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THE RESIGNING DIRECTOR—A TALE OF TWO CASES

Foster Bryant Surveying Ltd. v. Bryant[1]
Viking Airtech Pte. Ltd. v. Foo Teow Keng[2]

PEARLIE **KOH***

I. INTRODUCTION

It is axiomatic that a corporate director stands in a fiduciary position vis-à-vis his company. This subjects the director to a number of rules, all aimed at extracting the director's "single-minded loyalty"[3] to his company. He is thus "not entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."[4] If he does, in breach of his duty, make or obtain a personal gain or benefit by reason of his position as a director or in circumstances where a conflict, or a real, sensible possibility of conflict, existed between his duty and his personal interest, he is liable to account for that gain to the company.[5] The application of the fiduciary principles that impose this liability to account has often been described as absolutist and uncompromising. This was famously demonstrated by the House of Lords' decision in *Regal (Hastings) v. Gulliver*[6] where Lord Russell affirmed that "the liability arises from the mere fact of a profit having, in the circumstances, been made."[7] Disloyalty is presumed and liability attaches regardless of whether the director might have acted in good faith, or that no harm had been done to the company. This strict rule is justified on account of the control that directors exercise over the company on a day-to-day basis.

It would probably be correct to say that the local courts have generally embraced these principles in relation to the question of breach. In *Hytech Builders Pte. Ltd. v. Tan Eng Leong*,[8] for example, a director who took the benefit of a contract, the knowledge of which he had come by in his capacity as a director, was held liable to

* LL.B. (NUS); LL.M. (Melbourne); Associate Professor of Law, Singapore Management University.

1 [2007] EWCA Civ 200; [2007] 2 BCLC 239 [*Foster*].

2 [2008] 1 Sing. L.R. 225 [*Viking*].

3 *Bristol & West Building Society v. Mothew* [1998] Ch. 1 at 18.

4 *Bray v. Ford* [1896] A.C. 44 at 51 (per Lord Herschell).

5 See the useful discussion by Deane J in the High Court of Australia decision of *Chan v. Zacharia* (1984) 53 A.L.R. 417 at 433.

6 [1942] 1 All E.R. 378.

7 *Ibid.*, at p. 386.

8 [1995] 2 Sing. L.R. 795.

account, even though the company itself could not have successfully tendered for the award of the contract. Thus, if the equitable rule does apply, it does so rigidly, and the court will make no investigation into the surrounding circumstances in any attempt to uncover possible excuses that might sway the court into relieving the director from the consequences of his acts.[9]

However, the position is perhaps, and indeed should be, different where it is not the question of *breach* of the fiduciary duty that is under consideration, but the determination of *scope* of the duty imposed, if any at all, that is at issue. In the recent Court of Appeal decision of *Townsing Henry George v. Jenton Overseas Investment Pte. Ltd. (in liquidation)*,[10] Chan Sek Keong C.J. alluded to this distinction when he prefaced his discussion on directors' duties[11] by quoting Frankfurter J., who had observed in *Securities and Exchange Commission v. Chenery Corp*[12] as follows:

> [T]o say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. … What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[13]

The question "what obligations does he owe as a fiduciary?" brings us to that stage of inquiry that should *precede* any consideration as to whether a breach of the duty has occurred. Whilst undeniable that all directors are fiduciaries, to question thus is, arguably, to recognise that there might be room for the *ambit* of the duties owed to differ, depending on the particular circumstances of the case. It should follow, therefore, that whilst it would be accurate to say that fiduciary rules are indeed inexorably strict and inflexible *when applied*, this can only be so if the case is one to which the rule *does apply*. And it is in considering the latter—whether the rule applies to the particular factual situation—that the surrounding circumstances could be of relevance and some amount of flexibility could be exhibited in the demarcation of the boundaries of the duty owed.

II. The Two Cases

In this regard, two recent decisions, one of the High Court of Singapore[14] and the other, the English Court of Appeal,[15] make for an interesting study in contrasts. Whilst the English decision appeared to indicate a certain preparedness to reconsider the ambit of a director's obligations by reference to the particular factual circumstances, the Singapore court has held true to the traditionally strict stance, imposing liability without embarking on an investigation of the circumstances attendant to the impugned acts. Let us begin with a consideration of the earlier English decision.

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[9] Although these factors may be relevant for the judicial exercise of discretion under Companies Act s. 391. See P. Koh, "An Issue of Absolution—Section 391 of the Companies Act" (2003) 15 Sing. Ac. L.J. 306.

[10] [2007] 2 Sing. L.R. 597.

[11] *Ibid*. at para. 53, 54.

[12] 318 US 80 (1943).

[13] *Ibid*. at 85–86.

[14] *Viking*, *supra* note 2

[15] *Foster*, *supra* note 1.

A. *Foster Bryant Surveying Ltd v. Bryant*

The plaintiff company, FBS, provided surveying and project management services. The work for FBS's clients was done by its two directors Foster and Bryant, who between them held all the shares in the company, with Foster holding a majority. Bryant's wife, also a chartered surveyor, was an employee of FBS. One of the clients cultivated by Bryant went into receivership, causing loss to the company. Foster blamed Bryant for these losses, and sent an inflammatory email to Bryant which signalled the start of the end for the pair's working relationship. Foster appeared to have completely lost confidence in Bryant's business ability and proceeded to precipitously block Bryant from operating the company's banking account. The account was subsequently unblocked after an emotional meeting between the two directors. Things however did not improve and Bryant, who had by then begun to entertain thoughts of resigning, was quickly pushed to resign shortly thereafter when Foster unilaterally terminated Mrs Bryant's employment and refused Bryant the opportunity to "break the news to his wife slowly."[16] In the words of Rix L.J., "Bryant's resignation had no ulterior purpose[17]… it was forced on him by… Foster's hostile and truculent manner and the sacking of Mrs Bryant."[18] The trial judge found as a fact that, from that point of resignation on, Foster "ceased to treat [Bryant] as a director in the manner in which he had before."[19]

When informed of Bryant's resignation, one of the company's major clients, ALS, was anxious that there should be continuity in the management of their ongoing projects, which service had hitherto been provided by both Foster and Bryant through FBS. ALS therefore proposed, to both Bryant and Foster, that Bryant continue to provide services to ALS in respect of certain projects while Foster and the plaintiff company provide services in respect of other projects. To this end, ALS commenced negotiations with Bryant, which took place during the period of notice, after he had formally resigned but before his resignation took effect. The result of these negotiations was that Bryant set up his own company shortly before his resignation took effect and began working for ALS immediately thereafter. Foster however was opposed to the proposal, and by his own bellicose actions (including attempts to extract substantial compensation from ALS) alienated ALS, resulting in no further work being placed with the company. Under these circumstances, the company sued Bryant for breach of fiduciary duty for his acts during the notice period, claiming that Bryant should have "refused the offer of future employment"[20] and that classic fiduciary doctrine would have required him to press ALS to maintain all its business with the company.

The Court of Appeal affirmed Judge Richard Seymour Q.C.'s decision that there had been no breach of fiduciary duty. Rix L.J. subjected the relevant authorities to a careful review and observed that "although general principle is not in doubt, *the*

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[16] *Ibid*. at para 22.

[17] His Honour was comparing Bryant with errant officers "castigated as 'faithless fiduciaries' " (at para. 57) in *Canadian Aero Services Ltd. v. O'Malley* (1974) 40 D.L.R. (3d.) 371, as well as the defendant director who had resigned with an ulterior motive in *Development Consultants Ltd. v. Cooley* [1972] 1 W.L.R. 443.

[18] *Ibid*., [79].

[19] *Ibid*., [42].

[20] *Foster*, supra note 1 at para. 90.

extent of a director's duty in particular circumstances may depend on the circumstances."[21] Accordingly, Rix L.J. concluded that Bryant's acts were "no different from (at worst) setting in train preparations for potential competition after his resignation had become fully effective" which, on the authorities, do not amount to acts of conflicting interests.[22]

B. *Viking Airtech Pte. Ltd. v. Foo Teow Keng*

In contrast, in *Viking Airtech Pte. Ltd. v. Foo Teow Keng*, the High Court of Singapore did not consider the circumstances surrounding a director's resignation but imposed liability to account on the basis that the impugned acts had occurred while the defendant was still a director.

The first defendant, Foo, was the general manager of and director in the plaintiff company, Viking Airtech (VA). Foo was initially employed by Viking Engineering (VE), the majority shareholder of VA. The general manager of VE was one Ong. When VE decided to hive off a part of its business, it caused VA to be incorporated. Foo took up 30% of the issued capital of VA, and was appointed to its board of directors. There were 3 other directors, including Ong who himself held a minority stake in VA. Foo was initially employed as the manager of VA, and was subsequently promoted to general manager, having overall charge of VA's operations. He remained in this position until his resignation in November 2003. The second defendant was a company incorporated by friends of Foo, shares in which were ultimately transferred to Foo and his wife after the former's resignation from VA.

In his position as general manager, Foo dealt with VA's customers, including two Indonesian shipyards, PT Pal and PT Dok. VA had entered into a contract (known as the Pelindo II contract) with PT Pal to supply the latter with certain equipment, to be shipped in November 2003. Although VA had already fabricated the equipment, this was not delivered to the customer who did not press for delivery either. It transpired that the customer had already been supplied with the same equipment by the second defendant for which the latter was paid by way of a letter of credit. Additionally, about a month or so prior to Foo's resignation, he had caused contracts with each of PT Pal and PT Dok to be allocated to the second defendant.

The plaintiff claimed against Foo, arguing that Foo had breached his directors' duties in diverting each of these contracts to the 2nd defendant. Judith Prakash J. agreed, holding that Foo had deliberately diverted the Pelindo II contract to the 2nd defendant, thereby depriving VA of the benefit of the contract. As for the other two contracts, Prakash J. held that these were ripening or maturing business opportunities for VA, and in passing these contracts to the 2nd defendant without consulting with his fellow directors, Foo was in breach of his duty to act in the best interests of VA.

On this account of the facts, few would contend too strenuously against the correctness of the finding of breach. Without more, Foo's various acts would certainly

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[21] *Ibid.* at para. 65 [emphasis added].

[22] See *Hunter Kane Ltd. v. Watkins* [2003] EWHC 186 (Ch), at para. 25; *Island Export Finance Ltd. v. Umunna* [1986] B.C.L.C. 460, 482; *Balston Ltd. v. Headline Filters Ltd.* [1990] F.S.R. 385, 412; *Framlington Group plc. v. Anderson* [1995] 1 B.C.L.C. 475, 497-498.

epitomize the very type of disloyal behaviour for which fiduciary duties exist. However, what made the case interesting was the *factual matrix* within which these acts occurred, a matrix the consideration of which might have cast a different complexion upon these acts, or at least give pause to an unquestioning finding of breach. Prakash J. had concluded that Foo had "carefully planned"[23] his departure from VA and the diversion of the contracts to Foo's new business run through the second defendant. There was little heed paid to the impetus behind these "plans," specifically, whether there were acts of exclusion that might provide some explanation, if not excuse, for Foo's behaviour. The only indication that there could have been more to this than meets the proverbial eye was Prakash J.'s reference to a minority action suit[24] brought by Foo against the other shareholders of VA, including Ong. A reading of Lai Kew Chai J.'s account of the facts in that action brings to light the *similarity* between this case, and *Foster Bryant*.

The working relationship between Foo and Ong began well enough. About 5 years after the incorporation of VA, a firm known as Jin Lian Marine Engineering & Trading was engaged by VA as its sub-contractor for the purposes of supplying and supervising workers from China for VA's operations. Foo eventually married the lady who headed Jin Lian. There was nothing untoward about the engagement of Jin Lian and Lai J. specifically found[25] that both VE and Ong were fully cognizant of the engagement which had resulted, until the unfolding of subsequent events, in a mutually beneficial relationship. Unfortunately, it appeared that Ong could not abide Foo's successful management of VA, which had been turning in good profits even as VE, which was being managed by Ong, was not. Disgruntled, Ong proceeded to "make his moves,"[26] putting in place a systematic plan to marginalise Foo by neutralising VA's dependence on Foo and gaining control over the senior management of VA. From 2002, Ong took steps to recruit and employ management staff in VA, who consequently, and naturally, ended up reporting to Ong, despite Foo being the general manager of VA. All this while, Foo continued to secure contracts for VA and was busy executing them. According to Lai J., he made the mistake of not being vigilant.[27]

The final straw came at the end of August 2003, when Ong moved against Jin Lian Marine & Engineering. Through VE, he took over Jin Lian's workers and terminated its subcontract with VA. On the evidence, Lai J. found that this made the position of Foo "untenable."[28] As Lai J. explained:

> There was no commercial reason why the subcontract could not continue… Clearly, [Ong] undermined [Foo's] position as the general manager of VA. [Foo] was not vigilant enough when he was systematically and progressively marginalised.[29]

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[23] *Viking*, *supra* note 2 at para. 20.
[24] *Foo Teow Keng v. Ong Choo Guan* [2005] SGHC 117 [*Foo Teow Keng*]
[25] *Ibid.* at para. 10.
[26] *Ibid.* at para. 14.
[27] *Ibid*.
[28] *Ibid*. at para.16.
[29] *Foo Teow Keng*, *supra* note 24 at para. 16.

III. Of Similarities and Differences

Thus, like Bryant in *Foster Bryant*, the protagonist Foo in *Viking Airtech* was also systematically side-lined. However, unlike in *Foster Bryant*, there was no attempt in *Viking Airtech* to consider the significance, if any, to the question of liability of such evidence which might suggest the possibility of exclusion.

In *Foster Bryant*, significant store had been placed by the trial judge on the finding that Bryant had been excluded from his role as director,[30] a finding that Rix L.J. confirmed as being amply supported by the evidence.[31] It should be noted that whilst the working environment for Bryant was unpleasant, the actual exclusion occurred only *after* Bryant intimated that he was resigning. From that point on, the trial judge found, on the evidence, that:

> There were no more management meetings of directors and no discussions between them about matters which would otherwise have been considered appropriate to be discussed between directors, such as the proposal to subcontract [ALS] work to [another firm] or the issue of whether a sum on account of dividend should be paid to shareholders…Mr Foster simply made his own decisions on behalf of the company on these questions.[32]

In *Viking Airtech*, although Prakash J. did allude to Ong's "moves," which, it should be noted, *preceded* Foo's resignation and to Foo's unhappiness[33] with Ong's actions, there was no further consideration of these matters. And whilst Lai J. found that Foo had in fact been "marginalised," suggesting a diminution of his managerial authority, it was not apparent if this marginalisation involved acts of the same exclusionary nature as the acts in *Foster Bryant*.[34]

A. In Plus Group *and a "Mouldable" Duty?*

The relevance of facts indicating a director's exclusion from his role as a director to the question of his liability had been earlier considered by the English Court of Appeal in *In Plus Group and Others v. Pyke*.[35] The case also involved a small company with only two shareholders who were also the company's only directors. The defendant director, Pyke, while still a director, had set up his own company and successfully courted a very important customer of the company whom he knew to be dissatisfied with the service provided by the company. The company was, clearly, particularly vulnerable in these circumstances, and the defendant, as a fiduciary, would have been required to protect the interests of the claimant. Yet the court unanimously exonerated Pyke from breach of fiduciary duty and liability to account.

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[30] *Foster*, *supra* note 1 at para. 3.

[31] *Ibid.* at para. 83.

[32] *Foster*, *supra* note 1, at para. 42.

[33] *Viking*, *supra* note 2 at para. 10.

[34] Factual parallels could reasonably be drawn between the two cases in that Ong obviously did not consult Foo in relation to the recruitment of staff to manage VA's projects. See also *Foo Teow Keng*, *supra* note 24 at para. 14-15.

[35] [2002] B.C.L.C. 201, and noted in P. Koh, "The Director's Fiduciary Obligations—A Fresh Look?" (2003) 62 Cambridge L.J. 42.

Pyke's transgression had occurred at a time when the relationship between he and his "partner" Plank had completely fallen apart. Pyke had been effectively excluded from management by Plank, who also denied him access to relevant financial information, stopped his monthly drawings against his loan account with the company, and locked him out of his office. The court found that, in these circumstances, Pyke was really only a director in name. Both Brooke and Jonathan Parker L.JJ. concluded that as Pyke had been effectively expelled from the company, he could not be said to be in breach of his fiduciary duty. Sedley L.J. was somewhat more specific. His Honour queried whether it could be confidently asserted that Pyke, under those exceptional circumstances, owed any fiduciary duty to the company, and thought that Pyke's duty had been "reduced to vanishing point by the acts (explicable or even justifiable as they may have been) of his sole fellow director."[36]

If the fiduciary rule had applied, it cannot be doubted that Pyke would have been in breach of his duty. His knowledge of the customer's dissatisfaction was acquired in his capacity as director. In utilising this knowledge for his own benefit, and at a time when the company was especially vulnerable, Pyke was clearly disloyal. However, the English Court of Appeal exonerated Pyke because, in the peculiar circumstances of the case, he was as good as retired. Pyke could not have been in breach of any duty as he had by then owed none.

The decision in *In Plus Group* suggests that it may no longer be blithely asserted, without more, that the extent of duties owed by every corporate director in different situations and circumstances is necessarily co-extensive. There have, from time to time, been judicial statements on the fiduciary obligation in general that hint at a certain flexibility of application. Frankfurter J.'s statement quoted earlier is one such example. Another is the comment expressed by Dickson J. of the Supreme Court of Canada in *Guerin v. The Queen*,[37] that "[it] is the *nature* of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty."[38] The point was made also by Lord Wilberforce in the Privy Council decision in *New Zealand Netherlands Society 'Oranje' Inc v. Kuys*,[39] where his Lordship said:

> The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between interest and duty, is one of strictness. … It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, *but the precise scope of it must be moulded according to the nature of the relationship*.[40]

Although Lord Wilberforce was referring to the possibility of differences between broad *categories* of fiduciary relationships (in the sense that a partnership differs from a trust which differs from a directorship or an agency), it could well be that the peculiar specifics of individual relationships *within* each category may also determine

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[36] [2002] 2 B.C.L.C. 201 at para. 90.
[37] (1984) 13 D.L.R. (4th) 321.
[38] *Ibid.* at 341 [emphasis added].
[39] [1973] 1 W.L.R. 1126.
[40] *Ibid*. at 1129 [emphasis added].

or mould the precise scope or ambit of the duty owed. If indeed this is the case, it would obligate a more sensitive consideration of the factual matrix within which the fiduciary operates. The focus of this analysis is, therefore, the nature of the fiduciary obligation in a specific relationship. Whilst the existence of a fiduciary duty is generally assumed in the case of actors in certain categories, the actual boundaries of the duty owed would be determined by the specific details of the particular relationship. Hence, whether a conflict situation arises at all depends on the exact scope of the duty owed. It is only after this has been initially established that the question of *breach* may be considered. As Professor Finn observed in his seminal work on fiduciary obligations, "[t]rite though the point is, it must be made. A fiduciary's liability for a profit stems *not* from a conflict between his interests and his beneficiary's *interests*, but from a conflict between his own interests and the *actual undertaking* he has made (his duty) to his beneficiary."[41]

In Plus Group extended this idea of a "mouldable" scope to the duty owed by a corporate director. This approach is of course highly fact-sensitive. It should be noted that although flexibility in application was intended to *circumscribe*, at least in the cases under present review, the boundaries of the fiduciary duty owed, the same flexibility also operates to allow for the imposition of an obligation of self-denial in situations where a straight-forward capacity-based approach would not. Thus, liability may be imposed even where the disloyal acts occurred after the determination of the particular relationship which gave rise to the fiduciary relationship.[42] As a commentator cogently observed:

> To test profits according to whether they were acquired 'by reason and only by reason of' the fiduciary position is to miss the mark of the enquiry. The test presupposes that there is a fiduciary obligation and asks whether it was violated by the behaviour at issue. But the existence and extent of the fiduciary obligation is itself co-extensive with the scope of the discretion that can be exercised. What is crucial is the ambit of the discretion not the capacity of the profiteer. Once the former is determined so that the conduct of the supposed fiduciary either falls within it or stands outside it, the latter becomes superfluous.[43]

Indeed, this "mouldability" could be said to be the quintessence of the interstitial nature of the fiduciary obligation, allowing, as it does, the fiduciary obligation to fill in, as appropriate, such gaps as there may be in a particular relationship.

B. *Erosion of the Strict Ethic?*

It should, however, be pointed out that adopting this approach should not translate to a dilution of the fiduciary ethic. It is not being advocated that, each time an issue of breach of directors' duties arises, a re-examination of every directorial relationship within a company be conducted. For the most part, all current directors should be subject to a policy that is clear, "unbending and inveterate,"[44] and that is that the

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[41] P.D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co., 1977) at 233 [emphasis added].

[42] Classic examples include the decisions in *Industrial Development Consultants Ltd. v. Cooley* [1972] 1 W.L.R. 443, and *Canadian Aero Services Ltd. v. O'Malley* (1974) 40 D.L.R. (3d.) 371.

[43] E.J. Weinrib, "The Fiduciary Obligation" (1975) 23 U.T.L.J. 1 at 9.

[44] *Per* Cardozo J. in *Meinhard v. Salmon* 249 N.Y. 458, 164 N.E. 545, 546 (1928) [*Meinhard*].

standard of behaviour and fiduciary responsibility a director is held to is "not honesty alone, but the punctilio of an honor the most sensitive."[45] Adoption of a standard that falls short of the absolute detracts from the core rationale of imposing the fiduciary obligation in the first place, that of exacting undivided loyalty, and can only breed ambiguity and uncertainty, resulting in guessing games as to the boundaries of the corporate fiduciary's freedom of action.[46] In any case, the standard is only severe if the director does not obtain the fully-informed consent of the company. If the standard is consistently harsh, there is little reason for directors not to be aware of it, and even less reason then for not ensuring that proper consent is obtained.

The position, arguably, should be different in cases involving *resigning* directors, especially where there is evidence of exclusionary acts. In *In Plus Group*, the impugned acts occurred in the context of an impending resignation whilst in *Bryant Foster*, the accusations of breach related to acts of the director undertaken after he had already resigned. In such cases, the argument in favour of a strict rule for the protection of the company is somewhat moderated by the need to be fair to the excluded director. As Rix L.J. pointed out, a director who is forced out of his own company would be in need of the sort of protection the law accords to someone who has to thereafter earn his living.[47] Although this should not mean that all resigning or retiring directors would have their obligations curtailed, it does mandate a closer look at the factual matrix. As Rix L.J. observed:

> [T]he jurisprudence has shown that, while the [fiduciary] principles remain unamended, their application in different circumstances has required care and sensitivity both to the facts and to other principles, such as that of personal freedom to compete, where that does not intrude on the misuse of the company's property…For reasons such as these, there has been some flexibility both in the reach and extent of the duties imposed and in the findings of liability or non-liability. The jurisprudence also demonstrates…that in the present context of retiring directors, where the critical line between a defendant being or not being a director becomes hard to police, the courts have adopted pragmatic solutions based on a commonsense and merits-based approach.[48]

IV. Of Conjecture and Suppositions

If we accept this view of the fiduciary duty that is imposed on corporate directors, the single most important question that must be answered in each case is whether the director had been excluded from his role as director. Exclusion is of course a question of fact. A consideration of the factual differences between each of the cases under present discussion is therefore useful. The acts of exclusion carried out by Plank in *In Plus Group* were, as Rix L.J. pointed out, "more positive, more severe and longer standing,"[49] and these acts (hence the exclusion) preceded the competitive acts of Pyke. In *Foster Bryant*, Bryant's impugned acts of conflict, comprised in his

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[45] *Ibid.*
[46] P. Koh, "Once a Director, Always a Fiduciary?" (2003) 62 Cambridge L.J. 403 at 414.
[47] *Foster*, *supra* note 1 at para. 48.
[48] *Ibid.* at 76.
[49] *Ibid.* at 42.

negotiations with ALS, started with his first communication on the matter with ALS shortly before he handed in his written resignation, and the trial court had found that he was only excluded from discharging his role as a director from the date of that written resignation. It could be said that Pyke, therefore, had more reason to be disloyal than Bryant. Rix L.J. was therefore prepared to distinguish *In Plus Group* as being "on its own facts."[50] This notwithstanding, Rix L.J. opined as follows:

> [T]he position within the company after Mr Bryant's resignation makes it very arguable that, so long as he remained honest and neither exploited nor took any property of the company, *his duties extended no further than that*. To demand more while he is excluded from his role as director appears to me to be unrealistic and inequitable.[51]

Clearly, Rix L.J. was of the view that the duty owed by Bryant to the company as from the date of resignation was no longer the full inexorable duty of self denial applicable to directors generally. However, although the court was prepared to redefine the boundaries of the duty owed by reference of the particular "individual"[52] circumstances of each case, the extent of the redefinition was commensurate with the extent of the exclusion. Hence, if Bryant's acts had gone beyond mere negotiations with the customer into the realm of solicitation in the manner of Pyke, it is unlikely that he would have been able to escape liability for breach.

What then of Foo? Neither *In Plus Group* nor *Foster Bryant* was cited to the High Court. The court therefore had no opportunity to consider the effect of those factors that led Lai J. to grant Foo relief for oppression under section 216. Does this mean that Singapore law insists on a strict capacity-based approach to directors' duties, so that as long as a director remains a director at law, he is subject to the full brunt of the fiduciary proscription? It would be premature to say so conclusively, but, with respect, hopefully *not*. And, hopefully, there will also be opportunity for clarification soon enough.

In the meantime, let us engage in a bit of conjecture. It is apparent that Goh's acts of marginalisation began, unlike the acts of Foster, *before* Foo's impugned acts. However, as the point was not considered, it is difficult to speculate if the "progressive marginalisation" of Foo in the company was such as to reduce his fiduciary duty to a "vanishing point." On such facts as are reported, although it does not appear that Goh had exhibited the same level of antagonism as Plank had in *In Plus Group*, Goh's acts must nevertheless have been no less distressing for Foo. This seems a logical extrapolation from Lai J.'s finding of oppression. However, whilst the English Court of Appeal found that Plank had, through a series of acts, effectively denied Pyke of any role in the management of the plaintiff company, the same cannot be said of Foo, for he appeared to have continued to act on behalf of VA. Further, Pyke did not divert an existing contract with the plaintiff company, which Foo did. Accordingly, in connection with the diversion of the Pelindo II, Prakash J.'s finding of breach is unimpeachable.

What then of the exploitation of the business opportunities comprised in the contracts that could have gone to VA? In a sense, the transfer of custom in the cases of

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[50] *Ibid.* at 81.

[51] *Foster*, *supra* note 1 at para. 93 [emphasis added].

[52] [2006] EWHC 1232 (QB) at para. 145.

In Plus Group and *Foster Bryant* involved the loss of business opportunities on the part of the respective claimant companies. Certainly, when compared with Foster's acts in *Foster Bryant*, Goh's acts would appear further along the exclusionary line. As such, it might be plausibly argued that if Foo had merely begun negotiations with VA's Indonesian clients with a view to securing their custom, this would not be in breach of his duty to VA. Whether Foo's acts vis-à-vis the business opportunities lost to VA expose him to liability for breach of duty would thus really depend on how the court demarcates the ambit of the duty he owed in those circumstances.

V. Conclusion

There is little doubt that the fiduciary duties directors are subject to are strictly imposed, and the reason for this is clear: it is difficult not only to demand but also to monitor loyalty. A rigid adherence to the classic rule will, in theory, free the company from speculating as to the director's loyalty and fair-dealing, and consequentially reduce monitoring costs. This approach however, ignores the director's legitimate interests as an *individual* because the application of and corresponding liability under the absolute rule depends neither on an examination of the circumstances surrounding the alleged breach nor on the equities of the case.[53] Directors, albeit required to uphold Cardozo C.J.'s "punctilio of an honor the most sensitive,"[54] are nevertheless people who need to make a living. Certainly there will be directors of Mr Cooley's ilk who will orchestrate a resignation in the hope of avoiding liability for breach of duties, but there will also equally be as many others who resign because remaining with the company was neither viable nor attractive. To subject these directors to the full force of the fiduciary obligation at a time when their role in the company has diminished significantly can result in inequity, an inequity that may be avoided by the adoption of a more nuanced application of the obligation in such resignation cases.

[53] P. Koh, *supra* note 46 at 410.

[54] *Meinhard*, *supra* note 44 at 546.