COMMENTS

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DIRECTORS' FIDUCIARY DUTIES—THE CORPORATE OPPORTUNITY DOCTRINE.—The decision of the Supreme Court of Canada in *Peso Silver Mines Ltd.* v. *Cropper*[1] has been criticized, rightly it is submitted, for evading the equitable controls proscribing the making of improper profits by corporate fiduciaries.[2] The judgment of Cartwright J., in that case, failed to grapple adequately with the conflict between the interests of Cropper and those of the appellant company of which he was a director—the corporate fiduciary, who was partly responsible for rejecting the business opportunity as being unsuitable for the company, was the very person who benefited from this decision to reject.[3] The recent English decision in *Industrial Development Consultants Ltd.* v. *Cooley*[4] provides an interesting contrast to *Peso Silver Mines Ltd.* v. *Cropper* and also, it is suggested, a more satisfactory outcome.

The facts in *Industrial Development Consultants Ltd.* v. *Cooley* were as follows. Cooley had been managing director of the plaintiff company. During the time when he held this position he had conducted negotiations on behalf of the plaintiff with the Eastern Gas Board with a view to obtaining work from the latter for the plaintiffs. These negotiations came to naught. Subsequently, a representative of the Eastern Gas Board approached the defendant, in his private capacity, with a proposition similar to that in which the plaintiffs had been originally interested. The defendant

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[1] (1966), 58 D.L.R. (2d) 1 (S.C.C.).

[2] Beck, The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered (1971), 48 Can. Bar Rev. 80.

[3] See Prentice, (1967), 30 Mod. L. Rev. 450, at pp. 453-454. The difficulties connected with the decision in *Peso Silver Mines Ltd.* v. *Cropper* are neatly posed by asking the question of how would *Keech* v. *Sandford* (1726), 1 Sel. Cas. Ch. 61 have been decided if the reason why the lease had not been renewed was a *bona fide* decision by the trustee that renewal was not in the best interests of the trust. There is no doubt that the court would have found the trustee to be in breach of trust even though he acted *bona fide*. See *Boardman* v. *Phipps*, [1967] 3 All E.R. 721, [1967] 2 A.C. 46.

[4] [1972] 2 All E.R. 162, [1972] 1 W.L.R. 443. Both of the reports of this case need to be consulted as there are considerable differences between them. These differences will be referred to, when material, mainly in the footnotes.

decided to take this up for himself. He feigned illness,[5] resigned from his position as managing director of the plaintiff company and entered into a contract with the Eastern Gas Board. When the plaintiffs discovered these facts they sought an order making the defendant trustee for the plaintiffs of all the contracts between him and the Eastern Gas Board and for all "fees and remunerations received by or payable to him in respect of any such contracts", or, alternatively, damages for breach of the defendant's duties as director. The defence of the defendant was twofold: (1) the information he exploited "was received by the defendant in his private capacity, there could be no fiduciary obligation to pass on this information . . . to his employers generally",[6] (2) "under no circumstances" would the plaintiffs themselves have been able to enter into the contract due to the Eastern Gas Board's objection to their "set-up".

Both of these defences were rejected by Roskill J. With respect to the first the learned judge stated:[7]

> The first matter that has to be considered is whether or not the defendant was in a fiduciary relationship with his principals, the plaintiffs. Counsel for the defendant argued that he was not because he received the information which was communicated to him privately. With respect, I think, that argument is wrong. The defendant had one capacity and one capacity only in which he was carrying out business at that time. The capacity was as managing director of the plaintiffs. Information which came to him when he was managing director and which was of concern to the plaintiffs and was relevant to the plaintiffs to know, was information which it was his duty to pass on to the plaintiffs, because between himself and the plaintiffs a fiduciary relationship existed. . . .

It is important to note that the fact that Cooley made the impugned profit after he had resigned his position as managing director of the plaintiff company was treated by the court, rightly it is submitted, as being irrelevant. The opportunity which Cooley exploited came to his knowledge when he was a director of the plaintiff company and at that point in time "between himself [that is, Cooley] and the plaintiff company a fiduciary relationship existed". Accordingly, any fiduciary duty that the defendant owed to the plaintiff company came into existence at this point and his

[5] Roskill J. found that the defendant had acted with a total lack of scruple in obtaining release from his contract as managing director. The company, however, did not claim damages for "fraudulent misrepresentation", *ibid.*, at pp. 175G (All E.R.), 453E (W.L.R.). That such an action would have lain seems indisputable. The facts in *Industrial Development Consultants Ltd.* v. *Cooley* differ from those in the famous case of *Bell* v. *Lever Bros.*, [1932] A.C. 161 in that, in the latter case, the directors were found to have acted non-fraudulently in failing to disclose their breach of duty.

[6] *Ibid.*, at pp. 169-170 (All E.R.), 447D (W.L.R.).

[7] *Ibid.*, at pp. 173-174 (All E.R.), 451F (W.L.R.).

subsequent resignation could not operate to terminate this duty.[8] This, of course, distinguishes *Industrial Development Consultants Ltd.* v. *Cooley* from the recent decision of the Ontario Court of Appeal in *Canadian Aero Services Ltd.* v. *O'Malley*[9] in which the plaintiff company sought to make the defendants, who had been executive officers in the plaintiff company, accountable as constructive trustees for a contract with the Guyanan government; a contract which the defendants, when in the employ of the plaintiff company, had unsuccessfully attempted to obtain on behalf of the plaintiff company. The defendants were held unaccountable on the grounds that they obtained the "Guyana contract by use of their own personal educational skill and knowledge . . . rather than by any secret or confidential knowledge belonging exclusively to the plaintiff"[10] and "that the opportunity of obtaining the Guyana contract did not materialize until after they had terminated their employment".[11]

At first glance the decision in *Industrial Development Consultants Ltd.* v. *Cooley* appears no more than a straight forward application of equity's "inflexible rule"[12] that a person standing in a fiduciary position cannot benefit from his position without, at least, full disclosure having been made to and approval being obtained from his principals. This, arguably, is so if one accepts that Cooley's liability to account only arose because he personally benefited and that the mere failure to transmit the information about the Eastern Gas Board approach to him, without the element of improper profit making, would not, by itself, have constituted a breach of duty. Support for this interpretation—the narrower interpretation—can be found in the judgment of Roskill J. At one point the judge said:[13]

> Therefore I feel impelled to the conclusion that when the defendant embarked on this course of conduct of getting information on June 13 using that information and preparing documents over the weekend of June 14-15 (*i.e.* preparing the tenders on his own behalf for the Eastern Gas Board) he was putting himself into the position in which the duty to his employers, the plaintiffs and his own private interests conflicted and conflicted grievously.

Thus it was only because the defendant had "embarked upon a deliberate policy and course of conduct which put his personal

[8] Although the courts have castigated the concept of "director-elect" as belonging to "comic opera", *Lindgren* v. *L. & P. Estates Ltd.*, [1968] 1 All E.R. 917, at p. 923, it is clear that a director can be accountable for breach of duty even though the benefit he receives from such a breach accrues after he has resigned his office as director. *Curtis Furnishing Co. Ltd.* v. *Freedman*, [1966] 1 W.L.R. 1219.

[9] [1972] 1 O.R. 592. [10] *Ibid.*, at p. 602.

[11] *Ibid.*, at p. 598. See also *Baker* v. *Gibbons*, [1972] 1 W.L.R. 693.

[12] *Parker* v. *McKenna* (1874), 10 Ch. App. 96, at pp. 124-125, per James L.J.

[13] *Supra*, footnote 4, at pp. 175D (All E.R.), 452-453 (W.L.R.).

interest as a potential contracting party with the Eastern Gas Board in conflict with his pre-existing and continuing duty as managing director of the plaintiffs'"[14] that any breach of duty arose. An important corollary of this interpretation is, of course, that Cooley would not have been accountable to the plaintiffs if he had done nothing.

On the other hand it might be argued that the defendant in *Industrial Development Consultants Ltd.* v. *Cooley* was held liable because of his failure to transmit to the plaintiffs information which was of commercial value to them. This interpretation would make the case a dramatic contribution to extending the scope of directors' fiduciary duties in that it would recognize an affirmative duty on directors to promote actively the interests of their companies. In the past the fiduciary duties imposed on directors have been negative in nature, they have only become operative once a director determines to act.[15] There are dicta in Roskill J.'s judgment which amply justify this broader interpretation. Thus, in the course of his judgment the learned judge spoke of the "duty" on the part of the defendant "to pass on to the plaintiffs" information "which came to him while he was managing director and was of concern to the plaintiffs and was relevant for the plaintiffs to know".[16] On this theory Cooley would have been in breach of his duty to the company merely by failing to pass on to the plaintiffs the information relating to the Eastern Gas Board contract.

While this theory has its attractions (it compels directors to positively pursue the interests of their companies) it also has its shortcomings. What would the measure of recovery be where a director failed to transmit to his company information of potential value? In this situation there is no benefit accruing to the director although in many cases a loss may be suffered by the company. The element of corporate loss, however, will not always be present. In circumstances like those in *Industrial Development Corporation Ltd.* v. *Cooley* no such loss would have occurred because the other contracting party was unwilling to contract with the company. In this situation it would be grossly unfair to make a director accountable for all potential profits which might have accrued to the company on the supposition that the company would have been able to exploit the economic opportunity in question. Arguably, where a loss can be demonstrated and quantified by a com-

[14] *Ibid.*, at pp. 174B (All E.R.), 451H (W.L.R.).

[15] See Note, Corporate Opportunity (1961), 74 Harv. L. Rev. 765, at pp. 767-768. In *Levien* v. *Sinclair Oil Corp.* (1969), 261 A. 2d 911, the court reasoned that while it was an unfair use of majority power not to actively pursue the interests of the company such a wrong was "outside the mainstream of corporate opportunity cases".

[16] *Supra*, footnote 4, at pp. 173 (All E.R.), 451G (W.L.R.).

pany because of a failure of a director to pass on exploitable information then the culpable director should be liable to account. But if such a claim is allowed it is difficult to see how it could be framed as a restitutionary claim for breach of fiduciary duty in that no improper profit has been realized by the director. It could, more appropriately, be treated as an action for breach of the director's duty of care and skill. Such an action, however, would only give rise to a claim for damages and not for an accounting of profits. In *Industrial Development Consultants Ltd.* v. *Cooley* the claim for damages for breach of contract was treated differently from the claim for an order making Cooley a constructive trustee and the measure of recovery was materially different in each case. Also, it is difficult to see how the common law duty of care and skill could be invoked to impose on a director a positive duty to transmit information to his company. Such duties are negative in nature and only come into operation as a means of measuring the quality of a director's performance once he decides to act.[17]

Not only does the broader interpretation lack convincing juridical underpinning but it could also by a sidewind proscribe what are now presently accepted and widespread corporate practices. Firstly, it would eliminate the practice of a person holding more than one directorship, at least, where the companies are in the same line of business. A director in such a situation would be faced with an impossible dilemma if he acquired information which might be of benefit to either of the companies. Failure to communicate the information to either of the companies of which he was a director would result in him being in breach of his duties simultaneously to both companies. As the law now stands dual directorships are permissible, the only restriction on a director being that where he does determine to act he cannot sacrifice the interest of one company for the benefit of the other.[18] Secondly, the broader interpretation would also preclude a director from carrying on a business in competition with his company, although this might not be such a bad thing.[19]

[17] *Huckerby* v. *Elliott*, [1969] 1 All E.R. 189. In *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407, at p. 429, Romer J. stated that a director was obliged to "attend [board meetings] whenever in the circumstances he is reasonably able to do so". However, in no modern case has a director been liable for non-attendance to his duties. On the contrary quite extended absences from board meetings have been held not to constitute a breach of duty. *Re Denham Ltd.* (1884), 25 Ch. D. 752; *Marquis of Bute's Case*, [1892] 2 Ch. 100. Gower submits that the position is different for managing directors who would, at least, have to display greater diligence than ordinary directors, if not greater skill: Company Law (3rd ed., 1969), pp. 550-551.

[18] *Boulting* v. *A.C.T.T.*, [1963] 2 Q.B. 606; *S.C.W.S.* v. *Meyer*, [1959] A.C. 324.

[19] On the whole the language of Roskill J. supports the narrower interpretation. The learned judge appeared to premise his decision primarily

Although the interpretation of *Industrial Development Consultants Ltd.* v. *Cooley* which premises the defendant's liability on the fact that he personally benefited from the failure to transmit the information to the plaintiff company has been referred to as the narrower interpretation, it, in actual fact, represents a considerable development on the reach of fiduciary duties imposed on directors. In previous cases holding directors accountable to disgorge improper profits, the making of the profit has been immediately related to the holding of the office of director; that is, it was primarily because the director was a director that the profit was obtained. For example, in *Regal (Hastings) Ltd.* v. *Gulliver*[20] it is clear that the directors only obtained the opportunity to invest in Amalgamated Ltd. because of their position as directors of the appellant company. So also in the Canadian cases[21] applying *Regal (Hastings) Ltd.* v. *Gulliver* there was a strong connection between the position of director and the opportunity to make an improper profit. In the recent decision of the Ontario Court of Appeal, in *Canadian Aero Services Ltd.* v. *O'Malley*,[22] the court considered that the primary reason why the defendants were held accountable in *Regal (Hastings) Ltd.* v. *Gulliver* and *Phipps* v. *Boardman* was because "they acquired their knowledge of the opportunity and of the necessary information enabling them to take advantage of the opportunity only by reason of their respective positions and not by reason of their personal skills and knowledge".[23] Admittedly, in *Canada Safeway Ltd.* v. *Thomson*,[24] the information which the defendant director exploited could have been acquired by him even had he not held the position of director. But the defendant director in that case did obtain the information when actively searching for investment outlets for his company and, in addition,

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on the proposition that a fiduciary could not be allowed to put himself in a position where his duty and interest may conflict. He cited, for example, the dissent of Lord Upjohn in *Phipps* v. *Boardman*, [1967] 2 A.C. 46, at pp. 123-125, as embodying the principle on which fiduciaries are made accountable. The "overriding principle" of equity, in Roskill J.'s view was "that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflict". *Supra*, footnote 4, at pp. 176B (All E.R.), 453H (W.L.R.). On the differing juridical bases for holding a fiduciary accountable see McClean, The Theoretical Basis of the Trustee's Duty of Loyalty (1969), 7 Alta. L. Rev. 218.

[20] Throughout *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 the court repeatedly referred to the requirement that the profit, in order to be recoverable by the company, should have been made by a director because of his position as director: "by reason of and in the course of that fiduciary relationship", per Lord Russell, at p. 385; "By use of his fiduciary position", per Lord Porter, at p. 395; "The opportunity and the knowledge . . . came to them . . . in their position as directors." per Lord Wright, at p. 393. Similar statements are to be found in *Phipps* v. *Boardman*, *ibid.*, at p. 103, per Lord Cohen, at p. 105, per Lord Hodson.

[21] See, *e.g.*, *Zwicker* v. *Stanbury*, [1953] 2 S.C.R. 438.

[22] *Supra*, footnote 9.

[23] *Ibid.*, at p. 602.

[24] [1951] D.L.R. 295.

he made use of corporate facilities to evaluate the economic potential of the information.[25] There have been no cases which have gone so far as to hold a director accountable for profits arising from the exploitation of a business opportunity, which fell within the general line of business of the company in which he served as a director, but where the holding of the office of director contributed in no way whatsoever to the making of the profit.[26] This, of course, was the position in *Industrial Development Consultants Ltd.* v. *Cooley,* the information which the defendant exploited was received by him in his private capacity and not because he was a director of the plaintiff company.[27] It is submitted that the subsuming of this situation within the rules regulating the fiduciary duties of directors has much to recommend it. Where information is obtained by a director which is of potential use to the company of which he is a director it would, in many circumstances, be difficult to determine exactly in what capacity he received it.[28] Also, permitting such a distinction to be made presents a director with obvious temptations. The rule in *Industrial Development Consultants Ltd.* v. *Cooley* prevents these difficulties from arising. As a result of *Industrial Development Consultants Ltd.* v. *Cooley* the English law on corporate opportunity could now be formulated in a manner similar to its American counterpart:[29]

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[25] *Ibid.,* at p. 301. See also *Guth* v. *Loft Inc.* (1939), 25 Del. Ch. 255, 5 A. 503.

[26] There is dictum, for example, in *Phipps* v. *Boardman, supra,* footnote 19, at p. 102, which suggests that this would not necessarily constitute a breach of duty: "Information is, of course, not property in the strict sense of that word, and as I have already stated, it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as a result of the use he makes of that information and opportunity." per Lord Cohen. His Lordship thought that if the company in which the trust held the shares had been a public company then Boardman would not have been held accountable for profits arising from the purchase of its shares (at pp. 100-101).

[27] In the All E.R. report of the case, but not in that of the W.L.R., Roskill J. is reported as stating: "There can be no doubt that the defendant got this Eastern Board contract for himself and got it as a result of work which he did whilst still the plaintiffs' managing director." At p. 168G (All E.R.), Roskill J., however, did not premise his subsequent judgment on this fact as he accepted the fact that the plaintiff had been approached in his private capacity and did not utilize any corporate facilities in landing the contract with the Eastern Gas Board.

[28] In a different context in *Hely-Hutchinson* v. *Brayhead Ltd.,* [1967] 2 All E.R. 14, aff'd [1967] 3 All E.R. 98, Roskill J. did attempt, unsuccessfully it is submitted, to distinguish between a situation where a director entering into a contract with his company acted in his private capacity and not *qua* director. This distinction was not pursued on appeal.

[29] *Equity Corp.* v. *Milton* (1966), 221 A. 2d 494, at p. 497. See also *Greene* v. *Dunhill International Inc.* (1968), 249 A. 2d 427; Beck, *op. cit.,* footnote 2, at pp. 92-93: "The test should be whether the opportunity was so closely associated with the existing and prospective activities of the corporation that the director should have fairly acquired it for, or made it available to the corporation."

> The rule is that where there is presented to a corporate officer a business opportunity which the corporation is financially able to undertake, and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, or is an opportunity in which the corporation has an actual or expectant interest the officer is prohibited from permitting his self-interest to be brought into conflict with the corporation's interest and may not take the opportunity for himself.

The question still remains of the defences available to a director who falls within the above rules proscribing the exploitation of corporate opportunities for his own benefit. It will be recalled that one of the defences raised by Cooley was that he should not be held accountable as the Eastern Gas Board would not have entered into any contractual relationship with the plaintiff company. Roskill J. accepted evidence to this effect given by a representative of the Eastern Gas Board finding that there was only a ten per cent chance that the Eastern Gas Board would have contracted with the plaintiffs. The effect of rejecting this defence had the anomalous consequence, as Roskill J. recognized, of conferring on the plaintiffs a benefit "which . . . it is unlikely they would have got for themselves had the defendant complied with his duty to them".[30] Nevertheless the defence was rejected on the ground that "the question whether or not benefit would have been obtained but for the breach of trust has always been treated as irrelevant".[31] If this is considered a too mechanical invocation of well-established equitable principles there are sound policy reasons why the defence was correctly rejected. Any other conclusion would tempt the directors "to refrain from exerting their strongest efforts on behalf of the corporation" by affording them an "opportunity to profit"[32] at what might be the company's expense. As Roskill J. pointed out it would have been the defendant's duty to have tried to persuade the Eastern Gas Board "to change their mind" about dealing with the plaintiffs and that it would have been a "curious position" if "he whose duty it would have been to seek them to change their mind should now say that the plaintiffs suffered no loss because he would never have succeeded in persuading them to change their mind".[33] Similar reasoning would require the rejection of other possible available defences such as commercial liability on the part of the company to exploit the opportunity[34] or the fact that the opportunity was *ultra vires* the company.[35]

[30] *Supra*, footnote 4, at pp. 175F (All E.R.), 453C (W.L.R.).

[31] *Ibid.*, at pp. 175J (All E.R.), 483 (W.L.R.). See also *Boston Deep Sea Fishing Co.* v. *Ansell* (1888), 39 Ch. D. 339; *A.G.* v. *Reading*, [1951] A.C. 507; *Phipps* v. *Boardman*, *supra*, footnote 19.

[32] *Irving Trust Co.* v. *Deutsch* (1934), 73 F. 2d 121, at p. 124.

[33] *Supra*, footnote 4, at p. 176G (All E.R.), 454E (W.L.R.).

[34] *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, footnote 20, also reported in [1967] 2 A.C. 134n.

[35] *Fine Industrial Commodities* v. *Powling* (1954), 71 R.P.C. 253.

The approach of. Roskill J. in *Industrial Development Consultants Ltd.* v. *Cooley* clearly represents a more stringent approach than that of the Supreme Court in *Peso Silver Mines Ltd.* v. *Cropper*. In the latter case the non-confidential nature of the information exploited by Cropper was one of the major considerations underlying the rejection of the appellant company's claim. Cartwright J. stated:[36]

> There is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any information by reason of his office.

There are, of course, significant differences in fact between *Peso Silver Mines Ltd.* v. *Cropper* and *Industrial Development Consultants Ltd.* v. *Cooley*. In the former, the court found that Cropper acted *bona fide* when rejecting the business opportunity on behalf of the company while it is clear that Cooley patently failed to do so, particularly with respect to the way in which he obtained his release from his contract of employment. But *bona fides*, as such, is no absolute defence to a director who profits in breach of his fiduciary duty to his company.[37] Arguably the element of *bona fides* should go to the measure of corporate recovery[38] or to the question of ratification[39] but it has no bearing on the threshold question of whether or not a director has breached his fiduciary duty.

There was also present in *Peso Silver Mines Ltd.* v. *Cropper* the important factor that the appellant company had rejected the business opportunity as being unsuitable, whereas in *Industrial Development Consultants Ltd.* v. *Cooley* it is clear that the plaintiff company was vitally interested in the contract with Eastern Gas Board. But if this is put forward as a distinguishing feature can it not be argued that the refusal of the Eastern Gas Board to deal with the plaintiff company in *Industrial Development Consultants Ltd.* v. *Cooley* performed a similar function as the rejection of the opportunity by the appellant company in *Peso Silver Mines Ltd.* v. *Cropper*. Theoretically it should, as the essence of both defences is that the opportunity was unavailable to the com-

[36] *Supra*, footnote 1, at p. 10. There is also a flavour of this type of thinking in *Canadian Aero Services Ltd.* v. *O'Malley*, *supra*, footnote 9, although this case can be explained on other grounds.

[37] See *Rosenblum* v. *Judson Engineering Corp.* (1954), 109 A. 2d 558 where the court reasoned that "bad faith" was not an essential ingredient to establish a breach of duty with respect to the misappropriation of corporate opportunities on the grounds that the property so acquired ought in fairness to belong to the company. See also *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, footnote 20.

[38] See Jones, Unjust Enrichment and the Fiduciary's Duty of Loyalty (1968), 84 L.Q. Rev. 472, at pp. 497-502.

[39] See Beck, An Analysis of Foss v. Harbottle in, Ziegel, ed., Studies in Canadian Company Law (1967), p. 545, at pp. 577-578.

pany. Yet it was rejected as a defence in *Industrial Development Consultants Ltd.* v. *Cooley*. It is submitted that the same reasoning would also lead to the failure of the defence that the company had *bona fide* rejected the opportunity.

It might be argued that to permit a company to recover from a director profits made from the exploitation of non-confidential information is unduly harsh and for that reason *Peso Silver Mines Ltd.* v. *Cropper* is to be preferred. This argument might have some substance where the information is equally available to both the director and his company. But in *Industrial Development Consultants Ltd.* v. *Cooley* this was not so. And normally this will be the situation as the director acts as the conduit pipe through which the company receives information. It is because a company cannot know of information, whether it be confidential or otherwise, unless it is informed of it by its directors, that directors should feel themselves under some compulsion to relay potentially useful information to their companies. This can, in part, be achieved by discouraging them from putting such information to their own use.

There are a number of aspects of directors' fiduciary duties which require re-examination in the light of *Industrial Development Consultants Ltd.* v. *Cooley*. Firstly, it is to be doubted if *Burland* v. *Earle*[40] would be decided in the same way if it were to occur today. Even before *Industrial Development Consultants Ltd.* v. *Cooley* there were doubts as to whether or not the court that decided *Regal (Hastings) Ltd.* v. *Gulliver* would have decided that case as did the Privy Council,[41] doubts which, in the light of *Industrial Development Consultants Ltd.* v. *Cooley*, appear more than amply justified.[42]

Secondly, *Industrial Development Consultants Ltd.* v. *Cooley* will make it well nigh impossible for a director to carry on a competitive business with the company of which he is a director.[43] A

[40] [1902] A.C. 83.

[41] *Canada Safeway Ltd.* v. *Thomson*, *supra*, footnote 24, at p. 322. Some valiant, but essentially unsuccessful, attempts have been made to distinguish *Burland* v. *Earle*, *ibid.* See, *e.g.*, *Theatre Amusement Co.* v. *Stone* (1914), 50 S.C.R. 32, at p. 37, per Iddington J.

[42] It is hard to see any way around the observations of Moss J.A. in the Ontario Court of Appeal that the "desirability of the company acquiring the property being apparent what was the duty of the president and general manager? (*i.e.* Beatty) Surely to endeavour to acquire it for the company and not to purchase it for himself." (1920), 27 O.A.R. 540, at p. 561. The criticism of *Burland* v. *Earle* voiced by Manson J. in *Canada Safeway Ltd.* v. *Thomson* that "their Lordships almost ignored entirely the relevant facts as found" seems more than amply justified. *Supra*, footnote 24, at p. 322.

[43] On this see Gower, *op. cit.*, footnote 17, pp. 547-549. The Second Circuit in *Burg* v. *Horn* (1967), 380 F. 2d 897, declined to apply the corporate opportunity doctrine in that case because it could have operated to prevent a director from carrying on a business competing with that of his company. The case has been justly criticized. See Note (1967), 43 N.Y.U.L. Rev. 187.

director in such a situation will, by definition, divert to himself economic opportunities which could have been exploited by his company and therefore will fail within the proscription of *Industrial Development Consultants Ltd.* v. *Cooley*. It might be argued that if a director acts *bona fide* (discloses to his company the fact that he is carrying on a competitive activity, and obtains the company's approval) then he should be under no liability to account. Whether or not the answer to this is in the affirmative revolves around two questions: (i) would there be a breach of duty at all —in other words if Cooley had acted *bona fide* in *Industrial Development Consultants Ltd.* v. *Cooley* would he have been held accountable, (ii) if there is a *prima facie* breach of duty is it ratifiable or can it be condoned in advance. The second of these questions will be dealt with at a later part. With respect to the first it is clear that Roskill J. was influenced by the fact that Cooley behaved with gross impropriety by falsely misrepresenting that he was ill in order to obtain his release as managing director. But it influenced the learned judge's decision only in the sense that he had little compunction in making the defendant a constructive trustee for the contracts with the Eastern Gas Board.[44] The absence of *bona fides* did not affect the question of whether or not Cooley had breached his fiduciary duty to the plaintiff company. This, as has been argued previously, is consistent with previous authority. Accordingly it is submitted that even if a director carrying on a competitive enterprise with the company of which he is a director does fully disclose this fact he would still be in breach of duty to his company on the reasoning in *Industrial Development Consultants Ltd.* v. *Cooley*. Nor is this a mere mechanical invocation of "precedent and conceptualism"[45] without anything else to recommend it. The application of the fiduciary principles to this situation underscores the positive obligations of directors to actively pursue the interests of their companies, the dilution of this duty has very little to recommend it.

A third area in which *Industrial Development Consultants Ltd.* v. *Cooley* may have some impact will be on the practice of the same person holding multiple directorships, at least, where the companies which share the common director are in the same line of business. Take, for example, the situation where A is a director of X Co. and Y Co. both of which carry on the same business. If

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[44] "Perhaps it is permissible to say that I have less reluctance in reaching that conclusion [*i.e.* Cooley should be treated as a constructive trustee] on the application of this basic principle of equity since I know what happened was enabled to happen because a release was obtained by the defendant from a binding contractual obligation by . . . dishonest and untrue misrepresentations." per Roskill J., *supra,* footnote 4, at pp. 176D (All E.R.), 454B (W.L.R.).

[45] Jones, Unjust Enrishment and the Fiduciary's Duty of Loyalty (1968), 84 L.Q. Rev. 472, at p. 493.

A, in the service of either company, acquires confidential information then it would be a breach of duty to transmit it to the other.[46] Nor would failure to transmit such information constitute a breach of duty for, as has already been argued, *Industrial Development Consultants Ltd.* v. *Cooley* does not go so far as to make the failure of a director to transmit to his company information of value a breach of duty. What, however, if A in our hypothetical acquires information from a non-confidential source can he prefer either X Co. or Y Co. without the risk of having to account to the other. On our interpretation of *Industrial Development Consultants Ltd.* v. *Cooley* liability would only arise if A personally benefited from the giving of the information to the preferred company.[47]

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[46] See, *e.g.*, *S.C.W.S.* v. *Meyer*, *supra*, footnote 18. The recent decision of Donaldson J. in *North & South Trust Co.* v. *Berkeley*, [1971] 1 All E.R. 980 has some bearing on this problem. In that case an insurance broker, who acted as agent for the assured, also acted as agent for the underwriters in retaining assessors to report on the assured's claim. The assessor's report was shown to the underwriters but not the assured. When the assured sought a copy of the report the broker refused to give him one, on the grounds that to do so would constitute a breach of the duty of confidence owed by him to the underwriters. The assured commenced an action to obtain a copy of the report. Two propositions were put forward to Donaldson J. as the bases for the plaintiff's action to obtain a copy of the assessor's report: (a) If "X, a third party, knowing that A is the agent of P, the principal, enters into an agreement with A involving duties which are inconsistent with those owed by A to P, then, in the absence of fully informed consent of P, X acts at his own peril, and where there is any resulting conflict between X's interests and P's interests the law will prefer the interests of P". The learned judge considered this to contain "much that is sound" and was of the opinion that "the law prefers P's interests to the extent of avoiding any resulting contracts and calling X to account in relation to any commission paid to A", at pp. 992-993. (b) The second proposition was that "If knowing of A's agency for P, X passes information or documents to A relevant to matters which are the subject to that agency, X cannot complain if A complies with his duty to P, to pass on that information [to P] . . . however confidential that information . . . might otherwise be", at p. 993B. This second proposition was rejected by the learned judge on the grounds that it "assumes that it is the duty of the agent to pass on to his principal information that he would not have obtained save on terms that it would be kept confidential from his principal", at p. 993C. Where X, the third party, is aware that he is acting "in a wrongful manner" then things might be different, at p. 983 F.

These observations are not wholly germane to the hypothetical under discussion in that we have interpreted *Industrial Development Consultants Ltd.* v. *Cooley* in such a way as *not* to impose a duty on directors to transmit to their companies all potentially valuable information which they acquire. The situation would be analogous to that in *North & South Trust Co.* v. *Berkeley* if the director was obliged by the terms of a service contract to transmit all relevant information to his company. See *infra*, footnote 56.

[47] In *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*, footnote 20, the court had to decide whether Gulliver was accountable where he had arranged for third parties to purchase the shares in Amalgamated Ltd. The court held that Gulliver was not accountable as he had "made no profit" on the sale of shares. In view of the more liberal use now being made of the constructive trust doctrine the third parties might be liable, a point not discussed in *Regal (Hastings) Ltd.* v. *Gulliver*. See *Selangor United Rubber Estates Ltd.* v. *Craddock*, [1968] 2 All E.R. 1073, at p. 1098. The doubts

Whether such benefit is present will depend upon the circumstances of each case. Where it is evident that much benefit exists, for example, A holds all the shares in the preferred company, then there is every reason why A should be held accountable.[48] In other circumstances even a tentative answer is impossible to give.[49] What is tolerably clear is that the practice of dual directorships would need something more robust than *Industrial Development Consultants Ltd.* v. *Cooley* to blow it over, a case where the breach of duty was more than clearly demonstrated.

Having found Cooley to be in breach of his fiduciary duty to the plaintiff company there remained the problem of what remedy should be granted to the company. On this the court ordered that Cooley should be a constructive trustee for the plaintiffs of all the profits made from the contracts entered into with the Eastern Gas Board. Considering that Cooley acted with proven dishonesty in obtaining his release as managing director the granting of the proprietary remedy is amply justified. A consequence of granting this form of relief is that even if Cooley determined not to proceed with the contract he would still be liable to account to the plaintiff company for all prospective profits that might have been realized if the contract had been completed, on the grounds that equity treats as done that which ought to be done. It is also clear from the nature of the order given that the breach of duty by Cooley was not ratifiable.[49a] Whether this would also have been the case if Cooley had disclosed the information and obtained

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cast on this case by the Court of Appeal in *Carl-Zeis-Stiftung* v. *Herbert Smith & Co.*, [1969] 2 All E.R. 367, [1969] 2 Ch. 276 were not accepted by Brightman J. in *Korak Rubber Co. Ltd.* v. *Burden*, [1972] 1 All E.R. 1210, at pp. 1234-1242.

[48] This would require the court to pierce the corporate veil of the preferred company. Although the courts have failed to formulate any consistent body of principles as to when they will do this, the hypothetical in the text smacks of the use of the corporate form for purposes of doubtful probity, a situation where the courts have shown a willingness to ignore the entity doctrine. See *Jones* v. *Lipman*, [1962] 1 W.L.R. 832; *Re Bugle Press*, [1961] Ch. 276; *Esso Standard (Inter-America) Inc.* v. *J.W. Enterprises Inc.* (1963), 37 D.L.R. (2d) 598 (S.C.C.).

[49] It is to be doubted if *North & South Trust Co.* v. *Berkeley*, *supra*, footnote 46, has any direct bearing on this, again because the duty on a director does not oblige him positively to inform his company of information of use to it. In America the courts have tended to apply the corporate opportunity doctrine restrictively in the dual directorship situation. See *Johnstone* v. *Greene* (1956), 35 Del. Ch. 479, 121 A. 2d 919 (Sup. Ct.). Where, however, a majority shareholder (who is deemed to owe fiduciary duties to his corporation) acquires information which could be of use to his company, the court takes a more strict attitude. This is so even if the majority shareholder is another company. *Greene* v. *Dunhill International Inc.*, *supra*, footnote 29.

[49a] The order obviously entails that the property in equity belonged to the company. A breach of duty involving the taking of such corporate property is not ratifiable. *Cook* v. *Deeks*, [1916] A.C. 554; *Menier* v. *Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350.

prior approval to his entering into the contract with the Eastern Gas Board, it is difficult to say. On the reasoning put forward earlier, that the presence or absence of *bona fides* does not have any bearing on the question of whether or not a breach of duty has taken place, it follows that even in the above situation Cooley would have been accountable to the company—the property in equity would have belonged to the company and therefore corporate approval would have been ineffective.[50] However, to make Cooley in this situation a constructive trustee would be unduly harsh. A less draconic remedy would be more suitable.[51] On this reasoning the presence or absence of good faith would go to the form of relief but not to the question of whether or not there was, initially, a breach of duty.

One further point remains to be made with respect to *Industrial Development Consultants Ltd.* v. *Cooley.* As an alternative to the claim that the defendant was a constructive trustee for the profits arising from his contract with the Eastern Gas Board the plaintiff company also sought damages for breach of the contractual duties owed by the defendant to it under his contract of service as managing director. These damages being the "plaintiffs' loss of the opportunity to get [the] contract" with the Eastern Gas Board. Roskill J., however, rated the plaintiffs' chances of being able to do this, because of the critical attitude of the Eastern Gas Board towards them, as being no more than a "ten per cent chance" and it was on this basis that damages would have to be computed if for some reason the constructive trust order was improper. It is also clear that had the circumstances merited it, injunctive relief could have been afforded to the plaintiff company to remedy the defendant's breach of contract.[52] However, in *Canadian Aero Services Ltd.* v. *O'Malley,* Mackay[53] J.A. considered that proprietary relief in the form of recovery of the profits of the dishonest employee would not be available as a remedy for breach of contract: the principles of recovery with respect to the "trustee relationship" were different from those applicable to "employer and former employee relationship". The learned judge stated:[54]

> In the trustee cases it is unnecessary for the plaintiff to prove that the trust or the shareholders or the principal in an agency case suffered any loss. Liability is imposed as a penal sanction for the

[50] See generally, Wedderburn, Shareholders Rights and the Rule in *Foss* v. *Harbottle,* [1958] C.L.J. 93, at pp. 101-106.

[51] See Jones, *op. cit.,* footnote 38, at pp. 497-502 for a discussion of the various remedies possible.

[52] *Printers & Finishers Ltd.* v. *Holloway,* [1965] R.P.C. 239; *Cranleigh Precision Engineering Ltd.* v. *Bryant,* [1966] R.P.C. 81; *Bent's Brewery Co. Ltd.* v. *Hogan,* [1945] 2 All E.R. 570.

[53] *Supra,* footnote 9.

[54] *Ibid.,* at p. 607.

> misconduct of the trustee, director or agent and they are required to account for and pay to the trust or the company or their principal all profits made by them in respect of the impugned transaction on the ground either of unjust enrichment or that they are constructive trustees and to allow them to retain the profits would be contrary to public policy. On the other hand an action against an employer against a former employee is based on the contractual relationship and is for breach by the employee of his duty, express or implied, to his employer and damages or an injunction are given to compensate the employer for a loss suffered by the employer by reason of the conduct of the employee in making use of his employer's secret processes or confidential list of customers or an injuction to prevent anticipated loss or damage, and the employer must prove the loss or the probable loss.

While normally an employer will sue a dishonest employee in contract,[55] this being the obvious and most convenient remedy,[56] it is hard to see why in principle a constructive trust remedy should not also be available where appropriate.[57] Admittedly English law "looks upon" the constructive trust as an institution "akin to" the express trust and does not treat it as a remedial mechanism generally available to prevent unjust enrichment.[58] However, in the context of the employer-employee relationship a sufficient confidential relationship exists between the parties on which the constructive trust remedy could be founded. The "constructive trust" is "imposed . . . because of the mere use of confidential information for private advantage against the interests of the person who made the acquisition of the information pos-

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[55] See, *e.g.*, *Sanders* v. *Parry*, [1967] 1 W.L.R. 753.

[56] Although in *Industrial Development Consultants Ltd.* v. *Cooley* the constructive trust remedy was more beneficial to the plaintiffs than a remedy for breach of contract this may not be necessarily always so. This would be the situation where the contractual obligations are more extensive than the fiduciary obligations. This is illustrated by one of the arguments put forward by the plaintiff company in *Industrial Development Consultants Ltd.* v. *Cooley* (only reported in the All E.R. report of the case) to the effect that the defendant's "terms of service with the plaintiffs between the beginning of 1968, when he joined the plaintiffs, and the end of July or the beginning of August 1969, when he left, required him to devote the whole of his services to the plaintiffs. They say that from about the beginning or the middle of June 1969 onwards, instead of devoting the whole of his time or endeavour to giving the plaintiffs his advice and all his services as he should, he was in fact, in breach of his duty, seeking to obtain business for himself, particularly this Eastern Gas Board business. They say that his duty required him to obtain that business for and only for the plaintiffs". *Supra*, footnote 4, at p. 168B (All E.R.).

The plaintiffs did not have to pursue this line of argument as the court was willing to hold that the defendant was in breach of his fiduciary duty as a director.

[57] See Hepple and O'Higgins, Individual Employment Law (1971), p. 70.

[58] Goff and Jones, The Law of Restitution (1966), pp. 34-37.

sible",[59] a situation easily imaginable in the employer-employee context.

D. D. PRENTICE*

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CONFLICT OF LAWS—SITUS OF SHARES IN A COMPANY—PROVINCIAL SUCCESSION DUTIES.—A recent decision[1] of the Supreme Court of British Columbia gives a surprising answer to a question which is likely to be much litigated in coming years.

In that case the government of British Columbia claimed provincial succession duties from the estate of a non-resident on the ground that certain shares owned by the deceased were property situate within that province. The shares were held for the deceased by his stockbrokers on their books. No certificates were registered in his name, but the brokers held in their vaults in Toronto and Winnipeg sufficient certificates in street form or in the name of the brokers, to cover all such shares owed to all their customers. The brokers had branches in many provinces, but the deceased had dealt latterly with their Victoria office.

Verchere J. quoted the headnote of *R.* v. *Williams*[2] to the effect that shares are situate where they may be effectively dealt with as between their owner and the company (and not as between a transferor and a transferee). He concluded that the shares in question would likely be transferred by the brokers in Toronto and Winnipeg and that they were therefore situate in those cities and not in British Columbia, and that the assessment by the government of British Columbia for provincial succession duties failed. As the deceased was resident in California, the result is not displeasing. What are its implications?

In the first place, did the deceased own shares? His arrangement with his broker was a very common one. The report of the case does not disclose who the brokers were, or the precise terms of his contract with them. Some national brokerage houses use printed forms of contracts under which their customers agree to accept in such a case a mere debt claim against the brokers, rather than any trust or bailment of actual shares. If that were the case here, it is submitted that the asset would be a simple contract debt by the brokers, and not shares at all. That debt would be situate at the

[59] *Pre-Cam Exploration & Development Co.* v. *McTavish*, [1966] S.C.R. 551, at p. 555, per Judson J.

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[1] *Re Canada Trust Co. and the Queen* (1971), 24 D.L.R. (3d) 753 (S.C.B.C.).

[2] [1942] 3 D.L.R. 1, [1942] A.C. 541, [1942] 2 W.W.R. 321, [1942] 2 All E.R. 95 (P.C. (Ont.)).

residence of the debtor,[3] and in the present case that would probably be Victoria, where the deceased had dealt.[4] If that were so, the British Columbia assessment would have been valid. Such an argument was rejected in the present case, and we do not know enough of the facts to be able to comment on that decision.

Let us therefore assume that the court was right and that the deceased owned shares and not a debt. The test referred to above from *R.* v. *Williams*[5] is clearly correct, and is supported by many authorities.[6] But the same authorities give that test a very particular and definite meaning. Shares in a company are taken to be capable of effective dealings vis-à-vis the company, and so to be situate, where the company's transfer agency is.[7] And if the company had more than one transfer agency, then one looks for that transfer agency which the deceased would have been most likely to use, "in the ordinary course of affairs".[8] In the present case, the deceased was living in California, and most of the companies in question had share transfer agencies in Vancouver, as well as Winnipeg and Toronto. On what basis did Verchere J. prefer Winnipeg and Toronto to Vancouver?

His Lordship held that the latter two transfer agencies would be used because the brokers kept their own share certificates in those cities. Presumably he assumed that the deceased would retain the services of the same brokers, and that one should therefore look to whatever transfer agency they would use. That is a possible assumption, but it does effect a radical transformation of what have until now been thought to be the well-settled rules of situs. Furthermore, the reasoning comes close to being self-contradictory. As we saw, the court started by a careful distinction between owning shares and owning a broker's debt, and rejected the latter. If the holding by the brokers was ignored for that purpose, it seems inconsistent that it was reintroduced for the purpose of guessing which transfer agency would be used. In other words, the deceased either owned shares or he did not. If he owned shares, then the established authorities[9] say that they are situate where the

[3] See the general discussion in *R.* v. *National Trust Co.,* [1933] S.C.R. 670, [1933] 4 D.L.R. 465.

[4] Indeed, in the present case, Verchere J. held that a small money debt owed by the brokers to the deceased was situate in British Columbia. He did not find the money to be held in trust in Toronto.

[5] *Supra,* footnote 2.

[6] Dicey and Morris on Conflict of Laws (8th ed., 1967), pp. 512-513; Cheshire's Private International Law (8th ed., 1970), pp. 542-543; *Brassard* v. *Smith,* [1925] A.C. 371, [1925] 1 D.L.R. 528, [1925] 1 W.W.R. 311 (P.C. (Can.)); *Erie Beach Co.* v. *A.-G. Ontario,* [1930] A.C. 161, [1930] 1 D.L.R. 859 (P.C. (Ont.)); *Treasurer of Ontario* v. *Blonde,* [1947] A.C. 24, [1946] 4 D.L.R. 785, [1946] 3 W.W.R. 683 (P.C. (Ont.)); *A.-G.* v. *Higgins* (1857), 2 H. & N. 339, 157 E.R. 140 (Ex.).

[7] See the authorities cited *supra,* footnotes 2 and 6.

[8] *Treasurer of Ontario* v. *Blonde, supra,* footnote 6, at p. 790 (D.L.R.).

[9] See the authorities cited *supra,* footnotes 2 and 6.

deceased would have dealt with them, not where someone else would have dealt with them. The decision is all the more surprising because it is extremely doubtful that the deceased had any idea that the certificates were kept in Winnipeg or Toronto. A rule which was intended to make decisive the place where the deceased would normally have transacted his business has been used to confer situs upon a province in which and with which he had no dealings.

What is even stranger is that this decision has, in the guise of deciding where he would likely have dealt with the shares, reintroduced through the back door a consideration of where the certificates were kept. High authority[10] long ago rejected the notion that the physical location of the certificates governs situs. Indeed, in *Re Brookfield Estate*,[11] the Supreme Court of Canada held that shares were situate where the share registry was, and not where the certificates were held by a trustee. The fact that the certificates were not registered in the name of the deceased was held to be immaterial.

If the present decision is correct, it will have the effect of spreading very wide the net of Ontario's succession duties, for it will give an Ontario situs to millions of shares held by the Toronto head offices of national brokerage firms on behalf of customers in other jurisdictions. Indeed, it might subject the deceased in the present case to Ontario and Manitoba succession duties. Investors in Alberta, the Territories, and various American states who have until now assumed that their shares were safe from Ontario succession duties because there was another transfer agency closer to their home, would be well advised to take their shares out of the hands of their brokers and keep the certificates themselves.

J. E. COTE*

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LEGAL MAXIMS: EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.—The legal maxim *expressio unius est exclusio alterius* has been translated in Broom's *Legal Maxims*[1] as "The express mention of one thing implies the exclusion of another". Its effect is stated in Halsbury[2] as follows:

> Where authority to do an act is given upon a defined condition, the expression of that condition excluded the doing of that act upon any other conditions than those so defined.

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[10] *R.* v. *Williams, supra,* footnote 2, at p. 13 (D.L.R.).
[11] [1949] S.C.R. 329
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[1] (8th ed., 1911), J. G. Pease and H. Chitty, p. 504.
[2] (2nd ed., 1931), vol. 11, p. 394, para. 644.

This maxim has not often been referred to in Canadian law reports in recent years, but in the last twelve months it has cropped up in two instances in the *Ontario Reports*.

The first case was *Beaulieu* v. *Reliance Insurance Co.*[3] where an insurance policy was issued guaranteeing the insured indemnity against "all sums which the insured shall become obligated to pay by reason of the liability imposed by law upon the insured for damages because of bodily injury or because of property damage". An exception clause stated that this indemnity insurance "does not apply

(a) To the ownership, use or operation by or on behalf of an insured of automobiles

(b) To the ownership by an insured of watercraft".

The action was brought when the insured was held liable at law for damages caused in the "operation" of a power-boat. The defendant company disputed the claim for indemnity on the ground that it came within the exception clause relating to watercraft.

The trial judge held that this was a case for the application of the maxim *expressio unius,* although he quoted the maxim in reverse, as it were, as *exlusio unius est inclusio alterius.* This, however, seems quite logical, because the term *expressio* can be either an inclusion or an exclusion. The real meaning of the maxim is either that the inclusion of one thing implies the exclusion of other things, or that the exclusion of one thing implies the inclusion of other things. The judge therefore held that by excluding liability on the policy for claims arising from the "ownership" of watercraft, the company did not exclude liability arising from the "operation" of watercraft. In coming to this conclusion the judge also relied on the *contra proferentem* rule, which establishes that a contract must be most strictly construed against the party offering the contract accepted by the other party. He pointed out how much narrower the clause referring to watercraft was than the clause referring to automobiles.

The Ontario Court of Appeal affirmed the judgment of the trial judge on all points,[4] and in particular emphasized the *contra proferentem* rule. The court accordingly held that the defendant could not successfully argue an "intention" of the policy which was at variance with its express terms.

The second case was *Barrett* v. *Equitable Life Insurance Company of Canada,*[5] in which a County Court Judge held that the maxim was not applicable. The policy issued to the insured was, in general, a "disability" policy, providing for a monthly benefit during a period of total disability, through accident or illness, not

[3] [1971] 3 O.R. 75.
[4] [1972] 1 O.R. 484.
[5] [1972] 1 O.R. 442.

exceeding twelve months. An exception clause in the policy stated: "The insurance under this policy does not cover any disability or loss which is caused by, or results from, or is contributed to by suicide or self-inflicted injury or illness."

The insured died suddenly of a heart attack, and his widow brought this action, claiming twelve monthly benefits, on the grounds:

(a) that by making an exception of "disability resulting from suicide" the Company had impliedly included death within the definition of disability

(b) that by making the single exception of death by suicide, the Company, under the *expressio unius* maxim, was not entitled to exemption from liability for disability resulting from death by other causes not self-inflicted.

On a motion to strike out the statement of claim as disclosing no cause of action, the judge rejected the arguments of the plaintiff and dismissed the action. He held that to give effect to the plaintiff's claim would be to turn into a "life policy" a policy *intended* to protect only a living disabled person.

The total of the monthly benefits claimed was not large, and the judgment was not appealed. From an academic standpoint this is perhaps unfortunate, because it would have been interesting to see whether the Court of Appeal would have held that the *expressio unius* maxim did apply to the exclusion contained in the policy in question, and, as it did in the *Beaulieu* case, rejected any argument based on the "intention" of the insurer.

The two Ontario cases discussed here afford an interesting comparison. The decision in the *Beaulieu* case seems quite logical, in ruling that the exclusion from an insurance policy of one item from a certain area of liability implies the inclusion of another item in the same area, thus giving full force and effect to the time honoured *expressio unius* maxim. On the other hand, it is difficult to understand why the maxim was not applied to a similar situation in the *Barrett* case. Putting it another way, in line with the passage quoted from Halsbury at the beginning of this comment, since rejection of policy liability was permitted on the condition that disability resulted from death by suicide, such rejection should not have been permitted on any other condition.

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