

**LONDON & NEW MASHONALAND EXPLORATION CO
LTD V NEW MASHONALAND EXPLORATION CO LTD:
IS IT AUTHORITY THAT DIRECTORS CAN COMPETE
WITH THE COMPANY?**

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There is confusion concerning the ability of directors to compete with the company. There is uncertainty about whether a different rule or a relaxed application of the conflict rule is applied to directors competing with the company in contrast to other fiduciaries, such as trustees personally competing with the trust business. This stems from a preoccupation with the 1891 decision of New Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd ('New Mashonaland')¹ and a misunderstanding of the conflict rule. Courts and academics have expressed unease about this decision and uncertainty about the scope and meaning of the 'New Mashonaland principle', which provides that directors can compete with the company. This article aims to clarify the scope and meaning of the principle. In doing so it will be argued that the New Mashonaland principle is a limited one which does not answer whether a director can compete with the company; rather a director competing with the company is one application of the conflict rule. A proper understanding of the conflict rule reveals why a director competing with the company will not inevitably breach the rule. This article suggests a three step approach for applying the conflict rule that shifts attention away from New Mashonaland and back onto the unique facts and circumstances, which equitable doctrines and principles must accommodate.

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¹ *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165.

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I INTRODUCTION

The 1891 decision of *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd*² (*New Mashonaland*) has been cited as authority for the rule that it is ‘not impermissible per se for a director of a company to be at the same time a director of a competitor or to personally carry on a competing business’³ (the ‘*New Mashonaland* principle’). The *New Mashonaland* principle has created uncertainty and confusion about the ability of directors to compete with the company. Courts and academics have expressed reservations about the *New Mashonaland* decision and principle.⁴ In many cases the court has expressed uncertainty with the *New Mashonaland* principle but found it unnecessary to decide the issue,⁵ or assumed its correctness,⁶ or stated that as a judge sitting at first instance they must accept it.⁷ Others have called for a reconsideration of the *New Mashonaland* principle labelling it an ‘aberration’ and ‘somewhat difficult to defend.’⁸ Dal Pont and Ford, Austin and Ramsay suggest that there would ordinarily be a conflict where a director competes with the

² *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165.

³ See, eg GE Dal Pont, *Equity and Trusts in Australia* (Lawbook, 2015, 6th ed, 2015) 122 [4.115].

⁴ See eg, Ross Grantham, ‘Can Directors Compete with the Company?’ (2003) 66 (1) *Modern Law Review* 109, 109 where Ross Grantham described the status of *New Mashonaland* as ‘a long standing conundrum of company law’ but one which has ‘stood for over a hundred years’; *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] BCC 332, 347 [75] where Brooke LJ referred to the ‘unease with which some modern text book writers have viewed the *New Mashonaland* case’ before stating that it was ‘unnecessary to resolve the controversy in the present decision because of its unusual facts; *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [69] where McLure JA found that while there was ‘uncertainty’ about the ability of directors to compete with the company, ‘there was authority [*New Mashonaland*] in favour of directors being permitted to compete with the company.’ However, her Honour stated that ‘courts and commentators’ had ‘expressed unease with that view.’⁴

⁵ *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] BCC 332, 347 [75] (Brooke LJ); *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [69]- [70] (McLure JA).

⁶ *Mordecai v Mordecai* (1988) 12 NSWLR 58, 62-63 (Hope JA).

⁷ *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1, 190 [562] (Jessup J).

⁸ Pearlle Koh, ‘The Director’s Fiduciary Obligations- A Fresh Look?’ (2003) 62 (1) *The Cambridge Law Journal* 1, 1.

company but that the *New Mashonaland* principle has relaxed the position for directors.⁹ With respect many of these arguments arise from a misconception of the principle and or the conflict rule. This issue warrants further attention. The issue of competition continues to be relevant; for example in the Western Australian mining industry a number of directors sit on the boards of multiple junior mining companies. The issue has arisen in recent cases¹⁰ and is addressed in many textbooks¹¹ and articles¹² but remains unsettled.

This article argues that the *New Mashonaland* principle is a limited one which does not answer the issue of competition. Rather, applying the conflict rule does and there are circumstances where a director competing with the company will breach the conflict rule and circumstances where they will not. There is no unique rule or standard that applies to directors; what changes is the facts and circumstances to which the conflict rule is applied. This argument will be established in three parts. Part one explores the *New Mashonaland* decision and whether it is authority for a general principle. Part two examines whether *New Mashonaland* is good law in Australia and what for. It addresses the scope and meaning of the *New Mashonaland* principle and whether it answers the issue of competition. Part three establishes the correct approach for determining whether a director can compete with the company. In doing so Part three resolves some issues in applying the conflict rule and proposes a three step process for applying it.

II THE NEW MASHONALAND DECISION

A *Facts of the case*

The director (Lord Mayo) was the director and chairman of the plaintiff company. The plaintiff company alleged that the defendant company had issued a

⁹ G E Dal Pont, *Equity and Trusts in Australia* (LawBook, 6th ed, 2015) 122-123 [4.120]-[4.125] where Dal Pont states that strict application of fiduciary duties in the director-company context sits 'uncomfortably with the judicial recognition of the commercial reality of multiple directorships'; R P Austin, Ian M Ramsay, H A Ford, *Ford Austin & Ramsay's Principles of Corporations Law* (LexisNexis, at October 2015) [9.410] where it is argued that a director competing with the company appears logically to go beyond a real and sensible possibility of conflict but that the courts have (for practical reasons) relaxed the position for directors.

¹⁰ See, eg, *Streeter v Western Areas Exploration Pty Ltd* (2011) 278 ALR 291; *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1.

¹¹ See, eg, GE Dal Pont, *Equity and Trusts in Australia* (Law Book, 6th ed, 2015) 122-123 [4.120]; Meagher, Gummow & Lehane's *Equity Doctrines & Remedies* (Butterworths, 5th ed, 2015) 170-171 [5-170]; Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9th ed, 2012) 606-608 [16-166]- [16-171].

¹² See, eg, Michael Christie, 'The Director's Fiduciary Duty not to Compete' (1992) 55 (4) *The Modern Law Review* 506; Ross Grantham, 'Can Directors Compete with the Company?' (2003) 66 (1), *Modern Law Review* 109; Pearlie Koh, 'The Director's Fiduciary Obligations- A Fresh Look?' (2003) 62 (1), *The Cambridge Law Journal* 1.

prospectus, in which Lord Mayo's name was listed as a director. The companies were rival companies incorporated for similar objects. The plaintiff applied for an interim injunction¹³ restraining the defendant from publishing any announcement that Lord Mayo was one of its directors and to restrain Lord Mayo from authorising or permitting such a publication and from acting as a director of the defendant company. Chitty J refused the motion. However, there appears to be contention about Chitty J's reasoning and the basis for his Lordship's decision.

B What did New Mashonaland decide; did it state any general fiduciary principle?

Despite the use of the decision to explain the ability of directors to compete with their company, this article argues that the decision did not establish any general rule because it was not decided on the basis of fiduciary duties and has no currency today in relation to directors' duties.

1 *New Mashonaland is not about fiduciary duties but whether an interlocutory injunction should be ordered*

New Mashonaland is cited as authority for the *New Mashonaland* principle or rule.¹⁴ This principle has been formulated in different ways. This will be discussed further in Part two. However, generally it is cited as authority for the principle that directors are permitted to compete with the company.¹⁵ The decision is an 'inadequately reported'¹⁶ decision which has been misinterpreted for a general principle for which it is not authority. The case was reported in both the *Weekly Notes*¹⁷ and the *Times*.¹⁸ However, until the Hong Kong Court of Final Appeal decision in *Poon Ka Man Jason v Cheng Wai Tao*¹⁹ ('*Poo Ka Man*') cases have exclusively referred to the less detailed *Weekly Notes* report.²⁰

¹³ Although unclear from the *Weekly Notes* report, it is clear from the *Times* report that the application was for an interim injunction, as the report states, 'The plaintiff accordingly moved for an interim injunction.'

¹⁴ See eg, GE Dal Pont, *Equity and Trusts in Australia* (LawBook, 6th ed, 2015) 122 [4.120].

¹⁵ *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1, 190-191 [562]; *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 303 [69].

¹⁶ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 605 [16-166].

¹⁷ *London and Mashonaland Exploration Co Ltd v New Mashonaland* [1891] WN 165.

¹⁸ *London and New Mashonaland Exploration Co v New Mashonaland Exploration Co and the Earl of Mayo* reported in *The Times*, 10 August, 1891, 3 (See appendix 2).

¹⁹ *Poon Ka Man Jason v Cheng Wai Tao* 2016 W 16175 (CFA); [2016] HKEC 759.

²⁰ *Poon Ka Man Jason v Cheng Wai Tao* 2016 W 16175 (CFA); [2016] HKEC 759 [96] (Spigelman NPJ). See also *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291; *Mordeacia v Mordecai* (1988) 12 NSWLR 58; *On the Street Pty Ltd v Cott* (1990) 101 FLR 234; *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1; *Plus Group Ltd v Pyke* [2002] EWCA Civ 370, for examples of exclusive reference in the *Weekly Notes* report and not the *Times* report.

The case was decided on the basis of whether an injunction should be ordered. This is particularly clear from the more detailed *Times* report. In both reports Chitty J describes the case as ‘unprecedented.’ However the *Times* report illustrates that this was a reference to the circumstances in which an injunction could be granted.²¹ This is apparent from Chitty J’s reference to the case of *Whitwood Chemical Company v Hardman*²² in the *Times* report (but not the *Weekly Notes* report). *Whitwood Chemical Company v Hardman*²³ concerned the circumstances in which an injunction would lie.

Chitty J decided that the circumstances of the case did not warrant the granting of an interlocutory injunction. An injunction is a discretionary remedy and one of the principles for granting an interlocutory injunction is that the applicant would suffer irreparable harm for which damages would not be adequate compensation if the injunction were not granted.²⁴ Chitty J found that the plaintiff company had not established that it would suffer sufficient damage and hence had not proved that relief was required. The plaintiff company was not likely to suffer irreparable harm because it could prevent any harm by calling for Lord Mayo’s resignation or removing him as director. Hence, an injunction was not required because the Company had ‘the most appropriate remedy in its own hands.’²⁵

Chitty J’s finding (in both reports) that counsel’s analogy to a partnership was ‘incomplete’²⁶ has been interpreted as an analogy in relation to fiduciary principles. That is a comparison of the ability of partners to compete with the partnership compared to the ability of directors to compete with the company.²⁷ This article rejects that interpretation. The *Times* report (but not the *Weekly Notes* report) shows that the comparison was a reference to the inability of the plaintiff company to establish that it would suffer irreparable harm in comparison to the harm that a partnership would likely suffer if an injunction were not granted to prevent a partner competing with the partnership. Chitty J explained that this was because the plaintiff Company could seek the director’s resignation or have him removed without affecting the company, whereas removing an offending partner would

²¹ See, *Cheng Wait Tao v Poon Ka Man Jason* [2016] HKCFA 23 [99] (Spigelman NPJ).

²² *Whitwood Chemical Company v Hardman* [1891] 2 Ch 416.

²³ *Whitwood Chemical Company v Hardman* [1891] 2 Ch 416.

²⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 218 [13] (Gleeson CJ). See also *Earl of Ripon v Hobart* (1834) 3 My & K 169, 174; (1834) 40 ER 65, 67 (Brougham LC). See also *Attorney General v Hallett* (1847) 16 M & W 577; (1847) 153 ER 1316 where an injunction was refused because an injunction before trial is only granted to prevent irreparable injury.

²⁵ *The Times*, 10 August, 1891, 3.

²⁶ *The Times*, 10 August 1891, 3; *London and Mashonaland Exploration Co Ltd v New Mashonaland* [1891] WN 165.

²⁷ See eg, Michael Christie, ‘The Director’s Fiduciary Duty not to Compete’ (1992) 55 (4) *The Modern Law Review* 506, 509.

likely result in dissolution of the partnership to the loss of the injured partner or partners.²⁸

The *Weekly Notes* report refers to no case being made out that Lord Mayo was about to disclose to the defendant company any confidential information. It is apparent from the *Times* report that the reference to confidential information was not about the ability of a director to compete with the company so long as he or she did not disclose any confidential information. Rather it was about the requirements for establishing that an injunction should be ordered. The *Times* report states that an injunction would have been available if Lord Mayo's conduct had been of a 'grosser kind,' 'such as' but not limited to 'betraying secrets.' If an injunction were not granted in the case of such grosser conduct the company would likely suffer irreparable harm for which damages would be inadequate. However, that was not the position on the facts before Chitty J.

Although unclear from the *Weekly Notes* report, it is clear from the *Times* report that the *New Mashonaland* decision concerned an application for an 'interlocutory' injunction.²⁹ To obtain an interlocutory injunction a plaintiff need only prove a prima facie case.³⁰ The Court is not always required to decide difficult questions of law which the case depends on³¹ and it is not required to make final findings of fact.³² This lessens the precedential value of the decision.

2 *New Mashonaland* was decided in a different time

New Mashonaland is a product of its time and social, legal and corporate developments since mean that it is no longer relevant to directors' duties.

Chitty J's finding that the plaintiff company could remove Lord Mayo as director without affecting the company is a reflection of the times. At that time lords were often appointed as non-executive directors to promote a company's

²⁸ The *Times*, 10 August 1891,3.

²⁹ The *Times*, 10 August 1891, 3 states that the plaintiff company moved for an 'interim injunction' whereas the *Weekly Notes* report refers only to an 'injunction.' see also, Len Sealey and Sarah Worthington, *Sealy & Worthington's Cases and Materials in Company Law* (10th ed, 2013, Oxford University Press) 406.

³⁰ See eg, Heydon, Leeming and Turner, *Meagher, Gummow & Leahane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 761 [21-350]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

³¹ *Cohen v Peko-Wallsend Ltd* (1986) 68 ALR 394, 397 (Gibbs CJ, Mason and Wilson JJ).

³² Heydon, Leeming and Turner, *Meagher, Gummow & Leahane's Equity: and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 769 [21-390].

profile.³³ They had no active role in the company.³⁴ Removing a director like Lord Mayo who was not appointed for any specific skill set and who had never attended (and would likely never attend) a board meeting would not affect the company in the same way it would today given the large sums of money now often paid to directors for their particular expertise.

Directors were historically subject to a very low standard of care under the common law.³⁵ It was framed subjectively in terms of what could be reasonably expected from a person of their knowledge and experience.³⁶ It seemed to be framed in light of a non-executive director who had no serious role in the company.³⁷

Directors are now subject to higher standards. Directors have a duty of skill, care and diligence under both s 180 (1) of the *Corporations Act 2001* (Cth) and the general law.³⁸ The standard is essentially the same.³⁹ While the standard expected of the director adjusts depending on differences (such as their position in the company) there is a minimum standard now set by statute and informed by the common law.⁴⁰ Directors are now expected to attend all meetings unless there are exceptional circumstances such as illness.⁴¹

Today, a director would breach their duty of care and diligence to the company if they acted like Lord Mayo, in never attending a board meeting and having no active role in the company. The factual situation in *New Mashonaland* is unlikely

³³ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9thth ed 2012). 518 [16-25].

³⁴ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9thth ed 2012) 518 [16-25].

³⁵ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9thth ed 2012) 518 [16-25].

³⁶ *Re City Equitable Fire Insurance Co* [1925] Ch 407.

³⁷ The most extreme example can be seen in the case of *Re Cardiff Savings Bank* [1892] 2 Ch 100 where the Cardiff Savings Bank collapsed because of irregularities in its lending operations. Proceedings were brought against the Marquis of Bute for neglecting to perform his duties. He was held not liable despite being appointed president of the bank at only six months of age and attending only one board meeting in the next 38 years. His family owned Cardiff Castle and he was likely appointed merely to promote the company's image. see also, Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, London, 9thth ed 2012) 518[16-25].

³⁸ Section 180(1) of the *Corporations Act 2001* (Cth) provides that a director or other officer of a company must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a company in the company's circumstances and occupied the office held by, and had the same responsibilities within the company as, the director or officer.

³⁹ *Australian Securities Investment Commission (ASIC) v Adler* (2002) 168 FLR 253, 347 [3] (Santow J) (appeal largely dismissed: *Adler v Australian Securities Commission (ASIC)* (2003) 179 FLR 1); *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1, 127- 128 [7187]-[7192] (Austin J).

⁴⁰ *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 132 [7203] (Austin J).

⁴¹ *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 405 (Malcolm CJ).

to arise again and is out of step with modern times.⁴² The law has evolved from the ‘very undemanding’ duty that the older cases placed on directors to participate in the management of the company because of changes in public governance and corporate attitudes.⁴³

In addition to the development of directors’ duties since 1891, judicial attitudes toward equity have changed. The dominant judicial thinking at that time placed emphasis on contract law rather than equity.⁴⁴ This is evident in *Chitty J*’s focus on the company articles and the existence of any negative stipulation as a basis for granting an injunction.

The modern corporation is vastly different to corporations in 1891. Modern companies are characterised by a separation of control and ownership with shareholdings dispersed among large numbers of people. Earlier corporations often had entrepreneurs both owning and managing them.⁴⁵ The transformation of the modern corporation means that the potential for a conflict of interest or a conflict of duty is greater.⁴⁶ That is because the controllers have a less significant beneficial interest in the company. Consequently there are now more similarities between trustees and directors, requiring a greater emphasis to be placed on a director’s fiduciary duties.⁴⁷ Other changes include the degree of shareholder control. *Chitty J* was likely influenced by the old model of corporate decision-making in finding that the company could prevent itself suffering any harm by removing Lord Mayo as a director. Under the old model shareholders had effective control over the choice of directors. This gave rise to the belief that if the shareholders chose poor directors the remedy lay in their hands.⁴⁸ Today, shareholders in most public companies do not enjoy the same control over boards of directors.⁴⁹

⁴² *Cheng Wai Tao v Poon Ka Man Jason* [2016] HKCFA 23; [2016] HKEC 759 [98] (Spigelman NPJ).

⁴³ *Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)* [1994] All ER 261 cited in *Cheng Wai Tao v Poon Ka Man Jason* [2016] HKCFA 23; [2016] HKEC 759 [98] (Spigelman NPJ).

⁴⁴ Michael Christie, ‘The Director’s fiduciary duty not to compete’ (1992) 55 (4) *The Modern Law Review* 506, 509-510.

⁴⁵ Michael Christie, ‘The Director’s fiduciary duty not to compete’ (1992) 55 (4) *The Modern Law Review* 506, 509-510.

⁴⁶ Michael Christie, ‘The Director’s fiduciary duty not to compete’ (1992) 55 (4) *The Modern Law Review* 506, 513.

⁴⁷ Michael Christie, ‘The Director’s fiduciary duty not to compete’ (1992) 55 (4) *The Modern Law Review* 506, 513.

⁴⁸ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].

⁴⁹ Gower & Davies, *Principles of Modern Company Law* (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].

III IS NEW MASHONALAND GOOD LAW IN AUSTRALIA AND WHAT FOR?

Despite criticism of *New Mashonaland*⁵⁰ and its lack of currency, Australian courts have endorsed it.⁵¹ This Part examines how the decision has been endorsed and what for. In particular whether the *New Mashonaland* principle answers the question of whether directors can compete with the company.

Although the case was reported in both the *Weekly Notes*⁵² and the *Times*⁵³ Australian courts (and English)⁵⁴ have focused exclusively on the less detailed *Weekly Notes* report.⁵⁵ The exclusive focus on the *Weekly Notes* report and its misconceived endorsement in *Bell v Lever Brothers*⁵⁶ has resulted in an incorrect interpretation of *New Mashonaland*.

As explained in Part one, the case did not state any general principle relevant to fiduciary duties. Nevertheless, Australian courts have cited it and its subsequent endorsement by Lord Blanesburgh in *Bell v Lever Brothers*⁵⁷ as authority for the ‘*New Mashonaland* principle.’ It was Lord Blanesburgh who gave life to the principle after citing the *Weekly Notes* report of *New Mashonaland* as authority for the principle that:

*where it was held that, it not appearing from the regulations of the company that a director’s services must be rendered to that company and to no other company, and it not be established that, it not appearing from the regulations of the company he was at liberty to become a director even of a rival company and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company he could not at the instance of that company be restrained in his rival directorate. What he could for a rival company, he could of course, do for himself.*⁵⁸

⁵⁰ See, Michael Christie, ‘The Director’s Fiduciary Duty not to Compete’ (1992) 55 (4) *The Modern Law Review* 506; Ross Grantham, ‘Can Directors Compete with the Company?’ (2003) 66 (1) *The Modern Law Review*, 109-113; Pearlie Koh, ‘The Director’s Fiduciary Obligations- A Fresh Look?’ (2003) 62(1) *The Cambridge Law Journal*.

⁵¹ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

⁵² *London and Mashonaland Exploration Co Ltd v New Mashonaland* [1891] WN 165.

⁵³ *The Times* of 10 August 1891, 3.

⁵⁴ See eg, *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] BCC 332.

⁵⁵ See *Poon Ka Man Jason v Cheng Wai Tao* 2016 W 16175 (CFA); [2016] HKEC 759 [96] (Spigelman NPJ) and see for example, *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291; *Mordeacia v Mordecai* (1988) 12 NSWLR 58; *On the Street Pty Ltd v Cott* (1990) 101 FLR 234; *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1; *Plus Group Ltd v Pyke* [2002] EWCA Civ 370, for this exclusive focus on the *Weekly Notes* Report.

⁵⁶ *Bell v Lever Brothers* [1932] AC 161.

⁵⁷ *Bell v Lever Brothers Ltd* [1932] AC 161.

⁵⁸ *Bell v Lever Brothers Ltd* [1932] AC 161, 195 (Lord Blanesburgh).

Not only is Lord Blanesburgh's interpretation misconceived in light of the comments in Part one but also the reference to *New Mashonaland* was obiter. *Bell v Lever Brothers* was not about fiduciary duties. The case was decided on the basis of 'mistake' and a servant's duty to disclose misconduct.⁵⁹

Despite Lord Blanesburgh's misinterpretation of *New Mashonaland*, older Australian cases have endorsed the *Bell v Lever Brothers* formulation of the *New Mashonaland* principle.⁶⁰ Recent formulations of the principle have dropped the reference to confidential information, citing *New Mashonaland* (often with *Bell v Lever Brothers*) as authority for the principle that a director is permitted to occupy board positions in competing companies⁶¹ or that a director will not necessarily be precluded from engaging in a competitive business on his or her own account.⁶²

The principle is a limited one, which has been misconceived as having wider implications than it does. It has been argued that directors holding multiple positions on competing companies is the most obvious example of a possible conflict of duty and duty because there is a possibility of conflict at every board meeting the director attends where the strategy of the other company is discussed.⁶³ However, such arguments are based on a misconception. *New Mashonaland* is not authority for some absolute rule that allows directors to compete with the company or for a different rule in relation to directors. Rather, it is a limited principle which merely means that there is no rigid rule that a director cannot compete with the company. It is a general starting point that requires further inquiry to be made.

This is evident from a number of recent decisions, which have stated the heavily qualified nature of the principle or its narrow effect⁶⁴ or found that it exists but does not advance the situation any further because it does not elucidate any new or different test to be applied.⁶⁵ The courts have not applied a different test in the context of alleged competition. They apply the conflict rule.

⁵⁹ *Bell v Lever Brothers Ltd* [1932] AC 161, 213 (Lord Atkin), - see also see also counsels arguments at 164-167.

⁶⁰ *Mordeacia v Mordecai* (1988) 12 NSWLR 58, 63 (Hope JA); *On the Street Pty Ltd v Cott* (1990) 101 FLR 234, 242 (Powell J); *Rosetex Co Pty Ltd v Licata* (1994) 12 ACSR 779, 782 (Young J).

⁶¹ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 303 [69] (McLure P).

⁶² *Links Golf Tasmania Pty Ltd v Sattler* (2012) FCR 1 [564].

⁶³ R P Austin, Ian M Ramsay, H A Ford, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, at October 2015) [9.410].

⁶⁴ *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1.

⁶⁵ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 304 [70] (McLure P). McLure P notes the existence of the *New Mashonaland* rule but then applies what her honour believes to be the proper approach.

This is clearly illustrated by McLure P's judgment in *Streeter v Western Areas Exploration Pty Ltd (no 2)* ('*Streeter*').⁶⁶ McLure P does appear to endorse *New Mashonaland* as authority for the proposition that a director is permitted to occupy board positions in competing companies. Her Honour uses it as an example of what she says others have observed as a relaxing of the application of the conflict rule in relation to directors.⁶⁷ However, her Honour merely acknowledges this observation and then turns to examine what she calls the 'principled basis for any narrowing of fiduciary rules applicable to directors.'⁶⁸ Thus, her Honour makes the observation that the *New Mashonaland* principle has been endorsed but then applies the conflict rule as it is applied in all cases. That is a director competing with the company is one of the applications of the conflict rule.

Another application is a trustee competing with the trust business. For instance, in *Re Thomson*, a case where the plaintiffs applied for an injunction to restrain an executor and trustee from operating a business in competition with the trust business, Clauson J did not apply a rule of competition but applied the conflict rule to the particular facts of the case.⁶⁹ Clauson J found that

*the point [he] really [had] to consider [was] whether it would or would not have been a breach of Mr Allen's fiduciary duty [to] the beneficiaries under the will if he had started at the time of the commencement of the action a new business of yacht agent ...*⁷⁰

Re Thomson is cited as authority for the principle that trustees cannot personally compete with the business of the trust or estate.⁷¹ This position is often contrasted to The *New Mashonaland* principle that a director can compete with the company. However, this article rejects that there is a different rule or approach applied to directors and trustees. As demonstrated both require the application of the conflict rule. The *New Mashonaland* principle does not represent some separate competition rule or modified standard for directors compared to other fiduciaries; rather a director competing with the company is one the of the applications of the conflict rule.

⁶⁶ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

⁶⁷ R P Austin, Ian M Ramsay H A Ford, *Ford's Principles of Corporations Law* (LexisNexis Butterworths 13th ed, 2007) [9.060], cited in *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 303 [69] (McLure P).

⁶⁸ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 304 [70] (McLure P).

⁶⁹ *Re Thomson* [1930] 1 Ch 203, 216 (Clauson J).

⁷⁰ *Re Thomson* [1930] 1 Ch 203, 214 (Clauson J).

⁷¹ Heydon, Leeming, Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (Butterworths, 5th ed, 2015) 170 [5-170].

Although, a number of cases have explored the status of *New Mashonaland*, the author was unable to find any decision in which it was relied on as part of the ratio of the decision. For the majority of cases it is approved (often tentatively) without being necessary for the determination of the case, either because the case could be distinguished or because it could be decided on other grounds.⁷² For instance, a finding that there was no competition⁷³ or that the director had already resigned⁷⁴ or that the claim was barred by laches.⁷⁵

IV THE CORRECT APPLICATION OF THE CONFLICT RULE TO DETERMINE IF A DIRECTOR CAN COMPETE WITH THE COMPANY

In Part two it was argued that application of the conflict rule and not the *New Mashonaland* principle answers the question whether a director can compete with the company. This Part explains how the conflict rule is properly applied to determine this question and in doing so suggests a three step process for applying it. This Part demonstrates why a director will not necessarily breach the conflict rule by competing with the company.

A What is the conflict rule?

The conflict rule has been formulated in different ways. On its strictest formulation, the rule precludes a fiduciary from entering into engagements in which he or she has a personal interest (or duty to a third party) conflicting or which possibly may conflict with interests of those whom he or she is bound to protect⁷⁶ or put another way a fiduciary must not place himself in a position where his duty and interest may conflict.⁷⁷

Application of this strict formulation of the rule would mean that where a fiduciary has any loyalty to some interest or party other than that of the principal, the fiduciary would be in breach of the rule. Such a strict formulation is supported

⁷²See eg, *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [70] (McLure JA); *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1; *On the Street Pty Ltd v Cott* (1990) 101 FLR 234, 242; *Streeter v Western Areas Exploration Pty Ltd* (2011) 278 ALR 291.

⁷³ *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [70] (McLure JA).

⁷⁴ *On the Street Pty Ltd v Cott* (1990) 101 FLR 234, 242.

⁷⁵ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

⁷⁶ *Aberdeen Railway Co v Blaikie Brothers* [1843] All ER Rep 249; (1854) 2 Eq Rep 1281; 1 Macq 461.

⁷⁷ *Boardman v Phipps* [1967] 2 AC 46 at 123 Lord Upjohn referring to the 'the fundamental rule of equity'

by a number of high authorities.⁷⁸ Reliance on this strict formulation is likely to lead to the belief that directors who compete with the company will inevitably breach the conflict rule.⁷⁹ However, courts no longer apply that formulation strictly. It has been mitigated by the requirement that there be a ‘real and sensible possibility of conflict’ rather than a possibility no matter how insignificant. Hence the rule that is now applied by courts is that the fiduciary must avoid an actual or a real and sensible possibility of conflict or as it is sometimes put a real and substantial possibility of conflict.⁸⁰ Other formulations of this more qualified standard include a ‘significant possibility of conflict’ or ‘a real or substantial possibility of conflict.’⁸¹

The duty and duty limb of the conflict rule has received less attention and as a result there is some uncertainty in its application. It has been suggested that the conflict rule is applied differently in the context of the duty and duty limb and that this explains why directors can occupy multiple directorships in competing companies.⁸² However, the same general principles apply to both the conflict of duty and interest and the conflict of duty and duty limbs.⁸³ There is no separate doctrine for the duty and duty limb as has been suggested. Both limbs require either an actual conflict or a real and sensible possibility of conflict.⁸⁴

⁷⁸ *Bray v Ford* [1896] AC 44 at 51 (Lord Herschell); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1129; *Boardman v Phipps* [1967] 2 AC 46, 123 (Lord Upjohn); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; [1843-60] All ER Rep 249 (Lord Cranworth LC).

⁷⁹ See eg, Pearlle Koh, ‘The Director’s Fiduciary Obligations- A Fresh Look?’ (2003) 62 (1) *The Cambridge Law J*, 1.

⁸⁰ *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J); *Hospital Products Ltd v United Surgical Corp* (1984) 156 CLR 41, 103 (Mason J). In *Boardman v Phipps* [1967] 2 AC 46 at [124] Lord Upjohn, explained that in his view the phrase ‘possibly may conflict’ meant that ‘*the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.*’

⁸¹ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 103 (Mason J); *Chan v Zacharia*, (1984) 154 CLR 178, 198 (Deane J). See also, *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 558-559 [4506]-[4507] where Owen J referred to the ‘real and sensible possibility’ formulation and also the ‘real and substantial’ or ‘real and significant’ formulations. An appeal from the judgment of Owen J was partly allowed and partly dismissed: *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1.

⁸² P D Finn, *Fiduciary Obligations* (Law Book, 1977) 253 [582].

⁸³ *Pilmer v Duke, Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78]; *Settlement Agents supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [7] (Owen JA), [76] (McLure JA).

⁸⁴ *Pilmer v Duke, Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78]; *Settlement Agents supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [7] (Owen JA), [76] (McLure JA).

B What is required to breach the conflict rule; does it require 'pursuit' of a conflict?

Other issues in the application of the conflict rule may explain some of the uncertainty surrounding the *New Mashonaland* rule. One such issue is whether the conflict rule requires the fiduciary to 'pursue' the conflict or merely occupy a position of conflict or possible conflict. There is a divergence in opinion about whether it is sufficient for a fiduciary to merely occupy a position of conflict or possible conflict to amount to a breach of the rule, or whether the fiduciary must act in a position of conflict and actually pursue or prefer a personal interest (or one duty over another).⁸⁵ This article submits that there is no requirement that the fiduciary pursue the conflict.

The term 'pursuit' has been used in different ways resulting in further confusion. It could mean pursuit in the sense of obtaining a benefit or advantage or it could mean actually preferring a personal interest or duty to a third party whether or not that results in a benefit.⁸⁶ This article argues that neither of these is required. It is sufficient that the director or other fiduciary occupy a position of conflict or a position where there is a real and sensible possibility of conflict. Suggestions that the director must 'pursue' the conflict to amount to a breach of the conflict rule arise from a conflation of the profit rule with the conflict rule, or the phrasing of the conflict rule in light of the remedy of an account of profits.⁸⁷

The profit rule and the conflict rule overlap but they are not identical. They are two themes or sub rules. It would make little sense to speak of a conflict rule at all if it was identical to the profit rule. There are cases which have been decided on the basis of the conflict rule alone.⁸⁸ The conflict rule has a wider scope than the profit rule. The conflict rule, as explained above, is breached not only where there is an actual conflict but where there is a real and sensible possibility of conflict. It could be seen as having two limbs- the real and sensible possibility limb and the actual

⁸⁵ See, *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1, 51- 53 [265]-[275] (Edelman J).

CF *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233, 346 [360] (Black J); see also, Rosemary Teele Langford and Ian M Ramsay, 'Directors' conflicts: Must a conflict be pursued for there to be a breach of duty?' (2015) 9 *Journal of Equity*; Justice Ashley Black, 'Equitable and statutory regulation of conflicts of interests and duty' (Paper presented at University of New South Wales Law School, 10 May 2016, 6-9.

⁸⁶ Rosemary Teele Langford and Ian M Ramsay, 'Directors' conflicts: Must a conflict be pursued for there to be a breach of duty?' (2015) 9 *Journal of Equity* 281.

⁸⁷ Rosemary Teele Langford and Ian M Ramsay, 'Directors' conflicts: Must a conflict be pursued for there to be a breach of duty?' (2015) 9 *Journal of Equity* 281; *Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 11, 51 – 52 [266]-[267] (Edelman J).

⁸⁸ See, *Re Thomson* [1930] 1 Ch 203; *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1.

conflict limb. The real and sensible possibility limb is not merely ‘a counsel of prudence.’⁸⁹ It has been applied in cases.⁹⁰ As Edelman J found in *Agriculture Land Management v Jackson*,⁹¹ this real and sensible possibility of conflict limb negates suggestions that ‘pursuit’ is required. In that case the directors were acting on both sides of a transaction. There was no evidence that they had actually preferred one duty over the other or that they had actually obtained any benefit or profit but Edelman J found that that was not required to engage the conflict rule.

In addition to conflating the profit rule and the conflict rule, the framing of the conflict rule in light of the remedy of an account of profits has likely lead to the misguided conclusion that a fiduciary must ‘pursue’ a conflict.⁹² In order to obtain an account of profits it is clear that some profit must be made.⁹³ It is clear that where a plaintiff seeks an account of profits they must prove that the defendant has made a gain or profit by reason of their breach of fiduciary duty. However, an account of profits is not the only remedy available. A plaintiff can seek an injunction. For an injunction to be awarded it is not necessary to show that the fiduciary has made some gain or profit in breach of their duties. A fiduciary does not need to actually pursue a position of conflict by making a profit. Often they will but this is not essential to satisfy a breach of the conflict rule.

This is further confirmed by appreciating the objective of the rule. It is submitted that the objective of the conflict rule is to prevent a person who has undertaken to act for or on behalf of another in some matter from allowing any undisclosed personal interest (or duty to a third party) to sway them from the proper performance of that undertaking.⁹⁴ On the other hand the profit rule has a different objective. Its objective is to prevent a person from actually misusing the position

⁸⁹ Black J in *Re Colorado* applied Sir Frederick Jordan’s approach as argued in Sir Frederick Jordan, *Select Legal Papers*, (Legal Books, 1983) 115. Sir Frederick Jordan argued that it was merely a counsel of prudence. See Justice Ashley Black, ‘Equitable and Statutory regulation of conflicts of interests and duty (Paper presented at the University of New South Wales Law School, 10 May 2016); M Scott Donald, ‘Managing the “Possibility” of Conflict’, [2015] (June) *Superannuation Law Bulletin* 89.

⁹⁰ See eg, *Re Thomson* [1930] 1 Ch 203.

⁹¹ *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1, 51- 54 [265]-[275] (Edelman J).

⁹² Rosemary Teele Langford and Ian M Ramsay, ‘Directors’ conflicts: Must a conflict be pursued for there to be a breach of duty?’ *Journal of Equity* (2015); *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1, 51-52[267] (Edelman J).

⁹³ An account of profits is an order that requires the defendant to account to the plaintiff for the profits of a wrong (i.e. for any profit made in breach of their fiduciary duties), see: LexisNexis, *Halsbury’s Laws of Australia* (at 29 October 2015) 185 Equity, ‘4 Fiduciaries’ [185-815].

⁹⁴ P D, *Fiduciary Obligations* (Law Book, 1977) 200 [464]-[465]; *Bray v Ford* [1896] AC 44, 51-52; *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [74] (McLure JA); *Chan v Zacharia* (1983) 154 CLR 178, 198-199. Although there are different opinions about the object of the conflict rule, (see for example, Matthew Congalen, *Fiduciary Loyalty; Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) this is the more established view.

their undertaking has given them to further their own interests.⁹⁵ The profit rule focuses on the fiduciary actually preferring their personal interest. The conflict rule is breached where there is a possibility that the fiduciary will be swayed by a personal interest or a duty to a third party at the expense of performing their duty/undertaking to the principal. However, it would extend to an actual conflict where the fiduciary does prefer their personal interest or a duty to a third party over the performance of their duty to the principal. The actual conflict limb is likely to overlap with the profit rule. The profit rule would be breached where the fiduciary actually prefers their personal interest or a duty to a third party and in doing so makes a profit or gain. The conflict rule in a sense catches the issue at an earlier stage, before any gain is made, by ensuring there is no risk to the performance of their duty. This is evident from *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd*⁹⁶ ('*Settlement Agents*'), where McLure JA states that the extension of the conflict rule to cover a real and sensible possibility of conflict ensures that an anticipatory breach of the conflict rule can be restrained that is, the fiduciary can be restrained before an actual conflict occurs.⁹⁷

It has been suggested that the conflict of duty and duty limb of the rule requires an actual conflict and that this explains why directors can occupy multiple directorships in competing companies.⁹⁸ For example, Finn advocates that in the context of a duty and duty conflict, the fiduciary is permitted to occupy a position where there is a possibility of conflict so long as that possibility remains a possibility 'however real that possibility may be.'⁹⁹ He argues that an actual conflict is required in this context.¹⁰⁰ However, it is submitted that that is incorrect.¹⁰¹ As explained above the same general principles apply to both limbs of the conflict rule. One of the key authorities Finn relies on to assert that the duty and duty limb of the conflict rule requires an actual conflict is *Blythe Chemicals Ltd v Bushnell*.¹⁰² The comments of the High Court that actual competition was required and not a mere apprehension of competition have been interpreted as showing that there must be an actual conflict. However, such arguments fail to appreciate the context in which the Court made those statements. Although, it was a case where the employee owed

⁹⁵ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 200 [464].

⁹⁶ *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143.

⁹⁷ *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [72]. (McLure JA) citing *Re Thomson; Thomson v Allen* [1930] 1 Ch 203.

⁹⁸ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 253 [582]; R P Austin, Ian M Ramsay, H A Ford, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis, at October 2015) [9.100].

⁹⁹ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 253 [582].

¹⁰⁰ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 253 [582].

¹⁰¹ See eg, *Agricultural Land Management Ltd v Jackson* (No 2) (2014) 48 WAR 1, 52-53 [268]–[274] (Edelman J); *Commonwealth Bank of Australia v Smith* (1991) 42 FCR, 392; *Breen v Williams* (1996) 186 CLR 71, 135 (Gummow J).

¹⁰² *Blythe chemicals v Bushnell* (1933) 49 CLR 66.

fiduciary duties because he was a senior employee (a manager) the court was not expressing what was required to constitute a breach of the conflict rule but what constituted ‘misconduct’ warranting dismissal. The Court found that to amount to misconduct there had to be actual conduct on the part of the employee that was inconsistent with his duty.¹⁰³ The Court explicitly commented that if there had been a finding that the employee had taken steps in preparation to compete with the company then that may have warranted dismissal.¹⁰⁴ The case has to be considered in light of the remedy being sought, just as statements about the conflict rule requiring the fiduciary to obtain a benefit are often framed in light of an account of profits and should not be taken to be a requirement in all cases of alleged breach of the conflict rule where an account of profits is not being sought.

The real and sensible possibility limb of the conflict rule allows a principal to restrain a possible conflict by applying for an injunction.¹⁰⁵ However, it may not allow other remedies to be sought such as an account of profits or the dismissal of an employee on the grounds of ‘misconduct.’

C Proper application of the conflict rule; determining if a director who competes with the company breaches the conflict rule

Even once the correct standard or formulation of the conflict rule is determined, there are still difficulties in applying the conflict rule. Like all equitable principles, the conflict rule must accommodate the facts of the particular case.¹⁰⁶ The process suggested by this article ensures proper attention is placed on the facts of each case rather than a preoccupation with labeling the case as one of ‘competition.’ Competition is not determinative. Merely characterising the alleged breach as one arising because of ‘competition’ does not necessarily mean that there is an actual or real and sensible possibility of conflict. Similar to the debates surrounding ‘proximity’ in the context of tort law,¹⁰⁷ ‘competition’ is a label and what must be focused on is the particular nature of that business in the particular case to determine if it gives rise to a conflict with the director’s duty to the company in the particular case.

¹⁰³ *Blythe chemicals v Bushnell* (1933) 49 CLR 66, 82 (Dixon and McTiernan JJ).

¹⁰⁴ *Blythe chemicals v Bushnell* (1933) 49 CLR 66, 82 (Dixon and McTiernan JJ)

¹⁰⁵ *Settlement Agents supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [72] (McLure JA); *Re Thomson* [1930] 1 Ch 2013.

¹⁰⁶ *Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J); *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 107 [61] (Hayne and Crennan JJ).

¹⁰⁷ See eg, Prue, Vines, “The Needle in the Haystack: Principle in the Duty of Care in Negligence” (2000) 32 (2) *University of New South Wales Law Journal* 35; *Sullivan v Moody* (2001) 207 CLR 56 [48] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

The process suggested by this article involves engaging with the particular facts of the case in a three step process. First, what is content of the fiduciary duty or what is the subject matter over which the fiduciary obligation extends? Second, what is the personal interest or duty to a third party that is allegedly in conflict? Third, is that personal interest or duty to a third party inconsistent with or in opposition to the director's undertaking to the company?

1 *Step one – ascertain the content or scope of the fiduciary duty*

The first step is to determine the content of the fiduciary duty owed by the director to the company or as it is sometimes put the subject matter or scope of the fiduciary obligation.¹⁰⁸ This step has been described as 'fundamental.'¹⁰⁹ It is fundamental because the fiduciary duty which a fiduciary owes to avoid a conflict or a real and sensible possibility of conflict may not (and usually will not) attach to every aspect of the fiduciary's conduct.¹¹⁰ Therefore, it is necessary to determine what conduct is within the scope of the duty.

A director and company is an established fiduciary relationship. However, identifying that there is an established category or class of fiduciary relationship will not itself elucidate the content of the fiduciary duty. Directors usually have broad and general duties. The particular duties the director owes to the company must be identified with greater precision.¹¹¹ Identification of the content of the fiduciary duty is always necessary even where the fiduciary relationship falls within an established fiduciary relationship. The content of the fiduciary duty is not explained by some general obligation of loyalty; fiduciaries do not owe a general obligation to act in the interests of the beneficiary.¹¹² The conflict rule is proscriptive in nature.¹¹³ The director must not place themselves in a position of an actual or real and sensible possibility of conflict between their duty to the company and their personal interest or duty to a third party. The concept of 'duty,' which the conflict rule refers to is really a reference to the director's undertaking to the

¹⁰⁸ *Birtchnell v Equity Trustees; Executors and Agency Co Ltd* (1929) 42 CLR 384, 409 (Dixon J); *Chan v Zacharia* (1984) 154 CLR 178, 196, 204 (Deane J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69, 102; *Streeter v Western Areas Exploration Pty Ltd* (No 2) (2011) 278 ALR 291, 304 [70] (McLure P); *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63, 89 [206] (Jacobson J).

¹⁰⁹ *Re Colorado Products Pty Ltd* (in prov liq) (2014) 101 ACSR 233, 347 [361] citing *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) [206] (Jacobson J with whom Rares and Besanko JJ agreed).

¹¹⁰ *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 114 [91] (Hayne and Crennan JJ).

¹¹¹ *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 114 [91] (Hayne and Crennan JJ).

¹¹² *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See also, *Pilmer v Duke Group Pty Ltd* (in liq) (2001) 207 CLR 165, 197-198 (McHugh, Gummow, Hayne and Callinan JJ).

¹¹³ *Breen v Williams* (1996) 186 CLR 71, 289 (Gaudron, McHugh JJ).

company.¹¹⁴ Essentially the fiduciary duty to avoid a conflict or a real and sensible possibility of one exists within bounds and those bounds are ascertained by reference to the function or responsibility the director has undertaken to perform for the company in the particular case.

Given that the concept of ‘duty,’ which the conflict rule refers to is really a reference to the director’s undertaking to the company it is necessary to determine what functions and responsibilities the director has undertaken to perform for the company. This is determined objectively by looking at particular features of the relationship, including the existence of a contract, such as an employment contract or a contract of agency, the company constitution, the course of dealing between the parties and the circumstances of the fiduciary’s appointment.¹¹⁵ Accordingly, the scope of the fiduciary’s obligation is not uniform in all cases. There will be differences both between and within different classes of established fiduciary relationships.¹¹⁶

It is logical that the actual function or responsibility assumed by the director will determine the subject matter over which the fiduciary obligation to avoid a conflict of interest and duty or duty and duty extends.¹¹⁷ It is logical because the core of a fiduciary relationship is the notion that a person undertakes to act for or on behalf of another in some matter or matters.¹¹⁸ Some aspects of the fiduciary’s conduct will not fall within the scope of that undertaking and hence it will not fall within the scope of their fiduciary duty.¹¹⁹ With this in mind it is apparent that the duty must be stated with some precision and specificity by reference to the particular facts of the case.¹²⁰ It is therefore nonsensical to suggest that a director who competes with the company will always breach the conflict rule, or will never

¹¹⁴ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [179] (Finn, Stone and Perram JJ).

¹¹⁵ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 304 [70] (McLure P); *Chan v Zacharia* (1984) 154 CLR 178, 196, 204; *Birchnell v Equity Trustees Executors and Agency Co Ltd* (1992) 42 CLR, 408 (Dixon J).

¹¹⁶ *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ).

¹¹⁷ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, (Finn, Stone and Perram JJ).

¹¹⁸ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 102 - 104; *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815, 833; *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [68] (McLure P); Justice James Edelman, ‘The Importance of the Fiduciary Undertaking (Paper presented at the conference on fiduciary law, University of New South Wales, 22 March 2013) 4-5; P D Finn, *Fiduciary Obligations* (Law Book 1977) 201 [467].

¹¹⁹ *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ); *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15 (Bryson J); *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 271 ALR 291, 303 [70]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (Finn, Stone and Perram JJ).

¹²⁰ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, (Finn, Stone and Perram JJ); *Howard v Commissioner of Taxation* (2014) 253 CLR 83.

breach the conflict rule, without determining the scope of their fiduciary duty in the particular case. For instance, if it is a director's duty to safeguard and further the interests of the company then a personal interest which might sway the director from the proper performance of their duty is one which if pursued by the director would harm the interests of the company.¹²¹ However, as explained the director's duty will not usually be that broad and hence it is unlikely that a director holding any personal interest or any duty to a third party whatever will fall foul of the conflict rule. It is only those interests which fall within the bounds of the fiduciary obligation which will engage the conflict rule.¹²² Similarly in the case of a duty and duty conflict it is only those duties to a third party, which are or sensibly may be in opposition to, or inconsistent with the particular duty/undertaking owed by the director, which will fall within the scope of the conflict rule.

A review of the case law demonstrates that this first step sometimes resolves the whole issue. In *Howard v Commissioner for Taxation*, the High Court drew attention to the need to state the content of the director's duty with some specificity. The High Court explicitly stated that the appellant had stated the director's duty too broadly.¹²³ The High Court found that in the particular circumstances the director's duty was to take appropriate steps to give effect to a decision of the directors to try and bring the company in as the ultimate purchaser of the golf course. This distinction was important for determining if there was a conflict of interest and duty or duty and duty between the director's duty to the company, his self interest and his duty to the joint venturers. Crennan and Hayne JJ illustrated how the content of the duty would influence the outcome of whether there was a conflict of interest or duty by contrasting the result where the duty was defined differently because of a change in the circumstances of the case.¹²⁴

The judgment of McLure P in *Streeter* is another example of how the content of the fiduciary duty can resolve the issue. Her Honour found no relevant provisions in the company constitution. However, she looked in detail at the nature of the directors (Mr Cooper and Mr Streeter) appointment and at the course of dealing between them and the company.¹²⁵ In looking at the circumstances of Mr Streeter's appointment, her Honour noted that the reason he was appointed was because of his 'reputation as an astute investor of seed capital in the mining industry'¹²⁶ and

¹²¹ *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 114 [91] (Hayne and Crennan JJ).

¹²² *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15 (Bryson J).

¹²³ *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 8, 120 [112] (Gagler J), 98 [29] (French CJ, and Keane J).

¹²⁴ *Howard v Commissioner of taxation (Cth)* (2014) 253 CLR 83 [94] (Crennan and Hayne JJ).

¹²⁵ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 304 [70] (McLure P); *Chan v Zacharia* (1984) 154 CLR 178, 204 (Deane J).

¹²⁶ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

that that investment was usually accompanied by him being given board representation. Her Honour looked at the nature of investing seed capital in a start up company such as WAE, and said that it was speculative, particularly here given WAE's history of failed attempts to raise funds. Further, in looking at the director's responsibilities, the President found that the company had no employees, limited operations and had began divesting itself of its mining tenements. The company had been dormant since 1998. Although, she does not explicitly state, it is clear that the director of such a company will have quite limited responsibilities. In looking at the circumstances of their appointment and the course of dealings, her Honour came to the conclusion that it was,

*far-fetched and fanciful to suggest that the parties intended that, from the commencement of Mr Streeter and Mr Cooper's involvement with WAE, all future investments by Mr Streeter (or Mr Cooper) in the mining industry in this State or elsewhere had to be with, or through, WAE.*¹²⁷

It would seem that the directors had limited responsibilities to the company and that there was an implicit acceptance or recognition that Mr Streeter would pursue other opportunities in the mining industry, given the nature of investing seed capital and her Honour's others findings. The content of Mr Streeter's duty resolved the issue.

Another illustration of the importance of this first step is in *Re Colorado*.¹²⁸ The director of Colorado Products was alleged to have breached her fiduciary duty. It was argued that she had breached the conflict rule by placing herself in a position where she was the owner, director and controlling mind both of Colorado's landlord and Colorado's major supplier of goods. This would seem to give rise to a conflict given that a manufacturer or lessor's interests (particularly as to pricing and timing of payments) will often not align with those of its distributor or lessee. However, Black J accepted that a necessary step in determining whether the conflict rule had been breached was to ascertain the subject matter of the relevant fiduciary obligation.¹²⁹ His Honour found that the company constitution and the course of dealing between the parties informed the scope of the director's fiduciary obligation to Colorado. In particular Black J found that the scope of the conflict rule was narrowed by the parties deliberately adopting a particular structure. They chose a structure which involved the director of Colorado Products being also the director of the company that manufactured the goods it sold and also the director of the company that leased its premises to it.

¹²⁷ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

¹²⁸ *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233.

¹²⁹ *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233. [361] (Black J).

An extreme example of the importance of this first step in determining whether there is a conflict of interest and duty or duty and duty is found in the English Court of Appeal decision of *In Plus Group Ltd v Pyke*.¹³⁰ The appellant was appealing a decision that there had been no breach of fiduciary duty by Mr Pyke. The claimant company sought equitable relief on the ground of Mr Pyke's activities in setting up a new company in competition with it. In fact the company Mr Pyke established carried on business with the claimant company's most important customer. The Court expressed concern with the *New Mashonaland* principle. Brooke LJ stated that it was not an appropriate case to examine the scope of the principle. Sedley LJ also expressed considerable concern with the principle and found that it stood for only a very limited principle. In any event the Court went on to apply the conflict rule to determine if the director could conduct this business without breaching his fiduciary duty to the company. The focus of the decision was on this first step of ascertaining the scope of the fiduciary obligation, by reference to the director's duty or undertaking to the company. The Court engaged in a considerable examination of the facts of the case. In particular they looked at the nature of the relationship between Mr Pyke and the company and the course of dealing between them. They found that since having a stroke Mr Pyke had been excluded from the company.¹³¹ As Parker LJ and Sedley LJ stated:

*for all the influence Mr Pyke had, he might as well have resigned as a director. The defendant's role as a director of the claimant was throughout the relevant period entirely nominal... in the sense that he was entirely excluded from all decision-making and all participation in the claimant company's affairs.*¹³²

The result of Mr Pyke being excluded was that there was no duty with which Mr Pyke's personal interest or duty to another party could conflict. Essentially, the course of dealings between the parties revealed that Mr Pyke had no responsibilities to perform for the company. He owed no duty to the company and as a result the scope of his fiduciary duty had been limited to such an extreme degree that it had no content at all.

Dal Pont incorrectly asserts that *In Plus Group v Pyke* demonstrates that where a director holds directorships in companies that are in direct competition with each other there is a 'clear conflict of interest' but that the director will not commit a fiduciary breach where they have been excluded from the company.¹³³ This first

¹³⁰ *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370.

¹³¹ *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370[76] Sedley LJ [90] Parker LJ [94].

¹³² *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2003] BCC 332, 351 [90] (Sedley LJ).

¹³³ 123 [4.125]

step illustrates that that interpretation is incorrect. The reason there was no fiduciary breach was because there was no conflict.

It is submitted that *New Mashonaland* would have been decided similarly to *In Plus Group v Pyke* if Chitty J had made a final determination on the application of the conflict rule. Given that Lord Mayo had no active role in the company, he would unlikely have owed the company any duty with which his duty to another company could conflict.

Another factor that might influence a director's duties is whether they are an executive or non-executive director.¹³⁴ The court in *Woolworths v Kelly*¹³⁵ stated that the role of the director was important. For instance, the chairman of directors has greater responsibilities than other directors.¹³⁶ However, it is preferable to look behind these labels to determine the directors' actual role and responsibilities as described above. However, an executive director is subject to an employment contract and their duties are defined by reference to that contract, which may contain both express and implied terms.¹³⁷ Hence that contract will affect the scope of their fiduciary duty.

A director may avoid breaching the conflict rule if they make full disclosure of the facts to the company and the company consents to the fiduciary acting in a way that would otherwise place him or her in a position of conflict or real and sensible possibility of conflict.¹³⁸ Thus, a director may be permitted by the company to compete with it.

It was explained in Part two that the same approach is applied in all cases of a fiduciary competing with the business of the beneficiary. Accordingly, step one should be applied in all conflict cases, whether it involves a director, trustee, agent or partner.

A clear example of this first step being undertaken in a case involving a trustee is *Re Thomson*. In *Re Thomson* Clauson J had to decide whether an executor and trustee had breached the conflict rule by taking out a lease for premises from which he was going to establish a business in competition with that of the beneficiaries under the will. Clauson J stated that executors and trustees have duties of a fiduciary

¹³⁴ *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189; *On the Street Pty Ltd v Cott* (1990) 101 FLR 234, 242 (Powell J); *Industrial Development Consultants Ltd v Cooley* [1972] 2 AER 162.

¹³⁵ *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

¹³⁶ *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 225 (Mahoney JA).

¹³⁷ *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, 225 (Mahoney JA).

¹³⁸ *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233, 347 [361] (Black J).

nature. Clauson J then determined what the executor/trustee's particular duty was in the circumstances of the case. He found that it was to 'carry on the business of the testator to the best advantage of the beneficiaries.' That is quite broad, but it was determined by reference to the executor/trustees obligation under the will.

In the case of partnerships the scope of the obligation must similarly be ascertained. Indeed in *Chan v Zacharia*¹³⁹ Deane J made the observation that:

It is conceivable that the effect of provisions of a particular partnership agreement, in the context of the nature of the particular partnership, could be that any fiduciary relationship between the partners was excluded.

McLure P in *Streeter* observed that real estate agents are permitted to act for multiple vendors of real estate despite the vendors being in competition for purchasers in the same geographic or other relevant market.¹⁴⁰ The basis for this is not that a different standard applies to them or any rule of competition. Rather, it is the result of ascertaining the scope of the fiduciary obligation. In the case of real estate agents, their relationship with the vendor is defined by a contract of agency. Therefore, it is necessary to examine the particular contract of agency. Given the nature of the real estate business, it has been held that there is an implied term in a contract between real estate agent and vendor that the agent is entitled to act for other principals selling similar properties and to keep confidential information obtained from each principal.¹⁴¹ Thus, the conflict rule applies equally to real estate agents but the content of that duty is modified so that it does not extend to the situation of a real estate agent acting for multiple vendors in the same geographical location. The fiduciary principle accommodates itself to the terms of the contract.¹⁴²

It would be illogical to jump to step three and ask whether there is a conflict or a real and sensible possibility of conflict, without first identifying what the duty is that falls within the scope of that rule. That is you cannot determine whether a duty to a third party or a personal interest conflicts with the fiduciary's undertaking/duty without first determining the content of that duty. It is perhaps because of a failure to appreciate the importance of this first step that some have wrongfully argued that there is an inherent conflict in a director serving on multiple boards in companies that are direct competitors¹⁴³ or that there would ordinarily be a conflict

¹³⁹ *Chan v Zacharia* (1983) 154 CLR 178.

¹⁴⁰ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 303 [69] (McLure P).

¹⁴¹ *Kelly v Cooper* [1993] AC 205, 214.

¹⁴² *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J).

¹⁴³ Michael Christie, 'The Director's Fiduciary Duty not to Compete' (1992) 55 (4) *The Modern Law Review* 506, 507.

or possible conflict but that the *New Mashonaland* rule has allowed directors to compete with the company.¹⁴⁴

2 *Step two- identify the nature of the fiduciary's personal interest or duty to a third party*

The second step is to identify the nature of the interest or duty that is allegedly in conflict with the fiduciary's duty or undertaking. This is a similar enquiry to step one but on the other side. This step must be undertaken for two reasons. First, it is necessary to determine if it falls within the scope of the duty identified in step one. The point of determining the scope of the conflict rule is that the personal interest (or duty to a third party) must fall within it. As explained the 'duty' in the conflict rule really refers to the director's undertaking to the company. Thus, the conflict rule only encompasses conduct taken in exercising those responsibilities and duties the director has undertaken to perform for the company. Hence, while the personal interest does not need to be actually pursued or preferred it has to be a personal interest that exists in the exercising of a particular function, power or duty rather than in some abstract and general sense. The second reason is that in the real and sensible possibility limb of the conflict rule, it is necessary to examine the nature and or intensity or duration of the particular interest or duty to ensure that it is not too insubstantial or remote.¹⁴⁵

Accordingly, the personal interest of a fiduciary or duty they have to a third party must be stated with some specificity and detail. For instance if the personal interest is the running of a business, it would be necessary to ascertain what is involved in running that business, or if it is a duty to a third party, it would need to be ascertained what that particular duty is.

It is also not sufficient in the case of say a director of a company which transacts with another company, in which they hold shares, to simply define the personal interest as a share holding. It would be necessary to examine the size of that shareholding. If the shareholding is too insignificant it may not realistically amount to a personal interest in the matter and hence would be unlikely to sway the fiduciary. An example of stating the interest with some specificity can be seen in the example given by McLure JA in *Settlement Agents*. Her Honour stated that there

¹⁴⁴ GE Dal Pont, *Equity and Trusts in Australia* (LawBook, 6th ed, 2015) 122 [4.120]; R P Austin, Ian M Ramsay, H A Ford, *Ford Austin & Ramsay's Principles of Corporations Law* (LexisNexis, at October 2015) [9.410].

¹⁴⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103 (Mason J); *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [72] (McLure P).

would be an actual conflict where ‘a director had to consider a resolution that the company enter into a financially significant transaction with another company in which the director has a controlling interest.’ McLure JA did not simply say ‘interest’ but stated that it was a ‘controlling interest.’ Her Honour looked at the intensity of the interest and the nature of the transaction.

Another illustration of this requirement is in the situation where Company A enters into a transaction with Company B for the sale and purchase of some property and a director of Company A holds shares in Company B. The shareholding could be so insubstantial that the director could not realistically be said to have a relevant personal interest.¹⁴⁶ Although not identical an analogy can be made to cases of actual or apprehended bias. In *Ebner v Official Trustee in Bankruptcy* (*Ebner*)¹⁴⁷ the High Court emphasised that a judge is not automatically disqualified from presiding over a matter because they have any interest in the matter however small it may be. The High Court explained that the aim of the rule is to ensure that the judge will bring an impartial mind to the resolution of the question they are required to decide. Accordingly, it is only those interests, associations or other circumstances which have the potential to bring into question the independence or impartiality of the judge which would disqualify the judge on the basis of bias or apprehended bias.¹⁴⁸ In such cases of bias the court will look at the nature and degree of the association and potential interest that might exist.¹⁴⁹ In the two appeals heard together in *Ebner* the judge was described as having a ‘fairly modest’ shareholding in the public company involved in the proceedings before him.¹⁵⁰ The High Court found that in neither case could the outcome of the proceedings affect the value of the judge’s shares or his interest in them. Thus, he was not automatically disqualified from presiding over either of the cases.¹⁵¹ Of course, as Gaudron J said in *Ebner*, ‘minds may differ as to what constitutes a substantial holding or financial interest in a company.’¹⁵²

¹⁴⁶ P D Finn, *Fiduciary obligations* (Law Book, 1977) 203 [472].

¹⁴⁷ *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337.

¹⁴⁸ *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 348 [22], 356 [54], 358 [59] (Gleeson CJ, McHugh, Gummow and Hayne JJ) 366 [94] (Gaudron J).

¹⁴⁹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [2] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁵⁰ *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 359 [65] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 367 [99] (Gaudron J).

¹⁵¹ *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 346 [14], 347 [17] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ) 366 [99] (Gaudron J).

¹⁵² *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337, 367-368 [98]-[99] (Gaudron J).

Similarly, in applying the conflict rule minds may differ as to what constitutes an interest or duty to a third party which is real and sensible or substantial and not remote.¹⁵³ Just as the inquiry in *Ebner* centered on what the objective of the rule is (ensuring that the judge is impartial) it is helpful to consider what the objective of the conflict rule is in considering if the interest or duty is too remote and theoretical. There is contention about the purpose of the conflict rule.¹⁵⁴ However, the more established view is that the object of the rule is to ensure the fiduciary is not swayed from the proper performance of their duty or undertaking to the company (which was ascertained in step one).¹⁵⁵ Therefore, the interest has to be one that is significant enough to sway the director from the performance of their duty. It has to be an interest significant enough that the director might sensibly pursue it at the expense of their duty to the company.

An example of undertaking this second step where the personal interest is the running of a rival business is *Re Thomson*. Clauson J did not stop at describing the personal interest as the operation of a rival business. Rather, his Honour examined in detail what the nature of that industry was and what was involved in conducting the business.¹⁵⁶ The business was that of a yacht agent or broker. Clauson J found that a yacht agent operated similarly to a real estate agent. His Honour found that a yacht agent would enter into a contract with a yacht owner. The contract would provide that if they were the first yacht agent to secure a purchaser, they would obtain a benefit in the form of a commission. Clauson J then importantly observed that the nature of the yacht agent's business was that most of the yachts on the market were on the books of all yacht agents at the same time. However, it is only the agent to first secure a purchaser who receives a commission. Accordingly, every yacht agent was in competition with every other yacht agent. This step was essential to determining the third step. Without knowing what was involved in running that business, Clauson J would have been unable to determine the affect of that personal interest on the executor/ trustee's duty to the beneficiaries.

¹⁵³ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [79].

¹⁵⁴ See, Justice James Edelman, 'The Importance of the Fiduciary Undertaking' (Paper presented at the Conference on Fiduciary Law, University of New South Wales, 22 March 2013) Part II; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non Fiduciary Duties* (Hart Publishing 2010).

¹⁵⁵ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 200 [464]-[465]; *Bray v Ford* [1896] AC 44, 51-52; *Chan v Zacharia* (1983) 154 CLR 178, 198-199 (Deane J); *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASC 143 [74] (McLure JA).

¹⁵⁶ *Re Thomson* [1930] 1 Ch 203, 214-216 (Clauson J).

The requirement that the personal interest or duty to a third party give rise to a real and sensible possibility of conflict rather than any theoretical or possible conflict is one of the ways the strictness of the rule is mitigated.¹⁵⁷

3 *Step three- is the personal interest or duty to a third party inconsistent with or in opposition to the director's undertaking to the company?*

Once it is determined what the director's undertaking/duty to the company is in the particular case and what the particular personal interest or duty to a third party is it must be determined whether they are inconsistent or in opposition with each other.

The objective of the conflict rule is to prevent a person who has undertaken to act on behalf of another to be swayed from the proper performance of that undertaking or duty.¹⁵⁸ Hence, the focus is on ensuring the director will perform their undertaking to the company. There will be an actual conflict where the director owes duties that are adverse or inconsistent with each other or a personal interest that is inconsistent with their duty to the company.

The real and sensible possibility of conflict limb requires analysing in step two as explained above whether the interest or duty is of such a nature that it is likely to sway the director. That is, can it realistically be described as a personal interest in the matter? Can it be realistically said that if certain events happen (such as the establishment of a rival business of a particular kind) that the director will have a personal interest in the particular matter. Then in step three it must be determined whether the interest and duty or duty and duty are in opposition or inconsistent with each other by asking whether the director can properly fulfill both. Can the director further their personal interest and also act in accordance with their undertaking to the company? Can the director properly carry out their duty to the company and their duty to a third party? Or does one undermine the other? Does their duty require them to act in a particular way for the company or to exercise certain responsibilities which will be undermined by the existence of this other interest or duty?

Given that these issues are highly fact dependent and difficult to define in the abstract, it is useful to illustrate this step through an example. As previously

¹⁵⁷ See, M Scott Donald, 'Managing the "possibility" of conflict,' [2015] (June) *Australian Superannuation Law Bulletin*, 89-90.

¹⁵⁸ P D Finn, *Fiduciary Obligations* (Law Book) 1977) 200 [464]-[465]; *Bray v Ford* [1896] AC 44, 51-52; *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [74] (McLure P); *Chan v Zacharia* (1983) 154 CLR 178, 198-199.

explained *Re Thomson* was a case about a trustee and executor competing with the company. His duty was defined by reference to the terms of the will. The executor and trustee's duty or undertaking to the beneficiaries was to conduct the yacht agency business to the best advantage of the beneficiaries (step one). Clauson J then examined the nature of the personal interest. That is the nature of running his own business as a yacht agent (step two). After determining what this article has described as steps one and two, Clauson J then looked at the impact of that interest (personally operating the yacht agency business) on the executor and trustee's duty to conduct the yacht agency business to the best advantage of the beneficiaries (step three). Clauson J found that the nature of the yacht agent industry was that all of the yachts on the market were on the books of all the yacht agents but only the agent who first obtained a sale would obtain the commission. The executor and trustee's personal interest in pursuing the sale on behalf of his own business to obtain the commission for himself was inconsistent with his duty to the beneficiaries under the will. There was a real and sensible possibility that if the executor established a business as a yacht agent he would have a conflict between his interest in obtaining the sale and commission for himself and his duty to the beneficiaries to pursue yacht sales on their behalf. The nature of the industry meant that if he established his personal business it would be competing for the same sales as the business he was conducting on behalf of the beneficiaries and he could not obtain the sale for both himself and the beneficiaries. Hence his personal interest in obtaining the commission for himself was in opposition with his duty to the beneficiaries. Step three depends on the proper factual analysis being undertaken in steps one and two. Then it is determined if the director can properly serve both his or her personal interest or duty to a third party and his or her duty to the company.

The three step process suggested here demonstrates why there is no inevitable conflict in serving as a director of rival companies or personally competing with the company. It is because of this process and not the *New Mashonaland* principle or a less stringent fiduciary duty that a director may or may not be permitted to compete with company.

V CONCLUSION

New Mashonaland has generated much attention and caused confusion about the permissibility of directors to compete with the company. As argued in Part one, the decision no longer has any currency in relation to directors' duties and did not state any general fiduciary principle. It was a case about an interlocutory injunction. However, through misinterpretation it has come to be endorsed in Australia as authority for a general principle that a director is permitted to compete with the company. The principle has caused much confusion. Perhaps this is because it is

divorced from the actual findings and reasons of Chitty J or because it seems out of step with modern standards. While these are both true, the real confusion stems from a misunderstanding of what that principle means and how the conflict rule is applied. As demonstrated in Part two, it is a limited principle that answers few questions. It does not answer the question of whether a director is permitted to compete with the company. It simply means that they will not automatically be prohibited from doing so. It requires further analysis to be undertaken of the facts of the case, by applying the conflict rule as in all other established fiduciary relationships. The High Court has warned against too strict an application of general doctrines and principles of equity without an appreciation of the need to adjust them to the particular facts.¹⁵⁹ In Part three this article suggests adopting a three step process for applying the conflict rule. This process requires the identification of the duties or interests that are alleged to be in conflict or to present a real possibility of conflict and the alleged manner of the conflict.¹⁶⁰ It shifts attention back onto a proper consideration of the circumstances of each case, which seems to have been lost by a pre-occupation with the *New Mashonaland* principle.

¹⁵⁹*Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J); *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 107 [61] (Hayne, Crennan J).

¹⁶⁰ Hayne and Crennan JJ emphasised the importance of these steps in *Howard v Commissioner of Taxation (Cth)* (2014) 253 CLR 83, 107 [61].