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NOMINEE DIRECTORS: SILENT GUARDIANS OR CORPORATE PUPPETS?

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Abstract

A nominee director must act in the best interest of the company in addition to the duty to represent the nominator's interest. The Malaysian Companies Act 2016 has stipulated the responsibilities of a nominee director but did not specifically state the actual duties of a nominee director. Nominee directors are appointed to the board to oversee the management of the company. Their presence on the board has raised significant debate over their role and effectiveness. Some studies argued that nominee directors are more of a guardian than a fulfiller of their duties. Thus, this study examined the nature and the duties of nominee directors in companies in Malaysia. Doctrinal research was employed to analyse the laws in statutes, case laws and other relevant documents to ascertain the legal duties and functions of nominee directors. It was found that a nominee director is neither a puppet nor solely a guardian, but rather an appointed representative of a significant shareholder clothed with fiduciary duties. Nominee directors' fiduciary duties are primarily responsible for the company's best interests and not just the interests of the shareholders who appointed them, although their duty to the company may sometimes conflict with the wishes of their nominator. The result of this study will add knowledge to the literature on the duties of nominee directors, whilst legislators and policymakers may use the information to strengthen corporate governance in encouraging transparency and accountability in companies.

Keywords: Nominee Directors, doctrinal research, best interest of the company, corporate governance.

1. INTRODUCTION

Nominee directors are those who represent the interests of a specific group or people, such as a major shareholder or creditor to the company and are appointed to the board of directors (the board) (Adam, 2015). A nominee director can also be a person nominated to become a board member on behalf of another party outside the company, such as stakeholders, investors, or lenders (Salleh et. al. 2020). A director is a nominee director if he or she is not merely appointed by some identified nominator but also has an extraneous loyalty to the nominator or some interests other than the interests of the company (Ford et al., 2001 as cited in Rizal Salim and Tai Yong, 2008, p. 170). Despite those definitions, the Malaysian Companies Act 2016 (CA 2016) failed to define the term 'nominee director'; instead, CA 2016 stipulates the responsibility of a nominee director as provided under section 217(1), which is a mandatory duty to act in the best interests of the company. The CA 2016 merely states the responsibility of a nominee director but did not explicitly limit the powers of a nominee director nor compel a nominee director to adhere to a nominator's instructions (*What Does the Companies Act 2016 Say about Nominee Directors?*

- *MISHU - Malaysia No.1 Digital Company Secretary*, 2023). One argued that the relationship of the nominator and the nominee directors whom they have appointed is almost similar to that of principal and agent or employer and employee, however, such appointment as a nominee director to some extent would result to a breach of fiduciary duties of a director because the nominee directors are given the full force of obligations of a director when they representing the interests of the appointer (Ramsay & University Of Melbourne. Centre For Corporate Law and Securities Regulation, 1997).

Past studies shown that there is conflict between the duties of nominee director to their nominator and duties to the company in which the nominee serve as a director. On one hand the nominee director must carry out his or her duties as director in good faith and in the best interest of the company as whole, but on the other hand, the nominee director must act in the interest of his or her nominator (Ramsay & University of Melbourne. Centre For Corporate Law and Securities Regulation, 1997; Lekgau, 2016; Rizal Salim and Tai Yong, 2008). The presence of nominee directors on the board has raised significant debate over their role and effectiveness. Some studies argue that nominee directors are more of a guardian (Redmond, 1987) than a fulfiller of their duties (Adam, 2014). In simple term, it can be stated that a nominee director is neither a staff nor an officer because it is employed by a certain company, hence, they stand within the board as a non-executive director (Adam, 2016). Thus, this study examined the nature and the duties of nominee directors in companies in Malaysia to answer the question as to whether a nominee director is a guardian who act in the best interest of the company or a mere puppet acting on the behalf of the nominator.

2. LITERATURE REVIEW

Nominee directors are a product of modern corporate governance mechanisms (Rizal Salim and Tai Yong, 2008) and a tool frequently employed by shareholders, creditors, and other stakeholders to safeguard specific interests within a company's board structure (Nachane et al., 2005; Lekgau, 2016; Salleh et al., 2021). There are several reasons why nominee directors are needed. Apart from representing interests of the nominators, institutional investors particularly, appoint nominee directors to safeguard their investment (Annuar, 2015; Lekgau, 2016) and influence the strategic direction of the company (Lekgau, 2016). Past studies have suggested frameworks in the governance since shareholders have rights which will determine the strategic direction of the company (Mihalik, 2016; Roy and Mukerjee, 2021).

Any decision of the board should be in the best interest of the nominators who are also investors of the company. Situations of dual roles as board members and shareholders led to companies like venture capital firms employed nominee directors (Adam, 2014; Adam 2016) and government-linked investment companies (GLIC) in Malaysia such as Permodalan Nasional Berhad and Khazanah Nasional Berhad to appoint nominee directors to oversee investment and ensure compliance with public policy (Adam, 2016). Nevertheless, Roy and Mukerje (2021) found that the influence of non-executive directors such as nominee directors may not be significant in some strategy such as the business segment exposures.

Appointment of nominee director can be made in accordance with the shareholders agreement (Adam, 2016) and nominators should refer to the companies' constitution prior to appointment to ensure compliance with the statutory provisions (Cheong, 2019; Gabi Bellairs-Lombard, 2023). Apart from safeguarding the investment of the nominators, nominee directors also have to ensure that the nominators' interests are considered in the decision-making process (Adam, 2016; Salleh et al, 2021). Nominee directors act as intermediaries and even can improve corporate

governance by serving as information bridges and monitors (Nachane et al., 2005, Adam, 2016). However, having a voice in the company's decision-making process may influence the company's view by fostering a conservative approach toward capital adequacy (Rizal Salim & Tai Yong, 2008). Empirical data indicate that firm-specific factors like profitability, debt composition, and risk level affect how effective the nominee directors are (Nachane et al., 2005).

The interests of the nominator and the company may easily be in conflict since both have their own interests. It is a challenging and difficult task for nominee directors (Rizal Salim and Tai Yong, 2008; Adam, 2016; Abdul Raof et al., 2024). Past studies found that the dual loyalty may interfere with the nominee directors' fiduciary duties, particularly on the issue of confidentiality of company information, to which the nominators believe it is their entitlement to have the company's information, but the nominee director has a duty to protect such information (Hassan and Abd Ghadas, 2017). Nominee directors in Australia and New Zealand are permitted by statutes or court decisions to take their nominators' interests into account while maintaining certain protections (Rizal Salim and Tai Yong, 2008; Ahern, 2011).

Previous study found that it is difficult to reconcile between fiduciary duties and the concept of nominee directors representing an entity. Rizal Salim & Tai Yong (2008) contended that Malaysian approach to the duties of nominee directors is overly prescriptive and inconsistent with commercial reality. Malaysia's strict legal framework has drawn criticism for being disconnected from business reality and restricting corporate flexibility (Rizal Salim & Tai Yong, 2008; Koh, 2008). The problem is made worse by the concerns about information leaking and confidentiality. Reports to the nominators are frequently demanded of nominee directors, particularly those nominated by government agencies or institutional investors. The legal obligation of directors to maintain corporate secrecy and act independently is directly violated by this conduct (Salleh et al., 2021; Adam, 2016). Nominee directors are considered "associated persons" under Section 17A of the Malaysian Anti-Corruption Commission Act 2009, which holds businesses vicariously accountable for corrupt practices carried out by their appointees (Abdul Raof et al., 2024). This exposes businesses to serious legal and reputational risks, particularly if the nominee director acts without the required approval or supervision in the interest of an outside party. Countries such as the United Kingdom (UK), Australia, and New Zealand uphold the fiduciary duty to the corporation whilst at the same time acknowledging the particular difficulties faced by nominee directors (Salleh et al., 2021).

Although nominee directors are legally required to act in the company's best interest, the United Kingdom (UK)'s statutory provisions permit the consideration of nominator interests under certain conditions, as long as they act in the best interest of the company. Under section 217 of CA 2016, a nominee director must act in the best interest of the company, even if that conflicts with the interests of their appointer. This provision effectively rejects the notion that such directors are exempt from general fiduciary principles. The fiduciary duty of nominee directors is an attempt to reconcile "commercial pragmatism" with "legal orthodoxy." Directors, regardless of who appoints them, are fiduciaries of the company and must act in good faith and for a proper purpose (Ahern, 2010).

3. METHODOLOGY

This study utilised doctrinal legal research to examine the nature and duties of nominee directors in a company to answer the question as to whether a nominee director is a guardian who acts in the best interests of the company or a mere puppet acting on behalf of the nominator. This study involved the analysis of statutory provisions, judicial interpretations, case laws and legal

principles relating to nominee directors in Malaysia including case laws from other different jurisdictions such as the UK, Australia and New Zealand. Data collection was conducted through online library-based sources, including reported Malaysian cases, journals and academic writings. Critical and secondary data analysis of legal materials was conducted to identify the specific legal rules and later to discuss the legal meaning of the rules and their underlying principles.

4. RESULTS AND DISCUSSION

4.1 Common law position

Most cases discuss the duties of nominee directors based on the duties of a director. The basic question is to whom nominee directors owe their duty. According to the case of *Percival v Wright* (1902), duties are owed to the company (Salleh et al., 2021). Lord Greene MR in the case of *Re Smith and Fawcett* (1942, p. 306) stated, “[The directors] must exercise their discretion bona fide in what they consider, not what a court may consider, to be in the interests of the company, and not for any collateral purpose ... It is beyond question that that is a fiduciary power, and the directors must exercise it bona fide in what they consider to be the interests of the company”. Based on the statement by Lord Greene, the duty to act for a proper purpose and in good faith is a legal obligation imposed on directors for the best interests of the company and not for the best interests of individual shareholders (Rizal Salim and Tai Yong, 2008). Thus, the same duty also applies to a nominee director as can be seen in the case of *Bircher Asia Pacific Sdn Bhd v Yeoh Seng Keong & Anor* (2017) where the Malaysian High Court held that a nominee director is subject to the same fiduciary duties and responsibilities like any other director, including acting in the best interests of the company.

In a situation where there is conflict between the interests of the parent and those of one of its subsidiaries as in the case of *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1959), the parent may instruct their nominee directors on the board of the subsidiary to act in a manner that does not coincide with the best interest of the subsidiary. Lord Denning whose view is concurrent with Viscount Simmons, stated that as soon as the interests of two companies conflicted, the nominee directors were placed in an impossible position as nominee directors. Lord Denning said, “... they probably thought that ‘as nominees’ of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders” (Sekouti, 2009). The strict approach by the court in the case of *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1959) is contrary to the decisions of the courts in the cases of *Levin v Clark* (1962) and *Re Broadcasting Station 2GB Pty Ltd* (1964-65) where courts in both cases took into account the commercial reality and stated that the nominee directors may cater the interests of their nominators where these have been agreed by the shareholders (Redmond, 1987). Nonetheless, Malaysian courts are stricter as in the case of *Industrial Concrete Products Bhd v Concrete Engineering Bhd* (2001). In this case, the conflict arose when a decision or strategy proposed by the nominator is not in the best interests of the subsidiary company but rather serves the parent company’s interests at the expense of the subsidiary. The court held that the nominee director’s failure to act independently and had breached his fiduciary duties to the company since he had allowed his duty to the company to conflict with those of his nominator.

4.2 Statutory provisions

The Malaysian Companies Amendment Act 2007 had codified the common law issue on nominee directors, and as a result, the parent Act of CA 1965 was amended in section 132(1E) (*Conflicting Issues Faced by Nominee Directors - Azmi & Associates, 2022*). The same provisions in section 132 (1E) were maintained in section 217 of the CA 2016, which states:

“(1). A director who was appointed by virtue of his position as an employee of a company, or who was appointed by or as a representative of a member, employer or debenture holder, shall act in the best interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his nominator.

(2). A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or a fine not exceeding three million ringgit or to both.”

Pursuant to the provision of section 217 of the CA 2016, a nominee director shall act in the best interest of the company. The provision in section 217 is mandatory, where in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, the nominee director shall not subordinate his duty to act in the best interest of the company to his nominator. The same prohibition was dealt with by Lord Denning in the case of *Scottish Co-operative Wholesale Society Ltd. v. Meyer (1959)*.

Nevertheless, section 217 of the CA 2016 only discussed the responsibility of nominee directors without focusing on legislative gaps such as the definition of a nominee director and the transparency and accountability of the duties of nominee directors. Companies Commission of Malaysia have issued a Consultative Document on the Proposed Amendments to the Companies Act 2016 relating to the Nominee Shareholders and Nominee Directors in December 2023 (*Consultative Document on the Proposed Amendments to the Companies Act 2016 relating to nominee shareholders & nominee directors, n.d.*) requiring companies to establish and maintain registers amongst others register of nominee directors. The proposal was intended to strengthen the legal framework for corporate rehabilitation and align with the international best practices and standards advocated by organisations such as the Financial Action Task Force (FATF). The document was meant to address legislative gaps by introducing clear definitions and disclosure requirements relating to nominee directors. However, the consultation document, which is supposed to make changes relating to nominee directors, was not addressed in the Companies (Amendment) Act 2024, leaving the area of nominee directors in the same position as before. No specific nominee directors were reporting compared to the original consultative documents.

4.3 Silent guardian or corporate puppet?

Since a nominee director is a representative who has been appointed and nominated to the board to represent the interests of a specific group or people, such as a major shareholder or creditor, he or she has dual duty, i.e. to the board and to the nominator. When it comes to the duties and responsibilities of the company, the nominee director's duties are no different from those of other types of directors. Nominee directors have the same rights as other directors during board meetings and share the same rights and responsibilities. They have to serve their fiduciary duties diligently and avoid actions that could harm the company they represent. In the event the nominee directors divert business opportunities or use confidential information for personal gain, they are said to have breached their fiduciary duty and can be held personally liable for losses incurred by the company due to the breach of duty.

Investors who are corporate bodies will have nominee directors on the board, providing the services as a guardian for shareholders (Gilson and Kraakman, 1992) and to safeguard the interests of all shareholders. Their role can also be guardian to the nominator since they must keep informing the nominator of the decisions of the board. Nominee director will primarily safeguard the investors by prioritising the shareholders' value and avoiding conflicts of interest. Nominee directors, like the other directors, will ensure the decisions of the board align with the shareholders' interests while providing accurate financial information and ensuring transparency and accountability. Attending regular board meetings in compliance with the policies and procedures will mitigate the risk and financial losses.

Nominee directors have duties and responsibilities to ensure that they maximise the profits of the company. If the nominator uses a nominee director in the manner of a puppet, that is, to blindly follow the instructions of the nominator without discharging his duties diligently, the nominee director can be said to have breached his duties. Nominee director who has little appreciation of the significance of the acts he or she is performing is a puppet to the nominator, and he might not even understand the transaction to be accessed (Redmond, 1987).

4.4 Reassessing the nominee director's fiduciary duties

The appointment of nominee directors is still a crucial but contentious aspect of corporate governance. Usually, these directors are chosen to safeguard the interests of important parties, like governmental organisations, institutional investors, or large shareholders. Nonetheless, their presence creates difficult ethical and legal issues, particularly the conflict between fiduciary obligations to the company and loyalty to the nominator, even though their presence serves valid oversight and strategic goals (Adam, 2016; Salleh et al., 2021; Abdul Raof et al., 2024; Rizal Salim and Tai Yong, 2008). In Malaysia, nominee directors are legally obligated to act in the company's best interests regardless of their nominator's expectations. Nominee directors are implicitly expected to act or report in a way that benefits the parties that appointed them (Rizal Salim and Tai Yong, 2008). Other common law jurisdictions, like Australia and New Zealand, on the other hand, take a more accommodating stance, permitting modified fiduciary duties in certain situations, such as when they are specified in the company's constitution or approved by all shareholders (Salleh et al., 2021). The criminal prosecution of a penalty of imprisonment for a term not exceeding five years might deter a person from becoming a nominee director, hence no representative on the board. The sanction imposed upon nominee directors' breach of duty under Malaysian law, particularly section 217(2) of the CA 2016, is very harsh. The duties of nominee directors are not easy, and their position creates a tension-filled role. While they are expected to report to their nominators on the company's performance, they are legally constrained from breaching confidentiality or prioritising external interests over those of the company.

Nominee directors are neither guardian nor puppet for their appointer. The legal framework establishes a nominee director as having a fiduciary duty to act independently, and this duty is not only ethical but enforceable. Nominee directors are often expected to provide intelligence and insights just like any other directors during board meetings, although there might be conflict due to the dual loyalty. The UK Companies Act 2006 allows companies to mitigate conflicts through constitutional provisions, whilst Malaysia adopts a more rigid stance underlining the fiduciary priority of the company over any contractual loyalty to the nominator. Comparatively, Australia and New Zealand permit nominee directors in joint ventures to represent nominator interests, provided there is full disclosure, and such behaviour is expressly allowed by the company's constitution.

5. CONCLUSION

A nominee director is neither a puppet nor solely a guardian, but rather an appointed representative of a significant shareholder clothed with fiduciary duties. Nominee directors' fiduciary duties are primarily responsible for the company's best interests and not just the interests of the shareholders who appointed them, although their duty to the company may sometimes conflict with the wishes of their nominator. Such appointments of nominee director is frequently the consolidation of corporate or political power at the board level, making the board's function as a group decision-making body may be compromised, and abuse of power is possible. However, nominee directors must prioritise the company's interests over their appointers' interests to avoid conflicts of interest and fulfil their fiduciary duties to the company. This balance is crucial to ensure compliance with legal obligations and maintain the integrity of corporate governance. (Salleh et al., 2021).

The result of this study will add knowledge to the literature on the duties of nominee directors, whilst legislators and policymakers may use the information to strengthen corporate governance in encouraging transparency and accountability in companies. This study adds to the broader discourse on the responsibilities by clarifying the legal and moral limits within the nominee directors operate. It also lays the groundwork for future reforms by pointing to the importance of clearer regulations, greater transparency in board practices, and targeted ethical training. Since this study only look into the legal framework in ascertaining the position of a nominee directors, future studies may conduct interviews with nominee directors to identify the challenges faced by them in discharging their duties.

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