DO NOT ADOPT A DOUBLE NEGATIVE: AN INTERNATIONAL COMPARISON OF THE CORPORATE OPPORTUNITIES DOCTRINE

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Abstract

The no-conflict rule and no-profit rule, which prevents directors from usurping a corporate opportunity in the UK, has caused much academic and judicial debate. Some academics have argued that the law is outdated, and the UK should adopt a more contemporary approach, such as that seen in the US State of Delaware. However, other academics have rebutted this suggestion by saying it is impractical and not fit for purpose. The Judiciary is limited in their decision-making due to the doctrine of stare decisis. However, few, having realised the often outdated and inflexible law they are bound by, have attempted to implement the contentious legal issue more flexibly.

The purpose of this article is to examine if the current law in the UK is fit for purpose and if not, seek to determine if the approach adopted by Delaware is a model that could assist the UK in legal reform. In achieving this aim, the article will not merely emulate previous academic arguments which, primarily, adopt a theoretical viewpoint. Instead, it will evaluate how the current law impacts directors in a practical setting by considering a director's entrepreneurial acumen; the impact the law has on commercial objectives; and, highlight the weaknesses in the recently reformed 'board authorisation mechanism'.

Introduction

In the UK, when an action is brought against a director for misappropriating a corporate opportunity, the law focuses solely on two tests: (i) whether the opportunity could 'potentially' be appropriated by the company; (ii) whether the opportunity

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materialised as a result of the director's position. If the answer to one of these questions is in the affirmative, a director has breached the fiduciary duties they owe to the company they represent.[2]

The Delaware courts however have been developing what is known as the 'corporate opportunity doctrine' over the past eighty years.[3] This has led to the judiciary implementing an investigative measure, whereby the courts will first seek to determine if the company has a commercial interest in the opportunity, before determining that a director has breached their fiduciary duties.[4]

The difference in each of these jurisdictions has resulted in a conflict of academic opinion. Some argue that the UK's strict approach is anachronistic.[5] Thus, they advocate for UK law to assimilate Delaware's.[6] Those against adopting the Delaware model, highlight that it would inevitably lead to directors being more concerned with identifying personal opportunities, rather than company opportunities.[7] Others contest against comparing the two approaches altogether since the constitutional dissimilarities between the UK and US make such arguments otiose.[8]

1 The Importance of a Corporate Opportunities' Doctrine

Before discussing why it is important to regulate directors' actions, briefly visualise that you are a director of a company who manufactures kitchen tiles. On Saturday night, you attend a family gathering and engage in conversation with one of the guests. After several minutes of discussing one another's career backgrounds, you discover the guest owns a hospitality business. He has been seeking private tenders to refurbish the tiles throughout several of his hotel bathrooms. However, due to past logistical issues, he made it abundantly clear that he has no desire to contract with the company you currently represent. He acknowledges that you are precisely the

[2] R. Langford, 'Best Interests: Multifaceted but not Unbounded' [2016] 75 *CLJ* 505, 514
[3] J. Lowry and R. Edmunds, 'The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism' [2000] *JBL* 122, 123
[4] *Guth v. Loft*, 5 A.2d 503, 514 (Del. 1939)
[5] J. Lowry and R. Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundary of the Duty and its remedies' [1998] *MLR* 515, 521
[6] J. Lowry and R. Edmunds, 'The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism' [2000] *JBL* 122, 123
[7] Struan Scott, 'The Corporate Opportunity Doctrine and Impossibility Arguments' (2003) 66(6) *MLR* 852, 867
[8] D. Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' [2005] 25(4) *OJLS* 603, 611

type of professional he has been yearning to work with and, thus, offers you the contract personally. Excited by the opportunity that has been offered to you, you begin taking the necessary steps to get your own company "up and running" before leaving your current role. These 'steps' include submitting a tender for the above contract.
Under these circumstances, a director in the UK will have just breached their duty to avoid a conflict of interests under section 175 of the Companies Act 2006 (CA 2006).[9] However, if the director was representing a company which is incorporated in Delaware, it is highly improbable that they would have breached their directorial duties.

The outcomes differ because of how each jurisdiction recognises a corporate opportunity. Does it seem fair? Why should the law place prohibitions on directors not to pursue personal entrepreneurship? The starting point is to acknowledge the powers granted to directors.

Directors Authority

In contemporary times, the extent of a director's power is recognised under the Companies (Model Articles) Regulations 2008 (SI 2008/3229). Schedule 1(3) for private companies and schedule 3(3) for public companies provide that "*directors have full authority to exercise all of the company powers to the extent that the company's Article of Association does not provide otherwise"*.[10]

Directors representing a company which is incorporated in Delaware, have similar powers. The Delaware General Corporation Law (DGCL) §141(a) states *"The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors"*.

Therefore, directors have absolute power over the company they represent. It is the

[9] There is debate as to what steps must be taken by a director in order for them to have crossed the boundary of s.175 of the CA 2006. According to Rose J in *Invideous Ltd and others v Thorogood and others* [2013] EWHC 3015: 'The point of tendering for contracts' by a director for their own benefit when representing a company is a breach [178-179]. However, according to Hodge J in *Berryland Books Ltd v BK Books Ltd* [2009] EWHC 1877: Merely taking steps so that the company is 'up and running' will result in a breach [23]. Note: both cases have been overruled but for unrelated issues.
[10] For companies incorporated before 28th of April 2013 and who have decided not to incorporate the amended model articles, often applied The Companies (Tables A to F) Regulations as their articles of association. Art 70 confers the same powers to the board of directors as that stated in The Companies (Model Articles) Regulations 2008.

extent of this power that must be read in line with the agency theory, so that the importance of regulating directors can be understood.

The Agency Theory

It has longed been noted that the foundations of company law are analysed within the framework of agency theory.[11] Once a director is hired they enter into an agent-principal relationship with the company they represent.[12] The relationship between the Agent (Director) and Principal (Company) has been evaluated and analysed extensively by academics. In short, a director's overriding objective is to use their skill and experience to maximise the company's growth, profit, and sustainability.[13]

The agency costs and ownership model provides a clear analysis of the relationship between the agent and principal and the problems that arise in a corporate context.[14] The shareholders of the company contract with the director to perform the controlling tasks of the company, as such the position grants the director access to confidential information, intellectual property and forth-coming opportunities that may have commercial worth to the company they represent. Furthermore, it places the director in a position where, due to the access of this knowledge, together with the power granted to them by statute, they could be susceptible to usurping corporate opportunities or making individual profits.

Both agency theorists and the judiciary acknowledge the difficult position a director is placed in. Agency theorists suggest that directors are naturally business-minded, and it is within their 'managerial opportunistic behaviour' to exploit such information for their own economic gain.[15] In contrast, the judiciary has acknowledged that directors' who exploit opportunities for personal gain, is *'merely (prohibited) human nature'*.[16] However, this self-interest phenomenon conflicts with the overriding objective within the agency relationship. Therefore, to ensure the growth, profit and sustainability of

[11] M. Gelter and G. Helleringer, 'Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law' (2018) 15(1) *Berkeley Bus. L.J.* 92, 105
[12] *Aberdeen Railway Co v Blaikie Brothers* [1854] UKHL 1, [1854] 1 Macq. 461, 471 (Lord Cranworth L.C.)
[13] M. Jensen and W. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, 309
[14] *Ibid*
[15] M. Dion, 'Agency Theory and Financial Crime: The Paradox of the Opportunistic Executive' (2016) 23(3) *JFC* 574, 575
[16] *Bray v Ford* [1896] AC. 44, 51 (HL) (Lord Herschell)

the company, and to govern directors' absolute power, the law recognises that any conflict of interest, actual or potential, must be regulated by fiduciary duties.[17]

The doctrine's importance

The brief discussion of director authority and agency theory highlighted that without corporate governance companies would be incapable of operating. This is because directors will be more concerned with identifying personal opportunities rather than corporate opportunities and, thus, the company will never have the opportunity to grow or remain sustainable.[18] Under this observation, the intention behind the corporate opportunity doctrine is fundamentally sound. It provides an essential 'checks and balances' mechanism on directors. However, when this rule is applied so rigidly that it precludes directorial entrepreneurialism and, thus, an expanding commercial world it becomes a problem that needs rectifying.

2. UK v Delaware – A Comparative Analysis

Pre-2006, leading academics criticised corporate law for being inaccessible and lacking in clarity.[19] To address this criticism the Company Law Review Steering Group (CLRSG) was tasked with determining whether the law could be reformed in order to, *inter alia*, provide clarity and address the inflexible law which was governing directors.[20] In its final report, the CLRSG stated it was 'confident that the reform they suggested makes directors duties clearer and more flexible.[21]

However, while certain aspects of the CLRSG reform were worthy, director duties are certainly not clear and flexible. Since the implementation of these duties into the CA 2006, there has been more confusion than ever before. For example, some academics contend that the once separate 'no-profit rule' is now integrated as a sub-rule under the 'no-conflict rule'.[22] While this line of argument is understandable since

[17] See *A. B. Cook v George S. Deeks and others* [1916] UKPC 10, [1916] 1 A.C. 554, 563 (Lord Buckmaster L.C.)
[18] Struan Scott, 'The Corporate Opportunity Doctrine and Impossibility Arguments' (2003) 66(6) *MLR* 852, 867
[19] A. Dingham and J. Lowry, *Company Law* (9th edn, OUP 2016) [14.1]
[20] C. Nyombi, 'Corporate personality: the Achilles' heel of executive remuneration policy' (2014) 56(3) *Int. JLM.* 184, 185
[21] Department of Trade and Industry, *Implementation of Companies Act 2006: A Consultative Document* (URN: 07/666, DTI, 2007)
[22] B. Hannigan, *Company Law* (3rd edn, OUP 2012) 11-12

there is no direct provision governing the no-profit rule in the CA 2006.[23] For the purpose of this article, the no-profit rule will be analysed as a single rule. There are two reasons for this. Firstly, s.170(4) of the CA 2006 states *'duties shall be interpreted and applied in the same way as common law rules or equitable principles'.* Secondly, after the enactment of the CA 2006, LJ Rimer held directors liable based solely on their capacity, which is a test only attributable to the no-profit rule.[24]

A corporate opportunity under the no-conflict rule

When considering if a director has usurped a corporate opportunity under the no-conflict rule, most case consider the ratio decidendi of Lord Cranworth:

> *'No [person who has] 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'.*[25]

From this judgement, it is quite clear that a court must decide what interests a company has, in order to decide whether a director appropriation conflicts with those interests. However, how that interest was presented to the director, i.e., whether in their capacity or not is irrelevant under the no-conflict rule.[26] The emphasis is placed on 'whether the company *could* have taken advantage of that opportunity'.[27] Upon first inspection, it is akin to the test set out under Delaware law, but, as discussed later, the judicial approach is far from the same.

The stringent operation of this test is evident in *Bhullar v Bhullar*.[28] In this case the company leased a bowling alley. In 1998, the shareholders – who were also directors – fell out. The board agreed that the *company* would no longer invest in property. In 1999, one of the director's and another shareholder bought property adjacent to the bowling alley. The opportunity was presented to them in their personal capacity rather

[23] E. Lim, 'Directors Fiduciary Duties: A New Analytical Framework' (2013) 129 *LQR* 242, 252
[24] *O'Donnell v Shanahan and another* [2009] EWCA Civ 751, [54] (LJ Rimer)
[25] Aberdeen Railway Co v Blaikie Brothers [1854] UKHL 1, [1854] 1 Macq. 461 at 471 (Lord Cranworth LC)
[26] G. Jones, 'Injust Enrichment and the fiduciary's duty of loyalty' (1968) 84 *LQ Rev* 472, 472-474
[27] S. Witney, 'Corporate Opportunities Law and The Non-Executive Director' (2016) 16(1) *JCLS* 145, 150
[28] *Bhullar and others v Bhullar and another; Re Bhullar Bros Ltd* [2003] EWCA Civ 424

than their connection with the company. Nevertheless, LJ Parker held:

> *'The Appellants … [at the time] had one capacity only … they were in a fiduciary relationship with the company. [The adjacent property] would have been commercially attractive to the company … whether the company could or would have taken that opportunity is not the point … the Appellants breached their duties by failing to communicate the opportunity to the company'.*[29]

Therefore, the appropriation of a corporate opportunity is not concerned with how the opportunity materialised. Instead, the test is whether the company could 'potentially' appropriate it. Watts has pointed out one of the problematic issues faced with applying the test to 'potential conflicts. He refers to the fact that a company constitution is no longer required to specify the scope of their business and, thus, 'companies are free to diversify into any line of business'.[30] As a result, he suggests that all opportunities are potentially company opportunities, which would result in directors' needing authority in every personal pursuit.[31]

With respect to Watts, he is correct to a certain extent. Under the no-conflict rule a company, as seen in *Bhullar v Bhullar,*[32] does not have to be actively seeking the opportunity, or even be capable of appropriating it, in order for a breach to occur. However, the potential opportunity does have to be foreseen by a reasonable person as having a 'real and sensible possibility of conflict'.[33] It is these five words that need to be analysed when determining if an opportunity falls into the company's line of business.

Nevertheless, since this decision by the HOL, no UK court has considered what constitutes a 'real and sensible possibility of conflict'.[34] Instead, courts have considered the issue in both a broad and narrow context. In support of Watts argument, Parker LJ has stated an opportunity which is 'commercially attractive' falls into a company's line of business.[35] Also, LJ Roskill has ruled that any 'relevant'

[29] Ibid, [41] (Johnathan Parker LJ)
[30] P. Watts, *Directors Powers and Duties* (2nd edn, LexisNexis (NZ) 2015) [7.4]
[31] *Ibid*
[32] *Bhullar and others v Bhullar and another; Re Bhullar Bros Ltd* [2003] EWCA Civ 424
[33] *Boardman v Phipps* [1967] 2 AC 46, 124 (HL) (L Upjohn)
[34] D. Kershaw, 'Does it matter how the law thinks about corporate opportunities?' [2005] *LS* 533, 551
[35] *Bhullar and others v Bhullar and another; Re Bhullar Bros Ltd* [2003] EWCA Civ 424 [41] (Parker LJ)

business is within the company's line of business.[36]

However, in critique of Watts assertion, courts have provided scenarios where it would not be considered a corporate opportunity. One example, provided by LJ Lindley, is if a director represented a company in the business of science and the opportunity arises to write and sell a book based on the information he has acquired as a director, in his opinion, it would be 'manifestly absurd' to hold such facts to constitute a corporate opportunity.[37] Therefore, based on this analysis, Watts assertion cannot be immediately supported. While it is submitted that many judicial decisions interpret business opportunities broadly, there are some circumstances where the courts will not be convinced that the opportunity belonged to the company. However, it is because of the alternative track, discussed below that Watts argument comes into fruition.

A corporate opportunity under the no-profit rule

When considering if a director has conferred a benefit, the test stems from the rule set out by Lord Herschell:

> *'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'.*[38]

There are two cases which highlight the stringent operation of this test. The leading case is *Regal (Hastings) v Gulliver and Others*.[39] In this case, four directors had brought shares in a subsidiary company to secure a lease. There was no evidence that the four directors had acted in bad faith, in fact, it was petitioned that they acted in accordance with their fiduciary duties of ensuring the ongoing success of the company since the parent company could not afford to purchase the shares.

Nevertheless, by bare majority of 3:2, it was held that the good intentions of the directors and the capability of whether the company could take the opportunity were irrelevant. Lord Porter stated the ratio clearly:

[36] *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, (Roskill LJ) (Birmingham Assizes)
[37] *Aas v Benham* [1891] 2 Ch 244, 256 (Lindley LJ)
[38] *George Bray v John Ford* [1896] A.C. 44 at 50 (HL) (Lord Herschell)
[39] *Regal (Hastings) v Gulliver and Others* [1942] 1 All ER 378 (HL)

> *"one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position … It matters not that he could not have acquired the property for the company itself — the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf".*[40]

From this decision, it is abundantly clear that a director has an undivided duty of loyalty to the company, and it takes precedence over all their other duties. It is irrelevant that a director's intention was shrouded in good faith or that the company was unable to appropriate the opportunity. The mere fact they took a profit while occupying the position of director makes them accountable for that profit.

The unrelating nature of this rule is why it is conceded that Watts argument (above) where he stated 'all opportunities are potentially corporate opportunities', is correct.[41] To explain this rationale with more clarity, it is crucial to evaluate the case of *O'Donnell v Shanahan*.[42] In this case a company was owned and managed by the same three directors. The company acted as a financial intermediary. While acting for the company, two of the directors were tasked with finding a buyer for a client's property. When they could only find a purchaser who would take a 50 per cent interest in the property, the two directors acquired the other 50 per cent for themselves. Unlike in *Bhullar v Bhullar,*[43] LJ Rimer was satisfied that the opportunity was outside the scope of the company's business.[44] The two directors then sought to rely on this as a defence. However, LJ Rimer rejected their defence. He held that the defendants were liable because they obtained the information regarding the opportunity while acting as directors.[45]

Therefore, any opportunity can be argued to be a corporate opportunity. When a corporate opportunity is foreseen as belonging to the company by a reasonable person, i.e., in the company's line of business, a claim can succeed under the no-conflict rule. However, if the opportunity is not foreseen as a corporate opportunity by a reasonable person, the mere fact it came to the director in his director capacity results in it becoming a misappropriation under the no-profit rule. Koh is also highly

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[40] *Regal (Hastings) v Gulliver and Others* [1942], [1967] 2 A.C. 134, 158 (Porter L)
[41] See P. Watts above note 39
[42] *O'Donnell v Shanahan and another* [2009] EWCA Civ 751
[43] *Bhullar and others v Bhullar and another; Re Bhullar Bros Ltd* [2003] EWCA Civ 424
[44] *O'Donnell v Shanahan and another* [2009] EWCA Civ 751, [55] and [60] (Rimer LJ)
[45] *Ibid,* [54]

critical of this process and refers to it as ‘a rule of absolutism’.[46] She also highlights that the rule originates from the law of trusts, which is incompatible with contemporary company law objectives.[47]

Based on the above analysis, there are few circumstances where a court will not hold that the opportunity belonged to the company. Therefore, the CLRSG objectives of ‘increasing competitiveness; promoting enterprises; and increasing company growth’ is failing. It is contended that the problem is the “absolute” double negative no-profit rule. Thus, it naturally leads to the question of whether it would be more appropriate to remove the incompatible no-profit rule altogether and provide a more balanced approach by solely applying the no-conflict rule. However, several academics, such as Lowry, Edmund and Worthington disagree. Instead, they continually advocate that change is required under the no-conflict rule and often call on the legislature to consider implementing a model analogous to Delaware’s.[48] Therefore, as a starting point, it is imperative to analyse the Delaware model.

The Delaware Model

Directors in Delaware have the same fiduciary duties as that seen in the UK. They owe a duty of loyalty and must act in good faith towards the company they represent.[49] The primary difference is that in Delaware, director duties are not codified.[50] Nevertheless, Chief Justice Layton, while sitting in the Supreme Court of Delaware, stated how they are to be applied in practice:

> *‘[The duty of loyalty] affirmatively … protects the interests of the corporation committed to his charge, and refrains [Directors] from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it.’*[51]

Therefore, the fiduciary duty of loyalty, imposed on Delaware directors, is intended to

[46] P. Koh, ‘Once a director, always a fiduciary?’ [2003] 62(2) *CLJ* 403, 409
[47] *Ibid*
[48] J. Lowry and R. Edmunds, ‘The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism’ [2000] *JBL* 122, 123
[49] D. Kershaw, ‘Lost in Translation: Corporate Opportunities in Comparative Perspective’ [2005] 25(4) *OJLS* 603, 608
[50] M. Gelter and G. Helleringer, ‘Corporate Opportunities in the US and in the UK’ (2017) *ECGI Working Paper Series in Law* 346/2017, 6
[51] *Guth v Loft, Inc*., 5 A.2d 503 (Del. 1939), at 510 (Layton CJ)

operate in the same manner as that seen in the UK, namely, to prohibit directors from appropriating a corporate opportunity or taking an unauthorised profit. However, it is the process that the courts in Delaware adopt when determining if the opportunity is within the company line of business, which has resulted in UK academics advocating for such a model to be implemented in the UK.[52]

The classic statement of the corporate opportunity doctrine in Delaware first materialised In *Guth v Loft.*[53] Guth was a director and majority shareholder of a company (Loft Inc). Loft was a manufacturer and purchaser of drink syrups. Guth was approached by a controlling shareholder, in the then bankrupt Pepsi Cola, with an offer to purchase shares in a new company and the Pepsi Cola syrup. Guth appropriated the opportunity for himself without offering it to the company. He then used Loft's money and personnel to develop the Pepsi company. In explaining that Guth was liable and, thus, required to give the Pepsi company to Loft, Justice Layton stated:

> '*If … a corporate officer or director [is presented with] a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself'.*[54]

From this judgement, three factors are considered when determining if an opportunity rightfully belonged to the company: (i) is the company financially capable of exploiting the opportunity; (ii) is the opportunity within the company's line of business; (iii) does the company have an interest or expectancy in the opportunity.

In analysing how the courts of Delaware implement these three questions, it is

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[52] See: J. Lowry and R. Edmunds, 'The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism' [2000] *JBL* 122 and S. Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" [2013] 72(3) *CLJ* 720
[53] *Guth v Loft, Inc.*, 5 A.2d 503 (Del. 1939)
[54] *Ibid* at 511

relevant to evaluate another Delaware case of *Broz v Cellular Information Systems*,[55] which is now leading case in the jurisdiction.[56] Broz was a majority shareholder and director of RFB – a small mobile phone company. He was also a non-executive director for a competing network provider, CIS. While holding these positions, he was informed of an opportunity to acquire an additional network licence. Broz purchased the licence for RFB without formally offering it to CIS. However, he did informally mention it to the CIS board but, due to CIS financial difficulty, the board loosely claimed it would be unlikely that they would pursue the opportunity. Subsequently, Broz then appropriated the opportunity without authorisation. CIS was later taken over by RFB who, subsequently, brought an action against Broz for a breach of his fiduciary duty.

Chief Justice Veasey, when deciding that Broz had not appropriated a corporate opportunity, stated:

> *"[Although] the licence was quite clearly within CIS line of business, Broz comported himself in a manner which was wholly in accord with his obligations to CIS. Broz took care not to usurp any opportunity CIS was willing and able to pursue …. Therefore, the totality of the circumstances indicates that Broz did not usurp an opportunity that properly belonged to CIS."*[57]

Interestingly, therefore, it appears that the three questions, presented by *Guth v Loft*,[58] must be concurrent to establish that the opportunity belongs to the company. The fact the opportunity was within CIS line of business was irrelevant because once it was established that they could not pursue it, due to financial limitations, it was no longer capable of being a corporate opportunity. Before considering the alternative outcomes in Regal, Bhullar and O'Donnell, which could have resulted if the Delaware approach was adopted in the UK, two further questions must be determined: (i) whether the capacity of the director, when the opportunity materialised, is relevant; (ii) what is considered to be "an interest or expectancy in the opportunity".

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[55] *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996)
[56] D. Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' [2005] 25(4) *OJLS* 603, 608
[57] *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996), 157 (Veasey CJ)
[58] *Guth v Loft, Inc*., 5 A.2d 503 (Del. 1939)

In Broz, the Delaware supreme court thought that the opportunity came to him in his individual capacity. Nevertheless, the court emphasised that such a factor 'is not dispositive'.[59] Clark has stated that an interest-or-expectancy test defines a corporate opportunity by reference to 'current', rather than prospective activities of the corporation.[60] Therefore, unless the firm has existing contractual rights which would give them actual or reasonable expectancy in the opportunity, it will not be considered capable of being a maturing company opportunity.[61] Consequently, when considering whether an opportunity is 'capable' of maturing into a corporate opportunity, Delaware law does not experience the same limitations as that seen in the UK, when a company's constitution does not limit its scope of business, as raised by Watts earlier.[62]

Having now analysed the test regulating corporate opportunities in Delaware, a brief hypothesis can be made on the earlier cases discussed under the UK's rules.
In *Bhullar*, the result could have been different, i.e. Bhullar would not have breached his fiduciary duty. This is because even though Bhullar did not offer the opportunity to the company first, it was pre-determined that the company would not pursue any further opportunities. In *Northeast Harbor v Nancy Harris*,[63] which was a case in Maine but utilised the Guth test, the facts were analogous to Bhullar. The court held that once the board of directors agreed not to pursue such an opportunity moving forwards, the company no longer had an interest or expectancy in it.

In *Regal,* it is highly probable that the directors would not have breached their fiduciary duty. This is because in both *Guth* and *Broz* it was made abundantly clear that if the company was unable to appropriate the opportunity, due to financial limitations, then it could not be a corporate opportunity.

In *O'Donnell*, when LJ Rimer held the directors misappropriated the opportunity because it was offered to them while acting as directors and because it was a maturing business opportunity.[64] Under Delaware law, these reasons would unlikely have resulted in a misappropriation because whether or not it was presented to a

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[59] *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996), 155
[60] R. Clark, *Corporate Law* (2nd edn, Aspen 1986) 225
[61] *Ibid*, 226 – 227
[62] See P. Watts, *Above* note 40
[63] *Northeast Harbor Golf Club, Inc. v. Nancy Harris et al*., 661 A. 2d 1146 (Me.1995)
[64] *O'Donnell v Shanahan and another* [2009] EWCA Civ 751, [54] – [55]

director in his capacity is irrelevant, the company never 'reasonably expected' the opportunity. Therefore, it appears that all the UK cases would have derived different results, which are more compatible with the CLRSG objectives of 'ensuring company sustainability, increasing competitiveness and promoting new enterprises.[65]

Nevertheless, regardless of the hypothetical examples, the legislature is likely to highlight that all of the above cases, at least in contemporary times, could have been authorised because of the provisions under s.175(4)-(6) of the CA 2006 and, thus, it was the director's conduct which led to litigation. Davies and Worthington have acknowledged that the directors' in Regal, Bhullar and O'Donnell could have successfully sought authorisation before appropriating the opportunity.[66] Therefore, arguing that reform is necessary, based on these cases and principles alone, would be feeble. A more compelling argument would be to evaluate the difficulties directors and companies experience when seeking board authorisation.

Board Authorisation

Section 175(4)(b) of the CA 2006 provides that a director will not have appropriated a corporate opportunity if the board of directors has appropriately authorised the matter. Firstly, the CLRSG and Legislature rationale for such a provision goes further than their aims and objectives of creating certainty, competitiveness and entrepreneurial activity.[67] Instead, the CLRSG have given regard to the practical difficulties, which companies experienced pre-2006. For example, the old law, where only members could authorise conflicts of interest, was 'impractical and onerous' because of the logistical barriers of convening a general meeting.[68] Therefore, the amendment to allow directors to authorise conflicts has relieved the burdensome requirements, especially experienced by public companies.

Moreover, what is even more commendable is that the legislator sought to ensure that there remained a balance between the business judgement rule, whereby

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[65] Department of Trade and Industry, *Implementation of Companies Act 2006: A Consultative Document* (URN: 07/666, DTI, 2007), 2

[66] P. Davies and S. Worthington, *Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 626

[67] Company Law Review Steering Group, *Modern Company Law: For a Competitive Economy—Final Report*, Volume 1, DTI (June 2001) Para 3.23; Also, see: Explanatory Notes to the CA 2006 at paragraph 342, where it states that authorisation by the board was introduced to avoid the stifling of entrepreneurial activity resulting from the requirement of shareholder approval.

[68] *Ibid* 3.23 – 3.27

directors should use their subjective judgement to authorise conflicts of interest,[69] and the best interest rule where the *'duty to promote the interests of the company remains paramount'*.[70] A board can only authorise after considering the best interests of the company.[71] In order to achieve this, the conflicted director must give full disclosure of the conflicting interest or profit-making opportunity.[72] Otherwise, directors do not have the opportunity to give informed consent, and acquiescence can be reversed.[73] Once these strict formalities are achieved, "*it [then] prevents a shareholder from bringing claims – [outside fraud and dishonesty] – against directors"*.[74] Thus, it ensures that authorisation provides certainty for all while preserving company sustainability.

However, although the mechanism introduced by the CLRSG and Legislature appears commendable, there are several practical difficulties.

Board authorisation not so significant proviso?

Lord Goldsmith claimed, during the passing of the bill, that the authorisation mechanism was futile. He acknowledged:

"the constitution of the company is drawn up … by directors and … [thus] they can have regard to their [own] interests at the time that the constitution is drawn up".[75]
Interestingly, it seems that Lord Goldsmith's concerns have materialised.

In *Kleanthous v Paphitis,*[76] a company (RGL) board of directors drafted the constitution to allow for directors to authorise conflicts of interest. In early 1998 RGL's board decided against acquiring shares in La Senza, although they recognised them as commercially beneficial.[77] Mr Paphitis (a dragon in the TV series Dragon's Den) subsequently set up another company (Xunely). The RGL board authorised Xunely

[69] The rule was summed up by Lord Greene MR in *Re Smith & Fawcett Ltd* [1942] Ch 304: "*it is what the directors consider – not what the courts consider – to be in the best interest of the company"* [306]
[70] See: HC Deb 17 October 2006, vol 450, col 773 – 791
[71] R. Langford, 'Best Interests: Multifaceted but not Unbounded' [2016] 75 *CLJ* 505, 513
[72] *McWilliam and another v Norton Finance (UK) Ltd* [2015] EWCA Civ 186, [51]
[73] *Pennyfeathers Ltd v Pennyfeathers Property Ltd* [2013] EWHC 3530 (Ch), [64]
[74] HL Deb 9 May 2006, vol 681, col 866 (emphasis added)
[75] *Ibid* (emphasis added)
[76] *Kleanthous v Paphitis and others* [2011] EWHC 2287 (Ch)
[77] *Ibid* [8]

acquisition of La Senza and granted Xunely a loan to do so. On the same night, two of the directors who authorised the acquisition and loan also became directors of Xunely.[78] Newey J held that at the time of authorisation, the two directors did not have a conflict of interest.[79] Furthermore, he felt that although the acquisition could benefit the company, as the meeting notes suggested, this was a call better made by the directors.[80] Consequently, he held that the authorisation was valid and, thus, Mr Kleanthous was not entitled to bring an action against the three directors.

From this decision, several points arise, which shows that the authorisation mechanism is not fit for purpose. Firstly, it is not contended that Newey J applied the law wrong, but his decision is evident of how widely the authorisation mechanism can be applied. For example, although the meeting notes and the fact that three directors later appropriated the opportunity suggests it was in the best interest of RGL to appropriate the opportunity, Newey J felt that this is only something directors could answer and, thus, was not prepared to enforce the best interest rule over the business judgement rule. Furthermore, what is completely incomprehensible is how the two directors were not deemed to have an interest in the conflict, which should have prevented them from voting pertinent to s.175(6)(a) of the CA 2006. Newey J has set a precedence whereby if the director's interest is not yet "formalised" – or perhaps better put remains informally concealed – they are permitted to vote on authorisation in which they have an interest in.

Another scenario where commercial necessity can conflict with board authorisation is when an opportunity is presented, and time is of the essence. A brief example would be if a director were offered the opportunity to buy machinery at a discount for twenty-four hours; otherwise, it will be sold. The practical difficulties faced with such a scenario, would make it almost impossible to gain board authorisation in a large public company where directors are not readily available. The Companies (Model Articles) Regulations 2008 reg. 9, provides a director must give reasonable notice to call a directors' meeting – which is usually seven days for a public company. Obviously, within seven days, that opportunity may no longer be available. However, it was made clear in *Crown Dilmun v Sutton*,[81] that simply informing, which was at the time members, and then appropriating the opportunity without authorisation is a

[78] *Ibid* [12]
[79] *Ibid* [48]
[80] *Ibid* [75]
[81] *Crown Dilmun, Dilmun Investments Limited v Nicholas Sutton, Fulham River Projects Limited* [2004] EWHC 821 (Ch)

breach of fiduciary duty. Furthermore, although the law has changed to allow directors to authorise, it was indirectly implied by Mummery LJ in 2011, that this is still how the courts would proceed.[82] Consequently, relying on s.175(4) of the CA 2006 to 'promote personal entrepreneurialism' is a strategy not fit for purpose.

Keay is also critical of how the authorisation mechanism is utilised in practice. He states that although s.175(6) prohibits the potentially conflicted director from voting on the authorisation motion, they are still entitled to participate in the board discussion concerning the possibility of authorisation.[83] Keay believes such a practice influences the board's decision because directors will be hesitant to ask probing questions due to the risk of awkwardness or confrontation.[84] Hill's empirical study supports this presumption.[85] The study suggests that junior directors often conform with senior directors simply because of their level of experience.[86] Consequently, if a senior executive seeks authorisation to usurp a corporate opportunity, decisions are often based upon who the director is, rather than the welfare of the company.

Keay suggests an alternative process, which would make authorisation more impartial and secure. He suggests excluding the potentially conflicted director and their family from all levels of board room discussion.[87] However, while it is accepted that such a reform would offer more security during the authorisation process. This reform will not provide a remedy for situations where time is of the essence, or if a board consist of interested directors who have not yet been formalised as seen in *Paphitis*.

Nevertheless, it is contended that Delaware has provided a remedy in this area. Since 2000, the Delaware General Corporation Law Code § 122(17) has permitted companies to adopt articles which waive the corporate opportunity doctrine for specified business opportunities or categories of business opportunities. Its effect is simple. A contract is formed between a director and the company, before the director starts their role, stating precisely what opportunities a director can and cannot pursue

[82] *Philips Towers v Premier Waste Management* [2011] EWCA Civ 923 [35] (Mummery LJ)
[83] A. Keay, 'The Authorising of directors' Conflicts of Interest: Getting a Balance?' [2012] 12(1) *JCLS* 129, 140
[84] Ibid
[85] S. Hill, 'The Social Organization of Boards of Directors' (1995) 46(2) *The British Journal of Sociology* 245
[86] Ibid, 268 - 269
[87] A. Keay, 'The Authorising of directors' Conflicts of Interest: Getting a Balance?' [2012] 12(1) *JCLS* 129, 160-161

in their search for personal entrepreneurialism.[88]

Consequently, there is no requirement to hold board meetings which, as suggested by Keay's and Hill, are heavily influenced in the UK. Furthermore, since the contract already allows directors to take certain opportunities, there is no requirement to withhold from appropriating an opportunity when time is of the essence.[89]

The argument following comparison

Overall, the reform suggested by the CLSRG and implemented by the legislature should be applauded, particularly in regard to corporate sustainability. However, the strict approach for deciding whether the opportunity belongs to the company is still preventing personal entrepreneurialism and, thus, increased competitiveness. The proviso to authorisation further results in unrelenting practical barriers. In contrast, the Delaware model provides a mechanism which better supports the CLRSG objectives. Therefore, it appears that the calls for the UK to implement the Delaware doctrine are well-founded. However, to move forwards and argue for reform without addressing the weaknesses of the Delaware model would be too one-sided. Thus, the weaknesses of the Delaware model need to be considered.

3 Lack of Transparency

As mentioned, few academics, when advocating for the UK to adopt the Delaware approach, have considered the weaknesses of the Delaware corporate opportunities doctrine. Kershaw is one exception to this group, as his article provides a transparent argument of both approaches.[90] One point which Kershaw raises is that the US constitution dictates the Delaware doctrine.[91] Kershaw argues that as companies in the US are incorporated in individual States, the Legislature experiences pressure to entice company directors to incorporate in their State so as to increase wealth, by example, taxation. Consequently, the law is intended to be flexible and, most pertinently, favourable to a director; otherwise, they run the risk of having directors incorporate or reincorporate elsewhere.[92] One objection to Kershaw's rationale is if

[88] G. Rauterberg and E. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers' (2017) 117(5) *Col Law. Rev*
[89] Note: these corporate opportunities waivers, offer more than mere alternatives to board authorisation and will be analysed in more detail below, in 'Conclusion and Recommendation'.
[90] D. Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' [2005] 25(4) *OJLS* 603
[91] *Ibid*, 612
[92] *Ibid*

Delaware is experiencing increased taxes and, ultimately, benefitting the economy through being so flexible, then why should the UK not implement it, after all, one of the primary aims of the UK reform in 2006 was to 'provide flexibility and increase economic health'.[93] However, what is the price of flexibility and increased economic wealth?

Ribstein provides another stimulating argument as to why Delaware law is flexible.[94] He notes that 'virtually all of Delaware corporate law is proposed by the Delaware Bar, and the Bar's proposals invariably pass through the legislature'.[95] Thus, this suggests that the more flexible the Delaware doctrine is, the more the Bar can benefit by charging legal fees.

However, the notion that Delaware's corporate opportunities doctrine is simply the product of self-serving public servants and legal professionals seeking to maximise their interest in financial gain is dependent on two factors. Firstly, the law must be enticing enough for corporations to incorporate in Delaware, which is evident above. Secondly, the law must be so unpredictable that a significant amount of litigation arises for the state Bar to achieve increased legal fees.

Delaware's Unpredictable Flexibility

The courts in Delaware have expressed on several occasions that although their law is flexible, it also favours certainty and predictability.[96] However, this, at best, is a misconceived statement. Koh also shares such an opinion and says the problem with the Delaware doctrine is *'the challenge in finding a competing interest … in a significantly wide line of business test'*.[97]

While the line of business test is rooted in uncertainty and will be analysed below, there are also other areas which are equally uncertain. For example, uncertainty

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[93] Department of Trade and Industry, *Company Law Reform* (Cm 6456, 2005) 3

[94] L. Ribstein, 'Delaware, Lawyers and Contractual Choice of Law' (1994) 19 *Delaware Journal of Corporate Law* 999

[95] *Ibid*, 1010

[96] In *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996), at 159 Veasey CJ stated: 'that certainty and predictability are values to be promoted in our corporation law'; In: *Beam Ex Rel. M. Stewart Living v Stewart*., 833 A.2d 961 (Del. Ch. 2003) at 974, Chancellor Chandler stated: 'Delaware jurisprudence favours certainty and predictability'.

[97] P. Koh 'Once a Director, Always a fiduciary?' (2003) 62(2) *CLJ* 403, 411

stems from the conflicting cases of Broz[98] and Guth[99], which are the seminal cases in Delaware.[100] Guth suggests that the capacity of the director, at the time of appropriation, is a factor that needs to be considered by the court.[101] However, Veasey CJ, in Broz, states 'such a factor is not dispositive'.[102] Arguably, other factors may be of more significance, in determining whether the opportunity belongs to the company.[103] However, surely this is still a factor because if Guth was followed, a director who appropriates a corporate opportunity in his personal time immediately has one factor against him.

Returning to Koh's acknowledgement that the wide business test is resulting in the Delaware doctrine being uncertain, Koh relies on several academic opinions to support this point.[104] However, to negate the risk of regurgitating what has already been said, a case law comparison of Delaware's line of business test will be offered instead.

A comparison between *Beam v Stewart*,[105] and *Re eBay Shareholders*,[106] can show the uncertainty in Delaware's law. In *Beam,* a board of directors, whom all owned shares in the company (MSO), sold a sizeable proportion of its publicly traded stock to raise capital. Beam, who was solely a shareholder, brought a derivative action claiming, inter alia, that the raising of capital was a misappropriation of a corporate opportunity and the directors', being shareholders, should have gained authorisation since they all had a conflict of interest.[107] The importance of this case came from Chief Justice Veasey's decision when dismissing the claim:

> *'The selling of a company's stock … is not within "a" company's line of business'.*[108]

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[98] *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996)
[99] *Guth v Loft, Inc*., 5 A.2d 503 (Del. 1939)
[100] M. Gelter and G. Helleringer, 'Corporate Opportunities in the US and in the UK' (2017) ECGI Working Paper Series in Law 346/2017, 8-9
[101] *Guth v Loft, Inc.,* 5 A.2d 503 (Del. 1939) at 511
[102] *Robert Broz and RFB Cellular Inc v Cellular Information System Inc*., 673 A.2d 148 (Del. 1996), 155
[103] Academics seldom give rise to this factor. Instead, they focus on the financial capability, line of business and expectancy tests when arguing for reform.
[104] See: P. Koh 'Once a director always a fiduciary?' (2003) 62 *CLJ* 403, 410-415
[105] *Beam Ex Rel. M. Stewart Living v Stewart*., 833 A.2d 961 (Del. Ch. 2003)
[106] *Re eBay Inc. Shareholders Litigation*, WL 253521 (Del. Ch. 2004)
[107] *Beam Ex Rel. M. Stewart Living v Stewart*., 833 A.2d 961 (Del. Ch. 2003) at 972
[108] *Ibid* at 973

However, less than a year later, the same court heard *Re eBay*.[109] Senior directors were given a preferential allocation of shares that were being sold in an initial public offering in return for hiring an investment bank. Upon learning of the allocation, eBay brought an action against these directors. Chandler J held that the buying and selling of shares were within eBay's line of business as the company often invested its free capital in stocks and shares.[110]

Therefore, although the facts of these cases can be distinguished, how the courts implemented the line of business test cannot. In Beam, even though the company clearly operated in the financial markets, the court held that the dealing in stocks is not within 'a' company's line of business. Thus, the court set a precedence, whereby no company could claim that the financial markets were within their line of business. However, *it was because* eBay operated in the financial markets that the buying and selling of shares was within that company's line of business. Therefore, even though the same legal tests were applied, it shows how Delaware's line of business test can be overwhelmingly unpredictable.

When now returning to Ribstein observation that the flexibility of the doctrine is strategically proposed by the Delaware Bar, to ensure the financial security of its members, there is evidence of a correlation. Simply, the more uncertain and contentious the outcome, the more likely litigation is needed which demands legal fees.

Overall, if the law is so indecipherable and elusive to directors' judges, legislators and scholars, as Talley notes.[111] The question that arises is why academics are advocating for the UK to implement a doctrine that provides uncertainty across not only the legal sector but, also, across the entirety of the business sector.

The UK's Unfixable Dilemma

The CLSRG was also tasked with amending the law which was perceived as *'unnecessarily complicated and inaccessible [to directors]'*.[112] Therefore, to ensure

[109] *Re eBay Inc. Shareholders Litigation,* WL 253521 (Del. Ch. 2004)
[110] *Ibid* at 4 (Chandler J)
[111] E. Talley, 'Complexity in Corporate Governance: The Case of Corporate Opportunities' (Shareholder Rights and the Equitable Treatment of Shareholders Conference, Mumbai, 2002)
[112] Company Law Review Steering Group, Modern Company Law: For a Competitive Economy—Final Report, Volume 1, DTI (June 2001), p ix

that the non-legally trained director could access the law and, more pertinently, determine whether a decision would result in a breach of their duties, the remedy offered was to implement directors duties into statute.[113]

Whether s.175 of the CA 2006 has provided "directors" with accessibility and certainty is a matter of debate. The wording 'any opportunity' in s.175(2) can be construed as telling the director that all opportunities are corporate opportunities. However, it is asserted that the proviso provided by s.175(4)(a) where it states *"the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest"* has blocked that much-needed clarity. The test is quite clearly objective, based on what the courts decide to be "a real sensible possibility of conflict". Therefore, declaring that a director now has clarity is a farce. Instead, they are asking themselves "if I was to usurp this opportunity, would a reasonable person consider it to be a real possibility of conflict". This is a legal test and not one that a non-legally trained director should have to navigate because, as seen above, "a real possibility of conflict" is not clearly defined.[114] Lord Freeman held the same disconcertment and sought to amend s.175(2) to include *"an opportunity within the ambit of the business of the company"*.[115] Surely, this amendment would have provided more certainty or, at a minimum, allowed a director to make a subjective decision by referring to what opportunities the business is currently involved in. Unfortunately, Lord Freeman conceded far too easily to the Attorney General. The Attorney General merely referred to *Broadman*[116] and *Bhullar*[117] to show how the courts are adept at determining if the opportunity could reasonably cause conflict.[118] However, these cases do not assist the understanding of a non-legally trained director. Therefore, the question stays - how has the law provided clarity for directors?

Undoubtedly, the Court of Appeal has made the law more certain for directors - if they hold the office of director - they must gain authorisation from the company's board or risk the possibility of breaching their duty. However, in doing so, they have reopened

[113] Department of Trade and Industry, Company Law Reform (Cm 6456, 2005) 5
[114] See D. Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' [2005] 25(4) *OJLS* 603
[115] HL Deb 9 May 2006, Vol 681, Col 863
[116] *Boardman v Phipps* [1967] 2 AC 46 (HL)
[117] *Bhullar and others v Bhullar and another; Re Bhullar Bros Ltd* [2003] EWCA Civ 424
[118] HL Deb 9 May 2006, Vol 681, Col 863-864 (AG Lord Goldsmith)

the academic debate put forward by Lowry and Edmunds.[119] They assert that the strict capacity test inhibits personal entrepreneurialism.[120] However, Koh, although agreeing that the strict ethic is counterproductive, states anything but 'absolute stringency and rigidity will give rise to uncertainty [and inhibit] commercial morality'.[121] She then goes on to state, '*it is more important … that the law be settled than that it be settled right*'.[122] This is a strong statement, and evidences the extent of the dividing line between flexibility and rigidity.

Koh, Lowry, and Edmunds are all highly respected and, many would agree, leading academics in corporate law. However, what is clear is that they all agree certainty inhibits flexibility, and it is not possible to have both. Therefore, the UK, as the sub-title suggests, is in an "unfixable dilemma".

Is there a need for the strict 'capacity test'?

Those who feel that certainty is subordinate to commercial competitiveness and entrepreneurialism, such as Lowry and Edmunds,[123] simply advocate for the removal of the strict capacity test. However, there are policy arguments for keeping the test, which extends far beyond the line of director certainty and commercial flexibility.

Clarke notes that the rule is instrumental in ensuring that self-motivated directors do not use their position to remove a company's interests away from the opportunity so that they could pursue it themselves.[124] This type of situation is not novel. It was most recently seen in *Odyssey Entertainment v Kamp*.[125] Kamp, astonishingly, manoeuvred the company into liquidation so to ensure it could not pursue an opportunity. He then diverted the opportunity to his newly formed company. Fortunately, it was because of his director capacity that Barker J found there was a clear breach of s.175.[126]

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[119] J. Lowry and R. Edmunds, 'The No-Conflict — No-Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism' (2000) *JBL* 122
[120] *Ibid*, 141-142
[121] P. Koh 'Once a director always a fiduciary?' (2003) 62 *CLJ* 403, 415
[122] *Meinhard v. Salmon* (1928) 249 N.Y. 458, 164 N.E. 545, 546 quoted by Koh, Ibid at 415
[123] J. Lowry and R. Edmunds, 'The No-Conflict — No-Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism' (2000) *JBL* 122
[124] B. Clarke 'UK company law reform and directors' exploitation of corporate opportunities' (2008) 17(6) *ICCLR* 231, 234
[125] *Odyssey Entertainment Ltd (In liq) v Kamp* [2012] EWHC 2316 (Ch)
[126] *Ibid*, [238]

If these facts were to be presented under the Delaware model, the fact that Odyssey was not 'financially capable' of taking the opportunity, may lead many to believe that the courts would deem it not to be a corporate opportunity. However, this would be implying that the Delaware doctrine cannot prevent corporate abuse, which, is quite simply, not the case. In *Guth*, Justice Layton made it abundantly clear that:

> *'…Directors are not permitted to use their position of trust to further their private interests … [They] must refrain from doing anything that would … deprive [the company] of profit or injure the corporation'*.[127]

Therefore, the Delaware doctrine still recognises the capacity of a director but refuses to implement it quite as stringently as that seen in the UK.

The no-profit rule also allows comity with procedural fairness, particularly, the Civil Procedural Rules that concern litigation costs and case management.[128] Lord Justice Jackson was, primarily, tasked with providing reform to limit personal injury claims, but noted how commercial litigation is often evidentially complexed and recommended that one judge should be able to hear the entirety of the case in order to improve case management.[129] The difference in evidential requirements between the no-profit rule and no-conflict rule is vast. For example, the only evidence required under the no-profit rule is: (i) the defendant was a director and (ii) They made an unauthorised profit. It omits the requirement to consider the often-complexed question of whether a reasonable person would consider it to be within the company's line of business which, undoubtedly, requires evidence of past, present and future business interests. Therefore, it can be argued that the strict approach taken by the UK coincides with other policy factors.

While the reasons above are persuasive for supporting the strict capacity test on directors, there are limitations. They all assume that directors are motivated by self-interest. However, these suggestions are not true of every director. Instead, Cheffins acknowledges that:

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[127] *Guth v Loft, Inc.*, 5 A.2d 503 (Del. 1939) at 510
[128] Author's contribution to the contentious issue
[129] LJ Jackson, *Review of Civil Litigation Costs: Final Report*, (The Stationery Office, 2010) 279

> *'a reputation for honesty and reliability is a valuable asset in the marketplace, which means that someone who has spent time and effort becoming known as capable, competent and trustworthy will be reluctant to engage in conduct which might cast [their] credentials [as a director] into doubt'.*[130]

Therefore, arguments that self-interest is a dominant factor in preserving the no-profit rule is a fragile point. Directors are often hired based on their past performance. Thus, while situations such as *Odyssey*[131] exist, such complete disregard to duties are seldom experienced. Instead, most directors' endeavour to uphold their good name. Moreover, as clearly shown in *Guth,*[132] corporate abuse can be remedied without the need for the UK's strict capacity test.

Conclusion

Overall, the aims and objectives of the 2006 corporate reform were fundamentally sound. It sought to provide directors with certainty; grant directors the freedom to pursue outside interests, in the hope that it benefits the UK's economy; all while trying to ensure that the company, which the director represents, is not economically harmed. However, all these aims have resulted in the reforms greatest downfall. They have created a dilemma by seeking to achieve too much. In the UK, director certainty has come at the cost of inflexibility.

The question put forward by this article was whether 'the UK should implement Delaware's corporate opportunity doctrine?' The answer to that question, on its strict interpretation, is a resounding no. The Delaware doctrine is, quite frankly, littered with directorial and procedural uncertainty. Instead, of promoting certainty as to whether a director can appropriate a corporate opportunity, it experiences the mirrored dilemma to that being experienced in the UK; namely, director certainty is non-existent, but the flexibility to appropriate opportunities is readily available.

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[130] B. Cheffins, 'Trust, Loyalty and Cooperation in the Business Community: Is Regulation Required?' in Barry Rider (eds), *The Realms of Company Law* (Kluwer Law International, 1998) 75

[131] *Odyssey Entertainment Ltd (In liq) v Kamp* [2012] EWHC 2316 (Ch)

[132] *Guth v Loft, Inc.*, 5 A.2d 503 (Del. 1939) at 510

Recommendations

There has been several recommendations, post-2006, which will apparently offer remedies to the UK's current position, such as removing the no-profit rule.[133] However, while it would negate the stringent duties imposed on directors, it would still result in directorial uncertainty and the need for board authorisation, which should be at the forefront of future reform.

The UK can achieve a certain, fair, prosperous, and risk-free future for both directors and companies, by allowing companies to contract out of corporate opportunities. The notion of contracting out of a fiduciary duty may result in many being alarmed. However, a complete waiver from the fiduciary duty of loyalty is not being suggested. Instead, it suggested that only waivers to pre-negotiated opportunities should be allowed.

The Delaware General Corporation Law Code § 122(17) allows a contract to be formed between a director and the company, before the director begins their role, stating precisely what opportunities a director can and cannot pursue. Therefore, the contract immediately provides a director with much-needed certainty, while continuing to provide flexibility towards entrepreneurialism and competitiveness. Moreover, since the company is a party to the contract, the board of directors and shareholders can ensure that they only commit to opportunities being appropriated which do not subject the company to loss.

In Delaware, shareholders have appraised COW's as they feel it reduces the risk of litigation.[134] Therefore, conforming with agency/ownership costs. Moreover, although COW's may raise concerns, such as 'it will lead to corporate abuse', Rauterberg and Talley has found that corporate abuse has yet to materialise.[135] Finally, shareholders should not be alarmed by the fact it prevents the company from certain opportunities and, thus, may impact negatively on future investment. This is because Rauterberg and Talley empirical study has evidenced an increase of up to one and a half percent in stock price for those companies who have disclosed that they have implemented

[133] S. Churk, 'Just Abolish the No Profit Rule' (2015) 26(7) *ICCLR* 244
[134] G. Rauterberg and E. Talley, 'Contracting Out of The Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers' (2017) 117(5) *Colum Law Rev* at p. 47
[135] *Ibid* at p. 46

COW's.[136]

[136] G. Rauterberg and E. Talley, 'Contracting Out of The Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers' (2017) 117(5) Colum Law Rev at p.6 and p.42