

THE CORPORATE OPPORTUNITY RULE: A COMPARATIVE STUDY

by

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Declaration

I, STEFAN ANTON KLEYNHANS declare that **THE CORPORATE OPPORTUNITY RULE: A COMPARATIVE STUDY** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Summary

Company directors, being human, may be tempted to promote their own interests rather than those of the companies on whose boards they serve. Directors are subject to a number of legal duties.

A director has a fiduciary duty to act in good faith and in the best interests of the company. A number of other duties flow from this duty such as the duty to avoid a conflict of interests. The duty of a director not to appropriate a corporate opportunity belonging to the company of which he or she is a director, also flows from the duty to avoid a conflict of interests.

The common-law duties of directors which have their origins in English law, have developed over a number of years. Because of the difficulty that directors had in establishing what their duties were, a number of jurisdictions embarked on a process of codifying or partially codifying these duties. South Africa, Australia and England are three countries that have promulgated legislation which has resulted in the codification or partial codification of directors' duties. The purpose of the codification or partial codification of directors' duties was firstly to clarify the duties of directors, and secondly to make the duties more accessible to those affected by them – the directors of companies.

In South Africa the Companies Act 71 of 2008 has partially codified the duties of directors. Because directors' duties have only been partially codified there is uncertainty regarding their scope. This dissertation will focus on the possible effect of the 2008 Companies Act on the duty of a director not to take a corporate opportunity falling to the company.

In this dissertation I address two issues involving the effect of the 2008 Companies Act on the duty of a director not to appropriate a corporate

opportunity belonging to the company. Firstly, I consider whether the partially codified directors' duties are wide enough to cover issues involving the appropriation of corporate opportunities. Secondly, I consider the appropriate common-law test or tests to be applied in determining whether, in the specific circumstances, an opportunity should be classified as a corporate opportunity.

In considering whether the partially codified duties of directors are wide enough to include the corporate-opportunity rule, I compare the approach to corporate opportunities and the corporate-opportunity rule in South Africa, Australia and England.

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Table of abbreviations used

ACLC	-	Australian Company Law Cases
ACLR	-	Australian Company Law Reports
ALA	-	Supreme Court of Alabama
All ER	-	All England Law Reports
All ER (D)	-	All England Reports (Digest)
ALR	-	Australian Law Reports
ASCR	-	Australian Corporations and Securities Reports
BCC	-	British Company Law Cases
BCLC	-	Butterworths Company Law Cases
CSOH	-	Court of Sessions, Outer House
Del.Ch	-	Supreme Court of Delaware
DLR	-	Dominion Law Reports
EWCA Civ	-	Court of Appeal of England and Wales (Civil Division)
EWCA Ch	-	High Court of England and Wales (Chancery Division)
FCA	-	Federal Court of Australia
Macq	-	Macqueen's Scotch Appeal Cases
Mass	-	Supreme Judicial Court of Massachusetts
NSWSC	-	New South Wales Supreme Court
WASC	-	Supreme Court of Western Australia
WLR	-	Weekly Law Report

Chapter 1

Introduction

1.1 Introduction

A company is a juristic person. When a company acts it does so through its board of directors. Section 66(1) of the Companies Act 71 of 2008 ('2008 Companies Act') provides that the business and affairs of a company must be managed by or under the direction of its board. The board of directors of a company has full authority to exercise all of the powers and perform any function of the company to the extent that the 2008 Companies Act or a company's memorandum of incorporation does not provide otherwise.¹

From the time of his or her appointment a director is subject to four important fiduciary duties.² A director may not exceed his or her powers, exercise his or her powers for an improper purpose, fetter his or her discretion, or place him- or herself in a position where his or her personal interests conflict with his or her duties to the company.³ The well-established duty of a director to exercise his or her powers in good faith and in the best interest of the company has been entrenched by the partial codification of directors' duties in the 2008 Companies Act.⁴

The duty to act in the best interests of the company gives rise to a number of further duties or rules.⁵ These include the duty of a director not to make a secret profit (the so-called 'no-profit rule') and the duty not to take up an

¹ Section 66(1) of the 2008 Companies Act.

² *Havenga 1996 SA Merc LJ 233.*

³ *Blackman Companies 178.*

⁴ Section 76 of the 2008 Companies Act; *Visser Sitrus (Pty) Ltd v Goedehoop Sibus (Pty) Ltd* 2014 5 SA 179 (WCC) 198 ('*Visser Sitrus*'); *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) 627 ('*Da Silva*'); *Delpont et al Henochsberg* 292; *Cassim et al Company Law* 523.

⁵ *Blackman Companies 178.*

economic opportunity that belongs to the company (the ‘corporate-opportunity rule’).⁶ The focus of this dissertation is on corporate opportunities and the corporate-opportunity rule.

1.2 Background

In its original form, the corporate-opportunity rule has its origins in the United States of America (‘US’) and has, to a greater or lesser extent, been adopted or recognised as a separate rule in a number of Commonwealth countries.⁷ The rule provides that a director may not divert to him- or herself an opportunity that belongs to the company, or in which the company has an interest, or which the company may have wanted to exploit for itself.⁸

If a director breaches his or her fiduciary duties by appropriating an opportunity that belongs to the company, the company has two possible remedies available to it. It can either claim any profit made by the director, or it can claim the opportunity acquired or retained by the director in breach of his or her duty.⁹

For a company to claim a profit made from an opportunity or the opportunity itself, it must show that the opportunity in question qualifies as a corporate opportunity. This dissertation will accordingly consider the corporate-opportunity rule in particular.

The appropriation of a corporate opportunity may result in a breach a director’s duty to act in the best interests of the company and the no-conflict/no-profit rules. However, there may be situations where the no-conflict and no-profit

⁶ *Da Silva* para [18]; *Blackman Companies* 178.

⁷ For example, Canada, New Zealand, Australia and England. See *Havenga* 2013 *TSAR* 259.

⁸ *Magnus Diamond Mining Syndicate v Macdonald & Hawthorne* 1909 ORC 65 (‘*Magnus Diamond*’); *Spieth v Nagel* [1998] JOL 1320 (W) 1332 (‘*Spieth*’); *Havenga Directors* 163; *Cassim et al Company Law* 538; *Blackman Companies* 225.

⁹ *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs* 2005 (5) SA 550 (SCA) 563C-D (‘*Symington*’); *Da Silva* para [18].

rules do not apply. In these cases the corporate-opportunity rule is applied to establish when an opportunity is a corporate opportunity that may not be appropriated.

Before the 2008 Companies Act the duties of directors were derived mainly from the common law, and in particular English common law.¹⁰ The 2008 Companies Act has resulted in the partial codification of directors' duties.¹¹ This dissertation will consider two important issues in relation to the appropriation of corporate opportunities by directors. The first is whether the partially codified duties of directors are wide enough to provide for matters involving the appropriation of corporate opportunities. Secondly, the appropriate test or tests that ought to be applied when determining whether, in the particular circumstances, an opportunity is a corporate opportunity will be considered.

To understand the effect that the partial codification of directors' duties may have on the application of the corporate opportunity rule better, this dissertation includes an analysis of the common-law approach to matters involving the appropriation of corporate opportunities, and more specifically, the corporate-opportunity rule. Only then can a conclusion be reached on how corporate opportunity issues could possibly be dealt with under the 2008 Companies Act.

The paucity of South African decisions on matters involving the appropriation of corporate opportunities and the corporate-opportunity rule requires a consideration of the approach to corporate opportunities taken in other jurisdictions. I shall accordingly consider and compare the approach to that which Australian and English law have adopted to matters involving the appropriation of corporate opportunities.

¹⁰ Cassim et al *Company Law* 509.

¹¹ *Visser Citrus* 198; *Delpont et al Henochsberg* 285; Cassim et al *Company Law* 507; Botha 2009 *Obiter* 713; Havenga 2013 *TSAR* 263.

The choice of Australia and England is motivated by three factors.

- Both countries have recently adopted legislation that either partially codifies (Australian Corporations Act 2001) or codifies (UK Companies Act 2001) directors' duties.
- The common-law principles and rules in South African company law generally, and the law that has developed in regard to the duties' of directors, share a common heritage with Australian and English company law.
- Both Australian and English courts have considered matters involving the appropriation of corporate opportunities post-codification.

In addition to these reasons for undertaking a comparative study, the Constitution of the Republic of South Africa, 1996, enjoins courts, generally, to consider foreign law when interpreting legislation or developing the common law.¹² More specifically, the 2008 Companies Act enjoins the courts to consider foreign company law when interpreting or applying the Act.¹³

Post-codification decisions in Australia and the UK may provide a useful guide as to the application of statutory principles to matters involving the appropriation of corporate opportunities. In addition these decisions may also provide an indication of how common-law rules, such as the corporate-opportunity rule, have been used to apply statutory principles.

¹² Section 39 Constitution of the Republic of South Africa, 1996.

¹³ Section 5(2) of the 2008 Companies Act provides that "[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law."

1.3 *Chapter overview*

Chapter Two considers the common-law approach to matters involving the appropriation of corporate opportunities. This discussion entails a consideration of the corporate-opportunity rule and the various tests that have developed to determine when an opportunity can be regarded as a corporate opportunity. This chapter further analyses the duties of directors as set out in the 2008 Companies Act to determine whether the partially codified duties are wide enough to include matters involving the appropriation of corporate opportunities. The chapter concludes that corporate opportunities are covered by the 2008 Act and that the common-law corporate-opportunity rule will continue to apply in determining whether an opportunity ought to be classified as a corporate opportunity.

In Chapter Three I evaluate the Australian approach to corporate opportunities. The provisions of the Australian Corporations Act 2001 ('Australian Corporations Act') and the approach of Australian courts to matters involving the appropriation of corporate opportunities, are evaluated and compared to the position in South Africa

In Chapter Four I consider the English approach to matters involving the appropriation of corporate opportunities. Attention is paid to the provisions of the UK Companies Act 2006 ('UK Companies Act') dealing with corporate opportunities and to the approach of UK courts to corporate opportunity issues and the similarities and differences, if any, between the South African and UK approaches are considered and evaluated.

In the concluding chapter I argue that the partially codified directors' duties in the 2008 Companies Act are wide enough to cover matters involving the appropriation of corporate opportunities. Secondly, I argue that the common-law corporate-opportunity rule will continue to apply to corporate opportunity

matters determined under the 2008 Act. Having considered the approach of the Australian and English courts, I conclude by offering a possible approach that South African courts may take in matters involving the appropriation of corporate opportunities.

Chapter 2

The Corporate-Opportunity Rule in South Africa

2.1 Introduction

The 2008 Companies Act, which became law on 1 May 2011, has partially codified the duties of directors.¹⁴ The question arising is how the partial codification of directors' duties will affect the application of the corporate-opportunity rule.

The chapter first considers the common-law approach to corporate opportunities. This includes a discussion of the no-profit and no-conflict rules and the corporate-opportunity rule, and the tests developed to determine when an opportunity can be classified as a corporate opportunity. Secondly, the 2008 Companies Act is considered to determine whether the partially codified directors' duties are wide enough to cover corporate opportunities.

South African courts traditionally dealt with corporate opportunity matters in terms of either the no-conflict rule or the no-profit rule.¹⁵ These rules do not address when an opportunity ought to be classified as a corporate opportunity.¹⁶ In *Da Silva* the Supreme Court of Appeal recognised the corporate-opportunity rule for the first time.¹⁷

¹⁴ *Visser Sitrus* 198; *Delpont et al Henochsberg* 285; *Cassim et al Company Law* 507; *Botha* 2009 *Obiter* 713; *Havenga* 2013 *TSAR* 263.

¹⁵ *Brews* 1986 *SA Com LJ* 14; *Havenga* 1996 *SA Merc LJ* 52.

¹⁶ *Cartoon* 1980 *THRHR* 68 - 9; *Brews* 1986 *SA Com LJ* 14; *Davies Modern Company Law* 560. In the United States a rule, distinct from the no-conflict and no-profit rules and termed the corporate-opportunity rule has been developed by the courts.

¹⁷ *Da Silva* 627.

2.2 Corporate opportunities

A director stands, from the time of his or her appointment, in a fiduciary relationship to the company.¹⁸ Directors must use their positions for the benefit of the company and must act honestly and with candour. Directors are placed under four fundamental fiduciary duties.¹⁹ These are that they must:

- not exceed their powers;²⁰ or
- exercise their powers for an improper or ulterior purpose;²¹ or
- fetter their discretion;²² or
- not place themselves in a position where their personal interests conflict with their duties to the company.²³

A number of further rules or duties flow from the duty of a director to avoid a conflict of interests.²⁴ This includes the duty not to make a secret profit (no-profit rule) and the duty not to take an opportunity belonging to the company (the corporate-opportunity rule).²⁵

¹⁸ *Sibex Construction (SA) Pty Ltd v Injecatseal CC* [1988] 4 All SA 190 (T) 200 - 202 ('*Sibex Construction*'); *Blackman Companies* 178; Cassim 2008 SALJ 731.

¹⁹ For a discussion of the four fundamental duties see *Blackman Companies* 178ff; *Magnus Diamond* 76; *Sibex Construction* 200 - 202; *Joseph Forman Holdings (Pty) Ltd v Forim Holdings* [1999] 3 All SA 204 (W) 215 ('*Forim Holdings*').

²⁰ *Sparks & Young Ltd v John Hoastson* (1906) 27 NLR 634, 641; *Cohen v Segal* 1970 3 All SA 308 (W).

²¹ *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464 ('*Treasure Trove Diamonds*') 479; *Mills v Mills* (1938) 60 CLR 150 (HCA) 185; *Ngurli Ltd v McCann* (1953) 90 CLR 425 ((HCA) 438; *Howard Smith v Ampol Petroleum Ltd* 1974 1 All ER 1126 (PC) 1133.

²² *Coronation Syndicate Ltd v Lilienfeld & the New Fortuna Co Ltd* 1903 TS 489; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 All SA 535 (W).

²³ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 ('*Robinson*') 178 - 9.

²⁴ *Movie Camera Company (Pty) Ltd v van Wyk* [2003] 2 All SA 291 (C) ('*Movie Camera Company*') para [43]; Cassim et al *Company Law* 534; Lowry 1998 MLR 517.

²⁵ The other duties that flow from the duty of a director to avoid a conflict of interests are the duty of director not to act in a matter for the company where he has an interest in the matter; the duty to deal with the company openly and in good faith; the duty not to compete with the company; and the duty not to misuse company information (For a general discussion of these common-law duties see *Blackman Companies* 178ff.); Cassim et al *Company Law* 535 regards the no-conflict rule as a sub-rule of the duty to avoid a conflict of interests.

Situations involving the appropriation of corporate opportunities have traditionally been dealt with on the basis of either the no-conflict or the no-profit rule.²⁶ These two rules are now considered individually.

2.2.1 *Duty to avoid a conflict of interests: The no-conflict rule*

As a fiduciary, a director may not place him- or herself in a position where his or her interests conflict with the interests of the company on whose board he or she serves.²⁷ The no- conflict rule provides that a director may not act for his or her company if he or she has an interest in a matter which conflicts, or may possibly conflict, with his or her duty to the company.²⁸

The no-conflict rule is strictly enforced. This strict application emerged originally in *Aberdeen Railway Co*²⁹ where the court stated that the principle is so strictly “adhered to that no question is allowed to be raised as to fairness or unfairness of a contract so entered into.” South African courts recognise the strict application of the no-conflict rule.³⁰

Sibex Construction confirmed the pervasiveness of this strict ethic where the court stated that the courts should “recognise and strictly enforce the ‘strict ethic’ in this area of the law”.³¹ The court found that the two directors had placed

²⁶ Beuthin 1978 SALJ 461; -Havenga *Fiduciary Duties* 370.

²⁷ *Robinson* 177 - 8; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 (‘*Tvl Cold Storage*’) 32 - 4; *Magnus Diamond* 76; *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) (‘*Phillips v Fieldstone*’) 160.

²⁸ *Blackman Companies* para 128.

²⁹ *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 (‘*Aberdeen Railway Co*’) 470; *Magnus Diamond* 76; *African Claim and Land Co Ltd v WJ Langemann* 1905 TS 494 (‘*African Claim*’) 524.

³⁰ *Sibex Construction* 202; *Magnus Diamond* 76; *Phillips v Fieldstone* para [31].

³¹ *Sibex Construction* 203. The facts were briefly that the applicant’s general manager and managing director resigned and formed a rival company which operated in competition with the applicant in a highly specialised industry. Armed with the knowledge gained while employed by the applicant, they formed a company to tender for work to be done for Sasol at a price lower than that tendered by the applicant. -As to the strict ethics in this area of the law see also *Magnus Diamond* 76.

themselves in a position where their interests were in conflict with their duty to the applicant and that they were accordingly in breach of their fiduciary duties.³²

The acquisition of an opportunity by a director in circumstances under which he or she is under a duty to acquire the opportunity on behalf the company, is one instance where a director would be regarded as being in breach of his or her duty to avoid a conflict of interests.³³

A director who, in breach of his or her fiduciary duties as a director, places him- or herself in position where his or her duty comes into conflict with his or her personal interests, is accountable to the company for any profit made within the scope and ambit of his or her duty as a director.³⁴ Only once it has been established that the profits were acquired in circumstances where the personal interests of the director came into conflict with his or her duty as a director, will the director be prohibited from retaining the 'secret profit' made at the expense of the company.³⁵

2.2.2 The 'secret' or no-profit rule

The no-profit rule³⁶ has its origins in *Keech v Sandford*,³⁷ an eighteenth century English decision involving the breach of a fiduciary duty by a trustee of a trust. In *Regal (Hastings)*³⁸ the rule was applied in the context of company directors and has since become the "venerable bedrock governing the liability of company directors."³⁹

³² *Sibex Construction* 203 – 204.

³³ *African Claim* 505; *Da Silva* 627; *Havenga Fiduciary Duties* 345.

³⁴ *Philips v Fieldstone* 162; *African Claim* 505.

³⁵ *Blackman Companies* para [147].

³⁶ The no-profit rule is also referred to by some authorities as the secret-profit rule. In this dissertation reference to the no-profit rule is a reference to the secret-profit rule.

³⁷ *Keech v Sandford* (1726) Sel Cas Ch 61; 43 Digest 633 ('*Keech v Sandford*') 720.

³⁸ *Regal (Hastings) v Gulliver* 1942 1 All ER 378 (HL) ('*Regal (Hastings)*'); *Havenga Fiduciary Duties* 69; *Cassim et al Company Law* 536.

³⁹ Lowry 1994 *N Ir Legal Q*; Lowry 1998 *MLR* 516 – 17.

In terms of the no-profit rule a director is not allowed to retain any profits he or she has made or acquired while acting in the capacity as a director.⁴⁰ A director who makes a profit in breach of his or her fiduciary duty and in his or her capacity as a director is, in terms of the no-profit rule, required to account to the company for the profits made, failing which he or she is required to repay the profits.⁴¹

In *Dorbyl*⁴² the court applied *Regal (Hastings)* and held that as a paid executive director of the plaintiff company, the defendant had received secret profits in breach of his duty of trust. The profits made by the defendant had to be returned to the plaintiff as it was, according to the court, common cause that the defendant was a fiduciary when he received the secret profits.⁴³

Where a director has a duty to acquire an opportunity for the company, he or she will be required to account for and repay to the company any profits he or she may have made by reason of acquiring the opportunity for him- or herself. However, for a director to be liable the opportunity must be properly classified as a corporate opportunity.⁴⁴

The corporate-opportunity rule can be distinguished from the no-profit rule on a number of grounds.

⁴⁰ *Havenga Fiduciary Duties* 71ff; Cassim et al *Company Law* 536.

⁴¹ *Symington* 563D-E; *Phillips v Fieldstone* 162; *Da Silva* para [18].

⁴² *Dorbyl Limited v Vorster* [2011] 4 All SA 387 (GSJ) (*'Dorbyl'*) 398.

⁴³ The facts in *Dorbyl* were that the plaintiff had, for strategic reasons, resolved to sell off certain of its operations. The defendant, an executive of the plaintiff, participated in the purchase of the assets from the plaintiff – the defendant accordingly acted for both the plaintiff (as the seller of the assets) and for the purchaser (as buyer of the assets). The defendant received benefits totalling R36 million. The court regarded these benefits as an opportunity which that the defendant was required to disclose to the plaintiff. *Havenga* 2013 *TSAR* 261 n28 correctly criticises the decision on the ground that the court refers to corporate opportunities with reference to *Da Silva*, when in fact the director had not taken an opportunity for himself but had profited at the expense of the company.

⁴⁴ *Da Silva* para [19].

- The no-profit rule is wider in scope than the corporate-opportunity rule as it extends to all forms of fiduciary relationship, including commercial fiduciary relationships. The corporate-opportunity rule, on the other hand, only applies to commercial fiduciary relationships such as that between a director and his or her company.⁴⁵
- A secret profit is not made at the expense of the company but is obtained by reason of and in the course of the director's office and in his or her capacity as a director.⁴⁶ The no-conflict rule is breached because the director, in his or her capacity as a director, has allowed his or her own interests to conflict with his or her duty as a director. The corporate-opportunity rule does not depend on the capacity in which the opportunity is acquired.⁴⁷ If an opportunity can be categorised as a corporate opportunity then the director is liable even where he or she acquired that opportunity in his or her personal capacity.⁴⁸
- A director who obtains the fully informed consent of the members of a company either before or after he or she has made the profit, may retain that profit. Full disclosure of the profit and of the circumstances under which it was made is required, and the members must sanction the retention of the profit by the director.⁴⁹ Under the corporate-opportunity rule a director cannot retain the opportunity unless the shareholders have

⁴⁵ Havenga 2007 TSAR 169; Havenga 2013 TSAR 53; Sealy 1962 *Cambridge LJ* 69. Non-commercial relationships refer to the relationships between, for example, an attorney and his client, an agent and his principal, or a guardian and his ward. See *Robinson* 177 - 8; *Phillips* para [30].

⁴⁶ Havenga 2007 TSAR 169; Havenga 2013 TSAR 258; Austin *Fiduciary Accountability* 149.

⁴⁷ Havenga 1996 *SA Merc LJ* 44; Havenga 2007 TSAR 169; Prentice 1967 *Modern LR* 453; Prentice 1974 *Modern LR* 465; Beck 1975 *Canadian Bar R* 782.

⁴⁸ *Magnus Diamond* 76; Havenga *Fiduciary Duties* 72; Havenga 1996 *SA Merc LJ* 52; Cassim et al *Company Law* 536; Havenga 2013 TSAR 258.

⁴⁹ *African Claim* 525; *Robinson* 178; *Phillips* para [30]; *Regal (Hastings)* 389; Delpont et al *Henochsberg* 280.

given him or her their unanimous approval to take the opportunity him- or herself.⁵⁰

*Cooks v Deeks*⁵¹ is an example of the need to obtain unanimous consent from the members of the company before acquiring an opportunity. Three directors between them held 75 per cent of the shares in the company. At a meeting of shareholders (of whom the three directors were the majority shareholders) a resolution was passed based on the voting power held by the three directors, declaring that the company had no interest in a certain contract for the building of a railway line. The court held that directors holding a majority of the voting power cannot use this majority to retain a benefit for themselves where the benefit belonged to the company. Such an exercise of voting power would allow the majority to suppress the minority.⁵²

2.2.3 *The corporate-opportunity rule*

The corporate-opportunity rule has developed to determine when an opportunity should be regarded as a corporate opportunity.⁵³ A director has a duty to acquire an opportunity for the company where:⁵⁴

- i) He or she has been given an express or implied mandate to acquire the opportunity for the company or to inform the company of its suitability;⁵⁵
- ii) He or she:

⁵⁰ *Canada Safeway Ltd v Thompson* (1951) 3 DLR 295, 321; Beuthin 1978 SALJ 462; and Cassim et al *Company Law* 541 refer to *Canada Safeway Ltd v Thompson* (1952) 2 DLR 591 which is an application to settle a judgment. The dictum of the court is contained in *Canada Safeway Ltd v Thompson* (1951) 3 DLR 295, 321.

⁵¹ *Cook v Deeks* [1916] 1 AC 554; [1916-17] All ER Rep 285 (PC) ('*Cook v Deeks*').

⁵² *Cook v Deeks* 563ff.

⁵³ Beuthin 1978 SALJ 463; Brews 1986 SA Com LJ 4; Havenga *Fiduciary Duties* 163

⁵⁴ *Da Silva* para [19]; Delpont et al *Henochoberg* 287; Havenga 1996 SA Merc LJ 53.

⁵⁵ *African Claim* 518 - 20; *Robinson* 179; *Olifants Tin "B" Syndicate v de Jager* 1912 TPD 305.

- a) either alone or with other directors, is given a general mandate to acquire opportunities or to pass opportunities on to the company;⁵⁶ or
 - b) so controls the company or those empowered to manage the affairs of the company, that the company cannot acquire opportunities or a particular opportunity without his or her consent.⁵⁷
- iii) The company is actively pursuing an opportunity or the opportunity belongs to the company.⁵⁸

While this dissertation focuses on the corporate-opportunity rule in South Africa, Australia, and England no discussion of the rule is complete with referring to the position in the United States where the corporate opportunity rule has its origins.

In the US, the corporate-opportunity rule emerged as a separate rule operating in addition to, inter alia, the no-conflict and no-profit rules. The corporate-opportunity rule was developed as a separate rule because the duty of loyalty could not be applied restrictively in the modern commercial world as restrictive application would result in directors being unable to make acquisitions on behalf of their corporations. At issue was that directors frequently serve on multiple boards with the result that a director could possibly breach his or her duty of loyalty by acting for one company but not for another.⁵⁹

In South Africa and other Commonwealth countries, the corporate-opportunity rule developed to address the difficulty in identifying the circumstances under

⁵⁶ *Magnus Diamond* 76; *Bellairs v Hodnett* 1978 (1) SA 1109 (C) ('Bellairs').

⁵⁷ *Robinson* 196 - 7; *Movie Camera Company* 308.

⁵⁸ *Magnus Diamond* 78; *Canadian Aero Service Ltd* 382.

⁵⁹ *Anon* 1967 *Geo LJ* 381; *Havenga Fiduciary Duties* 163.

which an opportunity ought to be classified as a corporate opportunity.⁶⁰ Therefore, the crisp issue to be considered – and which has remained elusive – is when an opportunity should be regarded as a corporate opportunity.⁶¹ Neither the no-conflict nor the no-profit rule explains in what circumstances an opportunity would, for purposes of a directors' liability, be regarded as a corporate opportunity.⁶²

The no-conflict and no-profit rules emphasise the capacity in which the opportunity was acquired. Consequently, a director is in breach if, in his or her capacity as a director, he or she acquires an opportunity that belongs to the company. However, where a director acquires an opportunity or becomes aware of an opportunity other than in his or her capacity as a director – ie in his or her personal capacity – then it is important to identify whether the opportunity in question is a corporate opportunity.⁶³

2.2.3.1 The South African approach to corporate opportunities

Early South African cases dealt with corporate opportunity issues in accordance with the no-conflict and no-profit rules.⁶⁴ More recently, South African courts have taken cognisance of and applied the corporate-opportunity rule in determining whether an opportunity should be classified as a corporate opportunity.

The facts in *Bellairs* are typical of corporate opportunity matters where a director appropriates for him- or herself an opportunity belonging to the

⁶⁰ Brews 1986 SA Com LJ 4; Havenga *Fiduciary Duties* 354.

⁶¹ Brusser 1982 SA Co LJ 69; Brews 1986 SA Com LJ 4; Havenga 1996 SA Merc LJ 42; Davies *Modern Company Law* 560

⁶² Beuthin 1978 SALJ 463; Brews 1986 SA Com LJ 4; Davies *Modern Company Law* 560. In *Da Silva* paras [18] - [19] the court underscores the importance of categorising an opportunity as a corporate opportunity where a company intends claiming the opportunity for itself.

⁶³ Beuthin 1978 SALJ 462 - 3; Cartoon 1980 THRHR 68 - 9; Havenga 1996 SA Merc LJ 4 - 43; Havenga 2013 TSAR 258, 261.

⁶⁴ See Brusser 1982 SA Com LJ 79; Havenga 1996 SA Merc LJ 52.

company.⁶⁵ Unfortunately, based on the scope of the company's business as determined and agreed by the shareholders and the directors, the court found that the opportunity that Bellairs had acquired was not a corporate opportunity.⁶⁶ It is submitted that had the court approached the matter on the basis that the scope of business must be determined by what the company's memorandum provides, it would in all likelihood, have arrived at a different decision.⁶⁷

According to Brews, the Appellate Division missed a golden opportunity to incorporate the corporate-opportunity rule into South African law. While Brews argues that the court could have incorporated some guiding principles regarding the definition of a corporate opportunity into South African law, and given the nod to some of the tests that have been developed, he nevertheless regards the use by the court of concepts such as the 'scope of business actually carried on' as an indirect victory for the line-of-business test.⁶⁸

The decision in *Spieth v Nagel*,⁶⁹ in the context of the development of the corporate-opportunity rule, is important for two reasons. Firstly, it was the first South African decision in which a director was interdicted from continuing to exploit a corporate opportunity after having resigned from the company.⁷⁰ Secondly and more importantly, the court approved the approach taken in the Canadian decision *Canadian Aero Services v O'Malley*⁷¹ in regard to corporate

⁶⁵ *Bellairs* concerned a joint venture that was formed to develop certain property as a township. One of the joint venture partners, Bellairs, acquired a property adjacent to one of the properties owned by the joint venture for himself. The other partner, Hodnett, sued Bellairs for the profits he made in acquiring, developing and disposing of his interests in the particular property. The basis of the claim was that Bellairs had a fiduciary duty to the company and an implied mandate to purchase this property for the company, and that in breach of this mandate he had secretly bought the property for himself (see the discussion of Bellairs in Brews 1986 SA Com LJ 13ff).

⁶⁶ *Bellairs* 1128F-G.

⁶⁷ Cartoon 1980 THRHR 71; Brusser 1982 SA Com LJ 78.

⁶⁸ Brews 1986 SA Com LJ 10 and 14. See also Cartoon 1980 THRHR 71; Brusser 1982 SA Com LJ 78.

⁶⁹ *Spieth* 12.

⁷⁰ Salant 1999 De Rebus 34.

⁷¹ *Canadian Aero Services v O'Malley* [1974] SCR 592 ('*Canadian Aero Services*').

opportunity matters.⁷² This endorsement of the Canadian approach marked a shift away from the no-conflict and no-profit approach in earlier South African decisions.⁷³

Movie Camera marked a further step in the recognition of the corporate-opportunity rule in South African law. The court found, without elaborating on the factors, that all the relevant factors must be examined in order to determine whether a corporate opportunity belongs to the company.⁷⁴ The court further found that the approach (and factors) laid down by Laskin J in *Canadian Aero Services v O'Malley*⁷⁵ was a useful starting point in determining whether an opportunity belonged to the company. It is submitted that the fact that the court was prepared to apply the corporate-opportunity rule in preference to the traditional no-conflict and no-profit approach of the earlier South African decisions, indicates a shift towards the corporate-opportunity rule.

From the preceding discussion it can be seen that the corporate-opportunity rule has enjoyed the attention of our courts for a number of years. While reference was made in these early decisions to corporate opportunities, no attempt was made to explain when an opportunity would be regarded as a corporate opportunity. This task ultimately fell to Supreme Court of Appeal in *Da Silva*.

⁷² The decision is discussed below at para 2.2.3.3.6.

⁷³ Salant 1999 *De Rebus* 34.

⁷⁴ *Movie Camera* 309 (unfortunately the court did not explain what the relevant factors are).

⁷⁵ According to Laskin J in *Canadian Aero Services*, neither the conflict test nor the test for accountability for profits acquired only by reason of being directors, should be considered as the exclusive touchstones of a director's liability since new factual situations may arise that require a reformulation of existing principles. The test and the factors considered by Laskin J are discussed at paragraph 2.2.3.3.1 below.

2.2.3.2 The *Da Silva* decision

In the context of the South African law relating to the appropriation of corporate opportunities, and more specifically the corporate-opportunity rule, *Da Silva* is important as the Supreme Court of Appeal for the first time elaborated and defined the nature and scope of the corporate-opportunity rule.⁷⁶ Before dealing with the court's treatment of this rule, it is necessary to consider the facts of *Da Silva* specifically in relation to the exploitation of corporate opportunities.

The appellant (*Da Silva*) had, until his resignation, been the managing director of the respondent. He resigned so that he could establish a distribution agency in competition with the respondent. The agency was to be conducted through two companies (*Resinex Plastics* and *Resinex South Africa*).

Da Silva was the managing director of both companies and a shareholder in one. The court was called upon to consider two opportunities, the *Resinex* and the *Palstomark* opportunities, which the respondent alleged were corporate opportunities.⁷⁷

In regard to the *Resinex* opportunity, the respondents contended that the *Da Silva* and *Resinex NV* had entered into a contract in terms of which he would establish and head up *Resinex NV*'s local office. According to the respondent this contract was a corporate opportunity because it was a variant of one that the respondent and *Resinex NV* could have entered into on an earlier occasion. *Da Silva*, however, contended that the opportunity was not a corporate

⁷⁶ Havenga 2013 *TSAR* 260. For a different view on the impact of *Da Silva* see Cassim 2009 *SALJ* 61.

⁷⁷ *Da Silva* para [13].

opportunity as the contract differed from the one which could have been entered into earlier by the respondent and Resinex NV.⁷⁸

In regard to the Plastomark opportunity, the respondent contended that the opportunity to be part of the Dows distribution business was a corporate opportunity which Da Silva should have exploited for its benefit.⁷⁹

Having considered the corporate-opportunity rule the court concluded that neither of the opportunities could be considered a corporate opportunity.⁸⁰ The only opportunity that the respondent had pursued in relation to the Resinex opportunity was a joint venture which had ultimately not materialised. Resinex NV set up a business in competition with the respondent which put paid to any possibility of a joint venture.⁸¹

As for the Plastomark opportunity, the court concluded that the decision by Dow to sell the distributions part of its business was taken only after Da Silva had left the respondents' employ, and that the decision to sell was unrelated to any intervention by Da Silva in breach of his fiduciary duties.⁸²

Having evaluated the Resinex and Plastomark opportunities in accordance with the corporate-opportunity rule, the court concluded that neither of the opportunities was, in the circumstances, a corporate opportunity. Although the court concluded that neither of the opportunities was a corporate opportunity, the judgment remains significant in that the court confirmed the existence of the corporate-opportunity rule in South African law by stating that:

⁷⁸ *Da Silva* para [17].

⁷⁹ *Da Silva* para [17].

⁸⁰ *Da Silva* paras [35] and [42].

⁸¹ *Da Silva* para [35].

⁸² *Da Silva* para [42].

“A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company if it is acquired at all. Such an opportunity is said to be a ‘corporate opportunity’ or one which is the property of the company.”⁸³

According to the court, a director would be required to acquire a corporate opportunity where he or she:⁸⁴

- has been given an express or implied mandate to acquire the opportunity;
- is given a general mandate to acquire opportunities or to pass on opportunities to the company;
- so controls the company or those empowered to manage the affairs of the company, that the company cannot acquire opportunities or a particular opportunity without his or her consent.⁸⁵

The court held that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company, and that as a consequence of this rule a director is sometimes required to acquire opportunities for the company.⁸⁶ When a director acquires such an opportunity it is then regarded as a ‘corporate opportunity’ or one which is the ‘property’ of the company.⁸⁷ If the director acquired the ‘corporate opportunity’ for him- or herself, the acquisition would be deemed to have been made for the company and the company would be able to claim the opportunity from the delinquent director. In the alternative, and where it was no longer possible to reclaim the opportunity, the company would have an alternate claim for any profits which the director may have made as a result of his or her breach of duties.⁸⁸

⁸³ *Da Silva* para [18].

⁸⁴ The tests referred to by the court are discussed below at paragraphs 2.2.3.3.1 to 2.2.3.3.4.

⁸⁵ *Robinson* 196 – 7; *Delpont et al Henochsberg* 287.

⁸⁶ *Da Silva* para [18].

⁸⁷ *Da Silva* para [18].

⁸⁸ *Da Silva* para [18].

According to Havenga, *Da Silva* serves as confirmation that the test that should be applied in determining whether a particular opportunity is a corporate opportunity is the 'line-of-business' test developed in *Guth*.⁸⁹ She argues that *Da Silva* provides a clear exposition of the expropriation of a corporate opportunity by a director.⁹⁰

Cassim disagrees with Havenga and is generally critical of the court's judgment.⁹¹ Firstly, Cassim argues that the court's elucidation of the corporate-opportunity rule lacks profundity and depth.⁹² According to Cassim, although the court mentioned the tests to establish a corporate opportunity, it failed to deal in sufficient detail with the many complexities in this area of the law.⁹³

Secondly, according to Cassim, the opportunity available to the company and director respectively, need not be identical for purposes of the corporate-opportunity rule.⁹⁴ Cassim argues that the court should have found that *Da Silva* had usurped a corporate opportunity even though the opportunity available to CHC was to enter into a joint venture with Resinex, while the opportunity open to *Da Silva* was to be appointed as managing director of Resinex's South African subsidiaries and to compete with CHC.⁹⁵ It will be seen below that the line-of-business test provides that a director may not usurp

⁸⁹ Havenga 2013 *TSAR* 260; *Guth v Loft Inc* 23 Del Ch 5 A 2d 503 (1939) ('*Guth*').

⁹⁰ Havenga 2013 *TSAR* 260.

⁹¹ Cassim 2009 *SALJ* 61.

⁹² Cassim 2009 *SALJ* 65.

⁹³ Cassim 2009 *SALJ* 65. Cassim does not explain what these complexities are but they include drawing the line between a director who is required to act in the interest of the company and allowing a director to act in his own interests (Brusser 1982 *SA Comm LJ* 69); determining the liability of a director where the company was not pursuing the opportunity that was in the company's line of business; or where, due to financial constraints, a company was unable to exploit an opportunity. As the court pointed out (para [19]) whether an opportunity is a corporate opportunity or not is ultimately a question of fact to be determined by reference the circumstances of a particular case.

⁹⁴ Cassim 2009 *SALJ* 66.

⁹⁵ Cassim 2009 *SALJ* 66.

an opportunity that corresponds to existing or prospective interests or activities of the company.⁹⁶

It is submitted that despite the shortcomings expressed by Cassim, the court did provide a framework for the further development of the corporate-opportunity rule by laying down the possible tests that can be applied to determine whether a particular opportunity is a corporate opportunity. According to the court an opportunity is a corporate opportunity if:⁹⁷

- it is one which the company was actively pursuing;⁹⁸ or
- it falls within the company's existing or prospective business activities;⁹⁹ or
- it is related to the operations of the company within the scope of business;¹⁰⁰ or
- it falls within the company's line of business.¹⁰¹

2.2.3.3 Maturing the business-opportunity test

In *Canadian Aero Services* the court found that a director may not usurp for him- or herself, or divert to another person or company with whom or which he or she is associated, a maturing business opportunity which the company is pursuing.¹⁰²

⁹⁶ See para 2.2.3.6. below.

⁹⁷ *Da Silva* para [19].

⁹⁸ Maturing business opportunity test.

⁹⁹ While the court identified four definitions of what constitutes a corporate opportunity, it is submitted that this definition is in essence the line-of-business test (see *Davies Modern Company Law* 422).

¹⁰⁰ Scope -of- business test.

¹⁰¹ Line-of-business test.

¹⁰² *Canadian Aero Services* 607.

In assessing whether, in a particular case, a director had breached his or her fiduciary duty when appropriating an opportunity, a number of factors could be relevant. These factors, which the court stressed were not to be regarded as exhaustive, are the position or office held by the person appropriating the opportunity; the nature of the corporate opportunity; its 'ripeness'; its specificity; the director's relation to the opportunity; his or her knowledge of the opportunity; and how the opportunity was obtained.¹⁰³

2.2.3.4 Opportunity falling within the company's existing or prospective business activities

The test which the court refers to is discussed in the 7th edition of Davies's *Principles of Modern Company Law*.¹⁰⁴ According to the author, it is unduly limiting to classify a corporate opportunity as one which the company was actively pursuing as this would not bring all opportunities which come to a director's notice within the scope of his or her duty to disclose the opportunity to the company.

Davies suggests that an opportunity falling within the existing or prospective business activities of the company should be regarded as a corporate opportunity, even where the company has not yet identified the opportunity as one it wishes to take up. While the test will not, according to the author, bring all corporate opportunities within the scope of the directors' duty to disclose the opportunity to the company, it would recognise the directors' duty to promote the company's business as conceived of by senior management from time to time.

¹⁰³ *Canadian Aero Services* 620.

¹⁰⁴ *Davies Modern Company Law* 422.

2.2.3.5 The scope-of-business test

The scope of the company's business¹⁰⁵ test referred to in *Bellairs*, provides that an opportunity may be regarded as a corporate opportunity if it falls within the business that the company is actually carrying on, or intends carrying on. This is determined not by the so-called 'cold print' of the company's memorandum, but by what is agreed by the shareholders and directors to be the company's business.¹⁰⁶ Accordingly, unless the opportunity is one which, by agreement among and decision of the shareholders and directors, is one which the company should pursue, it would not be regarded as a corporate opportunity.¹⁰⁷

2.2.3.6 The line-of-business test

The line-of-business test referred to in *Movie Camera*¹⁰⁸ and originally considered in *Guth*,¹⁰⁹ has been described as the most prominent of the corporate-opportunity tests.¹¹⁰ The line-of-business test provides that if an opportunity is "so closely associated with the existing business activities" of the company" then it is deemed to be a corporate-opportunity.¹¹¹ The existing business opportunities include not only a company's current business activities and interest but also any prospective interests or activities as well as directions in which a company may expand.¹¹²

¹⁰⁵ *Bellairs* 1132F.

¹⁰⁶ *Bellairs* 1128. See the criticism of this approach to determining a company's scope of business in *Cartoon* 1980 *THRHR* 70 and *Brusser* 1982 *SA Com LJ* 77 - 8. It is submitted that when determining the scope of a company's business, an outsider would be guided by what the company's memorandum states its business to be.

¹⁰⁷ *Bellairs* 1128G-H.

¹⁰⁸ *Movie Camera* 308b.

¹⁰⁹ *Guth v Loft* para [12] and see also *Movie Camera Company* 308b and 313d.

¹¹⁰ *Cassim et al Company Law* 539; *Austin Fiduciary Accountability* 154; *Scott* 2003 *MLR* 853.

¹¹¹ *Movie Camera* 308b. See also *Brews* 1986 *SA Comm LJ* 7 and *Rosenblum v Judson Eng Corp* 99 NH 267 at 273 referred to in *Brews* 1986 *SA Comm LJ* 7 n14.

¹¹² *Brews* 1986 *SA Comm LJ* 7.

The corporate-opportunity rule as set out by *Guth*,¹¹³ provides that a director may not take an opportunity if: the corporation is in a financial position to do so; the opportunity falls within the company's line of business; the opportunity is one in which the company has an interest or a reasonable expectation; and the director, by taking the opportunity for him- or herself would bring his or her self-interest into conflict with that of his or her company.¹¹⁴ Commenting on the rule in *Guth* the court, in *Broz*, noted the factors used to determine whether an opportunity is a corporate opportunity are merely guidelines and that no single factor is decisive and that all the factors must be taken into account.¹¹⁵

It is submitted that *Da Silva* should be lauded for having finally acknowledged the corporate-opportunity rule as part of South African law.¹¹⁶ Perhaps the court could have done more to define the content and scope of the tests, but a court deciding on a corporate-opportunity matter in future will find, as a useful starting point, the corporate-opportunity tests adopted in *Da Silva*.

2.2.3.7 *Da Silva*: A postscript

*Dorbyl v Vortser*¹¹⁷ is the first decision after *Da Silva* to refer to the corporate-opportunity rule. While the defendant may have profited from his position as director by receiving certain benefits from the purchaser, there was certainly no diversion of a corporate opportunity belonging to the company, and it can hardly be said that the benefits involved the appropriation of a corporate opportunity by a director. It is submitted that, based on the facts of the particular case, the reference to *Da Silva* and the corporate-opportunity rule is both unfortunate and

¹¹³ *Guth* para [8].

¹¹⁴ *Guth* para [8].

¹¹⁵ *Broz v Cellular Information Systems Inc* 673 A.2d 148 (1996) para [41] ff ('*Broz*').

¹¹⁶ Cassim et al *Company Law* 538; Havenga 2013 *TSAR* 260 - 1.

¹¹⁷ *Dorbyl* 399.

misplaced, and that the matter should have been decided on the basis of the no-profit rule.¹¹⁸

It is further submitted that until another court is called upon to consider the corporate-opportunity rule, *Da Silva* will remain the leading South African authority on the rule.

The 2008 Companies Act was promulgated shortly after the decision in *Da Silva*. *Da Silva* established that in corporate opportunity matters, the corporate-opportunity rule must be applied. It is, however, not clear whether the partially codified directors' duties are wide enough to cover corporate opportunity matters or whether the corporate-opportunity rule would apply in such cases.

2.3 The 2008 Companies Act

The 2008 Act has resulted in the partial codification of the duties of directors.¹¹⁹ The partially-codified duties of directors are contained in sections 75 and 76 of the 2008 Companies Act.

The need for the partial codification of directors' duties can be traced to the 'Guidelines for Corporate Law Reform'¹²⁰ published on 23 June 2004. The Guidelines note that directors' duties were found mainly in English cases spanning four centuries, and that there was little consensus regarding what the content of the fiduciary duties of directors entailed. Accordingly, it was felt that "there is merit in considering a statutory standard" as management and directors were not clear about their duties, and a statutory standard for conduct

¹¹⁸ See Havenga 2013 *TSAR* 261 n28. See further the short discussion of *Dorbyl* in Havenga 2013 *TSAR* n43.

¹¹⁹ Stein & Everingham *The New Companies Act* 244; Havenga 2013 *TSAR* 262; Cassim et al *Company Law* 507; Parekh 2010 *De Rebus* 43.

¹²⁰ 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' General Notice 1183 GG 26493 of 23 June 2004 ('the Guidelines').

and a clear statement of duties would “assist in capturing case law set out in other jurisdictions and would give directors a degree of certainty about their duties, the standard for their conduct and associated liabilities.”¹²¹

The 2008 Companies Act does not refer specifically to ‘corporate opportunity’. There are two schools as to whether the provisions of 2008 Companies Act are sufficiently wide to include corporate opportunities. The one school holds that the corporate-opportunity rule can be implied from the 2008 Act.¹²² The other holds that the corporate-opportunity rule is encapsulated in more than one provision in the 2008 Act, rather than in any single provision and that the provisions must be interpreted in conjunction with the common-law principles.¹²³ I shall now consider the relevant sections in turn.

Section 75 provides that directors must disclose their personal financial interests in respect of matters to be considered at a meeting of the board, or in agreements in which the company has a material interest, to the board.¹²⁴ While section 75 only envisages disclosure to the board, Havenga argues that a director would also have to make disclosure when a company meeting considers taking a corporate opportunity and a director is interested in pursuing it for him- or herself if the company rejects the opportunity.¹²⁵

A director who has a personal financial interest in respect of a matter to be considered at a meeting of the board, or who knows that a related person has a personal financial interest, is required by section 76(5)(a) to disclose both the interest and its general nature before the matter is considered by the meeting. The director must disclose any material information relating to the matter of

¹²¹ Guidelines para [4.4.2].

¹²² Cassim et al *Company Law* 551.

¹²³ These provisions are ss 75, 76(2)(a), 76(2)(b) and 76(3)(b). According to Havenga 2013 TSAR 263 several provisions of the 2008 Companies Act could apply in matters involving the appropriation of corporate opportunities by directors.

¹²⁴ Section 75(5) and (6).

¹²⁵ Havenga 2013 TSAR 264.

which he or she is aware to the meeting,¹²⁶ and may disclose any observations or pertinent insights relating to the matter if requested to do so.¹²⁷ The director may not be present at the meeting and must leave the meeting after making the disclosure.¹²⁸

Where a director has acquired a personal financial interest in an agreement or other matter in which the company has a material interest, once the agreement or other matter has been approved by the company the director must, in terms of section 75(6), promptly disclose to the board or shareholders, the nature and extent of his or her financial interest and the material circumstances relating to the acquisition of the interest.

Section 76(2)(a) prohibits a director from using his or her position as director, or using any information obtained while acting in that capacity, to

- gain an advantage for him- or herself or another person;¹²⁹
- knowingly cause harm to the company of which he or she is a director.¹³⁰

According to Cassim, section 76(2)(a)(i) and (ii)¹³¹ is wide enough to apply to both the no-profit and the corporate-opportunity rules¹³² as nothing in section 76(2)(a)(i) and (ii) suggests anything to the contrary. Cassim's view is that the

¹²⁶ Section 76(5)(a).

¹²⁷ Section 76(5)(b).

¹²⁸ Section 75(5)(d).

¹²⁹ Section 76(2)(a)(i).

¹³⁰ Section 76(2)(a)(ii).

¹³¹ Section 76(2)(a)(i) of the 2008 Companies Act:

“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 –

- To gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
- To knowingly cause harm to the company or a subsidiary of the company.”

¹³² Cassim et al *Company Law* 551.

statutory duties in section 76(2)(a)(i) and (ii), together with the common-law fiduciary duty to avoid a conflict of interests, should reinforce one another.¹³³

Cassim does not substantiate why section 76(2)(a)(i) and (ii) are wide enough to encapsulate the corporate-opportunity rule, choosing rather to list the requirements that must be satisfied for purposes of the section. Havenga disagrees with Cassim that section 76(2)(a)(i) and (ii) encapsulates the corporate-opportunity rule. According to Havenga, situations involving corporate opportunities are only partially covered by section 76(2)(a).¹³⁴ The question, therefore, is whether – as suggested by Cassim – section 76(2)(a) is wide enough to cover matters involving the appropriation of corporate opportunities, or whether – as suggested by Havenga – section 76(2)(a) only partially covers corporate opportunity matters.

According to Cassim four requirements must be satisfied in order for section 76(2)(a)(i) and (ii) to apply. It is required that:

- the defendant must be a director, prescribed officer or alternate, or be *de facto* director or a member of the board or audit committee;
- the information or the advantage obtained must have come to the director while acting in his or her capacity as such, or because of his or her position as director;
- the director must have used his or her position as director, or the information obtained in his or her capacity as director, to gain an advantage or knowingly cause harm to the company; and
- the advantage must have been obtained for the director him- or herself or for some other person.

¹³³ Cassim et al *Company Law* 551.

¹³⁴ Havenga 2013 *TSAR* 265.

Havenga argues that to the extent that section 76(2)(a)(i) and (ii) provides that a director used his or her position as director, or used information obtained while acting in that capacity, to gain an advantage or to knowingly cause harm to the company, corporate-opportunities are only partially covered. This is because these limitations do not apply to corporate opportunity matters.¹³⁵

It is submitted that a director who uses information to acquire a corporate opportunity and in so doing gains an advantage for him- or herself, may be said to be appropriating a corporate opportunity. In this light section 76(2)(a)(i) and (ii) does appear to cover corporate opportunities. Havenga's interpretation that section 76(2)(a) only partially covers corporate opportunity matters, therefore, would appear to be correct.

Havenga argues that instead of corporate opportunities falling under only one specific section of the 2008 Act, a number of provisions could in fact apply to corporate opportunity matters.¹³⁶ These provisions will now be considered.

Section 76(2)(b) provides that a director must communicate any information that comes to his or her attention at the earliest practicable opportunity, unless he or she believes that the information is not material to the company, is generally available to the public, is known to the other directors, or he or she is bound not to disclose the information by reason of a legal or ethical obligation of confidentiality. In terms of the common law, if a company is not financially able to take up an opportunity, or does not wish to do so, a director is still regarded as having breached his or her fiduciary duty if he or she appropriates that corporate opportunity.¹³⁷ According to Havenga, under these circumstances a director could believe the information to be immaterial.¹³⁸

¹³⁵ Havenga 2013 TSAR 265.

¹³⁶ Havenga 2013 TSAR 263.

¹³⁷ *Da Silva* para [19].

¹³⁸ Havenga 2013 TSAR 266.

Section 76(3)¹³⁹ restates the important fiduciary duty requiring a director to act in good faith, for a proper purpose,¹⁴⁰ and in the best interests of the company.¹⁴¹ The director's duty to take up a corporate opportunity for the company and not for him- or herself, falls broadly within the scope of the duty to act in good faith and in the best interests of the company. Accordingly, section 76(3) could be said to contain a partial codification of the corporate-opportunity rule.¹⁴²

The common law has not been excluded by the 2008 Companies Act. Section 77(2)(a) makes this clear by stating that the director of a company may be held liable in accordance with the principles of common law for breach of a fiduciary duty as a consequence of a breach of section 76(2) or (3)(a) or (b). The partial codification falls short of providing an all-inclusive statement of duties, and creates uncertainty, especially as regards the scope and ambit of the corporate-opportunity rule. To this end the common law will continue to play a role in the development of the corporate-opportunity rule.

2.4 Conclusion

In this chapter I have reviewed, first, how the common law deals with matters involving the appropriation of a corporate opportunity. In particular, I considered

¹³⁹ Section 76(3)(a) and (b) provides that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director:

“(a) in good faith and for a proper purpose;
(b) in the best interests of the company”.

¹⁴⁰ 2008 Act s 76(3)(a).

¹⁴¹ 2008 Act s 76(3)(b) and see also 7 - 8 above.

¹⁴² Havenga 2013 TSAR 266 notes that one of the categories of a director's duty to act in the best interests of the company is the obligation to take up a corporate opportunity for the company's benefit and not for personal gain. The equivalent provision in the Australian Corporations Act is s 182 and in the UK Companies Act s 175. These provisions are considered below.

the tests referred to in *Da Silva* for determining whether a specific opportunity should be regarded as a corporate opportunity in its peculiar circumstances.

Secondly, I considered whether the 2008 Companies Act provides for matters involving the appropriation of corporate opportunities. It was shown that although the Act makes no specific reference to corporate opportunities, matters involving the appropriation of corporate opportunities are partially encapsulated by section 76(3) which provides that a director is required to act in the best interests of the company. A director acts in the best interests of the company if he or she acquires an opportunity for the company.

Regrettably, the 2008 Act does not explain when an opportunity is to be regarded as a corporate opportunity. In the absence of any specific reference in the 2008 Companies Act to the circumstances under which an opportunity will be regarded as a corporate opportunity, *Da Silva* will continue to provide the rules and principles by which corporate opportunity matters are decided.

Da Silva explained the various tests that a court can apply when called upon to determine whether a particular opportunity may be regarded as a corporate opportunity. According to *Da Silva*, once it has been established that an opportunity is a corporate opportunity, the question as to whether the company could take up the opportunity becomes irrelevant. This is a reiteration of the strict approach adopted in *Regal (Hastings)* and *Philips*, which provides that directors are liable even where the company is not in a position to take up the opportunity for itself.

It is submitted that while the court in *Da Silva* could have done more to explain the content of the tests, it has, at the very least, laid the groundwork for the further development of the corporate-opportunity rule. Whether or not an opportunity is or is not a corporate opportunity is ultimately a question of fact to be determined after a careful examination of all the factors in a particular case.

The approach of the Australian and English courts to matters involving the appropriation of corporate opportunities could serve as a useful guide to the future approach of the South African courts – especially as both the Australian and the English courts have dealt with corporate opportunity matters post-codification. The position in these two jurisdictions will therefore be considered and compared to the position in South Africa in the following chapters.

Chapter 3

The Business-Opportunity Rule in Australia

3.1 Introduction

In *Ominilab*¹⁴³ the court stated that the business-opportunity doctrine¹⁴⁴ is “...well-established in Australia, having been applied in a number of authorities including the decision in *Mordecai v Mordecai* (1988) 12 NSWLR 58 at 65...”.

Despite this statement in *Ominilab*, matters involving the appropriation of business opportunities continue to be adjudicated on the basis of the no-profit rule.¹⁴⁵ This may be because the business-opportunity rule is regarded as no more than an application of the no-profit rule where the profit takes the form of exploiting a business opportunity that is in line with the company’s existing or prospective business.¹⁴⁶

In this chapter I first consider how Australian courts have approached matters involving the appropriation of business opportunities following the partial codification of directors’ duties. Secondly, I consider whether the Australian Corporations Act includes a business-opportunity rule. Lastly, I evaluate the differences and similarities between the South African and Australian approaches to matters involving business opportunities.

¹⁴³ *Ominilab Media Pty Ltd and Another v Digital Cinema Network Pty Ltd* (2012) 285 ALR 65 (*Ominilab*) para [217].

¹⁴⁴ In Australian law the corporate-opportunity rule is sometimes referred to as the business-opportunity doctrine or business-opportunity rule.

¹⁴⁵ Austin, Ford & Ramsay *Company Directors* 368 para 9.4; Leibler *Taking a Chance* 14 and 18.

¹⁴⁶ Austin, Ford & Ramsay *Company Directors* 368 para 9.4.

3.2 The business-opportunity rule

The received law in Australia where a director appropriates a business opportunity for him- or herself, is constituted by the decisions of the House of Lords in *Phipps v Boardman* and *Regal (Hastings) Ltd v Gulliver*.¹⁴⁷ From these two cases it emerges that where a director appropriates an opportunity belonging to the company for him- or herself, the director must account to the company for the profit or benefit made if:

- the profit or benefit was obtained in a situation where there was a conflict or possible conflict between the director's duty toward the company and his or her personal interest; or
- the profit or benefit was obtained, by reason of his or her position as a director; or
- the profit or benefit was obtained by reason of his or her taking advantage of an opportunity or knowledge derived from his or her position as a director.¹⁴⁸

Austin considers the business-opportunity rule to be no more than a specific application of the no-profit rule in matters where the profit takes the form of the exploitation of a business opportunity which falls within a company's line of business.¹⁴⁹ The no-profit rule makes liability dependent on the existence of a causal link between the profit made and use of fiduciary office when making that profit or appropriating the opportunity.¹⁵⁰ In the case of the no-profit rule, the

¹⁴⁷ *Natural Extracts Pty Ltd v Glendon Micheal Stotter* NG 3192 of 1992 ('*Natural Extracts*').

¹⁴⁸ *Natural Extracts* 45.

¹⁴⁹ Austin, Ford & Ramsay *Company Directors* 362; Cuerden 2012 *Brief* 28.

¹⁵⁰ *Streeter v Western Areas Exploration (no 2)* (2011) 278 ALR 291 ('*Streeter*') para [387]; *Dawson v Crystal Finance* para [415]; Austin *Fiduciary Accountability* 149; Liebler *Taking a Chance* 19.

causal link is that the profit or opportunity must have been obtained by virtue of the directors' position.¹⁵¹

The no-profit rule emphasises the capacity in which the director acquired the opportunity in question. Unfortunately, the no-profit rule's emphasis on the capacity in which a director acquires an opportunity, does not address situations in which a director appropriates an opportunity belonging to the company in his personal capacity.

In order to overcome the no-profit rule's emphasis on capacity, Austin recommends an extended line-of-business test to determine whether, in the specific circumstances, an opportunity can be classified as a business opportunity.¹⁵² While some Australian decisions have referred to the line-of-business test suggested by Austin, a business-opportunity doctrine distinct from the no-conflict and no-profit rules has yet to be universally adopted.¹⁵³

The expanded line-of-business test suggested by Austin provides that a business opportunity is any opportunity to engage in a business activity of which a serving executive becomes aware under circumstances where he or she knows, or should have known, that:

- the opportunity in question is related to the corporation's business; or
- the corporation may reasonably be expected to engage in the line of business.¹⁵⁴

¹⁵¹ *EC Dawson Investments (Pty) Ltd v Crystal Finance (Pty) Ltd [No 3]* [2013] WASC 183 para [416] ('*EC Dawson*').

¹⁵² Austin *Fiduciary Accountability* 161; Liebler *Taking a Chance* 18.

¹⁵³ Cuerden 2012 *Brief* 28. Some of the pre-2001 Corporations Act cases in which the business-opportunity rule was considered include *SEA Food International v Lam* (1998) 16 ACLC 552; *Dwyer v Lippiatt* (2004) 50 ACSR 33; and *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110.

¹⁵⁴ Austin *Fiduciary Accountability* 157. The line-of-business test applied in *Da Silva* and *Movie Camera* provides that an opportunity is a corporate opportunity if it is in the contemplation of the parties and corresponds to the existing or prospective interests or activities the company.

As the discussion of a few decisions involving the appropriation of business opportunities following the partial codification of directors' duties by the Australian Corporations Act will show, the application of the business-opportunity doctrine by Australian courts remains inconsistent.¹⁵⁵ These decisions will now be considered.

The Federal Court of Australia recognised the existence of a business-opportunity rule in *Omnilab*.¹⁵⁶ According to the court, the principle that a director may not usurp or divert a maturing business opportunity which his or her company is actively pursuing, is well established in Australia.¹⁵⁷ The court further noted that, while the court *a quo* had decided the matter on the basis of the broader conflict of interest and profit rules, nothing precluded a finding that the breach of duty involved a breach of the business-opportunity rule.¹⁵⁸ Lastly, the court noted that the scope of DCN's business (the applicant in the matter) was the same as that of *Omnilab* (the respondent) and that this was sufficient to show that the director was in breach of his fiduciary duties.¹⁵⁹

One of the issues that the court was called upon to decide in *Streeter* related to the liability of a fiduciary to account for a profit derived from a 'corporate opportunity'.¹⁶⁰ While the parties to the appeal did not contend for a business-opportunity rule different to or separate from the conflict or profit rules,¹⁶¹ the court nevertheless acknowledged the existence of the business-opportunity

¹⁵⁵ See generally Austin et al *Australian Corporate Law* 32,294; Ford *Principles* 462. Part of the reason for the inconsistent application of the business-opportunity rule might, as Liebler suggests, "be an attempt to remain loyal to the foundations of equity's framework for dealing with breaches of fiduciary duty." Also see Liebler *Taking a Chance* 19.

¹⁵⁶ *Omnilab* para [217].

¹⁵⁷ *Omnilab* para [217]. See para 2.2.3.3 above. The maturing business opportunity test provides that the company must be actively pursuing an opportunity for the opportunity to be categorised as a business opportunity.

¹⁵⁸ *Omnilab* para [219].

¹⁵⁹ *Omnilab* para [228].

¹⁶⁰ *Streeter* para [409].

¹⁶¹ *Streeter* para [442].

rule.¹⁶² It noted that while it was necessary precisely to identify the nature of the opportunity that was said to have been diverted, it was preferable to focus on the precise circumstances from which the liability arose – that is the capacity in which the opportunity was acquired – rather than using a descriptor like “diversion of corporate opportunity”.¹⁶³

A view differing from that in *Omnilab* and *Streeter*, was expressed by the New South Wales Supreme Court in *Barescape*.¹⁶⁴ Here the court rejected the existence of a business-opportunity rule and stated that the applicable principles for dealing with claims involving the taking of corporate opportunities are the no-conflict and no-profit rules.¹⁶⁵ However, while rejecting the business-opportunity rule, the court nevertheless applied the line-of-business test in order to find that there had been a breach of the no-profit rule.¹⁶⁶

More recently the Western Australia Supreme Court was required, in *EC Dawson*,¹⁶⁷ to consider whether a former director (Coombs) of a liquidated company (FRC) had breached his fiduciary duty by taking a finance broking business opportunity which fell within the scope of FRC’s line of business. Although the court found it unnecessary to decide whether there was a separate business-opportunity rule wider in scope than the no-profit rule, the court nevertheless applied the line-of-business test to determine whether the opportunity in question fell within the scope of FRCs business.¹⁶⁸ In the circumstances the court concluded that the opportunity in question did not fall within the scope of FRC’s line of business. According to the court a separate

¹⁶² *Streeter* paras [78] and [441].

¹⁶³ *Streeter* paras [458] and [465].

¹⁶⁴ *Barescape Pty Limited v Bacchus Holdings Pty Limited* [2012] NSWSC 984 (*‘Barescape’*).

¹⁶⁵ *Barescape* para [148].

¹⁶⁶ *Barescape* para [149].

¹⁶⁷ *EC Dawson Investments Pty Ltd v Crystal Finance Ltd [No 3]* [2013] WASC 183 (*‘EC Dawson’*).

¹⁶⁸ *EC Dawson* para [485].

business-opportunity rule would not afford the plaintiff greater rights than those available under the no-conflict and no-profit rules.¹⁶⁹

What emerges from this overview of Australian cases is that, firstly, unlike the position in South Africa, there are divergent views regarding the business-opportunity rule as a rule distinct from the no-profit and no-conflict rules, and that the development of a separate business-opportunity rule is at best haphazard. Secondly, although the decisions indicate divergent views regarding a separate business-opportunity rule, the line-of-business test is nevertheless applied when determining whether, for purposes of the no-profit rule, an opportunity falls within a company's scope of business. It is submitted that in this regard the position may be said to be similar to the South African position.

Despite this divergence of views on the existence of a distinct business-opportunity doctrine, Austin opines that while the business-opportunity doctrine is no more than an application of the no-profit rule, it can nevertheless be identified as a separate rule.¹⁷⁰ This is because once it is shown that an opportunity that has been diverted falls within the company's line of business, it becomes unnecessary to show that the diversion of the opportunity was the result of the director's misuse of his or her position. The mere fact that the opportunity was diverted would then be sufficient to find the director liable without any need to show a causal connection between the opportunity and the office occupied by the director.¹⁷¹

3.3 The Corporations Act

The codified duties of directors are contained in sections 180 to 184 of the Australian Corporations Act.

¹⁶⁹ *EC Dawson* para [410].

¹⁷⁰ *Austin, Ford & Ramsay Company Directors* 362.

¹⁷¹ *Austin, Ford & Ramsay Company Directors* 362.

The provisions of the Australian Corporations Act are very similar to the provisions of the 2008 Companies Act. Section 181 of the Australian Corporations Act can be regarded as the counterpart of section 76(3)(a) and (b) of the 2008 Companies Act.

Not only is the wording of the sections dealing with directors' duties in the 2008 Companies Act and the Australian Corporations Act similar, a further similarity is that, like the provisions of the 2008 Companies Act, neither section 181 nor section 182 of the Australian Corporations Act contains a specific reference to a business-opportunity rule.

The arguments of Cassim and Havenga around section 76(2)(a)(i) and (ii) and section 76(3) of the 2008 Companies Act, apply equally to sections 181 and 182 of the Australian Corporations Act. Accordingly, the corporate-opportunity rule will either be implied from a particular section, or is encapsulated in more than one section of the Australian Corporations Act.¹⁷² The provisions of the Australian Corporations Act are now considered and discussed.

Section 181¹⁷³ of the Australian Corporations Act, like section 76 of the 2008 Companies Act, applies to directors and other officers of a corporation. Directors are required to discharge their duties and exercise their powers in good faith, in the best interests of the corporation, and for a proper purpose. These provisions are virtually identical to the provisions of section 76(3)(a) and (b) of the 2008 Companies Act.

¹⁷² See page 26 above for the two schools of thought on the corporate opportunity rule.

¹⁷³ "A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose."

The provisions of section 182¹⁷⁴ are similar to those of section 76(2) of the 2008 Companies Act. Section 182 of the Australian Corporations Act expressly provides for that which is, by implication, embodied in section 181. Accordingly, a director would be in breach of section 181 if he or she improperly used his or her position to gain an advantage for him- or herself, or for someone else, or caused detriment to the corporation.

Section 182 is regarded as the statutory version of the common-law duty of a director to avoid a conflict of interests.¹⁷⁵ According to the authors of *Business Corporations*, a director uses his or her position as director improperly for purposes of section 182 if he or she does not act in the best interests of the company.¹⁷⁶ According to Austin,¹⁷⁷ the word 'improper' in section 182 must be understood in its commercial context and refers to conduct which is inconsistent with the discharge of a director's duties, obligations, and responsibilities.

While there is no common and uniform standard as to what is regarded as 'improper' use of his or her position by a director, Austin suggests that the term should be determined by reference to the common-law duties of the particular officer concerned – in other words, reference should be made to the common-law principles and rules.¹⁷⁸ In *Business Corporations* the authors suggest that a director who exploits a business opportunity that the company had considered pursuing, may be using his or her position improperly and would be in breach of his or her fiduciary duties if a sufficient connection exists between his or her obligation as a director and the specific profit-making opportunity.¹⁷⁹

¹⁷⁴ "A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation".

¹⁷⁵ Fitzpatrick *Business Corporations* 548 para [10.75].

¹⁷⁶ See above page 30 for the discussion of s 76(3).

¹⁷⁷ Austin, Ford & Ramsay *Company Directors* 382 para [9.16].

¹⁷⁸ Austin, Ford & Ramsay *Company Directors* 382.

¹⁷⁹ Fitzpatrick *Business Corporations Law* 548 para [10.75]; see also Goss 2007 *Mondaq* 1.

Section 182 (and its predecessor)¹⁸⁰ have been applied in situations where an employee has diverted business away from his or her company to a company he or she has established,¹⁸¹ and where an officer solicited customers of the company he or she was employed by for a separate business that he or she intended establishing.¹⁸² If one considers the circumstances under which section 182 (and its predecessor) have been applied, it is submitted that the business-opportunity rule could be said to be implied in the section.¹⁸³

Section 185 of the Australian Corporations Act contains a provision similar to that contained in section 77(2)(a) and provides that section 182 and 184 have effect “in addition to, and not in derogation of, any rule of law” that relates to the duties or liability of a director. In determining whether in a particular matter an opportunity is a business opportunity, the existing common-law rules will, as in South African law, continue to apply.

3.4 Conclusion

What emerges from this discussion is, firstly, that Australian courts have been inconsistent in adopting and applying a business-opportunity rule which is separate and distinct from the no-profit rule. Rather, when confronted with matters involving the diversion or exploitation of business opportunities, the courts turn to the no-conflict and no-profit rules.¹⁸⁴

¹⁸⁰ Austin, Ford & Ramsay *Company Directors* 386.

¹⁸¹ *Digital Pulse Pty Ltd v Harris* (2002) 40 ASCR 487.

¹⁸² *Forkserve Pty Ltd v Jack and Aussie Forklift Repairs Pty Ltd* (2000) 19 ACLC 299.

¹⁸³ See Austin & Ramsay *Corporations Law* 474.

¹⁸⁴ Liebler *Taking a Chance* 14. The reason for continued application of the no-profit rule may be that under the no-profit rule no enquiry is required into the nature of the opportunity. The only enquiry is whether the director acquired the opportunity by reason of and in the course of his or her office. If he or she did he or she is liable to account for any profit made as a result of acquiring the opportunity. Any opportunity that a director acquires by reason of or in the course of his or her office may result in liability under the no profit rule. See also Austin, Ford & Ramsay *Fiduciary Accountability* 159.

Secondly, Australian courts continue to adjudicate business opportunity issues on the basis of the no-conflict and no-profit rules. However in doing so the line-of-business test is applied which, it is submitted, would indicate that there is at least some recognition of a need adequately to explain when an opportunity is to be categorised as a business opportunity.¹⁸⁵ It is submitted that in applying a line-of-business test, the Australian position is not dissimilar to that in South Africa.

In so far as the provisions of the Corporations Act are concerned, sections 181 and 182 are very similar to sections 76(2) and (3)(a) and (b) of the 2008 Companies Act.¹⁸⁶ While there have been no significant Australian decisions on the business-opportunity rule or section 182, Austin is of the view that a close correlation exists between the statutory and general fiduciary duties.¹⁸⁷ It is submitted that given the fact that the 2008 Companies Act does not directly refer to corporate opportunities, South African courts would, much the same as suggested by Austin, continue to apply the common-law principles set out in *Da Silva* when interpreting the statutory provisions.

¹⁸⁵ Austin, Ford & Ramsay *Company Directors* 362.

¹⁸⁶ Austin, Ford & Ramsay *Company Directors* 382ff; Harris, Hargovan & Adams *Australian Corporate Law* 509.

¹⁸⁷ Austin, Ford & Ramsay *Company Directors* 393.

Chapter 4

The Corporate-Opportunity Doctrine in England

4.1 Introduction

Because of its adoption in a number of English and Anglo-Commonwealth cases, *Regal (Hastings)* has come to be viewed as the “venerable bedrock governing the liability of company directors.”¹⁸⁸ The rule in *Regal (Hastings)* provides that the liability of a director is not dependent on the breach of his or her fiduciary duty, but on his or her having made a profit or acquired an opportunity by reason of – and only by reason of – his or her position as a director of the company.¹⁸⁹ For purposes of liability, it does not matter that the company was unable to acquire the opportunity itself since liability depends on the capacity in which the opportunity was obtained or the profit made.¹⁹⁰

The traditional English approach, which holds a director liable for usurping an opportunity if the opportunity is acquired in his or her capacity as a director, fails to address what constitutes a corporate opportunity.¹⁹¹ While matters involving the appropriation of corporate opportunities continue to be decided on the basis of the no-conflict and no-profit rules, a few English decisions have applied the line-of-business test to determine liability.¹⁹²

¹⁸⁸ Lowry 1998 *MLR* 516 – 17.

¹⁸⁹ *Regal (Hastings)* 395; *Keay Directors’ Duties* 315 – 16.

¹⁹⁰ *Regal (Hastings)* 395; *Gencor ACP Limited v Dalby* [2000] EWHC 1560 (Ch) para [17]; *Keay Directors Duties* 316.

¹⁹¹ *Keay Directors’ Duties* 336; *Davies Modern Company Law* 560 and 566; *Dobie* 2008 *Trinity CLR* 25.

¹⁹² *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch); (2007) BCC 717 para [290]; *O’Donnell v Shanahan* [2008] EWHC 1973 (Ch) ; *Keay Directors’ Duties* 339; *Davies Modern Company Law* 566; Lowry 2012 *IRL* 10 - 11.

In this chapter I first reflect on recent English decisions involving the diversion of corporate opportunities to establish the English common-law approach to the diversion of corporate opportunities. Secondly, I consider the codified duties of directors under the UK Companies Act. Lastly, and by way of a conclusion, the similarities and differences between the position in the UK and South Africa are considered.

4.2 The corporate-opportunity rule

English courts traditionally approach matters involving the appropriation of a corporate opportunity on the basis of the no-profit rule.¹⁹³ Under the no-profit rule a director is required to account to the company for any profit made as a result of him or her appropriating an opportunity by reason or use of his or her position as director.¹⁹⁴ The aim of the rule is to ensure that a director does not misuse his or her position for personal advantage.

The fact that an opportunity falls outside the scope of a company's business is irrelevant for purposes of the no-profit rule.¹⁹⁵ The only enquiry is whether the opportunity came to the director by virtue or use of his or her position as a director. The rule is both inflexible and strict and situates any opportunity a director appropriates within the scope of the rule. However, despite this strict adherence to the no-profit rule, there are some decisions where the scope of the company's business has been considered – albeit in the context of the no-conflict or no-profit rules. These decisions are considered below.

One of the issues that fell to be considered in *Commonwealth Oil and Gas Company* ('COGC') was whether the opportunity that had been exploited by the

¹⁹³ Kershaw 2005 *Legal Studies* 537 - 40; Keay *Directors' Duties* 336; Davies *Modern Company Law* 560 and 566; Dobie 2008 *Trinity CLR* 25.

¹⁹⁴ Mortimer *Company Directors* 313.

¹⁹⁵ Mortimer *Company Directors* 326.

director fell within the company's line of business. The facts, briefly, were that Baxter, a non-executive director of COGC, diverted to another company (Eurasia) of which he was a substantial shareholder, director, and president, an opportunity in terms of which Eurasia was granted a twelve month exclusive right to negotiate the terms for the possible exploration and development of an oil exploration block. According to the court, the opportunity that Baxter had diverted was one which would have been of interest and commercially attractive to COGC.¹⁹⁶ The court confirmed that the company's line of business was one of the issues to consider in determining whether, by diverting an opportunity, there had been a conflict between the directors' interests and those of the company.¹⁹⁷

The maturing-business test was applied by the court in *Foster Bryant*.¹⁹⁸ The company alleged that Bryant, a director of the company, had diverted a business opportunity from the company which had resulted in Bryant putting himself in a position of conflict with the company. On the facts, however, the court concluded that the director had not breached his duty to avoid a conflict of interests because the opportunity in question was not a maturing business opportunity.¹⁹⁹ The opportunity that the company alleged the director had usurped was an opportunity to provide services to a particular client. Bryant had been forced out of the company by the other director, and had been offered a position with the client. The client, however, was not interested in dealing only with the company and wanted to deal with both Bryant and the other director. The other director was, however, not amenable to this arrangement. On this basis the court found there to be no maturing business opportunity.

¹⁹⁶ *Commonwealth Oil and Gas Company Limited v Baxter and another* [2007] CSOH 198 para [188] ('*Commonwealth Oil and Gas*').

¹⁹⁷ *Commonwealth Oil and Gas* paras [185] and [186].

¹⁹⁸ *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 ('*Foster Bryant*').

¹⁹⁹ *Foster Bryant* para [89].

*Thermascan*²⁰⁰ involved a restraint application and the diversion of a corporate opportunity. At paragraph [14] the court confirmed the submissions made by the parties that the provisions of the UK Companies Act dealing with the fiduciary duties of a director set out in section 175, did not alter the pre-existing law, which it proceeded to summarise²⁰¹ – this despite the provision in section 170(5) of the UK Companies Act which provides that the codified duties have “effect in place of the common-law rules and equitable principles.” In regard to the liability of a director, the court confirmed the principles set out in *Foster v Bryant* that a director who acquires a maturing business opportunity sought by the company in circumstances which led him or her to the opportunity, would be in breach of his or her duty not to place personal interests before those of the company. Accordingly, while the court considered the nature of the opportunity, the emphasis remained on the capacity in which the director obtained the opportunity.

The codification of the no-conflict rule by section 175 of the UK Companies Act was confirmed in *Eastford*.²⁰² The court noted that that both *Boardman* and *Bhullar* (which are both pre-codification authorities on the appropriation of corporate opportunities) remain relevant to the interpretation of section 175(1).²⁰³ It is submitted that while section 175(1) contains a codification of the conflict rule, the applicable principles will still derive from the common law.

The facts in *Futurist Developments*²⁰⁴ are fairly complicated and do not warrant discussion for present purposes. What is important is that at paragraph [40] the

²⁰⁰ *Thermascan Limited v Norman* [2009] EWHC 3694 (Ch) (*Thermascan*).

²⁰¹ *Thermascan* para [14].

²⁰² *Eastford Limited v Thomas Graham Gillespie, Airdrie North Limited* [2010] CSOH 132 (*Eastford*) para [17].

²⁰³ *Eastford* para [18].

²⁰⁴ *Lee v Futurist Developments Limited* [2010] EWHC 2764 (Ch) (*Futurist Developments*).

court confirmed that there was a duty on a director not to divert, for his or her benefit or the benefit of a third party, a maturing business opportunity.²⁰⁵

The relevance of the terms in which the statutory duties had been framed was considered in *Towers*.²⁰⁶ According to the court, the codified duties “extracted and expressed the essence of the rules and principles which they replaced”. Applying the strict approach of earlier cases such as *Regal (Hastings)*, the court found that a director who obtains a business opportunity for him- or herself would be liable regardless of the fact that he or she acted in good faith, or that the company could not, or would not, take advantage of the opportunity.²⁰⁷

*Sharma v Sharma*²⁰⁸ involved an appeal against a decision that a director of a dental company was not in breach of her fiduciary or statutory duties when she acquired certain dental practices for her own benefit rather than for the benefit of the company. The company concerned was a family-owned dental business of which the appellant and the respondents were the shareholders. The court confirmed the codification of directors’ duties in section 175 of UK Companies Act, and accepted that there was no material difference between the statutory duties under section 175 and the pre-existing fiduciary duties.²⁰⁹ In applying section 175 the court held that the statutory duty imposed by section 175 provides that:

“A company director is in breach of his fiduciary or statutory duties if he exploits for his personal gain (a) opportunities which come to his attention through his role as director or (b) any other opportunities which he could and should exploit for the benefit of the company.”

²⁰⁵ An opportunity is regarded as a maturing business opportunity in that the opportunity in question is being actively pursued by the company. (See Lowry 2012 *IRL* 11.)

²⁰⁶ *Towers v Premier Waste Management Ltd* [2012] BCC 72 (*Towers*).

²⁰⁷ *Towers* paras [10] - [11].

²⁰⁸ *Sharma v Sharma* [2013] All ER (D) 291 (*Sharma*).

²⁰⁹ *Sharma* para [51].

It is submitted that the preceding discussion shows that while the approach to corporate opportunity matters remains the no-conflict and no-profit rules, the question of whether an opportunity falls within a company's line of business or is a maturing business opportunity, is a factor to be considered when determining liability.²¹⁰ The approach of the English courts remains strict. Once it has been shown that an opportunity falls within a company's line of business or is a maturing business opportunity, a director is liable either in terms of the no-conflict or no-profit rule. It is then irrelevant that the company was not in a position to take up the opportunity.²¹¹

4.3 The UK Companies Act 2006

In contrast to the 2008 Companies Act and the Australian Corporations Act which only partially codified the duties of directors, the UK Companies Act contains an extensive codification of directors' duties. The Commission appointed to draft the UK Companies Act took the view that principles relating to the duties of directors were difficult to find and understand because they were available mainly in case law that had developed the principles over many years. Accordingly, in drafting the sections dealing with the duties of directors, the Commission opted for a comprehensive statement of directors' duties so as to make these duties more accessible and easily understood.

The UK Companies Act stands on an altogether different footing to the 2008 Act and the Australian Corporations Act when it comes to the duties of directors. In terms of section 170(3) of the UK Companies Act, the codified directors' duties apply in place of the common-law rules and principles.²¹² This contrasts with the

²¹⁰ See the discussion in Hannigan *Company Law* 281ff.

²¹¹ Hannigan *Company Law* 281 and 284.

²¹² Section 170(3):

“The general duties 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.”

position both in South Africa and in Australia where the duties of directors have only been partially codified by the respective Acts, and where the common law has not been excluded.²¹³

While the duties apply in preference to the common-law rules and principles, the corresponding common-law principles and rules must be considered when applying and interpreting the general statutory duties.²¹⁴ This implies that the law, as it developed before codification, will continue to be applied in interpreting and applying the general statutory duties.²¹⁵

Section 175 of the UK Companies Act, which deals with conflicts of interest, refers specifically to the exploitation of a corporate opportunity by a director.²¹⁶ Section 175(2), which provides that a director must avoid any conflict of interests when he or she exploits a corporate opportunity, is regarded as a statutory version of the common-law no-conflict rule.²¹⁷

Dobbie argues that because in terms of section 175(2) it is immaterial whether or not the company was in a position to take advantage of the opportunity, the common-law rule with all its resultant inadequacies has been maintained.²¹⁸

²¹³ Havenga 2013 *TSAR* 257 n1; Jordan 2009 *Melbourne Univ Law R* 639 – 40.

²¹⁴ Section 170(4):

“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.”

²¹⁵ See the discussion para 4.2 above. See also *Premier Waste Management Ltd v Towers* [2012] 1 BCLC 67 CA [5]; Keay *Directors’ Duties* 339; Mortimer *Company Directors* 316; and Lowry 2012 *ILR* 6.

²¹⁶ “Section 175. Duty to avoid conflicts of interest

- (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 conflicts, 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)”.

²¹⁷ Davies *Modern Company Law* 559.

²¹⁸ Dobbie 2008 *Trinity CLR* 25; see also Keay *Directors’ Duties* 338; Mortimer *Company Directors* 322.

The UK Companies Act provides that the duty applies only where there is a conflict or possible conflict of interests with the company. This is, in essence, a statutory version of the common-law no-conflict rule. Because of the proviso that it is “immaterial whether the company could take advantage of the ... opportunity” courts will, according to Dobbie, still be unable to adopt the corporate-opportunity rule and the strict no-conflict and no-profit rules will continue to be applied.²¹⁹

While section 175 provides that a director must avoid a conflict between his or her own and the company’s interests – particularly in relation to the exploitation of opportunities – the section does not define what would be regarded as an opportunity. According to Lowry, if the intention of the codification was to achieve consistency and coherence, then the drafting of section 175 was possibly informed by the reasoning in *Bhullar v Bhullar* in which the line-of-business test was adopted.²²⁰

4.4 Conclusion

From the discussion in this chapter it appears that while courts in the United Kingdom use the term ‘corporate opportunity’, the corporate-opportunity rule as developed in the United States, is not applied. Matters involving the appropriation of corporate opportunities generally continue to be approached on the basis of the no-conflict and no-profit rules. There have, however, been exceptions to the strict no-conflict and no-profit approach where courts have followed a more pragmatic approach.

The pragmatic approach provides that the nature of the opportunity be considered. That involves asking whether the opportunity falls with the

²¹⁹ Dobbie 2008 *Trinity CLR* 26.

²²⁰ Lowry 2012 *IRL* 11; *Bhullar v Bhullar* [2002] EWCA Civ 1509 paras [12] to [13].

company's line of business, or whether it is a maturing business opportunity.²²¹ If it is established that the opportunity meets these criteria, the enquiry is then taken further and the question is asked whether there was a conflict between the director's personal interest and his or her duty to the company.

The UK Companies Act contains a comprehensive codification of directors' duties. This is in contrast to the 2008 Companies Act which has only partially codified these duties. Furthermore, other than the 2008 Companies Act, section 175 of the UK Act refers specifically to a duty to avoid a conflict of interests, particularly in regard to the exploitation of an opportunity.

By referring to 'opportunity' the UK Companies Act has gone a step further than the 2008 Companies Act. The UK Act makes it clear that a director's interest will be in conflict with those of the company if he or she exploits an opportunity. However, while the UK Companies Act does not define 'opportunity', the principles that have been developed at common law continue to apply.²²²

²²¹ See *Industrial Development Consultants, Island Export, CMS Dolphin, and Balston*.

²²² See *Thermascan, Eastford, Towers, and Sharma* above.

Chapter 5

Conclusions and Recommendations

5.1 *Introduction*

The purpose of this dissertation has been, firstly, to consider whether the partially codified directors' duties are wide enough to cover matters involving the appropriation of corporate opportunities. Secondly, the purpose has been to consider the appropriate common-law test or tests to be applied in establishing whether, in the particular circumstances, an opportunity should be classified as a corporate opportunity.

The South African position was compared to that in Australia and England. The purpose of the comparison was to ascertain the post-codification approach to matters involving the appropriation of corporate opportunities, and in so doing to consider the approach that South African courts are likely to adopt when adjudicating matters involving the appropriation of corporate opportunities post-codification.

5.2 *Partial codification: The 2008 Companies Act*

The 2008 Companies Act has only partially codified the duties of directors. These partially codified duties can be found in section 76 of the 2008 Companies Act.

Section 76 does not refer to corporate opportunities or to the corporate-opportunity rule. It is submitted that the provisions of section 76 are sufficiently wide to cover the corporate-opportunity rule. In interpreting and applying

section 76 of the Companies Act in a corporate opportunity matter, the common-law rules and principles will continue to apply.

5.3 Nature and scope

It emerged from the discussions in Chapters Three and Four that Australian and English courts have continued to apply pre-codification principles to matters involving the breach of directors' fiduciary duties generally, and in matters involving the appropriation of corporate opportunities specifically. This is despite these duties having been codified (in the UK) or partially codified (in Australia).

In Chapter Two we saw that the court in *Da Silva* attempted to set out a test that could be used to determine whether a particular opportunity was, in the circumstances, a corporate opportunity. While the tests set out in *Da Silva* may not have set out all the requirements as comprehensively as one would have wished, they at the very least, provide a framework within which a South African corporate-opportunity rule can be further developed.

While decisions of the courts in Australia and the United Kingdom do not provide guidance in regard to the application of, in particular, the corporate-opportunity rule and the tests, the general approach of the courts to the application of fiduciary duties post-codification, do provide guidance on a likely approach to matters involving corporate opportunities post-codification.

5.4 Conclusion and recommendation

In the absence of clear provisions in the 2008 Companies Act referring to corporate opportunities, the common-law principles and rules will continue to apply. Much as the courts in both Australia and England continue to apply the

pre-codification principles when interpreting the statutory duties, so too should the test set out in *Da Silva* provide the basis for interpreting and applying section 76(3) to matters involving the appropriation of corporate opportunities.

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