment as such. Also, a contractual relationship is not established between a director and the company by virtue of the Memorandum of Incorporation.[126] While a director can no doubt find herself in a contractual relationship with the company, this cannot be the basis of her fiduciary duties towards the company.[127] The Appellate Division in the *Randfontein* case endorsed the *sui generis* approach.[128]

At common law, the following remedies are generally available to an aggrieved party:

(a) an interdict such as in cases involving the appropriation of corporate opportunities;[129]

(b) rescission of contract;[130]

(c) damages where a director has expropriated a corporate opportunity;[131]

(d) an order to account for profits resulting from the misuse of confidential corporate information;[132] and

(e) where the directors breach their fiduciary duties not to make secret profits the company may force the director to disgorge the profits made.[133]

These remedies are available to litigants in circumstances where a case is founded on a breach of fiduciary duties. It is important to emphasise that a proper analysis of the underlying facts of a

[125]Havenga (1996) 8 SA Merc LJ at 376.
[126]*De Villiers v Jacobsdal Saltworks (Michaels and De Villiers (Pty)* Ltd 1953 (3) SA 873 (O).
[127]Davis *et al* (2009) 98.
[128]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168. Also see *Cohen v Segal* [1970] 3 SA 702 (W).
[129]*Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 68I-J.
[130]*Singh v McCarthy Retail Ltd t/a MchIntosch Motors* 2000 (A) SA 795 (SCA) at 12 and 15.
[131]*Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* (1909) ORC 65.
[132]Havenga (1996) 8 *SA Merc LJ* at 245.
[133]*Symington and Others v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 34.

matter will allow for the most suitable remedy to be utilised. We now turn to how the courts have dealt with liability in respect of breach of the fiduciary duty under the following headings introduced above.

4.2.1. DUTY TO ACCOUNT FOR SECRET OR INCIDENTAL PROFITS

The seminal case of *Regal Hastings* needs to be re-emphasised here as its application demonstrates the strict ethic of the no-profit rule.[134] Where a director profits because of her office in violation of her fiduciary duty she is liable to account to the company for these profits.[135] Our case law is replete with instructive examples of the working of this principle.[136] Where a claim for damages is sought the aggrieved party will have to prove the extent of the losses suffered by it.[137] As has already been stated above, a director is liable for having breached the no-profit rule where her profits are made regardless of whether the company suffers damage.[138]

4.1.2. DISCLOSURE OF INTEREST IN CONTRACTS, THE FAIR-DEALING RULE

A director must disclose any interest she may have in a contract. Where a director breaches this duty, she will have to account to the company for any profits she has made. Also, she will be liable to the company for damages in instances where the company suffered a loss as a result of damages the company may have suffered.[139] Notably, at common law, contracts entered into by directors, where there exists a conflict of interest, are voidable at the instance of the company.[140] The inference being that they are not *ipso facto* void.[141] A failure by a director to disclose an interest in a contract may lead to a claim to account for profits.[142]

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[134]Cassim *et al* (2012) 536.
[135]*Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) at 66D.
[136]*Symington v Pretoria – Oos Privaat Hospital Bedryfs (Pty) ltd* [2005] ZASCA 47 at 27.
[137]Havenga (1996) 8 *SA Merc LJ* at 245.
[138]*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL); [1967] 2 AC 134.
[139]Havenga (2007) 1 *Journal of South African Law* 169 at 177. Also see *Permanent Building Society v Mcgee* (1993) ASCR 260 (WASC) 289-290.
[140]*Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488 (CA) at 567-568.
[141]*Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) at 160-1.
[142]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178-9.

Under section 75(7)(b)(i) and 75(8) of the Companies Act the position is different in that the contract is deemed to be invalid unless it has been ratified or validated in accordance with the aforementioned sections.[143]

4.1.3. CORPORATE OPPORTUNITIES

As discussed above, corporate information includes the company's confidential information but is not limited thereto, as the concept includes corporate information generally.[144] The difference lies in the remedies applicable in that where a director breaches her fiduciary duty through the misuse of confidential corporate information the appropriate remedy is an interdict aimed at restraining the conduct together with an action for damages.[145] It is submitted that this would most likely be in the form of an urgent interdict comprising part A, being the interdict on the application, and a part B for damages sought as an action which is to be brought within a specified time limit.

The use of confidential corporate information must be distinguished from instances where a director exploits corporate information for her benefit. In the latter circumstances, an action to have her account for the profits made would be appropriate.[146] It is easy to envisage facts that give rise to other areas of law in this regard such as in circumstances of restraint of trade, where the director in question was contracted to the company but a clear distinction must be kept between the *sui generis* breach of fiduciary duties and other causes of action.

4.3. THE COMPANIES ACT

Liability in terms of the Companies Act attaches to a director in terms of section 77 read with sections 75 and 76(2) of the Act.[147] Directors who have not been formally appointed as such, incur liability from the time they act as a director, as the fiduciary relationship owed to the company by such director flows not from the appointment of the person as a director "as an incident of the office" but rather as a consequence of the nature of a director's position concerning the

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[143] Section 75(7)(b)(i) of the Companies Act; see also *Omar v Inhouse* [2015] 2 All SA 39 (WCC) at para 64.
[144]See para 3.3 of Chapter 3 above and the discussion in respect of corporate opportunities found thereunder.
[145]Havenga (1996) 8 *SA Merc LJ* 233 at 245.
[146]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 179-180 and 200. Also see *Da Silva v CH Chemicals (Pty) Ltd 1 All SA 216 (SCA)* and *Phillips v Fieldstone Africa (Pty) ltd* 2004 1 All SA 150 SCA.
[147]For the sake of completeness, s 77 makes provision for liability of directors and prescribed officers); s 76 makes provision for standards of directors' conduct; and s 75 provides for director's personal financial interest.

company.[148] This is so in that the fiduciary relationship has its basis in good faith.[149] Given that the fiduciary relationship of a director stems from her relationship of good faith and trust, liability in respect of fiduciary duties extends to non-executive directors.[150]

Section 77 dovetails with sections 75 and 76 of the Companies Act and deals directly with the liability of directors and prescribed officers. In these sections, "director" has an extended meaning and includes prescribed officers or a board committee member.[151]Therefore, it will be necessary to deal with both section 75 and section 76 together with section 77. Section 77 concerns itself with directors and prescribed officers' liability to the company.[152] Section 77(1)(b) also extends the application thereof to board committee members.[153] The position at common law is generally that the company is the proper plaintiff against a director in matters concerning the breach of her fiduciary duty. [154] The position is seemingly altered in that the Act allows shareholders of the company to institute an action against any person, presumably including directors, who intentionally or fraudulently cause damages to the company.[155] However, our courts have confirmed the proper plaintiff rule, particularly in the context of section 218(2), and that the derivative action can be utilised to enforce certain claims.[156] There is of course the derivative action as set out in section 165 of the Act which abolished the common law derivative action and allows interested parties to bring court proceedings for and on behalf of the company.[157]Also, the Act

[148]*Howard v Herrigel* 1991 (2) SA 660 (A) at 678 A.
[149]*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD at 177-8.
[150]*Howard v Herrigel NO* 1991 (2) SA 660 (A).
[151]Section 75(1) of the Companies Act.
[152]Section 77(1)(a) and (b) of the Companies Act. see also Delport (2019) at 301.
[153]Section 77(1)(b) of the Companies.
[154]*Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.
[155]Section 20(6) of the Companies Act.
[156]*Hlumisa Case v Kirkinis* [2020] ZASCA 83 at 34.
[157]Section 165(2) of the Companies Act provides:
"(2)a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person –

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
(b) is a director or prescribed officer of the company or of a related company;
(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person."; see also Cassim (2016) 1.

provides for extended standing to bring proceedings.[158] However, the machinery of the derivative action is not directly relevant to the discussion at hand and so it shall not be given further attention.

Section 75 deals with the personal financial interests of directors, in the wide sense. It states that, save in certain circumstances provided by the section, a director has certain disclosure obligations in respect of personal financial interests.[159] Where a director fails to comply with the provisions of section 75, and the company fails to ratify the contract, her liability to the company will be established in terms of either section 77(2)(a) or (b) of the Act. Section 75(8) gives the court the discretion, on application, to declare a transaction valid, with the necessary shareholder or director approval, notwithstanding a directors' failure to disclose her interest.[160] However, it is submitted that the court would not be hard-pressed to relieve a director from her liability to disgorge profits where she has subverted or misappropriated a corporate opportunity owing to the nature of trust underlying the duty to avoid a conflict of interest.

Liability for breach of this fiduciary duty is found in section 77(2)(a) read with the standards of conduct for directors contained in section 76(2) of the Act. A plain reading of these provisions suggests that liability is imposed only for loss, damages, or costs sustained by the company in consequence of the director's breach of his or her fiduciary duty.[161] Beyond liability for failure to avoid conflict of interest, directors' liability may also be imposed for breach of her fiduciary duty where she knowingly acted on behalf of the company without the necessary authority to do so.[162]

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[158]Section 157 of the Companies Act.

[159]Section 75(2) of the Companies Act states:

"(2)This section does not apply –

(a) to a director of a company –

i. in respect of a decision that may generally affect-

aa. all of the directors of the company in their capacity as directors; or

bb. a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the directors of persons related or inter-related to the director; or

ii. in respect of a proposal to remove that director from offices as contemplated in section 71; or

(b) to a company or its director, if one person –

i. holds all of the beneficial interests of all of the issued securities of the company; and

ii. is the only director of the company."

[160]Section 75(8) of the Companies Act.

[161]Cassim (2012) 550 and 551.

[162]Section 1 of the Companies Act also see the discussion concerning knowing and knowingly discussed under para 2.3 in Chapter 2 above.

Liability is also triggered where a director intentionally acted recklessly or with gross negligence in an attempt to defraud the company or where she acquiesced in such conduct.[163]

Given the above, section 77(2)(a) does not expressly deal with situations where a director has breached her fiduciary duty without the company having suffered damages, costs, or losses.[164] In this respect, Delport *et al* point out that liability for directors for any benefit irrespective of any damage to the company is not expressly covered in the Act.[165] The authors go on to state that section 77 does not create a statutory liability for disgorgement of the improper profit "irrespective of or in the absence of damage to the company".[166]

An interpretation including the strict application of liability for disgorgement of profits would be in line with established common law developments that trigger a directors' liability in instances where the company has not suffered damages.[167] The omission of the common law disgorgement of profits may be the result of an oversight in the Act.[168] Regardless, a litigant may still be able to utilise section 218(2) of the Act in instances where the company has suffered no damages only where the litigant can do so in terms of the derivative action. This is so as the SCA has recently restated the proper plaintiff rule as it relates to reflective loss suffered by a company.[169] This is because the common law doctrine of disgorgement is well established and is still in use.[170]

Interestingly, section 77(9) has a built-in safety valve whereby a director, other than in instances of having wilful misconduct or wilful breach of trust, may apply to court for relief wholly or in part from any liability in terms of the section on terms considered just by the court. This relief may be granted provided the director concerned is or may be liable but has acted "honestly and reasonably"[171] or "having regard to the circumstances of the case, including the appointment of

[163]Delport (2019) 302.
[164]McLennan (2009) 1 *TSAR* 184 at 185.
[165]Delport (2019) at 302.
[166]Delport (2019) at 301.
[167] Cases where strict liability for disgorgement of profits include *Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134 (HL); Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA).
[168]Stevens (2016) 37.
[169]*Hlumisa Case v Kirkinis* [2020] ZASCA 83 at para 54 where the court states that the reference to any person in 218(3) of the Companies Act should be taken to mean a "reinforcement of the company's rights".
[170]Cassim (2012) 550-3.
[171]Section 77(9) (a) of the Companies Act.

the director, it would be fair to excuse the director".[172] It immediately becomes apparent that this provision would ameliorate the strict ethic of the no-profit rule in instances where the company has not suffered a loss. It is submitted that a case may be persuasively made that the legislature intended to retain the strict application of the no-profit rule, together with the accompanying prohibition of a director's profits, even in instances where the company suffers no damage. However, this approach would not accord with the wording of section 77 (2)(a). The result is that section 77(2)(a) of the Act has narrowed the common law no-profit rule.

Lastly, directors cannot seek to absolve themselves from liability for acting in contravention of section 75 read together sections 76 and 77, through exclusion clauses in agreements or the company's Memorandum of Incorporations which seeks to restrict or limit their fiduciary duties.[173] Any agreement or provision in the company's Memorandum of Incorporation purporting to do so is deemed void by the Act.

4.4. CONCLUSION

It has been demonstrated that a director's liability for breach of fiduciary duties is *sui generis* in nature. Furthermore, the common law informs liability under the Act through section 77 read with sections 75 and section 76(2) and 76(3) thereof. the company is also considered the proper plaintiff in respect of bringing matters concerning it except those parties permitted to bring application on its behalf under the derivative action. The court is permitted in certain circumstances under section 77(2)(b) of the Act to declare a transaction valid.

Also, it has been shown that the position under the Companies Act alters the common law in that the Companies Act requires ratification or validation of a transaction or contract through the mechanisms provided in section 75(7)(b)(i) or section 75(8) of the act. This being different from the position at common law whereby full disclosure and proper consent are sufficient.

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[172]Section 77(9) of the Companies Act states that: "In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that –

(a) the director is or may be liable, but has acted honestly and reasonably; or

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director".

[173]Section 78(2) of the Companies Act.

CHAPTER 5 COMPARATIVE ANALYSIS – THE POSITION AT ENGLISH LAW

5.1. INTRODUCTION

The benefit of a comparative legal study is that it allows us, where appropriate, to gauge the bearing of our law's development. As has already been demonstrated above, directors' fiduciary duties as they are found in South African law originated from English company law. Therefore, understanding our position relative to that of English company law today is of great value.

This chapter will use the term UK law to describe the company law applicable to and governing companies in the United Kingdom, being England, Northern Ireland, Scotland, and Wales, and Northern Ireland.[174] As already discussed, many English law doctrines are readily accepted in our company law.[175] It is submitted that this should not be taken to mean our law ought to merely mirror English law but rather that the common roots of the two systems naturally lends itself to a comparative investigation. Therefore, by comparing the development of UK law with our own we may enrich our understanding, avoid pitfalls, and take steps toward a sounder application of the duty to avoid a conflict of interest in our law. Accordingly, this chapter will concern itself with an analysis of the UK position as it relates to the fiduciary duty of directors to avoid a conflict of interest as it is posited in statute and interpreted through case law.

5.2. UNITED KINGDOM (UK)

The United Kingdom Companies Act (c46) of 2006 (the "UK Act")[176] has codified fiduciary duties owed by directors to their company. When interpreting and applying portions of the UK Act concerning a director's fiduciary duties, principles of equity and the common law as developed through case law are directly relevant as will be shown below.

Directors' general duties are located in chapter 2 of the UK Act under sections 171 to 177 thereof. The result of the aforementioned sections has been, as in our case, the codification of directors'

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[174]Section 1 of the UK Companies Act – see definition of company.

[175]See Chapter 3 above; also see *Philips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 482 (E). See also *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] ZASCA 112 at 35 and 49 where clear reference is made to common law derived from English law.

[176]Companies Act (c46) of 2006.

fiduciary duties.[177] The duty to avoid a conflict of interest is situated in section 175 of the UK Act.[178] In this respect, section 175 states as follows:

> "(1) A director of a company must avoid a situation in which he has or can have a direct or indirect interest that conflicts or possibly may conflict with the interests of the company.
>
> (2) This applies in particular to the exploitation of any property, information, or opportunity (and it is immaterial whether the company could take advantage of the property, information, or opportunity).
>
> (4) The duty is not infringed –
>
> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
>
> (b) if the matter has been authorised by the directors.

While both the application of the corporate opportunity rule and the no-profit rule has been retained in UK courts the application of the no-profit rule is a rare occurrence.[179]

The severity of the no-profit rule is tempered by section 175(4)(b) which provides that section 175 is not infringed where the conflict has been properly authorised.[180] Also, section 176[181] of the UK Act prohibits directors from accepting benefits from third parties where the benefit is conferred because she is a director[182] or for her doing or not doing anything as a director.[183] This does not extend to benefits "received by a director from a person whom his services are provided to the company".[184] Finally, section 176 provides a safety valve which provides that if the acceptance of

[177]Stevens (2016) 49.
[178]Goddard (2008) 12 *Edinburgh LR* 468 at 468.
[179]Stevens (2016) 50.
[180]Section 175(4)(b) of the UK Companies Act.
[181]Section 176 of the UK Companies Act.
[182]Section 176(1)(a) of the UK Companies Act.
[183]Section 176(1)(b) of the UK Companies Act.
[184]Section 176(3) of the UK Companies Act.

the benefit cannot reasonably be regarded as "likely to give rise to a conflict of interest" then the duty not to accept benefits from a third party is not infringed.[185]

Having regard to section 170(3) of the UK Act, which states the general duties of directors "are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director", it would at first glance seem that the UK Act has followed a different approach to that of the South African Companies Act in that they have chosen to apply statutory duties in place of those found at commons law rules.[186] As demonstrated above, the application of this difference in wording does not seem to be material when one has regard to section 170(4) of the UK Act which provides that "the general duties [of directors] shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties". The UK Act provides further that the consequences of a breach of sections 171 to 177 are the same as those that apply to a breach of the "corresponding common law rule or equitable principle applied".[187]

As in our own Companies Act, the only defence available to a director is authorisation of the transaction by the company. This is particularly apparent when regard is had to the duty to disclose that rests upon a director as set out in section 177 of the UK Companies Act, the section is headed "duty to declare interest in proposed transaction or arrangement".[188] In this respect, it is submitted that the position is analogous to our own. That being said, however, subsection 177(4) states that "any declaration required by this section must be made before the company enters into the transaction or arrangement". In juxtaposition, section 75(8) of the South African Act allows the court a discretion, on application by an interested party, to declare an invalid transaction or agreement valid despite the director's failure to comply with the provisions.[189] There is no similar provision in section 177 of the UK Act. Nevertheless, it is submitted that the UK statutory position regarding directors' fiduciary duties is analogous to our own.

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[185]Section 176(5) of the UK Companies Act.
[186]Bouwman (2009) 21 *SA Merc LJ* 509–511.
[187]Section 178 of the UK Companies Act.
[188]Section 75 of the Companies Act as compared with s 177 of the UK Companies Act.
[189]Section 75(8) of the Companies Act.

Regarding codification of directors' fiduciary duties, Goddard observes that the effect thereof has been to make directors fiduciary duties more accessible although there are still difficulties.[190] However, it must not be forgotten that the courts will still have recourse to earlier decisions and that the common law will continue to be of significance.[191] The Court of Appeal for England and Wales in the case of *Towers v Premier Waste Management Limited*[192] ("**the *Towers* case**") was provided the opportunity to assess the confluence of the common law and statutory duties. This is so in that judgment was handed down after the coming into effect of the UK Act but where the underlying facts rose before the coming into effect of the UK Act.[193]

Lord Justice Mummery, in the unanimous decision of the court, stated that the effect of section 170 was not to "consign the replaced rules and principles to legal history".[194] The learned judge rested his reasoning in this respect on section 170(4), which states that "the general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties".[195] The *Towers* case also confirmed the continued existence of the no-conflict rule, which includes the duty not to make a secret profit.[196] In its analysis, the Appeal court expressly stated that the duty to avoid a conflict of interest is breached even in circumstances where the company does not itself suffer a loss. It is merely by the acquisition of a profit, accruing to the director, under the office held by her, that she is in breach of her fiduciary duty.[197] This is in keeping with prior decisions.[198] The rationale followed in the *Towers* case serves as an example to our courts as to the incorporation of principles and precedents from common law into the statutory framework.[199]

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[190]Goddard (2008) 12 *Edinburgh LR* (2008) 468 at 472.
[191]Ibid at 472.
[192]*Towers v Premier Waste Management limited* [2011] EWCA Civ 923.
[193]Ibid at 3.
[194]Ibid at 5.
[195]Section 170(4) of the UK Companies Act.
[196]*Towers v Premier Waste Management limited* [2011] EWCA Civ 923 at 12.
[197]Ibid at 10.
[198]*Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 see also note [*Regal Hastings* case above] at 144.
[199]Shandu (2012) March *Without Prejudice* 14 at 16.

From the above, it is clear that the strict ethic of the no-profit and no-conflict rule at common law is preserved in UK company law. The rationale for the aforementioned rules was succinctly put forward by Lady Justice Arden as follows:

> "It may be asked why equity imposes stringent liability …. Equity imposes stringent liability on a fiduciary as a deterrent… in the interests of efficiency and to provide an incentive to fiduciaries to resist the temptation to misconduct themselves, the law imposes exacting standards on fiduciaries and an extensive liability to account".[200]

It is submitted that although the aforementioned case was decided before the coming into effect of the UK Act, it is in keeping with the Act as part of the equitable principles and duties incorporated into the interpretation of directors' duties by section 170(3) and (4). It is further submitted that; this underscores the importance of the strict application of both the rules as a point of departure for courts in the application of the duty to avoid a conflict of interest.

As stated, section 175 of the UK Act requires a director to avoid even potential conflicts of interest. This position of conflict of interest does not, however, exist if the conduct has been properly authorised or if there is "not likely to be any reasonable conflict of interest".[201] The provision is therefore comparable to section 75 of the South African Companies Act.[202] This interpretation reinforces the view that a strict ethic of the no-profit and no-conflict rule ought to be followed in South African law.

Also, section 1157 of the UK Act affords the court a discretion to relieve a director, wholly or in part on such terms as it deems fit, among others, from breach of trust if it appears to the court that the director acted honestly and reasonably, and considering the circumstances of the case, he ought fairly to be excused.[203] The aforementioned section is echoed in our context by section 77(9) of

[200]*Murad v Al-Saraj*, [2005] EWCA Civ 959 at 74, [2005] ALL ER (D) at 503.
[201]Girvin *et al* (2010) at 346.
[202]See discussion of s 75 under para 2.4 of Chapter 2 above.
[203]Section 77(9) of the Companies Act; see also s 1157 of the UK Companies Act.

the South African Companies Act.[204] It is submitted that, in light of the above, the UK Act's departure from common-law does not represent a major difference to the South African approach.

5.3. CONCLUSION

Having considered the UK Act, it is clear the codification of directors' duties in the South African Companies Act has been in lockstep with the international approach. While there is some nuance as regards the place of common law, it is clear that both jurisdictions have retained the body of jurisprudence, expressed through common law, underpinning fiduciary duties inclusive of the duty to avoid a conflict of interest.

Furthermore, while there are some subtle differences in the respective approaches adopted by the jurisdictions, both have, wisely, chosen to allow the continued influence of the common law. More specifically, it is also revealed that both systems have continued to distinguish between and maintain the application of the no-profit and no-conflict rules.

Finally, both jurisdictions have expressly provided the court with the discretion to come to the aid of a director who has nevertheless acted honestly and reasonably by relieving him of liability, either wholly or in part.

[204] See Chapter 4 above on liability. The reader is also cautioned to remember the operation of the "proper plaintiff rule" as re-stated in *Hlumisa Case v Kirkinis* [2020] ZASCA 83 at 34 and 48.

CHAPTER 6 CONCLUSION

6.1 OVERVIEW

This research has shown that company directors are fiduciaries and as such owe fiduciary duties to the company. The duty to avoid a conflict of interest is one such fiduciary duty. The duty to avoid a conflict of interest is universally accepted. The Act has expanded the common law meaning of the term "director" to include prescribed officers as well as committee and audit committee members. Additionally, fiduciary duties are now owed by directors not only to their holding companies but also their subsidiaries.[205]

While a director's other fiduciary duties are expressly mentioned in the Act, the seating of the fiduciary duty to avoid a conflict of interest as it is found in the Act is not clear. The recent SCA decision in the *Modise* matter seems to have subsumed the fiduciary duty to avoid a conflict of interest within the duty to exercise their powers in good faith and in the best interests of the company.[206] It is submitted that this is an unnecessary conflation of two separate and distinct fiduciary duties.[207]

The partial codification of the fiduciary duties by the Act has preserved the status of the common law decisions. This by necessary implication means the law surrounding directors' duties is still flexible and capable of development. Our courts have and continue to strictly apply the duty to avoid a conflict of interest which is made up of the no-profit, no-conflict, and corporate opportunity rules. [208] The strictness of the application of the no-profit and no-conflict rules is counterbalanced by the ever-present mechanisms of disclosure and approval. A component of the common law position has been maintained by section 75 of the Act, which deals with disclosure of a director's interest.[209]

The content and extent of the corporate opportunity rule has been maintained and expressly retained by our courts.[210] The corporate opportunity rule can be succinctly expressed as prohibiting

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[205]See para 2.2 under Chapter 2 above.
[206]*Modise and Another v Tladi Holdings (Pty) Ltd* (Case No 307/2019) [2020] ZASCA at para 39.
[207]See Chapter 2 and the discussion of the *Modise* case thereunder.
[208]See Chapter 2 above.
[209]See para 2.4 under Chapter 2 above.
[210]*Ibid Modise and Another* at para 37.

a director from misappropriating or subverting an economic opportunity that properly belongs to the company, to herself. However, the SCA has warned against any attempt at an all-embracing test.[211] The inline of business test and the maturing opportunity concepts are used to aid in interrogating whether the facts of a matter admit of the misappropriation of a corporate opportunity.[212] The corporate opportunity rule is, like the no-profit and no-conflict rules, strictly enforced.[213]

It has been determined that a director's liability for breach of her fiduciary duty is *sui generis* in nature. This, therefore, means a rejection of the delict-centric or contract-centric approaches. The Act attaches liability to directors in section 77 read with sections 75 and section 76(2) and 76(3). The company is considered the proper plaintiff in respect of bringing matters concerning it except those parties permitted to bring application on its behalf under the derivative action.[214] The court is permitted in certain circumstances under section 77(2)(b) of the Act to declare a transaction valid.[215]

The United Kingdom has also adopted a system of partial codification of directors' duties and has, likewise, maintained the common law's force and effect. From the above discussion, it is also revealed that both systems have continued to distinguish between and maintain the application of the no-profit and no-conflict rules. Notably, provisions relating to disclosure and approval are included in both positions. Both jurisdictions also have expressly provided the court with a discretion to come to the aid of a director who has nevertheless acted honestly and reasonably by relieving him of liability, either wholly or in part.[216]

6.2. CONCLUSION

The question raised at the outset was whether the fiduciary duty to avoid a conflict of interest is easily accessible to and understandable by directors. This research shows that the law regarding fiduciary duties, especially that of the duty to avoid a conflict of interest, generally arises in the context of a complex factual and legal matrix. The codification of the common law director duties

[211]See Chapter 3 above under 3.3.
[212]See Chapter 3 above under 3.3.
[213]See Chapter 3 above.
[214]See Chapter 4 above under 4.3.
[215]See Chapter 4 above.
[216]See Chapter 5 above.

in the Act achieves the purpose of bringing the duties to the attention of directors in an easily understandable and accessible fashion. The preservation of the common law has also allowed the Act to be as succinct as possible; however, the failure of the Act to expressly mention the duty to avoid a conflict of interest does detract from this achievement.

Accordingly, it is submitted that the Act has not sufficiently set out the duty to avoid a conflict of interest with the result that the duty runs the risk of being conflated with the other fiduciary duties owed by a director to her company with the result that it will not be treated as a stand-alone fiduciary duty.

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