

Directors' Duties Part II

General Law Duty to avoid Conflicts of Interest and Secret Profits – Cases:

- This duty applies to everyone; directors, officers, and employees:
 - **McGellin vs Mount King Mining NL** → **s182-183** (improper use of position and/or info) and **s191** (material personal interests must be disclosed)
 - The director must give details of the nature and extent of their interest in the matter. All details must be given at a directors meeting and as soon as practicable after the director is aware of the conflict.
 - Material interest *"should be seen to have a capacity to influence the vote of a particular director upon the decision to be made."* Whether the interest is a material personal interest depends largely on whether the director has a beneficial interest (for example, by way of shareholding).
 - Voting on whether a director has a personal interest → the director themselves can vote on whether they have a personal interest or not in proprietary companies, however for public companies, under **s195**, they cannot
 - Eg. If a cleaner of a company one night found the secret to KFC's secret spices and sold it to their sister who owns McDonald's, this could cause the collapse of global, multi-national companies
 - So, the law must protect these companies from having confidential info leaked by those inside the company who have access to it
 - If there is a person who's a director of one company and a shareholder in another competing company, there is a fine line, and the law needs to ensure there is no conflict of interest, and that they act in the best interests of the company first
- In a legal problem question, identify all the people involved with the breach
- General Law Duty to avoid Conflict of Interest and make a Secret Profit:
 - Three main categories:
 - Making a secret profit or undisclosed commission → **Furs Ltd vs Tomkies**:
 - Furs Ltd made fur coats, including tanning, dyeing, and dressing animal skins → another company, Fur Dressers and Dyers Ltd, offered to buy just the tanning, dyeing and dressing part of Furs Ltd. Furs Ltd says 'ok, we'll sell the plant and equipment for £8,500, and another £5,500 for the business formula → the managing directors, Mr Tomkies negotiated on behalf of Furs Ltd, and then agreed to work for Furs Dressers and was paid a secret payment of £5,000 to do so. He did not disclose this payment to Furs Ltd. The negotiation was concluded with an offer of £8,500 which was accepted by Furs Ltd → when the payment was discovered, Furs sued Tomkies for breach of duty
 - Taking up a corporate opportunity (an offer that's too good to pass up) → **Cook vs Deeks**:
 - Four directors worked for the Toronto Construction Company which built railways in Canada → three of them had a fight with the other, Mr Cook, when a huge new project to build a railway with the Canadian Pacific Railway company came up → the three directors decided to create a secret company without Mr Cook, and took that new contract in their new company's name; one which their original company, the Toronto Construction Company, would have loved to have won. → the court agreed that as directors, they had a duty to protect their original company, hence there was a breach,

as the directors diverted this business opportunity to their newly created business

- However, there are cases in which it is ok to take up a corporate opportunity in a private capacity → **Queensland Mines Ltd vs Hudson**
 - QM was interested in developing iron ore mining operations in Tasmania. Mr Hudson was managing director of QM, and he succeeded in getting the necessary licences to develop the mines. → however, the company was in financial difficulty and was unable to proceed with the operation, so Mr Hudson resigned his position, and with full knowledge of all the directors of QM, he successfully developed the mines in his own private capacity → 11 years later, QM sought to hold Hudson accountable for the profits he had made, on the grounds that he had exploited his fiduciary position as managing director, to make those profits → the court held that Hudson was not liable to account, because QM had rejected the opportunity to develop the mines, and because Hudson had acted with the FULL knowledge of the directors of the company; therefore the company had consented to him setting up his own private capacity to take up the opportunity
- So, in a problem question, if corporate opportunity comes up, a director can save themselves against being liable for a breach of conflict of interest and secret profits if they first offer it to the company → and if the company rejects it or doesn't have the financial capacity to accept, then with full disclosure to the company about their intentions, the director can set up the private company and take up the corporate opportunity in their own name
- Using Confidential Info and Competing with the Company → **Green vs Bestobell Industries Ltd: p453 of text book**
 - Mr Green was Senior Manager of Bestobell, who constructed projects; it was his sole role to prepare tenders for construction work → he heard about a new round of tenders to build a government road and thought 'this is too good to pass up' → so he set up another company, Clara Pty Ltd, and submitted a tender through that company → Clara won the project, because it was able to underbid Bestobell, thanks to the info provided by Green → used his position as employee, used confidential info, to privately benefit himself and compete against the company