The Evolving Corporate Opportunity Doctrine: Is New Zealand Law Being Left Behind?

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This article considers when an opportunity is a corporate opportunity. This is a key aspect of the corporate opportunity doctrine. The article reviews New Zealand case law, s 145 of the Companies Act 1993, recent English case law, and some US material. The article's thesis is that New Zealand lawyers are in danger of developing a doctrine which is unable to respond to the changing role of directors. Against this background, the article advances the key components in a theoretical structure, designed to explain when an opportunity is a corporate opportunity.

1 INTRODUCTION

New Zealand judges and lawmakers seem to have trouble in deciding when a commercial opportunity is a "corporate opportunity", that is to say, an opportunity which the law regards as belonging to a company and cannot be exploited by the company's directors (or senior executives) for their own benefit. This is not surprising. It is recognised that the issue "raises difficult questions as to the scope of the fiduciary duties of directors".3

Judges are uncertain about the appropriate legal doctrine to answer the question.3 Sometimes they resort to core fiduciary prohibitions against making profits from one's position of trust, or allowing a conflict to develop between one's personal interests and one's duty as a fiduciary. Or they may refer to the director's general duty to act in good faith. But sometimes the objection is much more specific. For example, it may be said that confidential information has been misused.3 Frequently, these approaches

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1 A senior executive may owe fiduciary duties to a company, and these duties are analogous to those owed by a director, see Canadian Aero Services Ltd v O'Malley (1973) 40 DLR (3d) 171 (SC Can) ("Canaero"); SSC & B: Lintas NZ Ltd v Murphy (1981) 1 NZCLC 95-044 ("Lintas"). References to "director" includes these senior executives.


4 Two other specific concerns are: (i) misuse of corporate property (see R P Austin, "Fiduciary Accountability for Business Opportunities", in P D Finn (ed), Equity and Commercial Relationships, Sydney, Law Book Company, 1987, pp 141, 144-145); and (ii) unfair competition (Pacifica, above n 3, p 339).
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"overlap", so that the director's behaviour is evaluated against a range of doctrines and standards of conduct. As a result, it is hard to say, in general terms, when a director is required to regard a business opportunity as belonging to their company, and, if so, why.

When our Companies Act was passed in 1993 ("the Act"), the legislature may have attempted to deal with the matter in s 145. But s 145 may complicate matters further. The Act had a "difficult birth". Its genesis is contained in the Discussion Papers, Reports, and draft Bill, all prepared by the Law Commission. In its brief reflection on corporate opportunities, the Commission associated the question of when an opportunity is a corporate opportunity with the law against misuse of confidential information. And in the draft Bill, the Commission proposed a section governing the use of a company's confidential information and a company's opportunities. This section became s 145. But subtle changes were made to the Commission's draft. As a result of these changes, the scope of s 145 is unclear. But the way the section was drafted reinforces the Commission's association of corporate opportunities with the law against misuse of confidential information.

That development was unfortunate and potentially dangerous. Protection of confidential information is an important aspect of the corporate opportunity doctrine, but it has never been the whole of it. As the role of directors has evolved, courts in both the US and England have recognised that the doctrine responds to wider concerns. For example, some directors are expected to identify opportunities for their company to exploit. In that case, it is the use of the opportunity itself, rather than the way the director came to know of it, which attracts judicial disapproval.

For example, a director may learn of an opportunity from a third party who is unrelated to the company. Or the director may make their own enquiries, while taking a weekend stroll. It has been accepted in both the US and England that such opportunities can sometimes belong to the company, and the director will then be liable to the company for exploiting them privately.

The thesis of this article is that New Zealand courts may fail to recognise this important development. Two significant influences encourage this failure. The first is the apparent uncertainty of the function of the corporate opportunity doctrine. The other (possibly the result of the first), is the tendency to associate the doctrine with the protection of confidential information.

This confusion leads to information being regarded as confidential to the company in an ever-widening range of situations. For example, information may be regarded as the company's information where the circumstances give rise only to the expectation that it will not be used so as to harm the company. Or, it may be the fact that the information is not publicly available that will make it "company information", despite the fact that there is no real link between the company and the way the

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5 Austin, above n 4, p 142.
6 For example in Kawhia, above n 3, the managing director's actions were evaluated against all these concerns. These concerns had been earlier identified in Holden, above n 3, p 261.025.
9 NZLC Discussion paper, ibid, para 234 (the corporate opportunity doctrine is "grounded in information ... received in confidence"). Cf NZLC Report, ibid, para 536, (the section "articulates a major premise upon which much law relating to fiduciary duties is based: the obligation to maintain confidential information in confidence").
10 Lintas, above n 1, p 98,393.
director obtained the information. Such developments may do justice in the individual case, but they distort the entire corporate opportunity doctrine.

In Part 2 of this article, these broad tendencies and the contribution of s 145 are discussed. Part 3 explores a number of key US and English cases, which turn on misuse of the opportunity rather than the fact that the knowledge of the opportunity was information confidential to the company. Finally, Part 4 advances the key components in a broader theoretical structure, designed to explain when an opportunity is a “corporate opportunity”. Taking New Zealand cases as examples, it offers methods by which, it is hoped, any director’s private exploitation of an opportunity can be appropriately evaluated.

2 CORPORATE OPPORTUNITIES: SOME MISLEADING ASSOCIATIONS

2.1 Association with a Company’s Property

There is a temptation to associate the corporate opportunity doctrine with protecting the company’s property. The opportunity is regarded as the “company’s opportunity”, and the aim of the doctrine is seen as protecting that property against misuse. This association is encouraged by its ability to offer a straightforward explanation for imposing liability upon a director who exploits an opportunity. It is clearly wrong to exploit another’s property.

Sometimes an opportunity is the company’s pre-existing property. Such cases are relatively straightforward. But they are rare. This is because the function of the corporate opportunity doctrine is wider than protecting a company’s pre-existing ownership rights in an opportunity; rather, its function is to regulate the competing claims of a director (or associated entity) and the company to acquire an opportunity.

In the vast majority of cases, the company does not own the opportunity prior to the director learning of it. Typically, the closest the company comes to “owning” the opportunity is when it is actively seeking to acquire it; or, because of its relationship with the owner of the opportunity, the company is confident of acquiring it; or, in the case of franchises and distribution agreements, the company is confident of renewing or continuing the opportunity. But even in these situations the company’s interest in the opportunity is not property in the classic sense of being enforceable against “an indefinite

12 This extends to the director acquiring the opportunity in conjunction with others or through the medium of another legal entity.
13 Item Software (UK) Ltd v Fasshi [2004] EWCA Civ 1244; [2004] All ER (D) 187 comes very close to this situation. (Item had distributed another company’s software. The defendant director encouraged Item to attempt to negotiate more favourable terms. This resulted in the contract being terminated. But during these negotiations the defendant unsuccessfully attempted to acquire a contract for his own company. The issue was whether the director had a duty to disclose his wrongdoing to Item.) Bendall v Marshall 15/2/05, Wild J, HC Wellington CIV-2004-454-993 provides a recent New Zealand example. (In that
case, part of a company’s name was used as part of the name for new companies which were to operate in a similar line of business; Wild J observed at para 35 that the “name and reputation” may have been “needed for those [new] businesses”.)
14 Examples include Smith, above n 3 (discussed in text accompanying n 149); Cannaero, above n 1, and Pacifica, above n 3 (discussed in text accompanying n 33).
15 This was the situation in Cooks v Deek [1916] 1 AC 554 (PC). There, the defendant directors, “while still actually acting as managers of the company” (p 559) negotiated with a long term purchaser of the company’s services “in exactly the same manner as they had always acted for the company” (p 560) to personally acquire a contract with that purchaser. Both the purchaser and the company were unaware of the defendants’ personal interest in the contract.
16 Kiahia, above n 3 (discussed in text accompanying n 160) is a recent New Zealand example.
class of persons"; rather, the company’s interest is enforceable against the director(s) ultimately acquiring the opportunity (and associated parties).

Despite this, the temptation to associate the corporate opportunity doctrine with protecting the company’s property remains. Some attempt to achieve this association in a two-step process. The first step is to focus the doctrine on information about the opportunity, rather than the opportunity itself. The second step is to classify the information as the company’s. The result is to re-establish the doctrine’s association with protecting the company’s property.

2.2 Association with Information

The reasoning in Boardman v Phipps18 ("Boardman") shows that the law’s concern extends to opportunities which the director learns of while involved with the company.19 So, as the Law Commission identified, the doctrine is about information — information as to the existence of an opportunity.20 Directors must first learn of an opportunity before they can acquire it personally. But use of information alone is insufficient. As Lord Upjohn observed in Boardman, information "is normally open to all who have eyes to read and ears to hear".21 The problematic aspect of the doctrine is determining the circumstances in which a director’s personal use of the information is inappropriate.

2.2.1 Information acquired as a director

Appreciating this problem, their Lordships in Regal (Hastings) Ltd v Gulliver22 ("Regal") suggested that there should be a causal connection between the director’s position in the company and their ability to acquire the information about the opportunity (or their ability to acquire the opportunity). The test suggested by Lord Russell has received the greatest recognition, but all are similar.23 Lord Russell

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17 A-G v Blake [2004] 4 All ER 385, 395 (HL) per Lord Nicholls.
18 [1967] 2 AC 46 (HL). The facts in Boardman are well-known. The plaintiff, John Phipps, was a residuary beneficiary of a testamentary trust who objected to a profit made by the defendants Boardman and Tom Phipps. Boardman was the trust’s solicitor and Tom, John’s younger brother, was a residuary beneficiary. The defendants acquired the controlling shareholding in a company and then, through its reorganisation, they were able to increase its share value and make significant capital distributions to shareholders. The trust was a minority shareholder in the company and, as such, gained from the defendants’ actions. The profit was due to the defendants’ personal skill and knowledge, and their willingness to invest their own funds in the project. But the plaintiff successfully argued that the defendants’ personal profit was unauthorised and contravened their duty of loyalty. At all times the defendants acted honestly and it appears that the trust would not have acquired these shares (and thereby the profit) itself. Nevertheless, the House of Lords — in a three-two split — held that the defendants were required to account for their profit.
19 There are earlier examples of the courts depriving a trustee of an opportunity that the trustee was able to acquire because of their position, see: Keech v Sandford (1726) 25 ER 223 and Aberdeen Town Council v Aberdeen University (1877) 2 App Cas 544 (HL). In these cases the opportunity was closely associated with the trust property and so could be regarded as a transaction involving trust property. In Keech the opportunity was the renewal of a lease held by the trust. Aberdeen Town Council involved a town council obtaining fishing rights because of land that it was holding on trust.
20 See text in n 9.
21 Boardman, above n 18, p 127.
23 Ibid. The other suggested limitations were: had the directors "used and acted upon their exclusive knowledge acquired as ... directors" (per Lord Sankey, p 139); had the directors obtained the shares "in the course of their management and in utilisation of their opportunities and special knowledge as directors" (per Lord Macmillan, p 153); did "the knowledge and opportunity which enabled ... [the directors to personally purchase the shares] come to them solely by reason of their being directors of the ... company" (per Lord Wright, p 154); and were "the shares ... obtained by the defendants by reason of their position as directors of Regal" (per Lord Porter, p 158).
considered that a director must acquire the information about the opportunity “by reason, and only by reason of the fact” that he or she was a director of the company.24

With this test, Lord Russell was recognising that typically a director has “two hats”,25 and that the corporate opportunity doctrine applies only when the director learns of the opportunity while wearing their director’s hat. Continuing with this analogy, the crucial question becomes, “When is the director wearing (or is deemed to be wearing) their director’s hat?”

2.2.2 A solution: when the personal use of the information will produce a conflict

The answer advanced here is that the directorial hat is on when the director’s personal use of the information results in a conflict between their personal interests and their duty as a fiduciary. Some may criticise the use of the no-conflict rule in this context on the ground that it offers insufficient guidance.26 But this is to overlook that the no-conflict rule operates to enforce particular obligations.27 Properly understood, this rule requires the courts to determine the content and scope of a particular fiduciary’s obligations, and then to consider whether the fiduciary’s personal interest has conflicted with one of those obligations. But this is not the typical approach of New Zealand judges.28

2.2.3 An apparent solution: misuse of the company’s information

As said in the introduction, New Zealand judges tend to rely on general principles, such as the fiduciary prohibitions against conflicts of interests and unauthorised profit-making. Or they refer to the general duty of good faith. The problem with using general principles is that it can be hard to predict when a director will be required to regard an opportunity as belonging to the company.

Occasionally a judge’s objection is specific. Here the typical objection is that the company’s confidential information has been misused.29 This objection has a good pedigree; for example, it was used by Lord Hodson30 (a member of the majority) and Lord Upjohn31 in Boardman. This objection is

24 Ibid p 147.
25 Austin, above n 4, p 150.
26 Ibid p 149. Some may prefer the no profit rule over the no conflict rule, believing that it offers more guidance as to what behaviour is prohibited, see ibid. For others, the no profit rule is also dependent on the identification of particular obligations and can be misunderstood as prohibiting the acquisition of any and all unauthorised profits, see: John Lowry and Rod Edmunds, The No Conflict-No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism, [2000] JBL 122. The no conflict rule is preferred since it is less vulnerable than the no profit rule to factual arguments that the company was unlikely to acquire the opportunity.
28 The main exception is Architectural Finishes, ibid. There the Court of Appeal observed that some directors (presumably executive directors) were under “a duty positively to promote the company’s interest” in acquiring or retaining an opportunity; in that case retaining a distribution agency. McAlister, ibid also illustrates judicial recognition that the focus is on the content and scope of the defendant director’s obligations; there the Court’s attention was on whether the defendant directors’ fiduciary duties had been modified (p 261,672). Discussed in Watts, “Company Law” [1999] NZLR 23, 28.
29 New Zealand corporate opportunity cases in which the courts have considered whether the defendant has misused confidential information include Lintas, above n 1, p 98,393; Pacifica, above n 3, p 342; Holden, above n 3, p 261,030; and Kawhia, above n 3, paras 52-57.
30 Lord Hodson noted that the “relevant information [to which the prohibition applies] is not any information but special information which . . . must include . . . confidential information”: Boardman, above n 18, p 109.
31 Lord Upjohn considered that the “true test is to determine in what circumstances the information has been acquired”, for example in confidence. Ibid p 127.
also attractive for, as discussed earlier, it associates the corporate opportunity doctrine with protecting the company’s property, and thereby offers a straightforward rationale for imposing liability.\textsuperscript{32}

Moreover, this objection explains the typical corporate opportunity case where the company knows of the opportunity before the director does. The classic example is \textit{Regal}. There, under the Board’s direction, the company was actively seeking to acquire the leases to some cinemas, but the directors considered that the landlord’s requirements precluded the company from acquiring the leases. Rather, they decided to incorporate a subsidiary company and have that company acquire the leases. But the subsidiary was only partially owned by the company and some of the directors became the other shareholders. Not surprisingly, the House of Lords held that the leases and the opportunity to acquire shares in the subsidiary were corporate opportunities.

Sharing some similarity with \textit{Regal} is \textit{Pacifica}.\textsuperscript{33} There the Board of Directors (including the defendant director) was considering whether the company should acquire the opportunity. The defendant director was then approached personally and offered the opportunity. The Court held that the opportunity was the company’s.

Other New Zealand examples are \textit{Smith},\textsuperscript{34} and \textit{Kawhia}.\textsuperscript{35} They involved opportunities which the defendant directors learnt of through their position in the company. In \textit{Smith}, the working director had earlier sought the opportunity for the company. In \textit{Kawhia}, the managing director oversaw the existing contract and knew of the other party’s dissatisfaction before acquiring the replacement contract personally.

Sometimes the objection that the company’s information has been misused is rephrased as the taking of a “maturing business opportunity”. This concept derives from the judgment of the Canadian Supreme Court in \textit{Canaero}\textsuperscript{36} and is incorporated into New Zealand law by \textit{Pacifica}\textsuperscript{37} and \textit{Holden}.\textsuperscript{38} At its core, the concept refers to an opportunity which the company is “actively pursuing”.\textsuperscript{39} Of course, in this situation the company has information about the opportunity, so the concern is really misuse of information.\textsuperscript{40}

The result is that for lawyers seeking to predict, and judges seeking to determine, if an opportunity is a corporate opportunity, concerns directed at misuse of information appear to provide the most practical guidance. Section 145 reinforces the association of the corporate opportunity doctrine with misuse of information.

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\textsuperscript{32} See text accompanying nn 13-17 above.
\textsuperscript{33} Above n 3.
\textsuperscript{34} Above n 3.
\textsuperscript{35} Above n 3.
\textsuperscript{36} Above n 1.
\textsuperscript{37} Above n 3, p 334.
\textsuperscript{38} Above n 3, p 261,026.
\textsuperscript{39} \textit{Pacifica}, above n 3, p 334.
\textsuperscript{40} Some judges appear to regard the concept of a maturing business opportunity as responding to wider concerns. For example there are suggestions that the concept “include[s] areas of opportunity of a much more prospective character”, sec: \textit{Kawhia}, above n 3, para 24, referring to \textit{Pacifica} ibid. But such a wide generalisation offers little practical assistance in explaining why an opportunity is a corporate opportunity.
2.3 Section 145
Section 145 regulates the use of a company’s information. Subsection (1) provides:

“A director of a company who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, must not disclose that information to any person, or make use of or act on the information . . .”

For current purposes, there are two interesting aspects to s 145. First, the reasoning by which the information governed by this section is associated with confidential information. Secondly, whether the section complements or supersedes the common law corporate opportunity doctrine. In turn, this second point raises the (logically) preliminary question of whether s 145 regulates the use of corporate opportunities in addition to company information?

2.3.1 The information must be “confidential”
Section 145 can be seen as building upon Lord Russell’s test in Regal: the director must learn of the opportunity (or acquire it) “by reason, and only by reason of the fact that” he or she is a director of the company. Not only does s 145 require that a director receive the information in their “capacity as a director or employee of the company”, but it requires that the information “not otherwise be available” to that director. The latter requirement appears to exclude information which is publicly available. This appears to follow from the reasoning in Thexton. There the Court of Appeal considered the similarly worded s 149(1) of Act.

Section 149 regulates a director’s dealing in the company’s shares. Subsection (1) deals with the situation where the director has information which is “material to an assessment” of the shares’ value and, as occurs with s 145, the director acquired that “information in his or her capacity as a director or employee of the company . . . being information that would not otherwise be available to him or her”. Where subs (1) applies, a director acquiring shares must pay “not less than” their “fair value”; alternatively a director selling shares must receive “not more than” their “fair value”.

In Thexton the director purchased his father’s shares at a substantial discount. These proceedings were commenced following the father’s death. The son acknowledged that in his capacity as director, he had “information material to an assessment” of the shares’ value. But he argued that his father had obtained all this information, so the transaction should stand. The Court of Appeal disagreed. It considered that the crucial factor is whether the information is publicly available. If it is, then “the information is available to the director otherwise than through his or her position with the company”.

The result is to draw a distinction between publicly available information and, to use the Court’s description, “confidential” information. As is indicated by the context in which the Court uses the

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41 Regal, above n 22, p 147.
42 Some commentators imply a prerequisite that the information must be confidential from the section’s use of the phrase, “information that would not otherwise be available to him or her”, see S M Watson, “Directors’ Duties in New Zealand” [1998] JBL 495, 507-508.
43 Above n 11, para 14. The Court also held that a director’s disclosure of the company’s confidential information does not make it publicly available.
44 Companies Act 1993, s 149(1)(a).
46 Thexton, above n 11, para 3.
48 Ibid para 14.
term "confidential information", it is clear that the term extends beyond confidential information in its core sense of information that is confidential to the company, to encompass non-publicly available information.

Applying the Thexton reasoning to s 145, that section's prohibition against personal use of information applies to information which the director learns of in their capacity as a director or employee, and which is not publicly available. In the context of corporate opportunities, typically this will be where the company is exploring an opportunity and the director is given access to the information generated by the company — the situation in Regal, Pacifica, Smith, and Kavohia.

Further, this reasoning suggests that s 145 can apply where a director learns of an opportunity from a third party who is totally unrelated to the company. The key fact should be the third party's motivation for approaching the director. So, for example, if the director is seen as a conduit to the company, the information is not publicly available. This is the situation envisaged in Lintas.49 Alternatively, if the director is approached in their personal capacity the information is publicly available.

But the reasoning in Thexton also suggests that s 145 does not apply where the director learns of the opportunity by making their own enquiries, for example, while taking a weekend stroll. So, despite the attraction of associating corporate opportunities with misuse of confidential information, this approach is unable to respond to the situation where it is the use of the opportunity itself, rather than the way the director came to know of it, which attracts judicial disapproval.

2.3.2 Does s 145 supersedes the corporate opportunity doctrine?

There is an overlap between the corporate opportunity doctrine and misuse of information. This section considers whether s 145 supersedes the common law doctrine. There are two opposing views.

One view is that s 145 does not supersedes the common law doctrine. On this view, s 145 may apply when information about the opportunity was the company's confidential information. But the common law doctrine remains to the extent that it responds to wider concerns.50 On this view, a New Zealand judge who disapproves of a director's use of the opportunity (as opposed to the way the director learnt of it) is free to apply the common law doctrine. This situation will arise if the director is expected to identify opportunities for their company to exploit.

The alternative view is that the Act codifies director's duties. Inherent in this view is the assumption that s 145 applies to corporate opportunities. Support for this assumption comes from the Law Commission's preliminary work which led to the Act. Recall that the Commission considered that the corporate opportunity doctrine is "grounded in information . . . received in confidence".51 Consistent with this, the marginal note to cl 112(1) of the Commission's draft Bill (which evolved into s 145) provided that the section applied to "Use of Company information or opportunity". So, the Commission saw this section as extending to the corporate opportunity doctrine.

The marginal note also provides a counter argument for supporters of the continuation of a common law doctrine. During the course of the legislative process, the reference to "opportunity" was deleted in s 145. Stylistic changes were also made to the section's wording.52 At the time of this deletion, the Acts

49 Above n 1.
50 Brookers Company and Security Law, Wellington, Brookers, 2003, para CA131.01(4).
51 NZLC Discussion Paper, above n 9, para 234
52 As drafted by the Law Commission, cl 112 provided: "Use of Company information or opportunity

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Interpretation Act 1924 deemed that the marginal note was not part of the Act.\textsuperscript{53} So the significance of the deletion may be argued. But the importance of the marginal note has now increased. The Acts Interpretation Act 1999 provides that marginal notes "may be considered in ascertaining the meaning of an enactment".\textsuperscript{54} Significantly the 1999 Act has retrospective effect.\textsuperscript{55} Thus the change in marginal note supports the argument that s 145 deals only with corporate information as opposed to corporate opportunities. If so, s 145 should not preclude a court, if it wishes to do so, from employing the common law doctrine.

But supporters of the codification argument have another argument. This is based on other (and more substantial) changes to the Companies Bill during the legislative process. Under the Companies Act 1955, the "basic duties of directors . . . [had] to be discerned from a large volume of complex case law."\textsuperscript{56} The Commission saw this position as "undesirable".\textsuperscript{57} Wishing to make the general principles underlying directors’ duties\textsuperscript{58} "more accessible",\textsuperscript{59} and thereby "aid[ing] understanding of the standards required"\textsuperscript{60} it proposed that "the general themes reflected in the cases . . . [should] be simply stated\textsuperscript{61} in legislation.

Nevertheless, the Commission considered it "impossible to encapsulate all the current legal principles and unwise to inhibit development of the standards appropriate in particular cases by attempting codification".\textsuperscript{62} The Commission was particularly concerned "that the scope of fiduciary duties imposed by the common law upon directors should not be cut down in any statutory restatement".\textsuperscript{63} It considered that the Act should be treated "as the text of first resort".\textsuperscript{64}

Presumably reflecting these beliefs and concerns, cl 116 of the Companies Bill provided that the statutory duties were "in addition to any duty imposed on a director by any rule of law", save "to the extent that the duty imposed is inconsistent with or modified by this Act". But during the legislative process, cl 116 was omitted. This was on the recommendation of the Justice and Law Reform Committee. The Committee was concerned that cl 116 could "cause uncertainty and could undermine the purpose of the reform which was to make the law more accessible and certain".\textsuperscript{65}

\textsuperscript{53} Acts Interpretation Act 1924, s 5(g).
\textsuperscript{54} Ibid s 5(2)-(3).
\textsuperscript{55} Ibid; J F Burrows, Statute Law in New Zealand (3rd ed), Wellington, LexisNexis, 2003, p 159 ("Burrows").
\textsuperscript{56} NZLC Discussion Paper, above n 8, para 191. See also NZLC Report, above n 8, para 186.
\textsuperscript{57} NZLC Discussion Paper, ibid, para 191.
\textsuperscript{58} A similar process in which directors’ duties were to be “expressed positively as statements of general duty” was suggested with respect to some of the then existing statutory duties, for example reckless trading, see: NZLC Report, above n 8, para 187.
\textsuperscript{59} NZLC Discussion Paper, above n 8, para 191.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Ibid para 195.
\textsuperscript{64} New Zealand Law Commission, Company Law Reform: Transition and Revision, NZLC R 16, 1990, p xxiii.
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The deletion of cl 116 encourages the inference that Parliament intended the statutory list of directors’ duties to be exhaustive. This was the contemporary view of the authors of Morison’s Company and Securities Law, and it is a view which they still hold. Other academic writers agree, some on different grounds. The authors of Brookers Company and Security Law disagree.

Courts too, appear divided. For example, Master JCA Thomson in Taurus Transport v Taylor observed that he was “inclined to the view that ... the ... Act is a code”. In contrast, Morris J in Manukau City Council v Auckland City Council considered that the Act gave “additional rights”.

Benton v Priore contains the most substantive consideration of the status of the directors’ duties. There Heath J recorded his “satisfaction”:

“That Parliament expressed an intention not to codify all directors’ duties within those articulated in ss 131-138 of the Act. Instead, those provisions should be seen as a restatement of basic duties in an ‘endeavour to promote accessibility to the law. The possibility of further duties being owed by directors (whether through statutory obligations or otherwise) is not expressly excluded by the Act.”

Interestingly (and perhaps resolving this uncertainty for corporate opportunities), in a number of corporate opportunity cases, judges have simply ignored s 145. This may be due to judges recognising problems with associating corporate opportunities solely with a company’s confidential information. Additionally (but perhaps alternatively), since there is no provision in the Act requiring directors to account for profits, the availability of remedies may be a factor.

It is submitted that s 145 should not be regarded as a codification in the sense of “abolish[ing] the common law in a particular area [here the corporate opportunity doctrine] and replac[ing] it with a set of statutory rules that are the exhaustive and exclusive source of the law”. Rather, as is suggested in Benton v Priore, it should be regarded as a “restatement of basic duties in an endeavour to promote

67 Wellington, LexisNexis, 2004 ("Morison"), (Service 67), para 23.2.
69 H Rennie QC and P Watts, Directors’ Duties and Shareholders’ Rights, NZ Law Society Seminar, 1996, p 2. (“[T]he apparent comprehensiveness of the statutory formulation when combined with the removal of clause 116 does suggest that a code was intended”).
70 Above n 50.
71 22/5/00, HC Napier CP 33/99. This case involved an application to strike out a statement of claim in which the plaintiff was claiming the breach of a duty of care similar to, but not identical with, the statutory duty of care prescribed by s 135 of the 1993 Act.
72 Ibid para 7.
73 21/5/99, HC Auckland, CP 210-SW 99. That case involved a successful application for an interim injunction restraining certain changes to the governance structure of a company and his Honour’s comments were in the context of rejecting an argument that the plaintiffs were alleging a breach of s 128 of the 1993 Act (which deals with the management of a company) but were not “entitled persons” for the purposes of s 174 of the 1993 Act and, therefore, were unable to bring these proceedings.
74 [2003] 1 NZLR 564. The issue was the effect of a company’s liquidation on the ability of a creditor or shareholder to bring a claim against a director of the company.
75 Ibid para 46.
76 For example in Bendall v Marshall, above n 13, para 1, the Court refers to breach of fiduciary duties and breach of statutory duties.
77 Morison, above n 67, para 24.27 (Service 67).
78 Barrows, above n 55, p 375.

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accessibility”. This was the Commission’s vision, and it is consistent with the approach in Australia; the approach suggested for England, and the approach in recent New Zealand corporate opportunity cases. “The common law dies hard”. And rightly so. The danger with codifying a duty is that the duty “is crystallised and cannot be developed by the courts in accordance with changing social and economic conditions”.

Accepting that s 145 is not a codification does not mean that any (and every) opportunity which a director learns of is the company’s. But mainstream US law recognises, and English law is recognising, that an opportunity which a director may be offered and/or which the director may learn of through publicly available information, may be a corporate opportunity. I now turn to this recognition.

3 IDENTIFYING OPPORTUNITIES FOR THE COMPANY

In the US, it is judicially recognised that an important aspect of the corporate opportunity doctrine is protecting a corporation’s confidential information. But this is not at the expense of recognising wider concerns. In the late 1930s, and in a case destined to become the most significant corporate opportunity case in US law, the Delaware Supreme Court in Guth v Loft, Inc (“Guth”) recognised changes in the director’s role. One aspect of this change (at least for some directors) was to identify opportunities for their company’s potential exploitation. This recognition continues in the more recent formulation of the corporate opportunity doctrine prepared by the American Law Institute (“ALI”). The ALI recognises that the doctrine operates differently depending on the director’s role in the company. My examination of US law leads into an examination of English case law where similar recognitions are being made.

3.1 Early US Recognition: Guth

Guth was the President and dominant director of Loft, Inc (“Loft”). Loft was primarily involved in the retail sale of candies, beverages, and foodstuffs, but it also manufactured syrups for use in soft drinks, and had some wholesale activities. In addition to his involvement in Loft, Guth owned a family company which manufactured syrups for soft drinks. The case involved Guth’s acquisition of the Pepsi-Cola formula and trademark.

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79 Above n 74, para 46.
80 Since 1999, Australian company law has expressly recognised that the statutory duties are not exhaustive. Corporate Law Economic Reform Program Act 1999, Sch 1; Corporations Act 2001, s 179(1).
84 Throughout this article, the term “company” is preferred except where “corporation” is used in a quotation.
85 This was confirmed in Broz v Cellular Information Systems Inc. 673 A2d 148, 155 (Del 1996) (“misappropriation of the corporation’s proprietary information” is one “of the fundamental concerns under-girding the law of corporate opportunity”).
87 5 A2d 503 (Del 1939).
89 Guth, above n 87, p 505 (Loft had 115 stores).
90 Ibid p 505.
Prior to his involvement with Loft, Guth was approached to see if he was interested in investing in the National Pepsi-Cola Company (the owner of the Pepsi-Cola formula and trademark). Guth was not interested.º¹ A few years later the National Pepsi-Cola Company was in bankruptcy and Guth was reapproached with a similar proposal. At this time Guth was involved with Loft and, coincidentally, a day or so earlier, he had expressed concern as to the price Loft was paying for the Coca-Cola syrup; investigations about Loft changing to the Pepsi-Cola syrup had commenced.º² Through a company controlled by him, Guth acquired the Pepsi opportunity.

3.1.1 The line-of-business test

The Supreme Court held that the Pepsi opportunity was Loft’s corporate opportunity. In so doing the Court identified a number of questions as particularly relevant in determining whether a director personally should not pursue an opportunity. Subsequently these questions have become known as the “line-of-business” test.

Two of these questions are particularly relevant when considering the New Zealand cases and ss 145. These questions are:

- Whether the opportunity comes to the director in their individual capacity, in contrast to their official capacity? (the “capacity question”);
- Whether the opportunity is, from its nature, in the company’s line of business and is of practical advantage to it? (the “line of business question”).

3.1.2 The capacity question

Not surprisingly, the line-of-business test responds to the misuse of confidential information.º³ And, as appears to occur with ss 145, it is tempting to associate the capacity question with the issue of whether the director has misused the company’s confidential information. But the Court in Guth saw the capacity question as encompassing wider concerns. It recognised that a third party may advise a director of an opportunity because of the director’s position in the company. The Court concluded that this occurred in Guth.º⁴

º¹ Ibid p 506.
º² Ibid p 505.
º³ The Court provided the following advice as to when a corporate fiduciary could pursue personally an opportunity (ibid pp 510-511):

“If an opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course the officer or director has not wrongfully embarked the corporation’s resources therein.

“... On the other hand, it is equally true that, if there is presented to a corporate officer or director 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.”

º⁴ Broz, above n 85, p 155.
º⁵ Guth, above n 87, pp 512-513.
While information about an opportunity may not be given in situations to make it the company’s confidential information, the point is that the director should not be free to use it personally. Alternatively, if the information is given to a director because of their personal attributes, this is an important consideration suggesting that the director should be free to use it personally. Recognising the importance of the capacity in which the director receives the information, some US courts state that determining that capacity is the first step in determining whether the opportunity is a corporate opportunity.

3.1.3 The line of business question

Despite the importance of Guth’s recognition of the capacity question, its prominence is attributed to the Court’s recognition that directors (especially executive directors) were performing a more substantial role within companies, especially public companies.

Executive directors are usually full-time salaried employees of the company. Moreover, executive directors are employed because of their managerial prowess. Managerial talents encompass a range of skills. One skill is particularly important in determining the extent of an executive director’s obligation to surrender an opportunity. This is the executive director’s entrepreneurial skill. Such skills “include[... the generation of]... ideas ... for new business ventures”. Then there is the personal capital which executive directors bring to the company, ie their “network of contacts, business and social relationships, and club memberships”. This is an important resource for companies since the breadth and depth of an executive director’s personal capital influences the likelihood that he or she will “stumble across unsolicited news of a new opportunity”. It must not be overlooked that, typically, the executive director’s remuneration package reflects their skills and personal capital.

Further, it has been argued that it is not unreasonable to require executive directors to “devote” all “their managerial talents and energies” to the company; at least this should be the “normal[1]” rule.

In Guth the Court recognised that a director may be tasked with an “identification/acquisition role”, ie the responsibility of identifying (and sometimes acquiring) for the company an opportunity, or opportunities of a particular type. Associated with this, the Court recognised that companies could

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96 See Thorpe v Cerbco, Inc, 676 A2d 436, 442 (Del 1996) (“Since the Eriksons were approached in their capacities as directors of CERBCO, their loyalties should have been to the corporation. [To satisfy their duty to act in good faith, the Eriksons should have informed the CERBCO board of the [opportunity].”)

97 See Johnston v Greene, 121 A2d 919 (Del 1956); Broz, above n 85.

98 Rapistan Corp v Michaels, 511 NW2d 918, 924 (Mich 1993).

99 Some see this as a crucial distinction between full time officers and executives of a public company and the outside directors thereof. See V Brudney and R C Clark, “A New Look at Corporate Opportunities” (1981) 94 Harv L Rev 997, p 1024.

100 Ibid p 1024, n 87.


102 Davis, ibid p 233.

103 Ibid p 229 (This observation was directed at officers/directors but it is most true for senior executives).

104 Ibid p 233.

105 Brudney and Clark, above n 99, p 1003.

106 Ibid.

107 Ibid.
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expand into new fields of business activity. By specifying a boundary on the opportunities that can be corporate opportunities, the line-of-business question operates as a limit to the operation of the now expanded corporate opportunity doctrine.

3.2 Continuing US Recognition: The ALI Test

Consistent with Delaware’s prominence in US corporate law, the line-of-business test is the most prominent US corporate opportunity test. But other tests share its recognition that the concerns of the corporate opportunity doctrine extend to identifying opportunities which a director learns of from sources other than the company. A prominent recent example is the test proposed by the ALI in its review of Corporate Governance.

This “test” is of immediate interest, for it is not one test; rather the ALI recognised that the corporate opportunity doctrine should respond differently to different types of corporate fiduciary. For the purpose of this article, the focus is on directors and senior executives, but a distinct test is provided for “controlling shareholders”. While the ALI distinguishes between directors and senior executives, it should be noted that some directors (especially those who are employed by the company) may satisfy the definition of a senior executive with the result that their actions are evaluated against that test.

Turning to the relevant tests, for directors and senior executives a corporate opportunity is defined as:

108 Guth, above n 87, p 514.

109 The Court identified five subquestions to assist subsequent courts in identifying a company’s line of business. They are: (i) Does the company have “fundamental knowledge” of that type of opportunity? (ii) Does the company have “practical experience” of that type of opportunity? (iii) Does the company have the “ability to pursue” that type of opportunity? (iv) Is the opportunity “logically and naturally adaptable to [the company’s] business having regard for its financial position?”; and (v) Is the company’s acquisition of the opportunity “consonant with its reasonable needs and aspirations for expansion”? Ibid p 514.

110 See Miller v Miller, 222 NWd 71, 81 (Minn 1974) (the line of business question requires a court to consider “whether the business opportunity is of sufficient importance and is so closely related to the existing or prospective activity of the corporation as to warrant judicial sanctions against its personal acquisition by a managing officer or director of the corporation”).


112 ALI, above n 88.

113 Ibid § 1.13 (“director” defined as “an individual designated as a director by the corporation or an individual who acts in place of a director under applicable law or a standard of the corporation”).

114 The ALI’s definition of “senior executive” is indicative of the type of corporate employees who may be classified as senior managerial officers. As defined in § 1.33, a senior executive means “an officer described in Subs (a) or (b) of § 1.27 (Officer).” In turn, “officer” is defined in § 1.27 as:

“(a) the chief executive, operating, financial, legal, and accounting officers of a corporation; (b) to the extent not encompassed by the foregoing, the chairman of the board of directors (unless the chairman neither performs a policymaking function other than as a director nor receives a material amount of compensation in excess of director’s fees), president, treasurer, and secretary, and a vice-president or vice chairman who is in charge of a principal business unit, division, or function (such a sales, administration, or finance) or performs a major policymaking function for the corporation.”

115 A different test applies for “controlling shareholders”. Ibid § 5.12(b).

116 Ibid § 5.05(b).
“(1) Any opportunity to engage in a business activity of which a director or senior executive becomes aware, either:

“(A) In connection with the performance of functions as a director or senior executive, or under circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or

“(B) Through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or

“(2) Any opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage.”

One of the first things to note about this particular global definition is that subs (1) applies to both directors and senior executives. In contrast, subs (2) applies to senior executives only. The result is to impose a wider definition of corporate opportunity upon senior executives. This is rationalised on the ground that directors may be “engaged in multiple business activities”.

The fear is that directors may be discouraged from continuing this practice if they are under an “obligation to offer an opportunity to the corporation simply because the opportunity is closely related to the corporation’s business”. The unspoken assumption is that it is appropriate for directors to be so engaged.

As senior executives are employees of the company, however, a contrary assumption applies, and the ALI believes that they should be under a greater duty to advance the company’s interests. Not only must senior executives advise the company of an opportunity which is closely related to the company’s existing business, they must also offer it opportunities which are closely related to a business activity which the company is contemplating and may subsequently engage.

Turning to the subs (1) definition, applicable to both directors and senior executives, it should be noted that it deals with three distinct situations. First is where the director or senior executive becomes aware of the opportunity in the course of performing their functions. This is the situation where the director or senior executive is given the specific responsibility for carrying out an activity that leads to the generation of that opportunity, i.e. to locate new drilling sites for an oil exploration company. Not surprisingly, such an opportunity is declared to be the company’s.

The second situation is where the director or senior executive is offered the opportunity “in circumstances that should reasonably lead [them] to believe” that the offer was for the company.

The third situation reflects the ALI’s recognition that the corporate opportunity doctrine is interrelated with other fiduciary duties, in particular rules governing a corporate fiduciary’s use of corporate property, material non-public corporate information, or corporate position. The ALI offers the example of a director attending a board meeting; there the director learns of negotiations for the company to

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117 Ibid § 5.05, cmt c.
118 Ibid § 5.05, cmt c.
119 Ibid § 5.05(b)(1) cmt.
120 Ibid § 5.05(b)(1)(A).
121 Ibid § 5.05(b)(1)(A) cmt. (the director or senior executive has a duty of reasonable inquiry to determine whether the opportunity was intended for the corporation).
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acquire stock in another company and, before the negotiations become public, the director purchases
the stock personally. 122

3.3 The English Recognition

Compared to US courts, English courts have been slower to recognise that an opportunity which a
director learns of from non-company sources may be a corporate opportunity. But they have done so. Indeed, as illustrated by a recent review of English company law, this has mainstream recognition.

3.3.1 Recognition in the law reform process

At the close of the last century the British embarked on a comprehensive review of their company law. Following various consultation documents, 123 there is now a White Paper 124 containing a draft Companies Bill. The Bill adopts the recommendation of the Steering Group charged with overseeing this review, that “directors’ general duties to the company should be codified in statute”. 125 These are contained in Schedule 2 of the Bill and they are expressed as a number of principles.

Principle 6 deals with personal use of the company’s property, information, or opportunity. It prohibits a director (or former director) from using “any property or information of the company, or any opportunity of the company which he has become aware of in the performance of his functions as director”. 126

It should be noted that this principle is wider than s 145. It refers expressly to opportunities (as opposed to information). Additionally, its operation is not restricted to confidential information (the situation with s 145), but extends to opportunities which the director becomes “aware of in the performance of his functions as director”.

122 Ibid § 5.05(b) cmt B(1), illus 7.


125 White Paper, ibid, para 3.5.

126 The White Paper does record that the government “is currently considering how the text of the draft duties might be improved”: ibid, para 3.7.

In its current form, Principle 6 provides:

“Personal use of the company’s property, information or opportunity
A director or former director of a company must not use for his own or anyone else’s benefit any property or information of the company, or any opportunity of the company which he has become aware of in the performance of his functions as director, unless—
(a) the use has been proposed to the company and the company has consented to it by ordinary resolution; or
(b) the company is a private company, the use has been proposed to and authorised by the board, and nothing in the constitution invalidates that authorisation; or
(c) the company is a public company, its constitution includes provision enabling the board to authorise such use if proposed, and the use has been proposed to and authorised by the board in accordance with the constitution.

Notes
In this paragraph ‘the board’ means the board of directors acting without the participation of any interested director.
This paragraph does not apply to a use to which the director has a right under a contract or other transaction that he has entered into with the company, or that he has in the performance of his functions authorised, procured or permitted the company to enter into.”
3.3.2 Recognition by English courts
As occurred in Guth, English judges also have recognised that some directors (particularly managing directors) have an “identification/acquisition role” and that these directors are expected to dedicate their managerial talents to advancing the company. This is displayed by Industrial Development Consultants Ltd v Cooley,128 (“Cooley”).

Cooley was “an architect of considerable distinction and attainment”129 in the gas industry. The plaintiff company provided a comprehensive construction service, largely in the private sector. Wishing to expand into the public sector, and gas industry in particular, the plaintiff appointed Cooley its managing director. Cooley was approached and offered the management of a number of construction contracts. Cooley resigned and obtained this work. Roskill J (as he then was) appeared to accept that the approach had been to Cooley in his personal capacity.130 Nevertheless, he concluded that in so doing Cooley had breached his obligations. Underlying this conclusion was Cooley’s position as managing director. Roskill J considered that a managing director was precluded from arguing that he had been approached in a private capacity; rather a managing director was required to advance the interests of the company and advise it of all opportunities. Roskill J observed:131

“The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity was as managing director of the plaintiffs. Information which came to him while he was managing director and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass-on to the plaintiffs.”

The reasoning in Cooley was subsequently captured in a sentence by the Court in CMS Dolphin Ltd v Simonet.132 There Lawrence Collins J observed: “what [Cooley] did was to divert to himself the very type of contract it was his job to secure for the company”.

To date, Cooley has not received significant judicial attention by New Zealand judges.133 This is in contrast with the judgment of the Canadian Supreme Court in Canaero. Canaero is a relatively straightforward opportunity case; the defendants had been negotiating for the company to acquire an opportunity. Not surprisingly, the opportunity was held to be the company’s. Canaero was decided a year after Cooley, and it seems clear that the reasoning in Cooley was influential for the Supreme Court’s rejection of Lord Russell’s test in Regal as “the exclusive touchstone[e] of liability”.134 As noted earlier, Lord Russell asked whether the directors acquired the opportunity to obtain the shares “by reason, and only by reason of the fact that they were directors of Regal”.135 The Canaero Court considered that it “is a mistake... [to] encase the [corporate opportunity doctrine] in the straight-jacket of special knowledge acquired while acting as directors or senior officers”.136 In a similar vein, it

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127 See text accompanying nn 101-108.
128 [1972] 2 All ER 162.
129 Ibid p 166.
130 Ibid pp 169, 176.
131 Ibid p 173.
133 But see Holden, above n 3, p 261,028.
134 Canaero, above n 1, p 383.
135 Regal, above n 22, p 147.
136 Canaero, above n 1, p 390.
considered that “[t]he fact that breach of confidence . . . may itself afford a ground of relief does not make [it] . . . a necessary ingredient of a successful claim”. 137

Returning to English case law, the reasoning in Cooley was extended by the Court of Appeal in Bhullar v Bhullar138 ("Bhullar"). In Bhullar the company was a non-public family company and the director learned of the opportunity “by chance”139 ("as a pass[r]-by")140 on his way to go bowling. The family company was the landlord of the building used as the bowling alley, and the opportunity was the information that the adjoining property was for sale. Referring to Cooley, the Court stressed that some directors may have “one capacity”141 only, and, if they learn of an opportunity, they have “a duty to communicate it to the company”.142 This case clearly shows judicial recognition that some directors are expected to identify opportunities for their company to exploit. In these circumstances it is the use of the opportunity, rather than the way the director came to know of it, which attracts judicial disapproval.

The facts in Crown Dilmun v Sutton143 ("Crown Dilmun") are similar to those in Cooley. The case is important for showing continued acceptance of the approach in Cooley. Crown Dilmun was a property developer. As the company’s managing director and “dominant figure”,144 Sutton was expected to “identify suitable targets for investment”.145 It appears that Sutton became disenchanted when Crown Dilmun’s shareholder decided to wind down that Company. Sutton was approached with a variation146 on an opportunity which Crown Dilmun had rejected. Sutton did not disclose this “new” opportunity to Crown Dilmun but acquired it for another company in which, through intermediaries, he was personally interested. Peter Smith J held that this opportunity was a corporate opportunity. Sutton “had a duty to exploit every opportunity that he became aware of for the benefit of the claimants”.147

This case is of further interest for his Honour rejects the suggestion, that the key determinative of whether an opportunity is a corporate opportunity is whether the information about the opportunity was the company’s confidential information. Peter Smith J observed:148

“Whether or not the information is confidential, if the opportunity that arises by reason of the acquisition of the information puts the fiduciary in a position of conflict, he cannot take that opportunity.”

137 Ibid p 388.
139 Ibid para 11.
140 Item Software, above n 13, para 38.
141 Bhullar, above n 138, para 41.
142 Ibid para 41.
144 Ibid para 20. Sutton was “well-known in the property world, enjoying a high reputation and further he was voted Young Property Personality for 2002”: ibid para 8.
146 The Court accepted that this opportunity was “an entirely different proposition”: ibid para 31.
147 Ibid para 179.
4 AN ALTERNATIVE THEORETICAL STRUCTURE

The material considered in the last Part shows US and English recognition that some directors are expected to identify opportunities for their company to exploit. For such directors, it is the misuse of the opportunity which attracts judicial disapproval.

It is submitted that New Zealand courts are free to follow this approach and, in an appropriate case, should do so. This Part advances the key components in a theoretical structure designed to explain when an opportunity is a corporate opportunity.

As indicated earlier, the key question is whether the director’s personal exploitation of the opportunity conflicts with their obligations to the company. The following four obligations can be discerned from New Zealand, English, and US case law:

- the obligation to investigate an opportunity;
- the obligation not to undermine the company;
- the obligation to pass-on an opportunity; and
- the obligation to surrender a suitable opportunity.

The first three obligations should be uncontroversial, for they largely demand straightforward notions of fiduciary loyalty; moreover they are consistent with the results in New Zealand cases. The last obligation may be more controversial, just because there is no supporting New Zealand case law. Nevertheless, it is consistent with and explains the US and English material considered in the last Part.

As with all fiduciary obligations, the content and scope of these obligations differ depending on the director’s relationship with the company. There are two important variables. First, the role played by the director within the company. More is expected of an executive director than a non-executive director. The second variable is the nature of the company; in particular, considerations peculiar to the director and that company. The point is that the parties may enlarge or reduce the scope of the obligations. Because of the variable nature of these obligations, the following analysis is restricted to general principles.

4.1 The Obligation to Investigate an Opportunity

This may be the most straightforward obligation. It is directed to the situation where a director has (or assumes) the responsibility to investigate the suitability of an opportunity for the company’s exploitation. Typically the director is a company employee and the investigation occurs in that context. Commonwealth and New Zealand courts share the US recognition that the director is under an obligation not to personally exploit the opportunity.

Canaero provides the classic example. A New Zealand example is Smith. Smith was a director of the plaintiff company and in sole control of it. On behalf of the company, Smith applied for a license to import French laces and ribbons. The application was unsuccessful. A few months later, and while still a director, Smith personally reapplied for a license. This time he was successful. The Court held that the opportunity was the company’s.

149 See text accompanying nn 26-28.
150 See the capacity question in Guth, (discussed in the text accompanying nn 94-98) and § 5.05(b)(1) of the ALI test (discussed in the text accompanying nn 119-122).
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Canaero also illustrates that a director subject to this duty can not circumvent it by resigning. This approach was applied in Holden. There McGechean J observed that "a director who is involved in preparation or negotiation on behalf of the company, cannot resign with a view to taking up the opportunity himself, and subsequently proceed to do so". 151

4.2 The Obligation Not to Undermine the Company

This obligation explains most New Zealand corporate opportunity cases. It is directed to the situation where a director, aware that the company has identified an opportunity or a type of opportunity for the company’s acquisition or continued retention, acquires it personally. These opportunities are corporate opportunities. As described in Pacifica (and earlier in Canaero), these are "maturing business opportunity[ies] which [the] company is actively pursuing". 152 In some situations there is a potential overlap between this obligation and the obligation to investigate an opportunity.

The result in Regal is consistent with the recognition of this obligation not to undermine the company. Pacifica shares some similarity with Regal. There the Board of Directors (including the defendant director) was actively considering the opportunity. The defendant was then approached personally and was offered the opportunity. The Court held that the opportunity was the company’s.

Most New Zealand cases involve a variation 153 of the Regal/Pacifica situations; the opportunity is of a temporary nature, for example, franchises, distribution agreements, and the like. In these cases the director, and not the company, acquires the renewal. Here the obligation is directed at ensuring the director does not undermine the company’s prospect of acquiring the renewal. It requires that the director refrain from seeking the renewal personally. So in Holden, McGechean J recognises, as a general rule, that "a director cannot, whilst still a director, negotiate with his company’s supplier to switch an existing supply contract to himself". 154

Thorrington v McCann 155 ("Thorrington") is consistent with this obligation. There the opportunity was the lease of a tavern. McCann was offered the lease. Needing financial assistance to acquire and exploit this opportunity, McCann formed a company with Thorrington. Both were directors, but management was left solely to McCann. The tavern was a financial success. The company had a right to renew the lease, but McCann advised the lessor that the company would not exercise it. He then formed a new company; and that company acquired the new lease. The Court considered that this change arose because McCann became “disenchanted” with the company structure, in particular the share of the return going to Thorrington. 156 In these proceedings, Thorrington successfully sought leave to commence a derivative action against McCann; the Court considered that McCann had “used his fiduciary position as a director to secure his own advantage”. 157

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151 Holden, above n 3, p 261,025. Schilling v Kidd Garrett Ltd [1977] 1 NZLR 243 (discussed in Holden) is an earlier New Zealand case identifying judicial disapproval of resignation with a view of exploiting the principal’s opportunity. The extract from Holden was reproduced in Kawhia, above n 3, para 23.

152 Pacifica, above n 3, p 334. Canaero, above n 1, p 382.

153 Another variation involves use of client lists such as occurred in Lintas, above n 1.

154 Holden, above n 3, p 261,025.

155 (1998) 8 NZCLC 261,564.

156 Ibid p 261,567.

157 Ibid p 261,571.

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4.2.1 Examples of the scope of the obligation being shaped by the director’s role in their company

As was noted earlier, the scope of these obligations differs depending on the role played by the director within the company and considerations peculiar to the director and that company. The Holden litigation displays the importance of the director’s role in shaping the content of this obligation. In Holden, McGechan J considered that there were limits to the principle that a director could not personally acquire a renewal of an opportunity which the company was currently exploiting. He considered that three factors excluded the operation of the principle in this case. First, the supplier had independently resolved to terminate the company’s contract. Secondly, the “agencies, and their trade possibilities, ... [were] of global knowledge”. Thirdly, Holden’s personal attributes made him a suitable candidate to exploit this opportunity.

The Court of Appeal confirmed this result and, with respect, offered more convincing reasoning — that as a mere director, Holden “no longer had a duty positively to promote the company’s interest in the agency”. Prior to his resignation, Holden had been the only full-time working director, so a different result should have followed if there had been no resignation. That was the result in Thornton.

Kawhia further illustrates the judicial acceptance that more is expected of an executive director than a non-executive director. There the company’s sole customer advised the company’s managing director that it was considering terminating the contract. Following the customer’s advice, the managing director personally tendered for (and acquired) the new contract. As occurred in Regal, the Court considered that difficulties facing the company’s acquisition of the opportunity did not justify the director acquiring the opportunity; rather, his position in the company required him to attempt to overcome the difficulties.

4.2.2 An example of the scope of the obligation being shaped by considerations particular to the company and director

Additionally, the scope of these obligations may differ depending on considerations peculiar to the director and that company. Macalister illustrates this. It also provides an interesting comparison with Thornton. A Japanese company wished to obtain a supply of leather garments for sale in Japan. Mr Macalister’s company was able to supply these garments. Mr Sakurai (who controlled the Japanese company) and his agent, Mr Ishizuka, acquired shares in Macalister’s company. They also became two of its directors. Ultimately, the Japanese company became the major customer of Macalister’s company. A dispute then arose as to the cost of the garments. Following an unsuccessful attempt by the Japanese investors to acquire all the company’s shares, they resigned as directors, established another manufacturing company, and gave the order to their new company. The Court of Appeal upheld the reasoning of the trial Judge — Fraser J — to the effect that the scope of the Japanese directors’

158 Holden, above n 3, p 261,0303.
159 Architectural Finishes, above n 3.
160 This leads into the so-called “impossibility argument”. This argument proceeds on the premise that before an opportunity can be regarded as the company’s opportunity, the company must be able to acquire it or exploit it. Traditionally the common law has been hostile to this argument. Indeed, for some directors, especially managing directors, there is an inconsistency between this argument and their role in the company. This inconsistency was highlighted in Cooley, above n 128. For an overview of the “impossibility argument” and a defence of the common law’s rejection of it, see S Scott, “The Corporate Opportunity Doctrine and Impossibility Arguments” (2003) 66 MLR 852.
161 Above n 3.
fiduciary duties had been modified. The company had accepted that the Japanese directors were also agents of the Japanese company; that the company was free to purchase goods elsewhere; and that should a conflict arise, the Japanese director’s primary obligation was to the Japanese company.

4.3 The Obligation to Pass-on an Opportunity

A director may learn of an opportunity from a third party who is unrelated to the company. If the third party approaches the director because of their position in the company (the director being a mere conduit to the company), the obligation to pass-on an opportunity states that the opportunity is the company’s.

This obligation may seem less familiar than the earlier obligations, but it reflects mainstream fiduciary principles, in particular the prohibition against a fiduciary using information acquired in the scope of that relationship personally. Boardman provides a classic illustration. Lintas is a New Zealand illustration. There Holland J suggested that the circumstances in which the information was obtained is a key factor. Section 145 (as it operates on the Thexton interpretation) is also consistent with this obligation.

Guth provides more express recognition. There the Court stated that the “capacity” in which the corporate fiduciary learns of the opportunity is a relevant consideration for the line-of-business test. The ALI test for directors (and senior executives) provides further US recognition.

Turning to English case law, the result and reasoning in Crown Dilmun is consistent with this obligation.

4.4 The Obligation to Surrender a Suitable Opportunity

The US and English material considered in Part 3 illustrate judicial recognition that some directors are expected to be on the lookout for opportunities suitable for the company’s exploitation. This obligation reflects that recognition. A director who is subject to this obligation must obtain their company’s informed consent before they can exploit any opportunity. The circumstance in which the director learns of the opportunity is irrelevant. This obligation reflects the growth and professionalism of some directors (typically executive directors). It also reflects their entrepreneurial role.

Bhullar is consistent with this obligation. There the director learned of the opportunity while going bowling. Guth and the ALI test are also consistent with this obligation. Clearly influenced by Guth, the ALI suggests that for senior executives “any opportunity to engage in a business activity [of which

163 Boardman, above n 18, pp 127-129; Peso Silver Mines Ltd (NPL) v Cropper (1996) 58 DLR (2d) 1, 8 (the corporate fiduciary was not approached “in his capacity as a director [of the corporation] . . . but as an individual member of the public whom [the offeror] was seeking to interest as a co-venturer”).
164 Lintas, above n 1, p 98,393.
165 Guth, above n 87, p 510. In The Equity Corp v Milson 221 A2d 494 (Del 1966), the Court paraphrased parts of the judgment in Guth omitting reference to the capacity in which the corporate fiduciary received the information. This appears to have been an oversight and later Delaware courts have reincorporated the original Guth reference to the capacity in which the information was received. See Kaplan v Fenton 278 A2d 834, 836 (Del 1971); Broz, above n 85, at 155.
166 Recall that a corporate opportunity includes an opportunity which the director (and senior executive) “becomes aware” of in “circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation” ALI, above n 88, § 5.05(b)(2). The ALI suggests that directors and senior executives are under a duty to make reasonable inquiries to determine the offeror’s intent. § 5.05(b) cmt.
167 For the purposes of this test, a director may satisfy the definition of “senior executive”. See text accompanying n 114.

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he or she] becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage” is a corporate opportunity.\textsuperscript{168}

The obligation does extend to all opportunities, but US and English material suggests that it applies to a limited number of directors. Typically, this will be a senior executive director, such as Sutton (the managing director) in \textit{Crown Dilmun}. But, as \textit{Bhullar} illustrates, in smaller family companies, this obligation may extend to all directors.

There is another limitation on this obligation. The opportunity must be suitable for the company’s exploitation. The suitability qualification is comparable to the line-of-business question in \textit{Guth}. United States experience suggests that this limitation is not easily established. For example, US courts do not regard a company’s existing business activities (ie its line of business) as limiting the opportunities that it may wish to (and can) exploit. As the Court in \textit{Guth} stated, “latitude should be allowed for development and expansion” and “[t]o deny this would be to deny the history of industrial development”.\textsuperscript{169} While the acquisition of the Pepsi formula was “clearly of unique value to a soda fountain company”,\textsuperscript{170} it also constituted a development and expansion in Loft’s business.

Whether an opportunity is suitable is a factual enquiry. Nevertheless, an opportunity is likely to be suitable if: (i) the opportunity is of a type that the company exploits;\textsuperscript{171} (ii) the opportunity is of a type that the company was established to pursue;\textsuperscript{172} (iii) the opportunity is one that the company has identified as of interest to it;\textsuperscript{173} or (iv) the opportunity comes within the company’s strategic plan for expansion.\textsuperscript{174} These situations are straightforward, as the company has identified the opportunity or type thereof as of interest.

5 CONCLUSION

To date, New Zealand corporate opportunity cases have involved what are relatively mainstream applications of (now) settled aspects of the doctrine. For this reason, the tensions in the New Zealand understanding of the doctrine do not appear to have caused insurmountable difficulties. But a source of concern is the emphasis given to the protection of confidential information. As is illustrated by the situation where a director learns of an opportunity through their own enquiries, there are situations where a New Zealand court may have difficulty in classifying an opportunity as a corporate opportunity. Alternatively, influenced by the association of corporate opportunities with confidential information, they may classify it as a non-corporate opportunity. This is despite the US and English recognition that in some circumstances the corporate opportunity doctrine responds to the use of the opportunity itself, rather than the way the director came to know of the opportunity.

Against this background, the structure proposed in this article provides both a principled and logical explanation for the (largely correct) results in New Zealand cases and the ability for New Zealand law to evolve along US and English lines.

\textsuperscript{168} ALL, above n 88, § 5.05(b)(2) (discussed in the text accompanying n 117).

\textsuperscript{169} \textit{Guth}, above n. p 514.


\textsuperscript{171} The situation in \textit{Cooley}, above n 128 and in \textit{Crown Dilmun}, above n 143.

\textsuperscript{172} \textit{Ibid}.

\textsuperscript{173} The situation in \textit{Canaero}, above n 1.

\textsuperscript{174} The situation in \textit{Canaero}, \textit{ibid} and \textit{Guth}, above n 87.
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Postscript

After this article was written, the UK Department of Trade and Industry published a second White Paper on Company Law Reform.\(^{175}\) This contains a draft Company Law Reform Bill.

One change from the draft Companies Bill accompanying the first White Paper\(^{176}\) is to enlarge the scope of Principle 6,\(^{177}\) from personal use of a company's property, information, or opportunity to conflicts of interest generally. The stated aim of this change is to reflect that the corporate opportunity doctrine is an aspect of the no-conflict rule.\(^{178}\) It is also considered that this "provides a basis for the judicial development of the principle."\(^{179}\) This is similar to the approach advanced in this article.\(^{180}\) The revised duty provides that a director "must avoid a situation in which you have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company."\(^{181}\) It is stated that "[t]his applies in particular to the exploitation of any property, information or opportunity."\(^{182}\)

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177 See text accompanying nn 124–126.
179 Ibid.
180 See text accompanying nn 26–28.
182 Ibid B6(2).