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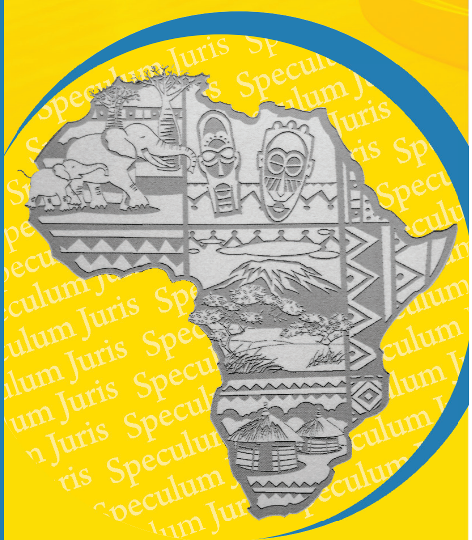

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"Foreseeable": Conceptualised in the Duty of Care, Skill, and Diligence?

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Abstract

The Companies Act 71 of 2008 (2008 Act) codifies the duty of care, skill, and diligence (duty of care). The duty operates separately from fiduciary duties under sections 76(3)(c)(i) and (ii) and 77(2)(a) of the same Act. Where a person has been wronged and that person argues breach of duty of care, possibly that person shall have recourse in both delict and breach of fiduciary duties. The question which arises is whether the 2008 Act aims to create a dual system by which the duty of care can be alleged and proved.

The question arises because, under section 4, the Act incorporates the concept "foreseeable". As a result, one observes that the 2008 Act appears not to codify the duty of care only in the form scribed under section 76(3); the duty seems to take different dimensions depending on two factors: the conscience the Act seeks to inculcate; and what the envisaged policy imperatives are in terms of that particular section.

This contribution interrogates and unpacks the concept "foreseeable" through the lens of the duty of care, skill, and diligence. This article takes the view that the concept is an embodiment of the duty. It exemplifies its characteristic attributes. A comparative analysis of relevant legislative provisions from other jurisdictions fortifies the latter submission.

The article argues that by including the concept relative to other jurisdictions, the legislature appears to buttress efficacy in the management of distribution in companies. In the same

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breath, it calls on directors to use their levels of acquired and personally possessed expertise, or other expertise available to them to make proper and informed governance decisions. Further, the article argues that "foreseeable" is incorporated not in its ordinary form, but to elevate the previous low standard of conduct directors observed when performing their duties. In that context, the concept and the duty of care are analysed.

Keywords: Foreseeable; duty of care, skill, and diligence; distribution; duties of directors; fiduciary duties

1 INTRODUCTION

The duty of care has its origins in common law.[1] Traditionally, it operates separately from the fiduciary duties that directors owe to their companies. Duty of care had the undertone that directors when exercising their powers or performing their duties were expected to avoid gross negligence. However, based on their personal skills, knowledge, abilities and capacities, their standard of judgment was low. Directors were not expected to demonstrate any attention to the affairs of a company nor were they expected to display any reasonable and objective level of competence.[2] Generally, common-law case law agrees that the standard of care required was a reasonably relaxed subjective standard. From the divergent court decisions visited, one infers that when it comes to establishing whether a breach of a duty of care, skill, and diligence exists it does not matter whether the question is directed at auditors or company directors; it is accepted that only the beneficiary of a fiduciary duty can enforce a duty;[3] the threshold and generic question to determine whether one bears the duty appears always to simply be whether a duty of care exists.[4]

The Companies Act 71 of 2008 (2008 Act) codifies the same separate operational approach between the duty of care and fiduciary duties under section 76(3)(*c*)(i) and (ii) and 77(2)(*a*).[5] Such that, where a person has been wronged and that person argues breach of duty of care, possibly that person shall have recourse in both delict and breach of fiduciary duties. However, one observes that the 2008 Act appears not to codify the duty of care only in the form scribed in the sections; the duty seems to take different dimensions depending on what conscience the Act seeks to inculcate and what the envisaged policy imperatives are in terms of that particular section.

Section 4 of the 2008 Act appears to incorporate a concept that specifically embodies the duty. This article takes the view that the concept "*foreseeable*" in the section exemplifies the duty of care, skill, and diligence. The concept is made central in the 2008 Act's efforts to

1 *Dovey v Cory* [1901] A.C. 477 (H.L.); *In re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425; and *In re City Equitable Fire Insurance Co.* [1925] 1 Ch 407 (C.A.); *Fisheries Development Corporation of South Africa Ltd v Jorgensen* 1980 4 SA 156 (W).

2 *Fisheries* 165H−166B and 166E; *Organisation Undoing Tax Abuse NPC v Myeni* [2019] ZAGPPHC 957 (*OUTA*); *Cooper v Myburg* [2020] ZAWCHC 174; [2021] 2 All SA 114 (WCC); *Re Equitable Fire Insurance Co Ltd* [1925] Ch 407. *Howard v Herrigel* 1991 All SA 113; *Lagunas Nitrate Co v Laguna Syndicate* 1899 Ch 392, 435; *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] SCC 68 489; Riley "The Company Director's Duty of Care and Skill: The Case of an Onerous but Subjective Standard" 1999 *The Modern Law Review Limited* 697 697−698.

3 *BCE v 1976 Debentureholders* [2008] 3 S.C.R. 585.

4 See *RCG Trade and Finance (Pty) Ltd v Rowland* [2002] ZAFSHC 22; *Deloitte & Touche v Livent Inc. Receiver of),* 2017 SCC 63; *Lavender v Miller Bernstein LLP* 2018 ONCA 729 para 13; *Anns v Merton London Borough Council,* [1978] A.C. 728 (H.L.); and *Cooper v Hobart,* 2001 SCC 79 [2001] 3 S.C.R. 537.

5 The Act was assented to by the President on 9 April 2009. The Act came into operation on 1 May 2011, GG No. 32121, GN 421.

prevent the dissipation of company money or property. The article is, therefore, an attempt to interrogate and unpack this concept through the lens of the duty.[6]

The article argues that by including "foreseeable" in section 4, the legislature seeks to buttress efficacy in the management of distribution in companies, and in the same breath, calls on directors to use their levels of acquired and personally possessed expertise,[7] or other expertise available to them to make proper and informed governance decisions.[8] Further, the article makes the argument that "foreseeable" is not incorporated in its ordinary form, but to elevate the previous low standard of conduct directors have observed when performing their duties.

Momentarily, this article has five parts. The following part outlines the philosophical premise of the concept. Thereafter, foreseeable as a device incorporated to precipitate prudence is examined. The next part interrogates the conceptualisation of foreseeable as a call to directors to act with care, skill, and diligence. Thereafter, the last part presents comments and concluding remarks.

2 "FORESEEABLE": EXAMINING ITS PHILOSOPHICAL DIMENSIONS

First and foremost, it is important to acknowledge at the onset that section 4 was incorporated into the Act after the overhaul of the Companies Act 61 of 1973 (1973 Act) to have it modernised for the twenty-first century.[9] The section provides for the solvency and liquidity test (test) as a mechanism to assist to maintain the existence of companies and to further promote investment. Within the section, "foreseeable" is incorporated alongside "reasonably". The two operate as the spinal cord or backbone formulated as such that they function as the construct upon which the satisfaction of the test by a company hinges.[10] Henceforth, the section contemplates that "foreseeable" shall be one of the pillars that play a foundational role when the financial information pertaining to the financial position of a company is assessed and a decision *is to be made* by a board of directors where distribution is contemplated at a particular time.[11] If one observes what section 4 stands to protect, it makes sense to aver that the concept "foreseeable" is ingrained within the duty of care, skill, and diligence, or that the duty underpins and contextualises the concept. With the incorporation, the legislature appears to direct prudence when company finances are the subject of consideration concomitant with the decision to be made. When making a decision, directors exercise a fiduciary duty as much as they also exercise a statutory duty.[12] Subsequent to making that distributive decision a company must not suffer loss, damage, or costs, because directors or the board failed

6 See the historical debates on the requirements of how foreseeability applies in a delictual claim in Neethling, Potgieter and Visser *The Law of Delict* (1993).

7 Riley 1999 (62) *The Modern Law Review Limited* 697; *Cooper NO v Myburg* [2020] ZAWCHC 174; [2021] 2 All SA 114 (WCC) para 8; *Sainic v Industrio-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA); *Ebrahim v Airport Storage (Pty) Ltd* 2008 (6) SA 585 (SCA); *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) 174E, which emphasised carrying on a business recklessly or fraudulently prejudicing creditors or disregards their interests.

8 See in this regard the defence mechanism with which the provisions of s 76(4) provide for directors.

9 The Department of Trade and Industry "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform" 2004 https://static.pmg.org.za/bills/040715companydraftpolicy.pdf (accessed 25-11-2020). See as well Bidie "The Protection of Company Capital in Contemporary Company Law: South Africa and Selected Commonwealth Jurisdictions" (LLD thesis, University of Fort Hare 2016).

10 For ease of reference, s 4 provides that: "for any purpose of the Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time…".

11 See s 46 of the 2008 Act on the procedure which must be adhered to when companies contemplate distribution of company money or property.

12 See s 76(4)(*a*) of the 2008 Act.

to foresee the consequent end result (loss or damage) where that ought to have been foreseen.[13]

One may argue that the latter is the point at which the duty of care, skill, and diligence complements fiduciary duties or *vice versa*. The latter combination is critical in the management of company affairs. In fact, it is apt to note that even as directors were expected to act with care and diligence previously, sight was not lost on how directors had to discharge their duties in order for them to be considered to have acted with care. Lindley M.R. in *Lagnas Nitrate Co v Laguna Syndicate* captured what was expected from a director, that they had to act within powers, having regard to their knowledge and experience observing the principles of honesty, and acting in the best interests of a company.[14] Thus, fiduciary duties have always been underpinned by the duty to act with care.

When it comes to complying with section 4, the 2008 Act does not define or elaborate on how the concept of "foreseeable" must be construed in light of its current incorporation under the section. Unfortunately, over the period of its existence and application, the concept has not been clearly defined in its exactness; the question only is whether or not that specific result was reasonably foreseeable.[15] The silent posture adopted by the Act is, therefore, astonishing given that the concept has often been visited and analysed in many fora and the drafters could not have been unaware that in South Africa the concept is not novel. In fact, at most times it has been applied in the context of delict for claims relevant to medical negligence,[16] pure economic loss[17] as well as criminal law cases.[18]

The literal meaning of foresee is to have prescience or foresight of events before they occur.[19] In practice, the concept has been interpreted to apply depending on the circumstances of the particular case;[20] and has been used as a mechanism to give an idea of, for example to what extent a defendant would likely be held liable. Further, it is accepted that its premise is quite complex and elusive.[21] Unfortunately, the latter is something that makes the concept's application uncertain. This elusiveness and uncertainty should have been the very reason the legislature had endeavoured to provide some form of clarity or some form of a definition to

13 Section 77(3) of the 2008 Act sets out the liability of company directors. Also, see *Law of Delict* 188.

14 *Lagunas Nitrate Co* para 435.

15 *Law of Delict* 188.

16 *The Premier of the Western Cape Province v Loots NO* [2011] ZSCA 32.

17 *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC) para 23 para 1; *Hendrik Johannes Pitzer v Eskom* [2012] ZASCA 44; *Kruger v Coetzee* 1966 2 SA 428 (A) 430E−F; *Oppelt v Department of Health, Western Cape* 2016 1 SA 325 (CC); *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC); and Neethling and Potgieter "Foreseeability: Wrongfulness and Negligence of Omissions in Delict – The Debate Goes on *MTO Forestry (Pty) Ltd v Swart NO* 2017 5 SA 76 (SCA)" 2018 *Journal for Juridical Science* 145–161.

18 *Moodley v S* [2019] ZAKZPHC 24 para 35; *S v Naidoo* 2003 (1) SACR 347 (SCA); *S v Nxumalo* 1982 (3) SA 856 (A) 861G−H; and *S v Humphreys* 2013 (2) SACR 1 (SCA) para 22.

19 Little *et al. Shorter Oxford English Dictionary on Historical Principles* (1973) 789.

20 *Loots* para 13; Havenga "Director's Co-liability for Delicts" 2006 *SA Merc LJ* 229−237.

21 De Villiers "Foreseeability Decoded" 2015 *Minnesota Journal of Law, Science & Technology* 343−412 344, 355 and 361; Ibbs and Razavi "Foreseeability in Construction" 2014 *J Leg Aff Dispute Resolution. Engineering Construction* 1–6 at 1. Neethling and Potgieter refers to the *ex-ante* approach (looking forward) as the subjective foreseeability of harm which is a core element of negligence in delict claims. Neethling and Potgieter 2018 *Journal for Juridical Science* 154−155. VerSteeg considered the concept of foreseeability from the perspective of two specific legal doctrines: The Tort doctrine of "intervening and supervening causes; and Contract doctrine referring to impossibility", "frustration of purpose", or "failure of presupposed conditions". See VerSteeg "Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationship Between 'Intervening Causes' and 'Impossibility'" 2011 *Michigan State Law Review* 1497−1519.

the extent necessary.

Many commentators, and courts alike, have given explanatory contexts to the concept and how it is applied or viewed. At times, foreseeable has been applied as a subset of a flexible approach where courts sought to avoid a result that right-minded persons would regard as unjust and unfair.[22] Meiring de Villiers explains foreseeable from the common-law context based on action. The author favours the approach that: "an event is the foreseeable result of an action if the action *ex ante* created or enhanced the risk of the event."[23] The author also regards foreseeable as an ingredient to the formation of "a systematic relationship between a defendant's wrongdoing and the type of harm that has befallen the plaintiff".[24] In other words, a person cannot be held liable to another if that person has no foreseeable duty of care to that other. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,[25] the Constitutional Court (CC) explained the fundamental role played by this concept and the premise from which it was normally determined. It held that foreseeability is a requirement of negligence and plays a role in the determination of legal causation such that a defendant would not be held liable for harm which would not have been reasonably foreseeable.[26] Similarly, in *Livent*, a case on duty of care for auditors, the Supreme Court of Canada stated that broadly "reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence".[27]

The systematic relatedness by Meiring de Villiers confirms the statement expressed in *Country Cloud* that for liability to lie, there must be a *sine qua non* between the result and the fact that the event which has occurred was or ought to have been foreseeable at the time.[28] Some court judgments in the United Kingdom (UK) and Australia have held to the same effect. This is despite the fact that the solvency and liquidity regulatory framework of these countries relating to company law, that is, the Corporations Act 2001, the Companies Act 2006, and the Canada Business Corporations Act, 1985 (CBCA), does not expressly evince references to the concept "foreseeable" as a pillar that a board must consider when deciding on a company's financial circumstances or solvency and liquidity of a company before distribution is made.

3 "FORESEEABLE": A DEVICE TO PRECIPITATE/HASTEN PRUDENCE?

The question for the author at this stage is why the legislature saw fit to include the concept "foreseeable" under section 4 of the 2008 Act even though the Act has incorporated the duty of care under section 76(3)(*c*)? Surely, the legislature should have known that section 76(3)(c) will apply to the obligation section 4 of the 2008 Act imposes on directors. So, was the aim then to hasten prudence?

The discussion hereunder exhibits that generally the duty of care is applied in different

22 *Loots* para 18.

23 De Villiers 2015 *Minnesota Journal of Law, Science & Technology* 362. See also Stevens "The Legal Nature of the Duty of Care and Skill: Contract or Delict?" 1−29 at 15.

24 De Villiers 2015 *Minnesota Journal of Law, Science & Technology* 362. *Ministry of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A).

25 *Country Cloud*.

26 *Country Cloud* para 27; *Loots* para 23; *Harvest Corporation v Duncan Docks Cold Storage* paras 21−22; and *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) paras 28, 34–35; *MTO Forestry (Pty) Ltd v Swart NO* 2017 5 SA 76 (SCA) para 18. Also see *Dean & Chapter of Rochester Cathedral v Leonard Debell* [2016] EWCA Civ 1094 CA (Civ Div). The latter case was an appeal against a finding of liability for negligence.

27 *Livent* para 33.

28 The test is whether a reasonable person in the position of the defendant would foresee the reasonable possibility of their conduct injuring another and would take steps to guard against such occurrence, and the defendant failed to take such steps. *Kruger* 430E.

jurisdictions as a means to extricating the standard of behaviour that should reasonably be expected from a company director or officer.[29] The inclusion of the word "foreseeable" in section 4 of the Act suggests that the contemporary norm, rather than the conventional, is to restrain or constrain defendants from making hasty decisions with financial implications. This thinking is consistent with Neethling and Potgieter's submission. The authors look at the application of foreseeability in both negligence and causation. They posit that in causation foreseeability of actual harm is relevant to establish legal causation.[30] There can be no breach where that connection is lacking in the defendant's wrongdoing.[31] In *Loots*, Brand JA, acknowledged in the context of legal causation as opposed to negligence, that our law has not provided a clear picture of the content of the foreseeability criterion in the context of causation. The foreseeability of harm may be in general terms, but if the harm is rare, it may not be the reasonably foreseeable consequence of another's negligence. But, in the context of causation and the facts in *Loots*, in Brand JA's view, if foreseeability "means anything, it must mean foreseeability of the actual harm as opposed to harm of a general kind".[32]

To explicate the contemporary trend, the thinking alluded to earlier is consistent with the three varieties identified by Lagnado and Channon, which appear elemental. One may argue that all these varieties appear inherent in the examination, and that they provide an explanatory context for the meaning of the concept "foreseeable" and the role it plays. The authors suggest these three distinct varieties as means to test whether a particular adverse outcome can be classified as being foreseeable in particular circumstances. These are: (i) a subjective element; (ii) an objective element; and (iii) a reasonable element.[33] The principles of the last two appear to overlap, and will be discussed in conjunction with each other. When all these elements are looked at through the lens of what section 4 of the 2008 Act prohibits, all three of these varieties are material ingredients or components in the determination process of whether it is reasonable or just and fair to impute liability in any way to a board of directors of a company where its distribution of company money or property is alleged to be the cause of the company having sustained losses or damages. It is submitted that the three varieties of foreseeability accommodate the predictive predisposition encompassed in section 4 of the Act. This general premise is grounded in the financial information and/or knowledge that the board had or ought to have had about the prospects of the company at the material time of decision-making. This information should have allowed the board to form an informed view of whether or not to distribute, given awareness of what was likely to happen once distribution is carried out. Next, is an exposition of each of the varieties of foreseeability.

29 *BCE* para 44.

30 Neethling and Potgieter 2018 *Journal for Juridical Science* 155, citing *Premier of the Western Cape Province v Loots NO* [2011] JOL 27067 (SCA) para 23. The latter case was concerned with medical negligence which was a result of unforeseen complications during the birth process leaving the mother severely disabled.

31 Further, and appearing to be confirming a low standard that directors' conduct has always been subjected to, they make the point that in negligence harm is foreseeable from a general nature. However, the precise or exact manner in which the harm occurs need not be foreseeable; only the general manner of its occurrence needs to be or the type of injury suffered which must be foreseeable. De Villiers 2015 *Minnesota Journal of Law, Science & Technology* 364. *Hendrik Johannes Pitzer* para 25. See also *Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 22.

32 *Loots* para 23.

33 Lagnado and Channon "Judgements of Cause and Blame: The Effects of Intentionality and Foreseeability" 2008 *Cognition* 754–770. Meiring de Villiers submits that in negligence cases the plaintiff must prove four elements: (i) a duty of care to prevent unreasonable risks of harm; (ii) a breach of duty; (iii) a causal connection between the defendant's conduct and the plaintiff's harm; and (iv) actual damage resulting from the defendant's negligence. De Villiers 2015 *Minnesota Journal of Law, Science & Technology* 356−357.

3 1 Arguing in Favour of the "Subjective" Element

The first of the three varieties is the subjective element and inquires on what outcome is likely to result from the agent's point of view.[34] Scrutinised in the context of section 4 and the duties directors carry, this element rests on the director's personal abilities, industry experience, general knowledge, expertise, care, skill and diligence to be able to detect the likely adverse outcome given the available financial information before the director and the financial position of the company whether or not the solvency and liquidity of the company is likely to remain preserved after that distribution has been made. Put differently, the element is concerned with what the agent believes is likely to occur. It reflects on the agent's state of mind/thinking.

Previously, judgments on section 424 of the 1973 Act set the principles applicable were a company's affairs or capital was carried recklessly or with intent to defraud creditors, the company or any other person or for a fraudulent purpose. In *Ebrahim v Airport Cold Storage (Pty) Ltd*,[35] the SCA summarised the intentions aimed at section 64 of the Close Corporations Act 69 of 1984, which was identical and equivalent to section 424.[36] The intention had been to retract corporate personality, that is, separate legal existence, where the level of management of a company would exceed mere inept or incompetence and became heedlessly gross or dishonest.[37] So, because owners or directors of a company had and still have the benefit of immunity from liability for the company's debts, the company had to be carried not in a manner that would cause it to incur obligations recklessly, gross negligently, or fraudulently. Where that occurred, personal liability followed.[38] The principle was applicable in any case where the manner by which a company's business was carried recklessly or fraudulently and prejudicing the company's or creditor's interests.[39] Thus, in that regard, the state of a person's mind had always been under the radar and, the underlying tenant being the underlying attitude that person holds at the time of his or her conduct. Subjectivity was determined in so far as

> one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge.[40]

From these principles, this first element does have correlation/connection with the concept "foreseeable" as well as the current obligations imposed by sections 76(3)(*c*)(i) and (ii)[41] and 76(4)(*a*)(iii)[42] of the 2008 Act as the sections are more concerned with how careful a decision of a board or director is or was at the time it is or was made when powers were exercised for purposes of distribution. Secondly, it is also consistent with section 76(3)(*a*) and (*b*) of same Act providing for the duties to act in good faith and proper purpose and the duty to act in the

34 Lagnado and Channon 2008 *Cognition* 758.

35 *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA).

36 *Sainic v Industro-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA) para 13.

37 *Ebrahim* para 15.

38 *Ebrahim* para 15.

39 *Philotex* 174E.

40 *Philotex* 143G–H.

41 The section provides that: "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 director: (c) with the degree of care, skill and diligence that may reasonably be expected of a person- (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director."

42 The section provides that: "In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company: (a)(iii) will have satisfied the obligations of subsection (3)(b) and (c) if– (iii) the director made a decision, or supported the decision of a committee of the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company."

best interests of a company. Its premise is to ensure that the board/directors conscientiously exercise powers and perform duties responsibly and accountably. According to the Act the test is that a belief held by a director must not be one that cannot reasonably be expected from a person in the position of a director.[43]

3 1 1 Cooper

The operation of the subjective element and how it relates to foreseeable as embodied in the duty of care, skill and diligence can still be gleaned from various observations in contemporary judgments. For example, in *Cooper*, Binns-Ward J was perturbed how the director of the company could not explain how he could have allowed a false and misleading director's report be included in the financial report/statements he presented knowing very well the parlous nature in which his company was. Two unaudited financial statements (2013 and 2014) of the company showed the company trading in insolvent circumstances; that at end 2014 the company's current liabilities exceeded its current assets by a ratio of more than 5:1.[44] The director's report was inconsistent with an application the director submitted in an affidavit submitted for an application for winding-up of the company, as well as recent advice received from his auditors which stated that he could not allow the company to continue to trade.[45] Further, the 2015 audited financial statements of the company carried an adverse opinion from the company's auditors that the company was trading in insolvent circumstances and reflected that the company's financial statements which had been prepared on a going concern basis did not fairly represent the company's situation. The company had alienated all its trucks and trailers in 2014, but was still trading yet it was a transport business.[46] The court further noted a 2014 liability to the amount of R1 002 777 to one of the companies owed by the director in the form of a loan, yet, despite the parlous nature in which the company was in, this liability was redeemed in 2015 as there was no reference to it in the financial statements of that year.[47] The court further noted various other factors: that despite the parlous nature of the company, the director concluded contracts to sell the company's undertaking/equipment, yet the price did not consider the value of the company's goodwill; the company to which the equipment was sold was dormant, yet payment was to be made over a period of 60 months, and that some amount of R1 630 200 was to be paid up front.[48] Binns-Ward J considered the arrangements made by the company to be generous if compared to the pressing claims of creditors.[49] The director further submitted to court that he had an extant loan account claim in the amount of R1 630 000 against the company. Binns-Ward J found this odd given the short period within which the loan could have arisen between 2014 and 2015, especially that the company had ceased to trade in 2014. This amount corresponded with the amount to be paid to the company for the sold assets.[50] The applicants contended that the loan accounts were fictitious.[51] Binns-Ward J was of the firm view that the scheme orchestrated by the director of the company was foreseeably structured to the prejudice of creditors, and to favour the director himself.[52]

Binns-Ward J was concerned that the disposal was signed off by shareholders based on section

43 See s 76(3) and (4) of the 2008 Act. See as well Cassim *et al.* (2012) 564.
44 *Cooper* para 18.
45 *Cooper* para 19.
46 *Cooper* para 21.
47 *Cooper* para 25.
48 *Cooper* para 28.
49 *Cooper* para 28.
50 *Cooper* para 30.
51 *Cooper* para 32.
52 *Cooper* paras 41–45.

115 of the 2008 Act, and in fact, it was this signing that was contended against by the applicants.[53] Binns-Ward J inferred from the evidence that the disposing of the assets was manifest and foreseeable that it was to the prejudice of creditors because the company to which the assets were sold had no assets of its own and was controlled by the respondent. The disposition was made to a company which could not purchase the assets even in the ordinary course of business, even if it was to be financed, and that this was known to the respondent.[54] The rentals received for some of the property was not credited to creditors.[55] What the respondent did was to devise a scheme which would ensure that creditor's claims would not be met. The respondents' belief that the scheme would have been to the advantage of creditors was so far-fetched and fanciful as to be nothing short of risible.[56] Further, it should have donned in the mind of the respondent that the advice he received from his lawyer was palpably misconceived that any businessman applying his mind would have recognised so.[57] The latter should have especially been recognised by the respondent because he was an experienced businessman who previously was employed by a bank and he as well conducted a successful truck business, but he also was astute to structure his business affairs so as to favour himself and avoid personal liability. The selling of the assets by one company yet leased to another could not be explained. The sale did not lead to a diminish in the liability of the company. All these factors show the state of mind of the director at the time of disposal of the assets. They show inconsistencies with a person who acts in the best interests of that company.[58] Thus, his conduct fell significantly short of the standard of conduct prescribed for directors under section 76 of the 2008 Act,[59] and constituted reckless, if not fraudulent, conduct within the meaning of section 424(1) of the 1973 Act.[60]

3 1 2 Country Cloud

Further, *Country Cloud* also analogously shows how the subjective element operates. In the latter case, the appellants argued that the department had unlawfully and intentionally cancelled a contract with iLima resulting in Country Cloud suffering harm, loss and/or damage because of a contract which Country Cloud concluded with iLima.[61] The argument made was that by cancelling the contract the department denied iLima a chance to capitalise and be solvent and liquid. The department disagreed with the argument contending that it did not act with intent in cancelling the contract with iLima. The Supreme Court of Appeal agreed with Country Cloud holding that the intent required in the circumstances of the case was in the form of *dolus eventualis*.[62] The court disagreed however that foreseeability of

53 *Cooper* para 36.

54 *Cooper* para 47.

55 *Cooper* para 45.

56 *Cooper* para 47.

57 *Cooper* para 48; *Howard* at 674E.

58 *Cooper* para 50.

59 *Cooper* para 49.

60 *Cooper* para 51. See s 22(1) of the 2008 Act, as amended by s 14 of the Companies Amendment Act 3 of 2011.

61 In the case, the duty in contention was one owed to a third party who was not party to the initial contract between the department and the company in question (iLima company). The contract between Country Cloud and iLima was entered into on the basis that iLima would be awarded a building contract by the department. Thus, in court the argument presented by Country Cloud was that the department had foresight of the precise nature and extent of the harm Country Cloud would suffer if the contract with iLima was cancelled as the contract Country Cloud had with iLima was precipitated on the basis of the contract iLima had or, at the time, would enter into with the department, and the department was aware of this fact. *Country Cloud* para 33.

62 *Country Cloud* para 34.

harm in and of itself was a relevant consideration in the context of the facts in the case.[63]

The case went on appeal to the Constitutional Court. The latter court confirmed, on the facts, that indeed the department was aware of the loan Country Cloud had provided to iLima. The department also knew of iLima's parlous financial predicament and that it would be able to pay Country Cloud only if it received the fees from the department. The ineluctable inference drawn by the Constitutional Court was that the department subjectively foresaw the possibility that its repudiation of the contract with iLima would cause loss to Country Cloud. The department reconciled with this possibility and repudiated the contract regardless.[64] Importantly, and much as the provisions of section 4 of the 2008 Act were not in argument, in the context of whether or not the standard of judgment in section 4 is objective or subjective the approach adopted by the Constitutional Court in *Country Cloud* is potent and appears to settle that argument.

Eventually, the Constitutional Court agreed with Country Cloud's argument, as well as the SCA in pining the intention required that indeed the department had intention in the form of *dolus eventualis*.[65] In distilling that intention, the Constitutional Court said that kind of intention is satisfied where a wrongdoer foresees the possibility of a consequence eventuating as a result of his or her conduct, but reconciles him or herself with the fact and proceed nonetheless.[66] Such conduct would therefore be relevant to prove wrongfulness.[67] The nature of the fault and other fault-related factors are relevant considerations to prove liability.

As was alluded to earlier, foreseeability can be said to play another significant role in that it is relevant to determine the degree and extent to which fault may be ascribed as, if the degree is merely negligence such may not amount to liability. In fact, in *Nxumalo* the Appellate Division held that in cases of culpable or blameworthiness exhibited by the accused in committing the negligent conduct, relevant "would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence".[68] In another factual situation conduct may not be regarded as wrongful even if intended. Wrongful conduct may be recognised only if it is accompanied by motive to cause harm or by awareness of risk of serious harm that would result.[69] The latter statement avers that liability will be imputed only if an element of gross-negligence in the particular conduct is proved.

In the main, and despite the department having met all the elements for the court to impute

63 *Country Cloud* para 34.

64 *Country Cloud* para 36.

65 In fact, the Constitutional Court's ruling was a confirmation of what was said in *Du Plessis NO v Phelps* 1995 (4) SA 164 at 170, that: "a[part] from their statutory duties, directors owe fiduciary duties to the company as well as a common law duty to take reasonable care in the management of the company's affairs. Liability in the event of a director failing to take reasonable care in the management of the company's affairs is based on the principles of *Lex Aquilia*. The basic requisite for liability under the *Lex Aquilia* is fault, ie *dolus* or *culpa*, which results in loss to the plaintiff." In *Transnet Ltd t/a Portnet v MV 'Stella Tingas'* 2003 1 All SA 286 (SCA) Scott JA, *obiter dictum*, said that the conduct in question, although falling short of *dolus eventualis*, must involve a departure from a standard of a reasonable person. The conduct had to be extreme, and where consisting of conscious risk-taking, must show obtuseness of mind, where no risk-taking, total failure to take care.

66 This form of intention, however, does not have to be the only intention present. The intent may also arise in the form of *dolus indirectus* where for example the defendant aims at one result, but has knowledge that the consequence in question would unavoidably occur. *Country Cloud* para 37.

67 *Country Cloud* para 39; *Roux v Hattingh* 2012 6 SA 428 (SCA) para 38; *Le Roux and Others v Dey* 2010 4 SA 210 (SCA) paras 34–35; and *South African Post Office v De Lacy and Another* 2009 5 SA 255 (SCA) para 5. Havenga uses the term unlawfulness. See Havenga 2006 *SA Merc LJ* 229–237.

68 *Nxumalo* 861G–H; *Moodley* para 35; and *Humphreys* para 22.

69 *Country Cloud* para 39; *Fodare Pty Ltd v Shearn* [2011] NSWSC 479 paras 63–64.

liability on it, the Constitutional Court refused in *Country Cloud* to find that the conduct of the department was wrongful citing its reason as being the fear of indeterminable liability. This was so because the court considered that much as blameworthiness and indeterminable liability were relevant, these however were not dispositive considerations.[70] The disposition had to be weighed with all other factors to determine wrongfulness.[71] The Constitutional Court held that Country Cloud had to convince the court that the department was responsible for the loss suffered, as, if the department acted permissively to cause that loss, it would not matter that it would have done so intentionally. The court must be satisfied that the department wronged Country Cloud.[72] At the end, the court was satisfied that the department breached the contractual duty it owed to iLima. But the challenge for the court was the fact that the challenge to the breach did not tell what duty the department owed to Country Cloud.[73] The appeal failed.[74]

3 2 Arguing in Favour of the "Objective and Reasonable" Elements

The last two elements are "objective and reasonable". Contrary to the subjective element, the objective element is concerned with what is likely, irrespective of what the agent actually expects.[75] In the context of section 4, the question under this element appears to be: objectively viewed, what likely result does the financial information in question reveal? Does it show that insolvency is or would be likely immediately after the distribution is made or that the company will remain solvent and liquid for the next twelve months? Conflicting arguments can be expected between directors on what would be likely. Paramount, this element informs that the concern is not whether the agent believes that the company is able to pay its debts; interpretatively it is what is likely to result given the information before the director at the time. The objective element's forecast is not embedded in the expectations of a director.

On the other hand, the author regards the reasonable element to be more or less of a twin element operating side-by-side with the objective element. The reasonable element applies as well because of section 76(4)(*a*)(iii) of the 2008 Act. The test it contemplates is objective.[76] The reasonable element is concerned with what the agent can reasonably expect given the information available and considered.[77] The law penalises the subjection of parties to risk where there is gross unreasonableness.[78] In the context of section 4, having the experience, expertise, knowledge, and skill, and having had the benefit of advice from experts,[79] and having

70 *Country Cloud* para 42.

71 *Country Cloud* para 42.

72 *Country Cloud* para 49.

73 *Country Cloud* para 37.

74 It may well be that the Constitutional Court associated itself with the ruling in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 55.

75 Lagnado and Channon 2008 *Cognition* 758.

76 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty)* 2014 5 SA 179 (WCC) paras 76 and 87; Bidie "Finding Juridical Dispositions Germane to the Interpretative Context to be Attributed to 'Reasonably' Under Section 4 of the Companies Act 71 of 2008" 2020 *SAPL* 1; Bidie "'Knowledge' as a Mechanism to Hold Directors Personally Liable for Adverse Distributive Decisions Under the Companies Act 71 of 2008" 2018 *JCCL&P* 1; and Cassim *et al. Contemporary Company Law* (2012) 564.

77 Lagnado and Channon 2008 *Cognition* 758.

78 *Philotex* 146H−147D. See as well s 22(1) of the 2008 Act.

79 In terms of s 76(4)(*b*) of the 2008 Act a director: is entitled to rely on: (i) the performance by any of the persons (*aa*) referred to in subsection (5); or (*bb*) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

subjectively applied its mind to the company's financial information, and weighed all relevant information, what is the reasonable course for the board of directors to take? Wrongfulness and/or unlawfulness in terms of this element is, therefore, determined by looking at the result. It is further submitted that the decision in *Winterton v R* can analogously be viewed as having set the principle in instances where a risk would in the circumstances be obvious. The decision in the case is consistent with the approach adopted by the SCA in *C Fourie v FirstRand Bank Ltd*,[80] on how it must be proved that a person will be blamed for the adverse result in the circumstances of a particular case. In the context of section 4, the thinking of the Court of Appeal can be put thus:

> should the risk have been foreseen or ought to have been foreseen, that it would pose an obvious danger which would have alerted a competent, knowledgeable and experienced director that the company would be insolvent as a result of the distribution. Where a risk would be obvious evidence would show that either the director foresaw the danger and ignored it or the director failed to see it in circumstances where an objective and reasonable director would have seen it. Thus, it would not only be the perception of how the director foresaw the risk that would matter in the circumstances, but whether objectively the risk ought to have been foreseen by an objective director.[81]

3 2 1 *C Fourie*

C Fourie is one of the recent and important cases in the last decade which has contributed to the explanation of the duty of care and provides a plausible combination of the elements. The duty of care and skill was not argued in the case nor was the concept "foreseeable" mentioned. Nevertheless, the case typically reflects when a director of a company could be held liable for a breach of the duty where loss or damage should have been reasonably foreseen. In this case the challenge might not have been argued and/or predicated on the duty of care, but the implied reference to the breach of this duty was implicit against Fourie and Du Preez. FirstRand Bank ("Bank") alleged fraud. The case concerned a combination of contraventions related to misuse of company funds and compilation of misleading financial statements of the company by directors to mislead the creditor Bank.[82] In the court *a quo* Southernwood J gave judgment for the Bank against Fourie only under section 424, and refused liability in delict. The delictual claim against Du Preez, represented by his executor, was dismissed due to failure by the Bank to prove proximity or existence of a causal link between the false statements and the losses and damages which were claimed.[83] The decision was appealed and cross-appealed, respectively.

One observes from the facts of the case that the case was replete with all the elements which are susceptible to be proved where a director is expected to exercise their powers and perform duties with care, skill, and diligence. In its ruling, the SCA agreed with the decision of the court *a quo*[84] when it held Fourie personally liable. The decision in favour of Du Preez was also overturned;[85] the SCA holding him jointly and severally liable with Fourie.[86] The directors were

80 *C Fourie v FirstRand Bank Ltd* [2012] ZASCA 119.

81 *Winterton v R* [2018] EWCA Crim 2435.

82 Fourie was an accountant by profession, and Du Preez was an auditor. Against Fourie, the action was based on s 424 of the Companies Act 61 of 1973, alternatively on the basis of *actio legis acquiliae*. Whilst against Du Preez, the action was in delict for vicarious liability as the employer responsible for the wrongs committed by Fourie. The basis of the claim was a Floor Plan Agreement entered into between Supreme Car and FirstRand Bank in terms of which the Bank advanced money to Supreme Car for purchase of second-hand vehicles. These cars would eventually constitute security for the loan. For each car sold, Supreme Car was to repay FirstRand Bank within a week of the sale. Supreme Car breached the terms of the agreement by not making repayments as agreed. Thus, FirstRand Bank cancelled the agreement. *C Fourie* paras 1 and 4. See also *Msimang NO v Katuliiba* [2012] ZAGPJHC 240.

83 *C Fourie* para 6.

84 *C Fourie* para 33.

85 *C Fourie* para 2.

86 *C Fourie* paras 34–40.

held liable in delict as well.[87]

3 2 2 Were the Company's Financial Statements a Representation?

In holding against the appellants, the SCA first noted that at the court *a quo* Fourie argued that the financial statements he prepared were not intended to communicate any representations to third parties about the financial position of Supreme Car. If, however, they were interpreted as such, the information contained therein was nevertheless not untrue.[88] Fourie, also contended that the Bank had failed to establish a causal link between the fraudulent misrepresentations, if there were any, and the company's eventual inability to pay.[89] Having assessed the statements presented, the SCA found many indiscretions pointing to misleading averments by Fourie.[90] The SCA found that the fraudulent misstatements induced the Bank to grant credit.[91] The indiscretions were connected to the ultimate loss.

In analysing the court *a quo*'s decision, the SCA applied the "but-for test". The court held that causation must be proved in two stages: factual causation, which is expressed as the "but-for test", which requires a hypothetical inquiry as to what probably would have happened, but for the wrongful conduct of the defendant.[92] The application of this leg of the test must not be misconstrued.[93] The other leg is legal causation which, as its premise, embodies considerations of public policy.[94]

On the first leg, the court noted that what Fourie did was to prepare and/or submit financial statements which reflected that the business of the company was growing and financially sound, which in fact was untrue.[95] Thus, the SCA put the response in the following words: "but for the misleading financial statements, the cash flow problems would have made FirstRand Bank/Wesbank reconsider increasing Supreme Car's credit."[96] As a result, the SCA found against Fourie, as did the court *a quo*, that[97] he was liable for: (i) knowingly having made false representations on behalf of the company to the Bank by preparing false financial statements, and thus, committed fraud; (ii) by being party to the conduct of the business of Supreme Car in a manner that amounted to recklessness, and that both Fourie and Du Preez were knowingly a

87 *C Fourie* para 40.

88 *C Fourie* para 12.

89 *C Fourie* para 12.

90 *C Fourie* paras 15–20.

91 *C Fourie* para 21.

92 *C Fourie* para 37.

93 *C Fourie* para 37.

94 *C Fourie* para 35; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700E−701C. In *Loureiro v Imvula Quality Protection (Pty) Ltd* para 55, the CC held that wrongfulness inquiry focuses on the harm-causing conduct and goes to whether the policy and legal convictions of a community, constitutionally understood, regard it as acceptable.

95 The consequence was that FirstRand Bank granted more increases to the credit facility which the company had with the Bank, something which the Bank would not have done had the financial position of the company been properly presented. *C Fourie* para 11.

96 The transaction was based on fraud or reckless conduct of the company's business and caused the company's inability to pay its debts. In support of its reasoning, the SCA referred to the numerous spending desires of the owners of the Supreme Car company using the company's finances. However, the spending by the owners was of no avail to Fourie to argue that that spending was in fact the cause of the financial woes of the company and not of his own actions. In fact, Fourie had accepted and supported the finding that the business of the company was conducted recklessly and Fourie was party to the spending. The court noted that Fourie advised the company owners on the viability of some of the transactions they entered into; allowed them to make use of the company's funds for personal debts; knew what the owners were doing, and yet he did not take steps to stop them from using the company's funds; he never threatened to resign if the owners did not desist; Fourie was therefore knowingly a party to the conduct of the business. *C Fourie* paras 21 and 23−26.

97 *C Fourie* paras 23−33.

party to such conduct.[98] Their misrepresentation had a causal connection to the accumulation of debt for the company. It concluded that the accepted facts of the case showed that had it not been for the misrepresentations of the financial position of the company which gave rise to the globular loss, the Bank would not have granted the incremental credit facility to the company.[99]

Brand JA held that the misrepresentations had two purposes. On the one hand, they were a cover-up to the owner's uncontrolled spending, *which, for all intents and purposes, was dissipation of the company's capital*. On the other, they served to induce the increased credit facilities by the Bank; the increased facilities in turn served to facilitate the uncontrolled spending.[100]

3 2 3 Was Loss or Damage to the Company Foreseeable?

It is interesting to note that Brand JA did not refer to whether Fourie should have foreseen that the misspending and his misrepresenting of the company's financial statements would have led to misleading the financial position of the company. The court was silent on this point. But, in hindsight, and judging from the position Brand JA took in his decision, Fourie should have or ought to have foreseen it. Fourie should have or ought to have had the requisite foresight to anticipate that his conduct, to assist in the dissipation of the company's capital and misrepresentation of the financial position of the company, would cause loss to the company, thus, he had to bear the blame for the loss or damage the company sustained. The applicant's conduct constituted gross negligence of the highest order. Brand JA dismissed Fourie's reasons on appeal and did not agree with the court *a quo*'s decision that liability in delict was not proved against Fourie and Du Preez.[101]

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98 *C Fourie* paras 31–33.

99 *C Fourie* paras 34–37; *Bentley* 700E–701C.

100 *C Fourie* para 39. Secondly, Fourie presented an argument to the effect that because one of the five misrepresentations relied on by FirstRand Bank against him could not be proved as causally linked with other misrepresentations, then it was correct for the court *a quo* to acquit him of wrong-doing. Brand JA held to the contrary. He stated that if one applies the test to each one of the misrepresentations relied upon by FirstRand Bank, the court would have arrived at the same conclusion, thus, the elimination of one misrepresentation would make no difference as the consequences of the remaining misrepresentations would remain the same. Such an application of the test as argued for by Fourie would lead to a situation where one person who committed a series of misrepresentations would be treated as if he or she was in a better position than a person who committed one wrong/misrepresentation. Lastly, Fourie raised the argument that FirstRand Bank should have been diligent when it approved the loans to detect that the statements were false and as such could not, after its failure to be so diligent to spot that the financial statements were misleading, claim such losses from Fourie. The Supreme Court held that it hardly lies in a person who knowingly set out to mislead, to now argue that if the credit provider had taken care the misleader would not have been successful to so mislead. The party who suffered loss and/or damages does not have to be more careful in order to prevent the wrongdoer from presenting misleading financial statements. FirstRand had no obligation to conduct proper enquiry so as to prevent Fourie from presenting misleading financial statements which were fraudulent and which willfully concealed the true state of affairs of the particular company. *C Fourie* paras 21–22 and 37; and *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 4 SA 588 (C) 594E–H; *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd* [2015] ZASCA 2.

101 *C Fourie* paras 33 and 40.

4 "FORESEEABLE": A COMPARISON WITH OTHER JURISDICTIONS

Both the contextual approach by courts in Canada as well as the words of section 76(4)(*a*) of the 2008 Act seem to adopt the posture that resonates with the "foreseeable" concept introduced under section 4 of the 2008 Act. In Canada, a case in point is that of *Peoples Department Stores v Wise*.[102] In the case, the Canada Supreme Court had to rule on whether the Wise brothers had breached their duty of care to the appellants. The court equated the relevance of the provisions of section 122(1)(*a*) and (*b*) of the CBCA with those found in Article 1457 of the Civil Code of Québec ("CCQ"), being the province where the company was registered.[103] The court had to determine whether the brothers were liable under the duty of care as alleged.[104] Major and Deschamps JJ referred to the wording of section 122(1)(*b*) of the CBCA which directly regulates the duty of care, diligence, and skill, and ruled that section 122(1)(*b*) requires more from directors and company officers than was the case before at common law. The judges went on to justify and, perhaps unwittingly confirm what this article initially alluded to as the reason for the inclusion of the concept "foreseeable" — that the idea behind stricter standards has been to improve the quality of board decisions.[105]

Touching on the standard used in Canada, the judges held that the standard of care was objective as opposed to "objective subjective" as was decided in *Soper v Canada*.[106] This was so because section 122(1)(*b*) is basically focused on factual aspects of circumstances surrounding the actions of a director or company officer as opposed to subjective motivations of that director or company officer, which are the subject of section 122(1)(*a*) of the CBCA.[107] Liability to be established under the duty of care also require consideration of contextual factors, including the prevailing socio-economic conditions. The words "in comparable circumstances" do not bring a subjective element relating to competence, but rather bring a contextual element into the decision-making process and standard of care.[108]

One finds resonance again between "foreseeable" and the wording of section 172(1)(*a*) of the UK 2006 Act. For example, the wording of the latter section postulates that the subsection obliges directors to consider the "likely consequences of any decision in the long term". Among others, the latter phrase is capable of an interpretation which is likely to mean that directors are expected to consider other factors that are likely to enable them to foresee the long-term consequences of their distributive decisions and what their adverse impact are likely to be on that company and its stakeholders. To the writer, it would appear that the latter specific rule is one of those which were developed in English law, not farfetched from Canadian corporations' law, within the sphere of company law to accommodate breaches of the duty of care.[109] Here it is worth pausing to submit that it is not a far-fetched suggestion to say that the

102 *Wise*.

103 The court was satisfied that if a breach of a standard of care, causation and damages are established, creditors would be entitled to resort to art 1457 of the CCQ to vindicate their rights under rules of conduct, thus, s 122(1)(*b*) of the CBCA was relevant. The Code provides for the classification of extra-contractual liability in the appeal which was the basis its decision was to be founded. The article provides that: "Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where a person is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody." Based on the Code, the court went on to delineate a director's duty of care in the context of the CCQ into three categorised questions: (i) who has the duty ("every person"); (ii) to whom is the duty owed ("another"); and (iii) what breach will trigger liability ("rule of conduct"). *Wise* at 487.

104 *Wise* at 487–488.

105 *Wise* at 491.

107 *Wise* at 491.

109 Havenga 2006 *SA Merc LJ*.

inclusion of the concept "foreseeability" in the 2008 Act was intended to project the same or adopt a similar trajectory/mechanism as what the Act aimed or aims to achieve.

To find liability, English case law follows the *agency theory approach*. This theory, as opposed to the *identification theory approach*, whereupon directors cannot be found liable because of their identification with the company, considers directors as company agents when they perform their duties and/or exercise their powers, and as such their liability is judged through that lens. Under the agency theory, a director would be held personally liable in tort only if they themself committed or participated in an act constituting a tort. The director has to assume personal liability when carrying out their duties which must lead to the creation of a special relationship between that director and the plaintiff, or they must procure or induce another to commit the tort. In addition, a director's participation must be to the degree and kind of personal involvement that the director made the tortious act on their own as distinct from the company. There has to be proof of knowledge, deliberate acts, and willful participation.[110] A director need not know that their conduct is likely to be tortious. Director's liability must be thoroughly and carefully examined to establish the part they personally played in respect of the conduct complained of.[111] Where a person seeks to rely on a representation reliance must be in fact and it must be reasonable.[112]

Further, one observes the same trend under Australian company law. In *DSHE Holdings (Receivers and Managers Appointed) (in Liquidation) v Nicholas Abboud (No 3); National Australia Bank Limited v Nicholas Abboud (No 4)*[113] an action was brought against directors regarding dividend payments in terms of section 254T(*c*) of the Corporations Act 2001. This was one of the aspects underpinning the action. The section provides that a company must not pay a dividend unless the payment does not materially prejudice the company's ability to pay its creditors. After its analysis of the facts, the court was of the view that the section was not breached. In its view, the dividend payment either had no material impact on creditors of the company, or the payment did not materially worsen the creditor's position because payment to them was to be delayed. However, the court did find a breach of fiduciary duties in terms of section 180(1) of the Corporations Act 2001 by one director (the Chief Financial Officer [CFO]) of the company, but not the board of the company. At the time the payment of the dividend was made, it transpired that there was possible prejudice to creditors in terms of operational daily cash flows available to the CFO which gave an indication that the dividend would materially worsen the position of creditors. Apparently, the CFO did not properly document his rationale behind the conclusion of how the company might have avoided the material prejudice. Section 180(1) of the Corporations Act, like section 4 of the 2008 Act, guards against loss or damage which might ensue on the company, for example where it might become insolvent or be at risk of such as a result of the distribution.[114] The plaintiff's expert testified that the information on which the decision to pay was based was not reliable and could not be justified and provide a reasonable basis to make the decision to pay. The expert was of the opinion that daily cash flows used by the finance team to manage daily and weekly creditor payments ought to have been provided to the board as these provided a more reliable prediction of the company's cash

110 *Mentmore Manufacturing Co Ltd v National Merchandising Co Inc* 1979 89 DLR (3d) 195 Ct App at 22.

111 *Whitehorse Distillers v Gregson Associates* [1984] RPC 61 (Ch) para 91.

112 *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL). See as well *Koninklijike Philips Electronics NV v Prisco Digital Disc GmbH*

113 *DSHE Holdings (Receivers and Managers Appointed) (in Liquidation) v Nicholas Abboud (No 3)*; *National Australia Bank Limited v Nicholas Abboud (No 4)* [2021] NSWSC 673.

114 The company directors paid dividends based on information contained in the monthly board packs, which contained actual and forecast monthly trading analysis, monthly cash flow forecasts, debt covenant analysis, functional area updates, audited half-year and full-year accounts, dividend discussion papers, and ASX briefing packs.

flows, including debt facility limit breaches. The expert was also of the opinion that the deferred creditor payments should have been considered when evaluating the company's compliance with its debt facility limits at the time.

In *ASIC v Mariner Corporation Limited*[115] the Australian Federal Court seemed to suggest that the term "foreseeable" does not have to be expressly provided for in the provisions of a statute for it to be invoked in corporate law in that country in situations where the liability of a director is the subject of determination by a court at the time. Whether a director had foreseen loss or harm to a company, the concept will be the subject of determination irrespective, as long as wrongfulness or unlawfulness of conduct is being determined. So, one observes that reference to what the "foreseeable" concept means is not always phrased similarly in statutes. Arguably, therefore, foundationally one potent role played by the concept is to balance the competing interests/ rights which might inauspiciously be affected as a result of the exercise of power by a director. Conversely, the concept may as well operate as a mitigating factor *vis-à-vis* the contravening act the director has been proved to have committed especially in situations where there would be benefits accruing to the company, irrespective of the contravening conduct.[116] If we construe what the court said in *Mariner* generally, we can see that the concept of "foreseeability" is complex. However, it is also a mechanism that can be used to maintain a company's solvency and liquidity, foster responsible governance, create a conducive environment, and encourage company directors to continue managing company affairs without fear of being held liable for the company's failure. Therefore, it may well be that the concept of foreseeability was included in section 4 of the 2008 Act in order to infuse or accommodate the delict principles arising from the duty of care under company law.

Seemingly affirming their support for changes effected from time-to-time, in *Wise* Major and Deschamps JJ held that stricter standards opted for should guard against directors being easily painted with allegations of breach of their duties of care. Courts must be alive to the fact that business decisions are at times made with high stakes and under considerable pressure, in circumstances where there is less information on the matter. Thus, to counter the risk of hindsight bias, Canadian courts have developed the rule of deference to business decisions (business judgment rule).[117] Meanwhile, directors will have to demonstrate good faith and diligence by making reasonable and fair decisions; decisions need not be perfect. Where the latter suffices courts will not interfere in the decision made. No definite alternative must have been available which was more beneficial to the company at the time than the chosen transaction.[118]

115 *Australian Securities and Investments Commission v Mariner Corporation Limited* [2015] FCA 589 paras 1 and 2. The case concerns the lawfulness of the defendants' conduct relating to an alleged wrongful announcement made of an off-market takeover bid. Australian Securities and Investments Commissions (ASIC) brought the proceedings against Mariner and its three directors Mr Darren Olney-Fraser, Mr Donald Christie and Mr Matthew Fletcher, alleging contraventions of ss 180, 631(2)(*b*) and 1041H of the Corporations Act 2001 (Cth) with respect to that takeover announcement.

116 In *Mariner*, the court expressed itself thus with regard to the concept: "relevant to the question of breach of duty is the balance between, on the one hand, the foreseeable risk of harm to the company flowing from the contravention and, on the other hand, the potential benefits that could reasonably be expected to have accrued to the company from that conduct. Not only must the Court consider the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, but the Court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question. After all, one expects management, including directors to take *calculated* risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of section 180." *Mariner* paras 450–452.

117 *Wise* at 491.

118 *Wise* at 492; *Maple Leaf Foods Inc. v Schneider Corp.* (1998) 42 O.R. (3d) 177 192.

5 COMMENTS AND CONCLUDING REMARKS

5 1 Foreseeable as a Legislative Directive for Accountable Decision-Making

The foregoing exposition categorises "foreseeability" as a potent concept that is factual[119] and broad in its outlook. By the same token, its essence is that it carries a unique legal meaning.[120] But, the problem is that it may also have a common meaning, hence it tends to confuse.[121] Further, the discussion alludes that to prove a breach of duty of care against directors, based either on delict or fiduciary duties, "proximity" and "foreseeable" are accepted as the dominant concepts that courts use when determining liability where misconduct or *gross* negligent conduct in the performance of one's duties is alleged.[122] It is comprehensible that the two play an assertive role in analysing breach of duty of care,[123] and thus, when blameworthiness may be imputed. In *C Fourie*, it is worth noting that no evidence needed to be adduced to prove a causal link. However, that did not necessarily mean that in the case there was no causal link established by the facts. Proximity of Fourie's conduct was an integral part to cause the loss suffered by the company, and ultimately by the Bank. Thus, one may submit that in instances that would resemble Fourie's behaviour, the concept "foreseeable" compels all directors or those who would be involved in decision-making, just as much as the duty of care aims to do, to be diligent and exercise more care with their decisions guarding against likely adverse outcomes to the company.

The contemporary direction professed by the 2008 Act is provided for under section 76(4)(*a*) of the Act. The section expressly directs directors to acquire knowledge about a matter. Steven submits that directors are no longer expected not to possess skills and knowledge.[124] In fact, directors can only be found liable under section 4 if there is proof that the director knows, had known, or has actual knowledge about a matter.[125] Thus, as an additional requirement the plaintiff "will have to prove breach of duty by identifying and pleading an untaken precaution that would have prevented loss or damage, or loss or breach, had it been taken".[126] It is submitted that the latter test will play a determinant role, whether the action is instituted based on delict or breach of the duty of care under statute, (my emphasis) to establish whether or not it was reasonable under the circumstances for the board to make the distributive decision it made.[127] From the discussion by Lagnado and Channon and section 4 of the 2008 Act, objectivity implies that decision-makers must take an array of factors into account before making their decision in addition to the financial standing of that company. One of these is, for example, whether the company made a profit, whether at the time the company has funds to pay dividends, or whether the decision will be proper in the circumstances and will not be against the interests of that company. It is clear under the first line of section 76(4)(*a*)(i) of the 2008 Act that when directors exercise their power or perform their duties, they must do so by making a decision. The decision is by voting for or against a resolution intended to make a distribution. However, the same section implies that the decision cannot be made in isolation. The approach of the objective and reasonable elements agrees with the contemporary views of authors and court decisions that the test is "whether an intelligent and honest person in the position of the director

119 *Hendrik Johannes Pitzer* para 24.

120 VerSteeg 2011 *Michigan State Law Review* 1499.

121 VerSteeg 2011 *Michigan State Law Review* 1499. Owen "Figuring Foreseeability" 2009 *Wake Forest Law Review* 1277–1307.

122 De Villiers 344; *Kruger* at 430E–F; and *Hendrik Johannes Pitzer* para 18.

123 De Villiers 360.

124 Steven 2017 *PER*.

125 See a comprehensive exposition of these concepts in Bidie 2018 *JCC&P* 1–46.

126 De Villiers 359.

127 *Winterton v R*.

could in the whole of the circumstances have reasonably believed that he/she was acting in the best interests of the company",[128] and should not have voted for a resolution approving the distribution made because they should or ought to have objectively foreseen the likely outcome. A decision that fails the objective and the reasonable tests cannot be regarded as just and fair, and will not pass legal muster for protection under the business judgment rule.[129] For a decision to be objectively reasonable, there must be a connection between the reasons and a director's decision that the decision was in the best interests of that company as *Wise* confirmed. A distribution must not be *ultra vires* the company, and the circumstances of each case will be determinative.[130] How a director must objectively exercise their discretion or to what extent their subjective wants play a dominant role in decision-making is crucial.[131]

5 2 Foreseeable as a Balancing Technique

What foreseeable brings for accountability is that much as directors may obviously distribute company money or property for shareholder benefit, what the Act prohibits is wrongful/unlawful distribution. Further, the drafters of the 2008 Act were clearly mindful of the stability/benefits and balance of interests "foreseeable" might bring in the financial governance of companies on incorporating the concept. In the author's view, the latter is fortified by the fact that the introduction of the concept in section 4 not only serves to rein in directors; it appears capable to assuage/allay fears that apportioning of blame and liability on directors shall be automatic. All factors which might have a bearing on the financial circumstances of a company will have to be established. One may argue that much as the concept "foreseeable" is scribed such that it be one of the pillars that informs director-made distributive decisions; this is more so for courts when they are called to determine whether a person has breached the duty of care, skill, and diligence as alleged. Courts are called to establish whether the actor should have known or ought to have known or should have been aware of future risks and take steps to avoid harm to a company, for example, by virtue of one's position.[132] The corollary implied by section 4 is that only justified and reasonable distribution of company money or property shall be legally tolerated. This is especially so given that section 4 must be read alongside other inherently potent concepts and sections, such as section 76(4)(*a*)(i)[133] of the 2008 Act,[134] including "rationality" and "reasonableness". These concepts are designed to give credence to a court decision when establishing what would have influenced a director to reasonably believe the decision was in the best interests of a company at the particular time of decision-making.[135]

From that context, it is clear that foreseeable and wording reflecting the same intent are aimed

128 *Visser* paras 75 and 87; Cassim *et al.* (2012) 476.

129 See s 76(4) of the 2008.

130 The deeming part was argued somewhere. See an extensive discussion of the solvency and liquidity test in Bidie "The Nature and Extent of the Obligation Imposed on the Board of Directors of a Company in Respect of the Solvency and Liquidity Test Under Section 4 of the Companies Act 71 of 2008" 2019 *JCCL&P* 59.

131 See a discussion of the subjective and objective test in Bidie "Director's Duty to Act for a Proper Purpose in the Context of Distribution under the Companies Act 71 of 2008" 2019 *PER* 1.

132 Among others, s 162(5) of the 2008 Act is brought into the equation that it be determined whether, as a matter of law, the person was grossly negligent or acted with willful misconduct or intentionally breached his or her duties and thus, caused loss and/or consequential loss or damage to a company, and whether that breach could have been foreseen/avoided. See s 162(5)(*c*) of the 2008 Act; and *McCrae* para 22. See as well Ibbs and Razavi 2014 *J Leg Aff Dispute Resolution. Engineering Construction* at 1. *Fodare*.

133 The section requires directors to take reasonably diligent steps to be informed about a matter.

134 Section 76(4)(*a*)(i) assists in the determination of whether the board had taken any steps to ascertain the likely type of outcome s 4 guards against should the carried-out distribution result in loss or damage. Also, see Lagnado and Channon where they make an example in reference to a doctor who administers medicine to a patient. Lagnado and Channon 2008 *Cognition* 758.

135 VerSteeg 2011 *Michigan State Law Review* 1499.

at urging directors to prudently and diligently take steps to empower or equip themselves so that they foresee the risks that might arise and adversely affect the interests of their companies. The concept and wording reflecting the meaning of the concept seek to draw a director's mind to the actual and subjective awareness of possible future occurrences.[136] Contemporary trends encourage the preservation of companies to contribute to a sustainable economy as section 7 of the 2008 Act contemplates. From this narrative, it suffices to argue that the concept "foreseeable" and like intended statutory provisions are not ordinary statutory inclusions. It is the author's view that the express statutory inclusion of such phrases is a commendable policy directive aimed at nurturing rational application of company finances when directors make decisions to distribute. Responsible decision-making runs through the Act as the key policy.[137] Section 76(4)(*a*)(iii) of the 2008 Act pronounces that it would be impossible and implausible for directors to rationally believe that a company is in a financial position to make a distribution where directors did not take steps to establish whether the relevant information reflects that company's true state of financial affairs.[138] That would be tantamount to gross carelessness and reckless conduct as was established in *C Fourie*.

Surely, in the circumstances the obligation to "foresee" as an instrument to instill accountability would have been subverted. In fact, *C Fourie* and other like cases tell us that the character of the information used to assess the occurrence against which section 4 protects companies will obviously play a prominent role. The level of competence and expertise of the board/director in question will feature strongly. As a result, how a board has conducted itself will have to be determined whether it was informed by empirical grounding. Otherwise, courts might judge the outcomes of a director or board's predictions to be susceptible to error especially if the prediction turned out to be naïve and intuitive,[139] thereby without adequate reasoning employed to come to the particular distributive decision in question.[140]

6 CONCLUSION

The preceding discussion indicates how the legislature cogently included in its drafting of section 4 the "foreseeable" concept. By doing so, the legislature seems to have opened a two-way route by which the duty of care may be established or proved. First, is the foreseeability route which appears to have been aimed at enabling courts to link loss or damage and the liability of directors to a company with a director's conduct simultaneously as they establish the breach of their statutory duties (fiduciary duties) where directors acted in dereliction or breach of their duty while possessed with expertise, experience, knowledge, and skill as well as true, credible and accurate information at their disposal. Clearly, the drafting of the concept indicates a departure in favour of an interpretation different from the common law route which is the second route. As it was evident in *C Fourie*, the latter route forces courts to unnecessarily refer to or invite the common law duty of care, skill, and diligence interpretation into the fold of interpretation of fiduciary duties, which obviously has always been the basis by which the duty

136 VerSteeg 2011 *Michigan State Law Review* 1499.

137 *McCrae* para 14; *369413 Alberta Ltd. v Pocklington*, 2000 ABCA 307 para 40.

138 Section 76(4)(*a*)(iii) of the 2008 Act provides that: "in respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company will have satisfied the obligations of section 76(3)(*b*) and (*c*) if the director made a decision, or supported the decision of a committee of the board, with regard to that matter, and the director had rational basis for believing, and did believe, that the decision was in the best interests of the company." Also see *Visser*.

139 Langevoort "Behavioral; Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review" 1998 *Vanderbilt Law Review* 1499–1540; Christine Jolls "Behavioral Law and Economics" 2007 *National Bureau of Economic* Research, Working Paper 2.

140 Simon "Rational Decision Making in Business Organisations" 1979 *American Economic Review* 493−513.

of care had to be proved.

The author is of the firm view that just like the policy which buttressed the duty of care, skill, and diligence, foreseeable as a concept carries the same sense of prevision, a consciousness of the possibilities of future happenings to a company, and implores directors to plan for those *adverse* future possibilities[141] or to avoid them. The concept "foreseeable" implores company directors to be foresighted persons who constantly endeavour to make an effort to see into the future or *take steps to equip themselves to see the likely adverse future happenings* and take the necessary precautions to protect the company and other stakeholders who might be dependent on the decisions the company makes to protect their interests while knowing that companies do take risks, advantages or opportunities.[142] Consequently, because the concept foreseeable's focus is "predictive" in nature it is conceivable that courts will assess a board's decision based on the level of predictability of outcomes (actual harm) which would result from information considered by a board for decision-making at the time. Surely, the latter exercise must be an assessment of whether a duty of care was executed with the necessary skill and diligence. Thus, different from how the principle underpinning the duty of care, skill, and diligence has historically been interpreted by courts, foreseeable suggests a second shift of what is expected of directors, that they are not to summarily resolve to distribute company money or property without more. Put differently, the concept "foreseeable" conscientiously compels directors to guard against judging the possible occurrence of harmful events to a company with hindsight. Rather, their judgment must be prospective, predicting based on the financial information before them and other knowledge, skill, expertise, and experience acquired in the marketplace to detect early what is likely to result from their "*to be made decisions*". The duty to act with care, skill and diligence is embedded in the concept of foreseeable whose interpretative principles are more aligned with the breach of duties of directors. Thus, directors are no longer expected to be static when exercising or performing their duties. It is expected that the duty of directors to protect the company entails the taking of active and diligent steps to engage with information so that directors can foresee what likely outcome to expect.

Impliedly therefore, simply satisfying the requirement to prudently and diligently consider relevant information was not enough under the common law duty of care, skill, and diligence, the same cannot be said in respect of what the Act contemplates by "foreseeable". In the main, it will have to be established whether that information was compiled and stored in accordance with the provisions of the Act and accounting standards;[143] and it will have to be established whether the way that information is compiled and stored accords with credible credence to the information itself. Thus, the quality of the information referred to would have to be such that it will equip that company board to make expertly informed, competent, and sound judgment calls; credible, true, and accurate information forms the foundation of the obligation section 4 of the 2008 Act imposes. The circumstances of the particular financial information in that case will determine the outcome.[144] The test in that instance would then be whether a prudent director, given their general knowledge — that is, the subjective state of mind — experience, care, skill, and diligence, after being privy to the relevant financial information, would have reasonably foreseen the likely adverse loss, damage or costs or ought to have and should have taken precautionary steps to avoid it, as another director in the same circumstances would. It is

141 VerSteeg 2011 *Michigan State Law Review* 1499.

142 VerSteeg 2011 *Michigan State Law Review* 1506–1507. *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 169 and 177–179.

143 See ss 28, 29 and 24 of the 2008 Act. Failure to adhere to how the information must be compiled and stored is an offence in terms of the Act and a director may be held personally liable as a result.

144 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 23.

submitted that the standard of judgment used is both objective and subjective.[145] It is objective in the sense that the actions of the defendant are measured against the conduct of a notional reasonable person. In other words, a director would be held liable simply by virtue of his or her failure to perform the required duties. The standard is subjective to the extent that it must be postulated that the notional person belongs to the same group as the defendant, moving in the same circles and having the same general knowledge or means of knowledge or *means to access such knowledge.*

The obligation "foreseeable" is meant to make an impactful dent in carelessness to adverse distributions and/or mismanagement of company affairs more than the common law duty of care, skill, and diligence did. The above provisions have been enacted to assist to discard the approach often employed by directors when they seek to distribute company money or property. Previous judgments have shown that when directors seek to pay dividends, they tended to adopt a retrospective instead of a prospective approach, looking at whether the company has profits instead of whether the reduction in the capital of that company would still enable that company to continue in existence. When it came to the payment of dividends, most times there was inadequate attention paid to whether a company would remain in business. Compared together, the concepts "*contextual context*" and the "*foreseeable*" as well as the "*likely consequences of any decision in the long term*" are, therefore, forward-looking, and much broader in scope than what directors previously had to consider, and what they must consider now before making a distribution. In *Winterton v R*, the Court of Appeal held that:

> the test for foreseeability should not be altered from being prospective of foresight based on what was known at the time to a retrospective test which judges with hindsight.

Therefore, the director's conduct should no longer be considered only to the extent that directors simply complied with their duty of care only so far as it is seen to be reasonable in the circumstances as it happened at common law.[146] Foreseeable compels a distinct change in focus, that in their decision-making directors be mindful of other much more important factors with social ramifications. This would be so especially in circumstances like the present where everyone stands to lose due to the possible effects caused by the COVID-19 pandemic. Thus, one may argue that the inherent intent the 2008 Act engraves in its provisions aims to change the status *quo* on how directors manage their companies' financial affairs. It appears to have seriously taken into cognisance the reality and the trite position that the lifeblood of a profit company resides in its solvency and liquidity. Where that solvency and liquidity dissipates, inevitably a company disappears along with it. The improvements by the Act are a commendable appreciation that what dissolves does not end with the company, but the broader concomitant economic and social compact of benefits derived from the very existence of companies.

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145 Riley 1999 *The Modern Law Review* 700; *Fourie NO v Newton* [2010] ZASCA 150 para 28; *Philotex* 143G. For an extensive discussion on directors being held liable based on their knowledge see Bidie 2018 *JCCL&P* 59.

146 *Lavender* paras 17 and 29. *South Australia Asset Management Corporation v York Montague Ltd* [1997] A.C. 191 ("*Saamco*"). *BPE Solicitors v Hughes-Holland* [2017] UKSC 21 (also known as *Gabriel v Little*). *Livent* paras 30, 35 and 37; *Hercules* para 27.