

## Business Opportunity — *Can a Director Divert?*

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Business opportunities will present themselves to directors of a company resulting from their position in the company. One might wonder whether a director can divert these opportunities for his own use.

A director is expected to hold himself to a high standard of conduct. In short, he must never act in any manner that would cause detriment to the company's interest.<sup>1</sup>

Section 218(d) of the Companies Act 2016 states a director or officer of a company shall not “*use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company ... to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company*”.



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The Privy Council in *Cook v Deeks*<sup>2</sup> observed as follows:

“But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.”

Cases are useful for guidance in determining if a business opportunity belongs to a company and whether directors are liable for using them.<sup>3</sup> There are two categories,<sup>4</sup> namely:

- “Maturing business opportunity”: It means opportunity belongs to a company where the company is actively seeking the opportunity;<sup>5</sup> or
- “Current line of business”: It means opportunity was within the company's line of business.<sup>6</sup>

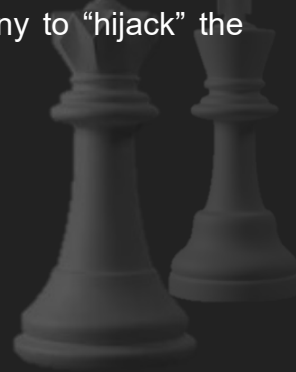
<sup>1</sup> *Zaharen Hj Zakaria v Redmax Sdn Bhd & Other Appeals* [2016] 7 CLJ 380 (CA)  
<sup>2</sup> [1916] 1 AC 554 (PC)  
<sup>3</sup> Arjunan, K, *Modern Company Law in Malaysia* (2nd ed, Wolters Kluwer 2018)  
<sup>4</sup> Chen, V, *Self-Dealing by Company Directors in Malaysia* (Sweet & Maxwell Asia 2003)  
<sup>5</sup> *Ibid.*  
<sup>6</sup> *Ibid.*



The following reported decisions demonstrate situations where the court ruled that directors were in breach of their duties in taking up a business opportunity for their own benefit:

- Diverting mature business opportunity
  - The Singapore High Court<sup>7</sup> held that the defendant breached his fiduciary duties as a director by diverting a maturing business opportunity from the company. The project was a real, and not speculative, business opportunity which the plaintiff company had been actively pursuing. The ultimate likelihood of the plaintiff company's success was immaterial for the purposes of establishing liability.
- Diverting customers
  - The Privy Council<sup>8</sup> ruled that the directors breached their duties in securing the contract for their own use. The Privy Council further declared that the directors could not retain the benefit of the contract for themselves but must be regarded as holding the contract for the benefit of the company.
- Diverting entire business
  - The Court of Appeal<sup>9</sup> found that the directors were in breach of their duties as they had acted deliberately to "steal" or "appropriate" the business of the company and transplant it to another company. The evidence showed the business, management and operations were diverted in entirety to another company such that it operated on a similar basis. The employees who served the company were simply transplanted to another company. The obvious benefit to the directors was the ability to acquire a thriving business with no set-up costs.
- Misuse of confidential information / trade secrets
  - The High Court<sup>10</sup> found that directors breached their fiduciary duties when they divulged the company's confidential information to the defendant company; misused the company's confidential information and caused the defendant company to "hijack" the

<sup>7</sup> *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2020] 3 SLR 943 (SGHC)  
<sup>8</sup> *Cook v Deeks* [1916] 1 AC 554 (PC)  
<sup>9</sup> *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 2 CLJ 48 (CA)  
<sup>10</sup> *Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors* [2020] MLJU 157 (HC)



plaintiff's prospective contract at a much lower price; developed the defendant company's programs based on the plaintiff's company confidential information and enabled the defendant company to compete unlawfully with the plaintiff company's program.

- The Court of Appeal<sup>11</sup> affirmed the trial judge's decision that the nominee director breached his fiduciary duties by diverting the plaintiff company's business away and capitalising on its trade secrets and confidential information.

## Conclusion

Directors need to be fully aware of the obligations they owe to a company. If a director pursues opportunities that should otherwise have been available to the company, the courts will readily find the director in breach of his duties. In such circumstances, the director may be fined, imprisoned<sup>12</sup> or made accountable for any profits obtained.

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<sup>11</sup> *Yeoh Seng Keong v Bircher Asia Pacific Sdn Bhd* [2018] 1 LNS 1156 (CA)  
<sup>12</sup> Companies Act 2016, s 218(2)

