

A critical exploration of the fiduciary duties of a director to act in good faith and for a proper purpose in respect of a company and an evaluation of the developments from common law to statute.

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ABSTRACT

The subject of fiduciary duties of directors is viewed as a cornerstone of modern company law. The subject of fiduciary duties of directors is of paramount importance as directors have an abundance of discretionary powers that has far reaching consequences for the company itself and society in general.

This study aims at understanding and exploring fully the fiduciary duties of a director of a company to act in good faith and for a proper or permissible purpose. The study seeks to explore these two fiduciary duties in terms of the common law as well as statute being the Companies Act¹ (2008 Act). The study goes on to explore the relationship between the extensive common law on the subject of fiduciary duties and the now partial codification of these duties in section 76(3)(a) of the 2008 Act and articulates the current extent to which the common law is still relevant.

This subject has been explored extensively in the past, however, this study seeks to revisit the subject from a new angle and explore the connection between the common law and the now partially codified version of the fiduciary duties of directors. This study also seeks to supplement the chasm in the existing literature regarding the fiduciary duty of a director to act for a proper purpose.

Finally, this study aims at fully interpreting the primary duty of a director to act in good faith and for a proper purpose so as to assist directors in understanding what is expected of them and thus resulting in mitigating the negligent breaching by directors of companies their fiduciary duties. Further, this study will set down the current position of the relationship between the common law and statute in terms of modern company law.

¹ 71 of 2008.

1. CHAPTER ONE: INTRODUCTION

1.1 Background to the study

The duties of directors has been a difficult yet fundamental area of company law in the past and even more so today. The old Companies Act²(1973 Act) did not set out clear and concise rules pertaining to directors duties and thus the common law was utilised extensively in this respect to help establish ground rules for the duties of directors.³ The 2008 Act, however, has partially codified these duties in section 76(3) of the 2008 Act. It must be noted, however, that the 2008 Act only partially codified the duties of directors and the common law still applies. Therefore the statutory provisions and the common law operate in tandem.

There are two main categories of duties that a director owes in respect of the company, there are fiduciary duties which are largely based in common law and secondly the duty of care and skill that is not classified as a fiduciary duty but a separate category on its own.⁴ The fiduciary duties that the directors owe in respect of the company entail that the directors act in the utmost good faith and the best interest of the company. These duties are derived from the fiduciary relationship that exists between the directors of the company and the company itself.⁵ There are many different duties that fall under the category of fiduciary duties, such as the duty to act bona fide, the duty to act for a proper purpose, the duty to avoid conflicts of interest and the duty not to use a corporate opportunity and information for personal profit.

The duty of care and skill, however, operates as a separate measure that holds a director liable for negligent conduct and is thus a protective measure against the abuse of power that directors possess.⁶ Whilst the directors of a company are carrying out their duties they have to abide by the required degree of care and skill. The required degree is difficult to determine, however, it is possible to determine ‘care’ objectively but ‘skill’ remains subjective in nature.⁷

² 61 of 1973.

³ MM Botha “ The role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective” (2009) 30(3) *Obiter* 706.

⁴ N Bouman “An Appraisal of the Modification of the Director’s Duty of Care and Skill”. (2009) 21 *SA Merc LJ* 509.

⁵ *Ibid.*

⁶ *Ibid* 510.

⁷ *Ibid* 510.

This study however will not focus on all the duties of a director but will focus on two specific fiduciary duties of a director, these being the duty of a director to act in good faith or *bona fide* and secondly, the duty of a director to act for a proper or permissible purpose.

As aforementioned the fiduciary duties of a director entails that the director act in good faith and in the best interest of the company.⁸ The director is in a fiduciary relationship with the company and this means he is in a trustee-like position and must thus act *bona fide*. In terms of the common law, the duty of a director to act in good faith, or *bona fide*, is the principal and most fundamental fiduciary duty from which all other fiduciary duties are derived.⁹ These duties are codified in s76(3)(a) of the 2008 Act. The duty of good faith is rooted in honesty and thus is subjective in nature.¹⁰ This principle thus requires that the director act in what he genuinely believes to be the best interest of the company.¹¹ The duty of good faith requires that the director apply his mind to the decision and then perform his duties in what he honestly believes to be in the best interest of the company.

The statutory provision of s76(3)(a) links the duty of good faith with the duty to exercise his powers for a proper purpose.¹² Thus it is not enough for a director to act in what he believes to be the best interest of the company he must also act for a proper purpose.¹³ Therefore it can be deduced that the director must subjectively have acted in what he honestly believed was the best interest of the company whilst still he must have objectively exercised his powers for a proper purpose.¹⁴

A director when exercising his duty for a proper purpose ultimately entails that the director must act for a purpose of which the powers were given,¹⁵ in other words the director cannot misuse or abuse the powers that they were given for an improper purpose¹⁶. Therefore if directors use their powers for a purpose other than which it was conferred on them it will be regarded as an abuse of their powers¹⁷ and it would thus be a breach of the duty to act for a proper purpose. The principles behind ‘exercising one’s duty for a proper purpose’ has been

⁸ Botha(see note 3;706).

⁹ FHI Cassim...et al. *Contemporary Company Law*. 2nd ed. (2012) 523.

¹⁰ *Ibid* 524.

¹¹ *Re Smith & Fawcett Ltd* 1942 1 ALL ER 542.

¹² Cassim (see note 9; 524).

¹³ *Ibid* 525.

¹⁴ *Ibid*.

¹⁵ JJ Du Plessis “Director’s Duty to use their powers for Proper or Permissible Purpose” (2004) 16(3) *SA Merc LJ* 315.

¹⁶ *Ibid* 310.

¹⁷ Cassim(see note 9;525).

described as a mechanism the courts utilise to limit the discretionary powers conferred onto directors.¹⁸

This study will explore the fiduciary duties of a director to act in good faith and for a proper and permissible purpose in terms of common law and statute. The study will also determine any developments and changes since the partial codification of the duties of directors in section 76(3)(a) of the 2008 Act. This study will also evaluate how the common law and statute work in respect of each other and whether this has an impact on the duties of directors in respect of these two particular fiduciary duties, being the duty of good faith and to act for a proper or permissible purpose.

1.2. Statement of Purpose

The fiduciary duties of directors is an important aspect of company law as the directors of companies have as their primary or fundamental duty, the duty to act in good faith and the best interest of the company.¹⁹ The problem however, comes in with the fact that the duties of directors have been partially codified in s76(3)(a) of the 2008 Act and although the common law is still relevant the question is to what extent.

There is a great deal of academic writing on the subject of the duties of directors, however, no recent discussion evaluate the changes from common law fiduciary duties to the new partial codification in the 2008 Act. Further, Du Plessis argues that although there is academic writings on general duties of directors there is a definite short fall of academic writing pertaining to the duty of a director to act for a proper or permissible purpose.²⁰

Furthermore, another criticism lies in the fact that directors are ignorant of their duties and this ignorance will usually lead to a breach of these duties. It must be noted that once a person accepts the office of a director they automatically and immediately enter into a fiduciary relationship with the company and thus need to know what is expected of them. Director's ignorance as well as negligence has devastating repercussions for the governance and running of the company. Therefore a good understanding by directors of their duties will only mitigate against any negligence or breach of duties that may occur as a result of not knowing what is expected of them.

¹⁸*Ibid.*

¹⁹ *Ibid* 523.

²⁰ Du Plessis(see note 15;308).

Therefore the topic of my dissertation aims at filling the chasm in the academic literature on the topic of the fiduciary duty to act in good faith and for a proper purpose focusing on evaluating any change or developments from common law to the now partial codification in section 76(3)(a) of the 2008 Act as well as clarifying the meaning of and the interpretation of these two fiduciary duties.

1.3. Research Purpose and Research Questions

Research purpose

The purpose of this study is to examine the fiduciary duties of directors to act in good faith and for a proper purpose in respect of modern Company law and to evaluate how these duties have evolved from common law to the now partial codification in statute²¹. This dissertation will not look at the other fiduciary duties but is limited and focuses on the duty to act in good faith and for a proper purpose.

This study aims at understanding and exploring fully the fiduciary duty of a director to act in good faith and to act for a proper purpose, looking at the views and interpretations that are considered by the academics in this field and well as the courts view's and interpretations. Further, this dissertation aims at looking at the developments or changes from common law fiduciary duties to the partial codification in the 2008 Act. This dissertation will also explore any relevant case law on this topic.

Research Questions

1. Which director's owe a fiduciary duty of good faith and to act for a proper or permissible purpose in respect of the company?
2. What is a fiduciary?
3. What is the duty of good faith and what does it entail for a director?
4. What is the duty to act for a proper or permissible purpose and what does this entail for the director?

²¹ S76(3) of the 2008 Act.

5. Where are these two duties derived from and how do these sources operate in relation to each other?
6. How does the partial codification of the common law duties affect the interpretation of these two duties and does the common law still apply?

1.4. Rationale for the Study

The rationale behind this study is firstly, to fully explore and understand the fiduciary duties of a director to act in good faith and for a proper purpose, so that it may clarify any confusion or misconception of what is expected of a director of a company in respect of these two primary duties.

Secondly, there is a great deal of academic literature on the fiduciary duties of directors, however, this does not focus on the development or interpretation of these duties since the partial codification in the 2008 Act which is an aspect on which my dissertation focuses. There is also a lack of academic writing and commentary on the duty to act for a proper or permissible purpose which my study will aim to supplement.

The 2008 Act as a whole is fairly new and any further investigation into it will add onto the understanding of the Act, especially to a significant aspect such as the fiduciary duties of a director.

Furthermore, directors play a fundamental role in the running and management of the company, thus a better understanding of their duties will only aid in providing a solid foundation of what is expected of them which will lead to better and more innovative corporate governance. The fiduciary duty of a director to act in good faith and for a proper purpose is not only linked in respect of the 2008 Act in terms of s76(3)(a) and (b) but is seen as the most fundamental and primary duty that a director owes to a company and thus to have a clear understanding of what this entails will only assist directors in understanding what is required of them as well as the perimeters of their powers.

Finally, directors acting negligently, either unconsciously or consciously, in respect of their duties, is a common and ever growing problem in modern company law and by giving a clear and concise understanding of directors duties will help to mitigate against this problem. It will prevent directors from acting negligently as they will know exactly what is expected of

them as well as highlighting what they cannot do, thereby eradicating the unconscious negligent breach of their duties due to ignorance.

1.5. Research Methodology and Theoretical Framework

The methodology followed in this study is based on desktop research and thus comprises mainly on the understanding and exploration of the literature on the subject of director's fiduciary duties focusing on the specific duties of good faith and to act for a proper purpose. This study will entail a thorough exploration of the literature on this topic and will include periodicals, journals, textbooks, case law and internet sources.

A qualitative approach will be utilised throughout this study that will explore both the common law and partially codified version of duties of directors focusing specifically on the fiduciary duty of a director to act in good faith and for a proper purpose.

The study will fully explore what these two fiduciary duties entail looking at common law and statute, there will also be a historical element that will be explored during the course of this study that will look at explaining the significant changes and developments of the fiduciary duties of a director which is largely grounded in English law.

There will also be a descriptive element to the study which will explain the duties of directors to act bona fide and for a proper or permissible purpose looking at the common law and statute as well as significant developments as established in case law and by academics in the field of modern company law.

The final stage of this study will sum up concisely and clearly what was discussed in all five chapters and highlighting any noteworthy and central issues that have been identified as well as any developments since the partial codification of directors duties in s76(3) of the 2008 Act. It will also include any criticisms of the new developments or shortfalls with the partial codification. Finally, this final stage will also set down how the common law and statute work in respect of each other and how it has affected the interpretation or meaning of the fiduciary duties of a director to act in good faith and for a proper purpose in modern company law.

Theoretical Framework

This dissertation will be examined largely from the position of a legal positivist. This is because this thesis only examines the law as it currently stands in terms of statute and common law and the discussion is limited to what is the written law and the interpretations and views that is taken by the courts and leading academics in the field. This dissertation will not involve any evaluation or exploration into morality or the ‘rightness’ of the law but is concentrated on the law itself as it stands now. Thus this dissertation is limited to the interpretation and evaluation of the common law and statute as it is written and interpreted by academics in this field and the legal meaning and principles set down by the courts.

1.6. Structure of Dissertation

The next chapter will look at the definition of ‘director’ in terms of the 2008 Act. It will identify which directors owe a fiduciary duty to the company and what exactly this entails. It will also explain what a fiduciary is and what is meant by a fiduciary relationship and how this operates in respect of directors and their companies. Chapter two (2) will also distinguish between a ‘fiduciary’ and a ‘trustee’ as these two concepts are often used to illustrate the nature of a fiduciary relationship.

Chapter three (3) will look at where these two fiduciary duties are derived from looking at the history and relevance of the fiduciary duty. This chapter will then look at the new partial codification of these two duties in s76(3) of the 2008 Act and what it entails. Finally, this chapter will look at how the common law and the 2008 Act work in relation to each other and the implication of the partial codification, if any. This chapter will also discuss any relevant developments or criticisms since the partial codification looking at any relevant case law or academic opinions.

Chapter four (4) will focus on the fiduciary duty of good faith. This chapter will fully explore what this duty entails taking into account common law and the now partially codified fiduciary duty of good faith in section 76(3)(a) of the 2008 Act. This chapter will also look at any well-established principles in terms of the long standing common law as well as noteworthy judicial decisions. Finally, this chapter will explore the link between the duty of good faith and corporate governance in modern company law.

Chapter five (5) will then go on to explore the duty of a director to act for a proper or permissible purpose and what this entails in terms of both common law and statute. This chapter will also look at any problematic areas and relevant case law in relation to this fiduciary duty.

Finally, chapter six (6) will seek to bring the exploration of these two fiduciary duties to a close by recapping what was discussed and finally concluding on what was observed from the discussion and then explain the present legal position in respect of these two duties as well as the position in respect of the development from common law to statute. This chapter will also discuss the contribution that this study has to the existing academic body of work.

2. CHAPTER TWO: DIRECTORS AND THE MEANING OF FIDUCIARY

Directors have a fundamental role to play in respect of a company. They are responsible for the strategic decisions as well as the management of the company. Due to the power the directors have in respect of a company there are specific duties that are placed on directors to ensure that these powers are not abused and are utilised in the best interest of the company. This chapter will explore what it means to be a director as well as who is recognised as a director in terms of the definition of a director in section 1 of the 2008 Act. This chapter will also examine the meaning of a fiduciary and how fiduciary duties applies to directors of companies.

2.1 The Nature of a director and the relationship in respect of the company

Every company has a board of directors and these directors are elected by the shareholders of a company. Section 66(1) of the 2008 Act states that the board of directors manage the company. It must be noted that whilst a director may also be a shareholder he is not managing the company in a dual capacity but in fact is a “wearer of many hats” and when managing the company he acts in his capacity as a director only. Shareholders have no authority to manage the company. Thus the role of a director is fundamental to a company.

The 2008 Act defines a director as-

‘a member of the board of a company...and includes any person occupying the position of director or alternate director, by whatever name designated’.²²

It must be noted that the term ‘board’ used in this definition refers to a ‘board of directors’ and refers to the instance where the directors of a company act collectively.²³ Where a board of directors act within the scope of their powers this is taken to be an act of the company itself and not merely the act of a company’s agent or representative; thus this is expressed by saying the board of directors are in fact an organ of the company not simply an agent of the company.²⁴

²² S 1(1) of the 2008 Act ‘director’

²³ RC Williams *Concise Corporate and Partnership Law*. 3ed. (2013) 150.

²⁴ *Ibid*.

The main function of a board of directors is to make the prime decisions regarding the management and long term strategic developments of the company.²⁵ These decisions are then carried out by the employees of the company.²⁶

Generally the board of directors are not liable for the debts of the company because a company has its own legal personality, however, directors may be liable for the debts of the company in three instances: firstly where it is stated that the directors will be liable in the memorandum of incorporation in terms of s19(2) of the 2008 Act; secondly, where the company is a personal liability company in terms of s8(2)(c) of the 2008 Act and finally, where the common law or the 2008 Act calls for the lifting or piercing of the corporate veil in terms of s19(3).

There are various types of directors and they have various functions within a company. A managing director plays two roles, one as a director of the company and one as the manager of the company; thus he is both a director and employee of the company.²⁷ It must be noted, however, that generally directors are not employees of a company, there is no contract of employment unless they have a dual capacity as in a managing director, in which the person acts as a director and an employee of the company but not simultaneously.²⁸ In other words the managing director will act in his capacity as a director when acting with the board but as a manager in the daily running of the business. Furthermore, directors do not act under the instructions of an employer as in the case of an employee.²⁹ There is an exception to this however, if the director is an executive director which means there is a contract with the company to work full time for the company, an example of this would be a managing director.

There is no distinction drawn between an executive and non-executive director in the 2008 Act, however, in practise they are often distinguished from each other.³⁰ An executive director is someone who works on a permanent basis for the company whilst a non-executive

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid* 151.

²⁸ *Ibid* 154.

²⁹ *Ibid* 153.

³⁰ *Ibid* 154.

director is someone whose duties comprise of attending sporadic meetings with the board of directors.³¹ In *Howard v Herrigel*³² the court held that-

‘it is unhelpful and even misleading to classify company directors as ‘executive’ or ‘non-executive’ for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts appointment as a director, that person becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf’.³³

A *de facto* director is not a term found in the 2008 Act however, it refers to a person who performs the functions of a director without holding the office of director in terms of law.³⁴ A *shadow director* again is not found in the 2008 Act however, it refers to a person who is not appointed as a director but whose direction and instruction is often followed by the actual board of directors.³⁵ A *de facto* director acts openly as if he is a director of the company whilst a shadow director is a third party who secretly exerts influence on the board of directors in breach of their fiduciary duties.³⁶ A shadow director causes the board to breach their fiduciary duties because the directors are meant to bring an independent mind to every issue regarding the company and act in accordance with what he genuinely believes to be the best interest of the company.³⁷ Thus, by being influenced by the shadow director the board of directors act as his “puppet” and merely follow his instructions without fulfilling their duties as a director and applying their own mind to the matter, therefore breaching their fiduciary duty to the company.³⁸

Williams has submitted that some doubt is expressed in respect of whether a *de facto* director and a shadow director fall within the ambit of the definition of a director in terms of the 2008 Act.³⁹ As aforementioned the 2008 act defines a director as:

‘a member of the board of a company...and includes any person occupying the position of director or alternate director, by whatever name designated’.⁴⁰

³¹ *Ibid.*

³² 1991 (2) SA 660 (A).

³³ *Howard v Herrigel Supra.*

³⁴ Williams(see note 23; 152).

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Cassim(see note 9; 525).

³⁸ Williams (see note 23;152).

³⁹ *Ibid* 153.

Williams argues that this definition is broad enough to include a *de facto* director however, does not include a shadow director due to the fact that a shadow director does not ‘occupy a position’.⁴¹ It must be noted however, that the act goes on to say that-

‘a person becomes a director when that person has been appointed or elected or holds office, title or designation or similar status that entitles that person to be an ex officio director of the company’⁴²

Williams thus submits that the definition in the 2008 Act is broad enough to include that of a *de facto* director but not broad enough to include that of a shadow director.⁴³

In contrast to this Cassim describes the definition of a director in the 2008 Act as ‘*open-ended, non-exhaustive definition of a director which is both tautologous and unhelpful*’⁴⁴

Cassim goes on to criticise the definition in section 1 of the 2008 Act arguing that the definition is inadequate because all that it does is allows certain people to be categorised as directors even if they are described under different names or designations.⁴⁵ Finally, Cassim argues that the definition of director is so broad that it encompasses most types of directors including executive and non-executive directors, nominee directors and alternate directors as well as *de facto* and shadow directors.⁴⁶

Therefore although Williams also finds the definition of director in section 1 of the 2008 Act problematic he submits that the definition is not broad enough to include a shadow director as a shadow director does not “occupy a position” as required by the definition.⁴⁷ In contrast Cassim argues that the definition is broad enough to in fact include a shadow director.⁴⁸ Cassim explains that this is because if the board is allowed to act in accordance to the advice or direction of a third party, this third party may be regarded as ‘occupying the position of a director’.⁴⁹ Thus Cassim argues that a shadow director falls within the ambit of the act as the legislature failed to adopt s1(2) of the 1973 Act which excluded from the definition of a director a third party that gives advice or instructions to the board in a professional capacity. Thus it is argued that the definition director in section 1 of the 2008 Act is wide and open-

⁴⁰ S 1(1) of the 2008 Act ‘director’

⁴¹ Williams (see note 23;153).

⁴² S66(7) of the 2008 Act.

⁴³ Williams(see note 23;153).

⁴⁴ Cassim(see note 9;509).

⁴⁵ *Ibid* 510.

⁴⁶ *Ibid*.

⁴⁷ Williams(see note 23;153).

⁴⁸ Cassim(see note 9;510).

⁴⁹ *Ibid*.

ended which results in almost all types of directors to fall within the ambit of the definition and be subject to the fiduciary duties of a director.⁵⁰

It must be noted however, that the fiduciary and statutory duties are not limited to directors only but also encompass senior employees and senior managers of the company.⁵¹ The 2008 Act also extends these fiduciary and statutory duties to prescribed officers⁵² and members of the audit committee or board committee even if they are not members of the board of directors in terms of section 76(1)(a) and (b) and even if they are entitled to vote at board level.⁵³ The reasoning behind this inclusive approach is that board committees and particularly audit committees play a central role in the functioning of corporate boards and thus the fiduciary and statutory duties should similarly extend to these members of the board committees and audit committees as they do with directors.⁵⁴ A direct result of this inclusive approach is that non-directors are forced to bear the weight of onerous duties being placed on them although they have no decision making power. In *Robinson v Randfontein Estates Gold Mining Co Ltd*⁵⁵ Bristowe AJ stated ‘*For as his power grew so his responsibility grew also*’ however, under section 76(1) (a) and (b) of the 2008 Act there is a result of greater responsibility being placed on persons with no power.⁵⁶

Therefore when referring to the duties of directors, it must be noted that ‘directors’ is applied in a broader sense than expected due to the wide and open-ended definition of director in section 1 of the 2008 Act.⁵⁷

⁵⁰ *Ibid.*

⁵¹ Laskin J in *Canadian Aero Service Ltd v O’Malley* (1973) 40 DLR (3d) 371 (SCC) 381; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA).

⁵² Section 1 of the 2008 Act describes prescribed officers as ‘the holders of an office within a company that has been designated by the minister in terms of s66(10). Regulation 38 of the Companies Regulations provide that a prescribed officer is person who exercises general executive control over management of the whole or significant portion of the business and activities of a company, or a person who regularly participates to a material degree in the exercise of general executive over the management of the whole, or significant portion of the business and activities of the company. The definition of prescribed officers is meant to identify persons who are involved in the management and running of the company.

⁵³ Cassim(see note 9;511).

⁵⁴ *Ibid* 512.

⁵⁵ 1921 AD 168 at 266.

⁵⁶ Cassim(see note 9;512).

⁵⁷ W Geach “Statutory, Common law and other Duties of Directors” (2009) *Paper for the CIS Corporate Governance Conference*. 5.

2.2 The meaning of fiduciary and the significance of it in respect of directors of a company

The fiduciary duties of a director is based on good faith, loyalty and an avoidance of any conflicts of interest.⁵⁸

A fiduciary is defined as-

‘a person in a position of trust or occupying a position of power and confidence with respect to another, such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect’.⁵⁹

Many persons may be classified as fiduciaries including trustees, agents, directors and attorneys. The content of this duty however, is not set and may vary depending on the nature of the relationship and purpose of the relationship between the parties.⁶⁰

In *English v Dedham Vale Properties Ltd*⁶¹ Slade J held that the various categories of fiduciary relationships is never closed and that fiduciaries are not limited to a fixed number of defined relationships.

In the case of *Phillips v Fieldstone Africa (Pty) Ltd*⁶² it was held that the fiduciary duty of a director is a question of fact that needs to be deduced from considerations of the nature of the relationship as well as other relevant factors or circumstances.⁶³

Each director owes a fiduciary duty to the company in his own capacity although the board of directors acts collectively.⁶⁴ When a person is in a fiduciary relationship this entails that the person in question act in with the utmost good faith in respect of the other party.⁶⁵ A fiduciary relationship is comprised of trust and confidence.⁶⁶ A fiduciary is someone who acts on behalf of and in the best interest of the other person.⁶⁷ In *Bristol and West Building Society v Mothew*⁶⁸ the court held that a fiduciary is a person who acts for or on behalf of another person that gives rise to a relationship of trust and confidence between the parties.

⁵⁸ Cassim(see note 9;509).

⁵⁹ The Oxford Companion to Law.

⁶⁰ Cassim(see note 9;512).

⁶¹ 1978 WLR 93 (ChD) 110.

⁶² 2004 (3) SA 465 (SCA).

⁶³ 2004 (3) SA 456 SCA at 477.

⁶⁴ Williams(see note 23;158)

⁶⁵ *Ibid* 157.

⁶⁶ Cassim(see note 9;512).

⁶⁷ *Ibid*.

⁶⁸ 1998 Ch1 at 18.

It has been noted that generally in a fiduciary relationship one party is at the mercy of another party's discretion.⁶⁹ In the case of *Hospital products Ltd v United States Surgical Corporation*⁷⁰ the court stated the following-

‘.. a fiduciary relationship may arise because on the facts a person has been appointed to act for the benefit of another whose appointment carries power that could be exercised to the detriment of another. A fiduciary has a special opportunity to exercise power or discretion to the detriment of another, who is vulnerable to abuse by the fiduciary.’

The court held further that the crucial feature of fiduciary relationships is that the fiduciary undertakes to act for or on behalf and in the interests of another in the exercise of power and discretion that will resultantly effect the interests of the other person.⁷¹

The duties of directors are divided into two broad categories, firstly the fiduciary duties of honesty, good faith and loyalty and the second category of duty to act with care and skill. It must be noted that the second category of the duty of care and skill is not a fiduciary one but a general duty imposed on directors to curtail negligence.⁷²

When a person is in a fiduciary relationship with that of another he is under a legal duty to act in the utmost good faith in respect of that person.⁷³ A director's fiduciary duties are divided into various headings, however, this study focuses on two main duties which are the duty to act *bona fide* or in good faith and secondly the duty to act for a proper or permissible purpose. It must be noted that if a director breaches this fiduciary duty that he owes to the company he will be liable to the company for any damages it may have suffered as a result or the company may demand the director disgorge the profit made as a result of the breach of the fiduciary duty.⁷⁴

The general principle is that a director is a fiduciary of the company and thus has a primary duty to act in good faith and for the benefit of the company. This duty is inflexible in nature

⁶⁹ Cassim(see note 9;512).

⁷⁰ 1948 156 CLR 41 at 96-97 (HC of A); referred to with approval in *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009(4) ALL SA 497 (SCA).

⁷¹ *Hospital products Ltd v United States Surgical Corporation Supra.*

⁷² Williams (see note 23; 157).

⁷³ *Ibid.*

⁷⁴ Williams (see note 23; 157).

and strictly endorsed by the courts as was held in the case of *Parker v McKenna*.⁷⁵ The rationale behind this strict approach is to ensure that a fiduciary does not abuse his power⁷⁶.

2.3. To whom the Directors owe their fiduciary duty

Each director owes a fiduciary duty to the company individually and in his or her own capacity as a director.⁷⁷ This is true although the board of directors act collectively when making decision regarding the running and management of the company. Due to this fact a director may not attempt to avoid liability arguing that he or she merely went along with the collective decision of the board.⁷⁸

In the case of *Howard v Herrigel*⁷⁹ the principle was established that immediately upon a party accepting his appointment as a director he would become a fiduciary in respect of the company and thus is under a duty to act in the utmost good faith towards the company and in the company's interest when acting as an agent of the company.⁸⁰

The fiduciary duty that directors owe is in respect of the company. This principle was illustrated in the landmark decision of *Foss v Harbottle*⁸¹ which became known as the *proper plaintiff rule* and states that where a company has suffered a wrong, the company itself will be the proper plaintiff. This is because the company has suffered the wrong therefore the company itself has the *locus standi* to sue.⁸²

Another case that illustrates that the fiduciary duties that a director owes is in respect of a company was illustrated in *Parke v The Daily News Ltd*⁸³ the facts in short are as follows: the Daily news Ltd was a company in which the board of directors decided to sell the entire company to a competitor arguing that they would take all the profit and divide it amongst the employees of the company. The shareholders of the company were upset and demanded a return on their shares. The board of directors contented that they were acting in the best interest of the company. The court rejected this contention arguing that it was nonsensical as

⁷⁵ 1874 LR Ch10 at 124-125.

⁷⁶ Cassim(see note 9;513).

⁷⁷ Williams(see note 23;158).

⁷⁸ *Ibid*.

⁷⁹ *Howard v Herrige Supral*.

⁸⁰ *Howard v Herrigel Supra*.

⁸¹ 1843 67 ER 189.

⁸² *Foss v Harbottle Supra*.

⁸³ 1962 ch927.

the company was going out of existence thus it could not be in the best interest of the company. The court went on to add that the directors argument that they owed a duty to the employees of the company as well could not be accepted as the fiduciary duty that the directors owe in in respect of the company and indirectly in respect of the shareholders.⁸⁴

The aim of directors is to see the success of the company and the collective best interests of the shareholders of the company. In *Cohen v Segal*⁸⁵ the court held that the directors of a company occupy a fiduciary position towards the company and thus must act in good faith solely for the benefit of the company and no ulterior motives.⁸⁶

Millet LJ made a profound statement in respect of directors' fiduciary duties in *Bristol and West Building Society v Mothew*⁸⁷ -

‘The distinguishing obligation of a fiduciary is the obligation of loyalty. The principle is entitled to the single- minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third person without he informed consent of the principle. This is not intended to be an exhaustive list, but is sufficient to indicate the nature of the fiduciary obligations. They are the defining characteristics of a fiduciary.’⁸⁸

In the UK and USA there is a new developing trend that impose the fiduciary duty towards shareholders as well however, this is not yet set in South African law.⁸⁹ The modern thinking by academics now is that directors do not only owe a fiduciary duty in respect of the company and shareholders indirectly, but owe a duty to society at large by way of preventing pollution or harm to the environment.⁹⁰

2.4. Directors versus Trustees

Fiduciary duties were derived from English law based on the relationship of loyalty and honesty that is similar to those encompassed by trustees.⁹¹ Directors are often associated or

⁸⁴ *Parke v The Daily News Ltd Supra.*

⁸⁵ 1970 (3) SA 702 (W) 706.

⁸⁶ *Cohen v Segal Supra.*

⁸⁷ *Bristol and West Building Society v Mothew Supra.*

⁸⁸ *Bristol and West Building Society v Mothew Supra*

⁸⁹ Williams(see note 23; 158).

⁹⁰ Williams(see note 23; 159).

⁹¹ Cassim(see note 9;513).

compared to a trustee, because both a director and a trustee are vested with the power to handle the affairs and manage the property of a third person.⁹² A fiduciary duty is often referred to as a trustee-like duty. The biggest similarity lies in the fact that both trustees and directors have to act in the utmost good faith in respect of their beneficiaries and company respectively. The difference, however, lies in the fact that a trustee must act conservatively and cautiously in his position whilst a director is encouraged to take risks.⁹³ In *Daniels v Anderson*⁹⁴ the court stated the following in respect of trustees and directors-

‘ while the duty of a trustee exercises a degree of restraint and conservatism in investment judgements, and that of a director may be to display entrepreneurial flair and accept commercial produce a sufficient return on capital invested.’⁹⁵

It should be noted that a director is not an employee of the company nor does he work under the instructions of another and he is obligated to applying his own mind to the issues at hand.⁹⁶ Therefore no matter the similarities of both trustees and directors a director is not a trustee. It is said that directors’ have trustee-like duties but directors are not trustees and their relationship in respect of the company is seen as being *sui generis*⁹⁷ in our South African law⁹⁸

The case that is often used to describe this trustee like duty is that of *Keech v Sandford*⁹⁹ which involved a trust in respect of a minor. In this case the trust was made up of one asset being a property that was being leased, the lease however, was coming to an end. The trustee asked the lessor to renew the lease in respect of the trust, the lessor refused but leased the property to the trustee in his personal capacity. The court held that the trustee was the only person who could not take up the lease as he learned about it by virtue of his position, thus he could not benefit without the consent of the minor which would be impossible. Thus the principle was established that similarly to trustees, directors too may not be permitted to take up opportunities for their own gain by virtue of his position unless the company has consented to this.¹⁰⁰

⁹² Williams(see note 23; 153).

⁹³ *Ibid* 156.

⁹⁴ 1995 16ACSR 607 (NSW).

⁹⁵ *Daniels v Anderson Supra*.

⁹⁶ Williams(see note 23;154).

⁹⁷ Meaning a distinct and unique independent category of a fiduciary relationship.

⁹⁸ Cassim(see note 9;513).

⁹⁹ 1726 EWHC Ch J76.

¹⁰⁰ *Keech v Sandford Supra*.

2.5. Conclusion

It is clear from this chapter that directors of a company are responsible for the fundamental decisions and the management of a company and that these decisions are then carried out by the employees of the company.¹⁰¹ Therefore although there are various types of directors and directors may also be employees of the company, as in the case of a managing director, the director wears more than ‘one hat’ and when acting with the board he only acts in the capacity as a director.¹⁰²

The 2008 Act recognises that directors are appointed into their position and that they act collectively as the board of directors when binding the company. Further, the definition¹⁰³ in the 2008 Act recognises a person who occupies the position of director by any alternate name thus Williams argues that due to this the definition is broad enough to recognise a *de facto* director but not a shadow director.¹⁰⁴ In contrast to this Cassim argues that the definition of director in section 1 of the 2008 Act is open-ended and wide enough to include most directors and does in fact include a shadow director as the legislature failed to include s1(2) of the 1973 Act which excluded a third party that gives advice or instructions to the board in a professional capacity. Therefore Cassim argues that a shadow director may fall within the ambit of the definition of a director in the 2008 Act. Overall however, the definition provided for in section 1 of the 2008 Act is problematic and is viewed as being too broad.

Upon a person being elected as a director the director immediately owes a fiduciary duty to the company to act in the utmost good faith towards the company.¹⁰⁵ This fiduciary duty applies to each director individually and applies in respect of a company and indirectly toward the shareholders as held in *Parke v The Daily News Ltd*.¹⁰⁶ A fiduciary relationship is based on loyalty trust and confidence and this is what directors’ owe to their company.

Finally, it must be noted that although trustees and directors are often compared and a fiduciary duty is seen as a trustee-like duty, there are some differences, the main being that

¹⁰¹ Williams(see note 23;150).

¹⁰² *Ibid* 152.

¹⁰³ S1(1) sv ‘director’.

¹⁰⁴ Williams(see note 23;153).

¹⁰⁵ *Howard v Herrigel Supra*.

¹⁰⁶ *Parke v The Daily News Ltd Supra*.

trustee are required to act conservatively whilst directors are encouraged to take business risks.¹⁰⁷

¹⁰⁷ Williams(see note 23;156).

3. CHAPTER THREE: THE ORIGIN OF THE FIDUCIARY DUTIES AND THE RELATIONSHIP BETWEEN THE COMMON LAW AND STATUTE

This chapter looks briefly at the origin of the fiduciary duties of directors to act in good faith and for a proper purpose. The chapter then goes on to focus on the relationship between the common law and the now partial codification of directors' duties in statute in terms of section 76(3)(a) of the 2008 Act. This chapter will also discuss any developments or changes since the partial codification of directors' duties in terms of section 76(3) of the 2008 Act. Finally the chapter will explore the current stance on the fiduciary duties of directors and how the common law and statute react in relation to each other.

3.1. Introduction

Our common law in South Africa is largely adapted from that of English law and other common wealth jurisdictions.¹⁰⁸ Prior to the 2008 Act director's rights and duties were derived mainly from contracts entered into with the company, the memorandum of incorporation, the articles of association and of course the extensively from the common law.¹⁰⁹ The common law and judicial decisions was thus previously the primary source of the fiduciary duties of a director.

As aforementioned the common law was influenced extensively by English law and English case law, it is said there are more reported cases regarding the fiduciary duties of directors than any other aspect of corporate law in South Africa.¹¹⁰ There is also a great deal of academic writing on the subject of fiduciary duties of directors¹¹¹ with the exception of the duty to act for a proper or permissible purpose, which my study aims to expand on. As a result of this a very expansive and well established common law has developed through the years in respect of the fiduciary duties of directors.¹¹²

¹⁰⁸ JS McLennan "Directors' Fiduciary Duties and the 2008 Companies Bill" 2009(1) *TSAR* 184.

¹⁰⁹ Bouman(see note 4; 509).

¹¹⁰ McLennan (see note 108;184).

¹¹¹ Du Plessis(see note 15; 308).

¹¹² McLennan(see note 108;184).

However, the 2008 Act has now partially codified the fiduciary duties of directors in section 76(3). This study is limited however to the specific fiduciary duties of a director to act in good faith and to act for a proper purpose and the discussion within this chapter will be limited to these two fiduciary duties only.

The common law duties of a director are referred to as the fiduciary duties of a director and is entrenched in good faith, honesty and loyalty.¹¹³ Fiduciary duties were derived from English law based on the relationship of loyalty and honesty that is similar to those encompassed by trustees.¹¹⁴ Fiduciary duties are of paramount importance to a well- structured and developed corporate law system.¹¹⁵

In terms of the 2008 Act the fiduciary duties of a director are ‘*mandatory, prescriptive and unalterable, and apply to all companies*’ and companies are unable to contract out of or exclude these duties by way of agreement.¹¹⁶ The fiduciary duties are preventative in nature, and thus another purpose behind them is to deter directors from abusing their office and the powers conferred upon them and offer a degree of protection to the company and the stakeholders.¹¹⁷

3.2. The Partial Codification of fiduciary duties of directors and the relationship between the statute and common law

The partial codification of directors’ fiduciary duties in section 76(3) of the act is a new and significant development in the 2008 Act.¹¹⁸ Emphasis must be placed on the fact that the 2008 Act has only partially codified the fiduciary duties of directors this means that it is not an exhaustive and fully codified body of rules.¹¹⁹

The 2008 Act does not expressly state that the statutory provisions do not substitute the common law provisions and thus the stance in terms of the interpretation of statutes, is that a statute “*will not unnecessarily amend the common law*”¹²⁰. Therefore it can be deduced that the legislature did not intend to amend or replace the common law in any way and it is simply

¹¹³ Cassim(see note 9;507).

¹¹⁴ *Ibid* 513.

¹¹⁵ *Ibid* 507.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ Bouman(see note 4;515).

a partial codification of the fiduciary duties.¹²¹ The current position in our South African Law can be described simply as-

“...the South African Companies Bill now contains statutory provisions dealing with the directors’ general duties and...these duties are comparable to director’s common law duties.”¹²²

The South African position therefore is that section 76(3) of the 2008 Act partially codifies the duties of directors but this does not replace or amend the common law in any way but in fact both the common law and the 2008 Act operate in tandem or as Cassim puts it “*in parallel*”.¹²³

The purpose behind partial codification of directors’ fiduciary duties is to install clarity and stability into the company law.¹²⁴ A survey done in England showed that many directors are unaware of what their duties are and what is expected of them¹²⁵ thus the partial codification is a mechanism to help create a clear code that will assist directors in establishing what their duties are and what is expected of them. It must be noted that directors must be knowledgeable about what is expected of them when acting in their capacity as directors or exercising their powers as directors, because, the conduct of directors can directly influence the profitability and success of a company as well as having far reaching effects such as influencing investments both internationally and within the Republic.¹²⁶ Another reason for the partial codification is that it presents an opportunity for the legislature to rectify and resolve any existing problems that may be present in common law including any conflicting judicial decisions.¹²⁷

Due to the well- established and expansive common law on the subject of duties of directors, however, it would be impossible to make an exhaustive codified version.¹²⁸ Thus the partial-codification route was taken in accordance to international trends that are attempting to make the duties of directors more accessible.¹²⁹ As aforementioned the act does not expressly

¹²¹ Bouman (see note 41; 516).

¹²² I Esser and JJ Du Plessis “the stakeholder debate and director’s fiduciary duties” 2007 *SA Merc LJ* 347.

¹²³ Cassim(see note 9;523).

¹²⁴ *Ibid* 508.

¹²⁵ *Ibid*.

¹²⁶ Geach(see note 57; 8).

¹²⁷ Cassim(see note 9;508).

¹²⁸ Williams(see note 23;156).

¹²⁹ *Ibid*.

exclude the common law and the interpretation is that both the common law and the 2008 Act are to operate parallel to each other.¹³⁰

The partial codification does not attempt to encompass the complex nature and all the relevant detail of director's fiduciary duties within the ambit of section 76(3) of the 2008 Act.¹³¹ The 2008 Act also preserves the applicability of the common law in its entirety and the Act expressly preserves the common law remedies for breach of fiduciary duties by directors.¹³²

Due to the lack of detail given in section 76(3)(a) of the 2008 Act, the fiduciary duties of directors cannot be properly understood or interpreted without the background and extensible well developed common law regarding fiduciary duties of directors, including judicial decisions and foreign decision, particularly English decisions which formed the basis of the South African common law on fiduciary duties of directors.¹³³

Therefore the partial codification has resulted in an overlap between the common law fiduciary duties of a director and the statutory version of the fiduciary duties of a director and directors have to now comply with both common law and statutory fiduciary duties.¹³⁴

3.3. Academic Opinions on the Partial codification of the Fiduciary duties of Directors

Cassim states that section 76(3) of the 2008 Act which deals with the fiduciary duties of a director is not free from ambiguity¹³⁵ and argues further that although the modern trend is to codify the duties of directors, in terms of what was done in South Africa, Cassim argues that it was 'step in the wrong direction'.¹³⁶ The rationale behind Cassim's argument is that the legislature failed to address the existing problems with the duties of directors and merely restated the common law in a brief codified version that served no purpose.¹³⁷ Cassim concludes that a '*golden opportunity*' was lost in that the legislature failed to address the uncertainty and conflicting judicial decisions regarding the fiduciary duties of directors and

¹³⁰ Williams(see note 23;156).

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Cassim(see note 9;508).

¹³⁵ *Ibid.*

¹³⁶ *Ibid* 509.

¹³⁷ *Ibid.*

instead restated the common law but in such a limited respect that it cannot be understood except under the background of the common law.¹³⁸

McLennan supports the view of Cassim discussed above and stated that his main reservation towards the partial codification of the fiduciary duties is, firstly, whether it was necessary when the common law on the subject is so vast and well developed and, secondly, would the partial codification create problems with the interpretation of provisions and actually create more problems than solving any and giving clarity to the common law.¹³⁹ McLennan articulated his stance on the matter soundly stating-

‘ In my view, the provisions overlegislate the issues. In particular, where a topic is governed satisfactorily by the common law, let it remain so. The more legislation there is, the more interpretation will be necessary.’¹⁴⁰

In contrast to this, Botha, has expressed support for the partial codification of the fiduciary duties of directors stating that the partial codification was a move in the right direction.¹⁴¹

Botha argues that the partial codification was necessary due to the shortcomings in the 1973 Act and also leads to better protection for stakeholders of the company.¹⁴²

3.4. Developments since the Partial codification

As far as developments to the fiduciary duties of a directors since the partial codification, in respect of the duty to act in good faith for a proper purpose as per section 76(3)(a) of the 2008 Act, there has been almost no change or alteration to the common law interpretation of these two specific duties.

Cassim describes the partial codification of these fiduciary duties in section 76(3)(a) of the 2008 Act as simply being *declaratory* of the common law fiduciary duties.¹⁴³ In other words, this means that the partial codification in respect of these two particular fiduciary duties has no real legal effect on the common law fiduciary duty to act in good faith and for a proper purpose.¹⁴⁴ In essence the common law is merely restated in section 76(3)(a) of the 2008 Act.

¹³⁸ Cassim(see note 9;509).

¹³⁹ McLennan(see note 108;187).

¹⁴⁰ *Ibid* 190.

¹⁴¹ Botha(see note 3; 714).

¹⁴² *Ibid*.

¹⁴³ Cassim(see note 9;508).

¹⁴⁴ *Ibid* 525.

Fienstein¹⁴⁵ agrees with Cassim's argument that there is in fact no development to the common law in respect of section 76(3)(a) of the 2008 Act, she states that the fiduciary duties that have now been partially codified will be no different than under common law.

There is however, one small development and that is that since the partial codification directors now owe a fiduciary duty to act in good faith not only to their company but any subsidiary of that company as well.¹⁴⁶ Williams also takes cognisance of this fact and states that the duty of good faith has been broadened to include that directors now owe this duty in respect of subsidiary companies as well.¹⁴⁷

Therefore it may be said that the partial codification of the fiduciary duties to act in good faith and for a proper purpose has not been developed or altered and is merely the common law restated¹⁴⁸, however, this is subject to one exception which is that the duty of good faith has now been expanded to include subsidiaries for the first time.¹⁴⁹

3.5. Conclusion

As explained throughout this chapter the common law is vast and well established in respect of the fiduciary duties of directors, it is largely influenced by English law and over the decades the common law has become the main source regarding the fiduciary duties of directors.¹⁵⁰ Since the 2008 Act however, most of these common law fiduciary duties have now been partially codified in section 76(3) of the Act. The relevant question however, seems to be, to what extent does the common law apply. As aforementioned the partial codification of these directors' duties have not rendered the common law irrelevant to any extent and instead both sources work together in tandem.¹⁵¹ Thus in answering this question it would be seen from above that the common law is still very much in operation and still relevant and the directors of companies are obliged to follow the fiduciary duties are laid down in both the common law and statute.¹⁵² The main reason for the partial codification was for the legislature to give clarity to the law and assist in rectifying any problematic areas such

¹⁴⁵ M Feinstein " A Practical Guide to the New Companies Act-Director's Duties and Responsibilities" (2010) *De Rebus* 43.

¹⁴⁶ Geach(see note 57;10).

¹⁴⁷ Williams(see note 23;162).

¹⁴⁸ Cassim(see note 9;508).

¹⁴⁹ Williams(see note 23;162).

¹⁵⁰ Cassim(see note 9;507).

¹⁵¹ *Ibid* 513.

¹⁵² *Ibid* 508.

as the conflicting judicial decisions¹⁵³ however, academics have interpreted the partial codification of the fiduciary duties of directors as a wasted opportunity¹⁵⁴ as there has been little to no development of the common law regarding the fiduciary duty to act in good faith and for a proper purpose, instead it is a mere restating of the common law.¹⁵⁵

¹⁵³ Cassim(see note 9;508).

¹⁵⁴ *Ibid* 509.

¹⁵⁵ *Ibid* 525.

4. CHAPTER FOUR: THE FIDUCIARY DUTY OF A DIRECTOR TO ACT IN GOOD FAITH

This chapter will focus on the primary duty of a director to act in good faith or bona fide in respect of the company. This chapter will examine and explain exactly what is required by directors to fulfil this duty and will look at this duty of good faith in terms of the common law as well as statute. This chapter will also explore the link between the duty of good faith and corporate governance in modern company law. This chapter will also look at noteworthy case law and academic opinions regarding the duty of good faith.

4.1. Introduction

As aforementioned the duties of directors fall within two main categories, firstly fiduciary duties, which stem from their trustee- like relationship in respect of the company. Secondly, the duty of care and skill which is not a fiduciary duty but a completely separate category on its own, which in essence comprises the duty to not act negligently in the carrying out of their duties.¹⁵⁶

This study, however, focuses only on fiduciary duties of directors, and specifically, on the duty to act in good faith and for a proper or permissible purpose. The fiduciary duties of a director are divided into a number of sub-categories such as: the duty to act in good faith; the duty to act for a proper purpose; the duty to avoid conflicts of interests and the duty not to use corporate opportunities or information for personal gain.¹⁵⁷ It must be noted however, that although the fiduciary duties of director of a company is divided into the various categories they are not in fact bound exclusively to that particular category and there tends to be an overlap in their application.¹⁵⁸ Thus it is said that although the fiduciary duties of directors are compartmentalised for the benefit of understanding what is expected of directors, these duties are not ‘*mutually exclusive*’¹⁵⁹ and there is a common thread that continues throughout all the categories of fiduciary duties. It is thus the belief that the primary duty of a director is

¹⁵⁶ Williams(see note 23;162).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* 163.

¹⁵⁹ *Ibid.*

to act *bona fide* and in the best interest of the company and from this over-arching duty all other fiduciary duties stem.¹⁶⁰

Further, it must be noted that if the director in question is both a director and a shareholder of the company then he does not owe any fiduciary duty to the company when acting in his capacity as a shareholder but is limited to the fiduciary relationship with the company only when acting in his capacity as a director of the company.¹⁶¹ The director does not act in both capacities at one given time but is a ‘wearer of many hats’ and thus cannot act in both capacities as a director and a shareholder simultaneously. The director therefore only owes a fiduciary duty to the company when he is acting in his capacity as a director.¹⁶²

In *Phillips v Fieldstone Africa (Pty) Ltd*¹⁶³ the court held that the nature and extent of a fiduciary duty is a question of fact that needs to be determined through an evaluation of the relationship between the director and his company as well as any relevant circumstances.

The duties of directors are derived from two sources the common law and the 2008 Act. The 2008 Act has partially codified the common law duties, however, these two sources still operate in tandem.¹⁶⁴ Cassim states that ‘*the duties are meant to be prophylactic and preventative*’ in nature.¹⁶⁵

Section 76(3)(a) and (b) of the 2008 Act states-

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director

(a) in good faith and for a proper purpose;

(b) in the best interest of the company.

The duty to act in good faith is the primary duty from which other fiduciary duties flow, it encompasses in it a duty to exercise an independent judgement as well as to act for a proper

¹⁶⁰ Williams(see note 23;163).

¹⁶¹ *North West Transportation Co v Betty* (1887) 12 App Cas 589 (PC).

¹⁶² Williams(see note 23;163).

¹⁶³ *Phillips v Fieldstone Africa (Pty) Ltd Supra*.

¹⁶⁴ Cassim(see note 9;523).

¹⁶⁵ *Ibid*.

purpose. Thus the legislature has linked these two fiduciary duties in section 76(3)(a) of the 2008 Act.¹⁶⁶

The fiduciary duty of a director to act in good faith is seen as the principal, overriding duty from which all other fiduciary duties emerge.¹⁶⁷ The duty of good faith is one that is every present and continues throughout all the fiduciary duties that a director has. The duty of good faith is based on the trustee-like position that directors are in with respect to the company and thus encompasses a high degree of good faith, honesty and loyalty.¹⁶⁸

4.2. The content of the duty to act in good faith and the best interest of the company

As aforementioned every director has the duty to act in good faith and in what he honestly believes to be the best interest of the company when exercising his powers as a director.¹⁶⁹ This is therefore a duty of subjective good faith as the focus is on what the *director* believed to be in the best interest of the company. Hahlo stated that the ‘*paramount duty of directors, individually, and collectively, is to exercise their powers bona fide in the best interests of the company*’¹⁷⁰ the basis of this duty is honesty, trust and loyalty.

This common law duty has been partially codified in s76(3)(a) of the 2008 Act and states-

‘a director of a company, when acting in that capacity, must exercise and perform the functions of a director...in good faith’.

The partial codification of this common law duty is very brief and lacks any detail that indicated what is meant by ‘good faith’ and what exactly does this duty entail. Due to this lack of detail provided by the act it is necessary to look to the common law, the courts and judicial decisions to determine the true content of this duty.

It must be noted that the duty of good faith refers to subjective good faith therefore if a director’s conduct is ever called into question before the courts in respect of the duty to act *bona fide*, the question that arises is not whether the court itself believes that the act taken by the director in question was in fact done in good faith and the best interest of the company,

¹⁶⁶ Cassim(see note 9;524).

¹⁶⁷ *Ibid* 523.

¹⁶⁸ M Judin “Directors’ legal responsibilities override corporate governance diktats” (2008) 8(2) *Without Prejudice* 24.

¹⁶⁹ Williams(see note 23; 163).

¹⁷⁰ JT Pretorius. *Hahlo’s South African Company Law through the cases.* (1999) 279.

but whether the *director* genuinely believes that his conduct was in the best interest of the company.¹⁷¹ The board of directors have a more extensive knowledge, qualification and expertise in the field of what will qualify as being in the best interest of the company in contrast to judges, whose expertise do not necessarily extend to the management and running of a company.¹⁷²

It is thus not the function of the court to act as a *superior board of directors* and the court is generally not interested in the wisdom or lack thereof in respect of the decisions taken by directors of a company.¹⁷³ The court in *Howard Smith v Ampol Petroleum Ltd*¹⁷⁴ expanded on this principle and stated-

‘there is no appeal on merits from managements decisions(made by directors) to the courts of law; nor will the courts of law presume to act as a kind of supervisory board over decisions within the power of management honestly arrived at’¹⁷⁵

In *Hogg v Cramphorn Ltd*¹⁷⁶ it was held that it is not for the courts to review the merits of a decision that the board of directors came to honestly.¹⁷⁷

It must be noted that the directors of a company are elected by the shareholders of the company and thus if the members elected as directors do not have the requisite skill, expertise or judgement and thus do not manage the company to its optimum potential then the shareholders have themselves to blame as they elected the board to run the company.¹⁷⁸

The test for good faith is subjective in nature and thus the relevant question is whether the director honestly believed that he or she acted in the best interest of the company. The relevant inquiry is thus the director’s state of mind when coming to a decision.¹⁷⁹

The subjective test is limited, however, where there is an absence of a reasonable grounds for finding that the director in question acted in the best interest of the company, this will be

¹⁷¹ Williams(see note 23;164).

¹⁷² Cassim(see note 9;524).

¹⁷³ Williams (see note 23;164).

¹⁷⁴ 1974 (1) ALL ER 1126 (PC).

¹⁷⁵ *Howard Smith v Ampol Petroleum Ltd Supra* at 1131-1132.

¹⁷⁶ 1976 Ch254 at 268.

¹⁷⁷ *Hogg v Cramphorn Ltd Supra* at 268.

¹⁷⁸ Williams(see note 23;164).

¹⁷⁹ Cassim(see note 9;524).

sufficient to find a lack of good faith and thus will constitute a breach of this duty.¹⁸⁰ In *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd*¹⁸¹ the court emphasised the point that the best interests of the company are not to be assessed by the court itself. The court stated that the test is whether a reasonable man would have regarded the act of the directors to be in the best interests of the company.¹⁸²

The court again stressed this point in *Treck Corp Ltd v Millar*¹⁸³ wherein the court held that there must be reasonable grounds for the director in question to believe that he was in fact acting in the best interest of the company. Then in *Extrasure Travel Insurances Ltd v Scattergood*¹⁸⁴ the court reiterated this principle and stated that there must be reasonable grounds for the belief that the directors were in fact acting in the best interest of the company.

In the case of *Charterbridge Corporation Ltd v Lloyd's Bank*¹⁸⁵ a test was formulated and stated that the relevant inquiry is: *whether an intelligent and honest person in the position of the director could under the same circumstances have reasonably come to find that he or she was in fact acting in the best interest of the company.*¹⁸⁶

This test is best understood by way of an example and a good example was illustrated in the case of *Neptune(Vehicle washing equipment) ltd V Fitzgerald(No2)*¹⁸⁷ wherein the court held that the sole director of the company had not in fact acted in the best interest of the company by arranging for the company to make gratuitous donations to him on the termination of his contract of employment with the company. The court found that the director was acting in his own interests and not the company's interests and thus breached his duty to act in good faith in respect of the company.¹⁸⁸

The most favoured illustration of what is regarded as acting in good faith and for the best interest of the company is demonstrated in the case of *Re Smith v Fawcett Ltd*,¹⁸⁹ wherein the company's articles of association give the board of directors an '*absolute and uncontrolled discretion to refuse to register any transfer of shares*'. When the one director passed away the

¹⁸⁰ Cassim(see note 9;524).

¹⁸¹ 1927 2 KB 9 at 23.

¹⁸² *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd Supra* at 23.

¹⁸³ 1972 33 DLR (3d) 288 (BCSC).

¹⁸⁴ 2003 (1) BCLC 598 (ChD) at 619.

¹⁸⁵ 1970 Ch2 at 74.

¹⁸⁶ *Charterbridge Corporation Ltd v Lloyd's Bank Supra*.

¹⁸⁷ 1995 1 BCLC 325 (ChD).

¹⁸⁸ *Neptune(Vehicle washing equipment) ltd V Fitzgerald(No2) Supra*.

¹⁸⁹ 1942 ch304 (CA).

other surviving directors refused to register a transfer of his shares into the name of the executors. The court then held that in terms of the articles of association of the company, the only limitation on the directors' powers was that they had to act in a manner that they believed to be in the best interest of the company. In this case the court could not detect any evidence of *mala fides*, or bad faith, thus the court refused to set the decision that the board of directors came to aside.¹⁹⁰

This case of *Re Smith v Fawcett*¹⁹¹ thus illustrates that the court when evaluating a decision that the board of directors has come to does not act as a superior board and will not set aside a decision, even, if the decision in question does not seem the most logical or a fair decision that could have been reached by the board. The Court will only set aside a decision reached by the board if it is clear that there is the presence of *mala fides*, in other words the directors did not act in good faith and in the best interest of the company when coming to that particular conclusion or decision. Therefore the powers that the directors have in respect of their company is qualified only by their ability to act in good faith and in the best interest of the company when coming to a conclusion or making a decision in respect of the company or its business.

In the case of a person being a director of more than one company the director in question owes a fiduciary duty to act in good faith to both companies separately and individually; this is true even if it is a subsidiary company.¹⁹² It must be noted that this is a new feature of the 2008 Act previously at common law the directors of a company did not owe a fiduciary duty to a subsidiary of a principle company wherein they were the director.¹⁹³

4.3 The duty to exercise an independent judgement

The duty to exercise an independent judgement is viewed by some academic writers as additional facet of the directors' duty to act in good faith and in the best interest of the company.¹⁹⁴ This may be the rationale as to why this specific common law duty was excluded

¹⁹⁰ *Re Smith v Fawcett Ltd Supra.*

¹⁹¹ *Re Smith v Fawcett Ltd Supra.*

¹⁹² Williams(see note 23;164).

¹⁹³ McLennan(see note 108; 187).

¹⁹⁴ Cassim(see note 9;529).

in the partial codification of the fiduciary duties of directors in section 76(2) and (3).¹⁹⁵ Due to the fact that the common law and the 2008 Act operate parallel to each other this particular common law duty continues to find application in modern company law and still falls within the parameters of the fiduciary duties of directors.

The common law principle with respect to this duty is well established in our law and states that in the exercising their powers as directors of the company and concluding what is in the best interest of the company, the directors must exercise an independent and autonomous mind to bear on the particular issue at hand.¹⁹⁶ In other words this duty would entail that when a director is deciding what is in the best interest of the company he is under a legal duty to bring an independent unhindered mind to apply to the issue at hand and act accordingly.¹⁹⁷

As stated in chapter two (2) directors are not generally employees of the company and thus would be in direct violation of his duties if he allowed himself to be influenced by a third party or be a mere “puppet” of a third party.¹⁹⁸ In *S v Shaban*¹⁹⁹ the court warned that “puppets” cannot lawfully be utilised in a company law structure. The court stated that “puppets” referred to persons placed on the board of directors who act as if they have taken part in decisions that they do not understand or pretend to have taken a role in the management of the company but have no idea what they have signed or agreed to.²⁰⁰ In *S v De Jager*²⁰¹ wherein a director who had resigned as a director of a company was then appointed as a puppet director for the same company, the court in the circumstances found that the irrespective of the resignation the person in question was a director. It should be noted however, that a puppet director is not lawful.²⁰² Similarly, in *Selangor united Rubber Estates Ltd v Cradock (No 3)*²⁰³ in this case two nominee directors disregarded their fiduciary duties and instead followed the instructions of their controller, the court held that they were

¹⁹⁵ Cassim(see note 9;529).

¹⁹⁶ *Ibid.*

¹⁹⁷ Williams(see note 23;165).

¹⁹⁸ PPWAWA National Provident fund v Chemical Energy, Printing Wood Allied Workers’ Union 2008 (2) SA 345 (W). at 32-33. This case related directly to trustees but the court made it clear that the same principles applied to directors of a company.

¹⁹⁹ 1965 (4) SA 646 (W).

²⁰⁰ *S v Shaban Supra* at 651.

²⁰¹ 1965 (2) SA 616 (A).

²⁰² Cassim(see note 9;531).

²⁰³ 1968 2 ALL ER 1073 (CHD).

mere puppets of the controller and were held liable for the improper use by their controller in smuggling funds belonging to the company.²⁰⁴

It must be noted that a company may not escape liability from a binding contract that was willingly entered into by its directors on the contention that the directors failed to exercise an independent judgment in deciding to enter into the contract.²⁰⁵

This duty has particular relevance to a nominee director. A nominee director is someone who has been appointed by a nominator to represent his interest at board meetings.²⁰⁶

Nevertheless, a nominee director is a lawfully elected director, however, he is obliged to act under a duty to his nominator as well as the fiduciary duty to the company.²⁰⁷ Irrespective of these two separate duties a nominee director is expected to bring an independent and unhindered mind to what he believed to be in the best interest of the company.²⁰⁸

In *Fisheries Development Corporation of SA Ltd v Jorgensen*²⁰⁹ the court stated that in respect of a director's duty to exercise an independent judgment and to take decisions according to the best interest of the company in respect of nominee directors that although nominee directors may be representing the interests of their nominator that are obligated in terms of law to serve the interest of the company exclusively at the exclusion of their nominator.²¹⁰ Therefore a nominee director is not allowed to have conflicting allegiances, the interests of the company is overriding over those of the nominator.²¹¹

It can be deduced from judicial decisions that the general legal principle is that once the nominee director is appointed he is obliged to act in the interest of the company and not the nominator.²¹² However, the nominee director may still converse with the nominator and this consultation will not amount to a breach of the duty to exercise an independent judgment in the best interest of the company as long as the nominee director brings a unhindered autonomous mind in the exercise of his duty.²¹³ It must be noted that a more flexible approach has been taken in England, New Zealand and Australia with respect to the duty to

²⁰⁴ Cassim(see note 9;532).

²⁰⁵ *Ibid* 529.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*.

²⁰⁸ Williams(see note 38;165).

²⁰⁹ 1980 (4) SA 156 (W).

²¹⁰ *Fisheries Development Corporation of SA Ltd v Jorgensen Supra* at 163.

²¹¹ Cassim(see note 9;531).

²¹² *Ibid*.

²¹³ *Ibid*.

exercise an independent judgment, this trend towards a more modern flexible approach may influence the South African position in the future, but presently, the strict inflexible approach with regards to nominee directors is still in application.

4.4. The overlap between corporate governance and the fiduciary duty of good faith

Due to the drastic changes in modern company law internationally corporate governance has become a vital aspect of corporate law and the way companies in South Africa run their business.²¹⁴ Corporate governance is an assortment of guidelines and recommendations that assist those who are running the company and that is grounded largely in the fiduciary duties of directors.²¹⁵

The 2008 Act introduces corporate governance into statute for the first time.²¹⁶ Previously corporate governance has been viewed as a voluntary process through King I²¹⁷ and then replaced in 2002 with King II²¹⁸. The 2008 Act recognises corporate governance and included it in the Act for the first time. Company law sets a legal framework for the operation of a company and King III provides a set of recommendations that aim at providing guidance to the directors of a company to achieve the optimum efficiency in managing the company.²¹⁹ Thus it is said that the 2008 Act and King III complement each other in its operation.²²⁰

The chapter on transparency and accountability in the 2008 Act has led to the partial codification of the director's duties in section 76 of the 2008 Act.²²¹ Corporate governance has been defined by King as

‘The way in which companies are directed and controlled or the principles and practices which are regarded as appropriate conduct by directors and managers’.²²²

²¹⁴ Botha(see note 3;702).

²¹⁵ *Ibid.*

²¹⁶ ME King “The synergies and Interaction between King III and the Companies Act 61 of 2008” (2010) *Acta Juridica: Modern Company Law for a Competitive South African Economy* 446.

²¹⁷ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 1994.

²¹⁸ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 2002.

²¹⁹ King (see note 216;446).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid* 447.

The standard that is required of a director was dealt with in King II²²³ and is now set out in section 76 of the 2008 Act. The fiduciary duties and the duty of care and skill in terms of the common law and the 2008 Act are considered a cornerstone of corporate governance in South Africa.²²⁴ McLennan²²⁵ argues that company law as a whole has to do with corporate governance however, the King II report states that ‘*directors of a company are the focal point of the corporate governance system*’.²²⁶

One of the main principles of corporate governance is that directors must always act *bona fide* in the best interest of the company²²⁷ which is in essence is the fiduciary duty of a director to act in good faith. King II²²⁸ encourages an inclusive approach to corporate governance, this entails that not only are directors liable to the company when they come to a conclusion or decision in respect of some aspect of the management of the business but they have to also be aware of the expectations and interests of the stakeholders, which comprise of the shareholders, employees and society as a whole.²²⁹ It is suggested that the 2008 Act has adopted an enlightened shareholder approach, in terms of this approach directors have a duty to not only maximise profit but they have a duty to maintain trust and confidence not only in respect of the company but with the company’s stakeholders as well.²³⁰

It is clear therefore that there is a link between the duty of good faith which is based on trust, honesty and loyalty and corporate governance as expected by the 2008 Act and King III.²³¹ Corporate governance emphasised the trust that is created by the fiduciary relationship between the directors of the company and the company itself as well as indirectly the shareholders, therefore qualities such as integrity, transparency and accountability are essential elements that the directors must in the carrying out of their duties and is encouraged by the principles of corporate governance.²³² Thus the link between these two aspects is clear and is utilised to assist in the efficient running of a company and will mitigate against the

²²³ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 2002.

²²⁴ Botha(see note 3; 714).

²²⁵ McLennan(see note 108; 185).

²²⁶ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 2002.

²²⁷ Botha(see note 3;708).

²²⁸ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 2002.

²²⁹ King(see note 216;448).

²³⁰ *ibid*.

²³¹ The King Report on Corporate Governance for South Africa (Institute of directors in Southern Africa) 2010.

²³² Botha(see note 3;705).

breaching of the primary fiduciary duty that a director has to act in good faith. It must be noted that corporate governance largely involves a system of principles or practices that enable directors to discharge their legal responsibilities.²³³

The partial codification is beneficial to corporate governance as it has assisted directors in further understanding their duties implicitly and creates a clear written authority of what is expected from the directors of a company.²³⁴ The common law still applies irrespective of the partial codification of directors duties in section 76(3) of the 2008 Act. Thus any well-established principles in terms of common law and definitions or accepted principles in terms of judicial decisions are still applicable and this guarantees that the duties of directors remain flexible and adaptable.²³⁵ Flexibility and adaptability is of the utmost importance as the economic state as well as the law itself is not stagnant but ever-changing and will thus allow for growth and development as the needs of directors, shareholders and the company as well as society at large change.

The partial-codification of director's duties has been regarded as a step in the right direction for corporate governance and is also seen as a necessary move towards wider protection for not only the company but for all stakeholders.²³⁶

In contrast to this statement, however, a very important point was made by Judin whereby he emphasised that corporate governance is merely a recommended practice that will assist in the running of an efficient company it is not a hard and fast rule that the board of directors are obliged to follow.²³⁷ Judin argues that if a particular decision reached by the board of directors is not in the best interest of the company even if the decision conforms to the standards of corporate governance, to follow on this decision, would constitute a breach of their fiduciary duty to act in good faith.²³⁸ Thus the board will be held liable for any loss suffered by the company.²³⁹ The emphasis is thus on the fact that corporate governance is flexible and not static as has to be adapted to each particular situation looking at the relevant circumstances.²⁴⁰ Corporate governance is there for assistance to achieve the efficient management of the company, it is not rules that have to be followed, especially where they

²³³ Botha(see note 3;704).

²³⁴ *Ibid* 712.

²³⁵ *Ibid* 713.

²³⁶ *Ibid* 714.

²³⁷ Judin (see note 168;24).

²³⁸ *Ibid*.

²³⁹ *Ibid*.

²⁴⁰ *Ibid* 25.

would result in the breach of the paramount duty of directors to act in good faith. Judin has emphasised this succinctly by stating-

“The duty of good faith is the highest duty of any director. Included is the duty of loyalty, acting in the best interest of the company and honestly applying one’s mind to the issue before the board. It is the obligation to follow this legal duty that has resulted in a general acceptance that corporate governance codes should be on a “*comply or explain*” basis, rather than “*comply or else*” basis. In short governance codes should contain recommended practices, which, if not in the best interest of the company, the directors have a legal duty to adopt an alternative”²⁴¹

4.5. Conclusion

As stated in this chapter the fiduciary duty of a director to act in good faith has now been partially codified in section 76(3)(a) of the 2008 Act. There is however, a lack of detail in the statutory codification of this duty and thus the common law and judicial decisions still apply extensively in respect of determining the content of this duty.

It is clear from this chapter that the duty of good faith is the paramount over-arching duty that all directors owe in respect of the company²⁴² and is the primary fiduciary duty from which all other fiduciary duties flow.²⁴³ The duty of good faith is one of subjective good faith²⁴⁴ and thus the inquiry is into whether the director acted in what he honestly and genuinely believed to be the best interest of the company.

Due to the fact that the duty of good faith is subjective in nature this means that if a decision made by a director is under scrutiny before a court, the court will not act as a superior board of directors, but the question would be whether the director acted bona fide and in what he believed to be the best interest of the company.²⁴⁵ The court will not readily set aside a decision that a director individually came to or collectively as the board of directors unless there is a lack of reasonable grounds for the finding²⁴⁶ or there is the existence of *mala fides* in coming to that decision.²⁴⁷

²⁴¹ Judin(see note 168;24).

²⁴² Cassim(see note 9;523).

²⁴³ *Ibid.*

²⁴⁴ *Ibid* 524.

²⁴⁵ *Howard Smith v Ampol Petroleum Ltd Supra.*

²⁴⁶ *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd Supra* at 23.

As mentioned above the duty to exercise an independent judgement is not partially codified under section 76(3) of the 2008 Act, the rationale behind this is that this common law fiduciary duty is a facet of the primary fiduciary duty of a director to act in good faith and in the best interest of the company which is partially codified in section 76(3)(a) and (b) of the 2008 Act.²⁴⁸ Thus this duty still has application within the partially codified duty of good faith as well as in terms of the common law as the common law and statute operate in tandem.

Finally, there is a clear link between corporate governance and the duty to act in good faith, corporate governance refers to principles and mechanisms that assist directors to reach the optimum level of efficiency within a company as well as to discharge their duties in respect of the company.²⁴⁹ The 2008 Act recognises corporate governance for the first time and it is said that both the act and King III complement each other.²⁵⁰ It must be noted, however, that although there is a clear link between fiduciary duties and corporate governance, the fiduciary duties always take precedent, the board of directors are not obliged to follow the recommendations that are made in the form of corporate governance codes but they are always obliged to follow the duties placed upon them.²⁵¹

²⁴⁷ *Re Smith v Fawcett Ltd Supra.*

²⁴⁸ Cassim(see note 9;532).

²⁴⁹Botha (see note 3;708).

²⁵⁰ King(see note 216 ;446).

²⁵¹ Judin(see note 168;24).

5. CHAPTER FIVE: THE FIDUCIARY DUTY OF A DIRECTOR TO ACT FOR A PROPER OR PERMISSIBLE PURPOSE.

This chapter explores the duty of a director of a company to act for a proper or permissible purpose in terms of the common law and the now partially codified version in terms of the 2008 Act. This chapter will also look at any noteworthy judicial decisions regarding this duty and academic opinions. Finally, although, the academic literature on fiduciary duties of directors is immense there seems to be a definite lack of literature on the fiduciary duty to act for a proper or permissible purpose as was pointed out by Du Plessis where he said ‘...it is remarkable that not a single article in South African legal periodicals deal pertinently with directors’ duty to use powers for their proper or permissible purpose.’²⁵² Thus this chapter will aim to fill the chasm in the academic literature regarding the duty to act for a proper or permissible purpose and explore this duty fully.

5.1. Introduction

Directors may not simply exercise their powers in good faith and what they believe to be the best interest of the company, although this is their fundamental duty, section 76(3)(a) of the 2008 Act requires that directors also exercise their powers for a proper purpose.²⁵³ A ‘proper purpose’ was not defined in the 2008 Act, however, the common law has interpreted this to mean that directors must exercise their powers for the objective purpose for which the power was conferred to them and for no other ulterior or collateral purpose.²⁵⁴

Therefore there are two separate fiduciary duties that have been partially codified under section 76(3)(a), the duty to act *bona fide* or in good faith and the duty to act for a proper purpose.²⁵⁵

Section 76(3)(a) of the 2008 Act states-

²⁵² Du Plessis(see note 15;308).

²⁵³ Cassim(see note 9; 525).

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director

(a) in good faith and for a proper purpose;

These two duties are separate concepts and encompass two distinct fiduciary duties, although they fall under the same section of the 2008 Act, however, these two duties have the effect that even if directors have subjectively acted in good faith and what they honestly believed to be the best interest of the company, they may still objectively have breached their duty to act for a proper purpose.²⁵⁶ Therefore although the duty to act in good faith and the duty to act for a proper or permissible purpose is two distinct fiduciary duties they work in conjunction to each other to ensure the discretionary powers that the directors possess are not abused.

It must thus be noted that most leading South African academics in this field all refer to the duty to act for a proper or permissible purpose, however, everyone interprets it slightly differently. Beuthin does not treat this as a separate fiduciary duty but simply as an aspect of the duty to act in good faith.²⁵⁷ Blackman refers to the duty to exercise powers for a proper purpose.²⁵⁸ Cilliers and Benade use '*failure to exercise...powers for the purpose for which they were conferred*'.²⁵⁹ Hahlo talks about the '*director's duty to act within their powers*'²⁶⁰ Williams refers to the '*duties to exercise powers for a proper purpose*'²⁶¹; and finally Cassim refers to this duty simply as proper purpose.²⁶² It is thus clear from this short summary that this duty could be referred to by a number of different names and may be phrased both positively and negatively²⁶³, however, for the purpose of this study this fiduciary duty will be referred to as the duty to act for a proper or permissible purpose.

It must be noted that section 76(3)(a) is declaratory of the common law fiduciary duties and thus has no legal effect on the common law fiduciary duty to act in good faith and for a

²⁵⁶ Cassim(see note 9;525)

²⁵⁷ RC Beuthin & SM Luiz. *Beuthin's Basic Company Law*. 2nd ed. (1992) at 224.

²⁵⁸ MS Blackman 'Companies' in: WA Joubert (founding ed) *LAWSA* 4(2) (1996) 185.

²⁵⁹ HS Cilliers and ML Benade. *Corporate Law*. 3rd ed. (2000) 146.

²⁶⁰ JT Pretorius..et al. *Hahlo's South African Company Law Through the Cases- A source Book*. 6th ed. (1999) 294.

²⁶¹ Williams(see note 23;166).

²⁶² Cassim(see note 9; 525).

²⁶³ Du Plessis (see note 15;310).

proper purpose.²⁶⁴ This aspect of how the common law and 2008 Act operate in relation to each other has been explored further in chapter 3.

Section 76(3)(a) however, has a useful purpose in that it removes any doubt relating to the existence of this specific fiduciary duty instead of simply disregarding it as another aspect of the duty of good faith as some academics mentioned above have interpreted.²⁶⁵

5.2. The content of the duty to act for a proper or permissible purpose

As aforementioned, the directors are now obliged to exercise their powers for a proper purpose by both the common law and statute.²⁶⁶ It is thus regarded as an abuse of power if a director utilises their powers for any purpose other than the purpose that the powers in question were conferred on them.²⁶⁷ The purpose behind this duty is in fact an attempt by the courts to control and maintain the exercise of discretionary power by directors of the company.²⁶⁸ The existence of subjective good faith is not enough to save the exercise of power by a director if the power was exercised for an ulterior or collateral purpose.²⁶⁹ Therefore the test for ‘proper purpose’ is objective in nature and not subjective as in the case of the duty of good faith.²⁷⁰

Consequently, if the directors of a company use their powers for a collateral or improper purpose, they cannot use the defence that they were acting in what they honestly believed to be the best interest of the company as an attempt to escape liability.²⁷¹ The duty to act for a proper or permissible purpose is separate and thus *additional* to the duty to act *bona fide*.²⁷²

The presence of bad faith and dishonesty indicate that the powers exercised by the directors were not done so for a proper purpose. This principle was explained in the case of *The Australian Metropolitan Life Assurance Co Ltd v Ure*²⁷³ where the court stated the following-

²⁶⁴ Cassim(see note 9;525).

²⁶⁵ *Treck Corp Ltd v Millar* Supra.

²⁶⁶ Cassim(see note 9;525).

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*.

²⁶⁹ *Darvall v North Sydney Brick & Tile Co Ltd*. (1989) 15 ACLR 230 SC (NSW).

²⁷⁰ Cassim(see note 9;526).

²⁷¹ Williams(see note 23;166).

²⁷² *Ibid*.

²⁷³ 1923 33 CLR 199 (HC of A).

‘although it is a power (power to issue shares) which necessarily involves some discretion, it must be exercised, as all such powers must be, *bona fide*, that is for the purpose of which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole.’²⁷⁴

This duty often becomes contentious with regards to the issuing of shares by directors although the board of directors have the power to issue shares that have been authorised in the memorandum of incorporation (MOI).²⁷⁵

In *Hogg v Cramphorn Ltd*²⁷⁶ the court held that the directors had exercised their powers for an improper purpose, the power in question related to the issuing of shares. The court found that although the directors of the company had honestly and genuinely believed in good faith that the takeover would not be in the best interest of the company, its employees or their customers, the issuing of the preference shares that was contrary to the constitution of the company and that carried special voting rights of ten votes per share, was nevertheless an inappropriate exercise of their power and thus in breach of their fiduciary duty to act for a proper or permissible purpose. The court found that the primary purpose for the issuing of shares is for the raising of share capital, however, in this case it was not done for this primary purpose but to ensure that the directors did not lose control of the company. Buckley J found that the manipulation of the voting position could not therefore be found to be within the bounds of acting for a proper purpose. Finally, the court held that the issuing of shares could be ratified by the members at a general meeting, however, the court emphasised that it was unconstitutional for the directors to exercise their powers to issue shares in order to avoid a takeover, the purpose of destroying the existing majority or to create a new majority.²⁷⁷

Similarly in the case of *Howard Smith Ltd v Ampol Petroleum Ltd*²⁷⁸ the board of directors awarded further shares to Howard Smith whom they preferred in order to dilute the majority shareholding of Ampol Petroleum and assist in assuring the take-over bid by Howard Smith. The court found that it was unconstitutional for the directors to use their fiduciary powers for the sole purpose of destroying the existing majority or creating a new majority. The court noted further that this would apply even if the directors believed in good faith that they were acting in the best interest of the company and they were not going to receive any personal

²⁷⁴ *The Australian Metropolitan Life Assurance Co Ltd v Ure Supra* at 217.

²⁷⁵ Williams(see note 23;166).

²⁷⁶ *Hogg v Cramphorn Ltd Supra*.

²⁷⁷ *Hogg v Cramphorn Ltd Supra*.

²⁷⁸ *Howard Smith Ltd v Ampol Petroleum Ltd Supra*.

benefit or advantage for themselves including retaining their position as directors. The court concluded that the principle was clear, no board of directors may interfere with the constitutional right of shareholders to decide the outcome of a take-over bid.²⁷⁹

In *Punt v Symons & Co Ltd*²⁸⁰ the board of directors issued shares to their friends and family with the intention of creating a majority which would result in them being able to pass a special resolution that would allow them to change the constitution of the company so as to deny certain shareholders special rights that were conferred on them by the constitution of the company. Similarly, in *Piercy v Mills*²⁸¹ the directors of a company issued shares with the intention of creating a majority that would allow them to prevent the election of further directors to the board and which would have the effect that the established directors would become the minority. The courts in both cases held that the directors exercised their powers for an improper purpose²⁸² and were in breach of their fiduciary duty to act for a proper or permissible purpose.

One of the primary purposes for which directors may exercise their power, is for the issuing of shares.²⁸³ Directors must therefore exercise their powers to issue shares for a proper purpose and not an improper purpose, it had been held that a valid purpose for issuing shares is to raise share capital for the company.²⁸⁴ It should be noted, however, that this is not the only proper purpose for which shares may be issued, shares may be issued where it is part of a commercial contract to do so or to assist in giving the company financial stability, the directors in this case would be regarded as exercising their powers to issue shares for a proper purpose.²⁸⁵

An issuing of shares to alter or misrepresent and manipulate the balance of voting power is an improper exercise of the power to issue shares²⁸⁶ as well as issuing shares with the intention of frustrating or assisting a take-over bid for control of the company; or for the purpose of creating a new majority or removing the existing majority²⁸⁷. These ‘purposes’

²⁷⁹ *Howard Smith Ltd v Ampol Petroleum Ltd Supra.*

²⁸⁰ [1903] 2 Ch 506.

²⁸¹ [1920] 1 Ch 77.

²⁸² Cassim(see note 9;527).

²⁸³ Williams(see note 23;166).

²⁸⁴ *Ibid* 167.

²⁸⁵ *Ibid*.

²⁸⁶ Cassim(see note 9;527).

²⁸⁷ Williams(see note 23;167).

have been interpreted by the courts as being an improper use of the power to issue shares by directors²⁸⁸.

Determining the purpose for which a director has exercised his power from the facts of the case is not an easy undertaking.²⁸⁹ The question as to whether a director acted for a proper purpose requires an inquiry into the subjective state of mind of the director in question.²⁹⁰ Where there is more than one purpose according to the facts of the case the court must identify the dominant or principle purpose.²⁹¹ In *Mills v Mills*²⁹² the court held that if the principle or dominant purpose is found to be improper the court must regard the exercise of power as being voidable. This decision was then confirmed in *Howard Smith Ltd v Ampol Petroleum Ltd*²⁹³ and *Treck Corp v Millar*.²⁹⁴

For the exercise of power to be considered as valid, the purpose cannot be improper and if it was improper in any way, the improper purpose cannot be the *reason* that the power in question was exercised.²⁹⁵ Put differently, it would mean that if the exercise of power was found to be for a proper or permissible purpose and in the best interest of the company, the mere fact that an incidental consequence of the particular exercise of power resulted in a take-over bid or allowed the directors to retain power, will not render the exercise of the power as improper.²⁹⁶

5.3. The Tests developed by the Courts

Merely because a director denies that they have exercised their powers for a proper purpose does not mean that the courts will believe the director; the court must establish whether the testimony is credible under the circumstances.²⁹⁷ Any disputes in terms of civil litigation has to be determined before a court of law on a balance of probabilities.²⁹⁸

²⁸⁸ Williams(see note 23;167).

²⁸⁹ Cassim(see note 9;525).

²⁹⁰ Williams(see note 23;167).

²⁹¹ Cassim(see note 9;527).

²⁹² 1938 60 CLR 150 at 185 (HC of A).

²⁹³ *Howard Smith Ltd v Ampol Petroleum Ltd Supra*.

²⁹⁴ 1072 33 DLR (3d) 288 (BCSC).

²⁹⁵ Cassim(see note 9;527) see also *Mills v Mills Supra*.

²⁹⁶ *Ibid*.

²⁹⁷ Williams(see note 23;167).

²⁹⁸ *Ibid* 168.

In *Extrasure Travel Insurance Ltd v Scattergood*²⁹⁹ the court held that the law regarding proper purpose is well established and clear, further the court stated that it is not necessary to prove dishonesty on behalf of the director or that he was aware that he was acting for an ulterior purpose. The court went on to establish a *four step test* that courts should apply. The test states that a court must:

1. Identify the particular power that is being challenged;
2. Identify the proper purpose for which the power was given to the directors;
3. Identify the substantial purpose for which the power was in fact exercised; and
4. Decide whether the purpose was proper.

Du Plessis³⁰⁰ in contrast, argues that the test that the South African courts should adopt in determining whether powers have been misused or abused by directors is the approach taken in *Howard Smith Ltd v Ampol Petroleum Ltd*.³⁰¹ The *first step* in this test is to determine what the purpose for which the power was conferred to the directors of the company. The court did take cognisance of the fact that there may be multiple purposes in such as case the principle or dominant purpose must be identified.³⁰² The *second step* is to establish whether under the circumstances the directors misused or abused the powers conferred upon them.

In essence what principle is established from this test is that if the decision made was primarily or substantially taken and falls within the ambit of what the power was conferred upon the directors for, the court will not set the decision aside irrespective of whether indecently the power may have been exercised for an improper purpose.³⁰³ The same principle phrased differently would entail that if the decision made was primarily for an improper or impermissible purpose the court will be obliged to set aside the decision irrespective of whether the powers may have partially been exercised for a proper purpose.³⁰⁴ Du Plessis submitted that this test should be used by South African courts when determining

²⁹⁹ 2003 1 BCLC 589 (ChD) 619.

³⁰⁰ Du Plessis(see note 15;318).

³⁰¹ *Howard Smith Ltd v Ampol Petroleum Ltd Supra*.

³⁰² *Howard Smith Ltd v Ampol Petroleum Ltd Supra* at 835 C.

³⁰³ Du Plessis(see note 15;320).

³⁰⁴ *Ibid*.

whether the exercise of power by the directors was done for a proper or permissible purpose.³⁰⁵

It must be noted that where a director has not acted in what he genuinely believes to be the best interest of the company, this breach of his fiduciary duty is incapable of being ratified, however, in contrast to this, where the director has exercised his powers in good faith and what he genuinely believes to be the best interest of the company, but has acted for an improper or impermissible purpose then this breach is capable of ratification by an ordinary resolution passed at a general meeting.³⁰⁶

5.4. Section 38 of the 2008 Act and the Duty to act for a proper purpose

Section 38 (1) of the 2008 Act gives the board of directors the power to issue shares. This power as aforementioned, is a fiduciary power that must be exercised in good faith and for a proper or permissible purpose.³⁰⁷ Due to section 38 of the 2008 Act this particular fiduciary power of issuing shares and the duty to act for a proper purpose becomes more important.

The common law rules that have been discussed in this chapter, however, still have application particularly the stance taken by Buckley J in *Hogg v Cramphorn Ltd*³⁰⁸ where the court reaffirmed the principle that the directors' power to issue shares is conferred upon them with the primary purpose to raise share capital for the company.³⁰⁹ It must be noted however, that although the primary purpose for issuing shares is to raise share capital this is not the only valid purpose.³¹⁰ Issuing shares so as to ensure the financial stability of a company or where there has been an agreement to issue shares are both examples of other valid purposes for which shares may be issued.³¹¹

Where directors have exercised their power for an improper purpose and this decision is set aside by the court, the directors will be jointly and severally liable to compensate the company for any loss suffered as a consequence of the improper exercise of power.³¹² A good illustration of this was in the case of *Bishopsgate Investment Management Ltd(In liquidation)*

³⁰⁵ Du Plessis(see note 15;318).

³⁰⁶ Williams(see note 23;168).

³⁰⁷ Cassim(see note 9;528).

³⁰⁸ *Hogg v Cramphorn Ltd Supra.*

³⁰⁹ Cassim(see note 9;528).

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

*v Maxwell (No2)*³¹³ wherein a director of a company was found to be in breach of his fiduciary duty in releasing company assets for no compensation to another company for whom he was also a director, the court accordingly found him liable for the loss that the company suffered.

Emphasis must be placed particularly on the fact that section 77(2)(a) of the 2008 Act provides that a director will be held liable according to the principles of common law³¹⁴ regarding the breach of a fiduciary duty as contemplated in section 77(3)(a) of the 2008 Act, in other words according to the duty of good faith and to act for a proper purpose. Further exploration into the remedies for breach of a fiduciary duty, however, is beyond the scope of this study.

5.5. Conclusion

Therefore it is clear that the duty of a director to act for a proper or permissible purpose is an essential fiduciary duty and is separate from the primary fiduciary duty of a director to act for a proper purpose.³¹⁵ This is emphasised by the fact that this duty is partially codified along with the duty to act in good faith in section 76(3)(a) of the 2008 Act, this has set the position that this duty to act for a proper purpose is distinct and not merely another aspect of the duty to act in good faith, as some academics have interpreted it.³¹⁶

The duty to act for a proper or permissible purpose entails the director exercise his powers for the reason which they were conferred upon him and not for any ulterior or collateral purpose.³¹⁷ This fiduciary duty is an attempt by the courts to mitigate and control against the abuse of power that is conferred upon directors of a company.³¹⁸ This duty is objective in nature and often comes under scrutiny in respect of the fiduciary power of director to issue shares. The judicial decision have established clear principles as to what would be regarded as exercising the power to issue shares for a proper purpose as well as what will be seen as issuing shares for an improper purpose.³¹⁹ The courts have also established tests to assist in

³¹³ 1994 1 ALL ER 216 (CA)

³¹⁴ Cassim(see note 9;528).

³¹⁵ *Ibid* 525.

³¹⁶ Cassim(see note 9;525).

³¹⁷ Williams(see note 23;166).

³¹⁸ Cassim(see note 9;525).

³¹⁹ See *Howard Smith Ltd v Ampol Petroleum Ltd Supra*; *Hogg v Cramphorn Ltd Supra*.

deciding whether directors have exercised their powers for an improper purpose or have abused the powers conferred upon them.

This issuing of shares is a contentious issue in respect of the fiduciary duty of a director to act for a proper purpose and thus directors should be extra vigilant when issuing shares and ensure it is not for a collateral purpose. Section 38(1) of the 2008 Act places more emphasis on the director's power to issue shares and thus has elevated the importance of the fiduciary duty of a director to act for a proper or permissible purpose.³²⁰

³²⁰ Cassim(see note 9;527).

6. CHAPTER SIX: CONCLUDING REMARKS

6.1. Introduction

The subject of the fiduciary duties of directors is one of great importance in the scheme of company law. Directors have the ability to control the company and its interest, directors are thus in a position of power that allows them to control the profitability and the success of a company.³²¹ The powers of directors are thus far reaching and have a definite impact such as influencing investments both domestically and internationally.³²² As the old adage goes, *with great power comes great responsibility* and thus the duties of directors are of paramount importance in that the fiduciary duties control how and when directors may exercise their discretionary powers³²³.

The fiduciary duties of directors is recognised as a cornerstone of company law.³²⁴ It is thus imminently important for directors to understand what is expected of them and be aware of their duties so that they do not breach their duties negligently or abuse their discretionary powers.³²⁵

The fiduciary duties of directors has been well explored by the leading academics in the field however, there is a definite gap in the literature when it comes to the specific fiduciary duty of a director to act for a proper or permissible purpose.³²⁶ This study aims to fill the chasm in the academic literature regarding this particular fiduciary duty. Although the academic literature regarding these fiduciary duties is extensive, it has not been examined in a new light since the partial codification of the fiduciary duties of a director in section 76(3) of the 2008 Act. Hence, this study aims at exploring the specific fiduciary duties of a director to act in good faith and for a proper purpose in terms of the common law and statute as well as examine whether there has been any alterations or developments since the change from common law to partial codification. Further, this study aims at exporting the relationship between the common law and the 2008 Act and how they operate in respect of each other.

³²¹ Geach(see note 57; 8).

³²² *Ibid.*

³²³ Cassim(see note 9;512).

³²⁴ *Ibid* 525.

³²⁵ Geach(see note 57;8).

³²⁶ Du Plessis(see note 15;308).

6.2. Findings of the Study

Chapter two(2) of this study explored the definition of a director in terms of the 2008 Act, as well as the meaning of a fiduciary in the context of company law. This chapter revealed that the definition of a director in terms of section 1 of the 2008 Act is in fact broad and thus problematic as it includes other members within the company as falling within the ambit of the definition and results in these other members having to bear the burden of these fiduciary duties without the benefit of exercising any discretionary power.³²⁷ This chapter also discovered that the directors are in a fiduciary relationship with the company and once a person accepts the position of a director he enters immediately into this fiduciary relationship with the company.³²⁸

Chapter three (3) was significant as it went on to explore the relationship between the common law and the 2008 Act. This chapter noted that the common law regarding fiduciary duties of a director is extensive and well developed and has been greatly influenced by that of English law. This chapter revealed that the partial codification of the fiduciary duties of a director was in accordance to international trends and the purpose behind it was to make the fiduciary duties of directors more accessible as well as to instil clarity to the law.³²⁹ Many academics such as Cassim, however, view the partial codification as a wasted opportunity as the legislature failed to address the problematic areas in the common law such as the conflicting judicial decisions and instead merely restated the common law.³³⁰ It is the opinion of the writer that the legislature did indeed waste the opportunity as instead of addressing the shortfalls in the common law the legislature restated the common law fiduciary duties in such a vague way that it cannot be interpreted without the background of the common law. Therefore none of the problematic areas were actually addressed or reformed by the legislature.

The exploration of the partial codification of the duty to act in good faith and for a proper purpose in terms of section 76(3)(a) of the 2008 Act revealed that there has been almost not alteration or development to the common law interpretation of these duties except that the duty of good faith was now extended to subsidiary companies.³³¹ Further, the fact that the duty of good faith and the duty to act for a proper purpose recognised the duty to act for a

³²⁷ Cassim(see note 9;512).

³²⁸ *Parke v The Daily News Ltd Supra.*

³²⁹ Cassim(see note 9;523).

³³⁰ *Ibid* 509.

³³¹ Williams(see note 23;162).

proper purpose as a separate fiduciary duty and not merely another facet of the duty to act for a proper purpose as some academics interpreted.³³² In respect of the relationship between the common law and statute, the 2008 Act has not rendered the common law irrelevant and the common law is still very much applicable.³³³ The legal position is that the common law and the 2008 Act operate parallel to each other and that directors are now obliged to follow their fiduciary duties in terms of both common law and statute.³³⁴

Chapter four (4) focused on the fiduciary duty of a director to act in good faith, which is the most fundamental duty that a director possesses and from which all other fiduciary duties expand.³³⁵ The duty of good faith refers to subjective good faith.³³⁶ The courts cannot act as a superior board of directors and the correct inquiry is whether the director honestly believed to be acting in the best interest of the company.³³⁷ The court will therefore only set aside a decision made by a director where there is clear indication of mala fide or lack of reasonable grounds to reach that decision.³³⁸ Finally, the link between corporate governance and the fiduciary duty of good faith was explored and it was discovered that there is in fact a clear link between these two concepts which are both based on trust, honesty and loyalty.³³⁹ The 2008 Act also recognised corporate governance for the first time and the Act and King III are said to complement each other.³⁴⁰ Nevertheless, it was emphasised that the duty of good faith always takes precedent over corporate governance codes, thus a director is always obliged to follow his duties but not necessarily the codes of corporate governance.³⁴¹

Chapter five(5) explored the fiduciary duty of a director to act for a proper or permissible purpose and sought to fill the gap in the existing body of academic literature. This duty is objective in nature and entails that a director may not exercise his powers for an improper or ulterior purpose but must exercise them for the purpose for which they were conferred upon him.³⁴² This chapter noted that this duty becomes highly contentious with regards to the

³³² Cassim(see note 9;525).

³³³ *Ibid* 513.

³³⁴ *Ibid*.

³³⁵ *Ibid* 523.

³³⁶ *Ibid* 524.

³³⁷ *Howard Smith v Ampol Petroleum Ltd Supra*.

³³⁸ *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd Supra*.

³³⁹ Botha(see note 3;708).

³⁴⁰ King (seenote 216;446).

³⁴¹ Judin(see note 168;24).

³⁴² Williams(see note 23;166).

power of directors to issue shares and thus the courts have established tests to assist them in determining when a director has abused his power or used it for an improper purpose.³⁴³ This chapter also discovered that section 38(1) of the 2008 Act has placed more emphasis on the director's power to issue shares and has thus directly resulted in placing a higher degree of importance on duty of a director to act for a proper purpose.³⁴⁴

Therefore it is clear to see from the brief summary of the findings that this study explored fully the duties of a director to act in good faith and for a proper purpose. The study also focused on the definition of a director and the meaning of a fiduciary in the context of company law. The study looked at for the first time whether there was in fact any development since the partial codification of the directors' duties to act in good faith and for a proper purpose, followed by an in-depth exploration into the reasoning behind the partial codification of fiduciary duties of directors. Finally the study also sets out the current relationship between the 2008 Act and the common law.

6.3. Contributions of the study

As aforementioned this study attempted a thorough exploration of the primary duty of a director to act in good faith and for a proper purpose. The study attempted to evaluate these two fiduciary duties fully and then examine whether there had been any development since the partial codification of these duties in section 76(3)(a) of the 2008 Act. This study sought to revisit the well-established subject of fiduciary duties in a new light and also attempted to fill the chasm in the existing academic literature relating to the duty of a director to act for a proper purpose. This study attempted to make the position in respect of these two duties clear so as to assist directors in understanding what is expected of them so as to prevent the negligent breaching of these fundamental duties.

This study sought to assist in the interpretation of fiduciary duties since the partial codification so as to assist in the understanding of the 2008 Act and finally set out the present stance on the relationship between the 2008 Act and the common law and explain to what extent the common law is still relevant in the context of fiduciary duties.

³⁴³ See *Howard Smith Ltd v Ampol Petroleum Ltd Supra*; *Hogg v Cramphorn Ltd Supra*.

³⁴⁴ Cassim(see note 9; 527).

It is therefore the opinion of the writer that all the research questions and goals have been fully answered or explored during the process of this study and will be beneficial to the understanding of these two particular fiduciary duties in the context of modern company law.

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