Florida State University Journal of Transnational Law & Policy

Volume 3 | Issue 1 Article 5

1994

Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Corporate Directorates in the Commonwealth Caribbean

Darren Skinner
University of the West Indies

Follow this and additional works at: https://ir.law.fsu.edu/jtlp

Part of the International Trade Law Commons

Recommended Citation

Skinner, Darren (1994) "Unlocking the Interlocks: Common Law Fiduciary Duties and the Phenomenon of Interlocking Corporate Directorates in the Commonwealth Caribbean," *Florida State University Journal of Transnational Law & Policy*: Vol. 3: Iss. 1, Article 5.
Available at: https://ir.law.fsu.edu/jtlp/vol3/iss1/5

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

UNLOCKING THE INTERLOCKS: COMMON LAW FIDUCIARY DUTIES AND THE PHENOMENON OF INTERLOCKING CORPORATE DIRECTORATES IN THE COMMONWEALTH CARIBBEAN

DARREN SKINNER*

INTRODUCTION

> The practice of interlocking directorates is the root of many evils. It offends human law and divine. Applied to corporations it tends to the suppression of competition and to the violation of the Sherman Law. Applied to corporations which deal with each other it tends to disloyalty and to violation of the fundamental law that no man can serve two masters. In either event it leads to inefficiency, for it removes incentive and destroys soundness of judgment.[1]

The issue of interlocking directorates has received scant academic, judicial, or legislative attention in the Commonwealth Caribbean. The available literature on the topic has been largely limited to sociopolitical and business studies and has been largely statistical and expository in its approach. In the singular report on the reform and harmonization of company law in the Caribbean,[2] one will find no reference to the issue of interlocking directorates. This paper is written in response to this dearth of juridical attention to the

---

* LL.B. *(magna cum laude)*, University of the West Indies, 1987; LL.M. (Corporate & Commercial), University of London, 1988; L.E.C., Hugh Wooding Law School, West Indies, 1990; LL.M., Harvard Law School, 1991.

1. L. Brandeis, *Breaking the Money Trusts*, HARPERS WEEKLY, December 6, 1913, at 13.

2. WORKING PARTY ON THE HARMONIZATION OF COMPANY LAW IN THE CARIBBEAN COMMUNITY, REPORT (1979) (hereinafter called the HARMONIZATION REPORT).

The 14th meeting of the heads of government of the Caribbean Community (Caricom) was held in Nassau, Bahamas, on 5th–8th July, 1993. Heads of government in attendance were the Rt. Hon. Erskine Sandiford, Prime Minister of Barbados; the Hon. Hubert A. Ingraham, Prime Minister of The Bahamas; the Rt. Hon. Manuel Esquivel, Prime Minister of Belize; the Rt. Hon. Nicholas Brathwaite, Prime Minister of Grenada; H.E. Dr. Cheddi Jagan, President of the Cooperative Republic of Guyana; the Rt. Hon. Percival J. Patterson, Prime Minister of Jamaica; Rt. Hon. Reuben Meade, Chief Minister of Montserrat; Dr. the Rt. Hon. Kennedy Simmonds, Prime Minister of St Kitts and Nevis; the Rt. Hon. John Compton, Prime Minister of St Lucia; the Rt. Hon. James Mitchell, Prime Minister of St Vincent and the Grenadines; Hon. Patrick Manning, Prime Minister of Trinidad and Tobago. Antigua and Barbuda was represented by Hon. Lester Bird, Minister of Foreign Affairs and Economic Planning and Dominica by the Hon. Charles Maynard, Minister of Trade, Industry and Commerce. The Caricom associate member of the British Virgin Islands was represented by Hon. Lavity Stoutt, Chief Minister.

phenomenon of interlocking directorates in the Commonwealth Caribbean.

The writer proposes to consider the company law relevance of the phenomenon in light of published information on the prevalence of interlocks in the Commonwealth Caribbean. It will be urged that the phenomenon of interlocks has serious implications to time honored judicial rules placing strict fiduciary duties upon company directors. It will be submitted that faced with economic vicissitudes and the dictates of commerce, the courts of industrialized common law countries have produced pragmatic decisions on interlocking directorates that are inconsistent with these strict and venerable rules. It will finally be submitted that in addressing the issue of interlocking directorates, the Commonwealth Caribbean jurist should approach decisions emanating from these other jurisdictions with circumspection and seek to determine the approach that is best suited to the unique requirements of these developing societies.

In analyzing these issues, the writer will first outline the reported incidents of interlocking directorates in the Commonwealth Caribbean. The nature of the office of director, his duties and disabilities, will then be described. The theoretical morphology and the effect of interlocking directorates will then be examined. In the course of the discussion, reference will be made to the company law of the United States and the British Commonwealth.

I. INCIDENCE OF INTERLOCKING DIRECTORATES IN TRINIDAD & TOBAGO, JAMAICA, AND BARBADOS

Trinidad & Tobago

When the world price of oil quadrupled in late 1973 due to the Organization of Petroleum Exporting Countries' (OPEC) embargo, the era of prosperity in Trinidad & Tobago (colloquially called 'the boom years') was heralded in. This new wealth was accompanied by the economic domination of by a triad of state, multinational, and private domestic enterprises which maintained domination through networks of interlocking directorates.[3] This new economic order expanded with the oil fed economy, spreading through consolidations and combinations of companies. The base of multinational and national companies expanded and a stock exchange was established to meet the flood of investor dollars.

---

3. S. B. MACDONALD, TRINIDAD AND TOBAGO, DEMOCRACY AND DEVELOPMENT IN THE CARIBBEAN 178 (1986).

Carl Parris used information published in the annual reports of all companies listed on the Trinidad & Tobago Stock Exchange and compiled the following conclusions.[4] The research revealed that if each company listed on the exchange was treated as a separate entity, there would have been thirty-nine such companies. Each of these companies had a board of directors, the members of which together totaled two hundred and nineteen directors.[5] It was recognized, however, that some of the companies listed were either subsidiary or associated companies of larger companies also listed (or were trading in both ordinary and preference shares). Parris therefore contends that there were twenty-eight companies trading on the Trinidad & Tobago Stock Exchange.[6] An examination of the boards of these companies revealed that there were twenty-three directors on more than two boards, seven on three or more boards, and three on four boards.[7] Of equal interest, says Parris, was the fact that all the shares of these listed companies have to be traded through state-recognized stockbrokers. Parris declares that when company letter heads or bulletins were examined, it was evident that the listed companies interlocked not only with each other, but with the stock brokerage companies as well. Twenty of the twenty-five listed companies share directors with five of these brokerage companies.[8] Parris also concluded that unlike the large industrialized countries in which banks appear to be the most interlocked companies, in Trinidad and Tobago it is the conglomerates that are most interlocked.[9] Parris also discovered indirect interlocks. Upon closer scrutiny of the board of one leading bank, he found directors of two leading conglomerates. Furthermore, he found that the boards of three leading conglomerates included directors of two leading banks, and the board of the leading conglomerate included directors of four leading banks in Trinidad & Tobago.[10] Parris concluded that interlocking directors sat on the boards of the leading banks, conglomerates, manufacturing companies, and trading companies of the country and that a power elite controlled every facet of the domestic private sector economy.

These conclusions reflect certain models of interlocking directorates, primarily the finance control interlock and the reciprocity

---

4. Carl Parris, *Power and Privilege in Trinidad and Tobago*, 34 SOCIAL AND ECONOMIC STUDIES 97 (1985).

5. *Id.* at 105.

6. *Id.*

7. *Id.*

8. *Id.* at 106.

9. *Id.*

10. *Id.*

model. The nature and significance of these models will be examined more closely later on.[11]

Barbados

In Barbados the existence of interlocking directorates has been shown to be as pervasive as in Trinidad & Tobago. In her writing on the subject,[12] Christine Barrow opines that there is increasing rationalization and concentration of control in Barbados' economy through the process of incorporation, and that the economy of Barbados is dominated by the corporate form of enterprise. Barrow states that of seventy-five larger corporations (i.e., those with an authorized share capital of Bds.$500,000 and over) four parent companies stand out for larger size, number and size of subsidiaries, and distribution of interest in a variety of economic activities. These companies were identified as Barbados Shipping and Trading Co. Ltd. (BST), Plantations Ltd., J. N. Goddard & Sons Ltd., and Commercial and Industrial Enterprise Ltd. (CIE).[13] Barrow states BST owns or has majority ownership of eighteen local subsidiaries (eight of which are among the seventy-five larger companies) and considerable investments in twenty other local companies:

> [m]any of which are protected by placing a director of the parent company on their boards of directors. The interests of this group span a large number of economic sectors including estate ownership and sugar production, the manufacture and the wholesale rental distribution of clothing and accessories, food and beverages, supermarket ownership, transportation and cargo handling, vehicle sales, maintenance and repair (including aircraft), tourism (including hotel and travel agency ownership and operation), and entertainment, building supplies and construction pharmaceuticals and insurance.[14]

With respect to Plantations Ltd., the tale is the same. The parent company owns or has majority ownership in eight local subsidiaries (four of which are in the 'top seventy-five') "and has considerable investments in sixteen other local companies, most of which are protected by overlapping directorships."[15] The interests of Plantations, Ltd. in the Barbados economy are as extensive and polymorphous as

11. *See* discussion *infra* part III.
12. Christine Barrow, *Ownership and Control of Resources in Barbados*, 32 SOCIAL AND ECONOMIC STUDIES 83 (1983).
13. *Id.* at 103-04.
14. *Id.* at 103.
15. *Id.* at 103-04.

BST's interests; they include sugar production, construction, property investment, vehicle sales, food retailing and insurance.[16]

J. N. Goddard & Co. is reported as owning ten local companies (eight in the 'top seventy-five'). The company also has "considerable investments in nine other local companies, most of which are again protected by overlapping directorships."[17] The interests of this conglomerate ranges from the manufacture of food, sugar production, and poultry farming, to supermarket ownership, property investment, vehicle sales, and more.

CIE was formed by the amalgamation of four local companies (three in the 'top seventy-five'). Like the other three companies, it also has considerable investments in five companies protected by interlocking directors and with interests that touch many of the island's industries.[18] These observations reveal an economy dominated and controlled by a minority of companies and their directors. Out of the total four hundred and twenty-eight directorships in the seventy-five larger companies of Barbados, thirty-four families were identified; each had directors on the boards of at least three companies.[19] Most notable among these were five families which were represented on at least eleven of the 'top seventy-five' companies.[20] Barrow concludes that the corporate structure and interlocking directorates in Barbados are linked by kinship and social ties. This device is used to strengthen the ownership and control of these families over the Barbados economy. The structure described by Barrow reflects elements of both the reciprocity model and the class hegemony model.[21]

Jamaica

In an analysis of Jamaican corporate ownership and control,[22] Stanley Reid contends that the concentration of power in the corporate sector lies in the hands of an elite group of twenty-one families. Reid states "[w]hat is more significant is the considerable overlapping of family elite groupings, interlocking directorships cementing a structure of group control of major financial institutions and public

16. *Id.* at 104.
17. *Id.*
18. *Id.*
19. *Id.* at 105.
20. *Id.*
21. *See* discussion *infra* part III.
22. Stanley Reid, *An Introductory Approach to the Concentration of Power in the Jamaican Corporate Economy, in* ESSAYS ON POWER AND CHANGE 15 (C. Stone, and A. Brown, eds., 1977).

corporate firms in what can be regarded as the corporate kingdom."[23]

Reid declares that the twenty-one families account for one hundred and twenty-five of the two-hundred and nineteen existing directorships in Jamaica.[24] Reid specifies that the Ashenheims, Des Noes-Geddes, Henriques and Matalon families (called the 'supergroup') occupy one out of every three available directorships.[25] The hegemony of the supergroup is further entrenched by extensive inter-marriages. Reid observes that the only listed life insurance company is controlled by these families; furthermore, eight of the sixteen directors of Jamaica Citizens Bank Board, including the chairman, and four out of every ten on the Board of Royal Bank of Jamaica are from the 'group of twenty-one.'[26] These findings reflect elements of both the finance control model and the class hegemony model.[27]

The information contained in these writings reflects a common socioeconomic structure throughout the Commonwealth Caribbean.

II. NATURE, ROLE AND DUTIES OF COMPANY DIRECTORS

Commonwealth Caribbean statutory and case law derives jurisprudence relating to the company director from the legislation and decisions of England. This is a reflection of a colonial past which should not be a fixture in an independent future. The attempt to harmonize the company law of the Commonwealth Caribbean, drawing from sources all over the common law world, shows a refreshing reluctance to slavishly follow English precedents. Nevertheless, existing law on the legal character of directors remains largely reflective of the English position.

The various Companies Acts of the Commonwealth Caribbean territories all make provision for the appointment, removal, disqualification and duties of directors. None of the regional legislation, however, contains a definition of a "director" or sets out any general prequalifications to be met before the post is filled. Some legislation describes "director" as "any person occupying the position of a director by whatever name called;"[28] in other places, a "director" is "a person in accordance with whose directions or instructions the

23. *Id.* at 23.
24. *Id.* at 24.
25. *Id.*
26. *Id.* at 33-34.
27. *See* discussion *infra*, part III.
28. Jamaica Companies Act, § 2 (R. L. 1967).

directors of a company are accustomed to act."[29] Thus the Acts are designed to ensure that the substance of a director's functions rather than the form of the title is determinative.

In contrast to the laws of the United States, none of the regional statutes prescribe the powers and functions necessary for an individual to conform to the mold of a directorship.[30] This is not a critical lacuna in the Caribbean statutes. As one writer opines:

> [S]uch provisions in fact help little, since they leave completely uncertain what powers to act in the name of the company are comprised in its management, direction or administration. Instead, they leave it for the courts to decide whether particular powers or functions of a company are to be exercised by its directors or by its shareholders acting together at general meetings.[31]

The general scheme of the regional statutes is to leave the allocation of the powers and functions of the corporate 'dyarchy' (board and stockholders in general meeting) to the articles of the company. A standard provision found in the 'sample articles' of Table A of regional Company Acts states that the business of the company "shall be managed by the directors" who may "exercise all such powers of the company as are not, by the Companies Act or by these regulations required to be exercised by a company in general meeting."[32] Therefore, juridically, the power of the directors is delegated to them from the shareholders; but within the area of management entrusted to the Board by the articles, the directors' discretion is absolute. In practice, the arena of directorial corporate governance has been described to include the following responsibilities:

> The directors acting as a board, have the duty of guiding the company's affairs in such a manner as to achieve the company's objective of making money. In so doing, they must exercise their management responsibilities for policy determination and implementation. The responsibility for determination of policy includes determination of areas of business and research and development within those areas, financing of the operation and the declaration of dividends. The responsibility for implementation includes selection and supervision of management, monitoring their performance through the examination of operational reports and financial

---

29. *Id.* § 178(b).

30. *See, e.g.*, Revised Model Business Corp. Act, §§ 8.30(a), 8.31, reprinted in CORPORATIONS AND BUSINESS ASSOCIATIONS: STATUTES, RULES AND FORMS 185 (M. A. Eisenberg ed., 1993), (hereinafter RMBCA).

31. R. PENNINGTON, DIRECTORS' PERSONAL LIABILITY 1(1987).

32. HARMONIZATION REPORT, *supra* note 2, at ¶12.96.

reports, as well as first-hand examination of books and the corporation's premises.[33]

In what capacity then does the director execute the mandate to manage the corporation? More than one analogy has been used to capture the quintessence of the directorial function. One can therefore fairly compare directors to agents, trustees, and employees of the company. These are all comparisons which are neither entirely incorrect nor entirely correct. With this obscurantist remark, one infers that the director may occupy a position akin to all three roles while not being identical to any one role in all its aspects.

Directors have been recognized by the courts as agents of the company for which they act. In *Ferguson v. Wilson,* Cairns, L.J. said:

> What is the position of the directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company.[34]

Accordingly, directors are agents of the company whenever they act on its behalf with express, ostensible, or implicit authorization as prescribed by the ordinary laws of agency. Juridically, however, the directors are more than mere agents of the company. The directors are correctly described as "the directing mind and will of the company." This apparent paradox is elucidated in the dicta of Viscount Haldane in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.:*

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[35]

Another incongruity of the directors' role with that of an agent *simpliciter* is that the Board is usually empowered by the Articles of the public company to delegate its powers (including this power of delegation) to individual directors.[36] This is inconsistent with a strict

---

33. J. M. WAINBERG, DUTIES AND RESPONSIBILITIES OF DIRECTORS IN CANADA 2 (5th ed. 1984).
34. Ferguson v. Wilson, [1866] L.R. 2 Ch. App. 77, 89 (Eng.).
35. [1915] App. Cas. 705 (Eng.).
36. F. B. PALMER, PALMER'S COMPANY LAW § 61-06 (24th ed. 1987).

reading of the common law maxim *delegatus non potest delegare* ("an agent cannot delegate his authority").

As often as directors have been described as agents of the company, they have also been allegorically referred to as trustees of the company's assets and interests. In an early case the proposition was stated as follows:

> The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust which if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their c'estui que trust.[37]

In *Re Forest of Dean Coal Mining Co.*,[38] Sir George Jessel M.R. said, ". . . directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control . . ." In several respects, the directors' role and function differs from those of the paradigmatic trustee. Chief among these is the standard of care and skill with which the directors use assets on behalf of the company. In this regard "their position, however is very different from that of ordinary trustees whose primary duty is to preserve the trust property and not to risk it. Directors have to carry on business and this necessarily involves risk."[39]

A further incongruity between the directorial and the trustee function is that the classic form of trust vests the legal title to assets in the trustees; whereas, under company law principles, the legal and beneficial title to any assets are invariably held by the company in its own right. Accordingly, although directors are not trustees in the legal sense, they are treated as trustees in that they hold a fiduciary relationship toward the company and have been held liable for breaches of this fiduciary relationship as if they were trustees. This conclusion is expressed in the following judicial pronouncement:

> It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of

---

37. York & N. Midland Ry. v. Hudson, [1853] 16 Beav. 485, 491 (Eng. Ch.).
38. [1878] 10 Ch. D. 450, 453 (Eng.).
39. LORD LINDLEY, LINDLEY ON COMPANIES 519 (6th ed., 1893).

> analogy of what those duties are, it appears to me to be wholly misleading.[40]

In another case it was explained as follows:

> The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his c'estui que trust. . .. The office of director is that of a paid servant of the company.[41]

The last sentence of this statement leads one to the third comparison applied to directors: the employee. There is nothing to preclude a director from also being an employee of the company. In *Lee v. Lee's Air Farming Ltd.*, the Judicial Committee of the Privy Council opined that a controlling shareholder and governing director was separate from the company and could be a "worker" for purposes of workmen's compensation legislation.[42] Nevertheless, a director is not an employee simply by virtue of his directorship. Whether he is also an employee is determined by the existence of a contract of employment.[43] If no express contract of service has been entered into, it will be difficult to persuade a court to consider a working director an employee of the company.[44] Accordingly, a director holding office under the articles without a service contract may not assume the dual capacity of employee/director. A director *simpliciter* has no right to remuneration unless such a provision is made in the articles.[45] Although the residual undelegated powers of the company remain with the shareholders in general meeting, the directors do not serve the shareholders in the usual sense. Within the area of management entrusted to the Board by the Articles, the directors are not obliged to follow the directions of the company in general meeting.

"The directors' power to manage the affairs of the company is complete. Even a majority of shareholders passing a resolution at a

---

40. Re City Equitable Fire Insurance Co. Ltd., [1925] Ch. 407, 426 (Eng.).

41. Smith v. Anderson, [1980] 15 Ch. D. 247, 275 (Eng.).

42. [1961] App. Cas. 12, 30 (P.C.) (appeal taken from Austl.).

43. DESMOND WRIGHT, RIGHTS AND DUTIES OF DIRECTORS 7 (1987).

44. PALMER, *supra* note 37, ¶ 61-10; Parsons v. A. J. Parsons, [1979] I.C R. 271 (Eng.) (holding that full time managing director in family business was not an employee of the company); Kerr v. Walker [1933] Sess. Cas. 458, 467 (Scot. 2d Div.).

45. Normandy v. Ind, Coope & Co. Ltd., [1908] 1 Ch. 84, 95 (Eng.); Hampson v. Price's Patent Candle Co., [1976] 45 L.J. Ch. 437 (Eng.); Kerr v. Walker [1933] Sess. Cas. 458 (Scot. 2d Div.).

general meeting cannot dictate to the directors."[46] The directors are therefore not properly classified as employees of the shareholders.[47]

What exactly, one may ask, is the legal status of the director? The answer to this question is crucial to an understanding of the legal implications of unregulated interlocking directors. The consensus of opinion among judges and jurists is that directorial duties and powers are those of a trustee; however, the standard of skill and care in the execution of these duties falls short of the standard for a trustee. It is therefore fair to use the epithet "fiduciary" to describe the office of director which is a general category covering duties owed by many office-holders to the persons for whose principal benefit they hold office: banker and investor, trustee and c'estui que trust, agent and principal, executor and beneficiary, and the like.[48]

The trustee-like duties of the director are the duties of loyalty and good faith. The standard of skill may be referred to as the duty of care. The director's duty of loyalty contains the essence of any common law implications on interlocks. Accordingly, the definition of the standard of skill and care should be considered briefly for continuity and harmony of exposition, before greater attention is focused on the nature of the duty of loyalty.

The classic common law exposition of the director's standard duty of care as presented in *Re City and Equitable Fire Insurance Co. Ltd.*[49] embodies the following three concepts and elements:

> (I) A director need not exhibit a greater degree of skill in the performance of his duties than may be reasonably expected from a person of his knowledge and experience.
>
> (II) A director is not bound to give continuous attention to the affairs of his company. His duties may be performed at periodical board meetings and committee meetings. Although he ought to attend whenever he is reasonably able to do so, he is not bound to attend all meetings.
>
> (III) In the absence of grounds of suspicion, a director is justified in trusting another official to perform honestly any duties which may properly be left to that official under the exigencies of business and the articles of association.[50]

---

46. Teck v. Millar, 33 D.L.R. (3d.) 288 (Can. B.C. Sup. Ct. 1973).
47. *Id.*
48. H. G. HANBURY & R. H. MAUDSLEY, MODERN EQUITY 287-88 (Jill Martin ed., 13th ed. 1989).
49. [1925] Ch. 407, 428 (Eng.).
50. *Id.* at 429.

In essence, therefore, the director must exercise the degree of diligence and skill that can be reasonably expected from a person of the director's knowledge and experience.[51]

The fiduciary duty of loyalty can now be outlined. The legal exposition of this topic traditionally divides the duty into two branches. First, company directors are bound to act *bona fide* and in the best interest of the company; and second, directors ought to refrain from placing themselves in a position in which their duties to the company and their personal interests may conflict. It should be understood that these duties of loyalty, like all the fiduciary duties of a director, are owed by the directors individually and not solely as a collective body. Furthermore, unlike the majority rule in United States,[52] these duties are owed only to the company and not to the shareholders.[53] In specific circumstances, directors may act as agents for the shareholders and will be subject to the usual duties of agent and principal.[54] Even a nominee or puppet director owes his duties to the company and not to his nominator.[55]

Amplification of the directors' duty to act bona fide and in the best interest of the company reveals that an element of subjectivity exists in this branch of the duty. Directors are required to act bona fide in what they consider, not what a court may consider, is in the best interest of the company.[56] It is evident, therefore, that honesty in the exercise of power is not sufficient to immunize directors from a claim for breach of duty. It must also be established that the directors acted in what they believed was in the company's best interests. The courts allow the directors absolute discretion, interfering only if no reasonable director could have believed that a course of action was in the best interests of the company.[57] This principal was judicially enunciated as follows:

> Directors, in who are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their

---

51. J. CHARLESWORTH & G. MORSE, CHARLESWORTH & MORSE'S COMPANY LAW 410 (14th ed. 1991).

52. Guth v. Loft Inc., 5 A.2d 503, 510 (Del. 1939).

53. Percival v. Wright, [1902] 2 Ch. 421 (Eng.).

54. Breiss v. Woolley, [1954] App.Cas. 333 (Eng.).

55. Boulting v. Ass'n Cinematograph, Television & Allied Technicians, [1963] 2 Q.B. 606, 626-7 (Eng. C.A.).

56. Re Smith & Fawcett Ltd., [1942] Ch. 304, 306 (Eng. C.A.).

57. Charterbridge Corp. v. Lloyds Bank Ltd., [1970] Ch. 62, 74 (Eng.).

> judgment, if exercised in good faith and not for irrelevant purposes, it is not open to review in the courts.[58]

This formulation was also echoed in *Howard Smith Ltd. v. Ampol* where Lord Wilberforce outlined the course of investigation adopted by the courts in reviewing a challenge to the exercise of directorial powers:

> Having ascertained, on a fair view, the nature of this power and having defined as can best be done in the light of modern conditions the, or some limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.[59]

This means that the directors do not have unlimited discretion in the exercise of their powers. Even if directors act bona fide in what they believe to be the best interests of the company, they must use their powers only for the "proper purposes" for which they were delegated onto them or face a claim for breach of duty.[60] In analyzing the propriety of the act, the courts do not apply predetermined enumerated purposes for the exercise of a power because the variety of situations facing directors of different companies cannot be anticipated. In order to ascertain the primary for the exercise of power, the court will examine each case in light of its particular circumstances and the directors' opinions on questions of management, while looking at the rest of the situation objectively.[61]

In assessing the propriety of a director's actions, the court may consider certain practical matters. For example, the company's 'Memorandum' and 'Articles' may be examined to ascertain what constitutes "proper purposes."[62] Since directorial powers are not

---

58. Harlowe's Nominees Pty. Ltd. v. Woodside (Lake Entrance) Oil Co., [1968] A.L.J.R. 123 (High Ct. Austl.).

59. [1974] App. Cas. 821, 835 (P.C.) (appeal taken from Austl.).

60. An illustration of this principle can be seen in the case of *Re W & M Roith Ltd.*, [1967] 1 W.L.R. 432 (Eng. Ch.D.), where the director and controlling shareholder of a company initiated and executed a service agreement with the company which provided his wife with a pension upon the eventuality of his death (which occurred). The court held that although the director acted honestly the agreement was held not binding on the company since no consideration was given to the question of whether the agreement was for the benefit of the company.

61. Howard Smith Ltd. v. Ampol Petroleum Ltd., [1974] App. Cas. at 832.

62. PENNINGTON, DIRECTORS PERSONAL LIABILITY, *supra* note 32, at 73.

commonly expressed in company constitutions, this technique is at times artificial and unconvincing. Therefore, the court invariably applies an objective intuition to the facts in determining whether the substantial and primary purposes were for the benefit of the company.[63] Directors who are shareholders, however, may promote their own interest if this is incidental to the promotion of the interests and prosperity of the company as a whole.[64] In this context, the term "company as a whole" is defined by reference to the shareholders in general meeting, not by reference to the company as a distinct entity. This includes the interests of both present and future members of the company.[65]

The second limb of the duty of loyalty is in essence the avoidance of a conflict of interest. The prohibition was highlighted in the celebrated early House of Lords decision of *Aberdeen Ry. Co. v. Blaikie Bros.* as follows:

> A Corporate body can only act by its agents, and it is, of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is the principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.[66]

This equitable principle remains largely unchanged by judicial pronouncements. Its general effect is that unless the shareholders in general meeting have excused the director by waiver or ratification, he must eschew situations of potential conflict of interest or the company will have a cause of action for breach of duty against him. This equitable position can be modified by the Articles of the company or by contractual agreement between the company and the director.[67] This ability to "opt out" of these equitable principles is restricted by the overriding statutory provision found in most Commonwealth Caribbean Company Legislation requiring every director who has a direct or indirect interest in a contract or proposed contract with his company to disclose his interest at the board meeting

---

63. CHARLESWORTH, *supra* note 51, at 402.
64. Mills v. Mills, [1938] 60 C.L.R. 150 (Austl. High Ct.).
65. Gaiman v. National Ass'n of Mental Health, [1971] Ch. 317, 330 (Eng.).
66. [1854] 1 Macq. H.L. 461 at 471-2 (Eng.) (emphasis supplied).
67. *See infra* text accompanying notes 159-60.

at which the contract is first considered, or if his interest does not arise until after that time, at the first meeting after his interest does arise.[68] Unlike the equitable rule, disclosure is required before the board, not the shareholders in general meeting. These sections, however, have no validating effect on the contract at issue: "It is purely negative in its operation limiting the ambit of any exclusion clause in the articles."[69] So, unless the articles (or any contractual agreement) clearly displace the general equitable rule, mere compliance with the section will not validate the otherwise voidable contract.[70]

In the United States, the courts have imposed similar duties upon the director. Directors must exercise an objective reasonably prudent standard of skill and care. If a director possesses special skills, he will not be allowed to neglect to use them merely because the ordinary director is not so endowed. On the other hand, below average skill or ability will not excuse the director if he does not meet the standard of skill expected of the average director.[71] The Revised Model Business Corporations Act reflects the position as reduced to statute in most states.[72] The strict standard is, however, mitigated by the "business judgment" rule. Under the common law, courts are disposed toward giving directors wide latitude in the management of a corporation's affairs while they reasonably exercise an honest, unbiased judgment.[73] The rule is "a presumption that in making a business decision, the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company."[74] The elements of the business judgment rule are best summarized as follows:

> A director or officer who makes a business judgment in good faith fulfills his duty (of care) if: (1) he is not interested in the subject of his business judgment; (2) he is informed with the subject of his

---

68. HARMONIZATION REPORT, *supra* note 2, ¶ 12.82.

69. L. C. B. GOWER, PRINCIPLES OF MODERN COMPANY LAW 588 (4th ed. 1979).

70. *Id.; see also* HARMONIZATION REPORT, ¶ 12.86.

71. Graham v. Allis-Chalmers, 41 Del. Ch. 79 (1963).

72. RMBCA § 8.30(a) states:

> A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.

73. W. KNEPPER, AND D. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS ¶ 203 (1978).

74. Aronson v. Lewis, 473 A.2d. 805, 812 (Del. 1984).

> business judgment to the extent he reasonably believes to be appropriate under the circumstances; and (3) he rationally believes that his business judgment is in the best interests of the corporation.[75]

In the United States, the directors also owe common law duties of loyalty. This means that a director must refrain from engaging in his own personal activities in such a manner as to injure or take advantage of his corporations. In other words, the directors may not secretly profit from their official positions and must give the corporation the benefit of any advantages they obtain in their official positions.[76] In cases of self-dealing or apparent breach of the duty of loyalty the courts will not attack the transaction if it is fair to the corporation.[77] Modern decisions mitigate this rule so that even if the transaction does not appear fair on its face, the director can justify it if he can show that either a disinterested and informed majority of the Board approved the transaction[78] or the transaction was approved or ratified by a majority of shareholders after full disclosure of relevant facts.[79]

* * * *

Before leaving this section, a brief word may be said on the functional differences between the fiduciary duties owed by outside (non-executive) and inside (executive) directors. In principle, there is no intrinsic difference ceteris paribus in the type of duties owed to the company by either office under the Company Acts of the Commonwealth Caribbean. It is clear, however, that the presence of a service contract may impose obligations upon the director that go beyond his duties *qua* director.[80]

---

75. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (Proposed Final Draft 1992). *See generally*, Smith v. Van Gorkom, 488 A.2d. 858 (Del. 1985) (holding that the board of directors is not entitled to its presumption of validity when they fail to act after due deliberation on an adequately informed basis).

76. KNEPPER AND BAILEY, *supra* note 73, ¶ 105.

77. The position is echoed in RMBCA 8.31(a) in pertinent part as follows:

> A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:
> (1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;
> (2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitles to vote and they authorized, approved, or ratified the transaction; or
> (3) the transaction was fair to the corporation.

78. Weiss Medical v. Kim, 408 N.E.2d 959 (Ill. App. Ct. 1980).

79. State *ex. rel.* Hayes Oyster Co. v. Keypoint Oyster Co., 391 P.2d 979 (Wash. 1964).

80. PALMER, *supra* note 37, ¶ 62-15.

In essence, executive or inside directors are usually retained under contracts of employment with the company. They are more deeply involved in the management of the company's affairs and usually have better access to the internal workings and information of the company.[81] These directors are rarely involved in corporate interlocking through multiple directorships. Many contractual provisions relating to the tenure of executive directors prohibit their holding positions in other enterprises.

In contrast, non-executive directors are rarely appointed under full-time service contracts. Usually only part-time in their labors, they invariably have other jobs, positions, and offices in other enterprises or fields of endeavor. They do not have any executive role in management of the company's daily affairs. These directors are those engaged in multiple directorships and interlocking directorates.

III. THE MORPHOLOGY AND THEORY OF INTERLOCKING DIRECTORATES

Models of Interlocks

All interlocking directorates[82] are not the same in their formal organizational structure or in their effects on the corporate sector. An analysis of the implications of this phenomenon for company law should therefore be prefaced with a synopsis of the different models and structures of interlocks.

An interlock exists when one individual sits on the board of two or more companies, thus linking those companies.[83] In approaching the questions of how and why interlocks occur, academics[84] have found it useful to develop models of interlocks to help structure the analysis of a remote and underdeveloped field of research. There are four principal models of interlocks which will now be examined *seriatim*.

The first model is "the management control" model. This theory, advocated by the "managerialists," proposes that the impact of interlocks is insignificant because, since the board defers to the direction

---

81. J. SCOTT & C. GRIFF, DIRECTORS OF INDUSTRY: THE BRITISH CORPORATE NETWORK 5 (1984).

82. Hereinafter also called "interlocks."

83. JOHANNES M. PENNINGS, INTERLOCKING DIRECTORATES: ORIGINS and CONSEQUENCES OF CONNECTIONS AMONG ORGANIZATIONS' BOARDS OF DIRECTORS, ix (1980).

84. T. Koenig *et al., Models of the Significance of Interlocking Corporate Directorates*, 38 AM. J. ECON. & SOC. 173 (1979); F. N. STOCKMAN ET AL., NETWORKS OF CORPORATE POWERS, 6 (1985); P. C. Dooley, *The Interlocking Directorate*, 59 AM. ECON. REV. 314, 316-8; SCOTT & GRIFF, *supra* note 81, at 27.

and judgment of management in practice, the center of corporate power lies with management. The theory is especially contemptuous of the claim that outside directors increase their individual power and the power of their corporations through multiple directorships. The managerialist's view is that outside directors are appointed primarily to provide the firm with an 'external view' and 'valuable contacts'.[85] Outside directors are seen as window dressing, providing the company with prestige, commercial and financial contacts, influence, and little else. The outside directors are said to wield little power; they are controlled by management officers who have access to inside information, full-time control over the strategies and operations of the company, and 'vote immune' contracts of tenure.[86]

There is sufficient criticism of the managerialist theory to make the interlocking directorate issue more than marginal and obscure. Opponents of the managerialists declare that the theory ignores arguments that outside directors act as a passive discipline or check on executive insiders. Their mere presence on the board forces insiders to consider their reactions to strategic plans. It is also argued that power and control do not qualify the insiders as the solely significant corporate actors. Outsiders are vital links to external entities such as technical, legal and financial sources, competing and complementary enterprises, politicians, and consumers. Whether insiders in fact monopolize information vital to the operations of the company is also questioned. Non-managerialists state that outsiders supplement the store of vital information used by the corporate machinery from unique and remote sources. Furthermore, it is argued by non-managerialists that the recruitment of non-executive outside directors is a means of ". . . securing some control over resources through collective action of interlocked firms thus providing an opportunity to evolve a stable collective structure of coordinated action through which interdependence is managed."[87]

The second interlock model is the "reciprocity model." This prototype, otherwise called the "inter-organizational elite model,"[88] postulates that "reciprocity takes place when two or more corporations cooperate with one another for mutual benefit."[89] This model depicts the corporate sector as structured in groups of coordinated

---

85. SCOTT & GRIFF, *supra* note 81, at 28.

86. R. E. Pahl & J. T. Winkler, *The Economic Elite: Theory and Practice* in ELITES AND POWER IN BRITISH SOCIETY 109 (P. Stanworth & A. Giddens eds., 1974).

87. SCOTT & GRIFF, *supra* note 81, at 27.

88. *See generally*, M. P. Allen, *The Structure of Interorganizing Elite Co-optation*, 39 AM. SOC. REV. 393 (1974).

89. Koenig *et al.*, *supra* note 84, at 176.

companies, each group subject to a specific locus of control.[90] Such interlocks are used as a "corporate co-op" to control the relationship of interlocked entities inter se while coordinating strategies to address exogenous contingencies and to maintain market control. The inter-directorial links facilitate cartelization, the practice of agreement and consensus on price fixes, squeeze-outs of competitors, buyouts, and control of supplies and market shares. These cartels are analogous to the classic economic (theory of the firm) model of the monopoly, with one difference. The monopoly involves domination of an industry by a single firm, whereas a multi-party price-fixing cartel usually divides the market into agreed exclusive zones for each firm, dominating the entire industry as a group. These theorists see the phenomenon of interlocks as a significant impediment to free and healthy competition in the market place. They advocate its prohibition or strong regulation.

The third model, the "finance control model," grows out of Marxist roots and explains interlocks as symptomatic of the efforts of financial institutions to monitor and control the objects of their investment and to manipulate company behavior. Theorists supporting this model[91] contend that financial institutions are the source and center of corporate interlocks. These interlocks are said to be the result of corporations having lost their independence to financial institutions due to their increasing needs for large amounts of capital. One early writer states that this leads to close associations between companies in financial need and financial institutions. "[B]y electing a banker to the Board of directors, a company may expect to have more ready access to bank funds, while the banker can watch over the operation of the company and reduce the risk of lending to a distressed borrower."[92]

These finance interlocks are considered a result of the investment operations of financial institutions which, as the depositories and trustees of vast amounts of wealth, become the principal investors in corporate stockholdings. Through this economic power and influence, financial institutions gain representation on the boards of non-financial corporations. The novel feature of this model is that the two interlocked corporations are not direct or potential competitors. These "money trusts" are attacked by politicians and academics alike. President Woodrow Wilson stated as follows in 1913:

---

90. STOCKMAN ET AL., supra note 84, at 8.

91. B. Mintz & M. Schwartz, *The Structure of Inter-Corporate Unity in American Business*, 29 SOC. PROBS. 87 (1981).

92. Dooley, *supra* note 84, at 317-8.

> Take any investment of an industrial character by a great bank. It is known that the directorate of that bank interlaces in personnel with . . . fifty, sixty boards of directors of all sorts, of railroads . . . of great groups of manufacturers . . . and of great merchants . . .; and the result is that every bank is under suspicion with regard to the motive of its investments. It is at least considered possible that it is playing the game of somebody who has nothing to do with banking, but with whom some of its directors are connected and joined in interest. The ground of unrest and uneasiness, in short on the part of the public at large, is the growing knowledge that many large undertakings are interlaced with one another and are indistinguishable from one another in personnel.[93]

More recently, this sentiment and concern was echoed as follows:

> Banks whose directors are tied to numerous local corporations which represent major concentrations of economic power and to a lesser extent to the most exclusive upper class social circles are those most likely to emphasize concentrated lending for capitalist borrowers and correspondingly, most likely to withhold capital from mortgage loans.[94]

Proponents of this model contend that interlocks between financial and non-financial organizations are rarely dynamic and distributive in their effect on credit, investment, and other microeconomic activity. In his seminal study of the phenomenon, Pennings states that interlocks between financial and non-financial organizations are prevalent among low-risk financial organizations and firms, for example, those with small debt-to-equity ratios and high solvency. A fair conclusion from these findings is that healthier and wealthier firms are part of inter-directorial alliances with financial institutions; thus, they are able to monopolize sources of capital and exclude weaker, capital-dependent entities:

> These interlocks are persuasive attempts by the financial firm to enhance its position with solvent firms that will be reliable customers for loans, bonds, and other forms of debt. Through these persuasive interlocks, the financial firm seeks to secure good customers, and the non-financial firms benefit from the bank's commitment and access to information about the market. An interesting by product . . . was the discovery that firms well interlocked with the financial community enjoy lower interest rates for their debt. . .[95]

---

93. WOODROW WILSON, THE NEW FREEDOM 110-11 (W. E. Leuchtenburg ed.,1913).

94. R. Ratcliff, *Banks and Corporate Lending: An Analysis of the Impact of the Internal Structure of the Capitalist Class on Lending Behavior of Banks*, 45 AM. SOC. REV. 553, 553 (1980).

95. PENNINGS, *supra* note 83.

The fourth model is the "class hegemony" model. This model has been considered the most common form of interlock in the economies of Commonwealth Caribbean territories. This model proposes that a cohesive elite controls the ownership of dominant corporations in all industries and perpetuates its class hegemony by maintaining consensus and commitment through directorial and social ties. While these social networks of kinship, politics and business can exist with or without interlocking directorates, the phenomenon of interlocks is a sturdy economic pillow for this status quo. Academic work classifies these intercorporate social networks into three types of class perpetuating bonds. These bonds of capital relations, commercial relations, and personal relations, are said to combine in varying mixes.[96] Capital relations are described as linked shareholding and credit, created when one company participates in another's share capital, when families have holdings in two or more enterprises, when banks grant overdrafts to connected companies, and so on. Commercial relations are described as linked trading and servicing, which exists by virtue of the fact that enterprises are buyers and sellers of one another's products, participate in joint ventures and consortiums, and employ the services of lawyers, accountants, registrars and consultants. Personal relations are described as links between firms, often at board level, which arise from the sharing or linking of their personnel through interlocking directorships, relations of friendship, kinship, and political associations. This does not rely on the view that the class hegemony interlocks are designed or conspiratorial. The interlocks may occur in concert with other patterns of interaction between class members such as informal links of prestigious scholastic education, membership in exclusive clubs and intermarriages.[97] According to these views, the directorships of the leading corporations are just another shape in the pattern of privilege and social elitism that also provide the ancillary benefit of consolidating and perpetuating economic power, thus strengthening the class' hegemony and cohesion.

Quality of Interlocks

Within the theoretical analysis of interlocks, lie subsidiary considerations of the quality of the interlock, that is, its strength, intensity and direction. A direct interlock is the strongest and most readily discernible form of interlock. A direct interlock occurs when one individual is a director of two organizations.

96. SCOTT & GRIFF, *supra* note 81, at 17.

97. *See* Parris, *supra* note 4, at 106; Barrow, *supra* note 12, at 106; Reid *supra* note 22, at 25.

An indirect interlock is a weaker and less discernible link which occurs where two companies with no directors in common are linked through another company (or companies) with whom they share directors.[98] "If A is interlocked with B, B with C, C with D and so on, there is a simple chain of connections. But if D is also connected to B and C also to A the network begins to acquire a more complex structure . . .."[99] The strength or weakness of an interlock is not solely dependent upon the proximity of the link. Obviously, the more remote the link and the more intermediaries that exist, the less significant the interlock will be. However, when the directors are all insiders, such as members of the same clubs or graduates of the same elite colleges, this indirect link may be a stronger conduit of inter-firm control and influence than a direct interlock consisting of directors without connections to each other, such as a politician and a business school professor. Additionally, the incidence of stock ownership, duration of interlock, and personal and social ties also contribute to the strength of an interlock.[100]

The 'intensity' of interlocking behavior is the proportion of directors that an organization shares with another organization. Where interlocked organizations create more shared directorships, especially if their board sizes remain the same, the interlock becomes more intense.[101] Intensity also increases when one person holds an executive directorship in both linked companies.

The direction of the interlock is usually classified as being vertical or horizontal. A vertical interlock exists when two or more corporations that deal with each other as supplier and customer share a director. A horizontal interlock exists when competing organizations share a director. A non-competitive interlock that is not vertical in direction is called a neutral interlock. An esoteric form of neutral interlock is a symbiotic interlock where companies that have complementary services are linked.[102]

These forms and structures of interlocking directorates are neither self-contained categories nor exhaustive classifications. There are many other forms of interlocking directorates that can be analyzed as variants or combinations of the above described prototypes and structures–for example an "institutional interlock":

---

98. AMERICAN BAR ASSOCIATION SECTION ON ANTITRUST LAW, INTERLOCKING DIRECTORATES UNDER SECTION 8 OF THE CLAYTON ACT 39-40 (Monograph No. 10, 1984).

99. STOCKMAN ET AL., *supra* note 84, at 2.

100. M. FENNEMA, INTERNATIONAL NETWORKS OF BANKS AND INDUSTRY 99 (1982); PENNINGS, *supra* note 83, at 40; SCOTT & GRIFF *supra* note 81, at 26-7.

101. FENNEMA, *supra* note 100, at 97; PENNINGS, *supra* note 83, at 25; SCOTT & GRIFF, *supra* note 81, at 25.

102. PENNINGS, *supra* note 83, at 11.

> . . . is the combination of the vertical and indirect interlocks. The first tier is a single bank interlocked with a single corporation, which can be analyzed as a vertical interlock. The second tier exists when the directors of several competing firms all sit on a single bank's board. At this stage, not only are there vertical interlocks but there is also an indirect interlock among the competing corporation. The final tier (institutional interlock) exists when the leading competitors in an industry are interlocked with several major commercial banks.[103]

The potential intricacy of the phenomenon of interlocking directorates is evident from this summary. Nevertheless, the complexity of a problem should never be reason for legislative, academic or judicial indifference or abdication. In absolute terms, the scale of the phenomenon of interlocks in the Commonwealth Caribbean is small. Nevertheless, the phenomenon occupies such a pervasive presence in Commonwealth Caribbean economies, that it is disappointing that so little of the region's juridical attention is devoted to the topic. One hopes that the silence of the region's jurisprudence is not related to the corresponding silence in English jurisprudence.[104]

IV. EFFECTS OF INTERLOCKING DIRECTORATES

Before examining the legal implications of interlocks, one should briefly identify the arguments supporting and condemning the phenomenon.

The principle argument in favor of interlocks is that, even in the largest industries, the pool of highly qualified and proficient directors is so small that the practical dictates of directorial quality result in inevitable overlapping on company boards. "Insofar as there is a scarcity of management talent, by making services of competent administrators available to more corporate organizations, this scarcity in part is overcome."[105]

This argument is a precursor to the following related point. It is said that commercial affairs are best left to be determined by businessmen. The practice and structure of commercial corporate life have evolved pragmatically and effectively over time (just as the *lex mercatoria*) to suit the needs and demands of commercial realities. For this reason, the courts and Legislatures should resist the

---

103. R. P. Murphy, *Keys to Unlock the Interlocks: Dealing with Interlocking Directorates,* 11 U. MICH. J. LAW REFORM 361, 366 n.37 (1978).

104. P. S. Johnson & R. Apps, *Interlocking Directorates Among the U.K.'s Largest Companies,* 24 ANTITRUST BULL. 357, 368-9 (1979).

105. STAFF OF THE ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, House of Representatives, 89th Cong., 1st Sess., REPORT ON INTERLOCKS IN CORPORATE MANAGEMENT (Comm. Print, 1965) at 7 (hereinafter called STAFF REPORT).

temptation to "fix that which is not broken." Some judges are aware of this sentiment; as one writer observes:

> The judges have faced one further difficulty. Whereas their training and experience make them well equipped to adjudicate on questions of loyalty and good faith, they move with less assurance among complicated problems of economics and business administration. Hence, they display an understandable reluctance to interfere with the directors' business judgment–a reluctance of which many examples will be found throughout the whole area of company law.[106]

The protagonists of interlocks also maintain that interlocks facilitate efficient transfer of information (raw data and managerial advice) for investment decisions; these efficiencies lower the transaction costs for investment, thereby increasing the return on investment.[107] This economic argument for optimal use of directorial talent is further expressed as follows:

> A qualified man has the capacity to act effectively for several corporations, and the experience gained in handling the problems of one redounds to the advantage of others. By virtue of this a director may be more valuable to any particular company because of his experience in other companies. From a purely business standpoint, the presence of one or both companies by insuring business on profitable terms with a minimum of selling costs. Another area in which a common director may be beneficial to business . . . is where there is need to obtain information in order to protect an investment or other substantial financial commitment.[108]

Of course one should not ignore the cries of the managerialist school[109] which minimize the significance of interlocks for public policy. They contend that the powerlessness of interlocking directors poses no threat to investor security or competition; if nothing else, interlocks serve the salutary function of providing corporations with an external view, contacts and venerability.

Another supporting view is that the practice of interlocks is an efficient way of facilitating corporate integrations. The permanency of consolidations or mergers may not be desirable where what is required is simply coordination of operations in complementary organizations, e.g., engineering firms producing a specific component for a military hardware producer.

---

106. GOWER, *supra* note 69, at 603-4.

107. D. Bunting, *Corporate Interlocking, Part 3, Interlocks and Return on Investment,* 1 DIRECTORS & BOARDS 4 (1976).

108. STAFF REPORT, *supra* note 105, at 7.

109. *Infra* note 85 and accompanying text.

The opposition to interlocks is also legion. One principal argument in opposition to interlocks seeks to rebut the "talent scarcity" arguments of interlock supporters. Its message is that interlocks contribute to the debasement of the quality of the management pool and actually decrease or restrict its size. The 'pool' is debased by directorial 'inter-breeding.' The perpetuation of the process of recruiting directors from a stagnant pool of notables will leave equally or more talented, but anonymous, candidates languishing in the corporate ranks. The practice of multiple directors is also said to decrease directorial quality because a director serving on multiple boards may be too busy to serve any one effectively. As for the quantity of qualified directors, "extensive interlocks foreclose opportunities for younger executives to gain experience as directors, experience which they need to become qualified directors. The very directors whose limited number 'requires' the existence of interlocks."[110]

Critics of interlocks also point to the entanglement of conflicting interests and divided loyalties arising when an individual is a multiple director. The argument is most obviously discerned with respect to competitive direct interlocks. How can a director of Corporation A serve with loyalty and good faith while being a director of Corporation B? The director could hardly vote for economic policy of A that would not injure B, and vice-versa; however, he could not decline to vote without abdicating from his duty to provide his best judgment.[111] The problem does not disappear with indirect (noncompetitive) interlock as the following illustration reveals:

> Take a director of Company A who is also a director of Company B, where company B is not a competitor. Assume the director for Companies A and B discloses information to another director of Company B, who is also a director of Company C, a competitor of Company A's. The director of Companies A and B is potentially in breach of his or her fiduciary duty to Company A not to disclose confidential information even though the Company B is not a competitor.[112]

Enemies of interlocks also insist that intracorporate conflict of interest arising from interlocks is not only a duty of loyalty problem. Investor protection may also be threatened by the practice of board

---

110. Murphy, *supra* note 103, at 368.

111. A. Travers, *Interlocks in Corporate Management & the Antitrust Laws*, 46 TEX. L. REV. 819, 840-841 (1968).

112. R. Carroll *et al., Interlocking Directorships and the Law in Australia*, 8 COMPANY & SEC. L.J. 290, 291.

interlocks. It can be argued that, in the short term, maximization of investor return (e.g., dividends) may be compromised through less than optimal business operations caused by the non-competitive, exclusive dealings relationships created by vertical interlocks. In the long run, the apparent market security created by vertical interlocks may backfire. This is because even in vertical or symbiotic interlocks, the time may come when the relationship sours between both corporations, e.g., when a scarcity or shortage of primary products tempts a supplier company to renege on the vertical relationship with an interlocked manufacturing concern.

Of greater concern to the investor is the fact that access to advanced information on the inner workings of financial institutions, manufacturing, retail and service industries poses a tremendous temptation to the multiple director. The interest of stockholders *qua* investor may be subordinated to the opportunity for "inside dealing." This is an especially worrisome problem for the Commonwealth Caribbean territories with nascent stock exchanges such as Jamaica, Trinidad & Tobago and Barbados, which have inadequate or non-existent securities regulations or other means of investor protection form the ravages of insider trading.[113]

Opponents of interlocks also complain about the anti-competitive effects of the practice on the economy as a whole. The following quotation from the Staff Report captures the fears that have been expressed.

> [A]n interlocking director is in a position to serve as a liaison officer between the two companies and to insure that the pursuit of the best interests of one is not seriously detrimental to the other. In addition, the liaison agent is in a position to bring about a measure of common action, and, if the proportion of interlocking directors is sufficient, competition between the two firms may be eliminated entirely. Interlocking relations between companies in closely related industries may tend to forestall the development of competition which otherwise would occur in the normal expansion and diversification of each of the respective companies.[114]

The anti-competitive effects of interlocks are not only limited to cases where there are horizontally interlocked corporations, but also where there are vertical interlocks.

> Common directors between companies that are in a supplier-purchaser position to each other may result in preferential

113. For an exploration of these inadequacies *see generally,* S. J. Leacock, *Essentials of Investor Protection in the Commonwealth Caribbean and the United States,* 6 LAWYERS OF THE AMERICAS 662 (1974).

114. STAFF REPORT, *supra* note 105, at 7.

> treatment in periods of short supply to the impairment of competition generally throughout the affected industry. Similarly, preferential treatment may occur in access to market outlets. An interlock between a manufacturing corporation and banks and insurance companies or other sources of financial services may establish a community of interest that would tend to assure adequate credit to a favored company and a withholding of credit and capital from disfavored competitors.[115]

A final criticism of the practice is the unsubstantiated claim that interlocking directorates promote power elites which manipulate and co-opt political and social institutions to suit their narrow sectional interests.

V. COMMONWEALTH COMPANY LAW AND INTERLOCKING DIRECTORATES

> The forces influencing and dominating boards of directors of corporations engaged in finance, banking, insurance, railroading, and commerce through common or interlocking directorships, restraining and stifling competition and freedom in business, and denying equality of opportunity to all entitled thereto, *abuse and violate the fiduciary relation and trust obligation of directors.* Some treatment must be found to cure or destroy the evil. Is there in law a remedy?[116]

This question was asked in 1913 with respect to the problem of unregulated interlocks in the United States. Now, more than seventy-five years later, the same plaintive cry can be made with reference to the Commonwealth Caribbean.

The main weapon available at common law to attack the problem of interlocking directorships is through the fiduciary duties of the director. There is unfortunately a dearth of decisions on the issue. Those available in the Commonwealth are uncertain, anomalous and sketchy.

The consensus of opinion finds its locus in the inadequately reported decision of *London & Mashonaland Exploration Co. Ltd. v. New Mashonaland Exploration Co. Ltd.*[117] In this case, Lord Mayo intended to be both chairman of the plaintiff company and a director of the defendant company, where the two companies were rivals. The relevant portion of the judgment of Chitty, J. reads as follows:

---

115. *Id.*

116. M. Pam, *Interlocking Directorates, The Problem and its Solution*, 26 HARV. L. REV. 467, 470 (1913)(emphasis supplied).

117. [1891] W.N. 165 (Eng. Ch.).

> [E]ven assuming that Lord Mayo had been duly elected chairman and director of the plaintiff company, there was nothing in the articles which required him to give any part of his time, much less the whole of his time, to the business of the company, or which prohibited him from acting as a director of another company; neither was there any contract express or implied to give his personal services to the plaintiff company and to another company. No case had been made out that Lord Mayo was about to disclose to the defendant company any information that he had obtained confidentially in his character of chairman . . . no case has been made for an injunction. . .[118]

This dicta was approved by Lord Blanesburgh in the House of Lords decision of *Bell v. Lever Bros.*,[119] reported about forty years later. In the opinion of Lord Blanesburgh, *Mashonaland* was authority for the principle that if the regulations of the company did not state that a director's services must be rendered to that company alone, and there was no disclosure of confidential information, a director could not be restrained from holding a directorship in a rival and competing company. Lord Blanesburgh was satisfied to reconcile this conclusion with the "strict principle" expressed in *Aberdeen Ry.*,[120] on the ground that the *Aberdeen Ry.* rule is only applicable to ". . . a company's contracts in which, on the other side of the table, a director is interested and with reference to which the company's regulations are silent. The [rule] . . . is not addressed to a director's own contracts with outsiders in which the company has no financial interest at all."[121]

In the Commonwealth Caribbean, there are no reported cases addressing this issue. It still is open for the region's courts to decide what the correct position is according to the rules of common law and equity. It is acknowledged that a decision from the House of Lords is highly persuasive; nevertheless, some points must be borne in mind before slavishly engrafting the *Mashonaland* and *Bell v. Lever Bros.* precedents to the *corpus juris* of the Commonwealth Caribbean. First, Lord Blanesburgh's opinion was only one of several judgments delivered by their Lordships in *Bell v. Lever Bros.*, and is not critical to the '*ratio decidendi*' of the case. Second, the dicta was based on what his Lordship concedes was an inadequately reported decision in which counsel for both sides may not have argued fully the available

---

118. *Id.* at 165.

119. [1932] App. Cas. 161 (Eng.); *see also* Waite's Auto Transfer v. Waite, [1928] 3 W.W.R. 649 (Can. Man. K.B.).

120. [1864] 1 Macq. H.L. 461 (Eng.); *see* text accompanying note 65, *supra*.

121. Bell v. Lever Bros. Ltd., [1932] App. Cas. 161, 195 (Eng.).

precedents.[122] Finally, in addition to much academic criticism of the effect of these decisions, the following House of Lords dicta implies they may no longer be the position in England under certain circumstances:

> Your Lordships were referred to *Bell v. Lever Bros., Ltd.* . . . where Lord Blanesburgh said that a director of one company was at liberty to become a director also of a rival company. That may have been so at the time. But it is at risk now of an application under section 210 if he subordinates the interests of one company to those of the other.[123]

It is submitted that cogent arguments can be advanced as to why the principle in *Mashonaland* is anomalous and should not be extended to Commonwealth Caribbean jurisdictions without closer reflection on basic equitable principles of the area.

The essence of the issue is to establish the nature of the director's fiduciary duties of loyalty. The nature of the director's fiduciary duties of loyalty and good faith are the same as those of a trustee, indeed they have a shared history:[124]

> Prior to 1844 most joint stock companies were unincorporated and depended on their validity on a deed of settlement visiting the property of the company in trustees. Often directors were themselves trustees and even when a distinction was drawn between passive trustees and the managing board of directors the latter would quite clearly be regarded as trustees in the eyes of the court of equity insofar as they dealt with trust property . . .[125]

Of course the risk-taking function of the director coupled with the business judgment rule causes an analogy with trustees to break down with respect to the duties of skill.[126] With respect to the duty of loyalty and good faith, the duties of a director are virtually identical to those imposed on trustees.

---

122. D. E. McClay, *Multiple Directorates and Loss of Corporate Opportunity: Bases and Remedies*, 10 VICT. U. WELLINGTON L. REV. 429, 441 n.78 (1980).

123. Scottish Coop. Wholesale Soc'y Ltd. v. Meyer, [1959] App. Cas. 324, 368 (appeal taken from Scot.). (The Companies Act, 1948, 11 & 12 Geo. VI, c. 38, § 210 (Eng.) allows a member of the company to sue the company if he finds the company's business is being conducted oppressively).

124. Re Gloucester, [1854] 4 De G.M. & G. 769 (Eng. Ch.D.).

125. GOWER, *supra* note 69, at 571.

126. Grimwade v. Mutual Society, [1885] 52 L.T. 409, 416 (Eng. Ch.D.) ("The strict principles which are applied . . . to trustees are not applicable to directors. The reason is obvious, arising . . . out of the nature of the business they have to conduct, which . . . is often of a speculative . . . character"). *See* text accompanying note 41 *supra*.

The arguments leveled against the decisions in *Mashonaland* and its progeny[127] is that they seem to conflict with the traditional duty of loyalty cases for directors and other fiduciaries. It has been established by a long and unbroken line of cases that as an inexorable rule of equity, a fiduciary must not place himself in a position of conflict with the interests of the beneficiary. It may be argued that the prohibition cannot exist 'in vacuo,' and that there must be some actual crystallized profit-making or misuse of confidential information before the prohibition can attach. It was such reasoning that settled the obvious discomfort experienced by the New Zealand court deciding *Berlei Hestia (N.Z.) Ltd. v. Fernyhough.* In that case, Mahon, J. had this to say:

> It is certainly true to say, . . . that there seems at first sight to be some measure of anomaly between the strict liability imposed upon directors in the *Regal v. Gulliver* type of case and the latitude which the law seems to extend towards the practice of a director holding office in two companies which might wholly or partly be in competition. *Cf.* Afterman, Company Directors and Controllers (1970) at p. 82-83 where the learned author says: "somewhat anomalously in the light of the strict application of the fiduciary principle forbidding directors from benefiting from their position, there is no legal prohibition upon a director entering into private competition with his company or acting as a director of a rival company . . .. [128]

The learned trial judge then explained away the anomaly by saying that:

> . . . there was wide distinction between asking a director to account for a profit made out of his fiduciary relationship, and asking a director not to join a board of a competing organization in case he should, at some future time, decide to act in breach of his fiduciary duty . . .[129]

It is submitted that this reasoning does not correspond with the established principles of the fiduciary's 'no conflict' rule. One writer lamented:

> Mahon, J. appeared to overlook the point that the making of a profit is only one facet of the conflict of interest rule which can apply to render a director in breach of his fiduciary duty even where he

127. *Supra* note 117.
128. [1980] 2 N.Z.L.R. 150, 161 (H.C.).
129. *Id.*

makes no profit. The law therefore, is in rather an unsatisfactory state.[130]

This 'no-conflict' rule was endorsed by the House of Lords in the context of a trustee under a will trust in *Boardman v. Phipps*.[131] Their Lordships held that ". . . the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust . . . is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict."[132] The courts have never burdened the c'estui que trust with the necessity of showing actual loss to himself or profit to the trustee when all appearance of loyalty and absence of self interest on the part of the judiciary has disappeared. It is an inexorable and inflexible rule based on considerations of human nature that fidelity by the trustee must not only be done but manifestly appear to be done.

In *North West Transportation Co. Ltd. v. Beatty* the court stated that the mere possibility of conflict was enough to attract the strict and unyielding "no-conflict" rule:

> [A] director of a company is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, *or which possibly may conflict*, with the interests of those whom he is bound by fiduciary duty to protect[.][133]

This echoes the words of Lord Cranworth in the *Aberdeen Ry.* case[134] which asserts that the fiduciary must not even enter situations of possible conflict; this is so even though the circumstances result in no loss or even a boon to the company. So inflexible is the rule, that no inquiry on that subject is permitted. The principal that the conflict and not the profit is important was re-iterated in *Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co.*[135] In that case, the plaintiff company purchased some shares in another company. One of the plaintiff company's directors (H) had interests in this other company, both as director and as trustee of a large portion of its shares to certain beneficiaries. He disclosed his position as director of the selling company, but not as a shareholder, at a board meeting of the plaintiff company. The court held that the

---

130. J. H. Farrar, *Revising or Rejecting the Concept of Control*, in COMPANY LAW IN CHANGE 39, 56 (B.G. Pettet ed.,1987).

131. [1967] 2 App. Cas. 46 (Eng.).

132. *Id.* at 123.

133. [1887] 12 App. Cas. 589, 593 (P.C., Eng.) (emphasis supplied).

134. [1864] 1 Macq. at 471-2 (Eng.). *See* text accompanying note 45 *supra*.

135. [1914] 2 Ch. 488 (Eng.).

eventual purchase was voidable at the instance of the plaintiff. Swinfed-Eady, J. said:

> Where a director of a company has an interest as a shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is director, he is in our opinion within this rule [in *Aberdeen Ry.*]. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director . . ..[136]

And then he went on to state the critical principle:

> It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others. He is bound to do as well for his cestuis que trust as he would for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of the contract have been the best obtainable for the interest of the cestui que trust, upon which subject no inquiry is permitted.[137]

It is evident from this judgment that the extent of any actual loss by the beneficiary, as well as the directness or indirectness of the fiduciary's conflicting position, is not considered important. Most importantly, placing oneself in a position where fiduciary duties are owed to conflicting masters at once is untenable and forbidden.[138]

To deny the beneficiary a remedy in instances where the possibility of real conflict exists, but no loss has been proven, would be to deny the beneficiary the remedy when it is most needed. In many cases, the fraud of the fiduciary may be undetected or impossible to prove. This reason for the strict "no conflict" rule is found in the ancient case of *Benson v. Heathorn*.[139] In that case, a director assumed the duties of ship's husband for his company with the consent of his co-directors. Remuneration made from that position was ordered disgorged, the headnote reading "it is prima facie a breach of trust in any director of a company established for the purpose of acquiring and working vessels . . . to take upon himself the duties of ship's husband." The court was impressed by the fact that assuming the duties of director carry an "implied and inherent term" not to acquire an interest adverse to the duty while remaining a director. Although

---

136. *Id.* at 503.

137. *Id.*

138. H. R. HAHLO & J. H. FARRAR, HAHLO'S CASES AND MATERIALS ON COMPANY LAW 405, (3rd ed. 1987) ("It is not necessary that there be proof of actual conflict of interest. It is sufficient that the interests 'possibly may conflict' . . ..").

139. [1842] 1 Y. & C.C. C. 326 (Eng. Ch.).

in this case the forbidden profits were calculable and detectable, the court stressed that "it is mainly the danger, the danger of the commission of fraud in manner and under circumstances which in the great majority of instances, must preclude detection . . ."[140] that requires the rule to be rigidly adhered to. The Vice-Chancellor pointed out ". . . . that though you may see in a particular case that [the director] has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court . . . whether he has made advantage or not."[141]

The foregoing discussion attempts to show that the anomalous and permissive rule that simply holding rival directorates is not enough to enter the ambit of the no-conflict principle is questionable, if not erroneous. One can now critically re-examine the reasoning used by Lord Blanesburgh in *Bell v. Lever Bros.* and conclude that the stricter no-conflict rule in the *Aberdeen Ry.* only applied to company contracts in which a director is interested, not to the director's contracts with outsiders. As will be shown, the principal difficulty with Lord Blanesburgh's proposition is that it would treat directors inconsistently and leniently compared to other classes of fiduciaries.[142]

In the case of an agent (which directors are in the conduct of the company's business),[143] the rule was expressed as follows in *Fullwood v. Herley:*

> No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment.[144]

This is so even though as an agent the offender deals on another's behalf and is not "on the other side of the table"[145] and directly interested in a contract with either principal (other than his contract of agency).

This situation is the same with respect to trustees. The *In Re Thomson*[146] court construed and applied the precise dicta of Lord Cranworth in *Aberdeen Ry.* to restrain a trustee in his personal capacity from engaging in a business that was a competitor to those of his

140. *Id.* at 342
141. *Id.* at 343 (quoting Ex Parte Lacey, Gr. R. at 11 (Eng.).
142. *See e.g.* Partnership Act § 53 & 54 Vict., Ch. 39, § 30 (1890) (Eng.).
143. Ferguson v. Wilson, [1866] 2 Ch. App. 77 (Eng.).
144. [1928] 1 K.B. 498, 502 (Eng.).
145. Bell v. Lever Bros. Ltd., [1932] App. Cas. Ch. 203 161,195 (1930) (Eng.).
146. [1929] 1 Ch. 203 (Eng.).

c'estuis que trust. The relevant part of Clauson, J.'s dicta is worth quoting:

> May I translate some portions of this passage into the language which would be appropriate when dealing with a case where the fiduciary relation exists, not because the one party is a director of the other party, but because one party is an executor or trustee . . . I find the principle to be this. The rule of universal application is that an executor and trustee having duties to discharge of a fiduciary nature towards the beneficiaries under the will . . . shall not be allowed to enter into any engagement in which he has or can have a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect . . .[147]

In another part of the Commonwealth, Justice Menzies (Australia) commented approvingly on the decision of *In Re Thomson* stating: "Clauson, J. it seems, used *Aberdeen Railway Co. v. Blaikie Bros.* most tellingly for the very purpose Lord Blanesburgh [in *Bell v. Lever Bros.*] disregards."[148]

In the case of the duty of employees to their employers, the position is the same. In *Hivac Ltd. v. Park Royal Scientific Instruments Ltd.*,[149] the court held the plaintiff company was entitled to an injunction restraining its employees from working in their spare time for a company in direct competition with the plaintiff company. This was so even though there was no term in their contract of employment to work exclusively for the plaintiff. Morton, L.J. saw it as "a necessary implication which must be engrafted on such a contract . . . that the servant undertakes to serve his master with good faith and fidelity."[150] In light of this case one academic writer has this to say about the incongruity of the *Mashonaland* and *Bell v. Lever Bros.* principle:

> This view is becoming increasingly impossible to support. It has been held that the duty of fidelity flowing from the relationship of master and servant may preclude the servant from engaging, even in his spare time, in work for a competitor, and that the servant's duty of fidelity imposes lesser obligations than the full duty of good faith owed by a director . . . How then, can it be that a director can compete whereas a subordinate employee cannot?[151]

The courts of other Commonwealth territories have displayed discomfort and mental gymnastics in applying the anomalous

---

147. *Id.* at 215.
148. D. Menzies, *Company Directors*, 33 AUSTRALIAN L.J. 156, 160.
149. [1946] 1 Ch. 169 (Eng.).
150. *Id.* at 180 (*quoting* Wessex Dairies Ld. v. Smith, [1935] 2 K.B. 80, 88).
151. GOWER, *supra* note 69, at 599.

Mashonaland principle. In the South African case of *Atlas Organic Fertilizers (Pty) Ltd. v. Pikkewyn Ghwano (Pty) Ltd.*, the rule was limited to permit such multiple directorships for non-executive directors. In that case, Van Dijkhorst, J. stated:

> The matter must in my view be approached on a common sense basis. It is inconceivable that this freedom to hold directorships in competing companies can exist in the case of a managing director actively so employed. It is impossible for one to advance the conflicting interests of two actively competing businesses as managing director of both . . .[152]

In Canada, judicial distaste for the *Mashonaland* rule has not been as reserved as in South Africa. In *Abbey Glen Property Corp. v. Stumborg*[153] the court disagrees with Lord Blanesburgh's opinion that the duty owed by the director when he contracts directly with the company is distinguishable from the case where the director has outside contracts without any conflict of interest:

> [I]n my view Lord Blanesburgh cannot be taken as having treated exhaustively of the liability of directors. While it is true that a director can be made accountable where he has made a profit through use of the property of the company or of some confidential information which has come to him as director of the company there is . . . a third class of case where a director may be called on to account, namely where he had misused his position as director of a company . . ..[154]

The court then went on to quote Lord Cranworth in *Aberdeen Ry.*[155] with approval and added:

> [I] do not hesitate to express my opinion that the sweeping proposition for which the *London & Mashonaland* case and Lord Blanesburgh's dicta are cited is not the law. Even when there is no question of a director using confidential information, there may be cases in which a director breaches his fiduciary duty to company A merely by acting as director of company B. This will particularly be possible when companies are in the same line of business and where acting as a director of company B will harm company A.[156]

As with other fiduciaries, the director can be absolved from liability for breach of duty if the company consents to or ratifies the

---

152. [1981] 2 S.A. 173, 198 (T.P. Dist.). (South Africa ceased to be part of the Commonwealth in 1969).
153. 65 D.L.R. 3d 235 (1976) (Can. Alta. Sup. Ct.).
154. *Id.* at 268 (citations ommitted).
155. *Id.* *See* text accompanying note 65 *supra*.
156. 65 D.L.R. 3d at 278 (1976).

otherwise prohibited act or omission. One can now examine the options of ratification and authorization as they relate to the issue of interlocking directorships in the Commonwealth Caribbean.

* * * *

As alluded to earlier,[157] the consent or ratification of the c'estui que trust can absolve the trustee form liability for breach of trust. This is also the rule with respect to the absolution of directors guilty of conflicting interests through multiple directorships. Consenting to a director's holding competing directorships can be achieved by three principal means: contract, the corporation's Articles, and statutory provisions.

An obvious way to prohibit a director from engaging in other enterprises that may conflict with his duties as director is to specifically include such prohibitions in an agreement of service. It has been argued that it is an implied term of the director's contract of service (if there is one) that he will not assume conflicting positions to the detriment of the beneficiary company. This implied term may be rebutted by express terms permitting him to sit on the boards of even competing entities.[158] In practice, however, only full-time executive directors are retained under a contract of service. The non-executive director, who accounts for the majority of multiple directorships, is virtually never subject to contracts of service, far less to exclusive service provisions.

The company's regulations may also excuse a director's conflict of interest. The Articles of Association of a company may contain waiver clauses immunizing the company's directors from liability under any action for breach of trust due to conflict of interests. These clauses can be drafted to be as wide or as narrow as desired in the ambit of their absolution. Such clauses are drafted to deal with the "difficulties which directors experience from the application of the equitable rule that a person who acts in a fiduciary capacity must not place himself in a position where his fiduciary duties and personal interests conflict."[159] Most company regulations immunize a director from liability for breach of duty if the director discloses any conflict of interests in accordance with any pertinent statutory directives and abstains from voting on the matter.[160] All things remaining equal however, the articles can, "if worded sufficiently widely,

157. *See* text accompanying notes 66-67 *supra*.
158. GOWER, *supra* note 69, at 586.
159. HARMONIZATION REPORT, *supra* note 2, ¶ 12:84.
160. *Id.*

relieve [directors] of any obligation not to place themselves in a position where their personal interest could conflict with their duty."[161]

Neither contract, the Articles, nor any statutory requirements of disclosure oust the director's duty to display subjective good faith towards the company he serves.[162] Although regional statutes invariably contain directives governing the director's duty to disclose his interest in the impugned contract, these provisions by themselves do not validate the director's misconduct. The statutory directives merely express the requirement of disclosure. This mirrors the common law principle that a beneficiary's consent or ratification must be preceded by full and frank disclosure of all material facts relating to any conflict with the beneficiary's interests faced by the fiduciary.[163] The statutes by themselves do not validate the director's actions. Furthermore, statutes that permit consent and ratification after disclosure of a contract tainted with a director's self interest only apply if the Articles allow the company to waive the right to void the tainted agreement. One such form of statutory provision is found in the Company Acts of the Commonwealth Caribbean. In common form it provides:

> For the purpose of this section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.[164]

This subsection must be read in conjunction with a subsequent sub-section that provides:

> Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.[165]

This has been interpreted to mean that the equitable principle that shareholders in general meeting must authorize such a contract or that there must have been a general waiver in the Articles of the

---

161. GOWER, *supra* note 69, at 601.

162. Kerr v. Walker, [1933] Sess. Cas. 458, 468 (Scot. 2d Div.) ("[s]uch a provision does not relieve the directors of a company of the duty . . . of acting in the interests of the company"); Re City & Equitable Fire Ins. Co., [1925] Ch. 407, 426 (Eng.); Gower, *supra* note 69, at 601.

163. Thomson v. Eastwood, [1877] 2 App. Cas. 215, 236 (Eng.) ("[A] Court of Equity . . . will throw upon the trustee the *onus* of proving . . . that all information was laid before the c'estui que trust. . . .").

164. Trinidad & Tobago Companies Ordinance, ch. 31 No. 1 § 147(3); Jamaica Companies Act, § 188(3).

165. Trinidad & Tobago Companies Ordinance, ch. 31 No. 1 § 147(5).

company still applies. When those conditions exist, the disclosure and notice requirements of these sections are activated.[166] It is important also to note that the sections deal with "contracts" in which the director has a direct or indirect interest. It does not apply to any disabilities affecting the director in a conflict of interest situation not involving a contract with his corporation. Most importantly for the interlocking directorate issue, it does not address the issue that a director must not place himself in a position of even possible conflict with the corporation even if there is no existing profit-taking or contracting. In these instances, the equitable principles apply to determine whether or not there is a breach of duty. Accordingly, if the Caribbean courts eschew the queer and anomalous decision of *Mashonaland* and its progeny and instead apply the older and stricter rule prohibiting multiple directorates at equity, then the consent of the corporation in the form of shareholder approval or waiver will be required to validate the directorial interlock (and the provisions of the statutes relating to disclosure by the common director to the Board will not apply).

It has been suggested that the duty does not apparently prevent a director from holding directorships in two or more competing companies because each company gives implied consent to his holding office in the other. This suggestion is implausible and pregnant with mischief and potential for abuse. First, equity has never permitted a fiduciary to entertain conflicting interest based on the "implied consent" of the beneficiary. The beneficiary may authorize or ratify a breach of trust such as the fiduciary's personal interest posing actual or potential conflict with the discharge of his duty; every such authorization or ratification must be after full and frank disclosure of all material facts by the fiduciary.[167] In Commonwealth company law, the shareholders in general meeting are owed fiduciary duties by the director.[168] His assumption of duties with the board of a potential or actual competitor company must therefore be authorized by this body after full and frank disclosure of the nature and the extent of the potential conflict. There is room for a theory of implied consent in this equitable rule. Second, when the director of company A assumes duties on the board of company B, while it may be the case that company B implicitly consents to any directorships he holds on his commencing duties (indeed the fact that he is a director

---

166. HARMONIZATION REPORT, *supra* note 2, ¶ 12:86; GOWER, *supra* note 69, at 600; Hely-Hutchinson v. Brayhead Ltd., [1968] 1 Q.B. 549 (Eng.).

167. J. B. Kearney, *Accounting for a Fiduciary's Gains in Commercial Contexts* in EQUITY AND COMMERCIAL RELATIONSHIPS (P.D. Finn ed., 1987), at 189, nn.20-1.

168. *See* note 63 *supra*, and accompanying text.

of competitor A may be company B's reason for retaining him), can it be said that the shareholders of company A authorized their director's assumption of duties in their rival?

Finally, even if implied consent can be advanced and attributed to both companies, can such consent cure prospective breaches of trust? As one writer observes ". . . provided that each company consents to the holding of the other directorship, the assumption of office will not be a breach of duty–though a subsequent failure to walk the resulting tight rope will be."[169]

VI. U.S. CORPORATION LAW AND INTERLOCKING DIRECTORATES

The problems of interlocking directorates have received legislative as well as judicial attention in the United States. Legislatively, the concern has been reflected in the economic policies of the United States. Statutory regulation of the phenomenon has been a chief vehicle for promoting high competitive standards in concert with the country's broader antitrust policies. Although the U.S. antitrust statutes are largely beyond the scope of this article, for cohesion of discussion this statutory framework is briefly summarized before attention is turned to the common law position in the U.S. with respect to interlocks.

There are two principal statutes[170] impinging on the practice of interlocking directorates in the U.S., namely the Sherman Act[171] and the Clayton Act.[172] Sections 1 and 3 of the Sherman Act are targeted at contracts, combinations or conspiracies in restraint of trade. Section 2 of the Act attacks monopolies. The spirit of the Sherman Act reflects the considerations that void contracts in restraint of trade at common law.

The Sherman Act was "developed from a congressional intent to expand the Sherman Act, which many felt had not been entirely effective in abolishing certain monopolistic practices."[173] The Clayton Act regulates only direct interlocks. With respect to industrial and commercial corporations[174] that are neither banks,

169. GOWER, *supra* note 69, at 600.

170. Paralleling or supplementing these federal statutes are state antitrust laws.

171. Codified as amended in 15 U.S.C. §§ 1, 2, 3 (West Supp. 1993).

172. The entire Clayton Act is codified as amended throughout 15 U.S.C.§§ 12-22, & 27, and 29 U.S.C. §§ 52-53 (West Supp.1993).

173. Amy Corton, *BankAmerica v. United States: Legitimizing Bank-Nonbank Interlocks*, 33 EMORY L.J. 1103, 1104 (1984)(citations ommitted).

174. This statute states in part:

§ 19. Interlocking directorates and officers

banking associations trust companies, nor common carriers, the Clayton Act seeks to bar horizontal interlocks between certain competitors through common directors. A variety of different kinds of interlocks have been untouched by the Act, including indirect interlocks and most vertical interlocks.[175] It has been the consensus of commentators on these provisions that "... the prohibitions of the Clayton Act against interlocks are too incomplete and restricted in scope to reach many significant corporate interrelations,and that the easy avoidance of (the Act's) express prohibitions has resulted in a failure of enforcement even as to those interlocks where there is a practical certainty that competition will be adversely affected."[176]

Since the Commonwealth Caribbean territories do not have legislation along the lines of the U.S. antitrust statutes, it would be more instructive to focus on the common law as applied by U.S. courts with respect to the issue of interlocking directorates. Having its roots in the English common law, these cases are instructive and relevant.

* * * *

The development of the U.S. case law approach to the issue of interlocking directorates has been exclusively in the realm of corporation law, specifically regarding the fiduciary duty of loyalty required of corporate directors. The issue as dealt with by U.S. courts provides a thought provoking and relevant study for one reflecting on the anomalous condition of the law in the Commonwealth.

The U.S. experience has been described as a historical puzzle[177] and a "watering down"[178] of the fiduciary standards of directors. Throughout, however, it is and was the approach of the courts that interlocking directorships involved conflict of interest considerations; the law in the area developed in concert with the courts'

> (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are–
> (A) engaged in whole or in part in commerce; and
> (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;
> if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

175. Murphy, *supra* note 103, at 365-66 (identifying seven types of unregulated interlocks including vertical interlocks).

176. STAFF REPORT, *supra* note 105, at 12; *See generally*, Note, *Interlocking Directorates: A Study in Desultory Regulation*, 29 IND. L.J. 429 (1954).

177. R. C. CLARK, CORPORATE LAW 160 (1986).

178. A. Bulbulia & A. R. Pinto, *Statutory Responses to Interested Director's Transactions : A Watering Down of Fiduciary Standards?* 53 NOTRE DAME L. REV. 201 (1977).

approach to self-dealing transactions in general. The academic consensus is that U.S. common law developed pragmatically, from a very rigid and strict approach to a relatively relaxed standard today.[179]

The strictness of the early rule was reflected in the late nineteenth-century case *Metropolitan Elevated Railway Co. v. Manhattan Elevated Railway Co.*[180] The court held that a contract between two corporations with antagonistic interests and directors in common (so that the directors of the one contracted with themselves as directors of the other) may be avoided by the corporation; if rescission is barred, damages can be awarded. It was held further, that the shareholders could ratify the transaction although some persons may be shareholders of both corporations. The fact that the common directors abstained from voting did not alter the conclusion. Interestingly, the court relied heavily on the English authority of *Aberdeen Ry* in deciding the case.[181] At this point, the law was that any contract between corporations with common directors was voidable without regard to the fairness or unfairness of the transaction. In another case, the rule was stated as follows:

> [The law] does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with question of abstract justice in the particular case.[182]

The rule was not only inflexible but displayed the view that multiple directorships were inconsistent with the director's fiduciary position; the philosophy of the rule was not to prevent a profit, but to provide the strongest safeguard the law can offer for the protection of the interests of the beneficiary.[183] The principle seemed impregnable in 1880, "[i]t was stated in ringing terms by virtually every decided case with arguments that seemed irrefutable, and it was sanctioned by age . . . Thirty years later this principle was dead."[184]

By the early twentieth century the rule had 'evolved' so that a contract between a director and his corporation was valid if it was approved by a disinterested majority of his fellow directors and was

---

179. CLARK, *supra* note 177, at 160-61.
180. 11 Daly (N.Y.) 373 (Ct. of C.P. 1884).
181. *See e.g., id.* at 497 (quoting dicta set out in text accompanying note 67 *supra.*).
182. Munson v. Syracuse Geneva & Corneng R.R. Co., 103 N.Y. 58, 74 (1886).
183. Smith v. Pacific Vinegar & Pickle Works, 78 P. 550, 554 (Cal. 1904).
184. Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW 35, 39-40 (1966).

not found to be unfair or fraudulent by the court if challenged. With respect to a contract in which the majority of the Board was interested, it was voidable at the instance of the corporation or its shareholders without regard to any question of fairness.[185] Accordingly, in *Hiles v. C.A. Hiles & Co.* the court upheld a contract between two corporations having only one common director on the ground that the contract was a fair one:

> Where, as we have found in this case, the contract was a fair one, the court will sustain it, even though one of the directors was common to both corporations.[186]

By the mid-twentieth century the rule had become even more lenient. Contracts with interested directors are generally valid unless found to be unfair by a court if challenged.[187] Accordingly, in the Supreme Court decision of *Geddes v. Anaconda Mining* it was stated:

> The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness . . .[188]

Most states have statutes governing corporate transactions that involve interested directors to reflect the modern rule. Section 8.31 of the Revised Model Business Corporation Act (RMBCA), is similar to the provisions in these States. The RMBCA sets out a tripartite approach to the issue. The transaction will not be voidable solely because of a director's conflict if: (i) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board, and the board or committee authorized, approved, or ratified the transaction by a majority of disinterested members; or (ii) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized or ratified the transaction; or (iii) the transaction was fair to the corporation.

Although fairness, disclosure or ratification are expressed in these statutes as alternative cures, the courts have declared that fairness is required in any event. Accordingly, a self-dealing transaction

---

185. *Id.*

186. 120 Ill. App. 617, 625 (1st Dist. 1905).

187. CLARK, *supra* note 177, at 160.

188. 254 U.S. 590, 599, 41 Sup. Ct. 209, 212 (1921) *see also* Shlensky v. South Parkway Bldg. Corp., 166 N.E.2d 793, 800 (Ill. 1960).

may be avoided notwithstanding full disclosure to and approval by the majority of the directors and/or shareholders.[189]

In summary, the present law is as follows: transactions between corporations with common directors are not void, but are considered 'self-dealing transactions' and place a burden of justification on the common director. If the director establishes that the transaction was approved by a majority of disinterested board members or if it was authorized or ratified by the majority of shareholders after full disclosure, the burden shifts to his opposition to show that the transaction was nevertheless "unfair." The overall fairness test requires the outcome of the transaction to be as advantageous to the plaintiff corporation as it would have been had the transaction been conducted instead by a rational, well informed decision-maker who was independent, loyal, and unaffected by a conflict of interests.[190]

In the U.S., as in the Commonwealth Caribbean,[191] it is customary to include "waiver" clauses in the charter or bylaws of corporations. Such provisions usually state that contracts involving direct or indirect director interests will not be invalidated because of such self-interest or because the interested director's presence was needed for a quorum or a majority vote. Such provisions have the effect of shifting the burden of proof of fairness from the directors to the attacker of the transaction. Additionally, the clauses will not absolve a director from a breach of duty of good faith in dealings.[192]

VII. A DIALECTIC RESOLUTION?

It is one thing to discern the relaxation of the traditional rule of equity with respect to interlocking directorships, it is another to rationalize the courts' benign approach to the issue. One writer laments:

> One searches in vain in the decided cases for a reasoned defense of this change in legal philosophy, or for the slightest attempt to refute the powerful arguments which had been made in support of the previous rule. Did the courts discover in the last quarter of the Nineteenth Century that greed was no longer a factor in human conduct?[193]

---

189. Flieger v. Lawrence, 361 A. 2d 218 (Del. 1976).
190. CLARK, *supra* note 177, at 147-8.
191. KNEPPER AND BAILEY, *supra* note 73, ¶ 3.05.
192. Irwin v. West End Dev. Co., 481 F. 2d 34 (10th Cir. 1973).
193. Marsh, *supra* note 184, at 40.

Several explanations have been suggested, varying from the avarice of lawyers to the capitulation of judges to what was a common business practice of the power brokers.[194]

It is submitted that the reason may be discovered by a dialectic analysis of the issue. A reflection of the socioeconomic milieu in the United States toward the end of the Nineteenth Century is revealed in the following excerpt:

> The present interest in the subject results from the unusual conditions obtaining since the year 1896. A great change has occurred in business methods and conditions during this period. About fifteen years ago was ushered in an era of expansion in trade and business of every kind. The resources of the nation were independently developed and business' established upon the largest scale ever known in this country, or perhaps any other.[195]

The writer goes on to declare that this economic revolution brought about consolidations, combinations of enterprises, and large undertakings which:

> . . . could not have succeeded without the supply of ample end indeed large, financial resources. This requirement brought into the situation banking firms and corporations having a very large public following and influence.[196]

The large public corporation was the hallmark of this rapid economic expansion. The resource required to fuel this vehicle of economic growth was capital contributed by a diverse shareholding public. Ownership and management were separated. Interlocking directors were a means for financial institutions to protect their investments; the phenomenon was a method of cooperation and coordination between corporations for mutual benefit, as well as a means of promoting and preserving socioeconomic privilege.[197] The

194. CLARK, *supra* note 177, at 161-3.

195. Pam, *supra*, note 116, at 467.

196. *Id.*

197. As Louis J. Brandeis lamented in the early 1900's:

> The existence of ... intertwined relations has made possible the huge concentration of financial power. The greater part of that power comes not from the interlocking of competitive businesses but from the interlocking of great businesses with other businesses in different lines, so that the same persons are connected with a railroad, a bank, an insurance company, an equipment company, and various manufacturing companies all down the line. . . . But the greatest objection to this scheme of interlocking directorates is that by virtue of it it has become possible for a few men, like the firm of J. P. Morgan and Company, to acquire extraordinary power. They, the bankers, control the railroads, and controlling the railroads they were able to control the issue and sale of securities. Being bankers, they bought those securities at a price which they had a part in fixing or could have had a part in fixing. They sold these securities, as bankers, to

shift in judicial attitude reflected a recognition that the phenomenon of interlocking directors was a matter of corporate reality and common occurrence. The judges displayed not only a healthy trepidation to impinge upon or hamper these strong waves of economic and commercial activity but also a recognition of their role as social engineers molding perceived anachronistic common law rules to suit these progressive changes. As the New York Supreme Court observed in *Genesee and W. Va. Ry.. Co. v. Retsof Mining Co.*:

> The rule . . . has been considerably relaxed of late years. Indeed it would be difficult to conduct the affairs of the multifarious corporations of the country, many of which, although apparently sustaining the relations of rivals in business, are nevertheless practically controlled by the same directors, if the element of good faith . . . were not established as the basis of intercorporate action.[198]

In *Robotham v. Prudential Ins. Co. of America,* it was said: ". . . [T]heoretical rules have to give way to the practical necessities of business . . . In these days the relations of corporations to each other are exceedingly complex . . . Common directors abound, and common directors are better than dummies."[199]

It is not perhaps mere coincidence that the anomalous rule in *London & Mashonaland* in 1891, modifying the centuries-old principle reflected in *Aberdeen Railway* in 1854, also coincided with certain economic developments at the time in England toward the close of the nineteenth century. The limited liability company was born at this time to support and encourage these economic changes:

> The greater part of the commercial expansion, the scientific development and the many other achievements which have changed the shape of society during and since the industrial revolution have come through the medium of the limited company . . . the limited company seems to have sprung into being in this country (England) very much in its modern form, if not in one leap, in a couple of quick surges in 1844 and 1855 just as it seems to have done at about

---

> insurance companies in which they were able to exercise some control as directors. They got the money with which to buy those securities from railroads through their control of the great banking institutions, and then, in their capacity of having control of the railroads, they utilized the money to purchase from the great corporations, like the Steel Corporation, what the railroads needed, and in their capacity as controlling other corporations they bought from the Steel Corporation again, and so on until we had the endless chain.

The Brandeis Guide to the Modern World 112-114 (A. Lief ed. 1941).

See generally sources cited *supra* note 84.

198. 15 Misc. 187, 195 (N.Y. Sup. Ct. 1895) (citiations ommitted).

199. 64 N.J. Eq. 673, 709 (1903).

> the same time in the countries at a similar stage of economic development. . ..[200]

The period after 1856 in England was steeped in the doctrine of economic liberalism and laissez-faire. The judges in England, as in the U.S., were faced with these quick and massive developments with ancient tools of law. The dilemma was the reconciling of the director as a trustee with the director as a businessman. The ancient doctrines of equity "enunciated and enforced by Hardwicke, Thurlow, Longborough, Eldon, Cranworth, Story and Kent and which the highest courts . . . declared to be founded on immutable truth and justice, and . . . upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self interest and integrity"[201] were ill equipped and inapplicable to the new commercial reality. Judges were obliged to change course in mid-flight. The sentiment is astutely expressed in the following passage:

> The exigencies of modern business demand a practical working rule . . . [t]he practice of calling directors "trustees" and subjecting them to the strict and rigorous rules which apply to dealings between a trustee and his beneficiary requires some modification.[202]

The benign attitude of judges toward corporate interlocks was also a reflection of the enlightenment and appreciation of later courts for a relatively burgeoning and fast-developing economic instrument. Accordingly, they addressed the issues differently from their predecessors during the infancy of company law:

> With the tremendous growth of corporate enterprise in the late nineteenth and early twentieth centuries and the greater familiarization of the courts with the corporate form, there was an increasing realization that intercorporate links often presented very definite advantages to the corporate parties and consequently to their stockholders; advantages which seemed often to outweigh the dangers of self-interest on the part of the directors.[203]

Regardless of the merits or demerits of the unwonted judicial rule, one must admire the astuteness of the English and American courts in refusing to abdicate from their role as servants of the needs

---

200. L. S. SEALY, COMPANY LAW AND COMMERCIAL REALITY 2 (1984).

201. Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553, 578-9 (N.Y. Sup. Ct. 1859).

202. H. W. Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 CAL. L. REV. 465, 476 (1931).

203. Note, *The Validity of Contract Between Corporations with Common Directors*, 51 HARV. L. REV. 327, 328 (1937).

of society and molding—sometimes reconstructing—traditional rules of equity to suit the practical demands of modern corporate activity.

Quo vadis courts of the Commonwealth Caribbean?

CONCLUSION

As this paper draws to a close, in the declaration of what seeds of thought it is hoped have been germinated in the mind of the reader, the writer will try not to be overly ambitious. The writer has two "hopes," if nothing more.

First, it is hoped that the dismal clouds of ignorance and indifference to the practice of interlocking directorates by Commonwealth Caribbean jurists will be dispelled. Second, it is hoped that Commonwealth Caribbean judges will address themselves to the issue as brave and assiduous social engineers.

With respect to the first hope, it is conceded that the subject of interlocks is presently '*terra incognita.*' There is a dearth of empirical data on the morphology and the socioeconomic ramifications of the practice of interlocks in the Caribbean. The experiences of other nations have attested to the undesirability of perpetuating this informational void. The role of the director in the corporation and the role of the corporation in the economy is too important for the region's societies to continue to ignore the existence of the phenomenon of interlocking corporate directorates. The evolution of our economies is inextricably bound with the evolution of the corporate ethic; the law must keep pace with both. Reid states with reference to Jamaica:

> [The] evolution of Company Law has been remarkably slow and unlike the developments in the modern capitalist economy to date little has been done to divest the corporate enterprise of the shrouds of secrecy which surround their operations.[204]

It is submitted that on the one hand interlocks are too diverse and variegated for a blanket condemnation or a 'per se' prohibition to be advocated regardless of the intensity, strength, direction or morphology of the interlock. On the other hand the region's economies need to be distributive and competitive. Nascent stock exchanges of the Commonwealth Caribbean must not become mediums of profit for the select whose intercorporate links allow them to make 'insider' profits at the expense of the shareholding public. The region's consumers of goods and services should face prices that are determined by competitive and free market forces, not by market

204. Reid, *supra* note 22, at 36.

dominating, cartelized corporations reinforced by bonds of directorial interlocks. The small businesses of these burgeoning economies must be permitted equal access to suppliers, finance and capital, and end markets. These sources must not be foreclosed to them by the unchecked stranglehold of finance control and reciprocity interlocks. Salvation from the ignominy of colonialism must not be replaced by its social synonym: class elites monopolizing economic and political ascendancy through the vehicle of class hegemony interlocks.

With respect to my second "hope," in the absence of legislative intervention, which will not be feasible until the empirical data relevant to the phenomenon is collected and documented, the issue of interlocking directorates falls almost entirely to judicial rulings of the fiduciary duties of the director as they relate to the phenomenon.

In other jurisdictions, orthodox principles regulating the director's duty of loyalty have been transgressed in the face of sudden economic vicissitudes and the benign deference to the commonality of "business incest." The strict rules of conduct imposed on the director must not be eroded in the Commonwealth Caribbean in blind deference to the decisions of foreign courts. Judges in the Commonwealth Caribbean may well consider these opinions, but the socioeconomic forces and circumstances behind them must be detected and appreciated. Commonwealth Caribbean judges must not respond to these foreign decisions with fealty and mimicry, especially when strident efforts are being made in these foreign countries to reverse the effects of the anomalous and permissive response of their early courts to the phenomenon. As was written elsewhere:

> It is unthinkable that a sovereign nation with its own laws and legal systems would continue to be subject to the authority of a foreign system and to changes in rulings which are . . . introduced in her courts, only because in the past, when there was a strong tie between the two nations, the former drew from the legal system of the latter.[205]

The Commonwealth Caribbean judges must be true to their role as social engineers of independent nations and in accordance with fundamental legal principles ". . . but with mature judgment in appropriate cases strike out and mold the common law to suit the needs of our ever-changing societies."[206]

The culmination of these 'hopes' is that when the working party on the Harmonization of Company Law in the Commonwealth

---

205. A. D. Burgess, *Judicial Precedent in the West Indies,* (1978) W.I.L.J. 27, 32.

206. Persaud v. Plantation Versailles Ltd., 17 W.I.R. 107, 118 (1970) (Guy. C.A.) (Per Bollers C.J. (ag) in the Guyanese Case).

Caribbean meets again, there will be at its disposal a healthy body of academic and juridical data relating to this pervasive, important, but hitherto overlooked, area of company law; and that the shrouded doors of corporate interlocks will finally be unlocked.