Directors' Secret Profit — Accounting to the Company

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1 Introduction

The successful acquisition of the Distillers Company (hereafter referred to as 'Distillers') by Guinness (hereafter 'Guinness') during 1986 caused an outrage in Britain. One of the consequences of the bid for Distillers was allegations of misconduct by Guinness. Criminal proceedings in connection with these allegations are still sub judice at the time of writing, but they, in their turn, led to the questioning of the payment of £5,2 million by Guinness to a company controlled by one of its directors, Ward. The repayment of this substantial amount by the director to Guinness was ordered by Nicolas Browne-Wilkinson VC in an application for summary judgment (see *Guinness plc v Saunders & Ward* 1987 PCC 413 (ChD)). The order for repayment was confirmed by Fox and Glidewell LJJ on appeal (see *Guinness plc v Saunders & Another* [1988] 1 WLR 863 (CA)). The Court of Appeal refused leave to appeal against their decision, but on 19 October 1988 the Appeal Committee of the House of Lords allowed a petition by the director for such leave (see *Guinness plc v Ward* [1988] 1 WLR 1271 (HL)). This final appeal was dismissed on 8 February 1990 (see *Guinness plc v Saunders* [1990] 2 WLR 324 (HL)). Judgment was delivered by Lord Templeman, with Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Griffiths concurring. Lord Goff of Chieveley also concurred with the dismissal of the appeal, but delivered a separate judgment.

2 The Facts of the Case

The relevant facts before the House of Lords were not in dispute. The appellant, Ward, admitted that he had received £5,2 million from the respondent company, Guinness, at a time when he was a director of that company. It was common cause that on 19 January 1986 a meeting of the board of directors of Guinness, attended by a quorum of the directors as well as advisers of Guinness, passed several resolutions. Amongst the directors present were the chief executive, Saunders, and two non-executive directors, Roux and Ward. Saunders and Roux explained the background to a proposed recommended offer by Guinness for the issued share capital of Distillers to the meeting. The board considered several draft documents in connection with the offer. There is no record of the possibility that any fees, commission or remuneration would be paid to a director (see at 327C of the report). The board of Guinness resolved to make an offer

and approved the draft documents. The board also resolved that 'any three directors of the company be and they are hereby appointed a committee of the board with full power and authority' (see at 327D) to settle the terms of the offer, to approve any revisions of the offer which the committee might consider it desirable to make and

> '*(vi)* to authorise and approve, execute and do, or procure to be executed and done, all such documents, deeds, acts and things as they may consider necessary or desirable in connection with the making or implementation of the offer and/or the proposals referred to above and any revision thereof . . . ' (327E)

It was common cause that Saunders, Roux and Ward established and constituted themselves a committee of the board for the purposes of these resolutions, that the committee carried the resolutions into effect, and that a revised offer resulted in Guinness acquiring all the share capital of Distillers. Subsequently an invoice was delivered to Guinness by a Jersey company controlled by Ward. This invoice claimed £5,2 million for advice in respect of the successful acquisition of Distillers. It was approved by Roux and the amount claimed was paid.

Guinness sought an order for immediate payment of the £5,2 million from Ward. The company alleged that payment of this amount had been unauthorised. The claim was successful in both lower courts. Ward appealed against the order made by the Vice-Chancellor and confirmed by the Court of Appeal.

3 The Decision of the House of Lords

The House of Lords agreed that the money had to be repaid to Guinness and the appeal was accordingly dismissed. Lord Templeman held that Ward had no right to remuneration without the authority of the board, and that there had been no contract between Guinness and Ward; the claim by Guinness for repayment was therefore unanswerable. Lord Goff found that it had emerged as a simple fact that there was in law no binding contract under which Ward was entitled to receive the money and that, as a fiduciary, he now had to repay that money to Guinness.

4 Reasons for the Judgment

4.1 Agreement

4.1.1 The appellant based his appeal primarily on an agreement which, so he contended, had originated in the articles of association of Guinness. The articles concerned departed from the articles recommended by statute, which reserve to a company in general meeting the right to determine the remuneration of the directors of the company.

Article 90 of the articles of association provided that the board was to fix the annual remuneration of directors provided that, without the consent of the company in general meeting, such remuneration was not to exceed a specified sum. An exception was provided for in article 91, which determined as follows (see at 328E–G):

> 'The board may, in addition to the remuneration authorised in article 90, grant special remuneration to any director who serves on any committee or who devotes special attention to the business of the company or who otherwise performs services which in the opinion of the board are outside the scope of the ordinary duties of a director . . . '

The court held that the effect of these provisions was that article 90 limited the annual remuneration which the directors could award themselves and that by article 91 special remuneration for an individual director could only be authorised by the board. A committee could therefore not impartially assess the value of its ownwork or the value of the contribution of one of its individual members (see at 328H). But a director could, as a condition of accepting an appointment to a committee or after he had accepted such an appointment, seek the agreement of the board to authorise payment for special work envisaged or carried out. The shareholders of Guinness ran the risk that the board might be too generous to an individual director at the expense of the shareholders, but had, by article 91, elected to run this risk. This article excluded the risk that a committee might value its own work and the contribution of its own members. It was the board, and only the board, who could grant special remuneration to a director who served on a committee (see at 329A).

It was submitted on behalf of the appellant, Ward, that the meaning of article 91 had been altered by article 2. This article contained various definitions which applied if they were not inconsistent with the subject or context of a specific article. The expression 'the board' was defined as

> '[t]he directors of the company for the time being (or a quorum of such directors assembled at a meeting of directors duly convened) or any committee authorised by the board on its behalf.'

Counsel for the appellant argued that the result of applying the definition in article 2 to article 91 was that a committee could grant special remuneration to any director who served on a committee or devoted special attention to the business of the company or who otherwise performed services which, in the opinion of the committee, were outside the scope of the ordinary duties of a director. Lord Templeman found that the subject and context of article 91 were inconsistent with the expression 'the board' in that article meaning anything except the board. The article drew a contrast between the board and a committee of the board. The board was expressly

authorised to grant special remuneration to *any* director who served on *any* committee. It could not have been the intention that any committee should be able to grant special remuneration to any director, whether or not a member of the committee (see at 329D). The remuneration of directors concerned all the members of the board and all the shareholders of Guinness. Article 2 did not effect a result which was inconsistent with the language, the subject and the context of article 91. Therefore, only the board possessed power to award £5,2 million to Ward (see at 329G). Lord Goff too concluded that article 91 did not empower a committee of the Guinness board to authorise special remuneration for services rendered by directors of the company (see at 340C).

The appellant further relied on article 110 of the Guinness articles of association, which permitted the directors to establish committees, local boards or agencies to manage any affairs of the company. The article stated that the directors could appoint any persons to be members, managers or agents of such boards, could fix their remuneration and could delegate to any committee, local board, managers or agent any of the powers, authorities and discretion vested in the board, including the power to sub-delegate. It was contended that the power conferred on the board by article 91 to grant special remuneration to a director could therefore be delegated to a committee. But the court held that the intention of article 110 could not have been to allow a local board, agency or manager to fix the remuneration of a director. In fact, the article expressly provided that remuneration should be fixed by the board. The article therefore did not enable the board to delegate the power of deciding directors' remuneration, which power was vested in the board alone in terms of articles 90 and 91.

Next, article 100(D) was relied upon. This article determined the following (see at 330C):

> 'Any director may act by himself or his firm in a professional capacity for the company and any company in which the company is interested, and he or his firm shall be entitled to remuneration for professional services as if he were not a director; provided that nothing herein contained shall authorise a director or his firm to act as auditor to the company or any subsidiary.'

Counsel for Ward confirmed that he was a member of a New York firm of attorneys but Ward did not alleged that he had provided professional services. The professional charges of his firm in connection with the bid had, in fact, been paid to his firm pursuant to article 100(D). Lord Templeman confirmed the distinction between remuneration and professional charges. Remuneration depended on an assessment of the value of the individual and the perceived quality of his work. Professional charges could be checked by taxation in the case of lawyers and in other instances by professional recommendations and standards of comparison (see at 330D). Had Ward

performed legal professional services separately from those rendered by his firm, then article 100(D) would have applied. In this instance, the advice and services upon which Ward relied were not legal professional services. He was one of a number of experts who advised, negotiated and implemented take-over bids. It was neither suggested by counsel that these experts were all lawyers, nor that they constituted a profession, nor that they possessed the indicia of a profession (namely an organisation which controlled entry and membership, provided educational and training qualifications, insisted upon a standard of work and behaviour, imposed disciplinary sanctions for misconduct and, above all, acknowledged and enforced a duty to the public over and above the duty common to all of obeying the law). The services pleaded by Ward were the services he was bound to carry out and which any member of the board was entitled and bound to carry out as a member of a committee established by the board (see at 330G). Failure to comply with article 91 could not be disguised as an application of article 100(D). Lord Goff was unwilling, without evidence, to hold what the modern professions were, but held that there were formidable difficulties which would in any event have to be surmounted if business consultancy as such were to be recognised as a profession (see at 340G). His Lordship found that Ward appeared to have been simply deploying, as a non-executive director of Guinness, an incidental (though no doubt important) skill which he had acquired in the exercise of his profession. On this basis, on his pleaded case, he could not have been acting in the course of his profession and article 100(D) accordingly had no application (see at 341B).

4.1.2 In the second instance, Ward contended that Saunders had possessed implied actual authority or ostensible authority to agree on behalf of Guinness that Ward should be paid for his services. The court held that this allegation was inconsistent with the express terms of the resolution dated 19 January 1986, whereby the board had conferred power on the committee and not on Saunders. The board could not confer on the committee the right to agree to or to award special remuneration to a director, and could thus not confer such a right on Saunders. Ward was not entitled to assume that Saunders possessed an authority which was inconsistent with the articles of Guinness, and with the appointment and the terms of appointment of the committee. If, before or after the board meeting on 19 January 1986, the board had been requested to agree to grant special remuneration to Ward, such a request may well have met with a favourable response. Had the bid for Distillers not led to allegations of misconduct by Guinness, it was possible that the payment of £5,2 million to Ward's company, apparently for services rendered by his

company, would not have been questioned or, at any event, that Ward would not have been required to repay that sum. There had, however, never been any contract by Guinness to pay special remuneration to Ward for services rendered in connection with the bid for Distillers (see Lord Templeman at 331C and Lord Goff at 343E).

4.2 Quantum Meruit or Equitable Allowance

Guinness conceded that Ward had performed valuable services to it in connection with the bid. Counsel for Ward therefore submitted that, should he not be entitled to remuneration pursuant to the articles, he was, nevertheless, entitled to be awarded compensation by the court by way of quantum meruit or equitable allowance for his services. Their Lordships confirmed that since Guinness was seeking a judgment without a trial in proceedings, it had to be assumed that Ward and the other members of the committee had acted in good faith and that the sum of £5,2 million was a proper reward for the services rendered by Ward to Guinness. Lord Templeman held that the quantum meruit claim, based on an implied contract by Guinness to pay reasonable remuneration for services rendered, could not succeed. There could be no contract by Guinness to pay special remuneration for the services of a director unless that contract was entered into by the board pursuant to article 91 (see at 331G). Counsel submitted that Guinness had entered into a voidable contract to pay remuneration to Ward and that since Ward had indeed performed the services he had agreed to perform under this voidable contract, there could be no restitutio in integrum and the contract could not be avoided. If this argument were accepted, it would enable a director to claim and retain remuneration under a contract which a committee purported to conclude with him, notwithstanding the fact that the committee had no power to enter into the contract. The fact was, however, that Guinness never did contract to pay anything to Ward. The contract upon which Ward relied was therefore not voidable but non-existent. *In re Duomatic Ltd* [1969] 2 Ch 365 and *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (CA) were distinguished from the present case where there had been no sanction or ratification either by the board of directors or by the shareholders. In *Craven-Ellis* the plaintiff was also not a director, there was no conflict between his claim to remuneration and the equitable doctrine which debars a director from profiting from his fiduciary duty, and there was no obstacle to the implication of a contract between the company and the plaintiff entitling the plaintiff to claim reasonable remuneration.

In respect of the claim on equitable allowance, Lord Templeman referred to the principle which forbids a trustee to make a profit out of his trust unless the trust instrument, in this case the articles of association of Guinness, so provided. In his view, the 'law cannot and

equity will not amend the articles of Guinness. The court is not entitled to usurp the functions conferred on the board by the articles' (at 331H). The court relied on the following authorities: *Snell's Principles of Equity* 28 ed (1982) by PV Baker & PStJ Langan; PL Davies in Clive M Schmitthoff (ed) *Palmer's Company Law* 24 ed (1987); *Aberdeen Rail Co v Blaikie Brothers* [1843-60] All ER Rep 249 (HL); *Barrett v Hartley* (1866) LR 2 Eq 789; *Bray v Ford* [1896] AC 44 (HL); *Phipps v Boardman & Others* [1964] 2 All ER 187 (Ch); and *Hely-Hutchinson v Brayhead & Another Ltd* [1968] 1 QB 549 (CA). In *Phipps v Boardman* (supra) it was decided that in exceptional circumstances a court of equity could award remuneration to a trustee. It was therefore argued that remuneration could be awarded also to a director. Lord Templeman was, however, unable to envisage circumstances in which a court of equity would exercise a power to award remuneration to a director when the relevant articles of association confided that power to the board of directors. He found that in the present case, such circumstances certainly did not exist.

Lord Templeman held that, although s 317 of the Companies Act 1985 (c 6) did not apply directly to the present case because there was no contract between Guinness and Ward, it did indicate the importance which the legislature attached to the principle that a company should be protected against a director who has a conflict of interest and duty. This section provides as follows:

> '(1) It is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with a company to declare the nature of his interest at a meeting of the directors of the company . . .
>
> (7) A director who fails to comply with this section is liable to a fine . . . '

The fundamental objection to any claim by Ward was that by the agreement with the committee he had voluntarily involved himself in an irreconcilable conflict between his duty as a director and his personal interests (see at 336D). His failure to realise that he could not use his position as director of Guinness to obtain a contingent negotiating fee did not excuse or enable him to defeat the rules of equity, which prohibit a trustee from putting himself in a position in which his interests and duty conflict and which insist that a trustee or any other fiduciary is not to make a profit out of his trust.

Lord Goff referred to *Hely-Hutchinson v Brayhead Ltd* (supra). In that case Lord Pearson referred to s 199 of the Companies Act 1948 (11&12 Geo 6, c 38), which was not, for present purposes, significantly different from s 317 of the Companies Act 1985, and held that s 199 did not in itself affect the contract; it merely created a statutory duty of disclosure and imposed a fine for non-compliance. If there had thus been a contract between Guinness and Ward, it would have been voidable under the general principles of law. On that basis Guinness could not simply claim to be entitled to the £5,2million received by Ward. The contract would have to be rescinded, and as a

condition of the rescission Ward would have to be placed in statu quo. This could have been done by a court of equity making a just allowance for the services he had rendered, but no such allowance had been considered, let alone made in the present case. The decisions of the courts a quo, founded as they were upon a breach of s 317 by Ward, were therefore erroneous. In ordinary circumstances, this conclusion would have led to the appeal being allowed (see at 339G). However, in the present case counsel for the respondent had justified the judgment on other grounds.

4.3 Section 727 of the Companies Act 1985

Finally, judgment against Ward on the appeal was resisted by a reliance on s 727 of the Companies Act 1985. This section (s 248 of the South African Companies Act 61 of 1973 reads exactly the same) determines as follows:

> '(1) If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of the company . . . it appears to the court hearing the case that that officer . . . is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case . . . he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as it thinks fit.'

Ward requested and received from the committee, out of funds belonging to Guinness, the sum of £5,2 million as a reward for his advice and services as a director. Ward had no right to such remuneration without the authority of the board. The claim by Guinness for repayment was thus found to be unanswerable. Lord Templeman held that if Ward had acted honestly and reasonably and ought fairly to be excused for receiving the substantial sum without the authority of the board, he could not be excused from paying it back (see at 337E). An order in terms of s 727 would entitle him to remuneration without the authority of the board. Such an order would be in breach of the articles which protected shareholders and governed directors and would be in breach of the principles of equity. Lord Goff agreed that a claim for relief under s 727 could not be successful. Given that the claim by Guinness had to be for the recovery of an amount paid to Ward under a void contract and received by him as a constructive trustee (see at 343D), his lordship held that there was no question of his being able to claim relief from liability for breach of duty, as might have been the case had Guinness founded its claim upon breach by Ward of his duty of disclosure (see at 343D).

The appeal was accordingly dismissed.

5 Evaluation and Comments

5.1 Basis of the Action

Before the Vice-Chancellor, judgment was given against Ward on admissions made by Ward. It is interesting that the basis of the decision was that he had received money in breach of his fiduciary duty as a director of Guinness, by reason of his failure to disclose his interest in the agreement under which he performed the services as required by s 317(1) of the Companies Act 1985. It was assumed that such an agreement existed. At least a part of the judgment by the Court of Appeal, however, proceeded on the basis of Ward having received the money as a constructive trustee under a void contract. In the final appeal to the House of Lords, both issues, that of non-disclosure and of acquisition as constructive trustee, were considered. This distinction was not so apparent in the judgment of Lord Templeman, who held that s 317 did not apply in this case because there was no actual contract. Section 317 is, however, of importance in the judgment of Lord Goff, who would have allowed the appeal against the decisions based upon a breach of that section (see at 339G). But his lordship agreed that the claim by Guinness was one for recovery of money paid to the appellant under a void contract and received by him as a constructive trustee. As there was in law no binding contract under which Ward was entitled to receive the money, he, as fiduciary, had to restore that money to Guinness.

5.2 Non-executive Directors

The common distinction between two classes of directors, namely 'non-executive' (also called 'outside' or 'non-management') directors, and 'executive' ('inside' or 'management') directors, is not provided for by statute in English or South African company law. It is frequently drawn to distinguish between directors who attend and vote at meetings of the board but who do not work full-time for the company and have no service contract, and those directors who have a service contract under which they work full-time for their company (*Hahlo's South African Company Law through the Cases: A Source Book* 5 ed (1991) by JT Pretorius (gen ed), PA Delport, Michele Havenga & Maria Vermaas 327). The fiduciary duties of these two categories of directors towards their company do not differ. The appellant in the case under discussion was a non-executive director (see at 327A). The fact that this did not alter his potential liability, as fiduciary, is so widely accepted that it did not merit any discussion by the court. (On executive and non-executive directors, see in general Larry D Soderquist 'Toward a More Effective Corporate Board: Reexamining Roles of Outside Directors' (1977) 52 *New York*

University LR 1341; JG Cilliers 'The Non-executive Director in Modern Company Law' (unpublished LLM dissertation Unisa 1986); Clare Dillon 'Non-executive Directors' (1987) 17 *Businessman's Law* 67 123 153.)

5.3 The Fiduciary Duty of Directors not to Make Secret Profits

The legal status of company directors (including non-executive directors) is sui generis (*Cohen NO v Segal* 1970 (3) SA 702 (W)), although their fiduciary duties are, basically, identical with those applying to any other fiduciaries. Directors are sometimes regarded as agents and are to some extent also trustees or in the position of trustees. The term 'constructive trustee' derives from this similarity in position. But the legal status of directors does differ considerably from that of ordinary trustees, and the strict rules applicable to such trustees do not apply in all respects to directors (see Davies op cit at 922). It therefore seems a pity that in his extensive discussion of the position of company directors, Lord Templeman often referred to trustees, without alluding to these differences.

From the time of his appointment or from the time that the director commences to act as such, he stands in a fiduciary relationship towards the company. This fiduciary relationship arises from the purpose for which his office and powers are entrusted to him, namely, the benefit of the company; and it seeks to ensure that they are used only for this purpose (MS Blackman 'Directors and Officers' in WA Joubert (ed) *The Law of South Africa Vol 4: Companies* (1982) par 218; *Cook v GS Deeks & Others* [1916] 1 AC 554 (PC); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Regal (Hastings) Ltd v Gulliver & Others* [1967] 2 AC 134 (HL); *Lindgren & Others v L&P Estates Ltd* [1968] 1 Ch 572 (CA)). The principles in connection with these duties were largely developed from English rules of equity, but are equally accepted and applied in South African law.

In general, directors may not allow themselves to be placed in a position where their personal interests and the interests of their company conflict; appropriate to themselves money, property or opportunities which rightfully belong to the company; or make secret profits while conducting the company's business (*Gower's Principles of Modern Company Law* 4 ed (1979) by LCB Gower, JB Cronin, AJ Easson & Lord Wedderburn of Charlton 572–602; Hahlo op cit at 364; Davies op cit at 943–959; Robert R Pennington *Company Law* 5 ed (1983) 659–674). The facts in *Guinness* were concerned with this latter aspect. The broad principle is that any profit acquired by a director through holding the office of director, must be accounted for to the company, unless the profit, and the circumstances in which he acquired it, have been disclosed to and sanctioned by the company in general meeting, or unless the director is protected by an appropri-

ately worded provision of the articles (AJ Boyle, John Birds & Graham Penn (eds) *Boyle & Birds' Company Law* 2 ed (1987) 614). Such a profit would usually be acquired by a director when he is interested in, or enters into, a contract with the company, but other ways of acquisition are possible.

5.4 Section 317 of the Companies Act 1985

Each of the courts in which the *Guinness* case was heard, considered s 317 of the Companies Act 1985. The reason appears to be the fact that in the court of first instance, Browne-Wilkinson VC based his decision on the 'alleged agreement' (see at 418(17) and 419(6)). Fox LJ in the Court of Appeal referred to the denial by Guinness that the agreement was entered into (see at 866B) but preferred to assume that it had been concluded and to decide the question whether Guinness was entitled to judgment on s 317 (see at 866B and 868D). In the House of Lords, Lord Goff approved the decision in *Hely-Hutchinson v Brayhead* (supra) and restated the principle that '[i]f a director enters into, or is interested in, a contract with the company, but fails to declare his interest, the effect is that, under the ordinary principles of law and equity, the contract may be voidable at the instance of the company, and in certain cases a director may be called upon to account for profits made from the transaction . . .' (at 338G). On that basis, he held that 'the contract (if any) between [Ward] and Guinness was no doubt voidable under the ordinary principles of the general law . . .' (at 339C) and proceeded to consider the matter of rescission. This led to his finding that the decisions of the courts below were erroneous, because they were founded upon a breach of s 317 (see at 339G), and that in ordinary circumstances this conclusion would have led to the appeal being allowed. His reason for not allowing the appeal was that counsel for Guinness had justified the judgment on other grounds.

Although his lordship's reasoning in respect of rescission of a voidable contract and restitution appears correct (it is not intended to discuss this aspect of the general law of contract), it is submitted that it was unnecessary to base the decision on s 317, rescission of a voidable contract and placing the parties to it in statu quo. It is surely preferable to follow the approach of Lord Templeman, by first determining whether there had, in fact, been an agreement between the parties (Ward and Guinness) at all. Section 317 imposes a statutory duty to disclose an interest in a contract or proposed contract between a director and the company. There is no reason to apply this section if such a contract or proposed contract does not exist. The confirmation by Lord Goff towards the end of his judgment that the claim of Guinness 'must be one for the recovery of money paid to Mr Ward under a void contract' (at 343D), and was not founded upon

breach of the appellant's duty of disclosure, makes his consideration of s 317, which specifically deals with non-disclosure, the more surprising.

It is apparent from the facts in this case that the members had elected to appoint the board of directors, and not the general meeting as would normally be the case, to decide on special remuneration for any director. The board did not conclude any contract with Ward and a committee of the board could not do so, because the members had elected otherwise. An express resolution, conferring power in relation to the take-over bid on a committee of three directors, further made it impossible for Saunders alone to have implied actual or ostensible authority to conclude a contract with Ward in respect of his remuneration. On the facts, a contract therefore did not exist between Ward and his company. In the absence of any other grounds on which he would be entitled to the amount claimed by Guinness, Ward therefore had to be liable to refund it.

The question whether the appellant could rely on article 100(C) of the articles of association to escape liability for non-disclosure of his interest in a particular contract or arrangement, was considered by the Court of Appeal, but not by the House of Lords. Since there was no contract between the director and the company in this case, and since article 100 deals with contracts in which a director has an interest, this issue will not be discussed here. It would appear, however, that Ward would not have been able to avoid liability had the express and mandatory provisions of s 317 not been complied with. The effect of provisions in the articles of association, where no mandatory statutory provisions exist, is a matter for separate discussion.

5.5 Quantum Meruit and Equitable Allowance

In exceptional circumstances a court of equity may, under English law, award remuneration to a trustee (see *Phipps v Boardman* supra). It is submitted that the court correctly found that no such circumstances existed in this case. As the rules of equitable allowance have not been not accepted in South African law, Ward would in a South African court not have been able to claim an 'equitable allowance'.

The quantum meruit claim was based on an implied contract by Guinness to pay reasonable remuneration for services rendered. As was discussed above, there could be no contract by Guinness to pay special remuneration for the services of a director unless that contract was entered into by the board pursuant to article 91. It is submitted that the court was correct in finding that the claim could therefore not succeed. In South African law, the expression 'quantum meruit' is often encountered in connection with claims for compensation for services rendered. When not used in a contractual context, the definition given to this expression is usually the English definition of

'the reasonable amount to be paid for services rendered or work done when the price therefore is not fixed by contract' (Wouter de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 281). De Vos indicates that this is not, strictly speaking, correct, and that the phrase 'reasonable amount' actually indicates enrichment. No general claim for enrichment is recognised in South African law (see eg *Nortje & Ander v Pool NO* 1966(3) SA 96 (A)). It is possible that, should Ward have been able to prove, under one of the recognised enrichment actions, that Guinness had been unjustly enriched to his detriment, a South African court may have allowed him to retain a portion of the amount paid to him by the company (see in general De Vos op cit at 153 et seq).

6 Conclusion

It is submitted that the decision by the House of Lords is undoubtedly correct, despite the few minor criticisms mentioned above. It again confirms the rule that a company director is not entitled to make a profit by putting himself in a position where his interest and duty conflict, unless the situation has been put before, consented to or ratified by the general meeting, or unless provisions and requirements in the articles of association (subject to mandatory statutory provisions), which deviate from this general rule, have been complied with. The court also gave an interesting indication of what might constitute 'professional' fees. The judgment further confirms that disclosure to a committee, duly appointed by the board of directors for a specific purpose, will not constitute disclosure to the board itself.

Bankgeheimnis en die Bank se eie Belang

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1 Inleiding

Faul beskryf bankgeheimnis as 'die aanspraak op geheimhouding deur 'n bank van persoonlike, finansiële en ander inligting aangaande sy kliënte' (W Faul 'Teoretiese Fundering van die Bankgeheimnis in die Suid-Afrikaanse Reg' 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 180 (hierna Faul 'Teoretiese Fundering')). Alhoewel die geheimhoudingsplig van die bankier reeds in *Abrahams v Burns* 1914 CPD 452 456, *Cambanis Buildings (Pty) Ltd v Gal* 1983 (2) SA 128 (N) 137 en onlangs ook in *GS George Consultants & Investments (Pty) Ltd v*