Published on e-First 15 January 2021

Case Comment

DIRECTORS' POST-TERMINATION FIDUCIARY DUTIES REVISITED

Innovative Corp Pte Ltd v Ow Chun Ming
[2020] 3 SLR 943

In *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943, the Singapore High Court restated the law regarding company directors' post-termination obligation not to obtain for themselves any business opportunity which properly belongs to their former company. In so doing, the High Court reframed Laskin J's oft-cited statement in *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382 as three distinct conditions that must be cumulatively satisfied for a finding of breach. This comment welcomes the High Court's attempt to streamline the law, but questions whether it is appropriate for Laskin J's statement to be distilled into three cumulative requirements, as opposed to remaining as a general statement of principle.

TAN Jui Yang Benedict[1]
LLB (Hons) (National University of Singapore),
LLM (Erasmus University Rotterdam).

I. Introduction

1 When directors resign or are otherwise terminated from office, they may nonetheless continue to owe a limited scope of fiduciary duties to their former company. In particular, it has been recognised that directors maintain the obligation not to obtain for themselves any business opportunity which properly belongs to their former company.[2] This obligation is said to be "a confluence of the rules that a director must not place himself in a position where his personal interests would conflict with his duty to the company and that a director must not abuse

1 The author is grateful to Dr Julia Lessa and Megan Chua for their views on earlier versions of this article. The author would also like to convey his appreciation to the anonymous referee for his/her insightful comments and suggestions. All errors and omissions remain the author's own.

2 *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at para 8.58.

his position to make an unauthorised profit".[3] Its persistence despite directors' cessation of office originates from the old Canadian Supreme Court case of *Canadian Aero Services Ltd v O'Malley*[4] ("*Canadian Aero*"), which has been cited with approval by the Singapore Court of Appeal in *Tokuhon (Pte) Ltd v Seow Kang Hong*[5] ("*Tokuhon*"). Laskin J stated in what is now an oft-cited passage:[6]

> [A] director … [is disqualified] … from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; *he is also precluded from so acting even after his resignation* where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired. [emphasis added]

2 In *Innovative Corp Pte Ltd v Ow Chun Ming*[7] ("*Innovative Corp*"), the Singapore High Court applied this concept, hereinafter referred to as post-termination fiduciary duties, to the case before it.[8] Although the court's consideration of post-termination fiduciary duties was, strictly speaking, *orbiter dictum*,[9] it is significant for adding to the small line of Singapore cases that consider this issue.[10] Moreover, what is also notable is that the court eschewed a routine citation of Laskin J's statement, choosing instead to reframe Laskin J's statement as three distinct requirements that *must* be cumulatively satisfied for a finding of breach.[11] On appeal, the Singapore Court of Appeal upheld the High Court's judgment but with no written grounds of decision rendered.[12]

3 This case note welcomes this attempt to clarify and streamline the law concerning directors' post-termination fiduciary duties. Cases in Singapore had hitherto cited Laskin J's statement, but none had gone so far as to suggest that it represents three distinct requirements that *must* be satisfied for a finding of breach. In *Personal Automation Mart Pte*

3 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [72].
4 (1973) 40 DLR (3d) 371.
5 [2003] 4 SLR(R) 414 at [50].
6 *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382.
7 [2020] 3 SLR 943.
8 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [72]–[93].
9 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [92].
10 This includes, chronologically, *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [56]; *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 at [50]; and *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2019] 5 SLR 56 at [113].
11 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [72].
12 See Editorial Note in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943.

Ltd v Tan Swe Sang[13] ("*Personal Automation*"), the Singapore High Court did not consider the elements in Laskin J's to be conditions that had to be satisfied. Instead, it noted that "[t]his obligation persists even after the director concerned has resigned, *at least* where the resignation can be said to have been prompted by the wish to obtain the … business advantage for himself" [emphasis added].[14] The phrase "at least" suggests that motivation for resignation may not *necessarily* have to be satisfied. In *Tokuhon*, the Court of Appeal cited Laskin J's statement verbatim and expressed its approval.[15] However, it is unclear whether it considered Laskin J's statement to contain strict requirements.[16] In *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat*[17] ("*Tongbao*"), the Singapore High Court did not mention *Canadian Aero* at all. Instead, it stated that "resignation will not terminate the fiduciary obligations if, but for the resignation, the acts of the director taken in totality would amount to a breach of his obligations of loyalty".[18]

4 Having said that, this case comment respectfully questions whether it is appropriate to interpret Laskin J's statement as three distinct requirements that *must* be satisfied for a finding that a director has breached his/her post-termination fiduciary duties. Put differently, Laskin J's statement may perhaps be understood as simply a general statement of principle, as opposed to a list of requirements to be fulfilled. Indeed, this is the approach that has been taken by the Hong Kong courts,[19] who also have Laskin J's statement as the starting position for this area of law. If that is the case, then the requirements laid down in *Innovative Corp* may not have to be *strictly* satisfied for a finding of a breach of directors' post-termination fiduciary duties.

5 This case comment will substantiate the above argument in the following manner. Firstly, it considers *Innovative Corp's* three requirements separately, to highlight potential difficulties (if any) with each requirement. Thereafter, it considers the theoretical basis for post-termination fiduciary duties, and its implications on the requirements.

---

13 [2000] SGHC 55.
14 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [55].
15 *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 at [50]–[51].
16 See *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 at [51]–[52]. The court did not even consider the elements of active pursuit and motivation for resignation in relation to the facts before it.
17 [2019] 5 SLR 56.
18 *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2019] 5 SLR 56 at [133].
19 *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113; *Kwok Lau Chu v Kwok Chi Yau* [2017] HKCU 2187; *Greenwin International Group Ltd v Jim Yuek Chau* [2007] HKCU 378.

II. Facts and background

6 The facts of *Innovative Corp* are fairly straightforward. The Fong Yun Thai Association ("FYTA") was desirous of building a residential housing development on its land.[20] In furtherance of this objective, it entered into negotiations[21] with the plaintiff, a Singapore-incorporated company in the business of property development and building construction.[22] One Chen was the plaintiff's director, major shareholder and major decision-maker.[23]

7 Around that time, Chen bumped into her old acquaintance, the defendant.[24] Both parties agreed to collaborate for the FYTA project, with the defendant extending his expertise in real estate development to Chen.[25] As part of the collaboration, the defendant became a shareholder and director of the plaintiff.[26]

8 Subsequently, FYTA underwent a change in management.[27] The new management did not favour Chen and the plaintiff.[28] Fearing that she might lose the deal, Chen introduced the defendant to FYTA as her business partner, hoping to rely on the defendant's reputation to salvage the plaintiff's chances of being appointed developer.[29]

9 Chen's efforts were futile. FYTA called for a fresh tender from several developers, including the defendant[30] but excluding the plaintiff.[31] FYTA cautioned the defendant that any tender by the defendant involving the plaintiff or Chen would be disqualified.[32]

10 The defendant resigned as director of the plaintiff, tendered for the project on his own and was awarded the role of developer.[33] There was

20 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [5]–[6].
21 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [109]–[112]. There was some dispute on whether a valid contract had been formed, but the court found that there was in law no agreement at all.
22 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [3].
23 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [2].
24 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [17]–[18].
25 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [20].
26 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [22]–[23].
27 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [24]–[26].
28 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [27].
29 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [30].
30 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [32] and [36].
31 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [48].
32 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [32] and [49].
33 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [36]–[38].

some dispute as to the precise timing of the resignation,[34] but it was clear that if the defendant had not been a director of the plaintiff, he would not have had access to FYTA and hence not have been invited to tender.[35] The plaintiff commenced an action against the defendant for breach of fiduciary duties.[36]

III. Decision of the High Court

11 The High Court found, as a matter of fact, that it was "more likely" that the defendant only resigned after tendering for the role as developer of the project.[37] Hence, there was straightforward breach of fiduciary duty during office.[38] Notwithstanding that, the court considered extensively[39] in *obiter* the issue of post-termination fiduciary duties, assuming that the defendant's resignation had indeed taken place prior to tendering for the role as developer.[40] The court provided a simple three-step approach:[41]

> A former director would be in breach of his duties to a company in respect of his resigning to procure a corporate opportunity of the company, if three conditions are satisfied, as explained by the Supreme Court of Canada in the oft-cited *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382:
>
> (a) First, there must be a 'maturing business opportunity'.
>
> (b) Secondly, the company must have been 'actively pursuing' that opportunity.
>
> (c) Thirdly, the director's resignation may 'fairly be said to have been prompted or influenced by a wish to acquire for himself' that opportunity.

On a general level, this succinct restatement of Laskin J's statement in *Canadian Aero* is to be welcomed because it provides clarity and guidance for subsequent litigants. More critically, however, it also confirms the removal of the last phrase in Laskin J's aforementioned statement – "or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired".[42]

34 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [57]–[65].
35 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [69].
36 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [42].
37 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [57]–[64] and [92].
38 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [92].
39 Almost 20 paragraphs were devoted to analysing post-termination fiduciary duties.
40 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [92].
41 *Innovative Corp Pte Ltd v Ow Chun Min* [2020] 3 SLR 943 at [72].
42 *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382.

12 This last phrase has been roundly criticised by previous cases[43] for suggesting that directors "would be accountable to their previous company for profits wherever information acquired by them in their position as such directors led them to the source from which they subsequently … acquired business".[44] Previous cases distance themselves from such a proposition because it is recognised that "directors acquire a general fund of knowledge and expertise in the course of their work and it is in the public interest that they should be free to exploit it in a new position".[45] If such interpretation of Laskin J's statement were to be adopted, then ex-directors may be prohibited from utilising their "general fund of knowledge and their stock-in-trade".[46] Thus, after-office liability is confined to maturing business opportunities, reflecting underlying policy considerations of balancing the protection of companies with the entrepreneurial interests of ex-directors.[47]

13 In Singapore, the older High Court case of *Personal Automation* adopted aforesaid criticism of Laskin J's last phrase.[48] However, in the later case of *Tokuhon*, the Court of Appeal cited Laskin J's *entire* statement without expressing any reservation regarding the last phrase.[49] Thus, the legal position is ambivalent and *Innovative Corp*'s addition to Singapore's jurisprudence is most welcome.

A. Maturing business opportunity

14 In relation to the requirement of "maturing business opportunity", the court elaborated that "the company must have invested its efforts and resources in attempting to secure that opportunity".[50] In other words, the opportunity must be "concretised", and not "mere prospect of future business".[51] On the facts before it, the court highlighted the following aspects in arriving at its conclusion that there was a "maturing business opportunity":[52]

43 *Island Export Finance Ltd v Umunna* [1986] BCLC 460 at 481–482, cited with approval in *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [57].
44 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [57].
45 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [57].
46 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [57].
47 See also, for example, *Poon Huat Seng v Goh Cheng Chua* [1994] SGHC 74, where it is recognised that excessive continuing fiduciary duties "would not only inhibit and impede free competition but could conceivably unfairly restrain trade or the pursuit of one's profession or the legitimate exercise of one's skills to earn a living".
48 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [57].
49 *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 at [50].
50 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [73].
51 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [73].
52 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [77]–[78].

(a) The opportunity was clearly identifiable, having already been particularised.

(b) Money had already been expended for the project.

(c) Financial institutions were prepared to give an indicative term sheet for financing.

(d) The company and client were finalising revisions to the draft documents.

Subject to what will be discussed later regarding the requirement of "active pursuit", it is submitted that the court's analysis here was eminently correct. On the facts, there can be no real dispute that the project was indeed a maturing business opportunity.

B. Active pursuit of opportunity

15 In relation to the requirement of "active pursuit" by the company of the opportunity, the court first noted that this inquiry "ties into the foregoing point [of maturing business opportunity]".[53] This is because "for an opportunity to be maturing, a company would have to pursue it in some way".[54] Thereafter, the court clarified that under this inquiry, the likelihood of a company actually acquiring the opportunity is irrelevant.[55] Thus, the fact that it was impossible for the plaintiff company to realise the opportunity due to its lack of experience and financial resources was immaterial.[56] However, a company's rejection of the opportunity is relevant in this inquiry of "active pursuit".[57] On the facts, because it was clear the plaintiff company had *not* withdrawn from the project and was still trying to engage with FYTA, the requirement of "active pursuit" was satisfied.[58]

16 It is respectfully submitted that there should *not* be such requirement that the company must have been "actively pursuing" the opportunity. Whilst it is true that a company ought to demonstrate

53 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [79].
54 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [79].
55 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [80].
56 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [79].
57 As inferred from the court further considering the factual issue of whether the plaintiff company had indicated its withdrawal from the project. See *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [87].
58 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [87].

some interest[59] in the opportunity to constitute a "maturing business opportunity", it goes too far to strictly require "active pursuit".

17 First, such requirement allows ex-directors to easily circumvent the law, as it is the ex-directors themselves, when they were still in office, "whose role it is to evaluate new business prospects and to recommend those that the company should pursue against those which it should not".[60] A director who has made up his mind to usurp the opportunity upon resignation can sneakily direct or influence the company to not pursue the opportunity (on supposed "commercial" grounds), so that upon his resignation aforesaid requirement of active pursuit is not satisfied and he is not liable for a breach of fiduciary duty. Aforesaid requirement of active pursuit will therefore create in directors "temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if … [the company does not actively pursue the opportunity] …, it will be open to them personally [upon resignation]".[61]

18 Secondly, a requirement of "active pursuit" is incoherent with the distinct but related[62] rule that a company's ability to realise an opportunity is irrelevant for ascertaining directors' liability. In cases of diversion/usurpation of corporate opportunities, the company's ability to realise the opportunity is regarded as irrelevant because directors' liability is capacity-based.[63] The underlying principle is stated as such: a director

---

59 The requisite amount of interest that a company must demonstrate is, of course, difficult to precisely quantify. It is submitted that courts should consider all surrounding circumstances, including the company's object clauses, the company's line of business, and, most importantly, the stage which the business opportunity has reached. Ultimately, courts must have in mind the underlying principle, which is that "upon termination of the relevant fiduciary relationship, a fiduciary is fully entitled to make use of such skills, general knowledge, know-how, experience and client contacts as he has acquired": *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at 141C–141D. The company's interest must be of such degree as to bring the opportunity outside the above-mentioned realm.

60 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 424.

61 *Irving Trust v Deutsch* 72 F 2d 121 at 124 (2nd Cir, 1934). See also *Northeast Harbor Golf Club Inc v Nancy Harris* 661 A 2d 116 (Me, 1995).

62 As will be alluded to in the next paragraph, in certain aspects a company's active pursuit of an opportunity and the company's ability to realise that opportunity are arguably two sides of the same coin: they both relate to the relationship between a company and its directors in circumstances of rejection. A company's ability to realise the opportunity concerns a potential business counterparty's rejection of the company. Active pursuit concerns a company's rejection of a potential business counterparty. Seen in this light, the factual circumstance triggering each of the two rules may at times only differ in terms of which party is effecting the rejection.

63 At least, to the extent that diversion of corporate opportunities is primarily considered a type of breach of the no-profit rule. If the diversion of corporate opportunity is understood as primarily a type of breach of the no-conflict rule, it may not be the

(cont'd on the next page)

may not obtain for himself unauthorised profits "in the course of and owing to his directorship".[64] Because it is the *position* of the director (and the profits made therefrom) that attracts liability, the impossibility or incapacity of the company to obtain the opportunity is irrelevant. Thus, for example, it does not matter if the potential business counterparty expressly declines to work with the company.[65] This was accepted by the court in *Innovative Corp*, even for post-termination fiduciary duties.[66]

19 If an unequivocal rejection of the company by the potential business counterparty is not a defence for the director, why then should the flip side – an unequivocal rejection of the potential business counterparty by the company – be a defence for the director? Both situations equally have no impact on the *position* of a director, but a requirement of "active pursuit" would allow the latter situation to be a defence. This is inconsistent with the capacity-based principle underlying directors' liability as expounded in the previous paragraph. Furthermore, a director in the latter situation is actually in a greater position to manipulate the outcome than in the former situation! Whether a potential business counterparty chooses to decline to work with the company is a decision made by the potential business counterparty – the company's director only has an outside role and indirect ability to influence. Conversely, a director has a direct inside role in controlling a company to determine whether it actively pursues or rejects the potential business counterparty.

20 To support the "active pursuit" requirement, it may be argued that directors' duties are narrowed down in scope when the company rejects the potential business counterparty, and that is why a director is permitted to usurp that opportunity.[67] However, it is then unclear why

---

capacity of directors that attracts liability. See Pearlie Koh, "A Director's Duty of Loyalty and the Relevance of the Company's Scope of Business: *Cheng Wai Tao v Poon Ka Man Jason*" (2017) 80(5) Mod L Rev 941. This segment's analysis is based on the no-profit rule for two reasons. Firstly, this was the approach taken by the court in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 ("*Innovative Corp*") at [81]–[84]. Secondly, there may not be any conflict if the company itself is unable to obtain the opportunity, which is what happened in *Innovative Corp*. See Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 407.

64 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 453G, cited in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [81].

65 See, *eg*, *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 and *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [82].

66 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [80]–[84].

67 This counterargument is based on first principles – that one should, as a preliminary step, ascertain what exactly is the precise scope and ambit of a director's undertaking to his company. In this vein, it has been suggested that:

> … the duties owed by a director may be qualified, for example … the factual circumstances may be such as to reduce the scope and extent of the duties owed. To this inquiry, the question of the company's scope of business is clearly

(cont'd on the next page)

a director's duty is not also reduced in scope when it is the other way round – the company being rejected by the potential business opportunity. After all, do we expect directors to continue pursuing such dead ends on behalf of the company, and thereby owe a duty to the company in relation to such dead ends? Accordingly, it is submitted that it is inconsistent to have a strict requirement of "active pursuit" that further circumscribes ex-directors' liability, when a company's ability to realise the opportunity is irrelevant. If the "active pursuit" requirement is based on policy considerations surrounding ex-directors, for example, to prevent overly onerous restrictions on their entrepreneurial freedom post-resignation, then ex-directors should also be permitted to pursue opportunities which their former company is clearly incapable of realising.

21 Finally, a strict requirement of "active pursuit" is also not universally recognised. Notably, Hong Kong courts (who also have *Canadian Aero* as the starting position for this area of law) have explicitly remarked that "it should … *not* be assumed that there can never be liability unless the business opportunity was one in which the … [company] … was actively pursuing" [emphasis added].[68]

C. Resignation "prompted or influenced by a wish to acquire for himself" that opportunity

22 In relation to the requirement that the directors' resignation must "fairly be said to have been prompted or influenced by a wish to acquire for himself that opportunity", the court's task was made simple. In cross-examination, the defendant himself confessed his guilty motivation:[69]

> Q: … you wanted to resign because you knew that as a director of Innovative you shouldn't be bidding for the project with [your own company]?
>
> A: Correct, because that's what you call fiduciary duty, and also conflict of interest

The ease with which the court was able to dispose of this requirement should not, however, detract from the fact that such requirement of motivation for resignation can be problematic.

---

relevant, for that would delineate the director's 'actual undertaking' and … the duty he owes.

See Pearlie Koh, "A Director's Duty of Loyalty and the Relevance of the Company's Scope of Business: *Cheng Wai Tao v Poon Ka Man Jason*" (2017) 80(5) Mod L Rev 941 at 946.

68 *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at 141I–142A.

69 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [89].

23 On a practical level, this requirement may allow wrongdoing ex-directors to evade the force of the law. As suggested by commentators, "a director's motivation for resigning … [can] … be difficult to prove".[70] Additionally, there can be "several reasons that prompted the resignation and the 'guilty' motivation was but one. How do we assess that *this* motivation was the primary one" [emphasis in original]?[71] A director can easily conjure a convincing façade of resigning for a plethora of other reasons, only for him to thereafter usurp the corporate opportunity.[72] Such requirement of motivation for resignation may allow directors to slip through the gaps as a result of practical difficulties in ascertaining matters of the mind.

24 Thus, it is submitted that if this requirement of motivation for resignation is to be maintained, it *cannot* be a purely subjective inquiry. In *Innovative Corp*, the inquiry was subjective, in so far as the court relied on the defendant director's own admission of subjective intent.[73] However, most cases will not be as straightforward, and *Innovative Corp* should thus not be read as authority for this inquiry being purely subjective. Instead, to prevent evasion by directors, it is submitted that the inquiry of motivation for resignation must have objective elements.[74] Commentators have even suggested for a presumption against directors who resign and within a year exploit an opportunity.[75] Such directors can be taken to have resigned for the specific purpose of exploiting that opportunity, unless they prove otherwise.

25 Beyond issues of proof, there is a weightier question of whether a requirement of motivation for resignation should even exist, in light of the theoretical underpinnings of directors' post-termination fiduciary

---

70 Tianshu Zhou, "China's Legal Reform of Corporate Governance: From Theoretical Research to Practical Solutions" (unpublished DPhil Thesis, University of Edinburgh, 2012) at p 225.

71 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 424.

72 In *IDC Development Consultants Ltd v Cooley* [1972] 1 WLR 443 at 445, the ex-director was found to have lied about his ill-health to resign, before promptly taking up the corporate opportunity.

73 Indeed, in the face of such clear-cut evidence of subjective intent, one cannot fault the court in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 for simply relying on it to quickly dismiss the matter and find that motivation for resignation was satisfied.

74 Tianshu Zhou, "China's Legal Reform of Corporate Governance: From Theoretical Research to Practical Solutions" (unpublished DPhil Thesis, University of Edinburgh 2012) at p 225 <https://era.ed.ac.uk/handle/1842/6416> (accessed 29 April 2020).

75 See Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 427, where Canadian authorities were cited in suggesting that fiduciary duties should extend for one year after resignation.

duties. This question has significant implications.[76] For example, such a requirement implicitly suggests that ex-directors who have been dismissed from their office (as opposed to voluntary resignation) will *not* be liable for a breach of post-termination fiduciary duties.[77] After all, a dismissed director's motivation for departure is obviously not to usurp the business opportunity; he has been fired!

26 On this point, this issue of a *dismissed* director was encountered in *Personal Automation*. In that case, which concerned post-termination usurpation of business and where *Canadian Aero* was also cited, the wrongdoing ex-director raised as a defence the fact that her departure from the company was a constructive dismissal by the company. After finding that the ex-director had deliberately diverted business, Judith Prakash J (as she then was) clearly did *not* regard motivation for resignation as a necessary requirement, holding that the dismissed director *was* nonetheless liable:[78]

> I do not think that … [wrongful dismissal] … excuses the deliberate diversion by the defendant of the plaintiff's business …. None of those cases … [cited by the defendant] … went so far as to say that an employee who is wrongfully dismissed is thereafter free to steal her employer's property. They could not do so since, as many mothers tell their children as part of their basic moral education, two wrongs do not make a right.

To resolve these conflicting authorities and the question of whether such requirement of motivation for resignation should exist, it is pertinent to consider the theoretical underpinnings of post-termination fiduciary duties, which is what this case note now turns to.

76 If the requirement of motivation for resignation exists, another implication is that directors who resign for innocent reasons will be permitted to subsequently usurp corporate opportunities.

77 It is submitted that the term "resignation" in the three-step approach in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 should be read broadly to refer to all forms of departure from a company. It is surely odd if the legal regime is bifurcated into rules concerning resigning directors and rules concerning dismissed directors. After all, resignation with ulterior motives, innocent resignation and dismissal are all just different instances that lie along a common spectrum of the various reasons for a director's departure from office. In *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 391, Laskin J saw himself as stating a proposition that applies not just to resigning directors but also to retiring directors and dismissed directors.

78 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [61].

IV. Theoretical basis for directors' post-termination fiduciary duties and its implication on the three-step test

27 There are at least two theories explaining why post-termination fiduciary duties are imposed.

A. The "evasion theory"

28 First, there is what the present author refers to as the "evasion theory", which in Singapore has found support in *Tongbao*.[79] This theory posits that post-termination fiduciary duties are imposed for the purpose of preventing directors from evading the fiduciary duties that exist *during* their term of office.[80]

29 As explained earlier, the no-profit rule is capacity-based.[81] A director is prohibited from obtaining for himself unauthorised profits "in the course of and owing to his directorship".[82] However, if a director resigns before obtaining the unauthorised profit, it is arguable that the unauthorised profit was not obtained "in the course" of the directorship, as the director no longer held office at the time the profit accrued. Therefore, a director can "go nearly to the brink, but resign before he falls over, only taking advantage … when he is no longer a director and therefore technically not subject to fiduciary obligations".[83] Resignation is effectively a "device to evade the strict fiduciary obligations"[84] that exist during office.[85]

79 *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2019] 5 SLR 56 at [133] states that "the rationale of the rule in this context is to prevent the use of resignation as a device to evade the strict fiduciary obligations".

80 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 416.

81 See Pearlie Koh, "A Director's Duty of Loyalty and the Relevance of the Company's Scope of Business: *Cheng Wai Tao v Poon Ka Man Jason*" (2017) 80(5) Mod L Rev 941.

82 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 453G, cited in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [81].

83 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 416.

84 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 418.

85 It is also often difficult to impose liability via alternative arguments based on breach of the "no-conflict" rule. This is because conflict may not be present if the company itself was unable to obtain the opportunity. See *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at [64] and Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 407.

30 Indeed, in the original case of *Canadian Aero* itself, the plaintiffs' action at trial failed because the judge at first instance accepted the above-mentioned argument that profit obtained after resignation was not profit obtained "in the course of" directorship.[86] On appeal, it was to address this apparent lacuna and to *fully* secure the loyalty of directors during their term of office that Laskin J extended the duration of directors' fiduciary duties to apply to a limited extent even after resignation by the director.[87]

31 Thus, under the "evasion theory", focus is placed on the directors' gain rather than the company's loss.[88] There is little concern with characterising the opportunity as being something that belongs to the company or the opportunity being existing "property" of the company.

32 The implications of preferring the "evasion theory", it is submitted, are twofold. Firstly, it justifies having a requirement of motivation for resignation, because such requirement is a good proxy for the presence of evasion, which is the mischief targeted at. Resignation for the *specific* purpose of acquiring the opportunity indicates an attempt to *avoid* a disadvantage that exists in acquiring the opportunity during office, and to *exploit* an advantage that exists in acquiring the opportunity after office. Such *avoidance* followed by *exploitation* nicely encapsulates the essence of the idea of evasion. Conversely, if a causal link between resignation and subsequent acquisition is absent, there is no element of sidestepping or evasion of the strict duties during office.[89]

33 Secondly, the "evasion theory" suggests that dismissed directors should *not* be held liable for subsequent usurpation of maturing business opportunities. Consider a director who has been abruptly dismissed from office. Finding himself suddenly excluded from the company, any *subsequent* competition by him for maturing business opportunities of the company clearly has no retroactive impact on his performance during his *previous* term of a director. Therefore, imposing liability on dismissed directors does not achieve the broader objective which the "evasion theory" propounds: securing the behaviour of directors *during* their term of office. In contrast, directors who conceive the idea of usurping the opportunity and then promptly resign to take that opportunity must face after-office liability. Allowing subsequent usurpation by such ex-directors

86 Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 420.

87 *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 383, see Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 420.

88 *Foster Bryant Surveying Ltd v Bryant* [2007] 2 BCLC 239 at [57].

89 Rather, it is just a neutral transition from a period when prohibitions and duties apply, to a period when prohibitions and duties do not apply.

creates temptation in directors *during* their term of office. *During* their term of office, they may not behave with single-minded loyalty towards their company in pursuing the opportunity because they know that the opportunity will be available to themselves personally if they just do the simple act of resigning.

B. The "property theory"

34 There is also what the present author refers to as the "property theory", which in Singapore has some degree of support from *Innovative Corp*[90] and *Personal Automation*.[91] This theory is derived from the English case of *CMS Dolphin v Simonet*[92] ("*CMS Dolphin*"), and the present author can do no better than to cite what Lawrence Collins J stated there:[93]

> In my judgment the underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property.

As seen, under the "property theory", focus is placed on characterising the opportunity as one belonging to the company, or a type of "property" owned by the company. The general tenor of Collins J's statement, especially the last sentence cited above, suggests that he views usurpation of maturing business opportunity as more of a breach of directors' prohibition against misappropriating company property, rather than as a breach of directors' prohibition against obtaining unauthorised profit. In *Personal Automation*, similar language was also used by Prakash J, where she suggested that after-office usurpation of corporate opportunity was tantamount to "steal[ing] … employer's property".[94] The emphasis placed on the company's loss of its existing property distinguishes the "property theory" from the "evasion theory". The "evasion theory" instead focuses on the (new) profit that a wrongdoing director wrongfully gains from his position.

---

90 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [121] states: "There can be no doubt as to the correctness of this principle … [laid down by *CMS Dolphin*] … in so far as it describes the basis of why the errant director is liable to account for trust assets."

91 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [61] states: "None of those cases went so far as to say that an employee who is wrongfully dismissed is thereafter free to steal her employer's property."

92 [2001] 2 BCLC 704.

93 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96].

94 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [64].

35 Under the "property theory", the reason why directors can be liable notwithstanding cessation of office is derived by analogy from "a trustee who retires without properly accounting for trust property".[95] In this regard, it is well accepted that trustees who retire from office cannot take along with them trust property as they must properly account for it.[96] Taking trust property along with them causes shortfall to the trust, and amounts to misappropriation of property that was entrusted to them in circumstances of trust and confidence. This is a clear instance of breach of trust, even if the trustees are now subsequently in a position free of the trust and its attendant obligations.

36 Transposing these principles to the corporate opportunity setting, departing directors are therefore also not permitted to take along with them corporate opportunity that is "property" of the company.[97] The difficulty, however, is that corporate opportunity is not a tangible object like funds that can be easily divested from the director and restored to the company at the point of a directors' departure. The opportunity inevitably remains in the directors' mind, and the connections with potential business counterparties persist. Thus, liability can only be imposed on subsequent exploitation of the opportunity, and not the initial retention of information representing the opportunity by the director at the time of departure. It is only when the ex-director exploits the opportunity later, for example, by submitting a tender offer,[98] that the opportunity can

95 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96] states: "He is just as accountable as a trustee who retires without property accounting for trust property." This is part of the segment of the judgment that was cited with approval in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [120].

96 See James Penner, *The Law of Trusts*, (Oxford University Press, 10th Ed, 2016) at paras 2.40, 11.1–11.3 and 11.17.

97 As succinctly stated in Pearlie Koh, "Once a Fiduciary, Always a Fiduciary?" (2003) 62(2) Camb LJ 403 at 421, "[a] corporate opportunity does not cease to be one, and the company does not stop being interested in it, just because the director has resigned".

98 In *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [92], the submission of a tender offer, rather than the successful award of the tender, was considered the critical act that amounted to exploitation of the opportunity. This must be correct – exploitation need not be successful. As explained in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [125], the opportunity, if it is property, is distinct from the bundle of contractual rights that are received as a consequence of successful utilization of the opportunity. The submission of a tender offer already "uses" or "exploits" the opportunity itself in so far as it is a formal act of drawing on the opportunity to place the director in direct contention to be awarded the tender, with the opportunity thereafter ceasing to exist (it is either replaced by the bundle of contractual rights if the tender is successful or destroyed if the tender is awarded to another bidder). If the present author may draw an analogy to baking: a baker already uses and exploits flour, even if the cake that results is a failed cake, a good cake or no cake. Similarly, a director already uses the opportunity and exploits it by submitting a tender offer, regardless of the result. As a matter of policy, it is also

(cont'd on the next page)

properly be said to have been misappropriated[99] or taken along with the director on his departure. This explains why directors can still be held liable even though exploitation of the maturing business opportunity takes place after cessation of office. Notably, there is no need to resort to any notion of avoidance followed by exploitation, which the "evasion theory" relies on.

37 The implications of preferring the "property theory", it is submitted, are also twofold. Firstly, it suggests that a requirement of motivation for resignation should *not* exist.[100] A maturing business opportunity remains company property regardless of the reasons behind the directors' resignation. Lack of motivation for resignation also does not change the fact that the opportunity came into the director's "possession" in circumstances of trust and confidence, and he failed to account for that property on departure by subsequently exploiting it. Notably, it is generally accepted that there is no need to show dishonesty before a director/trustee can be found liable for a breach of trust/fiduciary duties.[101] Even innocent misappropriation of trust property is a breach of trust – for example, *CMS Dolphin* suggests that liability is analogous to a retiring trustee who merely retires "without properly accounting for trust property".[102] Therefore, motivation for resignation should not affect whether liability is imposed or not.

38 Secondly, and as a corollary of the above-mentioned point, dismissed directors *will* be liable for subsequent usurpation of maturing business opportunity. Similar to motivation for resignation, the mode of directors' departure (dismissal as opposed to voluntary resignation) also has no impact on the corporate opportunity being the company's property. Being wrongfully dismissed also does not permit an ex-director to take company property along with him.[103] Therefore, dismissed directors are liable because their usurpation of corporate opportunity

undesirable if wrongdoing directors can escape scot-free just because their bid is not selected. That said, quantification of damages may be affected if the exploitation is unsuccessful.

99 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96] states: "By seeking to exploit the opportunity after resignation he is appropriating for himself that property." This is part of the segment of the judgment that was cited with approval in *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [120].

100 *Cf* the reading of *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 in *Foster Bryant Surveying Ltd v Bryant* [2007] 2 BCLC 239 at [69].

101 James Penner, *The Law of Trusts* (Oxford University Press, 10th Ed, 2016) at paras 11.1–11.3 and 11.17. See also *Pitt v Holt* [2013] 2 AC 108 at 141.

102 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [96].

103 As helpfully suggested by Judith Prakash J in *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55 at [61], "two wrongs do not make a right".

after cessation of office can also be characterised as misappropriation of company property that was entrusted to them.

C. Which theory should be preferred?

39 Following from the above analysis, whether a requirement of motivation for resignation should exist therefore depends on which of two theories is preferred. If the "evasion theory" is preferred, then the requirement is justified and dismissed directors are as a result generally not liable. If the "property theory" is preferred, then the requirement should not exist and dismissed directors can be held liable. Of course, it is also entirely possible to prefer a theory based on the desired outcome. This part provides several comments on this matter.

40 Firstly, *Innovative Corp* is, with respect, not entirely coherent when the theoretical underpinnings of post-termination fiduciary duties are examined. As noted above,[104] *Innovative Corp* endorses the "property theory", pin-citing Collins J's above-mentioned statement in *CMS Dolphin* and stating that "[t]here can be no doubt as to the correctness of this principle insofar as it describes the basis of why the errant director is liable to account".[105] However, *Innovative Corp* also includes a requirement of motivation for resignation, which is contrary to what the "property theory" as analysed above would suggest. It is respectfully suggested that the High Court was perhaps not alive to the implications of adopting the "property theory" in its entirety. After all, the High Court's statement concerning the theoretical basis for post-termination fiduciary duties was made in passing, when it had already laid down the three-step approach and was at the stage of considering accessory liability. There was no theoretical discussion in the judgment when laying down the three requirements.[106]

41 Secondly, there is indeed a choice between the two theories, contrary to what *Innovative Corp*'s statement of endorsement (referred to in the previous paragraph)[107] may possibly be read as saying. Whilst the "property theory" is *a* basis for why errant directors are liable to account for usurping corporate opportunity, it goes too far to say that the "property theory" is *the* (to the exclusion of others) basis for why directors are liable to account. In this regard, recent developments in the law have

104 See para 34 above.
105 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [121].
106 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [72]. But there is, in the course of the judgment, admittedly some language that may be construed as coherent with the evasion theory instead.
107 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [121].

made clear that there is *no* need to show that an errant director/fiduciary received or used property belonging to his principal, before he can be held liable to account and a constructive trust subsequently imposed on the benefits gained by him.[108] As held by the UK Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*[109] and cited with approval by the Singapore Court of Appeal in *Guy Neale v Nine Squares Pty Ltd*,[110] a principal is "entitled to *all* the benefits acquired by a fiduciary in the course of the fiduciary acting in breach of the duties which he owes to his principal" [emphasis added].[111] Both proprietary remedies (imposition of constructive trust) and personal remedies (liability to account) are available, regardless of whether there was a pre-existing "proprietary base".[112] Therefore, returning to the present concern which is post-termination fiduciary duties, it is ***not*** *necessary* to characterise the opportunity as "property" or something that "belongs" to the company.

42 Thirdly, doing away with the requirement of motivation for resignation (by preferring the "property theory") does not bring the law into unchartered territory. For example, Hong Kong courts focus their inquiry on the singular question of whether the opportunity can be said to be a "maturing business opportunity". There is no specific inquiry into whether the resignation was motivated by a desire to usurp the opportunity, although in most cases motivation is admittedly present.[113] Furthermore, doing away with the requirement of motivation for resignation also does not necessarily impose overly expansive liability on ex-directors. There is still a baseline requirement that the ex-director obtains the opportunity

108 In the UK, there has been for the longest time a debate regarding which classes of breach of fiduciary duty can give rise to a proprietary remedy (constructive trust), and which classes are limited to a personal remedy (liability to account). In *Sinclair Investments (UK) v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, the English Court of Appeal distinguished between breaches that involved usage of property belonging to the company and other breaches. It was only in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 3 WLR 535 that the UK Supreme Court settled the debate and held that a proprietary remedy is available for all types of breaches. In Singapore, the Court of Appeal arguably settled this debate much earlier in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 by holding the secret bribes were held on constructive trust.

109 [2014] 3 WLR 535.

110 [2015] 1 SLR 1097 at [127]–[130].

111 *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [130].

112 To use the terminology of Sir Roy Goode QC in Sir Roy Goode QC, "Proprietary Liability for Secret Profits – A Reply" (2011) 127 LQR 493 at 493–495. See *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 3 WLR 535 and *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [127]–[130].

113 *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113; *Kwok Lau Chu v Kwok Chi Yau* [2017] HKCU 2187; *Greenwin International Group Ltd v Jim Yuek Chau* [2007] HKCU 378.

"by reason of the fact that he was a director",[114] as well as a requirement that the business opportunity is one that is "maturing".[115] These provide the nexus[116] or causal link[117] between the (breach of) fiduciary relationship and the opportunity gained. From a "property theory" perspective, these explain why the opportunity can be said to "properly belong" to the company, in preference to the (ex- director.

43 Notwithstanding that, there are indeed reasons why the "property theory" should *not* be preferred, chief of which being that corporate opportunity is not an archetypal form of "property". It is odd to say that the opportunity "belongs" to the company when an opportunity is ultimately still just an opportunity – other market competitors (including the ex-director) can also independently have identical opportunities *vis-à-vis* the same potential business counterparty. Moreover, it is especially unconvincing to say that the opportunity is something that "belongs" to the company, or is "property" of the company, when the company may not even be able to realise the opportunity to convert it to tangible business. In many cases, such as *Innovative Corp*, the counterparty has already unequivocally rejected the company as a potential business partner. Can one really describe the company as "owning" the opportunity when every market competitor *but the company itself* has a chance to exploit the opportunity? In truth, the company does not "own" the opportunity; it merely owns a cloud of smoke.

44 The "evasion theory", on the other hand, is also not without its weaknesses. Whilst the "evasion theory" justifies the requirement of motivation for resignation, it does not fully explain why the requirement of motivation for resignation is imposed *in preference to* other tests which can also address the issue of evasion. For example, in *Tongbao*, the Singapore High Court relied on the evasion theory as the rationale for an alternative proposition that "resignation will not terminate the fiduciary obligations *if, but for the resignation, the acts of the director taken in totality* would amount to a breach of his obligations of loyalty" [emphasis added].[118] If the fear is that resignation can be used as a device to evade fiduciary obligations, such a but-for test to consider the counterfactual by hypothetically removing resignation from the equation seems, at face value, to also be a plausible approach.[119] On a separate note, the "evasion

114 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [83].
115 *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [73].
116 See Lord Peter Millett, "Bribes and Secret Commissions Again" (2012) 71 Camb LJ 583 at 601.
117 See *Kao Lee & Yip v Koo Hoi Yan Donald* [2003] 2 HKC 113 at 141H–142I.
118 *Tongbao (Singapore) Shipping Pte Ltd v Woon Swee Huat* [2019] 5 SLR 56 at [133].
119 This alternative approach also has the added advantage of its causal link not relying on matters of the mind. It is submitted that policy, rather than the "evasion theory",
(cont'd on the next page)

theory" also does not require the opportunity to be considered a type of property. But if opportunity is indeed considered property, there could be advantages in establishing accessory liability that is dependent on property being received (for example, knowing receipt).[120]

45 All in all, there are compelling arguments for either theory. Therefore, it may be that the ultimate choice is dependent on the outcome that is desired, that is, how strict directors' post-termination fiduciary duties are envisioned to be. For example, having a requirement of motivation for resignation results in a legal framework that is more relaxed towards ex-directors, as one additional requirement must be satisfied before they are liable. In turn, the question of how strict post-termination fiduciary duties should be is a question of policy. As explained above,[121] post-termination fiduciary duties involve balancing competing interests – companies must be protected from errant directors, but ex-directors also have an interest in pursuing legitimate entrepreneurial endeavours post-departure. As it is a matter of policy, the present author will say no more.

V. Conclusion

46 As remarked by Lord Woolf MR in *Attorney-General v Blake*,[122] the common law "do[es] not recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it".[123] Post-termination fiduciary duties

explains why motivation for resignation may be preferred. By not limiting liability to "maturing business opportunities", the but-for approach arguably does not give sufficient regard to the interests of ex-directors in utilising knowledge/know-how obtained from their directorship. Of course, this may be attenuated if the but-for approach is combined with the existing *Canadian Aero* "maturing business opportunity" approach, *ie*, by being implemented in place of the motivation for resignation requirement. In any event, the but-for approach may arguably still suffer from lack of clarity – it is parasitic on the conventional understanding of directors' duties (during office) and does not really spell out the (different) content of directors' duties in the period post-office. Fuller consideration of this issue is probably warranted on another occasion.

120 It is conceded that accessory liability is a different inquiry and something can be considered property for the limited purposes of knowing receipt even if it is not regarded as property in other circumstances. In *Innovative Corp Pte Ltd v Ow Chun Ming* [2020] 3 SLR 943 at [121]–[122], the court seemed to draw such a distinction. That said, it would of course be ideal if there were congruence across the different fields.

121 See para 12 above.

122 [1998] Ch 439.

123 *Attorney-General v Blake (Jonathan Cape Ltd)* [1998] Ch 439 at 453.

are therefore remarkable, in so far as they are a huge carve-out from the above-mentioned general principle.

47 At the same time, it has also been acknowledged that diversion and usurpation of corporate opportunity by directors are "unfortunately … not uncommon in business circles in Singapore".[124] Although this statement was made by the Singapore Court of Appeal in the context of directors in office, it is not hard to imagine the simple expedient of resignation being interposed.

48 Against these backdrops, it is critical that the law on directors' post-termination fiduciary duties is coherently developed. The scope of post-termination fiduciary duties must be properly calibrated, based on underlying theoretical principles as well as the policy considerations in the background. It is hoped that this case note has provided useful fodder for subsequent courts to consider when developing the law.

---

124 *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [1].