*663 Guinness Plc. Respondents v Saunders Appellant

House of Lords

8 February 1990

[1990] 2 W.L.R. 324

[1990] 2 A.C. 663

Lord Keith of Kinkel , Lord Brandon of Oakbrook , Lord Templeman , Lord Griffiths and Lord Goff of Chieveley

1989 Oct. 30, 31; Nov. 1, 2, 6, 7; 1990 Feb. 8

Company—Director—Fiduciary duty—Accounting for profits to company—Committee of board of directors agreeing to pay director sum in connection with company's take—over bid—Whether power in committee to grant special remuneration—Whether director entitled to retain sum paid or part on quantum meruit basis or as equitable allowance—Conflict of personal interest and duty—Whether company entitled to repayment of sum paid— Companies Act 1985 (c. 6), ss. 317(1), 727(1)

The two defendants and another director of the plaintiff company, as a committee of the board of directors, agreed to pay the second defendant £5.2m. for his services in connection with a take-over bid being made by the plaintiffs. Following the successful completion of the bid, the plaintiffs paid the money. They claimed recovery of the money on the ground that the second defendant had received the payment in breach of his fiduciary duty as a director in that he had not disclosed his interest in the agreement to the plaintiffs' directors as required *664 by section 317(1) of the Companies Act 1985[1] . On the plaintiffs' application, the Vice-Chancellor found that the second defendant had not disclosed his interest and ordered him to repay the money to the plaintiffs. The Court of Appeal dismissed an appeal by the second defendant.

On appeal by the second defendant: -

Held, dismissing the appeal,

(1) that by article 91 of the plaintiffs' articles of association special remuneration could be awarded to a director serving on a committee only by the board of directors, not by the committee, notwithstanding the definition of 'the board' by article 2 as 'any committee'; that article 110 did not enable the board to delegate its powers under article 91 to a committee, nor to a member of the committee so as to give rise to any implied actual authority or ostensible authority on the part of such member to agree remuneration, the power of deciding directors' remuneration being vested in the board alone under articles 90 and 91; that the second defendant had not been entitled to receive the £5.2m., or any part of it, under article 100(D) as remuneration for professional services since his services had not been professional services provided in a professional capacity but had been services as a member of the committee; and that, accordingly, the second defendant was not entitled to retain the £5.2m. pursuant to any articles of the plaintiffs (post, pp. 686E-H, 687E, H, 688G - 689D, 696B, 698H, 699G-H).

(2) That the second defendant was not entitled to recover any part of that sum by way of quantum meruit based on an implied contract by the plaintiffs to pay reasonable remuneration for his services since no contract could have been entered into on behalf of the plaintiffs, whether voidably or otherwise, save by the board pursuant to article 91; that he was not entitled to recover by way of equitable allowance since in equity as a trustee he had not been entitled to profit from his trust save in so far as the plaintiffs' articles provided, and the court would not usurp the functions of the board in that regard, especially in view of the importance that the legislature, by section 317 of the Companies Act 1985 (which, since there had been no contract between the company and the second defendant, was not directly applicable), attached to the principle that a company should be protected against a director who had a conflict of personal interest and duty;

that application of section 727 of the Act of 1985 to relieve the second defendant from his liability to repay the £5.2m. would equally, in remunerating him without the authority of the board, be contrary to the plaintiffs' articles protecting shareholders and a breach of the principles of equity; and that, accordingly, the second defendant had no answer to the plaintiffs' claim for recovery of the £5.2m. and must repay it (post, pp. 684B-C, 689G-H, 692C-D, G - 693C, 694C-D, F, 695D-E, H - 696B, 700C-D, 702B-C).

Aberdeen Railway Co. v. Blaikie Bros. (1854) 1 Macq. H.L. 461, H.L.(Sc.) and *Bray v. Ford [1896] A.C. 44* , H.L.(E.) applied.

Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403 , C.A.; *Phipps v. Boardman [1964] 1 W.L.R. 993* ; *[1967] 2 A.C. 46* , H.L.(E.); and *In re Duomatic Ltd. [1969] 2 Ch. 365* distinguished. ***665**

Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549 , C.A. considered.

Decision of the Court of Appeal [1988] 1 W.L.R. 863; [1988] 2 All E.R. 940 affirmed on different grounds.

The following cases are referred to in the opinions of Lord Templeman and Lord Goff of Chieveley:

Aberdeen Railway Co. v. Blaikie Bros. (1854) 1 Macq. H.L. 461, *H.L.(Sc.)*

Barrett v. Hartley (1866) L.R. 2 Eq. 789

Bray v. Ford [1896] A.C. 44, H.L.(E.)

Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403; [1936] 2 All E.R. 1066, C.A.

Duomatic Ltd., In re [1969] 2 Ch. 365; [1969] 2 W.L.R. 114; [1969] 1 All E.R. 161

Erlanger v. New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218, H.L.(E.)

Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549; [1967] 3 W.L.R. 1408; [1967] 3 All E.R. 70, C.A.

Phipps v. Boardman [1964] 1 W.L.R. 993; [1964] 2 All E.R. 187 ; *[1965] Ch. 992; [1965] 2 W.L.R. 839; [1965] 1 All E.R. 849* , C.A.; *[1967] 2 A.C. 46; [1966] 3 W.L.R. 1009; [1966] 3 All E.R. 721, H.L.(E.)*

The following additional cases were cited in argument:

Anglo-French Co-operative Society, In re, Ex parte Pelly (1882) 21 Ch.D. 492, C.A.

Bolton (H. L.) (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624, C.A.

Clark, In re; Clark v. Moore and Moores (Chemists) Ltd. (1920) 150 L.T.Jo. 94

Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. [1978] Q.B. 927; [1978] 3 W.L.R. 309; [1978] 3 All E.R. 1066, C.A.

Foster v. Foster [1916] 1 Ch. 532

Foster v. Oxford, etc., Railway Co. (1853) 13 C.B. 200

Great Northern Salt and Chemical Works, In re, Ex parte Kennedy (1890) 44 Ch.D. 472

Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd. [1972] A.C. 785; [1972] 2 W.L.R. 455; [1972] 1 All E.R. 641, H.L.(E.)

Imperial Mercantile Credit Association (Liquidators) v. Coleman (1873) L.R. 6 H.L. 189, H.L.(E.)

Lister & Co. v. Stubbs (1890) 45 Ch.D. 1, C.A.

Movitex Ltd. v. Bulfield [1986] 2 B.C.C. 99 ,403

O'Sullivan v. Management Agency and Music Ltd. [1985] Q.B. 428; [1984] 3 W.L.R. 448, C.A.

Phillips v. Brooks Ltd. [1919] 2 K.B. 243

Spence v. Crawford [1939] 3 All E.R. 271, H.L.(Sc.)

Stuart, In re; Smith v. Stuart [1897] 2 Ch. 583

Tito v. Waddell (No. 2) [1977] Ch. 106; [1977] 2 W.L.R. 496; [1977] 3 All E.R. 129

Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co. [1914] 2 Ch. 488, C.A.

Trevelyan v. Charter (1846) 9 Beav. 140

APPEAL from the Court of Appeal.

This was an appeal by the second defendant, Thomas Joseph Ward, by leave of the House of Lords from the decision of the Court of ***666*** Appeal (Fox and Glidewell L.JJ. and Sir Frederick Lawton) *[1988] 1 W.L.R. 863* on 10 May 1988 dismissing his appeal from Sir Nicolas Browne-Wilkinson V.-C. The Vice-Chancellor had ordered, on a motion by the plaintiffs, Guinness Plc., for judgment on admissions, that, inter alia, the second defendant pay to the plaintiffs £5.2m.

The Court of Appeal refused the second defendant leave to appeal. On 19 October 1988, the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle) *[1988] 1 W.L.R. 1271* allowed a petition by him for leave.

The facts are set out in the opinion of Lord Templeman.

Jonathan Crow for the second defendant. To summarise the second defendant's case: *I. Disclosure is not an issue:* (a) There has been a valid exercise of article 91. (b) Alternatively, section 317 (and therefore article 100(A)) does not apply to contracts that do not have to come before the full board: Report of the Company Law Committee ('the Jenkins Report') (1962) (Cmnd. 1749). (c) Alternatively, section 317 (and therefore article 100(A)) do not apply to contracts *with* a director personally in his own name.

If all the arguments above are rejected, then: II. There has been no breach of section 317: (a) disclosure to a committee competent to enter into the contract under consideration is adequate

disclosure under section 317; (b) any other construction of section 317 would leave a company in the intolerable position of being unable to make a contract (however trivial) in which a director was interested otherwise than through the full board; (c) that substantive effect of section 317 is not contemplated by its heading or its terms, which are concerned solely with disclosure.

III. There has been no breach of the articles: (a) if section II is accepted, there has been no breach of article 100(A), which tracks the requirements of section 317; (b) alternatively, even if there has been a breach of article 100(A), the operation of article 100(C) and/or 100(D) is not expressed to be contingent on compliance with article 100(A) (unlike the articles in *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549*); (c) alternatively, article 100(D) excludes the requirement of disclosure by the addition of the words 'as if he were not a director,' which would otherwise be meaningless.

IV. Effect of a breach of section 317 and/or the articles: (a) a breach of section 317 of itself has no effect on the validity of a contract: *Foster v. Oxford, etc., Railway Co. (1853) 13 C.B. 200* ; *Aberdeen Railway Co. v. Blaikie Bros.* (1854) 1 Macq. H.L. 461 and *Hely-Hutchinson v. Brayhead Ltd.;* (b) a breach of the disclosure provisions in the articles renders the contract voidable at the instance of the company: *Hely-Hutchinson v. Brayhead Ltd.;* (c) under a voidable contract the property passes unless the contract is avoided: *Phillips v. Brooks Ltd. [1919] 2 K.B. 243* ; (d) a contract, e.g. for services, that has been fully performed can only be set aside on equitable terms by a court hearing the evidence at trial in order to resolve what the equitable terms should be: *Erlanger v. New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218* ; (e) to say that ***667*** the second defendant became a constructive trustee from the moment of receipt of the £5.2m. is to commit two errors: (i) it ignores the true meaning of 'voidable,' i.e. valid until avoided, and substitutes a concept of 'void,' i.e. invalid ab initio; (ii) it confuses the cases of secret profit relied on by Guinness, with the receipt of remuneration pursuant to a valid contract that is flawed only by a procedural defect.

V. Defences. If the plaintiffs are prima facie entitled to judgment, the second defendant has three lines of defence that disentitle them to summary judgment: (a) *equitable allowance* (set-off) on the principles outlined in *Phipps v. Boardman [1964] 1 W.L.R. 993* and *O'Sullivan v. Management Agency and Music Ltd. [1985] Q.B. 428* ; (b) counterclaim (quantum meruit) and set-off: set-off was only refused in the courts below on the ground that the plaintiffs' claim was founded on a constructive trust, which it is not; (c) *section 727 relief* , which is a defence, not a counterclaim; it is not co-extensive with the counterclaim and should not be prejudged on a summary application.

VI. Discretion. Neither of the courts below exercised any discretion before entering judgment; even if there is a fatal admission the second defendant is entitled to a trial, bearing in mind: (a) the allegations of bad faith against him, where (b) he is a professional man, (c) he is involved in a case suffering from enormous publicity and (d) he is now facing extradition proceedings based on criminal charges in relation to this payment.

The starting-point in general law is that a director, as a fiduciary, is not entitled to profit from his position. This rule can be mitigated by the consent of the company. That consent can be given in a number of different ways: either ad hoc in a general meeting or, more conveniently, by providing a mechanism under the articles by which directors can contract with the company and receive remuneration. The question whether the second defendant was entitled to retain the money that he received is therefore to be decided primarily on the basis of the plaintiffs' articles of association. Nothing in a company's articles, of course, can relieve a director of his duty to act honestly and in good faith in the interests of the company, but honesty and good faith are not in question at this stage. [Reference was made to section 307 of the Act of 1985.]

The contract with and payment to the second defendant were duly authorised by the articles. (It is accepted that there is (the Acts impose) a general disability from contracting unless the articles permit the director to do so: see article 100(A).) (i) Article 110 permits the constitution of committees of the board. (For definition of 'the board,' see article 2: it includes a committee. See also article 90. Nothing in article 91 is inconsistent with the board including a committee. One must read it in the context of article 110, which is in broad terms.) (ii) The board's resolution of 19 January 1986 constituted any three directors as a committee for the purposes of doing all things necessary for the implementation of the bid. (iii) Mr. Saunders, the second defendant and Mr. Roux in agreeing to the fee constituted such a committee because under article 100(B)(v) the second defendant was entitled to be counted towards the quorum of such a committee. (iv) The plaintiffs, by their ***668*** duly authorised committee of the board, exercised their power to (a) vote extra remuneration to a director under article 91, and/or (b) contract with a director under article 100(C), and/or (c) remunerate a director acting in a professional capacity under article 100(D). As a matter of construction of the articles, no question of

disclosure arises to anybody at all in connection with the exercise of those powers. (i) The power in article 91 does not require a pre-existing contract and accordingly disclosure is not an issue. There has been a valid payment under (exercise of) article 91, in which case one does not get to article 100(A) at all. The second defendant is entitled to retain the payment unless the court finds that it was paid in bad faith. It is not a *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* situation. (ii) Articles 100(C) and (D) are not expressed to be contingent on compliance with article 100(A): nothing would have been simpler than to have inserted words to that effect, as there were in *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* . In the absence of such wording, the disclosure required by article 100(A) is not a precondition to the validity of a contract under article 100(C) or (D). Article 100(A) by its terms only requires disclosure in accordance with the Companies Act 1985 . It and section 317 are only concerned with contracts and proposed contracts. (iii) If article 100(A) did impose a requirement of disclosure as a precondition to a valid contract under article *100(D)* , no meaning could be given to the extra words added in that article: 'Any director may act . . . and . . . shall be entitled to remuneration . . . *as if he were not a director* . . .' The words emphasised must be taken expressly to exclude any obligation of disclosure that might otherwise be imposed on a director by reason of his directorship.

The second defendant thus has three routes: article 91; article 100(D); and the difference between the plaintiffs' articles and those in *Hely-Hutchinson v. Brayhead Ltd.* : nothing in the plaintiffs' articles says 'provided that there is compliance with article 100(A);' that is the distinction.

Section 317 of the Act of 1985 does not, and was not intended to, have any effect on the validity of contracts entered into by a company. (i) The normal validity of contracts between a director and his company is adequately covered by the general law and companies' articles; as a matter of public policy there is, therefore, no reason for the legislature to seek to intervene. (ii) The section expressly provides for a criminal penalty (section 317(7)) and leaves unaffected the general law restricting directors from entering contracts with their companies (section 317(9)). The outcome of contracts is to be determined by the general law, not by compliance or non-compliance with the Act itself. Where the Act of 1985 intends to avoid contracts between directors and their companies, or to impose any civil remedies in respect of any such contracts, it expressly says so: see, e.g., sections 319(6) and 322(3) ; see also sections 320, 322(1) and 330 . As a matter of public policy, there is no reason why the Act should have any civil consequences. The general law, with the articles, is quite sufficient. The articles represent the general will of the shareholders. There is no reason why the Act should impose different consequences. (iii) The decision of the Court of Appeal in ***669** *Hely-Hutchinson* is authority, binding on the courts below, for the proposition that the statutory duty of disclosure does not of itself affect the validity of a contract: see *per* Lord Wilberforce, at p. 589D-E, and Lord Pearson, at p. 594C-G. Only Lord Denning M.R. was equivocal on this issue (at p. 585D), and it is only Lord Denning's words that were quoted in the decisions in the courts below. *Hely-Hutchinson* was said by the courts below to be authority for the proposition that a failure to comply with the statutory duty of disclosure rendered any contract entered into between a director and his company voidable (though not void). That is a misconstruction of that authority; alternatively, the decision in *Hely-Hutchinson* is wrong and ought to be overruled.

As to the authorities, the second defendant relies on a useful analogy in *Foster v. Oxford, etc., Railway Co., 13 C.B. 200* . *Aberdeen Railway Co. v. Blaikie Bros.* , 1 Macq. H.L. 461, draws a distinction, on which the second defendant relies, between the fiduciary duty of a director to act in the best interests of the company and the disability (i.e. inability to contract) arising from that fiduciary duty. It is not a fiduciary duty not to contract: the director is disabled from contracting as a result of his fiduciary position. It is not a duty in itself: it is an inability to contract, not a duty not to. The distinction between disability and fiduciary duty has two important consequences: limitation of action and section 310 of the Act of 1985: see *Tito v. Waddell (No. 2) [1977] Ch. 106* , 247 and *Movitex Ltd. v. Bulfield [1986] 2 B.C.C. 99* , 403, 99, 429 et seq. The second defendant accepts that the *Aberdeen* case establishes the basic equitable rule that a director cannot contract with himself. He merely cites it to show what the effect of the *statute* is, apart from the articles. In *Hely-Hutchinson* , a breach of section 199 of the Companies Act 1948 would not have had any consequences in itself. The cases show that the articles can waive any requirement of disclosure but cannot relieve the director of his duty to act in the interests of the company. The second defendant does not contend that he can escape that, but whether disclosure is required is a question of construction of the articles.

As to the textbooks, see *Gower's Principles of Modern Company Law* , 4th ed. (1979), p. 856; *Buckley on the Companies Acts* , 14th ed. (1981), vol. 1, p. 1010, notes 6, citing three authorities, and 10 (to para. (1) of article (regulation) 84 of Table A (Act of 1948, Sch. 1; see now Companies (Tables A to F) Regulations 1985, Sch.)); *Gore-Browne on Companies* , 44th ed., vol. 2, para. 27.10.1

(Supplement 2, October 1988); Palmer's Company Law, 24th ed. (1987), where the correct view is taken that the statute itself has no civil consequences: vol. 1, para. 63-16, pp. 946-947; and *Pennington, Company Law* , 5th ed. (1985), p. 672, which correctly states that there are no civil consequences of a breach of the Act. [Reference was made to *Imperial Mercantile Credit Association (Liquidators) v. Coleman (1873) L.R. 6 H.L. 189* and *Transvaal Lands Co. v. New Belgium (Transvaal) Land and Development Co. [1914] 2 Ch. 488* .]

If, contrary to the second defendant's main case, disclosure in accordance with section 317 is necessary (either by reason of article 100(A) or because of the terms of section 317 itself), there has (on the relevant facts) been no breach of the section. (It does not necessarily ***670*** follow that if there has been a breach of section 317 there has been a breach of the articles.) (i) The disclosure required by the section is satisfied by disclosure to a committee of the full board where that committee is competent to enter into the contract with the director, or in which he is interested. Simply as a matter of statutory construction, the section does not require disclosure to a full meeting of the board of directors. There is no statutory definition of what 'a meeting of the directors' (article 100(A)) means and accordingly nothing that expressly prevents it from applying to a meeting of a duly appointed committee that has the legal capacity to act as and on behalf of the full board. It is capable of comprehending the committee. Section 317 must be construed in the context of the particular company. The way in which the company allows delegation is determined by the articles, not by the Act. The meaning to be attached to the phrase'a meeting of the directors' must be derived from the context. In section 317 the context includes subsection (2) . Where a contract can, under a company's articles, validly be entered into by a committee, no occasion or time for disclosure is prescribed by subsection (2), unless 'the meeting of the directors' is taken to comprehend a meeting of the committee. In the context of the section as a whole, therefore, 'the meeting of the directors' must be taken to include a meeting of a competent committee, otherwise subsection (1) imposes a duty without subsection (2) specifying a time at or within which it must be performed. A requirement of disclosure in that case would be a perverse construction of subsection (2). The whole of section 317 has to be read together consistently. Subsection (1) can only properly be read in the light of subsection (2), which provides no time limit at all for disclosure. 'A meeting of the directors' cannot mean all the directors for the time being, because some may be absent: see article 102. It means a meeting of so many directors as are competent to deal with the situation, as many as are necessary to enter into the appropriate contract (i.e. the appropriate quorum or committee).

(ii) Alternatively, if a 'meeting of the directors' in section 317(1) does mean a meeting of the full board, the section is not designed on its true construction to require disclosure: (a) where the contract is made in terms between the company and the director himself personally, because in such circumstances 'the nature of his interest' (which is all that has to be disclosed under section 317(1)) is self-evident; and/or (b) where the contract can, under the company's constitution, validly be entered into by a committee without reference to the full board, as was the case here. Subsection (2)(a) never arises in that case. Subsection (2)(b) must be read consistently with (a); it would be strange if (b) required disclosure to the full board when (a) did not. This is supported by the comments of the Report of the Company Law Committee ('the Jenkins Committee Report') (1962) (Cmnd. 1749) on section 199 of the Act of 1948: see paras. 94, 95, p. 33.

The Court of Appeal's decision did not address either of these arguments ((i) and (ii)). If they are wrong, and section 317(1) does require a director to disclose to a meeting of the full board the nature of his interest in a contract that can validly be made by a committee of the board, then the section does not specify any time at or within which ***671*** such disclosure must be made. At what stage, therefore, is the director in breach of the duty imposed by the Act? Assume that a contract is validly made by a committee with a director and he performs his part of the contract and receives remuneration from the company before any board meeting is held at which he could disclose the nature of his interest in the contract: to hold, as the Court of Appeal did, that the contract can only be valid if the director makes disclosure at a meeting of the full board, and that a director who receives money from the company prior to making such disclosure holds it (from the moment of receipt) as a constructive trustee means that: (a) the director is being held liable for a breach of duty in circumstances where no time is prescribed for the performance of that duty, and/or when an occasion for performance of the duty has not arisen. (b) The director is being made liable as a constructive trustee before the time at which he could first perform his duty, i.e. before the first meeting of the full board at which the disclosure must (according to the Court of Appeal) be made. These results are arbitrary and cannot have been intended by the legislature. (c) As a purely practical consequence, no contract between a company and a director, or in which a director is interested, can safely be made otherwise than at a meeting of the full board of directors, whatever the company's articles may say

(see also sections 314 and 315 and article 100). This alters and extends the effect of section 317 from being purely regulatory or procedural (requiring a process of disclosure) to being substantive (affecting the means by which a company is able to enter a contract). The practical consequences, in particular for large companies accustomed to acting by committees and that hold full board meetings infrequently, will be seriously inconvenient, and many contracts may on such an interpretation be liable to be avoided if they were agreed to or varied by a committee. It would be intolerable that contracts could only be entered into by the board of directors if a director had any interest, however trivial. The mechanism of disclosure does not provide protection to the company.

The resolution in the present case was authorised. 'Authorised' includes implied authority as well as express. This committee had implied authority. Implied authority does not depend on precise chronological dating. 'Delegation' in article 110 does not necessarily mean by resolution of the full board. In this case, one has to take into account the subsequent conduct of the full board and its acquiescence in the activities of Mr. Saunders and Mr. Roux (not acquiescence in any particular act but in a line of activity). They had the conduct of the company's affairs pursuant to the resolution. A member of a board can rely on the ostensible authority of another member, as in *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* .

The question of authority evidenced by the resolution is not to be derived from a strict Chancery construction of the resolution, which is not a deed but a written reduction of the intention of the board. It is not to be treated as a matter of pure construction. It is inappropriate to apply rules designed for deeds and contracts: see article 106, section 145 of the Act and *Buckley* , p. 395. If it is thought that there is an ambiguity in the resolution, the question is to be determined by ***672*** evidence, not construction: *In re Great Northern Salt and Chemical Works, Ex parte Kennedy (1890) 44 Ch.D. 472* and *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd. [1957] 1 Q.B. 159* . The members of the board should be heard as to what their intentions were. Factual evidence is admissible to show that authority was conferred either expressly or by implication from the activities of the board of directors. It is inappropriate that this question should be resolved on a summary application. If the board had authorised the committee, the wording of their resolution does not detract from that authority: the resolution is not the source of the authority.

The inclusion of the exception under article 100(B)(v) is broad enough to cover the power of the company under article 100(C) or 100(D) to contract with a director and allow him to take a benefit or (under article 100(D)) receive a remuneration. This was (as one way in which the second defendant puts his case) a payment under article *100(D).*

Alternatively to the above submissions, if the contract and/or payment to the second defendant were not authorised under the articles, then: (i) Mr. Saunders alone had the implied actual or ostensible authority of the plaintiffs to make the agreement and authorise the payment on their behalf, and (ii) in such circumstances section 317 does not require disclosure to a meeting of the full board of directors for the like reasons, mutatis mutandis, as given above. This argument, although pleaded in the amended defence, was not argued in the Court of Appeal, and the second defendant seeks leave to rely on it in the House of Lords.

In any event, on the evidence in this case, the plaintiffs did not identify any time at which it is alleged that disclosure should have been made, and they did not adduce any evidence to show that a full board meeting was held (at which the second defendant could have disclosed his interest) before they demanded repayment of the £5,200,000; this latter observation was not made in the court below and to the extent necessary the second defendant will seek leave to rely on it in the House of Lords.

A failure to comply with the disclosure requirements in the articles (and, if the Court of Appeal is right in this case, a failure to comply with the statutory disclosure requirements) merely renders a contract voidable, not void. If the second defendant was in breach of those disclosure requirements, he nevertheless acquired and retained good title to the £5,200,000 unless and until the plaintiffs could validly set the contract aside. The Court of Appeal was, therefore, wrong in holding that he had received the money 'improperly' and held it as constructive trustee from the moment of receipt: such a conclusion reverses the true meaning of 'voidable,' i.e. valid until avoided, and turns it into 'ratifiable,' i.e. invalid until ratified. Neither of the courts below attempted to reconcile their inconsistent findings that, on the one hand, a breach of section 317 made the agreement merely voidable, not void ab initio, and that, on the other, the second defendant had been a constructive trustee of the money from the moment when he had received it. There is a logical lacuna in the Court of Appeal's argument. Under a voidable contract, however, the contract is valid, and the ***673*** property passes, unless and until the contract is set aside: *Phillips v. Brooks Ltd. [1919] 2 K.B. 243* ; *Erlanger v. New Sombrero*

Phosphate Co., 3 App.Cas. 1218 ; *O'Sullivan v. Management Agency and Music Ltd. [1985] Q.B. 428* . A constructive trust does not automatically arise: it is a voidable contract and a question of the result of that. Where there has been a voidable contract for services that has been fully performed on both sides, there cannot be restitutio in integrum because the services rendered cannot be undone; accordingly, such a contract cannot be avoided by the innocent party simply asking for its money back. The Court of Appeal were, therefore, wrong in holding that the agreement with the second defendant had been avoided by the plaintiffs. They held *[1988] 1 W.L.R. 863* , 869 that it was not in doubt that, if the agreement had ever existed, the plaintiffs had exercised their right to avoid it, but no explanation was given as to the origins of one party's right unilaterally to avoid a contract that had been fully performed by both sides, nor was the alleged act of avoidance identified. If a contract has been fully performed, equity may order it to be set aside, but as a matter of discretion and, maybe, on terms. The correct analysis is that made in *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* : a voidable contract, if it is too late to avoid it, is enforceable. *Lister v. Stubbs (1890) 45 Ch.D. 1* and *Phipps v. Boardman [1967] 2 A.C. 46* are secret profit cases; it is wrong to blur the distinction between those and the *Hely-Hutchinson* line of cases.

If the court is going to exercise its equitable jurisdiction to set aside a fully performed contract, it can only do so on equitable terms; without hearing evidence, tested by cross-examination, the court cannot determine what those terms should be. In this case, the court could not decide how valuable the second defendant's services had been, and, accordingly, whether he ought to repay any, and, if so, how much, money to the plaintiffs without hearing his claim to an equitable allowance on the merits. The Court of Appeal misdirected itself in disregarding its own discretion; it proceeded on the basis that the plaintiffs had effectively avoided the agreement with the second defendant instead of holding, as it should have done, that it had a discretion to grant or not to grant rescission of the agreement with the second defendant and to impose terms on any such rescission.

If the second defendant is liable to the plaintiffs, and if his claim to receive good value for the services he rendered is rightly to be regarded as a counterclaim in quantum meruit, then such a counterclaim can be set off against the plaintiffs' claim against him. The Court of Appeal's rejection of this contention was based solely on its conclusion that he held the £5.2m. as a constructive trustee; that conclusion is wrong for the reasons set out above. If he is entitled to set-off his counterclaim, then the plaintiffs are not entitled to any judgment until that counterclaim has been quantified. The Court of Appeal held, at pp. 870-871, that his claim to an equitable allowance or quantum meruit could not be set off against the plaintiffs' claim to the £5.2m. because that claim was proprietary and, therefore, neither the claim to an equitable allowance nor to a quantum meruit could impeach the plaintiffs' claim to their own ****674*** money. The correctness of that finding is, again, wholly dependent on the untenable finding that the plaintiffs' claim was proprietary.

Again, if the second defendant is liable to the plaintiffs, he is entitled to have his claim for relief under section 727 of the Act of 1985 heard on the merits. Relief under section 727 provides a ground of relief to a claim against a director that can be granted by the court 'hearing the case,' and, accordingly, judgment should not be entered until the claim for relief has been heard at trial and the court has made a decision regarding it. When the plaintiffs commenced proceedings against the second defendant he no longer had the full amount of £5.2m. The bulk had been converted into U.S. dollars, and considerable sums had been spent by him before he was aware of any challenge to his title to the money. The trial judge could easily relieve him from liability under section 727 to the extent that innocent expenditure and/or exchange rate fluctuations have depleted the original fund of £5.2m. The courts below disregarded this argument. The Court of Appeal held that the second defendant's claim to relief under section 727 was coextensive with his counterclaim in quantum meruit for services rendered and that, therefore, there was no objection to giving judgment without hearing a full trial. That finding wholly ignores the fact that Guinness first sought to recover the £5,200,000 some 10 months after it had been paid to the second defendant, who had converted almost all of it into U.S. dollars and spent considerable sums long before he knew of any challenge to his entitlement to the money. In addition, the finding was wrong in law. The second defendant relies on *In re Duomatic Ltd. [1969] 2 Ch. 365* not as authority but to show that the court has done this under section 727 (then section 448 of the Act of 1948). The decision at which the Court of Appeal arrived cannot be made on an application for summary judgment. The wording of section 727 is clear: 'the court *hearing the case* .' The Act limits the liability: it was wrong of the Court of Appeal to prejudge whether discretion would be exercised at trial. The claim under section 727 is not coextensive with, and indeed may be greater than, the claim for quantum meruit.

The second defendant is a practising lawyer in Washington D.C. against whom allegations of dishonesty and bad faith have been made. The bringing of this action and the entering of judgment

against him have been attended by an enormous amount of publicity. Although the summary judgment is based on the legal consequences of non-disclosure to the full board, the public perception is inevitably that he has been found guilty of dishonesty and bad faith. This perception is encouraged by the remarks made in the judgment of Sir Nicolas Browne-Wilkinson V.-C. to the effect that he had 'secretly received remuneration without proper authority' and that the payment had 'wrongfully been abstracted' from Guinness and by further remarks made in the Court of Appeal *[1988] 1 W.L.R. 863* , 869, 870 that Mr. Ward had 'plainly acted in breach of duty' and 'has improperly received the company's money.' Such a public perception is obviously very damaging to a professional man, and the second defendant ought to be given the chance to clear his name at a full trial on the merits.

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David Oliver Q.C., Richard Field Q.C. and *Philip Sales* for the plaintiffs. The questions at issue are: (1) whether article 100(C) and (D) of the plaintiffs' articles of association, which permit a director in limited circumstances to take the benefit of contracts with the company in which he is interested, should be construed as subject to the requirement of disclosure of such contracts or proposed contracts at a meeting of the directors in accordance with the companies legislation, as set out in article 100(A), with the consequence that the payment of £5.2m. made by the plaintiffs to the second defendant on 23 May 1986 should be recoverable by them by reason of his failure to disclose the agreement at a meeting of their directors in accordance with article 100(A); (2) whether section 317 of the Companies Act 1985 imposes a fiduciary obligation on a director to disclose his interest in any contract that he has entered into or proposes to enter into with the company at a meeting of the directors of that company, with the consequence that the payment of £5.2m. should be recoverable by the plaintiffs by reason of the second defendant's failure to disclose the agreement at a meeting of their directors in accordance with that section; (3) whether the plaintiffs need to set the agreement aside in order to establish a right to recover the payment, and, if so, whether they may set it aside for non-disclosure despite the fact that the second defendant has provided services to them under it; (4) whether the plaintiffs may recover their money paid to the second defendant without deduction for equitable compensation, leaving him to bring a claim for a quantum meruit for reasonable payment for any services rendered by him and not yet paid for by the plaintiffs; (5) whether the second defendant is entitled to set off any claim that he may have for a reasonable payment by way of quantum meruit as a defence to the plaintiffs' claim; (6) whether there is any prospect of the second defendant being able to show that he should be relieved from liability by virtue of section 727 of the Act of 1985 should the action proceed to a full hearing.

On issue (1), the general position in equity is that a director may only take the benefit of an agreement between himself and his company where his interest in the transaction has been disclosed to and approved by the company in general meeting: *Aberdeen Railway Co. v. Blaikie Bros* ., 1 Macq. H.L. 461. The general position may be modified by provision in the company's articles of association, reducing the extent of disclosure required from the director. In the Court of Appeal, the second defendant sought to rely on article 100(D) as validating the agreement. Paragraphs (A) to (D) of article 100 must be construed together. They constitute a self-contained code. Article 100(C) and (D) should be construed as subject to the overriding duty of disclosure of interests in contracts contained in article 100(A) and to the statutory duty of disclosure in section 317 of the Act of 1985. Article 100 was construed in this way by Sir Nicolas Browne-Wilkinson V.-C. and the Court of Appeal. Any other construction would undermine the protection for the company that it was intended that article 100(A) and section 317 should provide. Thus, the second defendant owed a fiduciary duty to the plaintiffs to disclose his interest in the agreement at a meeting of the directors, which duty he has breached.

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On issue (2), section 317(1) imposes a clear mandatory duty of disclosure to the board on a director in relation to contracts or proposed contracts with the company in which he has an interest. The imposition of an express duty would be unnecessary if the section were intended merely to create a criminal offence. Therefore, it is clear that it is intended to create a civil duty of disclosure binding on a director. (ii) The general position in equity is, as stated above, that a director may not take the benefit of a contract with the company unless full disclosure is made to the company in general meeting. The general position may be altered by provision in the company's articles of association, but the articles cannot validly derogate from the statutory duty of disclosure contained in section 317. Thus, in a case in which the articles of association provide for extensive reduction in the usual duty of a disclosure in relation to a director, the duty of disclosure in section 317 becomes a minimum civil duty of disclosure binding on the director. (iii) Section 317 imposes a duty of disclosure on a director in order to provide

a minimum level of protection for the company through the mechanism of disclosure to the board. Given that the provision is designed to protect a particular person (the company) or class of persons (the shareholders), it imposes a civil duty of disclosure on a director that should be assimilated to the other fiduciary duties to which the director is subject by virtue of his position. (iv) The view that section 317 creates a civil duty of disclosure is supported by authority: *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* , 585C-586A, 589. (The case concerned section 199 of the Act of 1948, the predecessor of section 317.) It was the view adopted by the courts below in the Vice-Chancellor's judgment and in the Court of Appeal, *per* Fox L.J., and should be affirmed by the House of Lords. The usual civil consequences of non-disclosure as required under the civil law would then apply. (v) The disclosure required under section 317(1) is to a duly convened meeting of the directors of the company. Disclosure to a committee of the board will not suffice. To construe the provision in any other way would require reading words into it for which there is no warrant and would undermine the valuable protection afforded by the section. (vi) The time for making the disclosure required by section 317 is at the first duly convened board meeting after the contract is first proposed, and it should usually be made before the contract is entered into unless there are compelling reasons why that is not possible in any case. Where a contract is entered into prior to proper disclosure being made to the directors of the company, the director who is under a duty to disclose his interest relies on the contract at his own risk, as it is subject to approval being given by the board.

On issues (1) and (2) generally, the basic principle is that a trustee may not receive trust property for his own benefit save under the authority of the trust instrument or with the full, free and informed consent of his beneficiaries, they being of full age and sui juris. ('Trustee' in this context means the director; 'beneficiaries' means the shareholders in general meeting; and 'trust deed' means the articles of association.) If he does, he must return it. Nor is he entitled to receive remuneration unless authorised to do so by the trust instrument. ***677** ('Authority' means, here, the authority of the articles or the free and informed consent of the company acting by a majority of the shareholders in general meeting.)

It is a manifestly inconvenient rule in the modern age in the context of a large company that all decisions have to be made by the shareholders in general meeting, so they are delegated to the board of directors and, generally, there is power in them to subdelegate. The common form is article 100(C) here, which on its face gives the directors wide powers to contract without convening a general meeting each time. It was because that form of article got wider and wider, and a derogation from the basic rule, that in 1929 (by the Companies Act of that year) the old rules about directors' disqualification were replaced by the requirement that a director disclose contracts in which he was interested to the board. That was followed through in section 199 of the Act of 1948 and section 317 of the Act of 1985: see *Palmer's Company Law* , 24th ed., vol. 1, para. 63-13, pp. 943-945, and *per* Lord Wilberforce in *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* , 589. The plaintiff's primary case has always been that this payment was in breach of their articles. Unless the second defendant can find some authority for retaining it, he must give it back.

The second defendant says that the committee's resolution amounted to a grant of remuneration within article 91, but there are difficulties on that construction. Article 91 applies to 'the board.' That could only mean a committee of the board where that was not inconsistent with the subject matter or the context. Here, it is inconsistent with both: cf. article 92(A) and (C). If 'the board' in 92(A) is the board of directors, it would be strange if it were not the board of directors but a committee of the board in (C). Questions of disability under article 110 and of remuneration under article 91 are both irrelevant in this case. Referring to article 2, if there are places in the articles where 'board' means a committee and others where it does not, the only way to read it in article 110 is coextensively with those places where the board *can* authorise a committee to act on its behalf. Thus in article 91, where 'board' is used in contradistinction to 'any director who serves on any committee,' it is not apt to extend to a committee. One then approaches article 110 with the presumption that that power of delegation in article 110 does not extend to the voting of special remuneration under article 91. A proper interpretation of article 110 suggests that the power of delegation there contained is a power of delegation of the management powers of the board contained in article 109, and the structure of these articles is such as to indicate that remuneration of directors is not to be treated as business of the company for this purpose, whether under article 90 or under article 91. This proposition is strongly reinforced by *Foster v. Foster [1916] 1 Ch. 532* (the equivalent of section 317 of the Act of 1985 was not introduced until 1929).

Section 317 and articles 91 and 100(A) taken together make it plain that a contract in which a director is interested has to be disclosed to the full body of directors. The second defendant is wrongly trying

to divorce the contract from the grant of remuneration.

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Articles 100(B), (C) and (D) are all designed as derogations, in a not untraditional form, from the standard duty in equity of a fiduciary. That is the purpose of the Act, and it is incorporated into the articles, including those of the plaintiffs. It follows that, as a construction of article 100 as a whole, or of (B), (C) and (D) in conjunction with section 317, it is not conceivable, if one is going to give efficacy to the statutory prohibition, that (B), (C) and (D) are conditional on anything other than compliance with section 317 and article 100(A). Article 100(A) introduces a condition with which a director has to comply before he can take any benefit under a contract. Unless there is compliance with the provision of the act, section 317, as incorporated in the articles regarding the requirement of disclosure to the full board, there is no valid contract. Article 100(A) reflects section 317, which itself fits into the established structure of fiduciary duty. [Reference was made to *Trevelyan v. Charter (1846) 9 Beav. 140* .]

Section 317 is cast in the widest terms. It is impossible to construe a contract between a director himself and the company as anything other than a contract in which the director is interested. It is almost inevitable, in the way that section 317(1) is drafted, that it should have civil consequences. One can get this from article 100(A), but it derives from section 317 itself. Nothing in the wording of section 317(1) suggests that it depends on whether the director's interest is obvious or not. There is no reason to read it so as to read in that qualification. Section 317 was designed to prevent precisely what happened in this case. To construe it from a minimalist viewpoint is to derogate from the intended protection in much the same way that articles did before the Act of 1929 was passed. There is no justification for cutting down the plain language of section 317(1). The intention of Parliament was to give a minimum protection to companies; control by companies had been emasculated by the articles.

The second defendant says that restitutio in integrum is not possible. The answer to this is that a trustee is not entitled to remuneration absent some authorisation or agreement that he shall be remunerated. [Reference was made to section 317(6) and *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* .]

On issue (3): (i) this issue was raised for the first time by the second defendant in the Court of Appeal. The plaintiffs' primary case is that in the circumstances of this case there is no requirement that the agreement be set aside before the plaintiffs are entitled to recover their money. Their claim against the second defendant is for recovery of a payment that was at all times held by him under a constructive trust by reason of the flawed title that he received on payment of the £5.2m. because of the non-disclosure of his interest in the agreement under which he received the payment and his knowledge of that fact. The plaintiffs' claim is thus for knowing receipt of trust funds paid in breach of the second defendant's own fiduciary duty owed to the company to disclose his interest in the agreement, which does not require that the agreement be set aside before it can be made out. (ii) Where a fiduciary receives property from his beneficiary which prior to the fiduciary's own wrongdoing (in this case the second defendant's failure to disclose his ***679** interest in the agreement at a meeting of the directors of the plaintiffs) was the property of the beneficiary, the beneficiary has a claim founded on his title to the property to recover that property and any property deriving from it in the hands of the fiduciary: *Lister & Co. v. Stubbs, 45 Ch.D. 1* , 9-10, *per* Stirling J., approved in the Court of Appeal. Where a fiduciary exploits his position as such and derives a profit therefrom without proper disclosure to and approval from his beneficiary, the fiduciary will hold the profits so derived on a constructive trust for the benefit of his beneficiary: *Phipps v. Boardman [1967] 2 A.C. 46* (see, in particular, the order made at first instance *[1964] 1 W.L.R. 993* , 1018, affirmed by the House of Lords, and *[1965] Ch. 992* , 1022, 1031) and the commentary on it in *Goff and Jones, The Law of Restitution* , 3rd ed. (1986), pp. 653, 657. The beneficiary's right of recovery in such circumstances does not depend on the setting aside of any arrangement that may exist between the beneficiary and the fiduciary. (iii) In the circumstances of the present case, the second defendant was a constructive trustee of the plaintiffs' money on his receipt thereof without proper disclosure of his interest in the agreement to the plaintiff, and the Court of Appeal so held. There is thus no requirement for the plaintiffs to set the agreement aside prior to seeking recovery of their property from the second defendant. Once they have recovered the £5.2m. paid to him, he may have rights arising against them for a quantum meruit for services rendered on the basis of a total failure of consideration under the agreement brought about by the plaintiffs' recovery of their money. Such rights, if they exist, cannot impede the plaintiffs' right to immediate recovery of their money: see under issue (5) below. (iv) In the alternative, if, contrary to the plaintiffs' primary case, there is a requirement that the

agreement be set aside before the plaintiffs may proceed to recovery in respect of the payment, the agreement has been validly set aside in this case. A court will permit a party to avoid an agreement in equity by reason of any equitable wrongdoing (including non-disclosure by a director to his company of his interest in a contract with that company) provided that it is possible to put the parties back into the position in which they would have been had there been no agreement. The question is whether it is practically just for the court to permit the contract to be rescinded: *Erlanger v. New Sombrero Phosphate Co., 3 App.Cas. 1218* , 1278-1279. In the present case, the second defendant performed services for the plaintiffs at their request and so is entitled to claim a quantum meruit for the reasonable value of those services (to the extent that they have not otherwise been paid for by the plaintiffs). Thus practical justice may be achieved in this case if the plaintiffs are permitted to rescind the agreement, since the second defendant is able to recover the true value of his services from them by an independent claim.

On issue (4): (i) in certain cases where a fiduciary makes a profit from his position, the beneficiary to whom the fiduciary duties are owed is only permitted to recover the profit made by the fiduciary on making an allowance by way of fair equitable compensation for any services that the fiduciary may have rendered in realising that profit: *Phipps v. Boardman; O'Sullivan v. Management Agency and Music Ltd. [1985] Q.B. 428* . Such cases are distinguishable from the present because in them the fiduciary's efforts result in obtaining a benefit from third parties (typically through exploitation of a business opportunity), so that the benefit due to the beneficiary only accrues through the efforts of the fiduciary. In contrast, where, as here, the property that the fiduciary obtains for himself derives directly from the beneficiary, the efforts of the fiduciary have done nothing to increase the fund available for the beneficiary but have only reduced it. In such circumstances, there is no basis for allowing the deduction of equitable compensation out of the property that derived from the beneficiary. (ii) To the extent that the second defendant has a claim in equity for compensation for services rendered to the plaintiffs under the agreement, the issue of whether that claim should operate as a defence to the plaintiffs' claim is identical to the question of the availability of the equitable defence of set-off in respect of an independent quantum meruit claim: see under issue (5) below.

On issue (5), (i) the second defendant's counterclaim for a quantum meruit is an unquantified claim, so the only type of set-off that could be available to him as a defence is equitable set-off. Set-off in equity will only be allowed where the defendant's cross-claim arises out of the same transaction as the plaintiff's claim or is closely connected with it and the cross-claim impeaches the plaintiff's demand so that it would be unjust to allow the plaintiff to recover without taking the cross-claim into account: *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. [1978] Q.B. 927* , 974-975 (ii) The plaintiffs' claim for the return of their money does not depend on the agreement. It is a claim for the return of their own money improperly received by the second defendant. Thus the second defendant's cross-claim, which relates to services rendered by him to the plaintiffs and is logically unconnected with the payment of £5.2m., does not arise out of the plaintiffs' claim and so is not a candidate for equitable set-off. The Court of Appeal so held. (iii) Further, and alternatively, the £5.2m. remained the plaintiffs' property in equity at all times pending approval of the agreement under which it was paid by them after proper disclosure of his interest by the second defendant. The second defendant was a constructive trustee of that sum pending the giving of such approval. The Court of Appeal so held, and see submissions (i) to (iii) under issue (3) above. Any dealings by the second defendant with the fund prior to his obtaining the properly informed approval of the plaintiffs were at his own risk. As a constructive trustee of the sum which he improperly received from the plaintiffs without disclosure of his interest, there is no mutuality between the capacities in which the plaintiffs make their claim and that in which the second defendant makes his. The second defendant is in the position of trustee in relation to the fund, whereas the cross-claim is made in his personal capacity. In such circumstances, set-off is not permitted. (iv) Further, and alternatively, the second defendant should not be permitted by a doctrine of equity to rely on his own wrongful receipt of the £5.2m., and his failure to return that fund forthwith, in order to convert himself into a secured creditor of the plaintiffs in respect of his cross-claim through equitable set-off. Such a set-off would permit the second ***681*** defendant to profit from his wrong (indeed, from his crime in obtaining payment under the agreement without disclosure to the plaintiffs' board, contrary to section 317 of the Act of 1985). There is no doctrine of equity that actively requires that a wrongdoer should be allowed to benefit from his own wrong. Support for this policy is derived from the related area of set-off in the law of insolvency. (v) Alternatively, even if the second defendant did not hold the £5.2m. as a constructive trustee from the moment of its receipt (which is the plaintiffs' primary case), once the agreement had been disaffirmed by the plaintiffs the equitable ownership in all sums and property representing the £5.2m. vested in them. The plaintiffs could in law have disaffirmed the agreement at any time from its inception. The reason that they could not do so in fact was that the agreement and the second

defendant's interest it was not brought to the attention of the relevant body of the plaintiffs by reason of the second defendant's continuing breach of duty to disclose his interest. Thus no equitable set-off exists in favour of the second defendant, since to allow set-off by reason of the absence of a proprietary claim vested in the plaintiffs from the moment of receipt of the payment by the second defendant would permit him to benefit from his own wrong in not disclosing his interest to the plaintiffs' board at the first opportunity. In any event, the plaintiffs at all times had at least a potential proprietary claim against him, so that set-off is inappropriate in all the circumstances of the case.

On issues (3) to (5) generally, the fact that services are rendered pursuant to a contract is not a bar to recovery by the company by reason of the principle of restitutio in circumstances where the director has in any event available to him claims for quantum meruit or compensation. The equitable rule is more flexible and less strictly enforced than the rule at common law: *Snell's Principles of Equity* , 28th ed. (1982), pp. 247, 605; see also article (regulation) 85 of Table A. [Reference was made to *Trevelyan v. Charter, 9 Beav. 140* , and *Erlanger v. New Sombrero Phosphate Co., 3 App.Cas. 1218* , 1277.] The act of avoidance is the election of the parties themselves (here, of the plaintiffs), and the question is whether the court will give effect to that election and do practical justice: see *Goff & Jones, The Law of Restitution* , 3rd ed., pp. 169-171. *Spence v. Crawford [1939] 3 All E.R. 271* makes it clear that it is a matter of discretion in the court. It is unarguable that the courts below here did not exercise their discretion properly. They, and the plaintiffs, have never denied the possibility of a cross-claim by the second defendant.

Hely-Hutchinson v. Brayhead Ltd . (see *per* Lord Denning M.R., at p. 585, and Lord Wilberforce, at pp. 588-589) is authority that section 317 does have civil consequences.

It would be wrong to deny the plaintiffs judgment at this stage by reason of the second defendant's counterclaims: that would be in effect making him a secured creditor.

The second defendant is not entitled to a set-off: the claims are not in the same right: see *In re Anglo-French Co-operative Society Ex parte Pelly (1882) 21 Ch.D. 492* . In any event, it is a discretionary matter; there are dicta, including dicta in the House of Lords, to that effect: see ***682** *Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd. [1972] A.C. 785* ; *Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403* ; *Barrett v. Hartley (1866) L.R. 2 Eq. 789* ; Snell's Principles of Equity, 28th ed., p. 252 and *Phipps v. Boardman [1964] 1 W.L.R. 993* ; *[1965] Ch. 992* ; *[1967] 2 A.C. 46* . (R.S.C., Ord. 15, r. 2 simply enables the court to give judgment on a counterclaim where the case is clear. It is a purely procedural, convenient rule.)

Equity is not so uninventive as not to be able to allow an application for equitable compensation in an appropriate case.

On issue (6): (i) section 727 of the Act of 1985 only applies to 'proceedings for negligence, default, breach of duty or breach of trust against an officer of a company. . . .' The plaintiffs' claim to recover their £5.2m. in this case is not a claim to recover compensation for a breach of duty or default on the part of the second defendant. It is a claim based on the wrongful receipt of trust property, seeking the return of such property or its value to the plaintiffs. Such a claim is not founded on a breach of duty but arises out of the absence of proper informed consent on the part of the plaintiffs in making the payment. Therefore, section 727 has no application in this case. (ii) Further, and alternatively, there is a strong presumption in the law that, if a trustee or fiduciary obtains trust property for himself, the beneficiaries may set aside the transaction, however fair it may have been ('the self-dealing rule': *Tito v. Waddell (No. 2) [1977] Ch. 106* . 241A). That presumption could only be displaced by clear express words in a statute. The language of section 727 is not so clear that it should be construed as having any effect on the operation of the self-dealing rule. This proposition is supported by the absence of any authority in which section 727 or any of its predecessors has been held to apply in a case in which a fiduciary has received property directly from his beneficiary and by *In re Clark; Clark v. Moore and Moores (Chemists) Ltd.* (1920) 150 L.T.Jo. 94 (concerning section 3 of the Judicial Trustees Act 1896 , now section 61 of the Trustees Act 1925 , a predecessor of section 727). (iii) Section 727 should be construed as having no application to a case in which a fiduciary receives property from his beneficiary on the further ground that the mischief against which that provision and its predecessors were aimed was the excessive liability of trustees for dealings with trust property (e.g., by way of investment) resulting in a loss to the trust. The receipt by a trustee of trust property does not fall within that mischief. The plaintiffs will rely on the Report of the Select Committee published in (1895) 99 L.T.Jo. 67-69 (regarding the introduction of section 3 of the Act of 1896). (iv) Alternatively, even if section 727 can apply in the case of the wrongful receipt of company property, the onus is on the second defendant to show that he ought fairly to be relieved from liability: *In re Stuart; Smith v. Stuart*

[1897] 2 Ch. 583 (a case on section 3 of the Act of 1896). The only relief under section 727 to which the second defendant could be entitled in the circumstances of this case could not exceed the value of his services rendered to the plaintiffs, in respect of which he has a separate claim for a quantum meruit. It was only in the Court of Appeal that he contended that the relief that he claimed under section 727 could be wider than the amount of any ****683*** recovery that he might make under his counterclaim. Section 727 should not confer on him any right of set-off that is not available to him in equity (see above). Any loss caused by his dealings with the fund after it reached his hands was at his risk and may not found a claim for relief under section 727 given that he could at any time readily have protected himself by ensuring that his interest in the agreement was disclosed to the Board of the plaintiffs in accordance with his duty. In all the circumstances of the case, relief should not be granted under section 727. If the court finds, on a claim for equitable compensation, that the second defendant is entitled to anything, his prospect of being entitled to anything less than he would get under section 727 is unthinkable. If he were not entitled, the prospect of his getting anything under section 727 is equally unthinkable.

Crow in reply. As to *Foster v. Foster [1916] 1 Ch. 532* , the word 'business' is not used in the plaintiffs' articles. Article 110 expressly uses different wording: 'the affairs of the company.' There cannot be a wider word than 'affairs.' The power to vote remuneration is clearly delegable.

Express mens rea appears in section 730 of the Act of 1985. Those are not the words used in section 317. Section 318 (see subsection (8)) makes it plain that the legislature in section 317(5) was not contemplating any element of mens rea.

It is accepted that article 100(D) adds something to article 91, but it does not add anything to article 100(C).

Even if only the board can fix remuneration under article 91, there can be a contract with a committee under articles 109 and 110.

Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549 , on a proper analysis, concludes that a breach of the statute by itself has no civil effect. Lord Denning M.R. was the only member of the court who was equivocal on the point. The plaintiffs are effectively asking the House to overrule *Hely-Hutchinson* .

The plaintiffs have sought to raise a precondition to a contract: they say that the intention of the Act was to provide a minimum level of protection for companies. They did not, however, really explain how this was to be achieved in practice. Section 317 has to be construed within the four corners of the section itself. It is not a precondition to the validity of a contract, and contracts under article 100 are not dependent on compliance with section 317. To say that section 317 provides minimum protection by making the contract voidable simply does not stand up in the light of the facts contemplated by section 317 itself.

Where a contract has been performed and the parties have taken benefits from it, it is not voidable except by the court, which will consider whether restitution is possible. The contract is not avoided until the court says so. [Reference was made to *Barrett v. Hartley, L.R. 2 Eq. 789* ; *Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403* ; and *In re Duomatic Ltd. [1969] 2 Ch. 365* .]

The second defendant, on reconsideration, does not accept that there is some limitation on the power of delegation under article 110. One starts with article 91 and the presumption in article 2; if the second ****684*** defendant does not succeed by that route he probably will not do so under article 110, but in construing article 91 one should have article 110 in mind.

Their Lordships took time for consideration.

8 February 1990.

LORD KEITH OF KINKEL.

My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Templeman. I agree with it, and for the reasons that he gives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK.

My Lords, for the reasons given in the speech of my noble and learned friend, Lord Templeman, I would dismiss the appeal.

LORD TEMPLEMAN.

My Lords, the appellant, Mr. Ward, admits receiving £5.2m., the money of the respondent company, Guinness, at a time when Mr. Ward was a director of Guinness. Payment of this sum to Mr. Ward was, he says, remuneration authorised by Mr. Saunders, Mr. Roux and Mr. Ward, who formed a committee of the board of directors of Guinness. It is admitted by Mr. Ward that payment was not authorised by the board of directors. In these proceedings Guinness claim £5.2m. from Mr. Ward and in this application Guinness seek an order for immediate payment on the grounds that the articles of association of Guinness and the facts admitted by Mr. Ward show that the payment to Mr. Ward was unauthorised and must be repaid. The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, made the order sought by Guinness and his decision was affirmed by the Court of Appeal (Fox and Glidewell L.JJ. and Sir Frederick Lawton) *[1988] 1 W.L.R. 863* . Mr. Ward now appeals.

On 19 January 1986 a meeting of the board of directors of Guinness attended by a quorum passed several resolutions. There were 10 directors present; they included the chief executive, Mr. Saunders, and two non-executive directors, Mr. Roux and Mr. Ward. Legal and investment advisers of Guinness were in attendance. The minutes of the meeting record that Mr. Saunders and Mr. Roux explained the background to a proposed recommended offer by Guinness for the issued share capital of The Distillers Company Plc. The board considered drafts of an underwriting agreement, a letter of authority to be signed by each of the directors of Guinness, two commitment letters by banks, and a merger agreement between Guinness and Distillers. Mr. Roux reported on the fees and commissions payable by Guinness pursuant to the underwriting agreement. There is no record of the possibility of any fees, commission or remuneration being payable to a director. The draft merger agreement contained an agreement by Distillers to pay the costs incurred by Guinness if the offer should not prove successful and an agreement by Guinness to indemnify the directors of Distillers should the court determine that it had not been appropriate for the directors of Distillers to enter into the merger agreement and to pay the expenses of Guinness. The board of Guinness ***685*** resolved that an offer be made and approved the draft documents which had been considered. 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' 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. . . .'

It is common ground that Mr. Saunders, Mr. Roux and Mr. Ward established and constituted themselves a committee of the board for the purposes of the resolutions passed on 19 January 1986, that the committee carried the resolutions into effect and that a revised offer resulted in Guinness acquiring all the share capital of Distillers.

In these present proceedings, Mr. Ward pleads that in consideration of Mr. Ward 'providing advice and services' to Guinness during the currency of the offer (which he refers to as 'the bid') Guinness agreed, in the event of the success of the bid, to pay to Mr. Ward a sum equivalent to 0.2 per cent. of the ultimate value of the bid. The agreement is said to have been entered into by Mr. Saunders, Mr. Ward and Mr. Roux on behalf of Guinness and Mr. Ward on his own behalf. It is said that Mr. Saunders orally agreed about 19 February 1986, and that Mr. Roux orally agreed about the beginning of May 1986, and that the agreement was made or evidenced by an invoice delivered to Guinness by a company now admitted to be controlled by Mr. Ward. The invoice claimed £5.2m. for advice in respect of the successful acquisition of Distillers. The invoice was approved by Mr. Roux and the sum of £5.2m. was paid. Mr. Ward pleads in the alternative that an agreement by Guinness to pay Mr. Ward for his advice and services was made by Mr. Saunders who had implied actual authority, or ostensible authority, to do so. Mr. Ward pleads that he performed valuable services for the benefit of Guinness in connection with the bid. These services were rendered between 8 January 1986 (a day prior to the board meeting on 19 January) and 20 April 1986. These services as set out in particulars furnished by Mr. Ward were, in summary: (1) negotiations on behalf of Guinness at meetings and in the course of telephone conversations with directors and representatives of Distillers; (2) negotiations

on behalf of Guinness at meetings and in the course of telephone conversations with officials of the Monopolies and Mergers Commission; and (3) discussions from time to time of the bid, the revised bid and the desirability of and implementation of the bid at meetings (including the board meeting held on 19 January 1986) and in the course of telephone conversations with members of the board of Guinness and professional advisers of Guinness.

Mr. Ward claims particular credit for persuading the Monopolies and Mergers Commission to allow Guinness to bid for Distillers, for persuading some reluctant directors of Guinness to persevere with the ***686*** bid and for persuading Distillers to pay the costs of Guinness in connection with the bid should it prove unsuccessful.

Thus Mr. Ward admits receipt of £5.2m. from Guinness and pleads an agreement by Guinness that he should be paid this sum for his advice and services in connection with the bid. Mr. Ward admits that payment was not authorised by the board of directors of Guinness.

The articles of association of Guinness provide:

> 'Remuneration of directors. 90. The board shall fix the annual remuneration of the directors provided that without the consent of the company in general meeting such remuneration (excluding any special remuneration payable under article 91 and article 92) shall not exceed the sum of £100,000 per annum. . . . 91. 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. Such special remuneration may be made payable to such director in addition to or in substitution for his ordinary remuneration as a director, and may be made payable by a lump sum or by way of salary, or commission or participation in profits, or by any or all of those modes or otherwise as the board may determine.'

Articles 90 and 91 of the articles of association of Guinness depart from the Table A articles recommended by statute, which reserve to a company in general meeting the right to determine the remuneration of the directors of the company. But by article 90 the annual remuneration which the directors may award themselves is limited and by article 91 special remuneration for an individual director can only be authorised by the board. A committee, which may consist of only two or, as in the present case, three members, however honest and conscientious, cannot assess impartially the value of its work or the value of the contribution of its individual members. A director may, as a condition of accepting appointment to a committee, or after he has accepted appointment, seek the agreement of the board to authorise payment for special work envisaged or carried out. The shareholders of Guinness run the risk that the board may be too generous to an individual director at the expense of the shareholders but the shareholders have, by article 91, chosen to run this risk and can protect themselves by the number, quality and impartiality of the members of the board who will consider whether an individual director deserves special reward. Under article 91 the shareholders of Guinness do not run the risk that a committee may value its own work and the contribution of its own members. Article 91 authorises the board, and only the board, to grant special remuneration to a director who serves on a committee.

It was submitted that article 2 alters the plain meaning of article 91. In article 2 there are a number of definitions each of which is expressed to apply 'if not inconsistent with the subject or context.' The expression 'the board' is defined as ***687***

> 'The 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 to act on its behalf.'

The result of applying the article 2 definition to article 91, it is said, is that a committee may grant special remuneration to any director who serves on a committee or devotes special attention to the business of the company or who otherwise performs services which in the opinion of the committee are outside the scope of the ordinary duties of a director. In my opinion the subject and context of article 91 are inconsistent with the expression 'the board' in article 91 meaning anything except the

board. Article 91 draws a contrast between the board and a committee of the board. The board is expressly authorised to grant special remuneration to *any* director who serves on *any* committee. It cannot have been intended that any committee should be able to grant special remuneration to any director, whether a member of the committee or not. The board must compare the work of an individual director with the ordinary duties of a director. The board must decide whether special remuneration shall be paid in addition to or in substitution for the annual remuneration determined by the board under article 90. These decisions could only be made by the board surveying the work and remuneration of each and every director. Article 91 also provides for the board to decide whether special remuneration should take the form of participation in profits; the article could not intend that a committee should be able to determine whether profits should accrue to the shareholders' funds or be paid out to an individual director. The remuneration of directors concerns all the members of the board and all the shareholders of Guinness. Article 2 does not operate to produce a result which is inconsistent with the language, the subject and the context of article 91. Only the board possessed power to award £5.2m. to Mr. Ward.

Reliance was next placed on article 110 which provides:

> 'The directors may establish any committees, local boards or agencies for managing any of the affairs of the company, either in the United Kingdom, or elsewhere, and may appoint any persons to be members of such local boards, or as managers or agents, and fix their remuneration, and may delegate to any committee, local board, managers or agent any of the powers, authorities and discretions vested in the board, with power to sub-delegate, and may authorise the members of any local board, or any of them to fill any vacancies therein, and to act notwithstanding vacancies, and any such appointment or delegation may be made upon such terms and subject to such conditions as the directors may think fit . . .'

Therefore, it is said, the board may delegate to a committee the power conferred on the board by article 91 to grant special remuneration to a director. But article 110 could not have been intended to allow a local board or agency or manager to fix the remuneration of a director and article 110 expressly provides that remuneration shall be fixed by the board. Article 110 does not enable the board to delegate the power of deciding directors' remuneration which by articles 90 and 91 is vested in the board alone.

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Next, reliance was placed on article 100(D) which is in the following terms:

> '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.'

Article 91 deals with directors' remuneration; article 100(D) deals with directors' charges for professional services. There is a distinction between remuneration and professional charges. Remuneration depends on an assessment of the value of the individual and the perceived quality of his work. Professional charges can be checked by taxation in the case of lawyers and in other instances by professional recommendations and standards of comparison. Mr. Ward nowhere alleges in his pleadings that he provided professional services. Counsel on his behalf stated that Mr. Ward was a member of a New York firm of attorneys. The professional charges of that firm in connection with the bid were paid to the firm pursuant to article 100(D). If Mr. Ward had performed legal professional services separately from the services rendered by his firm, then article 100(D) would apply. The advice and services upon which Mr. Ward relies in these proceedings were not legal professional services. Counsel informed the House that Mr. Ward was one of a number of experts who advise and negotiate, implement or frustrate take-over bids. Counsel did not suggest that these experts are all lawyers or that they constitute a profession or that they possessed the indicia of a profession, namely, an organisation which controls entry and membership, provides educational and training qualifications, insists upon a standard of work and behaviour, imposes disciplinary sanctions for misconduct and, above all, acknowledges and enforces a duty to the public over and above the

duty common to all of obeying the law. The services pleaded by Mr. Ward were the services he was bound to carry out and which any member of the board is entitled and bound to carry out as a member of a committee established by the board. Guinness admit for the purposes of this application that Mr. Ward performed services which were of value to Guinness, although if it were necessary to do so Guinness would attempt to prove, and Mr. Ward would deny, that Mr. Ward has exaggerated the value of his services and that some of his activities were improper and caused damage to Guinness. For present purposes it suffices that Mr. Ward seeks remuneration for his services as a member of a committee; he is not seeking remuneration for professional services provided in a professional capacity. Failure to comply with article 91 cannot be disguised as an application of article 100(D).

Mr. Ward also pleads that Mr. Saunders possessed implied actual authority or ostensible authority to agree on behalf of Guinness that Mr. Ward should be paid for his services. This allegation is inconsistent with the express terms of the resolution dated 19 January 1986 whereby the board conferred power in relation to the bid on the committee and not on Mr. Saunders. The board could not confer on the committee the ***689*** right to agree or to award special remuneration to a director. The board could not confer such a right on Mr. Saunders. The resolution dated 19 January 1986 does not purport to confer on anybody a power which the board could not confer. The articles of Guinness are binding on the board, on the committee, on Mr. Saunders and on Mr. Ward. Mr. Ward was not entitled to assume that Mr. Saunders possessed an authority inconsistent with the articles of Guinness, inconsistent with the appointment of the committee and inconsistent with the terms of the appointment of the committee. If before or at the board meeting on 19 January 1986 the board had been requested to agree to grant special remuneration to Mr. Ward, such a request might well have met with a favourable response. If the bid for Distillers had not led to allegations of misconduct by Guinness it is possible that the payment of £5.2m. to Mr. Ward's company, apparently for services rendered by his company, would not have been questioned or, at any event, that Mr. Ward would not have been required to repay that sum. But there never was any contract by Guinness to pay special remuneration to Mr. Ward for services rendered in connection with the bid for Distillers.

Since, for the purposes of this application, Guinness concede that Mr. Ward performed valuable services for Guinness in connection with the bid, counsel on behalf of Mr. Ward submits that Mr. Ward, if not entitled to remuneration pursuant to the articles, is, nevertheless, entitled to be awarded by the court a sum by way of quantum meruit or equitable allowance for his services. Counsel submits that the sum awarded by the court might amount to £5.2m. or a substantial proportion of that sum; therefore Mr. Ward should be allowed to retain the sum of £5.2m. which he has received until, at the trial of the action, the court determines whether he acted with propriety and, if so, how much of the sum of £5.2m. he should be permitted to retain; Mr. Ward is anxious for an opportunity to prove at a trial that he acted with propriety throughout the bid. It is common ground that, for the purposes of this appeal, it must be assumed that Mr. Ward and the other members of the committee acted in good faith and that the sum of £5.2m. was a proper reward for the services rendered by Mr. Ward to Guinness.

My Lords, the short answer to a quantum meruit claim based on an implied contract by Guinness to pay reasonable remuneration for services rendered is that there can be no contract by Guinness to pay special remuneration for the services of a director unless that contract is entered into by the board pursuant to article 91. The short answer to the claim for an equitable allowance is the equitable 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 provides. 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.

The 28th edition (1982) of *Snell's Principles of Equity* , first published in 1868, contains the distilled wisdom of the author and subsequent editors, including Sir Robert Megarry, on the law applicable to trusts and trustees. It is said, at p. 244, that: ***690***

> 'With certain exceptions, neither directly nor indirectly may a trustee make a profit from his trust. . . . The rule depends not on fraud or mala fides, but on the mere fact of a profit made.'

The 24th edition (1987) of *Palmer's Company Law* , first published in 1898, contains the distilled wisdom of the author and subsequent editors concerning the law applicable to companies and

directors. It is said, in volume 1, at pp. 943-944, that:

> 'Like other fiduciaries directors are required not to put themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to the company. . . . the position of a director, vis-à-vis the company, is that of an agent who may not himself contract with his principal, and . . . is similar to that of a trustee who, however fair a proposal may be, is not allowed to let the position arise where his interest and that of the trust may conflict. . . . he is, like a trustee, disqualified from contracting with the company and for a good reason: the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising.'

The application of these principles to remuneration in the case of a trustee is described by *Snell* , 28th ed., at p. 252:

> 'As a result of the rule that a trustee cannot make a profit from his trust, trustees and executors are generally entitled to no allowance for their care and trouble. This rule is so strict that even if a trustee or executor has sacrificed much time to carrying on a business as directed by the trust, he will usually be allowed nothing as compensation for his personal trouble or loss of time.'

The application of these principles to remuneration in the case of a director is described by *Palmer* , 24th ed., at p. 902:

> 'Prima facie, directors of a company cannot claim remuneration, but the articles usually provide expressly for payment of it . . . and, where this is the case, the provision operates as an authority to the directors to pay remuneration out of the funds of the company; such remuneration is not restricted to payment out of profits.'

The following also appears, at p. 903:

> 'The articles will also usually authorise the payment by the directors to one of their number of extra remuneration for special services. Where such provision is made, it is a condition precedent to a director's claim for additional remuneration that the board of directors shall determine the method and amount of the extra payment; it is irrelevant that the director has performed substantial extra services and the payment of additional remuneration would be reasonable.'

So far as contract is concerned, Lord Cranworth L.C., in *Aberdeen Railway Co. v. Blaikie Bros.* (1854) 1 Macq. H.L. 461, considered, at pp. 471-472: ***691**

> 'the general question, whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. and it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could

> have been obtained from any other person - they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.'

So far as equity is concerned, Sir John Stuart V.-C. in *Barrett v. Hartley (1866) L.R. 2 Eq. 789* , 796, said that there was a

> 'very well established principle of this court, that a trustee is not to exact anything for his services. For the defendant it was contended, that although the payment was called a bonus, it was for important services rendered. No doubt the importance and benefit of the services can hardly be exaggerated. But a trustee who greatly benefits his cestui que trust by performing his duties, is not entitled to say to him that he will not give him his property, or proceed to execute the trust, unless he be paid a bonus.'

In *Bray v. Ford [1896] A.C. 44* a solicitor who was a governor of a charitable college charged profit costs for his professional services under the mistaken belief that the memorandum of association allowed him to do so. Lord Watson said, at p. 48, that the respondent was not

> 'legally justified in charging and accepting payment of full professional remuneration in respect of services rendered by him to the college in his capacity of solicitor . . . . the respondent was neither entitled to charge profit costs in respect of these services, nor to retain them when received by him. Such a breach of the law may be attended with perfect good faith, and it is, in my opinion, insufficient to justify a charge of moral obliquity, unless it is shown to have been committed knowingly or with an improper motive.'

Lord Herschell said, at pp. 51-52: ***692**

> 'It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing.'

Equity forbids a trustee to make a profit out of his trust. The articles of association of Guinness relax the strict rule of equity to the extent of enabling a director to make a profit provided that the board of directors contracts on behalf of Guinness for the payment of special remuneration or decides to award special remuneration. Mr. Ward did not obtain a contract or a grant from the board of directors. Equity has no power to relax its own strict rule further than and inconsistently with the express relaxation contained in the articles of association. A shareholder is entitled to compliance with the articles. A director accepts office subject to and with the benefit of the provisions of the articles relating to directors. No one is obliged to accept appointment as a director. No director can be obliged to serve on a committee. A director of Guinness who contemplates or accepts service on a committee or has performed outstanding services for the company as a member of a committee may apply to the board of directors for a contract or an award of special remuneration. A director who does not read the articles or a director who misconstrues the articles is nevertheless bound by the articles. Article 91 provides clearly enough for the authority of the board of directors to be obtained for the payment of special remuneration and the submissions made on behalf of Mr. Ward, based on articles 2, 100(D) and 110, are more ingenious than plausible and more legalistic than convincing. At the board meeting held on 19 January 1986, Mr. Ward was present but he did not seek then or thereafter to obtain the necessary authority of the board of directors for payment of special remuneration. In these circumstances there are no grounds for equity to relax its rules further than the articles of association provide. Similarly, the law will not imply a contract between Guinness and Mr. Ward for remuneration

on a quantum meruit basis awarded by the court when the articles of association of Guinness stipulate that special remuneration for a director can only be awarded by the board.

It was submitted on behalf of Mr. Ward that Guinness, by the committee consisting of Mr. Saunders, Mr. Ward and Mr. Roux, entered into a voidable contract to pay remuneration to Mr. Ward and that since Mr. Ward performed the services he agreed to perform under this voidable contract there could be no restitutio integrum and the contract ***693*** cannot be avoided. This submission would enable a director to claim and retain remuneration under a contract which a committee purported to conclude with him, notwithstanding that the committee had no power to enter into the contract. The fact is that Guinness never did contract to pay anything to Mr. Ward. The contract on which Mr. Ward relies is not voidable but non-existent. In support of a quantum meruit claim, counsel for Mr. Ward relied on the decision of Buckley J. in *In re Duomatic Ltd. [1969] 2 Ch. 365* . In that case a company sought and failed to recover remuneration received by a director when the shareholders or a voting majority of the shareholders had sanctioned or ratified the payment. In the present case there has been no such sanction or ratification either by the board of directors or by the shareholders. Mr. Ward also relied on the decision in *Craven-Ellis v. Canons Ltd. [1936] 2 K.B. 403* . In that case the plaintiff was appointed managing director of a company by an agreement under the company's seal which also provided for his remuneration. By the articles of association each director was required to obtain qualification shares within two months of his appointment. Neither the plaintiff nor the other directors obtained their qualification shares within two months or at all and the agreement with the managing director was entered into after they had ceased to be directors. The plaintiff having done work for the company pursuant to the terms of the agreement was held to be entitled to the remuneration provided for in the agreement on the basis of a quantum meruit. In *Craven-Ellis* the plaintiff was 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 as of right by an action in law. Moreover, as in *In re Duomatic Ltd* ., the agreement was sanctioned by all the directors, two of whom were beneficially entitled to the share capital of the company. In the present case Mr. Ward was a director, there was a conflict between his interest and his duties, there could be no contract by Guinness for the payment of remuneration pursuant to article 91 unless the board made the contract on behalf of Guinness and there was no question of approval by directors or shareholders.

In support of a claim for an equitable allowance, reference was made to the decision of Wilberforce J. in *Phipps v. Boardman [1964] 1 W.L.R. 993* . His decision was upheld by the Court of Appeal *[1965] Ch. 992* and ultimately by this House under the name of *Boardman v. Phipps [1967] 2 A.C. 46* . In that case a trust estate included a minority holding in a private company which fell on lean times. The trustees declined to attempt to acquire a controlling interest in the company in order to improve its performance. The solicitor to the trust and one of the beneficiaries, with the knowledge and approval of the trustees, purchased the controlling interest from outside shareholders for themselves with the help of information about the shareholders acquired by the solicitor in the course of acting for the trust. The company's position was improved and the shares bought by the solicitor and the purchasing beneficiary were ultimately sold at a profit. A complaining ***694*** beneficiary was held to be entitled to a share of the profits on the resale on the grounds that the solicitor and the purchasing beneficiary were assisted in the original purchase by the information derived from the trust. The purchase of a controlling interest might have turned out badly and in that case the solicitor and the purchasing beneficiary would have made irrecoverable personal losses. In these circumstances it is not surprising that Wilberforce J. decided that in calculating the undeserved profit which accrued to the trust estate there should be deducted a generous allowance for the work and trouble of the solicitor and purchasing beneficiary in acquiring the controlling shares and restoring the company to prosperity. *Phipps v. Boardman* decides that in exceptional circumstances a court of equity may award remuneration to the trustee. Therefore, it is argued, a court of equity may award remuneration to a director. As at present advised, I am 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. Certainly, the circumstances do not exist in the present case. It is in this respect that section 317 of the Companies Act 1985 is relevant. By that section:

> '(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 the 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. . . .'

In *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* , the Court of Appeal held that section 317 renders a contract voidable by a company if the director does not declare his interest. Section 317 does not apply directly to the present case because there was no contract between Guinness and Mr. Ward. But section 317 shows the importance which the legislature attaches to the principle that a company should be protected against a director who has a conflict of interest and duty. There is a fundamental objection to the admission of any claim by Mr. Ward whether that claim be based on article *100(D)* , a quantum meruit, section 727 of the Act of 1985 or the powers of a court of equity. The objection is that by the agreement with the committee, which is the foundation of Mr. Ward's claim to any relief, he voluntarily involved himself in an irreconcilable conflict between his duty as a director and his personal interests. Both before and after 19 January 1986, Mr. Ward owed a duty to tender to Guinness impartial and independent advice untainted by any possibility of personal gain. Yet by the agreement, which Mr. Ward claims to have concluded with the committee and which may have been in contemplation by Mr. Ward even before 19 January 1986, Mr. Ward became entitled to a negotiating fee payable by Guinness if, and only if, Guinness acquired Distillers and, by the agreement, the amount of the negotiating fee depended on the price which Guinness ultimately offered to the shareholders of Distillers. If such an agreement had been concluded by the board of directors, it would have been binding on Guinness under article 91 but foolish in that the agreement perforce made Mr. Ward's advice to Guinness ****695*** suspect and biased. But at least the conflict would have been revealed to the board. As it was, the agreement was not made by the board and was not binding on Guinness. The agreement was made by the committee and ought not to have been made at all. By the agreement Mr. Ward debarred himself from giving impartial and independent advice to Guinness. Mr. Ward was a director of Guinness and in that capacity was able to negotiate his own agreement with the committee of which he was a member, and was able to discuss the bid by Guinness for Distillers with the other directors, to advise and participate in decisions on behalf of Guinness relevant to the bid (including a decision to increase the amount of the offer) and to procure the acquisition by Guinness of Distillers and thus to claim£5.2m. from Guinness. I agree with my noble and learned friend Lord Goff of Chieveley (post, p. 696D-E) that for the purposes of this appeal it must be assumed that Mr. Ward acted in good faith, believing that his services were rendered under contract binding on the company, and that in that mistaken belief Mr. Ward may have rendered services to Guinness of great value and contributed substantially to the enrichment of the shareholders of Guinness. Nevertheless, the failure of Mr. Ward to realise that he could not properly use his position as director of Guinness to obtain a contingent negotiating fee of £5.2m. from Guinness does not excuse him 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 shall not make a profit out of his trust.

Finally, judgment against Mr. Ward on this application was resisted in reliance on section 727 of the Act of 1985. That section provides:

> '(1) If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor . . . it appears to the court hearing the case that that officer or person 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 (including those connected with his appointment) 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. . . .'

Mr. Ward requested the committee to pay him and received from the committee out of moneys belonging to Guinness the sum of £5.2m. as a reward for his advice and services as a director. Mr. Ward had no right to remuneration without the authority of the board. Thus the claim by Guinness for repayment is unanswerable. If Mr. Ward acted honestly and reasonably and ought fairly to be excused for receiving £5.2m. without the authority of the board, he cannot be excused from paying it back. By invoking section 727 as a defence to the claim by Guinness for repayment, Mr. Ward seeks an order of the court which would entitle him to remuneration without the authority of the board. The order would be a breach of the articles which protect shareholders and govern ****696*** directors and would be a breach of the principles of equity to which I have already referred.

I would dismiss this appeal.

LORD GRIFFITHS.

My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Templeman and Lord Goff of Chieveley. I agree with them, and for the reasons that they give I too would dismiss the appeal.

LORD GOFF OF CHIEVELEY.

My Lords, in this case, Guinness seeks judgment for the recovery of a sum of £5.2m. paid to the appellant, Mr. Ward, without a trial. Before Sir Nicolas Browne-Wilkinson V.-C. it obtained a judgment on admissions; the Vice-Chancellor's decision was affirmed by the Court of Appeal, from whose decision Mr. Ward now appeals to your Lordships' House.

I believe that I am not the only person concerned with these proceedings who has been startled by the size of that sum, which Mr. Ward has claimed to have been paid to him under a contract binding on Guinness. But, for present purposes, the amount is irrelevant. For since Guinness is seeking a judgment without a trial in proceedings in which Mr. Ward is protesting his good faith, he must be treated as, ex hypothesi, an innocent man, who has acted throughout in complete good faith, under what he believed to be a contract binding on Guinness, and indeed as one who claims to have rendered valuable services to Guinness, performed with great skill, which have contributed significantly, perhaps crucially, to the success of Guinness's bid for the shares in Distillers, thereby very substantially enriching the shareholders of Guinness. It is on this basis that Guinness's claim to be entitled to judgment against Mr. Ward has to be considered. It has also to be borne in mind that Mr. Ward claims that, if by any chance he is not entitled to the sum of £5.2m. under a contract binding on Guinness, then he is entitled to some recompense for the services which ex hypothesi he has rendered to Guinness, either by way of an equitable allowance, or on a quantum meruit, or under section 727 of the Act of 1985.

What course has the action taken? Before the Vice-Chancellor, judgment was given against Mr. Ward on admissions, on the basis that he had received the 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 section 317(1) of the Companies Act 1985 . In the Court of Appeal *[1988] 1 W.L.R. 863* , Mr. Ward's appeal against that decision was dismissed. It was said of him, at pp. 870-871, that he had 'succeeded in getting his hands on the company's money,' and that the company had never ceased to own the money which he had been paid. Accordingly Mr. Ward was constructive trustee of the money which he had received, and must pay it back. If he wished to make a claim for remuneration in respect of the services which he claimed to have rendered to Guinness, he must bring a separate action.

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The matter then came before your Lordships' House, by leave of the House. Mr. Ward's submissions were presented to the Appellate Committee, in an argument conspicuous for its moderation as well as for its skill, by junior counsel, Mr. Crow. It gradually became clear that Mr. Crow's criticisms of the decisions of the courts below were well founded, and that (quite apart from very serious difficulties arising upon the construction of section 317) they were inconsistent with *Hely-Hutchinson v. Brayhead Ltd. [1968] 1 Q.B. 549* , a decision of an exceptional Court of Appeal consisting of Lord Denning M.R., Lord Wilberforce and Lord Pearson. The decision in that case proceeded on the basis that the statutory duty of disclosure (then embodied in section 199 of the Companies Act 1948) did not of itself affect the validity of a contract. The section had however to be read with provisions in the articles imposing a duty of disclosure upon directors of the company. If 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: see *per* Lord Wilberforce, at p. 589, and Lord Pearson, at p. 594. Perhaps the matter is put most clearly by Lord Pearson, who said:

> 'It is not contended that section 199 in itself affects the contract. The section merely creates a statutory duty of disclosure and imposes a fine for non-compliance. But it has to be read in conjunction with article 99. The first sentence of that article is obscure. If a director makes or is interested in a contract with the company, but fails duly to declare his interest, what happens to the contract? Is it void, or is it voidable at the option of the company, or is it still binding on both parties, or what? The article supplies no answer to these questions. I think the answer must be supplied by the general law, and the answer is that the contract is voidable at the option of the company, so that the company has a

> choice whether to affirm or avoid the contract, but the contract must be either totally affirmed or totally avoided and the right of avoidance will be lost if such time elapses or such events occur as to prevent rescission of the contract . . .'

On this basis I cannot see that a breach of section 317, which is not for present purposes significantly different from section 199 of the Act of 1948, had itself any effect upon the contract between Mr. Ward and Guinness. As a matter of general law, to the extent that there was failure by Mr. Ward to comply with his duty of disclosure under the relevant article of Guinness (article 100(A)), the contract (if any) between him and Guinness was no doubt voidable under the ordinary principles of the general law to which Lord Pearson refers. But it has long been the law that, as a condition of rescission of a voidable contract, the parties must be put in statu quo; for this purpose a court of equity can do what is practically just, even though it cannot restore the parties precisely to the state they were in before the contract. The most familiar statement of the law is perhaps that of Lord Blackburn in ***698** *Erlanger v. New Sombrero Phosphate Co. (1878) 3 App.Cas. 1218* , when he said, at p. 1278:

> 'It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in statu quo. . . . It is a doctrine which has often been acted upon both at law and in equity.'

However on that basis Guinness could not simply claim to be entitled to the £5.2m. received by Mr. Ward. The contract had to be rescinded, and as a condition of the rescission Mr. Ward had to be placed in statu quo. No doubt this could be done by a court of equity making a just allowance for the services he had rendered; but no such allowance has been considered, let alone made, in the present case.

Faced with these problems, Mr. Oliver was driven, in the last resort, to submit that *Hely-Hutchinson v. Brayhead Ltd* . was wrongly decided. I have to confess that I would hesitate long before holding that a decision of such a court was erroneous. Careful study of the decision, with the assistance of counsel, merely served to reinforce my natural expectation that the case was rightly decided.

This being so, it followed that the decisions of the courts below in the present case, founded as they were upon a breach of section 317 by Mr. Ward, were erroneous. In ordinary circumstances, this conclusion would have led to the appeal being allowed. But Mr. Oliver then sought to justify the judgment on other grounds. It was first suggested by him quite simply that Mr. Ward, having received the money as constructive trustee, must pay it back. This appears to have formed, in part at least, the basis of the decision of the Court of Appeal. But the insuperable difficulty in the way of this proposition is again that the money was on this approach paid not under a void, but under a voidable, contract. Under such a contract, the property in the money would have vested in Mr. Ward (who, I repeat, was ex hypothesi acting in good faith); and Guinness cannot short circuit an unrescinded contract simply by alleging a constructive trust.

The next suggestion was that it was unnecessary to have regard to section 317 at all. There was a simpler solution to the problem. The committee which Mr. Ward claimed to have agreed to his remuneration, thereby binding the company, had no power to do so, either under article 91 or under article 100(D) of the articles of association. It followed that the contract upon which Mr. Ward relied was void for want of authority, and that Guinness was therefore entitled to recover from Mr. Ward the money paid under it on the ground of total failure of consideration, or alternatively on the basis that he had received the money as constructive trustee. On this basis, it was suggested, summary judgment should be entered against Mr. Ward for the full sum.

Having had the benefit of the assistance of counsel, I have reached the conclusion that article 91 does not empower a committee of the board of Guinness to authorise special remuneration for services rendered by directors of the company. It is true that the articles of Guinness are conspicuous neither for their clarity nor for their consistency. In particular there is no sensible basis upon which it is ***699** possible to reconcile article 91 with article 110 without doing violence to the language of one or other article. But I am satisfied that I should accept Guinness's argument on this point.

But what about article 100(D)? Plainly, on its express words, it is outside the ambit of article 91. For under it a director who acts for the company in a professional capacity is to be remunerated as if he were not a director.

Mr. Crow told your Lordships that Mr. Ward claims that he was acting in a professional capacity, in

that he was acting as a business consultant. Your Lordships' House has to consider whether that submission should be rejected without hearing any evidence upon it. I have been troubled whether it would be proper to do so. There is a tendency among elderly professional men to restrict the meaning of the word 'profession' to the older professions, such as the church, medicine and the law. But, in the course of this century, the meaning of the word has expanded, and I suspect that it is still expanding at an accelerating rate. For my part, I would be unwilling to hold, without evidence, what are the modern professions today. Even so, as is demonstrated in the speech of my noble and learned friend, Lord Templeman, there are the most formidable difficulties which would in any event have to be surmounted if business consultancy as such were to be recognised as a profession; and, especially as the expression 'business consultant' is capable of more than one meaning, I am satisfied that a bare assertion of the proposition cannot of itself be enough to justify a trial on this point in the present case.

The matter may be more appropriately approached in another way. Mr. Ward's profession was undoubtedly that of an American attorney, he being the senior partner in a law firm in Washington D.C.; and I can find no allegation in the pleadings that he was acting as a professional business consultant. Let it be supposed that he was not an American attorney but an English solicitor. It is well known that English solicitors may develop the most formidable negotiating skills, which they may deploy in the course of their profession as solicitors. No doubt the same is true of many experienced American attorneys. Had an English solicitor, who was also a non-executive director of Guinness, acted as Mr. Ward claims to have done, there might be circumstances in which he could claim to have acted in his professional capacity as a solicitor in this country. But it appears that Mr. Ward was not acting, in the context of a purely English take-over bid, in the course of his profession as an American attorney. He appears 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, Mr. Ward could not have been acting in the course of his profession and article 100(D) has no application in the present case.

But the matter does not stop there. Let it be accepted that the contract under which Mr. Ward claims to have rendered valuable services to Guinness was for the above reasons void for want of authority. I understand it to be suggested that articles 90 and 91 provide (article 100 apart) not only a code of the circumstances in which ***700*** a director of Guinness may receive recompense for services to the company, but an exclusive code. This is said to derive from the equitable doctrine whereby directors, though not trustees, are held to act in a fiduciary capacity, and as such are not entitled to receive remuneration for services rendered to the company except as provided under the articles of assocation, which are treated as equivalent to a trust deed constituting a trust. It was suggested that, if Mr. Ward wishes to receive remuneration for the services he has rendered, his proper course is now to approach the board of directors and invite them to award him remuneration by the exercise of the power vested in them by article 91.

The leading authorities on the doctrine have been rehearsed in the opinion of my noble and learned friend, Lord Templeman. These indeed demonstrate that the directors of a company, like other fiduciaries, must not put themselves in a position where there is a conflict between their personal interests and their duties as fiduciaries, and are for that reason precluded from contracting with the company for their services except in circumstances authorised by the articles of association. Similarly, just as trustees are not entitled, in the absence of an appropriate provision in the trust deed, to remuneration for their services as trustees, so directors are not entitled to remuneration for their services as directors except as provided by the articles of association.

Plainly, it would be inconsistent with this long-established principle to award remuneration in such circumstances as of right on the basis of a quantum meruit claim. But the principle does not altogether exclude the possibility that an equitable allowance might be made in respect of services rendered. That such an allowance may be made to a trustee for work performed by him for the benefit of the trust, even though he was not in the circumstances entitled to remuneration under the terms of the trust deed, is now well established. In *Phipps v. Boardman [1964] 1 W.L.R. 993* , the solicitor to a trust and one of the beneficiaries were held accountable to another beneficiary for a proportion of the profits made by them from the sale of shares bought by them with the aid of information gained by the solicitor when acting for the trust. Wilberforce J. directed that, when accounting for such profits, not merely should a deduction be made for expenditure which was necessary to enable the profit to be realised, but also a liberal allowance or credit should be made for their work and skill. His reasoning was, at p. 1018:

> 'Moreover, account must naturally be taken of the expenditure which was necessary to enable the profit to be realised. But, in addition to expenditure, should not the defendants be given an allowance or credit for their work and skill? This is a subject on which authority is scanty; but Cohen J., in *In re Macadam [1946] Ch. 73* , 82, gave his support to an allowance of this kind to trustees for their services in acting as directors of a company. It seems to me that this transaction, i.e., the acquisition of a controlling interest in the company, was one of a special character calling for the exercise of a particular kind of professional skill. If Boardman had not assumed the role of seeing it through, the beneficiaries would have had to employ (and would, had they been well advised, have ***701*** employed) an expert to do it for them. If the trustees had come to the court asking for liberty to employ such a person, they would in all probability have been authorised to do so, and to remunerate the person in question. It seems to me that it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.'

Wilberforce J.'s decision, including his decision to make such an allowance, was later to be affirmed by the House of Lords: *sub nom. Boardman v. Phipps [1967] 2 A.C. 46* .

It will be observed that the decision to make the allowance was founded upon the simple proposition that 'it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.' Ex hypothesi, such an allowance was not in the circumstances authorised by the terms of the trust deed; furthermore it was held that there had not been full and proper disclosure by the two defendants to the successful plaintiff beneficiary. The inequity was found in the simple proposition that the beneficiaries were taking the profit although, if Mr. Boardman (the solicitor) had not done the work, they would have had to employ an expert to do the work for them in order to earn that profit.

The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.

Not only was the equity underlying Mr. Boardman's claim in *Phipps v. Boardman* clear and, indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests. The present case is, however, very different. Whether any such an allowance might ever be granted by a court of equity in the case of a director of a company, as opposed to a trustee, is a point which has yet to be decided; and I must reserve the question whether the jurisdiction could be exercised in such a case, which may be said to involve interference by the court in the administration of a company's affairs when the company is not being wound up. In any event, however, like my noble and learned friend, Lord Templeman, I cannot see any possibility of such jurisdiction being exercised in the present case. I proceed, of course, on the basis that Mr. Ward acted throughout in complete good faith. But the simple fact remains that, by agreeing to provide his services in return for a substantial fee the size of which was dependent upon the amount of a successful bid by Guinness, Mr. Ward ***702*** was most plainly putting himself in a position in which his interests were in stark conflict with his duty as a director. Furthermore, for such services as he rendered, it is still open to the board of Guinness (if it thinks fit, having had a full opportunity to investigate the circumstances of the case) to award Mr. Ward appropriate remuneration. In all the circumstances of the case, I cannot think that this is a case in which a court of equity (assuming that it has jurisdiction to do so in the case of a director of a company) would order the repayment of the £5.2m. by Mr. Ward to Guinness subject to a condition that an equitable allowance be made to Mr. Ward for his services.

Finally, I cannot see any prospect of success in a claim by Mr. Ward to relief under section 727 of the Act of 1985. Given that Guinness's claim must be one for the recovery of money paid to Mr. Ward under a void contract and received by him as a constructive trustee, there is no question of his being able to claim relief from liability for breach of duty, as might have been the case if Guinness's claim had been founded upon breach by Mr. Ward of his duty of disclosure.

I have been very conscious, throughout this case, that Guinness is seeking summary judgment for the sum claimed by it, without any trial on the merits. Even so, I have come to the conclusion that Mr. Ward has no arguable defence to Guinness's claim. The simple fact emerges, at the end of the day, that there was, in law, no binding contract under which Mr. Ward was entitled to receive the money and that, as a fiduciary, he must now restore that money to Guinness. For these reasons, I would dismiss the appeal.

Representation

Solicitors: Calow Easton ; Herbert Smith .

Appeal dismissed with costs. (M. G.)

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1. Companies Act 1985, s. 317(1) : see post, p. 694D. S. 727(1): see post, p. 695E-F.