should be the survival of the fiduciary relationship post-resignation and whether the duty then was breached, rather than whether a "maturing corporate opportunity" was stolen, or whether confidential information had been misused.

It remains to query how a director like Mr. Pyke will be dealt with under the proposed statement of directors' duties (see CLRSG, *Modern Company Law for a Competitive Economy: Final Report* (2001, URN 01/942 (vol. 1) and 01/943 (vol. 2) Annex 1 and *Modernising Company Law-Draft Clauses* Cm. 5553-II, schedule 2). Certainly the option of saying that a director, while still a director, is not subject to certain (fiduciary) duties will not exist. All directors, regardless of the nature of their relationship with the company, are subject to the stated obligations. Would Mr. Pyke be in breach then? As the statement is currently crafted, this is not unlikely. The role of section 727 of the Companies Act 1985 as an exculpatory provision could then take on added significance. Whether this is the best approach to take, however, remains to be seen.

PEARLIE KOH

INQUORATE BOARDS, ORGANS AND SECTION 35A OF THE COMPANIES ACT 1985

THE recent decision of the Court of Appeal in *Smith* v. *Henniker-Major & Co.* [2002] EWCA Civ 762, [2002] 3 W.L.R. 1848 demonstrates the mess that the United Kingdom has made of its implementation of the First Directive of the European Union on harmonisation of company law and the interpretation of the legislation.

Section 35A(1) of the Companies Act 1985, which represents the second attempt to implement the Directive, provides that

> In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed free of any limitation under the company's constitution.

The central issue in the case, which involved an appeal against dismissal of an action as having no real prospect of success, was whether the chairman of a company who purported to act as an inquorate board meeting to assign the company's rights of action to himself could rely on the protection of the section. Although the transaction was self-interested, the claimant (whose good faith was assumed) was seeking to combat the misconduct of two of his

fellow directors in making off with a corporate opportunity. In terms of the section he was trying to have his cake and eat it. He was claiming to be the board of directors, and also claiming to be a person dealing with the company in terms of the section or a third party in terms of the Directive.

The majority of the Court of Appeal (Robert Walker L.J. dissenting) held that although a person dealing with a company could include a director, here the director was also chairman and involved in the decision. It was his duty to ensure that the constitution was properly applied and he could not rely on his own error to constitute a decision of the board. This is quite apart from the fact that the transaction might be voidable by the company under section 322A. All three members of the court held that delay and some prejudice to the respondent made it unfair for the claimant to rely on an attempt to ratify the assignment by deed subsequently.

Robert Walker L.J., dissenting, thought that there was no justification in taking a narrow view of the section and that there was a distinction to be drawn between a defective meeting and no meeting at all.

It is submitted that a purposive view of the section is appropriate: see H. Kutscher, "Methods of Interpretation as seen by a Judge at the Court of Justice" in *Reports of the Judicial and Academic Conference of the Court of Justice of the European Communities* (1976), Pt. I, sections 5–6). On the second point, however, there is something of a paradox in the Directive and section. The Directive aims to protect third parties, but to be protected there must be an act done by an organ of the company in the words of Article 9(1) of the Directive. Section 9(1) of the European Communities Act 1972 referred to "the directors". Section 35A(1) refers to the board of directors. In one pre-1973 case, *D'Arcy* v. *The Tamar, Kit Hall and Collington Railway Co.* (1866) L.R. 2 Exch. 158, it was held that the absence of a quorate decision of the board made the transaction a nullity. Other cases, however, held that a *bona fide* third party without notice was protected by the rule in *Royal British Bank* v. *Turquand* (see *Bargate* v. *Shortridge* (1855) 5 H.L.C. 297; *Davies* v. *R. Boulton & Co.* [1894] 3 Ch. 678; *Duck* v. *Tower Galvanizing Co.* [1901] 2 K.B. 314, cited by *Pennington's Company Law*, 8th edn., pp. 137–138). These latter decisions turned to some extent on matters such as representation, acquiescence or the presence of a validating article. In *TCB Ltd.* v. *Gray* [1986] Ch. 621 the Vice-Chancellor had held on the 1972 wording that a strict interpretation would drive a coach and horses through the section and adopted a purposive construction where there was agreement but no meeting of the directors ([1986] Ch. at 636C-D and 637C).

The view taken in the present case of wording which arguably justified the application of a strict view was similarly liberal and can be reconciled with the earlier case law. The problem to some extent was that the crucial issue of the good faith of the claimant was assumed for the purpose of the present proceedings and yet seemed to have some bearing on the majority decision.

Carnwath L.J.'s view was that if a document is put forward as a decision of the board by someone appearing to act on behalf of the company, in circumstances where there is no reason to doubt its authenticity, a person dealing with the company should be able to take it at face value. This is to be contrasted with Robert Walker L.J.'s dissenting opinion that the irreducible minimum was a genuine decision taken by a person or persons who can on substantial grounds claim to be the board of directors acting as such even if the proceedings are marred by procedural irregularities. It is submitted that Carnwath L.J.'s view, with which Schiemann L.J. appeared to agree, is more practical and is consistent with the opinion of Advocate-General Myras in *Friederich Haaga GmbH.* [1974] E.C.R. 1201 at 1210.

The majority view is consistent with Lord Simonds' *obiter dicta* in *Morris* v. *Kanssen* [1946] A.C. 459 at 476 and Lord Pearson's dicta in *Hely-Hutchinson* v. *Brayhead Ltd.* [1968] 1 Q.B. 549 at 594A-B on the question of a director's duty to know and observe the constitution: *a fortiori* in the case of a chairman, on which hitherto there has been surprising lack of authority. Schiemann L.J. thought that a director fell outside the concept of third party as used in the Directive, although this seems debatable where the director did not participate in the decision.

This case shows the continuing ambiguity in the concept and function of an organ and indeed of the board of directors in English law. Matters such as these are difficult to resolve in interlocutory proceedings. Clarification of both is a prerequisite of effective corporate governance, yet seems to have been neglected in the latest reform proposals.

J.H. FARRAR

FREEDOM OF ESTABLISHMENT FOR COMPANIES: A GREAT LEAP FORWARD

FREEDOM of establishment has been a promise not only to individuals, but also to companies, ever since the foundation of the EEC, and the relevant articles in the EEC Treaty have long been declared to have direct effect (*Reyners* v. *Belgium* [1974] E.C.R.