Multiple directorates and loss of corporate opportunity: bases and remedies

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In this article David McLay reviews a number of possible causes of action which can be brought against a multiple director who conveys a corporate opportunity from one company to another. The existing law is shown to provide a fruitful basis for such actions, particularly the duty of loyalty rule which comprises two subrules. The remedies which may accrue are also reviewed.

I. INTRODUCTION

Multiple directorates exist where a person is a director of more than one company or other body corporate.[1] Many objections have been raised to the holding of multiple directorates on the grounds of restriction of competition, conflicts of interest, decreasing opportunities for young managers, and debasement of the quality of business management. This article focuses on the microeconomic problem of conflicts of interest[2] rather than on the macroeconomic objections to multiple directorates. Owing to the microeconomic nature of the problem under consideration, an examination of the remedies available to the company will be the objective of the article.

In order to assess the reality of the problem, it is necessary to explore the extent of multiple directorates in New Zealand. A 1972 study, directed at potential interlocks between companies via their boards of directors, revealed that 65%

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1 In order to avoid the problems associated with nominee directors and directors of subsidiaries relating to acting "in the interests of the company" and to oppression of minorities, the multiple director hereafter is the director of two or more unrelated companies. See P. R. Kyle "The Government Director and his Conflicting Duties" (1973) 7 VUWLR 75.

2 Conflicts of interest can arise out of interlocks with competitors, suppliers, customers, and financial institutions, as well as where a person is director of both the offeror and offeree companies in a takeover or merger (subject to Second Schedule, Companies Amendment Act 1963). There is also the particular problem of "loss of corporate opportunity" to which this article is addressed.

of the 876 directors of the 160 public companies held more than one directorate.[3] Fogelberg and Laurent's concern was primarily with the restriction of competition.[4] The potential extent of directors' conflicts of interest can be judged by reference to the total number of multiple directorates, as that determines the maximum possible number of such conflicts. Some appreciation of the extent of multiple directorates in New Zealand was gained from the listing of directorates in *The New Zealand Business Who's Who*.[5] The resulting figures are:

Number of Directorates	2	3	4	5	6	7	8	9	10	11–15	16–20	20+
Number of Persons	2078	654	251	172	102	68	35	24	17	56	17	9

There are thus almost 3500 persons who are presently in a position where their duty to one company could conflict with their duty to another company. The number of possible two-company conflicts of interest is in excess of 22,000. Also significant is the fact that 9 persons hold more than 20 directorates.

The problem of loss of corporate opportunity may exist in either of two forms. First, company A's board of directors may decide, contrary to the apparent best interests of the company, to refrain from pursuing a business opportunity owing to the existing or future involvement of company B, sharing a common director X, in that area of opportunity. Second, company A may perceive a business opportunity, such as a compatible takeover victim or a new product line, but company B, sharing common director X, seizes that opportunity.[6] The second type may be termed a "leak" situation.

An example of such a problem is the following. X is a director of A Ltd and B Ltd. A Ltd, a retailer, with diverse interests, identifies Q Ltd, a manufacturer of goods sold by A Ltd, as suitable for takeover. B Ltd is also a manufacturer but of a different range of goods from Q Ltd. B Ltd, just before A Ltd decides to make a formal takeover offer, makes a successful offer for 55% of the shares in Q Ltd.[7] The following sections of this paper represent an attempt to explore the possible liability owed to A Ltd in this or any other situation involving a loss of corporate opportunity. It might be observed that the above example actually involves both types of loss of corporate opportunity identified earlier. The "leak" situation is clearly apparent. But the first type of situation

3 G. Fogelberg & C. R. Laurent *Boards of Directors in New Zealand Companies* (Department of Business Administration, V.U.W., Wellington, 1974) 21.

4 That concern, which is seen in the United States legislation (especially s. 8, Clayton Act of 1914), is a valid one if one is concerned with the interests of the company as a whole. But that is not the test of the legality of directors' actions. In relation to the individual company, the directors are required to act "in the interests of the company", which means in the interests of shareholders. Thus other interests, such as the restriction of competition or employees' interests, are outside the criteria by which directors' acts are judged (*Parke* v *Daily News Ltd* [1962] Ch. 927). Instead, it is necessary to determine in the individual circumstances of each company whether an interlocking directorate is in the interests of the company.

5 (Fourth Estate, Wellington, 1978).

6 The propriety of the decision or the bona fides of the directors are usually irrelevant where a conflict of interest exists.

7 Assuming that the provisions of the Companies Amendment Act 1963 are inapplicable or are complied with.

in which a board refrains from acting is also present, for the board of A Ltd has refrained from pursuing the takeover opportunity or the possibility of litigation.

The problem of loss of corporate opportunity differs from those problems associated with the company's links of mutual benefit with suppliers, customers, and financial institutions, and even in some cases with competitors. However these links of mutual benefit do not inevitably result in links which are "in the interests of the company". That is particularly true of links with competitors. In a number of cases, possibly a majority, the primary concern will be to prevent the competitor from taking advantage of the situation. It is convenient to note that Fogelberg and Laurent discovered 98 cases of direct interlocks with competitors in the 160 companies studied.[8]

In contrast to the links of mutual benefit, there are likely to be objections raised by shareholders in the case of loss of corporate opportunity, when the true position becomes known. The bases of those objections in the legal sphere will be analysed in this paper.[9] There are many difficulties involved, apart from the legal foundation of the action. First it may be difficult to discover that a loss of corporate opportunity has occurred. Second there is the problem of locus standi.[10] Third evidentiary problems may arise in the proof of a leak to the other company. Furthermore, there is the problem of actually getting a suitable remedy from the court.

II. STATUTE AND COMMON LAW

Any attempt to find a statutory prohibition of multiple directorates will prove unsuccessful in New Zealand.[11] Section 199 of the Companies Act 1955 is the only legislative provision relating to multiple directorates. That section by recognizing the possibility of persons being directors of more than one company might seem to legalize multiple directorates. But the section does not purport to affect the operation of any rule of law restricting directors from having interests in contracts with the company, so that the rules of Equity are left standing. A recent decision at first instance in the British Columbia Supreme Court[12] indicates that the statutory oppression remedy[13] is available as a further means of attacking the position of multiple directorates. The decision, based on dicta of Lord

8 Op. cit. n.3, 24.

9 But the following discussion also has relevance to a situation involving an apparent link of mutual benefit which has been exploited to one company's advantage.

10 The rule in *Foss* v *Harbottle* (1843) 2 Hare 461 should be noted. See L. C. B. Gower *The Principles of Modern Company Law* (4th ed, Stevens, London, 1979) Ch. 26; K. W. Wedderburn "Shareholders' Rights and the Rule in *Foss* v *Harbottle*" [1957] Camb. L. J. 194 and [1958] Camb. L. J. 93; O. C. Schreiner "The Shareholder's Derivative Action — A Comparative Study of Procedures" (1976) 96 S.A.L.J. 203.

11 Cf. s. 8, Clayton Act of 1914 (USA) which prohibits persons from acting as directors of two companies which have shareholders' funds exceeding 1 million and which are competitors.

12 *Redekop* v *Robco Construction Ltd* (1979) 89 D.L.R. (3d) 507 (per Meredith J.).

13 Section 209, Companies Act 1955 which is equivalent to s. 221, Companies Act 1973 (B.C.).

Denning in *Scottish Co-operative Wholesale Society Ltd* v *Meyer*,[14] would allow use of the remedy even where competition between the companies is not present.

Turning from the statute books, the potential plaintiff finds the Common Law of little assistance, as the duties of directors are not onerous. That is mainly the product of judges being reluctant to become involved in issues of business, economics and administration,[15] although Chancery judges having had greater familiarity with business matters than their Common Law brethren in the nineteenth century were less compromising in their approach.[16] The fiduciary position of the director,[17] as developed by the Chancery judges must be the plaintiff's avenue of inquiry.

III. FIDUCIARY OBLIGATIONS

The classification of the director as a fiduciary raises a number of questions, as Frankfurter J. pointed out in *Securities and Exchange Commission* v *Chenery Corporation*:[18]

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

Answers to those questions will be attempted in following parts of this article.

A. To Whom is the Obligation Owed?

That the duty is owed essentially to the shareholders is made clear in a number of cases which refer to the possibility of disclosure to and consent by the shareholders.[19] However two recent cases have questioned that conclusion. Instead of requiring disclosure to be made to the shareholders for the purpose of waiver, ratification or approval, these recent cases have referred to disclosure to the board.

In *Peso Silver Mines Ltd* v *Cropper*[20] the Supreme Court of Canada accepted that rejection of an opportunity by the board of directors permitted individual directors to take advantage of that opportunity. That is not exactly the same as saying that the fiduciary duties are not owed to the shareholders, but it is the practical effect if the decision is correct. One commentator has referred to the significance of the directors having the management of the company,[21] so that the directors might be able to reject opportunities, but probably cannot approve

14 [1959] A.C. 324, 366.
15 V. Powell-Smith: *The Law and Practice Relating to Company Directors* (Butterworths, London, 1969) 120; Gower, op. cit. n. 10, 603.
16 Note the positive statement of directors' duties by Danckwerts J. in *Aubanel & Alabaster* v *Aubanel* (1949) 66 R.P.C. 343, 346-7.
17 See G. W. Keeton "The Director as Trustee" (1952) 5 Current Legal Problems 11 and L. S. Sealy "The Director as Trustee" [1967] Camb. L.J. 83.
18 318 U.S. 80, 85-86 (1943). *Boardman* v *Phipps* [1967] 2 A.C. 46, 127 (per Lord Upjohn) follows essentially the same structure.
19 E.g. *Richard Brady Franks Ltd* v *Price* (1937) 58 C.L.R. 112, 143, per Dixon J.
20 (1966) 58 D.L.R. (2d) 1.
21 N. A. Bastin "The Honest Director and Secret Profits" (1978) 128 New L.J. 527

a director's breach of fiduciary obligation, despite the contrary implication in *Peso*. Alternatively the proposition may be rejected on the basis that *Peso* was wrongly decided.

In *Queensland Mines Ltd* v *Hudson*[22] the Privy Council held that, with "the fully informed consent of the Queensland Mines Board", the defendant director, who had taken advantage of mining licences which he had initially acquired for the company, was not liable to account. The decision was a short one, with the legal reasoning supporting the above conclusion not appearing on the face of the record. However the legal conclusion may be rationalised by reference to the facts. The defendant director made disclosure to the plaintiff's board of directors, of which he was a member, and gained its approval to his actions. The plaintiff company, being a joint venture company with two corporate shareholders, had in reality no other organ than its board. A meeting of shareholders presumably would have been indistinguishable from a board meeting.[23] The shareholder whom the defendant director represented on the plaintiff's board, had separate duties owed to it by virtue of the defendant's position as its managing director. Therefore the fact that the defendant did not make any disclosure to the company he represented should not have been relied upon,[24] and was not relied upon by the Privy Council. To rely upon it, would have enabled the other shareholder to have shared in the defendant's profits, despite having consented, after full disclosure, to the defendant having the opportunity of making them. In other words, that other shareholder should have been estopped from compelling the plaintiff[25] to bring the action against the defendant.

Despite the uncertainties which those cases have induced, a reasonable statement of the law is that directors owe their fiduciary duties to the company in general meeting. All the members of the High Court in *Furs Ltd* v *Tomkies*[26] affirmed that disclosure must be to the shareholders. In that case there had been some knowledge, and tacit approval, by some directors of the defendant director's secret profit, but that was treated as being irrelevant. In *Regal (Hastings) Ltd* v *Gulliver*[27] disclosure to and approval by the general meeting was stated by the House of Lords to be required to excuse the directors in breach. Bastin argues strongly for the disclosure being required to be made to the shareholders as a protection of their position.[28]

22 (1978) 18 A.L.R. 1, 10.

23 Informal consent of the shareholders was taken to be the equivalent of a resolution formally passed by the company in general meeting or by entry in the minute book; the approach taken in *Re Duomatic Ltd.* [1969] 2 Ch. 365 and *C. H. Mitchell Ltd.* v *Wellington Meat Export Co. Ltd.* [1962] N.Z.L.R. 768. Contrast *Regal (Hastings) Ltd.* v *Gulliver* [1967] 2 A.C. 134 where the directors controlled sufficient votes to have ensured shareholders' approval of their actions.

24 As did the trial judge.

25 That other shareholder held 51% of the shares.

26 (1936) 54 C.L.R. 583, 591, 592, 599, 600.

27 Supra n. 23.

28 Bastin, op. cit. n. 21, 528-529. On disclosure generally, see R. Baxt "Judges in Their Own Cause: The Ratification of Directors' Breaches of Duty" (1978) 5 Monash U.L.R. 16. *Coleman* v *Myers* [1977] 2 N.Z.L.R. 225 also emphasises the position of individual shareholders being owed fiduciary obligations in certain circumstances.

B. Fiduciary Obligations of Directors

Finn[29] has identified eight separate "fiduciary obligations" of which the following are relevant here: misuse of property held in a fiduciary capacity; misuse of information derived in confidence; conflict of duty and interest (hereafter called the duty of loyalty rule); conflict of duty and duty[30]; and inflicting actual harm on an "employer's" business. The action for breach of confidence does not depend on a pre-existing fiduciary relationship, and so shall be separately considered. Finn's approach is that a person is a fiduciary when one of the above rules applies to him, for the purposes of that rule.[31] However for present purposes that logic is not required, for there is clear authority for the proposition that a company director is a fiduciary.

1. *Misuse of property held in a fiduciary position*

In the case of trustees, it is clear in Equity that any dealing in the trust property for the trustee's benefit is actually done for the benefit of the cestuis que trust. The principle applies to company directors,[32] and has two significant implications. First, the proprietary remedies of constructive trusteeship and tracing are available in addition to the personal claim against the director.[33] Second, it is not possible for the directors voting as shareholders to ratify a misappropriation of the property of the company to themselves.[34]

The problem of loss of corporate opportunity does not, however, involve any misappropriation of company property except in two possible regards. The first is the misappropriation of a contract, which the company had some expectancy of gaining, to the director's benefit, as occurred in *Cook* v *Deeks*.[35] The Privy Council applied the rule, holding the directors accountable for taking a contract in which the company had an interest.

The second possibility is that of misappropriation of company information. But the premise that "information is property" must be established before the possible advantages of the proprietary remedies may be enjoyed. The premise is one which has not been categorically established by the courts; but nor has it been categorically refuted. Information is probably not a chose in action because a chose is a right of *property* only enforceable by action.[36] But the statutory definition in the Property Law Act 1952 does refer to "any other right or interest".

29 P. D. Finn *Fiduciary Obligations* (Law Book Co., Sydney, 1977) 79-80.
30 For discussion of the lack of necessity for the distinction between this and the duty of loyalty rule, see D. E. McLay "Multiple Directorates and Loss of Corporate Opportunity", LL.M. Research Paper, V.U.W. 1979, 25-26.
31 Op. cit. n. 29, 2.
32 *In re Lands Allotment Co.* [1894] 1 Ch. 616, 631 (per Lindley L. J.).
33 See infra pp. 448-449.
34 *Cook* v *Deeks* [1916] 1 A.C. 554, 564. The principle rationalises the decisions in *Marshall's Valve Gear Co.* v *Manning Wardle & Co.* [1909] 1 Ch. 267 and *John Shaw & Sons (Salford) Ltd* v *Shaw* [1935] 2 K.B. 113, with the earlier case involving company property, a patent.
35 Similarly *Westminster Chemical N.Z. Ltd.* v *McKinley* [1973] 1 N.Z.L.R. 659, 663.
36 R. E. Megarry and P. V. Baker (eds.) *Snell's Principles of Equity* (27th ed., Sweet & Maxwell, London, 1973) 69.

However, the right of action for breach of confidence is not of sufficiently general application to found the proposition that all information is property.[37] In two cases,[38] information has been held, rather than merely stated obiter, to have some of the characteristics of property. The statements of their Lordships in *Boardman* v *Phipps* are also important. Three of the Law Lords[39] thirteen years ago thought that information could be property. If relying on those dicta the reader should note the mixing of majorities.[40] Moreover it was not made clear that the references to "information" meant all information, or were limited to confidential information. The fact that two of their Lordships denied the suggestion, and that Viscount Dilhorne reached a contrary conclusion on the facts and so might have been thinking of confidential information, cannot be overlooked.

The proposition has also been commented upon by the Court of Appeal in *Bell House Ltd* v *City Wall Properties Ltd.*[41] All the learned Lord Justices accepted that knowledge of sources of finance was property of the company which could be sold. The proposition has also received judicial scrutiny in *North & South Trust Co* v *Berkeley*,[42] with Donaldson J. rejecting it.

The significance of the suggestion, if correct, is that misuse of company information by a director would be contrary to his fiduciary obligations, and there is no need to establish that the information is confidential to bring an action against the director. A company director could therefore be held a constructive trustee of the information rather than merely being liable to account. Third parties with knowledge, actual or constructive, of the source of the information, would also be liable.[43] Thus benefits derived from the use of that information would be vested, in Equity, in the company as beneficiary of the constructive trust. Moreover it would not be permissible for the misuse to be approved by the shareholder.[44]

2. *Duty of loyalty rule*

(a) Policy of the rule

The rule is a strict one. The existence of the rule is founded on an unfavourable view of human nature. It is thought that persons in whom trust is placed

37 The writer presumes that all the judicial dicta referring to the proposition that information is property were made with an awareness of the special position of confidential information. But that presumption has a doubtful basis when judges accept the proposition but reject it on the facts of the case before them, for example, Viscount Dilhorne in *Boardman* v *Phipps*, supra, n. 18, 89-90.

38 *Green* v *Folgham* (1823) 1 Sim & St. 398 (information can be the subject matter of a trust), and *In re Keene* [1922] 2 Ch. 475 (property passing to trustee in bankruptcy includes information).

39 Viscount Dilhorne (dissenting) supra n. 18, 89-90; Lord Hodson, 107; and Lord Guest, 115. Cf. Lord Cohen, 102; and Lord Upjohn, 127-128.

40 Contrast R. P. Meagher, W. M. C. Gummow and J. R. R. Lehane *Equity: Doctrines and Remedies* (Butterworths, Sydney, 1975) 133.

41 [1966] 2 Q.B. 656, 680 and 693.

42 [1971] 1 W.L.R. 470, 484.

43 But see infra pp. 447-448.

44 *Cook* v *Deeks*, supra n. 34.

may be inclined to take advantage of their position, without the restraining influence of the law.[45] That human nature has not changed, even in "the nuclear age," was accepted by Roskill J. in *Industrial Development Consultants Ltd* v *Cooley*.[46] Whether a strict rule is required in respect of directors was doubted by Bull J. A. in the British Columbia Court of Appeal in *Peso*.[47] But the views of the dissenting judge in that Court are to be preferred. Norris J. A. stated that[48]:

> . . . the complexities of modern business are a very very good reason why the rule should be enforced strictly in order that such complexities may not be used as a smoke screen or a shield behind which fraud might be perpetrated . . . .

(b) Subrules

The object of the rule has been stated to be two-fold by Finn.[49] However the better the view is that the two objects relate to slightly different formulations of the rule, henceforth referred to as subrules.[50]

The first object, which relates to a subrule emphasizing conflict, is to prevent a person who has undertaken to act for or on behalf of another to allow any undisclosed interest to sway him from the proper execution of that undertaking. It is within this subrule that, in principle, the conflict of duty and duty rule fits. The second object, which produces a subrule that a person shall not profit from his trust, is to prevent a person from actually taking advantage of his position.

Statements of the highest persuasive authority[51] demonstrate the earlier allegation of duality in the rule. Lord Upjohn in *Boardman* v *Phipps*[52] provides

45 E.g. *Keech* v *Sandford* (1726) Sel. Cas. T. King, 61, 62 (per Lord King L.C.); and *Bray* v *Ford* [1896] A.C. 44, 51 (per Lord Herschell).

46 [1972] 2 All E.R. 162, 175.

47 (1965) 56 D.L.R. (2d) 117, 154-155.

48 Ibid. 139.

49 Finn, op. cit., n. 29, 200.

50 For a contrary view, see A. J. McClean "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alberta L.R. 218; and R. D. McInnes "The Contemporary Relevance of the Scope Doctrine" LL.M. Thesis, V.U.W. 1980.

51 "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, . . . is not, unless otherwise expressly provided, entitled to make a profit: he is not allowed to put himself in a position where his interest and duty conflict.": *Bray* v *Ford,* supra n. 45, 51, per Lord Herschell.
"And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect": *Aberdeen Railway Co* v *Blaikie Bros* (1854) 1 Macq. 461, 471 per Lord Cranworth L.C.
"The rule of equity . . . insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit . . . ".: *Regal (Hastings) Ltd* v *Gulliver,* supra. n. 23, 144, per Lord Russell of Killowen.
"The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness.": *New Zealand Netherlands Society "Oranje" Inc.* v *Kuys* [1973] 2 NZLR 163, 166, per Lord Wilberforce.

52 Supra n. 18.

what is possibly the only judicial attempt at rationalising the two subrules. His Lordship stated the position to be[53]

> that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict.

That decision was a dissenting one, although it is generally considered that Lord Upjohn merely dissented on the application of the law to the facts. The correctness of Lord Upjohn's rationalisation is however open to question for it is possible to have situations which are outside the scope of one of the subrules but which are caught by the other subrule.[54] That possibility indicates the irreconcilable duality of the rule. But the present writer does not accept the proposition of McClean that there are actually two rules. Instead they are, in the language of set theory, two intersecting sets with neither being the subset of the other, but with a considerable degree of overlapping. The union of the two sets represents the "rule". The two subrules are not two different rules owing to their common origin, and their frequent applicability to the same facts.

(c) Application of the rule[55]

The leading application of the rule to directors is *Regal (Hastings)* v *Gulliver*.[56] It was not possible for the plaintiff to have made the profit, given its lack of liquidity and the prospective lessor's requirements. Neither fraud nor mala fides were present. The irrelevance of such facts must be noted by the multiple director; good faith is no defence. Lord MacMillan formulated a test for the profit subrule:[57]

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

The defendant directors had acted as directors in the creation of the opportunity for profit. Thus they were in breach of their duty of loyalty to the company by making a profit out of a fiduciary position.[58] Viscount Sankey applied the conflict subrule to reach the same conclusion.

53 Ibid. 123.

54 McClean, op. cit. n. 50, 227.

55 Unauthorised remuneration, particularly "bribes", and contracting with the company are not involved in the problem of loss of corporate opportunity, and so are not discussed.

56 Supra n. 23. The facts were that the plaintiff company formed a company to acquire the lease of two cinemas. The lessor required personal guarantees from the plaintiff's directors or a paid-up capital of £5,000. The first alternative was unacceptable to the directors, while the plaintiff was not sufficiently liquid to subscribe for more than 2,000 £1 shares. Thus the company was incorporated with a subscribed capital of £5,000; £2,000 by the plaintiff; lots of £500 by four directors, the company's solicitor, and the remainder by persons procured by the chairman. The companies were later sold, and the new owners commenced an action against the five former directors and the solicitor for recovery of the realised profit.

57 Ibid. 153.

58 The *Regal* decision has been followed in *G. E. Smith Ltd* v *Smith* [1952] N.Z.L.R. 470; *Canada Safeway Ltd* v *Thompson* [1951] 3 D.L.R. 295; *Zwicker* v *Stanbury* [1953] 2 S.C.R. 438; and *Hawrelak* v *City of Edmonton* (1975) 54 D.L.R. (3d) 45

The position of third parties is important in any consideration of the problem of loss of corporate opportunity via a multiple director. In *Regal*, the solicitor was released from his fiduciary obligations to the company by acting with the full knowledge and consent of the plaintiff's board of directors.[59] The chairman procured the subscription of companies of which he was a member and a director, but was held not liable to account for profits made by them, as they had taken beneficially. The extent of the profit made by a person thus limits his liability to account.

Brief mention must be made of *Boardman* v *Phipps*,[60] although the obligations of company directors were not at issue. The majority based their decision on the profit subrule, while the dissenting Law Lords based their speeches on the conflict subrule,[61] but Viscount Dilhorne and Lord Cohen made use of both subrules. Hence both subrules have received the highest support. Despite Lord Upjohn having dissented, his speech has been relied upon by subsequent courts, so that it can fairly be said that the conflict subrule has not been rejected. Thus its suggested application to multiple directorates is feasible.

The decision of the majority reiterates that the impossibilities of the use of information and of the opportunity (to acquire shares by the trust) are irrelevant factors in the application of the rule, as is the lack of necessary financial resources by the trust. Hence financial considerations cannot be relied upon as a defence by a multiple director to excuse "leaking" an opportunity to another company of which he is a director.

The Supreme Court of Canada, the same year, decided *Peso Silver Mines Ltd* v *Cropper*.[62] The profit subrule was applied with the Court holding that the respondent gained his interests not "by reason of the fact that he was a director of the appellant and in the course of the execution of that office".[63] The bona fide rejection of the offer by the board can be viewed as limiting the scope of the directorate, thereby allowing personal advantage to be taken by a director, or as providing a defence of informed consent. But limitation of the scope of the directorate cannot stand alongside the conflict subrule for the board could reconsider its rejection of the proposal, thereby creating a conflict of duty and interest.

59 The directors, legally, are the appropriate body to relieve a company's solicitor from breach of fiduciary obligation to the company. It is appropriate, for the power of management is generally vested in the directors by the articles. But whether the directors should have a relieving power, given their possible lack of independence is an open question.

60 Supra n. 18. The facts will not be recited here.

61 See McLay, op. cit. n. 300, 41-45, for further elaboration.

62 Supra n. 20. Noted S. M. Beck "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. B.R. 80. The facts were that the plaintiff's board of directors rejected offers of some mining claims, which were subsequently accepted by some of the directors. Later the plaintiff's new owners requested the turning over of interests in those claims to the plaintiff.

63 Ibid. 173-174.

The next case is *Industrial Development Consultants Ltd* v *Cooley*,[64] where Roskill, J. applied the conflict subrule. The learned judge referred to the defendant as having only one capacity in which he was carrying on business and that was as the plaintiff's managing director. Hence his fiduciary relationship imposed a duty upon him to pass on information "which was of concern to the plaintiffs and was relevant for the plaintiffs to know".[65] Prentice puts forward the alternative ratio of the profit subrule,[66] but that is predicated on the statement of Roskill J. of the defendant's sole business capacity. Two other points deserve mention: the Court placed no significance on the fact that the plaintiff was unlikely to receive the contract; and the fiduciary obligation survived the defendant's resignation, rather inevitably given the circumstances of the resignation.

The latter proposition was accepted in *Canadian Aero Services Ltd* v *O'Malley*,[67] despite the fact that the fiduciary obligation was imposed on senior officers of the company. The Court referred to a "corporate opportunity" doctrine[68] which "disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing".[69] The doctrine can be founded on either of the previously identified profit and conflict subrules although the reference to "diverting" indicates that the basis is the subrule with the greater utility in multiple directorate situations, the conflict subrule. *O'Malley*, like *Cooley*, involved a usurpation, yet the existing rule was adequate for the task of holding the delinquent director liable in *Cooley*. It is submitted that the rule has sufficient vitality to deal with cases as they arise without needing to resort to the American corporate opportunity doctrine, or even the doctrine of unjust enrichment.[70] Consideration of whether the plaintiff would have won the contract was deemed irrelevant: emphasis was placed on breach of the duty, rather than on the effect on the company.

64 Supra n. 46. Noted D. D. Prentice "Directors' Fiduciary Duties — The Corporate Opportunity Doctrine" (1972) 50 Can. B. R. 623. Also H. Rajak "Fiduciary Duty of a Managing Director" (1972) 35 M.L.R. 655 and J. G. Collier [1972] Camb. L. J. 222. The facts were that the defendant as the plaintiff's managing director negotiated unsuccessfully for a building contract. The next year the defendant was approached to act as project manager of the building. He resigned his position on false grounds and became the project manager.

65 Ibid. 173-174.

66 Op. cit. n. 64.

67 (1973) 40 D.L.R. (3d) 371. Noted S. M. Beck "The Quickening of Fiduciary Obligation: *Canadian Aero Services* v *O'Malley*" (1975) 53 Can. B.R. 771; and D. D. Prentice "The Corporate Opportunity Doctrine" (1974) 37 M.L.R. 464. The facts were that the defendants as senior officers of the plaintiff pursued a mapping contract. The contract was however awarded to a company formed by the defendants after their resignations from the plaintiff.

68 For the position in the U.S.A. see Note "Corporate Opportunity" (1961) 74 Harv. L.R. 765.

69 Supra n. 67, 382.

70 For contrary view, see G. Jones "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 L.Q.R. 472.

The most recent case is *Abbey Glen Property Corporation* v *Stumborg*,[71] decided by the Alberta Court of Appeal. The facts came within both subrules although most reference was made to the profit subrule. The fact that Traders refused to deal with the plaintiff was held to be irrelevant. The court was concerned with the aspect of windfall profits, with McDermid J. dissenting on the basis of the change of shareholders between the time of breach and the commencement of the action. But the majority considered that emphasis must be placed on enforcement of the duty, as well as referring to the corporate entity of the company.

(d) Multiple directorates

The real question to be answered here is whether the duty of loyalty owed by a director to his company precludes him from acting as director of any other company. The foregoing analysis produces two conclusions which form the basis of the consideration of the question. First, the court's attitude is a strict one, and liability to account is almost invariably imposed in the absence of fully informed consent.[72] Hence the courts can reasonably be relied upon to impose liability, so far as their available remedies permit, whenever impropriety is discovered. Second, the analysis reveals the continued existence of two subrules, with each being utilised by the courts as required. That is important for the conflict subrule has more utility in the multiple directorate situation.

The major advantage flowing from the support for the proposition of two subrules is in the utilisation of the conflict subrule in the multiple directorate situation. The conflict subrule may be so applied in the following manner, even to the anomalous situation of a director not holding shares.[73] It is clear that the director owes duties to each company of which he is a director. The economic assumption is that he will, in his own interests, seek to minimise any liabilities which may arise out of those duties. Hence multiple director X will, at one and the same time, owe duties to A Ltd while seeking to comply with the duties

71 (1978) 85 D.L.R. (3d) 35. Noted D. Prentice "Corporate Opportunity — Windfall Profits" (1979) 42 M.L.R. 215. The complicated facts were that the Stumborgs were directors of the plaintiff company, a land investment company. (i) They proposed a joint venture with Traders Finance Corporation Ltd in respect of the Ebbers and Zima lands. Traders refused to deal with the plaintiff, but entered a joint venture with the Stumborgs (Green Glenn Developments Ltd). The Stumborg's shares in Green Glenn were sold before the trial. (ii) The Stumborg's also held 26% of Clarepine Oil & Gas Ltd. Traders and Clarepine purchased the Williams land, which J. Stumborg had referred to Clarepine, using a joint venture company, Greenway Investments. (iii) A company owned 30% by Clarepine and 70% by Traders purchased the Groat lands, without the Stumborg's participation. (iv) The French land was sold to Traders' subsidiary by the plaintiff. (v) The British-Goebel-King lands were acquired by Green Glenn. Only the Ebbers and Zima lands were at issue on appeal. The plaintiff was sold and an action was then commenced.

72 The Court in *Peso* appears to have held liability to exist but for the board's resolution, The *Queensland Mines* decision has been so rationalised in this article. The only aberration appears to be *H. L. Misener & Son Ltd* v *Misener* (1977) 77 D.L.R. (3d) 428 (Nova Scotia C.A.).

73 Note that the extent of director's shareholding in their companies is not great: Fogelberg & Laurent, supra n. 3, 5-9.

he owes to B Ltd. In that situation X is, without more, in breach of the conflict subrule if there is a (real sensible) possibility of conflict, and so liable to account.[74] That the requirement is only that of a (real sensible) possibility of conflict demonstrates the attractiveness of the argument, for the prerequisite for application of the conflict of duty and duty rule is actual conflict of duties.[75] Such an argument could not be made on the basis of the profit subrule.

The foregoing argument has not been judicially considered. But multiple directorates have been. The question which demands resolution is whether there is a legal prohibition on the holding of more than one directorate especially where the companies are competing.[76] The initial reaction of the courts was simplistic, although the later cases have had more considered responses.

The question was first asked of Chitty J. in *London & Mashonaland Exploration Co Ltd* v *New Mashonaland Exploration Co. Ltd*,[77] who held that the courts would not restrain a person from acting as director of more than one company, even rival companies. The exceptions not present in the case, are any form of prohibition in the company's articles or any suggestion that the director is about to disclose information received confidentially. To those exceptions must be added a contractual term prohibiting the director from so acting.

The duty of loyalty cases cast serious shadows on the proposition of Chitty J.[78] Their effect is that a person may be able to hold more than one directorate provided that his duties do not actually or possibly conflict with his interests and so long as he does not make a profit out of his position. However, it is submitted that in accepting a multiple directorate, a person cannot discount the chance of facts arising in which a conflict or a real sensible possibility of conflict would be present. In that situation the multiple director would have liability to account. Thus it may be that the duty of loyalty cases demand a general prohibition before the occurrence of actual impropriety.

Only two judges, both at first instance, have been forced to consider the problem. The first was McDonald J. in *Abbey Glen Property Corporation* v *Stumborg*.[79] His Honour, in response to the submission that the Stumborgs could be directors of rival companies, stated[80]:

> I do not hesitate to express my opinion that the sweeping proposition for which the *London & Mashonaland* case and Lord Blanesburgh's dicta are cited is not the law. Even where there is no question of a director using confidential information, there

74 This may be important even where X makes no personal gains, if third parties can he held liable by reason of privity to the breach of fiduciary obligations: see infra pp. 447-448.

75 Infra p. 443.

76 The question of the courts' response to impropriety is clear: see the foregoing analysis.

77 [1891] W.N. 165. Approved in *Bell* v *Lever Bros* [1932] A.C. 161, 195 (per Lord Blanesburgh). Similarly *In re Lundie Bros Ltd* [1965] 1 W.L.R. 1051, 1058 (per Plowman J.). Criticised *Scottish Co-operative Wholesale Society Ltd* v *Meyer* [1959] A.C. 324, 367 (per Lord Denning). Note the anomaly especially compared with competing partners (s. 33, Partnership Act 1908 — see R. B. McInnes, op. cit. n. 50).

78 The brevity of the decision indicates that such cases were not argued by counsel.

79 (1976) 65 D.L.R. (3d) 235.

80 Ibid. 278.

> may well be cases in which a director breaches his fiduciary duty to company A merely by acting as a director of company B. This will particularly be possible when the companies are in the same line of business and where acting as a director of a company B will harm company A. Beyond that I need go no further than to say that the question whether a breach of a director's duty to company A must be determined upon the basis of the factors enumerated in *Canadian Aero Service Ltd* v *O'Malley* and *Regal (Hastings) Ltd* v *Gulliver*, and a negative answer will not necessarily be produced by the mere fact that the director is also a director of company B and owes it a like fiduciary duty.

The dictum appears to seriously weaken the multiple director's ostensibly secure position. But there may be some inconsistency between that dictum and the application of the rule to the facts. In respect of all the land apart from the Ebbers and Zima lands, no liability to account was held to exist. That conclusion is most tenuous for the Williams land, which J. Stumborg had actually referred to Clarepine, and the British-Goebel-King lands, the purchase of which was arranged at the very same meeting with Traders from which resulted the Stumborgs' liability to account for profits made from the Ebbers and Zima lands. McDonald J. even accepted the contention that a director is not ipso facto precluded from acquiring land in competition with the company's business,[81] subject to the director not being permitted to breach his fiduciary obligations.[82] In applying the rule, the learned judge appears to have been swayed by the numerous business interests of the Stumborgs.[83] Possibly the possession of numerous interests may entitle the director to compartmentalise his business activities.[84] But Roskill J. in *Cooley* referred to the director as having only one capacity[85] although the defendant in that case had no other business interests.

Recently in *Berlei Hestia (N.Z.) Ltd* v *Fernyhough*,[86] Mahon J. was forced to consider the submission that a person is allowed to act as director of two companies which are competing. The plaintiffs in seeking interlocutory injunctions, contended that the point has been settled by the *Mashonaland* decision. The defendants, rather unfortunately, referred to fiduciary obligations being "in their

81 Here McDonald J. appears to be retreating to the limited view of a director's duties (contrary to *Aubanel & Alabaster* v *Aubanel*, supra, n. 16, and *Industrial Development Consultants Ltd* v *Cooley*, supra, n. 46) taken by Finn, who would require the existence of a specific duty before a breach of fiduciary obligation can occur: supra n. 29, 240. Also, or alternatively, it was evidence of the change in negotiating position by the Stumborgs in respect of the Ebbers and Zima lands which resulted in their liability to account. It appears that insufficient evidence was adduced, or able to be adduced, in respect of the other lands in order to found liability.

82 Supra n. 79, 272.

83 Their interests in at least two land investment syndicates have been ignored in the previous recitation of the facts. Nothing really turned on those interests: Supplementary Reasons, ibid. 283-286.

84 Barwick C. J. adopted such an approach in *Slutzkin* v *F.C. of T.* (1977) 7 A.T.R. 166, 168 (H.C. of A.). Also *Re David Payne & Co. Ltd* [1904] 2 Ch. 608 and *In re Fenwick, Stobart & Co. Ltd* [1902] 1 Ch. 507.

85 Supra n. 46, 173. Contrast *Weitzen Land & Agricultural Co* v *Winter* (1914) 17 D.L.R. 750.

86 (Unreported, Supreme Court Auckland, A. 1457/79, March 7, 1980). See J. Hodder "Bendon Berlei's diversion en route to Heaven" *National Business Review* Wellington, New Zealand, April 7, 1980, p. 21.

infancy" in 1891, which the learned judge was not prepared to accept. His Honour noted the possible anomaly existing between the strictness of the fiduciary obligations and the latitude of the law concerning multiple directorates, but thought that the difference "may be in point of commercial practice fully justified".[87] Mahon J. then stated that there was a wide difference between requiring a director to account for a profit made out of his relationship and prohibiting the holding of multiple directorates. But the analysis of the cases shows that the conflict subrule has support. It is therefore respectfully submitted that that subrule cannot be dismissed covertly, yet the learned judge appears to refer only to the profit subrule.

The question of a general prohibition of multiple directorates is affected by the duty to pass on information of relevance to the company of which a person is a director, as postulated by Roskill J.[88] That duty, if the law, could oblige our director X to communicate the corporate opportunity of A Ltd to B Ltd, or be in breach of his duty to B Ltd. But such communication breaches the fiduciary duty of loyalty owed by X to A Ltd. Alternatively, the director receiving information from an independent source must pass it on to both companies. That is a totally imponderable situation for all multiple directors, and makes them essentially illegal.

3. *Conflict of duty and duty rule*

This rule prohibits a person who owes fiduciary duties to one person from owing conflicting duties to another person, and applies particularly to agents. As directors are agents in respect of their conduct of the company's business, the rule is applicable. The rule is[89]:

> No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment.

The only requirement not expressly incorporated into that dictum is that an actual conflict of duties must exist.[90]

Informed consent is the only possible defence, even to an action by the sole party from whom consent was obtained. If the duty of loyalty views compliance with an enforceable duty as being an "interest" of the fiduciary, then there is no need to rely on the conflict of duty and duty rule, with its limiting requirement of actual conflict, for the duty of loyalty's conflict subrule prohibits the possibility of conflict. Otherwise the rule is an obvious form of action to be used against a multiple director.

87 Ibid. 26.

88 Supra n. 46, 173-174.

89 *Fullwood* v *Hurley* [1928] 1 K.B. 498, 502 (per Scrutton L. J.).

90 *Blyth Chemicals Ltd* v *Bushnell* (1933) 49 C.L.R. 66, 74, 82 (H.C. of A.).

4. Harming an "employer's" business

An employee owes a general duty of fidelity to his employer. The basis of the rule is that it would be deplorable if an employee[91] could "knowingly deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business".[92] But mere detriment to the employer's business will be insufficient: infliction of great harm is the requirement. This detriment requirement makes the action inapplicable where the company's board has rejected the opportunity. The duty cannot be relied upon to restrain a director or other person from acting as director of another company, in the absence of activity like solicitation of customers.[93] Hence the duty has little usefulness in establishing a general prohibition of multiple directorates, but it can be relied upon once some impropriety has occurred.

IV. BREACH OF CONFIDENCE[94]

The right of action for breach of confidence emerges when a confidant threatens to break or does break a confidence where the confider imparted information to the confidant. It does not depend on the existence of any fiduciary relationship, but the principle applies with particular force as between a director and his company.[95] The basis of the claim depends solely on the equitable principles of good faith. The general principle is that[96]:

> If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

Three requirements for the action have been propounded by Megarry J.[97] Lord Denning M. R. has posited an additional requirement of the reasonableness of the stipulation of confidence,[98] but without the support of other judges. The requirements are as follows.

A. Confidentiality of the Information

The information cannot be public knowledge or have been published; otherwise it is not confidential.[99] Public knowledge may be used by the confidant, but

91 Logically directors should be subject to equal, if not greater, standards than mere employees. See Finn, op. cit. n. 29, 268-269; and Gower, op. cit. n. 10, 599-600.

92 *Hivac* v *Park Royal Scientific Instruments Ltd* [1946] Ch. 169, 178 (per Lord Greene M. R.).

93 *Aubanel & Alabaster* v *Alabaster* supra n. 16.

94 See Law Commission *Breach of Confidence* (Working Paper No. 58); G. Jones "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 L.Q.R. 463; Finn, op. cit. n. 29, Ch. 19; Meagher, Gummow and Lehane, op. cit. n. 40, Ch. 41; R. Goff and G. Jones *The Law of Restitution* (2nd ed., Sweet & Maxwell, London, 1978) Ch. 35.

95 *Baker* v *Gibbons* [1972] 2 All E.R. 759, 765 (per Pennycuick V-C.).

96 *Saltman Engineering Co Ltd* v *Campbell Engineering Co Ltd* (1948) [1963] 3 All E.R. 413 n, 414.

97 *Coco* v *A. N. Clark (Engineers) Ltd* [1969] R.P.C. 41, 47.

98 *Dunford & Elliott Ltd* v *Johnson & Firth Brown Ltd* [1977] 1 Ll. Rep. 505. Noted B. A. K. Rider "Abuse of Inside Information" (1977) 127 New L. J. 830.

99 *Saltman Engineering Co Ltd* v *Campbell Engineering Co Ltd*, supra. n. 96, 415; *Mustad & Son* v *Dosen* (1928) [1964] 1 W.L.R. 109n; *Franchi* v *Franchi* [1967] R.P.C. 149.

he is not allowed to abuse the confidence by using the public knowledge in the way the confider has used it in developing an invention or idea.[100] Hence a multiple director would be in breach of confidence in passing on information from one company, even if it was essentially nothing more than an analysis of publicly available facts, for instance, an assessment of a prospective takeover victim. An independent analysis, perhaps conducted by an employee of the second company would appear to be sufficient.[101] Ordinary skills and knowledge derived from employment are distinguished from confidential information,[102] and so presumably might be skills acquired by a director.

B. Confidential Situation

An exhaustive list of such situations would be impracticable to compile here. The essential feature of the cases is that the confider has an expectation of confidence being maintained. Generally the information is given for a limited purpose, creating the expectation.[103] Where a limited purpose is present, the confidant will have to satisfy a heavy burden to repel the contention.[104] In respect of any director, information given to him is obviously given for the limited purposes of acting in the interests of the company as a director.

The action for breach of confidence appears tenable even against a person who was not a party to the confidence. The third party can be prevented from using the information where he knew[105] or ought to have known[106] that the information was given to him in confidence. The bona fide purchaser for value without notice would appear, at first sight, to be free from restraint by the courts of Equity.[107] But more recent cases have expressed the view that express notice of the breach of confidence before use of the information by the third party imposes the obligation on the bona fide purchaser.[108] However Lord Denning M. R. altered his position in *Dunford & Elliott Ltd*,[109] appearing to preclude an injunction restraining an innocent third party.

100 *Seager* v *Copydex Ltd* [1967] 2 All E.R. 415; *A.B. Consolidated Ltd* v *Europe Strength Food Co Pty Ltd* [1978] 2 N.Z.L.R. 515; *Ansell Rubber Co Pty Ltd* v *Allied Rubber Industries Pty Ltd* [1967] V.R. 37, 49.

101 See *Interfirm Comparison (Australia) Pty Ltd* v *Law Society of New South Wales* (1975) 5 A.L.R. 527. The analysis may reveal flaws in the original analysis, and hence have value, rather than being a pointless exercise in order to comply with the law.

102 *Herbert Morris Ltd* v *Saxelby* [1916] 1 A. C. 688; *Westminster Chemical N.Z. Ltd* v *McKinley* [1973] 1 N.Z.L.R. 659, 667.

103 E.g. *A.B. Consolidated Ltd* v *Europe Strength Food Co Pty Ltd*, supra n. 100 (expectation of contract); *Pollard* v *Photographic Co* (1888) 40 Ch. D. 345 (photographs solely for plaintiff).

104 *Coco* v *A.N. Clark (Engineers) Ltd*, supra n. 97, 48.

105 E.g. *Ansell Rubber Co Pty Ltd* v *Allied Rubber Industries Pty Ltd*, supra n. 100.

106 *Prince Albert* v *Strange* (1849) 1 H. & Tw. 1; 47 E.R. 1302.

107 *Morison* v *Moat* (1851) 9 Hare 241; 68 E.R. 492.

108 *Stevenson, Jordan & Harrison Ltd* v *MacDonald & Evans* (1951) 68 R.P.C. 190, 195 not commented upon on appeal (1952) 69 R.P.C. 10; *Fraser* v *Evans* [1969] 1 All E.R. 8, 11 (per Lord Denning M.R.).

109 Supra n. 98, 510.

C. Unauthorized Use of the Information

There are two possible formulations of the law. One is that there is a duty to refrain from using or disclosing the confidential information without the confider's consent.[110] The other is that there is no right to use such information without reasonably compensating the confider for its use.[111] The distinction is important for an injunction is more consonant with the first approach, while pecuniary remedies are appropriate under the latter. Megarry J. in *Coco* concluded[112]:

> . . . the essence of the duty seems more likely to be that of not using without paying, rather than of not using at all. It may be that in fields other than industry and commerce (and I have in mind the *Argyll* case) the duty may exist in the more stringent form; but in the circumstances present in this case I think that the less stringent form is the more reasonable.

Although directors are in the fields of industry and commerce, information given to directors is likely to be of a financial nature, so their position may be distinguishable.

D. Defences

The defence of bona fide purchasers without notice is a questionable one. A defence advanced by Goff and Jones[113] of change of position has not yet been recognised by the English courts. Disclosure in the public interest has, however, been so recognised,[114] although the public interest is a two-edged sword, which can be the basis of the requirement of confidentiality.[115]

V. REMEDIES

There exists a wide variety of remedies which a court may grant in exercising its equitable jurisdiction, all of which are discretionary. They may be classified into three types: injunctive, pecuniary, and proprietary.

A. *Injunctive Remedies*[116]

The injunction could conceivably be issued in each of the five different forms of action considered in this article, but it is a matter of judicial discretion. Its most probable use is in actions for doing harm to an "employer's" business and for breach of confidence. In the former, injunctions have often been granted, particularly to prevent solicitation of customers. In respect of the latter, there is the already noted divergence of judicial opinion on which remedy is the most

110 See at n. 103.
111 E.g. *Seager* v *Copydex Ltd*, supra n. 100.
112 Supra n. 97, 50.
113 Op. cit. n. 94, 520.
114 *Gartside* v *Outram* (1856) 26 L.J. Ch. 113; *Initial Services Ltd* v *Putterill* [1968] 1 Q.B. 396.
115 E.g. *Attorney-General* v *Jonathan Cape Ltd* [1976] Q.B. 752.
116 See P. H. Pettit *Equity and the Law of Trusts* (3rd ed., Butterworths, London, 1974) Ch. 13; Meagher, Gummow and Lehane, op. cit. n. 40, Ch. 21; Megarry and Baker (eds.) *Snell's Principles of Equity*, op. cit. n. 36, Pt. VII, Ch. 6.

generally appropriate.[117] Hence permanent injunctions may become a rarity for breaches of confidence. For the present, the possibility must be noted of third parties being restrained provided that they know that the information was derived in breach of confidence.[118]

In the other three forms of action, it is frequently the case that knowledge of the facts sufficient to establish the right to bring an action is acquired only after the "damage" has been done. Also the loss of corporate opportunity is unlikely to be on-going. But if the argument is accepted that a director in holding a directorate in an actual or possible competitor is thereby in breach of the conflict subrule,[119] then an injunction might be granted prohibiting that director from so acting. But such an injunction, might be seen as being a quia timet injunction, which the courts are reluctant to order. For the profit subrule and the other actions, an injunction is not so useful because the statutory right of dismissal[120] makes continuation of the breach unlikely.

B. Pecuniary Remedies

The main pecuniary remedy in Equity's inherent jurisdiction is an account of profits,[121] whereby the defendant is required to account to the plaintiff for all his profits derived from the breach of his duty. The sole focus is on the profit made by the fiduciary or confidant, with no consideration being given to the loss or damage suffered, or not suffered, by the plaintiff. Savings made because of a breach have an unsatisfactory basis.[122]

The position of third parties is important. In respect of a breach of confidence, if the court will restrain a third party who has knowledge of the breach from using or disclosing confidential information, then a fortiori it will grant the (lesser) pecuniary relief against such a person. But pecuniary relief is obviously an inappropriate adjunct to an injunction issued before the actual misuse or disclosure. The decision in *Consul Development Pty Ltd* v *D P C Estates Pty Ltd*[123] illustrates the position of third parties in respect of breaches of fiduciary obligation. There was no actual knowledge of the breach, nor any encouragement of the breach. Stephen J., with Barwick C. J. concurring, stated that actual knowledge of the "fraudulent and dishonest design" is required to include a third

117 In New Zealand, contrast *Whimp* v *Kawakawa Engineering Ltd* [1978] N.Z. Recent Law 114 and *A.B. Consolidated Ltd* v *Europe Strength Food Co Ltd*, supra n. 100.

118 Supra p. 446.

119 Supra pp. 440-443.

120 Section 187, Companies Act 1955.

121 See Meagher, Gummow & Lehane, supra n. 40 Ch. 25; Snell, supra n. 36, Pt VII Ch. 5; Pettit, supra n. 116, pp. 470-473.

122 Finn, supra n. 18, 127. But saving of effort, time and expense by use of confidential information has been penalised by an account of profits: e.g. *A.B. Consolidated Ltd* v *Europe Strength Food Co Pty Ltd*, supra n. 100.

123 (1975) 49 A.L.J.R. 74 (H.C.A.). The facts were that the defendant Grey, a director, was responsible for locating properties to be purchased by the plaintiff, which was controlled by Walton. The defendant company's managing director, Clowes was employed by Watson's law firm. Grey and Clowes collaborated in purchasing properties by Consul. Grey told Clowes that Walton had rejected the properties, which it was held that Clowes reasonably believed because of his knowledge of Walton's financial difficulties.

party as a participant, unless the person has received trust property.[124] But if the suggestion of Ungoed-Thomas J. were correct, the position of third parties would not be secure, with the director's general disclosure under section 199 perhaps founding constructive notice, at least where the two companies were actually competing when the notice was given. Judicial opinion, however, is unfortunately weighted against the suggestion.

Decrees of compensation may alternatively be ordered to remedy breaches of fiduciary duty[125] and breaches of confidence. For the latter, compensation is an appropriate means of imposing a "starter's handicap" on the party in breach,[126] with the confider being compensated as if the confidant had purchased the information.

C. Proprietary Remedies

The proprietary remedies of constructive trusteeship[127] and tracing[128] both have some potential in respect of multiple directorates. The former remedy is manifestly appropriate for any misappropriation of (trust) property. An order will be made against anyone holding the property with actual or constructive knowledge of the breach. The effect is that such a person holds not for himself but for the benefit of the person to whom the breached obligation was owed. The constructive trust is a more extensive remedy than the personal remedy of account, having at least three advantages. First, it avoids ineffectiveness of account where the fiduciary is insolvent. Second, the plaintiff has priority over other creditors of the person holding the property. Third, the plaintiff can force the defendant to turn over shares or other property.

The rules governing tracing may prevent information from being property, as earlier postulated.[129] Following at Common Law is precluded by mixing of property or the property being a mere equitable right. Hence the rules concerning tracing at Equity, as enunciated in *Re Diplock*,[130] must be satisfied. Because of its abstract character, information is inevitably mixed with other property when it is utilised. It cannot be traced because it cannot be identified in the mixed "fund", unless the courts make further leaps from *Re Diplock*. This lack of traceability probably, in the final analysis, determines the issue of whether information is property

124 Ibid. 91. Rejecting *Selangor United Rubber Estates Ltd* v *Cradock (No. 3)* [1968] 2 All E.R. 1073, 1104 (per Ungoed-Thomas J.) and *Karak Rubber Co Ltd* v *Burden (No. 2)* [1972] 1 All E.R. 1210, 1241 (per Brightman J.) that constructive notice is sufficient. Accepting *Carl Zeiss Stiftung* v *Herbert Smith & Co Ltd* [1969] 2 Ch. 276. Contrast Gibbs J. in *Consul*, ibid. 85, although on the facts Clowes did not even have constructive knowledge. See also *Belmont Finance Corporation Ltd* v *Williams Furniture Ltd* [1978] 3 W.L.R. 712, 728, 730, 735.

125 E.g. *McKenzie* v *McDonald* [1927] V.L.R. 134.

126 E.g. *Whimp* v *Kawakawa Engineering Ltd*, supra n. 117; *Seagar* v *Copydex Ltd*, supra n. 100.

127 See D. W. M. Waters *The Constructive Trust* (1964, University of London, London).

128 See Snell, supra n. 36, 284-292; Pettit, supra n. 116, pp. 460-470; R. H. Maudsley "Proprietary Remedies for the Recovery of Money" (1959) 75 L.Q.R. 234.

129 Supra pp. 434-435.

130 [1948] Ch. 465.

against the proposition that it is. A constructive trust of information may yet be possible, but the effect of such an order can hardly be different from that reached by ordering an account of profit.

D. Statutory Defence

Section 468, Companies Act 1955 empowers the court to grant relief in proceedings for negligence, default, breach of duty, or breach of trust where the defendant has acted "honestly and reasonably" and "having regard to the circumstances of the case . . . he ought fairly to be excused". The applicability of the defence to all the forms of action dealt with in this article is moot. The defence is least applicable to a breach of confidence as it involves the breach of no pre-existing fiduciary duty.[131] The section's requirement of reasonable behaviour may place the fiduciary who breaches his obligations outside the scope of the section, given the strict attitude of Equity. Reliance on legal advice is often an indication of reasonable behaviour,[132] but it is now unlikely that legal advice would be given that multiple directorates are legally inviolable, in the light of the developments reviewed in this article. For a breach of confidence, it is submitted that misuse of information known to have been derived in confidence could not be "reasonable" by any standards. The section's test is conjunctive.[133] But it is most unlikely for a director to be thought by the courts to be fairly excused for a breach of a fiduciary obligation, as the underlying policy is to prevent such behaviour. Inevitably a breach of confidence must be similarly handled.

VI. CONCLUSION

Despite multiple directorates almost being a way of life in New Zealand, there is no statute law which attempts to regulate the resulting problems, especially those relating to loss of a corporate opportunity to another company. That legislative position is not intrinsically undesirable for there exists a number of actions available to a shareholder against the recalcitrant multiple director. Of those actions, the duty of loyalty rule has the greatest utility. It remains an open question whether the rule, particularly the conflict subrule, can be used to found a general prohibition; certainly the foundations for such a prohibition have been laid. It is clear, at least, that Equity will not tolerate any impropriety by a director. Attempts have been made in a number of jurisdictions to codify the equitable principles governing a director's conduct.[134] Unfortunately the only major benefit of such modifications is to permit the director to know better the standard expected of him, so enabling him to seize upon any lacunae of drafting.[135]

131 Contrast Finn, supra n. 29, 11. But note the broad view taken of the section in *Dimond Manufacturing Ltd* v *Hamilton* [1969] NZLR 609, 630 (per McCarthy J.).

132 E.g. *Re Duomatic Ltd* [1969] 2 Ch. 365.

133 *Re Day-Nite Carriers Ltd* [1975] 1 N.Z.L.R. 172.

134 Canadian Business Corporations Act 1974-1978, s.117; Uniform Companies Act 1961, s.124 (Australia); and Companies Bill 1978, cl. 44.

135 The writer agrees with Gower, op. cit. n.10, 595, that the codification proposed in the United Kingdom Bill is a "reasonably accurate distillation", but expresses the lingering doubt about codification.

Two deficiencies in the present law are revealed by the foregoing analysis. The first concerns the enforcement of obligations flowing from the proposition that information is property. However the difficulties of such enforcement are considerable, so that no reform is suggested by the writer. The second is the possibility of third parties receiving benefits from breaches of fiduciary duty not relating to property. The present law permits recovery only from a third party taking with actual knowledge of the breach. The writer suggests a legislative reform so that a company deriving a benefit from a breach of fiduciary duty of a multiple director may be made liable as if it had had actual knowledge of the breach. This could be achieved by providing the court with a discretion to deem the company to have constructive knowledge of the breach where a section 199(3) general disclosure has been made. Lack of clarity in the law may be used as an argument against the proposal, but that argument is used against the conferment of all judicial discretions. With such a provision, companies would be forced to employ persons as directors primarily on the basis of their ability, rather than on their ability to contribute ideas from other sources. Perhaps inevitably the reform would result in the breaking up of multiple directorates which are being abused. A general prohibition is the alternative, although Parliament seems unlikely to take that step.[136] But the evidence is that the courts are progressively moving towards such a prohibition, at least in their utterances, which is remarkable given the usual conservatism of the judiciary.

136 The judiciary, or some of its members, are equally unwilling, at least for the present. See *Berlei Hestia (N.Z.) Ltd v Fernyhough*, supra n. 86.