liquidator, and hence might validly be the subject of a deprivation provision. The "B" share was by the scheme of the LSE's articles designed to confer rights *ancillary* to membership, and was not transferable to a non-member. This imbued "B" share ownership with the essentially personal characteristics of membership, and sufficed to validate article 8.03's operation.

The reasoning in *Money Markets International* is not free from difficulties. It is not immediately obvious that a no-assignment clause should validate a deprivation provision. Simply because a contract is unassignable does not mean that it is valueless to the creditors. The liquidator might, after all, be able to procure the company to complete the contract. Moreover, if (as they are) parties are free to include no-assignment clauses by contract, then this provides a straightforward way for those who wish to insert an *ipso facto* clause to "work around" the common law rule which Neuberger J. outlined. That said, similarly difficult distinctions are drawn elsewhere: for example, section 365 of the U.S. Bankruptcy Code renders *ipso facto* clauses invalid, but preserves no-assignment clauses. All in all, Neuberger J.'s thorough synthesis of the law answers more questions than it raises.

John Armour

THE DIRECTOR'S FIDUCIARY OBLIGATIONS—A FRESH LOOK?

It is a pillar of equity that "a person in a fiduciary position must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict" (*per* Lord Upjohn in *Phipps* v. *Boardman* [1967] 2 A.C. 46, 123). The House of Lords in *Regal (Hastings)* v. *Gulliver* [1942] 1 All E.R. 378 demonstrated the unrelenting nature, and some have argued inequitable severity (see, *e.g.*, Jones, (1968) 84 L.Q.R. 472), of the director-fiduciary's obligations to his company. Such "absolutism" (Lowry & Edmunds, [2000] J.B.L. 122) is necessary because human infirmity makes it difficult to resist temptation, and it is only thus that the level of conduct for fiduciaries can be "kept at a level higher than that trodden by the crowd" (*per* Cardozo C.J. in *Meinhard* v. *Salmon* (1928) 249 N.Y. 456, 464). The principle that a director is free to act as a director of or otherwise engage in a competing business, established at the turn of the 19th century by Chitty J. in *London & Mashonaland Exploration Co. Ltd.* v. *New Mashonaland Co. Ltd.* [1891] W.N. 165 and assumed correct by Lord

Blanesburgh in *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161, 195, is therefore clearly an aberration and somewhat difficult to defend. A reconsideration of the rule would be timely. In this light, the decision of the Court of Appeal in *Plus Group Ltd. and others* v. *Pyke* [2002] EWCA Civ 370 is something of a missed opportunity as both Brooke L.J. and Jonathan Parker L.J. thought it unnecessary to attempt a resolution. Sedley L.J., although perspicuous about his discomfort with it, nevertheless admitted that *Mashonaland* "is the law that binds us". His Lordship did however observe that "if one bears in mind the high standard of probity which equity demands of fiduciaries, and the reliance which shareholders and creditors are entitled to place upon it, the *Mashonaland* principle is a very limited one".

The facts of *Plus Group Ltd.* are unusual. Mr. Pyke and Mr. Plank were shareholders (on a 50–50 basis) and sole directors of Plus Group Ltd., and also sole directors of its three wholly-owned subsidiaries (together, "the claimants"). Constructive Interiors, with whom Mr. Pyke had an excellent working relationship, was an important customer of the business. Mr. Pyke unfortunately suffered a stroke in mid-1996 which kept him away from the companies' business for most of that year. Thereafter, for various reasons, he and Mr. Plank fell out, leading to a "complete rupture" of their relationship by January 1997. From then until his formal departure from the boards in March 1998, Mr. Pyke was effectively excluded from the management of the companies, denied access to information and remuneration, and prevented from drawing against his corporate loan account. During this time, relations between the claimants and Constructive had also been deteriorating. In June 1997, Mr. Pyke incorporated John Pyke Interiors Ltd., and this company carried out £200,000 worth of work for Constructive. The Court of Appeal had to decide whether Mr. Pyke had breached his fiduciary duties.

If equity's no-conflict and no-profit rules were rigidly applied, Mr. Pyke would be in breach. He did not set up a competing business in the style of *Mashonaland* without more; he had courted the claimants' only important customer, who to his knowledge was unhappy with the claimants. It was this knowledge, acquired in his capacity as director, that arguably allowed him to profit without the consent of the claimants. Further, as a fiduciary, he was required to look first to the interests of the claimants and not his own, particularly during those times when the claimants' interests obviously required protection (see Beck, (1971) 49 *Canadian Bar Review* 81, 107). And as Sedley L.J. observed, it was "impossible to divorce the acquisition of Constructive's work by Mr. Pyke and his

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new company from the cessation of Constructive's relationship with the claimants''. But what was Mr. Pyke to have done? To avoid a breach, he needed to obtain the informed approval of the shareholders, namely Mr. Plank, and obviously this was unlikely given their acrimonious relationship.

The members of the Court of Appeal were unanimous in exonerating Mr. Pyke from liability, but not unanimous in their reasons. At trial, Judge Levy Q.C. had dismissed the claim against Mr. Pyke because he thought that there ''was no such [fiduciary] duty upon Mr. Pyke in the circumstances''. Judge Levy however, proceeded then to say: ''if ... I was wrong on this ..., in my judgment Mr. Pyke cannot be blamed for what he did''. In the Court of Appeal, Brooke L.J. based his decision on whether the fiduciary has *breached* his duty (which must by necessary implication then be assumed to exist). Although he referred to Lord Upjohn's caution in *Phipps* v. *Boardman* [1967] 2 A.C. 46 that ''the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made'', he concluded, after reiterating the salient facts, that ''the judge was right when he held that Mr. Pyke committed no breach of fiduciary duty in trading with Constructive''. Sedley L.J., on the other hand, appeared more concerned with whether the fiduciary duty to the claimants *remained* in those exceptional circumstances. Although he agreed that Judge Levy was right to hold that ''it is not a breach of fiduciary duty for a director to work for a competing company in circumstances where he has been excluded effectively from the company of which he is director'', he thought that Mr. Pyke's duty to the claimants had been ''reduced to vanishing point'' by the inexplicable actions of Mr. Plank.

Judges have always said that the categories of fiduciaries should not be considered closed (see, *e.g., Lloyds Bank Ltd.* v. *Bundy* [1975] Q.B. 325, 341, *per* Sir Eric Sachs L.J., and *Tufton* v. *Sperni* [1952] 2 T.L.R. 516, 522, *per* Sir Raymond Evershed M.R.). Perhaps this constant exhortation should be read in this light: just as other relationships beyond the established may be fiduciary in nature, the converse may also be true, and it should not be assumed that the relationship that an actor in an established category bears to his beneficiary is necessarily fiduciary in nature. As Dickson J. of the Supreme Court of Canada opined in *Guerin* v. *The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C.), 341, ''[it] is the *nature* of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty'' (emphasis added). This would mean, especially in resignation cases, that the focus 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