



# Divided Loyalties:

Directors, conflicts of interest, and potential defences

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# Overview

1. Introduction
2. The orthodox position: ss. 175/177
3. Interesting angles of defence
4. Key takeaways
5. Questions?



# 1. Introduction

- Traditional position and orthodoxy
- Post-codification world — unexplored opportunities?
- Our own experience: *A v B* [2023] EWCA Civ ???



## 2. The Orthodox Position

- The special position of directors in commercial law
- The rules pertaining to fiduciaries
  - *Keech v Sandford*
  - *Aberdeen Railway Co v Blaikie Bros*
- The strict application of the rules
  - *Bhullar v Bhullar*
  - *Industrial Developments v Cooley*
  - *Re Allied Business*



## 2. The Orthodox Position

- Codification of the rules
  - s. 175 CA 2006
  - s. 177 CA 2006
- Relaxation of the rules along with codification?



## 2. The Orthodox Position

### 175 **Duty to avoid conflicts of interest**

- (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
- (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
- (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
- (4) This duty is not infringed—
  - (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
  - (b) if the matter has been authorised by the directors.
- (5) Authorisation may be given by the directors—
  - (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or
  - (b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
- (6) The authorisation is effective only if—
  - (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
  - (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.
- (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

## 2. The Orthodox Position

### 177 Duty to declare interest in proposed transaction or arrangement

- (1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
- (2) The declaration may (but need not) be made—
  - (a) at a meeting of the directors, or
  - (b) by notice to the directors in accordance with—
    - (i) section 184 (notice in writing), or
    - (ii) section 185 (general notice).
- (3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.
- (4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.
- (5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.

For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

- (6) A director need not declare an interest—
  - (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
  - (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
  - (c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered—
    - (i) by a meeting of the directors, or
    - (ii) by a committee of the directors appointed for the purpose under the company's constitution.

# 3. Potential Defences

- Assume no recourse to *Duomatic* type defences
- Our case: the potential for new law in the pipeline
- s. 1157 CA 2006
- s. 175(4) and s. 177(6) CA 2006





# 3. Potential Defences

## 1157 Power of court to grant relief in certain cases

(1) If in proceedings for negligence, default, breach of duty or breach of trust against—

(a) an officer of a company, or

(b) a person employed by a company as auditor (whether he is or is not an officer of the company),

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.

### 3. Potential Defences: Section 1157

- The statute itself: underused?
- Availability
- Standard of review?
- Summary judgment?
- Analogy with section 61 of the Trustee Act 1925

### 3. Potential Defences: Reasonably likely to give rise to a conflict?

- What does this mean?
- Relationship to pre-codification principles
- Paucity of authority
- Our case
- Divergent approach in other jurisdictions
  - *Peso Silver Mines v Cropper*

## 4. Key Takeaways

- While directors' duties appear strict, there are still significant areas of uncertainty in the law, particularly post-CA 2006.
- In particular, s. 1157 CA 2006 is an untapped well for relief
- Possible flexibility with informal companies
- *Caveat emptor*: no sign of regression from substantive orthodoxy.

