



Blackstone
CHAMBERS

Team Moves, Trade Secrets and Remedies: the latest thinking

**OPPORTUNITY LOST: REMEDIES FOR
DIVERSION OF BUSINESS
OPPORTUNITIES**

James Segan

Opportunity lost: remedies for diversion of business opportunities

Introduction

1. The following principles applicable to establishing liability for breach of fiduciary duty by diversion of corporate opportunities were adopted and approved (as “*perceptive and useful*”) by the Court of Appeal in *Foster Bryant Surveying Ltd v Bryant* [2007] Bus LR 1565: see per Rix LJ at [8] and [76]:

“1. A director, while acting as such, has a fiduciary relationship with his company. That is, he has an obligation to deal towards it with loyalty, good faith and avoidance of the conflict of duty and self-interest.

2. A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any property or business advantage either belonging to the company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations.

3. A director’s power to resign from office is not a fiduciary power. He is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the company.

4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are a feature of the fiduciary relationship.

5. Acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of the implied term as to loyalty and fidelity.

6. Directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which [it] is plainly in the public interest that they should be free to exploit ... in a new position. After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the ‘stock in trade’ of the knowledge he has acquired while a director, even including things such as business contacts and personal connections made as a result of his directorship.

*7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the *1572 company and where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.*

8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.

9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as

if it were the property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.

10. It follows that a director will not be in breach of the principle set out at point 7 above where either the company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not pursuing further orders or where the director's resignation was not prompted or influenced by a wish to acquire the business for himself.

11. As regards breach of confidence, although while the contract of employment subsists a director or other employee may not use confidential information to the detriment of his employer, after it ceases the director/employee may compete and may use know-how acquired in the course of his employment (as distinct from trade secrets— although the distinction is sometimes difficult to apply in practice)."

2. This paper deals with what happens when, applying these principles, a fiduciary is found unlawfully to have diverted a corporate opportunity away from an entity or person to whom he owes a fiduciary duty. This is not an uncommon event. Attached to this paper is a table summarising 22 of the leading cases. It will be seen that in 18 of those cases, liability was established.
3. In that event, there are six categories of remedy to consider:
 - 3.1. A declaration of trust.
 - 3.2. An account of profits.
 - 3.3. Equitable compensation/damages.
 - 3.4. Common law damages.
 - 3.5. Interim injunction.
 - 3.6. Final injunction.

I will consider those six categories in turn.

(1) Declarations of trust

4. The most advantageous remedy available for an unlawful diversion of a corporate opportunity will usually be a declaration that the defendant holds on trust for the claimant either (1) a specific asset which constituted the "opportunity", or (2) the benefit of the contract or opportunity in question, or (3) the profits of that contract or opportunity.
5. The possibility that, in the event of a breach of the rule against diversion of business opportunities, the Court might impose a constructive trust in favour of the wronged party was contemplated expressly by the Privy Council in Cook v Deeks [1916] AC 554 per Lord Buckmaster LC at 563:

“...in the circumstances, the defendants ... were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.”

6. This statement of the appropriate remedy is supported by the rationalisation of the “corporate opportunity” cases by the Court of Appeal in *Brown v Bennett* [1999] BCC 525, namely that they concern “a distribution or disposal of the property of the company in breach of trust” (per Morritt LJ at 532).

7. In the important case of *CMS Dolphin Ltd v Simonet* [2002] BCC 600, Lawrence Collins J adopted a similar line of reasoning (at [96]):

“The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. ... In the case of a director he becomes a constructive trustee of the fruits of his abuse of the company’s property...”

8. That reasoning is easy to apply where the “opportunity” which has been diverted is the opportunity to purchase some identifiable property:

8.1. In *Re Bhullar Bros* [2003] BCC 711, a declaration was granted that the defendant directors’ company (which was not a party to the proceedings) held a piece of **real property** on trust for the company to which the defendant directors had owed their duties: see per Jonathan Parker LJ at [4]. What is more, an order was granted that the defendant directors’ company must, at the expense of the defendant directors, transfer the property at the price which was paid for it: see per Jonathan Parker LJ at [4].

8.2. In *Cobbetts LLP v Hodge* [2009] EWHC 786, a declaration was granted that the defendant solicitor held certain **shares** on trust for the firm, albeit making an allowance for the actual cost of acquisition: see per Floyd J at [112].

9. The constructive trust analysis is slightly more difficult to apply where the corporate opportunity which has been diverted consists of a contract. It will often not be possible for the wrongdoer to assign the benefit of a contract to the wronged party. However, it is possible to regard the equitable interest in the benefit of a contract as being held on trust for someone else: see *Don King Productions Inv v Warren* [2000] Ch 291 (CA), per Morritt LJ at 333-335. It is therefore possible for a Court to impose a constructive trust over the benefit of a diverted contract for the wronged party.

10. A penetrating analysis of this issue is to be found in *Ultraframe v Fielding* [2005] EWHC 1638 (Ch) per Lewison J at [1489], [1491]:

“...property will also count as the company’s property if it is property which the fiduciary has acquired for his own benefit but which, consistently with his fiduciary duties, he ought to have acquired on behalf of the company.

...

In this sense property can consist of choses in action (e.g. the benefit of a contract with a third party, or a debt). In Satnam Investments Ltd v. Dunlop Heywood [1999] 3 All ER 652 the Court of Appeal were prepared to assume that confidential information could count as trust property. Thus in the “corporate opportunity” cases, a director who diverts a corporate opportunity away from the company and towards himself holds any resulting chose in action (e.g. a contract enabling him to exploit that opportunity) on trust for the company, provided that there is a sufficient nexus between the property acquired and the breach of duty. It is possible that the corporate opportunity itself may be regarded as trust property, in the sense of being an intangible asset of the company.”

11. This analysis was followed by Morgan J in Aerostar v Wilson and ors [2010] EWHC 2032 (Ch), who proceeded on the basis that contracts concluded by a company after the relevant opportunities had been diverted unlawfully by a director of the claimant company were “...to be regarded in law as the property of [the claimant] or the traceable proceeds of the property of [the claimant] which was the property consisting of the business opportunity available to [the claimant] to enter into such contracts” (see [193]).
12. However, there are relatively few examples of such an order actually being made in practice. It appears more likely that the Court will declare the defendant the constructive trustee of the profits of a diverted contract. Thus in Industrial Development Consultants v Cooley [1971] 1 WLR 443, one of the remedies awarded by Roskill J was recorded as follows (at 454G-H):

“Declaration defendant trustee for plaintiffs of profits of his contracts with Eastern Gas Board relating to his appointment as project manager of four projects.”

13. Taking the analysis a step further, if the corporate opportunity consisted only of a “maturing business opportunity” which had not fructified into a contract, it is difficult to see any place for the imposition of a constructive trust, since there is no identifiable property or chose in action to subject to the trust.

(2) Account of profits

14. The next most advantageous remedy, in most cases, will be an account of profits. As is shown in the table attached, the remedy of an account of profits was awarded in 10 of the 18 successful cases.
15. The remedy is an equitable remedy and therefore rigid rules are few and far between. The basic position was set out in CMS Dolphin at [97] per Lawrence Collins J:

“There are no firm rules for determining which is the relevant profit: see Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, at p. 110, per Mason J. Where, as here, the business (to use a neutral term, not distinguishing between Mr Simonet and Blue) is not restricted exclusively to the performance of contracts which were obtained from CMSD, the fiduciary should be accountable for the profits properly attributable to the breach of fiduciary duty, taking into account the expenses connected with those profits and a reasonable allowance for overheads (but not necessarily salary for the wrongdoer), together with a sum to take account of other benefits derived from

those contracts. For example, other contracts might not have been won, or profits made on them, without (e.g.) the opportunity or cash-flow benefit which flowed from contracts unlawfully obtained. There must, however, be some reasonable connection between the breach of duty and the profits for which the fiduciary is accountable.”

16. An alternative statement of the principles for fashioning an account was given in Ultraframe at [1588] per Lewison J:

*“i) The fundamental rule is that a fiduciary must not make an unauthorised profit out of his fiduciary position;
ii) The fashioning of an account should not be allowed to operate as the unjust enrichment of the claimant;
iii) The profits for which an account is ordered must bear a reasonable relationship to the breach of duty proved;
iv) It is important to establish exactly what has been acquired;
v) Subject to that, the fashioning of the account depends on the facts. In some cases it will be appropriate to order an account limited in time; or limited to profits derived from particular assets or particular customers; or to order an account of all the profits of a business subject to all just allowances for the fiduciary’s skill, labour and assumption of business risk. In some cases it may be appropriate to order the making of a payment representing the capital value of the advantage in question, either in place of or in addition to an account of profits.”*

17. So, the remedy is highly fact-sensitive, and the Court is at liberty to order an account of any profits which it regards as having a reasonable connection to the breach of duty. Moreover:

17.1. Once an account has been ordered, the burden is on the defaulting fiduciary to establish that a particular profit is not one for which he should account: Murad v Al-Saraj [2005] EWCA Civ 959 at [77] per Lady Justice Arden.

17.2. The claimant is entitled to wait and let a deal run its course before crystallising the account: see Crown Dilmun v Sutton [2004] EWHC 52 (Ch) per Peter Smith J at [205]-[210].

17.3. A defendant can be made to account for profits on a deal which the claimant had little or even no opportunity of acquiring: see CMS Dolphin at [97].

18. On the face of it, this is an extremely advantageous position for a claimant to be in. There are, however, two limiting principles in respect of an account of profits which must be borne in mind.

19. First, it will always be important, if not easy, to distinguish between profits which truly bear some relationship of causation with the breach, and those which do not. The difficulty of separating out profits which are not attributable to the breach of duty was taken up by the Court of Appeal in the following cases:

19.1. Don King Productions. The Court of Appeal held that management and promotion contracts which were entered into by a partner of a partnership which

was in the process of dissolution, where such contracts were concluded with persons who were previously contracted to the partnership, amounted to partnership property and were held on trust for the partnership, with the benefit enduring “...until such time as the agreement expires or is properly disposed of in the winding up of the affairs of the partnership”: see per Morritt LJ at [45].

- 19.2. *Taylor v Masons* [2001] EWCA Civ 2106. The Court ordered an account of (i) the value of the goodwill of the existing partnership at the point when it was appropriated, and (ii) the profits in relation to the two defendant partners’ new business, but only that share of the profits which had been earned “...by use of the partnership assets ... including its goodwill”: see per Arden LJ at [37]. Precisely what these were in the particular case was to be “...worked out in the course of the accounts and enquiries”: see per Arden LJ at [37].
- 19.3. *Woodfull v Lindsley* [2004] EWCA Civ 165. The claimant was on the face of it entitled to both (a) the profits made on the contracts unlawfully diverted until they expire, and (b) the value of the goodwill, opportunity and advantage derived by the wrongdoer: see per Sir Martin Nourse at [22]. But since the wrongdoer had agreed a retirement date with the claimant, he would not be liable to account for profits on further contracts done with the misappropriated customer after the date of retirement (see per Sir Martin Nourse at [21]), except that the valuation of the goodwill in the opportunity would include an allowance for the possibility of renewal, whatever that may have been (see [42] per Arden LJ).
20. Second, there is considerable uncertainty as to the availability of the remedy when the corporate opportunity has been unlawfully diverted to a partnership or corporate entities:
 - 20.1. In *CMS Dolphin* at [99], Lawrence Collins J held that an account of profits was available against the wrongdoer when he diverts an opportunity to a partnership of which he is a partner, the relevant profit being the entire profit, not just his share of that profit, “...even if his partners are ignorant of his breach of fiduciary duty”.
 - 20.2. In *CMS Dolphin* at [100]-[104], Lawrence Collins J held that an account of profits was available against both the wrongdoer and the company where the company has been set up by the wrongdoer to take advantage of the opportunity, on the basis either (1) that the wrongdoer and company were jointly participating in the breach of trust, or (2) that the company was a knowing recipient of trust property.
 - 20.3. In *Ultraframe v Fielding* [2005] EWHC 1638 (Ch), Lewison J disagreed with the suggestion that the fiduciary could be made personally liable for property received by a separate legal entity (see [1576]):

“...the mere fact that a fiduciary has a substantial interest in a company which knowingly receives trust property does not, in my judgment, make the fiduciary personally accountable for the receipt. However, the company will itself be liable to any remedies available against a knowing recipient. The case is otherwise where the company is a mere cloak or alter ego of the fiduciary, in which case it may be appropriate to pierce the corporate veil and treat the company’s receipt as the

fiduciary's receipt. Different considerations may also apply where the fiduciary receives the profit and then diverts it to a company."

- 20.4. In *Aerostar*, Morgan J at [202] followed Lewison J's reasoning on this point, and therefore found that a director's liability to account was limited to profits which he had personally made as a result.
21. So, the present position would appear to be that where a corporate opportunity has been diverted to a partnership or separate legal entity:
 - 21.1. It is certainly possible to make the defaulting fiduciary personally liable for the full extent of any profit which he himself makes, and it may (if *CMS Dolphin* is correct on this point) be possible to make him personally liable also for any profits made by the partnership/company.
 - 21.2. The partnership or entity can be made liable themselves to an account of profits if it can be shown that there was knowledge on the part of a corporate entity or partnership.
22. On the latter point, it was knowledge which founded the liability of the Dominion Construction Company in *Cook v Deeks*: it had acquired the contract with "*full knowledge of the facts*": see per Lord Buckmaster LC at 565¹.

(3) Equitable compensation/damages

23. The remedies available in equity are not limited however to an account of profits. Equity retains a jurisdiction to make an award of other compensation, and in particular of damages.
24. The rules of causation are considerably less exacting than at common law and there is no remoteness requirement: see *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 434 per Lord Browne-Wilkinson.
25. There are a number of examples of the application of this jurisdiction in the corporate opportunity cases:
 - 25.1. In *Cooley*, one of the remedies awarded by Roskill J was equitable damages to reflect the loss of the 10% chance that IDC would itself have obtained the contract (see 454G-H).
 - 25.2. In *CMS Dolphin*, Lawrence Collins J made an award of equitable damages to reflect the loss of the chance that the claimant company would have obtained the business of a new customer (see [141]).

¹ See also the discussion in *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) giving rise to the holding of Peter Smith J at [197] that the company to which the director had diverted the opportunity had been reckless as to whether the director had breached his duties and knew of the director's dishonesty and therefore could be made liable.

- 25.3. In *Aerostar*, Morgan J made an alternative award of equitable damages to reflect an 80% chance that the company would itself have secured the business which had been diverted (see [216]).

(4) Damages at common law

26. The diversion of a business opportunity will sometimes amount to a breach of the implied contractual duty of good faith, and therefore sound in damages at common law.
27. There are a number of examples of this in the cases. The most famous is in *Sanders v Parry* [1967] 1 WLR 753, in which Havers J awarded common law damages for breach of the implied term of fidelity in favour of a solicitor's firm, again to reflect the loss of the chance that the firm would have been successful in retaining the business which had been diverted. These damages were to be calculated on the normal contractual basis.
28. Note also that in *CMS Dolphin* at [142], Lawrence Collins held that if there had been "*...no effective remedy in relation to the allegations of breach of fiduciary duty*", he would have found that there was a breach of the implied duty of fidelity by reason of the diversion of business opportunities. Moreover, he held that he would have calculated damages on a restitutionary basis, i.e. an account of profits, because diversion of business opportunities is an area in which *A-G v Blake* [2001] AC 268 justified such an award.

(5) Interim injunction

29. There are examples of claimants using a cause of action for diversion of corporate opportunities so as to found an application for interim relief:
- 29.1. In *Intelsec Systems Ltd v Grech-Cini* [2000] 1 WLR 1190, Nicholas Warren QC granted an interim injunction requiring the defendants to disclose "*...the names and addresses of those persons with whom contact has been made on behalf of the employer during the period of the employment*" (see 1206-8).
- 29.2. In *Hunter Kane Ltd v Watkins* [2003] EWHC 186 (Ch) and [2004] EWHC 841 (Ch), Bernard Livesey QC made, and Jonathan Gaunt QC upheld, an interim injunction which prevented the defendant forthwith and until judgment from dealing commercially with the potential customer from whom the opportunity emanated: see per Jonathan Gaunt QC at [2].

(6) Final injunction?

30. There are no reported examples of a final injunction being granted as relief for a breach of fiduciary duty by diversion of a business opportunity. It is difficult to imagine a Court making an order which purported to prevent a defendant from ever dealing with a particular customer.

31. However, following the reasoning in *Hunter Kane*, it may be argued that, at a speedy trial, a Court might be persuaded to order that a defendant should not deal with a particular prospective customer for a defined period, so giving the claimant a proper opportunity to see whether the corporate opportunity can be made to fructify into a concluded contract.

James Segan

24 March 2011

www.blackstonechambers.com

DECISIONS ON DIVERSION OF BUSINESS OPPORTUNITIES

Case	Facts	Success/failure	Remedies
<u>Cook v Deeks</u> [1916] AC 554	Three directors of the Toronto Railway Company, whilst still directors, negotiated a contract on behalf of the company. They then concluded the contract in their own right and assigned it to a new entity, the Dominion Construction Company. A fourth director, and shareholder of the company, sued for a declaration that the directors held the contract on trust for the company.	Success. The directors had breached their fiduciary duties by putting their own interests ahead of the company.	An account of profits in favour of the Toronto Railway Company against the three directors who had caused the diversion of the contract: see per Lord Buckmaster LC at 565. An account of profits in favour of the Toronto Railway Company against the Dominion Construction Company, because it had acquired the contract with “ <i>full knowledge of the facts</i> ”: see per Lord Buckmaster LC at 565.
<u>Regal (Hastings) Ltd v Gulliver</u> [1967] AC 134	Five directors of the claimant cinema company volunteered personally to fund a shortfall in the capital of a subsidiary company so as to enable the subsidiary to complete a particular transaction, in return for which they received shares in the subsidiary. They made substantial profits on the shares when they were later sold. The claimant cinema company	Success. The directors had profited from their position as fiduciaries and it was irrelevant that they had done so in good faith and so that the claimant company could complete the transaction.	An account of profits in favour of Regal against the five directors: see per Lord Russell of Killowen at 152C-G.

	sued for an account of those profits.		
<u><i>Sanders v Parry</i></u> [1967] 1 WLR 753	An assistant solicitor, whilst working for the claimant firm, accepted an offer from the firm's best client for the assistant solicitor to set up on his own in business and perform all the work previously given to the firm. The firm sued the assistant solicitor for breach of the contractual duty of fidelity.	Success. The solicitor had failed to promote the interests of the firm and had put his own interest first.	Damages in favour of the firm for loss of the chance of retaining the client as a client of the firm: see per Havers J at 767D-E.
<u><i>Industrial Development Consultants Ltd v Cooley</i></u> [1971] 1 WLR 443	The managing director of the claimant company had been negotiating a contract. The potential customer approached him with regard to doing business in a personal capacity. The managing director made false claims of ill health so as to procure his termination. The managing director then negotiated and took up the contract.	Success. The managing director had put his own interests before those of the company whilst still a director and had resigned deliberately in order to take advantage of the opportunity.	A declaration that the managing director was the trustee of the profits of the contracts: see 454G-H. An account of profits both past and future in relation to the contracts: see 454G-H. An alternative award of damages for loss of the chance that the claimant company would have obtained the business, assessed at a 10% chance only: see 454G-H.
<u><i>Island Export Finance Ltd v Umunna</i></u> [1986] BCLC 460	The claimant company had a postal services contract with Cameroon's postal authorities. The managing director resigned for reasons	Failure. The mere hope of further contracts was not a " <i>maturing business opportunity</i> ", the claimant company was not actively pursuing any such	N/A

	<p>unrelated to the contract. Some time later, when the company was not itself negotiating for any renewal, the ex-managing director obtained for his company a postal services contract with Cameroon's postal authorities. The claimant company sued for breach of fiduciary duty.</p>	<p>opportunity, and in any event the managing director had not been prompted in resigning by a wish to exploit such business.</p>	
<p><u><i>Framlington v Anderson</i></u> [1995] 1 BCLC 475</p>	<p>The claimant company was negotiating with a potential purchaser of its business. The claimant company excluded three directors from the negotiations and told them it was not concerned with their remuneration arrangements if the deal went through. The directors negotiated a handsome deal and in particular £1.67 million of shares. After the deal went through, the claimant found out and sued the directors for breach of fiduciary duty.</p>	<p>Failure. The shares were paid for an asset of the three managers, client goodwill. That opportunity was not open for the claimant company to exploit. The claimant company did exploit the relevant opportunity in its case, i.e. the goodwill in the business as a whole.</p>	N/A
<p><u><i>Brown v Bennett</i></u> [1999] BCC 525 (CA)</p>	<p>The directors of a company were accused of pressurising that company into receivership, so that they could buy the</p>	<p>Failure. Oasis bought the business in good faith and without the requisite knowledge. This was not a "<i>corporate opportunity</i>" case like</p>	N/A

	<p>company from the receivers via a new company formed for that purpose (“Oasis”). A shareholder sued the directors and Oasis. The trial judge struck out the claims against Oasis (knowing receipt, knowing assistance, common law conspiracy). The claimants appealed to the Court of Appeal.</p>	<p><i>Cook v Deeks</i> because those cases concern “a distribution or disposal of the property of the company in breach of trust” (per Morritt LJ at 532). The purchase of the business by Oasis did not involve a breach of trust.</p>	
<p><i>Intelec Systems Ltd v Grech-Cini</i> [2000] 1 WLR 1190</p>	<p>The defendants had been employed by the claimant company to develop and market a smoke detection system. At least one of the defendants was a director. The defendants resigned and set up in competition. There was evidence that they had contacted customers during employment with a view to soliciting them away. The claimant company sued for an interim injunction compelling the defendants to reveal which customers they had contacted. The causes of action relied upon included breach of fiduciary duty.</p>	<p>Partial success. A director was liable to “account for opportunities which come to him while he is a director and which he exploits later”: see per Nicholas Warren QC at 1206D. On that basis the claimant was entitled to an injunction telling it “...the names and addresses of those persons with whom contact has been made on behalf of the employer during the period of the employment”: see per Nicholas Warren QC at 1206G.</p>	<p>Amongst other things, an interim injunction requiring the defendants to disclose “...the names and addresses of those persons with whom contact has been made on behalf of the employer during the period of the employment”: see per Nicholas Warren QC at 1206-8.</p>
<p><i>CMS Dolphin Ltd v Simonet</i> [2002] BCC</p>	<p>The defendant director fell out with</p>	<p>Success. The “...underlying basis of</p>	<p>An account of profits against the defendant</p>

600	<p>his business partner. He secured a lease on new premises, and then resigned and started up his own business, proceeding to poach all of the staff of the claimant business, and many of its actual and potential clients, including their contracts with the claimant. The claimant sued for breach of fiduciary duty.</p>	<p><i>the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property”:</i> see per Lawrence Collins J at §96. The defendant director had breached this duty by diverting “...actual contracts or maturing business opportunities in relation to which Mr Simonet had fiduciary duties” (§129).</p>	<p>director for all profits made by his new business on the contracts which were diverted: see per Lawrence Collins J at [140].</p> <p>Equitable damages for loss of the chance to obtain the business of a potential new customer: see per Lawrence Collins J at [141].</p>
<p><u><i>Taylor v Masons</i></u> [2001] EWCA Civ 2106</p>	<p>Five partners had a licence to operate premises for a cattle market. Two partners resigned from the partnership shortly before the licence was due to be renewed. The partnership affairs were in the process of being sorted out. The two partners wrote to the Council asking for the licence to be given to them instead of the partnership and, after a tender exercise, succeeded.</p>	<p>Success. The two defendant partners had appropriated the goodwill and connections of the partnership to themselves, and had been put in a position of advantage in obtaining the new licence by “opportunity or knowledge” resulting from their fiduciary position in relation to the partnership: see per Arden LJ at §§28 and 36.</p>	<p>An account of (i) the value of the goodwill of the existing partnership at the point when it was appropriated, and (ii) the profits in relation to the two defendant partners’ new business, but <u>only</u> that share of the profits which had been earned “...by use of the partnership assets ... including its goodwill”: see per Arden LJ at 37.</p>

	The claimant partnership sued for breach of fiduciary duty and in particular for an account of profits made by the two partners in operating the cattle market.		
<u><i>Re Bhullar Bros Ltd</i></u> [2003] BCC 711 (CA)	A family company was owned 50:50 by two branches of the family. The company owned, inter alia, a property used as a bowling hall. By May 1998, relations had broken down and one branch informed the other that they wished to go their separate ways, and that the company should in the meantime acquire no more properties. In July 1999, the defendant directors incorporated a company and purchased the property adjacent to the bowling hall, part of which was used by the bowling hall as a car park. The claimant shareholders sought to make the defendant directors liable for breach of fiduciary duty in acquiring the property.	Success. The claimant company would have been commercially attracted to the purchase of the property. Accordingly, when the defendant directors became aware of the opportunity, they should have made the company aware of it. By not doing so, and by then purchasing the property themselves, the defendant directors breached the no conflict rule: see per Jonathan Parker LJ at §41. This was a case analogous to <i>Cooley</i> : see per Jonathan Parker LJ at §§36-39.	A declaration that the defendant directors' company held the property on trust for the company of which the defendants were directors: see per Jonathan Parker LJ at §4. An order that the defendant directors' company must, at the expense of the defendant directors, transfer the property to the company at the price which was paid for it: see per Jonathan Parker LJ at §4. An account of any profits which may have been made: see per Jonathan Parker LJ at §4.
<u><i>Crown Dilmun v Sutton</i></u> [2004]	The managing director of a	Success. The defendant managing	An account of profits made by the

<p>EWHC 52 (Ch)</p>	<p>property group became aware of an opportunity to participate in the development of a football ground. Knowing that the company would be interested in it, he instead diverted the opportunity to a company in which he had a personal interest. The property group sued both the defendant managing director and the company in which he had an interest.</p>	<p>director had breached his duties to the claimant property group by diverting the opportunity. Furthermore, the company to which the director had diverted the opportunity had been reckless as to whether the director had breached his duties and knew of the director's dishonesty: see per Peter Smith J at §197.</p>	<p>Defendants on the deal: see per Peter Smith J at §§205-210.</p>
<p><u>Woodfull v Lindsley</u> [2004] EWCA Civ 165</p>	<p>Three partners ran a business. Without telling the other two partners, the defendant partner incorporated a separate company and diverted to it a 12 month contract which he had been negotiating with a customer.</p>	<p>Success. The defendant partner had breached his fiduciary duties by diverting for his own benefit a business opportunity.</p>	<p>An account of profits on contracts concluded prior to the defendant's retirement: see per Sir Martin Nourse at [21].</p> <p>An account of the value of the goodwill, opportunity and advantage derived by the defendant from the same contracts: see per Sir Martin Nourse at [22].</p>
<p><u>Hunter Kane Ltd v Watkins</u> [2004] EWHC 841 (Ch)</p>	<p>The Claimant company ran a health training programme. It had negotiated an opportunity with Unilever to provide such training. The defendant was a shareholder and director of the company and also a</p>	<p>Success. There was a strong case that the defendant had breached his fiduciary duty. Moreover the situation was not like a springboard situation; the claimant company had worked to develop a specific</p>	<p>An interim injunction preventing the defendant forthwith and until judgment from dealing commercially with Unilever: see per Jonathan Gaunt QC at §2.</p>

	<p>doctor who would have delivered the training. He resigned. The claimant company brought a claim alleging that he had done so in breach of fiduciary duty, desiring to obtain the Unilever opportunity for himself. The claimant sought an interim injunction.</p>	<p>opportunity to the point of agreement of a price. It was therefore appropriate to restrain the defendant on an interim basis for so long as the opportunity still existed: see per Jonathan Gaunt QC at §33.</p>	
<p><u><i>Simtel Communications Ltd v Rebak</i></u> [2006] EWHC 572 (QB)</p>	<p>The claimant company was active in the wholesale of mobile telephones. The defendant director diverted a deal to another company.</p>	<p>Success. The defendant director had breached his fiduciary duties to the claimant, and the company to which he had diverted the opportunity was <i>“jointly liable having jointly participated in that breach of trust”</i>: see per Warren J at [81].</p>	<p>No decision on remedy.</p>
<p><u><i>Foster Bryant Surveying Ltd v Bryant</i></u> [2007] Bus LR 1565 (CA)</p>	<p>The defendant director was forced out of the claimant company by the majority shareholder. Whilst the defendant director was serving his notice period, the company’s main client suggested that the defendant director should work for it, so as to provide continuity. The defendant director incorporated a service company through which to</p>	<p>Failure. The defendant director’s resignation had not been prompted by the opportunity of working for the client. Indeed, that offer came only because the defendant director had been forced out of the business. The claimant company had been unable to identify any existing projects which had actually been subsequently transferred to the defendant director or</p>	<p>N/A</p>

	deliver his services to the client and did so. The claimant company sued the defendant director and his service company for breach of fiduciary duty.	his new company.	
<u><i>Crowson Fabrics Ltd v Rider</i></u> [2008] FSR 17	The defendants were employed as relatively senior employees of the claimant company. Whilst still employed, they set up an entity for future competition and directed enquiries to the claimant to their new business.	Success. By diverting the enquiries to their new business whilst still employed, the employees breached their duties of fidelity and (in the case of the employee who was found to owe fiduciary duties) fiduciary duty.	No decision on remedy.
<u><i>Cobbetts LLP v Hodge</i></u> [2009] EWHC 786 (Ch)	The defendant was an employed partner at a firm of solicitors. Whilst acting for a client who was seeking investors, he negotiated a private deal under which he would receive 5% of the shares in a company owned by the client if certain conditions were fulfilled. He did not tell the firm about this deal. The firm sued the solicitor for breach of fiduciary duty.	Success. The solicitor had made a personal profit from carrying out activities in respect of which he owed a fiduciary duty to the firm. He put his own interests above that of the firm.	A declaration that the solicitor held the shares on trust for the firm: see per Floyd J at [112].
<u><i>O'Donnell v Shanahan</i></u> [2009] BCC 822 (CA)	Three directors operated a company on a quasi-partnership basis. The company's business was in	Success. The defendants acting as directors on behalf of the company obtained information relating to the	No decision on remedy.

	<p>providing clients with financial advice and assistance. The company was instructed to find a purchaser for a piece of real property. Two of the directors purchased that property through a separate company. The third director brought an unfair prejudice petition arguing that the other two directors had acted in breach of fiduciary duty.</p>	<p>opportunity to purchase the property. It may have been improbable that the company would have wished to take advantage, but still it was a breach of the no profit rule to take personal advantage without making proper disclosure and obtaining consent.</p>	
<p><i><u>Aerostar v Wilson and ors</u></i> [2010] EWHC 2032 (Ch)</p>	<p>The defendant was a director of the claimant company. He negotiated certain contracts and then diverted them to a different entity owned and operated by an associate.</p>	<p>Success. The defendant had sought to make a personal profit out of his position as director and had placed himself in a position in which his interests conflicted with those of the company.</p>	<p>An account of profits against all defendants: see per Morgan J at §§202, 206 and 207.</p> <p>Equitable damages to reflect an 80% chance that the company would itself have secured the business: see per Morgan J at §216.</p> <p>Common law damages to reflect the same 80% chance: see per Morgan J at §§219-220.</p>
<p><i><u>Baldwin v Berryland Books</u></i> [2010] EWCA Civ 1440</p>	<p>The claimant company was a children’s books company. The defendants were employees of the company. The defendants conspired to incorporate a company. They</p>	<p>Success. Those defendants who owed fiduciary duties had breached them by diverting the opportunities: see per Etherton LJ at §§1 and 38.</p>	<p>An inquiry as to damages: see per Etherton LJ at §1.</p>

	resigned in concert and diverted maturing business opportunities of the claimant company to their own company.		
<u><i>Lee v Futurist Developments Ltd</i></u> [2010] EWHC 2764 (Ch)	The second defendant (on a counterclaim) was a director of the claimant company, which owned a piece of land. The second defendant negotiated, through a separate entity, a £450,000 “introduction fee” for introducing a third party to a potential purchaser of the land from the claimant. The claimant sued for breach of fiduciary duty.	Success. The second defendant, when he became aware of the opportunity to earn the introduction fee, should have directed the opportunity to the claimant rather than diverting it to some other entity for his own interests: see per HHJ Hodge QC at §§42-43.	An account of the £450,000 introduction fee, less a fee which the second defendant had had to pay to a third party in order to secure the fee: see per HHJ Hodge QC at §§47-48.