

Director Must Not Obtain Profit Out of His Position

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A director is the alter ego of the company. He is allowed access to highly sensitive information on the company's business that is generally not available to or accessible by the public. He is also given opportunity to make decisions for the company. In doing so, instances may arise when a director sees an opportunity to make a profit or benefit for himself.

Section 218(1) of the Companies Act 2016 stipulates "*a director or officer of a company shall not, without the consent or ratification of a general meeting ... use any information acquired by virtue of his position as a director or officer of the company... use his position as such director or officer ... to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company*". Under common law, this is known as the "no-profit rule". This principle stems from *Regal*,¹ where Lord Russell explained the rule:



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"... The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

The Court of Appeal, in *Alcatel-Lucent*,² also held:

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

The position is therefore clear – a director must not make a secret profit or obtain any advantage through his position as a director. Similarly, he is not allowed to use information or knowledge obtained via his position to benefit himself unless he obtains approval from the board of directors or consent at a general meeting. There can be a breach of fiduciary duty even though the director acted in good faith.³

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Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378 (HL)
Alcatel-Lucent (Malaysia) Sdn Bhd v Solid Investments Ltd & Another Appeal [2013] 2 CLJ 734 (CA)
Magnifine Sdn Bhd v Yap Mun Him [2005] 6 CLJ 413 (HC)



The courts have ruled that directors are in breach of the fiduciary duty of the no-profit rule, and consequently liable to account to the company for losses it has suffered, in these instances:

- The Court of Appeal⁴ held the directors acted in breach of their duties as they deliberately “appropriated” the business of the plaintiff company. They transgressed the no-profit and no-conflict rule with impunity and thus, were liable to account to the plaintiff company for the losses suffered as a consequence of their breach of directors’ duties.
- The High Court⁵ found the director breached his fiduciary duties as the evidence showed he obtained a secret profit amounting to USD160,000 by instructing the plaintiff to deposit the money for the purchase of a ship into his personal account. He was therefore unjustly enriched.
- The High Court⁶ held the defendant breached his fiduciary duty as evidence showed he failed to declare to the board of the plaintiff company that he was being paid commissions by another entity in relation to the purchases of polypropylene resins. The defendant ran afoul of the no-conflict and no-profit rule and made secret profits for himself⁷ and consequently, must account for such money to the company.
- The High Court⁸ found the first defendant breached his duties as a director and as a fiduciary of the company because he took monies paid by the third defendant for sub-rentals and electricity charges and that he did not account for the sums to the company. There was also a depletion of monies and assets due to the company. Thus, the first defendant breached his director’s duty by making secret profits.

Conclusion

The law is clear in that a director of a company cannot make a secret profit for himself. Temptation is hard to resist. In the context of a director, he must resist all temptations to benefit for himself. One false step may cause lifelong regret.

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⁴ *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 2 CLJ 48 (CA)

⁵ *Oon Cheng Thye v BS Pacific Maritime SA* [2020] 1 LNS 233 (HC)

⁶ *Mahesan v Malaysian Government Officers Co-Operative Housing Society Ltd*[1975] 1 MLJ 77(FC) is cited in *Magnifine*, *supra* n 3

⁷ *Magnifine*, *supra* n 3

⁸ *Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors* [1999] 5 MLJ 421 (HC)

