SELF-DEALING AND NO-PROFIT RULES: COMPANIES ACT 2016[1]

Past to Present

The codification of the various facets of the core obligation of utmost loyalty with respect to directors in the Companies Act 2016 (Act 777), have given rise to controversies in interpretation and application in the context of the duty of disclosure in conflict of interest cases – disclosure at formal board and general meetings is mandatory because of the word "shall" in the relevant provisions. The literal approach is problematic and inconsistent with the legislative scheme of the Act. Research into legislative history and case law from other jurisdictions do not support the literal approach. Equity operates functionally and its emphasis is on substance and not form.

LOH Siew Cheang
LLB (University of Malaya);
Managing Partner, Messrs Chooi & Company + Cheang & Ariff, Advocates and Solicitors.

I. Introduction

1 The issues concerning the core duty of loyalty of a director are as contentious today as before. The core duty is multifaceted and one of the facets is that a director must not put himself in, or must avoid, a situation in which his interest, direct or indirect, may conflict with the company's interest.[2] The no-conflict principle embodies two underlying themes often described as the "self-dealing" rule and the "no-profit" rule.[3] The constituent elements of the two rules are different[4] but the principles

1 First published in the *Journal of the Malaysian Judiciary*: July [2019] JMJ 164. Reproduced with permission.

2 Generally, see *Bristol and West Building Society v Mothew* [1998] Ch 1 (quoted with approval in *The Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed* [2008] 3 AMR 97; [2008] 5 MLJ 469). See also *Sinclair Investments Ltd (UK) v Versailles Trade Finance Ltd* [2012] Ch 453 at [34]–[36], *per* Lord Neuberger MR. Overruled on appeal but on a different point, see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250.

3 *Chan v Zacharia* (1984) 53 ALR 417.

4 *Bell v Lever Bros Ltd* [1932] AC 161 at 194, *per* Lord Blanesburgh.

often overlap in application and discussing the two rules together will assist better understanding of the no-conflict principle.

2 In the context of the Companies Act 2016[5] ("CA 2016"), the self-dealing rule (s 221) may be described as the rule against "transactional conflicts"[6] and the "no-profit" rule (s 218) as the rule against "situational conflicts".[7] This article traces the legislative development of the two rules in Malaysia, the judicial approach to the statutory provisions, the differences in application of principles between recent and earlier authorities, their relationship with the general statement of duty of directors in s 213 of the CA 2016 and the remedies that are available.

II. The common law

3 The self-dealing and no-profit rules developed out of the wider no-conflict principle in equity.[8] The constitution of a company may relax the strictness of the rules subject to the director complying with certain requirements, which usually include disclosure of his conflicting interest and not to vote on the subject matter. Compliance with the requirements enables the disinterested directors or the general meeting, as the case may be, to make an antecedent informed decision whether to give their consent to the subject matter or not. Where antecedent consent is given, it does not excuse the director from acting in the best interest of the company and for proper purpose.[9] Alternatively, the company, upon discovery of the breach of the requirements, may elect to forgive the errant director by affirming or ratifying the transactions.

4 Early case law did not regard the nature and the extent of the conflicting interest as being relevant to the application of the principle.[10] As equity is flexible, case law in the later part of the 20th century excluded theoretical and rhetorical conflicts.[11] Currently, the no-conflict principle

5 Act 777.
6 Companies Act 2016 (Act 777) s 221 (governing contracts and proposed contracts in which directors are interested).
7 Companies Act 2016 (Act 777) s 218 (governing misuse of company's property, information, opportunities and carrying on a competing business on the part of directors).
8 *FHR European Ventures LLP v Mankarious* [2014] 4 All ER 79 at [5].
9 *Magnifine Sdn Bhd v Yap Mun Him* [2005] 6 CLJ 413.
10 *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488 at 504, *per* Swinfen Eady LJ. This case concerned a director who held shares as trustee in the counterparty.
11 See the judgment of UpJohn LJ in *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637–638.

applies to situations where a real sensible possibility of conflict exists,[12] or the facts show a reasonable likelihood of conflict.[13]

5 The self-dealing rule is to prevent a director from being swayed by considerations of personal interest,[14] which may arise from a director being a member or creditor of the counterparty.[15] In such cases, the director has a duty and interest conflict. If he is also a director of the counterparty, he also has a duty-to-duty conflict.[16] In group companies, multiple directorships are common and the breach of the duty-to-duty conflict usually arises when the director advances the interest of one principal to the detriment of another principal in disregard of the separate legal entity principle.[17] In cases where the interest of a company is inextricably tied to the continued well-being of the group of companies, the directors may consider the interest of the group as a whole.[18]

6 The no-profit rule is to preclude the director from misusing or abusing his office to gain a personal advantage.[19] If he derives a gain by reason or in virtue of his fiduciary office or otherwise within the scope of that office,[20] he breaches his core obligation of loyalty. Differences in judicial opinion exist with respect to the extent equitable principles should be moulded and applied flexibly in particular to factual settings to test whether there had been a misuse or an abuse of office for personal advantage. The approach in England focuses on the fiduciary-based relationship to find liability, and in some cases, a merit-based common-

12 *Queensland Mines Ltd v Hudson* (1978) 3 ACLR 176. See also *Boardman v Phipps* [1967] 2 AC 46.
13 *Cowan de Groot Properties Ltd v Eagle Trust plc* [1991] BCLC 1045.
14 *Chan v Zacharia* (1984) 53 ALR 417 at 433, *per* Deane J.
15 Companies Act 2016 (Act 777) s 221(2).
16 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19.
17 *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd* [2012] 3 AMR 297; [2012] 3 MLJ 616; *Walker v Wimborne* (1976) 3 ACLR 529 at 532; *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74.
18 *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 11 ACSR 642.
19 *Chan v Zakaria* (1984) 53 ALR 417 at 433, *per* Deane J. See also *Don King Productions Inc v Warren* [2000] Ch 291. See also *Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] 62 ACSR 427 at [291], *per* Jacobson J.
20 See *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) at p 171, para 7-041. See the discussion by the Federal Court on the no-profit rule in *Gurbachan Singh s/o Bagawan Singh v Vellasamy s/o Pennusamy* [2015] 2 AMR 1; [2015] 1 MLJ 773.

sense approach is adopted.[21] Other jurisdictions generally prefer a merit-based approach that focuses on the factual sensitivities of a case.[22]

7 The self-dealing and no-profit rules have found their way into the CA 2016 on a piecemeal basis. Sections 218 and 221 of the CA 2016, like their ancestors, create an additional duty of disclosure on the part of interested directors in contracts or proposed contracts with the company and the use of their office to make personal gains. The breach of the additional duty is punishable by law.

III. Legislative developments

A. Self-dealing

8 The statutes that preceded Merdeka Day and the formation of Malaysia ("the Repealed Statutes")[23] did not prohibit a director from being directly or indirectly interested in a contract or proposed contract with the company. This was probably because it was recognised that the articles of association commonly allow directors to be interested provided the directors declare their interest at a board meeting.[24] It was also recognised that the common law does not provide for sanctions against directors for failure to disclose their interest. To inspire disclosure or deter non-disclosure, the Legislature introduced penal sanctions against non-disclosure. Section 151 of the Straits Settlement Companies Ordinance 1940,[25] which was taken from s 149 of the UK Companies Act 1929,[26] first introduced criminal penal sanction for non-disclosure in respect of self-dealing.

9 In 1963, the Malaysian government established a committee to advise on the form and content of a new statute to replace the existing laws.[27] The committee was assisted by J C Finemore, draftsman of the

21 *Foster Bryant Surveying Ltd v Bryant* [2007] BCC 804; *In Plus Group Ltd v Pyke* [2002] 2 BCLC 201.

22 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; *Poon Ka Man Jason v Cheng Wai Tao* [2017] 1 HKC 463.

23 The Straits Settlement Companies Ordinance 1940 (Ordinance No 49 of 1940); the Malayan Union Companies Ordinance 1946 (Ordinance No 13 of 1946); the Sabah Companies Ordinance (Cap 26); and the Sarawak Companies Ordinance (Cap 65).

24 See model Art 81, Fourth Schedule (Table A) to the Companies Act 2016 (Act 777).

25 Ordinance No 49 of 1940.

26 c 23. Later, s 199 of the UK Companies Act 1948 (c 38), and later, s 317 of the UK Companies Act 1985 (c 6). Now see s 183 of the UK Companies Act 2006 (c 46).

27 The committee comprised the then Secretary for Commerce and Industry, representatives of the Bar Council, the Society of Accountants and the Society of Chartered Secretaries.

Australian Uniform Companies Act, and had the benefit of the reports of the Cohen Committee[28] and the Jenkins Committee,[29] including the draft code prepared for Ghana by Prof Gower.[30] The Companies Bill was presented to Parliament on 9 August 1965 and the Companies Act 1965[31] ("CA 1965") came into force on 15 April 1966.

10 Section 131 of the CA 1965 reaffirmed the requirement of disclosure by interested directors in contracts or proposed contracts at a board meeting.[32] It was taken from s 123 of the New South Wales ("NSW") Companies Act 1961. The disclosure rules were made more elaborate and provided for a stringent criminal sanction – imprisonment for one year or a fine of RM2,000.[33]

11 Section 131 of the CA 1965 was not intended to save the company from a bad bargain but to uphold good internal management and promote informed corporate dealings.[34] The imposition of a penalty against defaulting directors also did not alter the ensuing consequences under the common law – the contract is voidable and the company may elect to avoid or affirm the contract after having acquired knowledge of the breach.[35] If the company elects to affirm the contract, the election is an affirmation of the contract in its entirety under the common law.[36] Subsequently, s 131(7B) was introduced, adopting the civil consequence at common law that the contract is only voidable. Following the repeal of the CA 1965, the disclosure provision is now housed in s 221 of the CA 2016.

28 *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945) (Chairman: Cohen J).
29 *Report of the Company Law Committee* (Cmnd 1749, 1962) (Chairman: Lord Jenkins).
30 See the Explanatory Statement to the Companies Bill 1965.
31 Act 79.
32 See s 123 of the Australian Uniform Companies Act and s 199 of the UK Companies Act 1948 (c 38).
33 The penalty was subsequently increased to imprisonment for a term not exceeding seven years or a fine of RM150,000 or both by the Companies Amendment Act (A1229/2007). Currently, under s 221(12) of the Companies Act 2016 (Act 777), the imprisonment term is not exceeding five years or a fine not exceeding RM3m or both.
34 *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 at 442, *per* Samuels JA.
35 *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549. See also *Guinness plc v Saunders* [1990] 2 WLR 324 at 338–339, *per* Lord Goff; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1991] BCLC 1045 at 1113, *per* Knox J; and *Roden v International Gas Applications* (1995) 18 ACSR 454 at 457, *per* McLelland CJ in Eq.
36 *Peyman v Lanjani* [1985] Ch 457.

B. No-profit rule

12 The no-profit rule was introduced in the CA 1965 and the first version of s 132 was taken from s 124 of the NSW Companies Act 1961 save that it had an extra provision in s 132(4) dealing with improper gains obtained from dealings with shares or debentures or options of the company. In August 2007, s 132(2) of the CA 1965 was amended by expressly setting out five sets of circumstances pursuant to which the gains were classified as improper gains. Significantly, s 132(3)(a) of the CA 1965 provided for a private cause of action against the defaulter for profit made by the defaulter or damages suffered by the company. In this context, the preservation of existing laws under s 132(5) in the CA 1965 appeared to be duplicitous.[37]

13 The current no-profit rule is found in s 218 of the CA 2016. The statutory private cause of action provision in s 132(3)(a) was deleted,[38] as well as the provision relating to the preservation of existing laws in s 132(5) contained in the repealed CA 1965. Further, s 218 is not strung together with the general statement of directors' duties and the duty of care and skill,[39] which are now housed in s 213 of the CA 2016. Section 218, like ss 221 and 213, is intended only to impose a criminal sanction against a defaulting director.

C. Statutory differences between the two rules

14 Self-dealing under s 221 may be authorised in advance by non-interested directors provided there is disclosure of the extent and nature of the conflicting interest. In the absence of disclosure, the company may elect to avoid or affirm the contract upon discovery of the breach under s 221(10). The discretionary powers on the part of disinterested directors to give antecedent consent and to affirm the contract is a departure from the common law where only the company in general meeting may do so. Nonetheless, s 221 must be read down for there are contracts or proposed contracts which require the approval of shareholders in general meeting. In such cases, full disclosure must be made to the company in general meeting.[40]

---

37 See s 3 of the Civil Law Act 1956 (Act 67).

38 The deletion endorsed the decision in *Castlereagh Motels Ltd v Davies Roe* (1966) 67 SR (NSW) 279. See para 42 below.

39 The duty of care and skill is not a fiduciary duty. See *Bristol and West Building Society v Mothew* [1998] Ch 1; *Henderson v Merret Syndicates Ltd* [1994] 3 All ER 506; and *Extrasure Travel Insurances v Scattergood* [2003] 1 BCLC 598 at 618.

40 There are transactions under the Companies Act 2016 (Act 777) which may be carried out only with the approval of the general meeting. For example, see s 223 (substantial transactions); s 224 (loans to directors); s 227 (payment for loss of

(cont'd on the next page)

15 Under the no-profit rule in s 218, only the company in general meeting may give its consent antecedently or subsequently by ratification. Unlike s 221, s 218 does not prescribe the manner in which disclosure may be made to the general meeting. In this respect, the general principles governing the disclosure of information for the purpose of enabling shareholders in general meeting to make an informed decision apply.[41]

16 Section 218 is circumstance specific with respect to the nature of the conflicting interest. Out of the five circumstances, three circumstances relate directly to unauthorised use of corporate property, the other relates to misuse of office and the last circumstance is directed at carrying on a competing business with the company. Under the CA 2016, certain transactions falling within the no-profit rule are codified in specific terms. These include the prohibition of tax-free payments,[42] payments for loss of office[43] and approval of fees to directors.[44]

IV. Self-dealing

17 Section 221 provides for a procedure for the disclosure of the direct or indirect interest of directors in contracts or proposed contracts with the company at a board meeting. A director who is not aware of his interest at the time of the contract or at the proposal stage must make the relevant disclosure as soon as practicable after the relevant facts have come to his knowledge. The statutory purpose is to enable the disinterested directors who were unaware of the interest to decide on behalf of the company whether to avoid the contract already entered into under s 221(10), or to decide whether to enter into the contract or not at the proposal stage. The secretary is required to record the declaration of interest in the minutes of the board meeting.[45]

18 Usually, the nature of the conflicting interest of a director relates to his status as a member, creditor or director of the counterparty to the contract or proposed contract. Section 221(2) is declaratory of

office); and s 228 (non-cash asset transactions of a specified value). In these cases, disclosure to and the approval of the general meeting are required. See also the Main Market Listing Requirements in respect of listed companies.

41 Generally, see *Darvall v North Sydney Brick and Tile Co Ltd* (1988) 14 ACLR 717; *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] BCC 145 at [72]; and *Sharp v Blank* [2015] EWHC 3220 (Ch) at [19].

42 Companies Act 2016 (Act 777) s 226.

43 Companies Act 2016 (Act 777) s 227.

44 Companies Act 2016 (Act 777) s 228. See *Wong See Yaw v Bright Packaging Industry Bhd* [2016] 1 AMCR 766.

45 Companies Act 2016 (Act 777) s 218(8). Previously, s 131(7) of the Companies Act 1965 (Act 125).

the common law principle which excludes theoretical conflicts by providing "materiality" as the determinant to evaluate whether that interest is capable of giving rise to a real sensible possibility of conflict. Concordantly, if the nature of the interest of a director under s 221(3)(a) is that of a guarantor to a loan given to the company, it is not treated as a material interest. Where the interest arises by virtue of the common directorship of a person in related companies, s 221(3)(b) deems that that nature of interest is not material by reason only of the common directorship.

19 The underlying statutory purpose for inserting the words "by reason only" in ss 221(3)(a) and 221(3)(b) is readily found. In a principal and surety relationship, the conflict arises when the surety director pays off the loan in default and becomes entitled in law to enforce the subrogated rights against the company, the principal debtor.[46] This legal incident is a matter which the company as principal debtor must be taken to have impliedly consented to at the time of the loan. Similarly, in cases of common directorship within a group of companies, it is inferred that the relevant companies have agreed to the common directorship.[47] To constitute a conflict of interest in material terms, there must be something more.

20 The opening words "[s]ubject to this section" in s 131(1) of the CA 1965 (now s 221(1)) have been recently interpreted to mean that ss 131(2) and 131(3) (now ss 221(2) and 221(3) respectively) are exceptions to the no-conflict rule in *Golden Cash Harvest Sdn Bhd v Elite Honour Sdn Bhd*[48] ("*Golden Cash Harvest*") and *Tan Kang Hai v Slimming Sanctuary Sdn Bhd*[49] ("*Tan Kang Hai*"). A contrary view, with respect, is that ss 221(2) and 221(3) are not exceptions as such but are statutory endorsements of the no-conflict test that require the existence of a real sensible possibility of conflict. In contrast, during the 19th century and the earlier part of the 20th century, it did not matter whether the fiduciary had a real or substantial interest in a contract and the validity or invalidity of the contract "cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable of the interest of the *cestui que trust*, upon which subject no inquiry is permitted".[50] A nominal

46 Contracts Act 1950 (Act 136) ss 93 and 94.
47 See *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18–19.
48 SBW-22NCvC 28/7-2014 (31 December 2016) (unreported).
49 [2016] MLJU 973.
50 *Transvaal Lands Co Ltd v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch 488 at 503, *per* Swifen Eady LJ.

interest would suffice.[51] The inapplicability of the no-conflict rule to the two situations envisaged in s 221(3) is merely an expansion of the materiality test in s 221(2) of the CA 2016.

21 The materiality test in s 221(2) is the reasonable man test in equity. It requires disclosure of the nature and extent of the interest.[52] The amount of details required to be disclosed cannot be reduced into a formula and each case must depend on its facts.[53] It is also said that the sufficiency of disclosure must be evaluated against the sophistication or intelligence of the persons to whom disclosure is required to be made.[54] In straightforward cases, a disclosure of a director's interest as a member and the size of the direct or indirect shareholding satisfies the extent and nature principle. Where the nature of the interest is that of a creditor, the size of the debt and the benefits that might accrue to the interested director are relevant determinants.

22 There are two broad categories of cases in which issues may arise in the absence of disclosure at a board meeting. The first category of cases concerns situations where the disinterested directors are informally aware of the extent and the nature of the conflicting interest of their fellow directors but there is no disclosure at a board meeting and the contract is entered into. In this category of cases, the issue is whether the company may subsequently repudiate the contract under s 221(10) on account of non-disclosure at a board meeting.

23 The second category of cases concerns situations where there is no disclosure and the disinterested directors are not informally aware of the conflicting interest, or only have vague notions of the conflicting interest. Subsequently, the disinterested directors become aware of the breach of the disclosure duty. The first issue that may arise relates generally to the circumstances under which the company may repudiate the contract. The second issue is whether affirmation of the contract has any consequence on the initial breach of duty. The third issue is whether affirmation precludes the company from separately claiming for breach of the codified duties in s 213 of the CA 2016 ("the General Duty").

---

51 *Todd v Robinson* (1884) 14 QBD 739. Cited with approval in *Transvaal Lands Co Ltd v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch 488.

52 *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131. Note that in this case the concealment of the interest was deliberate and dishonest.

53 *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14, *per* Lord Radcliffe. This case dealt with the no-profit rule where the appellant had used his position in the company and made large profits at the expense of the company by obtaining shares at a fixed discount of 80% and then selling them to his own advantage at much higher prices. See also *Maguire & Tansey v Makaronis* (1997) 188 CLR 449 at [466].

54 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209 at [107].

A. Purposive or literal approach to s 221

(1) Recent versus *earlier decisions*

24 The common law does not prescribe rules with respect to how the interest may be disclosed to the beneficiary, whether at a formal board meeting or a general meeting. Also, the manner in which full awareness is acquired by the beneficiary is irrelevant. Equity operates functionally and its emphasis is on substance and not form.[55] In *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd*[56] ("*Tneu Beh*") and *Tan Bok Seong @ Tan Leong Tian v Sin Bee Seng & Co (Port Weld) Sdn Bhd*[57] ("*Tan Bok Seong @ Tan Leong Tian*"), the High Court adopted the approach that if all the directors are aware of the particulars of the nature of the interest, disclosure at a formal board meeting is not required. However, recent High Court decisions have adopted a different approach. It is said that by reason of the word "shall" in the section, disclosure of interest at a formal board meeting is mandatory. In this regard, it does not matter if the other members of the board of directors are informally aware of the interest and have given assent to the transaction.

25 In *Golden Cash Harvest*, there was no disclosure of interest at a board meeting whether before or after the contract was entered into. Accordingly, by reason of the word "shall", the duty to disclose could not be waived even if the disinterested directors were aware of the impugned contract.[58] Extending this conclusion to cases where there is a breach of s 218, the duty to disclose at a formal general meeting also cannot be waived even if all the directors are shareholders and have knowledge outside the general meeting.

26 *Golden Cash Harvest* followed an earlier decision in *Tan Kang Hai*. In that case, the plaintiff director claimed unpaid commission under an agreement made between the plaintiff and two other directors.[59] The agreement was illegal and the parties were *in pari delicto*.[60] Nonetheless, and in *obiter*, it was held that "even if all directors … know about the contract", the need for disclosure at a formal board meeting is not

55 A manifestation of this is the principle of unanimous consent. See *Re Duomatic Ltd* [1969] 2 Ch 365; *EIC Services Ltd v Phipps* [2004] 2 BCLC 589; and *Jarret v Perpetual Trustee Co Ltd* (2008) 64 ACSR 552.

56 [1995] 1 CLJ 741.

57 [1995] 4 CLJ 795.

58 *Golden Cash Harvest Sdn Bhd v Elite Honour Sdn Bhd* SBW-22NCvC 28/7-2014 (31 December 2016) (unreported) at [75].

59 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [40].

60 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [53].

exempted.[61] In *Golden Cash Harvest,* the case of *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd*[62] ("*Beh Chun Chuan*") was also relied upon in support of the decision. In *Beh Chun Chuan*, the context of the issue was different. There, the articles provided for the automatic vacation of the office of director if there was failure to disclose interest in contracts with the company and the complaint was that the removal of the affected directors from office was unlawful or oppressive. Kang J (as he then was) rightly rejected the argument[63] and noted that there was no evidence of knowledge outside the boardroom.

27 The strict approach has its attraction in simplicity. However, it raises other issues below its surface. The equitable rules against self-dealing and the making of profits are proscriptive in nature – "equity is proscriptive, not prescriptive … It tells the fiduciary what he must not do. It does not tell him what he ought to do".[64] Equity guarded against the transgression of this proscriptive duty fervently and fashioned remedies to inspire directors to act loyally by obtaining the informed consent of the beneficiary.

28 Section 131 of the CA 1965 is "in addition to and not in derogation of any rule of law". The words "in addition to" refer to the imposition of penalties under s 131(8) for breach of the proscriptive duty in equity[65] and which typifies a proscriptive rule. In effect, the additional duty under the statute is to obtain the informed consent of the beneficiary to release the director (if the beneficiary thinks fit) from the proscriptive duty, or from what the director must not do in order to uphold his core obligation of loyalty.[66] Otherwise, the breach of the additional duty is punishable by law. The words "not in derogation of any rule of law" preserve all rules

61 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [42].

62 [1999] 3 MLJ 262; [1999] 3 AMR 3352; [1999] 7 CLJ 1.

63 The automatic vacation of office clause is derived from the Companies Clauses Consolidation Act 1845. See the judgment of Lord Wilberforce in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 589.

64 *Attorney-General v Blake* [1998] Ch 439 at 455, *per* Lord Woolf MR citing *Breen v Williams* (1996) 138 ALR 259. See also *Pilmer v Duke Group* (2001) 38 ACSR 122 at [74] and *Dresna Pty Ltd v Linknarf Management Services Pty Ltd* (2006) 237 ALR 687 at [132].

65 See *Castlereagh Motels Ltd v Davies-Roe* (1996) 67 SR (NSW) 279 discussed at paras 42–43 below.

66 In *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91, it was held that although a fiduciary had no separate and independent duty to make disclosure of his misconduct, he could not discharge his duty of loyalty if he did not make disclosure. Applied in *Sundai (M) Sdn Bhd v Masato Saito* [2013] 9 MLJ 729.

of law and this includes the doctrine of election[67] and equitable defences such as acquiescence, laches, estoppel or delay which will bar a plaintiff's right to rescission,[68] or to an account of profit on the basis that a person with knowledge of a breach, or who is aware of his rights, cannot stand by and permit the defendant to make profits and then claim entitlement to those profits.[69]

29 A beneficiary may waive the protection afforded to it.[70] If the statutory rules in s 221 cannot be waived by reason of the word "shall", it is inconsistent with the common law and the statutory right of the company under s 221(10) to elect either to repudiate or affirm the contract upon the discovery of the breach. With respect, it does require more convincing that the word "shall" should be construed literally.

30 The emphasis given to the word "shall", before assent may be found, inevitably has the effect of narrowing and confining the source of the informed knowledge of the disinterested directors to, or that the awareness must emanate from, expressed or implied disclosure at a board meeting. Thus, in *Tan Kang Hai,* even though the directors were parties to the commission agreement and they had on the company's behalf made the commission payments over a period of time,[71] the records of the company showed how the commission was calculated[72] and the other directors and shareholders had also received commission payments,[73] these facts were incapable of making a difference. Similarly, in *Golden Cash Harvest*, even if awareness could be gathered from extraneous official documents in which the disinterested directors had made statements of their awareness of the interest of the affected directors and that the defendant was the contractor, the documentary evidence could not be

67 Note that under the Companies Act 2016 (Act 777), the words "not in derogation of any rule of law" have been deleted in s 221(11). The deletion, in the author's respectful view, is a tidying exercise as the section is only to impose a criminal sanction against defaulters.

68 *Holder v Holder* [1968] Ch 353. In this case, it was held that acquiescence and estoppel are not necessarily coterminous and from which assent may be inferred. See the judgment of Sachs LJ at 403.

69 *Re Jarvis (deceased)* [1958] 2 All ER 336 at 340–341. Cited with approval in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

70 An early case is *De Bussche v Alt* (1878) 8 Ch D 286 at 312–313. See also *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 636 and *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19 where Millet LJ discussed the principle in the context of a duty-to-duty conflict.

71 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [26(2)(g)].

72 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [24(3)] and [26(2)(b)].

73 *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973 at [21(2)].

relied upon to show awareness on the ground of non-contemporaneity of the documents with the date of the contract.[74]

31 The better view, with respect, is that the leading principle is whether there was full awareness or knowledge of the conflicting interest giving rise to assent, which may be given expressly or impliedly.[75] Confining the source of awareness or knowledge to expressed or implied disclosure only at a board meeting in order to find assent is artificial. This is especially so where expressed or implied disclosure at a board meeting will not increase the level of knowledge of the disinterested directors. Awareness of the conflicting interest is a state of mind that bears directly on the issue of assent.[76] If there is awareness and disinterested directors act upon the awareness, it demonstrates informed and effective assent by the beneficiary,[77] although the burden of proof to demonstrate effective assent is upon the interested director. Another consideration is that confining the source of informed knowledge to expressed or implied disclosure at a board meeting to justify a finding of assent displaces the undoubted principle of informal unanimous consent given outside a board or general meeting under the *Duomatic* principle.[78]

32 The case of *Tneu Beh* concerned the distribution of assets in two family companies known as Tanjong and Lumayan in which four brothers were directors. A circular resolution was passed approving the transfer of shares from Tanjong in Lumayan to an unnamed purchaser who they knew was their brother who did not disclose his interest. Siti Norma J (as she then was) emphasised that awareness by the directors was the answer. It was held:[79]

> The duty to disclose is to make all directors aware of the interests which one or more directors may have in a contract entered into with the company. Under the circumstances of this case, I do not consider that s 131 has been contravened as all the directors were aware of Boon Seng's interest when they executed D3 [resolution].

33 The disclosure of interest in the formal way stipulated under s 221 has its advantages. It will assist directors who only have vague ideas of the extent and nature of the interest of their fellow directors.

---

74 *Golden Cash Harvest Sdn Bhd v Elite Honour Sdn Bhd* SBW-22NCvC 28/7-2014 (31 December 2016) (unreported) at [80].

75 See *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (2007) 62 ACSR 427 at [295].

76 See s 14 of the Evidence Act 1950 (Act 56).

77 *Woolsworth Ltd v Kelly* (1991) 4 ACSR 431 at 443, *per* Samuels JA.

78 Named after *Re Duomatic Ltd* [1969] 2 Ch 365.

79 *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd* [1995] 1 CLJ 741 at 750. Affirmed on appeal. See *Tneu Seng Bee v Lumayan Plantations Sdn Bhd* [1999] 2 CLJ 566.

In a contest, a formal declaration is evidence of informed awareness and effective assent to the transaction. Nonetheless, these matters do not provide a convincing answer to the question whether the source of informed knowledge must be confined to expressed or implied disclosure at a formal board meeting to find effective assent. Support for the proposition that knowledge outside the boardroom is enough to constitute effective assent includes *MacPherson v European Strategic Bureau Ltd*[80] ("*MacPherson*") and *Re Dominion International Group (No 2)*.[81] In the former case, the interested directors were held not to have breached s 317 of the UK Companies Act 1985 merely because the agreement was entered into without any formal board meeting approving the agreement and the absence of declaration of their interest. This was because all the parties knew about the interest when the agreement was signed. In the latter case, two directors who were aware of the interest were found to have given effective assent outside the boardroom to the impugned transactions. However, this was insufficient because the other directors were not sufficiently made aware of the transactions.

B. Approach in other jurisdictions

34 The word "shall" is also employed in s 317 of the UK Companies Act 1985 and s 123 of the NSW Companies Act 1961.[82] Case law in England and Australia adopts a purposive approach. Where non-interested directors are aware of the interest, it is ritualistic to insist on a formal declaration at a board meeting. In *MacPherson*, it was said:[83]

> No amount of formal disclosure by each to the other would have increased the other's relevant knowledge.

35 In *Lee Panavision Ltd v Lee Lighting Ltd*[84] ("*Lee Panavision Ltd*"), Dillon LJ said:[85]

> … if the judge was entitled to make the findings of non-disclosure and non-declaration of interests that he did, the position is that each of the directors has failed to disclose formally at the board meeting an interest common to all the directors and, *ex hypothesi*, already known to all the directors. I would hesitate to hold that such apparently technical non-declaration of an interest in breach of s 317 has the inevitable result, as to which the court has no discretion, that the second management agreement is fundamentally flawed and must be set aside if Lee Lighting chooses to ask sufficiently promptly that it be set aside.

80 [1999] 2 BCLC 203.
81 [1996] 1 BCLC 572.
82 Its predecessor was s 129 of the New South Wales Companies Act 1936.
83 *MacPherson v European Strategic Bureau Ltd* [1999] 2 BCLC 203 at 218.
84 [1992] BCLC 22.
85 *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22 at 33.

36 Although the statement of Dillon LJ was *obiter*, it reflected a concern in giving effect to form over substance or that the provision is to be applied technically or literally. In *Runciman v Walter Runciman plc*[86] ("*Runciman*"), it was said:[87]

> Whatever may have been the strict legal requirements of the position, on the particular facts of this case I am perfectly satisfied that for the plaintiff to have made a specific declaration of interest before agreement of the variations here in question would have served no conceivable purpose. It would have been mere incantation.

37 In *Re Dominion International Group (No 2),* Knox J, after referring to *Lee Panavision Ltd* and *Runciman,* said:[88]

> On the other hand it has been held that where the directors are all in fact sufficiently aware of the matter that should be formally disclosed, the absence of formal disclosure may not amount to more than a technical non-declaration of an interest.
>
> …
>
> The authorities cited above do establish that where there is genuine informed consent by the directors, a failure to make the declaration required by s 317 will be a technical rather than a substantive default …

38 The English and Australian authorities were applied in *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd*[89] ("*Genisys Integrated Engineers Pte Ltd*"). It was held:[90]

> 44 … The learned judge when applying s 131 had regard to its letter and not its intention. His direction upon the construction of s 131 is against the line of authority that has interpreted the section. In *Woolworths Ltd v Kelly* (1991) 4 ACSR 431, the New South Wales Court of Appeal had to consider the equipollent s 123 of the Australian statute. It was held that the Australian provision – and the same is true of our s 131 – does not require a formal declaration of a director's interest at a meeting. Neither does the section require a disclosure of relevant facts to persons wholly aware of them, provided of course that the directors fulfilled their fiduciary obligations. Samuels JA said:
>
> > It is true, of course, that s 123 does not merely provide for disclosure but requires the interested director to "declare the nature of his interest"; and, as I have pointed out, sub-s (7) provides that the secretary of the company "shall record every declaration under this section in the minutes of the meeting at which it was made". However,

86 [1992] BCLC 1084.
87 *Runciman v Walter Runciman plc* [1992] BCLC 1084 at 1093.
88 *Re Dominion International Group (No 2)* [1996] 1 BCLC 572 at 598 and 600.
89 [2008] 6 MLJ 237.
90 *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd* [2008] 6 MLJ 237 at [44]–[45].

> notwithstanding that this language contemplates some formality, I do not think it has the effect of requiring disclosure of facts to those who are plainly wholly aware of them.
>
> 45 Unfortunately, the learned judge did not address his mind to the decision in *Woolworths Ltd v Kelly*. Neither did he discuss *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22 which is an English case to the same effect as *Woolworths Ltd v Kelly*. The learned judge's approach to the construction of s 131 therefore constitutes a misdirection in law.

39 On appeal to the Federal Court,[91] the decision was reversed on the ground that there was no evidential foundation to interfere with the findings of fact by the High Court that there were acts of oppression. It was not reversed because the proposition stated by the Court of Appeal was wrong.[92]

40 Subsequent Australian decisions follow the majority decision in *Woolworths Ltd v Kelly*[93] ("*Woolworths v Kelly*"). In *Krupace Holdings Pty Ltd v China Hotel Investment Pty Ltd*[94] ("*Krupace Holdings Pty Ltd*"), Rein J held that "*Woolworths v Kelly* has been seen as authority for the proposition that formal disclosure is not required under an attenuation clause if what is to be disclosed is already known to other directors" and cited a host of subsequent authorities that followed *Woolworths v Kelly*.[95] Subsequent Australian decisions add confirmatory strength to the statement of the principle in *Tneu Beh* and *Genisys Integrated Engineers Pte Ltd.*

C. Failure to disclose

41 A breach of s 221 does not affect the validity of the contract. It only imposes a fine upon the defaulter: *Hely-Hutchinson v Brayhead Ltd*[96] ("*Hely-Hutchinson*"). In *Guinness plc v Saunders*[97] ("*Guinness plc*"),

91 *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785.
92 *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785 at [29]–[38].
93 (1991) 4 ACSR 431.
94 [2018] NSWSC 862.
95 *Krupace Holdings Pty Ltd v China Hotel Investment Pty Ltd* [2018] NSWSC 862 at [87]. The cases cited include *In the matter of Colorado Products Pty Ltd* [2014] NSWSC 789; *Hodgson v Amcor Ltd* (2012) 264 FLR 1; and *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35.
96 [1968] 1 QB 549 at 585C–585D, *per* Lord Denning MR, 589F–589G, *per* Lord Wilberforce, and 594E–594F, *per* Lord Pearce. This case was decided under s 199 of the UK Companies Act 1948 (c 38).
97 [1990] 2 WLR 324.

Lord Goff (Lord Griffiths concurring) affirmed the decision in *Hely-Hutchinson* when considering s 317 of the UK Companies Act 1985.[98]

42 In *Castlereagh Motels Ltd v Davies-Roe*[99] ("*Castlereagh Motels Ltd*"), the company sued for damages for breach of the statutory duty of disclosure. The NSW Court of Appeal held that there was no legislative intention to confer a private cause where the general law provides for the civil remedy of rescission. Wallace P held:[100]

> The third count raises a much different issue. It is an attempt to create a private right of action for breach of the statutory duty imposed by s 123 of the 1961 Companies Act with which during argument was associated s 129 of the 1936 Act.
>
> …
>
> I find it sufficient to say that I cannot detect a legislative intendment that a company should have a private right of action for alleged loss sustained 'in consequence' of a director violating either s 123 of the 1961 Act or s 129 of the 1936 Act.

43 Jacobs and Asprey JJA held:[101]

> The real purpose and effect of s 129 is to impose this duty on directors of companies in such a way that a breach of it will be a criminal offence. However, since prior to the introduction of the section or its predecessor there existed a similar duty enforceable by a court of equity by avoiding transactions entered into in breach of the rule, we do not think that there can be gathered from the words of the section and the surrounding circumstances any intention of the legislature or any circumstance which would lead to the conclusion that a company should have some cause of action at law for breach of the section … What was in mind was not some general loss from an unfavourable contract, which loss might or might not be causally related to the non-disclosure.

44 In *Von Roll Asia Pte Ltd v Goh Boon Gay*[102] ("*Von Roll Asia Pte Ltd*"), the High Court of Singapore came to the same conclusion as in *Castlereagh Motels Ltd* – non-disclosure only imposes a criminal sanction and liability is determined under the common law.

---

98 Presently, s 178 of the UK Companies Act 2006 (c 46) provides that the civil consequences for a breach of s 177 are the same as would apply if the corresponding common law rule or equitable principle is applicable.

99 (1966) 67 SR (NSW) 279. In this case, the New South Wales Court of Appeal considered both s 123 of the New South Wales Companies Act 1961 and s 129 of the Companies Act 1936.

100 *Castlereagh Motels Ltd v Davies-Roe* (1966) 67 SR (NSW) 279 at 284.

101 *Castlereagh Motels Ltd v Davies-Roe* (1966) 67 SR (NSW) 279 at 287.

102 [2015] 3 SLR 1115.

D. Effect of affirmation or ratification

45 The right to repudiate or affirm a contract under s 221(10) of the CA 2016 is in effect a right of election[103] as the company, through its disinterested directors, is called upon to make an informed choice between two mutually inconsistent courses of action.[104] When a company, acquainted with the facts, elects to affirm a contract under s 221(10) or ratifies the impugned act under s 218, it does so in its entirety.[105] It is semantical to argue that the act of affirmation of a contract is not ratification or adoption of the contract, or is not a waiver of the right to complain against the failure of disclosure in s 221(1).[106]

46 The doctrine of election is not confined to instruments[107] and affirmation simply means the contract and all its terms remain in full force and effect.[108] Thus, a company affirming a contract cannot claim for an account of the profits. The classical cases include *Burland v Earle*[109] ("*Burland*") and *Cook v GS Deeks*[110] ("*Cook*"). The reasoning is that affirmation validates the contract. In the latter case, it was held:[111]

> If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the agreed price. This would be for the Court to make a new contract between the parties.

47 Under the no-profit rule, if a company in general meeting ratifies the impugned acts, the company forgives the sins of its errant

103 *Re Marini Ltd; Liquidator of Marini Ltd v Dickenson* [2003] EWHC 334 (Ch) at [65].

104 *Peyman v Lanjani* [1985] 1 Ch 457. See also *Kammins Ballrooms Co v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882H–883D, *per* Lord Diplock, where a distinction was drawn between election and waiver. See further *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at 399, *per* Lord Goff.

105 *Peyman v Lanjani* [1985] 1 Ch 457. See also *Hely-Hutchinson* [1968] 1 QB 549 at 594E–594G, *per* Lord Pearson, and *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361.

106 *De Bussche v Alt* (1878) 8 Ch D 286 at 313, *per* James, Baggallay and Thesiger LJJ.

107 *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608 at 611–812.

108 *Suisse Atlantique Societe d'Armaement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 419.

109 [1902] AC 83.

110 [1916] 1 AC 554.

111 *Cook v GS Deeks* [1916] 1 AC 554 at 564.

directors.[112] The case of *Regal (Hastings) Ltd v Gulliver*[113] ("*Regal (Hastings) Ltd*") entrenched the principle that directors may, by either obtaining antecedent approval or subsequent ratification, keep what would otherwise be improper profits.[114] In *Northwest Transportation Co v Beatty*[115] ("*Northwest Transportation Co*"), transactions offending the self-dealing rule may be affirmed by the company in general meeting provided the affirmation is not brought about by unfair means, and is not illegal or fraudulent.[116]

48 *Tneu Beh*, *MacPherson, Runciman, Lee Panavision Ltd, Re Dominion International Group (No 2)* and *Woolsworth v Kelly* did not deal with the effect of affirmation of a voidable contract. A local controversial issue is whether affirmation of a contract under s 221(10) has any consequential effect on the initial breach of the statutory duty of disclosure. In *Golden Cash Harvest Sdn Bhd v Delta Pelita Sebakong Sdn Bhd*[117] ("*Delta Pelita Sebakong*"), it was held that assent, ratification and affirmation of the contract by conduct binds a party "as if there had been full disclosure"[118] to the effect that the formal non-disclosure "was of no consequence".[119] With respect, this proposition is flawless. A contrary proposition suggests an odd result – the contract is good only from the date of affirmation and it does not relate backwards to its initial date as if there had been full disclosure. Otherwise, the effect is that the defaulting director remains potentially liable to criminal sanctions and the affirming party may claim for profits made prior to the date of affirmation. This is contrary to the entirety principle in the doctrine of election. In the context of the UK Companies Act 2006, a same conclusion was arrived at in *Sharma v Sharma*[120] ("*Sharma*").

112 There are limits to the doctrine of ratification. Generally, majority shareholders cannot ratify acts that forfeit the rights of the minority. See *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1994] 3 AMR 2663; [1995] 1 MLJ 64 and *Lexton Furniture and Construction Sdn Bhd v So Thian Wan* [2013] 2 AMCR 895.

113 [1967] 2 AC 134; [1942] 1 All ER 378.

114 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 150, *per* Lord Russell.

115 (1887) 12 App Cas 589.

116 *Northwest Transportation Co v Beatty* (1887) 12 App Cas 589 at 593–594, *per* Sir Richard Baggallay.

117 SBW-22NCvC-7/10-2013 (7 June 2019) (unreported).

118 *Golden Cash Harvest Sdn Bhd v Delta Pelita Sebakong Sdn Bhd* SBW-22NCvC-7/10-2013 (7 June 2019) (unreported) at [367].

119 *Golden Cash Harvest Sdn Bhd v Delta Pelita Sebakong Sdn Bhd* SBW-22NCvC-7/10-2013 (7 June 2019) (unreported) at [367].

120 [2014] BCC 73. See discussion at para 52 below.

E. Relationship between ss 213 and 221

49 It is wrong to rely on s 213 to find liability when the breach of s 221 provides for its own liability. Where a company elects to affirm the contract under s 221(10), the contract is no longer voidable, and it follows that the affirmation extinguishes the liability to account for profits as well. The decision in *Golden Cash Harvest* is controversial. There, the company had elected to affirm the contract but notwithstanding the affirmation, the High Court, relying on the general principles applicable to fiduciaries, held that the affirming party could counterclaim and obtain remedies for breach of the General Duty on the application of the test in *Charterbridge Corp Ltd v Lloyds Bank Ltd*[121] ("*Charterbridge Corp Ltd*") and the proper purpose rule.[122] With respect, this conclusion cannot be reconciled with the principle that in non-disclosure cases, good faith in the company's interest is immaterial to the right of rescission or affirmation. The preponderance of authorities is that affirmation brings the matter to a complete end and it is wrong to vex a party twice. In addition to *Regal (Hastings) Ltd, Northwest Transportation Co* and *Sharma*, in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[123] ("*Suisse Atlantique*"), it was held:[124]

> In general, it cannot be disputed that where a party having an option to treat a contract at an end nevertheless affirms it, that contract and all its terms must remain in full force and effect for the benefit of both parties during the remainder of the period of performance, for it is not possible even for the innocent party to make a new contract between the parties without the concurrence of the other.

50 The codified General Duty in s 213 is silent with respect to the nature of the breach. In contrast, the nature of the breach is explicit in ss 221 and 218. In cases of transgression, it is generally correct that a director is barred from claiming that he had acted in good faith in the company's interest because self-interest is a vitiating factor: *Howard Smith Ltd v Ampol Petroleum Ltd*[125] ("*Howard Smith Ltd*"). However, the vitiating element in ss 221 and 218 is non-disclosure and nothing more is required. The principle that no inquiry will be entertained with respect to good faith and whether the transaction was in the company's best interest is beyond doubt.

---

121 [1970] Ch 62.

122 *Golden Cash Harvest Sdn Bhd v Elite Honour Sdn Bhd* SBW-22NCvC 28/7-2014 (31 December 2016) (unreported) at [183]–[184].

123 [1967] 1 AC 361.

124 *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 419F–419G.

125 [1974] AC 821.

51 Specifically, the proper purpose rule has no part to play in non-disclosure of interest. It plays an important part in cases where it is not doubted that the directors had acted in good faith in the company's interest, but the directors had nonetheless utilised the company's power to achieve a purpose not justified by the instrument creating the power: *Vatcher v Paul*[126] ("*Vatcher*") and *Howard Smith Ltd.* A breach of the duty of disclosure is simply non-disclosure and not whether there is an unconstitutional exercise of power to achieve a purpose that falls outside the constitution. The classical case is *Bamford v Bamford*[127] ("*Bamford*") where the cases of *Regal (Hastings) Ltd* and *Northwest Transportation Co* were applied. Russell LJ held:[128]

> I do not accept this argument, which seems to me to run counter to the general situation that impropriety by directors in the exercise of their undoubted powers is a proper matter for waiver or disapproval by ordinary resolution. Basically the argument treats an allotment by directors otherwise than *bona fide* in the interests of the company as a nullity, which it is not. In truth the allotment of shares by directors not *bona fide* in the interests of the company is not an act outside the articles: it is an act within the articles, but in breach of the general duty laid on them by their office as directors to act in all matters committed to them *bona fide* in the interests of the company.

52 In *Winthrop Investments Ltd v Winns Ltd*,[129] the principle in *Bamford* was applied – informed ratification or approval of voidable transactions negative the breach of fiduciary or statutory duty. In *EIC Services Ltd v Phipps*[130] ("*EIC Services Ltd*"), it is immaterial that subsequent assent is characterised as an agreement, ratification, waiver or estoppel. In *Sharma,* where a director exploited corporate opportunity for his personal gain with full knowledge of the shareholders, it was unanimously held "then that conduct is not a breach of fiduciary or statutory duty".[131]

53 It is not the business of the court to interfere with management decisions. Affirmation disentitles the company from complaining about

126 [1919] AC 378.

127 [1970] Ch 212. See *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd* [2018] 3 AMR 865; [2018] 4 MLJ 1, where *Bamford v Bamford* was cited with approval at [40], and *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149 at 160G. See also *Progress Property Co Ltd v Moore* [2008] EWHC 2577 (Ch) at [50]. See further *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 294.

128 *Bamford v Bamford* [1970] Ch 212 at 242.

129 (1975) 1 ACLR 219.

130 [2004] 2 BCLC 589 at [122], *per* Neuberger J (later, Lord Neuberger SCJ). The decision was reversed on appeal but not on this point.

131 *EIC Services Ltd v Phipps* [2004] 2 BCLC 589 at [52]. See also *Instant Access Properties Ltd v Rosser* [2018] EWHC 756 (Ch).

a bad contractual bargain, or from claiming for secret profits derived from the contract which it had elected to affirm.

54 The proper purpose rule, applied in *Golden Cash Harvest*, is contextually inappropriate to the issue of non-disclosure. It is irrelevant to inquire into what "caused" the breach by asking: "But for the improper purpose, would the directors have exercised their powers that way?" To do so in this area of the law opens up an abyss of imponderables. In another area of the law, where there are mixed purposes in the exercise of powers, comprising permissible and impermissible purposes, the court must determine whether the permissible or impermissible purpose was the substantial purpose: *Howard Smith Ltd*. In Australia, the "but for" causation test is applied where there are mixed purposes. In England, the issue remains controversial since the *obiter dictum* of Lord Sumption in *Eclairs Group Ltd v JKX Oil & Gas plc*,[132] which adopted the "but for" causation test and departed from the substantial purpose test in *Howard Smith Ltd*. In Malaysia, the substantial purpose test is applied.[133]

V. No-profit rule

55 The relationship-based duty is the common element in the self-dealing and the no-profit rule. In substance, there is no difference between being swayed by "personal interest" and acting to obtain a "personal advantage". Both are the products of acts of disloyalty. Common law examples of personal advantage include the taking of bribes,[134] making secret commissions,[135] usurpation of maturing corporate opportunities,[136] and diverting the business, clients or misappropriating confidential information of the company.[137]

56 Under the no-profit rule, a company that is incapable of pursuing an opportunity to make a profit may hold a director accountable for

132 [2016] BCLC 1.

133 *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Ltd* [2012] 3 AMR 297; [2012] 3 MLJ 616; *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* [2018] 1 AMR 517; [2018] 2 MLJ 177.

134 See *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 where Lai Kew Chai J (as he then was) discussed bribes and secret commissions and rejected the decision in *Lister & Co v Stubbs* (1890) 45 Ch D 1 that a proprietary remedy is not available. Affirmed on appeal in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312.

135 *De Bussche v Alt* (1878) 8 Ch D 286.

136 *Sundai (M) Sdn Bhd v Masato Saito* [2013] 9 MLJ 729. See also *Foster Bryant Surveying Ltd v Bryant* [2007] BCC 804; see the authorities cited at [48]–[78].

137 *Yukilon Manufacturing Sdn Bhd v Dato Wong Gek Meng* [1997] 2 MLJ 212; *Avel Consultants Sdn Bhd v Mohd Zain Yusof* [1985] 2 MLJ 209.

failure to make disclosure.[138] This is because the information about the opportunity and the opportunity itself came to the directors in the course and by virtue of the relationship,[139] and in this strict relationship-based approach, good faith and the inability of the company are irrelevant.[140] "Information" is not restricted to confidential information in equity and the broader view is that it will suffice if the director makes improper use of the information obtained by him in the course of his office.[141]

57 The strict relationship-based approach under the no-profit rule has given rise to controversy in cases where a company has no interest in the business or opportunity, or the company had restricted its scope or line of business. In England, the relationship-based approach is applied. In *Bhullar v Bhullar*,[142] the board had decided that the company would not acquire further property for investment. Certain directors subsequently acquired an investment property for themselves and were made liable. In *Re Allied Business and Financial Consultants Ltd*[143] ("*O'Donnell v Shanahan*"), the directors were held liable even though the impugned subject matter was not within the scope or line of the company's business. In both the cases, the effect is that there had been a misuse or abuse of office.

58 Australian case law favours the proposition that the conflict rule should not be inexorably applied.[144] Rather, it should be applied with regard to the particular circumstances of the relationship, the nature and scope of the activities or undertakings of the beneficiary and the

138 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; [1942] 1 All ER 378.

139 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 144–145; [1942] 1 All ER 378 at 387, *per* Lord Russell.

140 In *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; [1942] 1 All ER 378, it was the directors who unilaterally decided that the company could not afford to come up with the £2,000 to realise the corporate opportunity. The 20 shareholders were not consulted.

141 *Re Colorado Products Pty Ltd* (2014) 101 ACSR 233 at [443]. See *The Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed* [1999] 6 MLJ 497; *Sundai (M) Sdn Bhd v Masato Saito* [2013] 9 MLJ 729; and *Avel Consultants Sdn Bhd v Mohd Zain Yusof* [1985] 2 MLJ 209 for misuse of information.

142 [2003] 2 BCLC 241.

143 [2009] 2 BCLC 666. In this case, the principle in *Aas v Benham* [1891] 2 Ch 244 was distinguished on the basis that a director fiduciary is a general fiduciary and therefore the scope of business is irrelevant.

144 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR at 104, *per* Mason J citing *Phelan v Middle States Oil Corp* 220 F 2d 593 (1995). This departs from the case of *Parker v Mckenna* (1874) LR 10 Ch App 96 where James LJ said that the principles were "inflexible" and had to be applied "inexorably".

function and responsibilities the fiduciary has assumed to perform.[145] This fact-sensitive approach is reflected in the judgment of Lord Upjohn in *Boardman v Phipps*:[146]

> … that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him … Having defined the scope of those duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

59 In *Poon Ka Man Jason v Cheng Wai Tao*,[147] the Hong Kong Court of Final Appeal thought that the decision in *O'Donnell v Shanahan* went too far in distinguishing the case of *Aas v Benham*[148] and holding that a different test is applicable to partners and directors, as both are established categories of fiduciaries. The scope of business test should also be applied in the corporate context.[149]

60 In limited circumstances, the English courts have adopted "a common-sense and merits based approach", paying care and sensitivity both to the facts and other principles, provided this approach "does not intrude on the misuse of company's property whether in the form of business opportunities or trade secrets".[150] In *Foster Bryant Surveying Ltd v Bryant*,[151] the director was excluded from his role as director and his resignation was unaccompanied by acts of disloyalty.[152] In *In Plus Group Ltd v Pyke*,[153] the director had been expelled from management.

145 The cases have been collected in the judgment of Bathurst CJ in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2017) 116 ACSR 566 at [3]–[5].

146 [1967] 2 AC 46 at 127.

147 [2017] 1 HKC 463.

148 [1891] 2 Ch 244.

149 *Poon Ka Man Jason v Cheng Wai Tao* [2017] 1 HKC 463 at [85]–[87].

150 *Foster Bryant Surveying Ltd v Bryant* [2007] BCC 804 at [76]. See also *In Plus Group Ltd v Pyke* [2002] 2 BCLC 201.

151 [2007] BCC 804.

152 See *Island Export Finance Ltd v Umunn*a [1986] BCLC 460 and *Framlington Group plc v Anderson* [1995] 1 BCLC 475. *Cf Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Canadian Aero Service Ltd v O'Malley* 40 DLR (3d) 371; and *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110. See also *Northampton Regional Livestock Centre Co Ltd v Cowling* [2014] EWHC 30 (QB) at [196]–[198] for the circumstances under which a resigning director may still be held liable.

153 [2002] 2 BCLC 201.

A. Antecedent consent or ratification in general meeting

61 Consent of the general meeting may be given in advance or subsequently by ratification under s 218 of the CA 2016 upon a full and frank disclosure of the interest involved. A notice of a meeting accompanied by an agenda may not in all cases sufficiently explain the extent and nature of the proposed resolution to be passed. In such cases, a circular or explanatory statement should be furnished to obtain the informed consent of the general meeting. In *Kaye v Croydon Tramways Co*,[154] there was insufficient disclosure as the general meeting was not informed that the approval of the transactions would result in the directors obtaining compensation for loss of office. Similarly, in *Baillie v Oriental Telephone and Electric Co Ltd*,[155] where shareholders were not informed that alteration of the articles would have had the effect of authorising and making legitimate the large sums of money received by directors in a subsidiary company.

62 There is no statutory provision in the CA 2016 governing the ratification of acts giving rise to liability on the part of directors. Section 239 of the UK Companies Act 2016 governs ratification of directors' breach of duty or breach of trust, negligence or default by resolution of the company in general meeting but does not affect the operation of the *Duomatic* principle. Interested directors who are shareholders or shareholders connected to them cannot vote, overruling the decision in *North-West Transportation Co* and giving effect to the decision in *Cook*.

VI. Remedies

63 Civil remedies flowing from a breach of s 218 or 221 are determined under the general law. The primary remedy for the self-dealing rule is rescission of the contract. If rescission is impossible or inappropriate, the director must make good the financial equivalent of the loss suffered by the company. Where the law allows for multiple remedies, double recovery or double counting of loss in respect of the same subject matter is not allowed.[156]

64 Under the no-profit rule, transactions entered into with a third party tainted with the element of bribery or secret commission may be rescinded by the company provided the third party knew of the fiduciary

154 [1898] 1 Ch 358.
155 [1915] 1 Ch 503.
156 *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374.

status of the recipient with the company.[157] Otherwise, the company may only claim the bribe or secret commission from the director or officer.[158] The right is not dependent on whether the company had suffered a loss and the law treats the recipient as a constructive trustee.[159]

A. Personal and proprietary remedies

65 A fiduciary who receives a benefit in breach of his fiduciary duty will ordinarily be ordered to account to the principal for that benefit and pay a sum equivalent to the benefit as equitable compensation.[160] This relief in equity is "primarily restitutionary or restorative rather than compensatory" and it is a personal remedy.[161] Generally, an account of profits will not be ordered if the plaintiff had stood by and permitted the defendant to make the profits, and estoppel, laches and acquiescence would operate as a discretionary bar.[162]

66 A fiduciary who acquires a benefit or opportunity by virtue of his fiduciary position is taken to have acquired it for the benefit of the beneficiary[163] and an "institutional constructive trust" is imposed upon the fiduciary by operation of law which gives rise to a proprietary remedy in addition to the beneficiary's personal remedy. An election must be made between the two remedies. The difference between an "institutional constructive trust" and a "remedial constructive trust" was explained by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.[164] It was said:[165]

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences

157 The right to do so is on the basis of dishonest assistance.

158 *Tan Sri Dato' Dr Awang Had bin Salleh v Dato' Haji Mohamed Haniffa bin Haji Abdullah* [2007] 6 AMR 27; [2007] 6 MLJ 293. See also *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 and *Furs Ltd v Tomkies* (1936) 54 CLR 583.

159 [1979] AC 374 at 380, *per* Lord Diplock.

160 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; [1942] 1 All ER 378.

161 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, *per* Millet LJ (as he then was).

162 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

163 The genesis of this rule is traceable to *Keech v Sanford* (1736) 25 ER 223. See also *Cook v GS Deeks* [1916] 1 AC 554; *Boardman v Phipps* [1964] 1 WLR 993; [1964] 2 All ER 187; and *Bhullar v Bhullar* [2003] 2 BCLC 241 at [28], *per* Johnathan Parker LJ.

164 [1996] AC 669.

165 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714–715. Generally, see Alastair Hudson, *Equity and Trusts* (Routledge, 9th Ed, 2016) ch 12.

> to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

67 In *FHR European Ventures LLP v Mankarious*[166] ("*FHR European Ventures LLP*"), it was held that both personal and proprietary remedies are available to all unauthorised benefits received by an agent by virtue of his fiduciary office or as the result of an opportunity which resulted from his fiduciary position, including bribes or secret commissions. On bribes and secret commissions, the decision in *Lister & Co v Stubbs*[167] ("*Lister & Co*") that it only gives rise to a creditor and debtor relationship because the beneficiary never had a pre-existing proprietary interest in the bribe or secret commission to justify any proprietary remedy[168] is no longer good law. This means that the process of tracing[169] is available, and in the event of bankruptcy of the fiduciary, the beneficiary has priority over the general body of creditors.[170] In *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman*,[171] reference was made to *Lister & Co*.[172] The High Court nonetheless held that the plaintiff was entitled to a declaration that the moneys received were held on constructive trust.[173]

VII. Limitation period

68 Section 22 of the Limitation Act 1953[174] applies to cases of breach of trust. The meaning of "trust" and "trustee" in the Limitation Act 1953 have the same meaning as defined in s 3 of the Trustee Act 1949.[175] The meaning extends to "implied and constructive trust" and s 2 of the Specific Relief Act 1950[176] defines "trust" to cover every specie of trust,

166 [2014] 4 All ER 79.
167 (1890) 45 Ch D 1. Not followed in *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324; *Grimaldi v Chameleon Mining NL (No 2)* 87 ACSR 260 at [576]–[584]; and *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 (affirmed on appeal in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312).
168 See the judgment of Collins J in *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [78].
169 For the concept of tracing, see *Boscawen v Bajwa* [1995] 4 All ER 769 and *Foskett v McKeown* [2001] 1 AC 102.
170 *FHR European Ventures LLP* [2014] 4 All ER 79 at [1].
171 [1987] 2 MLJ 633.
172 *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 2 MLJ 633 at 637F.
173 *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 2 MLJ 633 at 638D.
174 Act 254.
175 Act 208.
176 Act 137.

or constructive fiduciary ownership. In the past, the term "constructive trust" or "constructive trustee" had been loosely used to include persons who are not express trustees and strangers to a trust for the purpose of finding a basis for liability. In *Paragon Finance plc v D B Thakerar & Co*,[177] a distinction was drawn between Class 1 and Class 2 constructive trustees – the limitation period does not apply to the former category of constructive trustees but to the latter category. In *Peconic Industrial Development Ltd v Lau Kwok Fai,*[178] an accessory or dishonest assister or a knowing recipient is not a Class 1 constructive trustee.[179]

69 In *Dato Wira A Nordin bin Mohd Amin v Rajoo a/l Selvappan*[180] ("*Dato Wira A Nordin bin Mohd Amin*"), an attempt was made to interpret s 22 of the Limitation Act 1953. Unfortunately, it was not analysed and interpreted from the perspective of trust laws and no distinction was drawn between the different classes of constructive trustees. The approach taken in *Dato Wira A Nordin bin Mohd Amin* was rejected in *Burnden Holdings (UK) Ltd v Fielding*.[181] In the author's respectful view, the interpretation given by Nallini Pathmanathan J (as her Ladyship then was) in *Kamdar Sdn Bhd v Bipinchandra Balvantrai,*[182] is consistent with the preponderance of authorities:[183]

> … The line between Class 1 and Class 2 constructive trustees turns on whether the trust or trust-like relationship existed even before the wrongful transaction in question, in which case, it would be a Class 1 trustee.

70 A director, by virtue of his status as a fiduciary, is in constructive fiduciary ownership of the property of a company, or is a Class 1 constructive trustee, and there is no limitation period for actions against directors for breach of trust of the assets of a company.[184]

---

177 [1999] 1 All ER 400 at 407–410.

178 [2009] 5 HKC 135. This case concerned s 20 of the Hong Kong Limitation Ordinance (Cap 347).

179 See also the majority judgment of the UK Supreme Court dealing with s 21 of the UK Limitation Act 1980 (c 58) in *Williams v Central Bank of Nigeria* [2014] 2 All ER 489.

180 [2007] 4 AMR 793; [2007] 5 MLJ 297.

181 [2017] 1 WLR 39.

182 [2017] 1 CLJ 369.

183 *Kamdar Sdn Bhd v Bipinchandra Balvantrai* [2017] 1 CLJ 369 at 400.

184 *Carrian Investments Ltd v Wong Chong-po* [1986] 5 HKLR 945; *China Everbright IHD Pacific Ltd v Ch'ng Poh* [2002] HKCU 130.