



Interested Director and Fiduciary Duties: A Never-Ending Mess in English Legal Regime

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ARTICLE INFO			ABSTRACT
Article History:			<i>This article investigates the critical situation that is produced due to a conflict of interest. Like, ambiguity arises in pinpointing various inconspicuous conflicting situations for instance, the highlighting of the situation that will not be a conflict of interest if the director of the company without obtaining the authorisation exploited the opportunity and it is not clear his fiduciary duties have been breached likewise, the determination situation of conflict of interest in case the opportunity exploited by the director was not expressly rejected by the company during the post-resignation and pre-resignation periods of company's director. This study provides a three-stepped model in the form of a proposal. Step one seeks whether the opportunity exploited by the director has been expressly rejected by the company neutrally and in a bona fide manner by the board Step two, in the pre-resignation situation proposes the scope of the company business test and the third step proposes the maturing the company's business opportunity test for the post-resignation period to judge whether the director has infringed his fiduciary duties. This article critically analyses the directors' duty enshrined in the Companies Act 2006 specifically the duty to avoid conflict of interest to formulate proposals and recommendations that could help to highlight when the company's director will breach his duty with regard to exploitation of corporate opportunity.</i>
Received:	February	25, 2023	
Revised:	March	20, 2023	
Accepted:	April	10, 2023	
Available Online:	May	30, 2023	
Keywords:			
Director, Company, Conflict of Interest, Companies Act 2006, Fiduciary Duties			



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INTRODUCTION

This article critically discusses the Equitable Rules and how these rules were applied prior to the enactment of the Companies Act 2006 (hereinafter 2006 Act) in an inconsistent strict and

flexible manner. The 2006 Act has preserved only the strict application in its provisions but it has created an uncharted terrain in the legal regime but enunciating that statutory duties should be applied with regard to the existing precedent which uses the bifurcated approach. Thereby, the article aims to draw a framework to fill unhindered gaps between the provisions of the 2006 Act and the existing precedent so the courts could easily determine two questions that are: which situations will not give rise to a conflict of interest when a director exploited opportunity without obtaining the authorization of the board and it is not evident his fiduciary duties are breached? How to determine whether the situation gives rise to a conflict of interest if the director exploited an opportunity which was not expressly rejected by the company in the post-resignation and pre-resignation periods? Hence, this article critically discusses the situations of the post-resignation and pre-resignation periods of “the director in the context of the corporate opportunity.” The article provides a framework for both of these questions. The article finds that the “Scope of Business Test” could assist the courts while dealing with the cases of pre-resignation situations “if the opportunity does not fall in the ambit of the company’s line of business” then in case this opportunity exploited by the director would not consider him liable of breaching his duties in order to satisfy section 175(4)(a) provision “cannot reasonably be regarded as likely to give rise to a conflict of interest.” Further, for the situation of the post-resignation period, this segment provides the “maturing business opportunity test” and investigates the reasons why this test should be preferred in the post-resignation period rather than the Scope of the company’s business test.

Inconsistent Application of Equitable Rules

Before the groundbreaking promulgation of the English Company law in the form of the 2006 Act, there was two folded application of the principles hereinafter in the context of the fiduciary duties of the company’s director in regard of extracting his loyalty. The applicability of these equitable principles was either flexible or strict (Ahern, 2011) Hence, it was inconsistent with each other. The application of the strict approach causes the triggering of an automatic liability on the director (*Bhullar v Bhullar*, 2003) when he enters into an arrangement on behalf of the company without getting informed consent from the company in which he can have, or has, any sort of personal interest in conflict or might possibly be in conflict with the company’s interest (*O’Donnell v Shanahan* 2009) A strict approach also imposes liability if the director enters into the interested transaction and makes a profit from it without the permission of the board of directors (*Bray v Ford*, 1896) Prior to the 2006 Act, these doctrines were considered inexorable and rigid. Consequently, it becomes irrelevant to inquire whether the company was going to opt for the opportunity that has been exploited by the company’s director and whether the opportunity was best for the company or not. “Whether the director had acted diligently in good faith or the third party was not willing to enter into the transaction with the company.” The irrelevancy of these provisions makes the strict application of equitable rules more stringent.

On the other hand, the courts also bend towards the flexible approach in which the courts inclusively assume the intensive exploration of the circumstances, facts, and relevant facts at a broader level including whether this opportunity was better for the company, whether the opportunity rest well with the company’s business, whether the company would exploit the opportunity, whether the opportunity was capable to mature the business or capital of the company and the company could raise its capital by pursuing it, whether the opportunity

encountered the company's director in its personal capacity, whether the action performed by the direction with fides, whether the company was in the position to enter into the transaction (for instance in case of solvency or financial distress the company could not be in a position to invest more). All these factors are *sine qua non* for the faultless application of the flexible approach and any single from all of them is decisive. The court is required to consider all these circumstances and evaluate all these holistically to determine whether the fiduciary duty of the company's director has been breached while exploiting the opportunity (*Foster Bryant Surveying Ltd v Bryant*, 2007). However, the propagation of the 2006 Act codified both equitable rules in section 175 (Cheang, 2020). The provisions of the 2006 Act regarding the equitable principles have reformed the rule that evolved in *Aberdeen Railway v Blaikie* (1854) which provided a flexible version of these equitable rules. Hence, section 175 of the 2006 Act has reformulated the bifurcated version into a single strict approach. The enactment of the 2006 Act had eradicated the utilisation of the flexible approach of the English courts and the legal regime has been revolutionised and provided space only to the strict approach while the execution of the general equitable rules to its entirety or an extent is still disputable (Ahern, 2011). Inconsistent application made the legal landscape more uncertain and added uncharted terrain in the legal regime. Hence, the 2006 Act restricts to one strict approach but the statute itself has some unnecessary whirlpools.

Interpretation of Statutory Duties in the Context of Existing Precedents

It has been enshrined in section 170(4) of the 2006 Act that while implementing and interpreting the duties of the director codified in the 2006 Act, the equitable principles and the rules of the common law should be regarded and considered. Section 175(4)(a) of the 2006 Act states that "*if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest.*" Then no conflict of interest occurred. Hence, it aims to encapsulate the doctrine evolved in the *Boardman v Phipps* (1967) that provides: "The phrase *possibly may conflict* requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a *real sensible possibility of conflict*; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict."

The court in *Boardman* used the term '*possibly*' and it is interesting to notice that section 175(4)(a) of the 2006 Act has not employed the term '*possibly*' and preferred to use '*likely*' in its place. The use of '*likely*' in place of '*possibly*' makes the circumstances more clear concerning the situation that no-conflict doctrine has not been breached as it can be assumed that the term '*likely*' emphasises that if there are fifty percent or less than fifty percent chances that the situation could cause the conflict of interest while the term '*possibly*' submits approximately around the ten percent. The use of '*likely*' in place of '*possibly*' suggests whether the doctrine of *Boardman* has been overridden by the 2006 Act and whether the law has been changed after the propagation of the 2006 Act. However, section 170(3) of the 2006 Act says that the duties protected in the 2006 Act rest well and are based on the existing equitable principles and the rules of the common law, and under section 170(4) it is necessary to interpret these duties according to the existing principles so if the statutory requirement is acted then section 175(4)(a) of the 2006 Act has to be interpreted in the light of the *Boardman* ruling. To this end, the effect

of “section 175(1) of the 2006 Act suggests that if the director of the company steps into a situation in which there is a chance greater than ten percent” (possibly) then the personal interest of the director will be in conflict with the company’s interest. Consequently, the duty of the director will be infringed upon. On the contrary, the duty will not be breached if the chance is less than ten percent. Therefore, section 175(4)(a) of the 2006 Act can be interpreted to reverse section 175(1) of the 2006 Act in case the term ‘*likely*’ is interpreted as ‘*possibly*’ (Liptrap, 2020). It is to submit that the courts are needed to be more sensitive to each specific context and they are required to explore the entirety of the actual situation (strongly opposing the hypothetical situations) before finally deciding whether the fiduciary duty of the company’s director that exploited the opportunity has been breached with regard to a situation and whether the situation is reasonably and justifiably considered to rise the conflict of interest.

Moreover, section 175(2) of the 2006 Act explicitly states that it is immaterial to say that the company was unable to exploit the opportunity (Bourne, 2016). If the court has been restricted to seek that whether the company ‘*could*’ enter into the transaction or could exploit the opportunity, the question is whether the court is also necessarily restricted from investigating whether the opportunity ‘*would*’ be exploited by the company after the literal construction of section 175(2) of the 2006 Act and interpreting it along with section 175(4)(a). Albeit it is a requirement under section 170(4) that the codified statutory duties should be construed in light of past precedents, for instance in *Bhullar v Bhullar* (2003), it has been that “whether the Company *could or would* not have taken the opportunity, had been aware of it, is not to the point,” (*Towers v Premier Waste Management Limited* 2011) however, the omission of ‘*would*’ expressively done in section 175(2) of the 2006 Act. It is submitted that it only says that it is immaterial relatively it is inconsequential that the company is capable (‘*could*’) to exploit the opportunity rather than that the company is not willing (‘*would*’) to take up the opportunity. It is not denied that the legislator would not be aware of the decision of *Bhullar* and a former landmark *Regal v Gulliver*. In *Regal* (1967), it was held that the unwillingness of the company to enter into the transaction or to exploit the opportunity is quite an immaterial factor to determine whether the directors’ fiduciary duty has been infringed. And yet, the term *would* is absent. However, in *Regal*, the director of the company was honest and no loss has been suffered by the company. Similarly, in *Aberdeen Railway* (1854), the arrangement was not unfair. Hence, it could not be more relevant while determining whether the fiduciary duties have been infringed.

It is a significant and essential rule of statutory construction that literal interpretation is considered a foremost method for the construction of the terms and words of any law and it is also a fact that when the words of the statutes are unblemished and plain and are not vague or difficult to understand, the court has to give effect to them in their simple and ordinary meanings and there is no need to add or subtract them further. The purposive construction is referred to and preferred in the case when the words are ambiguous or vagueness exists or the preference for the literal construction would give birth to absurd consequences. In short, it is reasonable to assume that ‘*would*’ has been omitted intentionally. The main bone of contention now is when the refusal of the company to get benefit from the opportunity, property, or information in question turns out to be a material consideration. More precisely, under section 175(4)(a) what are the circumstances under which the refusal of the company for an opportunity “*cannot reasonably be regarded as likely to give rise to a conflict of interest.*” It is discussed in the next heading.

Exploiting the Corporate Opportunity

This segment aims to critically analyse three situations in which exploiting corporate opportunity by the company's director can or cannot cause a breach of fiduciary duties and provides a framework for the courts to determine which situation will be called a conflicting situation.

Exploitation of Opportunity by Director without Informed Consent

First, if the director during his directorship exploits an opportunity and enters into the transaction without acquiring informed consent from the board as he assumed that the company could not or would not be interested in taking the opportunity. This view is authenticated by various landmark cases like *Shanahan*, *Regal*, and *Bhullar* can be cited in this regard. These cases affirmed whether the corporation would not or could not gain the opportunity and would not or could not enter into the transaction and the situations mentioned in these cases are not relevant in considering the company's director liable for infringing the fiduciary duties (*Regal (Hastings) Ltd v Gulliver* 1967).

There are two policy situations for that. The first is the rising concern in the context of the "informational asymmetry between the company and its director because the director is the main actor and he has total control" and unstoppable access to the company's resources due to it he is empowered to manipulate any kind of information on the capital and the company's economic capability. He can also manipulate the merits of the opportunity to make his action justifiable and reasonable to exploit the project at the company's expense (Corradi & Nowag, 2023). The second justification has been evolved in *Bray v Ford* which evinces the "prophylactic concerns" that need the temptation of the director to prefer his personal interest over the interest of the company should be removed. This is necessary because a director is the company's agent but actually, he is a human being so it is impossible to think that he would make such a decision when he will be encountered a situation where the conflict is most stark between his personal interest and the interest of the company and where the temptation to personal interest is more distinct (*Parker v McKenna* 1874). Therefore, the second policy situation can be regarded realistically as likely to engender or bring out the situation of conflict of interest.

Unbiased Refusal of Board to Exploit Opportunity

Second, if the company has encountered an opportunity, this subjected transaction was discussed in the board meeting with complete quorum, and after the voting, it was not approved by the board and hence the company decided to reject the opportunity. After the refusal by the company, if a third party persuaded the director of the company to exploit the same opportunity which was rejected by the company (Zion, 2022). The company's director enters into that transaction. In this situation, the opportunity was at first encountered by the company rather than a director. Therefore, assertively, the "prophylactic concerns" that arise in the first situation will not be applied to this second situation because it is clear that the director of the company did not determine on his own whether the company would or could not exploit the opportunity. In contrast, the stance of the company was fully informed and was clarified and the company has deliberated it in a bona fide manner. The second situation sits well with the facts of *Peso Silver Mines v Cropper* (1966).

Peso Silver Mines Case

It was unanimously held by the Supreme Court (SC) in *Peso Silver Mines*” that the fiduciary duties were not infringed by the director of the company despite the fact that he exploited an opportunity and entered into the transaction that was rejected in “a bona fide manner by the company’s board of director” that contained six directors including the impugned director. The court called the evidence and heard the testimonies of the witnesses and scrutinised the justifications of “the board of directors for not exploiting the opportunity.” SC then concluded that the company was fully informed about the opportunity and the board made an unbiased and neutral decision in the best interest of the company. The reason behind the refusal of the opportunity was the financially strained condition of the company and the company already had a lot of stress of work and had to manage many other projects. The company stated that it had no more funds for the subjected opportunity. There was no evidence that the impugned director being the in-charge officer of the company had hidden any information or manipulated the information to end the suit. In this way, in the first aforementioned situation, the concern in the context of the “informational asymmetry” did not exist. The Supreme Court affirmed and authenticated the Court of Appeal’s finding and considered it valid utterance that: “the decision rejecting the acquisition was an honest and considered decision of the appellant’s board of directors as a whole and done in the best of faith and solely in the interest of the appellant and not from any personal or ulterior motive on the part of any director, including the respondent (*Peso Silver Mines* at 677).” After this, the Supreme Court recalled the decision of *Regal* and the court held: “there are affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and with sound business reasons in rejecting the offer *Peso Silver Mines* at 674).”

After perusal and examination of the record and testimonies, the court did not find a single factor to establish the biases of the board with regard to the rejection of the transaction or the impugned director has exerted any kind of unreasonable influence or undue influence in the board’s deliberations or their decision of rejecting the opportunity. It is reasoned that there was nothing to demonstrate that the subjected director was interested in the transaction until the time had lapsed after the refusal of the transaction by the board of the company. After all, there was nothing in the record that the subjected director had an intention to exploit the opportunity before or during the decision-making process of the company’s board. The Supreme Court stated that the director became interested in the transaction at the third parties’ suggestion. The director had exploited the opportunity (rejected by the company’s board) after six weeks. Moreover, the other board members were unaware of the fact that the director would be interested in the arrangement (which they are rejecting) or he would enter into the transaction. The decision of the court does not rest well on the strict approach of the 2006 Act albeit it can be considered that the Supreme Court utilised the flexible approach that existed prior to the enactment of the 2006 Act.

Comparing Peso Silver Mines with Regal and Boardman Cases

If the decision of the board of directors in the *Regal* and the *Peso Silver Mines* is compared; the directors in *Regal* were obvious that the subsidiary would not be able to fulfill the demand of the lessor with regard to the paid-up capital. No supplementary funding was acquired by them from the parent company for the subsidiary capitalization. Due to that, they were capable of subscribing to the subsidiary shares with the aim to gain profit by selling their portion of the

shares. Moreover, they were willing to deprive the parent company of the profit earned by selling the shares.

There is a need to compare *Peso Silver Mines* with the landmark *Boardman*. However, in this case, there was an explicit indication by the trustee that he has no interest in buying the company's shares in which the trust was holding a very minor interest. Further, without the approval of the court, the trust was not able to buy the shares. It was held that the party who acted as a solicitor and was working on behalf of the trust was considered liable for infringement of the equitable principle, no-conflict rule after the shares were purchased by him. While in *Peso Silver Mines*, where there was a lack of fully informed trustee's rejection to exploit the opportunity of gaining the share but he merely stated that he is not interested in the transaction. But in *Boardman*, the solicitor would be biased and any suggestion given by him would also be biased and his advice would not be in the trust's best interest as the solicitor has his personal interest in buying the shares and he obtained the information of shares while he was acting as the company's agent and was holding a fiduciary position. The court, in this case, was a bit cynical of the attitude and ability of the *Boardman* in giving a piece of unprejudiced advice in the case when he would be called by the trustee for consultation about ascertaining for applying to the court for the approval for obtaining the shares (*Boardman v Phipps*, 1967).

Lastly, in *Peso Silver Mines*, the time between the refusal of the board to the period when the director entered into the transaction, there was nothing to establish that there existed any new information that should be known by the company that could have an effect on the decision of board before their decision to not exploit the opportunity or the director had any material information for the opportunity which he failed to disclose but that was very significant for the company or it was concerned information for the company. Therefore, it was stated by the Supreme Court that: "there is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as the director had access to any such information by reason of his office (*Boardman* at 682)."

Prudent Approach for English Courts in Second Situation

There is a need that English Courts' jurisprudence should follow the aforementioned justifications, reasons, and logic evinces in *Peso Silver Mines*. The English Courts should acknowledge and recognise these reasons and must not decline them as in *Queensland v Hudson* (1978), the Privy Council had allowed the director to enter into an arrangement that has been rejected by the board of directors and there should be an informed rejection.

In short, it is summarised that –the company director steps into an arrangement after time had lapsed since the refusal to enter into the arrangement by the board of directors in a bone fide, neutral, and fully informed manner and there is no arising of any material information (from the time when the opportunity was rejected by board to the time when the company director entered into it) that could affect the deliberation of the board and their decision to reject the opportunity– is the reasonably justified example under section 175(4)(a) in which it cannot be considered as possibly to give rise to a situation of conflict of interest. Hence, it is to submit that a proper and reasonable balance can be maintained about the competing interest arising due to the strict approach where there is arising of informational and prophylactic asymmetry issues in the employment of the flexible approach where it is important to consider the directorial

entrepreneurialism. Moreover, the English courts can also impose a burden on the interested director who exploited the opportunity to prove that the situation could not be regarded as a conflicting situation in light of section 175(4)(a). To this end, the court could play a role in ascertaining a protective measure to preserve the interest of the company. *Murad v Al-Saraj (2005)* can be cited in this context as a validated authority. Imposition of a burden on the company's director as held in *Murad* is "inconsistent with section 175(4) of the 2006 Act" which states that: "This duty is not infringed; (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors."

The 'imposition of burden' is not resting well with the language of the statute of 175(4)(a) and (b) are constructed and interpreted together then there are two ways that can be entertained by the interested director that are either he can demonstrate the situation does not fall in the ambit of section 175(4)(a) or the interested director can say that he acquired the approval of board under section 175(4)(b) of the 2006 Act then he exploited the opportunity and he has not breached any of his fiduciary duties.

Exploitation of Opportunity by Director after Board's Assent

Third, in this case, if the board of directors is aware of the fact that the director is interested in the opportunity which is being under consideration by "the board and the subjected director is part of the board" and the director is seeking whether the board rejects or accepts the opportunity so he can exploit it. For instance, in *Queensland v Hudson*, the court unanimously held that in case if the board rejects to enter into the transaction in a fully informed manner and the board of directors assents the subjected director to enter into the transaction for his personal gain, to this end, there will be no possibility of conflict and consequently, there will be no infringement his fiduciary duties. *Queensland* and *Peso Silver Mines* are distinguishable as later the board of directors did not assent the company's director to enter into the arrangement to benefit himself as the board in a bona fide manner rejected the opportunity. There is no evidence in this case that the director was willing to enter into the arrangement to benefit himself prior to or during the meeting of the board where the matter was under discussion. Even so, the board was unaware that the director was interested in the arrangement (no evidence was found by the court on this proposition). However, in the former case, the board was aware of "the interest of the company's director in the transaction." In *Queensland*, the board of directors was aware that "the director has an interest in the transaction" but it missed one basic and fundamental qualification which should have been made in *Queensland* as the director in this case was part of the board of directors that refused to step in the transaction and the same board allowed the director to take the opportunity.

Section 175(6) of the 2006 Act states that: "The authorisation is effective only if (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted." Consequently, the presence of the director having an interest in the transaction should not be counted as a member of the quorum. Additionally, his vote either for approval or rejection of the transaction should not be considered.

Corporate Opportunity and Company's Line of Business: Pre-resignation Period

The scope of the company's business means everything which is of or has the company's economic value and does rest well with the line of the company's business (Rauterberg, 2017) Reading of section 174(4)(a) of the 2006 Act evinces that a situation will cause a conflict of interest if the director exploits the opportunity that could add economic value to the corporation or company's business. The companies exploit such opportunities that rest well with their line of business (except when the company is in financial distress). *Industrial Development v Cooley* (1972) states that the director is required to disclose "the opportunity in front of the board that is relevant to the company's business. When the company bill was under debate in the parliament, it was stated by Lord Goldsmiths that: If the matter falls outside the ambit of the company's business, a real conflict of interest is unlikely. Hence, the director can avail the opportunity if it does not sit well with the company's line of business and it will not give rise to conflicting situations under section 175(4)(a) of the 2006 Act (Pollman, 2019)." For instance, in *Wilkinson v West Coast*, the company's director was selling clothing and the court held that fiduciary duty is not infringed as this business does not fall in the ambit of company business (*Wilkinson v West Coast* 2007) The "scope of business test" (Test hereinafter) helps to understand which situation is regarded as conflicting situations for the interested director under section 175(2) (Hardman, 2023). So, there is a need to make a connection between the company's business and the opportunity to establish which corporate opportunity the director can or cannot exploit.

Erroneous Treatment with Test by Courts

The test has been rejected in *Donnell v Shanahan*, where the company was asked to provide a client who could purchase a property, and the purchaser was found by the director who agreed to pay a commission to the company after finalization of the deal but the deal failed to occur. The director found another client who was willing to buy half of the stake on the condition that the rest of the stake will be purchased by the director. The director entered into this business but "the new client refused to pay a commission to the company on the occurrence of the deal." The director was sued because he exploited the company's opportunity and breached his duties. The court applied the test evolved from landmark *Aas* and held that the purchasing of property does not rest well with the company's business so the fiduciary duty has not been infringed. Later the Court of Appeal dismissed the stance of the lower court and held that the director has infringed both equitable rules as the company lost its commission due to him and the court said that the test is not applied to "no-profit and no-conflict rules" (*Wilkinson v West Coast* 2009). It is to submit that the assumption of the Court was erroneous and mistreatment with the test. The Court dismissed the test and reasoned that *Aas* is not applicable in this context due to factual differences. Second, the test is invalid and is not supported by various authorities. It is submitted that the Court's reasoning is subjective on various grounds:

First, the test is a kind of exception that is only applicable to the no-profit rule and is not applied to the no-conflict rule and there is no standing of the no-profit rule as after the propagation of the 2006 Act, the no-profit rule has been summed into no-conflict rule (can be seen in section 175(2)). The foremost and chief query in light of sections 175(1) and 175(4)(a) is whether there exists a probability of conflict. To answer this query; the court should seek into the test and hence the misapplication of the test was subjective.

Second, the Court stated that *Regal* and *Keech* did not apply the test exception. However, the test should be read with section 175(4)(a) albeit this section does not mention the test but this section tries to qualify the harshness preserved in sections 175(1) and 175(2) of the 2006 Act to a certain extent and to particular circumstances. Now there is a need to discuss whether the test is competent to sit well to assess the situation of conflict. It is to submit that *Boardman* and *Bhullar* are the authorities that provide support to the test. The test got approval in *Aas* and was applied in *Boardman* where the court held that buying of shares by the director does not fall in the scope of trust and the director has not breached his duties.

Test and Multiple Directorships

It has been commented by “Hannigan and Prentice” about an interested director that: “section 175(4)(a) provides protection to a director, who, for example, holds multiple directorships where there is a possibility that he *can have* a direct or indirect conflicting but on the facts, the *situation cannot reasonably be regarded as likely to give rise to a conflict of interest.*” (Gelter & Helleringer, 2018). However, the test could affect the director holding multiple directorships where each company has a competing business. In this case, the director will not be able to get consent from each company due to confidentiality obligations. In this context, *Industrial Development v Cooley* states that if the director is encountered by the information —*it was related to the company, and the company was required to know it*” but it was information that the director of the company should not exploit without getting consent.

Framework for Application of Test

In *Bhullar*, the test was applied when the directors bought the property near the office of “the company without informing the company about the property. The director was sued for breaching fiduciary duty as he exploited the opportunity that was competent of being falling into the line of the company’s business.” With regard to the decision of *Bhullar*, Professor Davis (2008) stated: “this is a notable decision... it seems to move English law in the direction of the US *line of business test*, i.e. if the opportunity falls within the company’s existing business activities as well as where the company is actively pursuing a particular type of opportunity, then an opportunity the director comes across is a corporate one, even if no property or information of the company was deployed.”

In *Commonwealth Oil and Gas v Baxter* (2009), the company had the business of exploration of oil and gas but the company was willing to start a venture in offshore exploration with Azerbaijan authorities. Thereby, it is easy to understand that agreement with the Azerbaijan authorities was a relevant and concerning opportunity for the business of the company. However, the director exploited this opportunity. The court held that “the director had breached his fiduciary duties by entering into a conflict of interest situation.” It is to submit that there must be a balance between a strict and flexible approach. The test by using “the strict approach should not be rejected (as done in *Shanahan* by the Court of Appeal) by delineating that the director should not exploit the opportunity at any cost. However, if the opportunity that fell in the ambit of the contemplated or existing business of the company is considered as an opportunity within the scope of the company’s business.” The opportunity must have relevance or it must be concerned with the company’s business. More precisely, if the impugned transaction is not part of the current or contemplated business of the company but it has concern or relevance with the company (it can be easily judged by a layman) then “it necessary should fall in the realm of the

company's business. By this, the interest of the company will be preserved and the entrepreneurialism of a director would also not be entirely suppressed. Consequently, the director will be able to exploit the opportunity which does not fall in the scope of the company's business and which must not be adequately connected to the company's business."

Consequently, in case of pre-resignation circumstances, if the opportunity has not been taken up by the board; the court can explore whether the opportunity stepped in by the company's director falls within the realm of the line of the company's business. In case of a negative answer, the director has not infringed his duty because in light of section 175(4)(a) no conflict of interest occurred.

Maturing the Business Opportunity: Post-resignation Period

If the company's director resigned from his job and left his office and the board of directors refused to enter into the transaction and did not consider the opportunity, whether the "scope of business test" will be applied or not is disputable. This segment describes that in the post-resignation period of the director, the aforementioned test will not be applied but the test called "maturing the business opportunity" (maturing business test hereinafter) will be applied. There are various reasons why maturing business tests should be applied by courts in case of post-resignation circumstances. The four justified reasons are as follows:

First, the application of maturing business test persuades the no-conflict rule more reasonably and imposes a more effective bar on the director to prefer the company's interest and not compete with its interest. Because the maturing business test gives a framework to courts by throwing two questions that are: Firstly, whether the departure or the resignation of the director from his job was influenced by his interest to gain the corporate opportunity that could mature the corporate business. Secondly, whether the opportunity in which the corporate director was interested was actually an opportunity that could mature the company's business at the time of his resignation from his job (*Hunter Kane Limited v Alan Watkins* 2003).

Second, the definition, extent, and "scope of the corporate opportunity" have been shortened by the English courts in the context of post-resignation circumstances in comparison to the pre-resignation situations, the courts deliberate that the cautionary measures must be considered while applying whichever test hence in this way the corporate opportunity canon is affected. It has been held by the judge in *Dolphin v Simonet* (2003) that "in my judgment, the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is to be treated as if it were the property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property."

In *Bhullar* (2003), a broad definition of the corporate opportunity has been considered with regard to the director who was holding his job and stepped in the "commercial opportunity neglecting the company's interest (the director thought the company will not exploit it). Court stated that there was a beneficial interest of the company in the opportunity. Moreover, the court rejected the argument of the director that the fiduciary has to have some improper dealing with property *belonging* to the party to whom the fiduciary duty is owed before liability can be

triggered.” In *Bhullar*, it was stated that the opportunity could mature the business of the company.

The third reason is the uncertainty in the application of this test about the post-resignation situation as there is no framework that should be followed by the courts to apply this test. It is not easy to generate a single question for exploration of whether the opportunity was reasonably exploited by the director. Lastly, there is more objectivity and firmness in the maturing business test than the scope of the company’s business test concerning the situation of the director’s post-resignation. While considering the situation of the director’s post-resignation, the court has to consider what facts or situation does not fall in the ambit of section 175(4)(a) of the 2006 Act.

The maturing business test has evolved from the *Canadian Aero Services v Malley (1974)* (case of Canadian Supreme Court) the test was then followed by various English cases including *Dolphin (2002)* and *Island Export Finance (1986)*. In *Canadian Aero Services*, “the court held that the director should not take the opportunity that is being pursued by the company.” The court stated that it is important to note in which capacity the opportunity is being taken up by the director is relevant to apply the maturing business test. However, it is stated by various scholars that the maturing of the business test was not considered by the court in *Bhullar* (it was not a case of the director’s post-resignation circumstances) (Hannigan, 2011) However, it is not true because the court checked that “the question of whether this is a maturing business opportunity is not conclusive” even though it has not been rejected by the Court of Appeal. *Bhullar* has not rejected or criticized the *Canadian Aero Services* or *Island Export Finance* which are landmark cases and reasonably employ the test.

There are many cases in which the maturing business test has been applied and heralded the welcoming attitude of the courts toward the test in post-resignation circumstances in which there was a kind of infringement of the no-conflict rule (*Kingsley v McIntosh, 2006*). In “*Hunter Kane Limited v Alan Watkins*”, the court held that a director (in the post-resignation period) is restricted to get an advantage from the business or property of the company when his resignation was made or influenced by his aim to gain the opportunity that has been sought by the corporate body. Moreover, if he gains the opportunity after the post-resignation period then he came to know about the subjected opportunity during his office rather than it was a fresh initiative for him. The court stated that he made secret profits after his retirement.

On the contrary to it, if the director’s departure is not influenced by the desire to take up the opportunity and the transaction was not competent to be called a business maturing opportunity, the director was not interested and he has not breached any of his duty (*CMS Dolphin Ltd v Simonet 2002*) and under section 175(4)(a) he never stepped in into the conflicting of interest situation. Section 170(2)(a) of the 2006 Act encapsulates the liability for the director’s post-resignation period. Section 170(2)(a) says that a director who ceases his office or job is subjected to section 175 of the 2006 Act. To this end, a question arises as to what are the situations in the post-resignation time that cannot be practically and reasonably called “*likely to give rise to a conflict of interest*” in the light of section 175(2) such that a director who leaves his job” is incapable to exploit without acquiring the consent from the board of the company. To this extent, the maturing business test is the best doctrine and framework to answer all these questions.

Proposal and Recommendations

The 2006 Act describes all the statutory duties that are imposed on the company's director in order to extract a kind of loyal attitude from him. To this end, the director is not permitted to prefer his interest when his interest conflicts with the interest of the company in any transaction under the duty to avoid conflict of interest. Hence, the 2006 Act has preserved some basic rules in sections 175(1) and (2) called the equitable rules to bar the director which has evolved from the Court of Equity. The company director is restricted to enter into the realm of a situation that is a situation of conflict and he is not permitted to compete with the company's interest except when he gets the consent of the board or he is authorised by the board to enter into the arrangement. In the first case, if the director prefers his interest and breaches the equitable rules (either by making a profit by using his office or exploiting the confidential information of the company) then he would have infringed his fiduciary duties. In the second case, if the board authorised him to exploit the opportunity then he can enter into the transaction and his duties will not be breached. These are simple and straightforward situations. It is easy to determine whether the duties have been breached or not. However, in case, if the director has preferred his interest and the board has not authorised him to enter into the transaction and it is not clear whether the duties of the director under section 175 (1) have been breached or not and then what will be the instances where he has not entered into the situation of conflict of interest despite he entered into the transaction without authorization.

This article endeavors to propose a proposal based on three steps for the interpretation of the above-mentioned questions: The first step of the proposal is to seek the basic information that whether the opportunity was expressly rejected by the company with the neutral, bona fide, and impartial decision of the board. If so, then the director of the company can take up that opportunity which is rejected by the company. One thing that is to be noticed from the time when the company refused to take the opportunity till the company's director entered into the transaction is that there should be no addition to any further material information that could affect the deliberation of the board. If no further information has been added and the refusal was made by the company impartially then if the director takes the opportunity it will not cause a conflict of interest under section 175(4)(a). The second question of this article is answered as: In case when the opportunity was not expressly considered by the company situation of the pre and post-resignation period of the director. In the period of the pre-resignation; this article proposes the second step of the proposal which is it is required and necessary to determine whether the company's director (he is still holding the office of the company) that had exploited the impugned opportunity falls in the realm of the scope of business of the company or it falls in the ambit of company's line of business. "If the impugned opportunity does fall into the line of business of the company" then the director had stepped into the conflicting situation and breached his duty. However, the duty will not be infringed if the opportunity does not rest well within the line of the company's business and the exploitation done by the company's director will not cause a conflict of interest and he does not step into the conflicting situation under section 175(4)(a). This test can be called the scope of the company's business test.

In case, the opportunity has not been considered by the company in the post-resignation situation of the company's director, for this situation, this article proposes to step three which is required to determine the impugned opportunity stepped into in by the resigned or former company's director whether this subjected opportunity was competent to mature the business of the

company. Hence, the article calls this test a maturing business test. The maturing business test is employed in the situation of the post-resignation period of the company which is more helpful instead of the scope of the company's business test in the post-resignation period (as explained in segment three why it is more reasonable). If the opportunity was competent to mature the company's business then the stepping into it by the former director could cause a breach of his duty as he stepped into a conflicting situation under section 175(4)(a) of the 2006 Act. It is to submit that this proposal has provided a three-step structure that is capable of not only giving reasonable findings to the research questions of this study but also establishing a framework for the justified and reasonable interpretation of section 175 of the 2006 Act. This proposal is competent in maintaining the dignity of the equitable rules and fiduciary duties employed in the statute and imposed on the director of the company. Most importantly, it provides a suitable balance between the preservation of the interest of the company and not destroying the entrepreneurialism of the company's director.

CONCLUSION

It is concluded that the proposal of containing the three-step structure is a diverse framework or a model that could help in the interpretation of section 175 of the 2006 Act. This framework endeavors to eradicate the inconsistency in the application of section 175 that occurred by the broad and loose application and interpretation of the English courts. Moreover, the three-step model proposes a series of tests like the scope of the company business test and maturing the business test to establish the integrity of the fiduciary duties of the director. As this study supports the interpretation of the basic statute but it maintains the balance of interest. Whether the director has fallen into the conflict of interest situation under section 175(4)(a) is to be determined by the three-stepped model. The first step seeks whether the company neutrally or in bona fide manner rejected or considered the subjected opportunity expressly and in the case where the answer is positive then if the director tries to exploit the opportunity or exploited it hence breached his duties. In circumstances if the opportunity was not expressly taken by the company and in case if the opportunity is exploited by the director and galls in the line of company business then the director in the pre-resignation period had breached his duties. Similarly, "if the company has not expressly rejected the corporate opportunity" in the post-resignation period of the director and the former director exploited it then it is to inspect whether the opportunity could mature the business of the company or not. If the director exploited that opportunity and it could mature the business of the company then his duty has been infringed. It is to submit that the model in the form of the proposal is sufficient to preserve the fiduciary duties of the director and to address all sorts of concerns like informational asymmetry or any kind of prophylactic concerns coming forward to the strict application of the fiduciary rules. Further, it also maintains an arm's length where the directorial entrepreneurialism is being destroyed or influenced by the strict approach of the fiduciary rules. Above all, this framework is competent to improve the legal landscape on the duty to avoid conflict of interest which is a statutory duty imposed by the 2006 Act on the company's director. Along with it, the uncertainty that existed in the regime due flexible approach established by the courts can also be eradicated by the execution of the proposal as the established flexible approach provides ample space to the courts to not only divert from the statute but also unreasonably use their discretion in certain and uncertain circumstances and creates ambiguity and a sort of vagueness in the application of the established law which is clear on these points.

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