CORPORATE OPPORTUNITY DOCTRINE AND SECTION 166(4) OF THE COMPANIES ACT: AN INDIAN FRAMEWORK

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A significant problem is achieving a balance between the director's entrepreneurial spirit and assuring his or her unwavering allegiance to the company. The rigorous purity of the director's responsibility to avoid instances of conflict between personal interests and business welfare must be modified in a changing commercial setting. The corporate opportunity doctrine ("COD") is a common law doctrine that restricts the power of a corporate fiduciary to seek new business possibilities independently without first proposing them to the corporation. In India, despite general fiduciary duties under Section 166(4) of the Companies Act 2013, the corporate opportunity doctrine remains under-defined and seldom addressed in case-law.

This paper presents a thorough analysis of the doctrine of corporate opportunity in India and reviews the jurisprudence concerning the doctrine in the United States and the United Kingdom. Part 1 of the paper highlights the test adopted by Delaware Courts concerning the doctrine and provides a critique of the same. Part 2 addresses the approach adopted by Courts in the United Kingdom and critiques it. Part 3 analyses the approach adopted by Indian Courts concerning the doctrine and critiques the approach adopted by the Court. Part 4 provides suggestions as well as a theoretical structure or alternative approach that should be adopted by India. The paper concludes by demonstrating why Indian courts should pay more attention to concerns concerning directors' fiduciary obligation and the

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doctrine of corporate opportunity. It proposes a structured four-duty framework and statutory amendments and concludes by advocating that India, in light of changing circumstances, should adopt a wider interpretation of Section 166(4) of the Companies Act, 2013.

Keywords: *Doctrine of Corporate Opportunity, Directors' Fiduciary Duty, Line of Business Test, Conflict of Interest, No-Conflict Rule.*

I. INTRODUCTION

Conflicts of interest between directors and their companies are usually quite simple to evaluate when they involve the utilisation of the corporation's physical assets. [1] However, such an evaluation would be very challenging if a conflict arose from the use of a corporate opportunity.[2] The legislation controlling how corporate opportunities should be exploited in India and other jurisdictions is still in uncertainty, despite several instances of directors who breached their fiduciary duties by prioritising their own interests over the interests of the company.[3] The director's obligation to the company and the limitations on his ability to take advantage of opportunities that come their way must be balanced. This search for a perfect balance raises a wide range of legal difficulties.[4]

The corporate opportunity doctrine ("COD") is a common law doctrine that restricts the power of a corporate fiduciary to seek new business possibilities independently without first proposing them to the corporation.[5] Conflicts over the distribution of business opportunities are particularly difficult matters in corporate law since the parties' respective interests are not

[1] Nimoy Kher & Varnika Chawla, '*The Doctrine of Corporate Opportunity: A Comparative Analysis; Part I'* (2018), 39 Bus L Rev <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\BULA\BULA2018033.pdf> accessed 05 January 2025.
[2] *Ibid.*
[3] S.V. Joga Rao & Y. Shiva Santosh Kumar, *Understanding the Law on Corporate Opportunity: Inputs for India*, 55 JOURNAL OF THE INDIAN LAW INSTITUTE 531 (2013).
[4] *Ibid.*
[5] Eric Talley and Mira Hashmall, *The Corporate Opportunity Doctrine,* 2001 U.S.C. Institute for Corporate Counsel <https://www.docsity.com/en/docs/the-corporate-opportunity-doctrine/9845017/> accessed 01 January 2025.

just mismatched but often profoundly contradictory.[6] Being a subspecies of the fiduciary duty of loyalty, this doctrine has been a bulwark in corporate precedents of virtually every state.[7]

This paper helps analyse the application of the doctrine of corporate opportunity in different countries, especially India and provides suggestions that need to be incorporated with respect to the doctrine in the Indian setting. The paper defines what constitutes a corporate opportunity. Part 1 of the paper highlights the test adopted by Delaware Courts in the United States and critiques the approach so adopted. The focus is mainly on Delaware corporate law, which is extensive of US jurisprudence. Part 2 addresses the approach adopted by Courts in the United Kingdom and provides a critique of the same. Part 3 analyses the approach adopted by Indian Courts with respect to the doctrine and critiques the approach adopted by the Court. Part 4 provides for an alternative structure or theoretical framework and suggestions as to how India should address the doctrine of corporate opportunity. The paper concludes by demonstrating why Indian courts should pay more attention to concerns concerning directors' fiduciary obligation and the doctrine of corporate opportunity. It concludes by advocating that India, in light of changing circumstances, should adopt a wider interpretation of Section 166(4) of the Companies Act, 2013.

II. DEFINITION OF CORPORATE OPPORTUNITY

An integral part of the regulation of the doctrine is the definition of *'corporate opportunity.'* Courts must provide an answer to the question of what constitutes a corporate opportunity. When a director utilises business assets or corporate knowledge for personal gain, it is evident that the profits rule is in play, as stated under Section 166(5) of the Companies Act, 2013. Section 166(5) of the Companies Act, 2013 reads as follows, *"A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company."* However, as observed above, the said doctrine lacks statutory codification in India and Section 175 of the Companies Act 2006 (UK) makes reference to *'opportunity'* but fails to define the same. This poses several concerns. In certain ways, the concept of corporate opportunity is reliant on the law that

[6] *Ibid.*
[7] Talley & Hashmall (n 5).

governs these opportunities. However, the usurpation of opportunities that do not directly involve corporate property or information may also result in a breach.[8]

2.1. Opportunity belonging to the company

Courts, in various cases have observed a corporate opportunity as one belonging to the company or as a part of company property.[9] To identify whether opportunities fall under this definition, it is necessary to evaluate various case laws. For instance, in *Matic v. Waldner,*[10] Pfuetzner of the Canadian Court observed that, 'Key to the analysis is the determination of whether the opportunity "belonged" to the corporation.'[11] In the English post-resignation instances of *CMS Dolphin*[12] and *Foster Bryant*,[13] this was also used as grounds for culpability. Determining which opportunity belongs to the corporation is a complicated matter, and often it is argued that it depends on the same factor as establishing of nexus. Every jurisdiction has a different approach to defining what a corporate opportunity is.

2.2. Maturing business opportunities

'Maturing business opportunities' has been the focus of Canadian jurisprudence on the legal doctrine of corporate opportunity. In the renowned case of *Canero*, Laskin J stated that, *"this ethic disqualifies a director or senior officer 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."* Similarly, in Hong Kong and New Zealand jurisprudence, as well as in the post-resignation cases in the UK, the concept of 'maturing business opportunity' remains prevalent. The usage of the term "maturing business opportunity" in Hong Kong cases demonstrates how to discern between prospects that are important to the firm and those that are speculative or irrelevant to the company.[14] In the case of *Kao Lee & Yip v. Koo Hoi Yan*[15], the Court clarified that a business opportunity whether it is mature or not would be a question of degree which would be determined by referring to variables such as the stage the discussions regarding the business opportunity have reached, the initiative taken by the fiduciary, timing, and the rationale given by the fiduciary to leave

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[8] Rosemary Teele Langford, Company Directors' Duties and Conflicts of Interest (OUP 2019), <https://doi.org/10.1093/oso/9780198813668.001.0001> accessed 03 January 2025.

[9] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (*Ultraframe); Canadian Aero Service Limited v O'Malley,* [1974] SCR 592, (1973) 40 DLR (3d) 371 (*Canaero).*

[10] 2016 MBCA, 330 Man R (2d) 107 (*Matic*).

[11] *Ibid* 128.

[12] *CMS Dolphin Ltd v Simonet* [2001] EWHC Ch 415.

[13] *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200.

[14] *Kishimoto Sangyo Co Ltd v Akihiro Oba* [1996] 1 HKLR 196.

[15] *Kao Lee & Yip v. Koo Hoi Yan* [2003] 3 HKLRD 296.

their position. Furthermore, Canadian Courts frequently demand that the corporate opportunity be one actively being pursued by the company.[16] However, recent cases show a different and contrary approach.[17]

Watts also points out a certain problematic issue. He says that often, company constitutions do not require companies to specify the scope of their business, and they are often free to expand into *'any line of business.'*[18] Keay observes that often all companies are interested in opportunities. Thus, it is difficult to determine which opportunities are within the ambit of the 'firm' and whether the opportunity is connected to or within the interest of the company.[19] The biggest challenge is deciding where to draw the line.[20] As previously stated, the challenges in defining the phrase 'corporate opportunity' underscore the advantages of regulating these possibilities through the conflicts and profits rules rather than through a distinct corporate opportunity doctrine.

Several more aspects are worth mentioning, notably those concerning Canadian law. First, business prospects do not have to be kept private as warranted in *Keech.*[21]. Secondly, the idea on its own would not constitute a corporate opportunity.[22] Thirdly, actual misappropriation of company assets is a blatant dereliction of duty.[23] Such misuse may result in greater repercussions.

It would be interesting to observe the stance taken by Indian Courts and regulators as to how they define a 'corporate opportunity.' Every opportunity coming a company's way cannot be defined as a corporate opportunity. Indian Courts would need to clarify what exactly a corporate opportunity is and how it is defined under the Companies Act. Courts would also need to clarify if they would define a corporate opportunity as an opportunity belonging to the business or a maturing business opportunity as highlighted above. In the latter part of the paper, Struan Scott[24] highlights the essential criteria Indian Courts should take into account when determining whether a certain opportunity qualifies as a corporate opportunity. It is imperative

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[16] *Aronowicz v Emtwo Properties Inc* (2009), 61 BLR (4th) 183, 96 OR (3d) 510 (*Emtwo*) at 51 - 54.
[17] Matic (n 11).
[18] Peter Watts, *Directors' Powers and Duties* (2nd edn, LexisNexis 2015).
[19] ROSEMARY (n 8).
[20] ROSEMARY (n 9).
[21] (1726) Sel Cas T King 61; 25 ER 223 (*Keech*).
[22] *Donor Gateway Inc v Passero* (2007).
[23] ROSEMARY (n 9).
[24] Struan Scott, *The Evolving Corporate Opportunity Doctrine: Is New Zealand Law Being Left Behind* (2005), <https://ourarchive.otago.ac.nz/handle/10523/8956> accessed 08 January 2025.

to understand the jurisprudence of the doctrine of corporate opportunity in the United States and the United Kingdom before proposing a law of the said doctrine in the Indian context.

III. LAW OF CORPORATE OPPORTUNITY IN THE UNITED STATES

United States, being a common law jurisdiction, has developed the doctrine of corporate opportunity through Court precedents and judicial interpretations. The Delaware Court adopted the line of business test in *Guth* and *Broz*, which stipulates that a new business possibility represents a corporate opportunity if it is judged to be within the firm's "line of business."[25] According to the majority of legal accounts, this test encompasses any project that the company may reasonably anticipate to adapt itself to or undertake now or in the reasonable future given its resources, body of experts abilities and skills.[26] The cases decided by the Delaware Court that are listed below provide more insight into the approach adopted by it.

3.1. Delaware and the corporate opportunity doctrine

One of the leading cases for the modern corporate opportunity doctrine[27] in Delaware is of ***Guth v. Loft.***[28] Loft Inc, a manufacturing and retailing company, was managed by Charles Guth, who was the director and president of the company.[29] Loft sold Coco-Cola at its shops. Guth, being made aware of Pepsi Cola Corporation's bankruptcy took advantage of the said opportunity and obtained effective control of the corporation for himself by buying Pepsi's shares.[30] Guth used his position in Loft to benefit Pepsi-Cola by replacing Coca-Cola bottles with those of Pepsi-Cola in the stores.[31] Loft later sued Guth, alleging that he was mandated by law to refer the opportunity to acquire Pepsi-Cola to Loft before doing so himself as it was a corporate opportunity. The *Supreme Court of Delaware* agreed with Loft and proposed the three-prong test for applying the doctrine of corporate opportunity.[32] Firstly, the Court inquired whether the opportunity was in Loft's line of business.[33] The Court answered the same in the affirmative. Although Loft did not produce cola syrups, it did sell cola-related items, thus the

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[25] Talley & Hashmall (n 5).
[26] Talley & Hashmall (n 5).
[27] Jennifer Ying, *Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine*, SSRN JOURNAL (2009), <http://www.ssrn.com/abstract=1414478> accessed 08 January 2025.
[28] 5 A.2d 503 (Del. 1939).
[29] *Ibid* 505.
[30] *Guth v. Loft* 5 A.2d 503, 505-507 (Del. 1939).
[31] *Ibid* 505-07.
[32] *Ibid* 511.
[33] *Ibid* 511.

company's potential future growth of entering into the business of producing cola syrups was taken into consideration.[34] Secondly, the Court inquired whether Loft had a prior interest or expectation in the business opportunity and also answered it in the affirmative. Since evidence showed that Loft was considering switching from Coca-Cola to Pepsi-Cola products, the Court answered the same in the affirmative. Lastly, the role of Guth as the President of the company was taken into consideration by the Court. Guth, being the president of Loft, had taken personal advantage of the business opportunity, which would have benefitted the company instead.[35]

The Supreme Court thus, concluded that Guth had no rights to take the corporate opportunity for himself. It summarised the rule of corporate opportunity as "*merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents.*"[36] The issue, according to the Court, was the opportunity of acquiring Pepsi was so closely related to Loft's existing business activities that if acquired by Guth instead it would make him a direct competitor of Loft, the existing company in which he was the director.[37] Analysing the ruling of the Court, it can be inferred that *'opportunity'* for the enterprise should be within the ambit of its corporate activities, and the corporate's future development and expansion endeavours should be taken into consideration.[38] The standard established by the Supreme Court is the *line of business test*.[39]

Another leading case that expounds on the line of business test is *Broz v. Cellular Information Systems, Inc*.[40] Broz was the director of CIS, a cellular phone company. Broz heard of acquiring a telephone license and offered the board the opportunity to acquire the said license.[41] However, the Board rejected the offer as it was the least interested, and CIS was not financially capable of exploiting the opportunity.[42] Broz eventually purchased the licence through a

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[34] *Ibid* 514.
[35] *Ibid.*
[36] *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).
[37] In his capacity as Loft's president, Guth terminated the supply contract with Coca- Cola. ibid. Guth then caused Loft to enter into a supply contract with Pepsi. Ibid. Note that Guth's conduct thus also could be condemned as an unfair related party transaction. A corporate officer or director may only compete with the corporation if the competition involves no breach of duty. Id. Here there was a clear cut breach of duty because of Guth's self-dealing. He controlled Loft and thus could force it to buy syrup from Pepsi; he controlled Pepsi and thus could set the terms on which the syrup would be supplied. ibid. By being on both sides of the transaction he had a rather pronounced conflict of interest.
[38] *Ibid*.
[39] Stephen M. Bainbridge, *Rethinking Delaware's Corporate Opportunity Doctrine*, (2008), <https://papers.ssrn.com/abstract=1296962> accessed 01 January 2025.
[40] *Broz v. Cellular Information Systems, Inc*, 673 A.2d 148 (Del. 1996).
[41] *Ibid*..
[42] *Ibid* 152.

corporation he owned. CIS was later acquired by another phone operator, PriCellular.[43] The procedure to acquire CIS had already begun when Broz grasped the opportunity by acquiring the telephone licence. Legal action was initiated against Broz by CIS's new board. Broz was found guilty by the Chancery Court for breach of his fiduciary duty and duty of loyalty to CIS, as well as his failure to examine whether the opportunity was in the best interests of PriCellular.[44]

The case was appealed to the Supreme Court of Delaware, which summarized its corporate opportunity doctrine. When a fiduciary accepts a business offer, the question under determination is whether the opportunity is a corporate opportunity based on certain parameters.[45] The following factors were set forth by the Court: "[a] *corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimical to his duties to the corporation.*"[46] For determining if the business opportunity is a corporate opportunity, every factor must be taken into consideration as no single factor is decisive.[47]

On the basis of the aforementioned factors the Supreme Court reversed the ruling of the Chancery Court and held that (1) in his individual capacity, Broz was made aware of the opportunity, (2) CIS had a precarious financial health, (3) the purchase of CIS was speculative and uncertain, (4) CIS did not have an interest in the expectancy opportunity, (5) there was no conflict between the interest of the company and those of the director.[48]

The *line of business test* has been a significant aspect of the judicial tests.[49] Opportunities in a corporation's field of operation must be surrendered. This broad criterion must be examined considering what the business does now and what it may do in the future.[50] The interest or expectation test, on the other hand, is more restricted and narrower. The Courts interpret the test by referring to the opportunities which the corporation has a strong interest in and is critical

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[43] *Ibid.*
[44] *Ibid* 159.
[45] *Ibid* 159.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid* 157-158.
[49] FRANKLIN GEVURTZ, CORPORATION LAW (2000).
[50] STEVEN EMANUEL, CORPORATIONS (2009).

for its survival and expansion.[51] Other elements that are not specifically specified in Broz may also be taken into account.[52] Some courts, for example, have emphasized the need for fairness.[53]

Fiduciaries accused of taking advantage of corporate opportunities invoke a variety of defences/claims.[54] Fiduciaries may claim, for instance, that they were acting in their personal capacity when they heard about the opportunity or that the business was incapable of taking advantage of the said opportunity due to technical or financial constraints.[55] On occasion, fiduciaries claim that the opportunity's offeror declined to do business with the corporation. Some courts have ruled that this argument is ineffective unless the opportunity is disclosed, whereas other courts have ruled that the unwillingness of the third party to contract with the business/corporation would lead to the disqualification of the opportunity due to its 'corporate' nature.[56]

The board or the shareholders must be presented with the corporate opportunity if none of the defences mentioned above can be invoked by the defendant. In the instance the corporation rejects the corporate opportunity or authorises the fiduciary to take it, then the fiduciary may accept the corporate opportunity.[57] It does not, however, apply if the latter has acted dishonestly to get the decision rejected by the directors or shareholders of the said company or if he controls the board.[58] A fair rejection, particularly one made by impartial directors or shareholders, may be more powerful.[59] A safe harbour can be undoubtedly established through formal procedures, but they are not necessary.[60]

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[51] ROBERT C. CLARK & ROBERT CHARLES CLARK, CORPORATE LAW (1986).
[52] Julien Koch, *LAW OF CORPORATE OPPORTUNITIES: A COMPARATIVE ANALYSIS*, VIVIEN & ASSOCIÉS, <https://va-fr.com/wp-content/uploads/2017/11/julienkoch-lawofcorporateopportunities-acomparativeanalysis-....pdf.> accessed 02 January 2025.
[53] *E.g. Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522 (Mass. 1948); *Miller v. Miller*, 222 N.W.2d.
[54] FRANKLIN *supra* note 51.
[55] *E.g. Energy Resources Corp. v. Porter*, 14 Mass.App.Ct. 296, 439 N.E.2d 391 (1982).
[56] *E.g. Science Accessories Corp. v. Summagraphics Corp.,* 425 A.2d 957 (Del. 1980).
[57] FRANKLIN (n 49).
[58] M. Feuer and J. Johnston, *Personal Liabilities of Corporate Officers and Directors* (2nd edn, Prentice- Hall 1974).
[59] FRANKLIN (n 49).
[60] Julien Koch (n 54).

3.2. A critique of the approach adopted in delaware

The Delaware Court's adoption of the line-of-business test is an example of the judiciary's effort to codify the principles of justice and fairness.[61] However, various courts in the United States have also applied the test of fairness and interest. Since this paper only analyses the approach undertaken by Delaware Courts it's imperative that this paper analyses the line of business test only.

Considering the Line of Business Test, it is difficult to define what falls or does not fall under a company's line of business.[62] The extent of a company's business may be unclear. Marginal opportunities will continue to present unattainable obstacles and challenges.[63] Furthermore, even if a model of directors' responsibility could be created, why should it be limited to the company's current line of business?[64] As several academics have noted and researchers concur, the Line of Business Test appears to defy common prudence.[65] If a company sues to recapture an opportunity, then that fact alone suggests the company's desire to expand into that area of business.[66] Why does it matter if the company hasn't previously worked in the businesses? Sequentially, the corporation is free to pursue any potential commercial ventures. The concept of a line of business is thus irrelevant and ought to be abandoned entirely.[67]

Thus, it appears that the model adopted by Delaware scarcely disposes the issue of seizure of corporate opportunity by directors. The Court might wish to think the approach adopted by English Courts about making the relationship between the director and the firm the fundamental level of scrutiny.[68] A more thorough examination of the responsibilities of directors should consider the company's interests and the range of its operations. In other words, there should be a presumption of guilt in situations when directors act against the interests of the firm, which may be disproved by demonstrating things like good faith or the fact that the opportunity was outside the normal course of business, among other things.[69]

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[61] Nimoy Kher & Varnika Chawla, '*The Doctrine of Corporate Opportunity: A Comparative Analysis-Part II*', 40 BUSINESS LAW REVIEW (2019), <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\BULA\BULA2019003.pdf> accessed 06 January 2025.
[62] *Ibid.*
[63] Michael Begert, *The Corporate Opportunity Doctrine and Outside Business Interests*, 56 THE UNIVERSITY OF CHICAGO LAW REVIEW 827 (1989).
[64] ROBERT C. CLARK (n 53).
[65] *Ibid.*
[66] Nimoy Kher & Varnika Chawla (n 62).
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

Furthermore, the way in which opportunities are viewed as "property"[70] by American and Delaware law merits substantial discussion. The line of business test shows vestiges of an opportunity as a corporate 'asset' that the defendant is capable of 'stealing.'[71] Various research and scholars have opposed such a characterization as this would lead courts and scholars to attribute business opportunities and legal conception developments in the line of context of tangible property.[72] Perhaps a pertinent question the courts should consider is: Can the corporate participant grab the opportunity as an individual without violating his duty of loyalty? If so, under what conditions would seizing such an opportunity be justified? As one researcher put it, *"the issue [in cases of potential conflict] is misbehaviour, not misappropriation."*[73]

IV. LAW OF CORPORATE OPPORTUNITY IN THE UNITED KINGDOM

The cases of *Bhullar*[74] and *Foster*[75] discuss the issue of fiduciary duty of directors concerning corporate opportunities available to the corporation or to directors in their personal capacity.[76] The Court adopts a different approaches in both cases to reach its decisions.[77] The Court uses an extremely narrow perspective.[78] based on the traditional approach used by English courts in earlier decisions; however, in the other case, the court departs from this conventional strategy in light of recent advancements in corporate law in other common law jurisdictions and uses a broader approach to arrive at its decision.[79]

4.1. Bhullar v. Bhullar: simplistic approach

A grocery shop was operated by two brothers, Mohan and Sohan, each holding 50% of the share capital.[80] The Board of Directors consisted of the Appellants (Inderjit Bhullar and Jatinderijit Bhullar) and their father Sohan, who excised a 3:2 majority over the Respondents (Mohan and his son, Sohan).[81] To expand its grocery business, it acquired several properties in

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[70] John E Jackson, *Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, The*, 53 MISSOURI LAW REVIEW (1988).
[71] Michael Begert, *The Corporate Opportunity Doctrine and Outside Business Interests*, 56 THE UNIVERSITY OF CHICAGO LAW REVIEW 827 (1989).
[72] *Ibid.*
[73] David Kershaw, *Does It Matter How the Law Thinks about Corporate Opportunities?*, 25 LEGAL STUDIES 533 (2005).
[74] *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] BCC 711.
[75] *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd*, [2007] EWCA Civ 200, [2007] BCC 804.
[76] Hans C. Hirt, The Law on Corporate Opportunities in the Court of Appeal: Re Bhullar Bros Ltd, J. Bus. L. 669 (2005).
[77] Kher and Chawla (n 1).
[78] *Ibid.*
[79] *Ibid.*
[80] *Bhullar v. Bhullar* [2003] EWCA Civ 424.
[81] *Ibid* 713.

the locality. It acquired a bowling alley as an investment property which was rented out to the UK Superbowl for carrying out bowling activities according to the Objects of the company.[82] The brothers decided to separate due to family issues, and it was decided that no further properties would be acquired on behalf of or in the name of the company.[83]

The property in question, White Hall Mill, was discovered by the appellants in the meantime, and they independently learned that it was available for sale. White Hall Mill, which was next to the company's investment property, was utilised in part as a parking lot by UK Super Bowls Ltd. On behalf of Silvercrest, a business they own and control, the appellants submitted a purchase proposal for the property, and it was accepted.[84] The Appellants did not disclose any information for the purchase of the property as they did not deem it necessary. Following a breakdown in talks over the split of the company's assets, the Respondents filed a petition. One of the reasons for the petition's assertions was the directors' private acquisition of White Hall Mill, which is close to the company's investment property, is in contravention of their fiduciary duties to the corporation.

The court based its decision on a simplicity model adopted by the courts in *Regal Hastings.*[85] and *Phipps v. Boardman,*[86] thus ruling in favour of the Respondent. It was held that the possibility of a conflict of interest emerging from the use of the corporate opportunity did, in fact, exist in the eyes of a reasonable man, given the undisputed facts of the case.[87] The court also ruled as the company's fiduciaries, directors had a duty to prevent any potential conflicts between their personal interests and duties they owed to the company.[88] The Court held the Appellant responsible for diversion of corporate opportunity as the directors had a fiduciary obligation to the company to avoid any conflict of interest, and by taking advantage of this opportunity in their personal capacities, they violated the same.[89]

Analysing the approach undertaken by the court it can be concluded that it has taken an extremely simplistic approach to the issues of diversion of corporate opportunities by directors in their personal capacity. The Court has only placed reliance on the *'real sensible possibility of conflict' test* and ignored the subtleties of the factual scenario of the case and the corporate

[82] *Ibid.*
[83] *Ibid.*
[84] *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] BCC 711.
[85] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.
[86] *Phipps v. Boardman* [1967] 2 AC 46.
[87] Bhullar (n 84).
[88] *Ibid* 721.
[89] *Ibid..*

opportunity's relevance to the corporation itself.[90] Instead, it based its decision completely on the fact that the directors had broken their fiduciary obligations by allowing for the prospect of conflict and held them accountable for the same.[91] It avoided investigating the complexities and possibilities of the company's exploitation of such business potential, choosing an excessively conservative and orthodox approach.

4.2. A paradigm shift: Foster Bryant Surveying Co. Ltd. vs. Bryant

The defendant in the petition was a director of the first claimant company, which provided surveying and project management services.[92] The second claimant, the company's co-director and main shareholder, had virtually compelled the defendant to resign. However, the company's biggest client, Alliance Ltd., wanted to keep both directors on board.[93]

As a result, it proposed to the defendant that once his resignation from the company was effective, the surveying work of Alliance, which had previously been performed exclusively by the company, would now be divided between the company and the defendant, with the defendant working essentially as an employee of the company. While the defendant accepted this offer, the second claimant objected, insisting on being handed sole responsibility for all of Alliance's work. The second claimant recommended that any work that the firm would be unable to complete would be outsourced to a subcontractor. This was unacceptable to Alliance, who explicitly requested the services of both the second claimant and the defendant. As a result, the first claimant, the company, filed suit against the defendant, alleging that by agreeing in principle to Alliance Ltd.'s proposal, the defendant breached his fiduciary duty to the company by prioritising his personal interests over the company's corporate opportunity.[94] In rendering its verdict in favour of the defendant, the High Court demonstrated a paradigm change in its perspective on directors' fiduciary duty with regard to the use of corporate opportunity.

The Court relied upon established principles laid down in *Hunter Kane*[95] and *CMS Dolphine*[96] with respect to the fiduciary duty of directors and opined that a director's ability to resign from

[90] Nimoy Kher & Varnika Chawla (n 1).
[91] *Ibid.*
[92] *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd*, [2007] EWCA Civ 200, [2007] BCC 804.
[93] *Ibid* 808.
[94] *Ibid* 809.
[95] *Hunter Kane Ltd v Watkins* [2003] EWHC 186 (Ch).
[96] *CMS Dolphin Ltd v Simonet* [2002] B.C.C. 600.

their position is not a fiduciary power but is instead a fundamental right that each employee of the organisation is entitled to. Any officer has the right to resign from his position, regardless of the implications for the company's operations and profitability. The Court placed reliance on *Group Ltd. v. Pyke* and held that a fiduciary connection ends after the relationship that gave rise to it has been *"determined"* or ended. As a result, the director has no duty to act in the company's best interests because he is no longer a fiduciary of the business. Furthermore, any actions taken by directors that may be preparatory to competition after the employment contract expires, even while the contract is still in effect, are not always a violation of any implied fiduciary duty they may have to the company, such as loyalty and fidelity. This is because the director should be allowed to exploit opportunities in a new position if they resigns from their previous position.[97]

In the aforementioned case, it was ruled that the director had no further fiduciary obligations to the firm once he had resigned from his position or that his fiduciary relationship had *"determined"* as a result of the end of his engagement with the company. Even if the director did owe any fiduciary obligation after providing notice of his resignation, it was determined that he had not infringed any such fiduciary duty in the particular case by taking advantage of the corporate opportunity made available to him. The Court considered Gower's critique of *Regal Hastings.*[98], which relied entirely on the *'no-conflict'* concept, as stretching equitable principles to inequitable conclusions.[99] The Court also determined that the company was not a developing business prospect since the owner's intention to take over the company did not motivate him to resign. The director could not be required to "make good the loss" that the business could have suffered, especially if the business suffered no loss as a result of the director's utilisation of the corporate opportunity. In *Foster*[100]*,* the Court departed from its prior approach of applying the traditional English law to hold directors liable if the one-step test of the existence of a *"real sensible possibility of conflict"* was satisfied, thereby attempting to lessen the strictness of the rules and adopt a more thorough strategy by ensuring equitable principles were not applied to reach inequitable conclusions. The Foster case demonstrates a transitional strategy used by the courts from a conventional to a contemporary approach. To

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[97] *Foster Bryant Surveying Ltd v Bryant*, Savernake Property Consultants Ltd, [2007] EWCA Civ 200, [2007] BCC 804.
[98] *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134n; [1942] 1 All E.R. 378.
[99] *Ibid.*
[100] *Foster Bryant Surveying Ltd v Bryant, Savernake Property Consultants Ltd*, [2007] EWCA Civ 200, [2007] BCC 804.

decide culpability, the court has moved away from using a crude one-step approach and towards a more persuasive and organised multi-step approach.

4.3. Critiquing the british approach

British courts are concerned with the question of whether the director's duty of loyalty to the corporation is jeopardised by personal exploitation of the corporate opportunity.[101] As noted in the courts' decision in *Guth*[102] and *Broz*[103], American courts attach a high value on the values of fairness, equity, and truth.[104] This is in sharp contrast to the British Model, which indicates a wholly preventative aim, oriented towards avoiding any circumstance in which directors may find themselves in conflict with the corporation.[105] The circumstances behind the violation are not investigated by the English courts. The court disregards equity considerations since the directors' culpability arises void ab initio.[106] According to scholars, such a paradigm is entirely unsuitable for today's business economy.[107] It is contended that the British Model fails to strike a balance between avoiding directorial abuse and fostering existing corporate culture. It takes an overly rigorous approach, failing to take into account the intentions of a 'miscreant' director.[108] This is significant because, in a contemporary economy, rigorous adherence to the no-conflict rule effectively prevents directors from participating in the majority of corporate activities.

Even in situations when businesses have no interest in pursuing the opportunity for themselves, strict reliance on the no-conflict approach results in liability. Due to this, the chance is lost to the commercial economy as a whole. It is proposed that the director's fiduciary, tied to the corporation, should only generate a presumption of guilt in circumstances when the director finds himself in a position of conflict.[109] Such a presumption should be rebuttable upon examination of the director's credentials. The no-conflicts strategy, when combined with the *fides* (truth) test, supports directorial personal endeavours while simultaneously providing enough disincentive against misuse of power and position.

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[101] PAUL LYNDON DAVIES ET AL., GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW (2012) at 529–531.
[102] *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).
[103] *Broz v. Cellular Information Systems Inc*, 673 A.2d 148 (Del. 1996).
[104] *Ibid.*
[105] Nimoy Kher & Varnika Chawla (n 62).
[106] *Ibid*.
[107] *Ibid.*
[108] *Ibid,*
[109] John Lowry & Rod Edmunds, *The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and Its Remedies*, 61 THE MODERN LAW REVIEW 515 (1998).

It is imperative that English law works to enhance liability principles by incorporating aspects of the American Model. It has to try to include the business opportunity theory's trust test also known as the *fides* test. This would need a review of issues such as: What actions are within the purview of the company's operations? What objectives and intentions did the directors have when they seized the corporate opportunity?

V. LAW OF CORPORATE OPPORTUNITY IN INDIA

It is commonly known that Indian laws and the Indian legal system are largely based on the British legal system, particularly judicial precedents, which are a crucial component of the common law system upon which Indian law is founded.[110] The doctrine of Corporate Opportunity even though is an established concept in the English Law system, Indian Jurisprudence on the same is unclear and underdeveloped.[111] The English Courts, as illustrated above follow a strict and absolute approach. Under this approach, a director is not allowed to make a profit for himself by utilizing a corporate opportunity without the informed consent of the company. This is considered an extremely broadly defined concept.[112] Despite the corporate opportunity doctrine being a well-established concept in the English legal system, Indian jurisprudence on the subject is exceedingly confusing and underdeveloped.[113] Indian's involvement in the application of the doctrine of corporate opportunity can only be viewed in the case of *Vaishnav Shorilal Puri; Seaworld Shipping and Logistics Pvt. Ltd. v. Kishore Kundanlal Sippy*.[114]

India's Companies Act, 2013, does not explicitly touch upon this doctrine, but Section 166(4) of the India Companies Act talks about the Fiduciary Duties of a Director. India's interpretation and understanding of fiduciary duties can be said to be derived from the English law, when the duties of a director have been laid, and they can be understood in the following Six Categories,[115]

1. That the directors must remain within the scope of the authorities bestowed upon them.

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[110] Nimoy & Varnika (n 62).
[111] *Ibid.*
[112] *Ibid.*
[113] S.V. Joga Rao & Y. Shiva Santosh Kumar, *Understanding the Law on Corporate Opportunity: Inputs for India*, 55 JOURNAL OF THE INDIAN LAW INSTITUTE 531 (2013).
[114] *Vaishnav Shorilal Puri; Seaworld Shipping and Logistics Pvt. Ltd. v. Kishore Kundanlal Sippy*, 2006 SCC OnLine Bom 361.
[115] S.V. Joga Rao (n 116).

2. That directors must behave in good faith to enhance the company's prosperity.

3. That they must use sound judgment.

4. In the event of a conflict originating from a transaction with the company (i.e., a self-dealing transaction).

5. From the director's personal exploitation of a company's property, opportunities, or knowledge, or,

6. From the receipt of a third-party benefit or a related-party transaction.'[116]

A brief examination of the aforementioned responsibilities indicates that the directors have been subjected to stringent requirements to ensure that the company's best interests always take precedence over those of any one director or member of the senior management.[117] The fact that the corporation is given such high importance while giving the directors little room to act in their personal interests indicates the strict and rigid approach taken by courts in the United Kingdom, which is completely at odds with the approach adopted by the courts in the United States.

The strict and unbending approach of Indian law, which is based on English law, prohibits a director from making a profit for himself without the company's informed consent using the doctrine of corporate opportunity—a term that has been viewed as having a very broad concept. As a result, the test adopted by both Indian and UK Courts, is whether by accepting the opportunity, the director would be putting himself in a situation where his interest and duty clash.

VI. CRITIQUING THE CASE OF VAISHNAV SHORILAL PURI; SEAWORLD SHIPPING AND LOGISTICS PVT. LTD. V. KISHORE KUNDANLAL SIPPY

Vaishnav Shorilal Puri and v. Kishor Kundan Sippy[118] is the only Indian case that has dealt with the concept of Diversion of Corporate Opportunity. It has been decided by the Bombay High Court. Two groups, Puri and Sippy Group, each owned equal ownership in two shipping businesses, Samrat Shipping Co. Pvt. Ltd (SSCO) and Samrat Shipping and Transport Systems

[116] Nimoy & Varnika (n 63).
[117] Chawla (n 1).
[118] *Vaishnav Shorilal Puri and Ors. v. Kishor Kundan Sippy and Ors*., 2006 SCC OnLine Bom 361.

Pvt. Ltd (SSTS) and had an equal number of directorships. SSTS primarily operated two types of businesses: Agency business in partnership with an international shipping company called Contship Containers Lines Ltd. ("Contship") and Charter business. The Puris oversaw the agency business, while the Sippy's were in charge of the charter business. It is critical to highlight that the agency with Contship supplied roughly 90% of the business of SSTS, which had two groups of owners, and that the whole business has now gone to SSL, the newly formed Puri group and that the agency arrangement between SSTS and Contship expired in November. Contship had previously changed its agents. SSCO was granted the Contship agency in 1991, when the firm had three groups of shareholders. Eventually, in 1996, the agency was transferred to SSTS, and the company was afterwards controlled solely by two sets of shareholders: the Puri group and the Sippy group. The court relied on Sections 88 of the Indian Trusts Act and 397 of the Companies Act, 1956

The Puri Group transferred SSTS's agency business with an international shipping corporation (Contship) to a Puri Group-owned company (Seaworld), which is under their sole control, giving rise to the issues of divergence of corporate opportunity and breach of fiduciary obligations. It was ascertained that the accepted position was that SSTS had been carrying on the same agency for five years before the expiry of the time of agency and the agency activity was in SSTS's *line of business*, in which it (SSTS) had skill and experience. The question of diversion of corporate opportunity comes into picture from the possibility of whether the Puri group could have averted the loss of business suffered by SSTS. Puri used the defence that the agency agreement with Contship of SSTS had terminated and that Contship no longer wanted to interact with SSTS. Due to the personal relationship of the Puris with Contship, there was no breach of fiduciary obligation to SSTS. Puri group argued before the Company Law Board that Contship was unwilling to work with SSTS because of the disagreements between the Sippys and the Puris. The Board opined that this plea was baseless. The Board stated that if a third party is unwilling to do business with the company, the director should disclose this fact and try to solve the problem. The viewpoint was supported by the ruling in the case of *Industrial Development Consultants (Assizes),*[119] and another decision of the *Massachusetts Appellate Court in Energy Resources Corporation v. Porter.*[120] The board held against the Puri group on the grounds that, as fiduciaries, they were acting as trustees. The benefits were derived by (SSL). It was formed and fully controlled by the Puri group and was used as a vehicle to obtain

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[119] *Industrial Development Consultants (Assizes)* [1972] 2 All ER 162.
[120] *Massachusetts Appellate Court in Energy Resources Corporation v. Porter* (438 NE 2d 391).

the agency, because there was no separate identity between the Puri group and the SSL, and they were accountable to SSTS.

The said case was appealed to the *Bombay High Court*. In deciding the case, the court emphasized the decisions of two cases: *C.G. Chetty v. C.S. Chetty and Ors.*[121] and *Deva Sharma v. L.N. Gaddodia.*[122] They relied on these instances to establish a fiduciary connection in accordance with Section 88 of the Indian Trust Act.[123] The court relied on the Supreme Court's decision in C.G. Shetty's case, thus overturning the Company Law Board's ruling. It held that a business partnership does not have to be renewed once it has ended. It relied on the case of Deva Sharma's, which held that once the fiduciary connection ceases, the individual is free to acquire the business advantage for himself. Therefore, in the present case the court for the said issue held that because Contship terminated the agency of SSTS, the economic opportunity between the two ceased to exit and so the diversion of Contship agency from SSTS to Seaworld cannot amount to a breach of fiduciary duty on the side of Puris.[124]

This case has a confused approach. Although the Court acknowledged that the Puri's actions were not entirely genuine, it nevertheless pronounced its verdict in favour of the Puri Group. The Court considered criteria applicable under the American corporate opportunity concept, such as the willingness (or unwillingness) of a third party to contract with the company. However, it failed to follow the fiduciary duties created for directors under Section 166(4) of the Companies Act. [125] The fact that Puri group was aware that Contship did not want to deal with SSTS, and yet did not act on it, portrays a breach of fiduciary duties, as they did not disclose Contship's refusal to SSTS alons with a fair explanation of the reasons behind it. Fiduciary duties of a director are for the director to always be loyal to the company; even if an opportunity is offered to him in his individual position, he should first disclose the information to the company, which was lacking in the current situation. It has been noticed that the simple inability to pursue the business opportunity is insufficient to demonstrate that the director did not act in violation of its responsibility.[126]

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[121] *C.G. Chetty v. C.S. Chetty and Ors.*, AIR 1959 SC 190.
[122] *Deva Sharma v. L.N. Gaddodia.*, AIR 1956 P H 49.
[123] The Indian Trust Act,1882 (Act 2 of 1882), s. 88.
[124] Anushweta Srivastava, *Analysis of Vaishnav Shorilal Puri vs Kishor Kundan Sippy (Bombay HC)*, https://taxguru.in/company-law/analysis-vaishnav-shorilal-puri-vs-kishor-kundan-sippy-bombay-hc.html accessed 04 January 2025.
[125] The Companies Act, 2013 (Act 18 of 2013), s.166(4).
[126] Richa Bhandari, *Doctrine Of Corporate Opportunity -An Indian Perspective - Shareholders - India*, <https://www.mondaq.com/india/shareholders/1241228/doctrine-of-corporate-opportunity--an-indian-perspective> accessed 02 January 2025.

In this regard, the case of *Irving Trust v. Deutsch*[127] may be cited, where it was determined that *"if directors are permitted to justify their conduct on such a theory [that the corporation is unable to undertake the venture], there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation because, if it does not meet the obligations, an opportunity for profit will be open to them personally."*[128] The same might be said about the Puri group's lack of information and inducement to persuade Contship to return to Sippy, or providing information about Puri's interest to deal with Contship. There was an obvious failure in performance and communication attempts. It is possible that the court would have reached a different decision in the end if it had considered the primary fact that, if Puri had informed Sippy group about their agreement with Contship, it would have been ideal. However, the fact that the Puri group did not mention any such agreement and went ahead with the opportunity is diversion. With such diversion and lack of communication, it becomes irrelevant for the court to go into the concept of Corporate Opportunity. This case plainly does not set down or indicate directions as to how matters involving diversion of corporate opportunity are to be dealt with, leaving India with little literature on this essential and fundamental corporate issue.

This clearly demonstrates how the Indian Jurisprudence on the aforementioned doctrine is exceedingly ambiguous and lacking. It would require considerable attention and a clear vision to address such fundamental issues, as well as help extend options for directors to grow outside the realm of the company's interests and diversion from such strict application of fiduciary duties. Both the flexible doctrine of corporate opportunity in the United States and the stringent approach to dealing with a director's fiduciary duty in the United Kingdom cannot be used to address concerns with the concept of corporate opportunity in India. India will have to come up with its own solution to the ambiguity of the doctrine of corporate opportunity.

VII. THE APPROACH INDIA SHOULD ADOPT: WAY FORWARD

As discussed in Part 3, the stance of Indian Courts remains ambiguous to this day. Section 166 of the Companies Act 2013 ("Act") specifies the director's duties. Section 166(4) of the Companies Law, 2013 encapsulates the no-conflicts principle.

[127] *Irving Trust v. Deutsch*, 73 F.2d 121 (1934).
[128] *Ibid.*

Section 166(4) of the Companies Act, 2013 provides that, *"A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company."*[129]

Section 166(4) is analogous to Section 175(1) of the UK Companies Act, 2006. The other parts of Section 175 of the UK Companies Act, codifying common law rules governing corporate opportunity are not included in the Companies Bill, 2012. The intention of Section 166(4) of the Companies Act, 2013 was to simply establish the general no-conflict concept without adding any details from Section 175 of the UK Companies Act, 2006. The resulting scope for judicial interpretation is problematic, especially because Section 175 of the UK Companies Act, 2006 appears to combine pragmatism with rigor. Another alternative for establishing legal certainty in relation to corporate opportunities is to include certain obligations in the already existing legislative code. It is suggested that codification offers some advantages. It helps streamline the legislation, making it more easily accessible and discernible. The common consensus is that if directors have easy access to the legislation governing their position, they are less likely to violate it.[130]

Lastly, in the context of the aforementioned, it is suggested that Section 166 be amended to include the following provisions:

7.1. Fundamental Duty of Directors

When appointed by or on behalf of a certain class of employees, members, or creditors, a director may devote special, but not exclusive, consideration to that class's interests. This would avoid conflict of interest with that of the company and the class of persons nominating the director.

7.2. Conflicts of Duty and Interest

Notwithstanding the memorandum or articles of association, a director shall not, without the consent of the company, establish himself in a position where his responsibility to the company conflicts or may conflict with his personal interests or duties to third parties. A director shall not, in particular, without such consent:

[129] The Companies Act, 2013 (Act 18 of 2013), s.166(4).

[130] Michele Kyra Havenga, *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities*, Jun., 1995, <https://uir.unisa.ac.za/handle/10500/18316> accessed 02 January 2025.

1. take advantage of any opportunity to participate in a commercial activity (including the acquisition of any contract right or other tangible or intangible property) of which the director becomes aware either:[131]

2. in connection with the execution of his duties as a director, or under circumstances that could reasonably cause him to assume that the offeror expects him to offer the opportunity to the corporation; or,

3. using corporate information or property, if the ensuing opportunity is one that the director might reasonably be expected to anticipate would be of interest to the corporation; or,

4. if he knows or has a reasonable expectation of knowing that the action is closely related to the business in which the corporation is involved or may reasonably be expected to engage.[132]

7.3. Civil Liabilities for Breach of Duty

A director who breaches any of the aforementioned obligations is accountable to the company for:

1. any damage sustained by the company as a result of the breach; or,

2. any economic gain derived by the director because of the breach.[133]

It is critical to strike a balance between the doctrine and the director's personal interests.[134] Relying entirely on statutory codification is undesirable because it lacks the flexibility needed to deal with changing commercial realities in India. It is suggested that Courts interpret the statute in accordance with the evolving socio-economic scenario in India. It is also proposed that where the director has completed his fiduciary duty to the company, he may serve his personal interests which would not amount to a breach of the doctrine of corporate opportunity.[135] Additionally, it is imperative for the courts to consider what exactly constitutes a corporate opportunity. Mentioned below is an alternative structure that can be adopted by Courts in India.

[131] *Ibid.*
[132] Michele Kyra Havenga (n 133).
[133] Michele Kyra Havenga (n 133).
[134] Richa Bhandari (n 129).
[135] *Ibid.*

VIII. ALTERNATIVE STRUCTURE

The information examined in the Parts 1 and 2 demonstrates the US and English understanding that certain directors are required to discover and capitalise on business possibilities for their organisation.[136] The misuse of such opportunity, by such directors, is what brings criticism by the Courts. This section outlines the essential criteria, as postulated by Struan Scott[137] that Indian Courts should take into account when determining whether a certain opportunity qualifies as a corporate opportunity. The question under consideration for Courts is whether the personal exploitation of the opportunity by the director would conflict with his fiduciary duty towards the company. Analysing the US, UK, and Indian positions, the following obligations can be inferred from case laws:[138]

1. Obligation to investigate an opportunity,
2. Obligation not to undermine the company,
3. Obligation not to pass on the opportunity,
4. Obligation to surrender the opportunity.

Since a straightforward notion of fiduciary loyalty is being demanded by the first three obligations, it should be uncontroversial.[139] Each of the four responsibilities is in line with and describes the US and English content that was considered in the previous parts.

The substance and extent of these duties, like all fiduciary responsibilities, vary based on the director's relationship with the company.[140] There are two crucial variables. First, considering the director's position within the organisation. In comparison to non-executive directors, executive directors are held to higher standards and more accountability. The second factor is the character of the business, particularly any peculiarities specific to the CEO and that particular business. The idea is that the parties have the ability to broaden or narrow the scope of their duties. The following analysis is limited to broad concepts due to the varying character of these responsibilities.

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[136] Struan Scott, *The Evolving Corporate Opportunity Doctrine: Is New Zealand Law Being Left Behind* (2005), <https://ourarchive.otago.ac.nz/handle/10523/8956> accessed 02 January 2025.
[137] *Ibid.*
[138] EQUITY AND COMMERCIAL RELATIONSHIPS, (P. D. Finn ed., 1987).
[139] Scott (n 136).
[140] *Ibid,*

8.1. Obligation to investigate an opportunity

This is the most straightforward requirement. In this situation, a director has (or takes) the obligation to determine whether an opportunity is appropriate for the business to exploit.[141] Since the director is an employee of the company, he must investigate the said opportunity and the director should not personally exploit the opportunity as recognised by the Courts in the USA[142] and India[143]. For example, X, the director of the plaintiff company is the sole controller of it. X applied for a licence to import Australian laces and ribbons. The application was unsuccessful. After a few years, he personally applied for the license and this time he was successful. The Court would hold X liable for diversion of business opportunity as the opportunity was of the business.

8.2. The obligation not to undermine the company

Under these criteria the director is aware that an opportunity has been identified by the company or a type of opportunity has been identified for the company's acquisition or continued retention, but he acquires it personally.[144] Such opportunities are corporate opportunities. Scott describes these as *"maturing business opportunities which the company is actively pursuing."*[145] Between this obligation and the duty to explore an opportunity, there may, on occasions, be a possible overlap. For example, X is the director of a gas company which has entered into multiple franchise and distribution agreements. In the said case, the gas company and not X acquires the renewal. It is X's responsibility to ensure that the company's chances of obtaining the renewal are not jeopardized. It is necessary for X and the directors of the gas company to abstain from directly pursuing the renewal. Scott observes that a director while still being the director of the company cannot negotiate with the company's supplier to switch an existing supply contract to himself.[146] The same was affirmed by the Court in *Thorrington v. McCann*.[147]

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[141] Scott (n 136).
[142] *Broz v. Cellular Information Systems, Inc* 673 A.2d 148 (Del. 1996), *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).
[143] *Vaishnav Shorilal Puri; Seaworld Shipping and Logistics Pvt. Ltd. v. Kishore Kundanlal Sippy* [2004] 120 Comp Case 681 (Bom).
[144] *Guth v. Loft,* 5 A.2d 503, 510 (Del. 1939).
[145] Scott (n 136).
[146] *Holden v. Architectural Finishes Ltd*. (1996) 7 NZCLC 260,976 (Holden).
[147] *Thorrington v. McCann* (1198) 8 NZCLC 261,025. There the opportunity was the lease of a tavern. McCann was offered the lease. Needing financial assistance to acquire and exploit this opportunity. McCann formed a company with Thorrington. Both were directors, but management was left solely to McCann. The tavern was a financial success. The company had a right to renew the lease. but McCann advised the lessor that the company would not exercise it. He then formed a new company; and that company acquired the new lease. The Court considered that this change arose because McCann became "disenchanted" with the company structure, in

8.3. Obligation to pass on the opportunity

A director may become acquainted with a possibility of acquiring a business opportunity through a third entity unrelated to the business. If a third party contacts the director because of his/her position in the business (the director being merely an intermediary for the company), the obligation to pass-on an opportunity state that the opportunity is of the company's.[148]

The prohibition against a fiduciary using information obtained in the course of that relationship for personal benefit is reflected in this duty, which may seem less recognizable than the earlier duties. The same has been affirmed by the Court in *Guth*[149]. In that case, the Court declared that a pertinent factor for the line-of-business test is the "capacity" in which the corporate trustee learns of the opportunity.[150]

8.4. Obligation to surrender a suitable opportunity

The rulings by English and UK Courts as examined in Part 2 and 3 show how courts have acknowledged that some executives must be on the watch for opportunities that will benefit the business. This obligation reflects that recognition. Before, exploiting any business opportunity, a director who is liable to this obligation must acquire the company's informed consent.[151] It makes no difference how the director hears about the opportunity.[152] The professionalism, growth and entrepreneurial spirit of some leaders especially executive directors is reflected through this obligation.

Bullar[153] and *Guth*[154] are consistent with this obligation. In the former, the director learned of this opportunity while going bowling. Scott, taking inspiration from *Guth*, proposes that a corporate opportunity for senior executives is an opportunity to engage in a business activity that he/she becomes aware of and has knowledge that it is closely related to a business that the company is involved or intends to engage.[155] Although the obligation pertains to all opportunities, US and English case law indicate that it only applies to a small number of

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particular the share of the return going to Thorrington. In these proceedings, Thorrington successfully sought leave to commence a derivative action against McCann; the Court considered that McCann had fused his fiduciary position as a director to secure his own advantage.

148 Scott (n 136)

149 *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).

150 *Ibid.*

151 Scott (n 136).

152 Scott (n 136).

153 *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] BCC 711

154 *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).

155 Scott (n 136).

directors, such as senior executive directors.[156] However, as *Bhullar* demonstrates, in smaller family businesses, this duty may apply to all directors.[157] This duty is also subject to another restriction. For the business to take advantage of the opportunity, it must be appropriate. The suitability criteria are analogous to the line-of-business test proposed in *Guth*. The experience of the United States indicates that this restriction is difficult to establish. For example, US courts do not view a company's current business operations (i.e., its field of business) as restricting the possibilities that it may desire to (and can) exploit other opportunities. As stated by the Court in *Guth, 'latitude should be allowed for development and expansion" and "to deny this would be to deny the history of industrial development.*'[158]

It is a factual enquiry to determine whether an opportunity is appropriate. Nonetheless, an opportunity is likely to be appropriate if: (i) is of a type that the company exploits,[159] (ii) is of a type that the company was established to pursue,[160] (iii) is of a type that the company has identified as of interest to it,[161] or (iv) it comes within its strategic plan for expansion.[162] Since the business has recognized the opportunity, these circumstances are straightforward.

The question that still needs to be addressed is assuming that an opportunity belonging to the company is relinquished by the corporation, then under what circumstances could the officer or director take the opportunity for himself?

In practice, it is well-known that disclosure and consent by the board would be inadequate for a director to take the corporate opportunity by himself. The rationale is that the director who is also a board member could collude with the board leading to the board agreeing to surrender an opportunity to one of its members, who would then take part in the grant of an opportunity to another board member and so on. As held in *Furs v. Tomkies,* it is a rule of general prudence that only consent by the board for an officer taking of a corporate opportunity would be insufficient to protect the officer from liability and shareholders' approval in the general meeting would be mandatory for the officer to be absolved of any liability towards the corporation.

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156 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 (Birmingham Assize) (*IDC v Cooley*).
157 Bhullar (n 83).
158 *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).
159 *Industrial Development Consultants v. Cooley* [1972] 2 All ER 162.
160 *Ibid.*
161 A senior executive owes a fiduciary duty to a company and these duties are analogous to those owed by directors *see Canadian Aero Services Ltd. v. O'Malley* (1973) 40 DLR (3d) 171 (SC Can) (*"Canaero"*).
162 *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).

Another pertinent question that arises is that: Couldy a director, who seeks permission to undertake the corporate opportunity and is also a shareholder himself or herself, vote their shares? In the case of *North-West Transportation Co Ltd v. Beatty,*[163] it was held that a fiduciary responsibility is not owed by the director when acting in a capacity as a shareholder and therefore he could participate as well as vote on the proposal for the corporate opportunity which would validate his conduct that would otherwise be in violation of his breach of duties. Austin, Ramsay, and Ford argue that such a precedent still stands. However, the Court in *North-West Transportation,*[164] held that the taking of the corporate opportunity by the director 'should not be fraudulent or oppressive to the shareholders who oppose the proposal.' Self- condonation by the director through the exercise of his voting power and rights on the said proposal for taking the corporate opportunity would be oppressive unless it is unanimously approved by all shareholders, that they are willing to let the director take the corporate opportunity for himself. The Court in *Cook v. Deeks*[165] held that the approval at the general meeting by shareholder directors who held 75% of the shares in the company for diversion of corporate opportunity to another company set up by them would be a breach of their fiduciary duty. They would be liable to surrender the profits so earned from the diverted opportunity to the company. Austin, Ramsay, and Ford argued that a better approach that the Courts adopt should be that any vote by shareholders authorising taking of a corporate opportunity by a director should be only by disinterested shareholders only, and no director who is seeking an authorisation for diversion of corporate opportunity should be allowed to vote on his/her shares.

IX. CONCLUSION

The legal framework in India is not fully established in relation to the specific issue of a director taking advantage of a business opportunity. The lack of engagement of Indian Courts with the law on the doctrine of corporate opportunity needs to be remedied. The authors have comprehensively covered the jurisprudential underpinnings of the director's fiduciary obligation to the corporation across jurisdictions. The authors have attempted to analyse and examine the theoretical models that have been adopted by Courts in the United States especially in Delaware and the United Kingdom to deal with the issue of corporate opportunity. The authors have analysed the line of business test adopted in *Guth* and expanded by the Court in

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[163] *Beatty v. North-West Transportation Co.* 12 SCR 598.
[164] *Ibid.*.
[165] *Cook v Deeks* [1916] UKPC 10.

Broz. The holding of *Bhullar*, in which the Court used a rigid approach, is contrasted with the pragmatic approach taken by the Court in *Foster Bryant*. The Bombay High Court in the case of *Vaishnav Shorilal Puri* has quoted the strict English approach but has adopted the pragmatic American approach. However, this approach adopted by the Court is problematic because it relies upon various jurisprudence from different countries without relying on its own codified laws, particularly Section 166(4) of the Companies Act, 2013. The Indian Judicial system has the resources it needs to develop decisions that are both commercially viable and legally justifiable by expanding the scope of Section 166(4). India while adopting conventional concepts and rules which can offer a solid framework for decision-making and problem-solving, adhering to them too strictly might have detrimental implications. It may be possible to achieve better outcomes by being open to new approaches and considering the aforementioned recommendations as well as the current principles stated in Section 166(4).