Conceptualising Overreach in the English Corporate Opportunities Doctrine

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Structure of Presentation

• I. The Nature of Corporate Opportunities.
• II. Characterising Competing Judicial Approaches.
• III. The Concept of Overreach.
• IV. Potential Normative Justifications.
• V. Conclusions.
• *Earth provides enough to satisfy every man's needs, but not every man's greed.*

Mahatma Gandhi
I.  THE NATURE OF CORPORATE OPPORTUNITIES
II. CHARACTERISING COMPETING JUDICIAL APPROACHES TO DIRECTORIAL ENTREPRENEURSHIP
The Duty to Avoid Conflicts of Interest at Common Law

*Keech v Sandford* (1726) Sel. Cas. Ch. (Temp King) 25 E.R. 223

*Boardman v Phipps* [1967] 2 AC 46

Assessment of Lord Upjohn’s “real sensible possibility of conflict” test.

*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378
The Doctrinal Dichotomy

**Strict**

*Regal (Hastings) Ltd v Gulliver* [1942] 1 All E.R. 378;


**Expansive**

*Island Export Finance Ltd v Umuuna* [1986] B.C.L.C. 460;

*Balston v Headline Filters Ltd (No. 2)* [1990] F.S.R. 385;

*Framlington Group plc v Anderson* [1995] 1 B.C.L.C. 47;

*CMS Dolphin Ltd v Simonet* [2001] 2 B.C.L.C. 704
Privileging Disclosure

Rimer L.J. in O’Donnell [2009] EWCA Civ 751,[71]:
“It may have been improbable that the company could or would want to be able to take up the opportunity itself. But the opportunity was there for the company to consider and, if so advised, to reject and it was no answer to the claimed breach of the ‘no conflict’ rule that property investment was something that the company did not do.”
III. THE CONCEPT OF OVERREACH
Overreach Cases: No direct harm to company.

Proximate Cases:

Direct conflict + harm to company
# Overreach Cases

<table>
<thead>
<tr>
<th>Company Lacking Functional Capacity</th>
<th>Company’s Interest cannot be Assumed</th>
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<td>No financial capacity to avail of opportunity.</td>
<td>No maturing business opportunity.</td>
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<td>Operational limitations would prevent opportunity being taken up.</td>
<td>Not obviously within company’s existing or future line of business.</td>
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Legislative Entrenchment of Overreach

Section 175(1) of the Companies Act 2006: “a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company”.

Section 175(2) adds that “it is **immaterial whether the company could take advantage of** the property, information or opportunity”.

Right of Enforcement Not Dependent on Harm

- Account of profits remedy is not loss-dependent.

- Windfall benefit for companies.
IV. POTENTIAL NORMATIVE JUSTIFICATIONS
Morality as a Normative Justification?

The overreach phenomenon skews the link to morality.
Deterrence

• *Murad v Al-Saraj* [2005] EWCA Civ 959, [74] Arden LJ:

• “equity imposes stringent liability on a fiduciary as a deterrent – *pour encourager les autres*”. 
Loyalty as a Normative Justification

• *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 B.C.L.C. 131, Mummery LJ: emphasis on fiduciary’s primary obligation of loyalty.

Broader Instrumental Purposes?

- Is the law indirectly reinforcing existing commercial institutions and relationships in the interests of economic stability?
Legal Certainty and Indirect Rule Utilitarianism

• Inflexible rule provides a consistent pattern of certain desired societal consequences over time.

• Consistent with maximising social wealth in the long-run through commercial certainty and social equilibrium.
Economic Stability through Conflict Reduction

• Fixed legal rule is protective of the interests of established enterprise by reducing the potential for conflict.

• Function in maintaining economic stability.
A Social Cohesion Function

• Durkheim and social cohesion.
• Roscoe Pound: discouraging individual ambition central to social order.
• Doctrinal overreach provides a protective societal scaffolding favouring the economic stability provided by existing corporations.
V. CONCLUSIONS
Conclusions

• Macro-level normative justifications can account for the potential for doctrinal overreach:
  
(i) Legal certainty attained through inveterate application of rules rather than standards has assumed a core stand-alone value.
(ii) Subordinating directorial ambition reduces commercial conflicts and minimises disruption to the established economic order thus overreach serves a social cohesion function.
Thank you.

Questions and comments

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