Directors, fiduciary duty and the burden of proof

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A look at claims against company directors for breach of fiduciary duty and the impact of the shifting burden of proof, including a review of the relevant case law and an assessment of the current position.

Introduction

1. It is trite law that, in relation to the custodianship of a company's assets, its directors owe fiduciary duties. To this extent, there is a similarity between the office of director and that of a trustee. These duties are separate, distinct and more onerous than the duties of skill and care with a common law origin and other duties owed by directors.

2. The differences between fiduciary and other duties are particularly important because of the nature of remedies available to a claimant. A breach of fiduciary duty opens the door to a range of equitable remedies, such as a proprietary claim to recover company property and an account of profits. The focus is often more on the disgorgement of benefits received by the fiduciary director. By contrast, a breach of a non-fiduciary duty focuses on the loss to the company and is subject to the usual common law principles of causation, foreseeability and quantification of damages. A fiduciary claim can, in the right circumstance, be the best route for an office holder.

3. As was explained by the former Chancellor, Sir Terrence Etherton[1], a core policy of equity is to accord special value to fiduciary relationships, that is to say to impose sanctions for breach of fiduciary duty that give the fullest protection to those to whom fiduciary obligations are owed, both by recouping to the most perfect extent any benefits obtained by a fiduciary from breach of the fiduciary relationship and also acting

[1] *The Legitimacy of Proprietary Relief:* Birkbeck Law Review Volume 2(1) 2016 at 59-86 (see also *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45

as a deterrence. Maintaining the integrity of the fiduciary relationship is a central policy in equity. This is properly described as both a legal and a social policy.

4. This policy and the recognition of the special liability of fiduciaries are recognised equally in other jurisdictions. For example, in many US states fiduciaries are ordinarily held to an extraordinary standard of behaviour:

> *"[A fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of honour . . .it is…the standard behaviour. As to this there has developed a tradition that is unbending and inveterate."*[2]

5. Whilst the role of a fiduciary has frequently been considered within the context of remedies, a less considered feature of importance to litigants is the shifting of the burden of proof in cases where a breach of fiduciary duty is alleged. This is of importance to a claimant, particularly where the litigant is an insolvency office holder who may have little information readily available to them.

6. This article addresses the operation of the burden of proof on a director and looks at how an allegation of breach of fiduciary duty in the context of proceedings against a director impacts on the conduct of the case and the trial process.

7. Before looking at the incidence of the burden of proof it is necessary to look briefly at the nature of fiduciary duties and the test applied by a court in deciding whether there has been a breach.

Fiduciary duty

8. The classic definition of a fiduciary was set out by Millet LJ in *Bristol and West Building Society v Mothew* [3] as follows:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust*

[2] *Meinhard v. Salmon,* 164 N.E. 545, 546 (N.Y. 1928) (quoting Chief Justice Cardozo)

[3] [1998] Ch 1 at 18

> *and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."*

9. The Companies Act 2006 **("CA 2006")** codified some of the duties a director owes to a company. That includes s.172 CA 2006[4] which contains the main duty of a fiduciary nature, the duty to promote the success of the company, previously referred to as the duty to act in good faith and for the benefit of the company as a whole. This duty has been described as the fundamental duty to which a director is subject[5] and the duty from which the other fiduciary duties of a director flow[6]. A director can be in breach of more than one fiduciary duty at any given time and this overarching fiduciary duty is closely related to the duty to avoid conflicts of interest contained in s.175 CA 2006[7].

10. There are other duties of a fiduciary nature, which whilst not set out in the Companies Act, are preserved by s.172(3) CA 2006[8], which itself recognises the existence of an external duty to have regard to the interests of creditors on insolvency, actual or likely. The authorities on the nature and development of this duty were reviewed most recently by the Court of Appeal in *BTI 2014 LLC v Sequana SA*[9] and held that the applicable trigger for the creditor's interest test is where company is or is likely to become insolvent accurately encapsulates the trigger. In this context, "likely" means probable[10].

11. It was described by Toulson LJ in *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)*[11] as follows:-

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[4] Set out in the appendix to this article.

[5] *Item Software (UK) v Fassihi* [2009] BCLC 91 at paragraph 41 per Arden LJ.

[6] Company Directors: Duties Liabilities and Remedies: Simon Mortimore QC 2nd Ed.

[7] See appendix

[8] See appendix

[9] [2019] 2 All E.R. 784 at paragraphs [105] to [102]

[10] At paragraph [220]

[11] [2016] AC 1 at paragraphs [123] to [124]

"123. It is well established that the fiduciary duties of a director of a company which is insolvent or bordering on insolvency differ from the duties of a company which is able to meet its liabilities, because in the case of the former the director's duty towards the company requires him to have proper regard for the interest of its creditors and prospective creditors. The principle and the reasons for it were set out with great clarity by Street CJ in Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722, 730:

> *"In a solvent company the proprietary interests of the shareholders entitle them as the general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration'*

124. This passage was cited with approval by Dillon LJ in West Mercia Safetywear v Dodd [1988] BCLC 250, 252—253. The principle now has statutory recognition in the Companies Act 2006. In Part 10, Chapter 2 of the Act, concerning the general duties of directors, section 172 provides:

> *"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole …*
>
> *(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."*

<u>Subjective nature</u>

12. The remainder of this article will largely concentrate on breaches of s.172 CA 2006 and the obligation to have regard to the interests of creditors. The duty imposed by s.172

CA 2006 (and its common law predecessor) is ordinarily regarded as a subjective one. As put by Jonathan Parker J in *Regentcrest plc (in liq) v Cohen*[12]:

> *"The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."*

13. The general principle of subjectivity is however subject to three qualifications: *Re HLC Environmental Projects Limited*[13]. Firstly, where (as in cases of insolvency or dubious solvency) the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount'. Secondly, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely, whether an intelligent and honest man in the position of a director of the company could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company. Thirdly, where there is a very material interest, such as that of a large creditor (in a company which is insolvent or of doubtful solvency) which is without objective justification overlooked and not taken into account, the objective test must equally be applied.

<u>Burden of proof</u>

14. Claimants uniformly bear the burden of proving that a fiduciary duty exists. However, where it is alleged that a director acted in breach of duty by misappropriating company assets an evidential burden falls on that director to account for those assets once a prima facie case has been made out that he or she was the direct or indirect beneficiary of the

[12] [2001] 2 BCLC 80 at paragraph 120

[13] [2013] EWHC 2876 Ch (per Mr John Randall QC sitting as a deputy High Court judge) at paragraph 92

transactions. The position in relation to conflict of interest claims is similar and addressed in more detail below.

15. Therefore, once it is shown that a director has received company money, it is for him to show that the payment was proper. Further where entries have been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. This recognises the close relationship between a director and a trustee.

16. In *Ultraframe (UK) Ltd v Fielding*[14] Lewison J set out the general position in relation to trustees as follows:-

> *"The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The trustee must show what he has done with that property."*

17. In *Murad v Al Saraj*[15], Arden LJ was addressing a case in which the claimants were held to be entitled to an account of profits as a result of the defendant fiduciary's deceit:

> *"77. Again, for the policy reasons, on the taking of an account, the court lays the burden on the defaulting fiduciary to show that the profit is not one for which he should account: see, for example, Manley v Sartori [1927] Ch 157. This shifting of the onus of proof is consistent with the deterrent nature of the fiduciary's liability. The liability of the fiduciary becomes the default rule.*
>
> *78. This principle was applied by the High Court of Australia in the Warman case:*
>
> > *'It is for the Defendant to establish that it is inequitable to order an account of the entire profits. If the Defendant does not establish that that would be so, then the Defendant must bear the consequences of mingling the profits attributable to those earned by the Defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own.'*
>
> *79. In the Warman case, the defaulting fiduciary was able to show that some of the profit was not attributable to his wrongful act, but to his own skill and effort. The court limited the account accordingly. On the facts, the court was satisfied*

[14] [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul) at [1513]

[15] [2005] EWCA Civ 959

> *that the period of time for which profits were to be accounted should be limited to two years. I will come back to this point below."*

18. This is not controversial but Arden LJ was dealing with an order for an account following a finding that the respondent had acted in breach of fiduciary duty. She was not dealing with the burden of proving the breach itself.

19. Within the context of directors duties the approach to this was addressed in *Gillman & Soame Ltd v Young*[16]. There a company claimed that a former director was liable for breach of fiduciary duty for misappropriating company assets. The judge said this:-

> *"I should also say something about the burden of proof. Where a person in a fiduciary position receives property of his principal the burden is on him to account: United Pan-Europe Communications v Deutsche Bank*[17]*. This principle applies to company directors as it does to trustees: Ultraframe (UK) Ltd v Fielding … It is, therefore, for [the company] to prove that [the director] received a particular payment from the company; but where it does so, it is for him to show that the payment was proper."*

20. In *Re Idessa (UK) Ltd (in liq), Burke v Morrison*[18] a liquidator alleged misfeasance in respect of payments made out of company funds, the judge said this about the burden of proof:-

> *'I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate that [counsel for the liquidator] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the respondents to explain the transactions in question. Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far for [counsel for the liquidator] to say that, absent such an explanation, in all cases the default position is liability for the respondent directors. In some cases, despite the absence of any adequate explanation, it*

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[16] [2007] EWHC 1245 (Ch) at paragraph [82] :(Robert Miles QC, sitting as a deputy High Court judge)

[17] [2000] 2 BCLC 461 at paragraph [34]

[18] [2012] 1 BCLC 80 at paragraph [28] (Lesley Anderson QC, sitting as a deputy High Court judge)

may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes.'

21. This reasoning was endorsed by Newey J in *GHLM Trading Ltd v Maroo and others*[19] where it was held that the burden of proof of showing that the drawings shown in the directors' loan account were justified lay on the director, because, applying the close analogy between directors and trustees, it was incumbent on a director to explain what had become of company property in his hands in much the same way that a trustee had to show what he had done with trust property.

22. The shifting of the burden can be seen from the following passage in the judgment of Lloyd LJ in the joint venture case, *Ross River Ltd and another v Waveley Commercial Ltd*[20]:

"[120] Thus, Ross River was able to show that many payments had been made out of WCL's current account which did not appear on their face to be legitimate joint venture payments, and some of which on examination were certainly not, and moreover these payments appeared to be for the benefit of Mr Barnett, Mr Harney or persons connected with them. Mr Caplan argued with some cogency that in this situation it should not have been necessary for Ross River to demonstrate by reference to each one of the 215 transactions that it was not a legitimate payment. Indeed, for that to be necessary would have reversed the normal burden of proof as between a fiduciary and the person to whom the fiduciary duty is owed. It is sufficient for the latter to put a payment, or a series of payments, in issue, or even simply to require the fiduciary to account for his or its dealings with the relevant funds, and it is then for the fiduciary to prove that the payments were proper. There may be cases in which the beneficiary acts unreasonably in persisting in questioning the fiduciary's account, in which case there may be issues as to the incidence of the costs of the accounting process. But it does not seem to me that it could be said that this is such a case. Accordingly, it seems to me that, to the extent that the judge criticised Ross River for not having proved its case in detail as regards individual transactions, that criticism was not justified. It should have been up to WCL and Mr Barnett to justify the payments which were questioned, in particular the 215 connected party payments. On that basis, none of these payments was shown to the judge to be justified. Mr Barnett is therefore accountable to Ross River for every one of them by way of compensation for his breach of fiduciary duty."

[19] [2012] EWHC 61 (Ch)

[20] [2014] 1 BCLC 545

23. A more recent example of the burden shifting to the director can be seen in *Northampton Borough Council v Cardoza and Ors* [2019] EWHC 26 (Ch) where the judge held that it was for a director to justify entitlement to company money and to look to the directors to explain the receipts they had received.[21]

24. Ultimately, the extent to which the burden might be said to shift is highly fact-specific. The particular facts of the case might result in the assessment of the evidence in the ordinary way without the need for the judge to decide where the evidential burden lies. That tension can be seen in the following passage in the judgment of Asplin J in *Global Energy Horizons Corporation v Gray*[22]:

> *"[135] In fact, during submissions the parties appeared to agree that in fact, the precise way in which the burden of proof at the first stage was imposed was unlikely to matter too much and that I should consider all of the evidence in the round and determine the issue on the balance of probabilities. I agree. However, it also seems to me that without in any way weakening or undermining the strict rule that the burden is on the defaulting fiduciary, as a matter of logic, in circumstances such as these, whilst adverse inferences may be drawn from a lack of evidence or silence in the account given, once there is documentary evidence in support of the accounting party's assertion that he has no interest in an asset, inevitably the evidential burden shifts to the Claimant to displace it. In all the circumstances, and taking all of the evidence in the round including any proper inferences to be drawn from the remainder of the account and any deficiencies in it, it may not be difficult to satisfy such a burden."*

Absence of books and records

25. In deciding whether there has been a breach of duty a court will not adopt the default position that where a director fails adequately to explain payments to him (or credit or debit entries on a director's loan account), he will be in breach of duty. It takes a wider view and looks at all the surrounding circumstances in considering whether the payments are justified, that evidence includes oral testimony of witnesses at trial.

[21] *At paragraphs 51 – 57*

[22] [2015] EWHC 2232 (Ch)

26. Within the context of claims against directors it is a common factual situation for the books and records to be inadequate. However, a director cannot rely on the inadequacy of his own record keeping to justify his inability to offer a proper explanation. In *Re Mumtaz Properties Ltd, Wetton v Ahmed*[23] a liquidator claimed for sums which he alleged were owing on a director's loan account. The office holder had sought to recover the books and records of the company but those responsible for keeping them failed to produce them. The director argued that had the books and records been available, the entries would have been justified and sought to rely upon the absence of the company records in support of his defence. Arden LJ (with whom Aikens and Patten LJJ agreed) said:

> "[16] *The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.*
>
> [17] *Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available.'*

27. Regarding the entries on the loan account, Arden LJ concluded as follows:-

> "[57] *[The judge] was entitled to find, in the absence of evidence as to how and why the entry had been made, that it was what it appeared to be, namely a debit entry duly made and increasing [the director's] liability on his loan account. [The director] produced no evidence showing how the entry had come about and provided no explanation for the absence of such evidence. The judge was entitled to infer that he could have made enquiries about this entry if there was any evidence or explanation that would support his case.'*

[23] [2011] EWCA Civ 610, [2012] 2 BCLC 109,

28. However, the absence of documentary evidence does not lead to automatic liability. The director may give oral evidence that the satisfies the Court that the challenged payments can be justified or the court can take into account the surrounding circumstances. In *re Wolverton Investments Ltd*[24] Chief Registrar Baister after citing the judgment in *Re Idessa (UK) Limited* said:

> *"...what is important is the adequacy of the fiduciary's evidence as an explanation for the transactions with which the court is dealing. Such evidence may take different forms: it might justify a transaction which is 'readily ... explained or accounted for by the documents or the ordinary motives of people' (paragraph 24), or its justification 'may be clear from ... other evidence' (paragraph 28). There is no absolute default position. Unsurprisingly, then, the court must look at the evidence and the facts quite closely and in the round."*

29. This approach of the courts was demonstrated by Registrar Barber in *Re Micra Contracts Limited*[25] (in liquidation). The liquidators argued that various recharges made to an inter-company account (the effect of which was to eliminate the liability of an associated company to the insolvent company) were invalid being unsupported by any documentary or other evidence or were false and/or not vouched for. The directors argued that the recharges were genuine and were made in good faith. The Registrar found the recharges were indeed genuine. However, the directors had not adduced the relevant evidence until the hearing of the application. The recharges were not properly explained in the witness statements and were only clarified by the evidence of the company's bookkeeper at the trial, and not by the directors in their evidence. The Registrar also took into the surrounding circumstances and that there were likely to be recharges between associated company's sharing the same premises and employees. Nonetheless the judge ordered the directors to pay the costs of the office holder on the grounds that it was only as a result of oral evidence at the trial that she had been able to conclude that the entry was genuine[26].

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[24] (unrep 18 May 2015 at paras 59-60)

[25] [2016] B.C.C. 153

[26] Upheld on appeal: [2016] 2 WLUK 224

Conflict of interests

30. Where an allegation is based on a conflict of interest, once it is established that a director has a personal interest in the transaction the burden is upon him to justify it. David Richards J said in *Newgate Stud Company v Penfold*[27] where the company had entered into numerous transactions with family members of the directors said:-

> *'What is however true is that in any such relationship there exists the potential for the exercise of fiduciary duties to be influenced by personal considerations. If a director causes his company to enter into a transaction with a close relation, or a spouse or other partner, there is a significant risk that the director will be compromised by a desire to favour the other party.'*

31. A little later he continued:

> *'In my view, the resolution of this issue lies in putting on the fiduciary the burden of showing, in a case where the fiduciary does not have a personal interest in the transaction but where on the facts there exists a real risk of conflict between duty and personal loyalties, that the transaction was demonstrably in the best interests of the company or others to whom he owes his duties. This assumes that the beneficiaries have not given their informed consent. It is an application of the fair dealing rule, rather than the self-dealing rule.'*

Conclusions

32. The shifting of the burden can assist an office holder where a director has failed adequately to explain transactions particularly where they are for his benefit or that of associates or connected parties. It can also persuade a director to co-operate where they might be reluctant to do so. Before issuing proceedings office holders must ensure that they have covered all of the bases. That means conveying in writing to the director the operation of the onus on the director to explain and the consequences of not doing so, followed by full and focused requests for explanations and documents. To the extent that the director's response is unsatisfactory, it should then be made clear in the statements of case in support of the proceedings that the burden rests on the director

[27] [2004] EWHC 2993 at paragraph 240

and that the office holder remains willing to listen to any proper explanation that may be given. This approach should also offer a degree of protection against costs. In *Micra,* a proper explanation was not offered until the company book keeper gave evidence at trial. For that reason, the court declined, when considering the question of costs, to deprive the liquidators of their costs in pursuing the unsuccessful element of their claim. The warning for directors is that they should co-operate and provide any explanation as soon as possible, failure to do so may mean the loss of costs protection.

33. Whilst the shifting of the burden of proof does not absolve an office holder of the responsibility to prove his case once litigation has commenced, it can reduce the complexity of doing so once it is established that a director had an interest in a transaction or transactions, whether as a recipient of company funds or otherwise interested in a contract. As far as the trial is concerned, there may be no need for expert evidence. Once a prima facie case is established, it is for the defendant to prove he was entitled to the benefits he received. Where there is an absence of documentation, it will be more difficult for a director to justify his actions, as it will be where there are substantial payments to of for the benefit of family members or new companies. A common example of this is where a director pays off cherry picked creditors for the benefit of a successor company.

34. Although not the subject of this article it also opens the door to a wider range of remedies, for example it may be possible to seek an account of profits of the successor company in the appropriate circumstances.

35. Overall, the shifting of the burden is no more than a reflection of the special status of a director, reinforced by the fact that they will have been in a position to control both the payments and/or dispositions of property and, subsequently, the provision of information to the office holder who represents the interests of the body of creditors as a whole.

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Appendix

S.172 CA 2006 - Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

S.174 CA 2006 - Duty to exercise reasonable care, skill and diligence

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with –

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
(b) the general knowledge, skill and experience that the director has.

S.175 CA 2006 - 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.